

October 25, 2021

By email

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Joint Venture Foster Wheeler USA
Corporation and Process Consultants, Inc.**
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**Re: Amec Foster Wheeler USA Corporation, Process Consultants, Inc., and Joint Venture
Foster Wheeler USA Corporation and Process Consultants, Inc. v. Republic of Colombia**
(ICSID Case No. ARB/19/34)

Dear Mesdames and Sirs,

I write to you on instructions from the President of the Tribunal.

On September 2, 2021, Claimants submitted an Application for Provisional Measures and Emergency Temporary Relief (the “Application”). On September 7, 2021, the Tribunal established a calendar for Respondent’s separate Responses to (a) the Request for Temporary Relief and (b) the Request for Provisional Measures. The Procedural Calendar was modified on September 20, 2021 and October 8, 2021. This Decision concerns Claimants’ Application for Emergency Temporary Relief.

(i) Claimants’ Position

In their Application and related communications, Claimants refer to the Auto 749 issued on April 26, 2021 by the *Contraloría General de la República de Colombia* (the “CGR Decision”) following fiscal liability proceedings in which damages in the amount of US\$811 million were awarded against Joint Venture Foster Wheeler USA Corporation and Process Consultants, Inc. (“FPJVC”), along with others. Claimants allege that the CGR Decision is the result of a proceeding improperly initiated by the CGR against FPJVC “in a transparent attempt to shift blame for alleged acts of

mismanagement from those who actually managed a project involving the modernization and expansion of a State-owned oil refinery located in Cartagena, Colombia.”¹

Claimants explain that they seek an emergency order preventing Colombia from disrupting the *status quo* by enforcing the CGR Decision pending the Tribunal’s determination of their Application for Provisional Measures. Claimants submit that the Tribunal has the authority to grant the requested emergency relief under Article 47 of the ICSID Convention and Article 10.20.8 of the US-Colombia TPA as their Application does not seek to enjoin the application of a measure alleged to constitute a breach under Article 10.16 of the US-Colombia TPA.

As to the urgency of the relief requested, Claimants refer to the Respondent’s confirmation that the proceedings to enforce the CGR Decision are underway and argue that this “worldwide campaign of litigation by Colombia while the CGR Decision is being challenged in this arbitration would aggravate this dispute, upset the status quo and threaten the Tribunal’s jurisdiction over the dispute.”²



(ii) Respondent’s Position

According to Respondent, the limitation in Article 10.20.8 of the US-Colombia TPA to a tribunal’s authority to recommend provisional measures under Article 47 of the ICSID Convention would prevent this Tribunal from issuing the emergency temporary relief requested by the Claimants. Respondent submits, *inter alia*, that here Claimants are seeking to enjoin the application of the same measure they allege is a violation of the US-Colombia TPA. Respondent contends that the enforcement of the CGR Decision is the “ultimate consequence” of the fiscal liability proceeding which the Claimants argue was initiated in breach of the US-Colombia TPA. Accordingly, enjoining the enforcement of the CGR Decision “would necessarily mean enjoining the ‘application’ or ‘implementation’ of the ‘measure’ alleged to constitute a breach of the Treaty, which is prohibited by Article 10.20(8).”⁴

Respondent also argues that Claimants have failed to meet the “heightened level of urgency” required to issue temporary emergency relief pending a decision on an application for provisional measures. Respondent submits that the fact that the CGR is initiating proceedings to enforce the CGR decision does not entail an imminent threat to Claimants’ assets. On this point, Respondent notes that the CGR (i) “has not located any assets owned by Foster Wheeler or Process Consultants, either in Colombia or abroad” and that, for that reason, it has not decreed any precautionary measures against the Claimants’ assets.⁵ Respondent further explains that, as of the date of its Answer to the Emergency

¹ Application, ¶ 2.

² Claimants’ Reply of October 18, 2021, ¶ 8.

³ Claimants’ Reply of October 18, 2021, ¶ 9.

⁴ Respondent’s Response of September 30, 2021, ¶ 23.

⁵ Respondent’s Response of September 30, 2021, ¶¶ 34-36.

Application (*i.e.* September 30, 2021), the CGR official in charge of the enforcement proceeding of the CGR Decision is in the process of reviewing such decision. If this official determines that the CGR Decision meets all legal requirements, it may initiate a voluntary collection phase seeking payment from the Claimants. Upon conclusion of that stage, the CGR may proceed with the forced collection stage. Any assets attached during the forced collection proceeding can only be auctioned off when all pending judicial reviews have concluded, so even at that stage, Claimants may initiate an annulment action against the Ruling with Fiscal Liability and may request a stay of enforcement.

(iii) Tribunal's Decision

The Tribunal has carefully reviewed and considered the Parties' submissions, including Claimants' communications of September 2, 15 and October 12, 2021 and Respondent's communications of September 30 and October 18, 2021 as regards Claimants' Application for Emergency Temporary Relief. The fact that the Tribunal does not specifically mention a given argument does not mean that it has not taken it into account.

The Tribunal considers that Claimants have failed to make a showing of the heightened level of urgency required to grant the emergency temporary relief that they have requested. In particular, Claimants have not provided evidence that any of their assets are currently under threat of harm. The Tribunal wishes to stress that this decision is without prejudice to the Tribunal's consideration of the Parties' arguments regarding the urgency of the Provisional Measures that Claimants have requested be issued until this arbitration is concluded, and its authority to order Provisional Measures in this arbitration in light of Article 10.20(8) of the US-Colombia TPA.

The Tribunal considers that its analysis of these matters would be further assisted by Respondent's Answer to the Request for Provisional Measures (due by October 28, 2021) and by the Parties' oral presentations on the Request for Provisional Measures. Accordingly, the Tribunal confirms that the Hearing on Provisional Measures will take place at the date tentatively scheduled, *i.e.*, November 4, 2021. The final schedule for the Hearing will be established by the Tribunal upon consultation with the Parties.

Accordingly, the Tribunal unanimously decides as follows:

- (a) Claimants' Request for Emergency Temporary relief is denied;
- (b) The Tribunal confirms that it will hear the Parties' oral arguments on Claimants' Request for Provisional Measures during the Hearing that will take place virtually on November 4, 2021.
- (c) Either Party may bring to the Tribunal's attention any new, relevant, facts that fundamentally change the current circumstances;
- (d) The Tribunal reserves its decision on costs for a later stage.

Sincerely yours,

[signed]

Marisa Planells-Valero
Secretary of the Tribunal

cc: Members of the Tribunal