INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID Case No. ARB/19/34

AMEC FOSTER WHEELER USA CORPORATION, PROCESS CONSULTANTS, INC., AND JOINT VENTURE FOSTER WHEELER USA CORPORATION AND PROCESS CONSULTANTS, INC.

Claimants

v.

REPUBLIC OF COLOMBIA

Respondent

RESPONDENT'S REJOINDER ON CLAIMANTS' APPLICATION FOR EMERGENCY TEMPORARY RELIEF

Counsel for Respondent

Agencia Nacional de Defensa Jurídica del Estado

Ana María Ordoñez Puentes
Elizabeth Prado López
Giovanny Vega Barbosa

Agencia Nacional de Defensa Jurídica del Estado

CURTIS

Claudia Frutos-Peterson
Elisa Botero
Fernando Tupa
Juan Jorge
Maria Paulina Santacruz

Curtis, Mallet-Prevost, Colt & Mosle LLP

October 18, 2021

INDEX

Page #

INTRODUCTION

1. The Republic of Colombia ("Colombia" or "Respondent") submits this rejoinder on Claimants' application for emergency temporary relief (the "Rejoinder on the Emergency Application") in accordance with the calendar set forth by the Tribunal on October 8, 2021.[1]

2. Claimants are seeking an "emergency order staying enforcement of the CGR Decision [(*i.e.* the Ruling with Fiscal Liability)] until [their] application for interim measures can be" decided by the Tribunal[2] (the "Emergency Application"). Respondent filed its answer to Claimants' Emergency Application on September 30.[3] Claimants then requested leave to file a reply on the Emergency Application arguing that Respondent had "advanced a number of new arguments and factual assertions [in its September 30 answer] that merit[ed] a response",[4] including "lengthy, if incorrect, analyses of many of the legal authorities . . . , such as its long discussion of *IBT v. Panama*, in connection with its argument under TPA 10.20.8, or *Gabriel Resources v. Romania*, which supposedly supports its 'heightened urgency' argument."[5]

[1] References in the form of "**Ex. R-**" and "**Ex. RL-**" are to the factual exhibits and legal authorities, respectively, submitted by Respondent in this Arbitration; while those in the form of "**Ex. C-**" and "**Ex. CL-**" are to the factual exhibits and legal authorities, respectively, submitted by Claimants in this Arbitration. Capitalized terms not defined in this Rejoinder on the Emergency Application shall have the meanings set forth in Respondent's Memorial on Preliminary Objections of July 1, 2021 and in Respondent's Answer to Claimants' Emergency Application of September 30, 2021.

[2] Claimants' Reply in Further Support of Application for Emergency Relief, October 12, 2021 ("Claimants' Reply on the Emergency Application"), ¶ 2.

[3] *See* Respondent's Answer to Claimants' Emergency Application, September 30, 2021.

[4] Claimants' (Robert Sills) e-mail to the Secretary of the Tribunal, October 5, 2021.

[5] Claimants' letter to the Tribunal, October 7, 2021, ¶ 6.

3. As Respondent anticipated,[6] Claimants' reply of October 12, 2021 in further support of their Emergency Application (the "Reply on the Emergency Application") does nothing to aid Claimants' case for interim relief. If anything, it corroborates that Claimants' request for provisional measures cannot be granted by this Tribunal – either on an emergency basis or otherwise. Claimants again acknowledge that the provisional relief they seek is meant to enjoin the implementation of the same "measure" allegedly constituting a violation of the Treaty, a relief which the Tribunal is expressly prohibited from granting under Article 10.20(8) of the Treaty.[7] As Respondent demonstrated in its Answer to the Emergency Application, that alone is enough to defeat Claimants' Application. But even if the Tribunal were to conclude that the limitation in Article 10.20(8) does not preclude it from granting Claimants' Emergency Application (as well as the Provisional Measures Application) (*quod non*), Claimants' Emergency Application still fails because the heightened test of urgency required to issue temporary provisional measures is not met.

4. Interestingly, Claimants' Reply on the Emergency Application does not address the "new" factual assertions and legal arguments supposedly made by Respondent in its September 30 Answer that, according to Claimants, it was intended to address.[8] Claimants do not actually contend the factual basis of Respondent's Answer to the Emergency Application. Rather, they make a series of exaggerated factual allegations of [redacted] the enforcement by the CGR of the Ruling with Fiscal Liability. Their allegations are so

[6] Respondent's letter to the Tribunal, October 6, 2021, pp. 1-2 (arguing that the pleading on the record were enough for the Tribunal to make its determination).

[7] Claimants' Reply on the Emergency Application, ¶ 8 ("the CGR Decision is being challenged in this arbitration").

[8] *See* ¶ 2, *supra.*

divorced from reality that they seem more an exercise in creative writing than a legal brief on provisional measures. As to the legal standard, Claimants failed once more to successfully distinguish *IBT v. Panama*, reiterating the same arguments they advanced in their September 15 letter to the Tribunal.[9] But most notably, in their Reply on the Emergency Application Claimants failed to address the case of *Gabriel Resources v. Romania* altogether, after having based their request for leave from the Tribunal on the need to respond to that case.

5. Leaving aside the frivolity of Claimants' Emergency Application, what is most absurd about it is its limited temporal scope in the absence of any imminent threat. Even if Claimants were to succeed (*quod non*), the temporary interim measures granted by the Tribunal would be in place only for a couple of weeks – a month at most. There is no imminent threat to Claimants that could materialize in that period preventing the Tribunal from giving due consideration to the substance of Claimants' interim relief request and issuing a decision on the Provisional Measures Application.

6. Respondent will now address in detail Claimants' Reply on the Emergency Application.

ARGUMENT

7. Claimants know that the interim relief they seek is barred under Article 10.20(8) or the Treaty. For that reason, they lead their Reply on the Emergency Application with fanciful allegations about the supposed "worldwide campaign of litigation" the CGR is about to embark on, leaving their arguments about Article 10.20(8) for last.

[9] *Compare* Claimants' letter to the Tribunal, September 15, 2021, p. 6 *with* Claimants' Reply on the Emergency Application, ¶¶ 21-22.

8. The Tribunal cannot be misled by Claimants' attempts to distract from the issue at hand and must start its analysis of the Emergency Application by looking to Article 10.20(8).

A. Article 10.20(8) of the Treaty Prohibits the Tribunal from Granting the Emergency Application (as well as the Provisional Measures Application)

9. Article 10.20(8) of the Treaty grants this Tribunal authority to "order an interim measure of protection to preserve the rights of a disputing party, or to ensure that [its] jurisdiction is made fully effective."[10] Respondent is not questioning that general authority. However, Article 10.20(8) prohibits the Tribunal from ordering a certain type of interim measures: measures that "enjoin the application of a measure alleged to constitute a breach referred to in Article 10.16."[11]

10. In their Reply on the Emergency Application, Claimants argue that the Treaty expressly allows the relief they seek.[12] According to Claimants, (1) Article 10.20(8) "is at least as broad as Article 47 of the ICSID Convention, which clearly allows anti-suit injunctions,"[13] (2) "Claimants' requested relief falls squarely within the interim measures allowed by Article 10.20.8," (3) "Claimants do not seek to enjoin the measure that they have alleged to be a breach of Article 10.16 of the [Treaty]",[14] and (4) the cases cited by Respondent are inapposite.

11. Respondent will respond now to each of these arguments.

---

[10] **Ex. RL-1**, Treaty, Article 10.20(8).

[11] *Id.*

[12] Claimants' Reply on the Emergency Application, ¶¶ 12 *et seq.*

[13] *Id.*, ¶ 19. *See also id.*, ¶ 14.

[14] *Id.*, ¶ 16.

(1) Article 10.20.8 of the Treaty Limits the Tribunal's Authority to Recommend Provisional Measures under Article 47 of the ICSID Convention

12. Citing to *Tennant Energy v. Canada* and *Alicia Grace v. Mexico*, Claimants argue that Article 10.20.8 of the Treaty "is at least as broad as Article 47 of the ICSID Convention", which, according to Claimants, "clearly allows anti-suit injunctions".[15]

13. As Respondent already explained in its Answer to the Emergency Application, Article 47 of the ICSID Convention provides that ICSID tribunals have "authority to recommend" provisional measures "to preserve the respective rights of either party," "[e]xcept as the parties [to a dispute] may otherwise agree".[16] Article 47 thus functions as a default rule, which the parties may vary from or override.[17]

14. Article 10.20(8) of the Treaty sets forth the Parties' specific agreement as to the Tribunal's authority to grant provisional measures in this case. While Article 47 of the ICSID Convention – and the cases that interpret and implement it – can be instructional in confirming an ICSID tribunal's general authority to order provisional measures (which is not disputed here),[18] this Tribunal must turn to Article 10.20(8) when

---

[15] *Id.*, ¶ 19.

[16] ICSID Convention, Article 47 (emphasis added). *See* ICSID Rules, Article 39(1) ("At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.").

[17] **Ex. RL-243**, Christoph Schreuer *et al.*, THE ICSID CONVENTION: A COMMENTARY (2d ed., Cambridge University Press 2009), p. 761 ("Art. 47 [of the ICSID Convention] is subject to exclusion or variation by the parties. The parties may agree to exclude the possibility of provisional measures altogether or to limit the tribunal's power with respect to the circumstances under which they are to be recommended or with respect to the types of measures which will be permissible.").

[18] Claimants cite to a few cases in support of the proposition that the Article 47 of the ICSID Convention allows tribunals to order anti-suit injunctions. Claimants' Reply on the Emergency Application, ¶ 8, n. 11. Firstly, none of the cases Claimants cite are applying treaties with a provision like Article 10.20(8) of the Treaty. In any event, Claimants struggle to make their argument for provisional measures even under the ICSID cases they cited in their Reply. In *Tokios Tokelés v. Ukraine*, the tribunal dismissed all three of claimants' requests for provisional measures finding that neither the enforcement of criminal proceedings nor a tax investigation provided sufficient urgency. **Ex. CL-18**, *Tokios Tokelés v. Ukraine* ICSID Case No. ARB/02/18, Procedural Order No. 3, January 18, 2005, ¶ 12 ("Assuming arguendo that the criminal

deciding on Claimants' Emergency Application (and Claimants' Provisional Measures Application).

15. Claimants' citation to *Tennant Energy* actually supports the notion that a treaty provision like Article 10.20(8) may limit the type of provisional measures the tribunal has authority to order under Article 47 of the ICSID Convention. In *Tennant Energy*, a case under NAFTA regarding the application of a tariff,[19] Canada requested that the tribunal order the claimant to post security for costs.[20] Claimants mischaracterize *Tennant Energy* by claiming that that "tribunal held that Article 1134 grants tribunals the power to grant the same interim measures allowed under Article 47 of the ICSID Convention."[21] When in fact, the tribunal explicitly mentions the carve-out of Article 1134 as limiting the measures it can order:

> Article 1134 [of NAFTA – which is identical, *mutatis mutandis*, to Article 10.20(8) of the Treaty –] permits the Tribunal to order measures of protection 'to preserve the rights of a disputing party'. It does not make any distinction between interim measures that protect contingent rights and measures that protect existing rights. The only types of interim measures that the Article expressly bars a tribunal from ordering are (i)

proceedings implicate Claimant's rights in this proceeding, Claimant has failed to show that a provisional measure is either necessary or urgent to protect those rights."). In *Plama v. Bulgaria*, the tribunal dismissed claimant's request for an injunction of domestic proceedings because it found specific performance an inappropriate interim measure in a proceeding where the claimant sought only monetary damages. **Ex. CL-17**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order, September 6, 2005, ¶ 46. In the cases Claimants cite where emergency measures were granted, the State had already begun seizing assets physically within the country. *See* **Ex. CL-23**, *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, November 19, 2007, ¶ 24; **Ex. CL-15**, *Burlington Resources Inc., et al., v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1, June 29, 2009, ¶ 65 ("If the seizures continue, it is most likely that the conflict will escalate and there is a risk that the relationship between the foreign investor and Ecuador may come to an end."). *See* Respondent's Answer to the Emergency Application, ¶¶ 24, 51 (distinguishing *City Oriente*).

[19] Article 1134 of NAFTA is identical, *mutatis mutandis*, to Article 10.20(8) of the Treaty.

[20] **Ex. CL-47**, *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54 (NAFTA), Procedural Order No. 4, February 27, 2020 ("*Tennant Energy*"), ¶¶ 2-3.

[21] Claimants' Reply on the Emergency Application, ¶ 19.

> attachment orders, and (ii) orders that enjoin the application of the challenged measure, none of which restricts the Tribunal from ordering security for costs.[22]

16. Claimants reliance on *Alicia Grace v. Mexico*, another NAFTA case, is similarly unhelpful here.[23] While the tribunal in *Alicia Grace* did speak to the "need to protect the integrity of the arbitration process and . . . to avoid any aggravation of the dispute,"[24] it did not deal with the carve-out in NAFTA Article 1134 because the criminal proceedings the claimant sought to enjoin were not a part of the challenged measures, which related to the expropriation of oil-rigs.[25]

(2) Even If the Interim Relief Requested Fell Within the General Authority of the Tribunal under the First Sentence of Article 10.20(8), it Is Barred under the Second Sentence

17. As Respondent already explained in its Answer to the Emergency Application,[26] tribunals called upon to apply provisions identical to Article 10.20(8) of the Treaty have all agreed that it bars tribunals from enjoining the implementation of the same "measure" supposedly constituting a breach thereof.

18. As the *IBT* tribunal aptly put it:

---

[22] **Ex. CL-47**, *Tennant Energy*, ¶ 168. The tribunal ultimately denied Canada's request for security for costs after going through the analysis for provisional measure because it found that Canada had not proved urgency or irreparable harm. The prohibition in Article 1134 did not come into play because the interim relief requested by Canada (security for costs) was not meant to enjoin the application of the measure challenged by claimant Tennant Energy in the arbitration.

[23] Claimants' Reply on the Emergency Application, ¶ 19.

[24] **Ex. CL-48**, *Alicia Grace & Others v. United Mexican States,* ICSID Case No. UNCT/18/4 (NAFTA), Procedural Order No. 6, Decision on the Claimants' Application for Interim Measures, December 19, 2019, ¶ 50.

[25] **Ex. RL-244**, *Alicia Grace & Others v. United Mexican States,* ICSID Case No. UNCT/18/4 (NAFTA), Notice of Arbitration, June 19, 2018, ¶¶ 74-76 (listing the challenged measures none of which are the criminal proceedings at issue in Procedural Order No. 6).

[26] Respondent's Answer to the Emergency Application, ¶ 15.

> Article 10.20(8) of the Treaty allows ordering provisional measures to preserve the rights of a disputing party, **so long as** such provisional measures do not impede or suspend the implementation of the measure alleged to constitute a breach through which the State is aiming at obtaining a certain result.[27]

19. Claimants argue that their "requested relief falls squarely within the interim measures allowed by Article 10.20.8,"[28] focusing only on the first sentence of that Article. But that is not the issue. Even assuming, *in arguendo*, that the provisional measures requested by Claimants are within the scope of the first sentence, the issue here is whether they fall within the scope of the prohibition in the second sentence of Article 10.20(8) of the Treaty. Respondent's position is that they do.

(3) Claimants Seek to Enjoin the Application of the Same Measure They Allege Is a Violation of the Treaty; the Enforcement of the Ruling with Fiscal Liability Is Not a "Separate Proceeding"

20. Claimants admit they are seeking to enjoin the application of the Ruling with Fiscal Liability, the same "measure" they themselves allege is a violation of the Treaty. In their Application, they stated:

> **The Application seeks an emergency order preventing Colombia from** disrupting the *status quo* by **enforcing the** April 26, 2021, **CGR Decision** that resulted from the

[27] **Ex. RL-231**, *IBT Group, LLC and IBT, LCC v. Republic of Panama*, ICSID Case No. ARB/20/31, Decision on the Request for Provisional Measures, February 5, 2021 ("*IBT*"), ¶ 110 (translation from Spanish; emphasis added). *See also* **Ex. RL-232**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Procedural Order No. 2, May 3, 2000 ("*Feldman*"), ¶ 5 ("[Granting the claimant's request for provisional measures] would not be consistent with the limitations imposed by NAFTA Article 1134, [which is identical, *mutatis mutandis*, to Article 10.20(8) of the Treaty] since such an order would entail an injunction of the application of the measures which in this case are alleged to constitute a breach referred to in NAFTA Article 1117."); **Ex. RL-233**, *Pope & Talbot Inc v. Government of Canada*, UNCITRAL (NAFTA), Ruling by Tribunal on Claimants' Motion for Interim Measures, 2000 ("*Pope & Talbot*, Ruling by Tribunal on Claimants' Motion for Interim Measures") ("Article 1134 of NAFTA does not confer jurisdiction on the Tribunal to enjoin the application of a measure . . ." and its implementation.").

[28] Claimants' Reply on the Emergency Application, ¶ 18.

concluded fiscal liability proceedings, **while the arbitration challenging the CGR Decision is heard**."[29]

21. In their Reply on the Emergency Application they admit it again, claiming that they are seeking to enjoin the enforcement of the CGR Decision (*i.e.* the Ruling with Fiscal Liability) because "a worldwide campaign of litigation by Colombia **while the CGR Decision is being challenged in this arbitration** would aggravate this dispute."[30]

22. Despite such clear statements, Claimants then proceed to try to muddle the issue by arguing that they "do not seek to enjoin a measure that they have alleged to be a breach of [the Treaty]"[31] because (a) "[a]ll the breaches that Claimants have alleged in this arbitration . . . have already occurred[, and so] there is nothing to enjoin because the CGR proceedings are concluded;"[32] and (b) the enforcement proceedings of the Ruling with Fiscal Liability "will be new measures constituting separate proceedings that are not challenged in the pending arbitration".[33]

23. Claimants are wrong on both accounts, but before addressing those arguments directly, let us start with determining what is the "measure" that Claimants allege constitutes a breach of the Treaty. According to Claimants' Reply on the

[29] Letter from Claimants to the Tribunal, September 15, 2021, pp. 3-4 (emphasis added). *See also id.*, p. 8 ("[I]f a stay is not enforced, the very purpose of this arbitration will be permanently disrupted.") (emphasis added). *See also, e.g.* Request for Arbitration, ¶¶ 2, 14. Moreover, in their Application, Claimants are seeking the same relief they requested in their Request for Arbitration, *i.e.* an order "enjoining any attempt by the CGR or any other arm of the Colombian state to seize, attach, or enjoin any assets of Claimants in Colombia or elsewhere." Request for Arbitration, ¶ 216. As Respondent explained in its Memorial on Preliminary Objections, the Tribunal does not have authority under Article 10.26 of the Treaty to grant injunctive relief. Respondent's Memorial on Preliminary Objections, ¶¶ 269-271.

[30] Claimants' Reply on the Emergency Application, ¶ 8.

[31] *Id.*, ¶ 16.

[32] *Id.*

[33] *Id*. *See also, id.*, ¶ 6 ("In order to seize and obtain Claimants' assets, in Colombia or elsewhere, Colombia will be required to initiate new and separate proceedings".).

Emergency Application, Respondent's breaches of the Treaty can be summarized as follows:

> the bringing of a fiscal liability proceeding against parties that are plainly not "fiscal managers" and hence not within the jurisdiction of the CGR, the gross departures from due process in those proceedings, the retroactive application of a statute seemingly aimed at Claimants broadening the definition of "fiscal manager", the unequal treatment of Claimants when compared to the Colombian respondents before the CGR, the calculation of damages under an absurd and illogical model introduced into the CGR proceeding at the very last minute, the imposition of liability on a joint and several basis without even an effort to show causation, and the denial of any meaningful opportunity to appeal.[34]

24. All those supposed breaches of the Treaty occurred within the context of the Fiscal Liability Proceeding, which resulted in a Ruling with Fiscal Liability finding 12 natural and four juridical persons (including Foster Wheeler and Process Consultants) jointly and severally liable [redacted].[35] The Ruling with Fiscal Liability (*i.e.* the CGR Decision, to use Claimants' terminology) crystallizes the alleged breaches of the Treaty that supposedly occurred during the Fiscal Liability Proceeding. Thus, according to Claimants,[36] the "measure" against which they are railing in this Arbitration is the Fiscal Liability Proceeding resulting in the Ruling with Fiscal Liability.[37]

---

[34] *Id.*, ¶ 16.

[35] Respondent's Memorial on Preliminary Objections, ¶¶ 149-150.

[36] *See* ¶¶ 20-21, *supra.*

[37] As the Tribunal may recall, Claimants commenced this Arbitration on December 6, 2019, after the CGR initiated the Fiscal Liability Proceeding on March 10, 2017 and after the CGR issued the Indictment Order (which Claimants refer to as the "Charges") on June 5, 2018, but before the CGR issued the Ruling with Fiscal Liability (which Claimants refer to as the "CGR Decision") on April 26, 2021, which is simply the culmination of the Fiscal Liability Proceeding. For that reason, in their Request for Arbitration Claimants do not specifically refer to the Ruling with Fiscal Liability, although they do ask that the Tribunal award them, *inter alia*, "an offsetting award equal to any amounts awarded in the CGR proceeding", *i.e.* the amount of the Ruling with Fiscal Liability. Request for Arbitration, ¶ 216. If the Fiscal Liability Proceeding had culminated in a ruling *without* fiscal liability for Foster Wheeler and Process Consultants, they would have probably terminated this Arbitration, which goes on to prove Respondent's point.

25. Given that Article 10.20(8) prohibits a tribunal from granting interim measures that seek to enjoin the "application" of a measure supposedly constituting a breach of the Treaty, the next question the Tribunal must examine is what does it mean to "apply" the Fiscal Liability Proceeding that resulted in the Ruling with Fiscal Liability? The tribunal's decision in *IBT* provides some useful guidance. According to *IBT*, "'application' is the effect of 'applying', which in turn is defined as 'employing, managing or putting into practice a . . . measure . . . in order to obtain a certain effect . . . in someone or something.'"[38] "Applying" or "putting into practice" the Fiscal Liability Proceeding means seeking satisfaction from the fiscally liable parties, including Foster Wheeler and Process Consultants, of the amount set forth in the Ruling with Fiscal Liability. That is precisely the effect the Fiscal Liability Proceeding seeks to obtain.

26. As Respondent has explained, under Colombian law the purpose of a fiscal liability proceeding is to determine whether public servants and private parties have caused a damage to the State through the mismanagement of public resources, and to seek compensation from those responsible.[39] The first three stages of the fiscal liability proceeding (*i.e.* the preliminary investigation, the initiation stage, and the ruling and administrative remedies stage) are aimed at determining whether there is liability and declaring the existence of a joint and several payment obligation on the part of those fiscally liable.[40] If the declaratory phase of the fiscal liability proceeding results in a ruling *with* fiscal liability, like it did in this case, the proceeding moves on to a final collection stage.[41]

---

[38] **Ex. RL-231**, *IBT*, ¶¶ 99-100 (translation from Spanish).

[39] Respondent's Memorial on Preliminary Objections, ¶¶ 77-81.

[40] *Id.*, ¶¶ 89, 108.

[41] *Id.*, ¶¶ 108, 116.

27. Having determined that the "measure" at issue in the Arbitration is, according to Claimants, the Fiscal Liability Proceeding resulting in the Ruling with Fiscal Liability, and that "applying" such "measure" means collecting the amount established therein from the fiscally responsible parties, what is left to determine is what is the interim relief sought by Claimants. The answer is easy. With both their Emergency Application and their Provisional Measures Application, Claimants seek to enjoin the enforcement of the Ruling with Fiscal Liability.[42]

28. For the *IBT* tribunal, the key to the analysis under 10.20(8) is to determine "whether there is a causal link that is sufficiently close between the acts that are sought to be affected by the provisional measure and the acts that constitute the violating measure."[43] The causal link in this case is clear. By requesting interim measures preventing the enforcement of the Ruling of Fiscal Liability, Claimants are seeking to enjoin the application of the Ruling with Fiscal Liability, which is the "measure" they claim is at issue in the Arbitration. For that reason, Article 10.20(8) of the Treaty bars the Tribunal from granting them the provisional relief they seek.

29. Claimants' attempts to break that "causal link" cannot be given any credence.[44] The fact that the supposed breaches of the Treaty have already occurred has no bearing in determining whether the interim relief requested by Claimants can be granted. It is precisely because those breaches supposedly occurred already that

---

[42] *See* Claimants' Application for Provisional Measures and Emergency Temporary Relief, ¶ 10 ("Accordingly, Claimants ask for: (1) an order for provisional measures preventing Colombia from initiating any enforcement proceedings with respect to the disputed CGR Decision until the Tribunal has issued its final award on the merits; and (2) an order of emergency temporary relief restraining Colombia from initiating any enforcement proceedings with respect to the disputed CGR Decision until the Tribunal renders a decision on this Application.").

[43] **Ex. RL-231**, *IBT*, ¶ 101 (translation from Spanish).

[44] *See* ¶ 22, *supra.*

Claimants brought a claim against Colombia. What is relevant to the Tribunal's analysis under Article 10.20(8) is whether the interim relief sought by Claimants seeks to enjoin the application of the measures constituting such breaches (not when the supposed breaches of the Treaty occurred).

30. Claimants second argument is factually incorrect. Claimants essentially argue that the interim relief they are requesting is not prohibited because the interim measures sought are aimed at enjoining the enforcement of the "collection proceeding", which is a separate measure to the Fiscal Liability Proceeding (and the Ruling with Fiscal Liability), and Claimants have not claimed that the collection proceeding has breached the Treaty. Claimants are wrong. The collection proceeding (*i.e.* the enforcement of the Ruling with Fiscal Liability) is not separate and distinct from the Fiscal Liability Proceeding and the ruling that resulted from it. Quite the contrary. As Claimants' witness expressly acknowledges, enforcing the Ruling with Fiscal Liability is the *raison d'être* of the collection proceeding.[45] Without a Ruling with Fiscal Liability there would be no amount to collect and nobody responsible for paying it. The collection proceeding is the final *stage* of the Fiscal Liability Proceeding, not a distinct and separate proceeding divorced from the Fiscal Liability Proceeding, as the Claimants would like this Tribunal to believe.[46] The fact that the CGR office in charge of enforcing the Ruling with Fiscal Liability is

[45] **CWS-5**, Supplemental Witness Statement of Cesar Torrente, ¶ 12 (stating that "[s]ince the respondent (sic) has already been declared fiscally liable, the goal of the proceeding is to collect from the debtor a clear, express, and enforceable obligation that has not been paid - in this case, the obligation is the money owed as a result of the fiscal liability decision.). *See* Respondent's Memorial on Preliminary Objections, ¶¶ 77-81.

[46] This conclusion is reinforced by the fact that the CGR official in charge of collecting the Ruling with Fiscal Liability does not have authority to reconsider any substantial issues that should have been decided during the declaratory phase of the administrative proceeding. *See* **Ex. RL-241**, Organizational Resolution No. 778 of 2021, which determines internal regulations for the collection of amounts through the forced collection proceeding carried out by the Office of the Comptroller General of the Republic, Article 14 (Paragraph 2º).

different than the CGR office that carried out the declaratory phase does not change that conclusion. The question here is not whether the collection proceeding is a separate "measure", but whether it implements the "measure" that is deemed a breach (*i.e.* the Fiscal Liability Proceeding and its Ruling with Fiscal Liability).[47] Again, the answer is yes.

(4) The Cases Respondent Relies Upon Are Directly on Point: All Three Rejected Requests for Interim Relief on the Basis of Provisions Identical to Article 10.20(8) of the Treaty Because the Claimants Sought to Enjoin the Implementation of the Measures at Issue in Those Cases

31. *Feldman v. Mexico*,[48] *Pope & Talbot v. Canada*[49] and *IBT v. Panama*,[50] cases Respondent has cited consistently since its September 9 letter,[51] deal directly with the present issue. In those cases, the investors applied for provisional measures to enjoin a challenged measure on the ground that the State's application of the challenged measure during the arbitration would cause financial harm. Claimants mischaracterized those decisions as relating to interim measures requests aimed at maintaining a *status quo*, in an attempt to complicate the tribunal's application of the clear language of Article 10.20(8) of the Treaty that bars tribunals from issuing orders "that enjoin the application of the challenged measure" regardless of the timing or circumstances.

32. In *Feldman*, a case concerning certain tax measures, the claimant requested that the tribunal order Mexico to "cease and desist for the duration of this arbitration from any interference with Claimant or his property or with CEMSA's [(a

---

[47] **Ex. RL-231**, *IBT*, ¶ 101 (translation from Spanish).

[48] **Ex. RL-232**, *Feldman*.

[49] **Ex. RL-245**, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL (NAFTA), Interim Award, June 26, 2000 ("*Pope & Talbot*, Interim Award").

[50] **Ex. RL-231**, *IBT*.

[51] *See* Respondent's letter to the Tribunal, September 9, 2021, pp. 1-2.

subsidiary of the claimant)] assets or revenues."[52] Feldman's request for interim relief was not a request to change the *status quo* of Mexico's tax regime, as Claimants suggest, but rather to prevent the application of what Feldman argued were "not general tax measures . . . but measures specifically targeted against CEMSA" which would financially harm CEMSA during the arbitration.[53] The *Feldman* tribunal did not address issues of *status quo* or timing in its decision. On the contrary it held that "for the Respondent to refrain from any interference by any means with Claimant or his property… would entail an injunction of the application of the [tax] measures which in this case are alleged to constitute a breach."[54]

33. Likewise, in attempting to distinguish *Pope & Talbot*, Claimants argue that, as opposed to here, the investor in that case "requested provisional measures enjoining Canada from decreasing [its] annual softwood lumber allocation in accordance with the new regulation pending the outcome of the arbitration, precisely the measure challenged in the underlying arbitration",[55] thereby attempting to "change the *status quo* and enjoin the very law that was being challenged".[56] Actually, contrary to Claimants' allegations, Pope & Talbot was not seeking to enjoin the new regulation (*i.e.* a soft lumber agreement between the U.S. and Canada) or attempting to change the "*status quo*",[57] but rather –

[52] **Ex. RL-232**, *Feldman*, ¶ 3.

[53] **Ex. RL-246**, *Marvin Roy Feldman Karpa v. United Mexican States,* ICSID Case No. ARB(AF)/99/1, Notice of Arbitration, April 30, 1999, p. 8.

[54] **Ex. RL-232**, *Feldman*, ¶ 5.

[55] Claimants' Reply on the Emergency Application, ¶ 24.

[56] *Id.*

[57] The tribunal in *Pope & Talbot* highlighted the fact that the investors were only challenging the annual quota implementation. **Ex. RL-245**, *Pope & Talbot*, Interim Award, ¶ 45 (indicating that "[t]he Investor has stated and reiterated that it does not take issue with the SLA [Soft Lumber Agreement] as such. It does, however, attack the implementation of the SLA by Canada via its Export Control Regime.").

like Claimants here – requesting that the tribunal enjoin Canada's *implementation* of that regulation by setting a new discretionary quota for lumber exports each year.[58] The tribunal properly denied Pope & Talbot's interim measures request because, like Claimants' Application in this case, it requested enjoining the State from future implementation of the challenged measures.[59]

34. Claimants' attempt at distinguishing *IBT* also fails. Claimants argue that the interim measures request in that case failed not because of the prohibition in Article 10.20(8) of the U.S.-Panama TPA, but because the *IBT* tribunal "determined that claimants sought to modify the *status quo* by rectifying measures they alleged were breached of the treaty".[60] That is a complete mischaracterization. As Respondent explained in detail in its Answer to the Emergency Application,[61] the request for provisional measures in *IBT* failed because, like here, the tribunal determined that claimants were attempting to enjoin the application of the measure at issue in the arbitration, *i.e.* a resolution terminating a construction contract. In rejecting the claimants' application, the *IBT* tribunal said it plainly: "[T]here is no doubt for the [a]rbitral [t]ribunal that the execution of the [performance bond] and the disqualification are both effects of the [resolution terminating the contract] and, therefore, suspending the former would mean, necessarily, paralyzing the application of the latter."[62]

* * *

[58] **Ex. RL-247**, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL (NAFTA), Notice of Arbitration, March 25,1999, ¶ F(vi) ("An Interim Order providing interim measures of protection pursuant to NAFTA Article 1134 to preserve the rights of the Investor and to provide that the Investment's annual softwood lumber allocation from Canada not be decreased pending a final award of the Tribunal.").

[59] **Ex. RL-233**, *Pope & Talbot*, Ruling by Tribunal on Claimants' Motion for Interim Measures.

[60] Claimants' Reply on the Emergency Application, ¶ 21.

[61] Respondent's Answer to the Emergency Application, ¶ 22.

[62] **Ex. RL-231**, *IBT*, ¶ 107 (translation from Spanish).

35. For the foregoing reasons, the Tribunal must reject Claimants' Emergency Application (and the Provisional Measures Application).

B. Even if the Interim Relief Requested Were Allowed under Article 10.20(8), the "Heightened Level of Urgency" Test Required to Grant the Emergency Application Is Not Met

36. If the Tribunal were to determine that it has authority under Article 10.20(8) of the Treaty to grant the interim relief requested by Claimants (*quod non*), the Emergency Application fails nonetheless because Claimants' have not met their burden of showing "heightened urgency".

(1) Claimants Do Not Dispute the Heightened Level of Urgency Test Set by *Gabriel Resources v. Romania*

37. It is quite ironic that having requested leave to file an additional pleading to respond to Respondent's "new" legal arguments, Claimants completely failed to address the case of *Gabriel Resources v. Romania* in their Reply on the Emergency Application. As Respondent explained in its Answer to the Emergency Application, the *Gabriel Resources* tribunal articulated a test to determine whether to issue emergency temporary relief.

38. Pursuant to *Gabriel Resources*, requests for emergency temporary interim relief must meet a "heightened test of urgency",[63] which test was not met in that case because (i) there was "insufficient evidence" that the measure that the claimant sought to enjoin was "not in accordance with Romania law", (ii) there was no threat of "irreparable

[63] Respondent's Answer to the Emergency Application, ¶¶ 28-29. *See* **Ex. RL-237**, *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania*, ICSID Case No. ARB/15/31, Tribunal's Reasoned Decision on Claimants' Request for Emergency Temporary Provisional Measures, October 21, 2016.

harm" to the claimant, (iii) there were procedures being pursued for measure to be challenged, and (iv) "the right of the State to enforce its domestic laws" weighted against claimant's request for provisional measures.[64]

(2) The Enforcement of the Ruling with Fiscal Liability Will Proceed in Accordance with Colombian Law; the CGR Is Not Competent to Embark on a "Worldwide Campaign of Litigation" to Enforce the Ruling with Colombian Law

39. As in *Gabriel Resources*, Claimants' Emergency Application fails because the heightened test of urgency for granting of emergency temporary relief is not met in this case.

40. Claimants' stated reason for applying for interim relief is the fact that the Ruling with Fiscal Liability has become final and binding, and enforcement proceedings are now underway.[65] Respondent does not dispute this.[66] The Ruling with Fiscal Liability

[64] Respondent's Answer to the Emergency Application, ¶ 50.

[65] Claimants' Application, ¶ 22; Claimants' Reply on the Emergency Application, ¶ 4. Claimants misrepresent the contents of Respondent's letter of September 1 denying Claimants' request that Colombia voluntarily suspend the enforcement of the Ruling with Fiscal Liability. Claimants' Reply on the Emergency Application, ¶ 5. Respondent did not "refuse[] Claimants' request, claiming that it lacked authority to agree to a stay on behalf of its own agency, the CGR", but rather indicated that it "[could] only represent and provide assurances that it [would] continue to comply with its Constitution and each of its organs [would] continue to act within the bounds of their competence". **Ex. R-94**, Letter from Respondent to Claimants, September 1, 2021 (translation from Spanish). **Ex. RL-6**, Political Constitution of the Republic of Colombia, after Legislative Act No. 4 of September 18, 2019, Article 6 (setting forth the constitutional principle that public authorities may only act within the scope of their competence).

[66] As Respondent explained in its Answer on the Emergency Application, the Ruling with Fiscal Liability is still subject to judicial review. Claimants may initiate an annulment action against the Ruling with Fiscal Liability and may request a stay of enforcement. *See* Respondent's Answer to the Emergency Application, n. 70.

has indeed become final at the administrative level,[67] and the CGR will – and must under Colombian law[68] – proceed with its enforcement.[69]

41. However, the enforcement of the Ruling with Fiscal Liability does not entail an immediate threat to Claimants' [redacted]:

(i) Contrary to Claimants suggestion,[70] enforcement of the Ruling with Fiscal Liability will proceed against all sixteen fiscally liable parties and four civilly liable parties – not solely against Claimants – because all are jointly and severally liable for the amount set forth therein;

(ii) Colombia has proven that the CGR failed to locate any assets owned by Foster Wheeler or Process Consultants, either in Colombia or abroad, during the Fiscal Liability Proceeding;[71]

(iii) The CGR has not decreed any precautionary measures against Foster Wheeler or Process Consultants;[72]

---

[67] Respondent's Answer to the Emergency Application, ¶¶ 39-40.

[68] *Id.*, ¶ 49. *See* **Ex. RL-5**, Political Constitution of the Republic of Colombia, prior to Legislative Act No. 4 of September 18, 2019, Article 268(5); **Ex. RL-6**, Political Constitution of the Republic of Colombia, after Legislative Act No. 4 of September 18, 2019, Article 268(5); **Ex. RL-8**, Prior Law 610 of 2000, Article 12; **Ex. RL-33**, Decree Law 403 of 2020, Article 117; Respondent's Memorial on Preliminary Objections, ¶¶ 115-121.

[69] *See* Respondent's Memorial on Preliminary Objections, ¶¶ 106, 115.

[70] Claimants' Reply on the Emergency Application, ¶ 4.

[71] Respondent's Answer to the Emergency Application, ¶¶ 34-36; **Ex. R-96**, Letter from the Deputy Comptroller No. 15 to *Agencia Nacional de Defensa Jurídica del Estado*, September 28, 2021, p. 1 (stating that, as of the date of the Ruling with Fiscal Liability, the CGR had not found any assets belonging to Foster Wheeler or Process Consultants, either in Colombia or abroad). *See* Claimants' Application, ¶¶ 52, 53.

[72] Respondent's Answer to the Emergency Application, ¶¶ 37-38. *See* **Ex. R-96**, Letter from the Deputy Comptroller No. 15 to *Agencia Nacional de Defensa Jurídica del Estado*, September 28, 2021, p. 1 (indicating that, during the Fiscal Liability Proceeding, the CGR did not decree any precautionary measures against assets of Foster Wheeler or Process Consultants, and attaching the letter remitting the docket of the Fiscal Liability Proceeding to the CGR office in charge of collecting the amount of the Ruling with Fiscal Liability − submitted separately as R-97); **Ex. R-97**, Letter from the Deputy Comptroller No. 15 to the CGR's Forced Collection Office, July 18, 2021, pp. 7-8 (including a schedule of the precautionary measures decreed during the Fiscal Liability Proceeding, which shows that no measures were decreed against Foster Wheeler or Process Consultants); **Ex. R-98**, Letter from the Director of Forced Collection No. 1 to *Agencia Nacional de Defensa Jurídica del Estado*, September 27, 2021 (confirming that no precautionary measures were decreed against Foster Wheeler or Process Consultants during the Fiscal Liability Proceeding).

(iv) Respondent has shown that a renewed search for assets owned by Foster Wheeler and Process Consultants in the context of the forced collection proceeding is unlikely to succeed;[73]

(v) If the CGR were to locate any assets abroad, attaching those assets would be challenging;[74] and

(vi) Any assets actually attached during the forced collection proceeding may only be auctioned off until the courts of the administrative adjudicatory jurisdiction rule on any annulment actions against the Ruling with Fiscal Liability initiated by Claimants.[75]

42. None of this has been contested by Claimants. In fact, the supplemental witness testimony of Mr. Cesar Torrente – who, having no direct knowledge of the facts at issue in this case, is really acting as an "expert" witness given that he used to work at the CGR – fully supports Respondent's arguments.[76]

[73] Respondent's Answer to the Emergency Application, ¶¶ 44-47.

[74] *Id.*, ¶ 46.

[75] *Id.*, ¶ 48.

[76] There is essentially no difference between the explanations Respondent and Mr. Torrente have provided regarding the workings of the Fiscal Liability Proceeding and the forced collection of the Ruling with Fiscal Liability under Colombian law: (a) the Ruling with Fiscal Liability is now final (Respondent's Answer to the Emergency Application, ¶ 49, **CWS-5**, Supplemental Witness Statement of Cesar Torrente, ¶ 9); (b) the Ruling with Fiscal Liability will be transferred to a CGR office in charge of collecting it (Respondent's Answer to the Emergency Application, ¶ 40, **CWS-5**, Supplemental Witness Statement of Cesar Torrente, ¶ 10); (c) in the forced collection proceeding, the persons or entities declared fiscally liable will be regarded as debtors (Respondent's Memorial on Preliminary Objections, ¶ 115, **CWS-5**, Supplemental Witness Statement of Cesar Torrente, ¶ 12); (d) since fiscal liability was declared via the Ruling with Fiscal Liability, the goal of the collection proceeding will be to collect payment, either voluntary or through attachment and auction (Respondent's Answer to the Emergency Application, ¶ 39, **CWS-5**, Supplemental Witness Statement of Cesar Torrente, ¶ 12); (e) the forced collection proceeding will start with the issuance of a payment order (Respondent's Memorial on Preliminary Objections, ¶ 117, **CWS-5**, Supplemental Witness Statement of Cesar Torrente, ¶ 13); (f) the collection proceeding will begin with a voluntary collection phase, which may last up to three months (Respondent's Answer to the Emergency Application, ¶ 41, **CWS-5**, Supplemental Witness Statement of Cesar Torrente, ¶¶ 13, 15); (g) during the collection proceeding, the CGR has authority to search for assets owned by the fiscally liable parties and to issue attachment orders over assets located in Colombia (Respondent's Answer to the Emergency Application, ¶ 44, **CWS-5**, Supplemental Witness Statement of Cesar Torrente, ¶ 14); and (h) no auctioning of assets may proceed until the judiciary has decided on any annulment action against the Ruling with Fiscal Liability (Respondent's Answer to the Emergency Application, ¶ 49, **CWS-5**, Supplemental Witness Statement of Cesar Torrente, ¶ 16).

43. Grasping at straws, Claimants now claim that, as part of the collection proceeding, the CGR is on the verge of launching a "worldwide campaign of litigation"[77] against Foster Wheeler and Process Consultants, which may include

> attempting to enforce the CGR Decision in U.S. courts through conversion to a U.S. judgment; attempting to collect the CGR Decision through judicial proceedings in Colombia, and then attempting to enforce any resulting court orders in Colombia, the U.S., or another foreign jurisdiction; seeking to institute involuntary bankruptcy proceedings in the U.S., Colombia, or elsewhere; or [redacted][78]

44. According to Claimants,

> [a]s a matter of Colombian law, and of the law of those jurisdictions in which those corporations are located, such collection efforts would necessarily involve the commencement of proceedings before various national courts or quasi-judicial bodies[, and] many of the issues of which the Tribunal is now seized would have to be separately litigated.[79]

45. As Claimants explain it, these multi-jurisdictional parallel proceedings against Foster Wheeler and Process Consultants threaten this Tribunal's jurisdiction, [redacted],[80] thus justifying an "anti-suit injunction" – which is how they now characterize their request for interim relief.[81]

---

[77] Claimants' Reply on the Emergency Application, ¶ 8.

[78] *Id.*, ¶ 6.

[79] *Id.*, ¶ 7.

[80] *Id.*, ¶¶ 8-9. Claimants make a series of arguments regarding the supposedly irreparable nature of the financial harm that could result from the enforcement of the Ruling with Fiscal Liability. *Id.*, ¶¶ 9-11. Respondent will address these arguments in detail in its October 28 answer to Claimants' Provisional Measures Application. For now, suffice it to say that there is no threat of harm to Claimants, and any harm would be monetarily compensable and therefore, reparable.

[81] *See* n. 18, *supra.*

46. These potential threats to the Tribunal's jurisdiction and Claimants' business are an utter fabrication, completely unsupported by law (let alone Colombia law). Claimants did not cite to a single provision in support of their trumped-up argument.[82]

47. The CGR is the (only) Colombian authority competent to enforce rulings with fiscal liability (no other Colombian authority has that competence),[83] including the Ruling with Fiscal Liability, and it must exercise that competence strictly in accordance with Colombian law.[84] Under Colombian law, the CGR is simply not competent to embark on a "worldwide litigation campaign" against Claimants in order to enforce the Ruling with Fiscal Liability, as Claimants would like this Tribunal to believe. It must carry out any collection efforts in accordance with the provisions set forth in the relevant Colombian laws and regulations.[85] And while the CGR does have authority within the framework of the collection proceeding to formally request international assistance in the search and eventual attachment of assets abroad,[86] under Colombia law it cannot chase Foster

[82] They also do not offer any factual support, because none exists. Claimants have not pointed to a single international legal proceeding where the CGR or any other Colombian authority has attempted to attach or seize their assets. They point only to the searches that did take place, but were unsuccessful.

[83] *See* **Ex. RL-5**, Political Constitution of the Republic of Colombia, prior to Legislative Act No. 4 of September 18, 2019, Article 268(5); **Ex. RL-6**, Political Constitution of the Republic of Colombia, after Legislative Act No. 4 of September 18, 2019, Article 268(5).

[84] *See* **Ex. RL-6**, Political Constitution of the Republic of Colombia, after Legislative Act No. 4 of September 18, 2019, Article 6 (setting forth the principle that public authorities may only act within the scope of their competence).

[85] *See* **Ex. RL-24**, Administrative Code, Articles 98-101; **Ex. RL-34**, Decree Law 624 of 1989, which establishes the Tax Code for Taxes Administered by the National Tax and Customs Office ("Tax Code"), Fifth Book, Title VIII; **Ex. RL-33**, Decree Law 403 of 2020, Title XII; **Ex. RL-241**, Organizational Resolution No. 778 of 2021, which determines internal regulations for the collection of amounts through forced collection proceeding carried out by the Office of the Comptroller General of the Republic. Respondent's Memorial on Preliminary Objections, ¶ 116.

[86] *See* Respondent's Answer to the Emergency Application, ¶ 35, n. 51.

Wheeler and Process Consultants (or other affiliated companies that were not found fiscally liable) around the world seeking enforcement of the Ruling with Fiscal Liability.[87]

48. Without prejudice to Respondent's further arguments in opposition of Claimants Provisional Measures Application (which Colombia is scheduled to file on October 28), suffice it say that there is no heightened urgency in the present case that would justify granting the interim emergency relief requested by Claimants.

CONCLUSION

49. In conclusion, Claimants' convoluted attempts to complicate this issue should be ignored and their Emergency Application should be dismissed as Article 10.20(8) of the Treaty prohibits any orders to enjoin the implementation of the same "measure" supposedly in breach of the Treaty. Even if the Treaty did not explicitly carve out the type of injunctive relief requested here, Claimants' Emergency Application should still be dismissed as it does not meet the heightened test of urgency for granting temporary provisional measures because the CGR does not have the power to pose an imminent threat to Claimants' assets internationally.

50. Given the frivolous nature of Claimants' Emergency Application, Respondent respectfully requests that the Tribunal order Claimants to pay all costs and expenses related thereto, including Respondent's attorneys' fees.

RESERVATION OF RIGHTS

51. Respondent reserves the right to submit such additional evidence and arguments as it deems appropriate to supplement and respond to any evidence or

[87] *Id.*

arguments submitted by Claimants in connection with their Application, including evidence and arguments relating to the merits of the dispute.

Respectfully submitted,

Agencia Nacional de Defensa Jurídica del Estado

Ana María Ordoñez Puentes
Elizabeth Prado López
Giovanny Vega Barbosa

Agencia Nacional de Defensa Jurídica del Estado

CURTIS

Claudia Frutos-Peterson
Elisa Botero
Fernando Tupa
Juan Jorge
Maria Paulina Santacruz

Curtis, Mallet-Prevost, Colt & Mosle LLP

Counsel for Respondent