

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

South32 SA Investments Limited

v.

Republic of Colombia

ICSID Case No. ARB/20/9

PROCEDURAL ORDER NO. 1

Members of the Tribunal

Ms. Deva Villanúa, President of the Tribunal

Prof. Guido S. Tawil, Arbitrator

Dr. Andrés Jana Linetzky, Arbitrator

Secretary of the Tribunal

Ms. Catherine Kettlewell

Assistant to the Tribunal

Ms. Francisca Seara Cardoso

December 29, 2020

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INTRODUCTION

The First Session of the Tribunal was held on December 21, 2020, at 10:00 a.m. (EST), by videoconference. The Session was adjourned at 12:17 pm (EST).

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. Deva Villanúa, President of the Tribunal

Prof. Guido S. Tawil, Arbitrator

Dr. Andrés Jana Linetzky, Arbitrator

ICSID Secretariat:

Ms. Catherine Kettlewell, Secretary of the Tribunal

Assistant to the Tribunal

Ms. Francisca Seara Cardoso, Assistant of the Tribunal

Participating on behalf of the Claimant:

Ms. Diana Suárez, South32 SA Investments Limited

Mr. Nigel Blackaby QC, Freshfields Bruckhaus Deringer US LLP

Ms. Madeline Snider, Freshfields Bruckhaus Deringer US LLP

Mr. Jean Paul Dechamps, Dechamps International Law

Participating on behalf of the Respondent:

Ms. Ana María Ordoñez Puentes, Agencia Nacional de Defensa Jurídica del Estado

Ms. Elizabeth Prado López, Agencia Nacional de Defensa Jurídica del Estado

Mr. Andrés Esteban Tovar, Agencia Nacional de Defensa Jurídica del Estado

Mr. Fernando Mantilla-Serrano, Latham & Watkins

Mr. Samuel Pape, Latham & Watkins

Ms. Esperanza Barrón-Baratech, Latham & Watkins

Mr. Diego Romero, Latham & Watkins

Ms. Paloma García Guerra, Latham & Watkins

Ms. Clara Cuesta, Latham & Watkins

The Tribunal and the Parties considered the following:

- The Draft Procedural Order circulated by the Tribunal Secretary on December 1, 2020; and

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- The Parties' comments on the Draft Procedural Order received on December 17, 2020, 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:

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

1. Applicable Arbitration Rules

Convention Article 44

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

2. Constitution of the Tribunal and Tribunal Members' Declarations

Arbitration Rule 6

- 2.1. The Tribunal was constituted on November 17, 2020 in accordance with the ICSID Convention and the ICSID Arbitration Rules. The Parties confirmed that the Tribunal was properly constituted and that no Party has any objection to the appointment of any Member of the Tribunal.
- 2.2. The Members of the Tribunal timely submitted their signed declarations in accordance with ICSID Arbitration Rule 6(2). Copies of these declarations were distributed to the Parties by the ICSID Secretariat on September 11, 2020 for Prof. Guido S. Tawil, on August 17, 2020 for Dr. Andrés Jana Linetzky, and once again together with the declaration of Ms. Deva Villanúa on November 17, 2020.
- 2.3. The Members of the Tribunal confirmed that they have sufficient availability during the next 24 months to dedicate to this case.
- 2.4. The contact details for the Members of the Tribunal are:

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Ms. Deva Villanúa
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General Pardiñas, 102
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Bofill Mir & Alvarez
Jana Abogados
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Chile
ajana@bmaj.cl

3. Fees and Expenses of Tribunal Members

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

- 3.1. The fees and expenses of each Tribunal Member shall be determined and paid in accordance with the ICSID Schedule of Fees and the Memorandum on Fees and Expenses of ICSID Arbitrators in force at the time the fees and expenses are incurred.
- 3.2. Under the current Schedule of Fees, each Tribunal Member receives:
 - 3.2.1. US\$3,000 for each day of meetings or each eight hours of other work performed in connection with the proceedings or *pro rata*; and
 - 3.2.2. Subsistence allowances, reimbursement of travel, and other expenses pursuant to ICSID Administrative and Financial Regulation 14.
- 3.3. Each Tribunal Member shall submit his/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, including by any appropriate means of communication.

5. Rulings of the Tribunal

Convention Article 48(1); Arbitration Rules 16, 19 and 20

- 5.1. Decisions of the Tribunal shall be taken by a majority of the Members of the Tribunal.
- 5.2. ICSID Arbitration Rule 16(2) applies to decisions taken by correspondence except that where the matter is urgent, the President may decide procedural matters without

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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, other than the Award, has not been issued within one month after the final submission on a particular matter, the Tribunal will provide the Parties with status updates every month. If the Award has not been issued within six months after the final submission, excluding submissions on costs, the Tribunal will provide the Parties with status updates every three months.
- 5.4. The President is authorized to issue Procedural Orders on behalf of the Tribunal.
- 5.5. The Tribunal's rulings on procedural matters may be communicated to the Parties by the Tribunal Secretary electronically in the form of a letter or email.
- 5.6. Any ruling of the Tribunal, including the certified copy of the award, will be dispatched electronically to the Parties.

6. Power to Fix Time Limits

Arbitration Rule 26(1)

- 6.1. The President may fix and extend time limits for the completion of the various steps in the proceeding.
- 6.2. In exercising this power, the President shall consult with the other Members of the Tribunal. If the matter is urgent, the President may fix or extend time limits without consulting the other Members, subject to possible reconsideration of such decision by the full Tribunal.
- 6.3. The Parties may also grant between themselves short extensions of time, on the basis of mutual courtesy, as long as these short extensions do not materially affect the timetable and the Tribunal approves such extension by ratifying the agreement of the Parties thereafter.

7. Secretary of the Tribunal

Administrative and Financial Regulation 25

- 7.1. The Tribunal Secretary is Catherine Kettlewell, Legal Counsel, 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:

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Ms. Catherine Kettlewell
ICSID
MSN C3-300
1818 H Street, N.W.
Washington, D.C. 20433
USA
Tel.: + 1 (202) 473-7231
Fax: + 1 (202) 522-2615
Email: ckettlewell@worldbank.org
Paralegal name: Anastasia Tsimberlidis
Paralegal email: atsimberlidis@worldbank.org

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

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

8. Assistant of the Tribunal

- 8.1. On December 1, 2020, the Tribunal proposed to the Parties that Ms. Francisca Seara Cardoso be appointed as Assistant of the Tribunal. Ms. Cardoso's *curriculum vitae* was distributed to the Parties on that day. She is an associate at Armesto & Asociados, the President's law firm. The Tribunal explained to the Parties that it considered that the appointment of an Assistant of the Tribunal would assist the overall cost and time efficiency of the proceedings.
- 8.2. As stated in the Tribunal's communication of December 1, 2020, the Assistant of the Tribunal shall work at all times under the specific instructions and continuous control and supervision of the Tribunal, and the Members of the Tribunal will not delegate to the Assistant of the Tribunal any of the duties and obligations incumbent on them as arbitrators.
- 8.3. The Assistant of the Tribunal shall undertake only such specific tasks as are assigned to her by the Tribunal, including:
- attending meetings, hearings and deliberations, taking notes;
 - administrative tasks, other than the administrative tasks carried out by the ICSID Secretariat;

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- summarizing submissions, reviewing authorities, conducting legal research, writing notes or memoranda on factual and legal issues, under the specific instruction and continuous control and supervision of the President.
- 8.4. The Tribunal shall ensure that the Assistant of the Tribunal does not duplicate the tasks of the ICSID Secretariat.
- 8.5. The Assistant of the Tribunal shall be bound by the same duties of confidentiality, independence and impartiality as the Arbitral Tribunal, and shall sign a declaration to that effect.
- 8.6. The Parties received the Assistant's declaration of independence and impartiality on December 16, 2020. With the express agreement of the Parties, the Tribunal hereby appoints Ms. Francisca Seara Cardoso as Assistant of the Tribunal.
- 8.7. Ms. Cardoso's contact details are the following:
- Ms. Francisca Seara Cardoso
Armesto & Asociados
General Pardiñas, 102
28006 Madrid
Spain
Tel.: +34 915 621 625
Email: fsc@jfarmesto.com
- 8.8. The Assistant to the Tribunal will be remunerated directly by the President of the Tribunal, without causing any additional cost to the Parties, save that the Assistant of the Tribunal will be entitled to reimbursement of reasonable expenses related to the Hearing, in accordance with Administrative and Financial Regulation 14 and the ICSID Memorandum on the Fees and Expenses, excluding any fees referred to in Regulation 14(1)(a) and (b).
- 8.9. The Tribunal may remove the Assistant of the Tribunal at its discretion. The Tribunal will remove the Assistant if the Assistant ceases to work for Armesto & Asociados. The Tribunal may appoint a substitute subject to the Parties' consent, by submitting to the Parties the substitute's *curriculum vitae* and declaration of independence and impartiality.

9. Representation of the Parties

Arbitration Rule 18

- 9.1. 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.

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For Claimant

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Mr. Nicolás Córdoba
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and
c/o Mr. Jean Paul Dechamps
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For Respondent

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and
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Mr. John Adam
Ms. Esperanza Barron Baratech
Mr. Diego Romero
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10. Apportionment of Costs and Advance Payments to ICSID

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

- 10.1. 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.
- 10.2. By letter of November 17, 2020, ICSID requested that each Party pay US\$200,000 to cover the initial costs of the proceeding. ICSID received Claimants' payment on December 14, 2020 and the Respondent's payment has not been received to the date of the First Session.
- 10.3. ICSID shall request further advances as needed. Such requests shall be accompanied by a detailed interim statement of account.

11. Place of Proceeding

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

- 11.1. Washington, D.C., United States shall be the place of the proceeding.
- 11.2. The Tribunal may hold in-person hearings at any other place that it considers appropriate if the Parties so agree.
- 11.3. The Parties also agree that the Tribunal may hold meetings and hearings with the Parties by telephone, video or web conference upon consultation with the Parties. This notwithstanding, the Parties prefer that hearings on the merits be held in person.
- 11.4. The Tribunal members may deliberate at any place and by any appropriate means it considers convenient including by video or telephone conference.

12. Procedural Language(s), Translation and Interpretation

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

- 12.1. English and Spanish are the procedural languages of the arbitration.
- 12.2. Routine, administrative, or procedural correspondence addressed to or sent by the ICSID Secretariat may be in either procedural language.

[For Parties' Pleadings]

- 12.3. Any written requests, applications, oral and/or written pleadings, expert opinions, witness statements, accompanying documentation or other submissions may be submitted in either procedural language, and need not be translated. The Parties are only required to simultaneously submit a translation of the relief sought.

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- 12.4. The Parties can file documents that have been originally drafted in other languages, provided that a translation of such document to one of the procedural languages is filed within 14 days following electronic submission.
- 12.5. If the document is relevant only in part, it is sufficient to translate only the 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.
- 12.6. The Tribunal may require that a Party translate any document in whole or in part.
- 12.7. Translations need not be certified. If a Party wishes to challenge the translation of a document, it may submit a new translation that clearly identifies the differences.
- 12.8. Documents exchanged between the Parties under §16 below (Production of Documents) may be produced in the original language and need not be translated.

[For Hearing]

- 12.9. Either procedural language, English or Spanish, may be used during hearings, including during witness examination. Transcription requirements will be further discussed at the pre-hearing organizational meeting.
- 12.10. The Parties and the Tribunal shall further discuss at the pre-hearing organizational meeting the requirements of interpretation of a witness called for examination during the hearing who prefers to give evidence other than in either of the procedural languages.
- 12.11. The Parties will notify the Tribunal, as soon as possible, and no later than at the pre-hearing organizational meeting (see §21 below), which witnesses or experts require interpretation. At the pre-hearing organizational meeting, the Tribunal shall also determine, after consulting the Parties, whether simultaneous interpretation into English and/or Spanish is required for witnesses testifying in either procedural language.
- 12.12. 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. However, the costs of interpretation for non-English or non-Spanish speaking witnesses or experts shall be borne by the Party presenting such witnesses or experts.

[For Tribunal's Documents Except the Award]

- 12.13. The Tribunal shall make any order or decision in either procedural language.

[For Tribunal's Award]

- 12.14. The Tribunal shall render the award in English and Spanish simultaneously. Both language versions shall be equally authentic. The Tribunal will undertake its best

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efforts to avoid delays in the issuance of the award on account of the preparation of the translation of the award.

13. Routing of Communications

Administrative and Financial Regulation 24

- 13.1. The ICSID Secretariat shall be the channel of written communications between the Parties and the Tribunal.
- 13.2. 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 and the Assistant of the Tribunal.
- 13.3. 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 once both Parties' communications are received.
- 13.4. 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.

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

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

- 14.1. 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
- 14.2. Four business days² after the relevant filing date, the Parties shall upload the pleading with all the supporting documentation and an updated index of all the supporting documentation attached to the pleading, organized in chronological order, to the file sharing platform that will be created by ICSID for purposes of this case (the "**Electronic Filing**"). This chronological index shall be updated for each pleading. For the avoidance of doubt, the Electronic Filing process indicated in this paragraph is applicable both to the original language submission and any translations.

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

² "Business days" shall be understood as those in Washington D.C. and Paris (France).

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- 14.3. Electronic files of pleadings, witness statements, expert reports, exhibits and legal authorities shall be text searchable (i.e., OCR PDF or Word). Any spreadsheet or excel table shall be editable and all formula visible; data used in the creation of spreadsheets and tables should indicate its source to the extent it may be reasonably identifiable.
- 14.4. All pleadings shall be accompanied by a cumulative index hyperlinked to all the supporting documentation that the Party has submitted up to the date of the pleading. The index shall indicate the document number and, the pleading with which it was submitted and the language of the document. (Please follow the naming conventions contained in **Annex B**).
- 14.5. The official date of receipt of a pleading or communication shall be the day on which the electronic file is sent to the Tribunal Secretary by email.
- 14.6. A filing shall be deemed timely if sent by a Party by midnight, Washington, D.C. time, on the relevant date.

15. Number and Sequence of Pleadings

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

- 15.1. The proceedings shall consist of a written phase followed by an oral phase.
- 15.2. The number and sequence of pleadings, and the dates on which they are to be filed, shall be as set out in **Annex A**. Any amendment to the Procedural Timetable shall be reflected in an updated **Annex A**.
- 15.3. The Parties' first submissions shall set forth the facts, the legal argumentation and the relief sought. The Parties should endeavor to discharge their burden of proof in their first submissions and should not rely on later submissions to provide evidence for unsupported allegations made in the first submissions. The Parties' subsequent submissions shall be limited to replying to the arguments that the counterparty has raised in its previous submission except with respect to new facts that have arisen following the first exchange of submissions.
- 15.4. All written submissions must contain consecutively numbered pages and paragraphs, and shall include a table of contents.
- 15.5. Neither Party shall be permitted to submit additional pleadings with regard to the merits outside of the Procedural Timetable, unless the Tribunal determines that exceptional circumstances exist based on a reasoned written request followed by observations from the other Party.

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16. Production of Documents

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

- 16.1. On the date provided in **Annex A**, each Party may submit a request for production of documents to the other party. The request shall be made in the form of a Redfern Schedule (in the format provided in **Annex C**), in both Word and PDF format, and shall not be copied to the Tribunal. The Parties shall send their request for production of documents to the Tribunal Secretary, who will circulate the Parties' objections to the Parties once both Redfern Schedules have been received. Production requests shall contain:
- 16.1.1. a description of each requested document sufficient to identify it, or a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents reasonably believed to exist (in the case of documents maintained in electronic form, the requesting Party may, or the Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such documents in an efficient and economical manner);
 - 16.1.2. a statement as to how the documents requested are relevant and material to the outcome of the case;
 - 16.1.3. a statement that the documents requested are not in the possession, custody, or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such documents; and
 - 16.1.4. a statement of the reasons why the requesting Party assumes the documents requested are in the possession, custody, or control of another Party.
- 16.2. On the date provided in **Annex A** the other Party shall, using the Redfern Schedule provided by the first Party, provide the requesting Party with its reasons and/or objections for its failure or refusal to produce responsive documents. The Parties shall send their objections to the Tribunal Secretary, who will circulate the Parties' objections to the Parties once both Redfern Schedules have been received.
- 16.3. On the date provided in **Annex A** the other Party shall produce the requested documents to which it has not filed any objection.
- 16.4. On the date provided in **Annex A**, the requesting Party shall reply to the other Party's objections in that same Redfern Schedule and shall submit such Redfern Schedule to the Tribunal and the Tribunal Secretary. The Tribunal Secretary will circulate the Parties' objections to the Parties once both Redfern Schedules have been received (in both Word and PDF formats).

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- 16.5. The Tribunal will make its best efforts to rule on the objections within four weeks of receiving the Redfern Schedules. A Party shall produce documents ordered by the Tribunal by the date provided in **Annex A**.
- 16.6. Documents shall be communicated directly to the requesting Party without copying the Tribunal or the Tribunal Secretary. Documents so communicated shall not be considered to be admitted to the record unless and until a Party subsequently files them as exhibits in accordance with § 17 below.
- 16.7. In relation to any documentary evidence alleged to contain privileged, confidential or highly sensitive information that a Party is directed by the Tribunal to produce, that Party shall present, together with the documents produced pursuant to § 16.6 above, a privilege and confidentiality log, listing the responsive documentary evidence alleged to contain privileged, confidential or highly sensitive information, including its description, date, author and recipient.

17. Submission of Documents

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

- 17.1. 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.
- 17.2. The documents shall be submitted in the manner and form set forth in §14 above.
- 17.3. Following each factual allegation, the Parties shall make specific reference to evidence which supports that allegation. If an exhibit consists of more than one page, the Parties shall refer to the specific page and paragraph number upon which they rely.
- 17.4. All documents and other evidence should be referenced in the Parties' respective pleadings. Parties should refrain from marshalling evidence without a specific reference in the submission with which the evidence is tendered.
- 17.5. For those documents directed to the Tribunal to be specifically produced outside of those produced documents under § 16 above, all documents shall either be submitted to the Tribunal in complete form or the Parties shall indicate that the relevant document is an excerpt. All documents, including both originals and copies, submitted to the Tribunal shall be deemed to be authentic and complete, unless disputed by the other Party.
- 17.6. Neither Party shall be permitted to submit additional or responsive documents or other evidence outside of the submissions agreed to in the Procedural Timetable attached as **Annex A**, unless the Tribunal determines that special circumstances exist based on a reasoned written request followed by observations from the other Party.

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- 17.6.1. Should a Party request leave to file additional or responsive evidence, that Party may not annex the evidence that it seeks to file to its request.
- 17.6.2. If the Tribunal grants such an application for submission of an additional or responsive evidence, the Tribunal shall ensure that the other Party is afforded sufficient opportunity to make its observations concerning such an evidence.
- 17.7. The Tribunal may call upon the Parties to produce documents or other evidence in accordance with ICSID Arbitration Rule 34(2).
- 17.8. Evidence shall be submitted in the following form:
 - 17.8.1. Exhibits and Legal Authorities shall be numbered consecutively throughout these proceedings.
 - 17.8.2. The number of each Exhibit containing a document produced by 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 Respondent shall be preceded by the letter “R-” for factual exhibits and “RL-” for legal exhibits containing authorities etc.
 - 17.8.3. Each document marshalled shall have an individual exhibit number. The Parties should not tender multiple documents under one exhibit number.
 - 17.8.4. Exhibits and legal authorities shall be submitted in PDF format and shall be numbered consecutively throughout these proceedings, commencing with “C-0001” and “R-0001,” and “CL-001” and “RL-001” respectively. The numbering shall also indicate the language of the document *e.g.* C-0001-ENG for a document submitted only in English, C-0001-SPA for a document submitted only in Spanish and C-0001-ENG/SPA for a document submitted simultaneously in English and Spanish. 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 § 17.7.5.
 - 17.8.5. Electronic files and the accompanying indexes shall follow the naming conventions contained in **Annex B**.
 - 17.8.6. Exhibits should be submitted in a searchable electronic file format, whenever possible.
- 17.9. 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.
- 17.10. The Parties shall file all documents only once by submitting them with their pleadings. Documents need not be resubmitted with witness statements and expert reports even if referred to in such statements and reports, and vice versa.

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17.11. Demonstrative exhibits (such as PowerPoint slides, charts, tabulations, etc.) may be used at any hearing, provided they contain no new evidence or new calculations (except when so approved by the Tribunal). Each Party shall number its demonstrative exhibits consecutively (preceded by “CD-” for Claimants, and “RD-” for Respondent), 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 editable PDF format to the other Party, the Tribunal Members, the Tribunal Secretary, the Assistant of the Tribunal, the court reporter(s) and interpreter(s) at the hearing at a time to be decided at the pre-hearing organizational meeting.

18. Witness Statements and Expert Reports

Convention Article 43(a); Arbitration Rule 24

- 18.1. Witness statements and expert reports shall be filed together with the Parties’ pleadings.
- 18.2. Neither Party shall be permitted to submit any testimony that has not been filed with the written submissions, unless the Tribunal determines that exceptional circumstances exist based on a reasoned written request followed by observations from the other Party (following the procedure outlined in §[17.7]).
- 18.3. Each witness statement shall be signed and dated by the witness and include:
- 18.3.1. The full name of the witness;
 - 18.3.2. A disclosure statement detailing any past and present relations of the witness with any Party, counsel or Member of the Tribunal;
 - 18.3.3. A description of the witness’s position and qualifications, if relevant;
 - 18.3.4. A full and detailed description of the relevant facts, and the source of the witness’s information as to those facts, sufficient to serve as that witness’s evidence in the matter in dispute;
 - 18.3.5. Any documents on which the witness relies that have not already been submitted (which shall be submitted with sequential numbering as documents);
 - 18.3.6. A statement as to the language in which the witness statement was originally prepared and the language in which the witness anticipates giving testimony at the Hearing; and
 - 18.3.7. An affirmation of the truth of the witness statement.
- 18.4. Witness Statements shall be submitted in a searchable electronic file format and have consecutive numbering on pages, headings and paragraphs.

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- 18.5. It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses, potential witnesses experts and potential experts and to discuss their prospective testimony with them.
- 18.6. Expert Reports shall be dated and signed by the expert or experts and contain:
- 18.6.1. The full name of the expert;
 - 18.6.2. A disclosure statement detailing any past and present relations of the expert with any Party, counsel or Member of the Tribunal;
 - 18.6.3. A brief description of the expert's qualifications;
 - 18.6.4. A brief description of the instructions pursuant to which he or she is providing his or her opinions and conclusions;
 - 18.6.5. A statement of his or her independence from the Parties, their legal advisors and the Tribunal;
 - 18.6.6. A statement of the facts on which he or she is basing his or her expert opinions and conclusions;
 - 18.6.7. His or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions;
 - 18.6.8. The documents relied on by the expert in the preparation of his or her Expert Report, which shall be provided as annexes to the Expert Report (which may have their own sequential numbering), any spreadsheet or table shall be editable and all formulae visible; data used in the creation of spreadsheets and tables should indicate its source, to the extent it may be reasonably identifiable;
 - 18.6.9. An affirmation of his or her genuine belief in the opinions expressed in the Expert Report.
 - 18.6.10. If the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author.
- 18.7. Expert Reports shall be submitted in a searchable electronic file format and have consecutive numbering of pages, headings and paragraphs, as well as a detailed table of contents.

19. Examination of Witnesses and Experts

Arbitration Rules 35 and 36

- 19.1. A Party may be called upon by the opposing Party to produce at the hearing for cross-examination any factual or expert witness whose written testimony has been advanced with the Pleadings. The examination of a fact or expert witness by video

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conference may be permitted for justified reasons at the discretion of the Tribunal. If a witness whose appearance has been requested pursuant to § 19.1 fails without a valid reason to appear for testimony at a hearing, even by video conference, the Tribunal shall assess the weight of the written statement taking into account the entire record and all the relevant circumstances.

- 19.2. The Parties shall notify the opposing Party which witnesses and experts presented by the opposing Party they intend to call for cross-examination on the date specified in the Procedural Timetable. Shortly after the Parties' notifications, the Tribunal will indicate which witnesses or experts, not called by the Parties, it wishes to question, if any. The facts contained in the written statement of a witness whose cross-examination has been waived by the other party and who has not been called by the Tribunal to testify shall not be deemed established by the sole fact that no cross-examination has been requested. The Tribunal will assess the weight of the written statement taking into account the entire record and all the relevant circumstances.
- 19.3. Witnesses and experts shall be examined by each Party under the control of the Tribunal. The Tribunal may examine the witness or expert at any time during the oral procedure. The Tribunal shall, at all times, have the power to request the presence of any fact or expert witness presented by the parties for examination at the hearing, upon application by any Party or on its own motion.
- 19.4. Direct examination is given in the form of witness statements and expert reports. However, the Party presenting the witness may conduct a brief direct examination at the hearing. Experts may summarize their reports and findings, either through direct examination or in the form of a brief presentation. Any witness or expert called for direct examination may be cross-examined by the other Party and questioned by the Tribunal.
- 19.5. Being duly informed of the dates of the hearing, the Parties will as quickly as possible inform their potential fact witnesses of such dates to secure their presence at the hearing and avoid any disruption in the procedural timetable.
- 19.6. Witnesses (fact or expert) may be cross-examined on relevant matters that either were addressed or presented in the witness' statement(s) or the expert's report(s), or about any evidence in the record of which the fact witness could reasonably be expected to have personal knowledge and on matters of credibility. The scope of re-examination shall be strictly limited to the matters that have arisen in cross-examination.
- 19.7. The Tribunal may organize the confrontation of two or more fact or expert witnesses if it deems it appropriate, after consultation with the Parties.
- 19.8. Each Party shall advance the costs connected with the evidence of its fact witnesses or any other witness (other than fact witnesses of the other Party) that such Party requests to attend the hearing, including the cost of preparing the witness statements and attending the hearing, without prejudice to the decision of the Tribunal as to which Party shall ultimately bear those costs. The costs of any fact or expert witness called to

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testify by the Party that presents such witness or called by the Tribunal shall be covered by the Party that is offering such witness.

20. Application of Soft Law

- 20.1. Without prejudice to applicable provisions of the ICSID Arbitration Rules, the Tribunal may take into consideration the International Bar Association Rules for the Taking of Evidence in International Arbitration (2010) and the International Bar Association Guidelines on Party Representation in International Arbitration.

21. Pre-Hearing Organizational Meetings

Arbitration Rule 13

- 21.1. A pre-hearing organizational meeting shall be held on / at a date determined by the Tribunal after consultation with the Parties, as indicated in **Annex A**. 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.
- 21.2. 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.
- 21.3. Following the pre-hearing organizational meeting, a Procedural Order will be issued by the Tribunal reflecting the decisions made in preparation for the hearing.

22. Hearings

Arbitration Rules 20(1)(e) and 32

- 22.1. The oral procedure shall consist of a hearing for examination of witnesses and experts, if any, and for oral arguments.
- 22.2. The Tribunal will make its best efforts to hold the hearing on the merits in-person, unless extraordinary circumstances prevent, in the opinion of the Tribunal, in-person hearings. An in-person hearing shall be held at a place to be determined in accordance with § 11 above.
- 22.3. The Hearing shall take place on a date or dates to be determined by the Tribunal after consultation with the Parties.

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- 22.4. 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.
- 22.5. The allocation of time shall be determined by the Tribunal in advance of the Hearing in a separate procedural order, following consultation with the Parties.]
- 22.6. Not having an agreement of the Parties, and in accordance with Arbitration Rule 32(2), Hearings shall be closed to the public.
- 22.7. The Tribunal shall address the preparation of documents to be referred to at the Hearing, including the preparation of joint hearing bundles, as well as any other pending procedural matters, in a separate procedural order to be issued following consultation with the Parties, and in any event no later than 60 days prior to the Hearing date or dates.

23. Records of Hearings and Sessions

Arbitration Rules 13 and 20(1)(g)

- 23.1. Sound recordings shall be made of all hearings and sessions. The sound recordings shall be provided to the Parties and the Tribunal Members.
- 23.2. As indicated above in § 22, the process relating transcripts shall be determined by the Tribunal in consultation with the Parties prior to the close of the Hearing. The Parties shall agree on the timing and method for corrections to the transcripts at the end of the hearing. In case of disagreement between the Parties, the Tribunal shall determine the timing and method for transcript corrections.

24. Post-Hearing Memorials and Statements of Costs

Convention Article 44; Arbitration Rule 28(2)

- 24.1. The Tribunal will consult with the Parties at the appropriate stage, and issue directions in relation to whether, and if so by which dates, the Parties shall submit post-hearing memorials and a statement of costs.

25. Publication

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

- 25.1. The Parties consent to ICSID publication of the Award and any order or decision issued in the present proceeding.

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[Signed]

Ms. Deva Villanúa
President of the Tribunal
Date: December 29, 2020

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ANNEX A

PROCEDURAL CALENDAR

Scenario 1

The following timetable shall apply in the event that the objections to jurisdiction (if any) are made with the counter-memorial, and there is no request for bifurcation

| Date / Period of Time | Party/Tribunal | Description |
|--|-----------------------|--|
| Friday, 23 April 2021 | Claimant | Memorial on the Merits |
| Friday, 10 September 2021 [+140 days from the Memorial on the Merits] – | Respondent | Counter-Memorial on the Merits [and Memorial on Jurisdictional Objections] |
| Friday, 30 September 2021 [+14 days from the Electronic Platform Filing (+4 business days) in support of the Counter-Memorial on the Merits] | Claimant & Respondent | Requests for Production of Documents |
| Thursday, 14 October 2021 [+14 days from the Document Production Requests] | Claimant & Respondent | Objections to Requests for Production of Documents and Voluntary Production of Documents |
| Thursday, 28 October 2021 [+14 days from the Objections to Production Requests] | Claimant & Respondent | Responses to Objections to Production Requests |
| Thursday, 11 November 2021 [+14 days from the Responses to Objections to Production Requests] | Tribunal | Ruling on Parties' Requests for Production of Documents |
| Thursday, 25 November 2021 | Claimant & Respondent | Document Production in accordance with the Tribunal's Ruling |

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| Date / Period of Time | Party/Tribunal | Description |
|---|-----------------------|---|
| [+14 days from the Tribunal’s Ruling on Parties’ Requests for Production of Documents] | | |
| Friday, 25 February 2022 +120 days starting from the middle of the document production phase – 28 October 2021) | Claimant | Reply on the Merits [and Counter-Memorial on Jurisdictional Objections] |
| Monday, 27 June 2022 [+120 days from the Reply on the Merits [and Counter-Memorial on Jurisdictional Objections]] | Respondent | Rejoinder on the Merits [and Reply on Jurisdictional Objections] |
| Monday, 26 September 2022 [+90 days from the Reply on Jurisdictional Objections] | Claimant | [Rejoinder on Jurisdictional Objections] |
| Wednesday, 26 October 2022 [+30 days from the Rejoinder on Jurisdictional Objections] | Claimant & Respondent | Witness notification |
| [DATE] [at least 30 days before the Hearing] | All | Pre-Hearing Organizational Meeting |
| 13 to 24 March 2023 [Within 90 (25 December 2022) to 120 (24 January 2023) days from Respondent’s Rejoinder on the Merits, or Claimant’s Rejoinder on Jurisdictional Objections, if applicable] | All | Hearing |

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Scenario 2

The following timetable shall apply in the event that the objections to jurisdiction are made in response to the memorial on the merits, and there is a request for bifurcation which is granted

| Date / Period of Time | Party/Tribunal | Description |
|---|-----------------------|--|
| 23 April 2021 | Claimant | Memorial on the Merits |
| Wednesday, 2 June 2021 [+40 days from the Memorial on the Merits] | Respondent | Request for Bifurcation |
| Monday, 12 July 2021 [+40 days from the Request for Bifurcation] | Claimant | Answer to Respondent's Request for Bifurcation |
| Monday, 23 August 2021 [+40 days from Claimant's Answer to Respondent's Request for Bifurcation] | Tribunal | Decision on Bifurcation |
| Scenario 2.1: Proceedings Bifurcated | | |
| Wednesday, 1 December 2021 [+100 days from Tribunal's Decision on Bifurcation] | Respondent | Memorial on Jurisdictional Objections |
| Friday, 11 March 2022 [+100 days from Memorial on Jurisdictional Objections] | Claimant | Counter-Memorial on Jurisdictional Objections |
| Thursday, 31 March 2022 [+14 days from the Electronic Platform Filing (+4 business days) in support of the Counter-Memorial on Jurisdictional Objections] | Claimant & Respondent | Requests for Production of Documents |
| Thursday, 7 April 2022 [+7 days from the Document Production Requests] | Claimant & Respondent | Objections to Requests for Production of Documents |
| Thursday, 14 April 2022 [+7 days from the Objections to Production Requests] | Claimant & Respondent | Responses to Objections to Production Requests |

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| Date / Period of Time | Party/Tribunal | Description |
|--|-----------------------|--|
| Thursday, 28 April 2022 [+14 days from the Responses to Objections to Production Requests] | Tribunal | Ruling on Parties' Requests for Production of Documents |
| Thursday, 12 May 2022 [+14 days from the Tribunal's Ruling on Parties' Requests for Production of Documents] | Claimant & Respondent | Document Production in accordance with the Tribunal's Ruling |
| Monday, 11 July 2022 [+80 days starting from the middle of the document production phase - 21/04/2022] | Respondent | Reply on Jurisdictional Objections |
| Thursday, 29 September 2022 [+80 days from the Reply on Jurisdictional Objections] | Claimant | Rejoinder on Jurisdictional Objections |
| [DATE] [at least 30 days before the Pre-Hearing Organizational Meeting, if the tribunal decides to hold the hearing] | Claimant & Respondent | Witness notification |
| [DATE] [to be held at least 30 days before the Hearing on Jurisdiction, if the tribunal decides to hold the hearing] | All | Pre-Hearing Organizational Meeting |
| Week of December 5, 2022 [Within 60 (November 28) to 120 (January 27) days from Claimant's Rejoinder on Jurisdictional Objections] | All | Hearing on Jurisdiction |
| [DATE] | Tribunal | Decision on Jurisdiction |

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| Date / Period of Time | Party/Tribunal | Description |
|---|-----------------------|--|
| Assuming that the Decision on Jurisdiction is not dispositive of the entirety of the arbitration (Dates to be determine upon Decision on Jurisdiction) | | |
| [DATE] [+140 days from Decision on Jurisdiction] | Respondent | Counter-Memorial on the Merits |
| [DATE] +14 days from Electronic Platform Filing (+4 business days) in support of the Counter-Memorial on the Merits] | Claimant & Respondent | Requests for Production of Documents |
| [DATE] [+14 days from the Document Production Requests] | Claimant & Respondent | Objections to Requests for Production of Documents |
| [DATE] [+14 days from the Objections to Production Requests] | Claimant & Respondent | Responses to Objections to Production Requests |
| [DATE] [+14 days from the Responses to Objections to Production Requests] | Tribunal | Ruling on Parties' Requests for Production of Documents |
| [DATE] [+14 days from the Tribunal's Ruling on Parties' Requests for Production of Documents] | Claimant & Respondent | Document Production in accordance with the Tribunal's Ruling |
| [DATE] +120 days from the middle of the document production phase] | Claimant | Reply on the Merits |
| [DATE] [+120 days from the Reply on the Merits] | Respondent | Rejoinder on the Merits |
| [DATE] [+30 days from the Rejoinder on the Merits] | Claimant & Respondent | Witness notification |
| [DATE] [at least 30 days before the Hearing] | All | Pre-Hearing Organizational Meeting |
| [DATE] [Within 60 to 120 days from Respondent's Rejoinder on the Merits] | All | Hearing on the Merits |

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| Date / Period of Time | Party/Tribunal | Description |
|--|-----------------------|--|
| Scenario 2.2: Proceedings Not Bifurcated | | |
| [DATE] [+140 days from Tribunal’s Decision on Bifurcation] | Respondent | Counter-Memorial on the Merits and Memorial on Jurisdictional Objections |
| [DATE] + 14 days from the Electronic Platform Filing (+4 business days) in support of the Counter-Memorial on the Merits] | Claimant & Respondent | Requests for Production of Documents |
| [DATE] [+14 days from the Document Production Requests] | Claimant & Respondent | Objections to Requests for Production of Documents |
| [DATE] [+14 days from the Objections to Production Requests] | Claimant & Respondent | Responses to Objections to Production Requests |
| [DATE] [+14 days from the Responses to Objections to Production Requests] | Tribunal | Ruling on Parties’ Requests for Production of Documents |
| [DATE] [+14 days from the Tribunal’s Ruling on Parties’ Requests for Production of Documents] | Claimant & Respondent | Document Production in accordance with the Tribunal’s Ruling |
| [DATE] [120 days starting from the middle of the document production phase] | Claimant | Reply on the Merits and Counter-Memorial on Jurisdictional Objections |
| [DATE] [+120 days from the Reply on the Merits and Counter- Memorial on Jurisdictional Objections] | Respondent | Rejoinder on the Merits and Reply on Jurisdictional Objections |
| [DATE] [+90 days from Reply on Jurisdictional Objections] | Claimant | Rejoinder on Jurisdictional Objections |
| [DATE] [+30 days after the Rejoinder on Jurisdictional Objections] | Claimant & Respondent | Witness notification |
| [DATE] [at least 30 days before the Hearing] | All | Pre-Hearing Organizational Meeting |

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| Date / Period of Time | Party/Tribunal | Description |
|---|----------------|-------------|
| [DATE] [Within 90 to 120 days from Respondent's Rejoinder on the Merits or Claimant's Rejoinder on Jurisdictional Objections, if applicable] | All | Hearing |

Procedural Order No. 1 – Annex B

ANNEX B

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 Hyperlinked Index (which shall be attached to each submission).

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 | CL-####–LANGUAGE |
| | 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> | |

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| | |
|--|---|
| 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> |
| | <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> | |

Procedural Order No. 1 – Annex C

ANNEX C

MODEL REDFERN-STERN SCHEDULE FOR DOCUMENT REQUESTS

| Request No. ... | |
|--|--|
| Documents or category of documents requested | |
| Relevance and materiality according to Requesting Party | |
| Documents not in the Requesting Party's possession | |
| Responses / Objections to document request | |
| Reply to Objections to document request | |
| Tribunal's decision | |