

**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**

Claimant,

v.

THE REPUBLIC OF COLOMBIA

Respondent.

RESPONDENT'S COUNTER MEMORIAL

16 November 2020

Counsel for the Respondent:
SHEARMAN & STERLING LLP
AGENCIA NACIONAL DE DEFENSA JURÍDICA DEL ESTADO

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I. INTRODUCTION

1. In accordance with Annex A of Procedural Order No. 1, as revised on 2 November 2020, the Republic of Colombia (“Colombia” or “the Respondent”) respectfully submits this Counter-Memorial on Jurisdiction, Merits and Damages.
2. The present case concerns the legitimate exercise of the State’s regulatory powers to fight the scourge of drug-dealing and money laundering, that has affected Colombia for decades and continues to do so. The history of Colombia’s fight against drug dealers is known, as are the thousands of lives that drug-dealing and the related violence has claimed. Contrary to what the Claimants attempt to portray – glossing over the most basic principles of Asset Forfeiture in Colombia – the measures at hand in this case do not constitute an expropriation, let alone an unlawful expropriation.
3. Asset Forfeiture Proceedings are a feature of Colombian law, enshrined in the Colombian Constitution of 1991, and which applies to assets which origin is illicit. It is no coincidence that the Constitution of 1991 enshrines Asset Forfeiture Proceedings as a means to fight illegal activities and the lucrative drug dealing. To recall, in 1991 Colombia was submerged in the fight against the drug-cartels, particularly the Medellin Cartel.
4. Indeed, Article 34 of the Constitution provides that asset forfeiture applies when assets have been the result of an illicit enrichment and acquired in violation of social *mores* or in a manner harmful to the public treasure. The Constitution provides that asset forfeiture requires a judicial decision to that end, and it distinguishes it from confiscation. Importantly, whereas confiscation and expropriation entail the existence of a right that is taken by the State, in the case of asset forfeiture proceedings, there is no acquired right as no right can be acquired in violation of the law. The asset forfeiture proceedings have been regulated in subsequent laws, and more specifically Law 1708 of 2014 – the Asset Forfeiture Code – which is applicable in this case.
5. This is the legal framework that existed, and which applied to the Claimants, when they decided to invest in Colombia. It is undisputed that the Claimants knew, or should have known, the legal framework. It is also undisputed that they knew the turbulent past of Colombia and the region in which they wanted to invest, and in particular, that Antioquia, where most of their alleged investments were made, was the epicentre of drug dealing activities. Hence, they accepted and decided to invest within a given legal framework and knowing the risks that investing in the area entails. What is more, as further noted in this Counter Memorial, part of the strategy of Mr. Seda’s company, Royal Realty, was to acquire lots in regions where there

was a perception of lack of security to negotiate prices down to a minimum, thus allowing returns of up to 1.000%. Besides the fact that such extraordinary gains are hardly realistic in any context – to say the least – it is evident the obvious risk that transacting in such environment entails.

6. Moreover, it should be noted that asset forfeiture proceedings follow the assets tainted by illegality, independently of who has them in a given moment. The action is not subject to a statute of limitation, precisely because it is aimed at avoiding money laundering. It is thus incumbent on the company or individual that acquires the property to conduct a proper due diligence on the assets to ensure that they are not tainted by illegality.
7. It is against this backdrop that the Claimants' acts need to be evaluated. The Claimants knew the law, knew they were investing in an area permeated by drug dealing and money laundering, where, as per their own exhibits, 80% of the land has been known to be in the hands of drug dealers at a given point. Yet they conveniently satisfied themselves with alleged studies that were insufficient in time and depth and which were ill-fitted for a due diligence in the context of asset forfeiture. Equally ineffective are what the Claimants try to present as "Certifications of Clean Title", which are mere responses from specific units of the Attorney General's Office to queries from individuals on the information that at a given date exists on the database of a specific unit of the Attorney General Office and that in no event constitute an assurance – let alone a commitment – by the State that the asset or land is "clean", as the Claimants would like the Tribunal to believe. In fact, as explained by former Minister of Justice, Dr. Yesid Reyes, their use for the purposes the Claimants attempt to use them has been disavowed by the authorities.
8. Furthermore, latest by 2014 Mr. Angel Samuel Seda ("Mr. Seda") knew that the lots where the Claimants were to build, and eventually started to build, the Meritage Project, were being claimed by a known drug dealer, Mr. Ivan Lopez Vanegas ("Mr. López Vanegas"). Not only did Mr. Seda knew that, but he met with Mr. Lopez Vanegas in several occasions until 2016. Simply put, the Claimants feign ignorance in the face of clear evidence of the situation of the lot and assumed the risk their position entails. Moreover, pre-sales of units went ahead despite this situation. As such, the Claimants' claim about the alleged impossibility and impracticability of conducting a proper due diligence on the lot has no basis.
9. Another remarkable feature of the Claimants claim is their lack of financial contribution and risk assumed in their alleged investments and lack of evidence of their actual disbursements. Indeed, as the Respondent demonstrates, the Claimants model for most of their projects was based on obtaining resources from the public via pre-sales of units or sale of shares in the

eventual profits from hotel- room occupancies, greatly diminishing their actual contribution and exposure. In fact, for many of the Claimants' projects with respect to which the Claimants bring claims, the Claimants have not even acquired the land – in fact what is referred to by the Claimants throughout their Memorial as “sales-purchase agreements” are in fact merely promises to acquire that do not transfer ownership and title to the promisor buyer. This is the case of the so-called Meritage Lot. An analysis conducted by the Respondent's expert on quantum shows that, assuming that the Claimants actually disbursed amounts in equal proportion to their shareholding in the projects – which has not been proven, their “contribution” for the five “projects”, which they claim were affected by the State's measures with respect to the Meritage Lot, was approximately USD 2.5 million. An amount that dwarfs in comparison with the Claimants' claim USD 309 million from the Colombian State.

10. Equally unsupported are the Claimants' claims of an orchestrated attempt by the different authorities to deprive them of the Meritage lot in violation of due process, and of the alleged violation of the State's obligations to afford them fair and equitable treatment, full protection and security and national treatment. As the Respondent demonstrates below, the State authorities have observed the process provided for in Law 1708 of 2014 as regards asset forfeiture proceedings. The allegations of the Fiduciary, Corficolombiana, as representative and title holder of the Meritage Lot have been heard, as have the interventions of Newport, despite the fact that Newport holds no right *in rem* over the Meritage Lot (this being a requirement set forth in Law 1708 of 2014 to be considered as affected party in an asset forfeiture proceeding). The legality of the precautionary measures imposed by the Asset Forfeiture Unit of the Attorney General Office has been reviewed twice by independent courts, and Newport's appeal on the Court's order accepting the Asset Forfeiture request by the Attorney General's office is still pending. Thus, the Claimants have benefited from all the applicable guarantees under Law 1708 of 2014 and their allegations of an orchestrated attempt by the different divisions of the State to disposes them of their projects ring hollow.
11. Importantly, contrary to the Claimants' assertion, the rationale informing the Asset Forfeiture Proceedings in the case of the Meritage Lot has remained the same from the beginning of the proceedings, that is, the investigations conducted by the Colombian authorities have shown that the lot where the Meritage Project was being built, has been acquired by a drug-dealer involved with the Medellín Cartel, and was then the object of a series of irregular transfers through the use of figureheads, who lacked the means to acquire, and did not pay for, the land, via falsifications by the *Oficina de Envigado* (the criminal band that succeeded the Medellín Cartel). The fact that the Attorney General's Office first learned about the origin of the lot due

to a complaint by Mr. López Vanegas has no bearing on the illicit nature of the acquisition of the land and the unlawful transfers that followed.

12. As regards Mr. Seda's allegations concerning the collusion of personnel from the Attorney General's Office with Mr. López Vanegas to extort money from him – which Mr. Seda only reported in December 2016, after having had contacts with Lopez Vanegas for two years – are based on conjectures. The Anti-Corruption Unit of the Attorney General's Office heard Mr. Seda's allegations, and in fact advised him to present an official complaint. The Unit took measures in this regard and conducted investigations on the merits of the allegations, and to date have not found any irregularity in the actions of the personnel of the Asset Forfeiture Unit as regards the proceedings *vis-à-vis* the Meritage Lot, which origin has been confirmed to be illicit.
13. It is a reiterated tenet of investment law that the protection provided by host States is not a risk insurance for bad business, let alone a means for exacting profits from the State. In the present case, the Claimants pursue some projects, most of which (*i.e.*, Santa Fé de Antioquia, Tierra Bomba and 450 Heights) existed only in paper, and two of which were on construction phase and experiencing considerable delays (*i.e.*, Meritage and Luxé). In this case, the State, in exercise of its regulatory powers, imposed precautionary measures on the lot where one of the projects was being developed, the Meritage Lot. The measure affected solely the land regarding the Meritage Project, halting the sale of units to third party buyers interested in the Project that was being built in the lot which origin was proved to be illicit. Yet, the Claimants allege that the Luxé Project, and their in-paper projects in Tierra Bomba, 450 height and Santa Fé de Antioquia, has been equally affected by the measures, preventing the Claimants from obtaining financing to complete, or pursue, them, due to the alleged damage to their reputation.
14. The Claimants' allegation is untenable. Beyond the obvious lack of causal link between a very specific measures in connection with the Meritage Lot (which is in itself fatal to the Claimants' case), the State has not initiated actions against Mr. Seda or the other Claimants, and is not liable for Mr. Seda's alleged damage to its reputation. Mr. Seda, on the other hand, has been very vocal about the imposition of the measures and the alleged threats suffered by Mr. López Vanegas, providing various interviews to the media. Furthermore, as showed by the Respondent, it is a known fact that financial entities have denied credit to Mr. Seda based on considerations alien to this claim. Pretending, as the Claimants do, that the State needs to compensate them for failed business, where their contribution has bene close to nil and which failure has no relation with the State's measures, is contrary to the rationale and reason of investment protection.

15. Moreover, as demonstrated by the Respondent, the Claimants' damages claims, regarding non-ongoing concerns, are completely speculative, overstated and have no correlation with either the reality of the measures or the reality of the economic market.
16. In the sections below, the Respondent sets the relevant facts underlying the dispute (**Section II**), before establishing that the Arbitral Tribunal should decline jurisdiction in the present case (**Section III**). The Respondent then shows that the Claimants' claims are unfounded and should be dismissed in their entirety (**Section IV**). Finally, the Respondent shows that the Claimants' claims for damages should be rejected in their entirety (**Section V**). For the avoidance of doubt, and unless stated otherwise, the Respondent does not accept any factual or legal assertion made by the Claimants in their Memorial.
17. In support of its submission, the Respondent also submits:
 - A set of factual exhibits (**Exhibits R-1 to R-63**);
 - A set of legal exhibits (**Exhibits RL-1 to RL-151**);
 - A witness statement by Dr. Caro, Deputy Prosecutor before the Specialized Criminal Courts in the Money Laundering and Asset Forfeiture Unit of the Attorney General's Office, dated 16 November 2020 ("Caro Witness Statement");
 - A witness statement by Dr. Hernández, Deputy Prosecutor 7 before the District Court of Bogotá, Delegado ante el Tribunal del Distrito Judicial de Bogotá, dated 16 November 2020 ("Hernández Witness Statement");
 - An expert report on Colombian law by Dr. Pinilla, former Judge of the Criminal Chamber of the Supreme Court of Colombia and of the Constitutional Court of Colombia, dated 16 November 2020 ("Pinilla Expert Report");
 - An expert report on Colombian law by Dr. Yesid Reyes, Former Minister of Justice and Law of Colombia, dated 16 November 2015 ("Reyes Expert Report"); and
 - An expert report on damages by Richard Hern of NERA UK Ltd, dated 16 November 2020 ("Nera Expert Report").

II. FACTUAL BACKGROUND

18. According to the Claimants, Mr. Seda was a successful businessman that decided to invest in Medellín, as it offered an attractive hospitality and real estate development opportunities. Following Mr. Seda's "early success" with the Charlee Brand, he engaged some of the other Claimants to develop the Meritage Project in Envigado, Antioquia. The Claimants claim to have conducted "extensive due diligence" on the Meritage Lot, following which they structured the project through a series of trusts. However, according to the Claimants, the Meritage Project – and subsequently all of the other projects the Claimants were developing in Colombia

– failed as a result of an “extortion scheme” orchestrated by Mr. López Vanegas, a drug trafficker who claimed to be the rightful owner of the Meritage Lot, the Attorney General’s Office and the Colombian Courts.

19. The Claimants’ portrayal of the factual background is misleading, to say the least. In the following section, the Respondent sets out the factual background relevant and necessary to address (and dismiss) the Claimants’ unfounded allegations on the merits and rectifies some of the misrepresentations made by the Claimants. The Respondent begins by addressing Mr. Seda’s arrival in Colombia and his initial business in the country (II.A). Then, the Respondent provides an overview of Antioquia’s turbulent history and recent tourism developments (II.B) and of the Claimants’ alleged investment and structuring of the Meritage Project (II.C), as well as the “due diligence” process conducted by the Claimants (II.D). The Respondent then addresses the Claimants’ allegations concerning an extortion scheme (II.E) and finally provides a detailed overview of the Asset Forfeiture Proceedings initiated against the Meritage Lot (II.F).

A. MR. SEDA’S ARRIVAL IN COLOMBIA AND INITIAL BUSINESS IN THE COUNTRY

20. In his witness statement, Mr. Seda states that in 2006 he started exploring the possibility of developing “luxurious” and “lifestyle properties” in Latin America.¹ Per Mr. Seda’s own account, he first arrived in Colombia in 2007² and he “immediately” recognized Medellín’s “distinct advantages as a base for his operations”.³ The Claimants further explain that Colombia was on a road of economic recovery,⁴ after decades of “drug-fuelled violence and civil unrest”⁵ and that Medellín was undergoing a transformation that offered good opportunities for business and hospitality.⁶
21. According to the outdated Certificate of Existence and Legal Representation of Royal Realty S.A.S., issued on 20 December 2017, Mr. Seda incorporated Royal Realty LTDA. U. on 31 October 2007, and on 24 August 2009, he transformed it to a Simplified Joint Stock Company

¹ See Seda Witness Statement, ¶¶ 7-9.

² See Seda Witness Statement, ¶¶ 7-10.

³ Claimant’s Memorial on Merits and Damages, ¶ 32.

⁴ See Claimant’s Memorial on Merits and Damages, ¶ 21.

⁵ See Claimant’s Memorial on Merits and Damages, ¶ 21.

⁶ See Claimant’s Memorial on Merits and Damages, ¶ 25.

(“*Sociedad por Acciones Simplificada*”), Royal Realty S.A.S.⁷ As per Mr. Seda’s recount, Royal Realty S.A.S.’s aim is to serve as a vehicle for the development of the projects he envisions in Latin America.⁸

22. The Charlee Hotel: The Claimants state that in 2008 Mr. Seda found a lot of land near the Lleras Park (“*Parque Lleras*”) in Medellín, conducted a title study, and in 2009 commenced construction of The Charlee Hotel (“The Charlee”).⁹ They further state that Mr. Seda financed the development of The Charlee in the Lleras Park by pre-selling individual suites of the hotel to purchasers,¹⁰ and that in order to do so he engaged Acción Sociedad Fiduciaria S.A., as fiduciary.¹¹ On 19 February 2009, Mr. Seda, a representative of the Panamanian Company Charlee M Ltd. Inc. and its office of representation in Colombia, Mr. Ricardo León Noguera Rodríguez, owner of the two parcels in the Lleras Park on which The Charlee was to be built, and Acción Sociedad Fiduciaria S.A., entered into a Fiduciary Contract between Sociedad Panameña Charlee M LTD Inc. and Acción Sociedad Fiduciaria S.A. (“*Contrato de Fiducia Mercantil Irrevocable*”).¹²
23. Pursuant to the Fiduciary Contract, Mr. Noguera Rodríguez, as Trustor, was to transfer in trust the two parcels to Acción Sociedad Fiduciaria S.A., the Trustee, which was to hold the title on the property. Mr. Noguera Rodríguez was to hold rights on the Trust for the equivalent value of the lots of land, and in its capacity as Beneficiary A of the Trust, was to be paid for the lots with the money from the sale of the hotel units. Mr. Noguera Rodríguez’s rights on the Trust were to be automatically transferred to the Panamanian Corporation, Charlee M LTDA Inc., as Beneficiary B, as soon as payments for the lots of land were made to Mr. Noguera Rodríguez.¹³ The Fiduciary Contract provided that construction of The Charlee would not commence until

⁷ See Royal Realty S.A.S. Certificate of Existence and Good Standing, 20 December 2017 (**Exhibit C-012bis**).

⁸ See Seda Witness Statement, ¶ 13.

⁹ See Claimants’ Memorial on Merits and Damages, ¶¶ 35-37.

¹⁰ See Claimants’ Memorial on Merits and Damages, ¶ 38.

¹¹ See Claimants’ Memorial on Merits and Damages, ¶ 38.

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

¹³ See Fiduciary Contract between Charlee M LTD Inc. and Acción Fiduciaria, 31 March 2009 (**Exhibit C-087**), p. 3.

the Project had reached the Point of Equilibrium, that is, when 70% of final suite units had been bought by purchasers. The Charlee is a small hotel of 42 suites.¹⁴

24. In other words, and as acknowledged by Mr. Seda,¹⁵ finance for The Charlee was procured by pre-sales of units to third-party interested purchasers. The purchasers would receive payments for the occupancy of the units on which they acquired an interest, after deducting the operational costs of the suites.¹⁶
25. The Luxé Project: in a similar fashion, in 2009, the Claimants started developing the Luxé Project (the “Luxé”). The finance for the Luxé was to be obtained from third-party purchasers via pre-sales. On 14 December 2009, Mr. Seda, as representative of the company Luxé by The Charlee S.A.S. incorporated before the *Cámara de Comercio del Oriente Antioqueño*,¹⁷ entered into a trust agreement with two companies which owned lots of land in the Guatapé area and Acción Sociedad Fiduciaria S.A., for the development of the Luxé Project (“*Aclaración Fiducia Mercantil – Fideicomiso Lote Luxé by The Charlee*”).¹⁸ The functioning of the trust, financing and system to acquire the lots of land and develop the project are in general terms similar to the one described above for The Charlee. Like the Trust Agreement for The Charlee, the Trustee would disburse funds to the Luxé by The Charlee S.A.S upon reaching the point of equilibrium of each phase of the project, defined as 70% of the real estate units of each given phase.¹⁹ Unlike The Charlee, however, the Luxé Project was a mixed development, consisting of both residential units (43 lodge-style cabins, 18 apartments and 17 lots for owners to design their own homes) and a 116 room hotel.²⁰ The Luxé Project was to be developed in 5 stages, as

¹⁴ See BRG Expert Report, ¶ 38. According to the Fiduciary Contract, the hotel was to have 44 rooms. See Fiduciary Contract between Charlee M LTD Inc. and Acción Fiduciaria, 31 March 2009 (**Exhibit C-087**), p. 3.

¹⁵ See Seda Witness Statement, ¶ 17.

¹⁶ See Sample Unit Buyer Contract for The Charlee Hotel, 2012 (**Exhibit C- 243**), p. 4.

¹⁷ See Luxé By The Charlee S.A.S. Certificate of Existence and Good Standing (**Exhibit C-249**), 28 April 2020.

¹⁸ See Contract with Acción Fiduciaria for Development of Luxé By The Charlee, 14 December 2009 (**Exhibit C-089**).

¹⁹ See Contract with Acción Fiduciaria for Development of Luxé By The Charlee, 14 December 2009 (**Exhibit C-089**).

²⁰ See Seda Witness Statement , ¶ 23; Contract with Acción Fiduciaria for Development of Luxé By The Charlee, 14 December 2009 (**Exhibit C-089**), p. 7; Amendment No. 1 to Fiduciary Contract between Luxé By The Charlee S.A.S. and Acción Fiduciaria S.A., 25 April 2013 (**Exhibit C-102**), pp. 2, 4; Felipe Lopez Montoya Witness Statement, ¶ 7; BRG Expert Report ¶¶ 48, 60. **Cfr:** the description of the project units, stages and components in Seda Witness Statement differs from the Claimants’ rendition in the Memorial on Merits and Damages, ¶ 49, according to which the project includes 50 cabins, instead of 43 as Mr. Seda stated. In turn the BRG report describes the project as comprising 49 houses (¶ 60), while the graphics in the report they include 50 (¶ 48).

follows: (i) 17 lots, 18 apartments and 25 cabins; (ii) sale and development of 14 Cabins; (iii) development of 116 hotel rooms; (iv) sale and development of 18 apartments and 5 cabins; and (v) operation of 6 cabins.²¹

26. On 21 March 2013, Luxé By The Charlee S.A.S (as Owner) and Royal Realty S.A.S (as Administrator) entered into a Management Contract (“*Contrato de Administración Hotel Luxé by The Charlee*”), pursuant to which Royal Realty would manage the Luxé hotel. Royal Realty would receive as consideration a “basic management fee of three per cent (3%) of gross sales paid to the Administrator as a compensation for its services” and incentive management fees “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”.²² Pursuant to the Management Contract, the Charlee brand would be entitled to fees for the use of the brand equivalent to 3,75% of the total income collected by the Luxé by The Charlee.²³
27. By 22 July 2016, Phases 1, 2 and 5 of the Luxé had been completed. The construction of a 116-room hotel, planned for Phase 3, was ongoing.²⁴ Whilst the Claimants’ experts portray that “the Luxé Hotel was planned to finish construction by December 2016 and begin operations in January 2017”²⁵, the construction progress report from July 2016 shows that as of July 2016, only 45% had been completed.²⁶
28. The Cartagena / Tierra Bomba Project: on 13 March 2013, Mr. Seda incorporated RDP Cartagena S.A.S. (also referred to as “Royal Development Partners S.A.S.”).²⁷ On 1 September 2013, the company entered into a contract, entitled “RDP Cartagena S.A.S. Investment Agreement” (“*Acuerdo Societario de RDP Cartagena S.A.S.*”), with individuals and entities,

²¹ See Claimant’s Memorial on Merits and Damages, ¶ 49; BRG Expert Report, ¶¶ 61-62; Bambaci-Dellapiane Financial Model - Project Description (**Exhibit BRG-001**).

²² Management Contract between Luxé By The Charlee S.A.S. and Royal Realty S.A.S., 21 March 2013 (**Exhibit C-101**), p. 18.

²³ See Management Contract between Luxé By The Charlee S.A.S. and Royal Realty S.A.S., 21 March 2013 (**Exhibit C-101**), Articles 3.01, 12.01.

²⁴ See BRG Expert Report, ¶ 61.

²⁵ BRG Expert Report, ¶ 61.

²⁶ See Luxé Project Accumulated Project Control, dated 11 July 2016, pp.1-2, **BRG-004**. See also Nera Expert Report, ¶¶ 167-168.

²⁷ See RDP Cartagena S.A.S. Investment Agreement with Gustavo Velasquez and Paula Hoyos, 1 September 2013, (**Exhibit C-114**), p. 91.

pursuant to which the entities and individuals would become Members / shareholders on RDP Cartagena S.A.S.²⁸ RDP Cartagena S.A.S., as stated by the Claimants,²⁹ constituted a special vehicle to develop the Tierra-Bomba Project. The Project, as per the brochure “Luxé Cartagena”, was a mixed development, comprising 80 hotel rooms, 80 apartments, 50 cabins, stores, and recreational amenities.³⁰ The Claimants allege that they paid USD 1.5 million to secure lots of land in Tierra Bomba.³¹ Yet, they do not provide any evidence of the actual disbursement of the money but rather include as exhibits three sale-purchase promises with three different individual sellers for parcels that were in their possession and occupation, but for which titles have not yet been executed.³²

29. In other words, the contracts with the individuals in possession of the lots are not full sale agreements but sale promises, subject to certain conditions (including the clearing of the titles).³³ Specifically, two of them clearly indicate that they transferred possession but that the lots are the object of a False Sale (“*Falsa Tradición*”), a term that signifies that the title is incomplete or that the seller is selling a parcel he / she does not own.³⁴ The third promise agreement indicates that what would be transferred is the occupation and possession of the lot.³⁵

²⁸ See RDP Cartagena S.A.S. Investment Agreement with Maria Alvarez & CIA S.C.A. (**Exhibit C-113**); RDP Cartagena S.A.S. Investment Agreement with Gustavo Velasquez and Paula Hoyos (**Exhibit C-114**); RDP Cartagena S.A.S. Investment Agreement with Ashmina Foundation S.A.S. (**Exhibit C-115**); RDP Cartagena S.A.S. Investment Agreement with Inversiones Blue Sky (**Exhibit C-116**), RDP Cartagena S.A.S. Investment Agreement with Packy S.A.S. (**Exhibit C-117**), all dated 1 September 2013.

²⁹ See Claimants’ Memorial on Merits and Damages, ¶ 108; Seda Witness Statement, ¶ 31; RDP Cartagena S.A.S. Investment Agreement with Gustavo Velasquez and Paula Hoyos, 1 September 2013 (**Exhibit C-114**), Annex D, p. 54.

³⁰ See Claimants’ Memorial on Merits and Damages, ¶ 107; Seda Witness Statement, ¶ 31.

³¹ See Claimants’ Memorial on Merits and Damages, ¶ 108; Seda Witness Statement, ¶ 31.

³² See Promise to Purchase Contract between Angel Seda and Jaime Francisco Martínez Pinilla and Edilia Rosa Sánchez Hoyos, 6 March 2014 (**Exhibit C-124**); Promise to Purchase Contract between Angel Samuel Seda and Ramon Antonio Duque Marín, 17 June 2014 (**Exhibit C-128**); Promise to Purchase Contract between Angel Seda and Jaime Alfredo Sánchez Vargas, 19 September 14 (**Exhibit C-134**).

³³ See Colombian Civil Code, 1887 (**Exhibit R-1**), Article 1611.

³⁴ See Promise to Purchase Contract between Angel Seda and Jaime Francisco Martínez Pinilla and Edilia Rosa Sánchez Hoyos, 6 March 2014 (**Exhibit C-124**), p. 2; Promise to Purchase Contract between Angel Samuel Seda and Ramon Antonio Duque Marín, 17 June 2014 (**Exhibit C-128**), p. 3. According to Article 8 of the Colombian Law 1579 (2012), the False Sale implies the selling of a property by whom is not the owner or the transfer of an incomplete right.

³⁵ See Promise to Purchase Contract between Angel Seda and Jaime Alfredo Sánchez Vargas, 19 September 14 (**Exhibit C-134**), p. 1.

30. In a similar vein, the Claimants assert that Royal Realty entered into an agreement to manage another hotel that was being built in Tierra Bomba, yet do not provide any evidence in that regard, beyond Mr. Seda's assertion.³⁶
31. The Claimants aver in their Memorial that: "[t]he sales process was expected to begin in early 2017, construction in 2020, with the hotel scheduled to begin operations in August 2022".³⁷ Nevertheless, it is worth noting the contradiction between this statement and Mr. Seda's declaration in his Witness Statement, where he states that the construction was scheduled to commence in April 2018 (instead of 2020) and operations at the hotel in January 2020 (instead of August 2022).³⁸ It also must be noted that the Cartagena/Tierra Bomba Project had been delayed by 7 months from the envisioned start of pre-sales³⁹ and start of construction was years away for many phases.⁴⁰ Moreover, the Claimants have failed to demonstrate that they had the urbanization and construction permits that are required to develop this project.⁴¹
32. The Santa Fé de Antioquia Project: on 22 December 2015, Royal Realty S.A.S. and others entered into an agreement with Ms. Fabiola Jaramillo Correa for the sale-purchase of two lots of land in Santa Fé de Antioquia.⁴² The declared value of the purchase was COP \$ 350 million. According to the sale-purchase deed, the buyers constituted a first degree open mortgage over the two lots of land in favour of the seller for the amount of COP \$ 350 million.⁴³ The Claimants have not provided any evidence of payment of the COP \$ 350 million to the seller/creditor.
33. On the same date, Royal Realty S.A.S. and Ms. Mónica Betancur entered into an agreement, titled "Royal Beverages S.A.S. Investment Agreement with Mónica Betancur", according to which the shareholders listed in Annex B agreed to incorporate Royal Beverages S.A.S., as a

³⁶ See Seda Witness Statement, ¶ 33.

³⁷ See Claimants' Memorial on Merits and Damages, ¶108; Seda Witness Statement, ¶¶ 31-32.

³⁸ See Seda Witness Statement, ¶ 31.

³⁹ See BRG Report, fn. 94 (noting that Mr. Seda had told BRG that the project would have a delay of 7 months).

⁴⁰ See BRG Report, ¶ 67.

⁴¹ See Decree No. 1077 of 2015 (**Exhibit R-33**), Articles 2.2.6.1.1.7, 2.2.6.1.2.1.8; Decree 1203 of 2017 (**Exhibit R-40**), Articles 2.2.6.1.1.1, 2.2.6.1.1.7 require that a Construction License and an Urbanization License be obtained before any construction works can commence in Colombia.

⁴² See Land Transfer Deed between Royal Realty S.A.S., Monica Betancur Cano, Nicolas Fernando Serna Navarro and Paola Andrea Serna Diez, (**Exhibit C-146**).

⁴³ See Land Transfer Deed between Royal Realty S.A.S., Monica Betancur, Nicolas Fernando Serna Navarro and Paola Andrea Serna Diez, 22 December 2015 (**Exhibit C- 146**), pp. 4-11.

corporation which social purpose was to invest in the Santa Fé Project. The agreement regulates the shareholders' capital contributions and obligations, as well as their rights. It further provides the right for Royal Realty to obtain remuneration and fees for several of its promotion activities, sales, rents, supervision of the construction and development, and the possibility of Royal Realty to provide through its affiliates different services regarding the construction of the project, its management and rentals for established fees.⁴⁴

34. In a letter from the Major's Office of Santa Fe de Antioquia to Mr. Seda, dated 9 May 2017, the Santa Fe de Antioquia Land Use Certificate allowed a mixed-development project comprising a 250 room apart-hotel and 180 residential lots.⁴⁵ However, this certificate is neither the Construction License nor the Urbanization License. Instead, this certificate only shows the commencement of the administrative proceedings directed to obtain the Construction License.⁴⁶ Accordingly, the Claimants have failed to demonstrate that they had the urbanization and construction permits that are required to develop this project.⁴⁷
35. Furthermore, the Santa Fé de Antioquia project is located next to the Cauca River,⁴⁸ which is an environmentally protected area under the jurisdiction of Corantioquia, the regional environmental authority.⁴⁹ Any construction in this area is subject to stringent environmental regulations, including the obligation to request and obtain environmental permits prior to commence construction.⁵⁰ The Claimants have not shown that they have requested and obtained from Corantioquia the necessary environmental permits to be able to begin construction of the project.
36. 450 Heights: according to the Claimants, Mr. Seda envisaged yet another mix-use project (comprising 100 hotel rooms, 83 condominium units, 300 luxury suites, 140 commercial units,

⁴⁴ See Royal Beverages S.A.S. Investment Agreement with Monica Betancur, 22 December 2015 (**Exhibit C-145**), pp. 7-8.

⁴⁵ See Claimants' Memorial on Merits and Damages, ¶ 111; Santa Fe de Antioquia Land Use Certificate, 9 May 2017, (**Exhibit C-065 bis**).

⁴⁶ See Santa Fe de Antioquia Land Use Certificate, 9 May 2017 (**Exhibit C-065 bis**) ("Moreover, we request the commencement of all the procedures for the issuance of the permits and licenses for the execution of the project").

⁴⁷ See Decree No. 1077 of 2015 (**Exhibit R-33**), Articles 2.2.6.1.1.7, 2.2.6.1.2.1.8; Decree No. 1203 of 2017 (**Exhibit R-40**), Articles 2.2.6.1.1.1, 2.2.6.1.1.7 require that a Construction License and an Urbanization License be obtained before any construction works can commence in Colombia.

⁴⁸ See Crystal Lakes Transfer Deed 2 (**Exhibit BRG-044**).

⁴⁹ See Corantioquia, Manual de Usuario, 2015 (**Exhibit R-32**) and Resolution 0463 of 2017 (**Exhibit R-39**).

⁵⁰ See Corantioquia, Manual de Usuario, 2015 (**Exhibit R-32**), pp. 43-51.

61 residential properties, gymnasium and a day care)⁵¹ in the outskirts of Medellín, purportedly named 450 Heights. The Claimants argue that to that end they incorporated another investment vehicle, RDP Interpalmas S.A.S. Yet as evidence of the incorporation and social purpose of Interpalmas, they only provide a Shareholder Ledger of the company showing its date of incorporation – 13 March 2013 – and Mr. Seda as the Sole Shareholder.⁵² The totality of the shares appear as pledged on 9 March 2018 to Downy North LLC.⁵³

37. The Claimants assert that Mr. Seda has entered into negotiations to purchase the lots of land where the envisioned project was to take place, but they offer no evidentiary support for that contention, let alone any proof of any disbursements made to purchase the property. The Claimants further argue that by January 2017, Mr. Seda had conducted several land and water studies of the lot and include as supposed evidence in support of their contention the “Heights Land Survey” dated 18 September 2011.⁵⁴ The alleged evidence of Mr. Seda’s land studies is at least surprising in light of the Claimants’ assertion that Mr. Seda identified the relevant lot in 2014.⁵⁵
38. According to the Claimants, construction of 450 Heights was to commence 12 to 18 months after the end of 2017.⁵⁶ The pre-sales however had a delay of 34 months⁵⁷ and the allegedly envisaged project of 450 Heights was never built. Moreover, the Claimants have not even shown that they had obtained the urbanization and construction permits required to develop this project.⁵⁸
39. Other alleged real estate projects: according to the Claimants, Royal Realty also envisaged other series of projects,⁵⁹ purportedly to be made via RVP Land Fund I S.A.S. a blind pool opportunistic real estate acquisition fund with a directive to acquire “unentitled, undervalued,

⁵¹ See 450 Heights Investment Brochure, (**Exhibit C-068**).

⁵² See Shareholder Ledger for Interpalmas S.A.S., 18 December 2014 (**Exhibit C-138**), which shows that RDP Interpalmas S.A.S. was incorporated on 13 March 2013.

⁵³ See Shareholder Ledger for Interpalmas S.A.S., 18 December 2014 (**Exhibit C-138**).

⁵⁴ See Heights Land Survey, 18 September 2011, (**Exhibit C- 094**).

⁵⁵ See Claimants’ Memorial on Merits and Damages, ¶ 113.

⁵⁶ See Claimants’ Memorial on Merits and Damages, ¶ 115.

⁵⁷ See Bambaci-Dellapiane Financial Model (**Exhibit BRG-001**), “450H – Ph. 1 (m)”.

⁵⁸ See Decree No. 1077 of 2015 (**Exhibit R-33**), Articles 2.2.6.1.1.7, 2.2.6.1.2.1.8; Decree No. 1203 of 2017 (**Exhibit R-40**), Articles 2.2.6.1.1.1, 2.2.6.1.1.7 require that a Construction License and an Urbanization License be obtained before any construction works can commence in Colombia.

⁵⁹ See Claimants’ Memorial on Merits and Damages, ¶ 116.

and/or undeveloped”⁶⁰ land close to the Prado, Colombia, set forth by Royal Property Group.⁶¹ On 15 April 2016, Royal Realty S.A.S. entered into two agreement with investors⁶² to invest into RVP Land Fund I S.A.S.⁶³

40. In an undated Prado Tolima Investment Fund Brochure, RPG advertises its “historical success in identifying terrains in previously dangerous regions, which have later stabilized” and how “that perception of danger generates a price fixation of a ‘bargain’, opening the doors to ‘bargaining’ negotiations aimed at reducing prices to the maximum possible”.⁶⁴ Similarly, the brochure remarks on the experience of RPG in “legalizing property titles”⁶⁵ and promising a return of more than 1.000 per cent in the value of the investment,⁶⁶ due to the low value of acquisition of the lots and its resale price.⁶⁷
41. On 17 May 2014, RVP Land Fund I S.A.S. acquired a lot of Land in Tafurito, within the jurisdiction of the municipality of Purificacion-Tolima.⁶⁸ On 26 February 2016, it acquired a second lot in Tolima⁶⁹ and on 9 September 2015, it signed a promise agreement for the purchase of another terrain in Tafurito, within the jurisdiction of the municipality of Prado-

⁶⁰ See Company Agreement of RVP Land Fund I S.A.S. with Beneficiary of Boston Enterprises Trust, 15 April 2016 (**Exhibit C-154**), p. 1; Claimants’ Memorial on Merits and Damages, ¶ 116.

⁶¹ See Prado Tolima Investment Fund Brochure (**Exhibit C-064bis**); Claimant’s Memorial on Merits and Damages, ¶ 116.

⁶² See Company Agreement of RVP Land Fund I S.A.S. with Beneficiary of Boston Enterprises Trust, 15 April 2016 (**Exhibit C-154**); Company Agreement of RVP Land Fund I S.A.S. with Carolina Galeano Franco, 15 April 2016 (**Exhibit C-155**).

⁶³ See Company Agreement of RVP Land Fund I S.A.S. with Beneficiary of Boston Enterprises Trust, 15 April 2016 (**Exhibit C-154**); Company Agreement of RVP Land Fund I S.A.S. with Carolina Galeano Franco, 15 April 2016 (**Exhibit C-155**).

⁶⁴ See Prado Tolima Investment Fund Brochure (**Exhibit C-064bis**), p. 9.

⁶⁵ See Prado Tolima Investment Fund Brochure, (**Exhibit C-064bis**), p. 8. In 2017, Colombia issued the Law No. 1848 designed to help low income citizens who, as squatters, want to legalize social interest houses, through a simplification of the titling process and the reduction of notary and registration costs.

⁶⁶ See Prado Tolima Investment Fund Brochure (**Exhibit C-064bis**), p. 16.

⁶⁷ See Prado Tolima Investment Fund Brochure (**Exhibit C-064bis**), p. 3.

⁶⁸ See Land Transfer Deed between RVP Land Fund S.A.S. and Helbert Evaristo Sarmiento Arias and Others, 17 May 2014 (**Exhibit C-126**).

⁶⁹ See Land Transfer Deed between RVP Land Fund I S.A.S. and Gómez H. CIA. S.A.S., 26 February 2016 (**Exhibit C-148**).

Tolima.⁷⁰ On 9 October 2015, Mr. Seda acquired one lot in Tafurito, within the jurisdiction of the municipality of Prado- Tolima.⁷¹

42. It must be noted that contrary to what the Claimants portray, they have also been involved in unsuccessful real estate projects in Colombia. For example, some of the Claimants were involved in the so-called project “Cabal”, which was supposed to be developed in Llano Grande, Rionegro, Antioquia but was cancelled after units had been pre-sold to buyers. According to Mr. Seda’s explanation to the media, the project was cancelled after two of Mr. Seda’s business partners, that were expected to contribute USD 4 million to the project, did not manage to get the money to Colombia.⁷² The Claimants have strategically omitted to mention their failed projects.

B. ANTIOQUIA’S DECADES OF TURBULENT HISTORY AND RECENT TOURISM DEVELOPMENTS

43. The Claimants fully acknowledge the turbulent past of Colombia — and in particular that of Medellín— and rely on several press and scholarly articles underscoring the decades during which Antioquia was the epicentre of Colombia’s drug dealing activities.⁷³ The history of the Cartel of Medellín and the immense fortune that its members Pablo Escobar Gaviria, Gustavo Gaviria, the Ochoa Brothers, Carlos Lehder, and José Gonzalo Rodríguez Gacha obtained due to drug trafficking during the decades of the 1980 and 1990 is well known. Among others, the assets acquired by the cartel members, were, and are, innumerable amounts of properties and large extensions of land.⁷⁴ As noted in one of the press articles referred to by the Claimants, in 1988, an estimated 80% of the land in southwest Antioquia, that includes the municipality of Envigado, was controlled by the cartel.⁷⁵ It comes as no surprise that lawyers of

⁷⁰ See Promise to Purchase Agreement between RVP Land Fund I S.A.S. and Sandra Liliana Conde Mora and Ricardo Sanchez Cardozo, 9 September 2015 (**Exhibit C-142**).

⁷¹ See Land Transfer Deed between Angel Seda and Zahir Hoyos Hoyos, 9 October 2015 (**Exhibit C-143**).

⁷² W Radio, “Ángel Seda despeja dudas sobre lote en disputa para proyecto de construcción en Medellín”, 5 August 2014 (https://www.wradio.com.co/escucha/archivo_de_audio/angel-seda-despeja-dudas-sobre-lote-en-disputa-para-proyecto-de-construccion-en-medellin/20140805/oir/2353698.aspx), accessed on 15 November 2020 (**Exhibit R-30**).

⁷³ See Claimant’s Memorial on Merits and Damages, ¶ 25- 26.

⁷⁴ See 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>) (**Exhibit C- 071**).

⁷⁵ See 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>) (**Exhibit C- 071**).

Corficolombiana noted, in connection with the Meritage Lot, that it was known that several parcels of land in the area were owned by the Ochoa brothers.⁷⁶

44. The history of the war that the Medellín Cartel, and more concretely its members, under the name of “the Extraditables”, launched against the State and the entirety of the Colombian population to avoid their extradition to the United States is equally well-known.⁷⁷ Whilst the killing of Pablo Escobar in 1993 was a milestone in the history of the war against drugs, his killing was far from the end of the illicit activities of the Medellín cartel and illegal groups in Antioquia.
45. It is a fact that criminals formerly under the cartel structure have continued the drug trafficking and money laundering activities.⁷⁸ After witnessing Escobar’s capture, criminals became more savvy and learned to avoid the spotlight. Rather than operating with a vertical organization with a salient head, they started operating via more fragmented groups, commonly known as criminal bands (BACRIMS by acronyms in Spanish).⁷⁹ Several of these organizations are the successors of, or directly linked to, former cartels. That is notably the case of the *Oficina de Envigado*, formerly known as “*La Oficina*”, which was in charge of recruiting guns for hire for the Medellín Cartel.⁸⁰ It bears mentioning that the State’s efforts against these groups, and in particular against the *Oficina de Envigado* members – which illegal activities have been

⁷⁶ See The New York Times, “Juan David Ochoa Vásquez, Co-Founder of Medellín Cartel, Dies at 65”, 30 July 2013 (<https://www.nytimes.com/2013/07/31/world/americas/juan-david-ochoa-vasquez-co-founder-of-medellin-cartel-dies-at-65.html>), accessed on 11 November 2020 (**Exhibit R-27**).

⁷⁷ See InSight Crime, “Colombia Profile”, 9 July 2018 (<https://www.insightcrime.org/colombia-organized-crime-news/colombia/>), accessed on 15 November 2020 (**Exhibit R-43**).

⁷⁸ See El Tiempo, “La Nueva Generación del Cartel de Medellín”, 30 November 1998 (<https://www.eltiempo.com/archivo/documento/MAM-82442>), accessed 15 November 2020 (**Exhibit R-13**).

⁷⁹ See InSight Crime, “Colombia Profile”, 9 July 2018 (<https://www.insightcrime.org/colombia-organized-crime-news/colombia/>), accessed on 15 November 2020 (**Exhibit R-43**); Infobae, “Urbanismo, seguridad e innovación: así fue el proceso de transformación de Medellín tras los años de violencia”, 11 November 2018 (<https://www.infobae.com/americas/colombia/2018/11/11/urbanismo-seguridad-e-innovacion-asi-fue-el-proceso-de-transformacion-de-medellin-tras-los-anos-de-violencia/>), accessed on 15 November 2020 (**Exhibit R-44**).

⁸⁰ See BBC, “After six years of falling violence, 2009 saw the murder rate rise by 12%, the increase mainly in cities and, above all, in Medellín”, 31 July 2010 (<https://www.bbc.com/news/world-latin-america-10560568>), accessed on 15 November 2020 (**Exhibit R-21**); El Tiempo, “Cómo es la ‘guerra fría’ entre los líderes de la ‘Oficina’ en Medellín”, 8 May 2019 (<https://www.eltiempo.com/colombia/medellin/que-es-la-oficina-y-como-es-su-violencia-en-medellin-358744>), accessed on 15 November 2020 (**Exhibit R-46**).

continuous for over three decades – continues to date, with captures of some of its main members as recently as in 2019.⁸¹

46. Hence, whilst it is true that Medellín, as a city, has experienced great renewal in the last years, particularly through investment in urbanistic developments, education, public transportation and facilities for economically disadvantaged population, as well as the State’s efforts to increase security, the authorities recognise that security is still very fragile.⁸² As explained by the security secretary of the city, Mr. Andrés Felipe Tobón Villadas, in 2018: “[i]t is a very complex fragility due to the cursed inheritance of the drug-dealing, of what was the logistic centre of Pablo Escobar in Medellín, which consolidated criminal groups, consolidated the organised crime. A crime that we are fighting nowadays”.⁸³
47. An inevitable corollary of the illicit activities is the money laundering. It is no coincidence that Medellín and its many economic sectors have been permeated by the criminal organizations in order to hide or launder the money obtained from their criminal activities. As remarked by a specialised prosecutor of the Attorney General’s Office Anti Money Laundering Unit, criminal bands, including *La Oficina de Envigado* and *La Terraza*, use different means to launder money, including investing the profits of their illegal activities in legal activities that produce gains with which in turn they acquire assets or invest in corporations.⁸⁴ The main modalities to launder money are money transferring, investing in companies that are likely to end up in bankruptcy, fake exports, creation of fake corporations or investments in real estate or

⁸¹ See El Colombiano, “Cuatro empresarios de Medellín a prisión por lavado de activos para la mafia”, 4 December 2019 (<https://www.elcolombiano.com/antioquia/seguridad/carcel-para-empresarios-de-medellin-por-nexos-con-la-oficina-y-clan-del-golfo-AK12090347>), accessed on 15 November 2020 (Exhibit R-52).

⁸² See Infobae, “Urbanismo, seguridad e innovación: así fue el proceso de transformación de Medellín tras los años de violencia”, 11 November 2018 (<https://www.infobae.com/america/colombia/2018/11/11/urbanismo-seguridad-e-innovacion-asi-fue-el-proceso-de-transformacion-de-medellin-tras-los-anos-de-violencia/>), accessed on 15 November 2020 (Exhibit R-44).

⁸³ See Infobae, “Urbanismo, seguridad e innovación: así fue el proceso de transformación de Medellín tras los años de violencia”, 11 November 2018 (<https://www.infobae.com/america/colombia/2018/11/11/urbanismo-seguridad-e-innovacion-asi-fue-el-proceso-de-transformacion-de-medellin-tras-los-anos-de-violencia/>), accessed on 15 November 2020 (Exhibit R-44).

⁸⁴ See Periódico Contexto, “Los modos de lavar activos en Medellín”, 23 April 2020 (<https://periodicocontexto.wixsite.com/contexto/single-post/2020/04/23/los-modos-de-lavar-activos-en-medellin>), accessed on 15 November 2020 (Exhibit R-54).

construction, be it in commercial centres, hotels, farms, which profits for sale or rent then enter the legal economy.⁸⁵

48. Indeed, the use of real estate transactions and forgery before the public notaries as a means to launder illicit money is well-documented by the Administration and Financing Unit (*Unidad de Administración y Financiamiento* or “UAFI”).⁸⁶ As noted by the UAFI, notaries are used to the integration phase of money laundering. Since the aim is to hide the blueprint of illicit activities by investing in legal activities, criminals use a series of complex operations which are difficult to follow, utilizing figureheads which hide the links between the parties and give the appearance of legality of the resources.⁸⁷
49. Statistics of money laundering are notoriously difficult to collect due precisely to the undercover nature of the transactions, yet some studies indicate that the amounts of money laundering between 1985 and 2013 corresponded to 4.7% of Colombia’s GDP.⁸⁸ Other sources suggest that “money laundering operations in Colombia involving funds from drug-trafficking amounting to close to US\$ 8.7 billion per year”.⁸⁹
50. Unfortunately, in addition to the crime related to drug dealing, Medellín resurgence has created two kind of tourisms: narco-tourism and sexual tourism.⁹⁰ The glorification of criminals have led to the first kind of tourism. The second, a by-product of poverty and exploitation, has converted formerly residential areas like the *Poblado* and the *Parque Lleras* in centres of

⁸⁵ See Periódico Contexto, “Los modos de lavar activos en Medellín”, 23 April 2020 (<https://periodicocontexto.wixsite.com/contexto/single-post/2020/04/23/los-modos-de-lavar-activos-en-medellin>), accessed on 15 November 2020 (**Exhibit R-54**).

⁸⁶ See Luis Edmundo Suárez Soto *et al.*, *Riesgo de Lavado de Activos y Financiación del Terrorismo en el Sector Notariado*, Unidad de Información y Análisis Financiero (UIAF), 2014 (**Exhibit R-29**).

⁸⁷ See Luis Edmundo Suárez Soto *et al.*, *Riesgo de Lavado de Activos y Financiación del Terrorismo en el Sector Notariado*, Unidad de Información y Análisis Financiero (UIAF), 2014 (**Exhibit R-29**).

⁸⁸ See Edgar Villa *et al.*, *Illicit Activity and Money Laundering from an Economic Growth Perspective, A Model and an Application to Colombia*, World Bank Group, Development Research Group, Macroeconomics and Growth Team, February 2016 (**Exhibit R-34**).

⁸⁹ See Thomas Pietschmann *et al.*, *Estimating Illicit Financial Flows Resulting from Drug Trafficking and Other Transnational Organized Crimes, Research Report*, United Nations Office on Drugs and Crime (UNODC), October 2011 (**Exhibit R-23**).

⁹⁰ See El Periódico, “Medellín, de la coca al turismo sexual”, 12 March 2018 (<https://www.elperiodico.com/es/tele/20180312/medellin-coca-turismo-sexual-6684569>), accessed on 15 November 2020 (**Exhibit R--42**).

prostitution, and sexual exploitation of minors.⁹¹ The prostitution rings are often controlled by criminal bands headed by locals and foreigners.⁹²

51. As such, Medellín’s reality – and Antioquia’s— with all its beauty, continues to be very challenging, permeated by crime, and where doing business is risky and requires an extremely cautious approach.

C. THE CLAIMANTS’ ALLEGED INVESTMENT AND STRUCTURING OF THE MERITAGE PROJECT

52. As with other of his envisioned projects, Mr. Seda sought to finance both the acquisition of the land on which the Meritage project was to be developed, as well as the construction of the Meritage Project, via the pre-sales of units in the Project.
53. On 1 November 2012, Mr. Seda, via its company Royal Realty S.A.S., entered into a Sale-Purchase Promise Agreement (the “Promise Agreement”) with La Palma Argentina y Cia. Ltd. (“La Palma Argentina”), pursuant to which La Palma Argentina promised to sell Royal Realty a lot of land with an area of 556,676,000 m² in El Perico, municipality of Envigado, registered with the real estate number 001-930485 (“Lot 001-930485” or the “Meritage Lot”).⁹³ In the Promise Agreement, the parties expressly agreed that the lot would be used for Royal Realty to develop a project comprising residential units, an apart-hotel and commercial facilities that would be developed in 9 phases. Royal Realty could acquire subdivisions of Lot 001-930485 according to the phases of the project and make payment to La Palma Argentina for the parcels

⁹¹ See Semana, “Sexo y Drogas un Paquete Turístico en Medellín”, (<https://especiales.semana.com/especiales/medellin-narcoturismo/>), accessed on 15 November 2020 (Exhibit R-59); Tripadvisor, “Parque Lleras” (https://www.tripadvisor.es/ShowUserReviews-g297478-d8179544-r492740732-Parque_Lleras-Medellin_Antioquia_Department.html), accessed on 15 November 2020 (Exhibit R-57); El Espectador, “Así cayó la red de explotación sexual de menores que operaba en el Parque Lleras de Medellín”, 19 October 2019 (<https://www.elespectador.com/noticias/judicial/asi-cayo-la-red-de-explotacion-sexual-de-menores-que-operaba-en-el-parque-lleras-de-medellin/>), accessed on 5 October 2020 (Exhibit R-50); Caracol, “Así reclutaban a niñas en Medellín para conformar red de proxenetismo en el Parque Lleras”, 19 October 2019 (<https://noticias.caracoltv.com/antioquia/asi-reclutaban-a-ninas-en-medellin-para-conformar-red-de-proxenetismo-en-el-parque-lleras>), accessed on 5 October 2020 (Exhibit R-51); El Tiempo, “Desarticulan red de proxenetismo que operaba Medellín”, 18 October 2019 (<https://www.eltiempo.com/colombia/medellin/desarticulan-red-de-proxenetismo-que-operaba-desde-medellin-424454>), accessed on 5 October 2020 (Exhibit R-49).

⁹² El Colombiano, “El crimen también hace fiesta en el parque Lleras de Medellín”, 14 January 2019 (<https://www.elcolombiano.com/antioquia/seguridad-en-el-parque-lleras-bandas-criminales-hacen-fiesta-GC10030053>), accessed on 6 October 2020 (Exhibit R-45).

⁹³ See Sales-Purchase Agreement Between Royal Realty and La Palma Argentina, 1 November 2012 (Exhibit C-019).

once it had achieved a point of equilibrium regarding the presales of units of the project.⁹⁴ Royal Realty had an option to buy the whole of the property within a certain time period.⁹⁵

54. According to the Promise Agreement, the payment for the parcels or the totality of the lot was to be made in the following manner:
- If Royal Realty was to acquire the totality of Lot 001-930485 at once, it had to pay \$ 32 billion (thirty two billion Colombian pesos) by 1st April 2015; and
 - If Royal Realty was to acquire Lot 001-930485 by parcels according to the development stages of the Meritage Project, it had to pay 19.5% of the value of the corresponding stage, taking into account the average sales of that stage.⁹⁶ In this case, 50% of the price was to be paid in units of the Project to be selected by La Palma Argentina, and the remaining 50% was to be paid out of the proceeds of the Trust or in cash, at La Palma Argentina's choice.⁹⁷
55. The Promise Agreement also provided for specific deadlines to develop the Project: (i) the predevelopment stage was to be finalized within nine months following the execution of the Promise Agreement, *i.e.* by 1 August 2013, (ii) the equilibrium point for the first stage of the Project was to be reached within 18 months (which could be extended for another 12 months if the sale of units reached at least the equilibrium point minus 20%), and (iii) the equilibrium point for the following stages was set to expire at a maximum every twelve months from month 18 of the Promise Agreement, "without it exceeding a total of 60 months from the purchase of 100% of Lot 001-930485".⁹⁸
56. It must be noted that the Promise Agreement does not have any legal validity under Colombian law, as pursuant to Article 1857 of the Colombian Civil Code, all promise agreements for sale and purchase of real estate shall be made through a registered public deed⁹⁹ and comply with

⁹⁴ See Sales-Purchase Agreement Between Royal Realty and La Palma Argentina, 1 November 2012 (**Exhibit C-019**), Clause First.

⁹⁵ See Sales-Purchase Agreement Between Royal Realty and La Palma Argentina 1 November 2012 (**Exhibit C-019**), Clause Third.

⁹⁶ See Sales-Purchase Agreement Between Royal Realty and La Palma Argentina, 1 November 2012 (**Exhibit C-019**), Clause Fourth.

⁹⁷ See Sales-Purchase Agreement Between Royal Realty and La Palma Argentina, 1 November 2012 (**Exhibit C-019**), Clause Fifth.

⁹⁸ See Sales-Purchase Agreement Between Royal Realty and La Palma Argentina, 1 November 2012 (**Exhibit C-019**), Clause Sixth.

⁹⁹ See Colombian Civil Code, 1887 (**Exhibit R-1**), Article 1857 ("A sale is deemed to be concluded when the parties have agreed on the object and the price, except in the following cases: the sale of real estate, easements and hereditary successions, which are not deemed to be concluded as long as a public deed has not been issued"). See also Colombian General Procedural Code, Article 256 (**Exhibit R-24**) ("In the absence of a document required by law as solemnity for the existence or validity of an act or contract, that document cannot be replaced by other evidence") and Article 1740 of the Colombian Civil Code: "Any act or contract that lacks any of the requirements prescribed by law for the validity of

basic legal requirements, as explained at length by the Second Criminal Court.¹⁰⁰ In any event, even assuming that the Promise Agreement would be valid under Colombian law, it did not transfer any property from La Palma Argentina to Royal Realty. Under Colombian law, two requirements, known as the title and mode, must be met in order to transfer the domain of a property.¹⁰¹ The first one, the “title”, is materialized through the purchase deed, and the second one, the “mode”, through the registration of such deed before the corresponding office.¹⁰² In this case, neither requirement took place, so Royal Realty could not have acquired any property right over Lot 001-930485.

57. Six months later, on 9 May 2013, Royal Realty, La Palma Argentina and Newport entered into a private agreement pursuant to which Royal Realty assigned to Newport the Promise Agreement (the “Private Assignment Agreement”).¹⁰³ In the Private Assignment Agreement, the parties acknowledged the importance that the project achieve its equilibrium point as soon as possible, so that the funds for the development of the project and the payment of the lot could be released.¹⁰⁴
58. Moreover, pursuant to the Private Assignment Agreement, Newport and Las Palmas agreed to sign a new promise of purchase-sale agreement providing that 100% of Lot 001-930485 would be acquired by an exchange of properties. This was allegedly done in order to reduce the equilibrium point for the funds to be released by Corficolombiana for the development of the

said act or contract according to its kind and the quality or status of the parties, is null and void. The nullity can be absolute or relative”).

¹⁰⁰ See below, Section II.F.10.

¹⁰¹ See Asset Forfeiture Court Avocamiento Order, 17 August 2017 (**Exhibit C-57**), p. 115.

¹⁰² See Asset Forfeiture Court Avocamiento Order, 17 August 2017 (**Exhibit C-57**), p. 115.

¹⁰³ See Agreement between Royal Realty S.A.S. and La Palma Argentina Y CIA. LTDA. 9 May 2013 (**Exhibit C-103**). Initially, RR Meritage Associates S.A., was to be incorporated in Panama with the express, limited and only purpose to acquire hundred percent (100%) stock of Newport and conduct the activities with respect to the Meritage Project. On 10 May 2013, Royal Realty entered into the Company Agreement of RR Meritage Associates S.A. with the following individuals and entities: The Boston Enterprises Trust, Angel Seda, Gary Sims, JTE International Investments LLC, James Evans, Roger Khaff Khabic, Green Park Trading, Fundación Ashmina, Modus Operandi SAS, Jorge Moreno, JCA Entity (TBD), Albert Wesley Burger, Daniel Correa Mejia and Jonathan Foley. For reasons that are not disclosed by the Claimants, this structure seems not to have been pursued and many of the individuals and entities that entered into the Company Agreement of RR Meritage Associates seem not to be related to the Meritage Project. See Claimants’ Memorial on Merits and Damages, ¶ 75; Company Agreement of RR Meritage Associates S.A. with Beneficiary of Boston Enterprises Trust, 10 May 2013 (**Exhibit C-104**); Company Agreement of RR Meritage Associates S.A. with JTE International Investments, LLC, 10 May 2013 (**Exhibit C-105**); Company Agreement of RR Meritage Associates S.A. with Jonathan Foley, 10 May 2013 (**Exhibit C-106**); Company Agreement of RR Meritage Associates S.A. with Royal Realty, 10 May 2013 (**Exhibit C- 276**).

¹⁰⁴ See Agreement between Royal Realty S.A.S. and La Palma Argentina Y CIA. LTDA. 9 May 2013 (**Exhibit C-103**), Whereas Fourth.

Meritage Project.¹⁰⁵ The agreement stated that this was created for purposes of presenting it to Corficolombiana, but that the parties to the Private Assignment Agreement agreed that despite the new promise of purchase-sale agreement being signed to facilitate the release of funds, “the real and legally binding agreement for the parties is the one initially signed on the 1st day of November of 2012”, according to which the price for Lot 001-930485 would be paid partly by an exchange of units in the Project and partly in cash.¹⁰⁶

59. On 5 July 2013, Royal Realty accepted the proposal of Fiduciaria Corficolombiana (“Corficolombiana”) to provide its services as administrator of a real estate trust for the development of the Meritage Project.¹⁰⁷ The Trust Agreement between Newport and Corficolombiana was signed on 17 October 2013 (the “Meritage Trust Agreement”) (“*Contrato de Fiducia Mercantil Irrevocable Inmobiliaria de Administracion y Pagos - Fideicomiso Meritage*”).¹⁰⁸
60. Pursuant to the Trust Agreement, the assets in trust were comprised by monetary funds (including those derived from a loan taken out by Newport and the funds transferred by the buyers of units in the Project¹⁰⁹) and parcels of Lot 001-930485.¹¹⁰ The parcels of Lot 001-930485 were supposed to be transferred to Corficolombiana by Newport, as the Trustor of the Meritage Trust.¹¹¹ However, in practice Newport could not have transferred Lot 001-930485 because, as explained above, Newport was never the owner of the lot (or any part thereof), because it only had the Promise Agreement with La Palma Argentina, and the actual sale-agreement was not entered into. In other words, Newport could never transfer to Corficolombiana what it did not have.

¹⁰⁵ See Agreement between Royal Realty S.A.S. and La Palma Argentina Y CIA. LTDA. 9 May 2013 (**Exhibit C-103**), Clause Third.

¹⁰⁶ See Agreement between Royal Realty S.A.S. and La Palma Argentina Y CIA. LTDA. 9 May 2013 (**Exhibit C-103**), Clause Fourth.

¹⁰⁷ See Letter from María Clara Quintero Ochoa to Laura Marcela Gómez Alvarez, 5 July 2013 (**Exhibit C- 108**).

¹⁰⁸ See Administration and Payment Trust Agreement and Amendments, 17 October 2013 (**Exhibit C-028**), Clause 9, pp. 7-8.

¹⁰⁹ Newport and Corficolombiana were to enter into a Presales Trust Agreement (“*Contrato de Encargo Fiduciario de Preventas*”), pursuant to which Corficolombiana would collect and administer the funds received from the buyers of units in the project. The Meritage Trust Agreement was subject to the condition that the “Conditions for Delivery of Funds” established in the Presales Trust Agreement be met. See Presales Trust Agreement, 17 October 2013 (**Exhibit C-034bis**), Clause 4.

¹¹⁰ See Administration and Payment Trust Agreement and Amendments, 17 October 2013 (**Exhibit C-028**), Clause 6.

¹¹¹ See Administration and Payment Trust Agreement and Amendments, 17 October 2013 (**Exhibit C-028**), Clause 8 and 9.

61. Once the assets were placed in trust, the legal title over the assets in trust was to be maintained at all times by the Trustee, Corficolombiana.¹¹² Corficolombiana would, in turn, give the parcels of Lot 001-930485 to Newport as a gratuitous bailment (*comodato precario*), for Newport to develop the project.¹¹³ Newport had the obligation to return the parcels to Corficolombiana within five calendar days following written notice terminating the gratuitous bailment.¹¹⁴ Newport, as the Trustor, was also considered as the beneficiary of the Trust.¹¹⁵
62. The Meritage Trust Agreement was modified on four occasions.¹¹⁶ Pursuant to the fourth amendment, of 18 May 2016, Banco de Bogotá, the bank that would finance the first phase of the Project, was included as a Beneficiary Creditor and Beneficiary, and was granted the right to obtain priority *payments* from the Trust funds.
63. On 17 October 2013, Newport and Corficolombiana entered into the Presales Trust Agreement (“*Contrato de Encargo Fiduciario de Preventas-Encargo Fiduciario Meritage*”),¹¹⁷ pursuant to which Corficolombiana was to collect and administer the funds paid by the buyers of units in the Meritage Project until the conditions for delivery of the resources for each project phase were met. According to the Presales Trust Agreement, the pre-operating phase of Phase 1 of the Project would last 12 months as of the signature of the Presales Trust Agreement, *i.e.* until 16 October 2014, and could be automatically extended for an additional 12-month period at Newport’s request.¹¹⁸

¹¹² See Administration and Payment Trust Agreement and Amendments, 17 October 2013 (**Exhibit C-028**), Articles 7 and 20, 22(1).

¹¹³ See Administration and Payment Trust Agreement and Amendments, 17 October 2013 (**Exhibit C-028**), Clause 5 and 11.

¹¹⁴ See Administration and Payment Trust Agreement and Amendments, 17 October 2013 (**Exhibit C-028**), Clause 11, p. 8.

¹¹⁵ See Administration and Payment Trust Agreement and Amendments, 17 October 2013 (**Exhibit C-028**), Article 4 (“Beneficiary: For all purposes, including taxes, the beneficiary will always be The Settlor”) and 34 (“Tax Aspects: The Fiduciary will not be responsible, nor acquire any commitment regarding the representation or tax assessment of the Parties different to the one related to the Trust. In the event the Trust be penalized by the tax authorities due to reasons attributable to the Settlor, the amounts to be paid shall be given by the Settlor, upon previous request by the Fiduciary. For tax effects, the beneficiary of this agreement will be the Settlor”).

¹¹⁶ See Administration and Payment Trust Agreement and Amendments (**Exhibit C-028**), pp. 30-46.

¹¹⁷ See Pre-sales Trust Agreement, 17 October 2013 (**Exhibit C-034 bis**).

¹¹⁸ Based on the information provided by the Claimants, the pre-sale period seems to have lasted more than 12, or even 24 months, as the sales period of phase 1 started on 1 June 2013 (*see* BRG Report, ¶ 58) and by August 2016 (*i.e.*, 39 months later), only 152 units had been sold (*see* Seda Witness Statement, ¶ 96).

64. On 25 November 2014, Corficolombiana, Newport and La Palma Argentina, via a private document, entered into the Meritage La Palma Trust Agreement (referred to by the Claimants as the “Parqueo Trust Agreement”) (“*Contrato de Fiducia Mercantil Irrevocable de Administración- Fideicomiso Meritage La Palma Argentina*”).¹¹⁹ According to the Meritage La Palma Trust Agreement, La Palma Argentina, as the owner of Lot 001-930485, was to transfer the Lot in trust to Corficolombiana, as Trustee, with the objective of parcelling, transferring and making it available to the beneficiary in order to develop the Project.¹²⁰ This meant that Corficolombiana, as the Trustee, would hold legal title to the lot and put it at the disposal of the beneficiary, *i.e.* Newport, for the development of the project.¹²¹
65. Pursuant to Article 3 of the Meritage La Palma Trust Agreement, the transfer of the parcels of Lot 001-930485 corresponding to each phase of the Meritage project to the Meritage Trust constitutes a condition precedent in the Presales Trust Agreement for Corficolombiana to disburse the resources for the development of the Project to Newport. Newport, as beneficiary, and La Palma Argentina, as grantor, would instruct Corficolombiana, upon fulfilment of the required conditions, to transfer the relevant parcels from the Meritage La Palma Trust to the Meritage Trust.¹²² While Corficolombiana would at all times hold legal title of Lot 001-930485 (or the relevant parcels), the Lot would be transferred to the beneficiary of the trust as a gratuitous bailment (*comodato precario*), with the obligation to return it to Corficolombiana within five calendar days following written notice terminating the gratuitous bailment.¹²³
66. According to the original Meritage La Palma Trust Agreement, Newport would be the beneficiary of the Trust. However, on 6 February 2015, La Palma Argentina, Newport and Corficolombiana, amended the Meritage La Palma Trust Agreement to replace the beneficiary of the trust, placing La Palma Argentina as the new beneficiary.¹²⁴ By doing so, Newport was

¹¹⁹ See Parqueo Trust Agreement and Amendment, 25 November 2014 (**Exhibit C-029bis**).

¹²⁰ See Parqueo Trust Agreement and Amendment, 25 November 2014 (**Exhibit C-029bis**), Clause 3.

¹²¹ See Parqueo Trust Agreement and Amendment, 25 November 2014 (**Exhibit C-029bis**), Whereas 3 (“Additionally, by means of this contract the PARTIES intend that THE TRUSTEE manage the real estate property that will be transferred into the Trust established herein, retain its ownership, and make it available to THE BENEFICIARY for the development of the urban project BENEFICIARY intends to develop on the real property” and Article 3.1: “The purpose of this Contract is for the Trustee to hold ownership of the Trust Asset, to manage it in accordance to the instructions issued jointly by THE TRUSTOR and THE BENEFICIARY, and make it available to THE BENEFICIARY for developing the real estate project it intends to develop on the aforesaid real estate property”).

¹²² See Parqueo Trust Agreement and Amendment, 25 November 2014 (**Exhibit C-029bis**), Article 3.3.

¹²³ See Parqueo Trust Agreement and Amendment, 25 November 2014 (**Exhibit C-029bis**), Article 3.4.

¹²⁴ See Parqueo Trust Agreement and Amendment, 25 November 2014 (**Exhibit C-029bis**), Orosí 1, Clause 4, p. 24.

effectively removed from the Meritage La Palma Trust Agreement and deprived from all the rights it had under the Trust, being replaced by La Palma Argentina. According to Mr. Seda, this was done “for tax planning and efficiency purposes”.¹²⁵

67. A few days after the amendment that removed Newport from the Meritage La Palma Trust, on 12 February 2015, Deed No. 361 was executed. Pursuant to Deed No. 361, La Palma Argentina transferred to Corficolombiana, in its capacity as the trustee of the Meritage La Palma Trust, the right of ownership and the real and material possession over Lot 001-930485.¹²⁶ In turn, Corficolombiana gave Lot 001-930485 to La Palma Argentina in gratuitous bailment (*comodato precario*).¹²⁷ In addition, pursuant to the same Deed No. 361, Corficolombiana, in its capacity as the trustee of the Meritage La Palma Trust, transferred to the Meritage Trust the parcel of the Lot to develop Phases 1 and 6 of the Meritage Project.¹²⁸ In turn, Corficolombiana was to give said parcel to Newport in gratuitous bailment (*comodato precario*), in the terms to be agreed in a separate gratuitous bailment agreement.¹²⁹ The Claimants have not produced any evidence of whether this gratuitous bailment was entered into, and if so, under which terms.

D. THE CLAIMANTS’ “DUE DILIGENCE” PROCESS

68. The Claimants assert that they directly and through Corficolombiana conducted a due diligence of Lot No. 001-930485. However, as the Respondent demonstrates below, the Claimants gloss over the various problems with their alleged due diligence and misrepresent the content and essence of the responses they obtained from the Attorney General’s Office as regards Lot No. 001-930485.¹³⁰
69. With respect to the “due diligence” measures taken or relied upon by the Claimants on the Meritage Lot, the Claimants allege that (i) they were assuaged by the response of the National Anti-Money Laundering and Asset Forfeiture Unit of the Attorney General’s Office, to the petition for information presented in 2007 by Las Palmas, and (ii) a title study conducted by Otero & Palacio.

¹²⁵ See Seda Witness Statement, ¶ 69.

¹²⁶ See Deed No. 361, 12 February 2015 (**Exhibit C-140**), Clause 1, p. 5.

¹²⁷ See Deed No. 361, 12 February 2015(**Exhibit C-140**), Transaction 1, Clause 7, p. 8.

¹²⁸ See Deed No. 361, 12 February 2015 (**Exhibit C-140**), Transaction 3, Clause 1, p. 46.

¹²⁹ See Deed No. 361, 12 February 2015 (**Exhibit C-140**), Transaction 3, Clause 9, p. 49.

¹³⁰ See also Reyes Expert Report, ¶¶ 53-79.

70. To recall, as stated above, on 1 November 2012, Royal Realty entered into the Promise Agreement with La Palma Argentina.¹³¹ According to Mr. Seda, he was reassured by the fact that:

La Palma Argentina had obtained a letter of clean title from the National Unit for Anti-Money Laundering and Asset Forfeiture of the Office of the Fiscalía General de la Nación, or Attorney General's Office ("Fiscalía") confirming that "[n]o record was found indicating that the real property identified", or the persons from whom La Palma purchased it "were involved in any criminal investigation or action and/or forfeiture proceeding."¹³²

71. However, not only is Mr. Seda's representation as to the nature of the Attorney General's Office's Response incorrect, but also cited in an incomplete manner. Indeed, the response provided on 30 October 2007 by the National Anti-Money Laundering and Asset Forfeiture Unit ("*Unidad Nacional para la Extinción de Dominio y Contra el Lavado de Activos*") to a right of petition ("*derecho de petición*") formulated by La Palma Argentina, does not constitute, as Mr. Seda states, "a letter of clean title".¹³³ Rather, the response is simply a response by an authority to a request for information, pursuant to Article 23 of the Colombian Constitution.¹³⁴ Via the right of petition, individuals can obtain information from the authorities, provided that the information is not reserved in character.¹³⁵ The response has nothing to do with the title of the property, as the Claimants wrongly state.
72. In any event, in its response of 30 October 2007, the National Anti-Money Laundering and Asset Forfeiture Unit, simply stated that after searching in the Unit's information data base "it had not find, at that point, that either Lot No. 001-930485 or Mrs. Mónica Marcela Rendon Gil and Tatiana Gil Muñoz were involved in criminal proceedings or proceedings of asset forfeiture", and added, circumscribing the scope of its search and response, that:

¹³¹ See Sales-Purchase Agreement Between Royal Realty and La Palma Argentina, 1 November 2012 (**Exhibit C-019bis**).

¹³² Seda Witness Statement, ¶ 45.

¹³³ See Seda Witness Statement, ¶ 45.

¹³⁴ See 1991 Political Constitution of Colombia (**Exhibit C-005bis**), Article 23.

¹³⁵ See Decision C-007/17 of the Colombian Constitutional Court, 18 January 2017, Gloria Stella Ortiz Delgado (**Exhibit R-41**) (stating that the "petition right" provided in article 23 of the Constitution, allows petitioners to submit petitions before the authorities to obtain a prompt response. The scope of the constitutional protection of the petition is limited to the right to receive an answer, albeit under no circumstance implies a right to be granted the request itself); Decision T-473 de 1992 of the Colombian Constitutional Court, 14 July 1992, Ciro Angarita Barón (**Exhibit R-6**) (stating that whilst the access to public documents is part of the essential core of the petition right, the authorities are entitled not to allow access to documents which consultation or disclosure could compromise secrets protected by law). See also Caro Witness Statement, ¶¶ 42-44.

It is pertinent to state that the answer provided is based on the information existing in the data base of this Unit which corresponds to the processes that have been assigned to it in the context of its area of responsibility, and therefore does not take into account information [of other processes before] others Units of the Attorney General's Office in the national territory.¹³⁶

73. It is patent that the response from the National Anti-Money Laundering and Asset Forfeiture Unit was circumscribed and qualified.¹³⁷
74. The Claimants heavily rely on the title study conducted by law firm Otero & Palacio on 7 March 2013, which reviewed 10 years of the chain of ownership¹³⁸ and other searches conducted by the same law firm. In the words of the Claimants “[i]n 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”.¹³⁹
75. According to the Claimant, a 10-year review of the title chain was sufficient for purposes of due diligence pursuant to Law 791 of 2002.¹⁴⁰ Law 791 of 2002 provides that the statute of limitation for actions to acquire property by squatting as well as the action to exercise an action against squatters to avoid title consolidating in their head is 10 years.¹⁴¹ However, not only are there several actions which prescription term is extended beyond 10 years, including, actions

¹³⁶ Letter from Elsa Maria Moyano Galvis to Maria Cecilia Uribe Quintero, 30 October 2007 (**Exhibit C-027bis**) (“It must be noted that the response provided is based on the information in the database maintained in this Unit, which is in charge of proceedings that have been assigned to it within the framework of its jurisdiction and, consequently, no information was taken from the other Attorney General's Office's Units elsewhere in the country”).

¹³⁷ See Reyes Expert Report, ¶¶ 54-58.

¹³⁸ See Claimants' Memorial on Merits and Damages, ¶ 67; Otero & Palacio Title Study and Supplement, 7 March and 23 July 2013 (**Exhibit C-030bis**).

¹³⁹ See Claimants' Memorial on Merits and Damages, ¶ 67.

¹⁴⁰ See Claimants' Memorial on Merits and Damages, ¶ 67; Otero & Palacio Title Study and Supplement, 7 March and 23 July 2013 (**Exhibit C-030bis**).

¹⁴¹ See Law No. 791 of 2002 (**Exhibit C-078**), Article 1 reduced the statute of limitation period in civil matters to 10 years, of all statute of limitations that used to be 20 years included in the Civil Code, such as domain acquisitive prescription, extinctive, petitioning inheritance, and legal cleanup of the absolute nullity. See original wording in Spanish: (“*Redúzcase a diez (10) años el término de todos <sic> 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*”).

concerning heirs requesting rescission,¹⁴² but this time period is of no relevance regarding the action for Forfeiture of Assets provided in Law 1708 of 2014, Article 21, as the action is expressly made not subject to a statute of limitations.¹⁴³

76. Indeed, neither the action for Land Restitution under the Victims Law (“*Ley de Víctimas y Restitución de Tierras*”), or Law 1448 of 2011,¹⁴⁴ nor the Action for Forfeiture of Assets Law 1708 of 2004¹⁴⁵ are subject to a statute of limitations. The Claimants should have been aware of this fact, and are in fact aware of this fact as these caveats were raised in the title study conducted by law firm Rodríguez Azuero in connection to the lots of land the Claimants alleged to have been interested in acquiring in Santa Fé de Antioquia.¹⁴⁶ The study by Rodríguez Azuero describes in no uncertain terms the limitations a title study entails and the issues which a title study does reveal, and the consideration buyers should have in this regard. In striking contrast with the Otero & Palacio’s study, the one of Rodríguez Azuero provides several key caveats and disclaimers as regards the scope of the title study.¹⁴⁷ What is more, the legal director of Royal Property, Ms. María Isabel Villegas, herself conducted in 2009 a title study in relation to the property where the Luxé was to be built, which included the review of transfer deed No. 1682 of 1987 and stated the need to review whether the seller in the deed had actual power to sell and to obtain the annexes to said deed.¹⁴⁸ Yet, the Claimants satisfied themselves with a less comprehensive title study for the Meritage project.
77. The limited temporal scope of the title review meant that Otero & Palacio only reviewed the title changes from 1997 to 2007, excluding public deed No. 1554 of 12 August 1994 through

¹⁴² See Colombian Civil Code, 1887 (**Exhibit R-1**), Article 1751, where the term to execute the action by the minor’s heirs starts once he reaches the legal age. Thus, the prescription time could be extended beyond 10 years and over 20.

¹⁴³ See Law No. 1708, 20 January 2014 (**Exhibit C-003bis**), Article 21 (“The asset forfeiture proceeding is imprescriptible. The asset forfeiture shall be declared regardless of whether the grounds for its application have taken place prior to the entry into force of this law”). See also Decision C-740/03 of the Colombian Constitutional Court, 28 August 2003 (**Exhibit R-15**), p. 67; Pinilla Expert Report, ¶ 32.

¹⁴⁴ See Law No. 1448 of 2011 (**Exhibit R-22**), Article 23 (“The victims, their families and the society in general, have the imprescriptible and inalienable right to know the truth about the motives and circumstances in which the violations were committed”).

¹⁴⁵ See Law No. 1708, 20 January 2014 (**Exhibit C-003bis**), Article 21.

¹⁴⁶ See Santa Fe Title Study by Rodriguez Azuero Contexto Legal, 30 November 2015 (**Exhibit C-144**).

¹⁴⁷ See Santa Fe Title Study by Rodriguez Azuero Contexto Legal, 30 November 2015 (**Exhibit C-144**).

¹⁴⁸ See Letter from María Isabel Villegas to Juliana Montoya, attaching Study of Ownership Titles, 18 November 2009 (**Exhibit C-088**).

which Sierralta López y Cia Ltda. obtained the relevant lot.¹⁴⁹ Similarly, Otero & Palacio did not review public deed No. 1130 of June 1997, through which Entrelagos Orozco Vanegas y Cia and Sierralta López y Cia Ltda. parcelled Lot 001-657878 into what later became Lots 001-719999 and 001-720000.¹⁵⁰ Both deeds show Mr. López Vanegas as the legal representative of Sierralta - López y Cia. S. en C. It bears mentioning that contrary to the Claimants' allegations, it is clear from the documents that Inversiones Nueve S.A. was the same company that was formerly known as Sierralta- López & Cia. S. en C.¹⁵¹

78. Moreover, contrary to the Claimants' assertion, not only was the title analysis incomplete from a temporal aspect, but as shown by the investigations conducted by the Technical Investigation Team and as remarked by the Attorney General's Office in its Determination of the Claim ("*Fijación de Pretension*")¹⁵² and Formal Petition for Forfeiture ("*Requerimineto de Extinción del Dominio*"),¹⁵³ the titles show a series of amendments and irregularities.¹⁵⁴ Further, as acknowledged by Ms. Ana María Palacio, she reviewed the "Deed of 94". Yet she did not recall having conducted further background searches in connection with Mr. López Vanegas, whose name appeared in that Deed, and confirmed that "Iván López does not appear on the list that I provided".¹⁵⁵
79. The Claimants further rely on the purported due diligence conducted by Corficolombiana as regards Lot No. 001-930485, ostensibly to discharge their due diligence obligation.¹⁵⁶ However, as demonstrated below, Corficolombiana's due diligence was far from exhaustive.¹⁵⁷

¹⁴⁹ See Otero & Palacio Title Study and Supplement 7 March 2013, 23 July 2013 (**Exhibit C-030bis**), p. 2.

¹⁵⁰ See Deed No. 1130, 25 June 1997 (**Exhibit C-074**).

¹⁵¹ See Letter from L. Maria Carvajal Velez to Sierralta López y CIAS. En C., attaching Deed 2379, 14 October 2003 (**Exhibit C-079**) p. 4; Deed No. 1762, 16 September 2004 (**Exhibit C-080**); Deed No. 815, 6 May 2005 (**Exhibit R-17**), p 1.

¹⁵² See Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**).

¹⁵³ See Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017 (**Exhibit C-024bis**).

¹⁵⁴ See Testimony of Ana María Palacio Bedoya in Pinturas Prime Arbitration, 28 August 2018 (**Exhibit C-216**), p. 8.

¹⁵⁵ See Testimony of Ana María Palacio Bedoya in Pinturas Prime Arbitration, 28 August 2018 (**Exhibit C-216**), p. 8.

¹⁵⁶ See Claimants' Memorial on Merits and Damages, ¶ 63.

¹⁵⁷ See Caro Witness Statement, ¶¶ 39-41, 45-46.

80. Indeed, Corficolombiana, as a regulated entity,¹⁵⁸ is obliged by law to know its client and adopt Anti-Money Laundering Measures,¹⁵⁹ and accordingly must implement a “*Sistema de Administración del Riesgo de Lavado de Activos y de la Financiación del Terrorismo,*” or SARLAFT.¹⁶⁰ As acknowledged by the Claimants, the “*Superintendencia Financiera*” (the entity that regulates financial entities) provides a minimum of criteria and parameters¹⁶¹ that financial institutions must comply with as regards their SARLAFT but the entities are at liberty to “tailor [the SARLAFT] to their specific procedures”.¹⁶² It is hence the obligation of the financial entities to ensure that the manner in which they implement their SARLAFT works efficiently and takes into account all potential risks. It bears mentioning in this regard that in 2016 the “*Superintendencia Financiera*” found deficiencies in Corficolombiana’s SARLAFT. Given that the deficiencies were not corrected by Corficolombiana, the “*Superintendencia*” imposed sanctions.¹⁶³
81. Further, it must be underscored that Corficolombiana relied on the title study performed by Otero & Palacio limited to 10 years, and considered the 10 year study sufficient,¹⁶⁴ despite one of their lawyer’s acknowledgment that “the area where this the lot of land [the Meritage

¹⁵⁸ See Decree No. 663 of 1993 (**Exhibit R-7**), Article 3 (“For the purposes of these Statutes, financial services companies are trust companies, general deposit warehouses, companies that manage pension and severance funds, and companies of exchange intermediation and special financial services, whose function is to carry out the operations provided for in the regime that regulates their activity. [...] Financial services companies have the character of financial institutions”).

¹⁵⁹ See External Circular of the Financial Superintendence No. 010 of 2013, March 2013 (**Exhibit R-26**), Chapter Eleven, Instructions regarding the management of the risk of money laundering and financing of terrorism, 4.2.2.1.1. Knowledge your client (“The SARLAFT must have procedures to obtain an effective, efficient and timely knowledge of all current and potential clients, as well as to verify the information and its bases”).

¹⁶⁰ See External Circular of the Financial Superintendence No. 007 of 2013, March 2013 (**Exhibit R-25**), Chapter Eleven, Instructions regarding the management of the risk of money laundering and financing of terrorism, 2. Scope of application (“The supervised entities shall design and implement the SARLAFT, in accordance with the minimum criteria and parameters required in this chapter [which] must be in line with the international standards on the matter, especially those issued by GAFI-GAFISUD”).

¹⁶¹ See Claimants’ Memorial on Merits and Damages, ¶ 63. See also Basic Legal External Circular Letter from Financial Superintendence of Colombia, 3 October 2014 (**Exhibit C-270**), Article 2. Scope of Application (“It is incumbent upon the supervised entities to design and implement the SARLAFT in accordance with the minimum criteria and parameters required in this Chapter, without prejudice to warn that according to literal e. of numeral 2 of art. 102 of the EOSF it must be in line with the international standards on the matter, especially those issued by the FATF - GAFISUD”).

¹⁶² See Basic Legal External Circular Letter from Financial Superintendence of Colombia, 3 October 2014 (**Exhibit C-270**).

¹⁶³ See Decision 911 of the Colombian Financial Superintendence, 10 July 2019 (**Exhibit R-48**), which was reviewed in second instance through Decision 682 of the Colombian Financial Superintendence, 31 July 2020 (**Exhibit R- 56**).

¹⁶⁴ See Testimony of Margarita Maria Betancourt Guzman, 18 September 2018 (**Exhibit C-219**), p. 3.

project] is located, were properties that belonged to the Ochoa family here in Medellín that had certain connections in relation to that lot, although they did not appear in the tradition of the lot”¹⁶⁵ and that the Meritage deal was the biggest sales business Corficolombiana had had at that date.¹⁶⁶ To recall, the Ochoa brothers were prominent members of the Medellín Cartel.¹⁶⁷

82. Corficolombiana retained external counsel Mr. Francisco Jose Sintura, who on 22 August 2013 presented a “*derecho de petición*” before the National Anti-Money Laundering and Asset Forfeiture Unit requesting to be informed about the “information incorporated in the Unit’s systems that can identify if against the properties, or their current or former owners, there are actions in progress, information that has no legal reserve in accordance with Article 74 of the Political Constitution, Law 57 of 1985 and Article 18 of Law 906 of 2004”.¹⁶⁸ Needless to say, the lots, companies and individuals listed in Mr. Sintura’s request were circumscribed to those appearing in the 10-year title search.
83. On 9 September 2013, the National Anti-Money Laundering and Asset Forfeiture Unit, answered the petition stating that “when consulting the consolidated internal information system that this Unit administers, to this date, there is NO record of natural and legal persons [in respect of which Mr. Sintura had requested the information”.¹⁶⁹
84. It must be noted that whilst the Claimants alleged that this was an extraordinary measure, beyond what was required,¹⁷⁰ Las Palmas had submitted a similar petition in 2007 and Ms. Palacio acknowledges “that Mr. Sintura had already recommended that study [presenting that kind of petition to the Attorney General’s Office]” and that in a “meeting of Asofiduciarías

¹⁶⁵ Testimony of Margarita Maria Betancourt Guzman, 18 September 2018 (**Exhibit C-219**), p. 4 (“*la zona en donde está ubicado ese lote, eran predios que pertenecían a la familia Ochoa aquí en Medellín que tenían ciertos antecedentes en relación con ese lote, y aunque no figuraban en la tradición del lote*”).

¹⁶⁶ See Testimony of Margarita Maria Betancourt Guzman, 18 September 2018 (**Exhibit C-219**), p. 4.

¹⁶⁷ See The New York Times, “Juan David Ochoa Vásquez, Co-Founder of Medellín Cartel, Dies at 65”, 30 July 2013 (<https://www.nytimes.com/2013/07/31/world/americas/juan-david-ochoa-vasquez-co-founder-of-medellin-cartel-dies-at-65.html>), accessed on 11 November 2020 (**Exhibit R-27**).

¹⁶⁸ See Petition for Information from Fiduciaria Corficolombiana to Attorney General Office of Asset Forfeiture and Anti-Asset Laundering, 22 August 2013 (**Exhibit C-031bis**), p. 2. (“*información incorporada en los sistemas de la Unidad que pueden identificar si en contra de los inmuebles, o sus actuales o anteriores propietarios, existen acciones en curso, información que no tiene reserva legal conforme con el artículo 74 de la Constitución Política, la Ley 57 de 1985 y el artículo 18 de la Ley 906 de 2004.*”).

¹⁶⁹ Petition Response from Attorney General Office of Asset Forfeiture and Anti-Asset Laundering to Fiduciaria Corficolombiana, 9 September 2013 (**Exhibit C-032bis**).

¹⁷⁰ See Claimants’ Memorial on Merits and Damages, ¶ 71.

some entities had mentioned that they did it”.¹⁷¹ Hence, the petition — the real nature of which has already been explained and which, contrary to what Claimants attempt to portray by conveniently titling it “Certification of no Criminal Activity”,¹⁷² does not constitute a certification of no criminal activity — was in fact a petition commonly made by financial entities.¹⁷³ It is not within the remit of the Fiscalía to produce certifications of no criminal activity.¹⁷⁴

85. Finally, as per Mr. Seda’s account, at the beginning of 2014 he was contacted by Mr. López Vanegas¹⁷⁵ who “claimed to be the rightful owner of the land on which the Meritage project was being build”¹⁷⁶ and demanded a “payoff”. Per Mr. Seda’s recount, Mr. López Vanegas continue to “pester various members of his staff calling the Royal Realty Office” and demanding money.¹⁷⁷ Moreover, Mr. Seda acknowledges that he informed both his in-house lawyers and [his] representatives in Corficolombiana about the alleged extortion and “and all agreed that Mr. López’s Vanegas extortion attempts should be ignored”.¹⁷⁸
86. Furthermore, Mr. Seda declared that in mid-2015 he was contacted by Mr. Jaime Andrés Toro Ariztizábal (National Director of Real Estate for Corficolombiana), who informed Mr. Seda that Mr. López Vanegas had met with Corficolombiana’s President, Mr. Jaime Sierra Giraldo, and repeated his claims. Mr. Seda states that he and Corficolombiana’s personnel “discussed and agreed that López Vanegas’s claims had no merit, that the diligence done had been more than sufficient, and that such a blatant extortion attempt should be ignored”.¹⁷⁹

¹⁷¹ Testimony of Margarita Maria Betancourt Guzman, 18 September 2018 (**Exhibit C-219**), p. 5 (“This procedure that Dr. Sintura did in 2013 before the Attorney General’s Office, was it usual for you in real estate trust projects in which FIDUCIARIA CORFICOLMBIANA intervened for the year 2013? ANSWER: Dr. Sintura had already recommended this study to us. In the meetings of Asofiduciarías some entities had already mentioned that they were doing it”).

¹⁷² Claimants’ Memorial on Merits and Damages, ¶ 72.

¹⁷³ This is particularly the case with respect to the petition filed by Corficolombiana, which limited the scope of the petition to those persons appearing in the chain of title in the last 10 years. *See also* Reyes Expert Report, ¶ 58, noting that in an attempt to avoid criminal liability, criminal organizations have tried to rely on similar certifications at least since 1994.

¹⁷⁴ *See* Caro Witness Statement, ¶ 43.

¹⁷⁵ *See* Seda Witness Statement, ¶ 62; Declaration of Angel Seda, submitted on record of Asset Forfeiture Proceeding, 28 February 2017 (**Exhibit C-035bis**).

¹⁷⁶ Seda Witness Statement, ¶ 62; Declaration of Angel Seda, submitted on record of Asset Forfeiture Proceeding, 28 February 2017 (**Exhibit C-035bis**).

¹⁷⁷ Seda Witness Statement, ¶ 63.

¹⁷⁸ Seda Witness Statement, ¶ 64.

¹⁷⁹ Seda Witness Statement, ¶ 65.

87. Mr. Seda’s and Corficolombiana's disregard of Mr. López Vanegas’s claims and lack of investigation on the identity of Mr. López are shocking. It cannot be disputed that any person – let alone one building an allegedly multi-million project – faced with the allegations of Mr. López Vanegas, would have, at the very minimum attempted to verify the identity and claims of Mr. López Vanegas. Still, Mr. Seda simply satisfied himself by asking “Las Palmas Argentina” if they knew Mr. López Vanegas.¹⁸⁰ His lack of diligence is even more shocking considering that the information concerning the illicit origin of the Meritage Lot and the possibility that it could subject to forfeiture were of public knowledge and was raised with Mr. Seda by journalists.¹⁸¹
88. It bears recalling in this regard, that Sierralta López & CIA – Mr. López Vanegas’s company and for which he was the legal representative – was identified in the chain of title, as was the name of his son, Mr. López Betancur. Mr. Seda’s (and Corficolombiana’s) complacency speaks volumes of their lack of interest in conducting a proper due diligence, lest he (and them) join the dots. The perils of the Meritage Lot having belonged to Mr. López Vanegas, a drug-dealer, were obvious: the Attorney General’s Office commencement of Asset Forfeiture. The Claimants assumed this risk and cannot feign legitimate ignorance.
89. What is more, as further detailed below, Mr. Seda continued having exchanges and in fact met with Mr. López Vanegas and his alleged envoys until 2016.¹⁸²
90. It bears noting that in clear contradiction with his statement that in early 2014 when contacted by Mr. López Vanegas, the Meritage Project was “being built”, Mr. Seda affirms – without providing any evidence – that construction of the Meritage Project commenced on March 2015.¹⁸³ At the very least, Mr. Seda and the other Claimants could have halted pre-sales and construction until they had fully verified Mr. López Vanegas’ claims. They chose not to.

¹⁸⁰ See Seda Witness Statement, ¶ 62.

¹⁸¹ W Radio, “Ángel Seda despeja dudas sobre lote en disputa para proyecto de construcción en Medellín”, 5 August 2014 (https://www.wradio.com.co/escucha/archivo_de_audio/angel-seda-despeja-dudas-sobre-lote-en-disputa-para-proyecto-de-construccion-en-medellin/20140805/oir/2353698.aspx), accessed on 15 November 2020 (**Exhibit R-30**); W Radio, “Ya han intentado detener la realización del proyecto Meritage: CEO de Royal Property Group.”, 8 August 2016 (https://www.wradio.com.co/escucha/archivo_de_audio/ya-han-intentado-detener-la-realizacion-del-proyecto-meritage-ceo-de-royal-property-group/20160808/oir/3210575.aspx), accessed on 16 November 2020 (**Exhibit R-38**).

¹⁸² See below, Section II.E.

¹⁸³ According to the Meritage Cash Flows Control Phase 1 (**Exhibit BRG-034**), the first costs in connection with the Meritage Stage 1 were incurred in June 2015.

91. Finally, the Claimants allege that two additional studies were conducted on the property title. Namely, a study conducted by Law firm Osorio & Moreno on 17 May 2016,¹⁸⁴ commissioned by Colpatría and a purported “title study” commissioned by Banco de Bogotá. The document produced by Osorio & Moreno relates a series of deeds consulted, among others No. 361 of 2015, 2107 of 2012, 1992 of 1992, 3338 of 2006, 2834 of 2006, 1562 of 2006, 807 of 2005, 815 of 2005, 738 of 2005, 1762 of 2004, 1130 of 1997, 1554 of 1994, 348 of 1995, and 4140 of 1991,¹⁸⁵ which reveal that López Vanegas was the legal representative of Sierralta López & CIA. Besides, it does not appear that Mr. Seda or any of the other Claimants either through Royal Realty, or Newport, made Colpatría aware of Mr López Vanegas’s claims.
92. In turn, the so-called “title study” dated 26 May 2017, performed for Banco de Bogotá by Daniel Castellon Pardo and on the basis of which Banco de Bogotá approved a construction loan to Corficolombiana, Newport and Las Palmas, does not contain an actual study on the chain of title, it simply states that “based on the record” of Lot No. 001-1198464 (*i.e.*, only one of the sub-lots resulting from the subdivision of the Meritage Lot), the property is “unencumbered” (“*libre de gravámenes*”), that is, that no liens, mortgages or attachments appear on the title.¹⁸⁶

E. THE ALLEGED EXTORSION SCHEME

93. The Claimants allege that they have been the victims of an extortion scheme orchestrated by Mr. López Vanegas, his representatives and functionaries of the Attorney General’s Office.¹⁸⁷ Their allegations are based on speculation.
94. As stated above, Mr. Seda’s testimony is that he was approached by Mr. López Vanegas in early 2014, and that Mr. López Vanegas continued contacting him during 2015, claiming that he was the rightful owner of the Meritage Lot and asking to be paid to “go away” and not to interfere with the development of the Meritage Project.¹⁸⁸ Mr. Seda and Corficolombiana disregarded Mr. López Vanegas’s claims.

¹⁸⁴ See Claimants’ Memorial on Merits and Damages, ¶ 126.

¹⁸⁵ See Osorio & Moreno Abogados, Title Study, 17 May 2016 (**Exhibit C-160**).

¹⁸⁶ See Daniel C. Pardo, Study for Banco de Bogotá, 26 May 2016 (**Exhibit C-161**).

¹⁸⁷ See Claimants’ Memorial on Merits and Damages, ¶¶ 11, 13-14.

¹⁸⁸ See Claimants’ Memorial on Merits and Damages, ¶¶ 85-86.

95. Mr. Seda claims that in 2016, he continued being “extorted” by Mr. López Vanegas and provides in support of its claim a letter dated 7 April 2016, of Mr. Víctor Mosquera, a lawyer representing Mr. López Vanegas. In the letter, Mr. Mosquera states that:

Víctor Mosquera Marín’s office, as legal representative of Mr. Iván López Vanegas, with due diligence - has conducted a rigorous legal and evidentiary study on the previous and present deeds regarding the property located in the Perico Village in the municipality of Envigado, and as a result of that study establishes that Mr. Iván López Vanegas remains the legitimate owner of the property in question. This is evidenced by public deed number 1554 of 12 August 1994, 348 of February 23, 1995 and 1130 June 25 1997 all they issued in the Notary 21 of Medellín.¹⁸⁹

96. In the letter, Mr. Mosquera indicates that he is writing in order to reach “an amicable solution” and states that Mr. López Vanegas and his counsellors “would like to meet and negotiate directly with [Mr. Seda] before pursuing any legal action” and invite him to a meeting “the second of (2) May, 2016 at the Marriott Marquis Hotel in Washington D.C., located at 901 Massachusetts Ave NW, in the Rose Garden Business Lounge Boardroom”.¹⁹⁰ Mr. Mosquera concludes the letter by stating that “[f]inally, in case you do not present yourself or we can't reach an agreement we reserve ourselves the right to start legal action both in Colombia and/or any international court”.¹⁹¹
97. As admitted by Mr. Seda, he ignored the request.¹⁹² Mr. Seda did not reply to the letter or communicate this letter to the Colombian authorities. Neither did he consider further investigating Mr. López Vanegas’s claims, even if as per Mr. Mosquera’s assertions, there were specific deeds that supported Mr. López Vanegas’s claim. Moreover, despite having the numbers of the specific deeds, Mr. Seda did not request his lawyers, or those of Corficolombiana, to further investigate the veracity of Mr. López Vanegas’s claims. It bears mentioning that, as demonstrated above, Mrs. Palacio from Otero & Palacio admitted to having looked at Deed No. 1554 of 1994 and yet not having conducted searches in connection with Mr. López Vanegas.¹⁹³

¹⁸⁹ Letter from Victor Mosquera Marin to Angel Samuel Seda, 7 April 2016 (**Exhibit C-151**), p. 3.

¹⁹⁰ Letter from Victor Mosquera Marin to Angel Samuel Seda, 7 April 2016 (**Exhibit C-151**), pp. 1,3.

¹⁹¹ Letter from Victor Mosquera Marin to Angel Samuel Seda, 7 April 2016 (**Exhibit C-151**).

¹⁹² See Claimants’ Memorial on Merits and Damages, ¶ 119.

¹⁹³ See above, ¶ 78.

98. In one of their repeated attempts to create a semblance of conspiracy between Mr. Seda and the Colombian authorities, the Claimants state that “[i]n a harbinger of what was to come”,¹⁹⁴ one day after Mr. Mosquera wrote to Mr. Seda—and two years after Mr. López Vanegas had filed his complaint with the Organized Crime Unit,¹⁹⁵ the Asset Forfeiture Unit, headed by Ms. Andrea del Pilar Malagón Medina (“Ms. Malagón”), assigned the case to Prosecutor No. 44, Ms. Alejandra Ardila Polo (“Ms. Ardila”) and states that “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”.¹⁹⁶ The Claimants further state that on 18 April 2016, Prosecutor No. 44, “apparently relying solely on the stale complaint filed by Mr. López Vanegas two years previously, initiated an asset forfeiture investigation into the Meritage Property.”¹⁹⁷
99. A perfunctory review of Resolution 125, through which the case was assigned to Prosecutor 44, and the Determination of Claim of 25 January 2017, as well as the events further detailed below, belie the Claimants’ speculations as to a purported extortion scheme involving Mr. López Vangas and the General Attorney’s Office and demonstrate their misrepresentations of the relevant facts.
100. *First*, contrary to the Claimants’ claim that after “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”,¹⁹⁸ Resolution 125 expressly instructed the investigation of Mr. López Vanegas’s claim:

[T]he Judicial Police of the Superintendency of Notaries and Registrar – Land, via report dated 8 April 2016, requests this National Direction, [...] to investigate the assets held in the name of Iván López Vanegas, member of the Envigado Office [...] taking into account that in Act N° 035, dated 6 April 2016, the investigation of the Judicial Police, is corroborated before the Internal Work Group.¹⁹⁹

101. *Second*, as further demonstrated in this Counter-Memorial, the decision of the Attorney General's Office 44 to proceed with the Asset Forfeiture Proceedings was not “solely” based on

¹⁹⁴ Claimants’ Memorial on Merits and Damages, ¶ 120.

¹⁹⁵ See Claimants’ Memorial on Merits and Damages, ¶ 120.

¹⁹⁶ Claimants’ Memorial on Merits and Damages, ¶ 120.

¹⁹⁷ Claimants’ Memorial on Merits and Damages, ¶ 121.

¹⁹⁸ Claimants’ Memorial on Merits and Damages, ¶ 103.

¹⁹⁹ Attorney General’s Office Resolution No. 125, 8 April 2016 (**Exhibit C-153**), p. 1.

the “stale complaint filed by Mr. López Vanegas”. Much to the contrary, it was based on the comprehensive evidence retrieved following extensive investigations which revealed the illicit origin of the Meritage Lot.²⁰⁰

102. *Third*, the Claimants conveniently gloss over the fact that, as per Resolution No. 125, the Judicial Police had presented the case to the Attorney General’s Office on 6 April 2016, that is, before Mr. Mosquera’s letter to Mr. Seda.
103. Further, as the Claimants’ themselves related, on 27 April 2016, the law firm of Mr. Mosquera emailed Mr. Seda and Mr. James Evans, Chief Operating Officer of Royal Property Group, referring to the letter of 7 April 2016 and stating that they awaited Mr. Seda and Mr. Seda’s lawyers, in Washington in the place indicated in the letter of 7 April, and that the purpose of the meeting was to provide them with evidence and proof obtained in the law firm’s due diligence that demonstrated Mr. Seda’s legitimate ownership of the disputed lot which they “would like Mr. Seda and Mr. Evans to know prior to [commencing] legal proceedings before the corresponding jurisdictions”.²⁰¹
104. Mr. Seda states that whilst he had refrained from responding until then, “he decided to do so in light of Mr. Mosquera’s threats that he would take legal action against the Meritage Project”. Thus, on 3 May 2016, Mr. Seda agreed to meet Mr. Mosquera and Mr. López Vanegas but, according to Mr. Seda, “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.’ Mr. Seda did not know what legal action Mr. López Vanegas, who had no valid claim of ownership, could feasibly take. He soon found out”.²⁰²
105. In fact, the evidence provided by the Claimants shows that Mr. Seda responded to Mr. Mosquera on 3 May 2016, that is, a day after the date in which the meeting requested by Mr. Mosquera was set forth. In his email, Mr. Seda stated:

Mr. Marin, [sic]

I am a little intrigued by what your client pretends to claim and which intentions he has. If you are in Medellín I could meet you any day you can. If you are definitely not travelling to Medellín, I can go

²⁰⁰ See below, Section II.F.2.

²⁰¹ 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 (**Exhibit C-156**), p. 1.

²⁰² Claimants’ Memorial on Merits and Damages, ¶ 122.

to Bogotá, in around one month, during one of my regular visits there. Let me know if either of these options works for you.

Thank you,

Angel Seda²⁰³

106. Mr. Mosquera answered Mr. Seda's email on the same day, stating as follows:

Dear Dr. Seda,

Thank you for your communication. Unfortunately, I must inform you that yesterday our law firm has exhausted the approach with the counterpart and by express instructions of our client, we are to proceed to his defence. I trust you will understand, his intentions are clearly stated in the prior correspondence. I regret the parties did not manage to meet and reach an amicable solution.

Kind regards,

Victor Mosquera Marín²⁰⁴

107. At the peril of underscoring the obvious, it bears noting that the above communications all took place after the Judicial Police had presented the case to the Asset Forfeiture Unit 44, on 6 April 2016, and after the case had been assigned to Unit 44, on 8 April 2016. The Claimants' reverse engineering is incongruous.

108. *Fourth*, following with their arguments regarding the threat of legal action by Mr. López Vanegas, the Claimants refer to the *Acción de Tutela* filed by Mr. López Vanegas on 6 May 2016.²⁰⁵ Corficolombiana, La Palma, Royal Realty, Newport and the Asset Forfeiture Unit 37 were also joined to the *Tutela* Action and their positions were heard during the proceedings.²⁰⁶ According to Mr. López Vanegas, he had presented (i) a request for information to Unit 24, to which he received a response on 9 March 2016, stating that his claim had been included with other claims against the *Oficina de Envigado*,²⁰⁷ and (ii) another request for information before

²⁰³ Email chain between Víctor Mosquera Marín and Angel Seda, 3 May 2016 (**Exhibit C-157**), p. 1.

²⁰⁴ Email chain between Víctor Mosquera Marín and Angel Seda, 3 May 2016 (**Exhibit C-157**), p. 1.

²⁰⁵ See Claimants' Memorial on Merits and Damages, ¶¶ 123-129; López Vanegas Tutela Action, 6 May 2016 (**Exhibit C-037bis**).

²⁰⁶ See Decree No. 2591 of 1991 by which the action of *tutela* enshrined in Article 86 of the Political Constitution is regulated (**Exhibit R-5**), Chapter I, General provisions and procedure, Article 1 ("Every person shall have an action of protection to claim before the judges, at any time and place, by means of a preferential and summary procedure, by himself or by anyone acting on his behalf, the immediate protection of his fundamental constitutional rights, whenever these rights are violated by the action or omission of any public authority or of individuals in the cases indicated by this Decree.") (Unofficial Translation).

²⁰⁷ See Decision on López Vanegas Tutela Action, 23 May 2016 (**Exhibit C-039bis**), p. 3.

Unit 37, to which the Unit replied stating that the process was in the initial stage of investigation and was hence under reserve as provided for in Article 117 of Law 1708 de 2014.²⁰⁸

109. The Claimants allege that after filing Newport’s response in the *Tutela* action, an attorney from La Palma advised Mr. Seda that the Attorney General’s Office had “acknowledged that López Vanegas was a criminal who was trying to extort [Mr. Seda]”, and that the Attorney General’s Office “wanted COP 500 million (USD 160,000) to ‘resolve’ the issue”, noting that “these things don’t move without help”.²⁰⁹ The Claimants submit that Mr. Seda had no interest in “paying bribes” and “ignored the request”.²¹⁰
110. Neither Mr. Seda nor the Claimants disclose the name of the alleged attorney of La Palma, and the wording suggests that the advisor was transmitting “the request”. Needless to say, if an attorney of La Palma Argentina – the title owner of the Property- was involved transmitting this information and requests, Mr. Seda should have been further alerted, should have not continued ignoring the facts, and should have also made a claim before the relevant authorities. He did not.
111. The Criminal Chamber of the Superior Tribunal of the Judicial District of Bogotá (“*Tribunal Superior del Distrito Judicial de Bogotá Sala Penal*”) rendered a decision on the *Tutela* action on 23 May 2016.²¹¹ The Tribunal delineated the difference and independence between the criminal proceedings regarding the alleged kidnapping of Mr. López Vanegas’s son and alleged dispossession of Mr. López Vanegas’s property by the *Oficina de Envigado*, and the Asset Forfeiture Proceedings initiated by the Attorney General’s Office in connection with the Meritage Lot. Whilst the Tribunal ordered the Attorney General’s Office 24 on Organized Crime to decide within 15 days whether it would commence instruction of criminal proceedings or not, it held that the Attorney General’s Office 37 was duly following the asset forfeiture proceedings set forth in Law 1708 of 2014 and hence had not conculcated the rights of Mr. López Vanegas. The Tribunal also rejected López Vanegas’s request to impose precautionary measures over the Meritage Lot, stating that the *Tutela* action was not the proper course to that end.²¹²

²⁰⁸ See Decision on López Vanegas Tutela Action, 23 May 2016 (**Exhibit C-039bis**), p. 3.

²⁰⁹ Seda Witness Statement, ¶ 82. See also Claimants’ Memorial on Merits and Damages, ¶ 127.

²¹⁰ Claimants’ Memorial on Merits and Damages, ¶ 127.

²¹¹ See Decision on López Vanegas Tutela Action, 23 May 2016 (**Exhibit C-039bis**).

²¹² See Decision on López Vanegas Tutela Action, 23 May 2016 (**Exhibit C-039bis**), p. 11.

112. *Fifth*, as previously referred in this Counter Memorial, the Claimants submit that after the Banco de Bogotá received a “title study” by Daniel Castellon Pardo stating that Lot No. 001-1198464 (*i.e.*, part of the Meritage Lot assigned for the development of Phases 1 and 6) was “unencumbered”,²¹³ on 2 June 2016 Banco de Bogotá – a bank that belongs as does Corficolombiana to Grupo Aval²¹⁴ – approved a construction loan in favour of Newport and registered a mortgage for USD 660,000 over the lot. It must be noted that the “title study” does not contain a study on the chain of title; it simply states that the lot is unencumbered, that is, that no liens, mortgages or attachments appear on the title. The “title study” does not say anything as regards the previous owners of the lot; it merely relates to La Palma, Newport and Corficolombiana which were jointly responsible for the construction loan.
113. Notably, Mr. Seda does not state that he warned Banco de Bogotá about Mr. López Vanegas’s claims, or the alleged requested bribes from the Attorney General's Office to avoid an Asset Forfeiture Proceedings. This information would have certainly been relevant to the bank when considering whether to approve the loan to be guaranteed, precisely, by the lot that Mr. López Vanegas’s was disputing.
114. *Sixth*, according to Mr. Seda, “Mr. López Vanegas and his representatives continue[d] to extort [him] and brag of their influence at the *Fiscalía*”.²¹⁵ For example, Mr. Seda claims that “sometime in mid-June 2016” he was approached at the parking of The Charlee Hotel by a man who stated he was from the General Attorney’s Office that urged him to pay a bribe.
115. Yet, Mr. Seda did not report the alleged threats and attempts to extort him. Rather, after two years since the alleged threats commenced, Mr. Seda realized that “[he] owed it to [his] investors to try to resolve the situation for good”²¹⁶ and decided to engage in direct negotiations with Mr. López Vanegas and his lawyers.
116. Thus, on 2 June 2016, by its own volition, allegedly troubled by “López Vanegas and his representatives display[ing] an apparent willingness to engage in corrupt and illegal conduct”²¹⁷

²¹³ Daniel C Pardo, Study for Banco de Bogotá, 26 May 2016 (**Exhibit C-161**), p. 4.

²¹⁴ See Grupo AVAL Website: *Nuestras compañías* (<https://www.grupoaval.com/wps/portal/grupo-aval/aval/nuestras-companias>) (**Exhibit-58**), accessed on 11 November 2020 (“Grupo Aval is the leader in Colombia in the traditional banking business through its four banks (Banco de Bogotá, Banco de Occidente, Banco Popular and Banco AV Villas), leader in the investment banking business through Corficolombiana and leader in the private pension and severance pay management business through Porvenir.”) (Unofficial Translation).

²¹⁵ Seda Witness Statement, ¶¶ 87-94.

²¹⁶ Seda Witness Statement, ¶ 88.

²¹⁷ Seda Witness Statement, ¶ 88.

and despite his “trepidation” about having any further contact with them, Mr. Seda contacted Mr. Mosquera. In his email to Mr. Mosquera, Mr. Seda stated:

Hello Mr. Marin, [sic]

This is Angel Seda of the Meritage Project, the project in which you have a case going. I am writing because I will be in Bogota and I suggest we sit down to talk because I believe you are a little mistaken in your strategy. First and foremost, I believe it is more than clear to both parties that we are good faith buyers. After four title searches, an analysis by the Prosecutor’s Office, and the purchase of the land before your client made his first claim before that entity... It seems complicated proving that we are not good faith buyers. However, I don’t believe with all my heart that your client or you have in mind that you can show before a court that we are not good faith buyers.

However, I understand the strategy is to press where you can....That is clear to me. But I believe you are looking at us the wrong way. In my opinion you should be looking at us as allies who could help instead of seeing us as an opposing party against whom you will win a trial. This week we received a quote from a firm of criminal law attorneys who in our opinion are the best in the country. As you can imagine their fees are high. When we sign a contract with them (which will be Thursday of next week) there will be no way for us to settle anything with your client.... . There is no way to help him. But if this coming Wednesday we sit down and look at what we can negotiate between him and the previous owners of the lot, we can help him to negotiate something good.

We are definitely not going to pay your client any compensation..... Very simple... Simple. This is something that has to be solved by the previous owners who sold the lot. But what we can do is negotiate and facilitate the transaction and pressure from our end for the hassles they can cause. Anyway... Again. I recommend that you think from another point of view ... Or rather, as an ally. My amount which we will pay for this lot is a final amount...The only difference is how much I pay the “former Owners” and how much we can negotiate for your client. I will arrive in Bogota this coming Wednesday and that is when I can meet. Let me know

Sincerely,

Angel Seda.²¹⁸

117. Mr. Mosquera replied on 5 June 2016. He agreed to meet at the Marriot Hotel in Bogotá, noting his willingness to reach an “amicable solution”.²¹⁹

²¹⁸ Email chain between Víctor Mosquera Marín and Angel Seda, 6 June 2016 (**Exhibit C-162**), p. 2 (emphasis added).

²¹⁹ See Email chain between Víctor Mosquera Marín and Angel Seda 6 June 2016 (**Exhibit C-162**).

118. Mr. Seda claims that during that meeting, which took place on 8 June 2016, Mr. Mosquera was joined by another representative of Mr. López Vanegas, named Gabriel Valderrama, and that Mr. Mosquera bragged about his influence with the General Attorney’s Office.²²⁰ Mr. Seda further claims that Mr. Valderrama proposed another meeting in Miami and that whilst he was not interested in reaching an agreement with Mr. López Vanegas, he “agreed to meet with him in the hopes of making him see” the legality of his investment and that “his efforts to extort [him] would be fruitless”.²²¹
119. Mr. Seda further states that on 10 June 2016, he once again met with Mr. López Vanegas, Mr. Mosquera and Mr. Valderrama at the Marriot Marquis in Miami. According to Mr. Seda, during that meeting, Mr. Mosquera reiterated his alleged influence on the General Attorney’s Office and Mr. Valderrama showed him some pictures of his children, hence threatening him. Mr. Seda asserts that he fled the hotel and then received messages of Mr. Valderrama apologising. In support of this contention, Mr. Seda produces what appear to be screenshot of a WhatsApp conversation purportedly pertaining to his exchanges with Mr. Valderrama.²²² The authenticity of the “document” and the identity of the parties to the conversation are questionable, to say the least.
120. According to Mr. Seda, he was again contacted by Mr. López Vanegas’s legal representatives on 25 July 2016, urging him to speak.²²³ According to Mr. Seda it “hardly seems a coincidence” that Mr. Valderrama reached him after the Precautionary Measures were signed by the General Attorney’s Office on 22 July 2016.²²⁴ Once again, the Claimants rely on mere conjectures, as there is not a piece of evidence linking Mr. López Vanegas’s alleged attempt to reconnect with Mr. Seda and the decision to impose Precautionary Measures. Yet, Mr. Seda suggests that it was because he refused to further negotiate with Mr. López Vanegas’s that the Precautionary Measures were imposed.
121. However, according to Mr. Seda’s own account, the threats continued after the Precautionary Measures were imposed. For example, he declares that at the end of August, after the Attorney

²²⁰ See Seda Witness Statement, ¶ 89.

²²¹ See Seda Witness Statement, ¶ 90.

²²² See WhatsApp chain between Angel Seda and Gabriel Valderrama, 8 June – 25 July 2016 (**Exhibit C-163**), p. 7.

²²³ See Seda Witness Statement, ¶ 93; WhatsApp chain between Angel Seda and Gabriel Valderrama, 8 June – 25 July 2016, (**Exhibit C-163**), p. 7.

²²⁴ See Seda Witness Statement, ¶ 94; Attorney General’s Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**); Claimants’ Memorial on Merits and Damages, ¶ 136.

General's Office had imposed the Precautionary Measures, he was once again contacted by someone purporting to be from the General Attorney's Office asking for payment to "keep the situation under control".²²⁵

122. It was not until 2 September 2016 – that is over two years after having first been contacted by Mr. López Vanegas, having met at least two times with Mr. López Vanegas's representatives and allegedly being threatened by Mr. Valderrama and by purported members of the Attorney General's Office – that Mr. Seda took a step to seek protection from any authority and requested help from the United States Embassy in Bogotá, stating that he and his family were under threat.²²⁶ As per an email from Mr. Seda to Ms. Elizabeth Garcon from the American Citizen Services Unit, he had met with her on 7 September 2016.²²⁷ This was followed by a communication on 20 October with the Legal Attaché to the US Embassy, Mr. Michel Burdick.²²⁸
123. Despite the alleged threats, his pleas for help to the American Embassy, and supposed internal conviction that Mr. López Vanegas had no title to the property, in October 2016 Mr. Seda, once again, contacted of his own volition, Mr. Mosquera,²²⁹ stating "I believe is now prudent to sit down to see what can be done. If you are here we should sit face to face".²³⁰ He allegedly did so to "gather evidence of the extortion" to which he had been subjected.²³¹
124. On 27 October 2016, he met Mr. Mosquera at Harry Sasson Restaurant in Bogotá. Allegedly, after having had all his electronic devices removed by Mr. Mosquera, Mr. Mosquera told Mr. Seda that if he paid Mr. López Vanegas USD 18 million or made Mr. López Vanegas a partner in the Meritage Project, Mr. Mosquera would "direct Malagon to declare Newport a good-faith buyer", thus putting an end to the Asset Forfeiture Proceedings.²³² The assertion that the Attorney General's Office could declare Newport as a good faith buyer and end the proceedings

²²⁵ See Seda Witness Statement, ¶103.

²²⁶ See Email chain between Angel Seda and U.S. Embassy Bogotá, 2 September 2016 (**Exhibit C-171**).

²²⁷ See Email from Angel Seda to Elizabeth Garcon, with attachments, 7 September 2016 (**Exhibit C-172**).

²²⁸ See Email chain between Michael Burdick and Angel Seda, 1 December 2016 (**Exhibit C-179**).

²²⁹ See WhatsApp chain between Angel Seda and Víctor Mosquera Marín 26 – 29 October 2016 (**Exhibit C-175**).

²³⁰ See WhatsApp chain between Angel Seda and Víctor Mosquera Marín 26 – 29 October 2016 (**Exhibit C-175**), p. 1.

²³¹ See Seda Witness Statement, ¶ 116.

²³² See Seda Witness Statement, ¶ 117.

is fanciful. As explained by Dr. Reyes, the proper procedural timing to demonstrate that a party is a good faith buyer is after the Attorney General's Office has provisionally determined the claim.²³³

125. Two days later, on 29 October 2016, Mr. Seda once again "arranged" yet another meeting with Mr. Mosquera and Mr. López Vanegas, this time in Miami. During this meeting, after again being searched and "forced to discard [his] electronic devices", Mr. Mosquera allegedly repeated his possibility to influence Ms. Malagón at the Attorney General's Office.²³⁴ Mr. Seda claims that he "kept up the pretense" that he wanted to negotiate to gather evidence of the extortion, and that on 30 October, Mr. Mosquera sent Mr. Seda Mr. López Vanegas's phone.²³⁵
126. On 31 October 2016, Mr. Seda wrote to Mr. Mosquera referring to the "constructive" meeting and the offer he had made to Mr. López Vanegas:

Hello Victor,

Thank you very much for being so constructive at the meeting. I see you with a great capacity of being very realist in the meeting but I did not see the same willingness from mister López. In this moment we are talking with some constructors who are maybe interested in buying our position in the property and continue with the fight them. They would prosecute the case and assume the commitments with the buyers. Thus, based on this I do not see a lot of potential considering that with them the business would be SO MUCH better than the one recommended by Mister Ivan. With this in mind, I tell you that the offer we made regarding the property Santa Fe is valid till the beginning of next week. If Monday or Tuesday at the latest we do not receive news that want to solve like this we will sell our position to them.

Thank you for everything Victor!

I send you a hug,²³⁶

127. While there is no evidence of what was discussed during the meeting, it is clear from Mr. Seda's email that he set out a proposal to Mr. López Vanegas regarding some property in Santa Fe de Antioquia. This is hardly in line with Mr. Seda's alleged purpose of "just gathering" evidence on the extortion.

²³³ See Reyes Expert Report, ¶¶ 8, 28. As explained by Dr. Pinilla, the "good faith without fault" qualification only applies to those recognized as "affected parties". See Pinilla Expert Report, ¶ 42.

²³⁴ Seda Witness Statement, ¶ 118.

²³⁵ See Seda Witness Statement, ¶¶ 118, 119.

²³⁶ Email chain between Angel Seda and Víctor Mosquera Marín, 31 October 2016 (**Exhibit C-176**).

128. In fact, the negotiations between Mr. Seda and Mr. López Vanegas continued and on 9 November 2016, as per the chain of emails produced by Mr. Seda, Mr. Mosquera transmitted a proposal of Mr. López Vanegas to Mr. Seda, requesting COP \$ 100.000.00 per m² of the Merture Lot.²³⁷
129. On the same day, Mr. Seda responded considering the offer “not fair” and stating that he was considering that they would “not be able to move the project forward” as there were delays and “without a bank and a trust the rest of the phases cannot be sold”.²³⁸ Mr. Seda also stated that if he would pay to López Vanegas and “the other owners” we would “lose too much money”. Mr. Seda reiterated that he would not close a deal that would make them “lose even more money” and that while he wanted people to be happy, he was not prepared to pay “30,000,000,000 in losses simply for that to happen”. He concluded that that would be the “problem of the trust and the bank, and we would rather let them finish the project and have them solve this problem. ... Or we continue fighting for the lot the time it takes”.²³⁹
130. Mr. Seda continued his email to Mr. Mosquera by inviting him to “open the eyes” of his client so that he accepts Mr. Seda’s offer for less than COP 20,000,000,000, in which case he could “attempt to facilitate it”.²⁴⁰ Finally, Mr. Seda added that one day the “Fiscal will change” and that someone will discover what “they are doing” and that maybe Mr. López Vanegas could “pocket a prosecutor... two ... a judge... another one... But I don’t think he will be able to pocket the whole world [...] And eventually the matter will reach all the way to the Supreme Court of Colombia”²⁴¹ and that then Mr. Mosquera and Mr. López Vanegas would “look back and think that at some point [they] made the decision of rejecting a very good offer and because of ambition you were left with nothing”. Mr. Seda continues suggesting that perhaps he can convince the sellers to provide two- thousand million.²⁴²

²³⁷ See Email chain between Angel Seda and Víctor Mosquera Marín 10 November 2016 (**Exhibit C-177**), p. 4.

²³⁸ See Email chain between Angel Seda and Víctor Mosquera Marín 10 November 2016 (**Exhibit C-177**), p. 2.

²³⁹ Email chain between Angel Seda and Víctor Mosquera Marín 10 November 2016 (**Exhibit C-177**), p. 2.

²⁴⁰ See Email chain between Angel Seda and Víctor Mosquera Marín 10 November 2016 (**Exhibit C-177**), p. 4.

²⁴¹ Email chain between Angel Seda and Víctor Mosquera Marín 10 November 2016 (**Exhibit C-177**), p. 3.

²⁴² See Email chain between Angel Seda and Víctor Mosquera Marín 10 November 2016 (**Exhibit C-177**), p. 3.

131. Mr. Mosquera answered to Mr. Seda's last email on 9 November 2016, stating that he would transmit Mr. Seda's offer to Mr. López Vanegas and adding:

2. Also, under no circumstance will I allow or accept your malicious comments that doubt our proper behavior under the law or that aim to suggest some type of illegal behavior before Colombia's legal authorities or their criminal investigation entity.

3. Regarding your threats or suggestions, I ask for complete respect toward me as an attorney and the firm I represent; I do not tolerate nor will I tolerate such behavior.²⁴³.

132. Finally, Mr. Seda answered on 10 November 2016 stating that he would not negotiate directly with Mr. López Vanegas and stressing that:

Victor... only you... Ivan... the Prosecutor's Office and God know the reality. I'm not anyone to be saying what is happening. I leave this to your conscience and your client's conscience.... and no one else's.²⁴⁴

133. In sum, whilst Mr. Seda asserts that he had been threatened by Mr. López Vanegas and that he interacted with Mr. López Vanegas and his legal representatives only in order to obtain "proof of their extortionate demand",²⁴⁵ the record shows that he engaged in protracted negotiations with precise offer terms with Mr. López Vanegas, a drug-dealer who had allegedly threatened him and his family's safety.²⁴⁶

134. *Seventh*, only in late 2016, *i.e.* almost three years after Mr. López Vanegas had allegedly approached Mr. Seda, did Mr. Seda approach the Colombian authorities. The Colombian authorities took measures to investigate Mr. Seda's claims.

135. To clarify, as stated by Dr. Hernández, the Deputy Prosecutor in charge of the investigations regarding alleged corruption in the Asset Forfeiture Proceedings Unit, the first meeting he had with Mr. Seda was in 2016 and it was sought by Mr. Seda. During the meeting, Mr. Hernández recommended to Mr. Seda to file a complaint with the Attorney General's Office, which Seda did on 19 December 2016.²⁴⁷

²⁴³ Email chain between Angel Seda and Víctor Mosquera Marín 10 November 2016 (**Exhibit C-177**), p. 1.

²⁴⁴ Email chain between Angel Seda and Víctor Mosquera Marín 10 November 2016 (**Exhibit C-177**).

²⁴⁵ See Seda Witness Statement, ¶ 121.

²⁴⁶ See Email chain between Angel Seda and Víctor Mosquera Marín 10 November 2016 (**Exhibit C-177**).

²⁴⁷ See Hernández Witness Statement, ¶¶ 6-7.

136. Also, contrary to Mr. Seda’s assertion, Mr. Hernández never represented that “Newport was a good faith buyer and that the case against it launched by Malagón’s team should be terminated”.²⁴⁸ In the words of Mr. Hernández, what Mr. Hernández indicated was that “should [Mr. Seda] be a good faith purchaser, that would be demonstrated in the [Asset Forfeiture] proceedings, but that in any event, independently of whether [Mr. Seda] was [or not] a *bona fide* buyer, if the origin of the asset is illicit, the asset forfeiture would be ordered by the court, and he will be entitled to take action against the seller”.²⁴⁹
137. The Anti-Corruption Unit took Mr. Seda’s complaints and allegations on Mr. López Vanegas, his representatives and the alleged corruption scheme within the Attorney General’s Office most seriously and – as admitted by Mr. Seda himself – recommended him to file an official complaint.²⁵⁰ Prompted by the Attorney General’s Office Anti-Corruption Division, Mr. Seda did so on 19 December 2016. In his official complaint, Mr. Seda stated that the “complaint is against such organized criminal group led by Mister Iván López and attorneys from the Organized Crime and Asset Forfeiture Unit of the General Attorney’s Office here in Bogotá, more specifically General Attorney 44 of the Organized Crime and Asset Forfeiture”.²⁵¹
138. Contrary to Mr. Seda’s assertion,²⁵² the Anti-Corruption Unit did not tell him that they had decided “to do nothing” about his complaint.
139. As a matter of fact, and contrary to the Claimants’ allegations, investigations were launched against Mses. Malagón and Ardila to determine their participation in any wrongdoing, which are still on-going.²⁵³ As attested by Mr. Hernández, the Attorney General’s Office has taken decisive action as regards the allegation of corruption in this regard.²⁵⁴ Notably, Mr. Seda was informed that an official investigation had been launched against Mses. Malagón and Ardila and was asked to collaborate with the investigation conducted by the Attorney General’s Office by providing additional information.²⁵⁵ While at first Mr. Seda did not react to the Attorney General’s Office request for assistance of March 2016, on 14 June 2017, Mr. Seda was

²⁴⁸ Claimants' Memorial on Merits and Damages, ¶ 221.

²⁴⁹ See Hernández Witness Statement, ¶ 9.

²⁵⁰ See Seda Witness Statement, ¶ 125.

²⁵¹ A. Seda Complaint to Attorney General’s Office, 19 December 2016 (**Exhibit C- 181**), p. 3.

²⁵² See Seda Witness Statement, ¶ 128.

²⁵³ See Hernández Witness Statement, ¶¶ 10-11, 14.

²⁵⁴ See Hernández Witness Statement, ¶ 10.

²⁵⁵ See Hernández Witness Statement, ¶¶ 6-8.

interviewed as part of the investigations. So far, there been no findings on corruption regarding the Meritage Lot.

F. THE ASSET FORFEITURE PROCEEDING

140. Contrary to the Claimants' portrayal of the Asset Forfeiture Proceedings as some sort of discretionary process subject to the whims of individuals within the Attorney General's Office and which has been carried out without observing due process and in connivance with the Colombian Courts, the Asset Forfeiture Proceedings - which are still on-going - have been carried out with strict adherence to the law and guaranteeing that all measures and decisions could be revised and reassessed in independent instances, as the Respondent demonstrates below.
141. As a preliminary matter, it is necessary to rectify one of the misguided mantras the Claimants repeat throughout their Memorial: that the legal basis for the Asset Forfeiture Proceedings was a complaint of Mr. Iván López Vanegas ("Mr. López Vanegas" or "López Vanegas")²⁵⁶ on 3 July 2014 as regards the alleged kidnapping of his son Mr. Sebastián López Betancur ("Mr. López Betancur or "López Betancur") by members of the *Oficina de Envigado*, who forced him to sign a blank paper and fraudulently used it to produce a sale purchase deed. In particular, the Claimants insist on that the whole Asset Forgeiture Proceedings is unsupported since there was no kidnapping of Mr. López Betancur and that somehow the Attorney General's Office has changed the narratives that serves as the basis for the request of Asset Forfeiture.²⁵⁷ As the Record of the Asset Forfeiture Proceedings shows and the Respondent demonstrates below, that is far from the truth. Whether Mr. López Betancur was kidnapped or not is irrelevant for purposes of the Asset Forfeiture Process. This is because the Asset Forfeiture Proceedings does not concern the alleged kidnapping of Mr. López Betancur but rather the illicit origin of the Meritage Lot claimed by Mr. López Vanegas, which became known to the Attorney General's Office as a result of the investigations conducted after Mr. López Vanegas filed his complaint.
142. It is a fact that due to the complaint filed by Mr. López Vanegas before the Attorney General's Office Organized Crime Unit 24, on 18 April 2016 the Asset Forfeiture Unit of the Attorney General's Office 44 commenced to investigate Mr. López Vanegas's, allegations as well as the origin and chain of sale-purchases regarding the Meritage Lot. Thus, on that same date the Office decreed the opening of the Initial Phase of an Asset Forfeiture Proceeding under Article

²⁵⁶ See Claimants' Memorial on Merits and Damages, ¶¶ 11-12 139, 164, 385, 404.

²⁵⁷ See Claimants' Memorial on Merits and Damages, ¶¶ 12, 14, 101.

116 (a) of Law 1708 of 2004.²⁵⁸ It was in the process of these investigations that the Attorney General’s Office realised that the Meritage Lot²⁵⁹ was tainted as an “Asset which [is] the direct or indirect product of illicit activity”, pursuant to Article 16 of Law 1708.²⁶⁰

143. To recall, Mr. López Vanegas provided a Sworn Declaration before the Attorney General’s Office 24 Specialised on Organized Crime (BACRIM, by its acronym in Spanish), according to which his son Iván López Betancur had been kidnapped in 2004 by the *Oficina de Envigado* and after being held captive for some days, he was obliged to sign a blank paper by his captors. According to Mr. López Vanegas, the document was used to forge a sale agreement over the lot being reclaimed by Mr. López Vanegas, which was followed by a series of false transfers of the property.²⁶¹ López Vanegas alleged that he was the legal owner of the Meritage Lot (previously known as “Santa Maria de las Palmas” and identified with lot No. 001-71999) located in Perico, Envigado.
144. For the Tribunal’s convenience, the Respondent explains in detail the Asset Forfeiture Proceedings.²⁶²

1. The complaint by Mr. López Vanegas

145. In his complaint, Mr. López Vanegas stated that in 2004, whilst he was in the U.S. under arrest for drug trafficking, his son, Mr. López Betancur was kidnapped by members of the *Oficina de Envigado*. López Betancur was forced to sign a blank paper that was later used fraudulently to transfer the property to Mr. Luis Varela Arboleda. Allegedly, the property was taken from his son as forced set-off of a debt he and his son had with Mr. Héctor Restrepo Santamaria (alias, “Perra Loca”), a member of the *Oficina de Envigado*.²⁶³

²⁵⁸ See Law No. 1708, 20 January 2014 (**Exhibit C-003bis**); Attorney General’s Office Resolution No. 125, 18 April 2016 (**Exhibit C-153**).

²⁵⁹ On 12 February 2015, through Deed No. 361, the Meritage Lot (No. 001-930485) was subdivided into Lots 001-1198464, 001-1198465, 001-1198466, 001-1198467, 001-1198468, 001-1198469, 001-1198470, 001-1198471, 001-1198472, 001-1198473, 001-1198474 and 001-1198475. For convenience, we will refer to these lots altogether as the “Meritage Lot”. See also Deed 361, 12 February 2015 (**Exhibit C-140**), Second Transaction, p. 10-37.

²⁶⁰ Attorney General’s Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017 (**Exhibit C-024bis**), pp. 1-3; Attorney General’s Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), p. 88.

²⁶¹ See López Complaint to Prosecutor 24, 3 July 2014 (**Exhibit C-130**), pp. 2-3.

²⁶² For an overview of the asset forfeiture proceedings, see Reyes Expert Report, ¶ 10; Caro Witness Statement, ¶¶ 9-10.

²⁶³ See López Complaint to Prosecutor 24, 3 July 2014 (**Exhibit C-130**), pp. 2,3.

146. López Vanegas declared that the property subsequently was divided into two lots and that was achieved by forging the signatures of his son Mr. López Betancur and brother Mr. Jaime Alberto Orozco. In his declaration, López Vanegas stated that the current owner of the property was Ms. Tatiana Gil Muñoz, a former girlfriend of his son, and spouse of Mr. Guillermo Arango, who was involved in the sale and was close to “*Perra Loca*”. Moreover, he provided information about several individuals that had participated in the various transfers of the property and who appear in the title chain, as well as other irregularities found in the deeds, including forged signatures. His assertions were supported by a deed study of the property.²⁶⁴
147. On 4 September 2014, the Attorney General’s Office 24 Specialised in Organized Crime wrote to the Attorney General’s Office 37 informing of the investigations commenced against Mr. Héctor Restrepo Santamaría (alias “*Perra Loca*” or “Mad Dog”), and requesting the Attorney General’s Office to investigate the persons appearing in the chain of title of the property called Santa Maria de Las Palmas, as well as the titles of property allegedly owned by Mr. Restrepo Santamaría in Tierra Bomba, which was, as per Mr. López Vanegas recount, offered to him *in lieu* of the Santa Maria de las Palmas lot.²⁶⁵
148. The Claimants state that the Prosecutor 24 of the Organized Crime section referred the matter to Unit 37 of the Attorney General’s Office in charge of Money Laundering and Asset Forfeiture, and emphasizes that this “was the very same Unit that had previously issued the letters to La Palma Argentina and Corficolombiana confirming that the Meritage Property had no links to criminal activity”.²⁶⁶ The Claimants’ statement is completely irrelevant. To recall, both rights of petition presented to the Attorney General’s Office on Anti-Money Laundering and Asset Forfeiture 37 were filed and responded prior to Mr. López Vanegas’s declaration before the Attorney General’s Office on Organized Crime 24, and the exchanges between the Attorney General’s Office on Organized Crime 24, Attorney General’s Office on Anti-Money Laundering and Asset Forfeiture 37. The response to the La Palma Argentina’s request dates back to 2007.²⁶⁷ The answer to the right of petition request of Mr. Sintura was issued on 9 September 2013. That is, the responses by the Attorney General’s Office on Anti-Money Laundering and Asset Forfeiture 37, predate by 7 and 1 years, respectively, the exchanges

²⁶⁴ See Lopez Complaint to Prosecutor 24, 3 July 2014 (**Exhibit C-130**), pp. 3,4.

²⁶⁵ See Judicial Police Report to Prosecutor 37, 4 September 2014 (**Exhibit C-133**); Attorney General’s Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**) p. 4.

²⁶⁶ Claimant’s Memorial on Merits and Damages, ¶ 102.

²⁶⁷ See Letter from Elsa Maria Moyano Galvis to Maria Cecilia Uribe Quintero, 30 October 2007 (**Exhibit C-027bis**).

referred to by the Claimants. The Attorney General's Office on Anti-Money Laundering and Asset Forfeiture 37, could not have foretold at those times the future developments due to Mr. López Vanegas's claims.

149. Following López Vanegas's declaration, the Judicial Police first and the General Attorney's Office later launched several investigations to confirm the authenticity of the information and documents submitted by Mr. López Vanegas. The findings show that, contrary to the Claimants' misguided claims, the Asset Forfeiture Proceedings are not based on a false story of a kidnapping but on solid elements obtained through an intensive and lawful investigation, which yielded sufficient evidence concerning the illicit origin of the Meritage Lot.
150. The history of the sales and chain of title of the lot claimed by López Vanegas, as demonstrated by the investigations of the Judicial Police and the Attorney General Office of Asset Forfeiture,²⁶⁸ is as follows:
 - On 5 December 1989, through deed No. 2589, Sierralta-López y Cia S. en C. was constituted by López Vanegas, Jaime Alberto Orozco Vanegas and Amparo Vanegas Ramírez. López Vanegas was appointed to manage the company.²⁶⁹
 - A few days later, on 26 December 1989, Jaime Alberto Orozco Vanegas, Ivan López Vanegas and Amparo Vanegas Ramirez constituted Entrelagos-Orozco Vanegas & Cia S. en C. through deed No. 2847.²⁷⁰
 - On 12 August 1994, López Vanegas acquired from Las Granjas Agrícola Ltda. 75% of lots 001-0577478 and 001-0592104 through deed No. 1554. He did so in his capacity as representative of Sierralta López and Cia . His brother, Mr. Jaime Alberto Orozco Vanegas, representative of Entrelagos-Orozco Vanegas & Cia. acquired the remaining 25%.²⁷¹ Subsequently, on 23 February 1995, through deed No. 348, the two lots were merged into one lot that was registered under the No. 001-657878.²⁷²
 - On 25 June 1997, lot No. 001-657878 was divided into lot A (001-719999, then known as "Santa María de las Palmas") and B (001-720000).²⁷³

²⁶⁸ See Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**) pp. 3-34; Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**).

²⁶⁹ See Deed No. 2589, 5 December 1989 (**Exhibit R-3**); Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**) p. 38; Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), p. 43.

²⁷⁰ See Deed No. 2847, 26 December 1989 (**Exhibit R-4**).

²⁷¹ See Deed No. 1554, 12 August 1994 (**Exhibit R-8**).

²⁷² See Deed No. 348, 23 February 1995 (**Exhibit R-10**); Deed No. 1130, 25 June 1997 (**Exhibit R-11**), Clause 2.

²⁷³ See Deed No. 1130, 25 June 1997 (**Exhibit R-11**) and Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), p. 39.

- On 16 September 2004, by deed No. 1762, Inversiones Nueve S.A. (formerly Sierralta López & Cia S. en C.), represented by Sebastián López Betancur, purportedly sold to Mr. Luis José Varela Arboleda 75% of lot A.²⁷⁴ The Coordinator of the Internal Legal Group of the Superintendence of Notaries and Registry confirmed in its report dated 8 April 2016 that Sebastián López Betancur's signature was different compared with the one included in his identification document attached as an annex in the protocol.²⁷⁵ According to the statements of Mr. López Vanegas and Sebastián López Betancur himself, he was forced to sign a blank document and never negotiated nor consented to the sale of lot A of lot No. 001-719999 to Mr. Varela Arboleda whom he never met.²⁷⁶ This was confirmed by Mr. Varela Arboleda's official statement which explained that he did not have the funds to buy any type of property and that he did not know and had never met Mr. López Betancur. He explained that he was just asked by some people to sign documents that he did not read nor negotiate in exchange for 15.000 Colombian pesos (approx. USD 7 in 2004).²⁷⁷
- On 6 May 2005, Inversiones Nueve S.A. (formerly Sierralta López y Cia.), again represented by Sebastián López Vanegas, supposedly sold to Mr. Jose Ignacio Cardona Rodríguez its 75% of lot B (No. 001-720000) by deed No. 815.²⁷⁸ As part of the investigation, it was concluded that this deed could not have been signed by Sebastián López Betancur, as the Special Administrative Unit of the Colombian Migration Office verified that on 6 May 2006 Sebastián López Betancur was in a flight from Medellín to Miami.²⁷⁹ Thus, his signature was counterfeited. This was also confirmed by Sebastián López Vanegas' statement.²⁸⁰ On the same day, 6 May 2005, Entrelagos Orozco Vanegas sold to Mr. Jose Ignacio Cardona Rodríguez the remaining 25% of lot B by deed No. 807.²⁸¹
- On 29 April 2005, according to deed No. 738, Mr. José Varela Arboleda sold the 75% of lot A No. 001-719999 to Mr. José Ignacio Cardona Rodríguez.²⁸²

²⁷⁴ See Deed 1762, 16 September 2004 (**Exhibit C-080**); Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), p. 52; Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), p. 57.

²⁷⁵ See Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), p. 34.

²⁷⁶ See Iván López Vanegas Complaint to Prosecutor 24 3 July 2014 (**Exhibit C-130**), p. 2; Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), pp. 36, 41-42.

²⁷⁷ See Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), p. 73; Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), p. 73.

²⁷⁸ See Deed No. 815, 6 May 2005 (**Exhibit R-17**); Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), p. 72.

²⁷⁹ See Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), p. 72.

²⁸⁰ See Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), p. 42.

²⁸¹ See Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), p. 48.

²⁸² See Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), p. 52.

- On 25 July 2006, through deed No. 1562, Mr. Cardona Rodríguez (owner of the 75% of lot A No. 001-719999 and 100% of lot B No. 001-720000) and Entrelagos Orozco Vanegas y Cia. S.C.A. (owner of the 25% of lot A No. 001-719999) divided lot A into A1 and A2. Lot B (001-720000) was merged with lot A1, which had been previously acquired by Mr. Cardona Rodríguez, and the newly merged lot was registered as a new lot in the registrar as lot No. 001-930485. Lot A2 was assigned to Entrelagos Orozco Vanegas and registered as lot 001-930484.²⁸³
- On 7 September 2006, through deed No. 2834, Mr. Cardona Rodríguez sold 16.10% of Lot No. 001-930485 to Inversiones Aler Ltda.²⁸⁴
- On 4 October 2006, Mr. Cardona Rodríguez sold the remaining 83.90% of Lot No. 001-930485 to Ms. Mónica Marcela Rendon Gil and Tatiana Munoz Gil, by deed No. 3338.²⁸⁵
- On 4 September 2007, Mses. Rendon Gil and Munoz Gil sold the acquired 83.90% of the property to La Palma Argentina, by deed No. 1992.²⁸⁶
- On 11 September 2012, La Palma Argentina acquired from Inversiones Aler Ltda. the remaining 16.10% of Lot No. 001-930485 by deed No. 2107, thus obtaining 100% of Lot No. 001-930485.²⁸⁷

151. Appendix A contains a chronology of the chain of ownership of the Meritage Lot.

2. The Initial Phase of the Asset Forfeiture Proceedings: investigations and findings

152. On 8 April 2016, the criminal investigation division of the Superintendencia of Notaries and Registry (“*Grupo Interno de Trabajo Jurídico facultado con funciones de policía judicial adscrito a la Superintendencia de Notariado y Registro - Oficina de Tierra*”) requested the Asset Forfeiture Office to investigate the assets owned, and previously owned by López Venegas.²⁸⁸ As a result, and based on the comprehensive information provided by the Internal Legal Work Group, the Asset Forfeiture Office commenced the investigations, which would eventually lead to the Asset Forfeiture Proceedings.²⁸⁹

²⁸³ See Deed 1562, 25 July 2006 (**Exhibit C-084**); Attorney General’s Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), pp. 52-53.

²⁸⁴ See Deed No. 2834, 7 September 2006 (**Exhibit R-18**).

²⁸⁵ See Deed No. 3338, 4 October 2006 (**Exhibit R-19**).

²⁸⁶ See Deed No. 1992 4 September 2007 (**Exhibit R-20**).

²⁸⁷ See Attorney General’s Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), p. 53.

²⁸⁸ See Attorney General’s Office Resolution No. 125, 18 April 2016 (**Exhibit C- 153**). See also Caro Witness Statement, ¶¶ 12-13.

²⁸⁹ See Attorney General’s Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), p. 1; Caro Witness Statement, ¶¶ 13-21.

153. On that same date, the Director of the Asset Forfeiture Unit of the Attorney General’s Office assigned the case to the Asset Forfeiture Unit of the General Attorney’s Office No. 44 (“*Dirección de Fiscalía Nacional Especializada de Extinción del Derecho de Dominio*”) to continue the investigation of the assets claimed by Mr. López Vanegas.²⁹⁰ As supported and demonstrated in the record of the Asset Forfeiture Proceedings, Attorney General 44 conducted further investigations which revealed the link between the *Oficina de Envigado*, Mr. López Vanegas and the lots where the Claimants intended to develop the Meritage Project.
154. On 18 April 2016, the Asset Forfeiture Unit of the Attorney General’s Office 44, decreed the opening of the Initial Phase of an Asset Forfeiture Proceeding, under Articles 17 and 18 of the Asset Forfeiture Law 1708 of 2014, and launched several investigations.²⁹¹ As part of the investigations, extensive information from a wide variety of public and private entities was retrieved. The totality of the evidence obtained showed that the Meritage Lot had been acquired by Mr. López Vanegas in 1994, and that Mr. López Vanegas had been involved in criminal activities including drug trafficking and had been associated with members of the criminal organization *Oficina de Envigado*. In other words, the evidence collected by the Asset Forfeiture Unit showed that the Meritage Lot had been acquired using illegal funds. Some of the investigations are described below.
155. In 2014, the judicial police requested the Superintendence of Notaries and Registry to provide copies of the deeds and chain of title to the lots included in Mr. López Vanegas’s complaint, as well as those that had been allegedly transferred by Mr. Hector Javier Restrepo Santamaría, a member of the *Oficina de Envigado* also known as “*Perra Loca*”. The request was aimed at identifying possible figureheads that belonged to this criminal organization.²⁹² Following the request, the Superintendence provided 27 deeds of real estate properties, some of which “are of licit provenance”, while some others “evidence illicit origins”.²⁹³ The Superintendence of Notaries and Registries, through its Delegate on Protection, Formalization and Restitution of Lands also conducted a research in the 195 Offices of Public Registry as regards the individuals appearing in López Vanegas’s complaint and their properties and sent on the findings to the Asset Forfeiture Unit. The Delegate for the Protection, Restitution and Formalization of Lands

²⁹⁰ See Attorney General’s Office Resolution No. 125, 8 April 2016 (**Exhibit C-153**).

²⁹¹ See Attorney General’s Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), p. 1.

²⁹² See Attorney General’s Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), pp. 3-4.

²⁹³ Attorney General’s Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), pp. 4-5.

carried out several inspections spanning 19 Notaries of Medellín, to review the notary protocols of the 52 public deeds mentioned by Mr. López Venegas and confirmed the existence of a series of irregularities in the deeds. A detailed record of all the irregularities found by the judicial police as regards the deeds and transfers is included in a document prepared by the Attorney General's Office (the "*Cuaderno Original de Medidas Cautelares en Fase Inicial*").²⁹⁴ Amongst the various irregularities, the Superintendence of Notary and Registry confirmed: (i) irregularities with the signatures of the deeds, namely, signatures that do not match the signatories' signature in their respective National ID cards protocolized before the Notaries of the Medellín Circle, (ii) several public deeds containing scratches, scuffs and corrections in their text without including the formalities required when amendments are done to public deeds, (iii) powers of attorney lacking legal requirements, (iv) irregularities on the dates in which the deeds were created and the date of their registration in the notary protocol, (v) public deeds conferring representation powers without the mandatory legal requirements and (iv) sellers represented by Officious Agent ("*Agente Oficioso*") or Managers of Third Parties' Business that were never ratified before the notary as required.²⁹⁵

156. The Internal Legal Team with functions of judicial policy also visited the Notary First and Second of the municipality of Envigado, as most of the deeds concerning the lots had been notarized therein. As a result, further irregularities associated to signatures, formalities and representatives were confirmed, which are fully detailed in the investigation file.²⁹⁶
157. Requests were also made to the Chamber of Commerce of Aburra Sur of Medellín, to provide information concerning all the involved companies, including Entrelagos Orozco Vanegas, Inversiones Nueve, Inversiones Aler. and La Palma Argentina. The Judicial Police also obtained confirmation about the identity of all the persons involved in the transactions concerning the lots, as well as all the details about the companies' constitution and the participation of López Vanegas, Mr. Cardona Rodríguez, Mr. Orozco Vanegas, Javier Garcia Rojas, La Palma Argentina and Sebastián López Betancur, among others. Complementing this information, the Judicial Police obtained additional information concerning the persons involved in the transaction from different databases including Health Care Providers, databases of Corficolombiana, CIFN ("*Central de Información Financiera*"), Datacredito and DIAN

²⁹⁴ See Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), pp. 2-35.

²⁹⁵ See Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), pp. 5-35; Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), pp. 10-26.

²⁹⁶ See Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), pp. 29-35.

(“*Dirección de Impuesto y Aduanas Nacionales*”) and obtained information with respect to their base salary, income and tax statements, cash transactions and bank statements²⁹⁷ and other financial information.²⁹⁸ Moreover, the Judicial Police requested information to DECEVAL S.A. about securities, shares and products of the involved persons and companies.²⁹⁹

158. Having confirmed that Mr. López Vanegas’s had indeed owned the Meritage Lot, as stated in his complaint, the investigation focused on Mr. López Vanegas’s links to criminal activities. Thus, Superintendence of Notary and Registry conducted online researches about López Vanegas and found a decision issued by a Court of Florida, U.S., on 20 July 2017, which confirmed that López Vanegas had been convicted on the charge of drug trafficking. The decision mentions that López Vanegas had done business with a drug trafficking organization in Colombia, transporting cocaine from Venezuela to France, as evidenced by certain proof obtained of the conversations between López Vanegas and such organizations.³⁰⁰ Through this information, the General Attorney’s Office confirmed that López Vanegas had been conducting illegal activities in Colombia at least since 1998 and especially in 2004 when its property 001-719999 was apparently transferred through his son. Besides, the investigation included other elements from public sources, such as López Vanegas’s radio interview at station W of 8 August 2016, where he described the acquisition of Lot 001-719999 and publications of newspapers and radios concerning Mr. López Vanegas’s conviction for drug trafficking. Notably, while López Vanegas was acquitted in 2007, the only reason for his acquittal was a jurisdictional issue, rather than on the basis of evidence showing that he had not been involved in the drug trafficking scheme of which he had been previously convicted.
159. Additionally, the Asset Forfeiture Unit investigated and collected information about the *Oficina de Envigado*, and its scheme consisting of using figureheads to acquire real estate, including “Morro” and “Mandi”, who had been mentioned by López Vanegas as the persons who requested his son to attend the mall where he was kidnapped, and “Pichi” and “Rogelio”.

²⁹⁷ See Attorney General’s Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), pp. 60, 71, 101, 103, 106-109.

²⁹⁸ See Attorney General’s Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), p. 101.

²⁹⁹ See Attorney General’s Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), pp. 100, 107.

³⁰⁰ See Attorney General’s Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), p. 50; Attorney General’s Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), p. 55.

Notably, all of them had been directly related to kidnappings, homicides of police officers and torture by the *Oficina de Envigado*.³⁰¹

160. The Attorney's General Office also contacted all the persons involved in the deed chain and conducted interviews asking about each one of the deeds and transactions in which they were involved. Thus, apart from Mr. López Vanegas and Mr. Sebastián López Betancur's statements, the following were interviewed: Mr. Jose Ignacio Cardona Rodríguez, Tatiana Gil Munoz, Mónica Marcela Rendón Gil, Mr. Luis Jose Varela Arboleda, John Jairo Vélez Arredondo, Carmen Alicia Gallego Saldarriaga and Lina Beatriz Echeverri Gómez (former wife of Mr. Jaime Alberto Orozco Vanegas).³⁰² These statements verified severe anomalies and irregularities, as alleged by Mr. López Vanegas, regarding the deed chain, and demonstrated the link between the criminal organization *Oficina de Envigado* and the transactions that took place after Mr. López Vanegas's acquisition of Lot 001-719999.

161. For example, as part of the series of interviews, Mr. Varela Arboleda declared that he had never signed the deeds where he apparently bought the property to Mr. Sebastián López Betancur, neither the one selling to Mr. Cardona Rodríguez. He further declared not knowing any of the parties of the transaction nor participated in the process and made plain that he lacked the funds to buy any type of property as for the last 30 years of his life he had worked as street vendor of mangos and declared to be associated of the SISBEN in Colombia which provides social programs to low income people. Indeed, he had been paid a symbolic amount, of 15.000 Colombian pesos for the signature of the deeds in which he appeared as seller and buyer. Nothing clearer than Mr. Varela Arboleda's statement explaining that he did not have the economic funds to buy any type or property:

[I] work watching over cars and motorcycles and I have sold mangos here in Envigado for 42 years(...)", and when he was asked about the purchase that he apparently realized according to the deeds he answered: "No, Sir, with what money. I have never had that amount of money.... have never bought anything. My father died ten years ago, and he left us the small house where I live with my mother, siblings and nephews and nieces."³⁰³

³⁰¹ See Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), p. 79; Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), pp. 81-83.

³⁰² See Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), p. 73; Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), pp. 72-74, 85-100, 103-106.

³⁰³ Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), p. 73.

162. Furthermore, Mr. Varela Arboleda declared that he had been threatened, thus demonstrating the existence of an underlying fraudulent scheme:

That year I was taken by three people to Notary Office 2 of Envigado and there they made me sign some papers. They came to my house and told me they had sold some properties under my name and that they needed my signature. So then I signed that for them, they took me to the Notary Office, and they gave me \$15,000 pesos. And they told me not to go to the General Attorney Office at all and to keep my mouth shut.³⁰⁴

163. In the same vein, the General Attorney's Office interviewed Mr. Jose Ignacio Cardona Rodríguez, who appears as having bought 75% of the lot A (001-719999) to Mr. Varela Arboleda and lot B (001-720000) to Sierralta López y CIA (represented by Sebastián López Betancur), and later sold them to Inversiones Aler, Tatiana Gil Munoz and Mónica Marcela Rendon Gil. As Mr. Varela Arboleda, Mr. Cardona Rodríguez confirmed the irregularities of the processes as he confirmed that he did not know either Mr. Varela Arboleda or Mr. López Betancur, and explained that he had never paid or received any amount of money in the context of the transactions he signed. Besides, he remarked he did not negotiate those agreements as Mr. Orozco Vanegas was in charge of it. In this regard, he stated:

I did sign the deed, but the financial part and knowing Mr. Varela, no, because Mr. Jaime Orozco did everything with the same purpose I stated the first time and I never met Mr. Varela.³⁰⁵

164. Also Ms. Mónica Marcela Rendon Gil and Tatiana Gil Muñoz, who according to deed No. 3338 bought Lot 001-930485 (*i.e.* the Meritage Lot) and then sold it to La Pampa Argentina by deed No. 1992, confirmed several anomalies and inconsistencies as they declared that they had not negotiated the purchases, they did not know the buyers or sellers of the lot, and they did not pay the corresponding purchase price or received the sale payment. These were all fictitious transactions.³⁰⁶ Specifically, Tatiana Gil Muñoz confirmed the relationship between the deed chain and one of the members of the *Oficina de Envigado* mentioned by Mr. López Vanega, Mr. Guillermo Arango, as she explained that while she signed the deeds, it was her partner Mr. Guillermo Arango who negotiated and contacted the seller and buyer:

³⁰⁴ Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017(**Exhibit C-023bis**), p. 73.

³⁰⁵ Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), p. 89.

³⁰⁶ See Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), p. 91-93.

The negotiation was done through three sales agents; I do not recall the names of all of them. I know one of them is connected to Álvaro Uribe, another one was known as BORRACHO, because I met him through my former partner; we met a person who was the one selling that property and whose name is HECTOR, who is known as PERRA LOCA; he was selling the lot and I met him through the sales agents.³⁰⁷

165. In sum, the investigations conducted by the Asset Forfeiture Unit during the Initial Phase of the Asset Forfeiture Proceedings provided reasonable elements to believe the existence of grounds to pursue the Asset Forfeiture Proceedings. In particular, as it was shown that Mr. López Vanegas had acquired the Meritage Lot, that he had been involved in criminal activities associated to drug trafficking, and that the subsequent deed chain was mostly simulated and directly related to the criminal organization *Oficina de Envigado* and using the *modus operandi* commonly used by the *Oficina de Envigado*.³⁰⁸

3. The imposition of the Precautionary Measures

166. Based on the information obtained during the Initial Phase of the Asset Forfeiture Proceeding, which provided reasonable elements to conclude the illicit origin of the Meritage Lot, on 22 July 2016, the Attorney General's Office 44 authorized the imposition of Precautionary Measures over the Meritage Lot.³⁰⁹ The decision to impose Precautionary Measures was based on Articles 16.1 (concerning “assets which are the direct or indirect product of an illicit activity”) and Chapter VII Precautionary Measures (including Article 89, concerning “precautionary measures prior to the provisional determination to proceed with the asset forfeiture claim”) of Law No. 1708 of 2004.
167. The General Attorney's Office's decision to impose Precautionary Measures was expressly justified by the following findings that the lot had been subject to a series of irregular transfers via falsification of signatures and the use of figureheads, which had paid no money in consideration for the land. This was in line with the *modus operandi* of the *Oficina de Envigado*, which had historically used duress to obtain properties.³¹⁰ Moreover, the decision to impose the measures was considered necessary – to avoid any further negotiations with the lots,

³⁰⁷ Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (Exhibit C-023bis), p. 93.

³⁰⁸ See Caro Witness Statement, ¶¶ 13-24.

³⁰⁹ See Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution 22 July 2016 (Exhibit C-022bis), p. 89.

³¹⁰ See Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (Exhibit C-022bis), pp. 82-86.

including the sale of units to third-party buyers, reasonable – due to the urgency to continue the Asset Forfeiture Proceedings based on the evidence obtained, and proportional – as the evidence obtained showed that “in all likelihood” the lot had an illegal origin which justified the continuation of the Asset Forfeiture Proceedings, in particular considering that “the private interest must yield to the general interest”. As summarized by the Attorney General’s Office, the Precautionary Measures were justified because:

[T]here is an inherent risk that persons unrelated to the demonstrated criminal activities could acquire, in good faith, the assets that are at issue in this asset forfeiture investigation, and for that reason it is necessary that the General Attorney’s Office secure those assets [...] to prevent their being transferred or being subject to negotiations and thus ensure the success of this investigation.³¹¹

168. The Precautionary Measures were effectively imposed on 3 August 2016.

4. Corficolombiana’s challenge of the Precautionary Measures

169. On 26 September 2016, Corficolombiana filed a request for legality control (“*control de legalidad*”) in accordance with Article 111 of Law 1708 of 2014, challenging the imposition of the Precautionary Measures and contesting their urgency and necessity.³¹²

170. On 20 October 2016, the First Criminal Court of the Specialized Circuit for Asset Forfeiture of Antioquia (the “First Criminal Court of Asset Forfeiture”) rejected Corficolombiana’s challenge on, and upheld the legality of, the Precautionary Measures.³¹³ In its decision, after recalling that the precautionary measures aim at ensuring that judicial decisions do not become nugatory and explaining that pursuant to Articles 87 and 89 of Law 1708 of 2014, precautionary measure can be decreed during the initial phase of the Asset Forfeiture Proceedings when required and necessary to avoid that the assets be “*hidden, negotiated, encumbered, distracted, transferred, or could suffer deterioration, loss or destruction to cease its unlawful use or destination*”,³¹⁴ the First Criminal Court of Asset Forfeiture recalled that pursuant to Articles 111,³¹⁵ 112,³¹⁶ and

³¹¹ Attorney General’s Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), pp. 87-88.

³¹² See Corficolombiana’s Control of Legality Petition, 26 September 2016 (**Exhibit C-043bis**).

³¹³ See Decision by Asset Forfeiture Court Corficolombiana’s Control of Legality Petition, 20 October 2016 (**Exhibit C-044bis**).

³¹⁴ Decision by Asset Forfeiture Court Corficolombiana’s Control of Legality Petition, 20 October 2016 (**Exhibit C-044bis**), p. 15.

³¹⁵ See Law No. 1708, 20 January 2014 (**Exhibit C-003bis**), Article 111 (“The precautionary measures which are ordered by the Attorney General of Colombia or his or her delegate shall not be subject to remedies of reconsideration or appeal. However, based on a reasoned request by the affected person, the Public Ministry, or the Ministry of Justice and Law, these decisions can be subject to a legality

113³¹⁷ of Law 1708 of 2014, the affected party can request the Forfeiture Assets Judge to review the legality of the measure. The legality analysis concerns the formal and material legality of the measure. As stated in Article 111, the courts in charge of the legality control should declare the illegality of the measures if they find that the measures were adopted “1. In the absence of sufficient minimum elements of judgement to consider that the assets affected [by the measures] have a probable link with any of the grounds for asset forfeiture. 2. If the materialization of the precautionary measures does not appear necessary, reasonable, and proportional to fulfil [the measures’] aim . 3. The decision imposing the precautionary measures lacks motivation. 4. When the decision imposing the precautionary measure is based on illegally gathered evidence”.³¹⁸

171. The First Criminal Court of Asset Forfeiture rejected Corficolombiana’s arguments that the measures were not necessary, reasonable or proportional and that the decision to impose the Precautionary Measures lacked motivation, holding that the Attorney General’s Office 44 had properly motivated the decision to impose the measures. For the Court, the Attorney General’s Office 44 had properly motivated the decision describing the background of Mr. López Vanegas’s claims about the alleged dispossession of the land by the *Oficina de Envigado*, which had led the Attorney General’s Office 44 to conduct a series of investigations, including the analysis of the chain of title of the land and interviews with the individuals appearing as title holders, which had ultimately resulted in findings of several irregularities in the transactions and fictitious sales of figureheads who lacked the economic capacity to acquire the land.
172. Therefore, the First Criminal Court of Asset Forfeiture held that the Attorney General’s Office 44 had properly motivated and justified the need, proportionality and urgency the measures, and transcribed the relevant excerpts of the decision imposing the Precautionary Measures.³¹⁹ Thus,

control before the competent asset forfeiture judges. Where it is necessary to take a precautionary measure during the trial stage, the Attorney General of Colombia or his or her delegate shall make the request to the competent judge, who shall decide in conformity with this Law”).

³¹⁶ See Law No. 1708, 20 January 2014 (**Exhibit C-003bis**), Article 112

³¹⁷ See Law No. 1708, 20 January 2014 (**Exhibit C-003bis**), Article 113 (“The affected person who petitions the legality control must clearly point out the facts on which the petition is based and show that, objectively, one of the circumstances listed in the preceding article is present”).

³¹⁸ See Law No. 1708, 20 January 2014 (**Exhibit C-003bis**), Article 112.

³¹⁹ See Decision by Asset Forfeiture Court Corficolombiana’s Control of Legality Petition, 20 October 2016 (**Exhibit C-044bis**), p. 22.

the Court concluded that the Attorney General's Office 44 had commenced the investigation in accordance with Article 250 of the Colombian Constitution and Law 1708 of 2014.³²⁰

173. On 26 October 2016, Corficolombiana appealed the First Criminal Court's decision on the legality of the Precautionary Measures.³²¹
174. The appeal was duly considered by the Bogotá Superior Court, Chamber of Asset Forfeiture ("*Tribunal Superior de Bogotá, Sala de Decisión de Extinción de Dominio*"), which on 21 February 2017 rejected Corficolombiana's appeal in relation to the control of legality and confirmed the decision of the First Criminal Court of Asset Forfeiture of 20 October 2016, upholding the legality of the Precautionary Measures.³²²
175. In its decision, the Bogotá Superior Court, Chamber of Asset Forfeiture, stated that the Attorney General's Office 44 had duly complied with the provisions set forth in Article 250 of the Colombian Constitution and Articles 29, 34, 158, and 159 of Law 1708 of 2014 regarding Asset Forfeiture Proceeding.
176. The Bogotá Superior Court, Chamber of Asset Forfeiture, also confirmed that the Attorney General's Office 44 had sufficient elements to conclude that the property in question was acquired, among others, through threats and false representations. More specifically, the Bogotá Superior Court pointed out to the findings of the Attorney General's Office investigations conducted by the technical police, showing irregularities and non-existent transactions in the transfer of the land lots and supporting a correlation between the origin of the property and the grounds for Asset Forfeiture provided in Law 1708 of 2014.³²³ The Bogotá Superior Court also stated that the Attorney General's Office 44 based its acts and decisions on the investigations conducted by the technical police and concluded that the Attorney General's Office 44 had sufficient elements to infer that the origin of the property was illicit.³²⁴ The Court differentiated between the sufficiency of elements to impose precautionary measures and

³²⁰ See 1991 Political Constitution of Colombia (**Exhibit C-005bis**), Article 250 p. 60; Law No. 1708, 20 January 2014 (**Exhibit C-003bis**).

³²¹ See Corficolombiana Appeal to First Instance Decision Corficolombiana's Control of Legality Petition, 26 October 2016 (**Exhibit C-045bis**), p. 1.

³²² See Appellate Decision on Corficolombiana's Control of Legality Petition, 21 February 2017 (**Exhibit C-047bis**).

³²³ See Appellate Decision on Corficolombiana's Control of Legality Petition, 21 February 2017 (**Exhibit C-047bis**), pp. 4-6.

³²⁴ See Appellate Decision on Corficolombiana's Control of Legality Petition, 21 February 2017 (**Exhibit C-047bis**), pp. 5, 15-16.

the determination of asset forfeiture under Article 148 of Law 1708 of 2014, which requires further evidence.³²⁵

177. As such, the Bogotá Superior Court held that that the General Attorney's Office had complied with Articles 87, 88 and 89 of the Asset Forfeiture Law No. 1708 of 2014, stating that the Precautionary Measures were necessary to prevent further transfers of the property to third parties alien to the investigations. It also stated that the decision to impose the measures was well reasoned and funded, and that the party affected by it, *i.e.*, Corficolombiana, had been given the opportunity to challenge them via the control of legality.
178. As regards Corficolombiana's request to be recognised as a good faith without fault third party, the Bogotá Superior Court explained that the initial phase of the Asset Forfeiture Proceedings was not the appropriate procedural phase for this determination, as the Attorney General Office had yet to issue the Provisional Determination of Claim, and at that moment Corficolombiana could demonstrate its arguments as regards its alleged condition as a good faith third party. At this stage, the process was at its inception and was subject to reserve.³²⁶
179. The Bogotá Superior Court, Chamber of Asset Forfeiture, further clarified that Corficolombiana's allegations that the Precautionary Measures have conculcated grounds 2 and 3 of Article 112 of Law 1708, were aimed at revindicating the character of its clients as *bona fide* buyers rather than to supporting the alleged violation of the requirements set forth in the Article, and that Corficolombiana's allegations did not, in any way, negate the legal and proper character of the Precautionary Measures.³²⁷ Thus, the Bogotá Superior Court, Chamber of Asset Forfeiture, dismissed Corficolombiana's challenge, stating that Corficolombiana had failed to provide any evidence that the Attorney General's Office 44 lacked sufficient elements to proceed as it did. Corficolombiana had equally failed to show the lack of necessity, reasonability, or proportionality of the Precautionary Measures.

5. Newport's petitions to the Attorney General's Office

180. On 7 December 2016, Newport requested the Attorney General's Office 44 to recognize it as a good faith third party without fault, insisting that in its capacity as grantor – promoter under the

³²⁵ See Appellate Decision on Corficolombiana's Control of Legality Petition, 21 February 2017 (**Exhibit C-047bis**), p. 5.

³²⁶ See Appellate Decision on Corficolombiana's Control of Legality Petition, 21 February 2017 (**Exhibit C-047bis**), p. 6.

³²⁷ See Appellate Decision on Corficolombiana's Control of Legality Petition, 21 February 2017 (**Exhibit C-047bis**), pp. 14-15.

Meritage Trust, it should be considered as such. Newport also contested the Precautionary Measures and requested that they be lifted.³²⁸ Newport supplemented its petition on 14 December 2016, providing letters from Corficolombiana regarding the advanced disbursements of contributions (“*anticipos de restitución de aportes*”) made by Corficolombiana, as trustee and administrator of the Meritage Trust, to Newport, that were purportedly used by Newport to pay for the Lot. Newport further argued that the Attorney General’s Office had failed to gather evidence on Newport’s alleged good faith.³²⁹

181. On 23 January 2017, Newport once again filed a request with the Attorney General’s Office 44, this time asking that the Precautionary Measures be lifted. Newport argued that the six-months statute of limitations provided in Article 89 of Law 1708 of 2014³³⁰ had elapsed.³³¹ It bears recalling in this respect that the six-month statute of limitation provided for in Article 89 of Law 1708 of 2014 for the Attorney General’s Office to issue a Provisional Determination of Claim, or decide that the proceedings should be archived, starts running from the date of the actual imposition of the measures, not from the date in which the Attorney General’s Office orders their impositions. In this case, the measures materialized on 3 of August 2016,³³² not on 22 July 2016 (date in which they were authorized).³³³ Therefore, by 23 January 2017, the Attorney General’s Office was well within the term to decide on whether to proceed with the Determination of the Claim or archive the proceedings, and was not obliged to lift the measures.

6. The Provisional Determination of Claim

182. In fact, on 25 January 2017, within the 6-months term provided to that effect, the Attorney General’s Office filed a Provisional Determination of Claim, pursuant to Article 116 of Law 1708 of 2014, ordering the formal commencement of the Asset Forfeiture Proceedings as

³²⁸ See Newport’s First Petition to Attorney General’s Office Asset Forfeiture Unit, 7 December 2016 (**Exhibit C-048bis**); Newport’s Supplement to Petition to Attorney General’s Office Asset Forfeiture Unit, 14 December 2016 (**Exhibit C-049bis**).

³²⁹ See Claimant’s Memorial on Merits and Damages, ¶ 218; Newport’s First Petition to Attorney General’s Office Asset Forfeiture Unit, 7 December 2016 (**Exhibit C-048bis**), p. 8; Newport’s Supplement to Petition to Attorney General’s Office Asset Forfeiture Unit, 14 December 2016 (**Exhibit C-049bis**).

³³⁰ See Law No. 1708, 20 January 2014 (**Exhibit C-003bis**), Article 89.

³³¹ See Newport’s Third Petition to Attorney General’s Office Asset Forfeiture Unit, 23 January 2017 (**Exhibit C-050bis**).

³³² See Certificate of Seizure of the Meritage Property, 3 August 2016 (**Exhibit C-165**), p. 25.

³³³ See Certificate of Seizure of the Meritage Property, 3 August 2016 (**Exhibit C-165**), p. 25.

regards the assets of Fiduciaria Corficolombiana, S.A., Meritage Trust, and La Palma Argentina.³³⁴

183. In the Provisional Determination of Claim, after providing the constitutional and legal basis for the Asset Forfeiture Proceedings and explaining its role as a tool to combat illicit activities and correlated economic gains by malefactors, the Attorney General's Office 44, provided a summary of the nature and main characteristics of the proceedings, underscoring that the action is directed towards the assets related to illicit activities, rather than against the individuals who procured the assets or committed the activities. The proceedings are not criminal in nature and are governed by specific regulation, which establishes two phases: (i) an Initial Phase or Pre-procedural Phase, which comprises (1) the investigations and gathering of evidence by the Attorney General's Office, (2) the Provisional Determination of Claim by the Attorney General's Office], and (3) the Request presented by the Attorney General's Office to the Court to declare the Asset Forfeiture or declare that Asset Forfeiture is not precedent; and (ii) the Trial Phase, of which the Courts are in charge, and which commences with the Request by the Attorney General's Office to the Court.³³⁵
184. In the Provisional Determination of Claim of 25 January 2017, the Attorney General's Office 44, explained that for the Provisional Determination of Claim to proceed it is necessary to prove: (i) the existence of at least one of the grounds provided for in Article 16 of Law 1708 of 2014; (ii) that there exist assets to which the grounds of Article 16 apply; and (iii) an unjustified increase in the wealth, without an explanation as to the licit origin of such increase or that the assets were acquired with the produce of licit activities, or that they were used in a manner that contravenes the social aims of property as described in the Constitution of Colombia.³³⁶
185. As regards the assets in the Meritage case, the Attorney General's Office 44 found three applicable grounds of those in Article 16 of Law 1708 of 2014, namely (i) the assets were the direct or indirect product of an illicit activity, (ii) the provenance of the assets is the legal or physical, transformation or partial or total conversion, of material products, instruments or objects of illicit activities, and (iii) those assets form part of an unjustifiable increase in wealth,

³³⁴ See Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim (**Exhibit C-023bis**).

³³⁵ See Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), pp. 114-115.

³³⁶ See Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), p. 116.

provided there are elements of knowledge, which allow reasonably to consider that [the assets'] provenance is illicit activities.³³⁷

186. The Provisional Determination of Claim provides a summary of the various investigations and findings of the Judicial Police and the Attorney General's Office confirming, *inter alia*, (i) the fictitious character of the various sale-purchase agreements appearing in the chain of title of the property, the use of figureheads, who lacked the financial means to buy the relevant parcels, as title holders and the forgery of the corresponding deeds; (ii) that Ivan López Vanegas was extradited in 2003 to the United States, information that was publicly available and which any businessman could have found, (iii) that Ivan López Vanegas, as representative of Sierralta López y Cia. S. en C. (nowadays Inversiones Nueve S.A.) together with his brother, Jaime Alberto Orozco, as representative of Entrelagos-Orozco y Cia. S. en C. (nowadays Entrelagos-Orozco Vanegas S.A.S.), had acquired respectively 75% and 25% of the Lots No. 001-0577478 and 001-0592104 (which after several modifications and mergers correspond to the Meritage Lot).³³⁸
187. The Provisional Determination of Claim further underscored the obligations of the financial institutions as regards Anti-Money Laundering and SARLAFT implementation, remarking that Corficolombiana could have detected the irregularities with the transactions of the property.³³⁹
188. Accordingly, the Attorney General's Office decreed the Provisional Determination of Claim.

7. Newport's Tutela Action

189. On 17 February 2017, Newport filed a *Tutela* Action claiming that the Attorney General's Office lack of response to its requests of 7 December 2016, 14 December 2016 and 23 January 2017, violated its fundamental rights of access to administration of justice and due process.³⁴⁰
190. The Supreme Court of Justice ruled on Newport's *Tutela* Action on 28 February 2017.³⁴¹ In its decision, the Supreme Court of Justice stated that the tutela action is a subsidiary action aimed at protecting the petitioners' fundamental rights, not to substitute existing proceedings and in

³³⁷ See Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), p. 1.

³³⁸ See Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), pp. 117-130.

³³⁹ See Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), p. 128.

³⁴⁰ See Newport *Tutela* Action, 17 February 2017 (**Exhibit C-052bis**).

³⁴¹ See Decision on Newport's *Tutela* Action, 28 February 2017 (**Exhibit C-053bis**).

particular those which are still pending, as is the case of the Asset Forfeiture Proceedings. The Supreme Court stated that the proceedings were still in an initial phase and that the alleged affected parties could access to the proceedings and propose the objections, oppositions and evidence about their claims. The Court remarked that on 27 February, the period to have access to the file, present opposition and present evidence had already started to run. Further, even if Newport's petitions were not to be accepted at that stage, pursuant to Articles 141 and subsequent of Law 1708 of 2014, there were other opportunities during the trial for it to request evidence and present observations, should the Attorney General Office proceed to Request the Asset Forfeiture.

191. Nevertheless, the Supreme Court noted that the Attorney General's Office 44 should have responded to Newport's petitions of 7 December de 2016, reiterated on 14 del December 2016, and 23 January 2017 or indicated that the petitions would be evaluated later on in the proceedings, and ordered the Attorney General's Office to provide a response in this regard within 48 hours.³⁴² The Supreme Court explained that answering to the requests did not mean that the Attorney General's Office was acceding to it.
192. On 4 March 2017, the Attorney General's Office 44 denied recognition of Newport as a good faith third party without fault, stating that the initial phase of the Asset Forfeiture Proceedings was not the proper stage to decide on Newport's allegations about its condition as a good-faith without fault third-party, as already stated by the Supreme Court, and that in addition there was evidence on the basis of which it was reasonable to believe that Newport has not conducted a proper due diligence on the title.
193. The Attorney General's Office recalled that Mr. López Vanegas, whose extradition had been requested by the U.S. authorities in connection with the crime of drug trafficking, had acquired the property in 1994 through deed No. 1554, and that several sales in the chain of transfers were proved to be fictitious. Indeed, the sale from Sebastián López Betancur allegedly perfected by Deed No. 815 of 6 March 2005 was forged, as according to the immigration report, Mr. López Betancur was traveling from Medellín to Miami on that date. The alleged buyer of the property, Mr. Arboleda, had confirmed he never paid for the property, as he lacked the means, nor did he know Mr. López Betancur. Further transactions evinced the same pattern of registered title holder who never paid for the property, including, among others, Ms. Tatiana López Gil, who confirmed that she participated in the alleged purchase through her husband, Mr. Guillermo Arango "Guru", and an individual *affiliated* with the cartel known as

³⁴² See Decision on Newport's *Tutela* Action, 28 February 2017 (**Exhibit C-053bis**), pp. 19-20.

“*Borracho*” who was mentioned by Mr. López Vanegas as member of the *Oficina de Envigado*. The Attorney General’s Office concluded:

[T]he evidence gathered in the investigation enables to reasonable infer that the real estate seized by the Attorney General’s Office has an illegal origin, drug dealing, and that, after the extradition of Mr. Ivan López Vanegas, a series of events were developed involving people linked to the Envigado Cartel.³⁴³

194. Finally, the Attorney General’s Office 44 further stated that since the Provisional Determination of Claim had been issued, the Attorney General’s Office no longer had jurisdiction to lift the Precautionary Measures and the decision would be within the Asset Forfeiture Court’s remit.³⁴⁴

8. Newport’s opposition to the Provisional Determination of the Claim

195. On 9 March 2017, Newport sent a letter to the General Attorney’s Office opposing to the Provisional Determination of the Claim.³⁴⁵ Newport’s opposition was based on its initial statement that the property was legitimately acquired in good faith with proceeds stemming from a lawful activity, that it had a legitimate interest to oppose the action and that the Provisional Determination of Claim failed properly to evaluate the evidence presented by Newport on its alleged capacity as good faith without fault third party.³⁴⁶ Whilst the General Attorney’s Office not legally obliged to reply to Newport’s opposition, Newport’s allegations were actually addressed in the Request for Asset Forfeiture.

9. The Request for Asset Forfeiture

196. On 5 April 2017, the Attorney General’s Office 53 filed its Request for Asset Forfeiture,³⁴⁷ formally requesting the Court to commence the Trial Phase of the Asset Forfeiture Proceedings.

197. The Attorney General’s Office recorded in its Request Corficolombiana’s position that its obligations in terms of SARLAFT and Anti-money Laundering concerned solely its clients and users and that to the extent that individuals in the chain title were neither their clients or users, it was not obliged to investigate them. That is, according to Corficolombiana, it was not obliged

³⁴³ Attorney General’s Office Asset Forfeiture Unit Response to Newport’s Petitions, 4 March 2017 (**Exhibit C-054bis**), p. 5.

³⁴⁴ See Attorney General’s Office Asset Forfeiture Unit Response to Newport’s Petitions, 4 March 2017 (**Exhibit C-054bis**) p. 8.

³⁴⁵ See Newport’s Opposition to Determination of the Claim, 9 March 2017 (**Exhibit C-055bis**).

³⁴⁶ See Newport’s Opposition to Determination of the Claim, 9 March 2017 (**Exhibit C-055bis**).

³⁴⁷ See Attorney General’s Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017 (**Exhibit C-024bis**).

to investigate Mr. López Vanegas who, Corficolombiana also stated, did not appear as the representative of Inversiones Nueve in the deeds of sales of the Lot.³⁴⁸ The Attorney General's Office also referred to Newport's oppositions and claims regarding the alleged right of credit that Newport would have on the Lot, and its alleged status as *bona fide* third party arguments described above.³⁴⁹

198. In setting out the legal and factual basis of its Request, the Attorney General's Office 53 relates 62 queries, declarations and investigations conducted by the Judicial Police and the Attorney General's Office to support the findings on the illegal origin of the Lot.³⁵⁰
199. In the Request, the Attorney General's Office 53 (i) found that the Meritage Lot (identified then with Lot Nos. 001-1198464, 001-1198465, 001-1198466, 001-1198467, 001-1198468, 001-1198469, 001-1198470, 001-1198471, 001-1198472, 001-1198473, 001-1198474 and 001-1198475) had been obtained as a result of the drug dealing illicit activities of López Vanegas, who had been active in drug dealing activities since the 1990's, as evinced in the case file opened to López Vanegas in the United States;³⁵¹ (ii) that the lot object of the Request for Asset Forfeiture suffered several transformations, subdivisions, and regrouping of premises and changes in legal title, which allow to affirm, with a high probability of truth, that these changes and transactions had no other purpose than hiding the illicit origin of the Lot; (iii) specify in detail all the transactions following the acquisition of the property by López Vanegas and his half-brother Jaime Alberto Orozco Vanegas and how they were transferred to figureheads, who lacked the economic capacity to purchase them (as related above in this Counter Memorial).³⁵²
200. The Attorney General's Office 53 stated that the fact that Corficolombiana now appears as the title holder of the Lot is no obstacle for the Asset Forfeiture Unit to pursue the Asset Forfeiture Proceedings, since the right that Corficolombiana had on the premises was merely apparent. The Attorney General's Office 53 recalled that, as provided in Article 22 of Law 1708 of 2014:

[O]nce the illicit origin of the assets affected by the Asset Forfeiture Proceedings has been demonstrated, the object of the legal transactions that give rise to their acquisition are contrary to the

³⁴⁸ See Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017 (**Exhibit C-024bis**), p. 148.

³⁴⁹ See above, Section II.F.5.

³⁵⁰ See Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017 (**Exhibit C-024bis**), pp. 11-18

³⁵¹ See Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017 (**Exhibit C-024bis**), pp. 1-3, 58, 118, 143.

³⁵² See above, Section II.F.1.

constitutional and legal regime which regulates property, and hence acts and transactions regarding those assets did not in any event create legal title and must be considered null and void ab initio.³⁵³

201. After stating the above, the Attorney General's Office turned to Corficolombiana and Newport's allegations that they are good faith third parties, and noted that they have failed to demonstrate their character as such. The Attorney General's Office concluded that Corficolombiana had failed to take the measures and due diligence it was obliged to as a financial entity according to Decree 663/1993 and the Financial Organic Statue. The Attorney General's Office 53 cited the Asset Forfeiture Chamber of the Superior Tribunal of Bogotá, which explained that financial entities should determine the user, asset transactions, source of incomes, main activity and compatibility between its activity and the revenues to avoid illegal activities.³⁵⁴
202. The General Attorney's Office concluded that Fiduciaria Corficolombiana failed to make use of the available resources to verify the origin of the Meritage Lot received from Las Palmas Argentina. In particular, the Attorney Office's General's Request counter Newport's and Corficolombiana's argument that the response from the Attorney General's Office to petitions presented in 2007 and 2013 to the Attorney General's Office as regards the existence in the data base of the Unit of proceedings regarding Anti-money Laundering against the Lot and limited number of persons in the title chain (misleadingly referred to by the Claimants as "Certification of No Criminal Activity") did constitute a guarantee that the Lot could not have an illicit origin, even more when it is known that the Initial Phase of asset forfeiture proceedings is reserved in nature.³⁵⁵
203. The Attorney General's Office 53 further stated that had Corficolombiana conducted a proper due diligence, including a proper title search and not one limited to 10 years, and specifically reviewed Deed 1554, which showed that Mr. Iván López Vanegas was the owner of the property from 1994 to 2004, it would have found that Mr. López Vanegas was the legal representative of Sierralta López and Cia. and that since 2003 it was known that he had been imprisoned for a drug trafficking.³⁵⁶ Similarly, had Corficolombiana checked the credit history

³⁵³ Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017 (**Exhibit C-024bis**), pp. 132-133.

³⁵⁴ Attorney General's Office, Asset Forfeiture Unit, Petition for Asset Forfeiture Court, 5 April 2017 (**Exhibit C-024bis**), p. 134.

³⁵⁵ See Attorney General's Office, Asset Forfeiture Unit, Petition for Asset Forfeiture Court, 5 April 2017 (**Exhibit C-024bis**), pp. 140-148. See also Caro Witness Statement, ¶¶ 39-41, 45-46.

³⁵⁶ See Attorney General's Office, Asset Forfeiture Unit, Petition for Asset Forfeiture Court, 5 April 2017 (**Exhibit C-024bis**), pp. 142-143.

of Mr. Varela Arboleda, Mr. Cardona, Ms. Gil Muñoz and Ms. Rendon Gil, who had not reported an economic activity - or any economic activity - that would allow them to acquire the property, it would have realized the anomalies in the transactions.³⁵⁷

204. Further, the Attorney General's Office 53 stated that it had obtained, as part of the investigation, information from Bancolombia as regards the analysis and SARLAFT conducted by this financial institution regarding a credit application made in 2013 by Royal Property Group SAS for the Meritage Project. Bancolombia had denied the credit on the basis that between 2009 and 2010, Royal Property Group had (i) an unjustified economic increase – increasing its profits significantly in the second year of operation (2009); (ii) irregular transactions due to the high volume of cash entering its bank accounts; and (iii) commercial alerts since the client refused to provide information about its shareholding structure.³⁵⁸ On this basis, Bancolombia concluded that the ensemble of elements did not comply with the risk management standards of Bancolombia and on this basis denied a loan request by Royal Property.³⁵⁹ For the Attorney General's Office 53, Bancolombia's analysis underscored that other financial institutions did detect problems as regards possible potential money laundering involving those related to the Meritage Project and displayed a cautious approach.³⁶⁰
205. Further, the Attorney General's Office 53 counter Corficolombia's arguments that it was obliged merely to conduct due diligence as regards its clients and users, pointing out the Concept of the *Superintendencia Financiera* pursuant to which, when entering into a contract of "*fiducia inmobiliaria*", such as the one it entered into in connection with the Meritage Project, the fiduciary should verify and evaluate that: (i) that the lots of land where the project is going to be developed had been contributed in a definitive manner and with all the legal formalities required by the law for this type of negotiation, and (ii) that the legal transfer of the land lots does not present any legal problems which could pose an obstacle or hinder the transfer of the resulting real estate units to the future purchasers.³⁶¹

³⁵⁷ See Attorney General's Office, Asset Forfeiture Unit, Petition for Asset Forfeiture Court, 5 April 2017 (**Exhibit C-024bis**), p. 139.

³⁵⁸ See Attorney General's Office, Asset Forfeiture Unit, Petition for Asset Forfeiture Court, 5 April 2017 (**Exhibit C-024bis**), pp 144-145.

³⁵⁹ See Attorney General's Office, Asset Forfeiture Unit, Petition for Asset Forfeiture Court, 5 April 2017 (**Exhibit C-024bis**), pp 144-145.

³⁶⁰ See Reyes Expert Report, ¶ 79.

³⁶¹ See Attorney General's Office, Asset Forfeiture Unit, Petition for Asset Forfeiture Court, 5 April 2017 (**Exhibit C-024bis**), pp. 149-150.

206. The Attorney General's Office 53 concluded that in his opinion, the affected entities could not be considered as good faith without fault third-parties and requested the Court to proceed to the declare the Asset Forfeiture.³⁶²
207. On 7 May 2018, the Second Criminal Court rejected the *Requerimiento* by the Attorney General's Office 53 requesting additional "information regarding the identification and location of the assets involved".³⁶³
208. On 25 May 2018, the Attorney General's Office 53 filed an amended *Requerimiento*.³⁶⁴
209. On 5 October 2018, Newport filed a petition with the Second Criminal Court presenting documentary evidence and requesting the admission of testimonial evidence.³⁶⁵
210. On 12 December 2018, the Second Criminal Court rejected the Attorney General's Office 53's amended *Requerimiento* requesting further the description and identification of the property, including *inter alia* information easements, public utilities, boundaries, topography, etc.³⁶⁶
211. On 19 December 2018, the Attorney General's Office 53 filed a second amended *Requerimiento* with additional description of the property.³⁶⁷
212. On 14 June 2019, the Second Criminal Court accepted the Attorney General's Office 53's amended *Requerimiento*, declaring the Asset Forfeiture Proceedings to be procedurally sound. The court denied Newport's access to the proceedings.³⁶⁸ On 20 June 2019, Newport appealed this decision.³⁶⁹ Newport's appeal is pending.

³⁶² See Attorney General's Office, Asset Forfeiture Unit, Petition for Asset Forfeiture Court, 5 April 2017, (**Exhibit C-024bis**), p. 150.

³⁶³ See Asset Forfeiture Court Decision on First *Requerimiento*, 7 May 2018 (**Exhibit C-058bis**), pp. 2, 14.

³⁶⁴ See Attorney General's Office, Amended *Requerimiento*, 25 May 2018 (**Exhibit C-059bis**), pp. 13-14.

³⁶⁵ See Newport's Petition to Asset Forfeiture Court in Response to Amended *Requerimiento*, 5 October 2018 (**Exhibit C-223**).

³⁶⁶ See Asset Forfeiture Court Decision on Amended *Requerimiento*, 12 December 2018 (**Exhibit C-060bis**).

³⁶⁷ See Second Amended *Requerimiento*, 19 December 2018 (**Exhibit C-056bis**).

³⁶⁸ See Specialized Asset Forfeiture Court's Decision on Second Amended *Requerimiento*, 14 June 2019 (**Exhibit C-236**), p. 328.

³⁶⁹ See Newport's Appeal Against Decision to Accept Corrected *Requerimiento*, 20 June 2019 (**Exhibit C-237**).

10. The avocamiento order

213. On 17 August 2017, the Second Criminal Court Specialized in Asset Forfeiture of Antioquia (“Second Criminal Court”) rendered its *avocamiento* order.³⁷⁰
214. The Court started by analysing who under Law 1708 of 2014 had standing as an affected party in the Asset Forfeiture Proceedings. To this end, it cited Article 1 of the Law, which, for the purposes of its interpretation and application, defines an affected person, as one who “claims to be the holder of some right over the asset object of asset forfeiture proceedings, with standing on the case to attend the proceedings”.³⁷¹
215. It then referred to Article 30 of Law 1708, which when referring to the procedural parties, provides that an affected party in asset forfeiture proceedings is “any person, whether an individual or a legal entity, who claims to be the holder of rights regarding one of the assets subjected to forfeiture proceedings”, to then specify that “in the case of tangible assets, whether movable or immovable [i.e., real estate], any person, whether an individual or a legal person, who claims to have a right *in rem* (“*derecho real*”) in the assets that are the subject of the asset forfeiture proceeding shall be considered an affected party”.³⁷²
216. The Court noted that the term “*real*” was amended by Law 1849 of 19 July 2019 and substituted with the term “patrimonial”, and explained that the amendment of the term introduced by Law 1849 of 2019, provided in its Article 57 that: “[t]hose proceedings in which a Provisional Determination of Claim has been rendered at the date of entry into force of this law will continue to be governed by the procedure established in Law 1708 of 2014, except as regards the administration of assets”.³⁷³
217. The Court stated that the proceedings at stake were thus governed by Law 1708 of 2014, and hence focused its analysis on who was a holder of a “*derecho real*” (right *in rem*) in the present case. It bears mentioning in this regard that the Claimants misrepresent the Court’s ruling in their Memorial,³⁷⁴ taking out of context and selectively citing the Court’s words as regards the application of the term “*derecho patrimonial*” under Law 1849 of 19 July 2019 for cases that are subject to Law 1849, which is not applicable in this case. To be clear, at no point did the

³⁷⁰ See Asset Forfeiture Court *Avocamiento* Order, 17 August 2017 (**Exhibit C-057bis**).

³⁷¹ Asset Forfeiture Court *Avocamiento* Order, 17 August 2017 (**Exhibit C-057bis**), p. 16.

³⁷² See Asset Forfeiture Court *Avocamiento* Order 17 August 2017 (**Exhibit C-057bis**), pp. 16-17.

³⁷³ Asset Forfeiture Court *Avocamiento* Order 17 August 2017 (**Exhibit C-057bis**), p. 16.

³⁷⁴ See Claimant’s Memorial on Merits and Damages, ¶ 264.

Second Criminal Court acknowledge that in the present case any person “*having a personal or credit right*” would be considered as an affected party, as suggested by the Claimants.³⁷⁵

218. The Court then turned to the analysis of what it means under Colombian law to hold a “*derecho real*” as opposed to a “*derecho personal*,” providing the following comparative chart:³⁷⁶

DIFFERENCES		
	RIGHTS <i>IN REM</i> (“ <i>derecho real</i> ”)	PERSONAL RIGHTS (“ <i>derecho personal</i> ”)
As regards the relationship	Create a direct and immediate relationship with a physical object, and which the holder may enjoy without limitation.	Arises from the relation between two persons in which one is called debtor, who must fulfil an obligation to give, to do, or abstain from doing something, in favour of another person, the creditor.
As regards its benefits	The benefits and profits of the right in rem depend on the right that the holder has over them.	The performance will consist in giving, doing or abstaining from doing something as regards a third party.
According to its object	The object will be based on a physical object.	Its object is the performance of the obligation.
According to its origin	Can only be created by law; and their creation is otherwise prohibited.	Personal rights can be created by the parties, allowing thus for the creation of all the rights they may consider appropriate.
Regarding the bond	In certain cases, the holder may break from the bond by abandoning the physical object.	The debtor is obliged to perform its obligation and cannot abandon the performance.

219. The Court explained that unlike rights *in rem*,

[P]ersonal rights can only be exercised against the “person obliged by the obligational link”, therefore if a party does not perform its obligation and the object or physical thing or real estate is transferred to a good-faith third party, or is legitimately forfeiture by the State throughout legal means such as the asset forfeiture, the of the personal right, cannot pursue the object (physical property), but only to sue its counterparty under the contract or the debtor for damages and interest.³⁷⁷

220. Having set up the applicable provisions in Law 1708 to the present case and the nature of the rights protected under Law 1708, the Court turned to the analysis of the Fiducia. In this regard, the Court analysed it under Article 1226 of the Colombian Commercial Code and established

³⁷⁵ See Claimant’s Memorial on Merits and Damages, ¶ 264. See also Asset Forfeiture Court *Avocamiento* Order 17 August 2017 (**Exhibit C-057bis**), p. 20.

³⁷⁶ See Asset Forfeiture Court *Avocamiento* Order, 17 August 2017 (**Exhibit C-057bis**), pp. 23-26.

³⁷⁷ Asset Forfeiture Court *Avocamiento* Order, 17 August 2017 (**Exhibit C-057bis**), pp. 25-26.

that it comprises three different types (i) *Fiducia de Administración* (administration), (ii) *Fiducia de Inversión* (investment) and (iii) *Fiducia Inmobiliaria* (real estate).³⁷⁸ As regards the *Fiducia Inmobiliaria*, the Court stated that it involves transferring to a fiduciary real estate property on which a real estate project is going to be developed. The fiduciary will render a series of services in this regard. Since it involves real estate, all formalities and protocols that the law requires in relation to real property must be observed for reasons of legal security.³⁷⁹ Thus, for example, when the *fiducia* involves real estate, the creation of the *fiducia* must be done by public deed, pursuant to Article 1228 of the Commercial Code.³⁸⁰

221. The Second Criminal Court further specified that a *Fiducia* requires for its existence the transfer or delivery of assets to the fiduciary, and that the fiduciary must maintain a complete separation between its patrimony (assets) and the client's assets, and must be held as an independent and autonomous property ("*patrimonio independiente y autónomo*"), which the fiduciary must administer without being its absolute owner.³⁸¹ The Court then analysed the rights of the grantor and the beneficiary under the *Fiducia Mercantil* and concluded that:

When the fiduciary business involves the transfer of property, we are speaking of a "Fiducia Mercantil", expressly regulated in our Commercial Code, and as a legal transaction it gives rise of personal obligations, as opposed to in rem obligations.³⁸²

222. The Court distinguished then between the *Fiducia Mercantil* and the "*encargo mercantil*", which whilst not defined under a specific law in Colombia, it has been developed in scholarly writings and which in accordance with the *Superintendencia Financiera* Basic Accounting Circular No. 100 of 24 November 1995³⁸³ and Basic Circular 007 of 1996,³⁸⁴ differs from the

³⁷⁸ See Asset Forfeiture Court *Avocamiento* Order, 17 August 2017 (**Exhibit C-057bis**), p. 32.

³⁷⁹ See Asset Forfeiture Court *Avocamiento* Order, 17 August 2017 (**Exhibit C-057bis**), p. 34.

³⁸⁰ See Asset Forfeiture Court *Avocamiento* Order, 17 August 2017 (**Exhibit C-057bis**), p. 45. See also Colombian Commercial Code, 1971 (**Exhibit R-2**), Article 1228 ("The *Fiducia* created *inter-vivos* should be created by registered in accordance with the nature of the assets..."). In Spanish: "*La fiducia constituida entre vivos deberá constar en escritura pública registrada según la naturaleza de los bienes*".

³⁸¹ See Asset Forfeiture Court *Avocamiento* Order, 17 August 2017 (**Exhibit C-057bis**), pp. 37-38.

³⁸² Asset Forfeiture Court *Avocamiento* Order, 17 August 2017 (**Exhibit C-057bis**), p. 40.

³⁸³ See Asset Forfeiture Court *Avocamiento* Order, 17 August 2017 (**Exhibit C-057bis**), p. 41.

³⁸⁴ See Asset Forfeiture Court *Avocamiento* Order, 17 August 2017 (**Exhibit C-057bis**), p. 41.

Fiducia Mercantil in that under the *encargo mercantil* there is no transfer of property but mere delivery of the assets to be administered by the fiduciary.³⁸⁵

223. The Second Criminal Court addressed then the Colombian Law requirements regarding sales of real estate, citing Article 1857 of the Colombian Civil Code, which specifically provides that a sale-purchase of real estate is not “perfected under the law, without a public registered deed”.³⁸⁶
224. As regards the Sale-Purchase Promise for Real Estate (“*Promesa de Compraventa de Inmuebles*”), the Court underscored the mandatory requirements required by law to avoid fraud in real estate contracts. Specifically: (i) it must be done in writing, unequivocally identify the parties by their full names, and identification cards of the promisor seller and the promisor buyer, and in the event of a legal entity, of its legal representative; (ii) clearly state the agreed price and the form of payment; (iii) thoroughly and unmistakably identify the property (location, number, area, description, cadastral record, real estate registry number, and boundaries), and its date of delivery; (iv) state the Notary Office, the date, and the time for the signature of the deed for the sale-purchase promised in the agreement; (v) both seller and buyer must have their signature and fingerprints certified in a Notary Office; (vi) clearly state the effects of the down payment, the nature of the security (*arras*) and penalty clause; (vii) provide what would happen with the agreement in case of death of the promisor buyer or the promisor seller, or in the case of legal entities, in case of its liquidation; and (viii) amendments to the original signed agreement must be made via an attachment entitled “*Otrosí*”, which shall expressly state the amendments to the initial purchase agreement and must also be signed and authenticated again by the promisor buyer and the promisor seller.³⁸⁷
225. In turn, pursuant to Article 89 of Law 153 of 1887, a promise to enter into a contract does not produce any legal effect, unless it complies with the following requirements: (i) it must be made in writing; (ii) the contract regarding which the promise is entered into must not be deemed ineffective by law because it does not meet the requirements provided for in Article 1511 of the Civil Code;³⁸⁸ (iii) the promise must set forth a time period or condition establishing when the

³⁸⁵ See Asset Forfeiture Court *Avocamiento* Order, 17 August 2017 (**Exhibit C-057bis**), pp. 41-42.

³⁸⁶ See Asset Forfeiture Court *Avocamiento* Order, 17 August 2017 (**Exhibit C-057bis**), pp. 115-117. See also Colombian Civil Code, 1887 (**Exhibit R-1**), Article 1857 (“A sale is deemed to be concluded when the parties have agreed on the object and the price, except in the following cases: the sale of real estate, easements and hereditary successions, which are not deemed to be concluded as long as a public deed has not been issued”).

³⁸⁷ See Asset Forfeiture Court *Avocamiento* Order 17 August 2017 (**Exhibit C-057bis**), p. 46.

³⁸⁸ Colombian Civil Code, 1887 (**Exhibit R-1**), Article 1511 (“An error of fact also vitiates consent when the substance or essential quality of the object that is the subject matter of the transaction or agreement is different from what it is believed to be; as if one of the parties were to suppose that the object is a

contract is to be entered into; and (iv) the contract is drafted in such a way that only the transfer of the asset or compliance with the legal formalities are missing in order to execute it.³⁸⁹

226. Having set up the legal requirements for the contracts involved in the case, the Court turned to the burden of proof of the parties in the Asset Forfeiture Proceedings, explaining that the concept of the dynamic burden of proof is a principle of self-responsibility for each of the parties. The parties are at liberty to submit or not to submit evidence of the facts that may help their case, or rebuttal evidence on the facts for which the other party has submitted evidence, and concluded that whilst a party has no obligation to submit evidence, not submitting evidence in most cases entails failure and defeat.³⁹⁰
227. The Court further explained that it is the task of the prosecutor that seeks a given legal result to prove the facts that support its claims, and to “the party affected or opposing the claim to demonstrate the facts supporting its position, exceptions of defense strategy, as well as its right *in rem* that is being affected”³⁹¹ to avoid the asset forfeiture. The Court added that Article 152 of Law 1708 of 2014:

[C]learly provides that the controverted facts in asset forfeiture proceedings must be proved by the party in the best position to gather the evidence necessary to prove them. And that the party who claims to be the holder of an altered or attached right *in rem* (afectado) has the burden of providing the evidence, which demonstrates the facts supporting its opposition to a forfeiture decision.³⁹²

228. The Court specified the assets concerned under the Forfeiture Request: 001-1198464, 001-1198465, 001-1198466, 001-1198467, 001-1198468, 001-1198469, 001-1198470, 001-1198471, 001-1198472, 001-1198473, 001-1198474, 001-1198475, which resulted from the subdivision of the parent Lot No. 001-930485, the title holder of which appears as La Palma Argentina.³⁹³
229. On this basis, the Court determined that it was obvious that La Palma Argentina was an affected party. The Court noted that according to the annotation 12 in the certificate of the history on

silver ingot but it is actually a mass of some other similar metal. An error regarding any other quality of the thing does not vitiate the consent of contracting parties, but only when that quality is the main reason why one of the parties enters into the contract, and that reason was known to the other party”).

³⁸⁹ See Asset Forfeiture Court Avocamiento Order, 17 August 2017 (**Exhibit C-057bis**), p. 48.

³⁹⁰ See Asset Forfeiture Court Avocamiento Order, 17 August 2017 (**Exhibit C-057bis**), p. 50.

³⁹¹ See Asset Forfeiture Court Avocamiento Order, 17 August 2017 (**Exhibit C-057bis**), p. 52.

³⁹² Asset Forfeiture Court Avocamiento Order, 17 August 2017 (**Exhibit C-057bis**), p. 52.

³⁹³ See Asset Forfeiture Court Avocamiento Order, 17 August 2017 (**Exhibit C-057bis**), pp. 54-55.

232. As regards Newport, the Court found that from the documentary evidence provided Newport had been eliminated as beneficiary of the *Fiducia*, via a private document entered into between the parties prior to the deed. As such, there is no basis to recognise Newport as an affected party. In particular, the Court found that Newport had neither an *in rem* nor a patrimonial right over the Meritage Lot, given that (i) it was not registered in real property matriculation documents of the assets to be forfeited and (ii) Newport itself had expressly waived its condition as beneficiary in the *Fiducia* created by trustor La Palma Argentina. As such, Newport was neither trustor, trustee, or beneficiary and could not be recognised as an affected party.³⁹⁷
233. The Court further queried the lack of order in the relevant documents, which “calls into question its own legality”, and censured the use of a private document for the *Fiducia* deal, which by law requires a public deed and legalization *a posteriori*. The Court emphasised that Newport had expressly waived its rights as a beneficiary of the *Fiducia*, that since the beginning it had been clear that the trustor is Las Palmas Argentina, which as owner of the land was the only one who could transfer the property, and that Newport merely appears as a promotor, which does not confer to it a capacity as grantor and cannot claim to be an affected party under Law 1708 of 2014. In this regard, the Court finalised with the following query:

How could NEWPORT S.A. be considered a trustor if it is physically and legally impossible for it to deliver to the fiduciary assets that do not belong to it?³⁹⁸

234. In relation to the unit buyers, who presented their claims as affected parties, the Court concluded that they had no rights *in rem* on the Lot and as such cannot be considered as affected parties in this Asset Forfeiture Proceedings. That does not mean that they cannot initiate actions for fraud and economic damages against Newport, which alleging to be a party in the Meritage La Palma Argentina Trust, without being so, had been raising money from the public without being authorised to do so by the *Superintendencia Financiera*.³⁹⁹
235. Finally, under the caption “On Newport S.A.S’ legitimate interest in the legal relationship of Fiduciaria Corficolombiana S.A. Meritage La Palma Argentina Trust TIN 800-256-769-6”, the Court noted that the copy of a private document titled *Promesa de Compraventa* between La

³⁹⁷ See Asset Forfeiture Court Avocamiento Order, 17 August 2017 (**Exhibit C-057bis**), pp. 59-60. See also Caro Witness Statement, ¶¶ 37-38.

³⁹⁸ Asset Forfeiture Court Avocamiento Order, 17 August 2017 (**Exhibit C-057bis**), p. 60.

³⁹⁹ See Asset Forfeiture Court Avocamiento Order, 17 August 2017 (**Exhibit C-057bis**), p. 105.

Palma Argentina and Royal Realty, dated 1 November 2012,⁴⁰⁰ authenticated before a public notary 20 days after it was entered into, pursuant to which La Palma Argentina promised to sell Lot 001-930485, did not comply with the material requirements set forth in the law for its validity. In particular, the Court remarked the lack of clarity, financial and managerial disarray of the clauses terms and conditions on payment and time for conclusion of the sale and remarked that the provisions are “driven more by the zeal to legalize a lot of land and ratify the return of sums of money, as profits, than by the transparency of a legitimate legal transaction that respects due time and procedures”.⁴⁰¹

236. The Court further called into question that, even assuming *ex hypothesis* that the Promise Agreement was legitimate and complied with all the requirements under the law, on 9 May 2013, one of the parties – without the other – created a “Private Agreement” through which Royal Realty assigned to Newport the Promise Agreement, together with all its rights and obligations and in particular provided in the private document the following clauses:

SECOND: THE OWNER expressly consents to the assignment set forth in the preceding clause.

THIRD: THE OWNER and NEWPORT S.A.S. agree to sign a new Sale-Purchase Promise to be submitted to the Fiduciary stating that the lot acquired hundred per cent (100%) by a swap on properties. This in order to diminish the POE [Point of Equilibrium] needed to release the funds for developing the project, and which will have no legal value between the parties once is submitted to the Fiduciary.

FOURTH: That, whilst a new Sale-Purchase Promise will be signed, the true agreement legally binding on the parties is the one originally signed on 1 November 2012, and recorded before a Notary on November 21 of the same year, according to which the price of the lot identified with matriculation number number 001-930485 shall be paid partly by swap of properties and partly in money.⁴⁰²

237. For the Court, the Promise Agreement “denotes the unprincipled behavior of the parties signing documents with the sole purpose of giving legal effect to that which is not legal, and to deceive and corrupt the truth for their own financial benefit or interest, defrauding not only others, but also the legal institutions”.⁴⁰³

⁴⁰⁰ See Sales-Purchase Agreement Between Royal Realty and La Palma Argentina, 1 November 2012 (**Exhibit C-019bis**).

⁴⁰¹ See Asset Forfeiture Court Avocamiento Order, 17 August 2017 (**Exhibit C-057bis**), p. 110.

⁴⁰² See Asset Forfeiture Court Avocamiento Order, 17 August 2017 (**Exhibit C-057bis**), p. 2.

⁴⁰³ See Asset Forfeiture Court Avocamiento Order, 17 August 2017 (**Exhibit C-057bis**), p. 112.

238. The Court then recounted that a year after the private assignment of the Promise Agreement, the sale-purchase contract was amended on 27 June 2013, and apparently authenticated on 19 July 2013, modifying the price and terms in which the promotor can acquire the property.⁴⁰⁴ The Court concluded that (i) if Newport had any participation in the project it was only as its developer, but not as the owner or as having any rights *in rem*; (ii) that the Promise Agreement lacked the legal requisites for its validity, (iii) that even if it would be considered valid, as a promise it only provided a mere expectation to acquire a right over the property, but not a right on the property. Hence, the Court concludes, Newport could have an action to claim the performance of the Promise Agreement, assuming the Promise Agreement was legitimate, but that does not give it standing as an affected party in the Asset Forfeiture Proceedings.⁴⁰⁵
239. Finally, the Second Criminal Court questioned Newport’s entering, on 15 November 2013, into a *Fiducia Mercantil Irrevocable Inmobiliaria de Administración y Pagos* with Corficolombiana, given that, as stated above, Newport was not the owner of the Lot. Similarly surprising for the Court is the fact that the trust (“*fideicomiso*”) was legitimately created years later, that is, in 2015, by Public Deed No. 361, and not prior to the *Fiducia Mercantil* contract as it should have been. Further, in Deed No. 361 Newport does not act as Grantor – which would also be impossible - but appears as Beneficiary, to then expressly renounce this capacity and states “This scam must be reproached to the utmost by the authorities; it discredits its interest in this case or its status as concerned party, and thus is not recognized as such”.⁴⁰⁶
240. In short, based on the evidence provided and the structure through which the Meritage Project was conducted, the Court held that - beyond the question as to the validity of the sale-purchase

⁴⁰⁴ See Asset Forfeiture Court Avocamiento Order, 17 August 2017 (**Exhibit C-057bis**), p. 112 (“By way of this document the parties covenant as follows:

FIRST: By common agreement the parties agree to amend CLAUSE FOUR of the agreement as follows:“FOURTH: PRICE: The price to be paid will be as follows: a) In case THE DEVELOPER decides to purchase the entirety of the lots where the MERITAGE project is to be developed, it shall pay before May 1, 2015, the sum of THIRTY-TWO BILLION PESOS One thousand_ (\$32,000,000,000.00). If at the time of the deadline THE DEVELOPER lacks the sufficient cash flow for paying this sum, but remains Interested in acquiring the entirety of the lot, shall have an additional term of 12 months during which it will pay at the end of each month. A monthly interest of two percent (2%) of the balance owed.

b) In case THE DEVELOPER wishes to purchase the lots of land that will make up the project known as MERITAGE in stages or wishes to purchase the entirety of the land following the period described in the preceding number, the price of the lot shall be equivalent to nineteen and five tenths percent (19.5%) of the value of the stage (1) that will be bought, calculated on the average of the sales made at the time the Point of Equilibrium (POE) is reached. In no [sic] will the price of the lot be less than THIRTY-TWO BILLION (\$32,000,000,000.00)”.

⁴⁰⁵ See Asset Forfeiture Court Avocamiento Order, 17 August 2017 (**Exhibit C-057bis**), p. 113.

⁴⁰⁶ See Asset Forfeiture Court Avocamiento Order, 17 August 2017 (**Exhibit C-057bis**), p. 114.

contract, Newport had a legal relationship with La Palma Argentina, but not a legal relationship with the Lot. As such, if Newport had any rights, those would be personal in nature *vis-a-vis* La Palma Argentina, and not rights *in rem* regarding the Lot.

241. On 24 August 2017, Newport appealed the Court’s *avocamiento* decision,⁴⁰⁷ alleging that under Public Deed No. 361, Newport had eventual rights as beneficiary under of the lots to be transferred from the Parqueo Trust Agreement (“*Contrato de Fiducia Mercantil Irrevocable de Administración-Fideicomiso Meritage La Palma Argentina*”) to the Meritage Trust (“*Fideicomiso Meritage La Palma Argentina*”), and that by the time of the Court decision, Lot number 001-1198464 associated with Phases 1 and 6 of the Project had already been transferred from the Parqueo to the Meritage Trust. On 11 September 2017, Newport filed a supplemental brief to its appeal, adding further clarifications.⁴⁰⁸ The decision on appeal is still pending.

III. THE ARBITRAL TRIBUNAL LACKS JURISDICTION OVER THE CLAIMANTS

242. It is widely acknowledged that “the fundamental principle and basic rule in international adjudication” is that consent is the basis of jurisdiction.⁴⁰⁹ This means that the Arbitral Tribunal’s jurisdiction is based on, and subject to, the consent of the Parties. Accordingly, a failure to respect the precise terms of the Respondent’s consent to arbitrate cannot only lead to the conclusion that the Tribunal lacks jurisdiction over the dispute.

⁴⁰⁷ See Newport’s Appeal Against the *Avocamiento* Order, 24 August 2017 (**Exhibit C-195**).

⁴⁰⁸ See Newport’s Memorial Complementing Its Appeal, 11 September 2017 (**Exhibit C-196**).

⁴⁰⁹ *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/05, Dissenting Opinion of G. Abi-Saab, 28 October 2011 (**Exhibit RL-50**), ¶ 8. See also, e.g., *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012 (**Exhibit RL-58**), ¶¶ 174–175 (noting that “[g]eneral respect for State consent is also manifested by the fundamental principle of public international law according to which international courts and tribunals can only exercise jurisdiction over a State on the basis of its consent”. Therefore, “it is not possible to presume that consent has been given by a state. Rather, the existence of consent must be established”); *Eureka BV v. Slovak Republic*, UNCITRAL, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010 (**Exhibit RL-45**), ¶ 219 (“As a preliminary matter, the Tribunal must satisfy itself of the existence and extent of its jurisdiction”) and ¶ 220 (“It is important to bear in mind, as a paramount factor relating to jurisdiction, that the Tribunal is established by, and derives its powers (if any) from, the consent of the Parties”); Zachary Douglas, *The International Law of Investment Claims* (2009) (**Exhibit RL-130**), ¶ 125 (“Arbitral tribunals constituted to hear international or transnational disputes are creatures of consent. Their source of authority must ultimately be traced to the consent of the parties to the arbitration itself”) and ¶ 317 (“Consent of the respondent host state to investor/state arbitration in the investment treaty is the most important condition for the vesting of adjudicative power in the tribunal”); *Manuel García Armas et al. v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction, 13 December 2019 (**Exhibit RL-114**), ¶¶ 629-633; *ICS Inspection and Control Services Limited (United Kingdom) v. Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012 (**Exhibit RL-52**), ¶¶ 279-281.

243. As acknowledged by the Claimants, the scope of this Tribunal’s adjudicative power is circumscribed by the ICSID Convention and the FTA.⁴¹⁰ This means that the Claimants must meet all the jurisdictional requirements set out in both the ICSID Convention and the FTA as a condition of the Respondent’s consent to arbitration, and must prove the facts necessary to satisfy these requirements.⁴¹¹ If the Claimants cannot meet that burden, the Tribunal must decline jurisdiction.
244. The Claimants allege to be qualifying “investor[s]” who have made a protected “investment” in Colombia.⁴¹² In particular, the Claimants aver that (i) Mr. Seda owns shares in Newport S.A.S. (“Newport”) and Luxé by The Charlee S.A.S. (“Luxé”) through Royal Realty S.A.S. (“Royal Realty”),⁴¹³ (ii) JTE International Investments, Jonathan M. Foley and The Boston Enterprises Trust hold shares in Newport, and (iii) The Boston Enterprises Trust, Brian Hass, Stephen J. Bobeck, Monte G. Adcock, Justin T. Enbody, and Justin T. Caruso all hold shares in Luxé.⁴¹⁴
245. Even though the Claimants had over a year to prepare their Memorial on Merits and Damages, the evidence of their investment in Colombia is outdated and incomplete. For example, the

⁴¹⁰ See Claimants’ Memorial on Merits and Damages, ¶ 336. See also, e.g., *Fábrica de Vidrios Los Andes, CA and Owens-Illinois de Venezuela, CA v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Award, 13 November 2017 (**Exhibit RL-97**), ¶ 261 (“ICSID arbitration is only available if the conditions for access to ICSID arbitration in the investment treaty and the ICSID Convention have been satisfied. That is a proposition that is universally accepted in the jurisprudence [...]. It is a proposition that follows inexorably from the fact that the BIT and the ICSID Convention are two separate legal instruments in international law”) (emphasis in original).

⁴¹¹ See *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004 (**Exhibit RL-15**), ¶ 58; *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 (**Exhibit RL-33**), ¶¶ 58-64, 74; *Cementownia “Nowa Huta” S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009 (**Exhibit RL-38**), ¶ 114 (“The investor must evidence all the necessary conditions for the Arbitral Tribunal to affirm its jurisdiction”); *Vito G. Gallo v. The Government of Canada*, NAFTA, UNCITRAL, Award, 15 September 2011 (**Exhibit RL-49**), ¶ 277 (“[A] claimant bears the burden of proving that he has standing and the tribunal has jurisdiction to hear the claims submitted. If jurisdiction rests on the existence of certain facts, these must be proven at the jurisdictional stage”); *ICS Inspection y Control Services Limited (United Kingdom) v. Argentine Republic*, UNCITRAL, PCA Case. No 2010-9, Award on Jurisdiction, 10 February 2012 (**Exhibit RL-52**), ¶ 280 (“The burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given respondent”); *Apotex Inc. v. The Government of the United States of America*, NAFTA, UNCITRAL, Award on Jurisdiction and Admissibility, 14 June 2013 (**Exhibit RL-64**), ¶ 150 (“Apotex (as Claimant) bears the burden of proof with respect to the factual elements necessary to establish the Tribunal’s jurisdiction in this regard”); *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017 (**Exhibit RL-93**), ¶¶ 124, 126; *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017 (**Exhibit R-91**), ¶ 161; *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, 1 June 2012 (**Exhibit RL-55**), ¶ 2.11.

⁴¹² Claimants’ Memorial on Merits and Damages, ¶ 337.

⁴¹³ See Claimants’ Memorial on Merits and Damages, ¶¶ 2, 340.

⁴¹⁴ See Claimants’ Memorial on Merits and Damages, ¶¶ 340-342.

passports of Messrs. Stephen John Bobeck,⁴¹⁵ Monte Glenn Adcock⁴¹⁶ and Justin Timothy Enbody⁴¹⁷ seem to have expired as far back as 2010,⁴¹⁸ and the certificates of existence and good standing of Royal Realty⁴¹⁹ and Newport⁴²⁰ were issued almost three years ago, so it is impossible to verify the status of these Claimants, including their nationality, as of the date “on which the parties consented to submit such dispute to [] arbitration”,⁴²¹ *i.e.*, on 25 January 2019. With respect to JTE International Investments, the Claimants produced only a certificate of incorporation of 23 May 2013, which in addition to being over seven years old, fails to show who owns or control the company, thus preventing the Respondent from determining whether there are grounds to deny the benefits of the Treaty in accordance with Article 10.12 of the Treaty.

246. Moreover, the documents that the Claimants did produce show a series of irregularities that fatally affect the jurisdiction of the Arbitral Tribunal. As demonstrated below, the Claimants have failed to discharge their burden to show that consent to arbitrate exists in this case and, accordingly, that the Tribunal has jurisdiction to decide on the merits of the dispute. In particular, the Respondent shows that the Claimants have failed to prove that they made an “investment” under the FTA and the ICSID Convention (**III.A**) and that, even assuming *quod non* that the Claimants did make an “investment” in the Meritage Project, the vast majority of the Claimants’ claims do not concern the Meritage Project (**III.B**). Moreover, the Claimants’ have failed to show that the Boston Enterprises Trust (**III.C**) and Mr. Hass (**III.D**) are entitled to bring investment claims before this Tribunal. Each of these points constitutes an independent reason for the Arbitral Tribunal to partially or totally decline jurisdiction.

⁴¹⁵ See United States Passport of Stephen Bobeck, 16 March 2007 (**Exhibit C-085**).

⁴¹⁶ See United States Passport of Monte Adcock, 1 September 2000 (**Exhibit C-076**).

⁴¹⁷ See United States Passport of Justin Enbody, 20 May 2005 (**Exhibit C-082**).

⁴¹⁸ All three documents are in very bad quality and hardly readable.

⁴¹⁹ See Royal Realty S.A.S. Certificate of Existence and Good Standing, 20 December 2017 (**Exhibit C-012bis**). With respect to Royal Realty’s shareholders, the Claimants have only filed page 1 of the company’s share ledger. Pages 2 to 4 of the share ledger, and pages 15 and 16 of the Shareholders’ Meetings Book were reported as lost on 27 June 2017. See Royal Realty S.A.S. Share Ledger, 13 December 2016 (**Exhibit C-180**).

⁴²⁰ See Newport S.A.S. Certificate of Existence and Good Standing, 6 October 2017 (**Exhibit C-014bis**).

⁴²¹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Article 25(2).

A. THE CLAIMANTS HAVE FAILED TO PROVE THAT THEY HAVE MADE AN “INVESTMENT” AS REQUIRED UNDER THE FTA AND THE ICSID CONVENTION

247. The Arbitral Tribunal lacks jurisdiction *ratione materiae* because the Claimants have not established that they made an “investment” that can be protected by the FTA and the ICSID Convention. In particular, the Claimants have not satisfied the objective definition of “investment” of the ICSID Convention and the FTA because they have failed to prove that they made an economic contribution or commitment of capital or resources qualifying for treaty protection, and that there was an assumption of an investment risk.
248. Article 10.16 of the FTA sets forth the conditions for jurisdiction by defining which type of dispute can be brought to arbitration: (i) an investment dispute, (ii) that cannot be settled by consultation and negotiation, (iii) concerning the alleged breach of an obligation under Section A of the FTA, an investment authorization or an investment agreement, and (iv) to claim for a loss or damage incurred by the claimant by reason of, or arising out of, that breach.
249. To the extent that the Claimants are pursuing an arbitration under the aegis of the ICSID Convention, the conditions for jurisdiction set forth in Article 25(1) of the ICSID Convention are also applicable:

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.⁴²²

250. The Claimants aver that “satisfaction of the definition of ‘investment’ contained in the TPA is sufficient to qualify as an investment pursuant to the ICSID Convention”.⁴²³ This is incorrect. It is widely recognised that a dual test is required for the Tribunal to assert jurisdiction.⁴²⁴ The

⁴²² Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Article 25(1) (emphasis added).

⁴²³ Claimants’ Memorial on Merits and Damages, ¶ 353.

⁴²⁴ See, e.g., *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010 (**Exhibit RL-46**), ¶ 43 (“it is now beyond argument that there are two independent parameters”); *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16 July 2001 (**Exhibit RL-9**), ¶ 44 (“insofar as the option of jurisdiction has been exercised in favor of ICSID, the rights in dispute must also constitute an investment pursuant to Article 25 of the Washington Convention. The Arbitral Tribunal, therefore, is of the opinion that its jurisdiction depends upon the existence of an investment within the meaning of the Bilateral Treaty as well as that of the Convention, in accordance with the case law”); *Jan de Nul N.V., et al. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006 (**Exhibit RL-22**), ¶ 90 (“the jurisdiction of the Tribunal is contingent upon

Arbitral Tribunal must thus verify the existence of an “investment” both under the ICSID Convention and the FTA. If the Claimants’ purported “investment” is not protected under one of these instruments – or under neither, as in this case – then the Tribunal lacks jurisdiction.

251. Under the FTA, the term “investment” is defined as “every 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”.⁴²⁵ An investment may take diverse forms, provided that it has the “characteristics of an investment”.
252. Whilst the term “investment” is not expressly defined under the ICSID Convention arbitral case law has confirmed in a reiterated manner that “investment” is objective and autonomous notion.⁴²⁶ This objective notion is routinely apprehended through at least three criteria that cumulatively serve to characterize an economic operation as an “investment”: (i) a contribution; (ii) a certain duration; and (iii) an assumption of risk.⁴²⁷ Without one or more of these elements, there is no “investment” under the ICSID Convention, and therefore no jurisdiction *ratione materiae*.

the existence of an “investment” within the meaning of Article 25 of the ICSID Convention and of an investment under the BIT”); *Toto Costruzioni Generali S.P.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009 (**Exhibit RL-37**), ¶ 66 (“given that the case at hand is submitted to an ICSID Tribunal, the Tribunal agrees with Lebanon that, for this Tribunal to have jurisdiction, it is not sufficient that the dispute arises out of an investment as per the meaning of ‘investment’ given by the parties in the Treaty, but also as per the meaning of ‘investment’ under the ICSID Convention”).

⁴²⁵ United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 10.28 (emphasis added).

⁴²⁶ See, e.g., *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004 (**Exhibit RL-16**), ¶ 50; *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010 (**Exhibit RL-43**), ¶ 108; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012 (**Exhibit RL-59**), ¶ 213; *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016 (**Exhibit CL-106**), ¶ 187 (“A majority of ICSID tribunals hold that the term ‘investment’ in Article 25 of the ICSID Convention has an independent meaning”).

⁴²⁷ See, e.g., *Salini Costruttori S.p.A. and Italstrade S.p.A v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001 (**Exhibit RL-9**), ¶ 52; *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010 (**Exhibit RL-43**), ¶ 110; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012 (**Exhibit RL-59**), ¶ 219; *KT Asia Investment Group BV v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013 (**Exhibit RL-65**), ¶¶ 170, 173; *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016 (**Exhibit CL-106**), ¶ 187 (“On the basis of ICSID jurisprudence as it has evolved, it can now be considered that the definition of ‘investment’ comprises three components: a commitment or allocation of resources, risk, and duration”).

253. As demonstrated below, the Claimants’ purported “investment” lacks at least two of the criteria to qualify as a protected investment under the FTA and the ICSID Convention: the Claimants have not shown that they made a contribution or commitment of capital (**III.A.1**) or that they assumed any investment risk (**III.A.2**).

1. The Claimants have not shown that they made a commitment of capital

254. It is well-established in investment jurisprudence that in order to be afforded protection, the private party must make a “commitment” or “contribution” in the sense of a meaningful transfer of resources into the economy of the host State, *i.e.* Colombia.⁴²⁸ This requirement also finds concrete expression in the definition of “investment” in the FTA, which requires “the commitment of capital or other resources”.⁴²⁹

255. This is in line with the “underlying concept of investment”, which requires that the investor commits his own financial means at his own risk. In the words of the *Toto Costruzioni v. Lebanon* tribunal:

[T]he underlying concept of investment, which is economical in nature [...] implies an economical operation initiated and conducted by an entrepreneur using its own financial means and at its own financial risk, with the objective of making a profit within a given period of time.⁴³⁰

256. Despite the importance of showing the existence of an “investment” for the purposes of this treaty arbitration, the Claimants have failed to set out and substantiate their contribution of value in Colombia. In particular, there is no evidence that the Claimants have made any significant contribution of capital or other own resources into the Meritage Project. If anything, the financial statements of Newport provided by the Claimants record some COP \$ 5.1 million (less than USD 2 million) from the shareholders between 2013 and 2017.⁴³¹ Not only it is uncertain which shareholder made this payment, but in any event the amount is ludicrous in

⁴²⁸ See, e.g., *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005 (**Exhibit RL-20**), ¶ 131; Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2009) (**Exhibit RL-129**), p. 130.

⁴²⁹ United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 10.28.

⁴³⁰ *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009 (**Exhibit R-37**), ¶ 84 (emphasis added).

⁴³¹ See Newport Audited Financial Statements 2012-2013 (**Exhibit BRG-099**); Newport Audited Financial Statements 2014-2015 (**Exhibit BRG-100**); Newport Audited Financial Statements 2015-2016 (**Exhibit BRG-101**); Newport Audited Financial Statements 2016-2017 (**Exhibit BRG-102**); Newport Audited Financial Statements 2012-2013 (**Exhibit BRG-099**), p. 7; Newport Audited Financial Statements 2015-2016 (**Exhibit BRG-101**), p. 10.

comparison with the almost USD 90 million claimed by the Claimants for alleged losses in connection with the Meritage Project (*i.e.*, 2.2%).

257. In addition to the absence of evidence as to any significant commitment of capital, the Claimants have also failed to show that they have rights *in rem* over the Meritage Lot – where the Meritage Project was to be developed and which was subject to Asset Forfeiture Proceedings. In fact, as explained above, in early 2015, La Palma Argentina replaced Newport as the beneficiary of the Meritage La Palma Trust “for tax planning and efficiency purposes”.⁴³²
258. In sum, there is no evidence of the contribution or commitment of capital or other resources made by the Claimants with respect to their purported investment in the Meritage Project. Absent any showing by the Claimants of this crucial factual prerequisite for the Tribunal’s jurisdiction, as provided both under the FTA and the ICSID Convention, the Tribunal cannot but decline to hear this case.

2. The Claimants have not shown that they assumed any investment risk

259. The Claimants have also failed to demonstrate their assumption of any investment risk. Plainly, because the Claimants have failed to demonstrate that they made an investment, there is no investment that could be lost. Therefore, the Tribunal should dismiss this case for lack of jurisdiction *ratione materiae*, since the risk element of an investment is also missing.
260. It is trite to state that any economic activity entails a certain degree of risk. However, not any risk suffices to convert a commercial transaction into an investment qualifying for protection under the FTA and the ICSID Convention. In the words of the *Romak v. Uzbekistan* tribunal:

All economic activity entails a certain degree of risk. As such, all contracts - including contracts that do not constitute an investment - carry the risk of non-performance. However, this kind of risk is pure commercial, counterparty risk, or, otherwise stated, the risk of doing business generally. It is therefore not an element that is useful for the purpose of distinguishing between an investment and a commercial transaction.

An “investment risk” entails a different kind of *alea*, a situation in which the investor cannot be sure of a return on his investment, and may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations. Where

⁴³² See above, ¶ 68.

there is “risk” of this sort, the investor simply cannot predict the outcome of the transaction.⁴³³

261. It is evident that absent a contribution of value, there cannot be an investment risk. As the *Caratube v. Kazakhstan* tribunal explained, an investor has to show “an economic arrangement requiring a contribution to make a profit and thus involving some degree of risk”.⁴³⁴
262. In other words, the Claimants have failed to demonstrate a contribution or commitment of capital or resources, as a corollary the investment risk requirement is also not satisfied. If anything, the Claimants undertook a commercial risk, but this is not sufficient for either the purposes of the FTA or the ICSID Convention. As noted by investment tribunals, international investment agreements are not insurance policies against business risk.⁴³⁵ The Claimants’ claims must be rejected for this further reason.

B. IN ANY EVENT, THE VAST MAJORITY OF THE CLAIMANTS’ CLAIMS DO NOT CONCERN THE MERITAGE PROJECT

263. According to the Claimants, the Respondent’s treatment of the Meritage Project “adversely affected Claimants’ investments in other projects”.⁴³⁶ It is undisputed that a vast majority of the Claimants’ claims concern other projects and damages allegedly incurred in connection with, and directly arising out of, the Asset Forfeiture Proceedings adopted by the State in relation to the Meritage Lot. In fact, whilst the Claimants acknowledge that the Respondent’s purported unlawful measures were exclusively directly related to the Meritage Project,⁴³⁷ only 25% of the Claimants’ damages claims concern damages in connection with the Meritage Project.
264. Moreover, many of the Claimants do not even have any connection to the Meritage Project, the only project affected by the Asset Forfeiture Proceedings. In particular, Brian Hass, Stephen J. Bobeck, Monte G. Adcock, Justin T. Enbody and Justin T. Caruso only claim to hold shares in Luxé. Moreover, some of the claims brought by The Boston Enterprise Trust also concern the alleged losses in connection with its purported investment in Luxé, and many of the damages claimed by Mr. Seda concern alleged losses in connection with his purported investment in

⁴³³ *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009 (Exhibit RL-39), ¶¶ 229-230.

⁴³⁴ *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, 5 June 2012 (Exhibit CL-115), ¶ 360.

⁴³⁵ See below, ¶¶ 378-381.

⁴³⁶ Claimants’ Memorial on Merits and Damages, Section V.B.2.f.

⁴³⁷ Claimants’ Memorial on Merits and Damages, ¶ 7.

other projects allegedly in preliminary stages of development, including Cartagena Tierra Bomba, 450 Heights and Santa Fé de Antioquia.

265. Given that none of Brian Hass, Stephen J. Bobeck, Monte G. Adcock, Justin T. Enbody and Justin T. Caruso has any direct connection to the Meritage Project and that there is no direct connection between Colombia's alleged unlawful acts and the claims brought by Brian Hass, Stephen J. Bobeck, Monte G. Adcock, Justin T. Enbody, Justin T. Caruso and The Boston Enterprise Trust in connection with Luxé and by Mr. Seda in connection with any of his alleged projects other than the Meritage Project, the Tribunal should respectfully reject these claims.
266. Therefore, even assuming that the Tribunal has jurisdiction at all – which the Respondent respectfully denies – it could only render a decision concerning the Claimants' claims directly in connection with the Meritage Project.

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

267. The Boston Enterprises Trust should not be entitled to rely on the protection afforded by the ICSID Convention or the FTA to seek protection before this Tribunal since (i) it does not qualify as a “national of another Contracting State” under Article 25 of the ICSID Convention and, (ii) even if it did, which is denied, the circumstances of its establishment and acquisition of shares in Newport and Luxé prevent it from invoking the protection of the FTA with respect to its alleged investment in Newport and Luxé.
268. *First*, pursuant to Article 25 of the ICSID Convention, the jurisdiction of the Centre extends to legal disputes between a Contracting State and “a national of another Contracting State”. The term “national of another Contracting State” includes natural or juridical persons. According to Prof. Schreuer, this indicates that “legal personality is a requirement for the application of Art. 25(2)(b) [so] the mere association of individuals or of juridical persons would not qualify”.⁴³⁸ Thus, “for purposes of the Convention the quality of legal personality is inherent in the concept of ‘juridical person’ and is part of the objective requirements for jurisdiction”.⁴³⁹

⁴³⁸ Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2009) (Exhibit RL-129), ¶ 690.

⁴³⁹ Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2009) (Exhibit RL-129), ¶ 693.

269. Applying this principle, the tribunal in *LESI-DISPENTA v. Algeria* declined jurisdiction to hear a claim brought by a consortium of companies which did not have juridical personality.⁴⁴⁰ Similarly, in *Impregilo v. Pakistan* the tribunal concluded that an unincorporated consortium – which the tribunal qualified as “nothing more than a contractual relationship between different entities” – did not qualify as a legal person for ICSID purposes.⁴⁴¹ In particular, the tribunal held that:

[T]he consent to arbitration contained in the BIT here does not cover claims by GBC, since GBC is not a “juridical person” for the purposes of the ICSID Convention.⁴⁴²

270. The Boston Enterprises Trust is no different than the unincorporated consortium at stake in *Impregilo v. Pakistan*, being as well “nothing more than a contractual relationship between different entities”, but without legal personality. As such, it does not have standing before this Tribunal, constituted under the ICSID Convention.

271. *Second*, even if The Boston Enterprises Trust could be regarded as a “National of another Contracting Party” under the ICSID Convention and an “investor” for the purposes of the TPA, the circumstances under which The Boston Enterprises Trust was established and acquired its interest in Newport and Luxé prevent it from invoking the protection of the Treaty with respect to its alleged investment in Newport and Luxé.

272. The Boston Enterprises Trust was established on 9 August 2018 under the laws of Arizona, *i.e.*, just 8 days before the Claimants filed their notice of dispute on 17 August 2018.⁴⁴³ Following its creation, the Boston Enterprises Trust acquired (i) 86.722 shares in Newport (4.56%) on 9 August 2018,⁴⁴⁴ and (ii) 2.483.076 shares in Luxé (2.48%) on 8 November 2018.⁴⁴⁵ The

⁴⁴⁰ See *Consorzio Groupement L.E.S.I. – DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/08, Award, 10 January 2005 (**Exhibit-RL-17**), ¶¶ 37–41.

⁴⁴¹ *Impregilo, S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 (**Exhibit RL-18**), ¶¶ 131–139.

⁴⁴² *Impregilo, S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 (**Exhibit-RL18**), ¶ 134.

⁴⁴³ See The Boston Enterprises Trust Formation Instrument, 9 August 2018 (**Exhibit C-215**).

⁴⁴⁴ See Banco de Bogotá Mortgage, 2 June 2016 (**Exhibit C-227**), p. 14.

⁴⁴⁵ See Luxé by The Charlee S.A.S. Share Ledger, 15 January 2019 (**Exhibit C-226**), pp. 3, 25.

Claimants have not disclosed the identity of the transferor, alleging unexplained confidentiality concerns.⁴⁴⁶

273. The Claimants have also intentionally hidden the identity of the beneficiary of The Boston Enterprises Trust, as well as that of its Trustee(s),⁴⁴⁷ so it is not possible to identify who is benefiting from the transactions performed to gain access to the arbitration. The Claimants have not provided any explanation in this regard.

274. Given the dates of the transactions and the secrecy surrounding those involved in The Boston Enterprises Trust, it is not unreasonable to assume that the establishment of The Boston Enterprises Trust and its acquisition of the shares of Newport and Luxé were aimed at unduly gaining access to arbitration. Therefore, The Boston Enterprises would be prevented from invoking Treaty protection with respect to its alleged investment in Newport and Luxé.

D. THE CLAIMANTS HAVE FAILED TO SHOW THAT MR. HASS HAS STANDING IN THIS ARBITRATION

275. The Claimants allege that Mr. Hass subscribed to shares in Luxé on 30 March 2016.⁴⁴⁸ However, Mr. Hass is not listed as a shareholder in the Share Ledger of Luxé,⁴⁴⁹ the only piece of evidence to which the Claimants refer to support Mr. Hass's purported investment in Luxé.

276. Pursuant to the Share Ledger of Luxé, as of 30 March 2016, Haystack Holdings LLC holds 2,000,000 million shares in Luxé (2%).⁴⁵⁰ According to a letter dated 4 October 2018 and signed by "The Private Trust Corporation Limited" (to which there is no reference whatsoever in the Claimants' Memorial), Haystack Holdings LLC is solely owned by The Hass Family Investment Trust, a discretionary trust established on 15 November 1999 in accordance with the laws of the Commonwealth of The Bahamas. Brian Hass and Andrea Nass are the Settlers and Primary Beneficiaries of the Trust and the Ultimate Beneficial Owners of the assets.⁴⁵¹ The Private Trust Corporation Limited is the Trustee.

⁴⁴⁶ See Claimants email of 3 July 2020, requesting that Exhibits C-226 and C-227 be replaced to hide "confidential information", including the identity of the previous owner of the shares acquired in 2018 by The Boston Enterprises Trust.

⁴⁴⁷ See Claimants' Memorial on Merits and Damages, fn. 161.

⁴⁴⁸ See Claimants' Memorial on Merits and Damages, ¶ 52(e).

⁴⁴⁹ See Luxé by The Charlee S.A.S. Share Ledger, 15 January 2019 (**Exhibit C-226**).

⁴⁵⁰ See Luxé by The Charlee S.A.S. Share Ledger, 15 January 2019 (**Exhibit C-226**), p. 22.

⁴⁵¹ See Private Trust Corporation Letter, 4 October 2019 (**Exhibit C-222**).

277. The short letter signed by The Private Trust Corporation Limited raises more questions than answers: What powers do the beneficiaries and the trustee have to manage and control the trust assets? What rights do Mr. Hass has in connection with the Trust? How are said rights distributed between Mr. Hass and Ms. Hass? Does the trust agreement set forth any limitations or restrictions to the exercise of said rights? Does Mr. Hass have the power to assert claims in connection with the trust assets? Did Mr. Hass have the “proper corporate authority” under the laws of the Bahamas to bring claims before this Tribunal? Without an answer to these questions, it is not possible to determine whether Mr. Hass is entitled to bring claims before this Tribunal in connection with the shares indirectly held by the Trust of which he is one of the beneficiaries.

IV. IN ANY EVENT, THE CLAIMANTS’ CLAIMS ARE UNFOUNDED AND SHOULD BE DISMISSED IN THEIR ENTIRETY

278. Contrary to the Claimants’ allegations, assuming *quod non* that the Claimants are protected investors, and therefore entitled to substantive protection under the FTA, the Respondent has fully fulfilled its obligations *vis-à-vis* the Claimants. As demonstrated below, the Respondent did not expropriate the Claimants’ investment (**IV.A**), treated the Claimants’ investment fairly and equitably (**IV.B**), did not breach the obligation to accord national treatment to the Claimants or their alleged investment (**IV.C**), and accorded at all time full protection and security (**IV.D**).

A. THE RESPONDENT DID NOT EXPROPRIATE THE CLAIMANTS’ INVESTMENT

279. The Claimants allege that by initiating and implementing Asset Forfeiture Proceedings against the Meritage Project, Colombia has unlawfully expropriated their investment in the Meritage Project.⁴⁵²

280. Article 10.7 of the FTA provides in relevant part that:

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

⁴⁵² See Claimants’ Memorial on Merits and Damages, ¶ 357.

(d) in accordance with due process of law and Article 10.5.⁴⁵³

281. According to the FTA Contracting Parties' "shared understanding" contained in Annex 10-B of the FTA, Article 10.7.1 addresses two main situations: (i) direct expropriation and (ii) indirect expropriation. In either case, the Contracting Parties to the FTA expressly agreed that "[a]n action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment".⁴⁵⁴

282. Pursuant to paragraph 3 of Annex 10-B, the determination of whether an action or series of actions constitutes an indirect expropriation "requires a case-by-case, fact-based inquiry" considering, among other factors:

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

(iii) the character of the government action.⁴⁵⁵

283. Finally, paragraph 3(b) of Annex 10-B of the FTA provides that non-discriminatory regulatory actions of a State do not constitute indirect expropriation:

Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.⁴⁵⁶

284. It is undisputed that Colombia did not "nationalize or otherwise directly expropriated through formal transfer of title or outright seizure" any of the Claimants' alleged investments. The dispute between the parties lies on whether by initiating and implementing Asset Forfeiture Proceedings against the Meritage Lot, Colombia indirectly expropriated the Claimants purported investment in the Meritage Project.

⁴⁵³ United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 10.7.1.

⁴⁵⁴ United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Annex 10-B, para. 1.

⁴⁵⁵ United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Annex 10-B, para. 3(a).

⁴⁵⁶ United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Annex 10-B, para. 3(b) (emphasis added). The FTA expressly indicates that the list of "legitimate public welfare objectives" in the provision is not exhaustive.

285. As demonstrated below, the Respondent did not expropriate the Claimants' investment. The Respondent first sets out the relevant core components of the indirect expropriation standard in Article 10.7 and Annex 10-B of the FTA (**IV.A.1**), to then demonstrate that the Respondent has not expropriated the Claimants' investment (**IV.A.2**).

1. The legal standard

286. The Claimants' claim that the Respondent has unlawfully expropriated the Claimants' investment in Colombia must be assessed in light of the following considerations.

287. *First*, it is well established in international law that States measures may affect an investor's investment to the point of destroying its value, without necessarily entitling the investor to compensation. This applies most notably to measures of general application, which are not abusive, unreasonable or discriminatory.⁴⁵⁷

288. This principle is expressly enshrined in the FTA, which provides that "non-discriminatory actions [] that are designed and applied to protect legitimate public welfare objectives" do not constitute expropriations.⁴⁵⁸

289. The principle excluding the expropriatory nature of measures adopted in the exercise of the host State's right to regulate in the public interest has been embraced by investment tribunals, even in the absence of an express treaty provision. For example, in *Saluka v. Czech Republic* the tribunal held that the principle forms part of customary international law:

[T]he principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are "commonly accepted as

⁴⁵⁷ See, e.g., Louis B. Sohn and Richard R. Baxter, *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens*, (1961) 55 AM. J. INT'L L. (**Exhibit RL-121**), pp. 545, 554, Article 10(5) ("5. An uncompensated taking of property of an alien or a deprivation of the use or enjoyment of property of an alien which results from the execution of the tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health, or morality; or from the valid exercise of belligerent rights; or is otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful, provided: (a) it is not a clear and discriminatory violation of the law of the State concerned; (b) it is not the result of a violation of any provision of Articles 6 to 8 of this Convention; (c) it is not an unreasonable departure from the principles of justice recognized by the principal legal systems of the world; and (d) it is not an abuse of the powers specified in this paragraph for the purpose of depriving an alien of his property"); UNCTAD, *Expropriation, Series on Issues in International Investment Agreements II* (**Exhibit CL-127**), pp. 12-13.

⁴⁵⁸ United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Annex 10-B, para. 3(b).

within the police power of States” forms part of customary international law today.⁴⁵⁹

290. This means that when assessing an expropriation claim, a tribunal should clearly distinguish between measures adopted by a State in exercise of its police powers and expropriatory measures. In the words of the *Suez v. Argentina* tribunal:

As numerous cases have pointed out, in evaluating a claim of expropriation it is important to recognize a State’s legitimate right to regulate and to exercise its police power in the interests of public welfare and not to confuse measures of that nature with expropriation.⁴⁶⁰

291. As noted by the tribunal in *LG&E v. Argentina*, a measure adopted in pursuance of a social or general welfare purpose, even if it interferes with an investor’s ownership rights, cannot give rise to liability (except if it is “obviously disproportionate”):

In order to establish whether State measures constitute expropriation under Article IV(1) of the Bilateral Treaty, the Tribunal must balance two competing interests: the degree of the measure’s interference with the right of ownership and the power of the State to adopt its policies.

[...]

With respect to the power of the State to adopt its policies, it can generally be said that the State has the right to adopt measures having a social or general welfare purpose. In such a case, the measure must be accepted without any imposition of liability, except in cases where the State’s action is obviously disproportionate to the need being addressed.”⁴⁶¹

⁴⁵⁹ *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 (**Exhibit CL-042**), ¶ 262; *Philip Morris Brand S&A, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016 (**Exhibit RL-88**), ¶¶ 292-301. See also *Methanex Corporation v. United States*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 (**Exhibit CL-040**), Part II, Chapter D, ¶ 7 (“as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios [sic], a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation”).

⁴⁶⁰ *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010 (**Exhibit RL-44**), ¶ 128 and ¶ 148 (“The police powers doctrine is a recognition that States have a reasonable right to regulate foreign investments in their territories even if such regulation affects investor property rights. In effect, the doctrine seeks to strike a balance between a State’s right to regulate and the property rights of foreign investors in their territory”).

⁴⁶¹ *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 (**Exhibit CL-045**), ¶¶ 189, 195 (emphasis added). See also, e.g., *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1,

292. *Second*, in order to constitute an expropriation under the FTA, an action or series of actions has to “interfere[] with a tangible or intangible property right or property interest in an investment”.⁴⁶² Therefore, that the investor had a right having the characteristics of “a property right or property interest in an investment” is a condition *sine qua non* for an expropriation. There cannot be an expropriation unless the investor had a property right or interest with which the State measure interfered.
293. Even in the absence of express treaty language, investment tribunals have held that expropriation claims are only cognizable in “respect of rights that [have] the characteristics of property rights” under domestic law.⁴⁶³ The rationale for this requirement was summarized by Prof. Douglas as follows:

There are compelling reasons of justice that demand that only property rights be considered as the potential objects of indirect or de facto expropriations. It is widely accepted that a state can be liable for an indirect or de facto expropriation regardless of whether the state intended to expropriate the rights in question or whether it even had actual knowledge of the existence of the rights. This is defensible because everyone, including the state and its organs and officials, has constructive notice of property rights. Property rights are good against the whole world.

[...]

[Therefore], a business activity or the activity of making a profit cannot be characterized as property interests and thus be the object of an expropriation.⁴⁶⁴

Decision on Liability, 27 December 2010 (**Exhibit CL-079**), fn 232 (“When foreign investors complain of State regulatory actions under a BIT, in order to decide whether the measures also amount to an indirect expropriation (a so-called regulatory taking) a tribunal must take into account their features and object so as to assess their proportionality and reasonableness in respect of the purpose which is legitimately pursued by the host State. These regulatory measures, when judged as legitimate, proportionate, reasonable and non-discriminatory, do not give rise to compensation in favour of foreign investors”).

⁴⁶² United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Annex 10-B, para. 1.

⁴⁶³ *Accession Mezzanine Capital LP and Danubius Kereskedőház Vagyonkezelő Zrt. v. Hungary*, ICSID Case No. ARB/12/3, Award, 17 April 2015 (**Exhibit RL-77**), ¶ 158. See also *Emmis International Holding et al. v. Republic of Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014 (**Exhibit RL-67**), ¶¶ 159, 169; Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009) (**Exhibit RL-128**), p. 351.

⁴⁶⁴ Zachary Douglas, *Property, Investment and the Scope of Investment Protection Obligations* in Z. Douglas et al (ed.) *The Foundation of International Investment Law: Bringing Theory into Practice* 363 (2014) (**Exhibit RL-135**), pp. 376–377 (emphasis added).

294. *Third*, the FTA also sets out three non-exhaustive factors which should be considered when conducting a case-by-case assessment of whether a government action constitutes indirect expropriation:

- The economic impact of the government action: the Claimants must demonstrate “that the government measure at issue destroyed all, or virtually all, of the economic value of its investment”. This deprivation must be “more than merely ‘ephemeral’”.⁴⁶⁵ When assessing the economic impact, “the economic value of an investment must be reasonably ascertainable, and not speculative, indeterminate, or contingent on unforeseen or uncertain future events”.⁴⁶⁶

The FTA clearly notes that the fact that a government action “has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred”. In other words, in the absence of other elements of an indirect expropriation, a governmental measure that results in a reduction in the economic value of an investment does not constitute an indirect expropriation.

- Interference with reasonable investment-backed expectations: this requires an objective inquiry of “the regulatory climate existing at the time the property was acquired in the particular sector in which the investment was made”.⁴⁶⁷ Any “specific commitments” made by the State should also be taken into account when assessing the reasonableness of the Claimants’ expectations.⁴⁶⁸

As explained by one commentator, this factor requires the investor “to prove that his/her investment was based on a state of affairs that did not include the challenged regulatory regime. The claim must be objectively reasonable and not based entirely upon the investor’s subjective expectations”.⁴⁶⁹

- The character of the government action: this element considers the nature and character of the government action, including “whether ‘it arises from some public program adjusting

⁴⁶⁵ *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2, Submission of the United States of America, 21 June 2019 (**Exhibit RL-110**), ¶ 24.

⁴⁶⁶ *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2, Submission of the United States of America, 21 June 2019 (**Exhibit RL-110**), ¶ 25. As noted by the US, the principles applicable to valuation of damages are applicable.

⁴⁶⁷ *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2, Submission of the United States of America, 21 June 2019 (**Exhibit RL-110**), ¶ 26. In *Lone Pine Resources Inc. v. The Government of Canada*, ICSID Case No. UNCT/15/2, Submission of the United States of America, 16 August 2017 (**Exhibit RL-94**), the USA stated that the “objective inquiry of the reasonableness of the claimant’s expectations [] ‘depend in part on the nature and extent of governmental regulation in the relevant sector’”. This is based on the assumption that “an investor entering an area traditionally subject to extensive regulation must do so with awareness of the regulatory situation”. See also ¶ 14 and fn 21.

⁴⁶⁸ See *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2, Submission of the United States of America, 21 June 2019 (**Exhibit RL-110**), fn. 21.

⁴⁶⁹ Katia Yannaca-Small, *Arbitration under international investment agreements: a guide to the key issues* (OUP 2018) (**Exhibit RL-138**), p. 590.

the benefits and burdens of economic life to promote the common good”⁴⁷⁰ Thus, “where an action is a *bona fide*, non-discriminatory regulation, it will not ordinarily be deemed expropriatory”⁴⁷¹ Notably, “[w]here a State proclaims that it is enacting a non-discriminatory statute or regulation for a *bona fide* public purpose, courts and tribunals rarely question that characterization”⁴⁷²

Investment tribunals, including the tribunal in *Starret Housing v. Iran* on which the Claimants rely, have acknowledged that the “assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law”⁴⁷³ Also in *CME v. Czech Republic*, on which the Claimants also rely, the tribunal noted that “deprivation of property and/or rights must be distinguished from ordinary measures of the State and its agencies in proper execution of the law”⁴⁷⁴ The tribunal further explained that regulatory measures “are common in all types of legal and economic systems in order to avoid use of private property contrary to the general welfare of the (host) State”⁴⁷⁵ In other words, a government’s regulatory actions to ensure that private property is not used contrary to the general welfare of the host State is deemed not to constitute an indirect expropriation, even if it involves the assumption of control over property by a government.

295. Finally, it is well-established that an expropriation requires the total and permanent deprivation of property rights. Absent a total and permanent deprivation, it would hardly make sense to compensate an expropriation according “to the fair market value of the expropriated investment immediately before the expropriation took place”⁴⁷⁶
296. This has been confirmed by investment tribunals. For example, in *Busta v. Czech Republic* the tribunal held that for an expropriation to occur, “there must be a permanent and irreversible deprivation”⁴⁷⁷ Similarly, in *Plama v. Bulgaria*, on which the Claimants relied,⁴⁷⁸ the tribunal

⁴⁷⁰ *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2, Submission of the United States of America, 21 June 2019 (**Exhibit RL-110**), ¶ 27.

⁴⁷¹ *Lone Pine Resources Inc. v. The Government of Canada*, ICSID Case No. UNCT/15/2, Submission of the United States of America, 16 August 2017 (**Exhibit RL-94**), ¶ 16.

⁴⁷² *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2, Submission of the United States of America, 21 June 2019 (**Exhibit RL-110**), ¶ 27.

⁴⁷³ *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 (**Exhibit CL-011**), p. 52.

⁴⁷⁴ *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001 (**Exhibit CL-027**), ¶ 603.

⁴⁷⁵ *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001 (**Exhibit CL-027**), ¶ 603.

⁴⁷⁶ United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 10.7.2(b).

⁴⁷⁷ *Ivan Peter Busta and James Peter Busta v. Czech Republic*, SCC Case No. V 2015/014, Award, 10 March 2017 (**Exhibit RL-92**), ¶ 389.

considered “the irreversibility and permanence” of the measures as one of the decisive elements in the assessment of an expropriation claim.⁴⁷⁹

297. This means that temporary measures are not, in nature, expropriatory. For example, in *A.M.F. v. Czech Republic* the tribunal had to determine whether the temporary seizure of an aircraft in the context of a bankruptcy proceeding constituted an expropriation. The tribunal held that:

The temporary sequestration of disputed assets during the course of bankruptcy proceedings can amount to expropriation only if they were carried out unlawfully, in bad faith or with an expropriatory purpose, or if upon determination that the asset does not properly belong in the bankruptcy estate, the assets (or their fair value at the time of such determination) are nonetheless not returned to the owner.⁴⁸⁰

298. In particular, the *A.M.F. v. Czech Republic* tribunal considered that bankruptcy proceedings “are within the Czech Republic’s lawful regulatory power” and that as part of the bankruptcy proceedings, States are allowed to “temporarily sequester possible assets of a bankrupt estate to prevent dissipation”.⁴⁸¹ The tribunal further noted that all the requirements of Czech law were

⁴⁷⁸ The Claimants erroneously refer to the Decision on Jurisdiction, but they refer to the Award.

⁴⁷⁹ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 (**Exhibit RL-030**), ¶ 193 (“The Arbitral Tribunal considers that the decisive elements in the evaluation of Respondent’s conduct in this case are therefore the assessment of (i) substantially complete deprivation of the -economic use and enjoyment of the rights to the investment, or of identifiable, distinct parts thereof (*i.e.*, approaching total impairment); (ii) the irreversibility and permanence of the contested measures (*i.e.*, not ephemeral or temporary); and (iii) the extent of the loss of economic value experienced by the investor.”). *See also*, e.g., *Bernhard Friedrich Arnd Rüdiger von Pezold, et al. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015 (**Exhibit CL-102**), ¶ 516 (the tribunal dismissed the claimants’ indirect expropriation claim relating to the respondent’s refusal to release foreign currency to repay a loan on the basis that it was unclear whether this situation was permanent); *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 (**Exhibit CL-045**), ¶ 200 (“Without a permanent, severe deprivation of LG&E’s rights with regard to its investment, or almost complete deprivation of the value of LG&E’s investment, the Tribunal concludes that these circumstances do not constitute expropriation”); *Técnicas Medioambientales, TECMED S.A. v. The United Mexican States*, ICSID Case No. Arb (AF)/00/2, Award, 29 May 2003 (**Exhibit CL-032**), ¶ 116 (“it is understood that the measures adopted by a State, whether regulatory or not, are an indirect *de facto* expropriation if they are irreversible and permanent”); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 (**Exhibit CL-023**), ¶¶ 287-288 (“In this case, the Interim Order and the Final Order were designed to, and did, curb SDMI’s initiative, but only for a time. [...] An opportunity was delayed. The Tribunal concludes that this is not an expropriation case”) (emphasis added); *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 (**Exhibit CL-075**), ¶ 140 (the tribunal found that the measures taken by Argentina to cope with the financial crisis “did not constitute a permanent and substantial deprivation” of the investments).

⁴⁸⁰ *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic*, PCA Case No. 2017-15, Final Award, 11 May 2020 (**Exhibit RL-119**), ¶ 628.

⁴⁸¹ *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic*, PCA Case No. 2017-15, Final Award, 11 May 2020 (**Exhibit RL-119**), ¶ 624.

“duly respected”, and that when claims were brought before the Czech courts, the courts considered the claims and rendered decisions, which were duly appealed and also decided, “consistent with the requirements of Czech law, and in general without undue delay”.⁴⁸² Therefore, the tribunal concluded that the process was a lawful exercise of the Czech Republic’s legitimate police powers and could not constitute expropriation.⁴⁸³

2. The Respondent’s conduct does not meet the standard for an unlawful expropriation

299. The Claimants allege that by initiating and implementing the Asset Forfeiture Proceedings against the Meritage Lot, Colombia unlawfully expropriated the Claimants’ investment in the Meritage Project.⁴⁸⁴ According to the Claimants, the measures adopted by Colombia were “based solely on a fabricated story of a convicted drug trafficker”⁴⁸⁵ and had “an effect equivalent to direct expropriation”.⁴⁸⁶

300. As demonstrated below, the Claimants’ allegations are misconceived both from a factual and legal perspective. The Respondent’s acts do not constitute an expropriation – let alone an unlawful expropriation – of the Claimant’s purported investment in the Meritage Project. Rather, the Asset Forfeiture Proceedings initiated by Colombia are a legitimate exercise of Colombia’s regulatory powers (**IV.A.2(i)**). Moreover, a proper analysis of the factors set forth in the FTA and international investment law shows that the acts of the Colombian authorities cannot be deemed expropriatory (**IV.A.2(ii)**).

(i) *The Asset Forfeiture Proceedings are a legitimate exercise of Colombia’s regulatory powers*

301. As a preliminary matter, it bears recalling that asset forfeiture was enshrined in the 1991 Colombian Constitution “as an instrument for the pursuit of assets acquired through illicit enrichment”.⁴⁸⁷ Already in 1997 – *i.e.*, ten years before Mr. Seda’s arrival to Colombia – the Colombian Constitutional Court had held that asset forfeiture is strictly related to the

⁴⁸² *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic*, PCA Case No. 2017-15, Final Award, 11 May 2020 (**Exhibit RL-119**), ¶ 627.

⁴⁸³ *See A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic*, PCA Case No. 2017-15, Final Award, 11 May 2020 (**Exhibit RL-119**), ¶ 627.

⁴⁸⁴ *See* Claimants’ Memorial on Merits and Damages, ¶ 369.

⁴⁸⁵ Claimants’ Memorial on Merits and Damages, ¶ 372.

⁴⁸⁶ Claimants’ Memorial on Merits and Damages, ¶ 374.

⁴⁸⁷ Medellín Expert Report, ¶ 18.

conception of private property in the Colombian Constitution and is, by nature, not expropriatory.⁴⁸⁸ It is therefore clear – as it should have been to the Claimants at all points – that the Colombian State has the sovereign power to initiate asset forfeiture proceedings in the circumstances and subject to the principles and guarantees provided by the Colombian Constitution and law.

302. In this case, the Asset Forfeiture Proceedings were a legitimate exercise of Colombia’s regulatory powers. In particular, the Asset Forfeiture Proceedings against the Meritage Project were a measure designed and applied to protect legitimate public welfare objectives **(IV.A.2(i)(a))**, on a non-discriminatory basis **(IV.A.2(i)(b))**, and were reasonable and proportionate measures adopted in accordance with Colombian law and following the due process of law **(IV.A.2(i)(c))**. On this basis alone, the Claimants’ expropriation claim must fail.

(a) The Asset Forfeiture Proceedings were designed and applied to protect legitimate public welfare objectives

303. The Claimants’ experts have acknowledged that the purpose of asset forfeiture is “to fight organized crime through the rejection of wealth originating in illicit activities, such as drug trafficking”⁴⁸⁹ and, by attacking organized crime, to “obtain social and economic stability in the country”.⁴⁹⁰ Thus, it cannot be contested that the Asset Forfeiture Law was enacted to protect a legitimate public welfare objective, namely, the maintenance of social and economic stability in the country.⁴⁹¹

304. As demonstrated above, the Asset Forfeiture Proceedings against the Meritage Lot were initiated and carried out in accordance with the Asset Forfeiture Law.⁴⁹² As such, the concrete Asset Forfeiture Proceedings could not pursue an objective different than that underlying the principle of asset forfeiture, namely, maintaining the social and economic stability in Colombia (and in particular in the Medellín region which, as explained, had been particularly impacted by organized crime).

⁴⁸⁸ See Decision C-374/97 of the Colombian Constitutional Court, 13 August 1997 (**Exhibit R-12**), pp. 3-5. See also Pinilla Expert Report, ¶¶ 16-18, 34-35; Caro Witness Statement, ¶¶ 5-8.

⁴⁸⁹ Martínez Expert Report, ¶ 17.

⁴⁹⁰ Medellín Expert Report, ¶ 18. See also Martínez Expert Report, ¶ 18.

⁴⁹¹ See Pinilla Expert Report, ¶¶ 20-21, 40.

⁴⁹² See above, Section II.F. Contrary to the Claimants’ allegations (Claimants’ Memorial on Merits and Damages, ¶¶ 403-404), whether the investigation was initially launched on the basis of “a fabricated story about a kidnapping” is irrelevant. As explained above, the precautionary measures were imposed, and the Asset Forfeiture Proceedings were initiated, on the basis of reliable evidence of illegalities in the chain of transfer of the Meritage Lot.

305. Although the FTA does not expressly mention the maintenance of social and economic stability in the host State as a “legitimate public welfare objective”, the Treaty provides that the list of legitimate public welfare objectives included in Annex 10-B is “not exhaustive”.⁴⁹³ In line with this provision, investment tribunals have recognized that a host State should be “free to judge for itself what it considers useful or necessary for the public good”.⁴⁹⁴ This means that States should be afforded “broad deference”⁴⁹⁵ to design and implement measures to protect their public welfare objectives.⁴⁹⁶ On this basis, the tribunal in *Vestey v. Venezuela* concluded that “[i]nternational tribunals should thus accept the policies determined by the state for the common good, except in situations of blatant misuse of the power to set public policies”.⁴⁹⁷
306. In practice, investment tribunals have considered that health, security, moral, enforcement of private property laws or bankruptcy laws constitute, among others, legitimate public welfare objectives.⁴⁹⁸ More particularly, both Colombia and the United States have included in their investment protection agreements “safety” or “security” as legitimate public welfare objectives.⁴⁹⁹

⁴⁹³ United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Annex 10-B.

⁴⁹⁴ *Vestey Group Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016 (**Exhibit CL-106**), ¶ 294.

⁴⁹⁵ *Vestey Group Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016 (**Exhibit CL-106**), ¶ 294.

⁴⁹⁶ See also Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009) (**Exhibit RL-128**), p. 365 (“In making the assessment of whether the measure in question was reasonably necessary, the state will enjoy a margin of appreciation”).

⁴⁹⁷ *Vestey Group Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016 (**Exhibit CL-106**), ¶ 294. The United States has also acknowledged that when a host State has articulated plausible reasons for enacting the measures in question, “it is not appropriate to search for a State’s alleged ulterior motives”. See *Lone Pine Resources Inc. v. The Government of Canada*, ICSID Case No. UNCT/15/2, Submission of the United States of America, 16 August 2017 (**Exhibit RL-94**), ¶ 17.

⁴⁹⁸ See, e.g., *Philip Morris Brand SÀRL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016 (**Exhibit RL-88**), ¶¶ 418, 429; *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015 (**Exhibit RL-80**), ¶ 445; *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic*, PCA Case No. 2017-15, Final Award, 11 May 2020 (**Exhibit RL-119**), ¶¶ 537-538.

⁴⁹⁹ See, e.g., Agreement for the Promotion and Protection of Investments between the Republic of Colombia and the Republic of India, signed on 10 November 2009 (**Exhibit RL-149**), Article 6(2)(c); Agreement for the Reciprocal Promotion and Protection of Investments between the Republic of Colombia and the Republic of France, signed on 10 July 2014 (**Exhibit RL-151**), Article 6(2); Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia, signed on 17 March 2010 (**Exhibit RL-150**), Article VI(2)(c); Bilateral Agreement for the Promotion and Protection of Investments between the Government of the Republic of Colombia and the Government of the People’s Republic of China, signed on 22 November 2008 (**Exhibit RL-148**), Article 4(2)(c); Treaty between the United States of America and the Oriental Republic of Uruguay concerning the Encouragement and

307. Therefore, the Asset Forfeiture Proceedings were designed and applied to protect legitimate public welfare objectives, including the maintenance of public security and social and economic stability in Colombia.

(b) Colombia did not discriminate against the Claimants

308. Contrary to the Claimants' assertions,⁵⁰⁰ the Respondent did not discriminate against the Claimants. The Claimants' allegations that the measures adopted by Colombia were discriminatory are based on the assumption that discrimination exists "where there is 'different treatments to different parties'", without more.⁵⁰¹ This is incorrect.

309. Investment tribunals have held that discrimination "requires more than different treatment".⁵⁰² Thus, a three-pronged test has commonly been applied to determine whether a State measure is discriminatory. According to this test, originally formulated by the tribunal in *Saluka v. Czech Republic*, State conduct is discriminatory if "(i) similar cases are (ii) treated differently (iii) and without reasonable justification".⁵⁰³ In the words of the *Quiborax v. Bolivia* tribunal, this means that:

Reciprocal Protection of Investment, signed on 14 November 2005 (**Exhibit RL-142**), Annex B(4)(b); Treaty between the Government of the United States of America and the Government of the Republic of Rwanda concerning the Encouragement and Reciprocal Protection of Investment, signed on 19 February 2008 (**Exhibit RL-147**), Annex B(4)(b); Free Trade Agreement between Australia and the United States of America, signed on 18 May 2004 (**Exhibit RL-141**), Annex 11-B(4)(b); Free Trade Agreement between the Government of the United States of America and the Government of the Republic of Chile, 6 June 2003 (**Exhibit RL-140**), Annex 10-D(4)(b); Free Trade Agreement between the United States and the Republic of Korea, signed on 30 June 2007 (**Exhibit RL-146**), Annex 11-B(3)(b); Treaty between the United States of America and the Kingdom of Morocco concerning the Encouragement and Reciprocal Protection of Investments, signed on 22 July 1985 (**Exhibit RL-139**), Article IX(1); Agreement between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area, signed on Oman-USA FTA, signed on 19 January 2006 (**Exhibit RL-143**), Article 10-B(b); Free Trade Agreement between the United States and Panama, signed on 28 June 2007 (**Exhibit RL-145**), Annex 10-B(4)(b); and Peru – United States Trade Promotion Agreement, signed on 12 April 2006 (**Exhibit RL-144**), Annex 10-B(3)(b).

⁵⁰⁰ Claimants' Memorial on Merits and Damages, ¶¶ 397-401.

⁵⁰¹ Claimants' Memorial on Merits and Damages, ¶ 397.

⁵⁰² *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 (**Exhibit CL-072**), ¶ 261.

⁵⁰³ *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 (**Exhibit CL-042**), ¶ 313. See also *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015 (**Exhibit CL-103**), ¶ 247; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 (**Exhibit CL-072**), ¶ 261.

[T]here are situations that may justify differentiated treatment, a matter to be assessed under the specific circumstances of each case.⁵⁰⁴

310. Regarding element (i), the assessment of whether the cases are similar or in “like circumstances” is fact-specific and cannot be carried out in the abstract. In other words, an investment/investor and the identified comparator will inevitably be similar and dissimilar in all sorts of respects that are wholly irrelevant to the measure that is alleged to be discriminatory. The similarities and dissimilarities that are irrelevant to the measure alleged to be discriminatory are *ipso facto* irrelevant to a determination of “like circumstances”. Accordingly, before determining whether an investment/investor and identified comparator are in like circumstances, a tribunal must determine what the relevant circumstances are given the discriminatory measure that is alleged.

311. As noted by the tribunal in *Cargill v. Mexico*:

In the Tribunal’s view, the fact that a difference in circumstances exists in the abstract is not enough; the difference has to be relevant in the context of the particular measure being imposed.

[...]

Thus, in both *GAMI* and *Pope & Talbot*, “like circumstances” was determined by reference to the rationale for the measure that was being challenged. It was not a determination of “like circumstances” in the abstract. The distinction between those affected by the measure and those who were not affected by the measure could be understood in light of the rationale for the measure and its policy objective. Indeed, it is possible that in respect of other, different measures, the mills in *GAMI* and the lumber producers in *Pope & Talbot* could have been found to be in “like circumstances”.⁵⁰⁵

312. Similarly, as indicated by the tribunal in *Total v. Argentina*, “[t]he elements that are at the basis of likeness vary depending on the legal context in which the notion has to be applied and the specific circumstances of any individual case”.⁵⁰⁶ In particular, “[t]he similarity of the

⁵⁰⁴ *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015 (**Exhibit CL-103**), ¶ 247.

⁵⁰⁵ *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 (**Exhibit CL-068**), ¶¶ 203, 206 (emphasis added). *See also Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, NAFTA, Award on the Merits of Phase 2, 10 April 2001 (**Exhibit CL-026**), ¶¶ 75–76 (“In other words, the application of the like circumstances standard will require evaluation of the entire fact setting surrounding, in this case, the genesis and application of the Regime. An important element of the surrounding facts will be the character of the measures under challenge”).

⁵⁰⁶ *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010 (**Exhibit CL-079**), ¶ 210.

investments compared and of their operations is a precondition for a fruitful comparison”.⁵⁰⁷ Also, the tribunal in *Renée Rose v. Peru* noted that “discrimination only exists between groups or categories of persons who are in a similar situation, after having assessed, on a case-by-case basis, the relevant circumstances”.⁵⁰⁸

313. Applying these principles, the tribunal in *Rusoro v. Venezuela* found that even though the claimant and other mining companies were both active in the mining sector, they were not in “like circumstances” because the claimant – as a large miner – was not in a similar situation as other small scale miners.⁵⁰⁹ Similarly, in assessing the existence of “like circumstances”, the tribunal in *Renée Rose v. Peru* found it irrelevant that the two banks being compared operated in the same sector and were regulated by a common regulator.⁵¹⁰ In short, when performed in the abstract, this exercise gets the Claimants nowhere. A finding of “like circumstances” must be determined by reference to the measure that is being challenged.
314. On the basis of the above, the Claimants’ contention that the Meritage Lot was comparable to the neighbouring lot cannot be accepted. As a matter of fact, it was due to Lopez Vanegas’s complaint that the Attorney General’s Office started investigating the origin of the Meritage Lot. That is, the fact that the Meritage Lot was made the object of investigations was somewhat haphazard. Yet, once the Attorney General’s Office found evidence of the illicit origin of the Meritage Lot, it had to move forward with the Asset Forfeiture Proceedings.⁵¹¹ In other words, the measures adopted by the Respondent were not the result of a whim of the Attorney General’s Office handpicking the Meritage Project for asset forfeiture, but followed as the direct results of alerts ignited by the investigations commenced as a result of Lopez Vanegas’s complaint.⁵¹²

⁵⁰⁷ *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010 (**Exhibit CL-079**), ¶ 344.

⁵⁰⁸ *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014 (**Exhibit RL-66**), ¶ 396.

⁵⁰⁹ *See Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016 (**Exhibit CL-108**), ¶ 563.

⁵¹⁰ *See Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014 (**Exhibit RL-66**), ¶ 396 (“The banks cited by the Claimant are in the same sector (banking) and are regulated by a common entity, the SBS. Notwithstanding this common denominator, the Tribunal considers that, as the banking sector is a sensitive area for any country, there are marked differences between the various banks operating in it”).

⁵¹¹ *See Reyes Expert Report*, ¶¶ 11-12; *Pinilla Expert Report*, ¶¶ 37-38.

⁵¹² *See above*, Section II.F.

315. Regarding element (ii), in order for an investment/investor to be treated differently to the identified comparator, there must be a discriminatory act or measure. Such discriminatory act or measure must be applied and produce “some not-insignificant practical negative impact”.⁵¹³
316. In this case, even if it were to be understood that the parties were treated differently, this resulted in no significant practical negative impact to the Claimants. In fact, as demonstrated above, as a result of comprehensive investigations, the Attorney General’s Office had found that the Meritage Lot was tainted as a “direct or indirect product of illicit activity”, and therefore subject to asset forfeiture.⁵¹⁴ This means that regardless of the initiation or not of similar proceedings against other properties, the Meritage Lot would still have remained subject to the Asset Forfeiture Proceedings.
317. Regarding element (iii), a measure will not be held to be discriminatory if there is “a rational justification of any differential treatment of a foreign investor”.⁵¹⁵ Thus, in order to prevail in a claim for discriminatory treatment, “a Claimant must demonstrate that it has been subjected to unequal treatment in circumstances where there appears to be no reasonable basis for such differentiation”.⁵¹⁶
318. In this case, the specific circumstances of the Meritage Project called for urgent measures. For example, the Claimants have acknowledged that despite Mr. López Vanegas’s claims over the Meritage Lot since 2014, the Claimants decided to move forward with the project and units in the Meritage Project were being sold to third parties.⁵¹⁷ Urgent measures were therefore required to prevent or mitigate any impact on third parties’ legitimate rights. In this sense, the imposition of precautionary measures was not only necessary in order to avoid any further negotiations involving the Meritage Lot, including the sale of units to third-party buyers,⁵¹⁸ but fully justified. Therefore, Colombia did not discriminate against the Claimants because the

⁵¹³ *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, NAFTA, Award, 25 August 2014 (**Exhibit RL-71**), ¶ 8.21. *See also S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, NAFTA, Partial Award, 13 November 2000 (**Exhibit CL-023**), ¶ 254 (“The word ‘treatment’ suggests that practical impact is required to produce a breach of Article 1102 [of the NAFTA]”).

⁵¹⁴ *See above*, ¶ 142.

⁵¹⁵ *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 (**Exhibit CL-042**), ¶ 460; *See also Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (**Exhibit RL-29**), ¶ 693.

⁵¹⁶ *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case Nos ARB/08/1 and ARB/09/20, Award, 16 May 2012 (**Exhibit RL-54**), ¶ 262.

⁵¹⁷ Claimants’ Memorial on Merits and Damages, ¶ 83.

⁵¹⁸ *See above*, ¶ 167. *See also* Reyes Expert Report, ¶ 49.

Meritage Lot and the neighbouring lot were not in “like circumstances”, the different treatment was reasonably justified and did not have any negative impact on the Claimants.

319. Further, as stated by Mr. Hernández, “[i]f the illegality in the origin of other plots of land or assets is proved, proceedings [in respect of these] ought to follow and should there be any wrongdoing by [officers] of the Attorney General’s Office in this connection, which constitutes the crime of *prevaricato*, the corresponding sanctions will be imposed. However, it is important to underscore that the Attorney General’s Office has limited resources and must prioritise assets which could be sold to third parties, as is the case in Meritage”.⁵¹⁹

(c) The Asset Forfeiture Proceedings was a reasonable measure adopted in accordance with Colombian law and due process of law

320. Contrary to the Claimants’ allegations,⁵²⁰ the Asset Forfeiture Proceedings were initiated and conducted in accordance with Colombian law and due process of law. Moreover, there is no evidence that the proceedings were tainted by corruption. The Asset Forfeiture Proceedings were a reasonable measure adopted by Colombia in exercise of its regulatory powers.

321. The Respondent agrees with the Claimant that the standard for “due process of law” in the expropriation context has been duly formulated by the tribunal in *ADC v. Hungary*.⁵²¹ According to the *ADC v. Hungary* tribunal, due process of law “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”.⁵²² This requires, for example, “some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute”.⁵²³ Moreover, the investor should be afforded “a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard”.⁵²⁴

⁵¹⁹ See Hernández Witness Statement, ¶ 17.

⁵²⁰ See Claimants’ Memorial on Merits and Damages, ¶¶ 383-396.

⁵²¹ Claimants’ Memorial on Merits and Damages, ¶ 383.

⁵²² *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 (**Exhibit CL-044**), ¶ 435.

⁵²³ *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 (**Exhibit CL-044**), ¶ 435.

⁵²⁴ *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 (**Exhibit CL-044**), ¶ 435.

322. The Respondent, however, cannot agree with the Claimants’ conclusion that Colombia breached the Claimants’ due process rights. A proper analysis of the facts leads to the exact opposite conclusion: that Colombia initiated and conducted the Asset Forfeiture Proceedings in accordance with Colombian law and guaranteed, at all times, the Claimants’ due process rights.⁵²⁵
323. Colombia had put in place “legal and substantive legal procedure[s]” for the Claimants to raise claims in connection with the Asset Forfeiture Proceedings. As explained by the Claimants’ legal expert, Dr. Medellín Becerra, the current Asset Forfeiture Law (Law 1708/2004) establishes “fundamental guarantees, principles” and procedural mechanisms, including precautionary measures and legal controls.⁵²⁶ As the Respondent has demonstrated, the Asset Forfeiture Proceedings have followed the stages and steps provided for in Law 1708, starting with the Initial Phase, imposition of the Precautionary Measures and the inception of the Second Phase before the Court.⁵²⁷
324. Indeed, as regards the Initial Phase and imposition of precautionary measures, it bears recalling that the Attorney General’s Office conducted in-depth investigations prior to deciding and imposing the Precautionary Measures, as detailed in **Section II.F.2** above. Further, the decision was reasoned and substantiated and the pertinence, necessity, proportionality and urgency of the Precautionary Measures were confirmed by the courts in first and second instance, as a result of the legality control exercised by the courts in regards the precautionary measures.⁵²⁸ In other words, the Precautionary Measures, challenged by Corficolombiana, were reviewed by independent bodies not once but twice, and both times found to be in accordance with the law. As explained by ex-Minister of Justice, Dr. Yesid Reyes:

[W]hat is clear is that the legality of the precautionary measures in this case was assessed by a prosecutor, a judge in Antioquia whom is by nature independent from the Attorney General’s Office, three magistrates of a Superior Tribunal based in a different city (Bogota D.C.), and all this under the watchful eye of a representative of the Office of the Inspector General (*Procuraduría*), whom as noted by Dr. Martínez Sánchez, guarantees the permanent oversight in order to

⁵²⁵ Unlike the case at hand, in *Kardassopoulos v. Georgia*, the host State had “failed to ensure that there was a procedure or mechanism in place, either before the taking or thereafter, which allowed Mr. Kardassopoulos, within a reasonable period of time, to have his claims heard”. See *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Award, 3 March 2010 (**Exhibit RL-40**), ¶ 396.

⁵²⁶ Medellín Expert Report, ¶ 24.

⁵²⁷ See above, Section II.F.

⁵²⁸ See above, Section II.F.4.

prevent abuses by prosecutors and judges in asset forfeiture proceedings. There is nothing in the documents analyzed that would reasonably suggest that the precautionary measures had been imposed with a purpose different to that envisaged by the legislator, as in this case all the guarantees provided by Law 1708 of 2014 to ensure that precautionary measures are not abusively imposed were applied.⁵²⁹

325. As regards the Provisional Determination of Claim, the Respondent has equally demonstrated that the Attorney General’s Office established the grounds under Article 16 of Law 1708 giving rise to the Determination, and the existence of the factual and legal elements required to proceed to the Determination. In a similar vein, the Request for Asset Forfeiture was reviewed by the Second Criminal Court, which in fact rejected it twice, requiring the Attorney General’s Office to include additional information, clearly contradicting the Claimants’ fanciful allegations about a universal collusion between all authorities of the State.⁵³⁰ It is worth underscoring that the Attorney General’s Office substantiated in its decisions the reasons why it considered that Newport was not an affected party in the proceedings, noting nonetheless that Newport would have the opportunity to request its inclusion in the proceedings at the second-phase before the Courts, which Newport did.⁵³¹
326. Indeed, Newport had the opportunity to present its position and evidence before the Courts, and the Second Criminal Court analysed Newport’s position *in extenso*.⁵³² Moreover, Newport has appealed the decision of *avocamiento* of the Second Criminal Court and the decision is pending.⁵³³
327. Therefore, as per the *ADC v. Hungary* standard, the Claimants were not only given “a reasonable chance” to raise their claims, but they have also made good use of the multiple “legal mechanisms” provided under Colombian law to raise their claims against the Asset Forfeiture Proceedings.⁵³⁴ In this sense, it bears recalling that the Claimants do not – and could not – dispute that they have not been afforded fair hearings or that the adjudicators assessing their claims are unbiased and impartial.

⁵²⁹ Reyes Expert Report, ¶ 52.

⁵³⁰ See above, Section II.F.9.

⁵³¹ See above, Section II.F.9.

⁵³² See above, Section II.F.10.

⁵³³ See above, Section II.F.10.

⁵³⁴ See above, ¶ 321.

328. Against this backdrop, the Claimants’ allegations that the Asset Forfeiture Proceedings were conducted “with a blatant disregard for due process of law” must fail. The Asset Forfeiture Proceedings were a reasonable measure adopted and conducted in accordance with Colombian law and due process of law. Moreover, the issues in dispute in this arbitration have been reviewed or are still subject to review by the Colombian courts. The Claimants cannot be allowed to use this Tribunal as a court of appeal “against the legal correctness or substantive reasonableness of individual administrative acts or the judgments of a municipal court reviewing them”.⁵³⁵
329. Equally unavailing are the Claimants’ allegations that Asset Forfeiture Proceedings were motivated by “a corrupt scheme in which Colombian Government officials colluded with a known drug dealer to attempt to extort Mr. Seda”.⁵³⁶ The Claimants’ claim is based on “a number of ‘red flags’ indicative of corruption”, including certain “coincidences” in timing,⁵³⁷ purported extortion attempts on Mr. Seda,⁵³⁸ and press reports that some Colombian officials involved in the early stages of the Asset Forfeiture Proceedings “have been linked to and investigated for corruption” in unrelated cases.⁵³⁹
330. As demonstrated below, there are no elements in the record that show the existence of a “corruption scheme” within the Colombian government involving the Claimants or the Meritage Project, let alone that the Asset Forfeiture Proceedings are invalidated due to corruption.

⁵³⁵ *ECE Projektmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücks-gesellschaft mbH & Co. v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013 (**Exhibit CL-090**), ¶ 4.764. *See also, e.g., Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999 (**Exhibit RL-6**), ¶ 99 (“The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA”); *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, NAFTA, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003 (**Exhibit RL-11**), ¶ 51 (“The Tribunal cannot under the guise of a NAFTA claim entertain what is in substance an appeal from a domestic judgment”); *Philip Morris Brand SÁRL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016 (**Exhibit RL-88**), ¶ 500 (“The high standard required for establishing this claim in international law means that it is not enough to have an erroneous decision or an incompetent judicial procedure, arbitral tribunals not being courts of appeal”).

⁵³⁶ Claimants’ Memorial on Merits and Damages, ¶ 389.

⁵³⁷ Claimants’ Memorial on Merits and Damages, ¶¶ 120, 390.

⁵³⁸ *See* Claimants’ Memorial on Merits and Damages, ¶ 391.

⁵³⁹ Claimants’ Memorial on Merits and Damages, ¶ 392.

331. *First*, under international law, the general principle is that the party who alleges a certain fact has the burden to prove it.⁵⁴⁰ As confirmed by the investment tribunals on which the Claimants rely on this very issue, there is no reason to deviate from this principle when corruption allegations are concerned. In the words of the *Glencore v. Colombia* tribunal, on which the Claimants relied:

In international law, the general principle is *actori incumbit probatio*: the party who alleges a certain fact has the burden to prove it. The Tribunal sees no reason to deviate from this principle. Since Colombia is alleging that the Eighth Amendment was obtained through the corruption of Director Ballesteros, it is for Colombia to marshal the appropriate evidence.⁵⁴¹

332. The same principle was held by the tribunal in *ECE v. Czech Republic*, on which the Claimants also relied:

[Corruption] is a charge that should not be made lightly, and the Tribunal is bound to express its reservations as to whether it is acceptable for charges of that level of seriousness to be advanced without either some direct evidence or compelling circumstantial evidence. That said, the Tribunal must of course decide the case on the basis of the evidence before it. If the burden of proof is not discharged, the allegation is not made out. The mere existence of

⁵⁴⁰ See *Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 7 August 2019 (**Exhibit CL-125**), ¶ 668.

⁵⁴¹ *Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 7 August 2019 (**Exhibit CL-125**), ¶ 668 (emphasis added). See also *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012 (**Exhibit RL-53**), ¶ 296 (the tribunal held that the burden of proof in connection with corruption allegations “cannot be simply shifted by attempting to create a general presumption of corruption in a given State”); *ECE Projektmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbH & Co. v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013 (**Exhibit CL-090**), ¶ 4.873 (“The burden of proof is undoubtedly on the party alleging corruption”); *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, United States of America Oral Submissions, 29 July 2019 (**Exhibit RL-112**), p. 26 (“when allegations of corruption are raised, either as part of a claim or part of a defense, the general principles of international law applicable to international arbitration require that the Party asserting that corruption occurred must establish the corruption through ‘clear and convincing’ evidence”); *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 (**Exhibit CL-070**), ¶ 221 (the tribunal confirmed that “clear and convincing evidence” is required to meet the “high standard of proof of corruption”). The *Methanex* decision on which the Claimants rely to argue that the burden of proof concerning corruption should be shifted does not support their case. The case concerns to the burden of proof with respect to the admissibility of evidence that had been “unlawfully, if not criminally” obtained. This is not an issue in our case. See Claimants’ Memorial on Merits and Damages, ¶ 393; *Methanex Corporation v. United States*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 (**Exhibit CL-040**), Part II, Chapter I, ¶ 55.

suspicion cannot, in the absence of sufficiently firm corroborative evidence, be equated with proof.⁵⁴²

333. In sum, as with any other allegation, the allegations of corruption need to be duly proved: “even the reddest of red flags does not suffice without proof of corruption before the tribunal”:⁵⁴³

Suspicion is not equivalent to proof. Unanswered queries may have innocent explanations, not amounting (in the absence of explanations) to proof of corruption. With hindsight, what business people agree not infrequently defies logic or commonsense to non-business people, again without amounting to proof of corruption. The legal burden of proving corruption rests upon the party alleging corruption; and it is not discharged by placing the burden on the adverse party to prove the absence of corruption.⁵⁴⁴

334. *Second*, even adopting the “red flags” and “connecting the dots” methodology proposed by the Claimants, it is plain that “the dots have to exist and they must be substantiated by relevant and probative evidence relating to the specific allegations made in the case before it”.⁵⁴⁵ In this case, the “indicia” or “dots” put forward by the Claimants do not allow the tribunal to “infer from these indicia (using experience and reason) that [corruption] has occurred”.⁵⁴⁶

335. Alleged coincidences in timing: the alleged coincidences in timing are inconclusive, to say the least. For example, the Claimants overlook that the seizure of the Meritage Lot that took place “just seven days after Mr. Seda had rejected Mr. Valderrama’s final overtures”,⁵⁴⁷ had been ordered on 22 July 2016, *i.e.* before the exchange between Messrs. Seda and Valderrama.⁵⁴⁸

336. In any event, the tribunal in *Glencore v. Colombia* confirmed that “red flags” based on a “chronological sequence” are unreliable:

⁵⁴² *ECE Projektmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbH & Co. v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013 (**Exhibit CL-090**), ¶ 4.876 (emphasis added).

⁵⁴³ *Union Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018 (**Exhibit CL-119**), ¶ 7.113.

⁵⁴⁴ *Union Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018 (**Exhibit CL-119**), ¶ 7.113.

⁵⁴⁵ *ECE Projektmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbH & Co. v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013 (**Exhibit CL-090**), ¶ 4.879. *See also Union Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018 (**Exhibit CL-119**), ¶ 7.114 (“with a case dependent upon circumstantial evidence (as in the present case), it is often a question of joining up the dots; but there have first to be dots in the evidence adduced before the tribunal”).

⁵⁴⁶ Claimants’ Memorial on Merits and Damages, ¶ 393.

⁵⁴⁷ Claimants’ Memorial on Merits and Damages, ¶ 136.

⁵⁴⁸ *See* Resolution 13641 of precautionary measures in the initial phase, 22 July 2016 (**Exhibit C-164**).

This alleged red flag is based on the logical fallacy post hoc, ergo propter hoc. This fallacy is a particularly tempting error, because there is an unconscious bias which equates temporal correlation with causality. This may be true in certain situations, but it can be radically false in others. A conclusion cannot be based exclusively on the order of events, but must consider other factors potentially responsible for the result.⁵⁴⁹

337. Extortion attempts on Mr. Seda: the Claimants allege that in mid-2016, several extortion attempts were made on Mr. Seda by Mr. Mosquera and other individuals “claiming to represent the Attorney General’s Office”.⁵⁵⁰ Not only there is no evidence of such attempts, but more strikingly the Claimants (and in particular Mr. Seda) did not deem it necessary to report them to the official authorities until 19 December 2016 and following the advice of the Attorney General’s Office.⁵⁵¹
338. In *ECE v. Czech Republic*, the tribunal considered, among other factors leading to the rejection of the corruption claims, the fact that there was “no evidence of any contemporaneous complaint of suspected corruption”.⁵⁵² In the tribunal’s view, “[h]ad ECE felt itself to be the victim of corruption, [...] it would have been advisable to express its suspicions to the relevant authorities with a request that they be investigated.”⁵⁵³ The same observation applies to Mr. Seda’s failure to report the alleged extortion scheme until December 2016.
339. Other charges against Mses. Malagón and Ardila: the Claimants’ allegations of wrongful conduct by Mses. Malagón and Ardila are based on press articles and speculation, including the information allegedly provided by an ex-prosecutor, Ms. Niño Farfán, to the media (which, in any event, is not related to the Meritage case).⁵⁵⁴ These reports have been expressly disavowed by Ms. Niño Farfán, who has negated to have any information or knowledge about any

⁵⁴⁹ *Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 7 August 2019 (**Exhibit CL-125**), ¶ 729 (emphasis added).

⁵⁵⁰ Claimants’ Memorial on Merits and Damages, ¶ 391.

⁵⁵¹ See A. Seda Complaint to *Fiscalía General*, 19 December 2016 (**Exhibit C-181**).

⁵⁵² *ECE Projektmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbH & Co. v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013 (**Exhibit CL-090**), ¶ 4.881.

⁵⁵³ *ECE Projektmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbH & Co. v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013 (**Exhibit CL-090**), ¶ 4.881.

⁵⁵⁴ See Claimants’ Memorial on Merits and Damages, ¶¶ 293-298.

corruption scheme as regards the Meritage Lot.⁵⁵⁵ Besides the clear disavowing of the information by Ms. Nino Farfán, it bears underscoring the probatory weight of the kind evidence adduced by the Claimants. In this regard, the *ECE v. Czech Republic* tribunal, on which the Claimants rely, rejected “blanket condemnatory allegations” based on an “‘everyone knows’ argument” in an attempt to make up “for a lack of direct proof”.⁵⁵⁶ In particular, the tribunal found that references to other instances of alleged corruption “may prove that corruption exists [], but it does little to advance the argument that corruption existed in the specific events giving rise to the claim”.⁵⁵⁷ The *ECE v. Czech Republic* tribunal also noted that allegations of this kind, do not shift the burden to the State to “‘disprove’ the existence of corruption”.⁵⁵⁸

340. In this case, even if Mses. Malagón and Ardila had been linked to, and investigated for, corruption in other cases, to date there is no evidence of any improper conduct in connection with the Asset Forfeiture Proceedings in the Meritage case. In fact, following Mr. Seda’s complaint in December 2016, an investigation was launched into the alleged extortion scheme involving Mses. Ardila and Malagón in connection with the Meritage Project, engaging the coordinated effort of the judicial police, the Attorney General’s Office and the criminal courts of Medellín.⁵⁵⁹ So far, no evidence of criminal conduct has been found. On this point, it bears recalling the observation of the tribunal in *Glencore v. Colombia* that “the Colombian criminal prosecutor and the Colombian criminal courts [] have a much higher capacity for investigation than this Arbitral Tribunal”.⁵⁶⁰

341. Even assuming, *quod non*, the existence of collusion between Mses. Malagón and Ardila and Mr. López Vanegas, this does not affect the legality of the Asset Forfeiture Proceedings. As

⁵⁵⁵ See Letter from Hilda Jeaneth Niño Farfán to Camilo Alberto Gómez Alzate, 28 October 2020 (**Exhibit R-61**); Interview of Hilda Jeaneth Niño Farfán by Rafael Castiblanco Beltran, 6 August 2020 (**Exhibit R-60**).

⁵⁵⁶ *ECE Projektmanagement International GmbH and Kommanditgesellschaft Pantá Achtundsechzigste Grundstücksgesellschaft mbH & Co. v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013 (**Exhibit CL-090**), ¶ 4.879. The Claimants in that case had relied, for example, on reports of NGOs as to the general presence of corruption within the Czech Republic.

⁵⁵⁷ *ECE Projektmanagement International GmbH and Kommanditgesellschaft Pantá Achtundsechzigste Grundstücksgesellschaft mbH & Co. v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013 (**Exhibit CL-090**), ¶ 4.879.

⁵⁵⁸ *ECE Projektmanagement International GmbH and Kommanditgesellschaft Pantá Achtundsechzigste Grundstücksgesellschaft mbH & Co. v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013 (**Exhibit CL-090**), ¶ 4.879.

⁵⁵⁹ See Hernández Witness Statement, ¶ 11. See also above, ¶ 139.

⁵⁶⁰ *Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 7 August 2019 (**Exhibit CL-125**), ¶ 738.

demonstrated above, the decision of 22 July 2016 to impose precautionary measures on the Meritage Project was based on objective evidence found by the Attorney General’s Office following a preliminary analysis of the case.⁵⁶¹ Since then, the Attorney General’s Office (independently of the role played by Mses. Ardila and Malagón, both of whom have since been removed from case, and of the veracity of Mr. López Vanegas’s story) has found additional objective and strong evidence of the unlawful origin of the Meritage Lot and is therefore under the legal obligation to move forward with the Asset Forfeiture Proceeding until a final decision has been made in accordance with Law 1708 of 2014.⁵⁶² In fact, it was Mr. Caro that signed and filed the petition to asset forfeiture in April 2017.⁵⁶³ The Claimants have not made – and cannot make – any allegations of improper conduct by Mr. Caro.

342. Therefore, none of the indicia on which the Claimants rely indicates the existence of corruption. In other words, “the dots do not exist”⁵⁶⁴ or, even if they do exist, “the dots do not connect”.⁵⁶⁵
343. *Finally*, the Claimants’ request for adverse inferences at this stage of the proceedings must be rejected. As noted by the tribunal in *Metal-Tech v. Uzbekistan*, on which the Claimants rely, the Tribunal may draw adverse inferences from a party’s non-production of evidence “ordered to be produced by the Arbitral Tribunal”.⁵⁶⁶ This is simply not the case here.
344. The Claimants’ attempt to circumvent their burden of proof regarding the alleged “corruption scheme” by requesting adverse inferences is particularly unavailing considering that “the standard for proving a conspiracy involving a bad faith component is a demanding one”.⁵⁶⁷
345. In sum, the Asset Forfeiture Proceedings was a reasonable measure adopted in accordance with Colombian law and due process of law. The Claimants have failed to demonstrate the contrary.

⁵⁶¹ See above, Section II.F.3.

⁵⁶² See above, Sections II.F.6, II.F.9. See also Reyes Expert Report, ¶¶ 11-12; Pinilla Expert Report, ¶¶ 37-38.

⁵⁶³ See Attorney General’s Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017 (**Exhibit C-024bis**). Dr. Caro had been assigned the case in early 2017. See Caro Witness Statement, ¶ 11.

⁵⁶⁴ *ECE Projektmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbH & Co. v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013 (**Exhibit CL-090**), ¶ 4.879.

⁵⁶⁵ *Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 7 August 2019 (**Exhibit CL-125**), ¶ 736.

⁵⁶⁶ *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013 (**Exhibit CL-091**), ¶ 245; Claimants’ Memorial on Merits and Damages, ¶ 393.

⁵⁶⁷ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 (**Exhibit CL-067**), ¶ 223.

Moreover, it has been demonstrated that the Asset Forfeiture Proceedings were designed and applied to protect legitimate public welfare objectives and were implemented on a non-discriminatory basis. On this basis alone, the Claimants' expropriation claim must fail.

(ii) *The actions of the Respondent do not constitute an indirect expropriation*

346. In any event, the Asset Forfeiture Proceedings does not constitute an indirect expropriation and, accordingly, the Claimants are not entitled to compensation. The FTA requires a case-by-case analysis to determine whether an action or series of actions of a State constitutes an indirect expropriation, including the assessment of the economic impact of the government action, its interference with the investor's reasonable investment-backed expectations and the character of the government action.
347. According to the Claimants, the Asset Forfeiture Proceedings constitute an indirect expropriation of the Claimants' investment in the Meritage Project because it (i) precluded the Claimants from developing the Meritage Project, thus affecting their stream of revenue, (ii) eviscerated the Claimants' expectations that they would be able to develop and profit from the Meritage Project, and (iii) had the character of the government action.⁵⁶⁸
348. As demonstrated below, a proper analysis of the requirements of the FTA, as well as other elements considered by investment case law when assessing indirect expropriation claims, including the nature and effects of the government actions, leads to the conclusion that the Asset Forfeiture Proceedings do not amount to an indirect expropriation, let alone an unlawful expropriation.
349. *First*, the Asset Forfeiture Proceedings cannot constitute an expropriation under the FTA because the Claimants did not have any property right or right *in rem* in the Meritage Lot, the only asset affected by the precautionary measures and the Asset Forfeiture Proceedings.
350. In *Vestey v. Venezuela*, the tribunal noted that in order to determine whether Venezuela's taking of a land constituted an expropriation, it had to assess "whether [the claimant] held a title to the land".⁵⁶⁹ This is *a fortiori* the approach that should be adopted in this case, where the FTA

⁵⁶⁸ See Claimants' Memorial on Merits and Damages, ¶¶ 375-379.

⁵⁶⁹ *Vestey Group Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016 (Exhibit CL-106), ¶ 252.

established that only a State action that “interferes with a tangible or intangible property right or property interest in an investment” can constitute an expropriation under the treaty.⁵⁷⁰

351. As demonstrated above, Newport had rights *in rem* over the Meritage Project, but had only entered into a sale-purchase promise agreement regarding the Meritage Lot, that is, it had no rights *in rem*.⁵⁷¹ On this basis alone, the Tribunal should reject the Claimants’ expropriation claims.
352. *Second*, none of the non-exhaustive factors listed in Annex 10-B of the FTA for the determination of whether an action or series of actions by a State constitutes an indirect expropriation has been met.
353. With respect to the first factor, the Claimants have failed to demonstrate that the Asset Forfeiture Proceedings destroyed (or virtually destroyed) the economic value of their alleged investment. As further demonstrated below, the Claimants’ purported damages are largely speculative and unsupported by any reliable evidence.⁵⁷² Moreover, the Claimants have failed to show that the alleged economic impact was caused by the measures adopted by the Colombian authorities.⁵⁷³
354. Even assuming, *quod non*, that the measures adopted by the Colombian authorities had a (limited and temporary) adverse economic impact on the Meritage Project, it is undisputed that this factor in itself cannot establish that an indirect expropriation has occurred.
355. With respect to the second factor, the Claimants could not have had “reasonable investment-backed expectations” that the Colombian authorities would not initiate Asset Forfeiture Proceedings against the Meritage Lot. As demonstrated above, the Claimants knew or should have known at the time they decided to develop the Meritage Project that Asset Forfeiture Proceedings are not subject to any statute of limitations (“*imprescriptible*”).⁵⁷⁴ In fact, by law the Attorney General’s Office is obliged to pursue the Asset Forfeiture proceedings if it finds

⁵⁷⁰ United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Annex 10-B, para. 1.

⁵⁷¹ *See above*, Section II.F.10.

⁵⁷² *See below*, Section V.C.

⁵⁷³ *See below*, Section V.B.

⁵⁷⁴ *See above*, ¶ 75.

that an asset has an illicit origin.⁵⁷⁵ Failure to do so will entail criminal and disciplinary sanctions.

356. Furthermore, none of the certificates on which the Claimants rely as a basis for their “reasonable and well-founded” expectations⁵⁷⁶ contains any specific commitments by the Colombian State that it would restrain from initiating the Asset Forfeiture Proceedings should a motive arise.⁵⁷⁷ Nor was it within the competence of the Attorney General’s Office to provide any such commitment.
357. Moreover, the due diligence conducted by the Claimants could not give rise to “reasonable investment-backed expectations”. Not only does it not constitute a commitment by the State, but in any event, in this case, it was highly deficient as demonstrated by the Respondent. In particular, Mr. Seda cannot possibly claim legitimate ignorance about Mr. López Vanegas’s claims and his links to the Meritage Lot: he was aware of it at least since 2014 but chose to ignore it and to go ahead with the Project. In light of the above, the Claimants cannot even maintain that they had subjective expectations, as any kind of expectation would not be legitimate in view of their knowledge about Mr. López Vanegas’s claims and background.
358. With respect to the third factor, it is undisputed that the Asset Forfeiture Proceedings was a governmental action.⁵⁷⁸ The Claimants, however, seem to overlook the real issue, namely, the character and nature of the government action. By initiating the Asset Forfeiture Proceedings, the Colombian authorities acted in application of general legislation that was known, or should have been known, to the Claimants when they decided to invest in Colombia and in the Medellín region. As demonstrated, the Asset Forfeiture Proceedings were adopted on a non-discriminatory basis and pursued a public purpose, *i.e.* to obtain social and economic stability in Colombia through the prevention of organized crime. It is therefore a legitimate measure applied on the basis of generally applicable laws.
359. Against this backdrop, any impact on the Claimants and their projects was but self-inflicted through their own actions – or rather inactions, including initiating the Meritage Project in a risky area such as Envigado, on the basis of a deficient due diligence and despite Mr. López Vanegas’s repeated claims to the lot, which the Claimants decided to ignore.

⁵⁷⁵ Reyes Expert Report, ¶¶ 11-12; Pinilla Expert Report, ¶¶ 37-38.

⁵⁷⁶ Claimants’ Memorial on Merits and Damages, ¶ 377.

⁵⁷⁷ *See above*, ¶¶ 71-72, 83-84.

⁵⁷⁸ *See* Claimants’ Memorial on Merits and Damages, ¶ 379.

360. *Finally*, the Asset Forfeiture Proceedings did not result in the total and permanent deprivation of property right. In fact, the Asset Forfeiture Proceedings are still ongoing and the Claimants have acknowledged that the precautionary measures are temporary.⁵⁷⁹ Therefore, as of today, the Claimants have not been permanently and substantially, or almost completely, deprived of the economic value, use or enjoyment of their investment.

B. THE RESPONDENT TREATED THE CLAIMANTS' ALLEGED INVESTMENTS FAIRLY AND EQUITABLY

361. The Claimants allege that Colombia breached the FET standard in Article 10.5 of the FTA 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”.⁵⁸⁰ In particular, the Claimants aver that the Respondent’s conduct was in breach of its duty to act reasonably and not arbitrarily, to respect due process and transparency and to protect the Claimants’ legitimate expectations.

362. Article 10.5 of the FTA provides in relevant part that:

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.

363. The Respondent sets out below the relevant core components of the “fair and equitable standard” standard in Article 10.5 of the FTA (**IV.B.1**), before going on to show that by initiating and pursuing the Asset Forfeiture Proceedings, the Respondent did not breach the FET standard with respect to the Claimants’ purported investment in Meritage (**IV.B.2**). Finally, the Respondent demonstrates that whatever impact the Asset Forfeiture Proceedings

⁵⁷⁹ See Claimants’ Memorial on Merits and Damages, ¶ 373.

⁵⁸⁰ Claimants’ Memorial on Merits and Damages, ¶ 409.

had on other projects in which the Claimants were involved, it cannot constitute a breach of the FET standard (IV.B.3).

1. The legal standard

364. The Claimants' FET claim must be evaluated in light of the following general considerations.
365. *First*, as acknowledged by the Claimants, a fact-specific assessment is required to determine whether conduct is in accordance with the fair and equitable standard "in the context and particular circumstances in dispute".⁵⁸¹ Thus, an analysis of whether a State's conduct has breached the fair and equitable treatment calls for the consideration of the totality of the circumstances. In the words of the *Micula v. Romania* tribunal, "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".⁵⁸² This means that the Tribunal "will have to decide whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable."⁵⁸³
366. Among others circumstances, investment tribunals have looked into the political and economic situation of the host State at the time the investment was made.⁵⁸⁴ In this sense, the *Mamidoil v. Albania* tribunal stressed that the FET standard "is not meant to favor the investors' interests over other economic and social interests" of the host State.⁵⁸⁵
367. Investment tribunals have also assessed whether the investor has acted diligently both at the time of entering into the investment, as well as in the course of managing the investment.⁵⁸⁶ In

⁵⁸¹ Claimants' Memorial on Merits and Damages, ¶ 413.

⁵⁸² *Ioan Micula, et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013 (**Exhibit CL-093**), ¶ 505.

⁵⁸³ *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 (**Exhibit CL-060**), Award, ¶ 610. *See also, Waguih Elie George Siag & Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009 (**Exhibit CL-066**), ¶ 182.

⁵⁸⁴ *See, e.g., Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003 (**Exhibit RL-13**), ¶ 20.37 (investment made in Ukraine by claimant "attracted to [...] Ukraine because of the possibility of earning a rate of return on its capital in significant excess to the other investment opportunities in more developed economies"; claimant was thereby "on notice of both the prospects and the potential pitfalls"). *See also below*, ¶¶ 421-424.

⁵⁸⁵ *Mamidoil Jetoil Greek Petroleum Products Société S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015 (**Exhibit RL-76**), ¶ 614.

⁵⁸⁶ *See, e.g., Joseph Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 (**Exhibit CL-072**), ¶ 285 (noting that "[t]he Tribunal must also balance other legally relevant interests, and take into consideration a number of countervailing factors, before it can establish that a violation of the FET standard, which merits compensation, has actually occurred:

the words of the *Rusoro Mining v. Venezuela* tribunal, “it is the investor’s duty to perform an appropriate pre-investment due diligence review and to show a proper conduct both before and during the investment”.⁵⁸⁷ The investor’s due diligence obligation include the assessment of the consequences of laws that are “part of the generally applicable law of the country”.⁵⁸⁸ When investing in “risky business environments”, the investor is expected to be “particularly diligent”. In the words of the *Churchill Mining v. Indonesia* tribunal:

Investment tribunals also held that investors must exercise a reasonable level of due diligence, especially when investing in risky business environments. In *Anderson v. Costa Rica*, for instance, the tribunal stated that “prudent investment practice requires that any investor exercise due diligence before committing funds to any particular investment proposal”. The scope of the due diligence depends on the particular circumstances of each case, such as the general business environment, and includes ensuring that a proposed investment complies with local laws, as well as investigating the reliability of a business partner and that partner’s representations before deciding to invest”.

[...] the investor’s duty to perform an investigation before effecting the investment”); *Alex Genin, Eastern Credit Ltd., Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001 (**Exhibit RL-7**), ¶ 345 (rejecting an FET claim in circumstances where the claimant, despite having conducted a certain due diligence, was deemed to have acted “unprofessionally and, indeed, carelessly”, because he “should have known that Social Bank was on the verge of bankruptcy and should thus have taken extra precautions, such as insisting on warranties relating to the quality of the assets”); *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA, UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006 (**Exhibit RL-23**), ¶ 67 (“agreements intended to protect international investment are not substitutes for prudence and diligent inquiry in international investors’ conduct of their affairs”).

⁵⁸⁷ *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016 (**Exhibit CL-108**), ¶ 525. In that case, the tribunal dismissed the claimant’s FET claim on the basis that the claimant had invested at a time when a particular exchange control regime was in place, without seeking any specific assurance that its investment would be exempted from the application of this regime. See also *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (**Exhibit RL-29**), ¶ 601 (the tribunal held that when assessing an FET claim, it is important to identify “the responsibility of foreign investors, both in terms of prior due diligence as well as subsequent conduct”).

⁵⁸⁸ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 (**Exhibit RL-30**), ¶¶ 268-269 (“While the members of the Arbitral Tribunal are not experts in Bulgarian accounting or tax law, it is clear to the Tribunal that Claimant, as the investor, was responsible for doing its due diligence regarding the tax consequences of debt reduction and for taking the necessary measures to deal with them. Respondent produced evidence which shows that the tax laws of many countries around the world treat debt reductions, as were negotiated in this case, as income taxable to the beneficiary []. It cannot be said that Bulgaria’s law in this respect was unfair, inadequate, inequitable or discriminatory. It was part of the generally applicable law of the country like that of many other countries.”). See also *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010 (**Exhibit CL-079**), ¶ 124 (highlighting that “the investor has its own duty to investigate the host State’s applicable law”); *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case Nos ARB/08/1 and ARB/09/20, Award, 16 May 2012 (**Exhibit RL-54**), ¶ 258 (“As intelligent and experienced investors, Claimants were, of course, required, as part of their due diligence, to become familiar with Costa Rican law and procedure”).

[...]

[O]ne would expect an investor aware of the risks of investing in a certain environment to be particularly diligent in investigating the circumstances of its investment.⁵⁸⁹

368. *Second*, on its face, the protection in Article 10.5 of the FTA is limited to “the customary international minimum standard of treatment of aliens”. As noted by the United States, “[t]he burden is on a claimant to establish the existence and applicability of a relevant obligation under customary international law”.⁵⁹⁰ Arbitral decisions “interpreting ‘autonomous’ fair and equitable treatment and full protection and security provisions in other treaties, outside the context of customary international law, do not constitute evidence of the content of the customary international law standard” under the FTA.⁵⁹¹
369. Moreover, the minimum standard of treatment in Article 10.5 of the FTA, including the obligation to provide fair and equitable treatment, extends only to “covered investments” and not to cover investors. This has also been confirmed by the United States:

[A] denial of justice claim, just like any claim alleging a violation of Paragraph 1 of Article 10.5, may not be arbitrated pursuant to Chapter 10 of the TPA if the Claim is for treatment accorded to an investor rather than a covered investment. It may only be arbitrated if the Claim is for treatment accorded to the Investor’s covered investment.⁵⁹²

370. This means that any claim concerning treatment accorded to an investor – rather than to a covered investment – must be immediately rejected without further consideration as to the merits of the claim.

⁵⁸⁹ *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case Nos. ARB/12/14 and 12/40, Award, 6 December 2016 (**Exhibit RL-89**), ¶¶ 506, 518. The tribunal also noted the claimants’ failure to exercise due diligence “when “indications of forgery” first came to light”. See ¶ 524.

⁵⁹⁰ *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Submission of the United States of America, 22 September 2014 (**Exhibit RL-72**), ¶ 5.

⁵⁹¹ *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Submission of the United States of America, 22 September 2014 (**Exhibit RL-72**), ¶ 8.

⁵⁹² *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, United States of America Oral Submissions, 29 July 2019 (**Exhibit RL-112**), p. 22. See also *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, United States of American Written Submission, 7 December 2018 (**Exhibit RL-108**), ¶ 3 (“As a threshold matter, Article 10.5.1 requires a Party to accord “treatment” to a covered investment. Article 10.5.1 differs from other substantive obligations (e.g., 10.3, 10.4 and 10.6) in that it obligates a Party to accord treatment only to a “covered investment”).

371. *Third*, even assuming – as alleged by the Claimants – that the minimum standard of treatment has evolved to include FET, the threshold for finding a breach of the FET standard remains high.⁵⁹³ In the words of the *Thunderbird v. Mexico* tribunal:

Notwithstanding the evolution of customary law since decisions such as *Neer* claim in 1926, the threshold for finding a violation of the minimum standard of treatment still remains high. [...] For the purposes of the present case, the Tribunal views acts that would give rise to a breach of the minimum standard of treatment prescribed by the NAFTA and customary international law as those that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards.⁵⁹⁴

372. Similarly, in *Al Tamimi v. Oman*, the tribunal described the high threshold required for a State conduct to be considered a breach of the FET standard, in particular where the impugned conduct concerns actions of the State to protect legitimate public welfare objectives (in that case, the protection of the environment):

In the Tribunal’s view, therefore, to establish a breach of the minimum standard of treatment under Article 10.5, the Claimant must show that Oman has acted with a gross or flagrant disregard for the basic principles of fairness, consistency, even-handedness, due

⁵⁹³ See *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015 (**Exhibit RL-80**), ¶ 386 (“The minimum standard of treatment in customary international law, to which Article 10.5 is expressly linked by virtue of Article 10.5.2, as well as Annex 10-A, imposes a higher threshold for breach. The language of Article 10.5.2 makes it very clear that the State Parties intended to impose only the minimum standard of treatment under customary international law”); *Bewater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (**Exhibit RL-29**), ¶ 597; *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 (**Exhibit CL-100**), ¶¶ 436, 437, 443-444 (the tribunal confirmed that “there is a high threshold for the conduct of a host state to rise to the level of” a FET breach, so “[a]cts or omissions constituting a breach must be of a serious nature”. In light of this high threshold, “the mere breach of domestic law or any kind of unfairness does not violate the international minimum standard” and “the imprudent exercise of discretion or even outright mistakes do not, as a rule, lead to a breach of the international minimum standard”); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 (**Exhibit CL-023**), ¶ 263 (“The Tribunal considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective.”); *BG Group Plc v. The Republic of Argentina*, UNCITRAL, NAFTA, Final Award, 24 December 2007 (**Exhibit CL-056**), ¶¶ 301-2 (although agreed with the evolution of the international minimum standard, the tribunal acknowledged that its violation threshold is “still remains high” by citing the NAFTA tribunal in *Thunderbird*).

⁵⁹⁴ *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, NAFTA, Award, 26 January 2006 (**Exhibit RL-21**), ¶ 194 (emphasis added). See also *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009 (**Exhibit RL-34**), ¶ 22 (“the standard for finding a breach of the customary international law minimum standard of treatment therefore remains as stringent as it was under *Neer*”); *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 (**Exhibit CL-068**), ¶ 284 (“even as more situations are addressed, the required severity of the conduct as held in *Neer* is maintained”).

process, or natural justice expected by and of all States under customary international law. Such a standard requires more than that the Claimant point to some inconsistency or inadequacy in Oman’s regulation of its internal affairs: a breach of the minimum standard requires a failure, wilful or otherwise egregious, to protect a foreign investor’s basic rights and expectations. It will certainly not be the case that every minor misapplication of a State’s laws or regulations will meet that high standard. That is particularly so, in a context such as the US–Oman FTA, where the impugned conduct concerns the good-faith application or enforcement of a State’s laws or regulations relating to the protection of its environment.⁵⁹⁵

373. In *Al Tamimi v. Oman*, the investor had been arrested and prosecuted for allegedly violating Omani environmental laws by operating quarries without the necessary permits, and he was later acquitted. The tribunal rejected the claimant’s FET claim on the basis that a State must be able to take a legal position when it comes to alleged violation of its laws, even if that position turns out to be wrong, provided it does so in good faith and with appropriate due process.
374. Thus, in order to constitute a breach of FET, the conduct of the host State must be “‘gross’, ‘manifest’, ‘complete’ or such as to ‘offend judicial propriety’”.⁵⁹⁶
375. As noted by the *Paushok v. Mongolia*, a more lax standard would result in an unreasonable increase of investment cases:

The fact that a democratically elected legislature has passed legislation that may be considered as ill-conceived, counter-productive and excessively burdensome does not automatically allow to conclude that a breach of an investment treaty has occurred. If

⁵⁹⁵ *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015 (**Exhibit RL-80**), ¶ 390 (emphasis added).

⁵⁹⁶ *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 (**Exhibit CL-068**), ¶ 285. See also *Joshua Dean Nelson and Jorge Blanco v. United Mexican States*, ICSID Case No. UNCT/17/1, Award, 5 June 2020 (**Exhibit RL-120**), ¶ 323 (“the use of language such as “gross,” “manifest,” and “complete lack” indicates that the threshold for showing a breach of this obligation is particularly high”); *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009 (**Exhibit RL-34**), ¶ 616 (“an act must be sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards and constitute a breach of Article 1105(1)”); *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002 (**Exhibit CL-031**), ¶ 112-3 (“the Tribunal is aware that not every business problem experienced by a foreign investor is an indirect or creeping expropriation under Article 1110, or a denial of due process or fair and equitable treatment [...] not all government regulatory activity that makes it difficult or impossible for an investor to carry out a particular business, change in the law or change in the application of existing laws that makes it uneconomical to continue a particular business, is [a violation of international standards] [...] it is undeniable that the Claimant has experienced great difficulties in dealing with SHCP officials, and in some respects has been treated in a less than reasonable manner, but that treatment under the circumstances of this case does not rise to the level of a violation of international law”).

such were the case, the number of investment treaty claims would increase by a very large number.⁵⁹⁷

376. *Fourth*, the determination of a breach of the FET obligation “must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders”.⁵⁹⁸ Other tribunals have referred to the State’s “margin of appreciation” when assessing whether a certain conduct is in breach of the FET standard⁵⁹⁹ and to the State’s “regulatory flexibility to respond to changing circumstances in the public interest”.⁶⁰⁰ This is particularly recognized in connection with the protection of the State’s legitimate public welfare objectives, as expressed by the tribunal in *Unглаbe v. Costa Rica*:

Where, however, a valid public policy *does* exist, and especially where the action or decision taken relates to the State’s responsibility “for the protection of public health, safety, morals or welfare, as well as other functions related to taxation and police powers of states,” such measures are accorded a considerable measure of deference in recognition of the right of domestic authorities to regulate matters with their borders.⁶⁰¹

⁵⁹⁷ *Sergei Paushok, CJSC Golden East Company, and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011 (**Exhibit CL-080**), ¶ 299.

⁵⁹⁸ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 (**Exhibit CL-023**), ¶ 263; *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 (**Exhibit CL-042**), ¶¶ 263, 305; *Mercer International Inc. v. Government of Canada*, NAFTA, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018 (**Exhibit RL-100**), ¶ 7.42. *See also, e.g., 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 (**Exhibit CL-100**), ¶¶ 440-41 (tribunal agreed that a determination of FET breach “must be made in light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders”); *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 (**Exhibit CL-072**), ¶ 505 (the tribunal recalls the “high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders”).

⁵⁹⁹ *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 (**Exhibit RL-61**), ¶ 8.35 (“Hungary would enjoy a reasonable margin of appreciation in taking such measures before being held to account under the ECT’s standards of protection.”). *See also, e.g., Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008 (**Exhibit CL-062**), ¶ 181 (“in the Tribunal’s view, this objective assessment must contain a significant margin of appreciation for the State applying the particular measure: a time of grave crisis is not the time for nice judgments, particularly when examined by others with the disadvantage of hindsight”).

⁶⁰⁰ *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 (**Exhibit RL-61**), ¶ 7.77.

⁶⁰¹ *Marion Unглаbe and Reinhard Unглаbe v. Republic of Costa Rica*, ICSID Case Nos ARB/08/1 and ARB/09/20, Award, 16 May 2012 (**Exhibit RL-54**), ¶ 246 (emphasis added).

377. Moreover, host States are afforded “some measure of inefficiency, a degree of trial and error”.⁶⁰² In the words of the *AES v. Hungary* tribunal, “[t]he standard is not one of perfection”; “[i]t is only when a state’s acts or procedural omissions are, on the facts and in the context before the adjudicator, manifestly unfair or unreasonable” that the standard is violated.⁶⁰³
378. *Fifth*, investment tribunals have repeatedly held that investment treaties – and in particular FET provisions – are not insurance policies against business risk or poor business decisions.⁶⁰⁴ Investors are expected to carry out their own risk assessment prior to making an investment, and to accept responsibility for any losses out of their own business judgment.
379. For instance, in *MTD v. Chile*, the tribunal considered that “the Claimants should bear the consequences of their own actions as experienced businessmen”.⁶⁰⁵ The tribunal further noted that the claimants had taken various risks—including “[t]heir choice of partner, the acceptance of a land valuation based on future assumptions without protecting themselves contractually in case the assumptions would not materialize, including the issuance of the required development

⁶⁰² *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007 (**Exhibit RL-25**), ¶ 272.

⁶⁰³ *AES Summit Generation Limited and AES-Tisza Erőmű Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010 (**Exhibit CL-076**), ¶ 9.3.40.

⁶⁰⁴ *See, e.g., Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000 (**Exhibit CL-022**), ¶ 64 (BITS “are not insurance policies against bad business judgments”); *Waste Management, Inc. v. United Mexican States*, NAFTA, UNCITRAL, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (**Exhibit RL-14**), ¶ 114 (“[A]s investment tribunals have repeatedly said, ‘Investment Treaties are not insurance policies against bad business judgments’”); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 (**Exhibit CL-035**), ¶ 178 (“BITS are not an insurance against business risk and the Tribunal considers that the Claimants should bear the consequences of their own actions as experienced businessmen”); *CMS Gas Transmission Company v. Argentine*, ICSID Case No. ARB/01/8, Award, 12 May 2005 (**Exhibit CL-039**), ¶ 248 (“The tribunal found that while the financial crisis “had in itself a severe impact on the Claimant’s business”, “this impact must to some extent be attributed to the business risk the Claimant took on when investing in Argentina”); *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 (**Exhibit CL-070**), ¶ 217 (investor “may not rely on a [BIT] as a kind of insurance policy against the risk of any changes in the host State’s legal and economic framework”); *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010 (**Exhibit CL-079**), ¶ 124 (“BITS ‘are not insurance policies against bad business judgments’”); *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 (**Exhibit CL-110**), ¶ 591 (FET standard “is not an insurance policy against bad business”).

⁶⁰⁵ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 (**Exhibit CL-035**), ¶ 178.

permits”—and that this was true “irrespective of Chile’s actions”.⁶⁰⁶ The tribunal took this factor into account in reducing the claimants’ damages for Chile’s violation of the BIT.⁶⁰⁷

380. Similarly, in *Un glaube v. Costa Rica* the tribunal reasoned that, “[a]s intelligent and experienced investors”, the claimants were expected to have become familiar with Costa Rican law and procedure before investing in that country.⁶⁰⁸

381. Investment tribunals have also pointed out that the mere fact that a host State action may cause a commercial or other setback for an investor does not necessarily mean that it amounts to a denial of FET. In *Azinian v. Mexico*, for example, the tribunal noted that “[i]t is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities”, and that it is not the purpose of the NAFTA “to provide foreign investors with blanket protection from this kind of disappointment”.⁶⁰⁹

382. *Sixth*, a causal link is required between the State’s action or omission and the harm allegedly suffered by the investor. In the words of the *Lemire v. Ukraine* tribunal:

[The FET standard] requires an action or omission by the State which violates a certain threshold of propriety, causing harm to the investor, and with a causal link between action or omission and harm.⁶¹⁰

383. *Finally*, the Claimants’ claims that the FET standard protects investors against conduct that is unreasonable, discriminatory and arbitrary treatment (**IV.B.1(i)**), not transparent and lacking in due process (**IV.B.1(ii)**) and in frustration of the investor’s legitimate expectations (**IV.B.1(iii)**), must be assessed in light of the specific considerations set out below.

⁶⁰⁶ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 (**Exhibit CL-035**), ¶ 178.

⁶⁰⁷ *See MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 (**Exhibit CL-035**), ¶¶ 242-243.

⁶⁰⁸ *Marion Un glaube and Reinhard Un glaube v. Republic of Costa Rica*, ICSID Case Nos ARB/08/1 and ARB/09/20, Award, 16 May 2012 (**Exhibit RL-54**), ¶ 258.

⁶⁰⁹ *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999 (**Exhibit RL-6**), ¶ 83. *See also, e.g., Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007 (**Exhibit RL-27**), ¶ 344 (“It is evident that not every hope amounts to an expectation under international law”).

⁶¹⁰ *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 (**Exhibit CL-072**), ¶ 284 (emphasis added). *See also, e.g., Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012 (**Exhibit RL-60**), ¶ 212; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012 (**Exhibit RL-53**), ¶¶ 286, 296 (noting the importance of the “causal link between the action, the treaty breach, and the occurrence of the alleged damage”); *Oxus Gold v. Republic of Uzbekistan*, UNCITRAL, Award, 17 December 2015 (**Exhibit RL-82**), ¶¶ 747-748.

(i) *The standard concerning unreasonable, discriminatory and arbitrary treatment*

384. The Claimants' allegations that Colombia breached the FET standard by treating the Claimants and their investments unreasonably, arbitrarily and in a discriminatory manner should be assessed in light of the principles below.
385. *First*, the landmark case on the meaning of "arbitrariness" under international law is the *ELSI* case, where the ICJ defined the term as being "not so much something opposed to a rule of law, as something opposed to the rule of law", or "a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety".⁶¹¹ The *ELSI* definition of "arbitrariness" has been described as "the most authoritative interpretation of international law" and widely adopted by investment tribunals.⁶¹² This sets the threshold for a finding of "arbitrariness" particularly high.

⁶¹¹ *Elettronica Sicula SpA (ELSI) (United States of America v. Italy)*, Judgment, 20 July 1989, 1989 ICJ Rep. 15 (**Exhibit RL-4**), ¶ 128.

⁶¹² *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007 (**Exhibit CL-048**), ¶ 318. *See also, e.g., Philip Morris Brand SAARL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016 (**Exhibit RL-88**), ¶ 390 ("the *ELSI* judgment is most commonly referred to by investment tribunals' decisions as the standard definition of "arbitrariness" under international law"); *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 (**Exhibit CL-061**), ¶¶ 378, 381-382 ("the Tribunal will rely on the ICJ's definition of arbitrariness set forth in *ELSI*"); *ECE Projektmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbH & Co. v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award (**Exhibit CL-090**), 19 September 2013, ¶¶ 4.822-824 ("In the Tribunal's view the judgment of the Chamber of the International Court of Justice in the *ELSI* case does indeed provide the appropriate standard"); *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (**Exhibit CL-105**), ¶ 577 ("An authoritative definition of arbitrariness was given by a Chamber of the ICJ in the *ELSI* case"); *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 (**Exhibit CL-068**), ¶¶ 291, 293 (the tribunal further held that arbitrary conduct constitutes a breach of FET "only when the State's actions move beyond a merely inconsistent or questionable application of administrative or legal policy or procedure 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"); *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Award, 7 March 2017 (**Exhibit RL-90**), ¶¶ 522-523; *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005 (**Exhibit RL-19**), ¶¶ 177-178; *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007 (**Exhibit CL-056**), ¶ 341; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 (**Exhibit CL-072**), ¶ 262; *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Mr. Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/13/38, Award, 14 December 2017 (**Exhibit RL-98**), ¶ 308; *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006 (**Exhibit CL-043**), ¶¶ 392-393; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 27 October 2011 (**Exhibit CL-081**), ¶ 319; *Alex Genin, Eastern Credit Ltd., Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001 (**Exhibit RL-7**), ¶ 371.

386. Even investment tribunals that have not expressly adopted the *ELSI* definition of arbitrariness, have set a high threshold for finding that a conduct of a State is arbitrary. For example, in *OI v. Venezuela*, the tribunal held that “[t]he fundamental idea of arbitrariness is that legality, due process, the right to judicial remedy, objectivity and transparency in the State’s management are replaced by privilege, preference, bias, preclusion and concealment”.⁶¹³ The same high standard was applied by the tribunal in *Cargill v. Mexico*, on which the Claimants rely:

The Tribunal thus finds that arbitrariness may lead to a violation of a State’s duties under Article 1105, but only when the State’s actions move beyond a merely inconsistent or questionable application of administrative or legal policy or procedure 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.⁶¹⁴

387. In connection with the examples of arbitrary measures listed by the Claimants, in reliance of *EDF v. Romania*, investment tribunals have confirmed that these examples are not meant to displace the *ELSI* stringent test. Rather, these should be interpreted in accordance with the *ELSI* test. For example, after referring both to the *ELSI* definition and to the same four categories of measures listed in *EDF v. Romania*, the *Lemire v. Ukraine* tribunal – on which the Claimants also rely – concluded that “the underlying notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law”.⁶¹⁵ Therefore, whereas the arbitrariness standard may broadly be said to cover the examples listed in *EDF v. Romania*, the threshold to establish a violation is that in *ELSI*, which is high.

388. *Second*, similarly high is the threshold to find that a conduct is “unreasonable”. For example, in *AES v. Hungary*, the tribunal held that to be unreasonable, the State conduct must be either not linked to a rational governmental policy, or unreasonable in view of the pursuit of a rational governmental policy:

There are two elements that require to be analyzed to determine whether a state’s act was unreasonable: the existence of a rational

⁶¹³ *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015 (**Exhibit CL-099**), ¶ 494.

⁶¹⁴ *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 (**Exhibit CL-068**), ¶ 293 (emphasis added). See Claimants’ Memorial on Merits and Damages, fn. 877.

⁶¹⁵ *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 (**Exhibit CL-072**), ¶¶ 262-263.

policy; and the reasonableness of the act of the state in relation to the policy.⁶¹⁶

389. Conversely, the *AES v. Hungary* tribunal held that an action by the State is reasonable when there is “an appropriate correlation between the state’s public policy objective and the measure adopted to achieve it”.⁶¹⁷
390. *Third*, the threshold for finding a breach of the prohibition against discrimination is also high. For example, in *Sempra v. Argentina* the tribunal held that discrimination requires a “capricious, irrational or absurd differentiation”.⁶¹⁸
391. Moreover, establishing a violation of the prohibition against discrimination requires more than different treatment. Specifically, determining whether a measure is discriminatory involves an “inherently fact-specific” three-pronged analysis of whether (i) the investment/investor was in like circumstances with the identified comparator, (ii) the investment/investor was treated differently to the identified comparator and (iii) there is a reasonable justification for the measure.⁶¹⁹

⁶¹⁶ *AES Summit Generation Limited and AES-Tisza Erömu Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010 (**Exhibit CL-076**), ¶ 10.3.7.

⁶¹⁷ *AES Summit Generation Limited and AES-Tisza Erömu Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010 (**Exhibit CL-076**), ¶ 10.3.9. *See also* *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 (**Exhibit CL-070**), ¶ 305 (in denying the claim for unreasonable or discriminatory measures, the tribunal considered the following factors: “a. there is no evidence of measures applied to Claimant without a legitimate purpose; on the contrary, [the impugned measures] have all been held by the Tribunal as justified either by the terms of the contract binding the Parties or by the exercise of the State’s police power in the public interest; b. none of such measures was based on discretion, prejudice or personal preference, as made clear by the Tribunal’s examination; c. no evidence has been proffered indicating that any such measures were taken for reasons other than those stated by the decision maker; d. as shown by the numerous recourses by Claimant to legal procedures in Romania, including courts proceedings, more than once with a positive outcome for Claimant, due process and proper procedural requirements appear to have been satisfied by Respondent”).

⁶¹⁸ *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007 (**Exhibit CL-054**), ¶ 319.

⁶¹⁹ *See, e.g., Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, NAFTA, Award, 6 March 2018 (**Exhibit RL-100**), ¶ 7.6 (“[E]stablishing a violation of NAFTA [National Treatment provision] involves an inherently fact-specific analysis”); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 (**Exhibit RL-30**), ¶ 184 (“With regard to discrimination, it corresponds to the negative formulation of the principle of equality of treatment. It entails like persons being treated in a different manner in similar circumstances without reasonable or justifiable grounds”); *Invesmart, BV v. Czech Republic*, UNCITRAL, Award, 26 June 2009 (**Exhibit RL-35**), ¶ 444 (“The Tribunal further agrees with the Saluka tribunal’s analysis about the meaning of the standard enshrined in the impairment clause when it states [...] the standard of ‘non-discrimination’ requires a rational justification of any differential treatment of a foreign investor”); *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 (**Exhibit CL-072**), ¶ 261 (“To amount to discrimination, a case must be treated differently from similar cases without justification”); *Parkerings-*

392. *Fourth*, when analysing whether a particular measure is unreasonable or arbitrary, tribunals have often held that, absent manifest impropriety, the State’s liability will not be engaged. This was the case, for example, in *Saluka v. Czech Republic*, on which the Claimants rely, where the tribunal noted that a breach of the FET standard requires conduct that “manifestly violate[s] the requirements of consistency, transparency, even-handedness and non-discrimination”.⁶²⁰
393. Similarly, in *Cervin v. Costa Rica* the tribunal noted that the difference between “simply illegal” conduct and arbitrary conduct is that the latter involves a “deliberate repudiation of the purpose and objectives of a State policy”.⁶²¹
394. In application of this principle, the tribunal in *Enron v. Argentina* found that while certain measures adopted by Argentina in the wake of the Argentine crisis may have been inconsistent with the legal framework and “far from desirable”, they were not arbitrary because “a finding of arbitrariness requires that some important measure of impropriety is manifest”:

The measures adopted might have been good or bad, a matter which is not for the Tribunal to judge, and as concluded they were not consistent with the domestic and the Treaty legal framework, but they were not arbitrary in that they were what the Government believed and understood was the best response to the unfolding crisis. Irrespective of the question of intention, a finding of arbitrariness requires that some important measure of impropriety is manifest, and

Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007 (**Exhibit RL-27**), ¶ 371 (“No policy or purpose behind the said measure must apply to the investment that justifies the different treatments accorded. *A contrario*, a less favourable treatment is acceptable if a State’s legitimate objective justifies such different treatment in relation to the specificity of the investment”); *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 (**Exhibit CL-042**), ¶ 313 (“State conduct is discriminatory, if (i) similar cases are (ii) treated differently (iii) and without reasonable justification”), ¶ 460 (“[T]he standard of ‘non-discrimination’ requires a rational justification of any differential treatment of a foreign investor”); *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 (**Exhibit CL-045**), ¶ 146 (citing ELSI, the tribunal held that “in order to establish when a measure is discriminatory, there must be (i) an intentional treatment (ii) in favor of a national (iii) against a foreign investor, and (iv) that is not taken under similar circumstances against another national”); *Cengiz Insaat Sanayi Ve Ticaret A.S. v. The State of Libya*, ICA Case No. 21537/ZF/AYZ, Final Award, 7 November 2018 (**Exhibit CL-121**), ¶ 525 (“To prove the existence of discrimination, it is necessary that a three-step approach be followed: - First, an appropriate comparator must be identified, i.e. an investor which is in a situation similar to that of Cengiz (or an investment which is in a situation similar to Cengiz’ investment in Libya); - Second, Claimant must prove that Libya has applied to this comparator a treatment more favourable than that accorded to Cengiz or to its investment in Libya; - Third, there must be a lack of a reasonable or objective justification for the difference of treatment”).

⁶²⁰ *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 (**Exhibit CL-042**), ¶ 307 (emphasis added); Claimants’ Memorial on Merits and Damages, ¶ 416.

⁶²¹ *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Award, 7 March 2017 (**Exhibit RL-90**), ¶ 527.

this is not found in a process which although far from desirable is nonetheless not entirely surprising in the context it took place.⁶²²

395. Conversely, measures adopted in pursuit of rational policy objective, have been deemed not to be unreasonable or discriminatory. For example, in *Electrabel v. Hungary* found that the claimant had not proven that Hungary’s conduct was “arbitrary” on the basis that the challenged measures were “reasonably related to a legitimate policy objective”.⁶²³ In reaching this conclusion, the tribunal reasoned that the principle that “a measure will not be arbitrary if it is reasonably related to a rational policy” encompassed two elements: (i) “the existence of a rational policy”, and (ii) “the reasonableness of the act of the state in relation to the policy”.⁶²⁴
396. Moreover, when the alleged arbitrary conduct has been subjected to the review of the domestic courts of the host State, the tribunal should consider the findings of the domestic courts, except if the courts “are disavowed at the international level”. As noted by the tribunal in *Azinian v. Mexico*, “[a] governmental authority surely cannot be faulted for acting in a manner validated by its courts unless the courts themselves are disavowed at the international level”.⁶²⁵

⁶²² *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007 (**Exhibit CL-049**), ¶ 281 (emphasis added). See also *Ulysseas, Inc. v. Republic of Ecuador*, UNCITRAL, Final Award, 12 June 2012 (**Exhibit RL-56**), ¶ 319 (the tribunal rejected a claim that measures taken by Ecuador aimed at improving the functioning of the electricity sector were “arbitrary” because the requisite measure of manifest impropriety was lacking); *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007 (**Exhibit CL-054**), ¶ 318.

⁶²³ *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015 (**Exhibit RL-81**), ¶ 214. See also *AES Summit Generation Limited and AES-Tisza Erömu Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010 (**Exhibit CL-076**), ¶ 10.3.34 (the tribunal reasoned that while Hungary’s measures were “principally motivated by the politics surrounding so-called luxury profits, [...] it is a perfectly valid and rational policy objective for a government to address luxury profits”).

⁶²⁴ *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015 (**Exhibit RL-81**), ¶ 179.

⁶²⁵ *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999 (**Exhibit RL-6**), ¶ 97; *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Mr. Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/13/38, Award, 14 December 2017 (**Exhibit RL-98**), ¶¶ 318, 366(d); *Iberdrola Energía S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Award, 17 August 2012 (**Exhibit RL-57**), ¶ 371 (“[if] the interpretation of the regulatory body was supported by the local tribunals, for this Tribunal to be able to resolve this process the Claimant should have demonstrated, beyond doubt, that the action of the courts violated the Treaty”); *Luigiterzo Bosca v. The Republic of Lithuania*, PCA Case No. 2011-05, Award, 17 May 2013 (**Exhibit RL-63**), ¶ 198 (“[...] when a tribunal is considering an issue of domestic law previously ruled upon by a domestic court, the tribunal ‘will accept the findings of local courts as long as no deficiencies, in procedure or substance, are shown in regard to the local proceedings which are of a nature of rendering these deficiencies unacceptable from the viewpoint of international law, such as in the case of a denial of justice.’ No such inappropriate conduct by the local courts has been alleged in the present case; the Lithuanian courts appear to have applied high standards of judicial propriety in each of their judgments”); *Hassan Awdi, Enterprise Business Consultants, Inc., and Alfa El Corporation v. Romania*, ICSID Case No.

(ii) *The standard concerning transparency and due process*

397. The Claimants’ allegations that Colombia breached the FET standard by not acting transparently and not respecting the Claimants’ due process rights should be assessed in light of the principles below.

398. *First*, the concept of “transparency” is not included within the minimum standard of treatment. This has been confirmed by the United States:

The concept of “transparency” also has not crystallized as a component of “fair and equitable treatment” under customary international law giving rise to an independent host-State obligation. The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation of host-State transparency under the minimum standard of treatment.⁶²⁶

399. Even assuming that the concept of transparency is included within the FET standard under customary international law, investment tribunals have held that even if a lack of transparency could constitute a breach of the FET standard, “there is a high threshold to be met in order to establish a breach”.⁶²⁷

400. In this sense, the transparency obligation requires that “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

ARB/10/13, Award, 2 March 2015 (**Exhibit RL-73**), ¶ 327 (“[a]n ICSID Tribunal will not act as an instance to review matters of domestic law in the manner of a court of higher instance. Instead, the Tribunal will accept the findings of local courts as long as no deficiencies, in procedure or substance, are shown in regard to the local proceedings which are of a nature of rendering these deficiencies unacceptable from the viewpoint of international law, such as in the case of a denial of justice”).

⁶²⁶ *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2, Submission of the United States of America, 21 June 2019 (**Exhibit RL-110**), ¶ 40. *See also, e.g., Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002 (**Exhibit CL-031**), ¶ 133 (finding that “it is doubtful that lack of transparency alone rises to the level of violation of NAFTA and international law,” and holding the British Columbia Supreme Court’s decision in *Metalclad* to be “instructive”); *Merrill & Ring Forestry L.P. v. Government of Canada*, NAFTA, ICSID Case No. UNCT/07/1, Award, 31 March 2010 (**Exhibit RL-41**), ¶ 231.

⁶²⁷ *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum 2015 (**Exhibit RL-115**), ¶ 660. *See also Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015 (**Exhibit RL-80**), ¶ 399 (noting that the standard of consistency and transparency requires to reach “the level of ‘manifest arbitrariness’ or ‘complete lack of transparency and candour’”); *Waste Management, Inc. v. United Mexican States*, NAFTA, UNCITRAL, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (**Exhibit RL-14**), ¶ 98 (setting the standard at “a complete lack of transparency and candour in an administrative process”).

investors”.⁶²⁸ However, it does not require host States “to act under complete disclosure”. This was expressly noted by the *Urbaser v. Argentina* tribunal, in a passage that was incompletely quoted by the Claimants:

The host State’s handling of matters in transparency cannot mean that it has to act under complete disclosure of any aspect of its operation. It rather means that in relation to a foreign investor, the authorities of the State shall act 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.⁶²⁹

401. *Second*, under the FTA, a breach of due process only amounts to a breach of the FET standard when it results in a denial of justice. This has been confirmed by the tribunal in *Aven v. Costa Rica*, which interpreted a provision identical to that in Article 10.5.2(a) of the FTA as follows:

Therefore, the claimant investor alleging the breach of the obligation to afford fair and equitable treatment has the burden of proof to show denial of justice, insofar as Article 10.5.2.(a) DR-CAFTA may be applicable. The investor may not be released of such burden invoking that DR-CAFTA does not require the prior exhaustion of domestic remedies to have access to arbitration, because what is at play is not the admissibility of the claim but the merit of the claim. Certainly, for the admissibility of a claim within DR-CAFTA, it is not necessary to have exhausted domestic remedies, but to establish the merits on the basis of denial of justice it is necessary to evidence that the State which receives the investment breaches its international obligation to provide investors of the other Parties to the Treaty, access to justice and due process for the resolution of their rights and obligations through competent, independent and impartial courts, under generally recognized international standards.⁶³⁰

⁶²⁸ *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 (**Exhibit CL-045**), ¶ 128.

⁶²⁹ *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 (**Exhibit CL-110**), ¶ 628 (emphasis added). See Claimants’ Memorial on Merits and Damages, ¶ 420.

⁶³⁰ *David Aven et al. v. The Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award, 18 September 2018 (**Exhibit RL-105**), ¶ 357 (emphasis added). As further clarified by the *Aven v. Costa Rica* tribunal, “[t]he due process right which is acknowledged and protected by most relevant conventions on Human Rights is more generous than that arising from minimum standard of treatment to non-nationals”. See ¶ 354. *David Aven et al. v. The Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Submission of United States of America, 17 April 2015 (**Exhibit RL-78**), ¶ 13 (the United States of America confirmed that the minimum standard of treatment includes “the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings” and sets a high threshold for when a denial of justice arises, “when a State’s judiciary administers justice to aliens in a “notoriously unjust” or “egregious” manner “which offends a sense of judicial propriety”. A conduct that does not meet this standard, could not be regarded as a breach of the minimum standard of treatment); *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, Submission of the United States of America, 18 March 2016 (**Exhibit RL-85**), ¶ 24.

402. For an investor to prevail on a claim for denial of justice, “a very high threshold is required”.⁶³¹ In this sense, investment tribunals have held that denial of justice involves a “*systemic failure* of the State’s justice system”.⁶³² Moreover, there can be no denial of justice until a final decision on the issue has been made by the State’s highest judicial authority.⁶³³ In light of this very high threshold, it is not surprising that the Claimants did not argue denial of justice, but rather vaguely a “breach of due process”.
403. Even if it were to be understood that a breach of the more stringent “denial of justice” is not required for a breach of the FET standard to take place, tribunals have understood that only severe due process violations would constitute a breach of the FET standard. As noted by the tribunal in *Krederi v. Ukraine*:

The core element of due process certainly is that the adjudicator conducts the adjudicatory process in a proper fashion. Thus, serious defects in the adjudicative process, such as violations of equal treatment of the parties, the right to be heard or other core rights of litigants may amount to violations of due process.⁶³⁴

⁶³¹ *Staur Eiendom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award, 28 February 2020 (**Exhibit RL-117**), ¶ 472. See also *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award, 30 November 2011 (**Exhibit RL-51**), ¶ 10.4.8 (“It is clear that this is a stringent standard, and that international tribunals are slow to make a finding that a State is liable for the international delict of denial of justice”); *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Excerpts of the Award, 6 May 2014 (**Exhibit RL-68**), ¶ 400 (“The Tribunal also stresses that the evidentiary threshold to establish a claim of denial of justice is high”); *Philip Morris Brand S&R, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016 (**Exhibit RL-88**), ¶ 499 (“An elevated standard of proof is required for finding a denial of justice due to the gravity of a charge which condemns the State’s judicial system as such”). The United States has also set the threshold for denial of justice very high. See, e.g., *David Aven et al. v. The Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Submission of United States of America, 17 April 2015 (**Exhibit RL-78**), ¶ 13 and footnote 17 (US established that “denial of justice arises, for example, when a State’s judiciary administers justice to aliens in a “notoriously unjust” or “egregious” manner “which offends a sense of judicial propriety”); *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, Submission of the United States of America, 18 March 2016 (**Exhibit RL-85**), ¶ 22 (noting the “high threshold required for judicial measures to rise to the level of a denial of justice in customary international law”).

⁶³² See, e.g., *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent’s Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DRCAFTA, 31 May 2016 (**Exhibit RL-86**), ¶ 254; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012 (**Exhibit RL-53**), ¶ 273 (“A denial of justice implies the failure of a national system as a whole to satisfy minimum standards”).

⁶³³ See, e.g., *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent’s Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DRCAFTA, 31 May 2016 (**Exhibit RL-86**), ¶ 264; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, NAFTA, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003 (**Exhibit RL-11**), ¶ 132, 151-154.

⁶³⁴ *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018 (**Exhibit RL-103**), ¶ 461. See also *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award,

404. In light of this high standard, investment tribunals have held that not any procedural irregularity amounts to a breach of FET. Indeed, the Claimants agree with the statement of the *AES v. Hungary* tribunal that:

[I]t is not every process failing or imperfection that will amount to a failure to provide fair and equitable treatment. The standard is not one of perfection. It is only when 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 – that the standard can be said to have been infringed.⁶³⁵

405. In concluding that Hungary did not breach AES's due process rights, the tribunal considered, among others, that AES had the opportunity to have the "several procedural shortcomings" in the implementation of a price review decree to the review of the Hungarian courts.⁶³⁶

406. Similarly, in *Genin v. Estonia*, the tribunal held that "in order to amount to a violation of the BIT, any procedural irregularity that may have been present would have to amount to bad faith, a wilful disregard of due process of law or an extreme insufficiency of action".⁶³⁷ The tribunal went on to assess whether certain procedures by the Estonian authorities were in breach of the BIT, including (i) not giving formal notice to a party that its licence would be revoked unless it complied with certain demands of the Bank of Estonia, (ii) no representative of the party was invited to the session of the Bank of Estonia's Council that dealt with the revocation to respond to charges brought against the party, and (iii) the revocation of the license was made immediately effective, giving the party no opportunity to challenge the revocation in court before it was publicly announced. The tribunal concluded that while these irregularities "invite[d] criticism", they did not amount to a breach of treaty.⁶³⁸

23 April 2012 (**Exhibit RL-53**), ¶ 299 ("The BIT does not grant protection for mere breaches of local procedural law").

⁶³⁵ *AES Summit Generation Limited and AES-Tisza Erömu Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010 (**Exhibit CL-076**), ¶ 9.3.40. See Claimants' Memorial on Merits and Damages, ¶ 436.

⁶³⁶ *AES Summit Generation Limited and AES-Tisza Erömu Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010 (**Exhibit CL-076**), ¶¶ 9.3.65-66.

⁶³⁷ *Alex Genin, Eastern Credit Ltd., Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001 (**Exhibit RL-7**), ¶ 371.

⁶³⁸ *Alex Genin, Eastern Credit Ltd., Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001 (**Exhibit RL-7**), ¶¶ 364-365. See also *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, NAFTA, Award, 26 January 2006 (**Exhibit RL-21**), ¶¶ 197-200 (the tribunal found that, while the proceedings "may have been affected by certain irregularities", none of these were "grave enough to shock a sense of judicial propriety and

407. Therefore, in order to constitute a breach of the FET standard, the due process irregularities have to lead “(i) ‘to an outcome which offends judicial propriety [...] in judicial proceedings’ or ‘to [...] a complete lack of transparency and candour in an administrative process.’”⁶³⁹
408. *Third*, the claims of violation of transparency and due process are to be assessed on a case by case basis, in light of the circumstances surrounding the impugned conduct. As noted by the tribunal in *Micula v. Romania*:

Whether a state has been unfair and inequitable by failing to be transparent with respect to its laws and regulations, or being ambiguous and inconsistent in their application, must be assessed in light of all of the factual circumstances surrounding such conduct. For example, it would be unrealistic to require Romania to be totally transparent with the general public in the context of diplomatic negotiations. The question before the Tribunal is thus not whether Romania has failed to make full disclosure of or grant full access to sensitive information; it is whether, in the event that Romania failed to do so, Romania acted unfairly and inequitably with respect to the Claimants. The same applies to consistency: the question is not merely whether Romania has acted inconsistently; it is whether, in acting inconsistently, it has been unfair and inequitable with respect to the Claimants. This is a question that cannot be answered in a vacuum; it is highly dependent on the factual circumstances.⁶⁴⁰

409. In particular, investment tribunals have held that there can be no violation of the FET standard (and in particular, a breach of due process) as long as the investor is given the opportunity to

thus give rise to a breach of the minimum standard of treatment”. The tribunal concluded that despite the irregularities, there was no evidence that the proceedings “were arbitrary or unfair, let alone so manifestly arbitrary or unfair as to violate the minimum standard of treatment.” In particular, the tribunal noted that the claimant had been given a full opportunity to be heard and to present evidence at an administrative hearing and that it made use of the opportunity); *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Award, 2 August 2019 (**Exhibit RL-113**), ¶¶ 471-472 (the tribunal found that the steps adopted by Spain for a regulatory reform, “imperfect though they may have been”, was not in breach of the FET standard because it provided the investors “with ample opportunities to be heard, to reach to the changes at issue and to ‘engage the host state in dialogue about protecting [their] legitimate expectations’); *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012 (**Exhibit RL-53**), ¶ 287 (the tribunal held that “procedural irregularities” would only constitute a breach of the FET standard if they amount to “severe improprieties with an impact on the outcome of the case, to the point that the entire procedure becomes objectionable as required by the notion of procedural denial of justice”).

⁶³⁹ *Joshua Dean Nelson and Jorge Blanco v. United Mexican States*, ICSID Case No. UNCT/17/1, Award, 5 June 2020 (**Exhibit RL-120**), ¶ 358. See also *Waste Management, Inc. v. United Mexican States*, NAFTA, UNCITRAL, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (**Exhibit RL-14**), ¶ 98 (the minimum standard of treatment is infringed by conduct that “involves a lack of due process leading to an outcome which offends judicial propriety-as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process”).

⁶⁴⁰ *Ioan Micula, et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013 (**Exhibit CL-093**), ¶ 533.

challenge the impugned measures before the local courts of the host State. For example, in *Bayindir v. Pakistan*, the tribunal concluded that the claimant had not been denied due process or procedural fairness because “the record shows that Bayindir was indeed given the opportunity to present its position on numerous occasions throughout the relevant period”.⁶⁴¹ Similarly, in *Lauder v. Czech Republic* the tribunal rejected the claimant’s due process claims on the basis that “the Czech judicial system has remained fully available to the Claimant”.⁶⁴²

410. Also in *Rumeli v. Kazakhstan* the tribunal considered that there was no breach of due process because “it does not have any clear evidence that the decisions of the various Kazakh Courts which have been reviewed above were wrong procedurally or substantially, or were so egregiously wrong as to be inexplicable other than by a denial of justice” and “when the decisions were appealed, they were carefully reviewed by the appellate courts and sometimes partially reversed by them”.⁶⁴³
411. Finally, transparency and due process by no means require the host State’s administrative and judicial authorities to decide in favour of the investor. As noted by the *Azinian v. Mexico* tribunal, investors “may be disappointed in their dealings with public authorities, and disappointed yet again when national courts reject their complaints”, but this does not amount to a breach of an investment agreement, because investment agreements are “not intended to provide foreign investors with blanket protection from this kind of disappointment”.⁶⁴⁴ Thus:

Even if the Claimants were to convince this Arbitral Tribunal that the Mexican courts were wrong with respect to the invalidity of the Concession Contract, this would not per se be conclusive as to a violation of NAFTA. More is required; the Claimants must show either a denial of justice, or a pretence of form to achieve an internationally unlawful end.⁶⁴⁵

⁶⁴¹ *Waguih Elie George Siag & Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009 (**Exhibit CL-066**), ¶¶ 347-348.

⁶⁴² *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001 (**Exhibit RL-8**), ¶ 314. See also *Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 7 August 2019 (**Exhibit CL-125**), ¶ 1319, as quoted by the Claimants’ Memorial on Merits and Damages, ¶ 422 (“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”).

⁶⁴³ *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 (**Exhibit CL-060**), ¶ 619.

⁶⁴⁴ *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999 (**Exhibit RL-6**), ¶ 83.

⁶⁴⁵ *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999 (**Exhibit RL-6**), ¶ 99 (emphasis added). See also *Eli Lilly and*

(iii) *The standard concerning legitimate expectations*

412. The Claimants’ allegations that Colombia breached the FET standard by frustrating their legitimate expectations with respect to their investment should be assessed in light of the principles below.
413. *First*, under customary international law, the concept of “legitimate expectations” cannot be considered as an element of the FET standard that gives rise to an independent host State obligation. Therefore, the investor’s expectations about the legal regime governing its investment “impose no obligations on the State under the minimum standard of treatment”.⁶⁴⁶ As noted by the *ad hoc* Committee in *MTD v. Chile*, the host State’s obligations are limited to those set out in the applicable treaty, rather than being based on the investor’s expectations:

[T]he *TECMED* Tribunal’s apparent reliance on the foreign investor’s expectations as the source of the host State’s obligations (such as the obligation to compensate for expropriation) is questionable. The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to

Company v. The Government of Canada, UNCITRAL, ICSID Case No. UNCT/14/2, Submission of the United States of America, 18 March 2016 (**Exhibit RL-85**), ¶ 23 (“domestic courts performing their ordinary function in the application of domestic law as neutral arbiters of the legal rights of litigants before them are not subject to review by international tribunals absent a denial of justice under customary international law”); *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Submission of the United States of America, 21 June 2019 (**Exhibit RL-111**), ¶ 12 (“there will be a breach of Article 1105(1) based on judicial acts (e.g., a denial of justice) only if the justice system *as a whole* (i.e., until there has been a decision of the court of last resort available) produces a denial of justice”); *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic*, PCA Case No. 2017-15, Final Award, 11 May 2020 (**Exhibit RL-119**), ¶ 707 (noting that States cannot be deemed to have breached their treaty obligations “when cumulatively they fail to provide an “effective remedy” against harms that befall an investor through the normal operation of State laws, even where the State action has been found not *otherwise wrongful* under international law”) (emphasis in original).

⁶⁴⁶ *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, Submission of the United States of America, 18 March 2016 (**Exhibit RL-85**), ¶ 13 (“The concept of “legitimate expectations” is not a component element of “fair and equitable treatment” under customary international law that gives rise to an independent host State obligation. An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment.”). *See also* *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Second Submission of the United States of America, 12 June 2015 (**Exhibit RL-70**), ¶ 18 (“it was erroneous to conclude that “reasonable expectations” are part of the customary international law minimum standard of treatment. A claimant’s “expectations” are not a component element of “fair and equitable treatment” under the customary international law that gives rise to an independent host State obligation. The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation under the minimum standard of treatment not to frustrate investors’ “expectations.” An investor may develop expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment. Instead, something more is required than the mere interference with those expectations. As Professor McRae noted in his Dissenting Opinion, “disappointment is not a basis for finding a violation of Article 1105”).

have. A tribunal which sought to generate from such expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its powers, and if the difference were material might do so manifestly.⁶⁴⁷

414. *Second*, even assuming that legitimate expectations would be protected under Article 10.5 of the FTA, only the investor’s expectations that are objectively reasonable could be afforded protection. As explained by the tribunal in *Invesmart v. Czech Republic*:

[A]lthough an investor’s expectation is subjective, i.e., what the investor believed to be the import of its dealings with government officials on which it claims to have relied, for the Tribunal, the test of whether such an expectation can give rise to a successful claim at international law is an objective one. It is not enough that a claimant have sincerely held an expectation; the expectation must be reasonable and the Tribunal must make the determination of reasonableness in all of the circumstances. If the expectation was unreasonable (for example, ill-informed or overly optimistic), it matters not that the investor held it and it will not form the basis for a successful claim.⁶⁴⁸

415. In the same vein, the *Saluka v. Czech Republic* tribunal held that the investor’s subjective motivations and considerations are not protected. Rather, to be protected, the investor’s expectations “must rise to the level of legitimacy and reasonableness *in light of the circumstances*”.⁶⁴⁹
416. *Third*, in principle, the investor’s legitimate expectations arise from specific promises or commitments made by the State to the investor. Investment tribunals (including those on which the Claimants relied) have repeatedly held that legitimate expectations “by definition require a promise of the administration on which the Claimants rely to assert a right that needs to be

⁶⁴⁷ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007 (**Exhibit RL-24**), ¶ 67 (emphasis added).

⁶⁴⁸ *Invesmart, BV v. Czech Republic*, UNCITRAL, Award, 26 June 2009 (**Exhibit RL-35**), ¶ 250 (emphasis added). See also, e.g., *Suez, InterAguas Servicios Integrales del Agua S.A., Sociedad General de Aguas de Barcelona S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, 20 July 2010 (**Exhibit CL-075**), ¶ 228 (“one must not look single-mindedly at the Claimants’ subjective expectations. The Tribunal must rather examine them from an objective and reasonable point of view”); Campbell McLachlan *et al.*, *International Investment Arbitration: Substantive Principles* (2nd ed., 2017) (**Exhibit RL-136**), ¶ 7.190 (“The requirement of reasonableness of reliance carries the consequence that breach of the standard is determined objectively and not by reference to the investor’s subjective expectations”).

⁶⁴⁹ *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 (**Exhibit CL-042**), ¶ 304 (“[T]he scope of the Treaty’s protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors’ subjective motivations and considerations. Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances”) (emphasis in original).

observed”.⁶⁵⁰ Therefore, in cases where “no promise or commitment had been made by the Respondent”, there cannot be a breach of legitimate expectations.⁶⁵¹ In particular, matters “of general policy that did not entail a promise made specifically to the Claimants” were found not to give rise to legitimate expectations.⁶⁵²

417. In the words of the *Crystallex v. Venezuela* tribunal:

A legitimate expectation may arise in cases where the Administration has made a promise or representation to an investor as to a substantive benefit, on which the investor has relied in making its investment, and which later was frustrated by the conduct of the Administration. To be able to give rise to such legitimate

⁶⁵⁰ *PSEG Global Inc. and Konya Ilgın Elektrik Üretim ve Ticaret Şirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007 (**Exhibit CL-047**), ¶ 241. See also, e.g., *Ioan Micula, et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013 (**Exhibit CL-093**), ¶ 688 (“[I]n order to establish a breach of the [FET] obligation based on an allegation that Romania undermined the Claimants’ legitimate expectations, the Claimants must establish that (a) Romania made a promise or assurance, (b) the Claimants relied on that promise or assurance as a matter of fact, and (c) such reliance (and expectation) was reasonable”); *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010 (**Exhibit CL-079**), ¶ 121 (the tribunal found “the form and specific content of the undertaking of stability” crucial, along with “the clarity with which the authorities have expressed their intention to bind themselves for the future” and “the more specific the declaration to the addressee(s)” and ¶ 167 (the tribunal noted that the claimant could have had no reasonable expectation, “especially as Total was not a beneficiary of any specific promise”); *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 (**Exhibit RL-61**), ¶ 9.10; *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007 (**Exhibit CL-050**), ¶ 191 (the legitimate expectations were based on assurances contained in a joint venture agreement that had been “endorsed” by the Government); *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 (**Exhibit CL-061**), ¶ 361 (the tribunal found that legitimate expectations arose from “the State’s representations” contained in specific payment provisions of a purchase agreement); *Union Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018 (**Exhibit CL-119**), ¶¶ 9.63 and 9.83 (the legitimate expectations were based on a letter containing Egypt’s express “official endorsement” of an agreement); *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, 21 April 2015 (**Exhibit CL-101**), ¶ 195 (the tribunal found that by failing to implement the rescheduling and waivers specifically contained in a letter signed by the Prime Minister and three other Ministers in compliance with a share purchase agreement, Romania obstructed the claimants’ legitimate expectations); *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005 (**Exhibit CL-041**), ¶ 226 (the legitimate expectations arose from the obligations contained in a purchase agreement).

⁶⁵¹ *PSEG Global Inc. and Konya Ilgın Elektrik Üretim ve Ticaret Şirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007 (**Exhibit CL-047**), ¶ 242. As noted by the Claimants, in *Glencore v. Colombia* the tribunal held that “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”. See *Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 7 August 2019 (**Exhibit CL-125**), ¶ 1368, as quoted in Claimants’ Memorial on Merits and Damages, ¶ 427. This finding is not relevant to our case, because the stability of the legal and regulatory regime is not at issue.

⁶⁵² *PSEG Global Inc. and Konya Ilgın Elektrik Üretim ve Ticaret Şirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007 (**Exhibit CL-047**), ¶ 243.

expectations, such promise or representation – addressed to the individual investor – must be sufficiently specific, i.e. it must be precise as to its content and clear as to its form.⁶⁵³

418. Thus, for example, in *White Industries v. India*, the claimant alleged to have legitimately expected that an award would be enforced in India “in a fair and reasonably timely manner”. The tribunal, however, reasoned that the claimant “knew or ought to have known” that the domestic court structure in India was overburdened,⁶⁵⁴ so “absent an express assurance from India that any award would be enforced in a particular manner or timeframe, it is simply not possible for White, legitimately, to have had the expectations as to the timely enforcement of the Award”.⁶⁵⁵ The *White Industries* tribunal further noted that representations that are too vague or general cannot give rise to legitimate expectations:

[T]he Tribunal agrees with India that the alleged representations suffer from vagueness and generality, such that they are not capable of giving rise to reasonable legitimate expectations that are amenable to protection under the fair and equitable treatment standard.⁶⁵⁶

419. Similarly, in *Allard v. Barbados* the tribunal held that a series of statements made by the Respondent, including a reply letter from the Barbados Ministry of Finance and Economic Affairs, the Deputy Minister’s statements during a meeting and a letter from the Permanent

⁶⁵³ *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2), Award, 4 April 2016 (**Exhibit CL-105**), ¶ 547 (emphasis added). As acknowledged by the Claimants (Claimants’ Memorial on Merits and Damages, fn 837), the *Crystallex* tribunal found that the claimant’s legitimate expectations arose from “specific representations” made in a letter in “unambiguous” terms, including that “the Permit will be handed over”, which “appears on its face as a positive representation [] in clear and precise terms” made by the State to the investor. See ¶¶ 562-563, 575. See also *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010 (**Exhibit CL-079**), ¶ 121 (“the form and specific content of the undertaking of stability invoked are crucial. No less relevant is the clarity with which the authorities have expressed their intention to bind themselves for the future. Similarly, the more specific the declaration to the addressee(s), the more credible the claim that such an addressee (the foreign investor concerned) was entitled to rely on it for the future in a context of reciprocal trust and good faith.”); *Mr. Jürgen Wirtgen, Mr. Stefan Wirtgen, and JSW Solar (zwei) GmbH & Co.KG v. Czech Republic*, PCA Case No. 2014-03, Final Award, 11 October 2017 (**Exhibit RL-95**), ¶¶ 409 and 422 (the tribunal held that to ascertain whether the state has given a specific assurance, “the form, the content and the clarity of the alleged promise are of critical relevance”. The tribunal concluded that the statements invoked by the claimants “contain[ed] no details of the level of the FIT that is guaranteed” and that the information was to be found in the regulatory framework “which was publicly available and which any potential investor would refer to when deciding whether to invest in the Czech Republic”. The tribunal further held that ambiguous representations made by the State “cannot change” the applicable legal and regulatory framework).

⁶⁵⁴ *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award, 30 November 2011 (**Exhibit RL-51**), ¶ 10.3.14.

⁶⁵⁵ *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award, 30 November 2011 (**Exhibit RL-51**), ¶ 10.3.15.

⁶⁵⁶ *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award, 30 November 2011 (**Exhibit RL-51**), ¶ 10.3.17 (emphasis added).

Secretary in the Ministry of Physical Development could not be regarded as “specific representation capable of creating a legitimate expectation” since they were “insufficiently specific”. In particular, the tribunal noted that “[t]he terms and context of these statements do not suffice to support the expression of an intention to create an obligation for the State”.⁶⁵⁷

420. *Fourth*, the investor’s legitimate expectations must be assessed in light of “an objective understanding of the legal framework within which the investor has made its investment” “as it existed at the time that the investment was made”.⁶⁵⁸ For example, in *Rusoro Mining v. Venezuela*, the tribunal dismissed the claimant’s FET claim on the basis that the claimant had invested at a time when a particular exchange control regime was in place, without seeking any assurance that its investment would be exempted from the application of this regime:

Claimant took the decision to invest in Venezuela when the Bolivarian Republic already had an exchange control regime in place, which imposed compulsory repatriation of (at least) 90% of foreign currency earned, required authorization from CADIVI for purchases of foreign currency and defined the Official Exchange Rate. The Bolivarian Republic never made any representation vis-à-vis Rusoro, either before or after the investment, that Rusoro would somehow be exempted from the application of the general exchange control regime. Claimant never developed a legitimate expectation that in due course Venezuela would not adopt more restrictive legislation, and that tolerance of the Swap Market would continue *sine die*. [...] In these circumstances, Rusoro’s allegation that the closing of the Swap Market implied a breach of the FET standard must fail.⁶⁵⁹

421. *Fifth*, an assessment of the reasonableness and legitimacy of the investor’s expectations must also take into account the overall conditions in the host State at the time the investment is made. The host State’s level of development, as well as its economic, social and political situation are all factors that have been considered by investment tribunals in this context.

⁶⁵⁷ *Peter A. Allard v. The Government of Barbados*, PCA Case No. 2012-06, Award, 27 June 2016 (**Exhibit RL-87**), ¶ 199. *See also* ¶¶ 199-208.

⁶⁵⁸ *Murphy Exploration & Production Company – International v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-16, Partial Final Award, 6 May 2016 (**Exhibit CL-107**), ¶ 248-249. Notably, in concluding that the claimant held legitimate expectations that the terms of a contract would not change except “within the confines of the law and pursuant to a negotiated mutual agreement between the contractual partners”, the *Murphy* tribunal took into account “both the terms of the Participation Contract and the legal framework that was in place in Ecuador at the time that [the] Claimant signed up to the Participation Contract”. *See* ¶ 273.

⁶⁵⁹ *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016 (**Exhibit CL-108**), ¶¶ 532–533 (emphasis added).

422. In *Energy v. Ecuador*, the tribunal noted that “to be protected, the investor’s expectations must be legitimate and reasonable at the time when the investor makes the investment and emphasized the contextual nature of this inquiry”:

The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest.⁶⁶⁰

423. Therefore, whether the investor invested in a more or less vulnerable State will shape his legitimate expectations. For example, in *Generation Ukraine v. Ukraine* the tribunal weighed the fact that the claimant was “attracted to the Ukraine because of the possibility of earning a rate of return on its capital in significant excess to the other investment opportunities in more developed economies”. Therefore, when the claimant decided to invest in the Ukraine, he was “on notice of both the prospects and the potential pitfalls”.⁶⁶¹ According to the tribunal, the “speculative” nature of the claimant’s investment could explain why the claimant “was cautious

⁶⁶⁰ *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 (**Exhibit CL-061**), ¶ 345 (emphasis added). *See also Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 (**Exhibit CL-067**), ¶¶ 192-193, 195 (the tribunal concluded that the claimant had “elected to pursue its activities in Pakistan despite a degree of political volatility of which it was fully aware”); *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007 (**Exhibit RL-27**), ¶ 335-336 (the tribunal took note of Lithuania’s instable political environment and concluded that given that the investor had not sought any specific protections “against unexpected and unwelcome changes”, the investor had “took the business risk” of investing in such an instable environment); *William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Final Award, 9 September 2003 (**Exhibit RL-12**), ¶ 293 (in assessing the claimant’s claims, the tribunal took into consideration the Czech Republic’s status as a transitioning democracy with a nascent market economy); *Alex Genin, Eastern Credit Ltd., Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001 (**Exhibit RL-7**), ¶ 348 (the tribunal considered as relevant the fact that Estonia was a newly independent country at the time the claimants decided to invest); *Mamidoil Jetoil Greek Petroleum Products Société S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015 (**Exhibit RL-76**), ¶¶ 625-626 (investment made in Albania, which had “had just overcome a highly repressive and isolationist communist regime” and “lived through a severe economic and financial crisis”; in those circumstances, the investor was “entitled to rely on Albania’s efforts to live up to its obligations under international treaties”, but “was not entitled to believe that these effort[s] would generate the same results of stability as in Great Britain, USA or Japan”); *Suez, InterAguas Servicios Integrales del Agua S.A., Sociedad General de Aguas de Barcelona S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, 20 July 2010 (**Exhibit CL-075**), ¶ 209 (the tribunal should assess “[w]hat would have been the legitimate and reasonable expectations of a reasonable investor in the position of the Claimants, at the time they made their investment in 1993, [...] in view of the [...] legal framework and bearing in mind that country’s history and its political, economic, and social circumstances?”).

⁶⁶¹ *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003 (**Exhibit RL-13**), ¶ 20.37.

about contributing substantial sums of its own money to the enterprise, preferring to seek capital from third parties” to finance its investment.⁶⁶²

424. In the same vein, the tribunal in *Bewater v Tanzania* set the limit to legitimate expectations “in circumstances where an investor itself takes on risks in entering a particular investment environment”,⁶⁶³ and the *Bayindir v. Pakistan* tribunal took into account when considering the investor’s legitimate expectations that “the Claimant elected to pursue its activities in Pakistan despite a degree of political volatility of which it was fully aware”.⁶⁶⁴
425. Finally, the State’s legitimate regulatory interests should also be considered *vis-à-vis* the investor’s expectations. As noted by the *Saluka v. Czech Republic* tribunal, to determine whether the host State has breached the FET standard, “a weighing of the Claimant’s legitimate and reasonable expectations on the one hand and the Respondent’s legitimate regulatory interests on the other” is required.⁶⁶⁵
426. In sum, the conditions prevailing in the host State at the time the investment was made and the risks undertaken by the investor shape the expectations that an investor can reasonably have. What an investor may reasonably expect requires therefore a case-by-case assessment taking into account the characteristics and nature of the investment, the investor’s prior due diligence and subsequent conduct, the conditions in the host State at the time the investment is made, any specific commitment or assurance made by the investor to the host State and the host State’s legitimate regulatory interests.

⁶⁶² *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003 (**Exhibit RL-13**), ¶ 20.37. See also, e.g., *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 (**Exhibit CL-045**), ¶ 130 (“the investor’s fair expectations cannot fail to consider parameters such as business risk or industry’s regular patterns”).

⁶⁶³ *Bewater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (**Exhibit RL-29**), ¶ 601.

⁶⁶⁴ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 (**Exhibit CL-067**), ¶ 195.

⁶⁶⁵ *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 (**Exhibit CL-042**), ¶ 306. See also *Mamidoil Jetoil Greek Petroleum Products Société S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015 (**Exhibit RL-76**), ¶ 614 (“The fair and equitable standard brings foreign investors into the normative sphere of rational policy in the general interest. It is not meant to favor the investors’ interests over other economic and social interests”).

2. The Respondent did not breach the FET standard with respect to the Meritage Project

427. According to the Claimants, Colombia breached the FET standard in connection with the Meritage Project by (i) launching the Asset Forfeiture Proceedings arbitrarily and in blatant disregard of fundamental procedural protections,⁶⁶⁶ (ii) launching the Asset Forfeiture Proceedings against the Meritage Lot but not against other neighbouring properties which are allegedly in similar circumstances,⁶⁶⁷ (iii) shifting the rationale for the Asset Forfeiture Proceedings and failing to recognize Newport as an affected party,⁶⁶⁸ (iv) precluding Newport from defending itself in the proceedings,⁶⁶⁹ and (v) failing to respect and protect Newport's interests as a good faith third party.⁶⁷⁰
428. As acknowledged by the Claimant, in order to determine whether Colombia's actions were in accordance with the FET standard, a "fact specific assessment" is required.⁶⁷¹ In this case, the analysis of the facts "in the context and particular circumstances in dispute" shows that the Asset Forfeiture Proceedings were initiated and conducted in accordance with the Asset Forfeiture Law and Colombian law, in order to protect Colombia's legitimate welfare objectives, namely, to fight organized crime and secure social and economic stability.
429. Moreover, most of the Claimants' claims concern treatment accorded to the Claimants as purported investors in Colombia. As such, the claims fall outside the scope of Article 10.5 of the FTA, which extends only to the treatment accorded to "covered investments".⁶⁷² On this basis alone, most of the Claimants' FET claims must be rejected.
430. In any event, as demonstrated below, the Claimants' FET claims must fail because none of Colombia's actions meets the high threshold required for a breach of the FET standard. In particular, the initiation of the Asset Forfeiture Proceedings was not in breach of the FET standard (**IV.B.2(i)**), the Asset Forfeiture Proceedings were not discriminatory (**IV.B.2(ii)**), Colombia acted transparently at all times (**IV.B.2(iii)**), Colombia has respected the Claimants'

⁶⁶⁶ See Claimants' Memorial on Merits and Damages, ¶¶ 432-437.

⁶⁶⁷ See Claimants' Memorial on Merits and Damages, ¶¶ 438-439.

⁶⁶⁸ See Claimants' Memorial on Merits and Damages, ¶¶ 440-441.

⁶⁶⁹ See Claimants' Memorial on Merits and Damages, ¶¶ 442-444.

⁶⁷⁰ See Claimants' Memorial on Merits and Damages, ¶¶ 445-454.

⁶⁷¹ Claimants' Memorial on Merits and Damages, ¶ 413. See also above, ¶¶ 365-367.

⁶⁷² See above, ¶¶ 368-370.

due process rights (**IV.B.2(iv)**) and the decision not to consider Newport as a good faith third party does not constitute a breach of the FET standard (**IV.B.2(v)**).

(i) *The initiation of the Asset Forfeiture Proceedings was not in breach of the FET standard*

431. The Claimants allege that the initiation of the Asset Forfeiture Proceedings was arbitrary, unreasonable, discriminatory, in breach of due process and transparency.⁶⁷³ The Claimants refer in particular to the alleged commencement of the Asset Forfeiture Proceedings “without any evidence”⁶⁷⁴ and “on the basis of a false story [contrived by a convicted drug trafficker]”,⁶⁷⁵ to the “corrupt motives”⁶⁷⁶ that gave rise to the Asset Forfeiture Proceedings and to the imposition of precautionary measures “without any apparent reason”.⁶⁷⁷

432. The Claimants’ claims are unavailing.

433. *First*, the Asset Forfeiture Proceedings were initiated and carried out in accordance with Colombian law. While the Attorney General’s Office was first informed of the irregularities affecting the Meritage Lot through a report by Mr. López Vanegas, the General Attorney’s Office did not “rely[] on his story to impose precautionary measure”, as alleged by the Claimants.⁶⁷⁸ Rather, following Mr. López Vanegas’s report, the Attorney General’s Office engaged in exhaustive investigations concerning the alleged irregularities affecting the Meritage Lot and, only once convinced that there were reasonable grounds to impose precautionary measures, it decided to impose precautionary measures to avoid further damage to the good faith buyers of units in the Meritage Project. Thus, the Claimants’ claims that the Respondent shifted the rationale for the Asset Forfeiture Proceedings in breach of the Claimants’ rights is misguided: the Asset Forfeiture Proceedings are not – and were never – based on the kidnapping story. While it was Mr. López Vanegas’s complaint that first brought the possible irregularities affecting the Meritage Lot to the attention of the Attorney General’s Office, the Attorney General’s Office launched an intensive and lawful investigation of the Meritage Lot

⁶⁷³ See Claimants’ Memorial on Merits and Damages, ¶¶ 432-437.

⁶⁷⁴ Claimants’ Memorial on Merits and Damages, ¶ 436.

⁶⁷⁵ Claimants’ Memorial on Merits and Damages, ¶ 433.

⁶⁷⁶ Claimants’ Memorial on Merits and Damages, ¶ 435.

⁶⁷⁷ Claimants’ Memorial on Merits and Damages, ¶ 437.

⁶⁷⁸ Claimants’ Memorial on Merits and Damages, ¶ 433.

which showed the illicit origin of the Meritage Lot and, in particular, that the grounds for asset forfeiture had been met in the case.⁶⁷⁹

434. Given that the Precautionary Measures were imposed, and the Asset Forfeiture Proceedings were initiated, in accordance with Colombian law and on the basis of the General Attorney's Office reasonable suspicions of serious irregularities in the Meritage Lot resulting from the evidence gathered during its investigation, the measures cannot be deemed arbitrary or unreasonable. On the contrary, it was a reasonable and proportional application of the legal framework that was known to the Claimants – or should have been known had they conducted proper due diligence. Thus, having assumed this risk, the Claimants cannot now rely on the FTA as an “insurance policy” to cover for their business decisions.⁶⁸⁰
435. *Second*, the decision to impose precautionary measures was subject to a legality control in accordance with the Asset Forfeiture Law.⁶⁸¹ For the avoidance of doubt, the possibility to submit the decision to a legality control was indicated in the decision itself.⁶⁸² Indeed, on 6 September 2016 Corficolombiana filed a request for legality control, challenging the Precautionary Measures. The decision of the First Criminal Court of Asset Forfeiture of 20 October 2016 rejecting Corficolombiana's challenge was appealed on 26 October 2016. On 21 February 2017, the Bogotá Superior Court rejected the appeal in a fully reasoned decision.⁶⁸³
436. *Third*, as demonstrated, despite the ongoing investigations against Mses. Malagón and Ardila, there is no evidence of the purported “extortion scheme” or other “corrupt motives” behind the Asset Forfeiture Proceedings.⁶⁸⁴ In this sense, it is worth recalling that “mere suggestions of illegitimate conduct, general allegations of corruption and shortcomings of a judicial system do not constitute evidence of a treaty breach or a violation of international law”.⁶⁸⁵
437. The cases on which the Claimants rely are inapposite and do not support their case:

⁶⁷⁹ See above, Section II.F.2.

⁶⁸⁰ See above, ¶¶ 378-381.

⁶⁸¹ See Law No. 1708, 20 January 2014 (**Exhibit C-003bis**), Article 111.

⁶⁸² See Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), p. 89.

⁶⁸³ See above, ¶ 174. See also Reyes Expert Report, ¶ 52.

⁶⁸⁴ See above, ¶ 139.

⁶⁸⁵ *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012 (**Exhibit RL-53**), ¶ 296.

- a. The *Anatolie Stati v. Kazakhstan* decision concerns the commencement of criminal investigations where “the evidence indicate[d] that the charge [...] did not comply with Kazakh law”.⁶⁸⁶ This is not the case here. Regardless of how the Attorney General’s Office came into knowledge of the situation of the Meritage Lot, further investigations were carried out which ultimately confirmed the unlawful origin of the asset. Only once this was verified and there was reasonable suspicion that the legal grounds for asset forfeiture have been met, the precautionary measures were imposed and, a few months later, the Asset Forfeiture Proceedings were initiated.
- b. In *Tethyan v. Pakistan*, the tribunal found that the denial of a mining license did not have “a justified ground” but was rather motivated by the government’s desire to implement its own project.⁶⁸⁷ In this case, it has been demonstrated that there were justified grounds for initiating the Asset Forfeiture Proceedings. More importantly, there is no evidence that the Colombian government ever intended or attempted to develop an alternative project in the Meritage Lot.
- c. In *TECO v. Guatemala*, the tribunal found that by failing to consider an advisory report when fixing the electricity tariff, despite having the “duty to seriously consider them and to provide its reasons in case it would decide to disregard them”,⁶⁸⁸ the regulator had repudiated the fundamental principles upon which the applicable regulatory framework bases the tariff review process.⁶⁸⁹ This is not the case here, where the Asset Forfeiture Proceedings and precautionary measures were implemented in accordance with the procedures and principles of the Asset Forfeiture Law. Notably, in the Claimants’ position, the Colombian authorities would have had to ignore the reports received as to the various irregularities affecting the Meritage Lot so as not to affect their project. This would have been arbitrary, unreasonable and

⁶⁸⁶ *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 (**Exhibit CL-094**), ¶ 1093 as quoted in Claimants’ Memorial on Merits and Damages, ¶ 436.

⁶⁸⁷ *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/21/1, Decision on Jurisdiction and Liability, 10 November 2017 (**Exhibit CL-116**), ¶¶ 1366, 1372.

⁶⁸⁸ *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013 (**Exhibit CL-095**), ¶ 588.

⁶⁸⁹ *See Teco Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013 (**Exhibit CL-095**), ¶¶ 710-711.

in clear breach of Colombian law, pursuant to which the General Attorney's Office has the duty to investigate and act upon the reports of wrongdoings.⁶⁹⁰

d. In *AES v. Hungary*, the tribunal concluded that despite “several procedural shortcomings” in the implementation of a price review decree and even though the consultation process was not “optimal”,⁶⁹¹ the irregularities were not sufficient to constitute unfair and inequitable treatment. The tribunal considered, among others, that AES had the opportunity to submit comments to the draft of the price review decree and to submit the process for review by the Hungarian courts.⁶⁹² In this case, no such “shortcomings” may be identified, as the Colombian authorities pursued the Asset Forfeiture Proceedings in accordance with the Asset Forfeiture Law. However, even assuming *quod non* any such “shortcoming”, it cannot amount to a breach of the FET standard because any such irregularity would not be sufficiently serious so as to vitiate the Asset Forfeiture Proceedings and, in any case, the Claimants had the opportunity – and used it – to have recourse to the Colombian courts.⁶⁹³

438. In this sense, it is worth recalling that Mr. Caro, the Prosecutor who took charge of the case after the removal of Meses. Malagón and Ardila – and against whom there are no suspicions of corruption – decided to move forward with the Asset Forfeiture Proceedings on the basis of the evidence of the irregularities affecting the Meritage Lot and it was him who signed the petition to asset forfeiture and filed it before the competent court.⁶⁹⁴ Against this background, any allegation that the Proceedings were initiated as a result of an extortion scheme must be rejected.

439. *Third*, Colombia has acted transparently at all times. Due to the confidential character of the precautionary measures, it is only reasonable that these were adopted without giving prior notice to the interested parties. As demonstrated above, the reasons to impose the precautionary measures were clearly explained and are justified in light of the circumstances of the case, to

⁶⁹⁰ See Reyes Expert Report, ¶¶ 11-12; Pinilla Expert Report, ¶¶ 37-38.

⁶⁹¹ See *AES Summit Generation Limited and AES-Tisza Erőmű Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010 (**Exhibit CL-076**), ¶¶ 9.3.66, 9.3.70.

⁶⁹² See *AES Summit Generation Limited and AES-Tisza Erőmű Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010 (**Exhibit CL-076**), ¶¶ 9.3.65-9.3.68.

⁶⁹³ See *above*, Section II.F.

⁶⁹⁴ See Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017 (**Exhibit C-024bis**).

avoid further harm to the buyers of units in the Meritage Project.⁶⁹⁵ This was confirmed by Dr. Reyes:

In my opinion, it is precisely the specific manner in which the project was being developed that made it necessary to seize the assets. The manner in which the plot that initially belonged to Iván López Vanegas was transferred to six individuals and companies within eight years, increased the probability of diluting the illicit origin of the lot among the potential good faith buyers. The subsequent participation of other companies included within the structure set up to develop the project and, finally, the sale of units to tens of investors further increased the risk that the State would not be able to move forward with the forfeiture in connection with the lot and, in any case, posed a financial threat to those people investing in a project that had been vitiated from its origin. Hence it was important for the Attorney General's Office to take drastic measures.⁶⁹⁶

440. Moreover, after the Precautionary Measures were imposed, Colombia granted every opportunity under Colombian law to challenge the Precautionary Measures Resolution,⁶⁹⁷ as well as the exclusion of Newport as a non-affected party.⁶⁹⁸

441. It is worth noting that the Claimants, and in particular Mr. Seda, also had the opportunity to meet representatives of the Anti-Corruption Unit of the General Attorney's Office and discuss their concerns about alleged irregularities of certain officials of the Attorney General's Office Asset Forfeiture Unit.⁶⁹⁹ It is therefore clear that the Colombian authorities acted "in a way to create a climate of cooperation" with the Claimants.⁷⁰⁰ Against this backdrop, any claim of lack of transparency cannot be reasonably sustained.

(ii) *The Asset Forfeiture Proceedings were not discriminatory*

442. According to the Claimants, the Asset Forfeiture Proceedings were "blatantly discriminatory" because only the Meritage Project was seized, but not "the lot from the same parent property" that is currently owned by Colombian citizens, and no "credible basis for this decision" has been provided.⁷⁰¹

⁶⁹⁵ See above, Section II.F.3.

⁶⁹⁶ Reyes Expert Report, ¶ 49.

⁶⁹⁷ See above, Section II.F.4.

⁶⁹⁸ See above, Section II.F.4 (¶ 241).

⁶⁹⁹ See Hernández Witness Statement, ¶¶ 5-8.

⁷⁰⁰ See above, ¶ 400.

⁷⁰¹ Claimants' Memorial on Merits and Damages, ¶¶ 438-439.

443. Even assuming that the Meritage Lot and the neighbouring lot were treated differently, this is not sufficient to show that Colombia breached the prohibition against discrimination. As demonstrated above, a finding on discrimination requires a “capricious, irrational or absurd differentiation”.⁷⁰² The Claimants have failed to show that this high threshold has been met.⁷⁰³
444. Even if such high threshold were not required, a fact-specific analysis considering the three elements of the “three-pronged analysis”, confirms that the Asset Forfeiture Proceedings against the Meritage Project were not discriminatory: (i) the circumstances of the Meritage Lot and the neighbouring lot are significantly different, (ii) the Claimants did not suffer any negative impact as a result of having been treated differently but rather, if any, as a result of the Asset Forfeiture Proceedings initiated against the Meritage Lot in accordance with Colombian law, and (iii) the Asset Forfeiture Proceedings were fully justified under, and conducted in accordance with, Colombian law.⁷⁰⁴
445. The cases on which the Claimants rely⁷⁰⁵ do not advance their case:
- a. In *Mobil v. Argentina*, the tribunal concluded that “differential treatment based on the existence of a different factual and legal situation does not breach the BIT standard”.⁷⁰⁶ In fact, even if two investors are treated differently, there is no discrimination as long as there is no “capricious, irrational or absurd differentiation in the treatment accorded to the Claimants as compared to other entities or sectors”.⁷⁰⁷ With respect to the impugned measure, the *Mobil v. Argentina* tribunal found that “the Claimants have not established that this measure was specifically aimed at foreign

⁷⁰² See above, ¶ 390.

⁷⁰³ The Claimants’ suggestion that the reason for that Colombia “seized” the Meritage Project is because it “happens to have been the site for a highly lucrative real estate development” (Claimants’ Memorial on Merits and Damages, ¶ 438) is equally unsubstantiated. Had the State been interested in the Project, it would have waited until the Project was finished to initiate the Asset Forfeiture Proceedings. However, exploiting real estate projects is clearly not within the competence of the host State.

⁷⁰⁴ See above, Section IV.A.2(i)(b).

⁷⁰⁵ See Claimants’ Memorial on Merits and Damages, ¶ 439.

⁷⁰⁶ *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 (**Exhibit CL-126**), ¶ 893.

⁷⁰⁷ *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 (**Exhibit CL-126**), ¶ 893.

companies and not of a general nature”,⁷⁰⁸ so there was no “improper differentiation [which] could be held as discriminatory treatment”.⁷⁰⁹ This is exactly the case of asset forfeiture proceedings in Colombia: these are generally initiated against assets that fall within the scope of the Asset Forfeiture Law (in this case, the Meritage Lot), regardless of the nationality of their owners.⁷¹⁰

- b. In *LG&E v. Argentina*, the tribunal held that in order to establish whether a measure is discriminatory, there must be “(i) an intentional treatment (ii) in favour of a national (iii) against a foreign investor, and (iv) that is not taken under similar circumstances against another national”.⁷¹¹ In this case, the Asset Forfeiture Proceedings were adopted in connection with the Meritage Lot, and not “against a foreign investor”. In fact, asset forfeiture proceedings are initiated against lots owned by Colombian nationals which are “under similar circumstances”, *i.e.*, when the grounds for asset forfeiture under the Asset Forfeiture Law are met. Moreover, as explained,⁷¹² the Meritage Lot and the neighbouring lots were not in “similar circumstances”.
- c. In *Siemens v. Argentina*, while the tribunal held that “the impact of the measure on the investment would be the determining factor to ascertain whether it had resulted in non-discriminatory treatment”, it found it unnecessary to determine whether Argentina had breached the non-discriminatory treatment obligation under the relevant BIT.⁷¹³ In this case, the Colombian authorities initiate asset forfeiture proceedings against assets owned by foreigners or nationals alike, provided they fall within the grounds set forth in Law 1708 of 2014, so neither the intent nor the impact of the measure could be deemed discriminatory.

⁷⁰⁸ See *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 (**Exhibit CL-126**), ¶ 890.

⁷⁰⁹ *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 (**Exhibit CL-126**), ¶ 893.

⁷¹⁰ See below, ¶¶ 491-492.

⁷¹¹ *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 (**Exhibit CL-045**), ¶ 146.

⁷¹² See above, Section IV.A.2(i)(b).

⁷¹³ *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 (**Exhibit CL-048**), ¶ 321.

(iii) *Colombia acted transparently at all times*

446. The Claimants allege that Colombia acted non-transparently by “shift[ing] the bases for the Asset Forfeiture Proceedings”.⁷¹⁴ According to the Claimants, the court’s determination not to recognize Newport as an affected party in the Asset Forfeiture Proceedings “compounded the problems”.⁷¹⁵ The Claimants’ allegations are untenable.
447. As demonstrated above, the Claimants’ allegation that the Asset Forfeiture Unit was “forced to shift the bases for the Asset Forfeiture Proceedings” is factually incorrect. As explained, whilst the Colombian authorities were alerted and commenced investigations on the Meritage Lot due to Lopez Vanegas’s complaint, the Asset Forfeiture Proceedings were based on the Judicial Police and Attorney General’s Office’ findings on the illicit origin of the Meritage Lot, the series of irregularities in the transfer deeds, forgery, and inexistent sales through the use of figureheads.⁷¹⁶
448. In any event, the Colombian authorities have acted with full transparency at all times, as demonstrated above.⁷¹⁷ Indeed, throughout the proceedings Mr. Seda had the opportunity to meet representatives of the General Attorney’s Office and discuss the Asset Forfeiture Proceedings.
449. The fact that Newport was not recognized as an affected party in the Asset Forfeiture Proceedings – a decision made in accordance with Colombian law and currently subject to appeal before the Colombian courts – has no impact on the above. In fact, Newport had access to the Colombian courts, including to challenge *avocamiento* decision where the Court found it not to be an affected party⁷¹⁸ and the decision not to allow Newport access to the Asset Forfeiture Proceedings, the appeal for which is still pending.⁷¹⁹
450. Thus, despite Newport not being recognized as an affected party in the Asset Forfeiture Proceedings, the Colombian authorities, including the General Attorney’s Office, have at all

⁷¹⁴ Claimants’ Memorial on Merits and Damages, ¶ 441.

⁷¹⁵ Claimants’ Memorial on Merits and Damages, ¶¶ 440-441.

⁷¹⁶ *See above*, Section II.F.2.

⁷¹⁷ *See above*, ¶¶ 439-441.

⁷¹⁸ *See above*, Section II.F.10.

⁷¹⁹ *See above*, ¶ 241.

times, and within the limits of Colombian law, “act[e]d in a way to create a climate of cooperation” with the Claimants.⁷²⁰

(iv) *Colombia has respected the Claimants’ due process rights*

451. The Claimants aver that by finding that Newport was not an “affected” party in the Asset Forfeiture Proceedings, thus preventing Newport from participating in the proceedings and showing its status as a good faith third party, Colombia denied the Claimants “critical due process rights”, including the right to be heard.⁷²¹
452. First of all, it bears noting that the Claimants have not – and cannot – allege denial of justice. This is because the “very high threshold required”⁷²² for an investor to prevail on a claim for denial of justice is far from having been met. It is not disputed that the case does not involve a “systemic failure of the State’s justice system” or a “wilful disregard of due process of law [] which shocks, or at least surprises, a sense of judicial propriety”.⁷²³ It is also undisputed that no decision has been made by Colombia’s Supreme Court in connection with the measures, so a denial of benefits claim would be *prima facie* unjustified.
453. Even adopting the standard for breach of due process adopted by the tribunal in *Glencore v. Colombia*, as proposed by the Claimants, Colombia cannot be deemed to have breached its obligation to accord the Claimants due process rights. In fact, Newport was given multiple “fair opportunit[ies] to present its case and to marshal appropriate evidence”, it has made use of said opportunities to have its case revisited “by an independent and impartial judge, with the guarantee of a formal adversarial procedure”, who have rendered “reasoned, even-handed and unbiased decision[s]”,⁷²⁴ some of which are still subject to appeal.⁷²⁵
454. In similar circumstances, the *Glencore v. Colombia* tribunal rejected Glencore’s allegations that Colombia had breached its due process rights:

⁷²⁰ See above, ¶ 400.

⁷²¹ Claimants’ Memorial on Merits and Damages, ¶¶ 442-444.

⁷²² See above, ¶ 402.

⁷²³ See above, ¶ 406.

⁷²⁴ *Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 7 August 2019 (**Exhibit CL-125**), ¶ 1318, as quoted in Claimants’ Memorial on Merits and Damages, ¶ 444.

⁷²⁵ See above, ¶¶ 212, 241.

[T]he Tribunal does not see any wilful or otherwise egregious breach of the foreign investor's due-process rights for which Colombia should assume international responsibility. The *Contraloría* duly reasoned its decision, the legal system permitted Prodeco to challenge the decision before the courts, which Prodeco did, and there is no allegation that, in finally dismissing Prodeco's appeals, the Colombian courts committed a denial of justice.⁷²⁶

455. This is also in line with the findings of *ECE v. Czech Republic*, on which the Claimants also rely: "there can be no violation of fair and equitable treatment in a flawed decision at first instance which is subsequently reversed on appeal, and the effects of which were therefore only temporary".⁷²⁷

456. As in the previous cases, Newport's due process rights were similarly respected: it has had access to the Colombian courts, the decisions were "duly reasoned" and subject to appeal and the Colombian courts have not committed a denial of justice.

(v) *The Attorney General's Office and Second Criminal Court's decisions not to consider Newport as a good faith third party does not constitute a breach the FET standard*

457. According to the Claimants, by not recognizing Newport's rights as a good faith third party, Colombia "acted arbitrarily, unreasonably and in violation of the Meritage Claimants' legitimate expectations and due process".⁷²⁸ Contrary to the Claimants' contentions, the non-recognition of Newport as a good faith third party does not constitute a breach of the FET standard because it was neither arbitrary, unreasonable or in breach of the Claimants' legitimate expectations, and the Claimants' due process rights were respected.

458. *First*, as demonstrated, the Colombian authorities acted at all times in accordance with the Asset Forfeiture Law. Having acted in application of the Asset Forfeiture Law, the conduct of

⁷²⁶ *Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 7 August 2019 (**Exhibit CL-125**), ¶ 1344. The situation in *Deutsche Bank v. Sri Lanka*, on which the Claimants rely (¶ 423), is significantly different. In that case, the Supreme Court of Sri Lanka rendered a judgment within 48 hours without having heard the affected parties. The Chief Justice that presided over the hearing had publicly admitted that "the decision was issued for political reasons". This is a far cry from our case. See *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012 (**Exhibit CL-087**), ¶¶ 476-479.

⁷²⁷ *ECE Projektmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbH & Co. v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013 (**Exhibit CL-090**), ¶ 4.805.

⁷²⁸ Claimants' Memorial on Merits and Damages, ¶ 445.

the Colombian authorities cannot be deemed as “opposed to a rule of law”, let alone “opposed to the rule of law”.⁷²⁹

459. Even assuming, *quod non*, that the non-recognition of Newport as a good faith third party would be questionable under Colombian law, it cannot amount to an arbitrary or unreasonable conduct because the decision does not involve an “important measure of impropriety”, let alone a “manifest” one.⁷³⁰ Or, in the words of the *Cargill v. Mexico* on which the Claimants rely, it does not constitute “an unexpected and shocking repudiation of a policy’s very purpose and goals, or otherwise grossly subverts a domestic law or motive for an ulterior motive”.⁷³¹
460. On the contrary, the Attorney General’s Office 53 in its *Requeriminetto* addressed Newport’s allegations and provided sound reasons why it would not qualify as a good faith without fault third party. In turn, the Second Criminal Court conducted an in-depth analysis of the alleged rights of Newport *vis-à-vis* the Meritage Lot, fully explaining why under Law 1708 of 2014, Newport would not be considered an affected party as it does not hold *in rem* rights over the Lot.⁷³² The decisions are both well-reasoned and substantiated and cannot be considered a subversion of the law.
461. *Second*, the Asset Forfeiture Proceedings were initiated and implemented in accordance with the Claimants’ due process rights. As demonstrated, the Attorney General’s Office followed the procedures established in the Asset Forfeiture Law. Moreover, the Claimants had the opportunity – and used it repeatedly – to present its case before independent and impartial courts that have revised, and are still revising, the Claimants’ claims.⁷³³
462. In particular regarding the status of Newport as a good faith third party, the Attorney General’s Office has provided sound reasons to consider that Newport cannot be considered a good-faith without fault party in view of the evident deficiencies in its due diligence process,⁷³⁴ as confirmed by Dr. Reyes.⁷³⁵

⁷²⁹ See above, ¶ 385.

⁷³⁰ See above, ¶ 394.

⁷³¹ See above, ¶ 386. The tribunal confirmed that actions that are “merely inconsistent or questionable application of administrative or legal policy or procedure” do not amount to arbitrary conduct in breach of the FET standard.

⁷³² As explained by Dr. Pinilla, only the “affected parties” could be regarded as “good faith without fault” third parties. See Pinilla Expert Report, ¶ 42.

⁷³³ See above, Section II.F.

⁷³⁴ The cases on which the Claimants rely (Claimants’ Memorial on Merits and Damages, fn. 878) are inapposite. For example, in *Metalclad v. Mexico*, Metalclad was led to believe that it would be granted

463. As indicated above, a comprehensive analysis of Newport’s rights on the Meritage Lot has also been conducted by the Colombian courts, concluding that Newport cannot be considered as an affected party within the meaning of Law 1708.
464. Even assuming, *quod non*, that the Claimants’ due process rights were not fully respected, this would not amount to a breach of the FTA. As demonstrated, Article 10.5 of the FTA applies only to “covered investments”.⁷³⁶ Any claim that the Claimants’ due process rights have been violated, therefore, falls outside the scope of protection of the FTA.
465. *Third*, the Asset Forfeiture Proceedings could not have frustrated the Claimants’ legitimate expectations simply because the Claimants could not have legitimately expected Colombia to refrain from initiating asset forfeiture proceedings should the legal grounds for such proceedings be found.
466. In fact, the Claimants could not refer to any specific promise or commitment by the Colombian authorities to the investor in the sense that the Colombian State would not initiate asset forfeiture proceedings in the future. The only two documents to which the Claimants refer, the so-called “Certification of No Criminal Activity” and Corficolombiana’s petition letter to the Attorney General Office,⁷³⁷ could not have given rise to legitimate expectations:
- a. As noted above, the letters provided by the *Unidad Nacional para la Extinción de Dominio y contra el Lavado de Activos* were a simple response to a request for information, pursuant to the right of petition (“*derecho de petición*”) in Article 23 of the Colombian Constitution. By their very nature, they could not be regarded as a specific commitment.⁷³⁸ What is more, the content of the responses merely notes that after searching the Unit’s information database, no relevant information was found in

a permit, it was denied the permit a meeting for which the interested party received no notice or invitation to which it was given no opportunity to appear. Moreover, the denial was made “without any consideration of, or specific reference to, construction aspects or flaws of the physical facility”. See *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 (**Exhibit CL-021**), ¶¶ 85, 91, 93. The Claimants’ reliance on *Karkey v. Pakistan* (¶ 452) is also misguided. In that case, the tribunal had to decide whether it could rely on a judgment of the Supreme Court of Pakistan when assessing its own jurisdiction. It is in this context that the tribunal had to analyze whether the judgment “presents deficiencies which are unacceptable from the viewpoint of international law”, because even if they do not amount to a denial of justice, they could justify the tribunal’s non-reliance on that judgment. See *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017 (**Exhibit CL-114**), ¶ 550.

⁷³⁵ See Reyes Expert Report, ¶¶ 53-79.

⁷³⁶ See above, ¶¶ 368-370.

⁷³⁷ See Claimants’ Memorial on Merits and Damages, ¶ 453.

⁷³⁸ See above, ¶¶ 71-72, 83-84.

response to the particular petition presented by Corficolombiana. The responses included explicit *caveats* in the sense that the information provided was based on the information existing in the database of the Unit and was not exhaustive. In this regard, Dr. Reyes confirmed the “various limitations” of the responses, including that they only referred to information within the specific Unit to which the petition was addressed (as expressly noted in both responses) and to persons or assets with respect to which there are open investigations at the time the response was prepared.⁷³⁹

- b. Despite the above, the Claimants allege that they were entitled to rely on the response from the Unit because the request “expressly stated its intent [...] to adopt preventive measures in the area of Money Laundering and Asset Forfeiture”.⁷⁴⁰ The Claimants’ argument completely misses the point. To begin with, Corficolombiana’s petition letter is a document produced by a third party unrelated to the Colombian government.⁷⁴¹ This alone shows that no legitimate expectations could have arisen from said letter. Moreover, the request made in said letter is very specific and limited in scope: “to get to know the information incorporated in the Unit’s systems that could identify whether there are ongoing proceedings against the properties or its current or former owners, information which is not subject to confidentiality by law”.⁷⁴² Thus, the Claimants could not have reasonably expected to obtain, on the basis of this letter (or otherwise, as it was not within the remit of the Unit), a commitment by the Colombian State that no asset forfeiture proceedings would be initiated – or even that no investigations were being conducted in connection with the Meritage Lot, as such investigation would have been confidential.⁷⁴³

467. Therefore, unlike the situation in *Crystallex v. Venezuela*, on which the Claimants rely,⁷⁴⁴ neither Corficolombiana’s petition nor the response by the Attorney General’s Office contain

⁷³⁹ See Reyes Expert Report, ¶¶ 54-58.

⁷⁴⁰ Claimants’ Memorial on Merits and Damages, ¶ 453.

⁷⁴¹ See Petition for Information from Fiduciaria Corficolombiana to Attorney General Office of Asset Forfeiture and Anti-Asset Laundering, 22 August 2013 (**Exhibit C-031bis**).

⁷⁴² See Petition for Information from Fiduciaria Corficolombiana to Attorney General Office of Asset Forfeiture and Anti-Asset Laundering, 22 August 2013 (**Exhibit C-031bis**) (“*conocer información incorporada en los sistemas de la Unidad que pueden identificar si en contra de los inmuebles, o sus actuales o anteriores propietarios, existen acciones en curso, información que no tiene reserva legal*”).

⁷⁴³ See Reyes Expert Report, ¶ 57.

⁷⁴⁴ See Claimants’ Memorial on Merits and Damages, ¶ 454.

any “specific representation”⁷⁴⁵ from the Colombian State that could have given rise to any legitimate expectations. In *Crystallex v. Venezuela*, the tribunal relied on “the explicit statements” contained in a letter by the Vice-Minister of Environmental Administration and Governance of Venezuela to Crystallex, the “unambiguous terms” of which made it clear that “a positive decision by the Administration towards the granting of the Permit had been taken”.⁷⁴⁶ The *Crystallex* tribunal found that the wording used in the letter, such as “the Permit will be handed over”, appeared “on its face as a positive representation made [] specifically to Crystallex in clear and precise terms” that the permit to exploit a gold deposit would be issued. On this basis, the tribunal concluded that the letter “was susceptible of creating the type of legitimate expectation” that the permit would be issued.⁷⁴⁷ The tribunal considered other conducts, such as the Ministry’s request that Crystallex pay the environmental taxes, which only become due with the issuance of the permit,⁷⁴⁸ to conclude that “Crystallex’s expectations that it would be granted the Permit promptly after the posting of the bond and the payment of the taxes was thus reasonable and legitimate”.⁷⁴⁹

468. Against this background, any subjective expectation the Claimants may have derived on the basis of these documents, however “sincere” it could be, is not protected under international law.⁷⁵⁰ As noted by the tribunal in *Generation Ukraine v. Ukraine*, the Claimants’ expectations should be assessed in light of the “speculative” nature of the Claimants’ real estate projects in Colombia (as reflected by the fact that they were “cautious about contributing substantial sums of [their] own money to the enterprise, preferring to seek capital from third parties” to finance their investment) and that they were – or should have been – “on notice of both the prospects and the potential pitfalls”.⁷⁵¹ In particular, (i) the Claimants should have been aware of Antioquia’s turbulent past as the epicentre of Colombia’s drug dealing activities and the risks

⁷⁴⁵ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (**Exhibit CL-105**), ¶ 575.

⁷⁴⁶ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (**Exhibit CL-105**), ¶¶ 561-562.

⁷⁴⁷ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (**Exhibit CL-105**), ¶ 563.

⁷⁴⁸ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (**Exhibit CL-105**), ¶ 564.

⁷⁴⁹ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (**Exhibit CL-105**), ¶ 564.

⁷⁵⁰ See above, ¶¶ 414-415.

⁷⁵¹ *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003 (**Exhibit RL-13**), ¶ 20.37.

inherent to developing any project in such a region;⁷⁵² (ii) the “due diligence” conducted by the Claimants’ was highly deficient;⁷⁵³ (iii) latest in 2014, the Claimants became aware of Mr. López Vanegas’s claims to the Meritage Lot. Yet, despite the alleged extortion and threats, Mr. Seda decided to engage in negotiations with Mr. López Vanegas;⁷⁵⁴ and (iv) the Claimants decided to structure the project through various layers of trusts through which the Meritage Lot would be made available by stages, according to the financing obtained by the Claimants from third parties (including via the pre-sales of units in the Project). As explained by the Claimants, for “tax planning and efficiency purposes”, in February 2016 Newport was removed as the beneficiary of the Meritage La Palma Trust Agreement.⁷⁵⁵ Having created the high risk structure through which they invested in a high risk region without conducting proper due diligence, the Claimants cannot claim to have had legitimate expectations that the Colombian State would not initiate the Asset Forfeiture Proceedings on the basis of the evidence that became available concerning the illicit origin of the Meritage Lot.

469. If anything, the Claimants could have expected the Colombian authorities to apply the legislative and regulatory framework in force at the time they invested, including the Asset Forfeiture Law which provides that the action has no state of limitation for proceedings in case one of the grounds in Article 16 of the Asset Forfeiture Law is met (“*imprescriptible*”), including in connection with assets which are the “direct or indirect product of illicit activity”. Thus, absent a specific representation “either before or after the investment, that [the Claimants] would somehow be exempted from the application of the general [asset forfeiture] regime”,⁷⁵⁶ the Claimants could not have developed a legitimate expectation that Colombian law, and in particular the Asset Forfeiture Law, would not apply to them. This is particularly the case in light of the obligation of the Attorney General’s Office to investigate and request the asset forfeiture once it learns that an asset may have an illicit origin.⁷⁵⁷

⁷⁵² See above, Section II.B.

⁷⁵³ See above, Section II.D.

⁷⁵⁴ See above, Section II.E.

⁷⁵⁵ See above, ¶ 66.

⁷⁵⁶ See above, ¶ 420.

⁷⁵⁷ See Reyes Expert Report, ¶¶ 11-12; Pinilla Expert Report, ¶¶ 37-38.

3. Whatever impact the Asset Forfeiture Proceedings had on other projects in which the Claimants were involved, it cannot constitute a FET breach

470. According to the Claimants, Colombia’s “systematic assault on Mr. Seda’s investments” has ceased the development of all of Mr. Seda’s projects in Colombia and “eliminated the possibility of the development of the other projects in Mr. Seda’s portfolio”.⁷⁵⁸ The Claimants’ claims must fail.
471. *First*, the Claimants’ claims are based on a misrepresentation of the facts. Contrary to the Claimants’ suggestion, the Colombian authorities did not launch a “systemic assault” targeting Mr. Seda or his investments in Colombia. Rather, the Colombian authorities exercised their sovereign right (and obligation) to apply the Asset Forfeiture Law and initiate the Asset Forfeiture Proceedings against the Meritage Lot, after it came to the authorities’ attention that the Lot was tainted by illicit activity, *e.g.*, it had been obtained by Mr. Lopez Vanegas, a drug dealer during his drug-dealing activities and had been transferred via a series of non-existent sales through the use of figureheads that lacked the financial means to purchase the property evincing a series of physical and legal transformations which are the blue-print of money laundering. Notably, the Asset Forfeiture Proceedings are initiated and pursue the assets of illicit origin, not the person who holds them.⁷⁵⁹ It is undisputed that the Colombian authorities did not adopt any other measure targeting any of Mr. Seda’s other projects in Colombia or the lots assigned for the development of such projects.
472. Moreover, it has been demonstrated that the Asset Forfeiture Proceedings were themselves not arbitrary or in breach of the FET standard and did not “inflict damage on the investor without serving any apparent legitimate purpose”.⁷⁶⁰ On the contrary, the Asset Forfeiture Proceedings were initiated and conducted in accordance with the Asset Forfeiture Law in order to protect Colombia’s legitimate welfare objectives, namely, to fight organized crime and secure social and economic stability.
473. *Second*, whatever impact the Asset Forfeiture Proceedings may have had on the Claimants’ projects other than the Meritage Project, Colombia cannot be deemed to have breached the FET

⁷⁵⁸ Claimants’ Memorial on Merits and Damages, ¶ 455. *See also* ¶¶ 456-459.

⁷⁵⁹ *See* Law No. 1708, 20 January 2014 (**Exhibit C-0003bis**), Article 16. *See also* Claimants’ Memorial on Merits and Damages, ¶ 141 and Medellín Expert Report, ¶ 31.

⁷⁶⁰ Claimants’ Memorial on Merits and Damages, ¶ 458.

standard with respect to these project because there is no causal link between the Asset Forfeiture Proceedings and the other projects “hav[ing] all come to a halt”.⁷⁶¹

474. As demonstrated above, investment tribunals have required that a causal link exists between the State’s conduct and the harm allegedly suffered by the investor.⁷⁶² This is confirmed by the cases on which the Claimants rely: in *Rompetrol v. Romania* the tribunal confirmed the need of “sufficient causal nexus between the claimed illegality and the asserted loss”,⁷⁶³ and in *Lemire v. Ukraine* the tribunal expressly noted that a finding that the FET standard has been breached requires “a causal link” between the host State’s action or omission and the alleged harm suffered by the investor.⁷⁶⁴
475. In this case, there is no evidence that any impact on the Claimants’ projects other than the Meritage Project was factually linked to the Asset Forfeiture Proceedings initiated against the Meritage Lot. For example, the Claimants have provided no evidence in support of their allegation that the construction of Luxé “has been stalled [] as the main bank funding the development of Luxé immediately stopped disbursing funds for that project”.⁷⁶⁵ Not only is there no evidence that Colpatria decided to stop the financing of the Luxé hotel,⁷⁶⁶ but even assuming the financing was actually halted, it would not be reasonable to assume that this was due to the Asset Forfeiture Proceedings⁷⁶⁷ and not to the significant delays in the construction⁷⁶⁸

⁷⁶¹ Claimants’ Memorial on Merits and Damages, ¶ 456.

⁷⁶² See above, ¶ 382.

⁷⁶³ *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 (**Exhibit CL-089**), ¶ 288. Contrary to the Claimants, representation, the *Rompetrol v. Romania* tribunal assessed the “cumulative effect” of a series of acts which individually may not amount to a breach of treaty but, when considered as a pattern, may amount to a treaty breach. In light of the circumstances of the case, the tribunal concluded that a series of “procedural irregularities” during criminal investigations initiated against the claimant’s principal were in breach of the FET standard. However, the tribunal clearly noted that its finding that Romania had breached the FET standard was “based entirely on the facts of the present case”. See ¶¶ 278-279.

⁷⁶⁴ *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 (**Exhibit CL-072**), ¶ 284.

⁷⁶⁵ Claimants’ Memorial on Merits and Damages, ¶ 456.

⁷⁶⁶ With respect to this loan, the Claimants have only provided the Loan Approval Letter (C-135) and the Amended Loan Approval Letter (C-137). Other relevant documents, including documents showing whether the loan was finally accepted under the terms described in the Amended Loan Approval Letter, evidence of disbursements and reports of the Bank’s inspections of the construction site, have been omitted from the record.

⁷⁶⁷ See Amended Loan Approval Letter, 11 December 2014 (**Exhibit C-137**). Pursuant to the Amended Loan Approval Letter, (i) the borrowers did not have the obligation to report the Asset Forfeiture Proceedings to Colpatria, and (ii) Colpatria did not have the right to terminate the loan agreement due to the Asset Forfeiture Proceedings against the Meritage Project.

– delays that are in no way related to the Asset Forfeiture Proceedings against the Meritage Lot.⁷⁶⁹ Similarly, with respect to the other projects the Claimants have failed to demonstrate that the Asset Forfeiture Proceedings had any actual impact on the projects.

476. *Third*, contrary to the Claimants’ allegations, it was not Colombia that had to “take any steps to minimize or mitigate the possibility of harm”,⁷⁷⁰ nor was the Respondent in a position to do so. In fact, all the Respondent did was applying its laws, which were or should have been known to the Claimants. Moreover, the Asset Forfeiture Proceedings was only against the Meritage Lot and did not involve any of the Claimants personally. Conversely, from 2014 Mr. Seda had attracted the public attention to the Meritage Project by turning to the media to discuss details of Mr. López Vanegas’s alleged extortion and threats. Already in August 2014, Mr. Seda reported that Mr. Iván López Vanegas was attempting to harm his reputation as part of his extortion scheme:

Then [López Vanegas] says “pay me some money because you took my property and if you are not paying me I will turn to the newscasts and will try to cause reputational damage”.⁷⁷¹

477. As explained, instead of reporting this extortion to the Colombian authorities, Mr. Seda decided to turn as well to the public media. Up until today, he has continuously ventilated details of the case to the press, including in connection with the arbitration.⁷⁷²

478. In sum, the Respondent cannot be held liable for whatever losses the Claimants suffered with respect to other projects following the Asset Forfeiture Proceedings.

⁷⁶⁸ See Amended Loan Approval Letter, 11 December 2014 (**Exhibit C-137**), p. 2 (“Disbursements will be made according to the rate of construction progress and the pertinent evaluation made by the Bank’s internal Committee or the official appointed by said committee”).

⁷⁶⁹ See, e.g., NERA Expert Report, ¶¶ 167, 172(c).

⁷⁷⁰ Claimants’ Memorial on Merits and Damages, ¶ 459.

⁷⁷¹ W Radio, “Ángel Seda despeja dudas sobre lote en disputa para proyecto de construcción en Medellín”, 5 August 2014 (https://www.wradio.com.co/escucha/archivo_de_audio/angel-seda-despeja-dudas-sobre-lote-en-disputa-para-proyecto-de-construccion-en-medellin/20140805/oir/2353698.aspx), accessed on 15 November 2020 (**Exhibit R-30**).

⁷⁷² El Espectador, “Verdades a medias del caso Meritage”, 17 April 2020 (<https://www.wradio.com.co/noticias/actualidad/caso-meritage-la-razon-por-la-que-inversionistas-estadounidenses-demandan-a-colombia/20200722/nota/4056892.aspx>), accessed on 15 November 2020 (**Exhibit R-53**).

C. THE RESPONDENT DID NOT BREACH THE OBLIGATION TO ACCORD NATIONAL TREATMENT TO THE MERITAGE PROJECT AND THE CLAIMANTS

479. The Claimants allege that Colombia breached the obligation to accord national treatment in Article 10.3 of the FTA to the Claimants and their purported investment in the Meritage Project. In particular, the Claimants aver that the Meritage Project “was singled out for seizure”, while no measures were adopted against other properties owned by Colombian nationals that were “subject to the very same alleged defects in the chain of title alleged against the Meritage Project”.⁷⁷³

480. Article 10.3 of the FTA provides in relevant part that:

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.

481. The Respondent sets out below the relevant core components of the “national treatment” standard in Article 10.3 of the FTA (**IV.C.1**), before going on to show that the Respondent has at all times accorded the Claimants’ alleged investments treatment in accordance with such standard (**IV.C.2**).

1. The legal standard

482. The Claimants’ claim that the Respondent breached the obligation to accord national treatment must be evaluated in light of the following considerations.

483. *First*, the purpose of the national treatment standard is to ensure a level playing field between domestic and national investors.⁷⁷⁴ It is in light of this purpose that the national treatment provision in Article 10.3 of the FTA should be interpreted and applied.

⁷⁷³ Claimants’ Memorial on Merits and Damages, ¶ 465.

⁷⁷⁴ *See, e.g., 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 (**Exhibit CL-055**), ¶ 199 (noting that the object of the national treatment standard is “to ensure that a national measure does not upset the competitive relationship between domestic and foreign investors”, which explains why tribunals have “focused mainly on the competitive relationship between investors in the

484. *Second*, in order to succeed in the national treatment claim, the Claimants must show⁷⁷⁵ that (i) a foreign investor, (ii) has received treatment less favorable (iii) than other investors in “like circumstances”, and (iv) the different treatment is not justified.⁷⁷⁶ This means that a host State may adopt measures that constitute a difference in treatment, provided that the investors are not in “like circumstances” or that the different treatment is not “inapposite or excessive to achieve an otherwise legitimate objective of the State”.⁷⁷⁷
485. As acknowledged by the Claimants, the assessment of whether investors or investments are in “like circumstances” is fact specific and requires the determination of whether the “competing

marketplace”); *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010 (**Exhibit CL-079**), ¶ 211 (“the national treatment obligation does not preclude all differential treatment that could affect a protected investment but is aimed at protecting foreign investors from *de iure* or *de facto* discrimination based on nationality” (emphasis added).

⁷⁷⁵ Contrary to the Claimants’ assertion, the tribunal in *Feldman v. Mexico* “did not purport to lay down a special “*prima facie*” test for national treatment claims. Rather, the Tribunal simply described the general burden of proof in international law, by which responsibility for establishing a claim rests, first and foremost, on the party who asserts it. [...] If evidence of disparate treatment is produced by a claimant, then it will certainly be for the responding party to justify or negate that evidence of disparate treatment. But the principle does not obviate the need for a claimant to provide at least some relevant evidence to support his or her claim. Mere assertion will not suffice”. *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015 (**Exhibit RL-80**), ¶ 457 (emphasis added).

⁷⁷⁶ See, e.g., *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 (**Exhibit CL-055**), ¶ 196, 205 (“the Arbitral Tribunal shall: (i) identify the relevant subjects for comparison; (ii) consider the treatment each comparator receives; and (iii) consider any factors that may justify any differential treatment”. The tribunal also noted that a breach of the national treatment requires “showing that a foreign investor has unreasonably been treated less favorably than domestic investors in like circumstances”) (emphasis added); *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, NAFTA, Award, 26 January 2006 (**Exhibit RL-21**), ¶ 176; *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010 (**Exhibit CL-079**), ¶ 212 (“a claimant complaining of a breach by the host State of the BIT’s national treatment clause: (i) has to identify the local subject for comparison; (ii) has to prove that the claimant-investor is in like circumstances with the identified preferred national comparator(s); and (iii) must demonstrate that it received less favourable treatment in respect of its investment, as compared to the treatment granted to the specific local investor or the specific class of national comparators” (emphasis added)); *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, 24 May 2007 (**Exhibit RL-26**), ¶ 84.

⁷⁷⁷ *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007 (**Exhibit RL-27**), ¶ 368 (“to violate international law, discrimination must be unreasonable or lacking proportionality, for instance, it must be inapposite or excessive to achieve an otherwise legitimate objective of the State. An objective justification may justify differentiated treatments of similar cases”).

entities” are in the same business or economic sector.⁷⁷⁸ In addition, the assessment of the “like circumstances” requires the “examination of the surrounding situation in its entirety”.⁷⁷⁹

486. This is confirmed by the cases on which the Claimants rely. For example, in *Pope & Talbot v. Canada*, the tribunal confirmed that because the meaning of the term “like circumstances” varies according to the facts of each case, “the application of the like circumstances standard will require evaluation of the entire fact setting surrounding”.⁷⁸⁰ Thus, “as a first step” when assessing a claim for breach of national treatment, the treatment accorded to a foreign investment “should be compared with that accorded to domestic investments in the same business or economic sector”. However, “that first step is not the last one”, and factors need to be assessed, including whether the measures “have a reasonable nexus to rational government policies” that do not distinguish between foreign and national companies.⁷⁸¹ The tribunal further noted that the “like circumstances” assessment “will require addressing *any* difference in treatment, demanding that it be justified by showing that it bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investments”.⁷⁸² The tribunal concluded that the different treatment accorded to different softwood lumber producers, who despite competing in the same business or economic sector were not in “like circumstances”, did not amount to a breach of the national treatment standard.⁷⁸³

487. Also in *SD Myers v. Canada* the tribunal considered that the assessment of “like circumstances” must take into account, in addition to the question of whether the two entities are in the same

⁷⁷⁸ Claimants’ Memorial on Merits and Damages, ¶ 462.

⁷⁷⁹ *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 (**Exhibit CL-055**), ¶ 197. See also *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007 (**Exhibit RL-27**), ¶ 368 (“It would be necessary, in each case, to evaluate the exact circumstances and the context”), 371 (“The difference of treatment must be due to a measure taken by the State. No policy or purpose behind the said measure must apply to the investment that justifies the different treatments accorded. *A contrario*, a less favourable treatment is acceptable if a State’s legitimate objective justifies such different treatment in relation to the specificity of the investment”).

⁷⁸⁰ *Pope & Talbot Inc v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001 (**Exhibit CL-026**), ¶ 75.

⁷⁸¹ *Pope & Talbot Inc v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001 (**Exhibit CL-026**), ¶ 78.

⁷⁸² *Pope & Talbot Inc v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001 (**Exhibit CL-026**), ¶ 79.

⁷⁸³ *Pope & Talbot Inc v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001 (**Exhibit CL-026**), ¶¶ 88, 94-95, 103-104

“economic sector” or “business sector”, other “circumstances that would justify governmental regulations that treat them differently in order to protect the public interest”.⁷⁸⁴

2. The Claimants have failed to show that Colombia breached its obligation to accord national treatment

488. According to the Claimants, by initiating Asset Forfeiture Proceedings against the Meritage Lot but not against other lots belonging to Colombian nationals, Colombia failed to accord to the Claimants treatment “no less favourable” than to Colombian nationals.⁷⁸⁵ Yet, in the one paragraph supporting their claim, the Claimants did not even attempt to show that the requirements to succeed in a national treatment claim are met. Rather, the Claimants try improperly to shift the burden of proof to the Respondent.

489. Contrary to the Claimants’ unsupported allegations, an assessment of the facts of the case shows that Colombia did not breach the national treatment obligation in Article 10.3 of the FTA.

490. *First*, the Meritage Lot and the other lots belonging to Mr. López Vanegas’s half-brother cannot be deemed to be in “like circumstances”. To begin with, the Claimants have not even attempted to show that the two lots are “competing entities ‘in the same business or economic sector’”.⁷⁸⁶ In fact, there is no evidence whatsoever that the neighbouring lots were intended to be used to develop a project competing with, or similar to, the Meritage Project.

491. An assessment of the “surrounding situation” confirms that they are not in “like circumstances”. In fact, the Claimants had been selling units in the Meritage Project to third parties and with the money collected through the pre-sales of units, they expected to finance both the acquisition of the Meritage Lot and the construction of the Meritage Project. The measures adopted were therefore necessary to avoid any further negotiations with the units in the lot that was tainted by illegality and, thus, protect the buyers of the units.⁷⁸⁷ Therefore, there is no evidence whatsoever that the Asset Forfeiture Proceedings against the Meritage Lot were initiated due to the nationality of the Claimants (who, as demonstrated, have no direct link to the Meritage Lot).

⁷⁸⁴ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 (**Exhibit CL-023**), ¶ 250.

⁷⁸⁵ Claimants’ Memorial on Merits and Damages, ¶ 465.

⁷⁸⁶ Claimants’ Memorial on Merits and Damages, ¶ 462.

⁷⁸⁷ *See above*, ¶ 318.

492. On the contrary, the Meritage Lot was far from being the only asset subject to investigation and forfeiture. For example, in October 2019 more than 380 assets including cars, houses, and lots were seized due to their connection with members of the criminal organization *La Terraza*.⁷⁸⁸
493. A similar situation was considered by the tribunal in *Al Tamimi v. Oman*, in which the claimant had been investigated for quarrying violations. In that case, the tribunal concluded that “the Claimant was targeted not because of his nationality but because, rather than adhering to the terms of his permits, he “decided to embark on a materially different operation outside the Jebel Wasa”.⁷⁸⁹ In reaching this conclusion, the tribunal took into account the fact that “the Claimant is not the only operator in Oman to be investigated by the Omani authorities for quarrying violations”, and that there was no evidence “that the Claimant was treated in a particular manner because of his nationality”.⁷⁹⁰
494. Therefore, to the extent that the Claimants were treated less favourably (which is denied), the different treatment was justified in light of the different circumstances.⁷⁹¹
495. *Third*, as demonstrated below, even assuming that the Claimants were treated differently, they did not suffer any significant practical negative impacts as a result of the alleged different treatment. As indicated, in light of the findings of the illicit origin of the Meritage Lot, the lot was subject to asset forfeiture and the Attorney General’s Office had the obligation to bring forward the proceedings for the Court to ultimately decide. Therefore, regardless of the initiation or not of similar proceedings against other properties, the Meritage Lot would still have remained subject to the Asset Forfeiture Proceedings.⁷⁹²
496. In sum, the Claimants have not shown that the Respondent breached its obligations to accord national treatment.

⁷⁸⁸ See Periódico Contexto, “Los modos de lavar activos en Medellín”, 23 April 2020 (<https://periodicocontexto.wixsite.com/contexto/single-post/2020/04/23/los-modos-de-lavar-activos-en-medellin>), accessed on 15 November 2020 (**Exhibit R-54**).

⁷⁸⁹ *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015 (**Exhibit RL-80**), ¶ 467.

⁷⁹⁰ *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015 (**Exhibit RL-80**), ¶¶ 466-467.

⁷⁹¹ See *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007 (**Exhibit RL-27**), ¶ 430. See also Section IV.A.2(i)(b).

⁷⁹² See above, ¶ 316.

D. THE RESPONDENT FULFILLED ITS OBLIGATION TO AFFORD FULL PROTECTION AND SECURITY TO THE CLAIMANTS' ALLEGED INVESTMENT

497. The Claimants allege that Colombia breached the FPS standard in Article 10.5 of the FTA by (i) subjecting the Meritage Project to “a corrupt extortion racket perpetrated by officials from the Attorney General’s Office” in collusion with Mr. López Vanegas,⁷⁹³ (ii) not protecting the Claimants’ investments from the unlawful actions of Mr. López Vanegas,⁷⁹⁴ and (iii) not protecting Mr. Seda and his family against the threats and attacks from third parties.⁷⁹⁵

498. The relevant part of Article 10.5 of the FTA provides that:

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

[...]

(b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.

499. The Respondent sets out below the relevant core components of the “full protection and security” standard in Article 10.5 of the FTA (**IV.D.1500**), to then demonstrate that the Respondent has at all times accorded the Claimants’ alleged investments treatment in accordance with such standard (**IV.D.2**).

1. The legal standard

500. The Claimants’ “full protection and security” claim must be evaluated in light of the following considerations.

⁷⁹³ Claimants’ Memorial on Merits and Damages, ¶¶ 469-470.

⁷⁹⁴ See Claimants’ Memorial on Merits and Damages, ¶¶ 471-472.

⁷⁹⁵ See Claimants’ Memorial on Merits and Damages, ¶¶ 473-474.

501. *First*, by its plain language, Article 10.5 of the FTA limits the application of the “full protection and security” to “covered investments”,⁷⁹⁶ *i.e.*, investments of nationals of the other Contracting Party. The “full protection and security” standard in Article 10.5 of the FTA does not offer substantive protection to investors.
502. Interpreting a similar provision in the Organisation of Islamic Cooperation Investment Agreement, the tribunal in *Al-Warraq v. Indonesia* understood that when the plain language of the treaty creates an obligation on the host State to provide protection to the investment, measures that affect the investors personally would not amount to a breach of the standard of protection:

The language of Article 2 is straightforward. It creates an obligation on the host state to provide adequate protection and security to the invested capital of the investor, *i.e.*, the investment. [...] [S]ince the protection under Article 2 of the OIC Agreement only applies to the “investment” and not the “investor”, it is generally not infringed by physical threats (if proved) to the investor.

[...]

[S]ince adequate protection and security is offered only to the investment, measures that affect an investor personally with no concomitant effect on the investment do not amount to a breach of that standard of protection.⁷⁹⁷

503. *Second*, again by reference to its plain language, Article 10.5 of the FTA requires the host State to “provide the level of police protection required under customary international law”,⁷⁹⁸ but “do[es] not require treatment in addition to or beyond” that, and “do[es] not create additional substantive rights”.⁷⁹⁹ This means that the provision protects against physical damage or interference only, and not against any other kind of impairment of an investor’s investment.
504. Even in treaties where no such clarification exists, investment tribunals have interpreted that the “full protection and security” standard is “not meant to cover just any kind of impairment of an investor’s investment, but to protect more specifically the physical integrity of an investment”

⁷⁹⁶ United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 10.5.

⁷⁹⁷ *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014 (**Exhibit CL-098**), ¶¶ 624, 629 (emphasis added).

⁷⁹⁸ United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 10.5.2(b).

⁷⁹⁹ United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 10.5.2.

against interference by use of force”.⁸⁰⁰ As clearly explained by the tribunal in *Crystallex v. Venezuela*, limiting the protections provided by the FPS standard to physical security “better accords with the ordinary meaning of the terms”, whereas interpreting the FPS standard to extend to legal security would risk significant overlap with the FET standard, which in turn would offend the *effet utile* principle.⁸⁰¹

505. *A fortiori*, when the applicable treaty expressly confines the “full protection and security” standard to physical protection, as does the FTA, the FPS standard cannot be reasonably understood to extend to legal security.⁸⁰²
506. Against this background, the Claimants’ attempts to extend the scope of Article 10.5 of the FTA to legal security by incorporating Article 2(3) of the Colombia-Spain BIT by means of the MFN provision in Article 10.4 of the FTA must fail. As a matter of treaty interpretation, the Claimants’ proposed interpretation contradicts the express language of Article 10.5 of the FTA – pursuant to which the “full protection and security” standard does not require treatment in addition to or beyond that required by the customary international law minimum standard of

⁸⁰⁰ *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 (**Exhibit CL-042**), ¶ 484 (emphasis added). See also *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014 (**Exhibit CL-097**), ¶ 622 (“While some investment treaty tribunals have extended the concept of full protection and security to an obligation to provide regulatory and legal protections, the more traditional, and commonly accepted view, as confirmed in the numerous cases cited by Respondent is that this standard of treatment refers to protection against physical harm to persons and property”); *Gemplus S.A., SLP S.A. & Gemplus Industrial S.A. de C.V. v. The United Mexican States and Talsud S.A. v. The United Mexican States*, ICSID Cases No. ARB(AF)/04/3 and ARB(AF)/04/4, Award, 16 June 2010 (**Exhibit RL-42**), Part IX, ¶¶ 9-12; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (**Exhibit CL-105**), ¶¶ 632-635; *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 (**Exhibit CL-060**), Award, ¶ 668; *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007 (**Exhibit CL-056**), ¶¶ 324-328; *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, 30 October 2017 (**Exhibit RL-96**), ¶¶ 8.44-8.46; *Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia*, PCA Case No. 2015-40, Final Award, 29 March 2019 (**Exhibit RL-109**), ¶ 267 (“Unless the relevant treaty clause explicitly provides otherwise, the standard of full protection and security does not extend beyond physical security nor does it extend to the provision of legal security”); *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007 (**Exhibit RL-25**), ¶¶ 201, 203 (the tribunal interpreted a provision providing for “full security and protection which in any case shall not be less than that accorded either to investments of its own investors or to investments of investors of any third state, whichever is more favorable to the investor concerned”, as applying only to physical violence against the investor, including mobs, insurgents and rented thugs).

⁸⁰¹ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (**Exhibit CL-105**), ¶¶ 632-634.

⁸⁰² See, e.g., *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006 (**Exhibit CL-043**), ¶ 408 (the tribunal distinguished between the agreements limiting FPS to the level of police protection required under customary international law and those where the terms “full protection and security” are qualified by “full”, in which case the standard could be extended beyond physical security).

treatment as defined in Article 10.5 of the FTA. Importing a treatment beyond that expressly agreed upon by the contracting parties to the FTA through the MFN provision would render Article 10.5 meaningless and contravene the widely recognized *effet utile* principle, pursuant to which a legal text should be interpreted in such a way that a reason and meaning can be attributed to every word in the text.⁸⁰³

507. *Third*, as acknowledged by the Claimants, the standard of “full protection and security” is not one of strict or absolute liability, but rather one of due diligence.⁸⁰⁴ This is because, as noted by leading commentators, “the focus [of the standard] is on the acts or omissions of the State in addressing the unrest that gives rise to the damage”.⁸⁰⁵

508. Notably, investment tribunals have held that the “full protection and security” standard only obliges the host State to exercise a level of due diligence which is reasonable under the circumstances:

[T]he Treaty obliges the Parties to exercise such due diligence in the protection of foreign investment as reasonable under the circumstances. However, the Treaty does not oblige the Parties to protect foreign investment against any possible loss of value caused by persons whose acts could not be attributed to the State. Such protection would indeed amount to strict liability, which cannot be imposed to a State absent any specific provision in the Treaty.⁸⁰⁶

509. Similarly, in *El Paso v. Argentina*, the tribunal held that a State need only take reasonable actions within its power to avoid harm to the investment:

It should be emphasised that the obligation to show “due diligence” does not mean that the State has to prevent each and every injury. Rather, the obligation is generally understood as requiring that the

⁸⁰³ See above, ¶ 504. See also, e.g., *Eureka B.V. v. Republic of Poland*, Partial Award, 19 August 2005 (**Exhibit CL-041**), ¶ 248 (“It is a cardinal rule of the interpretation of treaties that each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless. It is equally well established in the jurisprudence of international law, particularly that of the Permanent Court of International Justice and the International Court of Justice, that treaties, and hence their clauses, are to be interpreted so as to render them effective rather than ineffective”).

⁸⁰⁴ See Claimants’ Memorial on Merits and Damages, ¶ 467. See also Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (1995) (**Exhibit RL-123**), pp. 60–61 (“The [full protection and security] standard provides a general obligation for the host State to exercise due diligence in the protection of foreign investment as opposed to creating ‘strict liability’ which would render a host State liable for any destruction of the investment if caused by persons whose acts could not be attributed to the State”).

⁸⁰⁵ Campbell McLachlan *et al.*, *International Investment Arbitration: Substantive Principles* (OUP, 2017) (**Exhibit RL-136**), ¶ 7.253.

⁸⁰⁶ *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001 (**Exhibit RL-8**), ¶ 308.

State take reasonable actions within its power to avoid injury when it is, or should be, aware that there is a risk of injury.⁸⁰⁷

510. In this sense, it is well established that, when assessing the adequacy of a State’s response under the “full protection and security” standard, the response should be assessed in light of the circumstances of each case and the resources of the State in question. In this regard, two leading commentators have noted that:

Although the host State is required to exercise an objective minimum standard of due diligence, the standard of due diligence is that of a host State in the circumstances and with the resources of the state in question. This suggests that due diligence is a modified subjective standard – the host State must exercise the level of due diligence of a host state in its particular circumstances. In practice, tribunals will likely consider the state’s level of development and stability as relevant circumstances in determining whether there has been due diligence. An investor investing in an area with endemic civil strife and poor governance cannot have the same expectation of physical security as one investing in London, New York or Tokyo.⁸⁰⁸

511. *Fourth*, the threshold for finding a breach of the “full protection and security” standard is extremely high. This is confirmed by the Claimants’ own authorities. For example, in *AMT v. Zaire*, “disastrous consequences”⁸⁰⁹ ensued from the attacks on the claimant’s investment by the Zairian armed forces, which “destroyed, damaged and carried away all the finished goods and almost all the raw materials and objects of value found on the premises”.⁸¹⁰ As a result, the claimant’s investment was “permanently closed”.⁸¹¹ In *AAPL v. Sri Lanka*, the claimant’s investment was destroyed while the area was under “the exclusive control of the governmental security force” combatting insurgents,⁸¹² and in *Cengiz v. Lybia*, the claimant’s investment was

⁸⁰⁷ *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011 (**Exhibit CL-081**), ¶ 523. See also *Cengiz Insaat Sanayi Ve Ticaret A.S. v. The State of Libya*, ICA Case No. 21537/ZF/AYZ, Final Award, 7 November 2018 (**Exhibit CL-121**), ¶ 406 (noting that “Reasonableness must be measured taking into consideration the State’s means and resources and the general situation of the country”); *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 (**Exhibit RL-61**), ¶ 7.83.

⁸⁰⁸ Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009) (**Exhibit RL-128**), p. 310 (emphasis added).

⁸⁰⁹ *American Manufacturing & Trading, Inc. v Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997 (**Exhibit CL-018**), ¶ 6.08.

⁸¹⁰ *American Manufacturing & Trading, Inc. v Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997 (**Exhibit CL-018**), ¶ 3.04.

⁸¹¹ *American Manufacturing & Trading, Inc. v Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997 (**Exhibit CL-018**), ¶ 3.04.

⁸¹² *Asian Agricultural Products Ltd v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990 (**Exhibit CL-014**), ¶ 85.

repeatedly raided by private mobs that looted equipment and destroyed the facilities, at a time when there was a heightened security deficit in the region of the country where the investment was located.⁸¹³

512. In sum, the “full protection and security” standard in Article 10.5 of the FTA provides protection only to the physical integrity of the Claimants’ (alleged) investment. Further, and in any event, the standard is one of due diligence and carries a very high threshold. As demonstrated below, the Claimants have not shown that Colombia’s acts meet this very high threshold.

2. The Respondent afforded full protection and security to the Claimants at all times

513. According to the Claimants, Colombia failed to protect the Claimants and their alleged investments in Colombia by (i) not protecting the Claimants’ investments from the unlawful actions of third parties,⁸¹⁴ (ii) not protecting the Claimants and their investments from the actions of its State organs,⁸¹⁵ and (iii) not protecting Mr. Seda and his family against the threats and attacks from third parties.⁸¹⁶

514. As a preliminary matter, it is worth recalling that the Claimants knowingly decided to invest in Antioquia, a region which had been severely affected by drug cartels and organized crime.⁸¹⁷ It is in light of these circumstances that the Claimants’ allegations should be assessed. In any event, and as demonstrated below, none of the Claimants’ allegations comes close to furnishing the basis for a “full protection and security” claim in breach of Article 10.5 of the FTA.

(i) *The Claimants’ allegations concerning the State’s inaction in the face of Mr. López Vanegas’s extortion are untenable*

515. According to the Claimants, Colombia breached the FPS standard by failing “to protect Claimants’ investments from the (unlawful) actions of third parties despite express requests for assistance”.⁸¹⁸ In particular, the Claimants refer to the harassment and threats by Mr. López

⁸¹³ See *Cengiz Insaat Sanayi Ve Ticaret A.S. v. The State of Libya*, ICA Case No. 21537/ZF/AYZ, Final Award, 7 November 2018 (**Exhibit CL-121**), ¶ 442.

⁸¹⁴ See Claimants’ Memorial on Merits and Damages, ¶¶ 471-472.

⁸¹⁵ See Claimants’ Memorial on Merits and Damages, ¶¶ 469-470.

⁸¹⁶ See Claimants’ Memorial on Merits and Damages, ¶¶ 473-474.

⁸¹⁷ See *above*, Section II.B.

⁸¹⁸ Claimants’ Memorial on Merits and Damages, ¶ 471.

Vanegas and his representatives “for two years”⁸¹⁹ and to the fact that the “Colombian authorities appear to have dismissed” the official complaint filed by Mr. Seda in December 2016 and took “no steps to protect Mr. Seda’s and the Claimants’ investments”.⁸²⁰

516. As demonstrated below, the Claimants’ FPS claims on this basis are untenable both as a matter of fact and law.

517. *First*, Mr. Seda’s own conduct calls into question his FPS claim. In fact, despite his allegations that he has received threats from Mr. Iván López Vanegas since early 2014, it was not until December 2016 that he reported these alleged threats. In the meantime, he had been meeting with Mr. López Vanegas and his legal representatives in Colombia and abroad.

518. To recall, according to the Claimants, a person identifying himself as Mr. López Vanegas began contacting Mr. Seda in early 2014.⁸²¹ Mr. López Vanegas allegedly claimed to be the rightful owner of the Meritage Lot and threatened Mr. Seda to pay some USD 660,000 to let him develop the Meritage Project.⁸²² Admittedly, the Claimants decided not to report the threats because Mr. Seda “did not find Mr. López Vanegas’s claims credible”.⁸²³

519. A few years later, in April 2016, Mr. Mosquera contacted Mr. Seda asking for a meeting to discuss Mr. López Vanegas’s claims over the Meritage Lot,⁸²⁴ and the evidence available to Mr. López Vanegas in support of his claim.⁸²⁵ While at first Mr. Seda allegedly ignored the request to meet Mr. López Vanegas, “[d]eeming it baseless”,⁸²⁶ in the coming months Mr. Seda met with Mr. López Vanegas and his legal representatives on at least two occasions in Bogotá and Miami.⁸²⁷ During these meetings, Mr. López Vanegas’s representatives allegedly reminded

⁸¹⁹ Claimants’ Memorial on Merits and Damages, ¶ 469.

⁸²⁰ Claimants’ Memorial on Merits and Damages, ¶ 471.

⁸²¹ *See* Claimants’ Memorial on Merits and Damages, ¶ 85.

⁸²² *See* Claimants’ Memorial on Merits and Damages, ¶ 85.

⁸²³ Claimants’ Memorial on Merits and Damages, ¶ 86.

⁸²⁴ *See* Letter from Victor Mosquera Marin to Angel Samuel Seda, 7 April 2016 (**Exhibit C-151**).

⁸²⁵ *See* Email from Víctor Mosquera Marín to Angel Seda and J. Evans, *attaching* Letter from Victor Mosquera Marín to James Evans; and Letter from Víctor Mosquera Marín to Angel Samuel Seda, 27 April 2016 (**Exhibit C-156**).

⁸²⁶ Claimants’ Memorial on Merits and Damages, ¶ 119.

⁸²⁷ *See* Claimants’ Memorial on Merits and Damages, ¶¶ 133-134. The meetings held in June 2016 were presumably at Mr. Seda’s initiative, who offered that “*si este próxima Miércoles sentamos y miramos que podemos negociar entre [López Vanegas] y los dueños anteriores del lote, nosotros podemos ayudarlo a negociar algo bueno*”. *See* Email chain between Víctor Mosquera Marín and Angel Seda, 6 June 2016 (**Exhibit C-162**), p. 2.

Mr. Seda of their connections with the Attorney General's Office and threatened Mr. Seda with the seizure of the Meritage Lot and harm to his family.⁸²⁸ Mr. Seda allegedly refused to pay the amounts claims by Mr. López Vanegas.

520. In October 2016, Mr. Seda once again met with Mr. Mosquera in Bogotá. According to the Claimants, during the meeting Mr. Mosquera made “a blatant extortion attempt”, asking for USD 18 million.⁸²⁹ Yet, two days later Mr. Seda agreed to meet once again with Mr. Mosquera and Mr. López Vanegas in Miami.⁸³⁰ Following the meetings, Mr. Seda continued negotiating with Mr. López Vanegas⁸³¹ and made him what Mr. Seda called “such a good offer”.⁸³²
521. Despite all the threats to which Mr. Seda claims to have been subjected over an almost three-year period, it was not until 19 December 2016 – i.e., four months after the seizure of the Meritage Lot and once Mr. Seda realized that he could not “solve the issues” via negotiations⁸³³ – that Mr. Seda reported the alleged threats received from Mr. López Vanegas starting in 2014.⁸³⁴ The report was filed following the advice of the Attorney General's Office.⁸³⁵
522. Mr. Seda's conduct *vis-à-vis* Mr. López Vanegas for almost three years clearly shows that he did not consider that any action – let alone immediate action – was required from the Colombian government to address the alleged threats by Mr. López Vanegas. This alone calls into question the Claimants' FPS claim.

⁸²⁸ See Claimants' Memorial on Merits and Damages, ¶ 134; A. Seda Complaint to *Fiscalía General*, 19 December 2016 (**Exhibit C-181**), p. 3.

⁸²⁹ Claimants' Memorial on Merits and Damages, ¶ 210.

⁸³⁰ See Claimants' Memorial on Merits and Damages, ¶ 211.

⁸³¹ See Claimants' Memorial on Merits and Damages, ¶ 212; Email chain between Angel Seda and Víctor Mosquera Marín, 10 November 2016 (**Exhibit C-177**).

⁸³² Email chain between Angel Seda and Víctor Mosquera Marín, 10 November 2016 (**Exhibit C-177**), p. 3. He offered COP 20.000.000.000 (over USD 6.5 million at the time). See also Email chain between A. Seda and V. Mosquera, 31 October 2016 (**Exhibit C-176**) and WhatsApp chain between A. Seda and V. Mosquera, 26-29 October 2016 (**Exhibit C-175**).

⁸³³ Email chain between Angel Seda and Víctor Mosquera Marín, 10 November 2016 (**Exhibit C-177**), p. 2.

⁸³⁴ According to Mr. Seda, he was first contacted by Mr. López Vanegas and his lawyers in August 2014. See A. Seda Complaint to *Fiscalía General*, 19 December 2016 (**Exhibit C-181**), p. 3.

⁸³⁵ See Claimants' Memorial on Merits and Damages, ¶ 221.

523. *Second*, the Claimants’ allegations that “the authorities appear to have dismissed the complaint just a month later and took no steps to protect Mr. Seda’s and the Claimants’ investments”⁸³⁶ are not supported by the evidence provided by the Claimants.
524. The Claimants’ allegations are based solely on Mr. Seda’s declarations and two vague references in two documents issued by the Attorney General’s Office in January and April 2017, where a report by Mr. Seda is marked as “inactive”.⁸³⁷ However, neither document seems to support the Claimants’ allegations: while both documents refer to a report made by Mr. Seda for “fraud” (*estafa*), the report filed by Mr. Seda on 19 December 2016 does not refer to any fraud.⁸³⁸ There is otherwise no indication in the document that the report refers to extortion and threats. What is more, it is not even clear that the report for “fraud” which status is marked as “inactive” involved Mr. López Vanegas in any way.
525. *Third*, as demonstrated below,⁸³⁹ the Attorney General’s Office did act upon Mr. Seda’s report and launched an investigation into the alleged extortion scheme involving two representatives of the Attorney General’s Office, namely, Alejandra Ardila and Andrea Malagón.
526. With respect to Mr. López Vanegas’s alleged threats, the Claimants admit that the meetings took place in the United States of America and not in Colombia, so any crime committed by Mr. López Vanegas would have fallen outside of the jurisdiction of the Colombian authorities. In any event, there is no evidence that the alleged threats continued after Mr. Seda put an end to the negotiations with Mr. López Vanegas in November 2016. Therefore, even if it was true that the Colombian State did not act upon Mr. Seda’s report of December 2016, the Claimants have “not established that this negatively impacted [their] investment”.⁸⁴⁰

⁸³⁶ Claimants’ Memorial on Merits and Damages, ¶ 471.

⁸³⁷ Claimants’ Memorial on Merits and Damages, ¶¶ 471, 223. In particular, the Claimants refer to Attorney General’s Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**) and Attorney General’s Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017 (**Exhibit C-024bis**).

⁸³⁸ A. Seda Complaint to *Fiscalía General*, 19 December 2016 (**Exhibit C-181**).

⁸³⁹ *See above*, ¶ 139.

⁸⁴⁰ *South American Silver Limited v. Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018 (**Exhibit RL-107**), ¶ 695. *See also Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005 (**Exhibit RL-19**), ¶ 166 (“even if one concluded that there was a certain failure on the side of the Respondent sufficiently grave to regard it as a violation, it has not been established that non-compliance with the obligation prejudiced the Claimant, to a material degree. The Claimant has failed to prove that its alleged injuries and losses could have been prevented had the Respondent exercised due diligence in this regard”).

527. *Finally*, even if the facts as related by the Claimants could be verified, these do not even get close to meeting the legal standard for finding a breach of the FPS standard: none of the acts alleged by the Claimants destroyed or otherwise interfered with the physical integrity of the Claimants’ alleged investment, and in any event, they do not meet the high threshold required for a finding of breach of FPS.

528. As mentioned above, and contrary to the Claimants’ allegations, none of the cases on which the Claimants rely support their assertion that investment 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”.⁸⁴¹ Much to the contrary, the cases cited by the Claimants suggest that circumstances similar to the ones invoked by the Claimants do not meet the high threshold for finding a breach of the FPS standard.⁸⁴²

(ii) *The Claimants’ allegations concerning the State’s inaction in the face of unlawful conduct by State officials are untenable*

529. The Claimants further allege that Colombia breached the FPS standard by “fail[ing] to protect Claimants’ investment against the actions of its own State organs”.⁸⁴³ In particular, the Claimants refer to the “corrupt extortion racket perpetrated by officials from the Attorney General’s Office” in collusion with Mr. López Vanegas⁸⁴⁴ and the alleged failure to lift the precautionary measures on the Meritage Project and to identify and protect Newport as a good faith third party.

530. The Claimants’ allegations are constructed on the basis of “coincidences in timing”⁸⁴⁵ and the Claimants’ elucubrations. None of these stand against the hard evidence available.

531. *First*, as demonstrated above, there are no elements in the record that show the existence of “collusion” or a “corrupt extortion racket” by State officials. For example, many of the facts to which the Claimants refer to enrich their narrative of the alleged extortion scheme – and of which no evidence has been produced, were also not reported to the Colombian authorities in Mr. Seda’s official complaint.⁸⁴⁶ The alleged “coincidences in timing” on which the Claimants

⁸⁴¹ Claimants’ Memorial on Merits and Damages, ¶ 472.

⁸⁴² *See above*, ¶ 511.

⁸⁴³ Claimants’ Memorial on Merits and Damages, ¶ 470.

⁸⁴⁴ Claimants’ Memorial on Merits and Damages, ¶ 469.

⁸⁴⁵ Claimants’ Memorial on Merits and Damages, ¶ 120.

⁸⁴⁶ *See, e.g.*, Claimants’ Memorial on Merits and Damages, ¶¶ 131, 208.

insist are similarly baseless. For example, the Claimants overlooks that the seizure of the Meritage Project that took place “just *seven days* after Mr. Seda had rejected Mr. Valderrama’s final overtures”,⁸⁴⁷ had been ordered on 22 July 2016, *i.e.* before the exchange between Messrs. Seda and Valderrama.⁸⁴⁸ The only evidence that the Claimants could produce, namely press articles mentioning Ms. Malagón’s alleged involvement in other cases, are irrelevant to this case.⁸⁴⁹

532. What is relevant to this case, and in particular to the Claimants’ FPS claim, is that following Mr. Seda’s complaint in December 2016, an exhaustive investigation was launched into the alleged extortion scheme involving Alejandra Ardila and Andrea Malagón in connection with the Meritage Project, engaging the coordinated effort of the judicial police, the Attorney General’s Office and the criminal courts of Medellín.⁸⁵⁰ So far, no evidence of criminal conduct has been found.⁸⁵¹
533. Therefore, as in *SAS v. Bolivia*, claimants have failed to show that Colombia “refused or failed to intervene when requested to do [so] by [the claimant]”.⁸⁵² Moreover, as noted by the *SAS v. Bolivia* tribunal, to the extent that there were some “delays and inefficiencies regarding some specific actions”, the tribunal considered these to be “insufficient to qualify as actions in breach of the full protection and security standard”.⁸⁵³
534. In this case, the Claimants’ allegations that the Colombian State failed to act is particularly striking in light of the fact that by February 2017, Mr. Seda had contacted the Attorney General’s Office to discuss the allegations made against Ms. Malagón,⁸⁵⁴ advised to file an official complaint⁸⁵⁵ and informed that an official investigation had been launched against Mses. Malagón and Ardila, but he had also been asked to collaborate with the investigation

⁸⁴⁷ Claimants’ Memorial on Merits and Damages, ¶ 136.

⁸⁴⁸ See Resolution 13641 of precautionary measures in the initial phase, 22 July 2016 (**Exhibit C-164**). See also above, ¶¶ 335-336.

⁸⁴⁹ See also above, ¶¶ 339-340.

⁸⁵⁰ See Hernández Witness Statement, ¶¶ 10-11.

⁸⁵¹ See Hernández Witness Statement, ¶¶ 5-8.

⁸⁵² *South American Silver Limited v. Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018 (**Exhibit RL-107**), ¶ 689. See also ¶ 694.

⁸⁵³ *South American Silver Limited v. Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018 (**Exhibit RL-107**), ¶ 689.

⁸⁵⁴ See Claimants’ Memorial on Merits and Damages, ¶¶ 220-221.

⁸⁵⁵ See Claimants’ Memorial on Merits and Damages, ¶ 221.

conducted by the Attorney General’s Office by providing additional information.⁸⁵⁶ As of May 2017, Mr. Seda had not reacted to the Attorney General’s Office request for assistance of March 2016. Finally, on 14 June 2017, Mr. Seda was interviewed as part of the investigations.

535. *Second*, contrary to the Claimants’ allegations, the Colombian State is neither under the obligation to lift the Precautionary Measures on the Meritage Project nor to identify and protect Newport as a good faith party. As demonstrated above, while the Attorney General’s Office first learnt about the situation of the Meritage Lot through a complaint filed by Mr. López Vanegas, the decision of 22 July 2016 to impose precautionary measures on the Meritage Project was based on objective evidence found by the Attorney General’s Office following investigations of the case which, independently of the role played by Mses. Ardila and Malagón, both of whom have been removed from the case, and of the veracity of Mr. López Vanegas’s story, shows the illicit origin of the Meritage Lot.⁸⁵⁷ The Attorney General’s Office was therefore under the legal obligation to move forward with the Asset Forfeiture Proceeding until a final decision has been made in accordance with Law 1708 of 2014.⁸⁵⁸
536. Similarly untenable are the Claimants’ allegations that the Colombian State breached the “obligation to identify and protect good faith parties such as Newport”.⁸⁵⁹ As explained above, the issue has been – and is still being – reviewed by the competent Colombian courts. As such, any claim in this regard is not only unjustified but also premature, as Newport’s appeal is pending.
537. *Third*, in any event, the Claimants’ allegations cannot constitute a breach of the FPS standard. As demonstrated, the FPS standard is “not meant to cover just any kind of impairment of an investor’s investment, but to protect more specifically the physical integrity of an investment against interference by use of force”.⁸⁶⁰ The Claimants’ attempts to stretch the scope of the standard – in contravention of the clear wording of the FTA – should not be allowed.

⁸⁵⁶ See Hernández Witness Statement, ¶¶ 7-8.

⁸⁵⁷ See above, Section II.F.3.

⁸⁵⁸ See Reyes Expert Report, ¶¶ 11-12; Pinilla Expert Report, ¶¶ 37-38.

⁸⁵⁹ Claimants’ Memorial on Merits and Damages, ¶ 470.

⁸⁶⁰ See *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 (**Exhibit CL-042**), ¶ 484. See also *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014 (**Exhibit CL-097**), ¶ 622 (“While some investment treaty tribunals have extended the concept of full protection and security to an obligation to provide regulatory and legal protections, the more traditional, and commonly accepted view, as confirmed in the numerous cases cited by Respondent is that this standard of treatment refers to protection against physical harm to persons and property”); *Gemplus S.A., SLP S.A. & Gemplus Industrial S.A. de C.V. v. The United Mexican States* and *Talsud S.A. v. The United Mexican States*,

538. Even if the allegations of the Claimants could be considered to fall within the scope of the FPS standard, the Colombian State complied with its treaty obligations. As acknowledged by the Claimants, the FPS standard is one of due diligence.⁸⁶¹ By promptly launching investigations against Mses. Malagón and Ardila and assigning the Asset Forfeiture Proceedings to a different Prosecutor, the Colombian State exercised the required due diligence.

(iii) *The Claimants' allegations concerning the State's inaction in the face of threats against Mr. Seda and his family are untenable*

539. Finally, the Claimants claim that Colombia breached the FPS standard by remaining inactive in the face of threats against Mr. Seda and his family. In particular, the Claimants aver that Colombia did not take any steps to identify the individuals responsible of an alleged assassination attempt against Mr. Seda in September 2017 and denied Mr. Seda a permit for protecting his car, thus “obstruct[ing] Mr. Seda from taking steps to protect himself”.⁸⁶²

540. None of the Claimants' allegations amount to a breach of the FPS standard.

541. *First*, on 26 September 2017, at 18:00, Mr. Seda and his attorney filed a complaint before the police, stating that they had been the victims of a shooting attack by two individuals riding a motorcycle. The police officers inspected the car, a Mercedes Benz GL 500, and observed that it was not possible to identify whether the damage to the car was “the result of a firearm bullet”.⁸⁶³ Nevertheless, the police would launch investigations to identify the alleged attackers.⁸⁶⁴

ICSID Cases No. ARB(AF)/04/3 and ARB(AF)/04/4, Award, 16 June 2010 (**Exhibit RL-42**), Part IX, ¶¶ 9-12; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (**Exhibit CL-105**), ¶¶ 632-635; *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 (**Exhibit CL-060**), ¶ 668; *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007 (**Exhibit CL-056**), ¶¶ 324-328; *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, 30 October 2017 (**Exhibit RL-96**), ¶¶ 8.44-8.46; *Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia*, PCA Case No. 2015-40, Final Award, 29 March 2019 (**Exhibit RL-109**), ¶ 267.

⁸⁶¹ See Claimants' Memorial on Merits and Damages, ¶ 467.

⁸⁶² Claimants' Memorial on Merits and Damages, ¶ 473.

⁸⁶³ Angel Seda Statement attached to Request for Police Protection, 26 September 2017 (**Exhibit C-202**), p. 8 (“a small bump may be observed in the left side of the roof, and another small bump in the left side back door, which cannot be identified if it is the result of a firearm bullet”).

⁸⁶⁴ It bears noting that according to Mr. Seda's report, the attackers ran away when they saw two military policemen nearby. There is no evidence that Mr. Seda first reported the attack to the two policemen that were on site, who would have been in a better position to chase and catch the alleged shooters.

542. Two weeks later, on 11 October 2017, Mr. Seda reported the alleged attack before the Attorney's General Office. He also reported that on 28 September, his daughter was contacted by an unknown individual who, according to Mr. Seda, intended to kidnap her.⁸⁶⁵ Mr. Seda requested that measures be adopted to protect him and his family.⁸⁶⁶ As indicated in the evidence provided by the Claimants, on that same day the Attorney General's Office issued an order to the Police Commander to "adopt the necessary measures" for the protection of Mr. Seda and his family.⁸⁶⁷
543. Contrary to the Claimants' allegations, Colombia did adopt measures in response to Mr. Seda's report of the shooting. Among others, the case was assigned to the unit of the Attorney General's Office in charge of crimes against the life, which in turn instructed the Judicial Police to identify the shooters, but the Judicial Police did not succeed in said identification. As part of the investigation, Mr. Seda was called to provide a statement, but he failed to attend the scheduled meeting.
544. *Second*, the Claimants' allegations that Colombia "obstructed Mr. Seda from taking steps to protect himself" is also factually misleading. Mr. Seda's request to armor his car – a Mercedes Benz with license plate USY 851 – with a "level three (3) armor" was filed on 10 March 2017.⁸⁶⁸ On 7 November 2017, the Security Superintendence rejected this request, noting that the decision was subject to appeal.⁸⁶⁹ Not only there is no evidence whatsoever that Mr. Seda appealed the decision, but according to his own declaration, at the time of the alleged attack on 26 September 2017 (*i.e.*, before the decision was issued), his car – with license plate USY 851 – had an "armor level 3 plus".⁸⁷⁰
545. *Third*, even if the facts invoked by the Claimants were accurate, which they are not, they could not constitute a breach of the FPS standard because the allegations do not involve any attack or threat against the Claimants' alleged investments, but rather against the purported investors.

⁸⁶⁵ See Angel Seda Statement attached to Request for Police Protection, 26 September 2017 (**Exhibit C-202**), p. 6.

⁸⁶⁶ See Angel Seda Statement attached to Request for Police Protection, 26 September 2017 (**Exhibit C-202**), p. 6-7.

⁸⁶⁷ Angel Seda Statement attached to Request for Police Protection, 26 September 2017 (**Exhibit C-202**), p. 1.

⁸⁶⁸ Denial of A. Seda's Application for Permit to Armor Vehicle, 14 November 2017 (**Exhibit C-203**), p. 1.

⁸⁶⁹ Denial of A. Seda's Application for Permit to Armor Vehicle, 14 November 2017 (**Exhibit C-203**), p. 7.

⁸⁷⁰ Angel Seda Statement attached to Request for Police Protection, 26 September 2017 (**Exhibit C-202**), p. 4.

Moreover, by opening an investigation of the facts reported by Mr. Seda, the Respondent met its due diligence obligations. This conclusion is consistent with the findings of investment tribunals in similar cases. For example, in *GEA v. Ukraine*, an individual related to the investor suffered “grave bodily injuries” as a result of a shooting attack (unlike the case at hand, in which the police inspectors could not associate the damage to the car with firearm shots). The incident had been investigated by the Ukrainian authorities but remained unsolved. The tribunal held that even if the shooting could be considered as “related to an investment”, given that Ukraine had investigated the shooting, even if it remained unsolved, the facts could not amount to a violation of the FPS standard.⁸⁷¹

* * *

546. In sum, the Claimants’ FPS claims are not only unsupported by the facts underlying the dispute, but also fail to meet the legal standard for a violation of the FPS standard under the FTA.

V. THE CLAIMANTS’ DAMAGES CLAIMS ARE UNSUPPORTED BY LAW OR FACT AND IS OTHERWISE UNRELIABLE AND GROSSLY EXAGGERATED

547. The Claimants seek compensation in an aggregate amount of USD 309.2 million, which includes USD 246.1 million as compensation for the alleged damages to Mr. Seda, USD 18.6 million for the alleged loss in equity value to the Other Claimants and USD 47.3 million in pre-award interest.⁸⁷² Additionally, the Claimants claim 10% of the alleged damages owed to Mr. Seda in moral damages.⁸⁷³

548. Assuming, *arguendo*, that the Tribunal finds that it has jurisdiction and that there has been a violation of international law, the Claimants still bear the burden of proving the fact and the amount of their alleged loss (V.A). Accordingly, the Tribunal must deny compensation to the Claimants because they have failed to demonstrate that the claimed losses were caused by the Respondent’s actions (V.B) and the amount of the alleged losses (V.C). Moreover, assuming, that the tribunal finds it has jurisdiction to award moral damages, *quad non*, such damages are

⁸⁷¹ *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011 (Exhibit RL-48), ¶¶ 253-255.

⁸⁷² See Claimants’ Memorial on Merits and Damages, Section VI and BRG Expert Report ¶¶ 185-186.

⁸⁷³ See Claimants’ Memorial on Merits and Damages, Section VI.G.

not justified in this case (V.D). Finally, the Tribunal must reject the Claimants' claim for interest (V.E), and their claim that the award not be subjected to taxes (V.F).⁸⁷⁴

549. The Respondent's response to the Claimants' damages claim is supported by the independent valuation report prepared by Richard Seymour Hern of NERA UK Ltd (the "Nera Report").

A. THE CLAIMANTS MUST PROVE THEIR ENTITLEMENT TO THE DAMAGES CLAIMED

550. It is a generally agreed principle that the party alleging to have suffered loss bears the burden to prove both the fact and amount of the alleged loss. This requirement is embodied in Article 36(2) of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts, which provides that compensation "shall cover any financially assessable damage including loss of profits insofar as it is established".⁸⁷⁵

551. In the context of investment arbitration, an authoritative commentary confirms that:

In the damages context, it is always the claimant who alleges that it has suffered a loss as a result of the respondent's conduct; therefore, the claimant bears the burden of proof in relation to the fact and the amount of loss.⁸⁷⁶

552. The principle has also been applied by investment tribunals. For example, in *S.D. Myers v. Canada*, the tribunal confirmed that "the burden is on [the claimant] to prove the quantum of the losses in respect of which it puts forward its claims".⁸⁷⁷

553. In order to be recoverable, the damages claimed "must be neither speculative nor too remote".⁸⁷⁸ The Permanent Court of International Arbitration clearly articulated this rule in the landmark Chorzów Factory case:

In these circumstances, the Court can only observe that the damage alleged to have resulted from completion is insufficiently proved.

⁸⁷⁴ For the avoidance of doubt, the Respondent addresses the issues of damages solely for reasons of precaution. The Respondent's statements and arguments below do not indicate the Respondent's acceptance of any obligation to pay compensation to the Claimants.

⁸⁷⁵ INTERNATIONAL LAW COMMISSION, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001) (**Exhibit CL-025**), Article 36(2) (emphasis added).

⁸⁷⁶ Sergey Ripinsky & Kevin Williams, *Damages in International Investment Law* (British Institute of International and Comparative Law, 2008) (**Exhibit RL-127**), p. 162 (emphasis added).

⁸⁷⁷ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 (**Exhibit CL-023**), ¶ 316.

⁸⁷⁸ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, NAFTA, Second Partial Award, 21 October 2002 (**Exhibit RL-10**), ¶ 173.

Moreover, it would come under the heading of possible but contingent and indeterminate damage which, in accordance with the jurisprudence of arbitral tribunals, cannot be taken into account.⁸⁷⁹

554. This has been repeatedly confirmed by investment tribunals. For example, in *Khan Resources v. Mongolia*, the tribunal held that:

The burden of proof falls on the Claimants to show that they have suffered the loss they claim. The standard of proof required is the balance of probabilities. This, of course, means that damages cannot be speculative or uncertain.⁸⁸⁰

555. Thus, the tribunal in *Gemplus v. Mexico* dismissed the claimants' damages claim for future profits calculated on the basis of a potential extension of the disputed concession agreement's term as "far too contingent, uncertain and unproven, lacking any sufficient factual basis for the assessment of compensation under the two BITs".⁸⁸¹

556. The Claimants must also prove that their alleged loss was directly caused by a purported violation by the Respondent of its international obligations *vis-à-vis* the Claimants. This requirement of a direct causal link reflects a well-established rule of customary international law⁸⁸² and has been incorporated in Article 31 of the ILC Articles on State Responsibility:

⁸⁷⁹ *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Judgment, 13 September 1928, 1928 P.C.I.J. (Ser. A) No. 17 (**Exhibit CL-006**), pp. 56-57.

⁸⁸⁰ *Khan Resources Inc., et al. v. Mongolia*, PCA Case No. 2011-09, Award on the Merits, 2 March 2015 (**Exhibit RL-74**), ¶ 375. See also, e.g., *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014 (**Exhibit CL-097**), ¶¶ 685-686 ("Claimant bears the burden of proving its claimed damages. [...] [T]he appropriate standard of proof is the balance of probabilities. This, of course, means that damages cannot be speculative or merely "possible"); *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Award, 17 December 2015 (**Exhibit RL-83**), ¶ 175 ("the burden of proof falls on the Claimant to show it suffered loss. The standard of proof required is the balance of probabilities and damages cannot be speculative or uncertain"); *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004 (**Exhibit CL-036**), ¶ 210 ("contingent and undeterminate damage cannot be awarded"); *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, Decision on the Requests for Correction, Supplementary Decision and Interpretation, 10 July 2008 (**Exhibit RL-28**), ¶ 39 ("the tribunal must avoid speculative benefits in its damages calculation").

⁸⁸¹ *Gemplus S.A., SLP S.A. & Gemplus Industrial S.A. de C.V. v. The United Mexican States and Talsud S.A. v. The United Mexican States*, ICSID Cases No. ARB(AF)/04/3 and ARB(AF)/04/4, Award, 16 June 2010 (**Exhibit RL-42**), Part XII, ¶¶ 12-49.

⁸⁸² See, e.g., Bin Cheng, *General Principles of Law As Applied by International Courts and Tribunals* (1987) (**Exhibit RL-122**), pp. 244-245 ("In order that a loss may be regarded as the consequence of an act for purposes of reparation, either the loss has to be the proximate consequence of the act complained of, or the act has to be the proximate cause of the loss. Hence the maxim: *In jure causa proxima non remota inspicitur*"); *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica, 2 February 2018 (**Exhibit RL-99**), ¶ 32; Mark Kantor, *Valuation for Arbitration* (2008) (**Exhibit RL-126**), pp. 105-106 ("Compensation is, of course, payable only for the consequences of injuries

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.⁸⁸³

557. In its commentaries to the Articles on International Responsibility, the ILC further explained that:

It is only “[i]njury ... caused by the internationally wrongful act of a State” for which full reparation must be made. This phrase is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.⁸⁸⁴

558. Examples of tribunals dismissing damages claims on the ground that the acts complained of were not the proximate cause of the claimant’s alleged loss are myriad in the jurisprudence of international tribunals.⁸⁸⁵ More specifically, investment arbitration case law is consistent in requiring that a claimant seeking compensation prove that its loss was directly caused by a purported violation by the State of its international obligations.⁸⁸⁶

caused by the breaching party’s conduct. The injured claimant, therefore, has the burden of demonstrating that the claimed quantum flowed from that conduct. Shelves of books and papers contain discussion of the fundamental role the principle of ‘causation’ plays in determining both liability and compensation”).

⁸⁸³ INTERNATIONAL LAW COMMISSION, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001) (**Exhibit CL-025**), Article 31 (emphasis added). See also Article 36 regarding compensation (“The 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”) (emphasis added).

⁸⁸⁴ INTERNATIONAL LAW COMMISSION, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001) (**Exhibit CL-025**), Commentary 9 to Article 31.

⁸⁸⁵ See, e.g., *Administrative Decision No. II*, United States–Germany Mixed Claims Commission, 1 November 1923, 7 Rep. of Intl. Arb. Awards 23 (1923) (**Exhibit RL-1**), p. 29; *Otis Elevator Company v. Islamic Republic of Iran*, IUSCT Case No. Case No. 284, Award, 29 April 1987, 14 Iran–U.S.C.T.R. 283 (1987) (**Exhibit RL-2**), ¶ 47; *Elettronica Sicula SpA (ELSI) (United States of America v. Italy)*, Judgment, 20 July 1989, 1989 ICJ Rep. 15 (**Exhibit RL-4**), ¶ 101.

⁸⁸⁶ See, e.g., *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 (**Exhibit CL-021**), ¶ 115 (“The causal relationship between Mexico’s actions and the reduction in value of Metalclad’s other business operations are too remote and uncertain to support this claim. This element of damage is, therefore, left aside”); *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (**Exhibit RL-29**), ¶¶ 778-779 (“Compensation [...] will only be due if there is a sufficient causal link between the actual breach of the BIT and the loss sustained by [the claimant]”); *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 (**Exhibit CL-061**), ¶ 468 (“compensation will only be awarded if there is a sufficient causal link between the breach of the BIT and the loss sustained by the Claimants”); *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Award, 7 March 2017 (**Exhibit RL-90**), ¶ 699 (“para poder solicitar daños, las Demandantes tienen la carga

559. For example, the tribunal in *Biwater v. Tanzania* held that “it is well settled that one key requirement of any claim for compensation (whether for unlawful expropriation or any other breach of Treaty) is the element of causation”.⁸⁸⁷ Similarly, in *S.D. Myers v. Canada*, the tribunal determined that damages may only be awarded if there is a causal link between the treaty breach and the loss sustained by the investor:

[D]amages may only be awarded to the extent that there is a sufficient causal link between the breach of a specific NAFTA provision and the loss sustained by the investor. Other ways of expressing the same concept might be that the harm must not be too remote, or that the breach of the specific NAFTA provision must be the proximate cause of the harm.⁸⁸⁸

560. Notably, the *S.D. Myers v. Canada* tribunal held that the requirement of causation was included in the wording of Articles 1116 and 1117 of the NAFTA, which provides that compensation may only be sought if the “investor has incurred loss or damage by reason of, or arising out of, that breach”.⁸⁸⁹ The same wording is present in Article 10.16.1(a) of the FTA, pursuant to which an investor may submit to arbitration a claim that “the claimant has incurred loss or damage by reason of, or arising out of, that breach”.⁸⁹⁰

561. It follows that, even if the Claimants could establish that the Respondent acted in breach of its obligations under the BIT or customary international law, *quod non*, they would still carry the burden of proving that any loss suffered by their investment was caused by the Respondent’s alleged wrongful conduct and not other extraneous causes.

de probar, no solamente la existencia de una violación, sino también el nexo de causalidad existente entre la violación y el daño alegado y su cuantía”); The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Award, 6 May 2013 (Exhibit CL-089), ¶ 190 (“it must, as a matter of basic principle, be for the claimant to prove, in addition to the fact of its loss or damage, its quantification in monetary terms and the necessary causal link between the loss or damage and the treaty breach”).

⁸⁸⁷ *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (Exhibit RL-29), ¶ 778.

⁸⁸⁸ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, NAFTA, Second Partial Award, 21 October 2002 (Exhibit RL-10), ¶ 140. See also *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 (Exhibit CL-023), ¶ 316 (“compensation is payable only in respect of harm that is proved to have a sufficient causal link with the specific NAFTA provision that has been breached; the economic losses claimed by SDMI must be proved to be those that have arisen from a breach of the NAFTA, and not from other causes”).

⁸⁸⁹ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, NAFTA, Second Partial Award, 21 October 2002 (Exhibit RL-10), ¶ 118.

⁸⁹⁰ United States-Colombia Trade Promotion Agreement, 15 May 2012 (Exhibit CL-001), Article 10.16.1(a) (emphasis added).

562. In sum, only if the Claimants can prove the existence of a direct causal link between a purported violation by the Respondent, on the one hand, and the Claimants’ alleged loss, on the other, will they be entitled to an award of damages.

B. THE CLAIMANTS HAVE NOT ESTABLISHED THAT A LARGE AMOUNT OF THE CLAIMED LOSSES WERE CAUSED BY THE RESPONDENT’S ACTIONS

563. The Claimants claim USD 175 million plus interest in losses related to the projects other than the Meritage Project.⁸⁹¹ In particular, the Claimants allege that as a result of the Asset Forfeiture Proceedings, Mr. Seda’s reputation was “tarnished [...] to such a degree that it has made it impossible for him to develop any of the other projects in his pipeline”.⁸⁹²

564. The damages claimed by the Claimants in connection with the projects other than the Meritage Projects are not compensable. As demonstrated above, only the losses resulting directly from the wrongful act of the host State are compensable. The Claimants have failed to discharge their burden of proof in this respect.

565. To begin with, the Claimants’ have failed to demonstrate that as a result of the Asset Forfeiture Proceedings, they “hav[e] been stripped of any opportunity to develop [projects] due to Colombia’s actions”.⁸⁹³ Much to the contrary, the Claimants acknowledge that the Respondent did not directly interfere with the projects and the licences that had been granted or were expected to be granted.⁸⁹⁴ The Claimants also acknowledge that “Mr. Seda was not accused of any wrongdoing (and, indeed, he could not be)”⁸⁹⁵ and that it was because of the “news about the seizure. Yet, the Claimants do not even attempt to show that it was Colombia that leaked the details of the press, let alone that the press articles – that allegedly caused the reputational damage to Mr. Seda – are anyhow attributable to the Republic of Colombia. Conversely, it appears that Mr. Seda has provided information to the media more than once. Indeed, as early as August 2014 Mr. Seda had turned to the media to discuss the alleged extortion to which he had been subjected. By then, the reporter mentioned that the Meritage Lot had belonged “to someone involved some years ago with drug trafficking and that the family that owned the lot

⁸⁹¹ See BRG Expert Report, ¶¶ 185-186.

⁸⁹² Claimants’ Memorial on Merits and Damages, ¶ 499.

⁸⁹³ Claimants’ Memorial on Merits and Damages, ¶ 499.

⁸⁹⁴ For example, it is undisputed that the Charlee hotel and the Luxé continued their operations. The Claimants also state that the construction of the Santa Fé de Antioquia Project was approved in 2017. See Claimants’ Memorial on Merits and Damages, ¶ 315.

⁸⁹⁵ Claimants’ Memorial on Merits and Damages, ¶ 512.

had been illegally dispossessed from the lot and now wants to recover it”. Mr. Seda confirmed that he had been approached by Mr. López Vanegas, but that Mr. López Vanegas “does not appear in the title chain”.⁸⁹⁶ Again in August 2016, Mr. Seda spoke to the reporters of W Radio in connection with the “dispute” which “hinders the development of the Meritage real estate project”.⁸⁹⁷ Mr. Seda continued ventilating the details of the case, including of this arbitration, up until today. For example, in April 2020 he provided details of the case to El Espectador,⁸⁹⁸ and on 22 July 2020 he again appeared in an interview with W Radio.⁸⁹⁹

566. Mr. Seda was also the one that for over two years, between 2014 and 2016, engaged in negotiations with a drug-trafficker that allegedly had been threatening him and attempting to extort him without reporting it to the Colombian authorities.⁹⁰⁰ That being the case, any reputational damage would be mostly self-inflicted – or at least would have been aggravated by Mr. Seda’s actions and should not be compensated by the Respondent.⁹⁰¹
567. More specifically, the Claimants have failed to demonstrate a causal link between the Asset Forfeiture Proceedings – which concerned exclusively the Meritage Lot – and the damages claimed with respect to the real estate projects other than the Meritage Project. The reason is that such a causal link does not exist.

⁸⁹⁶ W Radio, “Ángel Seda despeja dudas sobre lote en disputa para proyecto de construcción en Medellín”, 5 August 2014 (https://www.wradio.com.co/escucha/archivo_de_audio/angel-seda-despeja-dudas-sobre-lote-en-disputa-para-proyecto-de-construccion-en-medellin/20140805/oir/2353698.aspx), accessed on 15 November 2020 (**Exhibit R-30**). During the interview, Mr. Seda also mentioned that he had previously discussed with “Revista Semana”, a weekly magazine based in Colombia, and that he had shown his “evidence” to the reporters who confirmed that “they did not find any link” between Mr. López Vanegas and the Meritage Lot.

⁸⁹⁷ W Radio, “Ya han intentado detener la realización del proyecto Meritage: CEO de Royal Property Group.”, 8 August 2016 (https://www.wradio.com.co/escucha/archivo_de_audio/ya-han-intentado-detener-la-realizacion-del-proyecto-meritage-ceo-de-royal-property-group/20160808/oir/3210575.aspx), accessed on 16 November 2020 (**Exhibit R-38**).

⁸⁹⁸ El Espectador, “Verdades a medias del caso Meritage”, 17 April 2020 (<https://www.wradio.com.co/noticias/actualidad/caso-meritage-la-razon-por-la-que-inversionistas-estadounidenses-demandan-a-colombia/20200722/nota/4056892.aspx>), accessed on 15 November 2020 (**Exhibit R-53**).

⁸⁹⁹ W Radio, “Caso Meritage: la razón por la que inversionistas estadounidenses demandan a Colombia” 22 July 2020 (<https://www.wradio.com.co/noticias/actualidad/caso-meritage-la-razon-por-la-que-inversionistas-estadounidenses-demandan-a-colombia/20200722/nota/4056892.aspx>), accessed on 16 November 2020 (**Exhibit R-55**).

⁹⁰⁰ *See above*, Section II.E.

⁹⁰¹ A finding on the contrary would have the perverse effect of preventing States from adopting legal measures against foreign investors for fear of the effect that the media coverage of the measures – which is absolutely beyond the sphere of control of the State – could have on the investors. This is clearly beyond the scope of any investment protection treaty.

568. For example, the Claimants claim USD 48 million for losses in connection with the Luxé Project.⁹⁰² The Claimants would like the Tribunal to believe – even though they do not state it clearly, let alone prove it, that (i) the Colpatria Bank was determined to finance the entire Luxé project, (ii) it decided to withdraw this financing due to the initiation of the Asset Forfeiture Proceedings and, (iii) as a result of Colpatria’s decision, the Claimants had to abandon the Luxé project.⁹⁰³ In other words, according to the Claimants, the Asset Forfeiture Proceedings relating to the Meritage Lot may have influenced the business decision of a third party, *i.e.*, the Colpatria Bank and that as a result of that decision the Claimants had to abandon a different business project (Luxé). The connection between the alleged cause, *i.e.*, the Asset Forfeiture Proceedings, and the alleged effect, *i.e.* the discontinuance of the Luxé Project, is not only too remote, but also fully unsubstantiated.
569. The Claimants’ claim is based on a simplistic temporal argument, *i.e.*, that “just after Colombia imposed precautionary measures on Meritage, Banco Colpatria stopped disbursing funds for the development of Luxé”.⁹⁰⁴ This is based on Mr. Seda’s self-serving witness statement, stating that Colpatria stopped financing the Luxé project after the precautionary measures were initiated against the Meritage project.⁹⁰⁵ The total lack of a clear explanation and evidence on how the proceedings against the Meritage project resulted in the failure of Luxé project speaks volumes as to the weakness of the Claimants’ argument.
570. Strikingly, the Claimants have not submitted any evidence showing a causal link between the Asset Forfeiture Proceedings and the Claimants’ decision to discontinue the Luxé project. For example, the Claimants have not shown that: (i) the alleged decision of Colpatria to withdraw financing from the Luxé project, (ii) any decision of Colpatria to stop financing the Luxé project, assuming there was such a decision, was motivated by the Asset Forfeiture Proceedings, (iii) assuming any such decision was based on the Asset Forfeiture Proceedings, that Colpatria had the right to withdraw their financing from the Luxé Project for motives completely unrelated to the project itself and its developers, (iv) the discontinuance of the Luxé project was due to Colpatria allegedly withdrawing their financing, and (v) the Claimants sought, and failed to obtain, alternative financing to finalize the Luxé Project.

⁹⁰² BRG Expert Report, ¶¶ 185-186.

⁹⁰³ See Claimants’ Memorial on Merits and Damages, ¶ 312.

⁹⁰⁴ Claimants’ Memorial on Merits and Damages, ¶ 499.

⁹⁰⁵ See Seda Witness Statement, 15 June 2020, ¶¶ 109-110.

571. Against this background, the mere fact that Colpatría decided to withdraw its financing from the Luxé after the initiation of the Asset Forfeiture Proceedings (assuming it did, which has not been proved) is inconclusive, to say the least. In fact, Colpatría may have decided to stop financing the Luxé project for market or technical reasons unrelated to the Asset Forfeiture Proceedings, including the significant delays in the construction of the project.⁹⁰⁶

572. Similarly, the Claimants have not even attempted to establish any reasonable connection between the Asset Forfeiture Proceedings and the failure of the Tierra Bomba, Santa Fé de Antioquia and 450 Heights projects. Given the very early stage of these projects, it would not be unreasonable to assume that their failure was due to other reasons, such as commercial and business considerations, lack of funding, difficulties to obtain permits or problems with local communities.

* * *

573. In sum, given that the Claimants have failed to demonstrate the causal link between the alleged measures in breach of the FTA and the alleged loss suffered, said losses (assuming they existed and can be sufficiently proved, which they are not as demonstrated below) are not compensable.

C. IN ANY EVENT, THE CLAIMANTS HAVE FAILED TO PROVE THE AMOUNT OF THEIR ALLEGED LOSSES

574. The Claimants' claim for damages must also be rejected because the Claimants have not discharged their burden of proving the amount of their alleged losses. Moreover, as shown below, the Claimants' damages claim must be dismissed because it is based on speculative and unreliable methodologies and is vastly overstated.

575. The Respondent sets forth below the appropriate standards governing the assessment of compensation under international law (V.C.1). The Respondent also explains why the valuation submitted by the Claimants is fundamentally flawed (V.C.2) and demonstrates that the value of the Claimants' projects as of 25 January 2017 was no more than USD 2,680,892 million (V.C.3).

1. The Claimants have applied the wrong standard of compensation

576. If the Tribunal finds that Colombia has expropriated the Claimants' investment in breach of Article 10.7 of the FTA, the compensation standard provided for in that article should be

⁹⁰⁶ See NERA Expert Report, ¶ 172(c).

applied. If the Tribunal finds Colombia liable for other breaches of the FTA, it should still apply the compensation standard set forth in Article 10.7.

(i) *The Standard of Compensation for the Claimants' Expropriation Claim is Set Out in Article 10.7.2(b) of the Treaty*

577. The Tribunal must determine any compensation due to the Claimants based on the Treaty standard set forth in Article 10.7.2(b). Accordingly, compensation, if any, is due only for the “the fair market value of the expropriated investment immediately before the expropriation took place.”⁹⁰⁷ There is no disagreement between the Parties on this point.⁹⁰⁸
578. Despite the Parties’ agreement that compensation is limited to “fair market value,” the Claimants suggest that the customary international law standard of “full reparation” should apply instead of the Treaty standard for compensation.⁹⁰⁹ The Claimants’ reference to “full reparation” is puzzling as it is well established that an investor is entitled to no more than the fair market value of its investment when the government has acquired property. Further, even if there were a difference between the “fair market value” and “full compensation standards,” the Claimants would bear the burden of establishing that it suffered additional damages as a result of the Respondent’s actions that would justify a greater level of compensation. The Claimants have not made such a showing.
579. In any event, the Respondent strongly rejects the Claimants’ suggestion and submits that there is no basis for deviating from the compensation standard set forth in Article 10.7.2(b) of the Treaty.
580. The Treaty standard applies as *lex specialis*. Contrary to the Claimants’ allegations, this is true irrespective of whether the alleged expropriation was “lawful” or “unlawful.”
581. *First*, the Treaty does not differentiate between lawful and unlawful expropriations.⁹¹⁰ *Second*, the weight of authority supports the application of the treaty compensation standard to both “lawful” and “unlawful” expropriations.⁹¹¹

⁹⁰⁷ United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 10.7.2(b).

⁹⁰⁸ Claimants’ Memorial on Merits and Damages, ¶ 482.

⁹⁰⁹ Claimants’ Memorial on Merits and Damages, ¶¶ 478-482.

⁹¹⁰ *See* United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 10.7, Annex 10-B.

582. Therefore, the standard for compensation is the Treaty standard, which looks to the “genuine” or “fair market” value of the investment as of 25 January 2017, the valuation date suggested by the Claimant. Fair market value “does *not* mean full compensation”.⁹¹²

(ii) *The Treaty Standard Also Applies to Non-Expropriation Claims*

583. The Treaty does not set forth a standard for compensation of non-expropriation claims. For purposes of determining the amount of compensation due to an injured investor, however, “the exact obligation breached by the respondent State appears to be irrelevant.”⁹¹³ Thus, the maximum compensation for any non-expropriatory claim should be the same as that for an expropriation claim, i.e., compensation for the “fair market value” only.

584. In any event, as stated above, the Claimants have not claimed that they had suffered any specific losses from the Respondent’s alleged breaches of Article 10.3 and 10.5 of the Treaty, and have not requested any such damages. Therefore, there is no basis for the Tribunal to award damages for any such alleged breaches.

2. The Claimants’ valuation is fundamentally flawed

585. As the Respondent demonstrates below, the Claimants’ valuation is based upon a flawed methodology, unsupported by the facts, and rife with errors and contradictions. As such, it should be disregarded by the Arbitral Tribunal.

⁹¹¹ See, e.g., *Phillips Petroleum Co. Iran v. The Islamic Republic of Iran and the National Iranian Oil Company*, 21 Iran-U.S.C.T.R. 79, Award, 29 June 1989 (**Exhibit RL-5**), ¶ 109 (stating that the treaty standard for compensation applied because “the Treaty does not say that any different standard of compensation would be applicable to an “unlawful” taking”); *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 20 May 2003 (**Exhibit CL-32**), ¶¶ 151, 187-88; *Rumeli Telekom A.S. & Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, (**Exhibit CL-060**, ¶¶ 698-99; Meg Kinnear, *Damages in Investment Treaty Arbitration*, in *Arbitration Under International Investment Agreements: A Guide to the Key Issues* 551 (Katia Yannaca-Small ed., 2010) (**Exhibit RL-131**), p. 557 (“The vast majority of cases have calculated damages for expropriation (lawful or unlawful) in accordance with the fair market value and have ignored the distinction between the two types of expropriation for purposes of assessing compensation.”); Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2012) (**Exhibit RL-133**), p. 150 (“[N]early all expropriation cases before tribunals follow the treaty-based standard of compensation in accordance with the fair market value.”).

⁹¹² Irmgard Marboe, *Compensation and Damages in International Law - The Limits of “Fair Market Value”*, 7 J. World Int’l Trade 723 (2006) (**Exhibit RL-124**), p. 731. See also Meg Kinnear, *Damages in Investment Treaty Arbitration*, in *Arbitration Under International Investment Agreements: A Guide to the Key Issues* 551 (Katia Yannaca-Small ed., 2010) (**Exhibit RL-131**), p. 558 (“[F]air market value is an objective standard that may not include consequential damages and other loss particular to the disputing investor”).

⁹¹³ Sergey Ripinsky & Kevin Williams, *Damages in International Investment Law* (British Institute of International and Comparative Law, 2008) (**Exhibit RL-127**), p. 90.

586. Berkeley Research Group LLC (“BRG”), the Claimants’ expert on damages, calculated damages using a discounted cash-flow (“DCF”) method on the Claimants’ real estate and hotel businesses. BRG’s DCF calculations consist of the following steps:⁹¹⁴
587. As regards the Claimants’ real estate business, BRG first calculated the projected cash-flows of each of the Claimants’ projects if the Respondent’s measures had not existed (the “but-for” scenario).⁹¹⁵ Then, BRG discounted the estimated cash-flows back to the valuation date suggested by the Claimants (i.e., 25 January 2017) using an estimated weighted average cost of capital (WACC) for the Claimants’ hotel and real estate operations.⁹¹⁶
588. In the case of projects Tierra Bomba, 450 Heights and Santa Fe de Antioquia, BRG assumed a subjective and unreliable 23% chance of failure.⁹¹⁷ For projects Meritage and Luxe, BRG considered a similarly unrealistic 0% chance of failure.⁹¹⁸
589. BRG then calculated the value of the projects after the measures (i.e., in the actual scenario) by estimating the residual value of the land.⁹¹⁹
590. Finally, BRG calculated the Claimants’ alleged damages on its real estate business by taking the difference between the value of the projects in the but-for scenario with the actual value of the land.
591. As regards the real estate and hotel services, BRG also applied the DCF method.⁹²⁰ BRG first calculated Mr Seda’s fees as a proportion of the individual project’s revenues and costs based on existing contracts for the Meritage and Luxé projects and on hypothetical future contracts for Tierra Bomba, 450 Heights and Santa Fe de Antioquia projects. BRG then discounted the fees to 25 January 2017 and applied a 23% chance of failure for the fees payable by the Tierra Bomba, 450 Heights and Santa Fe de Antioquia projects.

⁹¹⁴ See BRG Expert Report, Section V (“Valuation Assessment”).

⁹¹⁵ See BRG Expert Report, Section V.2.

⁹¹⁶ See BRG Expert Report, Section V.2.

⁹¹⁷ See BRG Expert Report, ¶ 101.

⁹¹⁸ See NERA Expert Report, ¶¶ 28, 29, 32 and, 90.

⁹¹⁹ See BRG Expert Report, Section VI.1.

⁹²⁰ See BRG Expert Report, Section V.2.6.

592. BRG also applied the DCF approach to calculate the alleged loss to the hypothetical future real estate projects that Mr Seda would have allegedly developed in the future.⁹²¹

593. BRG claims that its DCF calculation is based on an alleged “market approach”.⁹²² However, BRG’s market cross-checks are based on wholly unreliable information and methodologies prepared by Jones Lang LaSalle (“JLL”).

594. The Respondent submits below that the DCF valuation method is inappropriate and unreliable in this case (**V.C.2(i)**) and explains why the Claimants’ valuation is speculative and grossly exaggerated (**V.C.2(ii)**). The Respondent then shows why BRG’s market cross-checks of the DCF valuation are irrelevant (**V.C.2(iii)**) and proposes a more realistic cross-check using the equity values paid by investors for their shares in the Claimants’ projects (**V.C.2(iv)**).

(i) *The DCF valuation method is inappropriate and unreliable in this case*

595. While the DCF method is a generally accepted valuation method, it cannot be used to assess the value of the Claimants’ projects because it is inappropriate for early stage start-up projects (**V.C.2(i)(a)**) and there are no reliable estimates of key DCF inputs (**V.C.2(i)(b)**).

(a) The DCF method is inappropriate to assess the value of early stage start-up businesses like the Claimants’ projects

596. It is uniformly accepted by economic and financial literature that the DCF method is inappropriate to assess the value of early stage businesses with no track record of commercial operations.⁹²³ For instance, the World Bank Guidelines on Treatment of Foreign Direct Investments notes that the DCF method is only appropriate for companies with “a proven record of profitability”:⁹²⁴

For a going concern, i.e. an enterprise consisting of income-producing assets and already in existence for a sufficient period of time to generate the data necessary for proving its profitability and the calculation, with reasonable certainty, [...] *discounted cash flow* may represent an acceptable method of valuation. [...] This method is regarded as appropriate for valuing enterprises with a firmly established income-producing capacity [...]. Compensation under

⁹²¹ See BRG Expert Report, Section V.2.5.

⁹²² BRG Expert Report, Section V.3.

⁹²³ See Nera Expert Report, Section 4.1.

⁹²⁴ The World Bank Group. *Legal Framework for the Treatment of Foreign Investment, Volume II: Guidelines* (Foreign Investment Law Journal, 1992) (**Exhibit CL-128**), Chapter IV Expropriation and Unilateral Alterations of Termination of Contracts, Article IV(6)(i).

this [DCF] method is not appropriate for speculative or indeterminate damage.⁹²⁵

597. Investment tribunals have also recognized this requirement and rejected DCF as a basis for calculating damages where a company does not have an established record of profitability. For example, in *Metalclad v. Mexico* the tribunal held that the DCF method cannot be used “where the enterprise has not operated for a sufficiently long time to establish a performance record or where it has failed to make a profit”.⁹²⁶ The tribunal concluded that the DCF method was “inappropriate” given that the project “was never operative and any award based on future profits would be wholly speculative”.⁹²⁷
598. Furthermore, as explained in the Nera Report, the lack of operating history in the case of start-up businesses means that cash flow forecasts are speculative compared to those for mature, going-concern businesses, which are commonly valued using the DCF method.⁹²⁸
599. Thus, as indicated above, the DCF method is only applicable to on-going concerns with a long and reliable record of profitable cash flows. This is precisely the problem with the valuation carried out by the Claimants’ experts. As the Respondent explains below, there is no track record of earnings arising from the Claimants’ projects.

(b) In the present case, there are no reliable estimates of key DCF inputs

600. In the present case, the application of the DCF method would require countless baseless assumptions due to the total lack of reliable and objective data on the Claimants’ projects. As shown below, there are no reliable estimates for fundamental DCF inputs.

⁹²⁵ The World Bank Group. *Legal Framework for the Treatment of Foreign Investment, Volume II: Guidelines* (Foreign Investment Law Journal, 1992) (**Exhibit CL-128**), Chapter IV Expropriation and Unilateral Alterations of Termination of Contracts, p. 42.

⁹²⁶ *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award 30 August 2000 (**Exhibit CL-021**), ¶ 120. See also, e.g., *Técnicas Medioambientales, TECMED S.A. v. The United Mexican States*, ICSID Case No. Arb (AF)/00/2, Award 29 May 2003 (**Exhibit CL-032**) ¶ 186 (the tribunal considered “the brief history of operation of [the project] —a little more than two years— and the difficulties in obtaining objective data allowing for application of the discounted cash flow method on the basis of estimates for a protracted future, not less than 15 years, together with the fact that such future cash flow also depends upon investments to be made —building of seven additional cells— in the long term, lead the Arbitral Tribunal to disregard such methodology to determine the relief to be awarded to the Claimant”); *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000 (**Exhibit CL-024**) ¶ 123.

⁹²⁷ *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award 30 August 2000 (**Exhibit CL-021**), ¶ 121.

⁹²⁸ See Nera Expert Report, Section 4.1.

601. *First*, the failure rate used by BRG is highly speculative and unsupported.⁹²⁹ The failure rate of start-up businesses is generally very high as most of them do not become profitable going concerns.⁹³⁰ In the present case, there are many reasons why the Claimants' projects could fail: failure to obtain the required construction and urbanization permits, unavailability of financing, construction delays and commercial problems that may arise even if the projects become operative eventually.⁹³¹
602. Given that there is no objective evidence to determine the Claimants' projects' failure rate, the application of this rate, as suggested by BRG, automatically taints the DCF calculations with speculation.⁹³²
603. *Second*, the lack of a profitable operating track record of the Claimants' projects determines that the cash-flows to be used in the DCF calculation will be based on highly speculative and unreliable forecasts of future revenues.⁹³³ The problem of BRG's DCF valuation is that, even assuming that the Claimants' projects will become going-concerns – which is in itself a hypothetical conjecture – there are no contracts or market that could be used to forecast the project's future cash-flows.⁹³⁴ For instance, the future revenues from the Claimants' hotel operations depend on many different factors that make sales predictions highly speculative: the exact services to be offered (apart-hotel, resort-type, etc.), location, presence of competitors in the region and consumers' interest to pay the given hotel fees.
604. *Third*, another highly speculative assumption made by BRG is its assessment of the time of completion of the different projects.⁹³⁵ In fact, there is still total uncertainty on the timing required for the construction of the projects, if they are ever completed. The time of completion has substantial impact on the DCF results, as any construction delay increases costs and reduces the net present value of future profits.⁹³⁶

⁹²⁹ See Nera Expert Report, ¶ 81.

⁹³⁰ See Nera Expert Report, ¶ 77(a).

⁹³¹ See Nera Expert Report, ¶¶ 84, 104.

⁹³² See Nera Expert Report, ¶¶ 77, 78.

⁹³³ See Nera Expert Report, ¶ 77(b).

⁹³⁴ See Nera Expert Report, ¶ 98.

⁹³⁵ See Nera Expert Report, ¶ 99.

⁹³⁶ See Nera Expert Report, ¶ 99.

605. Thus, as explained above, the impossibility of obtaining reliable estimates of key DCF inputs determines that the DCF valuation of the Claimants' projects will inevitably display highly speculative and dubious results and is, therefore, inappropriate.

(ii) *The Claimants' valuation is grossly exaggerated*

606. As explained below, BRG's DCF valuation is grossly exaggerated because BRG has overstated the cash flow forecasts, assumed unrealistic low discount rates and ignored the risk of failure for each of the Claimants' projects.⁹³⁷

(a) Meritage

607. BRG has exaggerated each of the key drivers of the cash-flow for the Meritage hotel business.⁹³⁸

- BRG's revenue forecasts assume extensive outperformance of the Colombian luxury hotel market;⁹³⁹
- BRG's EBITDA margin forecasts are more than twice as high as margins for international luxury hotel comparators;⁹⁴⁰
- BRG assumes that hotel direct construction costs in phase 2&3 will be only 36 per cent higher than in phase 1, despite constructing around double the amount of the same towers as phase 1;⁹⁴¹ and
- BRG assumes that the Meritage project would be subject to a 30-year 0% tax holiday to which it would not have been entitled in the but-for scenario.⁹⁴² Pursuant to Law 1819 of 2016 and the Colombian Constitutional Court, only hotels completed by the end of 2016 would have been eligible for a 0 per cent tax holiday for 30 years.⁹⁴³ Hotels completed by the end of 2017 – as assumed by BRG for Meritage – would have been subject to a 9 per cent tax for 30 years. Irrespective, the Claimants have not demonstrated that the Meritage project would have been completed by the end of 2017 and, therefore, the full rate of Colombian corporate tax applies to Meritage (i.e., 34%).⁹⁴⁴

⁹³⁷ See Nera Expert Report, Section 5.

⁹³⁸ See Nera Expert Report, Section 5.3.1.1.

⁹³⁹ See Nera Expert Report, ¶¶ 125-127.

⁹⁴⁰ See Nera Expert Report, ¶¶ 128-131.

⁹⁴¹ See Nera Expert Report, ¶¶ 132-134.

⁹⁴² See Nera Expert Report, ¶¶ 135-138.

⁹⁴³ See Law 1819 of 2016_SP (**Exhibit BRG-026**), Article 240, ¶¶ 1, 5; Decision C-235/19 of the Colombian Constitutional Court, 29 May 2019, ¶ 38 (**Exhibit R-47**).

⁹⁴⁴ See Nera Expert Report, ¶¶ 135-138.

608. Similarly, BRG has also exaggerated the cash-flows for the Meritage real estate business:⁹⁴⁵

- BRG forecasts a 47 per cent real estate profit for phases 4-8 despite phase 1 making a 24 per cent loss;⁹⁴⁶
- BRG did not apply any corporate income tax on the profits arising from its real estate business;⁹⁴⁷ and
- BRG also wrongly assumed that Royal Realty would not incur in any costs and would not pay any corporate income tax.⁹⁴⁸
- Furthermore, BRG applied a discount rate that is implausibly low and unsupported.⁹⁴⁹
- Finally, BRG assumed an unrealistic 0% chance of failure of the Meritage project and, therefore, ignored that the Meritage was a start-up project with an inherent high risk of failure.⁹⁵⁰

(b) Luxé

609. The inputs used by BRG in its DCF calculation of the Luxé hotel operations are also exaggerated and wholly unreliable:

- The Luxé hotel profits used by BRG are exaggerated even for a best-case scenario;⁹⁵¹
- BRG understated construction costs required for finishing the Luxé hotel and assumed an overoptimistic completion schedule;⁹⁵²
- BRG incorrectly calculated damages associated with completed phases 1, 2 and 5 which are not part of the claim;⁹⁵³
- BRG failed to apply corporate income tax on fees payable to Royal Realty;⁹⁵⁴
- BRG assumed an unrealistically low WACC;⁹⁵⁵ and

⁹⁴⁵ See Nera Expert Report, Section 5.3.1.2.

⁹⁴⁶ See Nera Expert Report, ¶¶ 139.A, 140-143.

⁹⁴⁷ See Nera Expert Report, ¶¶ 139.B, 144.

⁹⁴⁸ See Nera Expert Report, Section 5.3.1.3.

⁹⁴⁹ See Nera Expert Report, Section 5.3.2.

⁹⁵⁰ See Nera Expert Report, Section 5.3.3.

⁹⁵¹ See Nera Expert Report, ¶¶ 160-164.

⁹⁵² See Nera Expert Report, ¶¶ 165-168.

⁹⁵³ See Nera Expert Report, ¶¶ 169-171.

⁹⁵⁴ See Nera Expert Report, ¶ 172.A.

⁹⁵⁵ See Nera Expert Report, ¶ 172.B.

- BRG ignored the risk of failure of this project.⁹⁵⁶

(c) Tierra Bomba, 450 Heights and Santa Fe de Antioquia

610. The inputs used by BRG in its DCF calculation of the Tierra Bomba, 450 Heights and Santa Fe de Antioquia projects are also inflated and hypothetical.
611. All inputs used in the DCF calculation for the Tierra Bomba, 450 Heights and Santa Fe de Antioquia projects are highly hypothetical because these projects in very preliminary stages of development and their eventual operation is highly uncertain. For instance, the Claimants have not even shown whether they have obtained the required construction and urbanization permits for these projects. Thus, the DCF valuation of these projects is totally speculative and unreliable.⁹⁵⁷
612. Furthermore, BRG's valuation of the Tierra Bomba, 450 Heights and Santa Fe de Antioquia projects is grossly exaggerated because:
- BRG assumed that the hotels in these projects will achieve substantially higher revenues and profits than the Charlee hotel, which operates under the same model and is described as a commercial success outperforming peers;⁹⁵⁸
 - BRG assumed that the profits from these projects would be obtained five times faster than the actual experience from phase 1 of the Meritage project;⁹⁵⁹
 - BRG failed to apply corporate income tax on the real estate profits and fees payable to Royal Realty from these projects;⁹⁶⁰
 - BRG assumed an unrealistically low WACC;⁹⁶¹ and
 - BRG assumed a failure rate that is arbitrary and unsupported.⁹⁶²

(d) Future Hypothetical Projects

613. The Claimants also argue that, absent the asset forfeiture proceedings, Mr. Seda would have also developed additional hypothetical projects in the future.⁹⁶³ The alleged value of these

⁹⁵⁶ See Nera Expert Report, ¶ 172.C.

⁹⁵⁷ See Nera Expert Report, Section 5.5.

⁹⁵⁸ See Nera Expert Report, ¶¶ 177-180.

⁹⁵⁹ See Nera Expert Report, ¶¶ 187-189.

⁹⁶⁰ See Nera Expert Report, ¶¶ 190.A, B.

⁹⁶¹ See Nera Expert Report, ¶ 190.C.

⁹⁶² See Nera Expert Report, ¶ 190.D.

hypothetical and inexistent projects account for 12% of the BRG's total damages calculation.⁹⁶⁴ BRG's valuation of these hypothetical projects is entirely speculative.

614. BRG assumed that Mr Seda would have looked for, and found, very high net-present-value positive real estate projects in Colombia, but that as a result of the Asset Forfeiture Proceedings, he would not be able to pursue any of these hypothetical and allegedly lucrative projects. As part of this assumption, BRG also assumed – wrongly – that Mr Seda could have only pursued these projects in Colombia and not in other locations around the world.⁹⁶⁵ BRG has not demonstrated any of these assumptions.
615. The Claimants' speculative valuation of a loss of future hypothetical projects must be completely dismissed because there is no evidence that these hypothetical projects exist and that there are no alternative net-present-value positive projects that Mr Seda could have pursued outside Colombia.

(iii) *BRG's market cross-checks are irrelevant*

616. BRG presents alleged market cross-checks of its DCF valuation of the projects. However, as shown below, these cross-checks are wholly unsuitable.
617. In order to cross-check its DCF valuation of the Claimants' hotels, BRG used the prices paid in transactions involving luxury and operative hotels in Central America, South America and the Caribbean.⁹⁶⁶ However, none of these hotels are comparable to the Claimants' hotels. In fact, as of the valuation date, the Claimants' hotels were all in pre-development phase and had no record of commercial operation.⁹⁶⁷ In contrast, the hotels used in BRG's cross-check were fully constructed and operational at the time of the transactions.⁹⁶⁸
618. Furthermore, none of the hotels used by BRG are located in Colombia. Instead, they are located in other parts of Latin America with lower country risks and more developed touristic sectors.⁹⁶⁹ Finally, the hotels of BRG's cross-check have substantially higher room rates than 5-

⁹⁶³ See Claimants' Memorial on Merits and Damages, ¶ 116.

⁹⁶⁴ See Nera Expert Report, ¶ 192.

⁹⁶⁵ See Nera Expert Report, ¶ 193.

⁹⁶⁶ See Nera Expert Report, ¶ 200.

⁹⁶⁷ See Nera Expert Report, ¶¶ 202, 203.

⁹⁶⁸ See Nera Expert Report, ¶¶ 202, 203.

⁹⁶⁹ See Nera Expert Report, ¶ 211.A.

star hotels in Medellín. Naturally, hotels with higher room rates have higher valuations and, therefore, are not comparable.

619. As regards BRG's cross-check of its valuation of the Claimants' real estate business, BRG used the sales prices and construction costs for real estate projects provided by JLL and compared this information with the assumptions used in its DCF valuation. However, these sale prices and costs do not reflect the key elements of a DCF valuation. For example, the sales prices and costs do not show the risks of failure inherent to the specific real estate involved, the time of completion of the project and whether there would be enough demand once construction is completed. The absence of these factors in the prices and costs used by BRG determines that they cannot be used to cross-check BRG's DCF valuation.⁹⁷⁰
620. As shown above, the cross-checks proposed by BRG are inappropriate and irrelevant in the present case. An appropriate cross-check would require transaction prices of comparable real estate and hotel projects.⁹⁷¹ As described below, Nera proposes a cross-check of BRG's DCF valuation using the equity values from the actual prices that investors paid for their shares in the Claimants' projects.

(iv) *An appropriate market cross-check is the equity value paid by investors for their shares in the Claimants' projects*

621. The best market cross-check is one based on the same assets being appraised by the DCF method. In the present case, that transaction would be the acquisition by investors of the shares in the Claimants' projects.⁹⁷² BRG has deliberately avoided considering this cross-check.
622. Using the documents submitted by the Claimants, Nera has been able to identify the historical prices paid by investors for their shares in Meritage, Tierra Bomba and Santa Fe de Antioquia projects.⁹⁷³ It should be noted that the projects have not made any progress since these transactions took place.
623. Nera's cross-check calculations using the share price paid by investors demonstrate that BRG's DCF valuation is grossly exaggerated. BRG's exaggeration is evident:

⁹⁷⁰ See Nera Expert Report, ¶¶ 224-228.

⁹⁷¹ See Nera Expert Report, ¶¶ 201-211, 237.

⁹⁷² See Nera Expert Report, Section 6.4.

⁹⁷³ See Nera Expert Report, ¶ 231.

624. BRG's DCF valuation is 100 times higher than the equity value in the Meritage project;⁹⁷⁴ and
625. BRG's DCF valuation is 20 times higher than the value in the Tierra Bomba project, 5 times higher than the value in Santa Fe de Antioquia project and 6 times higher than the value in 450 Heights project.⁹⁷⁵
626. Nera's appropriate market cross-check confirms that BRG's DCF valuation is grossly exaggerated and must be rejected.

3. The value of the Claimants' projects as of 25 January 2017 was no more than USD 2,680,892

627. As shown above, the DCF valuation presented by the Claimants is speculative, unreliable and grossly exaggerated. The Respondent submits that, in cases of early stage start-up businesses such as the Claimants' projects, the most appropriate, non-speculative and reliable method is the cost approach.⁹⁷⁶
628. According to Nera, the cost-based approach is the only method capable of valuating the Claimants' projects based on objective data.⁹⁷⁷
629. Nera has estimated the value of the Claimants' projects under the cost-approach as of 25 January 2017. It based its calculations on historical costs incurred by each project as provided in the financial statements of the projects' operating companies, produced by the Claimants, namely: *Newport S.A.S* (Meritage), *LUXÉ by the Charlee S.A.S* (Luxé), and *RDP Cartagena S.A.S* (Cartagena Tierra Bomba).⁹⁷⁸
630. The total value of the Claimants' projects under the cost-approach as of 25 January 2017 was USD 2,680,892.⁹⁷⁹

⁹⁷⁴ See Nera Expert Report, ¶ 233.

⁹⁷⁵ See Nera Expert Report, ¶ 233.

⁹⁷⁶ See Nera Expert Report, Section 7.

⁹⁷⁷ See Nera Expert Report, ¶ 239.

⁹⁷⁸ See Nera Expert Report, ¶ 241.

⁹⁷⁹ See Nera Expert Report, Table 7.4.

D. AN AWARD ON MORAL DAMAGES IS NOT JUSTIFIED IN THIS CASE

631. The Claimants claim “10 percent of the total damages owed to [Mr. Seda]”⁹⁸⁰ (*i.e.*, some USD 29 million) on moral damages for “the personal and reputational harm [Mr. Seda] has incurred as a result of the State’s actions”.⁹⁸¹ This claim must be rejected. As demonstrated above, the Tribunal does not have jurisdiction to award moral damages in this case. Even if the Tribunal decides that some or all of the Claimants’ moral damages claims are within its jurisdiction, *quod non*, the Claimants have failed to establish that such damages are justified on the facts of this case.
632. *First*, the Claimants’ request for moral damages is based on the allegation that the Asset Forfeiture Proceedings “have irrefutably damaged Mr. Seda’s credit and reputation”.⁹⁸² Yet, the Claimants themselves acknowledge (as it could not be otherwise, given the nature of the asset forfeiture proceedings under Colombian law) that Mr. Seda was not personally accused of any wrongdoing and that no association between his name and the drug cartels was made by the press.⁹⁸³ As demonstrated above, the Claimants did not attempt to show – and could not show – that any of the news articles were attributable to, or even originated from, the Colombian authorities. In this sense, the tribunal in *TECMED v. Mexico* rejected the claimant’s claim of moral damages due to the lack of evidence that actions attributable to the respondent had also “affected the Claimant’s reputation and therefore caused the loss of business opportunities for the Claimant”.⁹⁸⁴ In particular, the tribunal noted that there was no evidence that “the adverse press coverage [] was fostered by the Respondent or that it was the result of actions attributable to the Respondent”.⁹⁸⁵
633. This is exactly the situation in our case. On this basis alone, the Claimants’ request for moral damages must fail.
634. *Second*, the request for moral damages is, in any event, nothing but an impermissible attempt at double-dipping, that should not be allowed by this Tribunal. According to the Claimants, moral

⁹⁸⁰ Claimants’ Memorial on Merits and Damages, ¶ 521.

⁹⁸¹ Claimants’ Memorial on Merits and Damages, ¶ 510.

⁹⁸² Claimants’ Memorial on Merits and Damages, ¶ 512.

⁹⁸³ *See* Claimants’ Memorial on Merits and Damages, ¶ 512.

⁹⁸⁴ *Técnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 (**Exhibit CL-032**), ¶ 198.

⁹⁸⁵ *Técnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 (**Exhibit CL-032**), ¶ 198.

damages are justified because Colombia's actions allegedly "sullied Mr. Seda's reputation, causing him to lose his entire pipeline of projects" in Colombia.⁹⁸⁶

635. Even assuming, *quod non*, that the loss Mr. Seda's "entire pipeline of projects" was caused by the Asset Forfeiture Proceedings,⁹⁸⁷ the damages in connection with said loss are claimed by the Claimants separately. Therefore, an award on moral damages on this basis would in fact result in compensating the Claimants twice for the same losses. This would be in plain breach of the customary international law standard of "full reparation", the application of which is uncontested.⁹⁸⁸
636. *Third*, and in any event, the Claimants have failed to show that the exceptional circumstances that have warranted an award on moral damages in other investment cases are present in this case.
637. It is widely accepted that moral damages may only be awarded in exceptional circumstances where the State's conduct and the harm are grave and substantial. In the words of the tribunal in *Lemire v. Ukraine*:

The conclusion which can be drawn from the above case law is that, as a general rule, moral damages are not available to a party injured by the wrongful acts of a State, but that moral damages can be awarded in exceptional cases, provided that

- the State's actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act;
- the State's actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position; and
- both cause and effect are grave or substantial.⁹⁸⁹

⁹⁸⁶ Claimants' Memorial on Merits and Damages, ¶¶ 513-514.

⁹⁸⁷ *See above*, Section V.B.

⁹⁸⁸ *See* Claimants' Memorial on Merits and Damages, ¶¶ 478-479.

⁹⁸⁹ *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011 (**Exhibit RL-47**), ¶ 333 (emphasis added). *See also Bernhard Friedrich Arnd Rüdiger von Pezold, et al. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015 (**Exhibit CL-102**), ¶ 908 (noting that "moral damages will be awarded only in exceptional circumstances"); *Waguhi Elie George Siag & Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009 (**Exhibit CL-066**), ¶ 545 ("the prevailing view of the Iran-United States Claims Tribunal appears to have been that punitive damages are not available and it appears that the recovery of punitive or moral damages is reserved for extreme cases of egregious behaviour"); *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009 (**Exhibit RL-36**),

638. Thus, while the tribunal acknowledged that Mr. Lemire “was mistreated” by the host State and had suffered stress and anxiety, it rejected the claim for moral damages holding that the injury suffered “cannot be compared to that caused by armed threats, by the witnessing of deaths or by other similar situations in which Tribunals in the past have awarded moral damages”.⁹⁹⁰ The tribunal also noted that “the moral aspects of his injuries have already been compensated by the awarding of a significant amount of economic compensation, and that the extraordinary tests required for the recognition of separate and additional moral damages have not been met in this case”.⁹⁹¹
639. This high threshold to award moral damages is confirmed by the authorities on which the Claimants rely.⁹⁹² For example, in *Desert Line v. Yemen*, the tribunal found that Yemen had maliciously exerted “physical duress” on the executives of the claimant, including the son of the claimant’s chairman which, as a direct consequence, had an impact on their “physical health”.⁹⁹³ Similarly, in *von Pezold v. Zimbabwe*, the tribunal awarded moral damages on the

¶ 181 (the tribunal declined to award moral damages because it did “not consider that exceptional circumstances such as physical duress are present in this case to justify moral damages. The Tribunal believes that any potential reputational damage suffered by the Respondent will be remedied by the reasoning and conclusions set out in this Award, including an award of costs”); *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 (**Exhibit CL-094**), ¶¶ 1781-1782 (“a claim for moral damages can only be justified in investment treaty cases in very exceptional circumstances. Therefore, Claimants, having the burden of proof, must meet a very high threshold to show a liability for moral damages”); *Oxus Gold v. Republic of Uzbekistan*, UNCITRAL, Award, 17 December 2015 (**Exhibit RL-82**), ¶¶ 897, 903 (the tribunal declined an award on moral damages because “whilst the treatment of such persons may have been harsh, the Arbitral Tribunal has not received enough evidence to support a conclusion that the prosecutions initiated were not justified in the circumstances or were of such an egregious nature as to constitute a breach of Uzbek or international law”); *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014 (**Exhibit CL-098**), ¶ 653 (“moral damages are generally awarded only if illegal action was motivated or maliciously induced”); *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Excerpts of Award, 1 March 2012 (**Exhibit CL-083**), ¶ 428 (the tribunal rejected the request for moral damages because the State’s conduct was not “malicious” or driven by improper motives, so there was no “emotional or other harm Claimants may have suffered is sufficiently serious as to merit an award of additional compensation for moral damage”).

⁹⁹⁰ *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011 (**Exhibit RL-47**), ¶ 339.

⁹⁹¹ *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011 (**Exhibit RL-47**), ¶ 344.

⁹⁹² The decision in *Al Kharafi v. Libya* on which the Claimants rely is inapposite, as the law applicable in that case, including to determine the compensation due, was Libyan law. See *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. The Government of the State of Libya, et al.*, Final Arbitral Award, 22 March 2013 (**Exhibit CL-088**), pp. 364-365.

⁹⁹³ *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008 (**Exhibit CL-059**), ¶¶ 185, 290. The exceptional circumstances prevailing in this case had been acknowledged by other investment tribunals. See, e.g., *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015 (**Exhibit CL-099**), ¶ 907 (the tribunal noted that “In *Desert Line*, the circumstances were truly exceptional”); *Oxus Gold v.*

basis of Heinrich von Pezold’s statement that “[d]uring the invasions, I along with my staff, were humiliated, threatened with death and assaulted, had firearms put to our heads, and were kidnapped”.⁹⁹⁴ The tribunal took into account that the events contributing to the claimants’ stress about his own safety and that of his staff “stretched over a number of years”, throughout which the police was aware of the acts but did not act.⁹⁹⁵

640. The Claimants’ allegations bear no resemblance to the egregious and malicious State conduct in which moral damages have been awarded by investment tribunals. Specifically, the case does not involve “physical duress” by State officials, armed invasions or any other threat or assault by the State. Strikingly, while the Claimants allege that the Mr. Seda’s “physical and mental well-being” were harmed as a result of a “corrupt extortion racket” starting in 2014,⁹⁹⁶ it was not until December 2016 that Mr. Seda filed an official complaint with the Colombian authorities.⁹⁹⁷ In the meantime, Mr. Seda engaged in negotiations with the alleged drug dealers

Republic of Uzbekistan, UNCITRAL, Award, 17 December 2015 (**Exhibit RL-82**), ¶ 896 (“Desert Lines Projects is one of the rare cases in which such damages were awarded; the tribunal in that case noted that “the physical duress exerted on the executives of the Claimant, was malicious and is therefore constitutive of a fault-based liability”. The claimant in that case referred in particular to a Government-led “siege with artillery” and the “arrest and detention of the Claimant’s personnel – including the son of the Claimant’s chairman”).

⁹⁹⁴ *Bernhard Friedrich Arnd Rüdiger von Pezold, et al. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015 (**Exhibit CL-102**), ¶ 918.

⁹⁹⁵ *See Bernhard Friedrich Arnd Rüdiger von Pezold, et al. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015 (**Exhibit CL-102**), ¶ 920. *See also, e.g., 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) (**Exhibit CL-016**), where the Governing Council of the United Nations Compensation Commission set that compensation in case of mental pain and anguish would be provided in extreme cases including (i) the death of a spouse, child or parent, (ii) serious personal injury involving dismemberment, disfigurement or loss of a body organ, member, function or system, (iii) sexual or aggravated assault or torture, (iv) witnessing the intentional infliction of the events in (i), (ii) or (iii) or a spouse, child or parent, (v) having been taken hostage or illegally detained, (vi) deprivation of all economic resources so as to threaten seriously the individual’s survival; *Velásquez Rodríguez Case*, Compensatory Damages, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 7, 21 July 1989 (**Exhibit CL-015**) and *Godínez Cruz Case*, Compensatory Damages, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 8 (**Exhibit CL-012**), where the Inter American Court of Human Rights awarded moral damages suffered as a result of the involuntary disappearance of the husband and father of the claimants. The moral damages had been demonstrated by expert documentary evidence and by psychology experts that attested to the psychological consequences of the involuntary disappearance of the family member; *Di Caro (Italy v. Venezuela)*, Decision, 10 R.I.A.A. 597, 7 May 1903 (**Exhibit CL-003**), the Italian-Venezuelan Commission awarded moral damages to a wife resulting from the “unwarranted killing of her husband” (who had been seized by soldiers, cut with a machete and shot and killed in the street); *Lusitania Cases (United States v. Germany)*, Opinion, 7 R.I.A.A. 32, 1 November 1923 (**Exhibit CL-005**), concerned the sinking of a British ocean liner by a German submarine, which resulted in the death of 128 people.

⁹⁹⁶ Claimants’ Memorial on Merits and Damages, ¶ 515. It bears noting that the Claimants have not provided any evidence of the alleged harm to Mr. Seda’s “physical and mental wellbeing”, let alone a grave and substantial harm.

⁹⁹⁷ *See above*, ¶ 137.

that were extorting him.⁹⁹⁸ Even after the imposition of the Precautionary Measures and the initiation of the Asset Forfeiture Proceedings, Mr. Seda continued developing projects in Colombia⁹⁹⁹ and operating the Charlee Hotel and the Luxé complex. Therefore, Mr. Seda’s own conduct discredits his claims for moral damages.

641. *Fourth*, even if the Claimants were entitled to moral damages, which they are not, the amount claimed is excessive. For example, in *Desert Line v. Yemen* the tribunal awarded the claimant USD 1 million for moral damages, including loss of reputation.¹⁰⁰⁰ Similarly, in *von Pezold v. Zimbabwe* the tribunal considered the USD 5 million requested to be “excessive” and awarded USD 1 million in moral damages.¹⁰⁰¹ The tribunal considered the amount to be appropriate “especially given the number of years that Heinrich was exposed to these stresses”.¹⁰⁰² Therefore, the amount of claimed by the Claimants (*i.e.*, “10 percent of the total damages owed to [Mr. Seda]”, equivalent to some USD 29 million) is in any event excessive and should not be awarded.
642. In sum, the Claimants’ claim for moral damages should be rejected because the Claimants have failed to prove that as a result of the Respondent’s actions, Mr. Seda has suffered any harm, let alone a grave and substantial harm, that would warrant an award on moral damages.

E. THE CLAIMANTS’ CLAIM FOR INTEREST SHOULD BE REJECTED

643. The interest sought by the Claimants must be rejected because the Claimants apply the wrong starting date for interest (**V.E.1**), and an inappropriate interest rate (**V.E.2**).

⁹⁹⁸ See above, Section II.E.

⁹⁹⁹ See, *e.g.*, the license for the Santa Fe de Antioquia project was obtained in May 2017. See Santa Fé de Antioquia Land Use Certificate, 9 May 2017 (**Exhibit C-065bis**).

¹⁰⁰⁰ See *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008 (**Exhibit CL-059**), ¶ 290.

¹⁰⁰¹ See *Bernhard Friedrich Arnd Rüdiger von Pezold, et al. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015 (**Exhibit CL-102**), ¶ 921. That is, the tribunal awarded only 20% of the moral damages claimed. See also *S.A.R.L. Benvenuti & Bonfant v. People’s Republic of the Congo*, ICSID Case No. ARB/77/2, Award, 8 August 1980 (**Exhibit CL-010**) (the tribunal awarded only 2% of the amount claimed by the claimants for “intangible loss” (*i.e.*, CFA 5 million out of CFA 250 million)). See also ¶¶ 3.1, 4.96.

¹⁰⁰² See *Bernhard Friedrich Arnd Rüdiger von Pezold, et al. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015 (**Exhibit CL-102**), ¶ 921.

1. The Claimants apply an inappropriate start date for interest

644. The Claimants allege that interest runs from the valuation date (i.e., allegedly 25 January 2017).¹⁰⁰³ The Respondent, in contrast, submits that the Claimant is not entitled to pre-award interest and that interest, if any, should not accrue before the lapse of a grace period of sixty days from the Respondent's receipt of the Tribunal's final award in this arbitration.

645. The Respondent's position is in line with the findings of previous international tribunals. For example, the tribunal in *Libyan American Oil Company v. Libya* rejected the granting of pre-award interest as follows:

But as, in general law, interest on damages is due on claims of money whose amount is known [...] it cannot accrue for unliquidated damages before their judicial ascertainment and liquidation. Consequently, this Tribunal has to apply it only from the time of the final assessment of damages at the date of this Award.¹⁰⁰⁴

646. Similarly, in 2011, the ICSID tribunal in *Joseph Lemire v. Ukraine* concluded:

The Tribunal is of the opinion that the appropriate *dies a quo* is the date of delivery of this Award. This is the date when the actual amount of damage is established, the date when the Respondent's obligation to pay compensation arises and, consequently, the appropriate date for interest to start accruing.¹⁰⁰⁵

647. The decision of the *Lemire v. Ukraine* tribunal also supports the Respondent's request for a payment grace period:

[T]he Tribunal acknowledges that Respondent, being a State, requires a certain period of time to perform the legal formalities required for the payment of a sum of money. Therefore, Respondent shall have a 60 day grace period from the date of delivery of this Award to pay amounts owed, without interest.¹⁰⁰⁶

648. Accordingly, no interest should accrue before the lapse of a grace period of sixty days from the Respondent's receipt of the Tribunal's final award.

¹⁰⁰³ See BRG Expert Report, ¶ 183.

¹⁰⁰⁴ *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 (Exhibit CL-009), p. 164.

¹⁰⁰⁵ *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011 (Exhibit RL-47), ¶ 363.

¹⁰⁰⁶ *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011 (Exhibit RL-47), ¶ 363.

2. The interest rate suggested by the Claimants is inappropriate

649. Should the Tribunal determine that the granting of pre-award interest is appropriate, the suitable rate would not be the rate based on the Claimants’ cost of debt but the rolling yield on a 1-year US treasury bill.¹⁰⁰⁷ The use of a rolling yield on short-term US treasury bills protects the Claimants against changes in inflation expectations and in interest rates between the valuation date and the date of the award by updating the interest rate over time in line with changes in market conditions.¹⁰⁰⁸ The US risk-free rate is appropriate in this case because damages are being calculated in US Dollars.

650. Furthermore, from an economic point of view, the risk-free rate is the commercial rate associated with receiving an amount of money with certainty. The Claimants have not demonstrated that any additional premium should be provided on top of the risk-free rate.¹⁰⁰⁹

F. THE CLAIMANTS’ CLAIM THAT THE AWARD NOT BE SUBJECTED TO TAXES SHOULD BE REJECTED

651. The Claimants request that any amounts awarded to the Claimants not be subjected to taxes in Colombia.¹⁰¹⁰

652. As with the Claimants’ remaining damages claims, this claim is also highly speculative and premature. In fact, the Claimants have failed to prove “whether or in what amount any tax on compensation determined by a future award may be due”.¹⁰¹¹

653. To the extent that the award would be subject to taxes in the same amount as the corporate taxes, and that these corporate taxes would have been “adequately accounted for” in the Claimants’ damages calculation, the Claimants’ request could be acceptable. This is consistent with the findings of the tribunal in *Saint Gobain v. Venezuela*, where the tribunal ordered the

¹⁰⁰⁷ See Nera Expert Report, ¶ Section 7.3.

¹⁰⁰⁸ See Nera Expert Report, ¶ 256.

¹⁰⁰⁹ See Nera Expert Report, ¶ 257.B.

¹⁰¹⁰ See Claimants’ Memorial on Merits and Damages, ¶ 509.

¹⁰¹¹ *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018 (**Exhibit RL-101**), ¶ 673. See also, e.g., *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017 (**Exhibit CL-114**), ¶ 846; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (**Exhibit CL-105**), ¶ 946; *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018 (**Exhibit CL-118**), ¶ 660.

respondent not to deduct taxes in respect of the payment of the award¹⁰¹² because the valuation method agreed by the parties “adequately account[ed] for income taxes” that would have had to be paid in the future in the but-for scenario.¹⁰¹³

654. However, as explained in NERA’s Report, BRG has not accounted for the applicable corporate tax in Colombia in the following cases:

- BRG assumes incorrectly that the Meritage and Luxé hotels qualifies for 0% tax holiday as a result of assuming it would have been completed by December 2017;¹⁰¹⁴
- BRG assumes incorrectly zero taxes on real estate profits arising from Meritage, Luxé and Predevelopment Projects;¹⁰¹⁵ and
- BRG fails to apply tax on Royal Realty profits from Meritage, Luxe and Predevelopment Projects.¹⁰¹⁶

655. Therefore, the Claimants’ request should be rejected.

G. THE CLAIMANTS ARE NOT ENTITLED TO COSTS OR EXPENSES

656. The Claimants are advancing unmeritorious, premature and abusive claims that have caused the Respondent to incur considerable and unnecessary costs to defend their rights in this arbitration. For this reason, not only are the Claimants not entitled to any costs or expenses, but they should be directed to bear the entirety of the Respondent’s costs and the costs of the arbitration.

657. The Respondent reserves all of its rights to supplement its request for costs.

VI. REQUEST FOR RELIEF

658. On the basis of the foregoing, the Republic of Colombia respectfully requests the Arbitral Tribunal to:

- a. Declare that it lacks jurisdiction over the Claimants’ claims;

¹⁰¹² See *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 (**Exhibit CL-111**), ¶ 902.

¹⁰¹³ See *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 (**Exhibit CL-111**), ¶ 902.

¹⁰¹⁴ See Nera Expert Report, Tables 5.3 and 5.5.

¹⁰¹⁵ See Nera Expert Report, Table 5.3, 5.5 and 190.B.

¹⁰¹⁶ See Nera Expert Report, Tables 5.3, 5.5, ¶ 176.D and 190.B.

- b. In the alternative, dismiss the entirety of the Claimants' claims on the merits;
- c. In the alternative, declare that the Claimants are not entitled to the damages they seek, or to any damages;
- d. Order the Claimants to separately and together pay to the Republic of Colombia all costs incurred in connection with this arbitration, including, without limitation, the costs of the arbitrators and ICSID, as well as the legal and other expenses incurred by the Respondent including the fees of its legal counsel, experts and consultants on a full indemnity basis, plus interest thereon at a reasonable rate; and
- e. Grant such further relief against the Claimants as the Tribunal deems fit and proper.

659. The Republic of Colombia reserves its right to amend and supplement its pleadings and request for relief.

Respectfully submitted,
16 November 2020



Prof. Emmanuel Gaillard
Ximena Herrera-Bernal
Yael Ribco Borman

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