UNITED NATIONS COMMISSION
ON
INTERNATIONAL TRADE LAW

ALBERTO CARRIZOSA GELZIS
FELIPE CARRIZOSA GELZIS
ENRIQUE CARRIZOSA GELZIS

CLAIMANTS,

v.

REPUBLIC OF COLOMBIA

RESPONDENT.

NOTICE OF AND REQUEST FOR ARBITRATION

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January 24, 2018

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INTRODUCTION

This case is about the inordinate abuse of regulatory sovereignty. It is most exceptional because the consequences of the excessive and illicit use of regulatory authority were multiplied and enlarged over time by the Republic of Colombia's Constitutional Court's usurpation of the Council of State's jurisdiction: two tribunals of equal hierarchy. These abuses breached fundamental foreign investment protection standards that purported to ensure that non-Colombian investors and investments within that jurisdiction's national territory would be safeguarded from regulatory breach of public international law.

In the case before this Tribunal the respective investment of three U.S. citizens in one of the Republic of Colombia's leading financial institutions, *Corporación Grancolombiana de Ahorro y Vivienda "GRANAHORRAR"* ("GRANAHORRAR" or "the bank"), was reduced to the peppercorn value of COP[1] 0.01 based upon discriminatory, irregular, and unprecedented treatment on the part of the Central Bank of Colombia ("*Banco de la República*" or "the Central Bank"), *Fondo de Garantía de Instituciones Financieras* ("FOGAFIN"), and Superintendency of Banking (*Superintendencia Bancaria de Colombia,* now known as *Superintendencia Financiera*). In particular FOGAFIN deployed discriminatory methodologies when purportedly discharging statutory obligations to assist qualified financial institutions by ostensibly addressing what it identified as a "temporary liquidity" challenge confronting one of Colombia's two principal savings and loans, GRANAHORRAR. FOGAFIN discriminated against GRANAHORRAR and treated this formerly leading financial institution different from its peers by enacting the following five final acts comprising these measures: (i) artificially and deliberately reducing GRANAHORRAR's solvency status below the 9% legislative threshold,

[1] The acronym "COP" stands for Colombian peso in accordance with the ISO 4217 currency standard.

(ii) reducing the bank's share value to COP 0.01, (iii) denying GRANAHORRAR's shareholders due process statutory notice rights, (iv) unilaterally terminating GRANAHORRAR's CEO without notice to shareholders, and (v) replacing unilaterally GRANAHORRAR's Board of Directors. The bank was expropriated but never liquidated. It was sold to Banco Bilbao Vizcaya Argentaria (BBVA) for a payment in the amount of USD 423,000,000. These five final acts of regulatory excesses were not accompanied by *any* compensation or subjected to *any* iteration of a due process regime. As a predicate to these five regulatory measures, FOGAFIN and the Superintendency of Banking implemented nine regulating premises that materially weakened GRANAHORRAR.

First, FOGAFIN denied GRANAHORRAR conventional relief for a temporary liquidity deficit. Instead, FOGAFIN proceeded to cause GRANAHORRAR to pledge to FOGAFIN "A" rated performing assets having 134% of the value of a guarantee that FOGAFIN would extend to prospective GRANAHORRAR creditors who would provide GRANAHORRAR with liquidity earmarked loans ("the guarantee-restructuring program"). This guarantee-restructuring program was unprecedented and unresponsive to GRANAHORRAR's liquidity needs. The guarantee-restructuring program, however, did have the effect of materially wresting from GRANAHORRAR a significant percentage of the most productive assets that materially contributed to GRANAHORRAR's historically successful solvency status. This formula also was prejudicial to GRANAHORRAR because it did not address the bank's liquidity needs. The guarantee-restructuring program was not imposed on any of GRANAHORRAR's peers.

Second, pursuant to the guarantee-restructuring program FOGAFIN provided GRANAHORRAR with 30-60 day maturation timeframes that caused hardship and were materially shorter than the terms that FOGAFIN extended to GRANAHORRAR's peer financial

institutions during the Colombia economic crisis of 1998-2001. As more fully set forth below, these latter financial institutions were accorded direct funding (unlike GRANAHORRAR) and very generous maturation dates averaging seven (7) *years*.[2] The contrast is stark and inexplicable.

Third, within the framework of the guarantee-restructuring program, FOGAFIN foisted on GRANAHORRAR interest rates far higher than those extended to GRANAHORRAR's peer financial institutions that found themselves in significantly more threatening solvency challenges. GRANAHORRAR was required to pay to third-party creditors availing themselves of the benefits of the guarantee that FOGAFIN provided to them pursuant to the guarantee-restructuring program an average interest rate of 44%. The average interest rate, however, that FOGAFIN extended as a direct funding creditor to GRANAHORRAR's banking peers approximately during the same timeframe was 19%. When pressed, FOGAFIN was unable to account for this difference. The disparity is all the more quizzical because GRANAHORRAR enjoyed greater solvency and economic soundness than its peers at all times material to this action.

Fourth, FOGAFIN caused GRANAHORRAR, upon penalty of complete abandonment, to execute an adhesion contract containing a deliberately vague and unilateral *Clause* entitling FOGAFIN to keep for its own purposes and pursuant to unqualified ownership, the assets that GRANAHORRAR pledged to FOGAFIN in furtherance of the guarantee-restructuring program upon FOGAFIN's subjective determination that a "cessation of payment" event between GRANAHORRAR and any *third-party* creditor (irrespective of the amount, quality, cure

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[2] FOGAFIN partially funded GRANAHORRAR but withheld final payment and thus engineered a "cessation of payment" event that FOGAFIN itself identified as the basis for (i) expropriating GRANAHORRAR, and (ii) appropriating unencumbered ownership of the pledged assets.

potential, credit terms at issue, or position of the third-party payment beneficiary). The expert testimony in this case shall demonstrate that the use of such a *Clause* both was unresponsive to GRANAHORRAR's liquidity needs and unprecedented under the circumstances in the context of FOGAFIN's regulatory history.

Fifth, FOGAFIN refused to fund GRANAHORRAR directly for the entire credit amount. This exercise of its lending discretion was contrary to FOGAFIN's practice with respect to GRANAHORRAR's peer banks, particularly those predominantly configured by a mortgage based principal portfolio. This disparity in treatment is even more opaque because the GRANAHORRAR peer financial institutions receiving direct funding from FOGAFIN were not as financially sound as GRANAHORRAR.

Sixth, FOGAFIN's formula for addressing GRANAHORRAR's liquidity challenge consisted in requiring GRANAHORRAR's principal shareholder block, the U.S. shareholders (claimants in this cause), to divest themselves of their respective interests in GRANAHORRAR. Here too expert testimony establishes that such methodology was not responsive to GRANAHORRAR's temporary liquidity needs.

Seventh, FOGAFIN caused a deposit run that FOGAFIN used as a ground for challenging GRANAHORRAR's solvency status. The evidence compellingly teaches that FOGAFIN deliberately notified the media to report confidential events concerning restructuring negotiations between FOGAFIN and GRANAHORRAR. This run, among other matters, made worse GRANAHORRAR's liquidity status.

Eighth, even though the documentary evidence of record compellingly shows that GRANAHORRAR's solvency status enjoyed a history of economic soundness surpassing the

performance level of most of its peer financial institutions, and only suffered from a temporary liquidity event, FOGAFIN and the Superintendency of Banking based their expropriation of GRANAHORRAR on a purported insolvency crisis that, if at all, only existed during a matter of hours and solely because of FOGAFIN's and the Superintendency of Banking's machinations.

Ninth and finally, the Superintendency of Banking, with FOGAFIN's blessings, provided GRANAHORRAR with a "Cure Notice" containing a 14-hour deadline that was physically and legally impossible to perform. This "Cure Notice" required GRANAHORRAR shareholders to meet a capital call in the amount of COP 157,000,000,000. That capitalization was to take place between 1:00 AM Saturday October 3, 1998, and 3:00 PM on that *same* date. The "Cure Notice", presumably earmarked for GRANAHORRAR's shareholders, was *never* communicated to the GRANAHORRAR shareholders as required by law and in keeping with the provisions of the Administrative Code, Articles 46-48. Factual and expert testimony to be presented in this case shall demonstrate that the deadline was not performable or communicated to the GRANAHORRAR shareholders. It also was unresponsive to GRANAHORRAR's needs.

Once these nine conditions took place, the Superintendency of Banking and FOGAFIN proceeded to take over the ownership and management of GRANAHORRAR, as more fully detailed in this Notice of and Request for Arbitration. FOGAFIN's and the Superintendency of Banking's expropriation of GRANAHORRAR was undertaken in a most discriminatory manner and without providing GRANAHORRAR with due process and compensation to its shareholders arising from FOGAFIN's expropriation of the bank and conversion of the pledged assets. FOGAFIN and the Superintendency of Banking failed to expropriate GRANAHORRAR in furtherance of a public purpose because, among other things, the expropriation of the bank was not economically necessary or compelled by law, the bank's solvency status did not pose a

danger to the financial sector generally or to institutional banking in particular. Moreover, at the time of the bank's expropriation, FOGAFIN and the Central Bank misappropriated the difference between the value of the pledged assets representing a value of 134% of credits secured from third parties, and the actual value of the extended credits. This difference amounted to COP 238,570,000,000.

It was not until July 25, 2000, that FOGAFIN and Superintendency of Banking provided the U.S. shareholders with (i) the "Cure Notice" (Exhibit 19) and (ii) a copy of the Resolution No. 002 (Exhibit 20) that decapitalized the bank by placing a share value of COP 0.01 on GRANAHORRAR stock. Neither instrument, as the expert testimony shall corroborate, although plain from even a surface textual reading of these papers, complied with the requisite substantive legislative requirements and for this reason deprived the U.S. shareholders from basic due process protection.

The U.S. shareholders availed themselves of judicial recourse and initially were successful. An appeal from a first instance extraordinary judgment that issued four (4) years and 364 days after the U.S. shareholders registered claims with the First Instance Tribunal of Cundinamarca (*Tribunal Contencioso Administrativo de Cundinamarca*) dismissing *both* the claims that the U.S., shareholders asserted and the defenses that the Superintendency of Banking and FOGAFIN raised, the Council of State (*Consejo de Estado*) reversed the judgment finding for neither party and entered judgment in favor of the U.S. shareholders and against FOGAFIN and the Superintendency of Banking. The amount of this judgment in favor of the U.S. shareholders was for COP 226,961,237,735.

FOGAFIN and the Superintendency of Banking then undertook a frivolous and aggressive judicial campaign. No less than four (4) motions for reconsideration (*tutelas*) were filed with the Council of State. All four were denied.

FOGAFIN and the Superintendency of Banking then perfected an appeal with the Constitutional Court. On May 26, 2011, that appeal yielded a very prolific and prolix 203-page opinion that caused a constitutional crisis that today has not been resolved because the Constitutional Court (i) deliberately exceeded its jurisdiction, (ii) encroached on the jurisdiction of the First Instance Tribunal, (iii) usurped the authority, role, and adjudicatory process of the Council of State, (iv) departed from and violated the Constitutional Court's own precedent, (v) violated the Colombian Constitution's due process clause, (vi) disavowed the Administrative Code dispositive provisions Arts. 46-48, and (vii) disregarded basic due process requirements by applying unprecedented principles to statutory notice analysis. Further, the Constitutional Court engaged in non-constitutional merits-based adjudication that additionally precluded the U.S. shareholders from presenting their case.

The Constitutional Court's unprecedented and extreme opinion gave rise to two (2) dissenting opinions. One of these dissenting opinions authored by Justice Rojas Ríos virtually adopted verbatim the Council of State's position and scathingly warned his brethren on the Court not to abandon the rule of law in favor of financially driven economic expediency.

The record establishes that immediately upon issuance of this dissenting opinion Justice Rojas Ríos was removed from the Court.

The Council of State perfected a motion to vacate the Constitutional Court's opinion. On June 25, 2014, the Constitutional Court denied that motion. Issuance of this order constitutes the

end of all judicial labor in the matter that commenced with the filing of a complaint before the First Instance Tribunal. The Constitutional Court's opinion remarkably denied the U.S. shareholders justice and judicially expropriated their interests as embodied in the Council of State's judgment dated on November 1, 2007.

The proceeding before this Tribunal now ensues.

I. THE PARTIES:

A. The Claimants:

1. Claimants, Alberto Carrizosa Gelzis, Felipe Carrizosa Gelzis, and Enrique Carrizosa Gelzis (the U.S. shareholders),[3] formally provide notice of and request for arbitration pursuant to Articles 12.1, 12.2, and 12.3 of the U.S. - Colombia Trade Promotion Agreement ("TPA") that entered into force on May 15, 2012, and Articles 1, 3 (2), 3 (3), 3(4), 4, and 6 of the Agreement for the Promotion and Protection of Investments between the Republic of Colombia and the Republic of India ("Colombia - India BIT"), dated July 2, 2012, and Article 11 of the Agreement between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments ("Colombia - Switzerland BIT"), dated October 6, 2009, against the Republic of Colombia. This Notice of and Request for Arbitration also is provided pursuant to Article 3 of the United Nations Commission on International Trade Law ("UNCITRAL"). Accordingly, this Notice of and Request for Arbitration petitions that the

[3] Pursuant to Article 12.3 of the TPA and Article 1.1 of the Colombia - India BIT "[t]he term 'investor' means a physical or natural person or an entity of one of the Contracting Parties that has made investments in the territory of the other Contracting Party in accordance with its national legislation." Claimants are citizens of the United States of America consonant with the national legislation of that jurisdiction. Attached as Composite Exhibit 1A are true and correct copies of their respective U.S. passports.

dispute more fully detailed below be referred to arbitration under the UNCITRAL Arbitration Rules as adopted in 2013.

2. Article 12.1 of the U.S. - Colombia TPA in pertinent part reads:

> 1. This Chapter applies to measures adopted or maintained by a Party relating to:
>
> (a) financial institutions of the other Party;
>
> (b) investors of another Party, and investments of such investors, in financial institutions in the Party's territory [...].

3. Claimants are represented in this proceeding by Bryan Cave LLP. Contact details for communications in relation to this matter are:

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B. The Respondent

4. The respondent in this arbitration is the Republic of Colombia ("respondent" or "Colombia"), a Sovereign state and a Party to the TPA.

5. Pursuant to Article 12.3; Most-Favored-Nation Treatment the Parties, in part, have agreed as follows:

> 1. Each Party shall accord to investors of another Party, financial institutions of another Party, investments of investors in financial institutions, and cross-border financial service suppliers of another Party treatment no less favorable than that it accords to the investors, financial institutions, investments of investors in financial institutions, and cross-border financial service suppliers

of any other Party or of a non-Party, in like circumstances.

Moreover, in the Colombia - Switzerland BIT, pursuant to Article 11 (3), it was agreed in that instrument that each Party "gives its unconditional and irrevocable consent to the submission of an investment dispute to international arbitration in accordance to paragraph 2 above, except for disputes with regard to Article 10, paragraph 2 of this Agreement.[4]

6. The Republic of Colombia has not yet appointed counsel in this proceeding. Contact details for all communications in relation to this matter are:

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7. In conformance with Article 11 (2) of the Colombia - Switzerland BIT, claimants have met the obligation of providing a written request for consultations, amicable solution, and relief pursuant to the prosecution of claims before the national courts of respondent Colombia, through the end of all judicial labor. These efforts to resolve the pending dispute amicably and through the national courts of respondent far exceeded the six (6) month timeframe set forth in Art. 11 (2) of the referenced BIT.

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[4] Article 10(2) reads:

> (2) Each Party shall observe any obligation deriving from a written agreement concluded between its central government or agencies thereof and an investor of the other Party with regard to a specific investment, which the investor could rely on in good faith when establishing, acquiring or expanding investment.

This article and paragraph do not apply to the present dispute because claimants asserted no treaty breach concerning an obligation deriving from a written agreement.

II. SUMMARY OF RELEVANT FACTS

A. THE INVESTORS AND THE INVESTMENTS

8. Claimants, Alberto Carrizosa Gelzis ("ACG"), Felipe Carrizosa Gelzis ("FCG"), and Enrique Carrizosa Gelzis ("ECG"), are U.S. citizens and investors who invested in Corporación Grancolombiana de Ahorro y Vivienda "GRANAHORRAR". GRANAHORRAR in turn was a Colombian corporation with its principal place of business in Colombia. GRANAHORRAR was incorporated on September 14, 1972. Its main commercial purpose as a banking entity was to serve as a savings and loan. It provided financing for residential construction and urban development.

9. By October 2, 1998, twenty six (26) years after its incorporation, GRANAHORRAR had become, pursuant to standard metrics of assessment, (i) one of Colombia's most successful savings and loan institutions, and (ii) a national brand. As of August 1998 GRANAHORRAR ranked as number three (3) within the Colombian national territory with respect to savings and loan product-services. During this same timeframe it ranked second (2nd) in the nation with respect to the number of office branches, the value and diversity of assets, and the value of its credit portfolio.[5] At that same time (August 1998) GRANAHORRAR was the

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[5] In August 1998, Lehman Brothers prepared an Information Memorandum (the "Memorandum") in its capacity as financial advisor to Fiducrédito S.A. and the beneficiary shareholders of GRANAHORRAR for the singular purpose of supplying the Memorandum to a limited number of prospective investors. Even though the Memorandum contains the standard disclaimers attaching to information furnished to prospective investors, as to, for example, not constituting (i) an offer to invest, (ii) a guaranty of investment, or (iii) an offering of securities, the Memorandum affirmatively is based on Colombian banking regulation, audited unconsolidated Financial Statements, and consolidated Financial Statements. Further, while not purporting to be exhaustive, the Memorandum aspired to be comprehensive and contains ten (10) sections with particularity as to GRANAHORRAR's (i) business description, (ii) distribution network, (iii) credit portfolio and credit policy, (iv) funding and treasury activities, (v) products and services, (vi) bancassurance, (vii) investment and subsidiaries, (viii) human resources, (ix) information technology systems, and (x) financial performance. A true and correct copy of the Memorandum is here attached as Exhibit 1.

number three (3) financial institution in the country as to equity and also held this rank with respect to the aggregate value of deposits.[6]

10. Analysis of GRANAHORRAR's configuration as of the August 1998 timeframe places it among the top ten (10) private banking institutions in Colombia, and as an amply well capitalized institution.[7]

11. As of the August 1998 timeframe GRANAHORRAR's investments in other entities represented a premium to its own value pursuant to industry standards of assessment. By way of example, GRANAHORRAR held a 30% equity position in Horizonte Sociedad Administradora de Fondos de Pensiones y Cesantias S.A. ("Horizonte"), one of the largest pension funds in Colombia.[8] In this same vein, GRANAHORRAR held a 90% equity position in Fiduciaria Granahorrar S.A. Granfiduciaria ("Granfiduciaria"), a trust company holding an industry sector leadership position at a national level in real estate asset securitization.[9]

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[6] *Id.* at p. 1.

[7] By way of example, in June 1998 GRANAHORRAR had a COP 2,096,416,000,000 corroborated total credit portfolio, equivalent to USD 1,336,616,404.73, at an exchange rate of COP 1,568.45=USD 1. This figure compared very favorably to Banco de Colombia's (the number one (1) rated financial institution at the time) total credit portfolio of COP 3,731,753,000,000, equivalent to USD 2,379,261,691.47, at the referenced exchange rate. Similarly, as of June 1998 GRANAHORRAR had total deposits in the amount of COP 1,631,245,000,000, equivalent to USD 1,040,036,341.61. This figure competed quite favorably with the number one (1) ranked institution at the time, Banco de Colombia, which had total deposits in the amount of COP 3,370,338,000,000, equivalent to USD 2,148,833,561.79. *See* Exhibit 1, pp. 26-46, containing a more comprehensive analysis that includes credit type and a three (3) year performance history.

[8] During the week of December 25, 2012, BBVA would sell Horizonte to Sociedad Administradora de Fondos de Pensiones y Garantías Porvenir, S.A., in exchange for a payment in the amount of USD 528 million. *See* https://www.elheraldo.co/noticias/economia/grupo-aval-compro-el-fondo-de-pensiones-horizonte-de-bbva-94226.

[9] Granfiduciaria's elite market position in real estate assets securitization generated profitable and unique synergies with GRANAHORRAR's core savings and loans products and services. Exhibit 1, pp. 47-55.

12. GRANAHORRAR during this same timeframe had implemented unique products and methodologies that materially contributed to a financial prognosis of continued growth and development. Lehman Brothers observed that "[m]anagement ha[d] created a well-received and highly regarded name for the bank ideal for continued growth and expansion."[10] The brand was bolstered by innovations such as its "Fábrica de Crédito" that gave rise to what eventually became a national industry leading credit origination process.[11] This innovation allowed GRANAHORRAR to diversify its funding base matching its positive asset growth. Illustrative of this emphasis on the implementation of new methodologies and products was the implementation of a loan securitization process that had never before been offered in the financial sector.[12] It was equally chronicled that GRANAHORRAR introduced at the time innovative deposit products such as Certificates of Deposit, as well as novel insurance products.[13]

13. The sector historical development indicators established that as of June 1998 the national banking sector in Colombia had become increasingly competitive. Consequently, direct and collateral competitive challenges confronted GRANAHORRAR's core mortgage business base. At that time commercial banks such as BBV Ganadero, Andino, Anglo-Colombino (Lloyds), Banco Popular, Interbanco, and Sudameris, to mention only the principal competitive stakeholders, commenced distributing their respective mortgage products and competing

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[10] *Id.* at 1.

[11] The Fábrica de Crédito methodology was proprietary in nature. At the time GRANAHORRAR had applied to patent the trade mark and for other intellectual property protection. It spawned a specialized division of GRANAHORRAR that (i) originated, (ii) processed, and (iii) administered the bank's loans. For greater detail *see* Exhibit 1, pp. 36-37.

[12] *Id.* at 19.

[13] *Id.* at 19.

aggressively on price, which competitive practices included market entry price adjustments that historically garnered market share transfer during limited but important timeframes.[14]

14. This market development notwithstanding, Lehman Brothers corroborates that "GRANAHORRAR successfully adapted its distribution to the evolution of the market by involving its network in the origination of mortgages."[15] GRANAHORRAR's extensive branch network favorably reacted with a strategy that entailed providing branches within the network with greater loan originations, unique credit management processes, together with new penetration into the building contractor sector, coupled with continuous product innovation.[16]

15. As of June 30, 1998, GRANAHORRAR had approximately COP 2.4 trillion in total assets, and was listed on the stock exchanges of Bogotá, Medellín, and Occidente. At that time it was classified as a high liquidity stock.[17]

16. Claimant ACG owned and controlled, through Asesorías e Inversiones C.G. S.A. ("Asesorías"), a 4.1446% shareholder interest in GRANAHORRAR as of October 1998.[18] As of October 1998, Asesorias' primary business purpose consisted in the development of agricultural products (farming and livestock), as well as forestry (the development and processing of timber and lumber). As a secondary business purpose at the time subordinated to the company's agricultural and forestry commercial endeavors, Asesorias served as a holding company for shares in GRANAHORRAR.

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[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *See*, e.g. Exhibit 22.

[18] Claimant ACG held a 23.19% interest in Asesorias.

17. Claimant ACG owned and controlled, through Exultar S.A. ("Exultar"), a 2.6396% shareholder interest in GRANAHORRAR as of October 1998.[19] As of that date Exultar's primary business purpose was real estate based. In particular, Exultar served as a low income housing developer. In addition to engaging in the actual construction of low income housing projects, in coordination with the local and federal government, Exultar also provided consulting and financial service advising to other firms in the low income development sector. Since its incorporation on December 30, 1986, Exultar was under the supervision and auspices of the Superintendency of Banking. Likewise, it was able to develop quarries and to rent heavy machinery for construction, serve as a wholesale supplier of construction materials, and carry out any actions necessary to fulfill its principal purpose of serving as a low income housing contractor and developer.

18. As a secondary purpose, Exultar served as a holding company for shares in GRANAHORRAR.

19. As of October 1998, claimant ACG owned and controlled, through Compto S.A. ("Compto"), a 3.2828% shareholder interest in GRANAHORRAR.[20] As of that timeframe, Compto's primary business purpose was real estate based. In particular, Compto served as a low income housing developer. In addition to engaging in the actual construction of low income housing projects, in coordination with the local and federal government, Compto also provided consulting and financial service advising to other firms in the low income development sector. Since its incorporation on December 30, 1986, Compto was under the supervision and auspices of the Superintendency of Banking. Likewise, it was able to develop quarries and to rent heavy

[19] Claimant ACG held a 20.56% interest in Exultar.

[20] Claimant ACG held a 26.78% interest in Compto.

machinery for construction, serve as a wholesale supplier of construction materials, and carry out any actions necessary to fulfill its principal purpose of serving as a low income housing contractor and developer.

20. As a secondary purpose, Compto served as a holding company for shares in GRANAHORRAR.

21. Claimant ACG owned and controlled, through Inversiones Lieja LTDA ("Lieja"), a 2.3769% shareholder interest in GRANAHORRAR as of October 1998.[21] As of that date, Lieja's primary business purpose consisted in the development of agricultural products (farming and livestock), as well as forestry (the development and processing of timber and lumber). As a secondary business purpose at the time subordinated to the company's agricultural and forestry commercial endeavors, Lieja served as a holding company for shares in GRANAHORRAR.

22. Claimant ACG owned and controlled, through Fultiplex S.A. ("Fultiplex"), a 1.0194% shareholder interest in GRANAHORRAR as of October 1998.[22] As of that timeframe, Fultiplex's primary business purpose was real estate based. In particular, Fultiplex served as a low income housing developer. In addition to engaging in the actual construction of low income housing projects, in coordination with the local and federal government, Fultiplex also provided consulting and financial service advising to other firms in the low income development sector. Since its incorporation on January 6, 1987, Fultiplex was under the supervision and auspices of the Superintendency of Banking. Likewise, it was able to develop quarries and to rent heavy machinery for construction, serve as a wholesale supplier of construction materials, and to carry

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[21] Claimant ACG held a 23.29% interest in Lieja.

[22] Claimant ACG held a 19.97% interest in Fultiplex.

out any actions necessary to fulfill its principal purpose of serving as a low income housing contractor and developer.

23. As a secondary purpose, Fultiplex served as a holding company for shares in GRANAHORRAR.

24. Claimant ACG owned and controlled, through I.C. Interventorías y Construcciones LTDA ("Interventorías"), a 0.1164% shareholder interest in GRANAHORRAR as of October 1998.[23] At that time Interventorías' principal business had two fundamental component parts. First, Interventorías much like Exultar, was involved in the planning, construction, development, and sales of low income housing in conjunction with government sector developers. Second, Interventorías, as in the case of Exultar and Compto, engaged in the development of quarries, the sale of heavy construction machinery, as well as construction materials relating to low income housing urban development projects. Interventorías was extensively utilized as a multicompany holding entity.

25. As a secondary purpose, Interventorías served as a holding company for shares in GRANAHORRAR.

26. Pursuant to his interests in Asesorías, Exultar, Compto, Lieja, Fultiplex, and Interventorías collectively the companies ("the Companies"), as of October 1998, ACG owned and controlled a 13.5797% equity interest in GRANAHORRAR.

27. Claimant ECG owned and controlled, through Asesorías, 4.1254% shareholder interest in GRANAHORRAR as of October 1998.[24]

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[23] Claimant ACG held a 24% interest in Interventorias.

[24] Claimant ECG held a 23.08% interest in Asesorías.

28. Claimant ECG owned and controlled, through Exultar, a 2.5943% shareholder interest in GRANAHORRAR as of October 1998.[25]

29. Claimant ECG owned and controlled, through Compto, a 3.1887% shareholder interest in GRANAHORRAR as of October 1998.[26]

30. Claimant ECG owned and controlled, through Lieja, a 2.3591% shareholder interest in GRANAHORRAR as of October 1998.[27]

31. Claimant ECG owned and controlled, through Fultiplex, a 0.9514% shareholder interest in GRANAHORRAR as of October 1998.[28]

32. Claimant ECG owned and controlled, through Interventorías, a 0.1164% shareholder interest in GRANAHORRAR as of October 1998.[29]

33. Pursuant to his interests in the Companies, as of October 1998, ECG owned and controlled a 13.3420% equity interest in GRANAHORRAR.

34. Claimant FCG owned and controlled, through Asesorías, a 4.1260% shareholder interest in GRANAHORRAR as of October 1998.[30]

35. Claimant FCG owned and controlled, through Exultar, a 2.5956% shareholder interest in GRANAHORRAR as of October 1998.[31]

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[25] Claimant ECG held a 20.21% interest in Exultar.

[26] Claimant ECG held a 26.01% interest in Compto.

[27] Claimant ECG held a 23.12% interest in Lieja.

[28] Claimant ECG held a 18.64% interest in Fultiplex.

[29] Claimant ECG held a 24% interest in Interventorías.

[30] Claimant FCG held a 23.08% interest in Asesorías.

36. Claimant FCG owned and controlled, through Compto, a 3.1914% shareholder interest in GRANAHORRAR as of October 1998.[32]

37. Claimant FCG owned and controlled, through Lieja, a 2.3596% shareholder interest in GRANAHORRAR as of October 1998.[33]

38. Claimant FCG owned and controlled, through Fultiplex, a 0.9530% shareholder interest in GRANAHORRAR as of October 1998.[34]

39. Claimant FCG owned and controlled, through Interventorías, a 0.1164% shareholder interest in GRANAHORRAR as of October 1998.[35]

40. Pursuant to his interests in the Companies, as of October 1998, FCG owned and controlled a 13.3353% equity interest in GRANAHORRAR.

B. Respondents' Unlawful Taking of GRANAHORRAR without Compensation, Discriminatorily, Wanting in Due Process, and Contrary to Any Public Purpose

1. Colombia's Economic Crisis

41. During the timeframe commencing calendar year 1997 through 2001, the Colombian national economy underwent an economic contraction of historic proportions.[36] One academic report succinctly details the configuration of this crisis:

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[31] Claimant FCG held a 20.22% interest in Exultar.

[32] Claimant FCG held a 26.03% interest in Compto.

[33] Claimant FCG held a 23.12% interest in Lieja.

[34] Claimant FCG held an 18.67% interest in Fultiplex.

[35] Claimant FCG held a 24% interest in Interventorías.

> During the 1997-1999 timeframe, the Colombian economy experienced one of the most severe economic crisis in its history. That crisis consisted of two very significant vectors. First, it entailed a very material drop of its GDP (negative 4.2% in 1999) together with an incident increase in unemployment (22% in 1999) [citation omitted], but also a banking crisis of considerable importance and a collapse of the exchange rate regime. The confluence of these events and their severity have underscored this crisis as one that has garnered the most attention nationally among experts in recent years who have labored to uncover its root causes, underlying dynamics and contribution to lessons for the future.[37]

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[36] *See, e.g.,* Alejandro Torres G, *La Crisis Colombiana de Finales del Siglo XX: Choque Real o Financiero*, Perfil de Coyuntura Económica No. 18, Diciembre 18, 2011, pp. 79-96, here attached as Composite Exhibit 2.

[37] *Id.* at 82; *See* Clara Elena Parra and Natalia Salazar, *La Crisis Financiera y la Experiencia Internacional*, Boletines de Divulgación Económica, Unidad de Análisis Macroeconómico del Departamento Nacional de Planeación, Enero 2000, at 21-22, at Composite Exhibit 2. The authors observed:

> The spark that ignited the vulnerability of the financial sector appeared in June 1998 when, with the goal of protecting the exchange rate, the interest rates rose excessively, in fact beyond 50%. As of the time of that development a sharp and accelerated deterioration of profitability indicators commenced, as did the demise of the quality of solvency portfolios. Throughout the financial sector, the default rate indicator (*el indicador de cartera vencida*) went from 5.1% in June of 1995, to 7.1% in June 1998, 10.5% in December 1998, and 14.4% in April 2000. With respect to savings and loans, during the same timeframes the indicators reached the following levels: 5.0%, 9.5%, 14.8%, and 21.2%. Another important figure is the value of assets in default and assets recovered to foreclosure proceedings or otherwise, which reached the 9.4 billion Colombian pesos, that is close to 12% of the total assets in the entire system. Finally, solvency in the case of banks exceeded the 14% mark in February 1998 to 10.7% in May 1999, and with respect to savings and loans, from 11% to 7.9%. This decline in solvency is below the 9% regulatory minimum requirement.

Some analysts have underscored the liquidity problem that the financial sector faced during the second half of 1998. The interbank rate exceeded 60% in deposits registered during increasingly shorter timeframes. The interest rate spread caused significant and increasing losses, particularly with respect to savings and loans. During the final months of the year the solvency crisis began to acquire greater significance than the lack of liquidity. Echeverry and Salazar (1999) established that from June 1998 after the decline in the balances of the special assets sector, together with the perception of increased risk, credit availability was curtailed with the hope of minimizing solvency regulatory violations. This explains the phenomenon of a decline in growth of credit portfolios so dramatically as to exceed the lowest rates recorded during the crisis of the eighties. The capitalization credit lines that FOGAFIN (the entity charged with guarantying deposits) also reacted to this crisis, which government authorities acknowledged concerned liquidity and not solvency.

42. GRANAHORRAR, as was the case with all other similarly situated peer financial institutions, was not immune from the effects of this crisis. Understandably, the bank experienced an increase in delinquent assets representing COP 6.241 million, and corresponding reserves went from COP 18.355 million in December [1997] to COP 18.926 million in August of 1998.[38] These figures notwithstanding, however, during the months of July and August 1998 COP 7.800 million in reserves were adjusted to reflect performing assets.[39] The portfolio of non-performing assets during June and August of 1998 went from 8.31% to 9.18%.[40]

43. As previously noted, the high incidence of default and increase in non-performing assets was a systemic national industry sector occurrence.[41] The authoritative literature on the subject, both contemporaneous with the crisis, as well as more recent analyses, are in unison in ascribing this deficit to the government imposed interest rate increase that exceeded the fifty percent (50%) threshold. Also as previously observed, these interest rate adjustments precipitated a decline in the (i) profitability, (ii) portfolio quality, and (iii) solvency of financial industry sector assets.[42]

2. GRANAHORRAR Applies to the Central Bank and FOGAFIN for Funding.

44. In this same vein, GRANAHORRAR's liabilities during the June and August 1998 timeframe increased from COP 2.097.091 million to COP 2.235.087 million, representing

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[38] *See* Fondo de Garantía de Instituciones Financieras, Actas de la Junta Directiva No. 225, de fecha 3 de octubre de 1998, at No. 01996, constituting Exhibit 3.

[39] *Id.*

[40] *Id.*

[41] *See* Composite Exhibit 2, *La Crisis Financiera y la Experiencia Internacional*, *supra* at p. 21, *see also La Crisis Colombiana de Finales del Siglo XX: Choque Real o Financiero*, pp. 79-96.

[42] *See* Composite Exhibit 2, *La Crisis Financiera y la Experiencia Internacional*, *supra* at p. 21.

an increase of 6.95%.[43] The very Colombian government authorities (Superintendencia Bancaria in particular) observed that "the rubric that principally generated this increase was the interbank credits ["*fondos interbancarios*"], which increased during the month of December 1997 in the amount of COP 198.261 million, which represents an increase of 360.82%". The Superintendent of Banking's report to FOGAFIN also notes that "it must be underscored that part of the referenced interbank credits entailed financial guarantees from FOGAFIN." [44]

45. Here too it is foundational to emphasize two propositions that contextualize the liabilities in connection with the interbank credits. First, the government raised interbank credit rates by approximately 400% during the March through July 1998 timeframe,[45] representing an approximate value of 60%. The technical justification for this increase in rates was to control liquidity concerns.[46] The effect on savings and loan institutions, however, was to cause a spike in the liabilities versus assets ratio.

46. Second, the guarantees that FOGAFIN tendered to GRANAHORRAR compel analysis. As of the third quarter of 1997 the Colombian government withdrew all government agency, department, and Ministry deposits from GRANAHORRAR. This transfer of deposits is part of the government policy to strengthen choice cherry-picked financial institutions at the expense of others that were deemed to be sufficiently robust to withstand the transfers and in this way contributed to the government's prudential measures.

47. As a consequence of this government deposit run on GRANAHORRAR, non-government deposit holders misapprehended the significance of the government transfers and

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[43] *See* Exhibit 3, subsection 2.1.2 Pasivos.

[44] *Id.*

[45] *See, e.g.*, Echeverry and Mejía, *Notas sobre la tasa de interés y la inflación en Colombia*, Serie Borradores de Economía, Banco de la República (Septiembre 1997) marked as Exhibit 4.

[46] *See supra* note 36.

mistook this transfer for a more generic "run of deposits" that typically would be ominous of a failing or failed institution. This more expansive and unqualified run required the bank's senior management to apply to the Central Bank for a credit in the form of "ordinary liquidity support" pursuant to the External Circular 25 of 1995.[47]

48. On June 2, 1998, the ordinary liquidity support credit was approved and funded in the amount of COP 144,674,000,000 with an interest rate equivalent to a fixed term deposit, plus 7%. This credit, however, was not sufficient medium term to meet the deficits that the government and non-government runs caused.

49. On June 18, 1998, Colombia's Central Bank authorized the disbursement of COP 270,000,000,000. This increase represents an added value equivalent to COP 125,326,000,000, in addition to the initial credit provided to GRANAHORRAR in the amount of COP 144,674,000,000. Pursuant to a third transaction, the government credit in favor of GRANAHORRAR reached an amount of COP 300,000,000,000.[48]

50. The Central Bank demanded GRANAHORRAR to guarantee the three immediately referenced transactions totaling COP 300,000,000,000 with an "A" rated asset performing portfolio. GRANAHORRAR met this demand.[49]

51. In an effort to refinance the three credit transactions with the Central Bank, GRANAHORRAR's management applied to FOGAFIN for a credit in the amount of COP

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[47] Resolución Externa No. 25 "Por la cual se dictan normas sobre el apoyo transitorio de liquidez del Banco de la República a los establecimientos de crédito."

[48] *See, e.g., letters from Banco de la República to GRANAHORRAR dated on June 2, 1998; July 1, 1998; July 3, 1998; July 31, 1998; September 1, 1998; and, October 1, 1998 (bates No. 19075, 22966, 23350, 26890, 30637, and 34465).*

[49] *Id.*

300,000,000,000.[50]

3. The Guarantee-Restructuring Program: A Liquidity Not a Solvency Challenge

52. At the time (the last quarter of calendar year 1998) that GRANAHORRAR applied to FOGAFIN for this credit, FOGAFIN had implemented a series of emergency measures to address the crisis. One such measure called for injecting liquidity into banks "that lacked liquidity but were not insolvent." This program was funded by a special tax on financial transactions falling within the nomenclature "2 x 1000".[51]

53. FOGAFIN denied the application. Instead, it granted a *pledge* or *loan guarantee* in keeping with which FOGAFIN would be obligated to assume GRANAHORRAR debt obligations should default ensue. This proposition was dysfunctional and contrary to FOGAFIN's own liquidity assistance program in place at the time, which had been extended to GRANAHORRAR's peer financial institutions.[52]

54. The practical workings of FOGAFIN's response to GRANAHORRAR's application for the restructuring of its three credits with the Central Bank were non-viable. It required GRANAHORRAR to enter the interbank credit market at a time when most institutional peers were themselves suffering the effects of the economic crisis, which of course had generated solvency and liquidity concerns that foreclosed GRANAHORRAR's likelihood of successfully monetizing FOGAFIN's guarantee-restructuring program, based on guaranteeing GRANAHORRAR's obligations.

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[50] *See* Covenant between Fondo de Garantía de Instituciones Financieras and Corporación Grancolombiana de Ahorro y Vivienda GRANAHORRAR, dated July 6, 1998. A true and correct copy is attached as Exhibit 5.

[51] *See* Composite Exhibit 2, *La Crisis Financiera y la Experiencia Internacional*, at p. 83.

[52] *Id.*

55. As part of a condition precedent to providing GRANAHORRAR with the guarantee-restructuring program, FOGAFIN required GRANAHORRAR to tender to FOGAFIN performing assets representing a value equivalent to 134% of the credit sought, which was the equivalent of COP 400,000,000,000.

56. Moreover, FOGAFIN's guarantee-restructuring program was both unprecedented and internally inconsistent. FOGAFIN had never proposed in response to a bank's application for credit a tender in the form of a guarantee that required the borrower (i) to make public to the industry sector its borrowing needs by petitioning peers for percentages of the credit sought from FOGAFIN, i.e. to make public what is private and proprietary to the institution and (ii) to tender a loan to value ratio of 134% in "A" rated performing assets to FOGAFIN in exchange for mere pledges or guarantees in order to induce third-party institutions to supply in whole or in part the amount of the credit sought. Put simply, not only did the guarantee-restructuring program product itself find no precedent in FOGAFIN's practice or in orthodox government institutional lending methodologies generally, but equally novel was the request to provide collateral in the form of "A" rated performing assets in exchange for mere guarantees. The concept of a borrower guaranteeing a guarantor, which guarantor is not functioning as the active lender, is itself uncommon and suspect.

57. The literature that this economic crisis fostered is bereft of any comparable proposition extended to a financial institution on behalf of FOGAFIN or any other similar government agency, instrumentality, department, or representative.

58. To the contrary, the contemporaneous literature and record evidence points to FOGAFIN deploying a very different methodology when processing comparable applications for similarly situated peer financial institutions akin to GRANAHORRAR.[53]

59. The guarantee-restructuring program had an effect inimical to its practical and immediate objective. Instead of just injecting liquidity into GRANAHORRAR by relieving the bank of the terms of the three short-term credit obligations with the Central Bank,[54] it fueled speculation concerning GRANAHORRAR's soundness and caused a marked decline in deposit holders tantamount to a run on the bank. Further, in addition to these detrimental effects, the guarantee-restructuring program encumbered the assets pledged as collateral for the proposed guarantee(s).

4. Why the Guarantee-Restructuring Program was Discriminatory

60. The contemporary evidence and writings demonstrate that GRANAHORRAR was the only bank to have been asked to enter into the guarantee-restructuring program. In this regard, the Colombian government acting through its instrumentalities, agencies, and representatives distinguished GRANAHORRAR and discriminated against GRANAHORRAR because none of the eleven (11) banks[55] that applied to FOGAFIN for credit during the economic crisis were either asked to enter into or offered the guarantee-restructuring program as a form of relief.

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[53] *See infra* n. 80, *Crisis de la Banca Hipotecaria Colombiana de 1998-2001*, authored by Héctor José Cadena Clavijo, asserting and developing the proposition that FOGAFIN was charged with mitigating the effects and addressing the core causes of the economic crisis in part by injecting liquidity into key influential financial intuitions, mostly those ranking among the first ten in the nation.

[54] *See* Composite Exhibit 6, consisting of communications between GRANAHORRAR and the Central Bank concerning the three (3) short-term credits here discussed.

[55] *See* El Crédito Hipotecario en Colombia: Evaluación del Impacto Regulatorio Pos-Crisis, Investigación Realizada por ANIF para el BID (May 2011). Among other banks: Granahorrar, Bancafé, Financiera FES, Megabanco, Banco Uconal, Fogacop. *See also* Cadena Clavijo, n. 80.

61. There are two salient premises that distinguish GRANAHORRAR from all other banks that received credits from FOGAFIN during the economic crisis between calendar years 1997 and 2001. First, none of those banks have U.S. citizens as the controlling shareholders. GRANAHORRAR's controlling shareholder block was configured by a majority of U.S. citizens.[56] Second, GRANAHORRAR had no ownership or legal affiliation with commercial banks. This distinction is material.

62. GRANAHORRAR's peer institutional banks were able to draw from their commercial bank affiliates for practical purposes in order to meet the regulatory mandated *per diem* liquidity threshold. GRANAHORRAR did not enjoy this resource. Its *per diem* regulatory liquidity minimum had to be self-funded from its savings and loan operations.

63. As of October 1, 1998, GRANAHORRAR was a sound and viable savings and loan financial institution. Indeed, on that date the Central Bank authored a report titled: "*ANÁLISIS SOLICITUD NUEVO PLAN DE AMORTIZACIÓN APOYO ESPECIAL DE LIQUIDEZ C.A.V. GRANAHORRAR*", which was prepared under the auspices of their technical department, SGMR, that assesses the banks' solvency.[57] The report chronicles that "the savings and loan [GRANAHORRAR] despite registering an 8.62% loss of net positive equity during the month of August [1998], it is notable that this figure (8.62%) still retains a much better net equity position than the 7.8% that the industry sector has recorded during the last few years. This level of performance has allowed the entity [GRANAHORRAR] to continue to sustain an adequate solvency percentage (10.38%) that is higher than the legal limit of 9% and also higher than the aggregate of savings and loans that has been registered at 10.21%. Accordingly,

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[56] *See* paragraphs 16 to 40 *supra*.

[57] A true and correct copy of this document is here attached as Exhibit 7.

GRANAHORRAR has a very favorable solvency status but with liquidity hardships because of its inability to change its image before institutional investors."[58]

64. This admission is important. It is contained in a document that the leading financial sector instrumentality of the government of Colombia itself authored on a date of particular relevance to this cause. In part for these reasons its authenticity is particularly helpful to any effort to understand GRANAHORRAR's solvency as of August 1998.

65. In addition to emphasizing an industry sector solvency percentage that positively surpasses the legal limit below which solvency would constitute a legal liability that *may* invite prudential measures under mandatory national law, it notes that GRANAHORRAR enjoyed a positive solvency status as of August 1998 that exceeded that of peer savings and loans at a national level. The Central Bank's technical team auditing GRANAHORRAR at the time did not identify, let alone recommend, prudential measures on the part of the State or its instrumentalities.

66. There is a second proposition in the Central Bank's analysis pertaining to liquidity that commands attention. The Central Bank itself attributes liquidity hardships that GRANAHORRAR at that time was experiencing to the Bank's inability "to change its image before institutional investors" ["*no poder revertir la imagen ante los inversionistas*

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[58] The Spanish language original of the Central Bank's analysis merits citation on its entirety:

> De otra parte, la CAV a pesar de haber registrado durante el mes de agosto pérdida de participación del patrimonio al situarse en el 8.62% de los activos, esta es aun superior al 7.8% que registra en los últimos años el sector. Esto ha permitido que la entidad mantenga un indicador de solvencia adecuado (10.38%) por encima del límite legal (9%) y de los niveles del conjunto de CAV (10.21%).
>
> Así las cosas, Granahorrar, de una parte presenta una situación de solvencia aun favorable pero agravamiento en las condiciones de liquidez al no poder revertir la imagen ante los inversionistas institucionales.

Id. at p. 5.

institucionales"].[59]

5. GRANAHORRAR's Actual Solvency Status Through 1998

67. GRANAHORRAR's "image issues" were of recent vintage, as the factual chronology plainly establishes. Their origins are inextricably, and as a matter of causation, tied to the guarantee-restructuring program, and to the unorthodox and unprecedented formula for liquidity that FOGAFIN prescribed. Rather than address GRANAHORRAR's liquidity crisis, FOGAFIN (i) wrested "A" rated assets from GRANAHORRAR's net bottom-line assets, (ii) did not fund GRANAHORRAR's immediate needs arising from the restructuring of the three short-term credits with the Central Bank, and (iii) caused GRANAHORRAR to disclose that FOGAFIN would not lend but only serve as guarantor with respect to third-party loans pursuant to a financing structure that was uncommon and itself conducive to negative image inferences.

68. The Central Bank was hardly the only Colombian government instrumentality to report on GRANAHORRAR's economic viability and financial status during the last quarter of 1998. FOGAFIN's Board of Directors Minutes No. 223, dated September 23, 1998, which was attended by (i) Juan Camilo Restrepo Salazar (Minister of the Treasury and Public Credit), (ii) Sergio Clavijo (Vice Minister, Ministry of the Treasury and Public Credit), (iii) Andrés Uribe Arango (Superintendent of Securities), (iv) Miguel Urrutia Montoya (Chairman of the Central Bank of Colombia), (v) Santiago Madrinan de la Torre (representative-delegate of the President of the Republic of Colombia), and (vi) Gilberto Gomez Arango (representative-delegate of the President of the Republic of Colombia), among other notables, is eloquent in documenting GRANAHORRAR's financial liability at that time.[60] Annex 1 of that document reads that "the

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[59] *Id.*

[60] A true and correct copy of the Minutes of the Board of Directors of FOGAFIN, Minutes No. 223, September 23, 1998 session, bates No. 01981, are here attached as Composite Exhibit 8.

credit portfolio [of GRANAHORRAR in September 1998] reflected a COP 2,134,721 million value, representing a 13.85% growth during the first eight months [of the year], principally as a consequence of the monetary adjustment."[61] The Minutes further provide that "the value of [GRANAHORRAR] net assets at the time was in the amount of COP 218,465 million reflect[ing] a 14.02% increase during this same timeframe [the first eight months of calendar year 1998]."[62]

69. Moreover, the FOGAFIN Board identified 1998 profits (limited to the first eight months of the calendar year) in the amount of COP 7,082 million, notwithstanding that this figure represented a 65.90% decrease with respect to the same timeframe one year earlier.[63] These Minutes pointed to a 10.67% solvency index rating. The Board of Directors' solvency finding comports with that of the Central Bank's just one month earlier that placed GRANAHORRAR's solvency score at 10.38%.[64]

70. FOGAFIN's Board Minutes do not paint a picture of a failed financial institution commanding immediate intervention. Also, it does not speak of a savings and loan that is likely to fail in the near future. Quite the contrary is the case.

71. The very distinguished FOGAFIN Board of Directors projected that, assuming basically the *status quo ante*, GRANAHORRAR would yield gains during the last quarter of the 1998 calendar year.

72. The FOGAFIN Board of Directors forecast that during the months of October, November, and December of calendar year 1998 GRANAHORRAR would generate profits for

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61 *Id.* at No. 01985.

62 *Id.*

63 *Id.*

64 *See* Exhibit 7.

the year in the amount of COP 3,230 million. The solvency projected rating was equally promising at 12% for that same three month timeframe.[65]

73. GRANAHORRAR's fundamentals, according to FOGAFIN's and the Central Bank's technical team (SGMR), were sound. None of the writings that FOGAFIN or Central Bank technicians authored reflected a solvency problem, let alone a solvency crisis warranting the placement of the bank in receivership or otherwise inviting government intervention.

74. The government of Colombia's assessments concerning GRANAHORRAR's solvency prior to October 1998 always was consistent. It acknowledged that GRANAHORRAR was perfectly solvent in both relative and absolute terms. In addition, these pronouncements are compelling and binding as to Colombia because they were contained in materials that FOGAFIN or the Central Bank itself authored. These admissions date to GRANAHORRAR's early communications with FOGAFIN in July 1998 concerning its petition for the refinancing of the three short-term credits that GRANAHORRAR had placed with the Central Bank.

75. The FOGAFIN Board of Directors' Minutes dated July 2, 1998, memorialized FOGAFIN's findings concerning GRANAHORRAR's positive solvency. In those Minutes the very Board itself notes that GRANAHORRAR's solvency index is "satisfactory" and describes it as in the range between 10.62% (projected) for May 1998 to 10.65% through December 1, 1999.[66]

76. In those same Minutes the Board emphasizes that GRANAHORRAR has no solvency issue whatsoever. The Minutes in pertinent part read:

> The Superintendent of Banking spoke and noted that the scope of GRANAHORRAR's challenges was not simple to calibrate, but

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[65] *Id.*

[66] *See* FOGAFIN Board of Directors Minutes, dated July 2, 1998, No. 217, Bates No. 01932 at 01936, a true and correct copy is attached as Composite Exhibit 9.

> that *it was important to understand that the entity's problem is essentially one of liquidity and not having to do with solvency.* (Emphasis supplied)[67]

77. At no time material to this cause did insolvency cause Colombia to take over GRANAHORRAR. FOGAFIN, the Superintendency of Banking, and the Central Bank, all identified a liquidity concern but not an insolvency problem. As to this proposition the contemporaneous documentary evidence that governmental agencies authored highlight GRANAHORRAR's positive solvency status.[68] Also, GRANAHORRAR's contemporaneously authored accounting records further support Colombia's findings of a positive solvency status that never descended below the legal solvency litmus test.[69]

C. FOGAFIN's illicit manipulation and dissolution of GRANAHORRAR's solvency

1. A Pattern of Discriminatory Treatment: The Clause

78. FOGAFIN engaged in a pattern of discriminatory treatment directed at GRANAHORRAR that led to FOGAFIN's illicit dilution and evisceration of GRANAHORRAR's solvency. As noted, the guarantee-restructuring program had no precedent and FOGAFIN only used it with respect to GRANAHORRAR. This program was first documented in an instrument titled: *Covenant between Fondo de Garantía de Instituciones Financieras and Corporación Grancolombiana de Ahorro y Vivienda GRANAHORRAR*, which

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[67] The Spanish language original states:

> A continuación la Superintendente Bancario intervino para precisar que, en todo caso, si bien no resulta sencillo el dimensionamiento de las dificultades que enfrenta Granahorrar, es importante tener en cuenta que el problema de la entidad es eminentemente de liquidez y no de solvencia.

[68] *See, e.g.*, Exhibits 3 and 7.

[69] Here attached as Composite Exhibit 10.

was executed on July 6, 1998.[70] The "agreement" placed a limit of COP 300,000,000,000 on the amount that FOGAFIN would guarantee to third-party funders funding GRANAHORRAR. GRANAHORRAR in turn collateralized the guarantee by pledging and transferring "A" rated producing assets to FOGAFIN having a minimum value of 134% of the guarantee's limit. Between the date of execution of this contract (July 6, 1998) and the signing of a modification of that instrument (September 24, 1998), FOGAFIN continued to discriminate against GRANAHORRAR beyond just denying GRANAHORRAR direct funding, and subjecting it to treatment less favorable than that accorded to other similarly situated financial institutions. In particular, it now laid the predicate for taking over and expropriating GRANAHORRAR by causing the dissolution of GRANAHORRAR's solvency. One of FOGAFIN's initial steps towards the implementation of this objective entailed forcing GRANAHORRAR to execute an omnibus cross-default provision unrelated to the very subject matter of the July 6, 1998 instrument. During this very timeframe (July 6 - September 24, 1998) FOGAFIN continued to decline petitions for direct funding. Also during this timeframe GRANAHORRAR sought from FOGAFIN a COP 20,000 million limit increase with respect to FOGAFIN's guarantee-restructuring program. This increase became a functional necessity arising from an increasingly acute liquidity challenge.

79. FOGAFIN consistently denied direct funding without proffering any explanation for this denial, but agreed to increase the guarantee's limit by COP 20,000 million.

80. On September 24, 1998, FOGAFIN made clear to GRANAHORRAR that it would not provide an extended guarantee unless GRANAHORRAR agreed to accept an omnibus cross-default *Clause* allowing FOGAFIN to declare GRANAHORRAR in default and to demand

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[70] A true and correct copy of that instrument is here attached as Exhibit 5.

immediate satisfaction of obligations within a unilaterally imposed timeframe. GRANAHORRAR had no recourse but to accept FOGAFIN's terms and conditions, as it had with respect to the July 6, 1998 agreement, an instrument the terms of which according to FOGAFIN were not susceptible to negotiation. Thus, on September 24, 1998, FOGAFIN and GRANAHORRAR executed a document titled: *Otrosí No. 11 al Convenio entre el Fondo de Garantías de Instituciones Financieras y la Corporación Grancolombiana de Ahorro y Vivienda Granahorrar*.

81. FOGAFIN, however, premised the guarantee, which in effect was in a *de facto* adhesion contract, on the inclusion of the cross-default omnibus *Clause* that would empower FOGAFIN to place GRANAHORRAR in a default position triggering FOGAFIN's intervention of the bank without substantive cause on a strict liability basis, GRANAHORRAR's solvency notwithstanding. [71]

82. Specifically, on July 6, 1998, FOGAFIN executed a contract with GRANAHORRAR that served as the legal instrument documenting the guarantee-restructuring program.[72] This instrument guaranteed funding in the amount of COP 300,000 million, and also provided that GRANAHORRAR would pledge and transfer to FOGAFIN "A" rated performing assets that at no time were to be valued at less than 134% of the pledged limit memorialized in that instrument, COP 300,000,000,000. On September 24, 1998, this contract was modified to account for a guarantee that would cover increased funding up to COP 320,000 million (*See* Exhibit 11). In addition, however, to a modification of the amount covered by the guarantee, FOGAFIN now provided GRANAHORRAR with no alternative but to agree to the inclusion of

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[71] *See* contract between FOGAFIN and GRANAHORRAR dated September 24, 1998, a true and correct copy of which is here attached as Exhibit 11.

[72] A true and correct copy of this instrument is here attached as Exhibit 12.

an omnibus cross-default provision contained in the second clause of that adhesion contract, which provision reads:

> Second, add to the COVENANT the following clause: "TWENTY THIRD: In the event that GRANAHORRAR ceases payments, GRANAHORRAR's obligation to repurchase the pledged assets in favor of the FUND[73], it will be deemed that the sale of such assets will be permanent and the FUND shall be able to dispose of those assets as it deems fit of those assets [the "A" rated performing assets totaling no less than a 134% of the amount guaranteed] that make up the totality of the pledged portfolio together with corresponding guarantees. PARAGRAPH: In order to render this clause applicable and viable, GRANAHORRAR authorizes pursuant to this agreement the FUND and empowers it to secure from the Central Bank and the Superintendency of Banking all information necessary to corroborate any cessation of payments [default] on the part of GRANAHORRAR."[74]

83. The *Clause* is specious and indicative of an irregular and unorthodox practice exercised to the detriment of GRANAHORRAR based on nine, without limitation, propositions. First, there is no precedent for such *Clause*. A review of FOGAFIN's practice demonstrates that the imposition of such a *Clause* on a financial institution during the economic crisis was singular to GRANAHORRAR.

84. Second, FOGAFIN did not (i) offer any alternative to GRANAHORRAR and insisted on inclusion of the *Clause* as a condition precedent to any expansion of the guarantee's

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73 FUND here represents FOGAFIN.

74 It is necessary to cite to this *Clause* in its entirety in the Spanish language original:

> SEGUNDO: Adicionar al CONVENIO la siguiente cláusula: "VIGESIMOTERCERA: En el evento en que se configure la cesación de pagos por parte de GRANAHORRAR, se entenderá extinguida la obligación de recompra de la cartera transferida por GRANAHORRAR al FONDO, de forma tal que la operación de venta quedará firme y el FONDO podrá disponer plena y totalmente de los pagarés que integren dicha cartera junto con sus respectivas garantías. PARÁGRAFO: Para dar aplicación a lo acordado en la presente cláusula, GRANAHORRAR por medio de este instrumento autoriza al FONDO para obtener del Banco de la República y de la Superintendencia Bancaria la información necesaria para establecer la cesación de pagos de GRANAHORRAR."

scope. It was a "take it or leave it" proposal, (ii) nor did FOGAFIN advance any reason(s) that would otherwise justify the inclusion of this *Clause*. Similarly, at no time did FOGAFIN venture to explain why GRANAHORRAR was being treated in a manner that found no precedent in FOGAFIN's practice and institutional charge to support financial institutions during the crisis.

85. Third, the inclusion of the *Clause* was not supported by *any* additional consideration. FOGAFIN did not offer GRANAHORRAR *any* additional benefits in exchange for the inclusion of the *Clause*. The terms of the contract remained the same. GRANAHORRAR was obliged, and executed, a transfer of "A" rated performing assets to FOGAFIN in an amount no less than 134% of the guarantee's limit. For this reason, the inclusion of the *Clause* represented an additional hardship on GRANAHORRAR because GRANAHORRAR had to deploy more assets material to its solvency that now, for reasons left unexplained, were subject to a forfeiture based upon undefined triggering terms.

86. Fourth, the *Clause* was omnibus. It contemplated imposition of default status as to the pledged assets based upon *any* act or omissions that FOGAFIN unilaterally may construe as a lapse of payment that in turn FOGAFIN again unilaterally may interpret as a default having to do with entities extraneous to the guarantee.[75]

87. Fifth, the *Clause* has an expansive definition of default ("cease payments"), that in effect is purely subjective and self-judging. The practical workings of the *Clause* is that it authorizes FOGAFIN to keep the pledged assets, without FOGAFIN tendering any funds in aid of GRANAHORRAR's liquidity challenge based upon FOGAFIN's exercise of its unbridled discretion as to GRANAHORRAR's transaction with two entities unrelated to FOGAFIN.

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[75] The terms set forth in Exhibit 11 are clear. The purpose of the guarantee, at least as memorialized in Exhibit 12, provides that the guarantee issues so that GRANAHORRAR may raise funds "to address a transitory liquidity issue".

88. Sixth, the *Clause* is draconian. It does not provide for a cure provision. Yet, exercise of FOGAFIN's "rights" under the *Clause* would have the practical consequence of divesting GRANAHORRAR of a significant percentage of its producing assets and thereby adversely compromising its solvency. Thus, under the semblance of formal legality FOGAFIN in fact was creating a vehicle for the free transfer to it of an important percentage of GRANAHORRAR's "A" rated performing assets free of any consideration in the form of payment for those assets, which objectively would "justify" FOGAFIN's expropriation of GRANAHORRAR based upon alleged solvency below the 9% legal threshold. Under these facts any such expropriation would be (i) lacking in due process, (ii) discriminatory, (iii) lacking a public purpose, and (iv) without compensation of any kind or amount.

89. Seventh, even though the *Clause* is cloaked with the trappings of a legally binding "waiver of the right to repurchase", it is substantively but a methodology of transferring to FOGAFIN, free of corresponding payment, "A" rated performing assets and more broadly control and ownership of the entire bank somehow premised on "a cessation of payment" to third parties, without more.

90. Eighth, the *Clause* does not legally, conceptually or otherwise further FOGAFIN's adherence to its statutorily based mandate to assist financial institutions and to deploy prudential measures in furtherance of the national banking system's soundness. To the contrary, it minimizes the likelihood of solvency and viability of the very financial institutions that it is charged with protecting.

91. Ninth, the *Clause* provides a factual basis from which to infer a clear intent to wrest solvency from GRANAHORRAR in furtherance of a plan to expropriate rather than to

engage in remedial measures to assist what FOGAFIN itself had identified as a transitory liquidity problem.

92. Tenth, the *Clause* and its workings bear no reasonable relationship to the implementation of remedial measures aimed at curing a "transitory liquidity" challenge. Instead, it is a strict liability punitive default provision triggered by an unrelated non-default event. FOGAFIN's unilateral and non-negotiable imposition of the *Clause* itself is evidence of an illicit exercise of regulatory sovereignty that finds no justification in law, equity or policy. It is an emblematic example of abusive power and of an illicit vehicle that seeks to provide a semblance of legal pretense for the unjust enrichment that would ensue from mere fulfilment of its terms.

2. FOGAFIN Purported to Discharge its Obligations Through the Sale of the Bank.

93. The guarantee-restructuring program and the *Clause* are only two of a number of discriminatory and non-responsive measures that FOGAFIN raised and implemented in the purported effort to carry-out its statutory mandate to aid financial institutions. The implementation of the *Clause* in FOGAFIN's second contract with GRANAHORRAR modifying the limits of the guarantee-restructuring program was the culmination of a series of predicate measures that FOGAFIN had identified as responsive to the very narrow and identifiable liquidity challenge that GRANAHORRAR faced. An illustrative example of these measures was FOGAFIN's denial of practical solutions that GRANAHORRAR had proposed at FOGAFIN's insistence that GRANAHORRAR shed its controlling U.S. shareholders.

94. In July 1998, GRANAHORRAR petitioned FOGAFIN for assistance concerning proposed transactions tailored to addressing the liquidity concern, but this time during the course of more reasonable timeframes than the 30 day maturation periods that FOGAFIN insisted on

placing. The first of these proposals consisted in increasing the guarantee limit of the guarantee-restructuring program by having the guarantee cover new debt that GRANAHORRAR would issue to third parties (irrespective of whether the prospective holder fell within FOGAFIN's purview) to mature up to ninety (90) days. The underlying rationale behind this petition was simple. GRANAHORRAR would not be able to address liquidity concerns by increasing the limit of the guarantee while having a more reasonable timeframe attaching to the transfer of its highest producing assets. Put simply, the proposal was configured as a no risk proposition that merely extended the maturation timeframe by sixty (60) days from that which FOGAFIN habitually required (30 days).

95. This petition did not warrant denial. The evidence demonstrates that FOGAFIN was far more flexible in accommodating less attractive and higher risk proposals that other GRANAHORRAR peer financial institutions had proffered. Indeed, the GRANAHORRAR petition presented no risk or possible prejudice to FOGAFIN.

(a) FOGAFIN Discriminates as to GRANAHORRAR petitions

96. Three (3) observations are warranted. First, GRANAHORRAR's petition does not cause FOGAFIN to advance any funds. It was of no cost to FOGAFIN. The guarantee-restructuring program is one under which FOGAFIN mostly functions as a recipient of assets the value of which exceeds FOGAFIN's "obligations" as guarantor. FOGAFIN did not fund the final and critical credit installment.

97. Second, grant of the petition does not create or otherwise increase exposure for FOGAFIN. The guarantee-restructuring program is configured such that FOGAFIN can only benefit from financial windfalls for which it did not disburse all necessary payments or assume risks.

98. Third, the only material qualification contained in GRANAHORRAR's petition, other than appealing to institutions beyond FOGAFIN's auspices, is the 90 day maturation period. This timeframe, however, finds foundation in both industry practice and FOGAFIN's own standard requirements. Under no metric is it excessive. Similarly, it creates no additional risk.

99. These elements notwithstanding, the petition was declined. FOGAFIN offered no explanation for the denial. It concluded, however, that the liquidity concern would best be addressed by having GRANAHORRAR's U.S. shareholders sell their interest in GRANAHORRAR despite a twelve (12) year history of growth and positive market penetration under the guidance of the U.S. investors.

100. FOGAFIN's analysis was no different as to GRANAHORRAR's second request. In this petition, GRANAHORRAR proposed a 50% reduction in the guarantee's limit, all other terms unchanged, but for a 120 day maturation period together with an accounting arrangement that would free the guarantee's collateral in a direct proportion to payments registered.

101. Here too the proposition did not invite FOGAFIN to assume *any* risk. The second proposition did contemplate that the liquidity issue could best be addressed by maximizing GRANAHORRAR's solvency while providing for a more flexible maturation period. As with the first proposal, FOGAFIN concluded that the appropriate methodology for management of the liquidity challenge was for FOGAFIN to have complete custody and discretion over GRANAHORRAR's net assets together with calling for the removal of the U.S. shareholders. FOGAFIN's Board of Directors Minutes No. 218, dated July 22, 1998 (Bates No. 01941) memorializes both the two-prong petition, and FOGAFIN's response:

1. Petitions.

Giving the constant *liquidity* situation that Corporation Granahorrar has been facing, notwithstanding having put in place the guarantee mechanism in order to enable it to undertake interbank transactions in the open market, including overdrafts concerning current accounts that the FUND's Board of Directors approved during its last meeting, the CEO of that entity petitioned FOGAFIN, pursuant to communications dated July 8 and 16, respectively, for the enlargement of the guarantee's limit with respect to that issue concerning third-parties (irrespective of whether such parties are in the FUND), and a second petition pursuant to which the pledged assets would not exceed the amount of COP 150,000 million, to have a maturation of a 120 days, which would diminish in an amount equivalent to the guarantee's limit. (emphasis supplied).

Having had informal conversations with some of the Fund's Board members, the Fund has resolved that such petitions, in principle, do not appear to be viable, especially because of the Fund's conviction, which it already has expressed, that a viable alternative for saving that entity *necessarily would entail changing its majority shareholders.*

The Fund's administration then directed its efforts to communicating these concerns to Granahorrar's CEO. At the time of this writing the Fund was waiting for a communication from the Corporation [Granahorrar] reflecting the shareholders' agreement with this proposition and the explicit will and disposition to take all steps necessary to implement the proposed strategy. (emphasis supplied).[76]

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[76] A true and correct copy of the FOGAFIN Board of Director Minutes No. 218, dated July 22, 1998 (Bates No. 01941) is here attached as Exhibit 13.

The Spanish language original reads:

1. SOLICITUDES.

Dada la persistencia de la situación de iliquidez que ha venido enfrentando la Corporación Granahorrar, no obstante la puesta en marcha del mecanismo de aval para operaciones con el mercado interbancario, incluidos sobregiros en cuenta corriente, aprobado por la Junta Directiva del Fondo durante su pasada reunión, el Presidente de dicha entidad solicitó, mediante comunicaciones del 8 y 16 de Julio pasados, respectivamente, la ampliación de la cobertura del cupo aval del Fondo a operaciones con títulos de deuda emitidos hasta por 90 días por la Corporación a favor de cualquier entidad (inscrita o no en el Fondo), y una operación de descuento de cartera de créditos por un monto de

102. FOGAFIN does not explain why it concluded that the two requests would not be viable for purposes of addressing the liquidity problem. It also did not explain, because it cannot, any connection between the liquidity problem at issue and the U.S. shareholders' removal from GRANAHORRAR.

103. It remains opaque how or in which ways the removal of the U.S. shareholders would be remedial or at all of consequence to the liquidity challenge, let alone why such removal would be a matter of "necessity". The compelling and overwhelming evidence demonstrates that the U.S. shareholders were pivotal to GRANAHORRAR's growth, development, and success. It does remain evident and uncontroverted, however, that FOGAFIN did not avail itself of the formula of removing majority shareholders as a solution to an economic crisis-driven liquidity problem experienced by a financial institution with otherwise strong fundamentals, other than with respect to GRANAHORRAR.

104. During every phase of FOGAFIN's interaction with GRANAHORRAR, FOGAFIN applied to GRANAHORRAR unique and unorthodox formulations in purportedly addressing a liquidity problem that were not deployed with other similarly situated financial institutions.

> $150,000 millones, a un plazo de 120 días, disminuyendo en un monto equivalente el cupo avala autorizado.
>
> Adelantadas conversaciones informales con algunos miembros de la Junta Directiva del Fondo, tales peticiones no parecieron, en principio, procedentes, en especial por el convencimiento ya expresado por algunos de ellos de que una alternativa viable de salvamento de la entidad, supondría necesariamente el cambio de sus accionistas mayoritarios.
>
> La administración del Fondo se dio, entonces, a la tarea de plantear estas inquietudes a la Presidencia de Granahorrar. En el momento de escribir este documento, se estaba a la espera de una comunicación de la Corporación [Granahorrar] manifestando el acuerdo de los accionistas con este planteamiento y la voluntad explícita de dar los pasos necesarios para implementar la estrategia propuesta.

3. FOGAFIN Persists in Removal of the U.S. Shareholders as a Solution to the Liquidity Challenge

105. The U.S. shareholders demonstrated a sustained interest in working with FOGAFIN pursuant to orthodox financial formulations aimed at addressing the liquidity challenge. FOGAFIN's responses to these petitions were irregular, unorthodox, and absolutely non-responsive to the actual liquidity technical crisis. A close analysis of the history concerning the petitions that GRANAHORRAR tendered and FOGAFIN's proposed and actual assistance is both eloquent and illustrative.

106. FOGAFIN failed to provide GRANAHORRAR with the requisite maturity timeframes that it requested. Instead, FOGAFIN exacerbated the liquidity crisis by holding fast, without room for negotiation, to a thirty (30) day maturation timeframe.[77] Consonant with this disposition, FOGAFIN did not honor GRANAHORRAR's petition for comprehensive direct funding. FOGAFIN responded to these multiple requests by confecting the guarantee-restructuring program, which as previously observed, merely compromised adversely GRANAHORRAR's solvency status pursuant to an irregular and unprecedented methodology that experts shall testify to be inapposite to the liquidity crisis and GRANAHORRAR's needs. Moreover, this situation was compounded and made worse because FOGAFIN denied GRANAHORRAR the specific credit-guarantee increases that were essential to the challenges that the bank then faced.

107. FOGAFIN's discriminatory treatment extended beyond the immediately referenced irregularities and abuse of the exercise of its regulatory authority. The FOGAFIN Board of Directors simply was not open to negotiation with GRANAHORRAR. It insisted on forcing GRANAHORRAR, upon penalty of a regulatory abandonment and disavowable act of its

[77] *See* Exhibit 8, bates No. 01984, Exhibit 9, bates No. 01939, and Exhibit 13, bates No. 01941.

own regulatory-statutory mandatory law imperatives, on imposing (as it did) on GRANAHORRAR an adhesion contract in the ostensible form of a covenant for relief.

108. That contract, and its subsequent amendments, furthered FOGAFIN's objective of wresting from GRANAHORRAR its historically sound solvency status. As such, FOGAFIN included in its amendment to the July 6, 1998 covenant the September 24, 1998 amendment containing the *Clause*, which experts shall testify (i) was not responsive to a liquidity challenge, (ii) did not supply any form of immediate, medium-term, or long-term relief, (iii) does not comport with standard economic formulas and methodologies that would be responsive to the liquidity issue or to GRANAHORRAR's petitions, and (iv) that was unprecedented as a FOGAFIN proposed cure for the economic ailments attaching to other financial institutions because of the national economic crisis. The pattern of ineffective and discriminatory treatment comprised the additional element of commanding, bereft of explanation or analysis, the removal of the U.S. shareholders by forcing GRANAHORRAR's principal shareholder block to sell its shares. FOGAFIN never explained, largely because there is no coherent explanation, the reasons why removal of the shareholder leadership that had caused the bank to become a national brand name and one of the most successful in every cognizable banking economic sector, would cure the liquidity concern and contribute to the bank's stability.

109. FOGAFIN's insistence on the removal of the U.S. shareholders reached its apogee on September 23, 1998. The FOGAFIN Board of Directors' Minutes of that date reflect yet two additional formulas for removal of the U.S. shareholders that were equally unavailing to GRANAHORRAR's petitions as to the liquidity issue.

110. First, FOGAFIN proposed to have the universe of peer financial institutions that were currently serving as GRANAHORRAR's creditors under the guarantee-restructuring

program, as prospective buyers of the bank's controlling interest. This methodology for addressing the liquidity concern is disconcerting. It is less than clear how substituting one block of monolithic shareholders with a quilt of institutional investors, all of whom directly and explicitly competed with GRANAHORRAR, would accomplish anything beyond the removal of GRANAHORRAR's controlling shareholder block. Moreover, this proposal raises a number of collateral concerns. One such concern entails safeguarding GRANAHORRAR's proprietary information, as well as balancing the interests of GRANAHORRAR and the soundness of prudential measures affecting the entirety of the national banking system with those of specific institutional competitors of GRANAHORRAR.

111. For example, as to this latter point, the Minutes (EXHIBIT 8, at bates No. 01983) are careful to memorialize that Dr. Gilberto Gómez, then Chairman of GRANAHORRAR competitor Banco Cafetero and a FOGAFIN Board member, recused himself with the Board's approval from that part of the discussion that concerned the sale of GRANAHORRAR to the GRANAHORRAR creditors under the guarantee-restructuring program. Yet, it is clear from the very Minutes and other collateral documentary and testimonial evidence that Dr. Gilberto Gómez and the competitor bank that he led were steeped in the details of FOGAFIN's objective concerning the manipulation of GRANAHORRAR's solvency, as well as FOGAFIN's eventual outright expropriation of the bank.[78]

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[78] The September 23, 1998 FOGAFIN Board of Directors Minutes in part provides:

> 4th GRANAHORRAR MATTER
>
> At this point of the Board meeting Dr. Gilberto Gómez asked to be excused from the meeting because of his role as Chairman of Banco Cafetero, having concluded that his participation in this part of the meeting would be inconvenient in light of his personal interest in the matter.

112. The second proposed methodology for addressing the liquidity concern pursuant to the removal of GRANAHORRAR's principal shareholder block is even more disconcerting. The "recommendations" order of the day agenda item three (3) of the September 23, 1998 Board Minutes reads:

> If the Board considers it convenient, the maturation timeframe for the repurchase of the portfolio assets [the "A" rated assets that GRANAHORRAR had pledged to FOGAFIN as part of the guarantee-restructuring program] could be enlarged until October 31 of this year, which should be enough time to allow for the removal (*"enajenación"*) of the principal shareholder block [the U.S. shareholders], by any means whatsoever [*"por cualquier mecanismo"*].

113. Certainly enlarging the timeframe without *any* reference to GRANAHORRAR's economic best interest raises considerable concerns in connection with FOGAFIN's intent and objectives regarding GRANAHORRAR's core problem; namely, a transitory but still material liquidity issue. Yet, at this point the Board is indifferent over *who* or *which* shareholder group will govern GRANAHORRAR *so long as it is not the U.S. shareholders*. In this same context,

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> The Board of Directors agreed with his sentiment and authorized his departure.
>
> Thereafter the Superintendent of Banking had the floor and advised the Board with respect to the consensus that the Chairman of the financial entities serving as GRANAHORRAR's creditors with respect to the latter's pledged assets in favor of FOGAFIN, to participate in the removal of GRANAHORRAR's majority shareholder block identified as 'Grupo Carrizosa' [the U.S. shareholders] pursuant to a methodology that would satisfy the creditors' rights with the tender of the shareholder block's interest in GRANAHORRAR.

After several conversations the referenced financial entities designated the representatives of the following banks: Santander, Cafetero [***the institution that Dr. Gilberto Gómez led as Chairman***] and Bancolombia, to lead and develop the negotiations with the GRANAHORRAR majority shareholder block [the U.S. shareholders] and with the Government. *See* Exhibit 8 *supra* n. 60, at Bates No. 01983.

The Minutes made clear that Dr. Gilberto Gomez's self-induced absence from that part of the Board meeting concerning the removal of GRANAHORRAR's majority shareholder block was just a formal act lacking in substance and intended only to provide a semblance of propriety that in substance was lacking.

the FOGAFIN Board has relinquished any pretense of finding a technical solution to GRANAHORRAR's liquidity challenge. The minutes contribute to establishing that the Board's *singular* concern was the removal of the U.S. shareholders.

114. The second bullet point under agenda item three (3) "recommendations" of the September 23, 1998, Board Minutes points to another negative on the Board's behalf with respect to GRANAHORRAR's request for a technical solution to a technical problem:

> We do not conclude that it is viable to accept GRANAHORRAR's proposal concerning satisfaction of the obligation running in favor of the Fund with the securitization of the portfolio assets [the "A" rated performing assets pledged to FOGAFIN under the guarantee-restructuring program]. Because these papers have little liquidity, this transaction, which at one point was conceived as a short-term undertaking, would mean the freezing of Fund assets for a period of seven (7) years. The commitments that the Fund had assumed (See Annex 1) do not allowe for grant of this request at least not in its totality. For this very same reason, it is not convenient to honor the request for an increase of the guarantee limit.[79]

115. The Minutes reflect that FOGAFIN was unduly concerned only with the extent to which it would not be able to benefit from the subject assets for a period of time of seven (7) years that it implicitly identifies as too long or inordinate. There is no language in the minutes suggesting that an economic analysis and necessary consideration of competing benefits and detriments attaching to GRANAHORRAR's liquidity issue was considered.

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[79] The Spanish language original reads:

> No se considera viable aceptar la propuesta de Granahorrar consistente en el pago de la obligación con el Fondo con títulos resultantes de la titularización de cartera. Dada la poca liquidez de estos papeles, esta operación, que en un principio se concibió como de corto plazo, significaría la inmovilización de recursos del Fondo por un período de siete años en promedio. Los compromisos asumidos por el Fondo (ver cuadro anexo) no permiten acceder a esta solicitud, al menos en su totalidad. Por la misma razón, no es conveniente acceder a la ampliación del cupo. *Id.* at Bates No. 01984.

116. Moreover, the observation that a seven (7) year "encumbrance" on these assets would be detrimental is patently disavowed by FOGAFIN's own subsequent course of conduct. The purported seven (7) year "hardship" actually represents standard industry practice (as Experts shall testify) and constitutes FOGAFIN's standard practice. Accordingly, FOGAFIN's reliance on this premise as a basis for denying GRANAHORRAR an increase in the guarantee's scope defies conceptual justification. This representation was but a meritless pretext for further discriminatory action directed at GRANAHORRAR generally and the U.S. shareholders in particular. In fact, in an academic analysis (a magister thesis) by then candidate Mr. Héctor José Cadena Clavijo, under the supervision of Prof. Dr. Álvaro Montenegro of the Pontificia Universidad Javeriana dated February 2015, an analysis of the capitalization credits that FOGAFIN tendered as of 1999 establishes that FOGAFIN routinely and without qualification availed itself of 7 to 9 year credit maturation timeframes. An illustrative chart is provided in that study. It is here reproduced in its entirety:

Condiciones Financieras de la Línea de Capitalización de FOGAFIN 1.999

	Crédito a los Accionistas	Bonos FOGAFIN Banca Privada
Plazo	Hasta 7 años ampliado a 9 años.	Promedio 7 años
Período de gracia	Un año de intereses. Ampliado a 2.5 Tres (3) años a capital. Ampliado a 4	Ninguno a interés
Tasa de interés	DTF+2% (Los primeros 3 años) DTF+3% (Los últimos 4 años)	DTF
Amortizaciones	Semestrales	Única al vencimiento
Pago de intereses	Trimestrales a semestrales	Trimestrales
Garantía	133% del valor de las acciones pignoradas	FOGAFIN

Fuente: Fondo de Garantías de Instituciones Financieras [80]

[80] A true and correct copy of the magister thesis titled: *Crisis de la Banca Hipotecaria Colombiana de 1998-2001*, authored by Héctor José Cadena Clavijo, under the auspices of Prof. Dr. Álvaro Montenegro, Pontificia Universidad Javeriana, Facultad de Ciencias Económicas y Administrativas, at p. 20, is here attached as Exhibit 14.

117. Section 3.2.1 of the referenced analysis establishes that FOGAFIN tendered long-term credit based upon a 10% solvency threshold metric to a number of financial institutions (exclusive of GRANAHORRAR) that had petitioned for capitalization. In a number of instances it granted up to eighty percent (80%) of the capital requirements of the particular entity in question.[81]

118. As a result of the liquidity crisis that the government-imposed austerity measures in the form of artificially high interest rates generated, particularly during the 1998-1999 timeframe, it was not viable to address the crisis by compelling shareholders to engage in situation-altering capital campaigns, notwithstanding that a modified version of this approach was foisted on GRANAHORRAR by FOGAFIN, FOGAFIN disbursed "short-term credits" for a six (6) month timeframe. Pursuant to this methodology FOGAFIN capitalized fifty percent (50%) of the specific liquidity need while the Superintendent of Banking further extended the six (6) month timeframe to twelve (12) months with respect to the remaining fifty percent (50%).[82]

119. FOGAFIN did not extend any of these liquidity solution formulas to GRANAHORRAR, notwithstanding GRANAHORRAR's historically robust solvency status that had never reached the nine percent statutory litmus test for insolvency. The record that FOGAFIN generated during the 1998-1999 timeframe, however, demonstrates that it had tendered significant relief, in the form of credits and reasonable maturation periods, to eleven

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[81] *Id.* at p. 18. The Spanish language original reads:

> En la segunda fase, las entidades financieras que tomaron está línea debieron capitalizarse hasta alcanzar un índice de solvencia del 10%, para lo cual FOGAFIN, otorgó créditos de largo plazo hasta por el 80% del capital requerido por la entidad, cuya garantía se constituyó en las acciones emitidas por el mismo establecimiento de crédito y pignoradas por los accionistas a favor de FOGAFIN.

[82] *Id.*

(11) GRANAHORRAR peer financial institutions: (i) COLPATRIA, (ii) DE CRÉDITO, (iii) SUPERIOR, (iv) INTERBANCO, (v) UNIÓN COLOMBIANO, (vi) MEGABANCO, (vii) COFINORTE, (viii) COLTEFINANCIERA, (ix) MULTIFINANCIERA, (x) CREDINVER, and (xi) CONFINANCIERA.

120. FOGAFIN *never* provided GRANAHORRAR with a maturation date beyond thirty (30) to sixty (60) days. Also, the July 22, 1998 FOGAFIN Board of Directors Minutes reflects that the interest rate that FOGAFIN extended to GRANAHORRAR was "DTF plus seven points with a maturation timeframe varying between one (1) and two (2) months."[83] This interest rate as of July 5, 1998, based upon the Central Bank's fixed interest rate table, was equivalent to a 44.57% rate of interest. FOGAFIN, however, was providing the eleven (11) referenced financial institutions with a 19.79% interest rate with a maturation period of seven (7) to nine (9) years. The discriminatory practice was stark and arresting:

> 19.79% (eleven institutions) versus 44.57% (GRANAHORRAR), and seven (7) to nine (9) years maturation (eleven institutions) versus 30 to 60 days (GRANAHORRAR).[84]

121. It is important to emphasize that the information contained in the academic report here attached as Exhibit 14 explicitly references FOGAFIN as the source for all factual premises there recorded and relied upon.

122. FOGAFIN's pattern of discriminatory conduct, misleading assertions, and abandonment of the exercise of sound prudential measures that it was compelled to implement pursuant to mandatory national laws and regulations, are all revealed in documents, such as

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[83] FOGAFIN Board of Directors Minutes No. 218, dated July 22, 1998, at Bates No. 01945 (Exhibit 13).

[84] A true and correct copy of the Central Bank's table of historical interest rates is here attached as Exhibit 15.

FOGAFIN's Board of Directors Minutes, that *FOGAFIN itself* contemporaneously authored at all times material to this cause. They are not based on speculation, the argument of counsel, or other advocacy driven propositions. These elements of proof are particularly compelling and probative because FOGAFIN authored them.

4. A "Bait and Switch" Approach to the Contract Transferring the U.S. Shareholders' Interest to Creditor Institutions.

123. In furtherance of FOGAFIN's uncompromising directive, the U.S. shareholders agreed to transfer their interest in GRANAHORRAR to the financial institution creditors who were collateralized by the guarantee-restructuring program. In an effort to comply with this mandate, between September 30 and October 1, 1998, GRANAHORRAR's principal shareholder group, which included the U.S. investors, met with GRANAHORRAR's creditors, all of whom were gathered at the main office of Banco Cafetero. Banco Cafetero, together with Banco de Colombia, and Banco Santander (the "creditor representatives"), were the three (3) financial institutions that FOGAFIN had designated for purposes of representing GRANAHORRAR's creditors as well as FOGAFIN, in this transaction. What ensued was a poorly orchestrated frustration of purpose.

124. At first GRANAHORRAR and the creditor representatives were not able to execute the contract providing for the transaction. Oddly enough, the creditor representatives had sent the physical agreement by mail to GRANAHORRAR's principal place of business, even though all parties were meeting in the same room at Banco Cafetero's headquarters. Confronted with this "logistical challenge" GRANAHORRAR's principals suggested that the creditor representatives merely print-out another exemplar of the agreement. When the agreement was reprinted the GRANAHORRAR shareholders observed that the terms of the agreement had been

materially altered. A number of provisions contained in that document had *never* been discussed, let alone negotiated and agreed upon.

125. Two (2) very material terms of the agreement had been modified without prior discussion whatsoever. First, the creditor representatives insisted that the GRANAHORRAR principals were to value their shares at 50% *less* than the original agreed upon price. The creditor representatives were confronted with this adjustment and told that (i) the mailing of the original agreed upon contract to a place where the senders understood quite well there would be no recipient at the time of arrival, and (ii) the amount of the adjustment at 50% less than the agreed upon value, both facts bespoke bad faith, if not actual fraud.

126. A second unilateral modification to the material terms concerned a provision requiring GRANAHORRAR's principal shareholders to pledge in their personal capacities to collateralize outstanding credits that GRANAHORRAR had issued. The GRANAHORRAR principal shareholders also communicated their disagreement with this term, which never had been discussed and that was on its face onerous and overreaching. According to the U.S. shareholders, the inclusion of this additional term into the contract without prior consultation of any kind constituted additional proof of bad faith.

127. The creditor representatives were not willing to negotiate either one of these propositions. They argued that somehow because GRANAHORRAR's principal shareholders had characterized these terms as evincing bad faith, considerable judicial risk now attached to the transaction. They specifically asserted that because the GRANAHORRAR shareholders had mentioned bad faith with respect to this phase of the negotiation process, pursuant to Colombia's domestic law it would be theoretically and practically possible for the GRANAHORRAR

principal shareholders to unwind the transaction and take back the bank at some point in the future. This risk, so the creditor representatives said, was one not worth taking.

128. Even when submitted to a surface analysis it becomes clear that the creditor representatives really balked at the transaction because of the numerous irregularities that underlie FOGAFIN's treatment of GRANAHORRAR. FOGAFIN's discriminatory practices directed at GRANAHORRAR and its irregular and non-responsive methodologies concerning GRANAHORRAR's liquidity challenges, all made clear to the creditors and creditor representatives that any such transaction (the payment of shares as consideration for credits tendered) provided a significant framework for contesting at a future time the transfer that was the subject matter of the October 1 meeting at Banco de Colombia.

129. On the morning of October 2, 1998, Dr. Gilberto Gómez, a member of FOGAFIN's Board of Directors and CEO of Banco Cafetero (a creditor and competitor of GRANAHORRAR) leaked to the media that an agreement with GRANAHORRAR was not consummated. Because of his many hats, it is unclear in which capacity or on behalf of whose interests Mr. Gómez purportedly was advancing by such communication with the media. What does remain certain, however, is that the effect of this communication caused a significant run on the bank. The run in turn gave rise to a perception of an institutional crisis within GRANAHORRAR that was not susceptible to self-correction.

130. The run on the bank triggered overdraft defaults that were registered with the Central Bank. At 4 PM on October 2, 1998, FOGAFIN contacted Banco de Colombia officials to ascertain whether GRANAHORRAR had availed itself of the final guarantee enlargement in order to defray overdrafts arising from the run. Upon learning that no such measure was

undertaken, FOGAFIN declined to issue the guarantee enlargement thus foreclosing GRANAHORRAR from mitigating or altogether curing the run's effects. Similarly, FOGAFIN caused a "cessation of payment" event by wrongfully and contrary to law and basic common sense, withholding the final credit installment payment to GRANAHORRAR. The tender of such payments would have cured even FOGAFIN's induced insolvency and cessation of payments crises.

D. FOGAFIN CREATES AN ARTIFICIAL SOLVENCY CRISIS, AND AVAILS ITSELF OF THE CLAUSE TO EXPROPRIATE GRANAHORRAR

1. The October 2 event; FOGAFIN, the Central Bank, and the Superintendency of Banking.

131. On October 2, 1998 at 7:47 PM, the Superintendent of Banking contacted FOGAFIN and advised that GRANAHORRAR ceased payments on deposit holders in the amount of approximately COP 31,000 million. Three (3) minutes later the Superintendent of Banking contacted the Central Bank and communicated the same information. Later that night the Superintendent of Banking further advised FOGAFIN that Banco del Estado returned for insufficient funds checks drawn on GRANAHORRAR. It was based on this information that FOGAFIN used the *Clause* in the amendment to the guarantee-restructuring program (Exhibit 12) to advise the Superintendent of Banking that FOGAFIN would now assert complete and unfettered ownership of the "A" rated performing assets that GRANAHORRAR had pledged to FOGAFIN as part of the guarantee-restructuring program memorialized in Exhibit 12, as modified in Exhibit 11. In this connection, FOGAFIN specifically advised the Superintendent of Banking that it would keep and avail itself of COP 499,820,000,000, that it represented as corresponding to a 134% of credit that the creditors presumably had tendered to

GRANAHORRAR.[85]

132. Having learned that FOGAFIN had reduced and permanently divested GRANAHORRAR's net performing assets by COP 499,820,000,000, the Superintendent of Banking understandably observed that it was mathematically impossible for GRANAHORRAR to have preserved its historical solvency status. Hence, the Superintendency of Banking advised the Central Bank that "GRANAHORRAR at this time must register a loss in the amount of COP 128,726,040,000, which loss places GRANAHORRAR in a status of insolvency [as a matter of law] and below the nine percent (9%) solvency minimum required by law."[86]

133. Finally, at midnight October 2, 1998, the Central Bank advised GRANAHORRAR's CEO, Dr. Jorge Enrique Amaya Pacheco, that the Central Bank would keep as its unencumbered assets the pledged guarantee that GRANAHORRAR had tendered to it as part of the credit transaction pursuant to which in June 1998 the Central Bank provided GRANAHORRAR with credit in the amount of COP 300,000,000,000. The Central Bank premised its decision on the COP 128,726,040,000 loss arising from FOGAFIN's appropriation of the GRANAHORRAR pledged assets.[87]

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[85] A true and correct copy of correspondence dated October 2, 1998, from Francisco Azuero Zuñiga of FOGAFIN to Dr. Sara Ordoñez Noriega memorializing the substance of this communication, including the referenced figures, is here attached as Exhibit 16.

[86] A true and correct copy of correspondence from the Superintendent of Banking, Dr. Sara Ordoñez Noriega to Dr. Miguel Urrutia Montoya of the Central Bank, dated on October 2, 1998 (10:17 PM) is here attached as Exhibit 17. The Spanish language original of this translation states:

> Como consecuencia de lo anterior, la Corporación debe registrar a la fecha una pérdida por COP 128,726,040,000, que la coloca en situación de insolvencia toda vez que la relación correspondiente se reduce muy por debajo del 9% exigido por las normas pertinentes.

[87] A true and correct copy of correspondence dated October 2, 1998, from José Darío Uribe of the Central Bank to Dr. Jorge Enrique Amaya Pacheco, Bates No. 00031 is here attached as Exhibit 18.

134. The Superintendency of Banking asserted that GRANAHORRAR's insolvency required a capitalization minimum of COP 157,000,000,000, and further advised that this amount had to be verifiably registered as a payment by no later than October 3, 1998, by 3:00 PM.[88]

135. The Superintendency of Banking's grant to GRANAHORRAR of an obligatory opportunity to cure insolvency status was *legally* and *physically* impossible to perform. The terms of the right to cure were communicated to GRANAHORRAR on a Friday at 11:50 PM. GRANAHORRAR received the communication at 1:00 AM on Saturday October 3, 1998. Accordingly, in effect GRANAHORRAR had (i) to generate, (ii) to tender, and (iii) to register a minimum of COP 157,000,000,000, between the hours of 1:00 AM on Saturday October 3, 1998, and 3:00 PM of that date. Expert testimony, in addition to basic common sense, shall demonstrate that compliance with these draconian requirements was impossible not just because of the extreme brevity of time in which to generate a considerable amount of funds (14 hours) but also when considering that performance was required on a weekend (a Saturday), a date during which it is not physically possible to tender a liquid payment as required by the Superintendency of Banking. This demand constitutes an abuse of power. It is an administrative act by an agency that is unreasonable because compliance is physically and legally impossible.

2. FOGAFIN Expropriates GRANAHORRAR

136. FOGAFIN outright expropriated GRANAHORRAR immediately at the expiration of the fourteen (14) hour cure performance timeframe on Saturday October 3, 1998. Pursuant to Resolution 002 that FOGAFIN issued on that date, FOGAFIN undertook two ill-founded expropriatory measures. First, it diluted the value of the GRANAHORRAR shares to

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[88] A true and correct copy of correspondence dated October 2, 1998 (marked at 11:50 PM) from Sara Ordoñez Noriega to Dr. Jorge Enrique Amaya Pacheco, reference No. 1998050714, is here attached as Exhibit 19.

the nominal amount of COP 0.01. Second, it recapitalized the bank in the amount of COP 157,000,000,000 that GRANAHORRAR had been invited to tender within 14 hours by 3 o'clock of that very same day, Saturday October 3, 1998.[89] GRANAHORRAR's CEO was replaced on this date. Within two weeks' time, on October 16, 1998, GRANAHORRAR's Board of Directors was dismissed and replaced.

137. It is worth noting that while FOGAFIN provided GRANAHORRAR with *14 hours* in which to recapitalize the bank pursuant to a purported insolvency that FOGAFIN itself orchestrated principally pursuant to the guarantee-restructuring program requiring tender of the "A" rated pledged assets, FOGAFIN itself took *two weeks* to recapitalize GRANAHORRAR. Moreover, it did so by using the GRANAHORRAR pledged assets as payment, which payment entailed a substantial discount of those assets that were provided to the Central Bank.

138. Simple arithmetic places in high relief an important aspect of this illicit expropriation. GRANAHORRAR's pledged assets pursuant to the guarantee-restructuring program had a value of COP 499,820,000,000. The actual credit that the pledged assets were securing was in the amount of COP 373,000,000,000. FOGAFIN, however, is at a loss, among other things, to explain which entity or person kept the difference in the amount of COP 126,820,000,000.

139. The extraordinary windfall that FOGAFIN received is best evinced in correspondence dated February 5, 1999, from the Delegate Superintendent, Mr. Edgar Enrique Lasso Fonseca of the Superintendency of Banking to FOGAFIN's Director, Mr. Jorge

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[89] A true and correct copy of the Resolution No. 002 dated October 3, 1998, is here attached as Exhibit 20.

Castellanos Rueda titled with the reference "Final Response".[90] That letter purports to respond to a communication dated *four(4) months earlier* (October 28,1998) that presumably FOGAFIN served on the Superintendency of Banking.

140. It appears that FOGAFIN did not know what to do with the approximately COP 127,000 million net profit arising from the GRANAHORRAR pledged assets. Faced with this quandary, FOGAFIN sought instructions on *how* and *what* to do with the funds as it did not have any experience turning a profit on pledged assets following an expropriation. The query is understandable because it is not common for financial institutions that are presumably failed concerns (hence the need for expropriation) to have net performing assets of this kind.

141. The Superintendency of Banking took four months to respond, likely because the Superintendency itself was at a loss. Select language from that epistle requires attention. The letter identifies that the profit at issue arises from the difference between the COP 499,820,000,000 "value" of the "pledged assets classified as having an "A" category", and the credit on which it was based on only COP 373,000,000,000.

142. In the very following paragraph the letter provides that "with respect to the particular issue raised, and here described, which concerns a consummated transaction, this department opines that the instrumentality that you manage may proceed to register the profit arising from the referenced transaction under Code "4195 *Other Operational Income*" because the subject transaction and the profit derived therefrom arises from a transaction in support of a liquidation in furtherance of a public purpose that happens to coincide with the actual legal, economic, and financial structure of the transaction and profit, both of which may receive a

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90 A true and correct copy of this correspondence is here attached as Exhibit 24.

different accounting treatment depending on the final disposition of the funds."[91]

143. Ironically, the expropriation was premised on *insolvency* and not a *liquidity* challenge, even though the latter concern was the only economic challenge that GRANAHORRAR faced at all times material to this proceeding.

144. This illicit taking mirrors the irregularity that GRANAHORRAR suffered in connection with its dealings with the Central Bank. In particular, the Central Bank tendered to GRANAHORRAR a credit in the amount of COP 300,000,000,000. Yet the Central Bank was provided with the pledged assets valued at COP 411,750,255,867,31. Thus, a windfall of COP 111,750,255,867,31 remained unaccounted for and without explanation, even a formal one.

145. Together, FOGAFIN and the Central Bank misappropriated COP 238,570,000,000, of GRANAHORRAR "A" rated assets, which amount far surpassed the COP 157,000,000,000 purported loss that was the subject matter of the Superintendency of Banking's 14 hour recapitalization mandate.

146. Instead of receiving direct funding from FOGAFIN at an interest rate commensurate with that which at the time was offered and provided to GRANAHORRAR's peer financial institutions, and a competitive and reasonable maturation period beyond 30-60 days,

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[91] *Id.* The Spanish language reads:

> Sobre el particular considerando que para este caso estamos en presencia, según se afirma, de un negocio jurídico firme, este Despacho estima que la entidad que usted dirige puede proceder a registrar la utilidad derivada del mismo en el Código "4195 Ingresos Operaciones Otros", atendiendo que la misma obedece a la realización de una operación de apoyo de liquidez inherente al objeto social, aunado a que es coincidente la realidad económica, jurídica y financiera de la misma, evento que no tendría ocurrencia cuando se establezca que la operación se acometa con otros propósitos, en cuyo caso daría lugar a un tratamiento contable distinto."

FOGAFIN wrested from GRANAHORRAR its solvency status and within a four hour timeframe, based upon its exercise of the *Clause*, placed GRANAHORRAR in a fictitious state of insolvency while granting it cure terms and provisions that were impossible to meet. It then misappropriated the difference between the value of the pledged assets and the 134% guaranteed percentage, while using GRANAHORRAR's own funds to remedy the purported insolvency crisis. Colombia's position is indefensible.

147. For completeness' sake, the "Cure Notice" (Exhibit 19) only was sent to GRANAHORRAR's CEO, Dr. Jorge Enrique Amaya Pacheco, and its shareholders were never notified.

148. FOGAFIN's expropriation of GRANAHORRAR as here detailed, and consonant with what further facts expert testimony shall demonstrate, was (i) discriminatory, (ii) without compensation, (iii) wanting in due process, and (iv) lacking in public purpose. Notably, it was the *only* financial institution expropriated at the time of the Colombian economic crisis that was not liquidated and dissolved. The bank, with its far reaching branch infrastructure, innovative products, and blue chip portfolio, ultimately was sold to BBVA in November 2005 in the amount of USD 423,000,000.

149. This transaction between the Government of Colombia and BBVA was a very important one at a national level in Colombia. It placed BBVA as the first and leading mortgage lender in Colombia with 21.21% peerless market position, and second in that nation overall among financial institutions generally.[92]

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[92] *See e.g. El Banco Granahorrar es ahora del Bbva* (http://www.portafolio.co/economia/finanzas/banco-granahorrar-bbva-431334), and *El BBVA se "quedó"*

E. The U.S. shareholders commenced judicial proceedings against FOGAFIN and the Superintendency of Banking

150. In stark defiance of the then governing law, neither the Superintendency of Banking nor FOGAFIN communicated its respective resolution (i.e. Exhibits 19 and 20) to GRANAHORRAR's shareholders. Both the October 2, 1998 "Cure Notice" and October 3 Resolution No. 002, were sent to GRANAHORRAR's CEO, who was then replaced in a matter of just minutes following service of Resolution No. 002.[93] Therefore, the U.S. shareholders

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con el Banco Granahorrar que será fusionado (http://caracol.com.co/radio/2005/10/31/economia/1130770680_216914.html), a true and correct copy is here attached as Exhibit 21.

[93] The then determinative provisions of the Administrative Code (*Código Contencioso Administrativo*) were articles 43-48. Article 46, however, is the broadest and most practical in terms of notice compliance requirements binding on the Superintendency of Banking and FOGAFIN. It commands:

> When, in the authorities' judgment, their decisions directly and immediately affect third parties who have not intervened in the undertaking, they shall publish the dispositive part of the resolution in one publication session in the Official Paper or in an official media outlet earmarked for such notifications, or in a newspaper of wide circulation within the jurisdiction of the agencies that issued the decisions.

Equally relevant is compliance with Article 47 prescribing the publication of legal procedural avenues for challenging the decisions of administrative bodies. This Article provides that "the text of all notifications or publications shall set forth the appropriate legal avenue for challenges of the administrative decisions at issue, which information shall include the authorities before whom any challenge should be filed, as well as the relevant timeframes.

The legal consequences of these articles are best enunciated in Article 48, which provides that the failure to notify the interested parties in accordance with the referenced articles shall render the administrative acts as non-binding and without the force of law. The language of Article 48 commands citation in its entirety:

> Without compliance of the foregoing requirements the notification will be deemed as not having taken place nor shall the decisions that should have been contained in the notifications have any legal effect, unless the interested party holds herself out as having been sufficiently notified, agrees to have been so informed or otherwise timely avails herself of the appropriate legal recourse.

Neither condition here occurred.

exercised their right to petition and served a demand on FOGAFIN and the Superintendency of Banking requesting, among other things, copies of the October 2, 1998 "Cure Notice", Resolution No. 002, dated October 3, 1998, and an explanation of the legal methodology pursuant to which the purported COP 157,000,000,000 cure amount had to be tendered. These petitions were served on FOGAFIN and the Superintendency of Banking between March 15 and May 30, 2000, but it was not until four (4) months later (July 25, 2000) that true and correct copies were actually produced.[94]

1. The Proceeding before Cundinamarca's Administrative Judicial Tribunal and the Council of State.[95]

151. On July 28, 2000, the U.S. shareholders, through the Companies, perfected a four (4) count complaint before the *Tribunal de lo Contencioso Administrativo de Cundinamarca* styled: *Acción de nulidad y restablecimiento del derecho de Compto S.A. en Liquidación, y otros, contra la Superintendencia Bancaria y el Fondo de Garantías de Instituciones Financieras*, file No. 200000521. In that proceeding plaintiffs alleged that FOGAFIN and the Superintendency of Banking (i) issued resolutions that were void for want of premises establishing the factual bases and grounds supporting the ultimate conclusions and mandates contained in those papers (Exhibits 19 and 20), as well as a lack of insolvency that would justify such findings, (ii) lacked due process in connection with any ability to redress or address the concerns stated in Exhibit 19, (iii) violated mandatory laws, specifically Art. 72 of Legislation 45 (1990) (excessive interest

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[94] Colombian government authorities incorrectly had concluded that the affected shareholders, including the U.S. shareholders, were planning on filing legal recourse in the form of a class action proceeding. They thus delayed tender of the resolutions as a strategic effort aimed at triggering application of the class action limitations period were such action to proceed.

[95] In Spanish language denominated *Tribunal Administrativo de Cundinamarca*, and *Consejo de Estado.*

rates), Art. 1203 of the Commercial Code (misappropriation akin to expropriation), and (iv) violated Art. 29 of the Constitution (lack of due process).

152. That action lay fallow for five (5) years. On July 27, 2005 (4 years and 364 days) after the case had been filed and registered with this first instance tribunal on July 28, 2000, it was not until July 27, 2005, that the Court issued a rather inordinate judgment worthy of cross-appeals. The Court ruled that plaintiffs, the GRANAHORRAR shareholders, did not state viable causes of action. The Court also found that defendants' FOGAFIN and the Superintendency of Banking's defenses were similarly legally insufficient as a matter of law. Fees and costs were not awarded.

153. Plaintiffs, through the Companies, registered an appeal with the Council of State, styled: *Compto S.A. en liquidación y otros, contra Superintendencia Bancaria y Fondo de Garantías de Instituciones Financieras (FOGAFIN)*, file No. 25000-23-24-000-2000-00521-02-15728. On November 1, 2007, the Council of State issued an opinion overruling the judgment dismissing the case and the corresponding defenses and finding in favor of appellants (plaintiffs below) the GRANAHORRAR shareholders. Two (2) foundational principles underscore the otherwise prolix 75-page appellate opinion.[96]

154. First, the Council of State found that the resolutions that FOGAFIN and the Superintendency of Banking issued (Exhibits 19 and 20) were legally insufficient to cause these entities jointly and severally to expropriate GRANAHORRAR because they lacked the

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[96] A true and correct copy of the Council of State's opinion in the matter styled: *Compto S.A. en liquidación y otros, contra Superintendencia Bancaria y Fondo de Garantías de Instituciones Financieras (FOGAFIN)*, file No. 25000-23-24-000-2000-00521-02-15728, is here attached as Exhibit 22.

appropriate factual predicates. Therefore, the Court concluded that the expropriation was illegal. In furtherance of this holding it observed:

> What has here been narrated evinces to this Tribunal that GRANAHORRAR's supposed insolvency that gave rise to the order to capitalize the bank [Exhibit 19], was generated as a result of losses in the approximate amount of $ 228,726 million that the Superintendency of Banking had calculated as a result of GRANAHORRAR's cessation of payments.
>
> First of all, the capitalization order does not contain any explanation of how this figure was arrived at, nor does it reference any document from which such figure was calculated prior to issuance of the order. For this reason the insolvency reference in the Superintendency of Banking's cure notice lacks a necessary factual foundation and is equally wanting in evidentiary premises.
>
> On the other hand, the documents of record lead to the conclusion that as of that date, October 2, 1998, GRANAHORRAR was not insolvent but rather had a liquidity issue, these are concepts that are distinguishable both by their nature and effects.
>
> Lack of liquidity is defined as the want of disposable resources necessary to meet obligations as they become due or to make possible the everyday economic concerns of a business. Insolvency, however, is one in which an entity's net assets are below the threshold of necessary capital.
>
> GRANAHORRAR did not have an insolvency challenge, and in order for the Central Bank to authorize the temporary liquidity credits, both ordinary and extraordinary, what was required was for the entity not to be insolvent.
>
> Indeed, Art. 1 of the *Circular Externa No. 25 de 1995*, which was in effect during the operative timeframe when the Central Bank issued the temporary liquidity credits [citation omitted], expressly contemplated that '*in no instance shall the liquidity credits be provided to insolvent entities or have as there objective and justification for issuance the cure of an insolvency problem.*' For purposes of those liquidity credits, it was deemed that an entity would be entitled to insolvency credit only where 'upon summarizing its financial records what is gleaned are net assets at least 50% below the capital tender.'[97]

[97] *Id.* at pp. 42-43.

155. Second, as noted immediately above, in addition to wanting the requisite factual predicates in order to state legally sustainable resolutions, FOGAFIN and the Superintendency of Banking bottomed their resolution (Exhibits 19 and 20) on an erroneous legal and factual claim, *i.e.* lack of liquidity, rather than an actual state of insolvency that would create jeopardy for account holders, and more overarchingly, the financial sector as a whole.

156. The Council of State's opinion was even more scathing in passing on FOGAFIN's and the Superintendency of Banking's acts and omissions as to GRANAHORRAR. The Council of State, by way of example, expressly found in its opinion that FOGAFIN and the Superintendency of Banking together during the course of just a mere twelve hours, created an economic crisis for GRANAHORRAR that was artificial and hardly indicative of GRANAHORRAR's considerable solvency and historical performance record. Therefore, the Court reasoned and concluded that there was no justification for reducing GRANAHORRAR's share value to that of a nominal sum. There is no substitute for the Court's own language:

> The reduction of GRANAHORRAR's share value to a nominal amount requires that the entity or entities undertaking such measure [reducing share value to a nominal amount] has done so based upon true and accurate information that the Superintendency of Banking can establish as realistically accounting for an institution's value. Nonetheless, if the Superintendency of Banking's report does not reflect the actual net asset value of an entity, and it is similarly established that the losses of capital are not actual or accurate, then there is no basis for the reduction of share value to a nominal amount.
>
> In the case at bar, the actual breach of net assets or the insolvency status that Corporation Granahorrar was purportedly suffering from, were unveiled as non-existent based upon the certified accounting figures that the financial institution itself latter posted, which demonstrated that in addition to its fragile substantiation, the order to capitalize GRANAHORRAR was taken without the

benefit of any serious foundation or analysis concerning GRANAHORRAR's true net asset status, and in the same manner in which the decision to reduce GRANAHORRAR's share value to a nominal amount.

*In this Chamber's judgment, the foregoing issues demonstrate that the events marked by the repeated mail exchanges between FOGAFIN and the Superintendency of Banking, today **Financiera**, between the night of Friday October 2 and the afternoon of Saturday October 3, placed Granahorrar in a purported insolvency status, pursuant to which the bank was provided with the binding obligation to comply with a cure methodology that was impossible to meet. Instead, these exchanges of correspondence were the cause and origin for a chain of decisions on the part of the entities [Fogafin and the Superintendency of Banking], where one decision was supported by the other, which were all arising from Fogafin's failure to provide to GRANAHORRAR the additional help that GRANAHORRAR petitioned for that second day of October, consonant with what had been agreed to on October 1.*

The foregoing, when added to the wrongfully substantiated insolvency claim that the Superintendency of Banking had asserted against GRANAHORRAR, together with the Central Bank's decision to undertake the capitalization order, as part of the task to reduce to a nominal value GRANAHORRAR's shares, demonstrates the illegality of the administrative agencies' actions, and the reason why this Court must vacate the first instance trial court's judgment, which as appellant made clear, did not at all address the material allegations asserted and had not accorded any weight to the probative evidence on which plaintiffs had based their averments. (emphasis supplied).[98]

157. The Council of State's opinion reversed the trial court with instructions that, among other things, also included a finding of liability against FOGAFIN and the Superintendency of Banking and in favor of GRANAHORRAR's shareholders, in the amount of COP 226,961,237,735.[99]

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[98] *Id.* pp. 51-52.

[99] Claimants in this case are not asserting that they would be limited in presenting evidence on damages suffered in excess of this figure.

158. The Council of State saw through the badges of supposed legality that masked the illegal substantive content of the Superintendency of Banking's and FOGAFIN's expropriatory resolutions (Exhibits 19 and 20). It emphasized the lack of substantive foundation, as well as an unsustainable legal analysis defined by what appeared to be shifting and unsubstantiated legal standards.

159. The government of Colombia felt that its own Council of State had embarrassed its leading financial agencies and was undermining executive policy and authority. What ensued was a disappointing act of procedural aggression directed at the judicial branch of government. This procedural aggression was constituted by the filing of four (4) frivolous proceedings (*tutelas*) on the part of FOGAFIN and the Superintendency of Banking.

160. FOGAFIN and the Superintendency of Banking each filed two (2) papers with the Council of State seeking reconsideration of the November 1, 2007 opinion. All four motions were denied. Appeals were then perfected with the Constitutional Court.[100]

2. FOGAFIN and the Superintendency of Banking Perfected Appeals with the Constitutional Court

161. On March 5, 2008, FOGAFIN and the Superintendency of Banking perfected an appeal of the Council of State's decision against FOGAFIN and the Superintendency of Banking and in favor of the GRANAHORRAR shareholders. That appeal generated an extraordinary

[100] *Corte Constitucional.*

decision that pitted the Council of State against the Constitutional Court. On May 26, 2011, the Constitutional Court issued a prolix 203 page opinion.[101]

162. The opinion presents fundamental due process challenges at multiple levels. The Constitutional Court exceeded its jurisdiction and placed itself in the position of a fact finder rather than a constitutional tribunal charged with reviewing the constitutionality of legislation, regulations, judicial decisions, and executive decrees. Indeed, for example, at times the Constitutional Court itself introduces hearsay evidence in the form of newspaper articles that the parties, and particularly the GRANAHORRAR shareholders, never had an opportunity to review, much less to address with rebuttal evidence. The Constitutional Court's opinion represents an emblematic denial of justice that even more importantly itself gave rise to a constitutional crisis because of the extent of its abuse of regulatory-judicial authority.

163. Analysis of the Constitutional Court's opinion establishes, without limitation, that it violated the U.S. shareholders' procedural and substantive due process rights by adopting, condoning, and ratifying, far beyond the ambit of its jurisdictional purview, and contrary to the most fundamental principles of due process, the following sixteen (16) propositions:

164. First, the Constitutional Court disavows the Council of State's decision that the expropriation of GRANAHORRAR on the part of FOGAFIN violated the U.S. shareholders' due process rights because it was based on an artificial government-induced insolvency when in fact the bank merely suffered from a temporary liquidity challenge. The Constitutional Court so acted

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[101] A true and correct copy of the opinion from the Constitutional Court styled: *Superintendencia Financiera y Fondo de Garantías de Instituciones Financieras contra el Consejo de Estado, Sección Cuarta, Sentencia de 1 de noviembre de 2007, proferida en proceso de nulidad y restablecimiento de derecho iniciado por las sociedades Compto S.A. y otras contra Superintendencia Bancaria y Fondo de Garantías de Instituciones Financieras,* file No. T-2.089.121 and T-2.180.640, here attached as Exhibit 23.

without regard to evidence of record and based upon factual premises and other considerations that the U.S. shareholders were never able to raise, let alone address, at *any* procedural junction.

165. Second, the Constitutional Court's opinion represents a flagrant denial of due process, in part, because in defiance of the Council of State's findings, it approves discriminatory treatment directed at the GRANAHORRAR shareholders as to FOGAFIN credit *maturation dates* that caused irreparable injury to GRANAHORRAR and to its shareholders. The Constitutional Court's unqualified approval of this discriminatory treatment constitutes a violation of procedural due process, and also does violence to the GRANAHORRAR shareholders' constitutional rights by exceeding the Constitutional Court's jurisdiction and in this way proscribing the GRANAHORRAR shareholders from presenting their case.

166. Third, the Constitutional Court's opinion represents a flagrant denial of due process, in part, because in defiance of the Council of State's findings, it approves discriminatory treatment directed at the GRANAHORRAR shareholders as to FOGAFIN credit *interest rates* that caused irreparable injury to GRANAHORRAR and its shareholders. The Constitutional Court's unqualified approval of this discriminatory treatment constitutes a violation of procedural due process, and also does violence to the GRANAHORRAR shareholders' constitutional rights by exceeding the Constitutional Court's jurisdiction and in this way proscribing the GRANAHORRAR shareholders from presenting their case.

167. Fourth, The Constitutional Court's opinion further shocks the conscience of any reader because it approves the discriminatory treatment that FOGAFIN directed at GRANAHORRAR in the form of the guarantee-restructuring program, which caused FOGAFIN to weaken GRANAHORRAR's solvency and to misappropriate a significant percentage of that

institution's "A" rated performing assets, contrary to principles of law, equity, finance, and customary practice.

168. Fifth, the Constitutional Court's opinion approves and cloaks with the mantle of legal legitimacy the Superintendency of Banking's denial of due process as to GRANAHORRAR arising from the Superintendency of Banking's resolution (Exhibit 19), which was devoid of factual premises in support of its findings and mandates and for this reason in part proscribes the U.S. shareholders from presenting their case. In so doing the Constitutional Court's opinion also approves having provided GRANAHORRAR with a "Cure Notice" that violates due process because performance under its terms was both physically and legally impossible. In this regard, the Constitutional Court's opinion is particularly egregious because it usurps the role of the Council of State and of the trial court as fact finder. The opinion condones and accepts as legally viable non-compliance with notice requirements generally where no notice was supplied. As the Council of State aptly notes, the purported notice itself was defective because it lacked factual premises in support of its conclusions and in this way further perpetuated multiple denials of due process.

169. Sixth, the Constitutional Court's opinion represents an unprecedented usurpation of the Council of State's authority such that it gives rise to a foundational institutional crisis between two of that country's peer and highest appellate tribunals. It did so because, among other considerations, the Constitutional Court was instructed and provided with no alternative but to find that FOGAFIN's and the Superintendency of Banking's resolutions, despite their manifest debilities and lack of procedural due process, were legally viable, upon penalty of removal of the actual justices from the Constitutional Court. The evidence on this point is compelling.

170. Seventh, the Constitutional Court's opinion constitutes an aberration and extreme departure from fundamental legality because it adopts as legally sufficient FOGAFIN's resolution reducing the value of GRANAHORRAR's shares to COP 0.01, notwithstanding the resolution's lack of factual premises and methodological bases.

171. Eighth, the opinion denies the GRANAHORRAR shareholders due process because it deliberately and in conclusory fashion disregards in its totality the evidence of record that the Council of State explicitly referenced as contrary to both resolutions (Exhibits 19 and 20) and probative only of a temporary liquidity challenge and not a solvency crisis warranting expropriation. This shortcoming is particularly problematic and outlandish in the extreme because the Council of State is specifically endowed with a Chamber of the Court exclusively charged with adjudicating and passing judgment on the legality of financial flows attendant to financial institutions. Accordingly, the Council of State is the highest ranking national tribunal in the Republic of Colombia charged with adjudication of insolvency and liquidity issues incident to financial institutions. Deference is to be accorded to its findings particularly as they concern this subject matter.

172. In turn, the Constitutional Court is not endowed with this expertise, which is fundamentally beyond its constitutional jurisdictional competence. For this reason, it is aberrational and equally legally improper for the Constitutional Court (i) outright to disregard and substitute diametrically opposed findings, to those of the Council of State specifically when addressing institutional financial matters of this ilk, (ii) to engage in its own exegesis of factual premises of record, (iii) to supplement unilaterally the evidentiary record while aware that the parties would be proscribed from addressing or rebutting such "evidence", (iv) addressing non-constitutional issues, and (v) adopting as legally sufficient resolutions that *prima facie* and based

upon the findings of a tribunal of equal status in *pari materia* have been held to be legally flawed. These stark departures from fundamental notions of due process are multiplied where, as here, the Constitutional Court has usurped the role and domain of the Council of State.

173. Ninth, the Constitutional Court's opinion denies the GRANAHORRAR shareholders due process because it approves the discriminatory targeting that FOGAFIN and the Superintendency of Banking fostered and pursued with respect to the U.S. shareholders. The Constitutional Court *sua sponte* raised issues that are extraneous to the financial questions that underlie the Council of State's opinion. A glaring and for this reason illustrative example is the Constitutional Court's treatment of a purported minority interest stock sale among GRANAHORRAR investors, which was not a litigated issue, does not give rise to a constitutional question, and yet the Constitutional Court raises and identifies this transaction as the fulcrum of GRANAHORRAR's alleged insolvency concerns. Here too the Constitutional Court engages in the role of first instance tribunal fact finder and illicitly supplements the record before it, and in so doing denaturalizes its own role.

174. Tenth, the Constitutional Court flagrantly erred and in this manner *also* deprived the GRANAHORRAR shareholders of due process because it did not engage in a constitutional review of the Council of State's opinion, which was the subject matter of the underlying appeal presumably giving rise to the exercise of its jurisdiction.

175. Eleventh, because it condones discriminatory practices by adopting FOGAFIN's departure from national mandatory norms requiring that FOGAFIN provide assistance to financial institutions that would maximize the institutional autonomy of such institutions while minimizing government intervention (proportionality doctrine requiring the least interference

possible), the Constitutional Court's opinion represents a radical departure from basic principles of law.

176. Twelfth, as the Constitutional Court itself is compelled to admit its opinion constituted an unprecedented departure from governing jurisprudence and, so says the argument of the Court, is itself new law having a retroactive application. This very pronouncement, without more, is exemplary of a denial of due process as the U.S. shareholders, nor anyone else for that matter, could have travelled on the pleadings based on an illegal formulation that at the time did not exist, according to the Constitutional Court itself. The Council of State, as shall be demonstrated *infra*, seized on this extreme pronouncement that the Constitutional Court refused to disavow.

177. Thirteenth, the Constitutional Court's opinion is flawed to an extreme because it condones and adopts FOGAFIN's non-responsive liquidity "cure formulas" that allowed FOGAFIN to misappropriate a significant percentage of GRANAHORRAR's "A" rated working assets and in this way compromise adversely GRANAHORRAR's solvency status.

178. Fourteenth, the Constitutional Court was neither independent nor impartial in rendering its opinion. Instead, it was serving an executory function beyond its jurisdictional competence and for this reason the opinion is radically and fundamentally flawed.

179. Fifteenth, because the opinion is both internally and externally inconsistent, it constitutes a denial of due process. Even a surface analysis of the opinion reflects that it conflates liquidity and solvency standards that *may* trigger the exercise of regulatory sovereignty in the form of a permanent or temporary agency intervention in a financial institution. This misapprehension of the factual record and the governing legal standard, although extreme and of

consequence, is understandable because of the dichotomy between insolvency and liquidity that characterizes the underlying record. That record reflected a status of temporary lack of insolvency far *below* the 9% legal threshold. Yet, the intervention, expropriation, termination of the CEO, and replacement of the Board of Directors, all was founded on insolvency concerns and not liquidity issues, as the Council of State emphasized.

180. Sixteenth, the Constitutional Court's opinion ratifies the use of the "*Clause*", which is tantamount to sanctioning the use of irregular formulas that overreach and constitute an excessive exercise of regulatory authority that weakens solvency and liquidity. The "*Clause*" was not a formula responsive to a temporary liquidity challenge. Instead, it was a non-negotiated adhesion *Clause* that unconstitutionally provided FOGAFIN with the pretext of a right to expropriate based upon unrelated and self-judging default events.

181. The extreme and draconian nature of the Constitutional Court's order was such that it prompted the participation of the President of the Council of State, Dr. Mauricio Fajardo Gómez, who filed a motion seeking the annulment of the Constitutional Court's opinion.

a. The President of the Council of State's Participation Seeking Annulment of the Constitutional Court's Opinion.

182. The extreme character of the Constitutional Court's opinion invited the personal appearance of the President of the Council of State to argue that agency's motion for *annulment* of the Constitutional Court's opinion.[102] The motion asserted that the Constitutional Court had engaged in an act of judicial-regulatory abuse of authority by usurping the Council of State's

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[102] A true and correct copy of the Council of State's motion for annulment is here attached as Exhibit 25.

jurisdiction and improperly extending its own. The two-prong argument was framed as requiring annulment of the Constitutional Court's opinion based upon denial of due process.

183. The Council of State's President advanced that annulment was not only warranted, but actually necessary. He emphasized that the Constitutional Court violated its own competence (jurisdiction) by acting as a first instance trier of fact (*"juez natural"*), as well as a second instance appellate body charged with adjudicating the legal propriety of (i) first instance abuse of discretion, (ii) mistake of law, and (iii) error in the application of law to fact.

184. The motion to vacate similarly characterizes the Constitutional Court's opinion as extreme and dangerous. It observes that "even more *complex, questionable,* and *grave* is that the Court seizes for itself the attribution of a judge and extends its authority to adjudicate the specific merits of the case, which role is reserved for the Council of State."[103] In this very same vein, the President of the Council of State further provides that "even in instances when the parties to a litigation do not allow for the actual judge [*propio juez natural*], that is to say the Council of State, to adjudicate the question at issue, the arguments and extreme positions raised on appeal limit the appellate jurisdiction of a second instance tribunal, such that paradoxically and questionably the interested parties [FOGAFIN and the Superintendency of Banking] do not raise the corresponding challenge on appeal but they [FOGAFIN and the Superintendency of Banking] later do raise them in the form of *tutela* and the Constitutional Court addresses this newly-raised issue even though it was neither raised nor considered by the first instance judge."[104] (emphasis supplied).

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[103] *Id.* at p. 41.

[104] *Id.* at 41, the original Spanish language iteration states:

185. The President of the Council of State understandably framed the abuse of due process in terms of a complete "absence and opacity of reasons [*absolutamente ignotas las razones*] underlying the Constitutional Court's judgment in opinion SU-447, 2011, which is the subject matter of this motion to vacate, [noting that the Constitutional Court] concludes that entities such as the Superintendency of Finance [f/k/a the Superintendency of Banking] norms are to be applied by cherry-picking from fragmented doctrines and using non-systemic methodologies, from the Administrative Code,[105] which norms, to be sure, develop constitutional rights and principles that are well established."[106]

186. The non-judicial and extremely political and unjustifiable denial of due process that the Constitutional Court's opinion exemplifies can be gleaned by the extent to which, as the President of the Council of State notes, the Constitutional Court arbitrarily selected truncated

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> Pero, más complicado, cuestionable y grave aún resulta que la Corte se arrogue la atribución de juez natural y falle el caso concreto en el lugar del Consejo de Estado, cuando las partes en litigio ni siquiera permitieron al propio juez natural, esto es al Consejo de Estado, pronunciarse sobre el problema jurídico en cuestión pues, como es bien sabido, los argumentos y extremos planteados en el recurso de apelación limitan la competencia del juez de segunda instancia, de modo que paradójica y cuestionablemente las partes interesadas no platean el correspondiente problema en el recurso de alzada pero luego sí lo esgrimen en sede de tutela y la Corte Constitucional lo aborda sin que el juez natural del litigio haya sido debidamente llamado por los interesados a hacerlo.

[105] *See supra* n. 93.

[106] *Id.* at p. 37. The Spanish language original reads:

> Resultan absolutamente ignotas las razones por las cuales la Corte Constitucional, en la sentencia SU-447 de 2011, cuya nulidad se reclama, concluye que a entidades como la Superintendencia Financiera y el FOGAFIN le deben ser aplicadas de semejante forma fraccionada y asistemática, las normas del CCA, todas las cuales, por cierto, desarrollan principios y derechos fundamentales constitucionalmente reconocidos."

doctrinal support, seemingly randomly, from the Statute of the Financial System and Code of Civil Procedure[107] rather than operative provisions of the Administrative Code. Therefore, the ill-effects arising from (i) the usurpation of the trial court's adjudicatory role, and (ii) the similar usurpation of the Council of State's jurisdiction for merits appellate review, is made all the worse because of the (iii) Constitutional Court's haphazard reliance on doctrine that is inapposite but expedient as concerns its mission of implementing a political decision notwithstanding the legally untenable nature of that disposition.

187. On June 25, 2014, the Constitutional Court denied the Council of State's motion to vacate the Constitutional Court's opinion, SU-447.[108]

b. The Two Dissenting Opinions in the Constitutional Court's Order Denying the Motion to Vacate

188. The order denying the motion to vacate was meaningfully qualified by two (2) dissenting opinions that embodied the egregious and shocking denial of due process because of what one of the dissents characterized as an economic motive to deny due process and to disavow fundamental constitutional protections. Here the concluding sentences comprising Justice Rojas Rios' dissenting opinion[109] are particularly relevant:

> Adujo, que en concordancia con la posición adoptada por el Consejo de Estado cuando se pretenda afectar, o en efecto se

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[107] In the original Spanish language: Estatuto Orgánico del Sistema Financiero and Código de Procedimiento Civil.

[108] A true and correct copy of the Constitutional Court's order denying the Counsel of State's motion to vacate, dated December 11, 2011, is here attached as Exhibit 26.

[109] A true and correct copy of Justice Rojas Rios' dissenting opinion, contained in *Comunicado No. 25*, June 25/26, 2014, issued by Colombia's Constitutional Court, is here attached as Exhibit 27, *also available at* www.corteconstitucional.gov.co.

afecten derechos de terceros, debe surtirse la respectiva notificación pues la misma corresponde a un acto procesal que no puede transgredirse argumentando la ocurrencia de un hecho notorio o de una conducta concluyente supuestamente derivada de comentarios noticiosos en medios de comunicación. A juicio del magistrado Rojas Ríos, la razón de la decisión acogida por el pleno de la Corporación desconoce el derecho al debido proceso pues autoriza que la administración pública no efectúe notificaciones a terceros, en procesos como el estudiado, cuando las normas financieras no prevean un sistema de notificación, contrariando de manera vehemente la doctrina de la doctrina de la Corte.

Concluyó, exponiendo que no podía desconocerse que en el fondo, *el caso objeto de estudio estaba otorgando legalidad a una expropiación que había sido debidamente corregida por una sentencia del Consejo de Estado, cuya motivación resulta impecable, por lo cual no existe argumento jurídico aceptable y riguroso para revocarla, máxime si gran parte de su fundamentación obedeció a implicaciones económicas, por la cuales se legitimó el desconocimiento de las garantías constitucionales de los ciudadanos involucrados en el proceso de referencia.*[110]

189. Central to Justice Rojas Rios' dissent was the finding that the Constitutional Court deliberately turned a blind eye towards the constitutional *and* due process rights of the GRANAHORRAR shareholders merely because of the economic incentive incident to expropriating a valuable asset. This dissenting opinion is robust in emphasizing that the

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[110] Consonant with the premises that the Council of State asserted with respect to notice provisions that may affect third parties, or in effect are material to the rights of third parties, the actual notice must be adhered to as prescribed because such notice concerns a procedural predicate that cannot be modified merely by arguing that it is public knowledge or that notice is not necessary because of media reports. In Justice Rojas Rios' opinion, the reasons underlying the Constitutional Court's opinion are contrary to due process because such reasons would justify government instrumentalities shying from providing legally prescribed notices to third parties under the theory that such notices are not necessary based upon the opinion that they already form part of the awareness of the general public. In cases such as the one at bar, where the governing financial norms do not contain a system for notification in the Constitutional Court's view, such conduct vehemently conflicts with this Court's own precedent and established doctrine.

Justice Rojas Rios concluded that it is not possible to turn a blind eye to the consequences of the Constitutional Court's opinion which has the effect of bestowing legality to a wrongful expropriation that the Council of State had corrected based upon an impeccable analysis that is immune from being changed or reversed based upon any acceptable or rigorous legal argument, let alone altered because of economic incentives that caused the Constitutional Court to look askance at the constitutional rights of the parties that actually were affected.

Constitutional Court's opinion defied that very Court's precedent, as well as the normative strictures of the Administrative Code, particularly with respect to the latter's Articles 46-48.[111]

190. Justice Rojas Rios' dissenting opinion carefully analyzes how the Constitutional Court, based solely on its own novel exegesis, (i) fashions out of whole-cloth a new rule of law that dispenses with codified notice provisions replacing them with a doctrine of constructive notice arising from *vox populi,* (ii) without justification or legal authority substituted the due process rights that the GRANAHORRAR shareholders held pursuant to Articles 46-48 of the Administrative Code with reliance on Articles 335 (19), and 74 of the Statute of the Financial System, and (iii) in so doing perpetrated a violation of constitutional protection. Put simply, Justice Rojas Rios' dissent asserted that the Council of State's opinion (Exhibit 22) had actually corrected a wrongful expropriation that FOGAFIN and the Superintendency of Banking had perpetrated.

191. Notably, on the very same day on which Justice Rojas Rios announced to the Court his dissent and the grounds in support of it, he was discharged from that tribunal.

192. The issuance of the Constitutional Court's order denying reconsideration in the form of a motion to vacate constitutes (i) the ripening of the conflict brought before this arbitral tribunal, and (ii) the end of all judicial labor concerning the subject matter here at issue.[112]

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[111] *See supra* at n. 93.

[112] The second dissenting opinion authored by Justice Pretelt Chaljub, attached as Exhibit 27, in every material way coincides with Justice Rojas Rios' dissent, but contributes to Justice Rojas Rios' "lack of due process" argument by adding that the GRANAHORRAR shareholders were deprived of "the right to present a defense."

III. COLOMBIA'S BREACHES OF TREATY OBLIGATIONS

193. On November 22, 2006, the governments of the United States of America and the Republic of Colombia signed the TPA that entered into force on May 15, 2012. An important part of the object and purpose of the TPA was to further the public welfare by ensuring "a predictable legal and commercial framework for business and investment".

194. Consistent with general bilateral investment treaty practice, the TPA expresses the clear purpose of establishing favorable conditions for investment to flow from a Contracting Party to the other Contracting Party, promoting the investment process and granting to these investments a high standard of protection.

195. Colombia's treatment of the U.S. shareholders, its representatives, affiliates, and agents in Colombia and its investments, violates Colombia's international legal obligations under the TPA and customary international law.

A. Colombia's Breach of Article 12.2: National Treatment

196. Article 12.2 of the TPA purports to guarantee to investors of another Party treatment no different from that which is accorded to similarly placed investors of its own nationality. According to this Article investors of another Party can be treated no less favorably than Colombia's own investors.

197. Specifically, Article 12.2 of the TPA provides:

> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords to its own investors, in like circumstances, with respect to the establishment, acquisition,

> expansion, management, conduct, operation, and sale or other disposition of financial institutions and investments in financial institutions in its territory.
>
> 2. Each Party shall accord to financial institutions of another Party and to investments of investors of another Party in financial institutions treatment no less favorable than that it accords to its own financial institutions, and to investments of its own investors in financial institutions, in like circumstances, with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of financial institutions and investments.
>
> 3. For purposes of the national treatment obligations in Article 12.5.1, a Party shall accord to cross-border financial service suppliers of another Party treatment no less favorable than that it accords to its own financial service suppliers, in like circumstances, with respect to the supply of the relevant service.

198. Numerous financial institutions throughout Colombia, including competitors of GRANAHORRAR, and other financial institutions conducting business within the national territory of Colombia but controlled by nationals of third States, were in like circumstances to GRANAHORRAR, and its representatives, affiliates, and agents in Colombia operated and managed the bank during all timeframes material to this proceeding.

199. These and other financial institutions have been operating without the challenges that FOGAFIN and the Superintendency of Banking imposed on GRANAHORRAR and its shareholders, including on the U.S. shareholders. As more fully articulated in paragraphs 116 through 120 of this demand, FOGAFIN and the Superintendency of Banking imposed a treatment regime on GRANAHORRAR, including the U.S. shareholders, substantially and materially less favorable than that accorded to nationals of Colombia who invested in the financial sector and to investors of third States. FOGAFIN and the Superintendency of Banking imposed unilaterally on GRANAHORRAR financial institutional formulas designed to place GRANAHORRAR's net operating assets, *i.e.* its solvency, in jeopardy such that

GRANAHORRAR's solvency would artificially plummet below the regulatory 9% insolvency threshold. FOGAFIN denied GRANAHORRAR, including the U.S. shareholders, insolvency relief that it provided to investors in the financial sector that were nationals of Colombia and to investors in that sector who were nationals of third States.

200. In addition, the Constitutional Court's June 25, 2014 order denying vacatur of the May 26, 2011 opinion also accorded the U.S. shareholders with treatment less favorable to that which is granted to nationals of Colombia and to nationals of third States.

201. FOGAFIN caused GRANAHORRAR to enter into a guarantee-restructuring program that was not required of investors in the financial institution sector who were Colombian nationals or of investors in this sector of third States. The guarantee-restructuring program, as explained in paragraphs 52 to 66 in greater detail, (i) was not intended to address the temporary liquidity challenge that GRANAHORRAR faced, and (ii) caused GRANAHORRAR to divest itself of a substantial percentage of its "A" rated net performing assets and in this way compromise adversely its solvency status. This unfavorable treatment was not extended to investors in this sector who were Colombian nationals and to nationals of third States who invested in this sector.

202. The scope of FOGAFIN's and the Superintendency of Banking's disparate and less favorable treatment imposed on GRANAHORRAR, including the U.S. shareholders, was focused on providing GRANAHORRAR with materially less, if at all, assistance in the form of funding and direct credit than that granted to nationals of Colombia who invested in this sector and to investors in financial institutions in Colombia who were nationals of third States. The draconian "credit" maturation dates were accompanied by less favorable treatment in the form of

higher interest rates imposed on GRANAHORRAR and that extended to investors who were Colombian nationals and nationals of third States who invested in the financial institution sector and appealed to FOGAFIN during the Colombian economic crisis.

203. FOGAFIN and the Superintendency of Banking, without limitation, provided GRANAHORRAR with less favorable treatment than that accorded to Colombian nationals who invested in the financial sector and nationals of third States who also invested in that sector by imposing on GRANAHORRAR the requirement of having GRANAHORRAR substitute its majority shareholders pursuant to the sale of this shareholder block's interest in GRANAHORRAR to GRANAHORRAR's creditors.

204. This treatment was less favorable in material ways that deprived the U.S. shareholders of the Article 12.2 national treatment protection standard that constitutes a fundamental substantive right under public international law provided for in the TPA. The Article 12.2 "no less favorable" standard was resolutely disavowed and violated.

B. Colombia's Breach of Article 12.3: Most-Favored-Nation Treatment

205. Article 12.3(1) of the TPA requires that Colombia provide investors and investments in financial institutions of another Party with treatment no less favorable than that which it grants to investors and investments in financial institutions in similarly situated circumstances of any other Party or non-Party investor or investment.

206. Article 12.3(1) of the TPA reads:

> 1. Each Party shall accord to investors of another Party, financial institutions of another Party, investments of investors in financial institutions, and cross-border financial service suppliers of another

> Party treatment no less favorable than that it accords to the investors, financial institutions, investments of investors in financial institutions, and cross-border financial service suppliers of any other Party or of a non-Party, in like circumstances.

1. Colombia's failure to accord Fair and Equitable Treatment

207. Colombia executed a BIT with the Republic of India that entered into force on July 2, 2012. Article 3(3) of the Colombia-India BIT states that "[e]ach Party shall accord to investments of investors of the other Contracting Party fair and equitable treatment ["FET"] and full protection and security in its territory."[113] In an effort to provide certainty, transparency, and predictive value to the scope and elements of the FET standard, the Colombia-India BIT included the following paragraph under Article 3:

> 4. For greater certainty,
>
> a. "Fair and equitable treatment" includes the prohibition against denial of justice in criminal, civil, or administrative proceedings in accordance with the principle of due process.
>
> b. The "Full protection and security" standard does not imply, in any case, a better treatment to that accorded to nationals of the Contracting Party where the investment has been made.
>
> c. A determination that there has been a breach of another provision of this Agreement or another international agreement does not imply that the minimum standard of treatment of aliens has been breached.

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[113] The Colombia-India BIT does not distinguish among industry sector investors or investments. For this reason its standards of protection are equally applicable to investors in all industry sectors, including the financial institution sector.

208. The customary international law obligation to accord FET has been interpreted to require treatment in accordance with an investor's legitimate, investment-backed expectations.[114] This standard is enshrined in both conventional and customary international law. Also, it has been interpreted as requiring protection of an investor from conduct attributable to a State and harmful to the investor. A State's acts breach this requirement if:

> the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or 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.[115]

209. The terms "fair" and "equitable" commonly have been interpreted to mean "'just', 'even-handed', 'unbiased', [and] 'legitimate.'"[116] The customary international law obligation to accord full protection and security has been interpreted to require not only physical protection of an investor's investment, but also maintenance of "the stability afforded by a secure investment environment."[117]

210. The U.S. shareholders at all times material to this cause held the reasonable expectation of being protected against discriminatory, arbitrary, grossly unfair, unjust or idiosyncratic treatment on the part of Colombia's government. At no time did they contemplate

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[114] *See Mondev International LTD v. United Sates of America*, ICSID Case No. ARB(AF)99/2 (Award) (October 11, 2002). *See* also *Técnicas Medioambientales TECMED S.A. v. United Mexican States*, ICSID Case No. ARB(AF)00/2 (Award) (May 29, 2003); *Plama Consortium, Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24 (Award) (August 27, 2008)

[115] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)00/3 (Award) (April 30, 2004), ¶ 98.

[116] *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8 (Award) (February 6, 2007), ¶ 290.

[117] *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12 (Award) (July 14, 2006), ¶ 408.

or could they have contemplated that the leading government financial agencies and instrumentalities, FOGAFIN and the Superintendency of Banking, would deny them the institutional support that these agencies are charged with granting to financial institutions, let alone that in so being deprived of such services by design, the U.S. shareholders were to be treated less favorably than investors in the financial sector who were similarly situated but of Colombian nationality and nationals of third States who also invested in the financial sector.

211. The acts and omissions of FOGAFIN and the Superintendency of Banking, as more fully here detailed in paragraphs 131 through 149 above, caused GRANAHORRAR and the U.S. investors, among other harm, the artificial demise of GRANAHORRAR's solvency status, the consequences of an artificially induced deposit run on GRANAHORRAR, the dilution of the GRANAHORRAR share value to COP 0.01, the U.S. shareholders' complete loss of their respective investments, and the loss of a judicial award surpassing the amount of COP 200,000,000,000, in June 2014.

a. Denial of Justice

212. The U.S. shareholders' attempts to seek judicial recourse have failed. As set forth in greater detailed in paragraphs 150 through 191 above, the U.S. shareholders first perfected a four (4) count complaint before the Tribunal de lo Contencioso Administrativo de Cundinamarca styled: *Acción de nulidad y restablecimiento del derecho de Compto S.A. en Liquidación, y otros, contra la Superintendencia Bancaria y el Fondo de Garantías de Instituciones Financieras*, file No. 200000521. These counts included (i) averments that the issued resolutions were void for want of premises establishing the factual bases and grounds supporting the ultimate conclusions and mandates contained in those papers (Exhibits 19 and 20), as well as a lack of insolvency that would justify such findings, (ii) lack of due process as to any ability to redress or address the

concerns stated in Exhibit 19, (iii) violation of mandatory laws, specifically Art. 72 of Legislation 45 (1990) (excessive interest rates), (iv) violation of Art. 1203 of the Commercial Code (misappropriation akin to expropriation), and (v) violation of Art. 29 of the Constitution (lack of due process).

213. This action was unavailing and after the passage of 4 years and 364 days merely yielded a hapless judgment that washed its hands of the controversy by finding that neither (i) the claims that claimants averred nor (ii) the defenses that respondent raised, had merit.

214. An appeal ensued to one of Colombia's three (3) highest ranking tribunals, the Council of State in the matter styled: *Compto S.A. en liquidación y otros, contra Superintendencia Bancaria y Fondo de Garantías de Instituciones Financieras (FOGAFIN)*, file No. 25000-23-24-000-2000-00521-02-15728. That tribunal issued a judgement in favor of claimants and against respondents FOGAFIN and the Superintendency of Banking, as set forth with specificity in paragraph 153 through 160 above.

215. Respondents filed appeals seeking reconsideration (four *tutelas*) of the judgment awarding claimants COP 226,961,237,735. All four appeals were summarily denied and the judgment in favor of claimants upheld.

216. Respondents sought recourse to the Constitutional Court. Consonant with the narrative detailed in paragraph 161 through 191 above, on May 26, 2011, the Constitutional Court entered an award that ostensibly purported to overturn on constitutional grounds the Council of State's judgment in favor of claimants. The Constitutional Court's opinion was an extreme and stark departure of national law (See paragraphs 182 through 190 above). The opinion (i) disavows the Constitutional Court's own precedent, (ii) disregards fundamental

principles of due process embodied in statutory notice provisions, (iii) ignores foundationally applicable codified strictures in the Administrative Code (in particular Articles 46 through 48), (iv) equivocates media reports with procedural and substantive statutory notice requirements, contrary to its own precedent, (v) exceeds its competence (jurisdiction) by adjudicating non-constitutional *legal* issues, (vi) further undermines its competence by adjudicating patently non-constitutional *factual* issues, (vii) spawns a national constitutional crisis because the opinion usurps the role and authority of a first instance tribunal, (viii) fosters an additional constitutional crisis because the opinion usurps the role of a parallel tribunal of equal hierarchy, and (ix) raises process legitimacy questions as to the Court's integrity by seemingly retaliating against a justice who issued a dissenting opinion.

217. The extreme and ethically challenged nature of the Constitutional Court's opinion impelled the Council of State to file a motion seeking vacatur of the Constitutional Court's opinion. The Council of State's own President and Chief Justice, Dr. Mauricio Fajardo Gómez, personally presented oral and written advocacy on that motion.

218. On June 25, 2014, the Constitutional Court denied the Council of State's motion to vacate. That opinion yielded two dissenting opinions (Exhibits 27) that found favor with the Council of State's position and characterized the Constitutional Court's opinion as founded on economic interest and manifestly devoid of all legal merit (See discussion in paragraphs 187 through 190 above).

219. On June 25, 2014, this cause ripened and with its maturation the final element of a treaty violation based upon denial of justice was perfected.

b. Judicial Expropriation

220. Colombia engaged in judicial expropriation because the outcome of the Constitutional Court's opinion (Exhibit 23) was to deprive in its entirety the U.S. shareholders of their property in the form of a readily enforceable decree that the Council of State issued. In this regard, the Constitutional Court's opinion amply meets the type of judicial action that treaty based investor-state arbitral tribunals have identified as an actionable taking of property in violation of public international law.[118]

221. Thus, the Constitutional Court's opinion has the direct and explicit effect of depriving claimants of any entitlement or right to the Council of State's judgment in favor of claimants in the amount of COP 226,961,237,735.

222. On May 26, 2011, the Constitutional Court's principal decision issued. The end of all judicial labor in that action took place on June 25, 2014, in the form of the final order of the case, which had the effect of permanently depriving claimants of a substantial property right in the form of the June 25, 2014 order denying the Council of State's petition for vacatur. While settled doctrine on this issue holds that a breach of FET, or the manner in which a judicial tribunal takes such property may not be material, let alone case dispositive, in this proceeding the

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[118] *See, e.g., Saipem S.p.A. v. Bangladesh*, ICSID Case No. ARB/05/7 (Award) (June 30, 2009) ¶ 202 ("After having carefully reviewed the arguments of the parties and having taken into account all the circumstances of the case, and in particular the fact that the expropriated rights at hand were Saipem's residual contractual rights under the investment as crystalized in the ICC Award ... the Tribunal considers that in the present case the amount awarded by the ICC Award constitutes the best valuation of the compensation due under the *Chorzów Factory* principle"), and *Rumeli Telkom v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16 (Award) (July 29, 2008), ¶¶ 705-706.

Constitutional Court's taking of claimants' property cannot be significantly distinguished from authority holding that a judicial expropriation had taken place.[119]

223. In the case before this Tribunal, however, the manner in which the Council of State's opinion was rendered null and void violated material principles of customary international law, conventional international law, as well as the jurisprudence, regulatory rubric and legislation of the Republic of Colombia.

c. Expropriation

224. Article 6 of the Colombia-India BIT prohibits expropriation, whether direct or indirect, except for a public purpose, in a non-discriminatory manner, in accordance with due process, and upon payment of compensation equivalent to the fair market value of the investment expropriated prior to the expropriatory event.

225. Specifically, Article 6 of that BIT in pertinent part provides:

> 1. Investments of investors of either Contracting Party in the territory of the other Contracting Party shall not be subjected to nationalization, expropriation, or any other measure having similar effects (hereinafter "expropriation") except for reasons of public purpose in accordance with the law, on a non-discriminatory basis and against fair and equitable treatment.
>
> 2. It is understood that:
>
> a. Indirect expropriation results from a measure or series of measures of a Contracting Party having an equivalent effect to

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[119] *See Sistem Mühendislik Inşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)06/01 (September 9, 2009) (Holding that "abrogation was effected by an organ of the Kyrgyz State, for which the Kyrgyz Republic is responsible. The abrogation of contractual rights by a State, in the circumstances in which they were obtained in this case, is tantamount to an expropriation of property by that State. The Court decision deprived the claimant of its property rights in the hotel just as surely as if the State had expropriated it by decree. If the claimant has been deprived of its property rights by an act of the State, it is irrelevant whether the State itself took possession of those rights or otherwise benefited from the taking.")

direct expropriation without formal transfer of title or outright seizure;

b. The determination of whether a measure or series of measures of a Contracting Party constitute indirect expropriation requires a case-by-case, fact-based inquiry considering:

(i) The economic impact of the measure or series of measures; however, the sole fact of a measure or series of measures having adverse effects on the economic value of an investment does not imply that an indirect expropriation has occurred;

(ii) the extent to which the measures or series of measures are discriminatory either in scope or in application with respect to an investor or an entity of a Party;

(iii) the extent to which the measures or series of measures interfere with distinct, reasonable investment-backed expectations concerning the investment;

(iv) the character and intent of the measures or series of measures, whether they are for bona fide public interest purposes or not and whether there is a reasonable nexus between them and the intention to expropriate.

c. Non-discriminatory regulatory actions by a Contracting Party that are designed and applied to protect legitimate public welfare objectives including the protection of health, safety and environment, do not constitute expropriation or nationalization; except in rare circumstances, where those actions are so severe that they cannot be reasonably viewed as having been adopted and applied in good faith for achieving their objectives.

d. Actions and awards by judicial bodies of a Contracting Party that are designed, applied or issued in public interest including those designed to address health, safety and environmental concerns do not constitute expropriation or nationalization.[120]

226. For there to be an expropriation there must be a "substantial deprivation" of the investor's property rights as a result of the measure taken by the host-State. An expropriation

[120] The judicial proceedings here described are precisely those that do not constitute exceptions pursuant to this subsection.

occurs when the "owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral."[121]

227. The entire value of the U.S. shareholders' investment in Colombia derives from the GRANAHORRAR share value. Because FOGAFIN illicitly reduced the share value to a value of COP 0.01, and then the Constitutional Court concluded and placed an end to all judicial labor by denying vacatur or modification of its opinion (Exhibit 23) rendering void the decision providing the U.S. shareholders with compensatory damages in the amount of COP 226,961,237,735 (Exhibit 22), the U.S. shareholders suffered the consequences of an illegal expropriation and then of an equally legally flawed judicial expropriation. In effect, they were twice unlawfully expropriated. The underlying expropriation occurred (i) without *any* compensation, let alone fair market value as contemplated in the TPA, (ii) based upon wanton discriminatory treatment, (iii) without due process, and (iv) was not for a public purpose.

228. Colombia's actions have destroyed the U.S. shareholders' investments. Judicial recourse, as here detailed, was protracted and ultimately so politically driven and afield from law and basic notions of human decency that it gave rise to a lasting Constitutional crisis. To date the Constitutional Court's usurpation of the Council of State's competence lingers as a problematic and ominous problem.

229. The Constitutional Court was complicit in the FOGAFIN's and the Superintendent of Banking's disregard for due process and application of discriminatory measures, all based upon socio-economic considerations that looked askance to normative legal directives.

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[121] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 (Award) (July 24, 2008), ¶ 438 (quoting *Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFAA Consulting Engineers of Iran*, Case No. 7 (141-7-2), 6 Iran-US C.T.R. 219, 225 (Award dated June 29, 1984)).

230. The Colombian judiciary in the form of the Constitutional Court has demonstrated that it is neither impartial nor independent.

231. The combined actions of numerous Colombian officials throughout several governmental agencies and instrumentalities have been coordinated to deprive the U.S. shareholders and their representatives, affiliates, and agents in Colombia of the control, use, benefits, enjoyment, and economic value of their investments in Colombia.

232. The underlying expropriation, artificially compromising GRANAHORRAR's solvency, reducing its share value to COP 0.01, unilaterally terminating its CEO, similarly unilaterally replacing the Board of Directors, and ultimately selling the bank itself to a non-Colombian privately owned bank, deprived the U.S. shareholders in absolute terms of the value of their investments.

233. The Constitutional Court's issuance of its May 26, 2011 ruling (Exhibit 23) and June 24, 2014 order (Exhibit 26) also illicitly and permanently deprived the U.S. shareholders of their property embodied in the Council of State's opinion dated November 1, 2007 (Exhibit 22).

IV. CONSENT TO ARBITRATE CLAIMS

234. On October 6, 2009, the Colombia-Switzerland BIT came into force. Article 11 of that Treaty governing, in part, the settlement of disputes between a Party and an investor of the other Party, in parts reads:

> (1) If an investor of a Party considers that a measure applied by the other Party is inconsistent with an obligation of this Agreement, thus causing loss or damage to him or his investment, he may request consultations with a view to resolving the matter amicably,

> (2) Any such matter which has not been settled within a period of six months from the date of written request for consultations may be referred to the courts or administrative tribunals of the Party concerned or to international arbitration. In the latter event the investor has the choice between either of the following:
>
> (a) the International Centre for Settlement of Investment Disputes (ICSID) provided for by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on March 18, 1965; and
>
> (b) an *ad hoc*-arbitral tribunal which, unless otherwise agreed upon by the parties to the dispute, shall be established under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).
>
> (3) Each Party hereby gives its unconditional and irrevocable consent to the submission of an investment dispute to an international arbitration in accordance with paragraph 2 above, except for disputes with regard to Article 10 paragraph 2 of this Agreement.
>
> (4) Once the investor has referred the dispute to either a national tribunal or any other international arbitration mechanism provided for in paragraph 2 above, the choice of the procedure shall be final.
>
> (5) An investor may not submit a dispute for resolution according to this Article if more than five years have elapsed from the date the investor first acquired or should have acquired knowledge of the events giving rise to the dispute.
>
> (8) The arbitral award shall be final and binding for the parties to the dispute and shall be executed without delay according to the law of the Party concerned.

235. Claimants have consented to this UNCITRAL arbitration pursuant to this Notice of and Request for Arbitration.

236. Colombia has consented to UNCITRAL arbitration pursuant to Article 11 of the Treaty here cited and Article 12.3 of the TPA.

237. All jurisdictional requirements and conditions for submitting this dispute to UNCITRAL arbitration have been met.

V. RELIEF OR REMEDY SOUGHT

238. Pursuant to UNCITRAL Article 3(3)(f), claimants Alberto Carrizosa Gelzis, Felipe Carrizosa Gelzis, and Enrique Carrizosa Gelzis, in the aggregate seek damages in the amount of USD 323,393,712.81, exclusive of attorney's fees and costs.

VI. PROPOSAL AS TO NUMBER OF ARBITRATORS

239. Claimants propose an arbitral panel consisting of three (3) arbitrators. None of the arbitrators is to be a national of the United States or the Republic of Colombia.

VII. PROPOSED LANGUAGE TO BE USED IN THE ARBITRATION

240. Claimants propose that the arbitration be conducted as a bilingual proceeding in both the English and Spanish languages.

VIII. THE PROPOSED PLACE OF ARBITRATION

241. Claimants propose the city of The Hague, Kingdom of Netherlands.

IX. THE PROPOSED APPOINTING AUTHORITY

242. Claimants propose the Secretary-General of the Permanent Court of Arbitration at The Hague.

X. THE PROPOSED ADMINISTRATIVE AUTHORITY

243. Claimants propose designating the Permanent Court of Arbitration at The Hague as the institutional authority charged with the administration of this arbitral proceeding.

XI. EVIDENCE GATHERING PROPOSAL

244. Claimants propose having this arbitral proceeding, were applicable, governed by the IBA Rules on the Taking of Evidence in International Arbitration (2010).

XII. THE PROPOSED PARTY APPOINTED NEUTRAL ARBITRATOR

245. Claimants propose appointing Professor Franco Ferrari, a national of the Republic of Italy, as claimants' party appointed neutral arbitrator to serve in this proceeding.

Professor Franco Ferrari's contact information is as follows:

NYU School of Law
Executive Director,
Center for Transnational Litigation, Arbitration, and Commercial Law
(212) 992-8123
(917) 724-1081
franco.ferrari@nyu.edu

XIII. RESERVATION OF RIGHTS AND REQUIREMENT FOR RELIEF

246. Claimants reserve the right to advance further arguments and produce such additional evidence, factual or legal, as necessary to complete or supplement the presentation of its claims or to respond to any arguments or allegations that Colombia may advance. Claimants also reserve the right to produce further documentary evidence and to produce and render available witness evidence to supplement and support the claims made in this *Notice of and Request for Arbitration.*

247. Reserving their right to amend, supplement, or otherwise restate their claims and the relief requested in connection with such demand, claimants request an award granting, without limitation, the following relief:

(i) A declaration that Colombia has violated the Treaties, customary international law, and Colombian law with respect to claimants' investments;

(ii) Compensation to claimants for all damages that it has suffered, to be developed, and quantified in the course of this proceeding, but including, without limitation, compensation for the wrongful expropriation of claimants' investments, and damages for Colombia's failure to provide claimants and their investments fair and equitable treatment,

national treatment, fair judicial recourse, and for its arbitrary and discriminatory interference with claimants' use and enjoyment of its investments;

(iii) Such compensation, exclusive of attorney's fees and costs must be no less than USD 323,393,712.81.

(iv) All costs and fees associated with this proceeding, including all professional fees and disbursements;

(v) An award of compound interest until the date of Colombia's final satisfaction of the award at a rate to be fixed by the Tribunal; and

(vi) Such other relief as counsel may advise and the Tribunal may deem appropriate.

CONCLUSION

For the reasons here detailed, claimants respectfully request for this UNCITRAL arbitration to proceed against the Republic of Colombia and for the issuance of a damages award in favor of claimants and against Colombia in an amount no less than USD 323,393,712.81.

Dated: January 24, 2018

Respectfully,

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