

**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 ANSWER TO CLAIMANTS' APPLICATION FOR
EMERGENCY TEMPORARY RELIEF**

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INTRODUCTION

1. On September 2, 2021, Amec Foster Wheeler USA Corporation (“Foster Wheeler”), Process Consultants, Inc. (“Process Consultants”), and Joint Venture Foster Wheeler USA Corporation and Process Consultants, Inc. (“FPJVC”, and together with Foster Wheeler and Process Consultants, “Claimants”) submitted an application for provisional measures and emergency temporary relief (the “Application”), seeking “(1) an order for provisional measures preventing Colombia from initiating any enforcement proceedings with respect to the disputed [Ruling with Fiscal Liability] until the Tribunal has issued its final award on the merits”¹ (the “Provisional Measures Application”); as well as “(2) an order of emergency temporary relief restraining Colombia from initiating any enforcement proceedings with respect to the disputed [Ruling with Fiscal Liability] until the Tribunal renders a decision on [the Provisional Measures] Application”² (the “Emergency Application”).

2. The Republic of Colombia (“Colombia” or “Respondent”) submits this answer to Claimants’ Emergency Application (the “Answer to the Emergency Application”) in accordance with the calendar set forth by the Tribunal on September 20, 2021.³

3. The Provisional Measures Application and the Emergency Application both seek the same injunctive relief from the Tribunal, albeit with a different temporal scope.

¹ Claimants’ Application, ¶ 10 (emphasis added).

² Claimants’ Application, ¶ 10 (emphasis added).

³ 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 Answer to the Emergency Application shall have the meanings set forth in Respondent’s Memorial on Preliminary Objections of July 1, 2021.

Claimants request that the Tribunal issue an order enjoining Colombia from enforcing the Ruling with Fiscal Liability, the same “disputed” Ruling that they allege constitutes a breach of the Investment Chapter (the “Treaty”)⁴ of the Trade Promotion Agreement between the Republic of Colombia and the United States of America.

4. The fact that the injunctive relief sought by Claimants is so patently outside the scope of Article 10.20(8) of the Treaty – which prohibits the Tribunal from enjoining the implementation of the same “measure” supposedly constituting a breach thereof – simultaneously shows the frivolity of their Application and exposes their true purpose: to delve into the merits of a dispute over which the Tribunal has no jurisdiction.⁵ Indeed, Claimants’ Application is really a pleading on the merits. That much is apparent from a cursory review.⁶ The first 34 pages of their 64-page Application are essentially devoted to discussing in detail the alleged breaches of the Treaty by Respondent.⁷ Claimants

⁴ **Ex. RL-1**, United States – Colombia Trade Promotion Agreement, signed on November 22, 2006 and effective from May 15, 2012, Chapter 10 (the “Treaty”).

⁵ See Respondent’s Memorial on Preliminary Objections, ¶ 269.

⁶ For context, Claimants’ Request for Arbitration is 60 pages long, has five factual exhibits and one legal authority, and is not accompanied by witness statements. Claimants’ Application is 64 pages long and has 10 new factual exhibits and 38 new legal authorities. It is accompanied by four witness statements. The witness statement of Mr. Cesar Torrente is 17 pages long and has 20 new exhibits; the witness statement of Mr. Collin Johnson is 19 pages long and has 11 new exhibits; and the witness statements of Steve Conway and Mr. Thomas Grell are four pages long each.

⁷ See e.g. Claimants’ Application, ¶ 2 (“This fiscal liability proceeding was, as described in FPJVC’s Request for Arbitration and in this Application, conducted in a flawed and highly partial manner, and in violation of the most basic norms of due process, that stripped FPJVC of its rights under [the Treaty], including the right to fair and equitable treatment.”) (emphasis added), ¶ 3 (“As discussed below, the [Ruling with Fiscal Liability], on its face, plainly deprives FPJVC of its bargained-for contractual protections and its rights under the Treaty in numerous ways, including: . . .”) (emphasis added), ¶ 47 (“The fact that the CGR did precisely that constitutes a clear violation of Colombia’s obligations under the [Treaty] to provide fair and equitable treatment and due process, and to honor FPJVC’s reasonable expectations, because no reasonable investor could have possibly foreseen the risk of such treatment.”), ¶ 71 (“[I]t is completely improper and is a gross violation of Colombia’s obligations under the [Treaty] and international law to have held FPJVC liable as fiscal managers without evidence of decision-making authority – the retroactive application of a statute is one of the clearest violations of a host country’s obligations towards its foreign investors.”), ¶ 76 (“The CGR’s damages methodology does not meet the minimum requirements for a damages methodology in an investment treaty case, and suffers from multiple fundamental problems.”).

even attached the expert testimony of Mr. Collin Johnson, who acted as their “independent expert witness” in the Fiscal Liability Proceeding, and uses his testimony here to criticize the damage calculation methodology employed by the CGR.

5. Respondent is not going to fall prey to Claimants’ gamesmanship and address the merits of this case in the context of a provisional measures application.⁸ However, Respondent would be remiss not to point out that Claimants’ Application actually underscores that Respondent’s 10.20(4) objection should be upheld, and this case dismissed in its entirety. Underlying Claimants’ request for injunctive relief is a clear acknowledgement that they have suffered no certain loss or damage arising out of Colombia’s supposed substantive breaches of the Treaty.⁹ The absence of a loss or damage – presently and at the time they submitted their Request for Arbitration – prevents Claimants from bringing a claim against Colombia under the Treaty, and the Tribunal from making an award in their favor.¹⁰

6. As instructed by Tribunal, Respondent will now address Claimants’ Emergency Application.

⁸ For now, suffice it to say that Respondent rejects all such allegations and reserves all its rights.

⁹ See **Ex. R-93**, Letter from Claimants to Respondent, August 24, 2021, p. 2 (“**[REDACTED]**, and would aggravate the dispute between the parties at the same time that this arbitration, which seeks precisely to prevent such harm, is pending.”) (emphasis added). Claimants provided a copy of this letter with their Application, as exhibit C-003. However, Claimants had provided a different exhibit “C-003” with their Request for Arbitration. In order to avoid misunderstandings, Respondent is filing Claimants’ August 24 letter as exhibit R-93.

¹⁰ Respondent’s Memorial on Preliminary Objections, ¶¶ 251-261.

ARGUMENT

7. Claimants request that the “Tribunal award emergency temporary relief restraining Colombia from initiating and/or continuing any enforcement proceedings [of the Ruling with Fiscal Liability] until the Tribunal has rendered a decision on [their Provisional Measures] Application.”¹¹

8. Claimants’ Emergency Application should be dismissed because (A) Article 10.20(8) of the Treaty prohibits the Tribunal from enjoining the enforcement of the Ruling with Fiscal Liability, even on a temporary basis; and (B) in any case, there is no urgency or threat of imminent harm against Claimants justifying the temporary emergency relief requested by Claimants.

A. Tribunal Does Not Have the Authority under the Treaty to Grant the Injunctive Relief Requested by Claimants on an Emergency Basis (or Otherwise)

9. The injunctive relief that Claimants seek on a “temporary” basis (i.e. the Emergency Application) is the same injunctive relief they request pending a decision on the merits of this dispute (i.e. the Provisional Measures Application). The limitations on the Tribunal’s authority and the conditions to grant such injunctive relief are also the same, regardless of whether those provisional measures are to be granted on an emergency basis or not.

¹¹ Claimants’ Application, ¶ 30.

(1) **Article 10.20(8) of the Treaty Limits the Type of Provisional Relief that this Tribunal May Order, Prohibiting the Tribunal from Granting the Emergency Application (as well as the Provisional Measures Application)**

10. Claimants base their Application on Article 47 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the “ICSID Convention”) and Rule 39(1) of the Rules of Procedure for Arbitration Proceedings (the “ICSID Rules”). Claimants made no mention of the Treaty in their original Application.

11. Article 47 of the ICSID Convention provides as follows:

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.¹²

12. Under Article 47, ICSID tribunals do indeed have authority to recommend provisional measures when extraordinary circumstances so require.¹³ That much is undisputed. However, the parties to a dispute may agree on conditions and limitations to that authority.

¹² 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.”).

¹³ ICSID tribunals have uniformly agreed that the provisional measures contemplated in Article 47 of the ICSID Convention should be reserved for extraordinary circumstances. See e.g. **Ex. RL-228**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Decision on Provisional Measures, April 6, 2007, ¶¶ 32-33 (“It is common understanding that provisional measures should only be granted in situations of absolute necessity and urgency, in order to protect rights that could, absent these measures, be definitely lost. . . . It is not contested that provisional measures are extraordinary measures which should not be recommended lightly.”) (emphasis added); **Ex. RL-229**, *Emilio Agustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, October 28, 1999, ¶ 10 (“The imposition of provisional measures is an extraordinary measure which should not be granted lightly by the [a]rbitral [t]ribunal.”) (emphasis added); **Ex. RL-230**, *RSM Production Corporation and others v. Government of Grenada*, ICSID Case No. ARB/10/6, Tribunal’s Decision on Respondent’s Application for Security for Costs, October 14, 2010, ¶ 5.17 (“It is beyond doubt that a recommendation of provisional measures is an extraordinary remedy which ought not to be granted lightly.”) (emphasis added).

13. Article 10.20(8) of the Treaty – to which the Claimants agreed when submitting their claim to arbitration¹⁴ – actually restricts this Tribunal’s authority to grant provisional measures.¹⁵ Pursuant to Article 10.20(8),

A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal’s jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal’s jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 10.16. For purposes of this paragraph, an order includes a recommendation.¹⁶

14. Having failed to address Article 10.20(8) of the Treaty in their Application, Claimants cited to it in their September 15 letter to the Tribunal (the “September 15 Letter”),¹⁷ only after Respondent invoked such provision in its letter of September 9.¹⁸ In their letter, Claimants argued that the interim measures they seek “fall squarely within the authority of the Tribunal pursuant to Article 47 of the ICSID Convention and Article 10.20(8) of the [Treaty]”,¹⁹ but conveniently omitted any reference to the language expressly barring this Tribunal from granting them the injunctive relief they request.²⁰

¹⁴ **Ex. RL-1**, Treaty, Article 10.17.2 (providing that the submission of a claim to arbitration under Section 10 of the Treaty constitutes a claimant’s consent to arbitration in accordance with such Section).

¹⁵ See *id.*, Article 10.16.5 (“The arbitration rules applicable under paragraph 3 [i.e. the ICSID Convention and the ICSID Rules], . . . shall govern the arbitration except to the extent modified by this Agreement.”) (emphasis added).

¹⁶ *Id.*, Article 10.20(8) (emphasis added).

¹⁷ Letter from Claimants to the Tribunal, September 15, 2021, p. 4.

¹⁸ Letter from Respondent to the Tribunal, September 9, 2021, p. 1. See *also*, Respondent’s Memorial on Preliminary Objections, ¶ 269.

¹⁹ Letter from Claimants to the Tribunal, September 15, 2021, p. 4.

²⁰ In addition to omitting critically important language from their citation of the treaty, Claimants also cited an excerpt from *Alicia Grace v. Mexico* in support of their Application, without providing any of the necessary context, like that the requested provisional measures in that case were to halt criminal proceedings, not

15. Article 10.20(8) prohibits the Tribunal from “enjoin[ing] the application of a measure alleged to constitute a breach referred to in Article 10.16.”²¹ The language of the Treaty is plain and clear and leaves no room for interpretation. Tribunals called upon to apply provisions identical to this one have all agreed on its meaning:

- *IBT v. Panama*: “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. Such determination will depend on the specific facts of each case: the interim relief requested, the measure alleged to constitute a breach, and how close or remote is the causal link between the measure alleged to constitute a breach and the act sought to be enjoined. As a general rule, the only thing that is not allowed is to enjoin the application of the measure alleged to constitute a breach under pretext of granting a provisional measure.”²²
- *Feldman v. Mexico*: “[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.”²³

applicable here, and that the tribunal denied the request. Letter from Claimants to the Tribunal, September 15, 2021, p. 4.

²¹ **Ex. RL-1**, Treaty, Article 10.20(8).

²² **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).

²³ **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, ¶ 5. In their September 15 letter to the tribunal, Claimants attempted to distinguish *Feldman* from the present case by arguing that while the enforcement of the challenged tax decision was a part of the challenged measure, somehow, the enforcement of the administrative decision challenged in this arbitration constitutes a separate measure. This is not the case. The enforcement of a measure is still a part of the challenged measure and enjoining it was clearly prohibited by NAFTA Article 1134 in *Feldman* and is prohibited by Article 10.20(8) in this case. See Letter from Claimants to the Tribunal, September 15, 2021, n. 14.

- Pope & Talbot v. Canada: “Article 1134 of NAFTA does not confer jurisdiction on the Tribunal to enjoin the application of a measure . . .” and its implementation.”²⁴

16. Moreover, the prohibition in Article 10.20(8) is consistent with Article 10.26(1) of the Treaty, which limits the types of remedies a tribunal may award to monetary damages and restitution of property.²⁵ If a tribunal constituted under the Treaty cannot order a respondent to revert, stop, or modify a measure found to be in violation of the Treaty, it follows that it also cannot enjoin the application of such measure.²⁶ Kinnear and Bjorklund explain:

Article 1134 [which is identical, *mutatis mutandis*, to Article 10.20(8) of the Treaty] specifically excludes interim orders in the nature of attachment or which enjoin the measure at issue. These exclusions narrow the scope of interim measures available in Chapter 11 arbitrations. These exclusions are consistent with Article 1135, which limits the final award of a Chapter 11 tribunal to monetary damages or restitution at the election of the disputing Party. A tribunal cannot order a Party to amend or withdraw the challenged measure on either an interim or final basis.²⁷

²⁴ **Ex. RL-233**, *Pope & Talbot Inc v. Government of Canada*, UNCITRAL (NAFTA), Ruling by Tribunal on Claimants’ Motion for Interim Measures, 2000 (“*Pope & Talbot*”). Claimants also attempted to distinguish *Pope & Talbot* from this case by arguing that the claimants in *Pope & Talbot* challenged “the very law it claimed was a breach” when, in fact, the tribunal stated that it refused to enjoin the “application” and “implementation” of the challenged measure. See Letter from Claimants to the Tribunal, September 15, 2021, n. 14 and **Ex. RL-233**, *Pope & Talbot*, ¶ 1.

²⁵ Respondent’s Memorial on Preliminary Objections, ¶¶ 269-271.

²⁶ **Ex. RL-1**, Treaty, Article 10.26(1) (“Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; and (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution. A tribunal may also award costs and attorney’s fees in accordance with this Section and the applicable arbitration rules.”). See Respondent’s Memorial on Preliminary Objections, ¶¶ 269-271; n. 30, *infra*.

²⁷ **Ex. RL-234**, Meg Kinnear, Andrea K. Bjorklund *et al.*, *Article 1134 - Interim Measures of Protection*, in INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11 (Kluwer International Law 2006), p. 2 (emphasis added).

17. Others have reached the same conclusion, stating:

NAFTA Article 1134, quoted above, provides for interim relief to preserve the rights of a disputing party. However, in contrast to the ICSID system, it makes it clear that the rights in dispute cannot be the subject matter of the provisional measures. The reason for this appears to be that 'Articles 1134 and 1135 permit a state to implement and maintain a measure even if it breaches substantive rights contained in Chapter 11A. Thereafter, even if restitution is ordered, a State Party may choose to pay monetary damages instead.'

²⁸

18. Claimants do not seem to dispute the scope of the limitation in Article 10.20(8), but claim that it does not apply in this case. The test is simple and straightforward: if the Tribunal finds that the Claimants' are seeking to enjoin the application of the same measure allegedly constituting a breach, then it must reject Claimant's Emergency Application (as well as the Provisional Measures Application).

(2) Claimants Are Seeking to Enjoin the Application of the Same Measure They Allege Is a Violation of the Treaty

19. After having completely ignored the prohibition in Article 10.20(8) of the Treaty in their original September 2 Application, in their September 15 Letter Claimants tried to argue that the provisional measures they seek are not aimed at enjoining the same measure they allege constitutes a breach of the Treaty. According to Claimants:

Claimants' Application does not seek to enjoin the concluded fiscal liability proceeding that, as alleged in their Request for Arbitration, Colombia commenced . . . in violation of FPJVC's rights under Chapter 10 of the TPA . . . Nor do Claimants seek specific performance of the PMC Contract that required, among other things, [REDACTED]

²⁸ **Ex. RL-235**, Gabrielle Kaufmann-Kohler *et al.*, *Interim Relief in International Investment Agreements*, in *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO KEY ISSUES* (K. Yannaca-Small (ed.), Oxford University Press 2018), ¶ 24.28.

██████ (a significant departure from the US \$811 million the CGR asserts to be FPJVC's liability).²⁹

20. Quite absurdly, in the paragraph that immediately follows Claimants themselves admitted that the provisional relief they seek is meant to enjoin the implementation of the same measure allegedly constituting a violation of the Treaty. In Claimants' own words:

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 concluded fiscal liability proceedings, **while the arbitration challenging the CGR Decision is heard**.³⁰

21. Claimants' contorted arguments cannot obscure reality. The provisional measures requested by Claimants – an order preventing Respondent from enforcing the Ruling with Fiscal Liability – seeks to enjoin the “application” of the “measures” supposedly constituting a breach of the Treaty – the Fiscal Liability Proceeding itself and the Ruling with Fiscal Liability that resulted from it.³¹ For that reason, Article 10.20(8)

²⁹ Letter from Claimants to the Tribunal, September 15, 2021, p. 3.

³⁰ 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.

³¹ 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.

bars this Tribunal from granting the provisional measures Claimants' seek, both on an emergency temporary basis or pending a decision on the merits.

22. The decision on provisional measures in *IBT v. Panama* supports this conclusion. In that case, the claimants initiated an arbitration arguing that Panama had breached the US-Panama TPA when the ministry of government issued an administrative resolution (i) terminating a construction contract executed by claimants due to contract breaches, (ii) disqualifying claimants from entering into contracts with Panama for a period of three years, and (iii) notifying the issuer of the contract's performance bond of the contract's termination. Following the issuance of the administrative resolution, Panama took steps to execute the performance bond, which prompted the claimants to request an order from the tribunal enjoining such execution, as well as the 3-year disqualification. Panama opposed the claimants' application arguing that the US-Panama TPA, which contains a provision identical to Article 10.20(8) of the Treaty, barred the tribunal from enjoining the application of the same measure at issue in the arbitration. The claimants argued that it was not the same measure, because they had never argued that the execution of the performance bond and the imposition of a 3-year disqualification were in and of themselves in violation of the US-Panama TPA.³² In siding with Panama, the tribunal explained:

What is the ordinary meaning of the expression 'application of a measure' [in Article 10.20(8)]?

According to the *Diccionario de la Lengua Española*, '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.'

³² **Ex. RL-231**, *IBT*, ¶ 89.

... Therefore, an arbitral tribunal called to decide on a request for provisional measures under article 10.20(8) of the [t]reaty must examine, in each specific case, if the [provisional measure] requested impedes or suspends the implementation of the measure that is deemed a breach, through which the State is aiming at a certain effect. For each case an analysis is to be made as to 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.

The issue in this case is to determine whether the execution of the [performance bond] and the disqualification are part of the practical implementation of the measure constituting the violation (that is, the [administrative resolution terminating the contract]). The [a]rbitral [t]ribunal believes that to be the case.

...

[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.³³

23. In this case, the Ruling with Fiscal Liability is the culmination of the Fiscal Liability Proceeding (i.e. the “measure”), which, according to Claimants, was initiated and conducted in violation of the Treaty.³⁴ The enforcement of the Ruling with Fiscal Liability

³³ *Id.*, ¶¶ 99-102, 107 (translation from Spanish; emphasis added). In attempting to distinguish *IBT*, Claimants completely mischaracterize it. Claimants argue that “[t]he ICSID tribunal in that arbitration was not being asked to preserve the *status quo*. It was asked to grant specific performance of a contract and to modify the *status quo*, placing claimants in their original position prior to the respondents’ alleged contractual breaches, which entailed, *inter alia*, reversing the execution of a bond by a third-party surety.” Letter from Claimants to the Tribunal, September 15, 2021, p. 6 (emphasis omitted). The *IBT* tribunal performed no such analysis; it simply found it did not have competence to grant the claimants’ provisional measures request because it fell within the scope of the limitation in Article 10.20(8). **Ex. RL-231, *IBT*, ¶ 108** (“[T]he [p]rovisional [m]easures requested fall within the [l]imitation [set forth in Article 10.20(8)] and, therefore, the [a]rbitral [t]ribunal lacks competence to order them.”), ¶ 122 (“In conclusion, the [a]rbitral [t]ribunal considers that, duly interpreted, art. 10.20(8) of the [t]reaty does not allow for an order paralyzing the execution of the [performance bond] and the disqualification, because both are immediate consequences of a measure that is supposedly in breach [of the treaty] and, thus, are part of the application [of such measure].”) (translation from Spanish; emphasis omitted).

³⁴ Request for Arbitration, ¶¶ 2, 9, 14, 76-80, 97, 104, 105, 109, 136, 154, 156-167, 176, 184, 187, 197-199, 215. See n. 31, *supra*.

(obtaining voluntary payment or forcibly collecting payment)³⁵ is the ultimate consequence of the Fiscal Liability Proceeding, which seeks compensation for the damage to public assets caused by inadequate fiscal management.³⁶ Thus, enjoining the enforcement of the Ruling with Fiscal Liability, as Claimants' request, 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).

24. The cases of *Perenco v. Ecuador* and *City Oriente v. Ecuador and Petroecuador* cited by Claimants in support of their Emergency Application do not aid their case. While both the *Perenco* and *City Oriente* tribunals granted temporary provisional measures pending a final decision on provisional measures,³⁷ neither of those cases were based on treaties with a provision similar to Article 10.20(8) of the Treaty. *Perenco* was brought under the Ecuador-France BIT,³⁸ while *City Oriente* was a contract based arbitration.³⁹

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

³⁵ See ¶¶ 39-43, *infra*.

³⁶ Respondent's Memorial on Preliminary Objections, ¶¶ 77-78, 81. See Claimants' Application, ¶ 61 ("The CGR is in charge of fiscal control, which includes the surveillance of the adequate administration and management of public funds or goods and the power to initiate fiscal liability proceedings to recoup public resources in cases where there is damage against the State.") (emphasis added).

³⁷ **Ex. CL-21**, *Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, May 8, 2009 ("*Perenco*"), ¶¶ 23, 28; **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 ("*City Oriente*"), ¶ 13.

³⁸ **Ex. CL-21**, *Perenco*, ¶ 17.

³⁹ **Ex. CL-23**, *City Oriente*, ¶ 48 ("The Contract contains no provision whatsoever prohibiting the adoption of provisional measures.").

B. In Any Event, There Is No Urgency Warranting the Emergency Relief Sought by Claimants before the Tribunal Issues a Decision on the Provisional Measures Application

26. In the unlikely event that the Tribunal determines that it has authority to issue the temporary injunctive relief Claimants seek in their Emergency Application (*quod non*), it must still refuse it because the heightened test of urgency required to issue temporary provisional measures is not met.⁴⁰

(1) Granting Temporary Provisional Measures Requires a Heightened Level of Urgency

27. ICSID tribunals faced with requests for emergency temporary relief pending a decision on provisional measures frequently grant or dismiss such requests by letter, without delving into their reasoning in a separate decision.⁴¹

28. However, the tribunal in *Gabriel Resources v. Romania* issued a separate decision articulating a test to determine whether to issue emergency temporary relief. In

⁴⁰ The Tribunal asked Colombia to submit a separate answer to Claimants' Provisional Measures Application by October 28, 2021. Respondent will be addressing each of the conditions for granting provisional measures then. For now, suffice it to say that those conditions have not been met in this case. As demonstrated in Respondent's Memorial on Preliminary Objections, the Tribunal does not have *prima facie* jurisdiction over Claimants' claim. Respondent's Memorial on Preliminary Objections, ¶¶ 279-343. Claimants' have also failed to establish a *prima facie* case on the merits. *Id.*, ¶¶ 168-261. There is no showing the provisional measures requested are urgent and necessary to prevent an irreparable harm. Moreover, if the Tribunal were to grant the injunctive relief requested by Claimants, it would prejudice the merits of the dispute and infringe upon Respondent's legitimate right to enforce the Ruling with Fiscal Liability in accordance with Colombian law.

⁴¹ See e.g. **Ex. RL-236**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Claimant's Request for Provisional Measures, December 13, 2012, ¶¶ 21-22 ("On 15 October 2012, Claimant submitted its Reply on Provisional Measures ("Reply") together with the Second Witness Statement of Mr. Timothy Livesey. In the Reply, Claimant renewed its request that, given the imminent nature of the harm anticipated by Claimant, the Tribunal immediately grant the requested provisional measures as a temporary restraint pending disposition of the Request. By letter dated 18 October 2012, the Secretariat informed the Parties of the Tribunal's decision that the Tribunal would not decide on the requested relief before having received Respondent's Rejoinder and having heard both Parties' arguments at the oral hearing.").

rejecting the claimant's request for emergency temporary relief, the *Gabriel Resources* tribunal stated:

The real question for the Tribunal at the stage of the Request for Emergency Temporary Provisional Measures is whether the urgency of the matter as explained by the Claimants justify an emergency temporary provisional measure pending the final decision on the Second Request for Provisional Measures. The Tribunal is of the view that the heightened test of urgency is not met.⁴²

29. In that case, the claimant's requested emergency temporary relief ordering the respondent "to refrain from enforcing or taking any action in connection with a [certain] VAT assessment . . . on [claimant's Romanian subsidiary,]. . . pending determination by the [tribunal] of the [claimant's] [request for [provisional [measures]]."⁴³ The *Gabriel Resources* tribunal reasoned that the heightened test of urgency was not met in that case because (i) there was "insufficient evidence" that the measure (i.e. the VAT assessment) was "not in accordance with Romania law", (ii) there was no threat of "irreparable harm" to the claimant, (iii) there were procedures "being pursued for the VAT Assessment to be challenged", and (iv) "the right of the State to enforce its domestic laws" weighted against claimant's request for provisional measures.⁴⁴

(2) There Is No Heightened Urgency in Claimants' Emergency Application

30. As in *Gabriel Resources*, the heightened test of urgency for the issuance of emergency temporary relief is not met in this case. There is no urgency whatsoever in

⁴² **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 ("*Gabriel Resources*"), ¶ 36 (emphasis added).

⁴³ *Id.*, ¶¶ 8(b), 9.

⁴⁴ *Id.*, ¶¶ 37, 39, 40, 41.

Claimants' Application, let alone an imminent threat to Claimants' assets requiring emergency temporary relief pending the Tribunal's decision on the Provisional Measures Application – which, according to the schedule set forth by the Tribunal, is likely only a couple of months away.⁴⁵

31. Claimants argue that they seek emergency temporary provisional measures “[b]ecause Colombia has already taken steps to enforce the [Ruling with Fiscal Liability] and is unwilling to agree not to seek enforcement action against FPJVC, [and therefore] the harm will likely occur even before this Tribunal rules on this Application”.⁴⁶

32. As supposed evidence of that threat, Claimants point to a letter from Respondent to Claimants dated September 1, 2021. In that letter, Respondent stated that it could not voluntarily agree to stay the enforcement of the Ruling with Fiscal Liability as Claimants' requested, and that it could “only represent and provide assurances that it [would] continue to comply with its Constitution and laws, and that each of its organs [would] continue to act within the bounds of their competence”.⁴⁷ According to Claimants, Respondent's September 1 letter “signal[s] its intention to proceed” with the enforcement of the Ruling with Fiscal Liability.⁴⁸

⁴⁵ Pursuant to the schedule set forth by the Tribunal on September 20, Respondent is due to answer Claimants' Provisional Measures Application on October 28, 2021. The Tribunal can and should wait for Respondent's full response before deciding whether to issue any provisional measures in this case.

⁴⁶ Claimants' Application, ¶ 28.

⁴⁷ **Ex. R-94**, Letter from Respondent to Claimants, September 1, 2021. Claimants provided a copy of this letter with their Application, as exhibit C-003. However, Claimants had provided a different exhibit “C-003” with their Request for Arbitration. To avoid misunderstandings, Respondent is filing its September 1 letter to Claimants as exhibit R-94. See n. 9, *supra*.

⁴⁸ Claimants' Application, ¶ 91. See also, Claimants' Application, ¶ 9 (stating that from Respondent's September 1 letter, “it appears clear that Colombia intends to begin immediate steps to enforce the [Ruling with Fiscal Liability].”).

33. Claimants are wrong. There is absolutely no evidence that any of their assets [REDACTED] are under threat of imminent harm. To be clear, the enforcement of the Ruling with Fiscal Liability will in fact begin in accordance with Colombian law.⁴⁹ However, the fact that the CGR is initiating enforcement proceedings does not entail an imminent threat to Claimants' assets.

The CGR has not located any assets owned by Foster Wheeler or Process Consultants, either in Colombia or abroad

34. In accordance with Colombian law, during the Fiscal Liability Proceeding the CGR conducted a search – both domestically and abroad – for assets owned by the allegedly liable parties, including Foster Wheeler and Process Consultants, that could be used to satisfy the amount of a potential ruling with fiscal liability.⁵⁰

35. The CGR faces enormous practical hurdles in the search of assets abroad. It must formally request assistance from authorities in other jurisdictions based on international treaties and other cooperation agreements.⁵¹ Foreign authorities are often

⁴⁹ Respondent's Memorial on Preliminary Objections, ¶¶ 115-121 (describing the "forced collection proceeding" that follows a ruling with fiscal liability).

⁵⁰ See **Ex. RL-8**, Law 610 of 2000, which establishes the procedure for fiscal liability proceedings under the authority of the Comptroller's Office, prior to the amendments of Decree Law 403 of 2020 Law 610 of 2000 ("Prior Law 610 of 2000"), Article 10 ("Officials of the comptroller's offices who perform investigative or inquiry functions, or who are commissioned to take evidence in a fiscal liability proceeding, have authority of judiciary police. For such purpose, . . . they shall have the following [functions]: . . . 3. To request information from official or private entities in search of data that may be of interest to request the initiation of the fiscal liability proceeding or for the inquiries or investigations therein, including the identification of the assets of the persons involved in the facts generating economic damage to the State, including protected information. 4. To report assets of the allegedly liable parties to the judicial authorities, so that the relevant precautionary measures may be taken, without the need to provide a guarantee.") (translation from Spanish).

⁵¹ Within the CGR, the international search for assets is conducted by the National and International Cooperation Unit for Prevention, Investigation and Seizure of Assets ("UNCOPI", by its Spanish acronym). UNCOPI was governed by Resolution No. 247 of 2013 until October 11, 2019, and is now governed by Resolution No. 724 of 2019. See **Ex. RL-238**, Regulatory Resolution No. 0247 of 2013, which issues the rules for the operation of the National and International Cooperation Unit for Prevention, Investigation and Seizure of Assets, Article 3(7); **Ex. RL-239**, Organizational Resolution No. OGZ-0724 of 2019, which

unresponsive, international instruments for cooperation currently in place are not well suited for the search of assets in non-criminal matters,⁵² and the CGR is regularly asked to identify the assets with respect to which it requires assistance *before* any assistance can be provided.⁵³

36. The CGR was unable to locate any assets of Foster Wheeler or Process Consultants abroad.⁵⁴ Moreover, the CGR could not locate any assets of Foster Wheeler and Process Consultants in Colombia – not even a single bank account, vehicle, or office space.⁵⁵

No precautionary measures against Claimants' assets are currently in force

37. Having failed to identify any assets owned by Claimants, the CGR did not decree any precautionary measures against assets of Foster Wheeler or Process

redefines the functions of the National and International Cooperation Unit for the Prevention, Investigation and Seizure of Assets and creates the attached Assets Search Group, Article 3(10).

⁵² See e.g. **Ex. RL-240**, United Nations Convention Against Corruption, adopted by the UN General Assembly on October 31, 2003, entered into force on December 14, 2005, Article 43(1) ("States Parties shall cooperate in criminal matters in accordance with articles 44 to 50 of this Convention. Where appropriate and consistent with their domestic legal system, States Parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption") (emphasis added), Article 46(1) ("States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention"). As Respondent explained, fiscal liability proceedings are not criminal in nature. Respondent's Memorial on Preliminary Objections, ¶¶ 81-82.

⁵³ See e.g. **Ex. R-95**, Letter from the U.S. Department of Justice to UNCOPI, April 22, 2019, p. 1.

⁵⁴ **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.

⁵⁵ [REDACTED] Claimants' do not have an investment in Colombia. See Respondent's Memorial on Preliminary Objections, ¶¶ 281-298.

Consultants during the Fiscal Liability Proceeding,⁵⁶ even though it had authority to do so.⁵⁷

38. Moreover, because the CGR first needs to identify an asset before it can attach it, there is absolutely no short term risk that the CGR will “immediately issue precautionary attachment orders over the assets of the Claimants, including an asset freezing or asset seizure order, preventing Claimants from freely disposing and/or dissolving their assets”, as Claimants argue.⁵⁸

The enforcement of the Ruling with Fiscal Liability is in its early stages; Claimants will have an opportunity to resist enforcement

39. As already explained by Respondent, the forced collection proceedings of rulings with fiscal liability take place in two stages: the voluntary collection stage – which seeks to obtain payment of the amount owed by debtors on a voluntary basis by means of negotiated payment agreements –, and the forced collection stage.⁵⁹

⁵⁶ 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).

⁵⁷ **Ex. RL-8**, Prior Law 610 of 2000, Article 12 (“At any time during the fiscal liability proceeding, precautionary measures may be decreed on the assets of the person allegedly liable for a detriment to public assets, for an amount sufficient to cover payment of the possible detriment to the State, without the need of a surety bond from the official ordering such measures. . . .”) (translation from Spanish; emphasis added). See, n. 54, *supra*.

⁵⁸ **CW1-1**, Mr. Cesar Torrente Witness Statement, ¶ 11 (emphasis omitted).

⁵⁹ Respondent’s Memorial on Preliminary Objections, ¶¶ 116-120.

40. Before the voluntary stage can even begin, the ruling with fiscal liability is assigned to an official of the forced collection offices of the CGR.⁶⁰ Once assigned, the official responsible must conduct a formal review of the ruling with fiscal liability to verify that it complies with the legal requirements of an enforceable instrument (i.e. *título ejecutivo*).⁶¹ If the official responsible determines that those legal requirements are not met, he or she may ask that the deputy comptroller's office that conducted the fiscal liability proceeding supplement or amend the ruling with fiscal liability.⁶² As of the date of this Answer to the Emergency Application, the CGR official that will be responsible for the forced collection proceeding of the Ruling with Fiscal Liability is in the process of reviewing it.

41. If and when the official responsible determines that the Ruling with Fiscal Liability meets all legal requirements, it may initiate a voluntary collection stage – which may last up to three months – seeking voluntary payment from Foster Wheeler and Process Consultants, as well as from the rest of the fiscally liable parties.⁶³ As of the date of this Answer to the Emergency Application, the voluntary stage of the forced collection proceeding has not even begun.

⁶⁰ **Ex. RL-241**, Organizational Resolution No. 778 of 2021, which determines internal regulations for the collection of amounts through forced collection proceedings carried out by the Office of the Comptroller General of the Republic (“Resolution No. 778 of 2021”), Article 15.

⁶¹ *Id.*, Article 14.

⁶² *Id.*, Article 14 (Paragraph 1).

⁶³ As a reminder, the Ruling with Fiscal Liability is joint and several. See Respondent's Memorial on Preliminary Objections, ¶¶ 7, 10, 127, 128, 150, 255, 275, n. 515. See *id.*, ¶¶ 88, 108.

42. Upon conclusion of the voluntary stage, the CGR will proceed with the forced collection stage.⁶⁴ The forced collection stage will begin with an administrative act ordering payment in favor of the CGR.⁶⁵

43. During the forced collection stage, the debtors, including Foster Wheeler and Process Consultants, will have the opportunity to fully exercise their right of defense by filing objections, reconsiderations, and challenges to resist the CGR's collection efforts.⁶⁶

Any additional search for assets during the forced collection proceeding will take time and do not immediately threaten Claimants' assets

44. In accordance with Colombian law, during the forced collection proceeding the CGR may renew its search for assets owned by all the fiscally liable parties, including Foster Wheeler and Process Consultants.⁶⁷

45. [REDACTED]

[REDACTED], a renewed search will likely be as unsuccessful as the original one.

⁶⁴ **Ex. R-98**, Letter from the Director of Forced Collection No. 1 to *Agencia Nacional de Defensa Jurídica del Estado*, September 27, 2021 (stating that the forced collection proceeding of the Ruling with Fiscal Liability has not yet begun).

⁶⁵ See Respondent's Memorial on Preliminary Objections, ¶ 117; **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"), Article 826.

⁶⁶ See Respondent's Memorial on Preliminary Objections, ¶¶ 118-121; **Ex-RL-34**, Tax Code, Article 830, 831 (stating that debtors may file objections against the payment order); **Ex-RL-33**, Decree Law 403 of 2020, which establishes rules for the proper implementation of Legislative Act 04 of 2019 and the strengthening of fiscal control ("Decree Law 403 of 2020"), Article 114(5) (stating that the administrative act that rejects all or part of the objections against the payment order is subject to reconsideration), Article 116 (stating that the administrative act that rejects the objections, in full or in part, and orders the execution and auction of assets may be challenged before the administrative adjudicatory jurisdiction).

⁶⁷ **Ex. RL-33**, Decree Law 403 of 2020, Article 117; **Ex. RL-241**, Resolution No. 778 of 2021, Articles 16(1), 19.

46. The search for assets abroad will face the same hurdles already described.⁶⁸ Even if the CGR manages to identify assets abroad owned by Foster Wheeler and Process Consultants, procuring attachments over those assets will be equally challenging.⁶⁹

47. For these reasons, Claimants' assets in Colombia and abroad are not under immediate threat.

Any assets attached during the forced collection proceeding can only be auctioned off when all pending judicial reviews have concluded

48. Even if the CGR manages to identify and attach assets abroad owned by Foster Wheeler and Process Consultants, under Colombian law, the auction of those assets cannot take place until the courts of the administrative judicatory jurisdiction rule on any annulment actions against the Ruling with Fiscal Liability initiated by Claimants.⁷⁰

⁶⁸ See ¶ 35, *supra*.

⁶⁹ The CGR would have to engage counsel in a foreign jurisdiction, rely on the cooperation of local authorities in that jurisdiction, and comply with the legal requirements for the attachment of assets in such jurisdiction.

⁷⁰ Pursuant to an August 26, 2021 decision of the *Consejo de Estado*, Claimants may challenge the Ruling with Fiscal Liability before the administrative adjudicatory jurisdiction through an annulment action. **Ex. R-99**, *Consejo de Estado* of Colombia, Chamber for Administrative Adjudicatory Proceedings, Special Decision Chamber No. 20, Decision on Admission, August 26, 2021, p. 13. See **Ex. RL-24**, Law 1437 of 2011, which establishes the Code of Administrative Procedure and Administrative Adjudicatory Proceedings ("Administrative Code"), Article 138. Within the annulment proceeding, Claimants may apply for precautionary measures, including a provisional stay of enforcement of the Ruling with Fiscal Liability. **Ex. RL-24**, Administrative Code, Articles 229, 230(3). Even without a stay of enforcement, the fact that an annulment proceeding is pending would prevent the CGR from auctioning any of Claimants' assets. **Ex. RL-33**, Decree Law 403 of 2020, Article 116. **CW1-1**, Mr. Cesar Torrente Witness Statement, ¶ 32 ("If the Enforcement Proceedings conclude before the Nullity Action or Future Nullity Action is decided (if the Provisional Stay was not granted), the CGR will have to wait for the final judicial decision in order to sell and/or liquidate FPJVC's assets."). See n. 66, *supra*.

The CGR has a constitutional and legal obligation to enforce the Ruling with Fiscal Liability

49. The Ruling with Fiscal Liability is an administrative act that is deemed legal so long as it is not annulled by the Administrative Adjudicatory Jurisdiction.⁷¹ Accordingly, the CGR has a constitutional and legal obligation to enforce the Ruling with Fiscal Liability and to attempt to recover the amount determined therein.⁷² Such enforcement will be carried out in accordance with Colombian law, which Respondent has a sovereign right to enforce.⁷³

* * *

50. The absence of any short term threat to Claimants' assets shows that the supposed urgency underlying their Emergency Application is completely manufactured. Claimants proffered no evidence to demonstrate that the circumstances of this case meet the "heightened test of urgency" for granting the temporary injunctive relief they seek. As in *Gabriel Resources*, (i) there is no evidence that the enforcement of the Ruling with Fiscal Liability is not in accordance with Colombian law; quite the opposite, Respondent has shown that such enforcement proceeding is established in the relevant laws and regulations;⁷⁴ (ii) there is no threat of "irreparable harm" to Claimants because, as Respondent has shown, there is no short term danger to Claimants' assets;⁷⁵ (iii) there are

⁷¹ **Ex. RL-24**, Administrative Code, Article 88.

⁷² 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.

⁷³ See **Ex. RL-237**, *Gabriel Resources*, ¶ 41.

⁷⁴ See ¶ 29, *supra*

⁷⁵ See ¶ 29, *supra*

procedures established in Colombian law for Claimants to challenge the enforcement of the Ruling with Fiscal Liability;⁷⁶ and (iv) Colombia's right to enforce its domestic laws outweighs Claimants' feigned concern about the enforcement of the Ruling of Fiscal Liability.⁷⁷ The circumstances in this case simply do not justify the extraordinary step of ordering temporary provisional measures.

51. In support of their Emergency Application, Claimants cited to the cases of *Perenco* and *City Oriente*. Leaving aside the fact that neither of those cases were based on treaties with a provision similar to Article 10.20(8) of the Treaty,⁷⁸ *Perenco* and *City Oriente* can also be distinguished on the facts. In *Perenco*, the tribunal granted an injunction preventing Ecuador from seizing the claimant's assets physically in Ecuador including oil, plant, equipment, or bank balances, which seizure was to take place "in three days' time".⁷⁹ Here, Respondent has failed to locate any assets in Colombia owned by Claimants and there is no imminent threat of attachment or seizure. The *City Oriente* tribunal ordered "both parties to refrain from engaging in any conduct – including, without limitation, any act, resolution or decision – that may directly or indirectly affect or modify the legal situation existing" at the time,⁸⁰ after the claimant argued that the Ecuador's attorney general had announced the filing of a criminal complaint against City Oriente's

⁷⁶ See n. 66, *supra*.

⁷⁷ See also, **Ex. RL-242**, *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Procedural Order No. 2, October 16, 2002, p. 301 ("We cannot enjoin a State from conducting the normal processes of criminal, administrative and civil justice within its own territory. We cannot, therefore, purport to restrain the ordinary exercise of these processes.").

⁷⁸ See ¶ 24, *supra*.

⁷⁹ **Ex. CL-21**, *Perenco*, ¶¶ 23, 25, 46.

⁸⁰ **Ex. CL-23**, *City Oriente*, ¶ 13.

representatives and managers.⁸¹ In contrast, there is no imminent threat to Claimants or their assets stemming from the enforcement of the Ruling with Fiscal Liability.

CONCLUSION

52. In sum, Claimants' Emergency Application should be dismissed because Article 10.20(8) of the Treaty prohibits the Tribunal from ordering the injunctive relief requested by Claimants. Moreover, the heightened test of urgency for granting temporary provisional measures is not met in this case because the enforcement of the Ruling with Fiscal Liability by the CGR does not imminently threaten Claimants' assets.

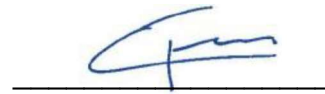
53. Given the frivolous nature of Claimants' Emergency Application, Respondent respectfully requests that the Tribunal order Claimants to pay all costs and expenses related thereto, including Respondent's attorneys' fees.

RESERVATION OF RIGHTS

54. Respondent reserves the right to submit such additional evidence and arguments as it deems appropriate to supplement this Answer to the Emergency Application, as well as to respond to any evidence or arguments submitted by Claimants, including evidence and arguments relating to the merits of the dispute.

⁸¹ *Id.*, ¶ 12.

Respectfully submitted,



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