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. 3
DECISION ON CLAIMANTS' APPLICATION FOR PROVISIONAL MEASURES

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

May 31, 2022

I. PROCEDURAL BACKGROUND

1. On September 2, 2021, Amec Foster Wheeler USA Corporation, Process Consultants, Inc., and Joint Venture Foster Wheeler USA Corporation and Process Consultants, Inc. ("Claimants") filed an Application for Provisional Measures and Emergency Temporary Relief, together with the witness statements of Cesar Torrente dated August 30, 2021 (CWS-1), Steve Conway dated July 29, 2021 (CWS-2), Thomas Grell dated July 29, 2021 (CWS-3), and Colin Johnson dated August 9, 2021 (CWS-4), exhibits C-001 to C-010 and legal authorities CL-001 to CL-038, and a consolidated index of exhibits and legal authorities.

2. On September 7, 2021, the Tribunal invited the Republic of Colombia ("Respondent") to submit a response to (i) Claimants' Application for Emergency Temporary Relief by September 17, 2021, and (ii) Claimants' Application for Provisional Measures by September 28, 2021.

3. On September 9, 2021, Respondent submitted a letter along with Annexes 1 to 4, proposing a revised procedural calendar for its submissions on Claimants' Applications.

4. On September 10, 2021, Claimants submitted their observations to Respondent's revised procedural calendar, together with Annex 1.

5. On September 13, 2021, the Tribunal invited the Parties to confer and to try to reach agreement on the revised procedural calendar or, in case of disagreement, to provide any additional comments on the matter by September 15, 2021. The Tribunal also informed the Parties of its decision to stay the procedural calendar of September 7, 2021 until a revised calendar was agreed by the Parties or a decision on the matter was adopted by the Tribunal upon consideration of the Parties' positions.

6. On September 15, 2021, the Parties informed the Tribunal that they had not been able to agree on a procedural calendar. Claimants submitted additional comments on the matter.

7. On September 16, 2021, Respondent submitted further comments on Claimants' communication of September 15, 2021.

8. On September 20, 2021, having considered the Parties' positions, the Tribunal established a revised procedural calendar by which Respondent was invited to submit (i) a response to Claimants' Application for Emergency Temporary Relief by September 30, 2021; and (ii) a response to Claimants' Application for Provisional Measures by October 28, 2021.

9. On September 30, 2021, Respondent filed its Answer to Claimants' Application for Emergency Temporary Relief, together with Exhibits R-93 to R-99, Legal Authorities RL-008, RL-024, RL-228 to RL-242, and a consolidated index of exhibits and legal authorities.

10. On October 5, 2021, Claimants requested an opportunity to reply to Respondent's Answer to the Application for Emergency Temporary Relief. Claimants also requested that the Tribunal schedule oral arguments following receipt of Colombia's response to the Application for Provisional Measures due by October 28, 2021. On October 6, 2021, Respondent asked the Tribunal to reject Claimants' request. A further communication on the matter was received from Claimants on October 7, 2021.

11. On October 8, 2021, the Tribunal decided to invite Claimants to submit a Reply to Respondent's Answer to the Application for Emergency Temporary Relief by October 12, 2021 and to invite Respondent to submit a Rejoinder to that Reply by October 18, 2021. By this same communication, the Tribunal invited the Parties to confirm their availability for a hearing on Claimants' Application for Provisional Measures, if needed, on November 4 or 5, 2021.

12. On October 12, 2021, Claimants submitted a Reply on the Application for Emergency Temporary Relief together with the supplemental witness statement of Cesar Torrente dated October 11, 2021 (CWS-5).

13. On October 13, 2021, Respondent confirmed its availability for a hearing on provisional measures on November 4, 2021. On that same date, Claimants informed the Tribunal that Charles Conrad, Claimants' co-lead counsel, was unavailable for a hearing on November 4, 2021 due to previous commitments. They inquired as to the possibility to schedule the hearing on another date in November 2021.

14. On October 18, 2021, the Respondent submitted its Rejoinder on Claimants' Application for Emergency Temporary Relief.

15. On October 20, 2021, the Tribunal confirmed that, due to its limited availability of the during the month of November 2021, the Hearing on Claimants' Application for Provisional Measures (the "Hearing") would take place remotely, if needed, on November 4, 2021. By this same communication, the Tribunal proposed a hearing schedule and invited the Parties' comments by October 25, 2021.

16. On October 25, 2021, the Tribunal rejected Claimants' Application for Emergency Temporary Relief and confirmed that the Hearing would take place remotely on November 4, 2021.

17. On October 28, 2021, Respondent submitted its Answer to Claimants' Application for Provisional Measures.

18. On November 4, 2021, at the Hearing, the Parties made further submissions and the Tribunal put questions to counsel for the Parties. In their oral arguments, Claimants referred to a presentation purportedly given by the Contraloría General de la República de Colombia (the "CGR") which was not in the record. Following Respondent's inquiry regarding this document, Claimants acknowledged that the presentation was not yet in the record and agreed to submit it as a new exhibit. The Tribunal then gave Respondent leave to provide any comments upon the new exhibit by November 11, 2021.

19. On November 11, 2021, Respondent submitted its comments on the new CGR presentation, which had been introduced into the record by Claimants after the conclusion of the Hearing as Exhibit C-23.[1]

20. Also on November 11, 2021, Respondent informed the Tribunal of the Parties' agreed-upon corrections to the Hearing transcripts. The final Hearing transcripts incorporating the agreed corrections were issued on November 15, 2021.

21. On November 16, 2021, Claimants submitted comments on Respondent's communication of November 12, 2021. On that same date, Respondent applied to the Tribunal to strike

[1] On November 9, 2021, the new exhibit was uploaded to the Box Folder for this arbitration proceeding as Exhibit C-23.

Claimants' November 16, 2021 letter from the record. Further comments from Claimants were received on that same date.

22. On December 2, 2021, Claimants requested leave from the Tribunal to submit as an exhibit to their Application for Provisional Measures a copy of a Notice received on December 1, 2021 from the Coactive Collection Unit of the CGR.

23. On December 3, 2021, the Tribunal invited Claimants to submit a copy of the Notice by December 6, 2021 and Respondent to provide comments on the contents of the Notice by December 8, 2021. The Parties proceeded accordingly.

24. On December 10, 2021, the Tribunal rejected Respondent's request to strike Claimants' letter of November 16, 2021 from the record. In doing so, the Tribunal invited Respondent to submit any additional comments in connection with Claimants' letter by December 15, 2021. Respondent proceeded accordingly.

25. On February 9, 2022, Claimants requested leave to introduce three additional documents into the record and indicated that Respondent had confirmed that it had no objections to their request. In view of the Parties' agreement, the Tribunal invited Claimants to submit the three new documents as exhibits by February 14, 2022. In doing so, the Tribunal also invited Respondent to submit comments by February 18, 2022.

26. Pursuant to the Tribunal's instructions, on February 14, 2022, Claimants introduced exhibit C-29 (Letter from the CGR dated Feb. 7, 2022 regarding the Coercive Collection Proceeding) and legal authorities CL-261 (Law 2195 of 2022) and CL-262 (Bill No. 341 of the 2020 Senate) into the record (the "New Documents"). On February 18, 2022, Respondent submitted comments on the New Documents.

27. On February 21, 2022, the Tribunal invited Claimants to provide comments on Respondent's letter of February 18, 2022 by February 24, 2022 and Respondent to reply by February 28, 2022. The Parties proceeded accordingly.

28. The Tribunal has carefully reviewed and considered the Parties' submissions, including Claimants' communications of September 2, 15, October 12 and 18, November 16, and December 2021, and February 14 and 24, 2022 and Respondent's communications of

September 30, October 18 and 28, 2021, November 12 and 16, December 15, 2021, and February 18 and 28, 2022 as regards Claimants' Application for Provisional Measures. The fact that the Tribunal does not specifically mention a given argument does not mean that it has not taken it into account.

II. POSITIONS OF THE PARTIES

A. Claimants' Position

29. In their Application and related communications, Claimants refer to the Auto 749 issued on April 26, 2021, by the CGR (the "CGR Decision") following fiscal liability proceedings in which damages in the amount of US$811 million were awarded against Joint Venture Foster Wheeler USA Corporation and Process Consultants, Inc. ("FPJVC"), along with others. Claimants allege that the CGR Decision is the result of a proceeding improperly initiated by the CGR against FPJVC "in a transparent attempt to shift blame for alleged acts of mismanagement from those who actually managed a project involving the modernization and expansion of a State-owned oil refinery located in Cartagena, Colombia."[2]

30. Claimants argue that, unless enjoined, the enforcement of the CGR Decision will aggravate the *status quo* [redacted]. They add that the risk of irreparable harm is both imminent and urgent. On this basis, Claimants seek an order for provisional measures "preventing Colombia from initiating any enforcement proceedings with respect to the disputed CGR Decision until the Tribunal has issued its final award on the merits."[3]

i. The Tribunal's Authority to Grant Provisional Measures under the US-Colombia TPA

31. Claimants argue that the interim relief that they seek "fall[s] squarely within the authority of the Tribunal pursuant to Article 47 of the ICSID Convention and Article 10.20.8 of the

[2] Application, ¶ 2.

[3] Application, ¶ 10. See also, Claimants' *petitum* reproduced in full in ¶ 52 below.

US-Colombia TPA." In particular, Claimants refer to the first part of Article 10.20.8, which states that "[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 . . . to protect the tribunal's jurisdiction." According to Claimants, this accords with Article 47 of the ICSID Convention, which states that "the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party."[4]

32. Claimants note that "tribunals hearing investor-state claims commonly grant provisional measures to restrain sovereign States from enforcing disputed court judgments, fines, taxes, and penalties because preventing such harm was necessary to preserve the *status quo* of the arbitration pending a final ruling on the merits," and submit that "few actions could be more aggravating to this dispute, or effect the integrity of these proceedings more than [redacted]."[5]

33. Claimants reject Respondent's argument that the second part of Article 10.20.8 of the US-Colombia TPA, which provides that "[a] tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 10.16," would prevent the Tribunal from granting the requested measures.

34. Claimants explain that they are not seeking to enjoin a measure that they have alleged to be a breach of Article 10.16 of the US-Colombia TPA.[6] This is because all of the breaches that they 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

[4] Claimants' Letter of September 15, 2021, page 4.
[5] *Id.*
[6] Tr. p. 22:18-21.

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."[7] For this reason, Claimants continue, they are not asking the Tribunal to restore them to the position they were in before the CGR initiated the concluded fiscal liability proceeding.[8] Instead, what Claimants are requesting here is that the Tribunal enjoin "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." On this point, Claimants add that Colombia's imminent enforcement proceedings will be "new measures constituting separate proceedings that are not challenged in the pending arbitration."[9]

35. Claimants note that in *IBT v. Panama*, *Feldman v. Mexico*, and *Pope & Talbot v. Canada,* the three cases cited by Colombia in support of its position, the "investor sought to *change* the *status quo"* and "to enjoin the breaches that claimants were complaining of."[10] In particular, Claimants note that the tribunal in *IBT v. Panama* "determined that claimants sought to modify the *status quo* by rectifying measures they alleged were breaches of the treaty and denied the request."[11] Here, unlike in *IBT v. Panama*, "if the Tribunal does not stay enforcement of the CGR Decision, [redacted]."[12]

ii. The Requirements for Granting Provisional Measures

36. Claimants note that the elements required to obtain an order for provisional measures are: (1) *prima facie* jurisdiction; (2) *prima facie* establishment of the right to the relief sought; (3) imminent danger of serious prejudice (necessity); (4) urgency; and (5)

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[7] Claimants' Reply to the Application for Emergency Temporary Relief, ¶ 16.

[8] Claimants' Letter of September 15, 2021, page 7.

[9] Claimants' Reply to the Application for Emergency Temporary Relief, ¶ 16. *See* also Tr. p. 25:11-26:18.

[10] Claimants' Reply to the Application for Emergency Temporary Relief, ¶ 20 (emphasis in the original).

[11] Claimants' Reply to the Application for Emergency Temporary Relief, ¶¶ 21-22 (emphasis in the original).

[12] *Id.*

proportionality.[13] They submit that they unequivocally satisfy each of these elements as follows:

a. *Prima facie* jurisdiction

37. Claimants assert that they "make more than a *prima facie* showing that the Tribunal has jurisdiction to consider and resolve this dispute."[14] They state that Colombia consented to this arbitration pursuant to Article 10.17.1 of the US-Colombia TPA, which provides that: "[e]ach Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement."[15] In turn, Claimants consented to arbitration in accordance with the procedures set forth in Chapter 10 of the US-Colombia TPA when they submitted their Request for Arbitration.[16]

38. Claimants further argue that they are qualified to commence this arbitration against Colombia under the US-Colombia TPA. First, this matter arises directly out of an "investment dispute," specifically, FPJVC's rights established under the US-Colombia TPA with respect to its investment in Colombia. Claimant FPJVC is a contractual joint venture and each of its members – Claimant Amec Foster Wheeler USA Corporation and Claimant Process Consultants, Inc. – are corporations organized under the laws of the State of Delaware, United States of America, so that Claimants are an "enterprise of a Party" within the meaning of the US-Colombia TPA.[17]

39. Claimants are also "investor[s] of a Party" and have made an "investment" under the US-Colombia TPA. On this point, Claimants explain that they contracted with Reficar (a Colombian State-owned enterprise) to provide project management services for the expansion of an oil refinery owned by Colombia. In doing so, Claimants invested significant amounts of time, capital, personnel, and labor in Colombian territory with the

[13] Application, ¶ 105.
[14] Application, ¶ 118.
[15] Application, ¶ 108.
[16] Application, ¶ 115.
[17] Application, ¶ 111.

expectation that they would return a profit. The contract also created rights, both tangible and intangible, to a contractual benefit having economic value to Claimants. This dispute concerns Colombia's violations of its obligations to Claimants under the US-Colombia TPA.[18]

40. Additionally, Claimants submit that the contract is an "investment agreement," as defined by the US-Colombia TPA, because Reficar is "a national authority of a Party," which is wholly owned by Ecopetrol (a Colombian entity controlled by the Ministry of Mines and Energy) and, as such, it also entitles Claimants to submit a claim to arbitration under Article 10.16.1(a)(i)(c) of the US-Colombia TPA.[19]

41. Finally, Claimants argue that they have satisfied all notice and time requirements to submit a claim to arbitration under the US-Colombia TPA as follows: six months have elapsed since the events giving rise to this claim. Less than three years have elapsed from the date on which Claimants first acquired knowledge of the breaches, and the resulting damages from the same, under Article 10.16.1 of the US-Colombia TPA. Furthermore, Claimants and Respondent attempted, without success, to resolve the dispute through consultation and negotiation. The required waiting period following the submission of Claimants' notice of its intention to submit the claim to arbitration had expired prior to Claimants' filing of their Request for Arbitration.[20]

b. *Prima facie* establishment of the right to the relief sought

42. Claimants argue that their rights to an exclusive remedy pursuant to Article 26 of the ICSID Convention and to the preservation of the *status quo* and non-aggravation of the dispute deserve protection. [21] Notably, they submit that:

(i) *Preservation of the Status Quo*. ICSID tribunals routinely grant provisional measures to protect this right by enjoining a party from initiating parallel proceedings that concern the same subject matter of the arbitration. On this

[18] Application, ¶¶ 112-113.

[19] Application, ¶ 114.

[20] Application, ¶ 116.

[21] Application, ¶¶ 117-118.

basis, Claimants "seek an order preventing Colombia from taking steps to enforce the disputed CGR Decision until this arbitration has concluded, as enforcement would certainly aggravate the dispute and impair Claimants' rights to effectively participate in this arbitration."[22]

(ii) *Right to an Exclusive Award*. Citing *Tokios Tokelés v. Ukraine*, Claimants submit that the right to an exclusive remedy means that a party may not seek any other recourse with respect to the subject matter of the arbitration, whether by way of domestic or international relief. On this basis, Claimants request that the Tribunal "enjoin Colombia from commencing any enforcement proceedings with respect to the CGR Decision or pursue any other recourse against Claimants that involves the subject matter of this dispute to preserve FPJVC's right to an exclusive remedy under the TPA."[23]

43. Claimants note that, when determining whether to grant provisional measures, previous investment tribunals "have required only that the claimant plead a facially plausible case." Here, according to Claimants, the "factual and legal bases for the Application far exceed the establishment of Claimants' *prima facie* case on the merits." [24]

44. On this point, Claimants explain that the CGR's exercise of jurisdiction, assertion of charges, and subsequent findings in the CGR Decision denied Claimants fair and equitable treatment under Article 10.5 of the US-Colombia TPA and the National Treatment standard under Article 10.3 of the US-Colombia TPA. According to Claimants, Colombia also deprived FPJVC of the fundamental protections in the Contract and indirectly expropriated its benefits in violation of Article 10.7 of the US-Colombia TPA. Finally, Claimants have also pleaded, *inter alia*, that Colombia's violation of the Contract amounts to a violation of both the most favored nation guarantee in Article 10.4 and Article 10.16 of the US-Colombia TPA.[25]

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[22] Application, ¶¶ 93-95. *See* also, Tr. p.18:13-19:6.

[23] Application, ¶¶ 96-98. *See* also, Tr. p. 17:5-18:12.

[24] Application, ¶¶ 119-120.

[25] Application, ¶¶ 122-125.

c. Necessity

45. Claimants contend that provisional measures are necessary when, in the absence of such measures, the requesting party would suffer "irreparable loss".[26] They submit that it is sufficient for FPJVC to show that "there is a 'material risk' that harm will occur."[27] In this case, as Claimants explain, absent the measures sought, Claimants "will be stripped of their rights under the Contract,"[28] and their "[redacted]."[29] Claimants add that, under that scenario, "no award by the Tribunal will adequately compensate Claimants' damages."[30]

46. Claimants also note that, as requested here, investment tribunals frequently enjoin States "from enforcing disputed court judgments, fines, taxes and penalties finding that, in the absence of the interim measures, the investor would suffer irreparable harm." The prevention of such harm is necessary to preserve the *status quo* pending a final ruling on the merits.[31] Claimants add that investment tribunals have also held that provisional measures are "necessary" to "preserve the contractual rights agreed upon by the parties – like the contract between Reficar and FPJVC,"[32] or to "order the discontinuance of parallel proceedings to maintain the *status quo* and prevent aggravation of the ICSID arbitration,"[33] scenarios which are also applicable here.

d. Urgency

47. Claimants allege that, as stated above, the provisional measures are urgent and necessary both to preserve the *status quo* and to protect the Parties' right to an exclusive remedy.

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[26] Application, ¶ 126.
[27] Application, ¶ 130.
[28] Application, ¶ 149.
[29] Application, ¶ 131.
[30] Application, ¶ 147. *See* also, Tr. p. 20:3-13.
[31] Application, ¶¶ 132-137.
[32] Application, ¶¶ 139-141.
[33] Application, ¶¶ 142-145.

They add that "these rights will be immediately lost if Colombia proceeds to enforce the CGR Decision before this Tribunal reaches its determination on the merits of Claimants' underlying claims."[34]

48. Claimants submit that "the threat of harm to FPJVC is imminent" and explain that, once their appeal against the CGR Decision had been summarily dismissed, "under Colombian procedures, the CGR decision [became] final and enforceable with immediate effect,"[35] in Colombia or in any foreign jurisdiction. According to Claimants, "to the extent any local remedies to prevent enforcement of the CGR Decision remain pending or unresolved, these matters will only, at most, temporarily suspend the enforcement of the CGR Decision."[36]

49. Claimants further submit that "the mere threat of recognition or enforcement proceedings, by itself, warrant[s] urgent relief."[37] They note that Colombia has admitted that it has "initiat[ed] enforcement proceedings" during which the CGR may attach Claimants' assets at any time. Claimants contend that this admission, by definition, makes the harm to Claimants' interests imminent.[38]

50. Additionally, on December 2, 2021, Claimants drew the attention of the Tribunal to the Notice received on December 1, 2021 from the Coactive Collection Unit of the CGR. In doing so, Claimants noted that the Notice states that collection proceedings have commenced and that it contains an invitation to Claimant Process Consultants, Inc. ("PCI") to pay the obligation owed as determined by the CGR through Auto 749, COP $2.940.950.323.482,43, plus interest. Finally, on February 14 and 24, 2022, Claimants also brought to the Tribunal's attention, *inter alia*, the enactment of Law 2195 codifying CGR's previous practices and granting it new statutory powers to enforce and collect CGR decisions. According to Claimants, this new law, "is clearly part of the CGR's ongoing

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[34] Application, ¶ 151.

[35] Application, ¶ 152.

[36] Application, ¶¶ 152-153. *See* also, Claimants' Reply to the Application for Emergency Temporary Relief, ¶ 4.

[37] Application, ¶ 155.

[38] Claimants' Reply to the Application for Emergency Temporary Relief, ¶ 10.

effort to collect from parties such as Claimants." Claimants also referred to an email sent on February 7, 2022 by the CGR to Mr. Hector Hernández, Claimants' Colombian counsel, asking if he would accept service of the payment order issued by the CGR. According to Claimants, such service is "a condition to commencing the coercive stage of the collection proceeding."[39]

e. Proportionality

51. According to Claimants, the provisional measures sought are proportionate, "given that the Respondent would suffer little to no harm."[40] On this point, Claimants explain that "at most Respondent would have to wait for the conclusion of these ICSID proceedings before enforcing the CGR Decision," so "any harm dealt to Colombia would simply be the passing of more time until it can enforce the CGR Decision." In contrast, Claimants could face [redacted]."[41]

iii. The Request

52. On the basis of the above, Claimants request that the Tribunal order the following provisional measures:

> (1) "Respondent, its courts, its executive branch, and any administrative agency, including the CGR, refrain from taking any measures of enforcement of the CGR Decision discussed herein until this arbitration has concluded;
>
> (2) Respondent, its courts, its executive branch, and any administrative agency, including the CGR, shall suspend all enforcement proceedings or actions directed towards the enforcement of the CGR Decision mentioned herein until this arbitration has concluded;
>
> (3) That Respondent shall communicate this Order without delay to the CGR, and any other authority with jurisdiction to enforce the CGR Decision discussed herein, and inform such authority that the CGR Decision is not enforceable pending the outcome of this arbitration;

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[39] Claimants' Letter of February 24, 2022 p. 3. *See* also ¶¶ 22 and 25-27 supra.

[40] Application, ¶ 157.

[41] Application, ¶¶ 157-160. *See* also, Tr. p. 14:16-20 and Tr. p. 21:12-17.

(4) That Respondent refrain from taking any action that would aggravate or exacerbate this dispute, threaten the integrity of this arbitration or frustrate the effectiveness of any award from this Tribunal;

(5) Respondent shall promptly inform the Tribunal of the action that it has taken in compliance with this Order; and

(6) Granting Claimants such other and further relief as the Tribunal deems just and equitable."

B. Respondent's Position

53. In its Answer to the Application for Provisional Measures and related communications, Respondent requests that the Tribunal dismiss the Application for Provisional Measures and issue an order for costs and attorney's fees against Claimants.

i. The Tribunal's Authority to Grant Provisional Measures under the US-Colombia TPA

54. According to Respondent, Article 10.20.8 of the US-Colombia TPA limits the type of provisional relief that may be ordered under the Treaty, such that it prohibits the Tribunal from granting the provisional measures requested by Claimants.

55. *First*, Respondent explains that Article 10.20.8 of the US-Colombia TPA limits the Tribunal's authority under Article 47 of the ICSID Convention to recommend provisional measures, by providing that "(ii) [a tribunal may not] enjoin the application of a measure alleged to constitute a breach referred to in Article 10.16." This limitation, Respondent adds, is consistent with Article 10.26.1 of the US-Colombia TPA, which limits the types of remedies a tribunal may award to monetary damages or restitution of property. The Respondent notes that "if a tribunal constituted under the Treaty cannot order a respondent to revert, stop or modify a measure found to be in violation of the Treaty, it follows that it also cannot enjoin the application of such measures." Respondent notes that Claimants have failed to address this point in their submissions.[42]

[42] Respondent's Answer, ¶¶ 7-9. Tr. p. 37:16-38:6. *See* also, Tr. p. 41:14-42:6.

56. According to Respondent, both Claimants' own admissions and the facts of the case should lead the Tribunal to conclude that Claimants are seeking to enjoin the application of the same measures they allege constitute a violation of the US-Colombia TPA.[43]

57. Respondent explains that the CGR Decision is the culmination of the Fiscal Liability proceeding, which Claimants allege was initiated in breach of the US-Colombia TPA. Respondent adds that "because the purpose of a fiscal liability proceeding is to determine whether public servants and private parties have caused a damage to the State through the mismanagement of public resources and to seek compensation from those responsible, 'applying' the [CGR Decision] means seeking satisfaction from the fiscally liable parties, including Foster Wheeler and Process Consultants, of the amount set forth in the [CGR Decision]." Accordingly, enjoining the enforcement of the CGR Decision "would necessarily mean the 'application' or implementation of the measure alleged to constitute a breach of the Treaty, which is prohibited by Article 10.20.8" [44]

58. Additionally, Respondent submits that, by seeking to enjoin the enforcement of the CGR Decision, Claimants are actually seeking to alter the *status quo*. This is because stopping the CGR's enforcement efforts would "alter the ordinary course of the Fiscal Liability Proceeding" preventing Colombia from applying its own laws and affecting third parties, namely, the other juridical and natural persons found jointly and severally liable alongside Foster Wheeler and Process Consultants.[45]

59. As to Claimants' argument regarding the right to an exclusive remedy under Article 26 of the ICSID Convention, Respondent submits that this Article is irrelevant here, as "[t]he exclusivity of the remedy set forth in Article 26 refers only to investment disputes, barring the parties that have consented to ICSID arbitration from seeking relief in another forum."[46]

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[43] Respondent's Answer, ¶¶ 14, 16-17. Tr. p. 44:18-47:4.

[44] Respondent's Answer, ¶ 15. Tr. p. 48:17-50:4.

[45] Respondent's Answer, ¶ 19. Tr. p. 58:10-22.

[46] Respondent's Answer, ¶ 18, footnote 36. Tr. p. 57:12-58:9.

60. Respondent further notes that *IBT v. Panama*, *Feldman v. Mexico*, and *Pope & Talbot v. Canada* are directly relevant to this case; the tribunals in those cases rejected requests for provisional measures seeking to enjoin the application of a measure at issue in the arbitration on the basis of provisions identical to Art. 10.20.8 of the US-Panama TPA, as is the case here.[47]

61. Respondent concludes that "if the Tribunal were to enjoin the enforcement of the [CGR Decision], it will tacitly recognize that the [CGR Decision] is not the Measure at issue in this arbitration, and thus Claimants will be prevented from alleging [sic] in the arbitration that the [CGR Decision] constitute a violation of the Treaty and claim [sic] damages associated with the supposed breach."[48]

ii. The Requirements for Granting Provisional Measures are Not Met

62. According to Respondent, "both Parties substantially agree" that a request for provisional measures must satisfy the following five cumulative requirements: (1) that the provisional measures sought are necessary and urgent to prevent an irreparable harm; (2) that the tribunal has *prima facie* jurisdiction over the dispute; (3) that the applicant has made a showing of a *prima facie* case on the merits; (4) that granting the provisional measures does not prejudice the other party; and (5) that granting the provisional measures does not cause the tribunal to prejudge the merits of the dispute."[49]

a. Lack of *prima facie* jurisdiction

63. Respondent submits that Claimants have failed to meet their burden of proof to show that there is a *prima facie* basis for the Tribunal's jurisdiction. Respondent refers to its Memorial on Preliminary Objections, and submits that the Tribunal does not have jurisdiction over this case for the following reasons:

- "The Tribunal does not have jurisdiction *ratione voluntatis* over this case because Claimants did not comply with the requirements established in Article

[47] Tr. p. 53:5-55:17.

[48] Tr. p. 56:2-12.

[49] Respondent's Answer, ¶ 21.

10.16.1 of the Treaty for submitting a claim to arbitration thereunder: there is no breach of a substantive obligation of the Treaty or an investment agreement and Claimants have not incurred any loss or damage by reason of, or arising out of, that breach. In fact, the Provisional Measures Application highlights the absence of an actual loss or damage arising out of the Fiscal Liability Proceeding, as the interim relief Claimants seek is aimed at "preventing" the supposed loss or damage that could stem from the enforcement of the Ruling with Fiscal Liability.

- Claimants do not have a qualifying investment under the Treaty and the ICSID Convention because the Services Contract, which Claimants allege constitutes their "investment", does not qualify as an investment" under Article 25 of the ICSID Convention since it is an ordinary commercial contract for the provision of services that does not entail investment risk for Claimants.

- Claimant FPJVC does not qualify as a "national of another Contracting State" under the ICSID Convention because FPJVC is – in Claimants' own words – a "contractual joint venture", and as such, it cannot be considered a "juridical person" for purposes of Article 25(2)(b) of the ICSID Convention.

- Contrary to the express requirement in Article 10.16.2 of the Treaty, Claimants Foster Wheeler and Process Consultants did not send a notice of intent to submit the present dispute to arbitration, thus depriving this Tribunal of jurisdiction *ratione voluntatis* over their claims.

- Claimants did not effectively waive their right to initiate or continue proceedings with respect to the measure that they allege to be a breach of the substantive obligations under the Treaty. On the one hand, Claimants' 'waiver' – submitted with their Notice of Arbitration –does not satisfy the formal requirements set forth by Article 10.18.2(b) of the Treaty since it contains a reservation of rights (which is not only impermissible but empties the waiver of content). On the other hand, Foster Wheeler and Process Consultants have not effectively and materially complied with such 'waiver' because not only have they continued to participate actively in the Fiscal Liability Proceeding, and have even appealed the Ruling with Fiscal Liability before the fiscal liability and administrative sanctions chamber of the CGR, but they have also – subsequent to filing their Notice of Arbitration – initiated two additional *acciones de tutela* before Colombian courts for alleged violations of due process with regard to the conduct of the Fiscal Liability Proceeding, all of which results in the lack jurisdiction *ratione voluntatis* of the Tribunal."[50]

[50] Respondent's Answer, ¶¶ 47-49 (footnotes omitted).

b. Lack of a *prima facie* case on the merits

64. Respondent alleges that Claimants have also failed to meet their burden to establish a *prima facie* case on the merits.[51] First, according to Respondent, Claimants' FET claim has no basis, since "(i) the Treaty's FET standard only protects investments and not investors, and all of Claimants' claims are based on alleged acts, omissions and conduct by Colombia that would have affected only investors; (ii) in any event, Claimants plead their case on the basis of an incorrect FET standard, since the FET standard – under the Treaty – is limited to the minimum standard of treatment under customary international law, and none of Claimants' allegations is capable of violating the minimum standard of treatment."[52]

65. Second, no *prima facie* case on expropriation has been made. According to Respondent, Claimants have merely alleged that the following contractual rights have been allegedly expropriated: [redacted] However, Respondent continues, "neither of these two 'contractual rights' is capable of being economically exploited independently and separately from the rest of the Services Contract."[53]

66. Third, the national treatment obligation under Article 10.3 of the US-Colombia TPA is also completely baseless. According to Respondent, "it is clear that Claimants have failed to prove – even *prima facie* – that the conditions necessary for a breach of the national treatment obligation are met due to the fact that: (i) the Indictment Order (as well as the [CGR Decision] that was issued after this Arbitration was initiated) involves both nationals and foreigners."[54]

[51] Respondent's Answer, ¶¶ 47-49.
[52] Respondent's Answer, ¶ 51.
[53] *Id.*
[54] *Id.*

67. Fourth, Respondent argues that Claimants' claims are not capable of constituting a *prima facie* breach of the MFN obligation under Article 10.4 of the Treaty for the following reasons: "(i) the MFN obligation is a standard of 'treatment' and Claimants have failed to make a *prima facie* showing of a factual scenario in which third-country investors were accorded more favorable treatment, in like circumstances, than U.S. investors; (ii) the MFN clause of the Treaty cannot be used to import substantive obligations from other investment treaties (new rights) that are not found in the base treaty (*i.e.*, the Treaty), nor – if the importation of new rights were permitted – can such an importation be contrary to the public policy considerations taken into account by the Contracting Parties to the Treaty; (iii) even if the importation of an umbrella clause from another treaty were permitted, the umbrella clause of the Colombia-Switzerland BIT that Claimants seek to import does not grant consent to arbitrate claims for breaches of that umbrella clause; and (iv) in any event, even if the umbrella clause of the Colombia-Switzerland BIT could be imported in the manner requested by Claimants, it would be impossible to apply that clause in this case because the requirements for its application are not met (*inter alia*, because Reficar is not an agency of the Colombian central government)."[55]

68. Finally, Respondent submits that there could not have been a breach of an investment agreement, because the US-Colombia TPA "does not grant jurisdiction to the Tribunal to hear alleged contractual breaches and, in any case, no investment agreement *prima facie* exists."[56]

69. Respondent also rejects Claimants' contention that they have *prima facie* established that they have a right to the relief sought. According to Respondent, Claimants' claims would fall outside the Tribunal's powers under Article 10.26 of the US-Colombia TPA, because "(i) the Tribunal is not empowered to award moral damages; (ii) the Tribunal is also not

[55] *Id.*

[56] Respondent's Answer, ¶ 51 (footnotes omitted).

empowered to award non-monetary orders or injunctions; and (iii) the Tribunal cannot grant an offsetting award since it is not empowered to award hypothetical damages."[57]

c. No necessity or urgency

70. Citing *Phoenix v. Czech Republic*, Respondent argues that provisional measures should only be granted in situations of "absolute necessity and urgency." Because Claimants will not suffer an irreparable harm if the requested relief is not granted, there is no absolute urgency or necessity in their Application.[58]

71. *First*, as to the "necessity" requirement, Respondent submits that Claimants have failed to prove that the relief they seek is necessary to prevent an irreparable harm. It explains:

- "The [CGR Decision] is joint and several, and so collection efforts of the amount set forth therein will not solely focus on Claimants.
- Although the [CGR Decision] became final at the administrative level, it is still subject to judicial review. Claimants may initiate an annulment action against the [CGR Decision] and may request a stay of enforcement to halt any collection efforts.
- A request for a provisional stay of enforcement before the administrative adjudicatory jurisdiction would not require Foster Wheeler or Process Consultants to offer a bond.
- The fact that the CGR has been thus far - more than four years since the initiation of the Fiscal Liability Proceeding - unable to locate any assets of Claimants in Colombia shows that enforcement against them will likely prove unsuccessful. In fact, Mr. Thomas Grell, Claimants' witness and the President of Foster Wheeler, admits that that company does not have any assets in Colombia.
- The CGR's efforts to identify Claimants' assets abroad have also failed so far.
- Even though the CGR will renew its search for assets during the forced collection proceeding, such a search is likely to be unsuccessful. Claimants are

[57] Respondent's Answer, ¶ 52.

[58] Respondent's Answer, ¶¶ 29-32.

not likely to have acquired assets in Colombia, and the search for assets abroad faces enormous legal and practical hurdles.

- The CGR does not currently have in place precautionary measures against assets owned by Claimants in Colombia or abroad, despite having authority to do so. That is unsurprising given that an asset must first be identified before it can be attached or seized.

- In the unlikely event that the CGR is able to identify assets owned by Claimants in a foreign jurisdiction (Claimants accept the bulk of their assets are located abroad), attaching such assets is entirely another matter. The CGR relies on cooperation mechanisms that are ill-suited for such purpose.

- The CGR must carry out any collection efforts of the [CGR Decision] in accordance with the provisions set forth in the relevant Colombian laws and regulations, and simply does not have authority to embark on a "worldwide litigation campaign" against Claimants.

- [redacted] If locating a single asset abroad has thus far - more than four years since the initiation of the Fiscal Liability Proceeding - proven hopeless, locating, attaching, and auctioning off the bulk of Claimants assets is simply impossible.

- Even if the CGR manages to attach any of Claimants' assets - either in Colombia or abroad - during the forced collection proceeding, it may only auction those assets after the courts of the administrative adjudicatory jurisdiction rule on any annulment actions initiated by Claimants against the [CGR Decision].

- If an asset owned by Claimants is attached and sold off, monetary damages would be an appropriate means to repair such damage."[59]

72. *Second*, as to the "*urgency*" requirement, Respondent submits that "the fact that the CGR is initiating enforcement proceedings of the [CGR Decision] […], does not entail an imminent threat to Claimants' assets 'urgently' requiring the provisional measures."[60]

[59] Respondent's Answer, ¶ 34 (footnotes omitted).

[60] Respondent's Answer, ¶ 37.

73. Respondent explains that the "forced collection proceedings of rulings with fiscal liability" take place in two stages: (1) the voluntary collection stage – which seeks to obtain payment of the amount owed by debtors on a voluntary basis by means of negotiated payment agreements – and (2) the forced collection stage, at which point, the debtor may resist enforcement by filing objections against the administrative act by which the payment order is issued. In this case, the Respondent submits, the collection proceedings are in their early stages and "the CGR will first attempt to persuade the fiscally liable parties to pay voluntarily."[61] Even if the proceedings were to enter into the forced collection stage, Claimants would have the means to resist enforcement of the CGR Decision under Colombian law.[62] In its letter of December 8, 2021, Respondent indicates that the notice from the Coactive Collection Unit of the CGR received by Claimants on December 1, 2021[63] confirms this point as it notifies Claimants of the initiation of the voluntary collection stage of the collection proceeding and invites them to make payment of the amount established in the CGR Decision.[64] On February 18, 2022, when commenting on the CGR's email of February 7, 2022 to Mr. Hernandez,[65] Respondent indicated that "a payment order [in the collection proceedings] has now been issued – as Respondent anticipated it would, marking the initiation of the forced collection stage, *but* (i) the CGR has yet to serve notice of the payment order on Claimants; (ii) Claimants may file objections to the payment order before the CGR; and (iii) if the CGR rejects their objections and orders the sale of any assets of Claimants previously attached, Claimants may challenge such decision before the courts of the administrative adjudicatory jurisdiction, with such challenge having the effect of suspending the sale of the attached assets."[66]

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[61] Respondent's Answer, ¶ 37.

[62] Respondent's Answer, ¶¶ 37-38.

[63] *See* ¶¶ 22-23 supra.

[64] Respondent's Letter of December 8, 2021. On this point, see also Respondent's Answer ¶ 34 and Tr. pp. 62-64.

[65] *See* ¶ 50 supra.

[66] Respondent's Letter of February 18, 2022, p. 2-3 (emphasis added). *See* also ¶¶ 22 and 25-27 supra.

74. Finally, Respondent rejects Claimants' argument pursuant to which they would need only to show "material risk of harm" instead of "irreparable harm." Respondent notes that the alleged harm that Claimants seek to prevent with the provisional measures "is highly speculative and distant," and that the Tribunal "cannot grant interim relief based on mere conjectures of potential harm."[67]

75. According to Respondent, none of the cases cited by Claimants assists their position, as they do not factually resemble this case and they were not based on investments treaties with a provision akin to Article 10.20.8 of the US-Colombia TPA.[68]

d. Prejudice to Respondent and Third Parties

76. First, Respondent alleges that granting the provisional measures "would affect Respondent's sovereign right to enforce the [CGR Decision]." Respondent explains that the CGR has "a constitutional and legal obligation to enforce the [CGR Decision] and to attempt to recover the amount determined therein," and adds that "Colombia's right to enforce its domestic laws outweighs Claimants' feigned concern about the enforcement of the [CGR Decision]".[69]

77. Respondent further explains that granting the Request "would mean that the enforcement of the [CGR Decision] would be limited to the remaining fiscally liable parties, excluding Claimants, which would change the *status quo* and affect the rights of third part[ies]."[70]

e. Prejudgment of the merits

78. Respondent explains that "even though Claimants do not expressly refer to this requirement independently, in paragraph 117 of their Application, Claimants cite the case *Pey Casado*

[67] Respondent's Answer, ¶ 39.
[68] Respondent's Answer, ¶¶ 41-45.
[69] Respondent's Answer, ¶ 55.
[70] Respondent's Answer, ¶ 55.

v. Chile, in which the tribunal warned against the danger of prejudging the merits of the claim."[71]

79. According to Respondent, if the Tribunal were to grant the provisional measures sought, "it [would] be prejudging this case because it [would] effectively grant Claimants the relief they are seeking without fully examining the merits."[72]

III. ANALYSIS

A. Introduction

80. The core discussion between the Parties is related to the potential impact of the enforcement of the CGR Decision upon Claimants and their businesses and assets during the course of this arbitration. In reliance upon such asserted impact, Claimants filed an Application for Provisional Measures with the Arbitral Tribunal simultaneously with an Application for Emergency Temporary Relief, which was dismissed on October 25, 2021, for lack of established urgency and necessity.

81. The pending Application by Claimants seeks, first and foremost, an order of the Arbitral Tribunal requiring Respondent, its courts, its executive branch and any administrative agency (which includes the CGR) to refrain from taking any measures for the enforcement of the CGR Decision. Should any such similar measure have been initiated, Claimants request that the Arbitral Tribunal order its immediate suspension.

82. The Arbitral Tribunal has analysed and deliberated upon the allegations and arguments of the Parties. It has further reviewed the exhibits as well as doctrine and case law. On that basis, it proceeds to issue its Decision on Claimants' Application for Provisional Measures.

[71] Respondent's Answer, ¶ 58.

[72] Respondent's Answer, ¶ 60.

B. Legal Framework

83. The analysis of the Application for Provisional Measures by the Arbitral Tribunal will focus on (i) the discussion regarding the authority of the Arbitral Tribunal to grant provisional measures at the request of a party in light of Article 47 of the ICSID Convention, Rule 39 of the ICSID Arbitration Rules and, further, Article 10.20.8 of the US-Colombia TPA (the "Relevant Provisions"), and (ii) the conformity of the Application tendered by Claimants with the requirements widely accepted by arbitral tribunals as a basis upon which to grant provisional measures.

84. Article 47 of the ICSID Convention provides the following:

> "Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party."

85. Rule 39 of the ICSID Arbitration Rules reads as follows:

> "(1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.
>
> (2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).
>
> (3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.
>
> (4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.
>
> (5) If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.

> (6) Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests."

86. Pursuant to Rule 39 (1) of the ICSID Arbitration Rules, an application for provisional measures must address three matters: the rights to be preserved; the measures requested; and the circumstances that require such measures.

87. Finally, Article 10.20.8 of the US-Colombia TPA provides 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. For purposes of this paragraph, an order includes a recommendation.

C. Jurisdiction of the Arbitral Tribunal

88. The Parties have discussed extensively whether the Arbitral Tribunal has the power and authority to grant the provisional measures envisaged in the Application filed by Claimants.

89. While it is substantially undisputed that in ICSID cases, arbitral tribunals have the power and authority to recommend provisional measures, as envisaged by the Relevant Provisions, it is also noteworthy that the language of the second part of Article 10.20.8 of the US-Colombia TPA includes a limitation upon the power and authority otherwise conferred upon arbitral tribunals by Article 47 of the ICSID Convention.

90. For the avoidance of any doubt, it is important to underscore that it is also undisputed (and it could not be understood otherwise) that Article 47 of the Convention provides that parties may limit the power and authority conferred upon arbitrators. The opening language of Article 47 of the ICSID Convention provides for such possibility by the inclusion of the express qualification: "*except as the parties otherwise agree*". Thus, the power and

authority of an arbitral tribunal is not absolute to the extent that parties, in the exercise of their private autonomy, may opt to set limits upon them. In this case, upon entering into the US-Colombia TPA, the Parties consented expressly to such limitation associated with the type of relief that may not be ordered by an arbitral tribunal.

91. In line with the authorization provided by Article 47 of the ICSID Convention, Article 10.20.8 of the US-Colombia TPA encompasses the authority granted to arbitral tribunals to recommend provisional measures, together with the limitation imposed on such power and authority by virtue of the nature of the relief sought, which must be strictly observed. The Arbitral Tribunal considers that the preceding construction of the provisional measures system is in strict compliance with the Relevant Provisions.

92. Article 10.20.8 of the US-Colombia TPA has given rise to an extensive discussion among the Parties. Respondent is adamant in stating that the relief sought by Claimants in the context of the Application for Provisional Measures coincides with the relief sought in the context of Claimants' main claim in the Arbitration. Respondent further alleges that Claimants are looking to stop it from enforcing through its instrumentalities the collection of amounts owed by Claimants by virtue of the CGR Decision which found Claimants fiscally liable.

93. Claimants' reasoning led them to state that their application for an order to enjoin the collection efforts by Respondent does not seek the same relief as that which they seek in the arbitration. The Arbitral Tribunal emphasizes that Claimants and Respondent have brought into issue the nature and extent of the CGR Decision and whether the collection efforts were the culmination of the Fiscal Liability Proceeding or a separate and independent proceeding.

94. The Arbitral Tribunal observes that, even on *prima facie* analysis, it is clear that the principles and features of the proceeding instituted by the CGR against Claimants and others are complex matters. Any review would necessarily encompass various phases, including the forced collection proceedings that Claimants now seek to enjoin by filing their Application for Provisional Measures.

95. Irrespective of deciding whether the relief sought falls within the scope of the limitation in Article 10.20 8 of the US-Colombia TPA, an exercise that would certainly require the appraisal of various other elements which are not before the Arbitral Tribunal, it is the Arbitral Tribunal's understanding that the forced collection proceedings are part of the Fiscal Liability Proceeding. This is a logical conclusion that derives from the essence and nature of the proceeding which is designed to ascertain the existence of fiscal liability of public servants, individuals and/or legal entities, who or which, it is alleged, may have harmed the State's interests and caused them damage. Assuming that the decision is affirmative, enforcement is a natural consequence of the complex process with a view to making the aggrieved party whole and allowing it to recover the losses and damages incurred by virtue of wrongdoings perpetrated by those deemed liable. Hence, the collection proceedings may not in any circumstance be deemed a separate and independent mechanism to recover any sums owed. They are, indeed, the culmination of the Fiscal Liability Proceeding.

96. Another aspect of the matter of which the Arbitral Tribunal has taken account in its consideration of the nature and essence of the Fiscal Liability Proceeding and the impact of the application of Article 10.20.8 of the US-Colombia TPA is the need to ascertain whether the provisional measures requested are such that they will protect the *status quo* without aggravating the dispute.

97. As anticipated earlier, the Arbitral Tribunal has had the opportunity to analyze the nature and essence of the Fiscal Liability Proceeding and to determine that it is a complex process consisting of various phases which are inter-related. The initial phase of the proceeding is aimed at issuing a ruling with respect to fiscal liability. Should the ruling uphold the fiscal liability of those who harmed the interests of the Republic causing it damage, the process culminates with the enforcement of the affirmative ruling against those individuals and entities that are deemed liable thereby and the consequent collection of the amounts owed.

98. Hence, the *status quo* in this case, as the Arbitral Tribunal understands it, is that Respondent enjoys the freedom to apply its national laws and rules and to proceed with all the steps required to finalize the process. Respondent maintains that the Arbitral Tribunal

may not enjoin it from conducting the fiscal liability process, nor may it purport to restrain the ordinary exercise of that process by Respondent.[73] In the Tribunal's opinion, Claimants' contention that the relief sought encompasses their right to the preservation of the *status quo* and the avoidance of any aggravation of the dispute between the Parties is not borne out by the circumstances in this case. This argument, if accepted, would end up altering and modifying the *status quo* rather than preserving it.

99. The power and authority of this Arbitral Tribunal to grant the provisional measure sought by Claimants will depend upon the Arbitral Tribunal's determination of whether such power and authority is subject to the Treaty limitation.

100. The determination by the Arbitral Tribunal of the application of the limitation provided by the Treaty is a very sensitive matter. It requires extreme care on the part of the Arbitral Tribunal, not least, because the Arbitral Tribunal is very conscious of its duty not to prejudge the merits of this case in the context of the current summary proceedings.

101. This Arbitration is still in its preliminary phase. The Arbitral Tribunal does not yet have available to it all the information that it would need and require to enable it to decide whether the relief sought as a provisional measure is identical to that which constitutes the relief sought and to be reflected in the final award, should the Arbitral Tribunal's decide that it has jurisdiction, and, ultimately, were to rule in favour of Claimants.

102. It is the understanding of the Arbitral Tribunal that provisional measures have an extraordinary nature and, due to such unique characteristic, they should only be granted in very limited circumstances and provided that the party seeking the measures can demonstrate that all of the applicable prerequisites have been met. Should one of them fail to be met, the order may not be issued.

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[73] *See,* for example, *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Procedural Order No. 2 (October 16, 2002), p. 301 (Ex. RL-242)

103. Thus, in addition to the Arbitral Tribunal having the power and authority to grant the provisional measures under Article 10.20.8 of the US-Colombia TPA, cumulative requirements must be met for the granting of the provisional measures requested.

104. This Arbitral Tribunal has already determined that it lacks the information that it needs and requires to determine its power and authority under the Treaty. In any event, it is incumbent upon the Arbitral Tribunal to ascertain whether the prerequisites for an order to grant provisional measures have been met.

D. Requirements to be met by Claimants

105. The Parties agree that if all the requirements are met, then the Arbitral Tribunal may make the order sought. Furthermore, the burden of proof of the satisfaction of all such requirements shall rest with the applicant, in this case, Claimants. The Arbitral Tribunal also understands that among those requirements, special attention must be given at this stage to those which go to the necessity and urgency of the order to be granted.

106. Although this Arbitral Tribunal is now deciding whether to grant the Application for Provisional Measures, it has clearly in mind that Claimants previously filed an Application for Emergency Temporary Relief which was dismissed by the Arbitral Tribunal on October 25, 2021. That application was denied by reason of Claimants' inability to establish that their assets were under threat of harm, there being no, or no sufficient evidence of urgency, necessity or danger of imminent harm.

107. Since Claimants' Application for Emergency Temporary Relief was dismissed on those grounds, the Arbitral Tribunal deems it appropriate to revisit and analyze anew the current status of urgency and necessity, such that it is in a position to ascertain whether the then prevailing conditions have been altered by subsequent events.

108. Following the exchange of briefs in connection with this Application for Provisional Measures, Claimants requested leave from the Arbitral Tribunal to submit a copy of a Notice received on December 1, 2021 from the Coactive Collection Unit of the CGR as an exhibit in support of their Application. According to Claimants, such Notice stated that

collection proceedings had commenced and it invited PCI to pay the obligation owed as determined by the CGR through Auto 749, namely COP $2.940.950.323.482,43, plus interest. Claimants stated that this was new information that did not exist when the Parties had made their submissions on the Application for Provisional Measures. The Arbitral Tribunal granted leave to Claimants to submit the Notice received and invited Respondent to comment on it.

109. On December 8, 2021, Respondent clarified that the Notice simply notified PCI of the voluntary collection stage of the collection proceedings and invited it to make payment of the amount established in the CGR Decision. Respondent further noted that the payment amount indicated in the Notice was less than the amount established in the CGR Decision. On this point, Respondent reiterated that the payment obligation in the CGR Decision is joint and several, such that payments made by any fiscally liable party reduce the total amount owed by all. Finally, Respondent explained that the voluntary collection stage may last up to three months following which, the CGR would initiate forced collection stage. Even if matters reached the point of a forced collection stage, the CGR's search and the eventual attachment of assets abroad faced monumental practical hurdles as it had explained.

110. Looking back, the Arbitral Tribunal is now able to compare the situation which prevailed at the time of Claimants' Application for Provisional Measures with the current situation.

111. Despite the development before the Arbitral Tribunal, referenced at paragraphs 108 and 109 above, it may be established that notwithstanding the receipt of the Notice on December 1, 2021, Claimants have not been able to report any consequential measure affecting their assets. Apparently, similar notices were served on those other parties found liable by Auto 749. The Arbitral Tribunal has no reason to believe that was not the case in so far as Auto 749 includes other individuals and entities found jointly and severally liable with Claimants.

112. The Tribunal has also considered the additional exhibits introduced by Claimants on February 14, 2022 and the Parties' comments of February 18 and 24, 2022.

113. The briefs submitted by Respondent list in detail the various steps to be followed by the authorities in their collection efforts. From the communications received from the Parties in February 2022, the Arbitral Tribunal understands that the forced collection stage has just been initiated, but that the CGR has yet to serve notice of the payment order on Claimants, to which Claimants may object. The Tribunal further understands, first, that if the CGR rejects Claimants' objections and orders the sale of any assets previously attached, Claimants may challenge such decision before the Colombian courts and, second, any such challenge would have the effect of suspending the sale of the attached assets.

114. The Arbitral Tribunal has before it Claimants' statement that unless enjoined, the enforcement of the CGR Decision will aggravate the *status quo* [redacted]. They add that the risk of irreparable harm is both imminent and urgent.

115. As a matter of fact, however, the evidence before the Arbitral Tribunal does not allow it to draw the conclusion that Claimants' assets are under any immediate threat, or that the current collection proceedings by themselves give rise to an imminent risk that Claimants will suffer irreparable harm. In the opinion of the Tribunal and, irrespective of any discussion of whether what is required is a showing that the harm has to be irreparable to give rise to the right to protection, or whether a simple danger or threat of harm would suffice, the reality is that no, or no sufficient, evidence has been adduced by Claimants to establish that either is yet present in this case.

116. Moreover, the passing of time since the filing of the Application for Provisional Measures has so far demonstrated that no harm to Claimants' assets is imminent and that they have not yet suffered damage. Claimants have not been able to produce any evidence that circumstances are such that provisional measures protection are necessary and appropriate.

117. In sum, the Arbitral Tribunal has been unable to identify any material change in circumstances upon a comparison of the current situation with that which prevailed towards the end of last year when it rejected Claimants' Application for Emergency Temporary Relief, which could affect the assets and the businesses of Claimants by virtue of the

normal course of such collection proceedings under Colombian laws. Thus, the Arbitral Tribunal concludes that Claimants have failed to demonstrate that the requirements related to necessity and urgency have been met.

118. Since all requirements must be met cumulatively, the failure identified above is sufficient to enable the Arbitral Tribunal to decide the application without the need for any further analysis of the remaining requirements.

IV. DECISION

119. For these reasons, the Arbitral Tribunal **DISMISSES** Claimants' Application for Provisional Measure. Should hereafter Claimants consider that a material change of circumstances has arisen, the Arbitral Tribunal grants them liberty to apply on the basis that it would be prepared to entertain a further reasoned application, fully supported with evidence of the asserted urgency of, and necessity for, the measures then sought. A decision on the allocation of the costs originated by this Application will be rendered at the appropriate procedural time.

On behalf of the Arbitral Tribunal,

[signed]

_____
Mr. José Emilio Nunes Pinto
President of the Tribunal
Date: May 31, 2022