

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Eco Oro Minerals Corp.**

Claimant

**v.**

**Republic of Colombia**

Respondent

**(ICSID Case No. ARB/16/41)**

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**PROCEDURAL ORDER No. 10**

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***Members of the Tribunal***

Mrs. Juliet Blanch, President of the Tribunal  
Professor Horacio A. Grigera Naón, Arbitrator  
Professor Philippe Sands, Arbitrator

***Secretary of the Tribunal***

Mrs. Ana Constanza Conover Blancas

***Assistant to the President of the Tribunal***

Mr. João Vilhena Valério

27 December 2019

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Pursuant to ICSID Arbitration Rules 19 and 21, Procedural Order No. 1 of 30 November 2017, and the Pre-Hearing telephone conference between the President of the Tribunal and representatives of the Parties on 20 December 2019, the Tribunal issues the present order, which establishes the additional procedural rules that will apply to the final hearing (the “**Hearing**”) in this case. As agreed during the Pre-Hearing telephone conference, the Tribunal may be guided by the International Bar Association Rules on the Taking of Evidence in International Arbitration (2010).

**I. Details of the Hearing**

1. The Hearing will be held at the World Bank’s hearing facilities at 1225 Connecticut Ave N.W., Washington, D.C. 20036, from **Monday 20 January 2020** through **Friday, 24 January 2020**, with **Saturday, 25 January 2020** held in reserve.

**II. Order of proceedings and logistics**

2. As soon as possible, but in any event no later than **6 January 2020**, the Parties<sup>1</sup> will inform the Tribunal if they will require videoconference services for any witness who is unable to appear personally at the Hearing for valid cause.
3. Without prejudice to the chess clock system described in Section 7.5 below, no later than **13 January 2020**, the Parties will submit to the Tribunal an indicative (non-binding) timetable setting out their best estimates as to the approximate duration of the examination of each witness. For the avoidance of doubt, while this timetable is non-binding, the objective of this timetable is to ensure that the Parties are provided with a reasonable expectation of the likely duration of the examination of each witness at the hearing.
4. The Parties will separately coordinate the logistical arrangements for the Hearing with the ICSID Hearing Organization Team.

**III. Schedule and allocation of time**

5. Each Hearing day will start at 9.00 a.m. and close at 6.00 p.m. There will be a lunch break of 1.5 hours, as well as mid-morning and mid-afternoon breaks, each of 15 minutes.
6. The timetable for the Hearing will be subject to any such adjustments as the Tribunal may deem necessary or appropriate.
7. Allocation of time at the hearing will be as follows:
  - 7.1. Day 1 of the Hearing will begin with the Claimant’s opening statement, followed by the Respondent’s opening statement. Each Party will have up to three hours to present its opening statement. One hour will be reserved for the Tribunal’s questions and any procedural and logistical matters.

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<sup>1</sup> For the purposes of ICSID Arbitration Rule 32(1), the Parties’ agents include any member of the board of directors of a Party and any advisor to the board of directors of a Party.

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- 7.2. To the extent that there remains time after completion of the Respondent's opening statement, the examination of witnesses may, at the Tribunal's discretion, begin on Day 1.
- 7.3. The total number of effective hearing hours per day is seven hours<sup>2</sup>, such that there are 35 effective hearing hours for Days 1 through 5, plus an additional seven hours in the event that the reserve day, Saturday, 25 January 2020, is used.
- 7.4. On each of Days 1 to 5 (and Day 6, if the reserve day is used), one hour will be reserved for addressing Tribunal questions and procedural and logistical matters, such that the Parties will have six hours of effective hearing time per day.
- 7.5. The Tribunal and the Parties' allotted time will be administered with a chess clock system.
- 7.6. It is anticipated that the examination of fact witnesses will take place on Days 2 and 3 of the Hearing, taking up 12 hours of effective hearing time for the use of the Parties. To reflect the fact that Claimant will cross-examine five fact witnesses compared to the Respondent, who will cross-examine only two fact witnesses, time will be allocated on a 60/40 basis on Days 2 and 3 (subject to the provision of 7.2 above). Consequently, the Claimant will have 7.2 hours and the Respondent will have 4.8 hours.
- 7.7. Each Party will have six hours for the examination of expert witnesses, which is anticipated to begin on Day 4, unless it is subsequently agreed that the reserve day, Saturday, 25 January 2020, is required, in which case each Party would have an additional three hours.
- 7.8. If a Party does not use all of the time allocated to it for the examination of fact witnesses on Days 2 and 3, or it exceeds that time, its remaining time for the examination of expert witnesses will be adjusted accordingly.
- 7.9. In accordance with the chess clock system, each Party will be free to allocate its allotted time as it deems convenient, notwithstanding the provision of the indicative (non-binding) timetable referred to in Section 3 above.
- 7.9.1. The following will not be counted against any Party's time:
- 7.9.1.1. time spent on questions posed by the Tribunal and on responses to those questions;
  - 7.9.1.2. time spent on administrative or organizational matters; and
  - 7.9.1.3. time spent dealing with objections from a Party.
- 7.9.2. Time allocated for opening statements and not used by a Party will be added to that Party's total time, unless the Tribunal, exercising its discretion pursuant to 7.2 above, determines that the examination of witnesses shall not begin on Day 1.

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<sup>2</sup> 9 hours per day minus 2 hours for breaks.

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8. The Secretary of the Tribunal will control and maintain a record of the time used by each Party and the Tribunal throughout the Hearing. At the close of each hearing day, the Secretary will inform the Tribunal and the Parties of the total time used and the remaining time for each Party and the Tribunal.
9. At an appropriate time after the examination of the fact witnesses, but before the commencement of the examination of the expert witnesses, the Tribunal will consult with the Parties as to whether the reserve hearing day, Saturday, 25 January 2020, will be used.

**IV. Witness and expert examination**

10. In accordance with Section 19.2 and Annex A of Procedural Order No. 1 and Annex A of Procedural Order No. 5, on 16 December 2019, each Party notified the other Party that it wished to cross-examine all of the other Party's witnesses at the Hearing.
11. On 18 December 2019, each Party confirmed to the opposing Party, with a copy to the Tribunal, the order in which it wishes to cross-examine the other Party's witnesses. The examination of witnesses and experts will take place in the order set out below, unless the Parties agree otherwise:
  - 11.1. Claimant's fact witnesses:
    - Mr. Mark Moseley-Williams
    - Ms. Wilmer Gonzalez Aldana
  - 11.2. Respondent's fact witnesses:
    - Mr. Javier Garcia
    - Ms. Luz Helena Sarmiento
    - Ms. Brigitte Baptiste
    - Mr. Carlos Sarmiento
    - Ms. Maria Isabel Ulloa
  - 11.3. Claimant's legal expert:
    - Ms. Margarita Ricaurte
  - 11.4. Respondent's legal expert:
    - Mr. Felipe de Vivero Arciniegas
  - 11.5. Claimant's mining and engineering experts:
    - Mark K. Jorgensen
    - Messrs. Bernard J. Guarnera and Robert Cameron
  - 11.6. Respondent's mining and engineering experts:
    - Mr. Christopher Johnson
    - Mr. Mario Rossi

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- 11.7. Claimant's damages experts:
- Messrs. Manuel A. Abdala and Pablo T. Spiller
- 11.8. Respondent's damages experts:
- Messrs. James C. Burrows and Tiago Duarte-Silva
12. The examination of witnesses and experts will be conducted pursuant to Section 19 of Procedural Order No. 1, which is reproduced in part below with certain limited clarifications (bolded):

*19.7. **Fact and expert witnesses shall be examined before the Tribunal by the Parties under the control of its President. The Tribunal may examine the witness at any time, either before, during or after examination by one of the Parties.***

*19.8. **Fact witnesses giving oral evidence shall, before giving evidence, make the declaration in ICSID Arbitration Rule 35(2), and expert witnesses shall make the declaration in ICSID Arbitration Rule 35(3). The witnesses will be asked to confirm their statement or report and may then be briefly examined by counsel for the Party that is presenting the witness for "direct examination" which may not introduce new matters not already covered by the written statement or report, save in response to new matters raised in the Rejoinder. During the brief direct examination, the Party who has presented the witness may ask the witness introductory questions, including about any corrections to be made to the statement or report, and to address new matters raised in the Rejoinder. Expert witnesses may give a presentation before the start of their cross-examination. The witness may then be examined by counsel for the opposing Party ("cross-examination"), and subsequently by counsel for the Party offering the witness, limited to matters that arose during cross-examination ("re-direct examination").***

*19.9. Each Party shall be responsible for the practical arrangements, cost and availability of any witness it offers, without prejudice to the final decision of the Tribunal as to the allocation of costs.*

*19.10. A fact witness shall not be present in the hearing room during the hearing of oral testimony, discuss the testimony of any other witness who has already testified prior to giving his/her testimony, or read any transcript of any oral testimony, prior to his or her examination, except with the express permission of the Tribunal upon request from a Party. This condition does not apply to experts.*

*19.11. The Tribunal shall, at all times, have complete control over the procedure for hearing a witness. The Tribunal may in its discretion refuse to hear a witness when it appears that the facts on which he or she is to testify are already proven by other evidence or are irrelevant. It may also order that a witness be recalled for further examination at any time. Any witness may only be recalled by the Tribunal (of its own motion or on request) if such intention is announced in time to assure the availability of the witness during the hearing.*

*19.12. Counsel may meet witnesses and potential witnesses to establish the facts, assist with the preparation of witness statements and oral examinations.*

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13. For the avoidance of doubt, fact witnesses may also not access or view the live or recorded stream of the public Hearing referred to in Clauses 35 and 36 hereof prior to giving testimony.
14. The direct examination of fact witnesses shall not exceed 15 minutes. The direct examination or presentation of any expert (or group of experts) shall not exceed 30 minutes.
15. By 30 December 2019, for each expert report submitted on behalf of a group of experts, each Party shall provide to the other Party, with a copy to the Tribunal, “an attribution of the entirety or specific parts of the Expert Report to each author” as required by paragraph 18.3.6 of Procedural Order No. 1.
16. If experts have submitted a report as a group, they will be cross-examined together as a group. All cross-examination questions will be directed to one expert in the group as designated by the Party presenting the group of experts, in accordance with the indication provided pursuant to 15 above. That expert will be responsible for determining which expert within the group should respond to the question, taking into consideration that the experts’ testimony shall be given in a time-efficient manner and with the purpose of assisting the Arbitral Tribunal.
17. If a fact or expert witness’s examination is interrupted and must continue in the following session, the fact or expert witness may not speak with or contact any of the Parties, their representatives or counsel until the examination is completed. The Parties will use their best efforts to ensure that the examination of a given fact or expert witness is conducted in its entirety on the same day.
18. In accordance with Section 19.4 of Procedural Order No. 1<sup>3</sup> and the letter from the Tribunal to the Parties dated 29 October 2019, in respect of witnesses called to testify at the Hearing, if a Party is unable to present a witness physically at the Hearing for a valid cause, that Party shall inform the other Party by **30 December 2019**, indicating the cause, with a view to agreeing suitable alternative arrangements to allow the witness to testify (such as videoconference facilities). If there is a dispute between the parties as to whether such valid cause exists, or if the parties are not able to agree suitable alternative arrangements, then the parties will present their respective positions on such question to the Tribunal by no later than **6 January 2020**.

**V. Documents for use at the Hearing**

19. The rules regarding additional documents and new evidence are set out in Section 17.3 of Procedural Order No. 1, which is copied below for ease of reference:

*17.3. Neither Party shall be permitted to submit additional or responsive documents after the filing of its respective last written submission, unless the Tribunal determines that exceptional circumstances exist based on a reasoned written request followed by observations from the other Party.*

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<sup>3</sup> Section 19.4 of Procedural Order No. 1 provides as follows: “[i]f a witness is unable to appear personally at a hearing for valid cause (for example, force majeure or reasons of health), the Tribunal may permit alternative arrangements (such as videoconference facilities), upon consultation with the Parties.”

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*17.3.1. Should a Party request leave to file additional or responsive documents, that Party may not annex the documents that it seeks to file to its request.*

*17.3.2. If the Tribunal grants such an application for submission of an additional or responsive document, the Tribunal shall ensure that the other Party is afforded sufficient opportunity to make its observations concerning such a document.*

20. The rules regarding demonstrative exhibits are set out in Section 17.8 of Procedural Order No. 1.<sup>4</sup> For ease of reference, the Parties are reminded that “*demonstrative exhibits (such as PowerPoint slides, charts tabulations, etc.) may be used at any hearing, provided they contain no new evidence*”. For the avoidance of doubt, experts may use demonstrative exhibits during their direct examinations or presentations. The Party submitting such demonstrative exhibits will provide electronic copies and Sufficient Copies to the other Party, the Tribunal Members, the Secretary and Assistant to the President of the Tribunal, the court reporters, and the interpreters at the Hearing at any time before referring to such exhibit and will ensure that each slide provides the source of the evidence on the record on which it relies. “**Sufficient Copies**” means sufficient hard copies for 11 copies to be provided to the other Party (2 copies), Tribunal Members (three copies), the Secretary and Assistant to the President of the Tribunal (two copies), the court reporters (two copies), and the interpreters (two copies).
21. Sufficient Copies of cross-examination bundles (*i.e.* bundles of exhibits or legal authorities on the record to which the witness or expert is to be referred, including an index identifying the relevant tab and exhibit / legal authority number) are to be provided immediately before the cross-examination. The Party conducting the cross-examination will provide at least two copies of the cross-examination bundle and two additional copies of the index to the cross-examination bundle to the opposing Party. The cross-examination bundle provided to the witness or expert must remain in the hearing room.
22. In accordance with Section 21.7 of Procedural Order No. 1, the parties are not required to provide to the Tribunal additional hard copies of their respective sets of pleadings and supporting documents for use by the Tribunal during the Hearing.
23. In accordance with Section 21.6 of Procedural Order No. 1, the Parties will jointly agree and prepare a single USB drive containing copies of all pleadings, witness statements, expert reports, exhibits, legal authorities, translations, decisions and orders in the arbitration file, with a unified hyperlinked index, which they will provide to the Tribunal as soon as possible, but in any case, no later than **6 January 2020**.
24. As regards the indices of documents referred to in Sections 21 and 23 above, all material designated as “confidential information” within the meaning of Article 830(2) of the Free Trade Agreement between Canada and the Republic of Colombia will be marked in **red**.

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<sup>4</sup> Section 17.8 of Procedural Order No. 1 provides as follows: “[d]emonstrative exhibits (*such as PowerPoint slides, charts, tabulations, etc.*) may be used at any hearing, provided they contain no new evidence. Each Party shall number its demonstrative exhibits consecutively, e.g. “CH-1”, “CH-2”, etc for Claimant, and “RH-1”, “RH-2”, etc. for Respondent. Demonstrative exhibits shall clearly reference the source of the information from the record (e.g. pleading, witness statement, expert report, exhibit, legal authority, with a pinpoint citation). The Party submitting such exhibits shall provide them in hard copy to the other Party, the Tribunal Members, the Secretary and Assistant of the Tribunal, the court reporters, and the interpreters at the hearing, at a time to be decided at the pre-hearing organizational meeting.”

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**VI. Interpretation**

25. Pursuant to Section 12 of Procedural Order No. 1, the Hearing will be conducted in Spanish and English. There will be simultaneous Spanish-English and English-Spanish interpretation throughout the Hearing.
26. By **6 January 2020**, the parties will indicate the language in which their fact and expert witnesses will testify.

**VII. Audio recording and Hearing transcripts**

27. Pursuant to Section 22 of Procedural Order No. 1, sound recordings will be made of the Hearing as well as verbatim transcripts in the two procedural languages. English transcripts will be taken throughout the Hearing. Spanish verbatim transcripts will only be required for the examination of those witnesses and experts who will testify in Spanish, as notified on **6 January 2020**.
28. ICSID will arrange to have English and, where required, Spanish verbatim transcripts available in real-time using Live Note or a similar software during the Hearing.
29. Electronic versions of the transcripts will be provided to the Parties and the Tribunal on a same-day basis.
30. The court reporters will indicate in the transcripts whenever they have transcribed from the English or Spanish simultaneous interpretation and not the original language spoken on the floor.
31. Any corrections to the transcripts will be made in accordance with Section 41, below.
32. The original language (non-translated) version of the transcript will be the only authoritative transcript for use in any other subsequent pleading or presentation. As a consequence, insofar as any Party quotes the translated version of the transcript in a subsequent pleading or presentation, the original language transcript will be quoted in a footnote.

**VIII. Hearing equipment**

33. Each Party commits to carry a laptop that will be connected to the screens made available by ICSID for projections of demonstrative exhibits and visual aids.
34. ICSID will arrange to have a whiteboard in the Hearing room.

**IX. Transparency**

35. In accordance with Section 21.8 of Procedural Order No. 1 and Article 830(2) of the FTA, the Hearing will be open to the public. The Tribunal may hold portions of the Hearing *in camera* to the extent necessary to ensure the protection of confidential information.
36. The Hearing will be live-streamed with a one-hour delay for viewing in an overflow room. The Hearing will be streamed only in the language being spoken during the proceeding at any given time, which will be English or Spanish only, without the provision of

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interpretation into the other language. No cameras or other recording equipment (including phones or laptops) will be allowed in the overflow room.

37. During the Hearing, any information designated by one or both of the Parties as being confidential will be protected by muting the video stream and indicating to the viewer(s) that the Hearing is being temporarily held privately. The required mechanics for the Parties to alert the Tribunal about the use of confidential information during the Hearing are addressed in the Protocol attached hereto as **Annex A**.
38. The time, location and date of the Hearing will be announced publicly via the ICSID website in English and Spanish.

**X. Travel certificates**

39. In accordance with Regulation 31 of the ICSID Administrative and Financial Regulations, the Parties have confirmed that certificates of official travel are required for the following individuals:

**Claimant will require a travel certificate for:**

- Wilmer Gonzalez Aldana, witness
- Margarita Ricuarte, expert
- Mark Moseley-Williams, witness

**Respondent will require travel certificates for:**

- Camilo Gómez Alzate, *Agencia Nacional de Defensa Jurídica del Estado*, Party Representative
- Ana María Ordoñez Puentes, *Agencia Nacional de Defensa Jurídica del Estado*, Party Representative
- Juan Sebastián Torres Oliver, *Agencia Nacional de Defensa Jurídica del Estado*, Party Representative
- Javier García Granados, Witness
- Brigitte Baptiste, Witness
- Luz Helena Sarmiento, Witness
- Carlos Sarmiento, Witness
- María Isabel Ulloa, Witness
- Felipe De Vivero Arciniegas, Expert

**XI. Post-hearing briefs**

40. The parties shall file a single post-hearing brief simultaneously. At the end of expert examinations, and in consultation with the Parties, the Tribunal will provide guidance on: (a) the content of the post-hearing brief including (without limitation) any questions it would like addressed; (b) time limits; and (c), length and format. No additional evidence

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may be produced together with the post-hearing briefs, except with leave from or at the request of the Tribunal.

41. In an annex to its post-hearing brief, each Party will list any necessary corrections to those portions of the transcripts that are quoted or referenced in its post-hearing brief, for which purpose each Party will need to precisely indicate the time-stamp of the floor audio recordings corresponding to each statement requiring correction. If the other Party disagrees with any corrections, it will notify the Tribunal of its disagreement within two weeks of the filing of the post-hearing brief. The Tribunal will decide upon any disagreement between the Parties. Any correction adopted by the Tribunal, as well as the corrections to which both Parties agree, will be entered by the Parties into the revised transcripts.

**XII. Statements of costs**

42. In accordance with Section 23.2 of Procedural Order N. 1 and Arbitration Rule 28(2), promptly after the closure of the proceeding, each Party will submit to the Secretary of the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding. The Tribunal will issue specific directions in this regard.

On behalf of the Tribunal,

[Signed]

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Mrs. Juliet Blanch  
President of the Tribunal  
Date: 27 December 2019

**Procedural Order No. 10 – Annex A**

**ANNEX A**

**PROTOCOLS FOR PROTECTION OF “CONFIDENTIAL INFORMATION”**

**HEARING**

(20– 25 January 2020)

**1.1. OBJECTIVES**

1. These protocols are established to ensure:
  - (a) Appropriate logistical arrangements for the open Hearing, in accordance with the transparency regime established by Article 830 of the Canada-Colombia FTA.
  - (b) The protection of “confidential information” (as defined in Article 838 of the Canada-Colombia FTA).
  - (c) An efficient, smooth and minimally disrupted Hearing.

**1.2. GENERAL RULES**

2. As agreed by the Parties, the Hearing will be broadcast on a one-hour delay in an overflow room.
3. No cameras or other recording equipment (including phones or laptops) will be allowed in the broadcasting room.
4. “Confidential information” shall be protected from disclosure by holding relevant parts of the Hearing “in private”, instead of publicly.
5. The privacy of the Hearing shall be achieved, when necessary, through the moderation of the video feed.
6. The term “moderation” means that the video feed will be muted and the screen will be showing a sign indicating that the Hearing is temporarily held “in private”.
7. The Parties shall follow the protocols established below to alert the Tribunal of the use of “confidential information” during the Hearing and request the “moderation” of the video feed.

**1.3. PROTOCOLS**

8. A Party may request at any time during the Hearing that part of the Hearing be held “in private” and that the broadcast be moderated temporarily to prevent disclosure of “confidential information”.

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9. The Parties shall request moderation of the video feed **before** the “confidential information” is discussed, addressed or shown at the Hearing (whether by the counsel or by witnesses or experts).
10. Requests for moderation after alleged “confidential information” has been discussed can only be accommodated in **exceptional** circumstances and in a **minimum** number (*i.e.* no more than one moderation per hour). In such case, the Party requesting the delayed moderation is responsible for identifying and promptly communicating the exact video time stamp (hour, minute, second) of the moderation request **before** the end of the respective hour.
11. To avoid delayed requests for moderation, which may result in a breach of confidentiality, the Parties are responsible for identifying, **before** discussing, addressing or showing (whether through counsel submissions or through witnesses or experts’ examination) documents or information, whether these are “confidential information” or could raise confidentiality issues.
12. To minimize the number of interruptions, the Parties are invited to organize the topics addressed during their oral statements and witness/expert examinations so that those which involve “confidential information” are grouped together, wherever possible.
13. Each Party shall designate one member of its legal team who shall be responsible for bringing moderation requests to the Tribunal’s attention.
14. The Parties shall request moderation of the video feed both orally and by using the **RED** sign provided by the Secretary of the Tribunal before the start of the Hearing.
15. The Parties shall request the resumption of the video feed both orally and using the **GREEN** sign provided by the Secretary of the Tribunal before the start of the Hearing.
16. When the Parties request the moderation or resumption of the video feed, the Secretary of the Tribunal shall inform the technician in charge of the video feed, using an audiovisual alert device located in the technical booth. A **RED** light will be shown in the Hearing room to signal to participants when the video feed is closed to the public.
17. If a Party has an objection to the moderation or resumption of the video feed requested by the other Party, it shall immediately alert the Tribunal, which shall hear the Parties and decide on the matter. The discussion between the Parties and the Tribunal shall be held “in private” and the transcript shall be marked “confidential”.
18. If the Tribunal decides that documents and information about to be discussed, addressed or shown warrant the Hearing to be temporarily held “in private”, the video feed shall be moderated per the Tribunal’s instructions.

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19. Resumption of the video feed shall be requested by the Party which requested and obtained moderation (subject to any objection to resumption under protocol 17 above) or proposed by the Tribunal. Resumption may also be requested by the other Party if it deems it necessary. The Tribunal shall rule on any dispute between the Parties in that respect.