

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**Amec Foster Wheeler USA Corporation, Process Consultants, Inc., and Joint Venture
Foster Wheeler USA Corporation and Process Consultants, Inc.**

v.

Republic of Colombia

(ICSID Case No. ARB/19/34)

PROCEDURAL ORDER NO. 1

Members of the Tribunal

Mr. José Emilio Nunes Pinto, President of the Tribunal

Mr. John Beechey, Arbitrator

Prof. Marcelo G. Kohen, Arbitrator

Secretary of the Tribunal

Ms. Marisa Planells-Valero

March 18, 2021

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Introduction

The first session of the Tribunal was held on August 26, 2020 at 10:00 a.m., by videoconference. The session was adjourned at 12:40 p.m.

An audio recording of the session was made and deposited in the archives of ICSID. The recording was distributed to the Members of the Tribunal and the parties.

Participating in the conference were:

Members of the Tribunal

- Mr. José Emilio Nunes Pinto, President of the Tribunal
- Mr. John Beechey, Arbitrator
- Prof. Marcelo G. Kohen, Arbitrator

ICSID Secretariat

- Ms. Marisa Planells-Valero, Secretary of the Tribunal

Participating on behalf of the Claimants

- Mr. Charles C. Conrad, Pillsbury Winthrop Shaw Pittman LLP
- Mr. Robert L. Sills, Pillsbury Winthrop Shaw Pittman LLP
- Mr. Richard Deutsch, Pillsbury Winthrop Shaw Pittman LLP
- Mr. Matthew F. Putorti, Pillsbury Winthrop Shaw Pittman LLP

Participating on behalf of the Respondent

- Ms. Ana María Ordoñez Puentes, Agencia Nacional de Defensa Jurídica del Estado, Republic of Colombia
- Mr. Giovanni Vega Barbosa, Agencia Nacional de Defensa Jurídica del Estado, Republic of Colombia
- Ms. Elizabeth Prado López, Agencia Nacional de Defensa Jurídica del Estado, Republic of Colombia
- Mr. Andrés Felipe Esteban, Agencia Nacional de Defensa Jurídica del Estado, Republic of Colombia
- Ms. Gabriela Álvarez Ávila, Curtis, Mallet-Prevost, Colt & Mosle LLP
- Ms. Claudia Frutos-Peterson, Curtis, Mallet-Prevost, Colt & Mosle LLP
- Ms. Elisa Botero, Curtis, Mallet-Prevost, Colt & Mosle LLP
- Mr. Fernando Tupa, Curtis, Mallet-Prevost, Colt & Mosle LLP

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The Tribunal and the parties considered the following:

- The Draft Procedural Order circulated by the Tribunal Secretary on August 7, 2020; and
- The parties' comments on the Draft Procedural Order received on August 19, 2020, indicating the items on which they agreed and their respective positions regarding the items on which they did not agree, the parties' agreement received on October 7, 2020 regarding Sections 11 and 13 of the Draft Procedural Order, and the parties' additional submissions received on October 9 and 16, 2020.

Following the session, the Tribunal now issues the present Order:

Order

Pursuant to ICSID Arbitration Rules 19 and 20, this first Procedural Order sets out the Procedural Rules that govern this arbitration. The timetable is attached as Annex A.

1. Applicable Arbitration Rules
Convention Article 44

- 1.1. These proceedings are conducted in accordance with the ICSID Arbitration Rules in force as of April 10, 2006.
- 1.2. In addition, the Parties and the Tribunal note the applicability of certain provisions of the United States – Colombia Trade Promotion Agreement (the “**US-Colombia TPA**”) to the conduct of the proceedings.

2. Constitution of the Tribunal and Tribunal Members' Declarations
Arbitration Rule 6

- 2.1. The Tribunal was constituted on June 18, 2020 in accordance with the ICSID Convention and the ICSID Arbitration Rules. The parties confirmed that the Tribunal was properly constituted and that no party has any objection to the appointment of any Member of the Tribunal.
- 2.2. The Members of the Tribunal timely submitted their signed declarations in accordance with ICSID Arbitration Rule 6(2). Copies of these declarations were distributed to the parties by the ICSID Secretariat on June 18, 2020.
- 2.3. The Members of the Tribunal confirmed that they have sufficient availability during the next 24 months to dedicate to this case.

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- 2.4. Respondent underscored that all points in this Procedural Order are without prejudice to its objections to jurisdiction and/or admissibility. Claimants reserved all rights with respect to jurisdiction and/or admissibility.
3. Fees and Expenses of Tribunal Members
Convention Article 60; Administrative and Financial Regulation 14; ICSID Schedule of Fees
- 3.1. The fees and expenses of each Tribunal Member shall be determined and paid in accordance with the ICSID Schedule of Fees and the Memorandum on Fees and Expenses of ICSID Arbitrators in force at the time the fees and expenses are incurred.
- 3.2. Under the current Schedule of Fees, each Tribunal Member receives:
- 3.2.1. US\$3,000 for each day of meetings or each eight hours of other work performed in connection with the proceedings or *pro rata*; and
- 3.2.2. subsistence allowances, reimbursement of travel, and other expenses pursuant to ICSID Administrative and Financial Regulation 14.
- 3.3. Each Tribunal Member shall submit his claims for fees and expenses to the ICSID Secretariat on a quarterly basis.
- 3.4. Non-refundable expenses incurred in connection with a hearing as a result of a postponement or cancellation of the hearing shall be reimbursed.
4. Presence and Quorum
Arbitration Rules 14(2) and 20(1)(a)
- 4.1. The presence of all Members of the Tribunal constitutes a quorum for its sittings, including by any appropriate means of communication.
5. Rulings of the Tribunal
Convention Article 48(1); Arbitration Rules 16, 19 and 20
- 5.1. Decisions of the Tribunal shall be taken by a majority of the Members of the Tribunal.
- 5.2. ICSID Arbitration Rule 16(2) applies to decisions taken by correspondence, except that where the matter is urgent, the President may decide procedural matters without consulting the other Members, subject to possible reconsideration of such decision by the full Tribunal.

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- 5.3. The Tribunal will draft all rulings, including the award, within a reasonable time period and will provide regular updates to the parties.
 - 5.4. The President is authorized to issue Procedural Orders on behalf of the Tribunal.
 - 5.5. The Tribunal's rulings on procedural matters may be communicated to the parties by the Tribunal Secretary electronically in the form of a letter or email.
 - 5.6. Any ruling of the Tribunal, including the certified copy of the award, will be dispatched electronically to the parties.
6. Power to Fix Time Limits
Arbitration Rule 26(1)
- 6.1. The President may fix and extend time limits for the completion of the various steps in the proceeding.
 - 6.2. In exercising this power, the President shall consult with the other Members of the Tribunal. If the matter is urgent, the President may fix or extend time limits without consulting the other Members, subject to possible reconsideration of such decision by the full Tribunal.
7. Secretary of the Tribunal
Administrative and Financial Regulation 25
- 7.1. The Tribunal Secretary is Ms. Marisa Planells-Valero, Legal Counsel, ICSID, or such other person as ICSID may notify to the Tribunal and the parties from time to time.
 - 7.2. To send copies of communications by email, mail, and courier/parcel deliveries to the ICSID Secretariat, the contact details are:

Ms. Marisa Planells-Valero
ICSID
MSN C3-300
1818 H Street, N.W.
Washington, D.C. 20433
USA
Tel.: + 1 (202) 458-9273
Fax: + 1 (202) 522-2615
Email: mplanellsvalero@worldbank.org
Paralegal email (Marisela Vazquez): mvazquezmarrero@worldbank.org
 - 7.3. For local messenger deliveries, the contact details are:

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Ms. Marisa Planells-Valero
ICSID
1225 Connecticut Ave. N.W.
(World Bank C Building)
3rd Floor
Washington, D.C. 20036 USA
Tel. 202-458-1534

8. Representation of the Parties
Arbitration Rule 18

8.1. Each party shall be represented by its counsel (below) and may designate additional agents, counsel, or advocates by notifying the Tribunal and the Tribunal Secretary promptly of such designation.

For Claimants

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For Respondent

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9. Apportionment of Costs and Advance Payments to ICSID
Convention Article 61(2); Administrative and Financial Regulation 14; Arbitration Rule 28

- 9.1. The parties shall cover the direct costs of the proceeding in equal parts, without prejudice to the final decision of the Tribunal as to the allocation of costs.
- 9.2. By letter of June 22, 2020, ICSID requested that each party pay US\$150,000 to cover the initial costs of the proceeding. ICSID received Claimants' payment on July 22, 2020 and Respondent's payment on July 24, 2020.
- 9.3. ICSID shall request further advances as needed. Such requests shall be accompanied by a detailed interim statement of account.
- 9.4. The unused balance held on deposit at the end of the arbitration shall be returned to the parties as directed by the Tribunal in proportion to the payments that they advanced to ICSID, without prejudice to the final decision of the Tribunal as to the allocation of costs.

10. Place of Proceeding
Convention Articles 62 and 63; Administrative and Financial Regulation 26; Arbitration Rule 13(3)

- 10.1. Washington D.C., United States of America, shall be the place of the proceeding.
- 10.2. The Tribunal may hold in-person hearings at any other place that it considers appropriate if the parties so agree.
- 10.3. The Tribunal members may deliberate at any place and by any appropriate means it considers convenient.

11. Procedural Language(s), Translation and Interpretation
Administrative and Financial Regulation 30(3) and (4); Arbitration Rules 20(1)(b) and 22

- 11.1. English and Spanish are the procedural languages of the arbitration and have equal dignity.
- 11.2. Routine, administrative, or procedural correspondence addressed to, or sent by, the ICSID Secretariat shall be in English.

For Parties' Pleadings

- 11.3. Any written requests and applications, including applications for immediate or urgent relief, shall be submitted in English, without the need for translation into Spanish.

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- 11.4. Pleadings and witness statements may be submitted in either procedural language, provided that a translation of any such pleadings and witness statements to the other procedural language shall be filed within fourteen (14) calendar days thereafter.
- 11.5. Expert opinions shall be submitted in English, without the need for translation into Spanish.
- 11.6. Exhibits shall be submitted in their original language, along with an English or Spanish translation, as the case may be. Translations of exhibits may be limited to the relevant portions on which a party relies, unless the Tribunal requires a fuller or a complete translation. Original language exhibits and accompanying translations shall be filed together, along with the original language version of the written request, application, pleading, witness statement or expert report to which they relate.
- 11.7. Legal authorities shall be submitted in English, without the need for translation into Spanish. Legal authorities in a language other than English shall be accompanied by an English translation. Translations of legal authorities may be limited to the relevant portions on which a party relies.
- 11.8. Each party shall bear its own translation costs.
- 11.9. Time limits set by the Tribunal or set forth in the timetable attached as Annex A shall run from the day on which the original written request, application or pleading is filed in accordance with §§ 11.3 and 11.4.
- 11.10. Translations need not be certified unless there is a dispute as to the translation provided and the party disputing the translation specifically requests that the Tribunal order a certified version, and in any event the Parties shall ensure that all translations filed under § 11 are professional and accurate.
- 11.11. Documents exchanged between the parties under § 15 below (Production of Documents) may be produced in the original language and need not be translated.

For Hearings

- 11.12. The hearing shall be conducted in English with simultaneous interpretation into Spanish, provided that if any witness called for examination during the hearing has filed an original witness statement in Spanish, any oral testimony presented by that witness may be given in Spanish at the option of such witness, provided further that due notice of his or her intent to do so is given in accordance with § 11.13 hereof. With respect to the examination of such a witness, each examiner shall have the option of examining him or her in Spanish or English, with simultaneous translation from English to Spanish or Spanish to English, as the case may be. The examination

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of any witness who files an original witness statement in English shall be in English. Transcripts of the whole hearing shall be taken in both languages.

11.13. The parties will notify the Tribunal, as soon as possible, and no later than at the pre-hearing organizational meeting, which of their respective witnesses or experts require interpretation.

11.14. The costs of the interpreter(s) will be paid from the advance payments made by the parties, without prejudice to the decision of the Tribunal as to which party shall ultimately bear those costs.

For Tribunal's Documents Except the Award

11.15. The Tribunal may initially make any order or procedural decision in one language and subsequently issue that order or procedural decision in the other. Both language versions shall be equally authentic.

11.16. The Tribunal shall render any decision(s) on jurisdiction or award(s) in English and Spanish simultaneously. Both language versions shall be equally authentic.

12. Routing of Communications

Administrative and Financial Regulation 24

12.1. The ICSID Secretariat shall be the channel of written communications between the parties and the Tribunal.

12.2. Each party's written communications shall be transmitted by email or other electronic means to the opposing party and to the Tribunal Secretary, who shall send them to the Tribunal.

12.3. Electronic versions of communications ordered by the Tribunal to be filed simultaneously shall be transmitted to the Tribunal Secretary only, who shall send them to the opposing party and the Tribunal.

12.4. The Tribunal Secretary shall not be copied on direct communications between the parties when such communications are not intended to be transmitted to the Tribunal.

13. Number of Copies and Method of Filing of Parties' Pleadings

Administrative and Financial Regulation 30; Arbitration Rules 20(1)(d) and 23

13.1. By the relevant filing date, the parties shall submit by email to the Tribunal Secretary and the opposing party electronic files of the pleading and witness

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statements (in their original language), and the expert reports (in English), without supporting documentation.¹

- 13.2. Within two (2) business days of the electronic filing pursuant to § 13.1, the parties shall upload to the file sharing platform created by ICSID for purposes of this case (“the file sharing platform”) the pleading and witness statements in their original language, expert reports (in English), exhibits with their accompanying translations, legal authorities (in English) with any accompanying translations, and a consolidated index (without *hyperlinks*) to all supporting documentation submitted by the relevant party to date.
- 13.3. Within fourteen (14) calendar days of the electronic filing pursuant to § 13.1, the parties shall:
 - 13.3.1. submit by email to the Tribunal Secretary and the opposing party electronic files of the translated pleading and witness statements, and upload such files to the file sharing platform;
 - 13.3.2. courier to the opposing counsel at the address indicated at § 8.1 above one USB drive with a full copy of the entire submission, including the pleading (original and translation), the witness statements (original and translation), expert reports (in English), exhibits (original and translation), legal authorities, and a consolidated index (with *hyperlinks*) to all supporting documentation submitted by the relevant party to date;
 - 13.3.3. courier to each the President of the Tribunal and Prof. Kohen at the addresses indicated in §13.6 below:
 - 13.3.3.1. one USB drive with a full copy of the entire submission, including the pleading (original and translation), the witness statements (original and translation), expert reports (in English), exhibits (original and translation), legal authorities, and a consolidated index (with *hyperlinks*) to all supporting documentation submitted by the relevant party to date; and
 - 13.3.3.2. one hard copy of the pleadings (original and translation), witness statements (original and translation) and expert reports (in English) (but not the exhibits and legal authorities) in A-5 format, double-sided, spiral bound and in soft covers.
 - 13.3.4. courier to Mr. Beechey, Arbitrator, at the address indicated in §13.6 below:

¹ Please note that the World Bank server does not accept emails larger than 25 MB.

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- 13.3.4.1. one USB drive with a full copy of the entire submission, including the pleading (in English only), the witness statements (in English only), expert reports (in English), exhibits (original and translation), legal authorities, and a consolidated index (with *hyperlinks*) to all supporting documentation submitted by the relevant party to date; and
- 13.3.4.2. one hard copy of the pleading (in English only), witness statements (in English only) and expert reports (in English) (but not the exhibits and legal authorities) in A-5 format, double-sided, spiral bound and in soft covers.
- 13.4. Electronic files of pleadings, witness statements, expert reports, exhibits and legal authorities shall be text searchable (i.e., OCR PDF or Word).
- 13.5. All pleadings shall be accompanied by a consolidated index hyperlinked to all the supporting documentation that the party has submitted up to the date of the pleading. The index shall indicate the document number, the pleading with which it was submitted, and the language of the document.
- 13.6. The addresses of the Tribunal Members are as follows:
- | | | |
|-----------------------------|----------------------|------------------------|
| Mr. José Emilio Nunes Pinto | Mr. John Beechey | Prof. Marcelo Kohen |
| Av. Pres. Juscelino | Arbitration Chambers | The Graduate Institute |
| Kubitschek 28 | Lamb Building, 3rd | Chemin Eugène-Rigot 2 |
| 9o andar | Floor South | P.O.Box 1672 |
| 04543-000 São Paulo SP | Temple, London, | 1211 Geneva 21 |
| Brazil | EC4Y 7AS UK | Switzerland |
- 13.7. The official date of receipt of a pleading or communication shall be the day on which the electronic file is sent to the Tribunal Secretary by email pursuant to § 13.1.
- 13.8. A filing shall be deemed timely if sent by a party by 11:59 pm, Washington, D.C. time, on the relevant date.
14. Number and Sequence of Pleadings
Arbitration Rules 20(1)(c), 20(1)(e), 29 and 31
- 14.1. The arbitration shall proceed in accordance with the Procedural Timetable attached hereto as Annex A, except if the Tribunal, upon a showing of good cause by either party or on its own initiative, decides that this Procedural Timetable has to be amended, or both parties agree to such an amendment.

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- 14.2. In the first round of pleadings (Memorial and Counter-Memorial), the parties shall set forth all the facts and legal arguments on which they rely including any witness statements and expert opinion evidence the parties submit in support of their respective cases.
- 14.3. In their second round of pleadings (Reply and Rejoinder), the parties shall limit themselves to responding to allegations of fact and legal arguments made by the other party in the first exchange of submissions, unless new facts have arisen after the first exchange of submissions which justify new allegations of fact and/or legal arguments.
- 14.4. Following each factual allegation, the parties shall, whenever possible, identify the evidence adduced in support of that allegation. Following each legal argument, the parties shall, whenever possible, identify the legal authority adduced in support of that argument.
- 14.5. All written submissions shall be divided into consecutively numbered paragraphs.
- 14.6. The Respondent shall file a memorial regarding its objection that, as a matter of law, the claim submitted is not a claim for which an award in favor of Claimants may be made under Article 10.26.10 of the US-Colombia TPA in compliance with the timetable set out in Annex A thereto.
- 14.7. Respondent shall also address any other admissibility and jurisdictional objections that it proposes to raise for determination by the Tribunal in the Memorial filed pursuant to Section 14.6 above.
- 14.8. Claimants shall submit a Counter-Memorial addressing the Respondent's preliminary question pursuant to Article 10.20.4 of the US-Colombia TPA and any other admissibility and jurisdictional objections raised by the Respondent in its Memorial in compliance with the timetable set out in Annex A thereto. The Parties are further invited to file their Reply and Rejoinder in compliance with the timetable set out in Annex A thereto.
- 14.9. Pending any determination of such preliminary issue(s), the Tribunal shall suspend any proceedings on the merits.
- 14.10. The Tribunal will then issue its ruling on the Respondent's objections, including on the scope of Article 10.20.4 of the US-Colombia TPA. Following issuance of this ruling, the Tribunal will fix, in consultation with the Parties, the procedural calendar for the remainder of the proceeding, if necessary.

15. Production of Documents

Convention Article 43(a); Arbitration Rules 24 and 33-36

15.1. The International Bar Association Rules on the Taking of Evidence in International Arbitration (2010) (“IBA Rules of Evidence”) shall guide the Tribunal and the parties regarding document production in this case.

15.2. Every request for production of documents shall identify each document or category of documents sought and its relevance. The requests shall be recorded in a Redfern Schedule and submitted in both Word and PDF formats. These requests shall not be sent to the Tribunal. The document production phase shall consist of the following stages:

15.2.1. Request for production of documents.

15.2.2. Responses and objections to requests for production.

15.2.3. Reply on objections to requests for production.

15.2.4. Voluntary production of requested documents

15.2.5. Tribunal decisions on objections to requests for production

15.2.6. Ordered production of requested documents based on the Tribunal’s decisions.

15.3. Other than as set forth in the procedural timetable attached hereto as Annex A, further requests for production of documents sought by either party, if any, shall be permitted only at the discretion of the Tribunal in exceptional circumstances. Such request(s) to the Tribunal must be substantiated.

15.4. The parties’ document requests, responses and objections, and replies, as well as the Tribunal’s decisions regarding production of documents shall be in English.

16. Submission of Documents

Convention Article 44; Administrative and Financial Regulation 30; Arbitration Rule 24

16.1. The Memorial and Counter-Memorial shall be accompanied by the documentary evidence relied upon by the parties, including exhibits and legal authorities. Further documentary evidence relied upon by the parties in rebuttal shall be submitted with the Reply and Rejoinder.

16.2. The documents shall be submitted in the manner and form set forth in §13 above.

16.3. Neither party shall be permitted to submit additional or responsive documents after

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the filing of its respective last written submission, unless the Tribunal determines that special circumstances exist based on a reasoned written request followed by observations from the other party.

- 16.3.1. 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.
- 16.3.2. 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.
- 16.4. The Tribunal may call upon the parties to produce documents or other evidence in accordance with ICSID Arbitration Rule 34(2).
- 16.5. The documents shall be submitted in the following form:
 - 16.5.1. The number of each Exhibit containing a document produced by Claimants shall be preceded by the letter “C-” for exhibits and “CL-” for legal authorities. The number for each Exhibit containing a document produced by Respondent shall be preceded by the letter “R-” for exhibits and “RL-” for legal authorities.
 - 16.5.2. Claimants’ witness statements shall be preceded by the letters “CWS-” followed by the number and name of the witness (e.g. CWS-1, John Doe), and Respondent’s witness statements shall be preceded by the letters “RWS-”, followed by the number and name of the witness (e.g. RWS-1, Jane Doe). Claimants’ expert reports shall be preceded by the letters “CER-” followed by the number and name of the expert (e.g. CER-1, John Doe), and Respondent’s expert reports shall be preceded by the letters “RER-” followed by the number and name of the expert (e.g. RER-1, Jane Doe). Exhibits to witness statements and expert reports shall be numbered sequentially adding the relevant number to the aforementioned notation (e.g. CWS-1_1, CWS-1_2, CWS-1_3, etc.).
 - 16.5.3. Original language exhibits and accompanying translations shall be filed in a single electronic file (clearly separated by a color divider) and assigned a single exhibit number. Translations shall be clearly marked as such in the header of the document, indicating “English translation of Spanish original”, or “Spanish translation of English original”, as the case may be.
 - 16.5.4. Exhibits and legal authorities shall be numbered consecutively throughout these proceedings, commencing with “C-0001” and “R-

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0001,” and “CL-001” and “RL-001” respectively. The number of the exhibit or legal authority shall appear on the first page of the document and shall be incorporated into the file name in accordance with § 16.5.4.

16.5.5. A party may produce several documents relating to the same subject matter within one Exhibit, numbering each page of such Exhibit separately and consecutively.

16.6. Copies of documentary evidence shall be assumed to be authentic unless specifically objected to by a party, in which case the Tribunal will determine whether authentication is necessary.

16.7. The parties shall file all documents only once by submitting them with their pleadings. Documents need not be resubmitted with witness statements even if referred to in such statements.

16.8. Demonstrative 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 and indicate on each demonstrative exhibit the number of the document(s) from which it is derived. The party submitting such exhibits shall provide them in electronic and, if requested, hard copy to the other party, the Tribunal Members, the Tribunal Secretary, the court reporter(s) and interpreter(s) at the hearing at a time to be decided at the pre-hearing organizational meeting.

17. Witness Statements and Expert Reports
Convention Article 43(a); Arbitration Rule 24

17.1. Witness statements and expert reports shall be filed together with the parties' pleadings.

17.2. Neither party shall be permitted to submit any testimony that has not been filed with the written submissions, unless the Tribunal determines that special circumstances exist based on a reasoned written request followed by observations from the other party (following the procedure outlined in §16.3).

17.3. Each witness statement and expert report shall be signed and dated by the witness.

17.4. Witness statements and expert reports shall be accompanied by any documents or information upon which they rely, unless such documents or information have already been submitted as exhibits with the parties' submissions, in which case reference to such exhibits shall be sufficient. Such documents or information shall be subject to the rules on language set forth in § 11 above.

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18. Examination of Witnesses and Experts
Arbitration Rules 35 and 36

- 18.1. At a date to be determined by the Tribunal, but no later than by the pre-hearing organizational meeting, the parties shall identify the witnesses and experts whom they intend to call at the hearing for examination and cross-examination.
- 18.2. The waiver by a party of its right to cross-examine a witness or expert shall not imply acceptance of the content of the corresponding witness statement or expert report.
- 18.3. Each party shall be responsible for summoning its own witnesses to the hearing, except when cross-examination of a witness or expert has been waived and the Tribunal does not direct his or her appearance.
- 18.4. If a witness or expert has been called to testify by the adverse party but the witness or expert does not appear for examination, the Tribunal may draw any consequences it considers appropriate, including that the witness statement or expert report in question shall be disregarded. the Tribunal may examine the witness or expert at any time, either before, during or after examination by one of the parties.
- 18.5. Each party shall be responsible for the practical arrangements, cost and availability of any witness it offers. This is without prejudice for the Tribunal's final decision on costs.
- 18.6. Without prejudice to the power of the Tribunal to request or allow the parties to produce further evidence at any stage of the proceedings, written witness statements and expert reports shall be submitted together with the written submissions which they support and shall constitute the direct testimony of each factual or expert witness, respectively. Notwithstanding, expert witnesses shall be permitted to make a presentation summarizing their respective expert report(s). The length of such presentation shall be decided by the Tribunal after consultation with the parties at the pre-hearing organizational meeting.
- 18.7. Witnesses and experts shall be examined by the parties under the control of the Tribunal. Before giving evidence, witnesses shall make a declaration of truthfulness, and experts shall make a declaration of sincere belief. The Tribunal may examine the witness or expert at any time during the oral procedure.
- 18.8. The party presenting the witness or expert at the hearing may conduct a brief direct examination merely to introduce the witness or expert, confirm the accuracy and completeness of the witness's or expert's written statement(s) or expert report(s), and offer any corrections to the witness's or expert's written statement(s) or expert report(s) that may be necessary. The opposing party shall cross-examine the witness

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or expert. Thereafter, the party presenting the witness or expert shall be entitled to conduct re-direct examination which shall be limited to the scope of cross-examination.

18.9. Prior to his or her examination, a fact witness shall not be present in the hearing room; nor discuss the oral arguments or the testimony of any other witness who has already testified prior to giving his or her testimony; nor read any transcript of oral arguments or oral testimony; nor listen to or watch any audio or video recording of the oral arguments or oral testimony. These restrictions do not apply to non-testifying nominated representatives of a Party.

18.10. Notwithstanding the paragraph above, prior to his or her examination, a fact witness, who is a Party and any testifying nominated representatives of a Party, excluding any testifying corporate representatives, may be present in the hearing room during the Parties' opening statements, but they shall exit the hearing room after opening statements, and shall be called to give their testimony before any other witnesses or experts are called. Upon giving his or her testimony, a fact witness who is a Party and any testifying nominated representatives of a Party may remain in the hearing room throughout the duration of the hearing.

18.11. Expert witnesses shall be allowed in the hearing room at any time.

18.12. Other matters regarding any hearing shall be agreed upon by the parties or decided by the Tribunal having consulted with the parties at a pre-hearing organizational meeting.

19. Pre-Hearing Organizational Meetings
Arbitration Rule 13

19.1. A pre-hearing organizational meeting shall be held at a date determined by the Tribunal after consultation with the parties. It shall comprise a teleconference between the Tribunal, or its President, and the parties and should resolve any outstanding procedural, administrative, and logistical matters (including modality of interpretation and transcription) in preparation for the hearing.

19.2. At a date to be determined by the Tribunal, and in any event no later than the date of the pre-hearing conference, the parties shall submit to the Tribunal jointly – or, where they are unable to agree, separately – a proposal regarding a daily schedule for the hearing.

20. Hearings
Arbitration Rules 20(1)(e) and 32

20.1. The oral procedure shall consist of a hearing for examination of witnesses and experts, if any, and for oral arguments.

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- 20.2. Hearings shall be held in-person in Washington D.C., unless the parties agree otherwise. In the event that it is deemed impractical or impossible to hold a hearing in person due to the COVID-19 pandemic or any other public health emergency of international concern, the Tribunal may decide, after consulting the parties, to conduct hearings remotely over a secure video-conference platform, with necessary measures in place to safeguard the equal rights of the parties to present their respective cases.
 - 20.3. Hearings shall take place on the dates indicated in the Procedural Timetable at attached as Annex A or as may be otherwise agreed by the parties and the Tribunal.
 - 20.4. The Members of the Tribunal shall endeavor to reserve at least one day after the hearing to determine the next steps and to hold deliberations.
 - 20.5. Hearings shall be open to the public as set forth in § 24 below.²
 - 20.6. Unless the parties agree otherwise, the total hearing time shall be split evenly between them, subject to the time the Tribunal intends to reserve for itself for questions and other matters. Time shall be documented and measured using a chess clock with the Secretary of the Tribunal responsible for time-keeping.
21. Records of Hearings and Sessions
Arbitration Rules 13 and 20(1)(g)
- 21.1. Sound and video recordings shall be made of all hearings and sessions. The sound and video recordings shall be provided to the parties and the Tribunal Members.
 - 21.2. Verbatim transcripts in Spanish and in English shall be made of any hearing and session other than sessions on procedural issues. Unless otherwise agreed by the parties or ordered by the Tribunal, the verbatim transcripts shall, if possible, be available in real-time, using LiveNote or similar software. Electronic transcripts shall be provided to the parties and the Tribunal on a same-day basis.
 - 21.3. The parties shall agree on any corrections to the transcripts within 30 days of the later of the dates of the receipt of the sound recordings, video recordings or the transcripts. The agreed corrections may be entered by the court reporter in the transcripts (“revised transcripts”). The Tribunal shall decide upon any disagreement between the parties and any correction adopted by the Tribunal shall be entered by the court reporter in the revised transcripts.

² Any hearing held remotely over a secure video-conference platform will be video recorded, and the video recording will be streamed in the English and Spanish languages on the ICSID website as soon as possible after the conclusion of the Hearing. An announcement to this effect will be published on the ICSID website.

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22. Post-Hearing Memorials and Statements of Costs

Convention Article 44; Arbitration Rule 28(2)

22.1. Before the end of the hearing, the Tribunal shall consult with the parties as to whether they shall submit Post-Hearing Briefs and shall determine the additional details regarding such briefs, length, format, content and timing. No additional evidence may be produced together with the post-hearing submission.

22.2. The Tribunal shall consult with the parties and issue directions on the parties' statements of costs at the end of the hearing.

23. Non-Disclosure of Information

Article 10.21 of the US-Colombia TPA

23.1. The parties agree that "protected information" is as defined in Article 1 of the US-Colombia TPA. Article 1 states in relevant part, "'protected information' means confidential business information or information that is privileged or otherwise protected from disclosure" under the laws of the United States of America or the Republic of Colombia. Such information may not be publicly disclosed, in accordance with §24 (Transparency) below.

23.2. In addition, and in accordance with Articles 22.2 or Article 22.4 of the US-Colombia TPA, Respondent shall not be required to disclose information that Respondent deems to be "contrary to its essential security interests" or to "impede law enforcement or otherwise be contrary to the public interest or which would prejudice the legitimate commercial interests of particular enterprises public or private" (hereinafter, "Article 22.2 and 22.4 Information"). The production of such information may not be compelled from the Respondent, nor may such information be publicly disclosed, in accordance with §24 (Transparency), below.

23.3. For the purposes of this Order, "protected information" and "Article 22.2 and 22.4 Information" are collectively referred to as "non-disclosure information".

24. Transparency

Convention Article 48(5), Administrative and Financial Regulation 22, Arbitration Rule 48(4); Article 10.21 of the US-Colombia TPA

24.1. In accordance with Article 10.21 of the US-Colombia TPA, hearings shall be open to the public, subject to a procedure to ensure "non-disclosure information" is not disclosed to the public during the hearing.

24.2. The parties consent to ICSID's publication of the documents listed in Article 10.21 of the US-Colombia TPA. They are: (a) the notice of intent; (b) the notice of arbitration; (c) pleadings, memorials and briefs by the United States of America, if any, submitted to the Tribunal pursuant to Articles 10.20(2) and 10.20(3) and 10.25

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of the US-Colombia TPA; (d) minutes or transcripts of hearings, where available; and (e) orders, awards, and decisions of the Tribunal.

- 24.3. For purposes of §24.2 above, the reference in Article 20.21(1) of the US-Colombia TPA to the “notice of arbitration” and to “pleadings, memorials and briefs” does not include accompanying material (i.e. witness statements, expert reports, exhibits and legal authorities).
- 24.4. The Parties agree that Respondent, and not ICSID, retains the obligation to transmit the documents listed in §24.2 above to the United States of America (the non-disputing State party to the US-Colombia TPA), as required by Article 10.21(1) of the US-Colombia TPA.
- 24.5. In accordance with Article 10.21 of the US-Colombia TPA, the documents published under that provision shall not contain “non-disclosure information”.
- 24.6. The Parties agree that the following procedure applies to the redaction of “non-disclosure information” prior to publication.

- 24.6.1. For the notice of intent and the notice of arbitration, which pre-date this order:

Within fourteen (14) calendar days of the date of this Order, Claimants shall submit redacted versions that do not contain any “non-disclosure information”. Within fourteen (14) calendar days of the date that the redacted versions are submitted to the Tribunal, Respondent shall notify Claimants and the Tribunal whether it objects to any of Claimants’ redactions. If Respondent objects to any of Claimants’ redactions, the parties shall undertake their best efforts to resolve these objections. If the parties cannot resolve Respondent’s objections within fourteen (14) calendar days and upon the request of either party, then the Tribunal will decide the issue.

- 24.6.2. For pleadings, memorials, and briefs:

Any party claiming that certain information constitutes “non-disclosure information” shall clearly designate the information at the time it is submitted to the Tribunal and submit a redacted version of the document, in electronic version only, that does not contain the information within five (5) business days. Within twenty-one (21) calendar days of the date of the redacted document’s submission to the Tribunal, the other party shall notify the party submitting the document and the Tribunal whether it objects to any of the redactions. The parties shall undertake their best efforts to resolve these objections. If the parties cannot resolve the objections within fourteen

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(14) calendar days and upon the request of either party, then the Tribunal will decide the issue.

If the Tribunal determines that any information that a party sought to redact is not “non-disclosure information”, that party may either resubmit the document (i) withdrawing the content for which redaction was sought or (ii) with the redactions corresponding to the Tribunal’s determination.

24.6.3. For minutes or transcripts of hearing and orders, awards, and decisions of the Tribunal:

The parties shall within twenty-one (21) calendar days of dispatch by the ICSID Secretariat submit redacted versions that do not contain any “non-disclosure information”. Within fourteen (14) calendar days of the date that the redacted versions are submitted to the Tribunal, each party shall notify the other party and the Tribunal whether it objects to any of the redactions. If there are objections, the parties shall undertake their best efforts to resolve these objections. If the parties cannot resolve the objections within fourteen (14) calendar days and on the request of either party, then the Tribunal will decide the issue.

24.7. Neither the parties nor the Tribunal shall disclose to the United States of America (the non-disputing State party to the US-Colombia TPA) or to the public any “non-disclosure information” redacted in accordance with this Order or a subsequent ruling of the Tribunal.

25. Proposed Decision or Award
Article 10.20(9)(a) of the US-Colombia TPA

25.1. In accordance with Article 10.20(9)(a) of the US-Colombia TPA, at the request of a party, the Tribunal will, before issuing a decision or award on liability, transmit its proposed decision or award to the parties and to the United States of America (the non-disputing State party to the TPA).

25.2. A party must make the request for the transmission of the proposed decision or award either fourteen (14) calendar days after any hearing on liability or fourteen (14) calendar days after the party’s last post-hearing memorial, whichever is later.

25.3. Within sixty (60) calendar days after the Tribunal transmits its proposed decision or award, the disputing parties may submit written comments to the Tribunal concerning any aspect of its proposed decision or award. The Tribunal shall consider any such comments and issue its decision or award not later than 45 days after the expiration of the 60-day comment period.

On behalf of the Arbitral Tribunal,

[signed]

Mr. José Emilio Nunes Pinto
President of the Tribunal

Date: March 18, 2021

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ANNEX A

| Procedural Step | Party/ Tribunal | | Filing date |
|--|--------------------------------------|--|--------------------------------|
| Request to address objections as preliminary question (Article 10.20.4 of the US-Colombia TPA) | Respondent | | August 24, 2020 |
| Observations to request | Claimants | | September 8, 2020 |
| Procedural Order No. 1 | Tribunal | | March 18, 2021 |
| Memorial on Preliminary Objections | Respondent | 90 days | June 16, 2021 |
| Counter-Memorial on Preliminary Objections | Claimant | 90 days | September 14, 2021 |
| Reply on Preliminary Objections | Respondent | 60 days | November 15, 2021 ³ |
| Rejoinder on Preliminary Objections | Claimant | 60 days | January 14, 2022 |
| Pre-hearing Conference | Claimant; Respondent; Tribunal | | TBD |
| Hearing on Preliminary Objections | Claimant; Respondent; Tribunal | No sooner than 45 days after the last written submission | TBD |

³ See Rule 29(2) of the ICSID Administrative and Financial Regulations.