

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Mainstream Renewable Power Ltd and others

v.

Federal Republic of Germany

(ICSID Case No. ARB/21/26)

PROCEDURAL ORDER NO. 1

Members of the Tribunal

Ms. Wendy Miles QC, President of the Tribunal

Mr. Antolín Fernández Antuña, Arbitrator

Dr. Charles Poncet, M.C.L., Arbitrator

Secretary of the Tribunal

Ms. Martina Polasek

November 22, 2021

as amended on January 26, 2022

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Introduction

The first session of the Tribunal was held on Tuesday, October 26, 2021 at 5:00 p.m. (BST) / 6:00 p.m. (CEST), by videoconference. The session was adjourned at 6:48 p.m. (BST) / 7:48 p.m. (CEST).

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

Participating in the conference were:

Members of the Tribunal:

Ms. Wendy Miles QC, President of the Tribunal
Mr. Antolín Fernández Antuña, Arbitrator
Dr. Charles Poncet, M.C.L., Arbitrator

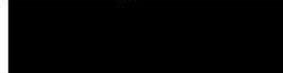
ICSID Secretariat:

Ms. Martina Polasek, Secretary of the Tribunal
Mr. Govert Coppens, Legal Counsel, ICSID
Ms. Colleen Ferguson, Paralegal, ICSID

Attending on behalf of the Claimants:

Dr. Markus Burgstaller, Hogan Lovells International LLP
Mr. Karl Pörnbacher, Hogan Lovells International LLP
Mr. Jonas Poell, Hogan Lovells International LLP
Mr. Scott Macpherson, Hogan Lovells International LLP
Ms. Nicole Geldenhuys, Hogan Lovells International LLP
Mr. Aidan Guinan, Mainstream Renewable Power Ltd
Mr. Vincent O'Grady, Mainstream Renewable Power Ltd
Mr. Remi Tissa, Mainstream Renewable Power Ltd

Attending on behalf of the Respondent:

 Federal Ministry for Economic Affairs and Energy
 Federal Ministry for Economic Affairs and Energy
Dr. Anke Meier, Noerr PartGmbH
Mr. Christof Federwisch, Noerr PartGmbH
Ms. Lucie Gerhardt, Noerr PartGmbH
Dr. Barbara Maucher, Noerr PartGmbH
Ms. Judith Fuchs, Noerr PartGmbH

The Tribunal and the parties considered the following:

- The Draft Procedural Order circulated by the Tribunal Secretary on October 8, 2021;
and

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- The parties' comments on the Draft Procedural Order received on October 22, 2021, indicating the items on which they agreed and their respective positions regarding the items on which they did not agree.

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

Order

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

1. Applicable Arbitration Rules

Convention Article 44

- 1.1. These proceedings are conducted in accordance with the ICSID Arbitration Rules in force as of April 10, 2006.

2. Constitution of the Tribunal and Tribunal Members' Declarations

Arbitration Rule 6

- 2.1. The Tribunal was constituted on September 14, 2021 in accordance with the ICSID Convention and the ICSID Arbitration Rules. The parties confirmed that the Tribunal was properly constituted and that no party has any objection to the appointment of any Member of the Tribunal.
- 2.2. The Members of the Tribunal timely submitted their signed declarations in accordance with ICSID Arbitration Rule 6(2). Copies of these declarations were distributed to the parties by the ICSID Secretariat on September 14, 2021.
- 2.3. The Members of the Tribunal confirmed that they have sufficient availability during the next 24 months to dedicate to this case.

3. Fees and Expenses of Tribunal Members

Convention Article 60; Administrative and Financial Regulation 14; ICSID Schedule of Fees

- 3.1. The fees and expenses of each Tribunal Member shall be determined and paid in accordance with the ICSID Schedule of Fees and the Memorandum on Fees and Expenses of ICSID Arbitrators in force at the time the fees and expenses are incurred.
- 3.2. Under the current Schedule of Fees, each Tribunal Member receives:

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- 3.2.1. US\$3,000 for each day of meetings or each eight hours of other work performed in connection with the proceedings or *pro rata*; and
 - 3.2.2. subsistence allowances, reimbursement of travel, and other expenses pursuant to ICSID Administrative and Financial Regulation 14.
 - 3.3. Each Tribunal Member shall submit his/her claims for fees and expenses to the ICSID Secretariat on a quarterly basis.
 - 3.4. Non-refundable expenses incurred in connection with a hearing as a result of a postponement or cancellation of the hearing shall be reimbursed.
4. Presence and Quorum
Arbitration Rules 14(2) and 20(1)(a)
 - 4.1. The presence of all Members of the Tribunal constitutes a quorum for its sittings. The Tribunal may sit by any appropriate means of communication, provided that all Members are present via the same means.
5. Rulings of the Tribunal
Convention Article 48(1); Arbitration Rules 16, 19 and 20
 - 5.1. Decisions of the Tribunal shall be taken by a majority of the Members of the Tribunal after hearing and taking into consideration the position of the parties.
 - 5.2. ICSID Arbitration Rule 16(2) applies to decisions taken by correspondence except that where the matter is urgent, the President may decide procedural matters without consulting the other Members, subject to possible reconsideration of such decision by the full Tribunal.
 - 5.3. The Tribunal will draft all rulings, including the award, within a reasonable time period. If a ruling has not been issued within three months after the final submission on a particular matter, the Tribunal will provide the parties with status updates every month.
 - 5.4. The President is authorized to issue Procedural Orders on behalf of the Tribunal.
 - 5.5. The Tribunal's rulings on procedural matters may be communicated to the parties by the Tribunal Secretary electronically in the form of a letter or email.
 - 5.6. Any ruling of the Tribunal, including the certified copy of the award, will be dispatched electronically to the parties. The Secretariat will send certified hard copies to the parties upon a request.

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6. Power to Fix Time Limits

Arbitration Rule 26(1)

- 6.1. The President may fix and extend time limits for the completion of the various steps in the proceeding.
- 6.2. In exercising this power, the President shall consult with the other Members of the Tribunal. If the matter is urgent, the President may fix or extend time limits without consulting the other Members, subject to possible reconsideration of such decision by the full Tribunal.

7. Secretary of the Tribunal

Administrative and Financial Regulation 25

- 7.1. The Tribunal Secretary is Ms Martina Polasek, ICSID, or such other person as ICSID may notify the Tribunal and the parties from time to time.
- 7.2. To send copies of communications by email, mail, and courier/parcel deliveries to the ICSID Secretariat, the contact details are:

Ms. Martina Polasek
ICSID
MSN C3-300
1818 H Street, N.W.
Washington, D.C. 20433
USA
Tel.: + 1 (202) 458-4567
Fax: + 1 (202) 522-2615
Email: mpolasek@worldbank.org
Paralegal name: Ms. Colleen Ferguson
Paralegal email: cferguson2@worldbank.org

- 7.3. For local messenger deliveries, the contact details are:

Ms. Martina Polasek
ICSID
1225 Connecticut Ave. N.W.
(World Bank C Building)
3rd Floor
Washington, D.C. 20036
USA
Tel. +1 (202) 458-1534

8. Representation of the Parties

Arbitration Rule 18

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

For the Claimants:

Dr. Markus Burgstaller
Mr. Scott Macpherson
Ms. Nicole Geldenhuys
Mr. Karl Pörnbacher
Mr. Jonas Poell
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and

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Christof.Federwisch@noerr.com
Lucie.Gerhardt@noerr.com
Barbara.Maucher@noerr.com

9. Apportionment of Costs and Advance Payments to ICSID

Convention Article 61(2); Administrative and Financial Regulation 14; Arbitration Rule 28

- 9.1. The parties shall cover the direct costs of the proceeding in equal parts, without prejudice to the final decision of the Tribunal as to the allocation of costs.

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- 9.2. By letter of September 17, 2021, ICSID requested that each party pay US\$150,000 to cover the initial costs of the proceeding. ICSID received the Claimants' payment on October 13, 2021 and the Respondent's payment on October 28, 2021.
- 9.3. ICSID shall request further advances as needed. Such requests shall be accompanied by a detailed interim statement of account.

10. Place of Proceeding

Convention Articles 62 and 63; Administrative and Financial Regulation 26; Arbitration Rule 13(3)

- 10.1. The parties reserve their right to agree on a location of any hearing at a later stage of the proceeding. Unless otherwise agreed in accordance with Articles 62 and 63 of the Convention, the proceedings shall be held at the seat of the Centre, in Washington, D.C., United States of America.
- 10.2. The Tribunal may hold in-person hearings at any other place that it considers appropriate if the parties so agree.
- 10.3. The Tribunal may also hold remote hearings by video link should it be appropriate to do so after consultation with the parties.
- 10.4. The Tribunal members may deliberate in person or remotely at any place and by any appropriate means it considers convenient.

11. Procedural Language(s), Translation and Interpretation

Administrative and Financial Regulation 30(3) and (4); Arbitration Rules 20(1)(b) and 22

- 11.1. English is the procedural language of the arbitration.
- 11.2. Documents filed by the Parties in any other language must be accompanied by a translation into English. Further to the Respondent's request, the Respondent's translations shall be filed no later than 10 days after the relevant filing deadline ("**Translation Extension**"), in accordance with the time limits detailed in the procedural timetables in **Annex C**. The Claimants have an additional 10 days to file their immediately subsequent responsive submission (with the exception of submissions concerning requests for production of document) in accordance with the time limits detailed in the procedural timetables in **Annex C**.
- 11.3. If the document is lengthy and relevant only in part, it is sufficient to translate only relevant parts, provided that the Tribunal may require a fuller or a complete translation at the request of any party or on its own initiative.

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- 11.4. Translations need not be certified unless there is a dispute as to the content of a translation provided and the party disputing the translation specifically requests a certified version.
- 11.5. Documents exchanged between the parties in a language other than English under §15 below (Production of Documents) need not be translated.
- 11.6. The testimony of a witness or expert called for examination during the hearing who prefers to give evidence other than in the English language shall be interpreted, simultaneously if possible, by a certified interpreter. In principle, a witness who wishes to testify in a language other than English shall have previously submitted (pursuant to the timetable) a written statement/report in the language in which the witness will testify, accompanied by an English translation.
- 11.7. The parties will notify the Tribunal, as soon as possible, and no later than at the pre-hearing organizational meeting (see §19 below), which witnesses or experts require interpretation.
- 11.8. The costs of the interpreter(s) will be paid from the advance payments made by the parties, without prejudice to the decision of the Tribunal as to which party shall ultimately bear those costs.

12. Routing of Communications

Administrative and Financial Regulation 24

- 12.1. The ICSID Secretariat shall be the channel of written communications between the parties and the Tribunal.
- 12.2. Each party's written communications shall be transmitted by email or other electronic means to the opposing party and to the Tribunal Secretary, who shall send them to the Tribunal.
- 12.3. Electronic versions of communications ordered by the Tribunal to be filed simultaneously shall be transmitted to the Tribunal Secretary only, who shall send them to the opposing party and the Tribunal.
- 12.4. The Tribunal Secretary shall not be copied on direct communications between the parties when such communications are not intended to be transmitted to the Tribunal.

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

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

- 13.1. By the relevant filing date, the parties shall submit by email to the Tribunal Secretary and the opposing party an electronic version of the pleading with witness statements, expert reports and an index of all supporting documentation.¹
- 13.2. By the third business day after the relevant filing deadline, the parties shall upload the pleading with all the supporting documentation and updated index to the file sharing platform that has been created by ICSID for purposes of this case.
- 13.3. Electronic files of pleadings, witness statements, expert reports, exhibits and legal authorities shall be text searchable (*i.e.*, OCR PDF or Word), unless in exceptional circumstances it is technically not possible with reasonable means in which case the submitting party shall provide an explanation as to those exceptional circumstances.
- 13.4. All pleadings shall be accompanied by a cumulative index of all the supporting documentation that the party has submitted up to the date of the pleading. The index shall indicate the document number and the pleading with which it was submitted. (Please follow the naming conventions contained in **Annex A**).
- 13.5. After the conclusion of the written phase of the proceeding, at least 30 days before a substantive hearing, the parties shall courier to the ICSID Secretariat at the address indicated at §7.3 above and to each Member of the Tribunal at the addresses indicated at §13.6 below a USB drive containing an electronic copy of the entire case file (including pleadings, witness statements, expert reports, exhibits, legal authorities and Tribunal decisions and orders to date) with a consolidated hyperlinked index of all documents.
- 13.6. The addresses of the Tribunal Members are as follows:

| | | |
|--|---|---|
| Ms Wendy Miles QC Twenty Essex Chambers 20 Essex Street London WC2R 3AL United Kingdom | Mr. Antolín Fernández Antuña Antuña & Partners Paseo de la Castellana, 93-2 28046 Madrid Kingdom of Spain | Dr. Charles Poncet, M.C.L. Poncet SARL Rue Bovy-Lysberg 2 P.O. Box 5271 1211 Geneva 11 Switzerland |
|--|---|---|

- 13.7. The official date of receipt of a pleading or communication shall be the day on which the electronic file is sent pursuant to §13.1 and in line with §13.8 to the Tribunal Secretary by email.

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

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13.8. A filing shall be deemed timely if sent by a party by midnight, Washington, D.C. time, on the relevant date.

14. Number and Sequence of Pleadings

Arbitration Rules 20(1)(c), 20(1)(e), 29 and 31

14.1. The proceeding shall consist of a written phase followed by an oral phase.

14.2. A full procedural timetable, which includes written submissions, production of documents (per §15 below) and hearing(s) is in **Annex C**.

15. Production of Documents

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

15.1. Articles 3 and 9 of the IBA Rules on the Taking of Evidence in International Arbitration (2020) (the “IBA Rules”) shall be used as a guideline by the Tribunal and the parties regarding document production in this case.

15.2. Each party will be permitted to make requests for the production of documents. These requests shall be made by the parties following the submission of the Respondent’s Counter-Memorial on the Merits in accordance with the procedural timetable in **Annex C**, which includes a document production phase.

15.3. The request, responses or objections to the request, the reply to the responses or objections to the request, and the Tribunal’s decisions referred to in this Section shall be recorded in a joint Redfern schedule by each side in the form below:

| | |
|---|--|
| Document Request Number | |
| Identification of documents or category of documents requested | |
| Relevance and materiality | |

| | |
|---|--|
| Summary of objections to production of requested documents | |
| Reply | |
| Decision of the Tribunal | |

16. Submission of Documents

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

- 16.1. The Memorial and Counter-Memorial shall be accompanied by the documentary evidence relied upon by the parties, including exhibits and legal authorities. Further documentary evidence relied upon by the parties in rebuttal shall be submitted with the Reply and Rejoinder.
- 16.2. To the extent the parties make other submissions that rely on documentary evidence, they should submit such evidence with those submissions as well as legal authorities.
- 16.3. The documents shall be submitted in the manner and form set forth in §13 above.
- 16.4. Neither party shall be permitted to submit additional or responsive documents after the filing of its respective last written submission, unless the Tribunal determines that special circumstances exist based on a reasoned written request followed by observations from the other party.
 - 16.4.1. Should a party request leave to file additional or responsive documents, that party may not annex the documents that it seeks to file to its request.
 - 16.4.2. If the Tribunal grants such an application for submission of an additional or responsive document, the Tribunal shall ensure that the other party is afforded sufficient opportunity to make its observations concerning such a document.
- 16.5. The Tribunal may call upon the parties to produce documents or other evidence in accordance with ICSID Arbitration Rule 34(2).

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16.6. The documents shall be submitted in the following form:

16.6.1. The number of each Exhibit containing a document produced by the Claimant shall be preceded by the letter “C-” for factual exhibits and “CL-” for legal exhibits containing authorities etc. The number for each Exhibit containing a document produced by the Respondent shall be preceded by the letter “R-” for factual exhibits and “RL-” for legal exhibits containing authorities etc.

16.6.2. Exhibits and legal authorities shall be numbered consecutively throughout these proceedings, commencing with “C-0001” and “R-0001,” and “CL-001” and “RL-001” respectively. The number of the exhibit or legal authority shall appear on the first page of the document, and shall be incorporated into the file name in accordance with §16.6.4.

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

16.6.4. Electronic files and the accompanying indexes shall follow the naming conventions contained in **Annex A**.

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

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

16.9. Demonstrative exhibits (such as PowerPoint slides, charts, tabulations, etc.) may be used at any hearing, provided they contain no new evidence. Each party shall number its demonstrative exhibits consecutively and indicate on each demonstrative exhibit the number of the document(s) from which it is derived. The party submitting such exhibits shall provide them in electronic and, if requested, hard copy to the other party, the Tribunal Members, the Tribunal Secretary, the court reporter(s) and interpreter(s) at the hearing at a time to be decided at the pre-hearing organizational meeting.

17. Witness Statements and Expert Reports

Convention Article 43(a); Arbitration Rule 24

17.1. The IBA Rules shall be used as a guideline by the Tribunal with regard to the taking of witness and expert evidence.

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- 17.2. Witness statements and expert reports shall be filed together with the parties' pleadings.
- 17.3. Neither party shall be permitted to submit any testimony that has not been filed with the written submissions, unless the Tribunal determines that special circumstances exist based on a reasoned written request followed by observations from the other party (following the procedure outlined in §16.4).
- 17.4. Each witness statement and expert report shall be signed and dated by the witness or expert and contain the information required by Articles 4(5) (for fact witnesses) and 5(2) (for experts) of the IBA Rules.

18. Examination of Witnesses and Experts

Arbitration Rules 35 and 36

- 18.1. Any person may present evidence as a witness, including a party's officer employee or other representative.
- 18.2. On the date indicated in **Annex C**, each party shall notify the other party, with a copy to the Tribunal, which witnesses and experts of the opposing party, whose statement or report has been submitted, it wishes to cross-examine at the hearing.
- 18.3. On the date indicated in **Annex C**, the Tribunal will indicate the names, if any, of the witnesses or experts whose statement or report has been submitted, not called by the parties, whom it wishes to examine at the hearing.
- 18.4. Any witness who has submitted a witness statement or expert who has submitted an expert report must, at the request of the other party made in accordance with the time-limits set out in the procedural timetable in **Annex C**, or at the request of the Tribunal, be made available for examination at the hearing.
- 18.5. Each party shall be responsible for summoning and securing the appearance of its own fact and expert witnesses to the hearing when called for cross-examination by another party or for examination by the Tribunal, and shall assume the costs of appearance of such witnesses in the first instance without prejudice to the decision of the Tribunal as to which party shall ultimately bear those costs.
- 18.6. If a witness or expert fails to appear at the hearing without justification, the Tribunal may, after hearing the parties, direct that the witness statement of such witness or report of such expert be struck from the record, or may attach such weight to the witness statement or expert report as it may consider appropriate in the circumstances.
- 18.7. The Tribunal may, in its discretion, keeping the facts and circumstances in view and after hearing the parties in this regard, permit a witness or expert to be examined

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by video conference or permit alternative arrangements for taking of his/her testimony.

- 18.8. If a party has not called another party's fact or expert witness for cross-examination, that will not be deemed as an admission by that party nor will it imply that the party accepts of the evidence given in the relevant witness statement(s) or expert report(s) as correct or proven. Rather, the statement or report of such a witness or expert shall be examined and weighed by the Tribunal, in its discretion, in light of all the evidence presented by the parties.
- 18.9. Pursuant to ICSID Arbitration Rule 35(1), witnesses and experts shall be examined by each party under the control of the President of the Tribunal. Before giving evidence, witnesses shall make the declaration set out in ICSID Arbitration Rule 35(2), and experts shall make the declaration set out in ICSID Arbitration Rule 35(3).
- 18.10. Witnesses will first be briefly examined by counsel for the party that is presenting the witness ("direct examination"), for the purpose of introducing the witness and having him or her confirm the statement or report, including any corrections to be made thereto. Direct examination may not introduce new matters not already covered by the written statement or report. Experts may give a presentation before the start of their cross-examination, in lieu of traditional direct examination. The duration of the direct examination of fact witnesses and expert presentations presumptively shall be decided during the pre-hearing organizational meeting after consulting the parties.
- 18.11. Following direct examination and/or expert presentations, the witness or expert may then be examined by counsel for the opposing party ("cross-examination"). Cross-examination of a witness or expert shall not go beyond the scope of the issues and matters relevant to the matters in dispute.
- 18.12. Following the cross-examination, "re-direct examination" of a witness or expert may be carried out by the party presenting that witness or expert but shall be limited to the matters that arose during cross-examination of that witness or expert. The Tribunal shall decide upon any request for re-cross examination from the parties.
- 18.13. The Tribunal may examine the witness or expert at any time during the oral procedure.
- 18.14. The presence of fact and expert witnesses in the hearing room prior to giving their oral evidence shall be discussed between the parties prior to the pre-hearing organizational meeting to be held pursuant to §19 below and, if required, decided by the Tribunal at that meeting.
- 18.15. In relation to evidentiary matters, the Tribunal may seek guidance from the IBA Rules.

18.16. The witnesses and experts shall be examined in the order agreed by the parties. If not agreed by the parties, the Tribunal shall determine the order in which the witnesses and experts will be called after consultation with the parties during the pre-hearing organizational meeting in §19 below.

18.17. Parties' counsel shall be authorized to meet and discuss with witnesses and potential witnesses to establish the facts and prepare their testimony.

19. Pre-Hearing Organizational Meetings

Arbitration Rule 13

19.1. A pre-hearing organizational meeting shall be held on the date stated in **Annex C**. It shall comprise a teleconference or videoconference between the Tribunal, or its President, and the parties and should resolve any outstanding procedural, administrative, and logistical matters (including modality of interpretation and transcription) in preparation for the hearing.

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

20. Hearings

Arbitration Rules 20(1)(e) and 32

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

20.2. The hearing may be held in-person or remotely by video link as determined by the Tribunal after consultation with the parties. An in-person hearing shall be held at a place to be determined in accordance with §10 above.

20.3. The hearing shall take place in accordance with the applicable procedural calendar in **Annex C**.

20.4. The Members of the Tribunal shall endeavor to reserve at least one day after the hearing to determine the next steps and to hold deliberations.

20.5. The principle of equality of time shall be applied with flexibility in light of the circumstances of the case. The amount of time available to each side for use at the hearing will be set by the Tribunal after consultation with the parties during the pre-hearing organizational meeting.

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- 20.6. Consistent with Arbitration Rule 32(2), the parties reserve their right to give their consent to public hearings at a later stage of the proceeding. The Tribunal shall consult with the parties regarding the possibility to have public hearings at least four weeks before the hearing.

21. Records of Hearings and Sessions

Arbitration Rules 13 and 20(1)(g)

- 21.1. Sound recordings shall be made of all hearings and sessions. The sound recordings shall be provided to the parties and the Tribunal Members.
- 21.2. Verbatim transcript(s) in the procedural language(s) shall be made of any hearing and session other than sessions on procedural issues. Unless otherwise agreed by the parties or ordered by the Tribunal, the verbatim transcripts shall, if possible, be available in real-time using LiveNote or similar software and electronic transcripts shall be provided to the parties and the Tribunal on a same-day basis.
- 21.3. The parties shall agree on any corrections to the transcripts within 45 days of the later of the dates of the receipt of the sound recordings and transcripts. The agreed corrections may be entered by the court reporter in the transcripts (“revised transcripts”). The Tribunal shall decide upon any disagreement between the parties and any correction adopted by the Tribunal shall be entered by the court reporter in the revised transcripts.

22. Post-Hearing Memorials and Statements of Costs

Convention Article 44; Arbitration Rule 28(2)

- 22.1. At the conclusion of the final evidentiary hearing, the parties and the Tribunal shall discuss whether post-hearing briefs are desirable and, if so, their modalities. They shall also establish a schedule for submission of statements of costs.

23. Publication

Convention Article 48(5), Administrative and Financial Regulation 22, Arbitration Rule 48(4)

- 23.1. The parties consent to ICSID publication of the award and any order or decision issued in the present proceedings provided that, before any such publication takes place, each party is permitted to redact any information contained in the award, order and/or decision which is considered by that party to be sensitive, or a business or trade secret.

24. Encryption of Email Correspondence

- 24.1. By email dated May 12, 2021, the Respondent requested that “an s/mime encryption” is established for case-related communication via email.
- 24.2. The ICSID Secretariat will facilitate the process required to establish encrypted email correspondence between the parties, the Secretariat and the Tribunal.
- 24.3. The adoption of this encryption protocol requires:
 - 24.3.1. every individual in the email distribution group for the case to have access to email client software that supports the S/MIME protocol (e.g., Microsoft Outlook);
 - 24.3.2. each individual member of the email distribution group has obtained an S/MIME certificate through their organization or a third-party vendor and has installed that certificate in their email client software;
 - 24.3.3. encryption capability among the email distribution group to be set up through the exchange of digitally signed emails among the members of the distribution group, which would permit each member to obtain and save the public key of each other member. Encrypted emails can thereafter be exchanged.
- 24.4. The parties attested at the First Session that they do not anticipate any technical limitations that might impact their ability to adopt an S/MIME encryption protocol for emails between the parties and ICSID.
- 24.5. By December 15, 2021, the parties will confirm to the ICSID Secretariat whether all party representatives and members of the respective counsel teams who are on record as such in this case have obtained and installed S/MIME certificates and are ready to commence encrypted communication.
- 24.6. The cost for any ICSID staff to obtain the necessary certificates will be charged to the case account.

[signed]

Ms. Wendy Miles QC
President of the Tribunal
Date: November 22, 2021

ANNEX A

ELECTRONIC FILE NAMING GUIDELINES

Please follow these guidelines when naming electronic files and for the accompanying Consolidated Hyperlinked Index. The examples provided (in *italics*) are for demonstration purposes only and should be adapted to the relevant phase of the case.

All pleadings and accompanying documentation shall indicate the LANGUAGE in which they are submitted (e.g., SPA=Spanish; FR=French; ENG= English). Such indication should be reflected both i) in the name used to identify each individual electronic file and ii) in the Consolidated Index (which shall be attached to each submission). The Consolidated Index shall be hyperlinked when required in accordance with §13.5 above.

For cases with a single procedural language, the “LANGUAGE” designation may be omitted, except for documents in a language other than the procedural language and the corresponding translations.

| SUBMISSION TYPE | ELECTRONIC FILE NAMING GUIDELINES |
|--|---|
| MAIN PLEADINGS | Title of Pleading–LANGUAGE |
| | <i>Memorial on Jurisdiction-FR</i> |
| | <i>Counter-Memorial on the Merits and Memorial on Jurisdiction-SPA</i> |
| | <i>Reply on Annulment-FR</i> |
| | <i>Rejoinder on Quantum-ENG</i> |
| SUPPORTING DOCUMENTATION Exhibits | C-####–LANGUAGE |
| | R-####–LANGUAGE |
| | To be produced sequentially throughout the case. |
| | CLAIMANT’S FACTUAL EXHIBITS |
| | <i>C-0001-ENG</i> |
| | <i>C-0002-SPA</i> |
| | RESPONDENT’S FACTUAL EXHIBITS |
| | <i>R-0001-FR</i> |
| | <i>R-0002-SPA</i> |
| | Legal Authorities |
| RL-####–LANGUAGE | |
| To be produced sequentially throughout the case. | |
| CLAIMANT’S LEGAL AUTHORITIES | |
| <i>CL-0001-ENG</i> | |
| <i>CL-0002-FR</i> | |
| RESPONDENT’S LEGAL AUTHORITIES | |
| <i>RL-0001-SPA</i> | |
| <i>RL-0002-ENG</i> | |
| Witness Statements | Witness Statement-Name of Witness-Name of Submission-LANGUAGE |
| | <i>Witness Statement-Maria Jones-Memorial on Jurisdiction-SPA</i> |
| | <i>Witness Statement-Maria Jones-Reply on Jurisdiction-[Second Statement]-ENG</i> |
| Expert Reports | Expert Report-Name of Expert-Type-Name of Submission-LANGUAGE |
| | <i>Expert Report-Lucia Smith-Valuation-Memorial on Quantum-ENG</i> |
| | <i>Expert Report-Lucia Smith-Valuation-Reply on Quantum-[Second Report]-ENG</i> |
| Legal Opinions | Legal Opinion-Name of Expert-Name of Submission-LANGUAGE |
| | <i>Legal Opinion-Tom Kaine-Counter-Memorial on the Merits-FR</i> |

Procedural Order No. 1

| | |
|---|--|
| | <i>Legal Opinion-Tom Kaine-Rejoinder on the Merits-[Second Opinion]-FR</i> |
| Exhibits to Witness Statements, Expert Reports, Legal Opinions | WITNESS/EXPERT INITIALS-### |
| | <i>For exhibits filed with the Witness Statement of [Maria Jones]</i> |
| | <i>MJ-0001</i> |
| | <i>MJ-0002</i> |
| | <i>For exhibits filed with the Legal Opinion of [Tom Kaine]</i> |
| | <i>TK-0001</i> |
| | <i>TK-0002</i> |
| | <i>For exhibits filed with the Expert Report of [Lucia Smith]</i> |
| | <i>LS-0001</i> |
| | <i>LS-0002</i> |
| INDICES | Consolidated Hyperlinked Index |
| | Index of Exhibits-C-#### to C-#### |
| | <i>Index of Exhibits-C-0001 to C-0023</i> |
| | Index of Legal Authorities-RLA-### to RLA-### |
| | <i>Index of Legal Authorities-RLA-0001 to RLA-0023</i> |
| OTHER APPLICATIONS | Name of Application-[Party]-LANGUAGE |
| | <i>Preliminary Objections under Rule 41(5)-SPA</i> |
| | <i>Request for Bifurcation-ENG</i> |
| | <i>Request for Provisional Measures-[Respondent]-SPA</i> |
| | <i>Request for Production of Documents-[Claimant]-SPA</i> |
| | <i>Request for Stay of Enforcement-FR</i> |
| | <i>Request for Discontinuance-[Claimant]-ENG</i> |
| | <i>Post-Hearing Brief-[Claimant]-SPA</i> |
| | <i>Costs Submissions-[Respondent]-ENG</i> |
| <i>Observations to Request for [XX]-[Claimant]-SPA</i> | |

ANNEX B

ENCRYPTION OF CASE-RELATED EMAIL CORRESPONDENCE

1. ICSID will obtain its S/MIME certificates from Global Sign (<https://shop.globalsign.com/en/secure-email>):
 - 1.1. The specific software required is the “For Business Use” Certificate.
 - 1.2. This software must be installed on the email account of each individual who will send or receive encrypted emails for the case.
 - 1.3. A certificate may be installed only on an email system that uses the S/MIME protocol, as most do (e.g., Microsoft Outlook, Apple Mail, Lotus Notes).
 - 1.4. Once an individual orders a certificate online, Global Sign verifies the identifying information provided by that individual, a process which takes two to three days. Following verification, Global Sign provides an email with a link to download and install the certificate.
 - 1.5. The process and complexity of installing downloaded certificates varies depending on the user’s email system and security controls ([https://support.globalsign.com/#category SSL Installation](https://support.globalsign.com/#category_SSL_Installation)).
2. Once all members of the email distribution list are in a position to commence encrypted communications, the following process will be adopted:
 - 2.1. ICSID will send an email to the distribution list for this case, requesting that each recipient reply to all, with a signed email (in Outlook: “Options” > “Sign”).
 - 2.2. Once all relies have been made, each member of the distribution list will then need to click on the sender information for each email and save that sender as a contact. You will need to do this even if the sender is already a contact (you may need to delete the existing contact first). This will save the sender’s certificate “Public Key” information to your computer, to enable the exchange of encrypted emails.
 - 2.3. Once you have saved each contact, you may need to ensure that your options are set to explicitly trust the contact’s certificate. (In Outlook: Open contact card > “Certificates” > double click the listed certificate > “Trust” tab > “Explicitly Trust this Certificate” > Save & Close).
 - 2.4. The Global Sign support page can be searched for details applicable to other supported email programs if needed.

- 2.5. Please note that, when a S/MIME certificate is renewed or reissued, the user will receive a unique keypair. This means that the new certificate will not be able to decrypt past emails that were encrypted with the old certificate. For this reason, users should ensure that any old certificates are kept installed on their computers. Even if they are expired, they still have the functionality to decrypt old emails.
- 2.6. The process of exchanging signed emails may periodically need to be repeated, when users' certificates are renewed or reissued.

ANNEX C

PROCEDURAL TIMETABLE

If the Tribunal decides to uphold the Respondent’s application under ICSID Arbitration Rule 41(5), the below scenarios naturally come to a close.

Scenario 1: The Respondent does not request bifurcation of its objection(s) to jurisdiction

| Event | Date | Interval (weeks) |
|--|-----------------------|-----------------------------------|
| Respondent’s Rule 41(5) Application | 12 October 2021 | |
| Claimants’ Observations on Respondent’s Rule 41(5) Application | 22 October 2021 | |
| First Session with Tribunal | 26 October 2021 | |
| Respondent’s Reply Observations on the Respondent’s Rule 41(5) Application | 5 November 2021 | |
| Claimants’ Rejoinder Observations on the Respondent’s Rule 41(5) Application | 15 November 2021 | |
| Tribunal’s Decision on the Rule 41(5) Application | [as soon as possible] | |
| Claimants’ Memorial | 11 February 2022 | 15 |
| Respondent’s Counter-Memorial on the Merits and Jurisdiction | 3 June 2022 | 16 + 10 days to file translations |
| Parties’ Requests for Production of Documents | 17 June 2022 | 2 |
| Parties’ Responses and/or Objections to Requests for Production of Documents | 22 July 2022 | 5 |
| Parties’ Replies to Objections to Requests for Production of Documents | 12 August 2022 | 3 |
| Parties’ Production of Documents which are not subject to Objections | 26 August 2022 | 2 |
| Tribunal’s Decision on Objections to Requests for Production of Documents | 16 September 2022 | 3 |

| Event | Date | Interval (weeks) |
|---|--|---|
| Parties' Production of Documents ordered by Tribunal | 21 October 2022 | 5 |
| Claimants' Reply on the Merits and Jurisdiction | 20 January 2023 | 13 |
| Respondent's Rejoinder on the Merits and Jurisdiction | 21 April 2023 | 13 + 10 days to file translations |
| Parties to confirm which witnesses and experts they wish to examine Parties to communicate agreement or disagreement to the Tribunal | 5 May 2023 | 2 (Pre-hearing organizational meeting minus 2 weeks) |
| Tribunal to indicate whether it wishes to examine any witnesses/experts not called for examination by the Parties | 12 May 2023 | 1 (Pre-hearing organizational meeting minus 1 week) |
| Pre-hearing organizational meeting | 19 May 2023 | 1 Hearing minus 4 weeks |
| Main evidentiary hearing | 19–30 June 2023 reserved [Number of days TBD] | 4 |

Scenario 2: The Respondent requests Bifurcation and Bifurcation is Denied

| Event | Date | Interval (weeks) |
|--|-----------------------|-------------------------|
| The Respondent's Rule 41(5) Application | 12 October 2021 | |
| Claimants' Observations on the Respondent's Rule 41(5) Application | 22 October 2021 | |
| First Session with Tribunal | 26 October 2021 | |
| Respondent's Reply Observations on the Respondent's Rule 41(5) Application | 5 November 2021 | |
| Claimants' Rejoinder Observations on the Respondent's Rule 41(5) Application | 15 November 2021 | |
| Tribunal's Decision on the Respondent's Rule 41(5) Application | [as soon as possible] | |

| Event | Date | Interval (weeks) |
|---|------------------|---|
| Claimants' Memorial on the Merits | 11 February 2022 | 15 |
| Respondent's Request for Bifurcation and Memorial on Jurisdiction | 25 March 2022 | 6 + 10 days to file translations |
| Claimants' Response to the Request for Bifurcation and Memorial on Jurisdiction | 6 May 2022 | 6 + 10 days (adjusted time limit) |
| Tribunal's Decision on Bifurcation rejecting bifurcation | 27 May 2022 | 3 |
| Respondent's Counter-Memorial on the Merits | 26 August 2022 | 13 + 10 days to file translations |
| Parties' Requests for Production of Documents | 9 September 2022 | 2 |
| Parties' Responses and/or Objections to Requests for Production of Documents | 7 October 2022 | 5 |
| Parties' Replies to Objections to Requests for Production of Documents | 28 October 2022 | 3 |
| Parties' Production of Documents which are not subject to Objections | 11 November 2022 | 2 |
| Tribunal's Decision on Objections to Requests for Production of Documents | 2 December 2022 | 3 |
| Parties' Production of Documents ordered by Tribunal | 6 January 2023 | 5 |
| Claimants' Reply on the Merits | 7 April 2023 | 13 |
| Respondent's Rejoinder on the Merits | 7 July 2023 | 13 + 10 days to file translations |
| Parties to confirm which witnesses and experts they wish to examine Parties to communicate agreement or disagreement to the Tribunal | 31 July 2023 | 2 (Pre-hearing organizational meeting minus 2 weeks) |
| Tribunal to indicate whether it wishes to examine any witnesses/experts not called for examination by the Parties | 14 August 2023 | 1 (Pre-hearing organizational meeting minus 1 week) |

| Event | Date | Interval (weeks) |
|------------------------------------|---|----------------------------|
| Pre-hearing organizational meeting | 21 August 2023 | 1 Hearing minus 4 weeks |
| Main evidentiary hearing | 18–29 September 2023 reserved [Number of days TBD] | 4 |

Scenario 3: The Respondent requests bifurcation of its objections to jurisdiction and bifurcation is granted

| Event | Date | Interval (weeks) |
|---|-----------------------|-----------------------------------|
| The Respondent’s Rule 41(5) Application | 12 October 2021 | |
| Claimants’ Observations on the Respondent’s Rule 41(5) Application | 22 October 2021 | |
| First Session with Tribunal | 26 October 2021 | |
| Respondent’s Reply Observations on the Respondent’s Rule 41(5) Application | 5 November 2021 | |
| Claimants’ Rejoinder Observations on the Respondent’s Rule 41(5) Application | 15 November 2021 | |
| Tribunal’s Decision on the Respondent’s Rule 41(5) Application | [as soon as possible] | |
| Claimants’ Memorial on the Merits | 11 February 2022 | 15 |
| Respondent’s Request for Bifurcation and Memorial on Jurisdiction | 25 March 2022 | 6 + 10 days to file translations |
| Claimants’ Response to the Request for Bifurcation and Memorial on Jurisdiction | 6 May 2022 | 6 + 10 days (adjusted time limit) |
| Tribunal’s Decision on Bifurcation granting bifurcation | 27 May 2022 | 3 |
| Respondent’s Reply on Jurisdiction | 24 June 2022 | 4 |
| Claimants’ Rejoinder on Jurisdiction | 22 July 2022 | 4 |

| Event | Date | Interval (weeks) |
|---|------------------|---|
| Parties to confirm which witnesses and experts they wish to examine Parties to communicate agreement or disagreement to the Tribunal | 5 August 2022 | 2 Pre-hearing organizational meeting minus 2 weeks |
| Tribunal to indicate whether it wishes to examine any witnesses/experts not called for examination by the Parties | 12 August 2022 | 1 Pre-hearing organizational meeting minus 1 week |
| Pre-hearing organizational meeting | 19 August 2022 | 1 Hearing minus 3 weeks |
| Hearing on Jurisdiction | 4-5 October 2022 | 2 days |
| Tribunal's Decision or Award on Jurisdiction | | Within 3 months after the hearing |

If the Tribunal upholds its jurisdiction:

| | | |
|--|--|---|
| Parties' Requests for Production of Documents | | 2 |
| Parties' Responses and/or Objections to Requests for Production of Documents | | 5 |
| Parties' Replies to Objections to Requests for Production of Documents | | 3 |
| Parties' Production of Documents which are not subject to Objections | | 2 |
| Tribunal's Decision on Objections to Requests for Production of Documents | | 3 |
| Parties' Production of Documents ordered by Tribunal | | 5 |
| Claimants' Reply on the Merits | | 13 |
| Respondent's Rejoinder on the Merits | | 13 + 10 days to file translations |
| Parties to confirm which witnesses and experts they wish to examine | | 2 Pre-hearing organizational meeting minus 2 weeks |

| | | |
|---|-----|--|
| Parties to communicate agreement or disagreement to the Tribunal | | |
| Tribunal to indicate whether it wishes to examine any witnesses/experts not called for examination by the Parties | | 1 Pre-hearing organizational meeting minus 1 week |
| Pre-hearing organizational meeting | | 1 Hearing minus 4 weeks |
| Main evidentiary hearing | TBD | 4 |