

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Bank of Nova Scotia
Claimant

v.

Republic of Peru
Respondent

(ICSID Case No. ARB/22/30)

PROCEDURAL ORDER NO. 1

Members of the Tribunal

Ms. Lucy Reed, President of the Tribunal

Prof. Dr. Kaj Hobér, Arbitrator

Prof. Zachary Douglas K.C., Arbitrator

Secretary of the Tribunal

Ms. Veronica Lavista

28 February 2024

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Introduction

On 22 June 2023, the Respondent filed a Submission pursuant to ICSID Arbitration Rule 41, requesting the Tribunal to declare that the Claimant’s claims are manifestly without merit and order the Claimant to pay to the Respondent all costs in connection with the Arbitration (the “**Rule 41 Submission**”).

The Tribunal held a hearing on the Rule 41 Submission and the first session of the Tribunal on 26 February 2024, starting at 9:00 a.m. EST, by video conference. The session was adjourned at 2:00 p.m.

A 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. Lucy Reed, President of the Tribunal
Prof. Dr. Kaj Hobér, Arbitrator
Prof. Zachary Douglas K.C., Arbitrator

ICSID Secretariat:

Ms. Veronica Lavista, Secretary of the Tribunal

On behalf of the Claimant:

Mr. John Terry, Torys LLP
Ms. Emily Sherkey, Torys LLP
Ms. Amanda Wolczanski, Torys LLP
Ms. Mayra Bryce Alberti, Payet, Rey, Cauvi, Pérez
Mr. Alvaro Ayala Margain, The Bank of Nova Scotia
Ms. Gia Ghassemi, The Bank of Nova Scotia
Mr. Francisco Rivadeneira, Scotiabank Peru
Ms. Sacha Larrea Echelandia, Scotiabank Peru

On behalf of the Respondent:

Dr. Yas Banifatemi, GBS Disputes
Ms. Ximena Herrera-Bernal, GBS Disputes
Ms. Yael Ribco, GBS Disputes
Ms. María del Pilar Álvarez Díaz, GBS Disputes
Mr. Federico Achard Brito del Pino, GBS Disputes
Ms. Vanessa Rivas Plata Saldarriaga, Ministerio de Economía y Finanzas del Perú
Ms. Claudia Gladys Muñoz Vildoso, Superintendencia Nacional de Aduanas y de Administración Tributaria del Perú
Mr. Jhans Armando Panihuara Aragón, Ministerio de Economía y Finanzas del Perú

Non-Disputing Parties

Ms. Alexandra Dosman, Deputy Director and Senior Counsel, Trade Law Bureau

Ms. Elena Lapina, Trade Law Bureau

Mr. Tim Cleland, Senior Project Leader, Departmente of Finance, Canada

The Tribunal and the Parties considered the following:

- The Draft Procedural Order circulated by the Tribunal Secretary on 9 June 2023; and
- The Parties' comments on the Draft Procedural Order received on 26 January 2024, indicating the items on which they agreed and their respective positions regarding the items on which they did not agree.

Having considered the above documents and the Parties' views, the Tribunal now issues the present Order:

Order

Pursuant to ICSID Arbitration Rules 27 and 29, this Procedural Order sets out the Procedural Rules that govern this arbitration.

1. Applicable Arbitration Rules

Convention Article 44; Arbitration Rule 1; Canada-Peru FTA Article 824(3)

- 1.1. These proceedings are conducted in accordance with the ICSID Arbitration Rules in force as of July 1, 2022 (the "ICSID Arbitration Rules" or the "Rules"), except to the extent modified by Section B of Chapter Eight of the Free Trade Agreement between Canada and the Republic of Peru signed on May 29, 2008, that entered into force on August 1, 2009 (the "Canada-Peru FTA"), in which case the Canada-Peru FTA provision shall apply.
- 1.2. Subject to the ICSID Arbitration Rules and the Canada-Peru FTA, if the provisions and rules in this Procedural Order do not address a specific procedural issue, the Tribunal shall determine the applicable procedure after consulting with the parties.
- 1.3. The Tribunal may seek guidance from, but shall not be bound by, the 2020 IBA Rules on the Taking of Evidence in International Arbitration ("2020 IBA Rules").

2. Constitution of the Tribunal and Tribunal Members' Declarations

Arbitration Rule 21; Canada-Peru FTA Article 826

- 2.1. The Tribunal was constituted on May 8, 2023 in accordance with the ICSID Convention, the ICSID Arbitration Rules and the Canada-Peru FTA. 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 19(3)(b). Copies of these declarations were distributed to the Parties by the ICSID Secretariat upon acceptance of each arbitrator's appointment on February 7, 2023, February 17, 2023 and May 6, 2023.
- 2.3. The Members of the Tribunal confirmed that they have sufficient availability during the next 24 months to dedicate to this case and that they will use best efforts to meet all time limits for orders, decisions and the Award, in accordance with ICSID Arbitration Rule 12(1).

3. Fees and Expenses of Tribunal Members

Convention Article 60; Administrative and Financial Regulation 14; ICSID Schedule of Fees; Memorandum on Fees and Expenses; Canada-Peru FTA Article 826(3)-(4)

- 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 in force at the time the fees and expenses are incurred.

4. Presence and Quorum

Arbitration Rule 33

- 4.1. The presence of all the members of the Tribunal is required to constitute a quorum for its settings, including by any appropriate means of communications.

5. Rulings of the Tribunal

Convention Article 48(1); Arbitration Rules 10, 11(4), 12, 27 and 35

- 5.1. Decisions of the Tribunal shall be taken by a majority of the Members of the Tribunal.
- 5.2. Orders, decisions and the Award may be made by any appropriate means of communication.
- 5.3. Orders, decisions and the Award may be signed electronically.
- 5.4. The President is authorized to issue Procedural Orders on behalf of the Tribunal.
- 5.5. When 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.

- 5.6. The Tribunal's orders and decisions shall indicate the reasons upon which they are made. The reasons may be minimal for non-controversial or minor procedural, administrative and organizational matters, e.g., extensions of time.
- 5.7. The Tribunal will use best efforts to issue all rulings, including the Award, within the time limits prescribed by the ICSID Arbitration Rules. If the Tribunal cannot comply with an applicable time limit, it will advise the Parties of the special circumstances justifying the delay and the date when it anticipates rendering the ruling, in accordance with ICSID Arbitration Rule 12(2).
- 5.8. 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 Rules 10 and 11

- 6.1. Depending on the outcome of the Tribunal's decision on the Rule 41 Submission, the Tribunal will set the Procedural Calendar in consultation with the Parties after that decision is issued.
- 6.2. Short extensions of time may be agreed between the Parties as long as the Tribunal is promptly informed, and effort is made to avoid any disruption of the hearing date to be set by the Tribunal in consultation with the Parties.
- 6.3. Neither Disputing Party will request an extension of time to the Tribunal without first having attempted to seek agreement from the other disputing party, if reasonably possible to do so.
- 6.4. The President may exercise the Tribunal's power to fix and extend time limits for the completion of each procedural step in the proceeding under Arbitration Rules 10(1) and 11(3), in accordance with Arbitration Rules 10(3) and 11(4).
- 6.5. In exercising the power to fix time limits under Arbitration Rule 10(1), the President shall consult with the Parties as far as possible. If the matter is urgent, the President may fix or extend time limits without consulting the other members of the Tribunal, subject to possible reconsideration of such decision by the full Tribunal.
- 6.6. The Tribunal shall render its decisions as soon as possible and, in any event, within the timeframe provided in Arbitration Rule 58 and subject to Arbitration Rule 12.

7. Secretary of the Tribunal

Administrative and Financial Regulation 28

- 7.1. The Tribunal Secretary is Ms. Veronica Lavista, 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:

Ms. Veronica Lavista
ICSID
MSN C3-300
1818 H Street, N.W.
Washington, D.C. 20433
U.S.A.
Tel.: + 1 (202) 458-8887
Fax: + 1 (202) 522-2615
Email: vlavista@worldbank.org
Paralegal name: Pedro Magariño
Paralegal email: pmagarino@worldbank.org
arb/22/30@icsidcases.worldbank.org

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

Ms. Veronica Lavista
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1225 Connecticut Ave. N.W.
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U.S.A.
Tel.: +1 (202) 458-1534

8. Representation of the Parties

Arbitration Rule 2

- 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 Claimant

Mr. John Terry
Mr. T. Ryan Lax
Mr. Chris Kinnear Hunter

For the Respondent

Ms. Vanessa Rivas Plata Saldarriaga

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Presidenta de la Comisión Especial que
Representa al Estado en Controversias
Internacionales de Inversión

Mr. Jhans Armando Panihuara Aragón
Secretaría Técnica de la Comisión
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xherrera@gbsdisputes.com

8.2. The Tribunal may refuse designation of additional agents, counsel, or advocates if the designation would create a non-waivable conflict of interest with one or more members of the Arbitral Tribunal.

9. Apportionment of Costs and Advance Payments to ICSID – Division of Advances
Convention Article 61(2); Administrative and Financial Regulation 15; Arbitration Rule 50

- 9.1. The Parties shall cover the direct costs of the proceeding in equal parts, without prejudice to the final decision of the Tribunal as to the allocation of costs.
- 9.2. Following registration of the Request for Arbitration, by letter of 23 November 2022, ICSID requested that the Claimant pay US\$ 150,000 to cover the initial costs of the proceeding through the first session. ICSID received the Claimant's payment on 15 December 2022. Upon the constitution of the Tribunal, by letter of 9 May 2023, ICSID requested that the Parties pay US\$ 300,000 to defray the estimated costs of the subsequent phase of the proceeding. Payment made by the Claimant on 15 December 2022 is considered a partial payment toward that sum. ICSID received the Respondent's payment on 7 June 2023.
- 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 and Hearings

Convention Articles 62 and 63; Arbitration Rule 32; Canada-Peru Article 833

- 10.1. Washington, D.C. shall be the place of the proceeding.
- 10.2. The Tribunal may hold in-person hearings at any other place that it considers appropriate after consultation with the Parties. The method of holding a hearing will be determined in accordance with §20.2.
- 10.3. The Tribunal members may deliberate at any place and by any appropriate means they consider convenient.

11. Procedural Language(s), Translation and Interpretation

Administrative and Financial Regulation 32; Arbitration Rule 7

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

For Parties' Pleadings

- 11.3. All written submissions, including written requests, applications, pleadings, document requests, and corresponding responses, objections and/or replies, shall be submitted in English.

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- 11.4. Witness statements and expert reports may be submitted in either procedural language, provided that a translation of such materials submitted in Spanish will be followed by a translation of such document into English within the deadlines to be set by the Tribunal in accordance with 6.1.
- 11.5. Accompanying documentation (*e.g.*, exhibits, legal authorities, annexes to expert opinions, etc.) in English will not need to be translated. Accompanying documentation submitted in Spanish shall be translated into English within the deadlines to be set by the Tribunal in accordance with 6.1. Accompanying documentation in any language other than English or Spanish shall be translated into English within the deadlines to be set by the Tribunal in accordance with 6.1.
- 11.6. If a document other than a memorial, witness statement or expert report 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.
- 11.7. Translations need not be certified, unless the translation is disputed and the Tribunal orders a Party to provide a certified translation.
- 11.8. Documents exchanged between the Parties under §15 below (Production of Documents) may be produced in the original language and need not be translated.

For Hearings

- 11.9. The hearing shall be conducted in English and Spanish with simultaneous interpretation into the other procedural language. Transcripts shall be taken in both procedural languages.
- 11.10. The testimony of a witness called for examination during the hearing who prefers to give evidence in a language other than in English or Spanish shall be interpreted into both procedural languages, simultaneously if possible. The Parties will notify the Tribunal, as soon as possible, and no later than when notifying which witnesses and experts are called for examination at the hearing, if any witnesses or experts will require interpretation from a language other than English or Spanish.
- 11.11. The costs of interpretation will be paid from the advance payments made by the Parties, without prejudice to the decision of the Tribunal as to which Party shall ultimately bear those costs.

For Tribunal's Rulings Except the Award

- 11.12. The Tribunal shall make any order or decision in English.

For Tribunal's Award

11.13. The Tribunal shall render any decision on jurisdiction, partial award or final award in English and Spanish simultaneously. Both language versions shall be equally authentic.

12. Routing of Communications

Arbitration Rule 6

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

Arbitration Rules 4, 5 and 9

13.1. By the relevant filing date, the Parties shall:

13.1.1. 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 including witness statement, expert reports, exhibits and legal authorities.¹

13.1.2. Within three business days following the relevant filing date, 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.²

13.2. Electronic files of pleadings, witness statements, expert reports, exhibits and legal authorities shall be text searchable (i.e., OCR PDF or Word).

13.3. All pleadings shall contain consecutively numbered paragraphs and shall be accompanied by a cumulative index of all the supporting documentation that the

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

² Supporting documentation shall be uploaded as individual files, not in .zip format.

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 shall follow the naming conventions contained in **Annex A**.

- 13.4. At the conclusion of the written phase of the proceeding, on a date to be determined by the Tribunal, or at any other time the Tribunal or the Secretariat so requests, the Parties shall upload to the file sharing platform, in a format that can be readily downloaded, 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.³
- 13.5. The official date of receipt of a pleading or written communication shall be the day on which the electronic file is sent to the Tribunal Secretary by email.
- 13.6. A filing shall be deemed timely if sent by a Party by 11:59pm, Washington, D.C. time, on the relevant date. If a filing falls on a Saturday or Sunday, the relevant date is the subsequent business day.

14. Number and Sequence of Pleadings – Procedural Calendar *Arbitration Rule 30*

- 14.1. For the purposes of this order, the pleadings include all substantive written submissions made by either disputing party and in particular, all Memorials (Memorial, Counter-Memorial, Reply Memorial and Rejoinder Memorial).
- 14.2. A pleading shall be filed and exchanged by the date indicated in the Procedural Calendar to be set by the Tribunal in accordance with 6.1. Any filing date coinciding with a Saturday, Sunday or public holiday observed in Canada, Peru or France shall be deemed to fall on the next business day in the applicable country. The filing party shall timely notify the other disputing party and the Tribunal of the existence of a public holiday coinciding with a deadline.
- 14.3. In the first exchange of pleadings (Memorial and Counter-Memorial), the disputing parties shall set forth all facts and legal arguments on which they intend to rely. Allegations of fact and legal argument shall be presented in a detailed, specific and comprehensive manner, and shall respond specifically to all allegations of fact and legal arguments made by the other disputing party. Together with such submissions, each disputing party shall produce all evidence upon which it wishes to rely, including documentary evidence, such as fact exhibits and legal authorities,

³ To ensure the full operation of the hyperlinked index, the entire folder shall be housed within one folder and then uploaded to BOX as a single zip file. Should the size of the zip file make the upload to BOX impossible, the parties shall upload the organized folder to a designated sub-folder on to the BOX filesharing platform, in a sub-folder and including a consolidated (non-hyperlinked) index.

written witness statements and expert reports, if any, with the exception of documents to be obtained during the document production phase.

- 14.4. In the second exchange of pleadings, the disputing parties shall limit themselves to responding to allegations of fact and legal arguments made by the other disputing party in the first exchange of pleadings or arising from evidence obtained in the document production phase unless new facts have arisen after the first exchange of submissions. Together with this second exchange of submissions, the disputing parties may file additional documentary evidence, including fact exhibits and legal authorities, witness statements and expert reports insofar as relevant to the adverse disputing party's preceding submission (including documents, witness statement and expert reports produced therewith) or the documents produced by the disputing parties during the document production phase.
- 14.5. A pleading shall be consecutively paragraph-numbered and page-numbered in Arabic numerals and shall contain a table of contents.

15. Production of Documents

Convention Article 43(a); Arbitration Rules 5 and 36-40; Canada-Peru FTA Article 835(7)

- 15.1. The applicable dates that shall govern the request for and production of documents in this proceeding are indicated in the Procedural Calendar to be set by the Tribunal in accordance with 6.1.
- 15.2. The 2020 IBA Rules shall guide the Tribunal and the disputing parties regarding document production in this case.
- 15.3. One round of document production shall take place prior to the submission of the Claimants' Reply on the Merits. If the case is bifurcated, an additional round of document production shall take place prior to the submission of the Respondent's Reply on Jurisdiction, except if the disputing parties agree to waive their right to request documents relevant to the jurisdictional phase.
- 15.4. Within the time limits to be set by the Tribunal in accordance with 6.1, each disputing party may serve a request for production of documents on the other party. Each disputing party's request for production shall be submitted in electronic MS Word version and in the format of a Redfern Schedule, attached at Annex C, including:
 - 15.4.1. 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 that are reasonably believed to exist;

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- 15.4.2. a statement as to how the documents or categories of documents requested are relevant to the case and material to its outcome;
- 15.4.3. a statement that the documents or categories of documents requested are not in the possession, custody or control of the requesting disputing party; and
- 15.4.4. a statement of the reasons why the requesting disputing party believes the documents or categories of documents requested are in the possession, custody or control of the other disputing party.
- 15.5. Upon receiving a request for documentary production, pursuant to the Procedural Calendar to be set by the Tribunal in accordance with 6.1, the other party shall, using the Redfern Schedule provided by the first Party, provide the requesting Party with its consent to production or reasons and/or objections for its failure or refusal to produce responsive documents, with reference to the objections listed in Article 9(2) of the 2020 IBA Rules.
- 15.6. Pursuant to the Procedural Calendar to be set by the Tribunal in accordance with 6.1, the requesting Party shall reply to the other Party's objections in that same Redfern Schedule.
- 15.7. The exchange of the Redfern Schedule pursuant to §§ 15.4, 15.5 and 15.6 above shall be sent to the ICSID Secretariat, to facilitate simultaneous exchange.
- 15.8. Following the exchange of replies further to § 15.6, the parties shall simultaneously file the completed schedules to the Tribunal, in both Word and PDF formats.
- 15.9. The Tribunal shall target to rule on production requests pursuant to the Procedural Calendar to be set by the Tribunal in accordance with 6.1.
- 15.10. Documents agreed to be produced, or ordered to be produced, shall be produced pursuant to the Procedural Calendar to be set by the Tribunal in accordance with 6.1.
- 15.11. Documents shall be produced directly to the requesting Party without copying the Tribunal. Documents produced according to the above procedure shall not be considered part of the evidentiary record unless and until a disputing party subsequently submits the document as evidence in this arbitration. In such case, § 16 establishes the procedure for the submission as exhibits of documents disclosed to the requesting party by the other party.
- 15.12. In addition to the above, the Tribunal may on its own motion order a disputing party to produce documents.

15.13. Any other request for the production of documents not provided for in the Procedural Calendar to be set by the Tribunal in accordance with 6.1 shall be permitted only at the discretion of the Tribunal. The request must set out the reasons why the documents were not requested within the timeframe provided in the Procedural Calendar, as well as the elements described in § 15.4.1 to 15.4.4. The Tribunal will rule on such reasoned application only after it has given the other party a proper opportunity to reply.

15.14. In case of the failure by a Party, without a satisfactory explanation, to comply with an order of the Tribunal to produce a document, or a category of documents, the Tribunal may make any inferences it deems appropriate in light of the relevant circumstances.

16. Submission of Documents

Convention Article 44; Arbitration Rule 5

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

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

16.3. Neither Party shall be permitted to submit additional or responsive documents after the filing of its respective last written submission, unless the Tribunal determines that special circumstances exist based on a timely and reasoned written application followed by observations from the other Party.

16.3.1. Should a Party request leave to file additional or responsive documents, that Party shall not annex the documents that it seeks to file to its request to the Tribunal. However, the Party seeking to submit the additional document shall send the document to the other Party, not copying the Tribunal or the Tribunal Secretary.

16.3.2. If the Tribunal grants such an application for submission of an additional or responsive document, the Tribunal shall ensure that the other Party is afforded sufficient opportunity to make its observations concerning such document.

16.4. The Tribunal may call upon the Parties to produce documents or other evidence in accordance with ICSID Arbitration Rule 36(3).

16.5. Documents shall be submitted in the following form:

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- 16.5.1. 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 file name shall also include the document’s date in yyyy-mm-dd form and a brief indication of the document it contains, as well as the language of the document e.g. C-0001 – 2010-05-09 – Lease Agreement - ENG for a document submitted in English or C-0001 - – 2010-05-09 – Lease Agreement - SPA for a document submitted in Spanish. 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.
- 16.5.2. 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 §16.5.4.
- 16.5.3. Exhibits shall be submitted in PDF format and shall contain single documents.
- 16.5.4. Electronic files and the accompanying indexes shall follow the naming conventions contained in **Annex A**.
- 16.6. Copies of documentary evidence shall be assumed to be authentic unless specifically objected to by a Party, in which case the Tribunal will determine whether authentication is necessary.
- 16.7. The Parties shall file all documents only once by submitting them with their pleadings. Documents need not be resubmitted with witness statements even if referred to in such statements.
- 16.8. The Parties may use PowerPoint slides and demonstrative exhibits (such as charts, tabulations, etc. compiling information which is on record but not presented in such form), provided that they (i) identify the source in the record from which the information is derived, (ii) do not contain information not in the record.
- 16.9. An electronic copy of each demonstrative exhibit, other than PowerPoint slides, shall be distributed by the Party intending to use it via an electronic mail sent to the entire case email distribution for each Party, the Members of the Tribunals, the Tribunal Secretary, to the court reporter and to the interpreters as necessary at the hearing at a time to be decided at the Case Management Conference.
- 16.10. In addition, promptly after the conclusion of the hearing day on which the corresponding demonstrative exhibit is used, the Parties shall upload such demonstrative to the case folder in the BOX filesharing platform, designating each with the corresponding CD-__ or RD-__ number.

17. Witness Statements and Expert Reports

Convention Article 43(a); Arbitration Rule 38; Canada-Peru FTA Article 839

- 17.1. Witness statements and expert reports shall be filed together with the Parties' pleadings.
- 17.2. Witness statements shall be numbered separately as "CWS-" for the Claimant's witness statements, and "RWS-" for the Respondent's witness statements, followed by the applicable name and number. The disputing parties shall use sequential numbering throughout the proceeding.
- 17.3. Expert reports shall be numbered separately as "CER-" for the Claimant's expert reports, and "RER-" for the Respondent's expert reports, followed by the applicable name and number.
- 17.4. Neither Party shall be permitted to submit any testimony that has not been filed with the written submissions, unless the Tribunal determines that special circumstances exist based on a reasoned written request followed by observations from the other Party (following the procedure outlined in §16.3).
- 17.5. Each witness statement and expert report shall be signed and dated by the witness.
- 17.6. Pursuant to Article 839 of the Canada-Peru FTA, the "Tribunal, at the request of a disputing party [i.e. Claimant or Respondent], or on its own initiative unless the disputing parties disapprove, may appoint experts to report to it in writing on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing party, subject to such terms and conditions as the disputing parties may agree."
- 17.7. Each witness statement and expert report shall, in the case of factual witnesses, comply with paragraph 4.5 of the 2020 IBA Rules and, in the case of experts, with paragraph 5.2 thereof.
- 17.8. Each witness statement shall contain at least the following:
 - 17.8.1. the full name and present address of the witness;
 - 17.8.2. a description of the witness's position and qualifications, if relevant to the dispute or the contents of the statement;
 - 17.8.3. a description of any past or present relationship between the witness and the disputing parties, counsel or members of the Tribunal;

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- 17.8.4. a description of the facts on which the witness's testimony is offered and, if applicable, the source of the witness's knowledge;
 - 17.8.5. copies of all evidence upon which the witness relies unless already exhibited; and
 - 17.8.6. the signature of the witness and the date it was given.
- 17.9. Each expert report shall contain at least the following:
- 17.9.1. a description of the instructions pursuant to which they are providing their opinions and conclusions;
 - 17.9.2. a confirmation that this is the expert's own, impartial, objective, unbiased opinion which has not been influenced by the pressure of the dispute resolution process or by any disputing party;
 - 17.9.3. a statement that the expert understands that, in giving their opinion, their duty is to the Tribunal, and that they are complying with that duty;
 - 17.9.4. a statement of the facts and/or assumptions on which they are basing their expert opinions and conclusions;
 - 17.9.5. a description of the methods used in arriving at the conclusions, to the extent applicable;
 - 17.9.6. a statement of the qualifications of the expert in the claimed area of expertise and an attached current curriculum vitae evidencing the expert's qualifications; and
 - 17.9.7. a statement that, if the expert subsequently considers that their opinions require any correction, modification or qualification, they will notify the disputing parties to this arbitration and the Tribunal forthwith.
- 17.10. Expert reports shall be accompanied by any documents or information upon which they rely, unless such documents or information have already been submitted as exhibits with the parties' submissions, in which case reference to such exhibits shall be sufficient.

18. Examination of Witnesses and Experts
Arbitration Rule 38

- 18.1. Each disputing party shall be responsible for ensuring the attendance of its own witnesses to the applicable hearing, except when the other disputing party has

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waived cross-examination of a witness and the Tribunal does not direct their appearance.

18.2. At any hearing, the examination of each witness and expert shall proceed as follows:

18.2.1. the witness shall make the declaration specified at ICSID Arbitration Rule 38(6) and the expert shall make the declaration specified at ICSID Arbitration rule 38(8);

18.2.2. the disputing party presenting the witness may conduct a brief direct examination for the purpose of introducing the witness, including to confirm and/or correct that witness's written statement, and addressing matters that have arisen after the party's last pleading was filed, if any;

18.2.3. in the case of experts, in lieu of direct examination, the experts may give a presentation, including the use of PowerPoint, summarizing their findings and addressing matters that have arisen since the expert report was filed. The duration of the presentation will be determined at the Case Management Conference by the Tribunal in consultation with the disputing parties;

18.2.4. the adverse disputing party may then cross-examine the witness and/or expert on the subject matter of the witness statements/expert report and matters affecting the witness's credibility. The cross-examination of witnesses shall be limited to the witness statement produced by the witness and/or facts and/or documents on which the witness based its statement or is reasonably expected to be aware of;

18.2.5. the disputing party presenting the witness/expert may then re-examine the witness/expert with respect to any matters or issues arising out of the cross-examination, with re-cross-examination limited to the witness's/expert's testimony on re-examination at the discretion of the Tribunal;

18.2.6. the Tribunal may examine the witness/expert at any time, either before, during or after examination by any of the disputing parties; and

18.3. The Tribunal shall, at all times, have control over the procedure for hearing a witness/expert. The Tribunal may in its discretion:

18.3.1. direct that a witness/expert be recalled for further examination at any time, or

18.3.2. decide whether a witness can reasonably be expected to be aware of a fact or document.

- 18.4. The Tribunal shall, at all times, have the power to request the presence of any witness and expert for examination at the hearing, upon application by any party or on its own motion.
- 18.5. It shall not be improper for counsel to meet with witnesses and potential witnesses to establish the facts, prepare the witness statements and prepare for examination.
- 18.6. Subject to further discussion at the pre-hearing conference, prior to his or her own examination, a factual witness shall not be present in the hearing room during the hearing of oral testimony, discuss the testimony with any other witness, or read any transcript of any oral testimony. This limitation does not apply to expert witnesses or to fact witnesses if the witness is the designated disputing party representative.⁴ A party representative who is a factual witness shall be examined before the other factual witnesses presented by the party, absent exceptional circumstances.
- 18.7. Once the Parties are duly informed of the dates of the hearing, they shall as quickly as possible inform their potential witnesses and experts of these dates, to secure their presence at the hearing and avoid any disruption in the Procedural Calendar.
- 18.8. At least one week prior to the pre-hearing organizational meeting, each party shall notify the other party, with the Secretary of the Tribunal in copy, which witnesses and experts for whom the other party has submitted a statement or a report it wishes to examine at the hearing.
- 18.9. Within a week of the parties' notifications, the Tribunal will indicate the witnesses or experts not called by the parties whom it wishes to question, if any.
- 18.10. Notwithstanding the above, in the event that a witness is unable to physically appear at an in-person hearing or the parties otherwise agree that the witness's physical appearance is unnecessary (*e.g.*, the required examination will be brief), the witness may be examined by videoconference if the disputing parties so agree or upon the determination of the Tribunal.
- 18.11. If a party, notwithstanding a request of the other party or an order by the Tribunal, fails to make a witness or an expert available for cross-examination at the hearing without reason considered valid by the Tribunal, the Tribunal may disregard that witness statement or expert report. However, to the extent that the witness provides a valid reason for failing to appear at a hearing, the Tribunal may assess the value of the evidence, taking into consideration the witness statement(s) of the absent witness, as well as the fact that the other Party was denied the opportunity to test the witness or expert in to cross-examination.

⁴ A "representative" means the individual(s) designated as a disputing party's agent charged with giving instructions to counsel at the hearing.

- 18.12. The Tribunal may consider the witness statement of a witness who provides a valid reason for failing to appear at a hearing, having regard to all the surrounding circumstances, including the fact that the witness was not subject to cross-examination. A witness who is not called for cross-examination has a valid reason not to appear at a hearing and that witness' witness statement or expert report shall be admitted into evidence for consideration by the Tribunal. The Tribunal shall not admit into evidence the witness statement or expert report of a witness who fails to provide a valid reason for not appearing at the hearing. The Tribunal shall have the discretion to decide whether or not a witness has provided a valid reason for not appearing at a hearing, after hearing submissions of the parties on the issue, and having regard to the reason for the non-attendance and the nature of the witness's proposed evidence.
- 18.13. The written statement or expert report of a witness or expert whose cross-examination has been waived by the other disputing party shall be admitted into evidence, unless the Tribunal determines that the witness or expert must be heard. However, the failure by a party to request cross-examination of a certain witness or expert shall not be considered to reflect consent as to the correctness of the content of that witness' statement or that expert's report. Unless the Tribunal determines, on its own motion or at the request of a Party, that the witness or expert must be heard, the Tribunal will assess the weight of the witness statement or expert report taking into account the entire record and all the relevant circumstances.

19. Case Management Conferences
Arbitration Rule 31

- 19.1. The Tribunal shall convene case management conferences with the Parties in accordance with ICSID Arbitration Rule 31 in order to (i) identify uncontested facts (e.g., joint chronology of facts); (ii) clarify and narrow the issues in dispute (e.g., address tribunal questions, decision tree, road map, matrix and/or skeleton arguments); or (iii) address any other procedural or substantive issue related to the resolution of the dispute (e.g., appointment of Tribunal-appointed expert, production of evidence). It is expected that a case management conference will be held after the first round of written submissions in accordance with the Procedural Calendar to be set by the Tribunal in accordance with 6.1.
- 19.2. A case management conference for hearing organization shall be held on a date determined by the Tribunal after consultation with the Parties. It shall comprise a teleconference or videoconference between the Tribunal, or its President, and the Parties and address any outstanding procedural, administrative, and logistical matters (including modality of interpretation and transcription) in preparation for the hearing.

- 19.3. At a date to be determined by the Tribunal, and in any event no later than the date of the case management conference for hearing organization, 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 Rule 32; Article 835 of the Canada-Peru FTA

- 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 by any other means of communication 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. Having due regard to the views of the Parties and the specific circumstances of the case, including any relevant travel or public health/security restrictions, the Tribunal may decide to hold a hearing remotely or in a hybrid form.
- 20.4. The hearing shall take place no earlier than 4 weeks after the filing of the last written submission.
- 20.5. The Members of the Tribunal shall reserve at least one day after the hearing to determine the next steps and to hold deliberations.
- 20.6. Subject to further discussion at the pre-hearing conference concerning adjustments required for due process, in principle, each disputing party will have an equal time allocation to examine witnesses and/or experts at the hearing.
- 20.7. In accordance with Article 835 of the Canada-Peru FTA, hearings shall be open to the public. The Tribunal may hold portions of hearings *in camera* to the extent necessary to ensure the protection of confidential information.
- 20.8. The Tribunal, in consultation with the Parties, shall establish procedures for the protection of confidential information and appropriate logistical arrangements for open hearings.

21. Recordings of Hearings and Sessions

Arbitration Rule 29(4)(i)

- 21.1. Recordings shall be made of all hearings and sessions. The recordings shall be provided to the Parties and the Tribunal Members.

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- 21.2. Verbatim transcripts in the procedural languages 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 and electronic transcripts shall be provided to the Parties and the Tribunal on a same-day basis.
- 21.3. Unless the Parties agree on a different timeframe, the Parties shall agree on any corrections to the transcripts within 30 days of the later of the dates of the receipt of the sound recordings 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. The Secretariat shall provide the Parties and the Tribunal Members the final version of the transcripts once the revised transcripts have been approved by the Tribunal.

22. Post-Hearing Memorials and Statements of Costs

Convention Article 44; Arbitration Rules 51

- 22.1. At or before the hearing, the Tribunal shall decide, in further consultation with the disputing parties, whether and when the disputing parties shall submit post-hearing submissions and replies to post-hearing submissions. Should the Tribunal request post-hearing submissions, no additional evidence (including documents, witness statements or expert reports) may be produced with them, except with leave from and after having heard the other Party, or on the request of the Tribunal.
- 22.2. If ordered, the Tribunal may fix a page-limit for post-hearing submissions, in consultation with the disputing parties.

23. Transparency matters

Convention Article 48(5), Arbitration Rules 62-66

- 23.1. The Parties agree that the transparency regime governing these proceedings is dealt with in Procedural Order No. 2.

24. Data Privacy and Cybersecurity

- 24.1. The Members of the Tribunal, the Parties and their representatives acknowledge that the processing of their personal data is necessary for the purposes of this arbitration proceeding.
- 24.2. The Members of the Tribunal, the Parties and their representatives agree to comply with all applicable data protection and privacy regulations, including providing

appropriate notice to data subjects whose personal data will be processed in the arbitration proceeding, where necessary. Should compliance with applicable law require action from another participant in the arbitration proceeding, the Parties are invited to bring that to the attention of that other participant and/or to apply to the Tribunal for specific data protection measures to be put in place.

- 24.3. The Parties and their representatives shall ensure that the storage and exchange of the personal data processed in this arbitration is protected by way of appropriate technical and organizational safeguards.

25. Amicable Dispute Settlement

- 25.1. The Tribunal notes that the Parties may seek to reach an amicable settlement of all or part of the dispute, including through mediation under the ICSID Mediation Rules, at any time in the proceeding. If the Parties settle the dispute in full, they may request that the Tribunal embody their settlement in its Award, pursuant to ICSID Arbitration Rule 55(2).

26. Submissions and Attendance to Hearing of the “non-disputing [FTA] Party”
Arbitration Rule 68; Canada-Peru FTA Article 832

- 26.1. The provisions of Article 832 of the Canada-Peru FTA concerning participation by the “non-disputing [FTA] Party” are applicable.

27. Submissions by “Other Persons”
Arbitration Rule 67; Canada-Peru FTA Article 836 and Annex 836.1

- 27.1. The provisions of Article 836 and Annex 836.1 of the Canada Peru FTA are applicable.

On behalf of the Tribunal,

[SIGNATURE]

Ms. Lucy Reed
President of the Tribunal
Date: 28 February 2024

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 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-#### –YYYY-MM-DD – BRIEF DESCRIPTION - LANGUAGE
	R-#### – YYYY-MM-DD – BRIEF DESCRIPTION - LANGUAGE
	To be produced sequentially throughout the case.
	CLAIMANT’S FACTUAL EXHIBITS
	<i>C-0001 - yyyy-mm-dd – brief description - ENG</i>
	<i>C-0002 - yyyy-mm-dd – brief description - SPA</i>
	RESPONDENT’S FACTUAL EXHIBITS
	<i>R-0001 - yyyy-mm-dd – brief description - FR</i>
	<i>R-0002 - yyyy-mm-dd – brief description - SPA</i>
	Legal Authorities
R-#### – YYYY-MM-DD – BRIEF DESCRIPTION - LANGUAGE	
To be produced sequentially throughout the case.	
CLAIMANT’S LEGAL AUTHORITIES	
<i>CL-0001 - yyyy-mm-dd – brief description - ENG</i>	
<i>CL-0002 - yyyy-mm-dd – brief description - FR</i>	
RESPONDENT’S LEGAL AUTHORITIES	
<i>RL-0001 - yyyy-mm-dd – brief description – SPA</i>	
<i>RL-0002 - yyyy-mm-dd – brief description - 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>
	<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>	