

---

---

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**AMEC FOSTER WHEELER USA CORPORATION (USA),  
PROCESS CONSULTANTS, INC. (USA), AND  
JOINT VENTURE FOSTER WHEELER USA CORPORATION AND PROCESS CONSULTANTS, INC.  
(USA)**  
*Claimants*

v.

**THE REPUBLIC OF COLOMBIA**  
*Respondent*

ICSID Case No. ARB/19/34

---

**CLAIMANTS' REPLY IN FURTHER SUPPORT OF CLAIMANTS' APPLICATION  
FOR EMERGENCY TEMPORARY RELIEF**

---

October 12, 2021

1. Claimants Amec Foster Wheeler USA Corporation (“**AFWUSA**”) and Process Consultants, Inc., (“**PCI**”) individually and as members of the contractual joint venture named Joint Venture Foster Wheeler USA Corporation and Process Consultants, Inc. (USA) (collectively, “**FPJVC**” or “**Claimants**”) respectfully submit this Reply in further support of their Application for Emergency Relief (the “**Emergency Application**”) in accordance with the Tribunal’s Order, dated October 8, 2021.
2. There are two applications by Claimants pending before the Tribunal, both made on September 2, 2021. First, Claimant seeks interim measures staying enforcement of the CGR Decision<sup>1</sup> during the pendency of this arbitration. Colombia’s papers in opposition to that application are now due to be submitted on October 28, 2021. The second application is for an emergency order staying enforcement of the CGR Decision until the application for interim measures can be heard. Colombia filed its opposition to the application for emergency relief on September 30, 2021 (the “**Answer**”) (having previously sought and obtained an extension of time to do so), and Claimants now file this reply in further support of that application.
3. Colombia advances two principal arguments in its Answer. First, Colombia contends that Claimants’ requested relief is barred by Article 10.20.8 of the Trade Promotion Agreement between the Republic of Colombia and the United States of America (the “**TPA**”).<sup>2</sup> Second, Colombia argues that Claimants have failed to make a showing of urgency.<sup>3</sup> Those arguments are addressed below.

---

<sup>1</sup> Capitalized terms used in this reply and not otherwise defined have the same meaning as in Claimants’ papers submitted on September 2, 2021.

<sup>2</sup> Answer, ¶¶ 3-4, Section A.

<sup>3</sup> Answer, at Section B.

**A. Colombia’s Ongoing Attempt to Enforce the CGR Decision**

4. On July 6, 2021, the *Sala Fiscal Sancionatoria* of the CGR (the “FSS”) rejected FPJVC’s final administrative appeal so that Auto 749 (the “CGR Decision”), which imposes US\$811 million in damages, plus interest, against FPJVC, is now final.<sup>4</sup>
5. Hoping to avoid the need for emergency relief and for interim measures, on August 24, 2021, Claimants wrote to Colombia requesting that Colombia halt any efforts to collect against FPJVC’s assets until the conclusion of this arbitration, or failing that, at least agree to a stay until Claimants’ application for interim measures could be heard.<sup>5</sup> By email dated September 1, 2021, Colombia refused Claimants’ request, claiming that it lacked authority to agree to a stay on behalf of its own agency, the CGR.<sup>6</sup> By letter dated September 9, 2021, Respondent revealed that it was actively attempting to locate and seize Claimants’ assets, either “in Colombia or abroad.”<sup>7</sup> Colombia’s papers in opposition further acknowledge that enforcement proceedings are underway.<sup>8</sup>
6. In order to seize and obtain Claimants’ assets, in Colombia or elsewhere, Colombia will be required to initiate new and separate proceedings.<sup>9</sup> Those may include proceedings within

---

<sup>4</sup> Claimants’ Application for Provisional Relief and Emergency Temporary Relief, Sept. 2, 2021, ¶¶ 2, 5, 72, 76, 90 (the “Application”).

<sup>5</sup> Application, ¶¶ 8, 91. *See* the August 24, 2021, Letter from Claimants’ Counsel to Respondent’s Counsel Requesting a Stay of Enforcement Proceedings, the August 31, 2021, Letter from Claimants’ Counsel to Respondent’s Counsel Requesting a Stay of Enforcement Proceedings, and the September 1, 2021, Letter to Claimants’ Counsel from Respondent’s Counsel Regarding Stay of Enforcement (C-003).

<sup>6</sup> *Id.*

<sup>7</sup> “[T]he CGR has not located any assets of Claimants – either in Colombia or abroad – from which to satisfy the ruling.” Colombia’s September 9, 2021, letter to the Tribunal at 5 (emphasis in original).

<sup>8</sup> Answer, ¶¶ 33, 39-40.

<sup>9</sup> Even in Respondent’s illustration of the “Status of the Fiscal Liability Proceeding as of 1 July 2021”, the full accuracy of which Claimants contest, Colombia makes a distinction between the fiscal liability proceeding and the forced collection proceeding. *See* Respondent’s Memorial on Preliminary Objections, July 1, 2021, at p. 89 (Figure 5) (“Resp. Mem”).

the separate “forced collection office” of the CGR,<sup>10</sup> before courts in Colombia, and before courts in foreign jurisdictions, [REDACTED]. Enforcement could take many forms, including attempting to enforce the CGR Decision in U.S. courts through conversion to a U.S. judgment; attempting to collect the CGR Decision through judicial proceedings in Colombia, and then attempting to enforce any resulting court orders in Colombia, the U.S., or another foreign jurisdiction; seeking to institute involuntary bankruptcy proceedings in the U.S., Colombia, or elsewhere; or [REDACTED] [REDACTED] [REDACTED].

7. It appears that Colombia will attempt to enforce the CGR Decision [REDACTED] [REDACTED] [REDACTED] [REDACTED]. As a matter of Colombian law, and of the law of those jurisdictions in which those corporations are located, such collection efforts would necessarily involve the commencement of proceedings before various national courts or quasi-judicial bodies. In such proceedings, many of the issues of which the Tribunal is now seized would have to be separately litigated. To cite only one example, in the United States, the recognition of a foreign administrative order would be treated as a matter of comity, whether under statute or of common law, under which the multiple failures of the CGR to afford Claimants the most elementary due process – a key issue in dispute in this arbitration – would be a defense to enforcement.

---

<sup>10</sup> See Resp. Mem. ¶ 116.

**B. All Requirements for an Anti-Suit Injunction Are Satisfied**

8. It is evident that a worldwide campaign of litigation by Colombia while the CGR Decision is being challenged in this arbitration would aggravate this dispute, upset the *status quo*, and threaten the Tribunal’s jurisdiction over the dispute in two ways. *First*, almost any such action would involve determining questions that this Tribunal has sole jurisdiction to resolve, most importantly, the propriety of the CGR Decision and the means by which it was reached. An anti-suit injunction is the appropriate way in which to main the exclusive jurisdiction of this Tribunal.<sup>11</sup> As one ICSID tribunal explained when faced with a request for provisional measures to stay a State’s enforcement actions,

the passing of the provisional measures is indeed urgent, precisely to keep the enforced collection or termination proceedings from being started, as this operates as a pressuring mechanism, aggravates and extends the dispute and, by itself, impairs the rights which Claimant seeks to protect through this arbitration. Furthermore, where, as is the case here, the issue is to protect the jurisdictional powers of the tribunal and the integrity of the arbitration and the final award, then the urgency requirement is met by the very own nature of the issue.”<sup>12</sup>

9. *Second*, if Colombia were successful in enforcing the CGR Decision [REDACTED]  
[REDACTED]

---

<sup>11</sup> *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 3, Jan. 18, 2005, ¶ 7 (CL-018) (“Among the rights that may be protected by provisional measures is the right guaranteed by Article 26 to have the ICSID arbitration be the exclusive remedy for the dispute to the exclusion of any other remedy, whether domestic or international, judicial or administrative.”); *see also Burlington Resources Inc., et al., v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1, June 29, 2009, ¶ 57 (CL-015) (“The Tribunal has no doubt about the existence of a right to exclusivity susceptible of protection by way of provisional measures”); *CSOB v. Slovakia*, ICSID Case No. ARB/97/4, Procedural Order No. 4, Jan. 11, 1999 (CL-020); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order, Sept. 6, 2005, ¶ 38 (CL-017).

<sup>12</sup> *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, Nov. 19, 2007, ¶ 69 (CL-023) (emphasis added). *See also Burlington v. Ecuador*, Procedural Order No. 1, ¶ 74 (CL-015) (“when the measures are intended to protect against the aggravation of the dispute during the proceedings, the urgency requirement is fulfilled by definition.”).



11. Other investment tribunals have reached the same conclusion. For example, in *Chevron Corp., et al. v. Republic of Ecuador*, PCA Case No. 2009-23, a very distinguished tribunal granted broad anti-suit relief enjoining enforcement of a judgement entered under questionable circumstances by the Ecuadorian courts, stating as follows:

[F]rom its perspective under international law, this Tribunal is the only tribunal with the power to restrain the Respondent generally from aggravating the Parties' dispute and causing irreparable harm to the Claimants in regard to the enforcement and execution of the Lago Agrio Judgment. Such restraint has not been achieved by any state court (including courts in the USA); nor could it be in the circumstances of this most unusual case. The Tribunal therefore confirms and declares, as a matter of international law, that the Respondent has a continuing obligation to ensure that the commitments that it has given under the Treaty and the UNCITRAL Rules are not rendered nugatory by the finalisation, enforcement or execution of the Lago Agrio Judgment in violation of the First and Second Interim Awards.

The Tribunal bears much in mind that the amounts at stake are potentially huge in these arbitration proceedings, measured in multiple billions of US dollars. For the Claimants, that means that an award of damages expressed in tens of billions of US dollars could provide no adequate remedy, if their full case were to prevail against the Respondent and if the Lago Agrio Judgment were in the meantime enforced and executed ....

...

It is therefore difficult now to exaggerate the risks facing the First Claimant and thus, indirectly, the Respondent also from the enforcement and execution of the Lago Agrio Judgment. In the Tribunal's view, based on the materials filed by both sides in this arbitration, there are increasingly grave risks that enforcement and execution of the Lago Agrio Judgment against the First Claimant (with its subsidiary companies) will imperil to a very significant extent the overall fairness and the efficacy of these arbitration proceedings.<sup>18</sup>

---

<sup>18</sup> Fourth Interim Award on Interim Measures, Feb. 7, 2013 at ¶¶ 82-85 (CL-040). While the amount at issue in Chevron was substantially larger than the one at issue here, it represented a smaller percentage of the claimants' assets or stock market valuation.

### C. The TPA Expressly Allows the Relief Sought Here

12. Colombia asserts that Article 10.20.8 of the TPA bans the relief sought here.<sup>19</sup> In full, that article reads as follows:

A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal’s jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal’s jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 10.16. (emphasis added)

13. Colombia makes no argument that Claimants’ requested relief does not preserve its rights or protect the Tribunal’s jurisdiction—only that the exception to the broad grant of authority set out in the second sentence applies. Accordingly, the logic of Colombia’s argument is that if Claimants’ relief does not “enjoin the application of a measure alleged to constitute a breach referred to in Article 10.16”, then Claimants have requested relief that the Tribunal can (and should) grant. As discussed before, that is precisely the case.
14. The power of arbitrators in an ICSID arbitration to grant anti-suit relief has been recognized since the very first case brought after the adoption of the ICSID Convention.<sup>20</sup> Subsequent ICSID awards show “that anti-suit injunctions designed to protect the ongoing arbitral proceeding have been frequently granted.”<sup>21</sup> As one commentator notes, “the presence of Article 26 alone appears to provide the justification for the grant of an antisuit order.”<sup>22</sup> Indeed, in *Tokio Moku v. Ukraine*, the tribunal determined that the State had “the legal

---

<sup>19</sup> Answer, ¶ 14.

<sup>20</sup> E. Gaillard, *supra* note 14, at 244-245 (CL-039) (discussing how in the first ICSID arbitration, *Holiday Inns S.A. and others v. Morocco*, the tribunal held that Moroccan courts should refrain from making decisions until the tribunal made its decision).

<sup>21</sup> E. Gaillard, *supra* note 14, at 247.

<sup>22</sup> R. Moloo, *Arbitrators Granting Antisuit Orders: When Should They and on What Authority*, 26 J. of Int’l Arb. 675, 687 (2009) (CL-041).

obligation to abstain from, and to suspend and discontinue, any proceedings ... which might in any way jeopardize the principle of exclusivity of ICSID proceedings or aggravate the dispute before it.”<sup>23</sup>

15. Nonetheless, Colombia suggests that Article 10.20.8 limits the ability of the Tribunal to issue an anti-suit injunction here. Specifically, Colombia argues that enjoining imminent enforcement proceedings would amount to enjoining “the application of a measure alleged to constitute a breach referred to in Article 10.16”, which is prohibited by Article 10.20.8 of the TPA.<sup>24</sup> Colombia’s interpretation of Article 10.20.8 is wrong for several reasons.
16. *First*, Claimants do not seek to enjoin a measure that they have alleged to be a breach of Article 10.16 of the TPA. All of the breaches that Claimants have alleged in this arbitration – the bringing of a fiscal liability proceeding against parties that are plainly not “fiscal managers” and hence not within the jurisdiction of the CGR, the gross departures from due process in those proceedings, the retroactive application of a statute seemingly aimed at Claimants broadening the definition of “fiscal manager”, the unequal treatment of Claimants when compared to the Colombian respondents before the CGR, the calculation of damages under an absurd and illogical model introduced into the CGR proceeding at the very last minute, the imposition of liability on a joint and several basis without even an effort to show causation, and the denial of any meaningful opportunity to appeal – have already occurred. Claimants never sought, and do not seek, an injunction against those

---

<sup>23</sup> *Tokios Tokelés v. Ukraine*, Procedural Order No. 3, ¶ 3 (CL-018). See also Application, ¶¶ 132-138. See also e.g., C. Mouawad and E. Silbert, *A Guide to Interim Measures in Investor-State Arbitration*, 29 *Arbitration International* 381, 407-410 (2013) (“To protect contractual and legal rights, including the rights to the *status quo*, the non-aggravation of the dispute, and the integrity of the arbitral proceedings, arbitral tribunals have ordered the suspension of enforcement proceedings....”); E. Gaillard, *supra* note 20, at 245-249.

<sup>24</sup> Answer, ¶¶ 13-25.

measures; there is nothing to enjoin because the CGR proceedings are concluded.<sup>25</sup> Claimants only seek to enjoin, through a classic anti-suit injunction, parallel proceedings brought to enforce the CGR Decision that raise the same issues that are before the Tribunal, threatening its jurisdiction and aggravating the dispute. Just as each violation of due process may constitute a separate denial of justice claim,<sup>26</sup> Colombia's imminent enforcement proceedings, whether judicial or quasi-judicial, will be new measures constituting separate proceedings that are not challenged in the pending arbitration.

17. As Colombia's papers admit, the CGR Decision has been transferred to the separate enforcement arm of the CGR.<sup>27</sup> Once that occurs, a new case is opened, with a new case number, in that separate division and the *Contraloría Delegada para Responsabilidad Fiscal, Intervención Judicial y Cobro Coactivo* (in English, the "**Deputy Controller for Forced Collection**") reviews the CGR Decision prior to collection.<sup>28</sup> The Deputy Controller for Forced Collection then makes a determination regarding the CGR Decision and either begins collection or terminates the collection proceedings.<sup>29</sup> These actions are all taken without any involvement by the department of the CGR that made the fiscal liability determination that is the subject matter of the arbitration.<sup>30</sup> Moreover, the Deputy

---

<sup>25</sup> Had Claimants sought injunctive relief against those treaty violations while the CGR proceeding was ongoing – for example, by requesting an order directing Colombia to afford it more than five days to prepare and file an internal appeal before the CGR – Article 10.20.8 would presumably have barred such relief.

<sup>26</sup> See e.g., *Chevron Corporation and Texaco Petroleum Company*, PCA Case No. 2009-23, Second Partial Award on Track II, Aug. 30, 2019, at paras. 8.13, 8.70-8.77 (**CL-042**) (noting that claimants' case constituted five separate and independent denial of justice claims, and finding a violation of Article II(3)(a) of the relevant treaty in relation to four of the allegations).

<sup>27</sup> Answer, ¶ 40.

<sup>28</sup> CWS-5, Supplemental Witness Statement of Cesar Torrente at ¶ 10.

<sup>29</sup> See Article 14 of Organizational Resolution 778 of 2021 (**CWS-5\_4**).

<sup>30</sup> CWS-5 at ¶ 10.

Controller of Forced Collection need not proceed before the Colombian courts to enforce the decision, but has the authority to simply begin attaching assets in Colombia, in effect acting in a quasi-judicial capacity.<sup>31</sup> In that event, Claimants will have an opportunity to raise objections. In sum, such an enforcement proceeding before the Deputy Controller for Forced Collection is a separate proceeding and not the application of the measure that Claimants challenge in the underlying arbitration.<sup>32</sup>

18. *Second*, Claimants' requested relief falls squarely within the interim measures allowed by Article 10.20.8. As explained by one prominent commentator, "[t]his reference [in the first sentence of Article 10.20.8] to protecting the tribunal's jurisdiction would appear to encompass an order enjoining a respondent state from obtaining an anti-arbitration injunction from a national court."<sup>33</sup> An anti-suit injunction of the type sought here likewise falls within the relief allowed by Article 10.20.8.
19. *Third*, Article 1134 and the North America Free Trade Agreement's ("NAFTA"), which Colombia agrees is identical to Article 10.20.8,<sup>34</sup> is at least as broad as Article 47 of the ICSID Convention, which clearly allows anti-suit injunctions.<sup>35</sup> In *Tennant Energy v.*

---

<sup>31</sup> *Id.* at ¶ 13.

<sup>32</sup> Colombia too draws a distinction between the fiscal liability proceeding and forced collection proceeding. *See* note 9 *supra*.

<sup>33</sup> M. Kantor, *The New Draft Model U.S. BIT: Noteworthy Developments*, 21 J. of Int'l Arb. 383, 392 (2004) (CL-043). *See also* G. Born, *Provisional Relief in International Arbitration*, in G. Born, *International Commercial Arbitration* (3d ed. 2021), at 2688 (CL-044) (explaining that anti-suit injunctions are premised on the authority of the tribunal to preserve its jurisdiction).

<sup>34</sup> Answer, ¶ 15 (noting in the quote of *Feldman v. Mexico* that NAFTA Article 1134 "is identical, *mutatis mutandis*, to Article 10.20.(8) of the Treaty").

<sup>35</sup> R. Bismuth, *Anatomy of the Law and Practice of Interim Protective Measures in International Arbitration*, 26 J. of Int'l Arb. 773, 778-779 (2009) (CL-045) ("[T]he ICSID Convention refers to measures 'to preserve the respective rights of either party,' whereas the wording of NAFTA, Article 1134 includes measures 'to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective.' Thus, **in the case of a NAFTA arbitration under the ICSID Convention, the tribunal's authority to grant interim measures will be determined under the broader scope of NAFTA, Article 1134.**" (emphasis added)). *See also* M. Kinnear et al.,

*Canada*, for example, the tribunal held that Article 1134 grants tribunals the power to grant the same interim measures allowed under Article 47 of the ICSID Convention.<sup>36</sup> Similarly, the tribunal in *Alicia Grace & Others v. United Mexican States*, stated as follows:

What does however clearly fall within the scope of the mandate of the Tribunal is the paramount need to protect the integrity of the arbitration process and the equally important need to avoid any aggravation of the dispute. Consequently, were the Tribunal to conclude that, as a result of Respondent's actions... the integrity of the proceeding could be affected or the dispute could be aggravated, it would have to avoid it using all available measures.<sup>37</sup>

20. *Fourth*, none of the cases Colombia cites – all of which do not involve anti-suit relief – supports a contrary result. Colombia relies on three cases in support of its position: *IBT v. Panama*, *Feldman v. Mexico*, and *Pope & Talbot v. Canada*.<sup>38</sup> In all of those cases, the investor sought to *change* the *status quo* and clearly sought to enjoin the breaches that claimants were complaining of.
21. In *IBT Group, LLC and IBT, LCC v. Republic of Panama*, Panama terminated its contract with claimants by administrative resolution and called on a performance bond in January 2020.<sup>39</sup> In July 2020, Claimants filed a request for arbitration alleging those actions

---

Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11, at 1134-5 (2006) (CL-046) (“An interim measure pursuant to Article 47 of the ICSID Convention and Rule 39 of the ICSID Convention Arbitration Rules may issue only to preserve the rights of a party. This should be contrasted with the broader scope of Article 1134, which authorizes interim measures either to preserve the rights of a party or to ensure that a tribunal's jurisdiction is fully effective.”).

<sup>36</sup> *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Procedural Order No. 4, Feb. 27, 2020, ¶¶ 154-157, 168-69 (CL-047). As noted above, tribunals acting under Article 47 have granted anti-enforcement interim measures.

<sup>37</sup> ICSID Case No. UNCT/18/4, Procedural Order No. 6, Decision on the Claimants' Application for Interim Measures, Dec. 19, 2019, ¶ 50 (CL-048).

<sup>38</sup> Answer, ¶¶ 15, 22.

<sup>39</sup> *IBT Group, LLC and IBT, LCC v. Republic of Panama*, ICSID Case No. ARB/20/31, Decision the Request for Provisional Measures, February 5, 2021, ¶ 22 (CL-049).

violated its rights.<sup>40</sup> A month later, in August 2020, the surety accepted the execution of the bond.<sup>41</sup> Only after the surety's acceptance, claimants applied for provisional measures requesting that the tribunal prevent Panama from executing on the bond and to suspend Panama's order disqualifying the claimants from public contracting.<sup>42</sup> The tribunal determined that claimants sought to modify the *status quo* by rectifying measures they alleged were breaches of the treaty and denied the request.<sup>43</sup>

22. Here, in contrast, Claimants do not seek to reverse any of the challenged measures, for example, by demanding rehearing or a fresh opportunity to pursue an appeal with more than five days to prepare and file its papers. Indeed, in denying provisional relief, the tribunal expressly noted that “maintaining the *status quo* [] was a question of preventing a future act ... not of undoing the effects of an act already perfected long ago.”<sup>44</sup> Thus, *IBT v. Panama* actually supports Claimants' contention that its assets do not need to already be seized for the irreparable harm to be imminent and interim relief to be warranted.
23. In *Feldman v. Mexico*, the investor alleged that Mexico's refusal to rebate excise taxes on cigarettes his company exported violated several of his rights under NAFTA.<sup>45</sup> Feldman also applied for an order that “Respondent ‘immediately... cease and desist for the duration of this arbitration from any interference with Claimant or his property or with [his company's] assets or revenues, whether by embargo or by any other means.’”<sup>46</sup> Again,

---

<sup>40</sup> *Id.* at ¶ 1.

<sup>41</sup> *Id.* at ¶ 26.

<sup>42</sup> *Id.* at ¶ 27.

<sup>43</sup> *Id.* at ¶¶ 132-133, 136.

<sup>44</sup> *Id.* at ¶ 136.

<sup>45</sup> *Marvin Roy Feldman Karpa (U.S.) v. Mexico*, ICSID ARB(AF)/99/1, Final Award, Dec. 16, 2002, at ¶ 1.

<sup>46</sup> *Id.* at ¶ 3.

through the requested provisional measures, Feldman sought to alter the *status quo* by no longer being subject to taxes and other regulations Mexico otherwise imposed. Unsurprisingly, the tribunal held that “such an order would entail an injunction of the application of the measures which in this case are alleged to constitute a breach referred to in NAFTA Article 1117” and denied the request.<sup>47</sup>

24. Finally, in *Pope & Talbot v. Canada*, claimant alleged that Canada’s Export Control Regime, which regulated the quotas and fees for softwood lumber manufactured in Canada and exported to the U.S., violated NAFTA because the effect of the regulation would make claimants’ business less profitable.<sup>48</sup> Claimants requested provisional measures enjoining Canada from decreasing claimants’ annual softwood lumber allocation in accordance with the new regulation pending the outcome of the arbitration, precisely the measure challenged in the underlying arbitration.<sup>49</sup> The tribunal held that the relief requested sought to “enjoin the application of the measure which is the quota regime and its implementation” and, pursuant to Article 1134 of NAFTA, the tribunal lacked the power to grant such relief.<sup>50</sup> Again, claimants sought to change the *status quo* and enjoin the very law that was being challenged. Here, however, Claimants only seek to maintain the *status quo* and enjoin new actions that will threaten the tribunal’s exclusive jurisdiction and Claimants’ rights.

---

<sup>47</sup> *Id.* at ¶ 5.

<sup>48</sup> M. Kinnear, *supra* note 35, at 1134-9.

<sup>49</sup> *Id.*

<sup>50</sup> *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Ruling by Tribunal on Claimants’ Motion for Interim Measures, dated January 13, 2000.

25. Colombia cites to Kinnear and Bjorklund for the proposition that what Article 1134 of NAFTA excludes is an order amending or withdrawing the challenged measure: “Article 1134... specifically excludes interim orders in the nature of attachment or which enjoin the measure at issue. ...A tribunal cannot order a Party to amend or withdraw the challenged measure on either an interim or final basis.”<sup>51</sup> That comment only establishes Claimants’ point. Claimants do not seek to withdraw or amend the CGR Decision or the breaches to the Contract—on this application, they only seek to enjoin new enforcement proceedings until this Tribunal can hear and determine their application for interim measures.
26. Colombia’s argument simply assumes its conclusion, that anti-suit measures sought here is an injunction “against a measure alleged to cause a breach.” They are not, and both the ICSID Convention and the TPA grants power to the Tribunal in this case to issue an anti-suit injunction prohibiting Colombia from instituting any judicial or quasi-judicial proceedings to enforce the CGR Decision. Absent such relief, Colombia may [REDACTED] [REDACTED] before its challenges to the grossly flawed CGR proceeding and the resulting decision can be heard by this Tribunal.

**D. Request for Relief**

27. For the reasons set forth above, and in their initial submission, Claimants respectfully seek the following emergency temporary provisional measures:
- a. Respondent, including its courts, its executive branch, and any administrative agency, including the CGR, shall refrain from taking any measures of recognition or enforcement of the CGR Decision discussed herein, pending the Tribunal’s determination of this Application;

---

<sup>51</sup> Answer, ¶ 16.

- b. Respondent, its courts, its executive branch, and any administrative agency, including the CGR, shall suspend any and all recognition or enforcement proceedings or actions directed towards the recognition and/or enforcement of the CGR Decision discussed herein pending the Tribunal's determination of this Application; and
- c. Such other relief as the Tribunal determines to be just and proper.

Dated: October 12, 2021

Respectfully submitted,

**PILLSBURY WINTHROP SHAW PITTMAN LLP**

By:   
Robert L. Sills  
Ari M. Berman  
31 West 52nd Street  
New York, New York 10019  
Tel: +1 (212) 858-1000  
robert.sills@pillsburylaw.com  
ari.berman@pillsburylaw.com

By:   
Charles C. Conrad  
Richard D. Deutsch  
Two Houston Center  
909 Fannin, Suite 2000  
Houston, TX 77010  
Tel: +1 (713) 276-7600  
charles.conrad@pillsburylaw.com  
richard.deutsch@pillsburylaw.com

*Counsel for Claimants*