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 PROVISIONAL MEASURES

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INTRODUCTION

1. 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") applied to the Tribunal seeking an order for provisional measures to enjoin Colombia from enforcing the Ruling with Fiscal Liability until the Tribunal renders a final award on the merits (the "Provisional Measures Application").[1] The Republic of Colombia ("Colombia" or "Respondent") submits this answer to Claimants' Provisional Measures Application ("Answer to the Provisional Measures Application")[2] in accordance with the procedural calendar set forth by the Tribunal on September 20, 2021.[3]

2. Claimants were also seeking, on a temporary emergency basis, an order for provisional measures enjoining Colombia from enforcing the Ruling with Fiscal Liability

[1] Claimants' Application for Provisional Measures and Emergency Temporary Relief, September 2, 2021 ("Claimants' Application"), ¶ 10 (emphasis added).

[2] 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 Provisional Measures Application shall have the meanings set forth in Respondent's Memorial on Preliminary Objections of July 1, 2021. References in the form of "**CWS-**" are to the witness statements submitted by Claimants in this Arbitration.

[3] Respondent will not deal in this Answer to the Provisional Measures Application with the factual allegations on the merits of this dispute (and even on quantum issues) made by Claimants in their Application, and will only respond to those that are directly related to the standards and conditions that are relevant to their provisional measures request. In particular, Respondent will not be addressing the witness statement of Mr. Colin Johnson, which is solely focused on issues of merits and quantum. *See* Letter from Respondent to the Tribunal, September 9, 2021, p. 3. As Respondent previously stated, in a clear attempt to disregard the order of the Tribunal to bifurcate these proceedings to decide Respondent's objection under Article 10.20.4 of the Treaty and its jurisdictional objections as a preliminary question, Claimants submitted a full brief on the merits of this case (accompanied by four witness statements) disguised as a Provisional Measures Application. Letter from Respondent to the Tribunal, September 9, 2021, pp. 1, 3. Respondent reserves its right to expand on the facts of this case and to respond in due course to Claimants' factual allegations relating to Respondent's preliminary objections and/or to the merits of this case.

until the Tribunal rendered a decision on the Provisional Measures Application[1] (the "Emergency Application"). The Tribunal rejected Claimants' Emergency Application on October 25, 2021, finding that "Claimants ha[d] failed to make a showing of the heightened level of urgency required to grant the emergency temporary relief that they ha[d] requested[, and i]n particular, [that] Claimants ha[d] not provided evidence that any of their assets are currently under threat of harm."[4]

3. While Claimants' Emergency Application was fully briefed (and rejected by the Tribunal),[5] until now Respondent had not had the opportunity to directly address Claimants' Provisional Measures Application. However, because Claimants seek essentially the same injunctive relief in both their applications, most arguments made in Respondent's Emergency Application Answer and Emergency Application Rejoinder are equally applicable here.[6]

4. Claimants' Provisional Measures Application does not fare better than their Emergency Application and should also be rejected by this Tribunal. Article 10.20.8 of the Treaty clearly prohibits the Tribunal from granting the injunctive relief that Claimants request here. But even if one were to disregard the unambiguous language of the Treaty,

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[4] Tribunal's Decision on Claimants' Request for Emergency Temporary Relief, October 25, 2021 ("Decision on the Emergency Application"), p. 3.

[5] Respondent submitted its answer to Claimants' Emergency Application on September 30 ("Emergency Application Answer"). Claimants filed their reply on the Emergency Application on October 12 ("Emergency Application Reply") and then Respondent filed its rejoinder on the Emergency Application on October 18 ("Emergency Application Rejoinder"). The Emergency Application was denied by the Tribunal on October 25, 2021.

[6] This only serves to underscore that Claimants' Emergency Application was completely baseless. In fact, as the Tribunal remarked, "Claimants have not provided evidence that any of their assets are currently under threat of harm." It was obvious that there was no urgency, necessity or danger of imminent harm that would warrant granting Claimants' Emergency Application, and it is also obvious that there is no urgency, necessity or danger of imminent harm that would warrant granting Claimants' Provisional Measures Application. *See* Emergency Application Answer, ¶¶ 26-51; Emergency Application Rejoinder, ¶¶ 36-48; ¶¶ 24-46, *infra*.

Claimants have not satisfied their burden of proving that there is an absolute need or urgency to prevent an irreparable harm warranting the imposition of such extraordinary measures. Due to the frivolous nature of their Provisional Measures Application, Claimants should bear all costs and expenses (including Respondent's attorneys' fees) related thereto.

ARGUMENT

5. Claimants request that "this Tribunal issue an interim award that instructs Colombia to refrain from enforcing the [Ruling with Fiscal Liability] until this arbitration has concluded."[7] As it will be explained below, Claimants' Provisional Measures 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; and (B) in any event, the conditions for granting provisional measures are not met in this case.

A. The Treaty Expressly Prohibits the Tribunal from Granting the Provisional Measures Requested by Claimants

6. As noted before, the injunctive relief that Claimants request pending a decision on the merits of this dispute (*i.e.*, the Provisional Measures Application) is the same injunctive relief they previously sought on a "temporary" basis (*i.e.*, the Emergency Application). Accordingly, the limitations on the Tribunal's authority to grant such injunctive relief are also the same. Respondent has addressed the scope of Article 10.20.8 of the Treaty at length in its prior submissions on provisional measures.[8] To avoid

[7] Claimants' Application, ¶ 30.

[8] Emergency Application Answer, ¶¶ 8-25; Emergency Application Rejoinder, ¶¶ 9-19.

unnecessary repetition, Respondent will summarize its arguments below, but refers the Tribunal to its prior submissions for an in-depth discussion.

(1) Article 10.20.8 of the Treaty Limits the Type of Provisional Relief that May Be Ordered, Prohibiting the Tribunal from Granting the Provisional Measures Application

7. It is undisputed that under Article 47 of the ICSID Convention, ICSID tribunals have authority to recommend provisional measures when extraordinary circumstances so require.[9] However, according to that same provision, the parties to a dispute may agree on conditions and limitations to such authority.[10] That is precisely the case of Article 10.20.8 of the Treaty, to which Claimants agreed when submitting their claim to arbitration.[11]

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[9] ICSID tribunals have uniformly agreed that the provisional measures under 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 ("*Phoenix*"), ¶¶ 32-33; **Ex. RL-229**, *Emilio Agustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, October 28, 1999 ("*Maffezini*"), ¶ 10; **Ex. RL-230**, *RSM Production Corporation and others v. Government of Greneda*, ICSID Case No. ARB/10/6, Tribunal's Decision on Respondent's Application for Security for Costs, October 14, 2010 ("*RSM*"), ¶ 5.17.

[10] ICSID Convention, Article 47 ("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.") (emphasis added).

[11] **Ex. RL-1**, Treaty, Article 10.20.8, 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). *See also 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."). Having failed to address Article 10.20.8 of the Treaty in their September 2 Application, Claimants cited to it in their September 15 letter to the Tribunal (the "September 15 Letter"), only after Respondent invoked such provision in its letter of September 9. *See* Letter from Claimants to the Tribunal, September 15, 2021, p. 4; Letter from Respondent to the Tribunal, September 9, 2021, p. 1. *See also* Memorial on Preliminary Objections, ¶ 270. 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]." *See* Letter from Claimants to the Tribunal, September 15, 2021, p. 4. However, Claimants omitted critically important language from their citation of the Treaty (the reference to the language expressly barring this Tribunal from granting them the injunctive relief they request) and also cited an excerpt from *Alicia Grace v. Mexico* that, analyzed in its whole context, bolsters Respondent's objections. *See* Letter from Claimants to the Tribunal, September 15, 2021, p. 4. Later, Claimants also addressed Article 10.20.8 of the Treaty in their Emergency Application Reply. Emergency Application Reply, ¶¶ 12-26. However, nothing new was added by Claimants. Quite on the contrary, Claimants own words make it even more evident that the provisional measures they seek are aimed at enjoining the same

8. The language of Article 10.20.8 is plain and clear. It consists of two sentences. The first sentence, which is not at issue here, establishes that "[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."[12] The second sentence sets forth two specific limitations to such power: (i) "[a] tribunal may not order attachment"; and (ii) "[a tribunal may not] enjoin the application of a measure alleged to constitute a breach referred to in Article 10.16."[13]

9. The latter limitation, which bars this Tribunal from granting Claimants' Provisional Measures Application, 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.[14] 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,[15] it follows that it also

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measure they allege constitutes a breach of the Treaty in this Arbitration, which is barred under the second sentence of Article 10.20.8 of the Treaty. *See* Emergency Application Rejoinder, ¶¶ 9-30; ¶¶ 7-17, *infra*.

[12] **Ex. RL-1**, Treaty, Article 10.20.8.

[13] *Id.,* (emphasis added). Leaving aside the fact that Claimants seek to alter (rather than maintain) the *status quo* (*see* ¶¶ 18-19, *infra*), Respondent does not question the Tribunal's authority to issue provisional measures to preserve the parties' rights and to protect its jurisdiction. However, that is irrelevant here for two reasons. First, Article 10.20.8 of the Treaty specifically prohibits the type of provisional measures Claimants are requesting. Second, even if that prohibition did not exist, the point is not whether the rights Claimants are seeking to protect can be protected through interim measures, but whether the conditions to impose provisional measures are satisfied (*quod non*). *See* ¶¶ 20-62, *infra*).

[14] Memorial on Preliminary Objections, ¶¶ 269-271. *See also* **Ex. RL-37**, Lee M. Caplan and Jeremy K. Sharpe, *United States*, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 755 (C. Brown (ed.), Oxford University Press 2013), pp. 835-836 ("Article [10.20.8], which mirrors Article 1134 of the NAFTA, provides that a tribunal may order (including by recommendation) interim measures of protection to preserve the rights of a disputing party or to ensure that the tribunal's jurisdiction is made fully effective. Article [10.20.8], however, is not unbounded. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article [10.16]. This provision thus complements Article [10.26], which limits final awards to restitution of property or monetary damages. . . . [A] tribunal cannot in an interim or final award order a party to amend or withdraw a challenged measure . . .".) (emphasis added).

[15] *See e.g.* **Ex. RL-121**, Kenneth J. Vandevelde, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION (Oxford University Press 2010), p. 618 ("[A] tribunal would not have the authority to order a host state not to enact or not to enforce a law. This clause is based on Article 1135 of NAFTA [which is identical to Article 10.26 of the Treaty]. It responds to concerns raised by critics that investor-state arbitral

cannot enjoin the application of such measure.[16] Claimants never addressed this point in their submissions.

10. In their failed attempt to convince this Tribunal that it has authority under the Treaty to grant the Provisional Measures Application, Claimants make two main arguments.[17] First, focusing only on the first sentence of Article 10.20.8, Claimants argue that that their "requested relief falls squarely within the interim measures allowed by Article 10.20.8."[18] Whether or not that is the case is irrelevant, because the point here is that the interim relief they are seeking falls squarely within the scope of the prohibition in the second sentence of Article 10.20.8 of the Treaty.[19]

11. Second, Claimants argue that the limitation in Article 10.20.8 does not apply because they are not seeking to enjoin the implementation of the same measure

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tribunals would have the power to invalidate U.S. law or overrule decisions of U.S. courts.") (emphasis added).

[16] **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* Memorial on Preliminary Objections, ¶¶ 269-271; Emergency Application Answer, n. 30. *See also* **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; **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.

[17] In its Emergency Application Rejoinder, Colombia addressed Claimants' arguments that Article 10.20.8 "is at least as broad as Article 47 of the ICSID Convention, which clearly allows anti-suit injunctions," and distinguished the cases cited by Claimants. *See* Emergency Application Rejoinder, ¶¶ 12-16, 31-35.

[18] Emergency Application Reply, ¶ 18.

[19] Emergency Application Rejoinder, ¶¶ 19-30.

supposedly constituting a breach of the Treaty.[20] Thus, Claimants do not dispute the legal scope of the limitation,[21] but take issue with its application to the facts in this case.

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

12. Claimants argue that the provisional measures they seek are not aimed at enjoining the same measure they allege constitutes a breach of the Treaty.[22] But Claimants' own words negate their argument.

13. In their September 15 Letter, Claimants state:

> **The Application seeks an emergency order preventing Colombia from** disrupting the *status quo* by **enforcing the** April 26, 2021, **CGR Decision [*i.e.*, Ruling with Fiscal Liability]** that resulted from the concluded fiscal liability

[20] *See* Letter from Claimants to the Tribunal, September 15, 2021, p. 3; Emergency Application Reply, ¶¶ 13, 16.

[21] Similar or identical provisions to Article 10.20.8 have consistently been interpreted in this manner by arbitral tribunals. *See* **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 ("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") (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, ¶ 5; **Ex. RL-233**, *Pope & Talbot Inc v. Government of Canada*, UNCITRAL (NAFTA), Ruling by Tribunal on Claimants' Motion for Interim Measures, 2000 ("*Pope & Talbot*"). In their September 15 Letter to the Tribunal, Claimants attempted to distinguish *Feldman* and *Pope & Talbot* from the present case, but failed to do so. *See* Letter from Claimants to the Tribunal, September 15, 2021, n. 14; **Ex. RL-233**, *Pope & Talbot*, ¶ 1; Emergency Application Answer, nn. 23-24. Later, Claimants also addressed Article 10.20.8 of the Treaty in their Emergency Application Reply. However, all three cases cited by Claimants 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. *See* Emergency Application Rejoinder, ¶¶ 31-35.

[22] *See* Letter from Claimants to the Tribunal, September 15, 2021, p. 3; Emergency Application Reply, ¶¶ 6, 16.

proceedings, **while the arbitration challenging the CGR Decision is heard**.[23]

14. Claimants' own admissions should be enough to settle the issue. But even a closer inspection of the facts should lead the Tribunal to the same conclusion: that Claimants are undoubtedly seeking to enjoin the application of the same measure allegedly constituting a breach.

15. Claimants' Provisional Measures Application seeks to enjoin the enforcement of the Ruling with Fiscal Liability. 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.[24] Because 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,[25] "applying" 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.[26] Thus,

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[23] 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). Likewise, in their Emergency Application Reply, Claimants admit again 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." Emergency Application Reply, ¶ 8 (emphasis added). Moreover, in their Application, Claimants are seeking the same relief they requested in their Notice of 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." Notice of Arbitration, ¶ 216. *See also, e.g.* Notice of Arbitration, ¶¶ 2, 14. 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. Memorial on Preliminary Objections, ¶¶ 269-271.

[24] Notice of Arbitration, ¶¶ 2, 9, 14, 76-80, 97, 104, 105, 109, 136, 154, 156-167, 176, 184, 187, 197-199, 215. *See* Emergency Application Answer, n. 31.

[25] Memorial on Preliminary Objections, ¶¶ 77-81.

[26] Emergency Application Answer, ¶¶ 39-43; Memorial on Preliminary Objections, ¶¶ 77-78, 81. *See also* 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

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,[27] which is prohibited by Article 10.20.8.[28]

16. Claimants' Application is riddled with references that confirm that the Ruling with Fiscal Liability (*i.e.*, the CGR Decision) is inexorably linked to the Fiscal Liability Proceeding they alleged violated their rights under the Treaty:

- "The CGR Decision is the result of a proceeding that was improperly initiated by the CGR against FPJVC – without a colorable claim of jurisdiction – in a transparent attempt to shift blame for alleged acts of mismanagement from those who actually managed a project . . ."[29]

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proceedings to recoup public resources in cases where there is damage against the State.") (emphasis added).

[27] 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 Notice of 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. Notice of Arbitration, ¶ 216.

[28] The decision on provisional measures in *IBT v. Panama* (under the US-Panama TPA, which contains a provision identical to Article 10.20.8 of the Treaty) supports this conclusion. *See* **Ex. RL-231**, *IBT*, ¶¶ 89, 101 ("[A]n 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."), ¶107 ("[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.") (translation from Spanish; emphasis added). Claimants fail in their attempt to distinguish *IBT*,. *See* Letter from Claimants to the Tribunal, September 15, 2021, p. 6; Emergency Application Answer, n. 33. *See also* **Ex. RL-231**, *IBT*, ¶¶ 108, 122. Moreover, the cases of *Perenco v. Ecuador* and *City Oriente v. Ecuador*, constantly cited by Claimants, do not aid their case because neither of those cases were based on treaties containing a provision similar to Article 10.20.8 of the Treaty. *See* **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*"), ¶¶ 17, 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, 48. *See also* Emergency Application Answer, ¶ 24, nn. 37-39.

[29] Claimants' Application, ¶ 2 (emphasis added).

- "The CGR Decision adopts some of the unwarranted and baseless theories asserted from the outset of the proceeding . . ."[30]

- "Simply put, the proceedings and the resultant US$811 million decision against FPJVC violate FPJVC's most basic rights, including its right to due process and rights under the TPA as an investor."[31]

- "Even if there were the slightest merit to the premises of that argument . . . it . . . could not possibly amount to the gross negligence that is the minimum standard for the CGR to exercise its jurisdiction and impose liability. The fact that the CGR did precisely that [*i.e.*, imposing fiscal liability in the Ruling with Fiscal Liability] constitutes a clear violation of Colombia's obligations under the TPA . . ."[32]

- "By disregarding the PGN Decision and its carefully considered findings, the CGR Decision violated the "Harmonious Collaboration" principle, including FPJVC's reasonable expectations . . ."[33]

- "Like the CGR Charge and the underlying CGR proceedings [*i.e.*, the Fiscal Liability Proceeding] before it, the CGR Decision is riddled with material deficiencies that effected grave violations to FPJVC's due process rights."[34]

- "As such, Claimants seek an order preventing Colombia from taking steps to enforce the disputed CGR Decision until this arbitration has concluded."[35]

17. Respondent could go on, but does not need to. The matter is clear. By Claimants own admission, the Provisional Measures Application seeks to enjoin the same measure they claim is a breach of the Treaty. For that reason, the Tribunal must reject it.

[30] *Id.*, ¶ 3 (emphasis added).

[31] *Id.*, ¶ 31 (emphasis added).

[32] *Id.*, ¶ 47 (emphasis added).

[33] *Id.*, ¶ 61 (emphasis added).

[34] *Id.*, ¶ 73.

[35] *Id.*, ¶ 95.

(3) The Provisional Measures Requested Seek to Alter the *Status Quo*

18. In an attempt to circumvent the prohibition in the second sentence of Article 10.20.8 of the Treaty, Claimants argue that their Application seeks to protect "its right to the preservation of the *status quo* and the non-aggravation of the dispute."[36] Claimants are wrong. Their Application seeks in effect to alter the *status quo*.

19. By seeking to enjoin the enforcement of the Ruling with Fiscal Liability, Claimants are actively attempting to change the situation as it currently stands. As of now, Claimants have been found to be fiscally liable pursuant to Colombia law. According to such law, the next phase in the Fiscal Liability Proceeding is the collection of the amount established in the Ruling with Fiscal Liability.[37] To stop the CGR's enforcement efforts, which is what Claimants are requesting here, would alter the ordinary course of

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[36] *Id.*, ¶ 92. Claimants allege that the provisional measures they request also seek to protect the right to an exclusive remedy with respect to the subject matter of this arbitration under Article 26 of the ICSID Convention. However, Article 26 of the ICSID Convention is irrelevant here. The exclusivity of the remedy set forth in Article 26 refers only to investment disputes, barring the parties that have consented to ICSID arbitration from seeking relief in another forum. *See e.g.* **Ex. RL-249**, Campbell McLachlan, Laurence Shore y Matthew Weiniger, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2d ed., Oxford International Arbitration Series 2017), ¶ 4.84 ("The exclusivity of ICSID arbitration in the case of treaty claims will, however, only relate to the investment dispute that forms the subject of such a claim. It will not operate so as to preclude pursuit of claims by the investor against the host State that are not founded upon treaty rights and can thus only be the subject of other forms of dispute resolution.") (emphasis added); **Ex. RL-248**, Christoph Schreuer and others, THE ICSID CONVENTION: A COMMENTARY (2d ed., Cambridge University Press 2009), p. 351 ("[O]nce consent to ICSID arbitration has been given, the parties have lost their right to seek relief in another forum, national or international, and are restricted to pursuing their claim through ICSID"). The Fiscal Liability Proceeding commenced before this Arbitration was initiated (in fact, the Fiscal Liability Proceeding prompted Claimants to initiate this Arbitration), and deals with fiscal liability, not with an investment dispute. *See e.g.* **Ex. CL-10**, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Provisional Measures, April 8, 2016, ¶ 193 ("Th[e] right of exclusivity [under Article 26 of the ICSID Convention] relates to the resolution of investment disputes only and does not include or extend to criminal proceedings which deal with criminal liability and not with investment disputes. As a result, in principle, the criminal proceedings commenced by way of the Complaints and the Federal Prosecutor's preliminary investigation do not address the investment dispute before the Tribunal and, therefore, do not threaten the exclusivity of these ICSID proceedings."); **Ex CL-9**, *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures, March 3, 2016, ¶ 3.23 ("The Tribunal is not persuaded that any provisional order should be made in order to protect the right of exclusivity of the arbitral proceedings. The prosecution of an offence is of a very different nature to the resolution of a civil claim where compensation is sought for the infringement of an alleged right.").

[37] Emergency Application Rejoinder, ¶ 26.

the Fiscal Liability Proceeding. Altering the *status quo* would not only prejudice Respondent, who would be prevented from applying its own laws, but it would also affect third parties, namely, the other juridical and natural persons found jointly and severally liable alongside Foster Wheeler and Process Consultants.[38]

B. In Any Event, the Conditions for Granting Provisional Measures Are Not Met

20. In the unlikely event that the Tribunal determines that it has authority to grant the injunctive relief Claimants seek in their Provisional Measures Application (*quod non*), the provisional measures requested by Claimants do not meet the applicable legal standard under the ICSID Convention and the Treaty.

21. In general terms, there is no disagreement between Claimants and Respondent regarding the requirements for provisional measures.[39] Both Parties substantially agree that the applicant must satisfy five cumulative requirements: (1) that the provisional measures are necessary and urgent to prevent an irreparable harm;[40] (2) that the tribunal has *prima facie* jurisdiction over the dispute;[41] (3) that the applicant has made a showing of a *prima facie* case on the merits;[42] (4) that granting the provisional measures does not prejudice the other party;[43] and (5) that granting the provisional measures does not cause the tribunal to prejudge the merits of the dispute.[44]

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[38] *See* ¶¶ 54-57, *infra*.

[39] *See* Claimants' Application, ¶¶ 11, 24-29, 105-160; ¶¶ 24-59, *infra*.

[40] *See id.*, ¶¶ 11, 24, 27-28, 105, 126-156.

[41] *See id.*, ¶¶ 11, 24-25, 105-116.

[42] *See id.*, ¶¶ 11, 24, 26, 105, 117-125.

[43] *See id.*, ¶¶ 11, 24, 29, 105, 157-160.

[44] *See id.*, ¶ 117. Although Claimants do not expressly refer to this requirement independently, in paragraph 117 of their Application they cite paragraph 48 of the Decision on Provisional Measures in the *Víctor Pey Casado* v. *Chile* case, which warns against the danger of prejudging the merits of the claim. **Ex. CL-16**,

22. ICSID tribunals have consistently recognized that the applicant – in this case, Claimants – has the burden of proving each one of these requirements.[45] Claimants seem to agree that the burden is on them.[46]

23. In the present case, the Tribunal should dismiss the Provisional Measures Application as Claimants have not met their burden. Respondent will now turn to each of the five requirements.

(1) There Is No Necessity and Urgency to Prevent an Irreparable Harm

24. Claimants argue that, "no matter the standard employed, FPJVC will undoubtedly suffer grave and irreparable harm absent interim measures", [redacted]"[47] Based on those purported reasons, Claimants contend that the provisional measures requested are necessary and urgent to prevent such irreparable harm, as "monetary award years later will not make Claimants whole."[48]

Víctor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, Decision on Provisional Measures, September 25, 2001, ¶ 48. Several ICSID cases also recognize this requirement. *See* n. 149, *infra*.

[45] **Ex. RL-229**, *Maffezini*, ¶ 10; **Ex. RL-250**, *Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited,* ICSID Case No. ARB/98/8, Decision on the Respondent's Request for Provisional Measures, December 20, 1999, ¶ 18; **Ex. RL-230**, *RSM*, ¶ 5.17; **Ex. CL-19**, *Occidental Petroleum Corporation Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, August 17, 2007 ("*Occidental*"), ¶ 90; **Ex. RL-251**, *Rand Investments Ltd., et al. v. Republic of Serbia*, ICSID Case No. ARB/18/8, Procedural Order No. 9 [New Evidence, Assistance and Provisional Measures], March 12, 2021 ("*Rand Investments*"), ¶ 87 ("the Party seeking provisional measures bears the burden of establishing these conditions, which are cumulative, *i.e.,* the Claimants must establish that all of them are met") (emphasis added).

[46] *See, e.g.,* Claimants' Application, ¶ 117.

[47] *Id.*, ¶¶ 131, 146.

[48] *Id.*, ¶¶ 131, 147, 149.

25. None of Claimants' arguments have any merit. As Respondent will explain below: (i) given their extraordinary nature, provisional measures should only be granted in limited circumstances, when there is absolute necessity or urgency; (ii) the facts of this case do not support the notion that provisional measures are absolutely necessary or urgent to prevent an irreparable harm; and (iii) none of the cases cited by Claimants support their position that provisional measures should be granted in this case.

a. Provisional Measures Should Only be Granted in Limited Circumstances, When There Is Absolute Necessity or Urgency, and Should Not Be Recommended Lightly

26. Claimants argue that provisional measures are "necessary" when, in the absence of such measures, the requesting party would suffer "irreparable loss".[49] Claimants also contend that "[i]rreparable loss has been defined to mean . . . 'where action by one party may cause loss to the other which may not be capable of being made good by an eventual award of damages'."[50] In addition, Claimants state that "urgency" can be

[49] *Id.*, ¶ 126.

[50] *Id.* During the negotiation and drafting of the ICSID Convention, it became clear that a prejudice is irreparable only if it cannot be remedied by monetary compensation. *See* **Ex. RL-252**, ICSID, HISTORY OF THE ICSID CONVENTION: DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES, VOL. II, PART 1 (ICSID 2009) ("HISTORY OF THE ICSID CONVENTION, VOL. II, PART 1"), p. 516. As Claimants acknowledge, ICSID tribunals have consistently followed this standard and have ruled that, if damage can be remedied by monetary compensation, such prejudice is not irreparable. For example, the tribunal in *Quiborax v. Bolivia* found that "an irreparable harm is a harm that cannot be repaired by an award of damages. Such a standard has been adopted by several ICSID tribunals." **Ex. CL-12**, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, February 26, 2010, ¶ 156. *See also* **Ex. CL-17**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order [on Provisional Measures], September 6, 2005 ("*Plama*"), ¶ 46 ("Whatever the outcome of the . . . proceedings . . . in Bulgaria is, Claimant's right to pursue its claims for damages in this arbitration and the Arbitral Tribunal's ability to decide these claims will not be affected. The Tribunal accepts Respondent's argument that harm is not irreparable if it can be compensated for by damages, which is the case in the present arbitration and which, moreover, is the only remedy Claimant seeks"); **Ex. CL-19**, *Occidental*, ¶ 97 ("Provisional measures are not designed to merely mitigate the final amount of damages. Indeed, if they were so intended, provisional measures would be available to a claimant in almost every case."), ¶ 99 ("The harm in this case is only 'more damages', and this is harm of a type which can be compensated by monetary compensation, so there is neither necessity nor urgency to grant a provisional measure to prevent such harm.").

defined as any question or matter that "cannot await the outcome of the award on the merits."[51] Respondent largely agrees with the above concepts.

27. Although Respondent does not dispute that Article 47 of the ICSID Convention generally empowers tribunals to recommend provisional measures,[52] as clearly reflected in the *travaux préparatoires* of the ICSID Convention, such provisional measures are limited to cases of "absolute necessity" and ICSID tribunals must thus exercise "self-restraint" or "*auto-control*" in recommending them.[53]

28. The International Court of Justice ("ICJ") has confirmed the extraordinary nature of provisional measures under international law,[54] ruling that its power to issue provisional measures may be exercised only in situations where there is "an urgent necessity to prevent irreparable prejudice to such rights [that are the subject-matter of the dispute]."[55]

29. Finally, ICSID tribunals – including many of those cited by Claimants in their Provisional Measures Application – have uniformly recognized that provisional measures under Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules are

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[51] Claimants' Application, ¶ 150.

[52] As Respondent explained, the Parties to the dispute may set limits on the Tribunal's authority to grant provisional measures. *See* ¶¶ 7-11, *supra*. *See also* Emergency Application Answer, ¶¶ 10-18; Emergency Application Rejoinder, ¶¶ 12-19.

[53] **Ex. RL-252**, HISTORY OF THE ICSID CONVENTION, VOL. II, PART 1, pp. 516, 523.

[54] Article 47 of the ICSID Convention has its origin in Article 41 of the Statute of the ICJ. **Ex. RL-253**, ICSID, HISTORY OF THE ICSID CONVENTION: DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES, VOL. II, PART 2 (ICSID 2006), pp. 668, 813. *See also* **Ex. CL-21**, *Perenco*, ¶ 42. Thus, the standard provided for in the ICJ Statute is illustrative in determining the scope of Article 47 of the ICSID Convention.

[55] **Ex. RL-254**, *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Order, January 23, 2007, ¶ 32. *See also* **Ex. CL-19**, *Occidental*, ¶ 59 ("The jurisprudence of the International Court of Justice dealing with provisional measures is well established: a provisional measure is necessary where the actions of a party 'are capable of causing or of threatening irreparable prejudice to the rights invoked'. A measure is urgent where 'action prejudicial to the rights of either party is likely to be taken before such final decision is given'.").

an extraordinary remedy that can only be granted in "limited circumstances" of absolute urgency and necessity and cannot – and should not – be granted "lightly".[56] In words of the tribunal in *Phoenix v. Czech Republic*:

> 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.[57]

[56] Claimants argue that "[t]he mere threat of recognition or enforcement proceedings, by itself, warrants urgent relief." Claimants' Application, ¶ 155. However, the only case cited in support of that proposition is *City Oriente v. Ecuador*. *See* Claimants' Application, ¶ 155. *City Oriente* does not support Claimants' Provisional Measures Application. First, although the *City Oriente* tribunal granted provisional measures, that case was not based on a treaty with a provision like Article 10.20.8 of the Treaty; it was a contract-based arbitration. *See* **Ex. CL-23**, *City Oriente*, ¶ 48 ("The Contract contains no provision whatsoever prohibiting the adoption of provisional measures"). Second, the *City Oriente* tribunal ordered provisional measures after the claimant argued that the Ecuador's Attorney General had announced the filing of a criminal complaint against City Oriente's representatives and managers. *Id.*, ¶ 12. In contrast, there is no imminent threat to Claimants or their assets stemming from the enforcement of the Ruling with Fiscal Liability.

[57] **Ex. RL-228**, *Phoenix*, ¶¶ 32-33 (emphasis added). *See also* **Ex. CL-19**, *Occidental,* ¶ 59 ("It is also well established that provisional measures should only be granted in situations of necessity and urgency in order to protect rights that could, absent such measures, be definitely lost. It is not contested that provisional measures are extraordinary measures which should not be recommended lightly. In other words, the circumstances under which provisional measures are required under Article 47 of the ICSID Convention are those in which the measures are necessary to preserve a party's rights and where the need is urgent in order to avoid irreparable harm.") (emphasis in original); **Ex. RL-229**, *Maffezini*, ¶ 10 ("The imposition of provisional measures is an extraordinary measure which should not be granted lightly by the Arbitral Tribunal"); **Ex. CL-18**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Procedural No. 3, January 18, 2005, ¶ 8 ("The circumstances under which provisional measures are required under Article 47 are those in which the measures are necessary to preserve a party's rights and that need is urgent. The international jurisprudence on provisional measures indicates that a provisional measure is necessary where the actions of a party 'are capable of causing or of threatening irreparable prejudice to the rights invoked'") (emphasis in original); **Ex. RL-230**, *RSM*, ¶ 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); **Ex. CL-21**, *Perenco*, ¶ 43 ("[The Tribunal] will not judge that circumstances require the grant of provisional measures unless it judges such measures to be necessary and urgent."); **Ex. RL-255**, *Burimi S.R.L and Eagle Games SH.A v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2, May 3, 2012, ¶ 34 ("Provisional measures are 'extraordinary measures' which should be recommended only in limited circumstances. Specifically, an order for provisional measures will be made only where such measures are (i) necessary to avoid imminent and irreparable harm and (ii) urgent"); **Ex. RL-251**, *Rand Investments*, ¶¶ 86, 95, 97. *See also* Claimants' Application, ¶¶ 126-130, 132, 150.

b. The Facts of This Case Do Not Support the Notion That There Is Absolute Necessity and Urgency to Prevent an Irreparable Harm

30. Claimants will not suffer an irreparable harm if the injunctive relief they request is not granted,[58] and thus there is no absolute urgency or necessity in their Provisional Measures Application.

31. According to Claimants,

> [a]bsent provisional relief, Colombia's enforcement of the CGR Decision will cause immediate and irreparable harm to FPJVC. Colombia's enforcement proceedings against FPJVC in multiple jurisdictions will strain the integrity of the ICSID arbitration and aggravate the *status quo*. [redacted][59]

32. Claimants are wrong. There is no threat of harm to Claimants, let alone a threat of irreparable harm, and thus the provisional measures requested are not "necessary". Even if Claimants were able to prove that they face an irreparable harm (*quod non*), such harm is by no means imminent, and thus the provisional measures they are requesting are also not "urgent".

(i) The Provisional Measures Are Not Necessary to Prevent an Irreparable Harm

33. Claimants argue that the provisional measures are necessary because [redacted]."[60]

[58] *See* Emergency Application Answer, ¶¶ 30-50.

[59] Claimants' Application, ¶ 23.

[60] *Id.*, ¶ 27 (emphasis added). *See* **CWS-2**, Witness Statement of Steve Conway, ¶¶ 5, 12; **CWS-3**, Witness Statement of Thomas Grell, ¶¶ 5, 12.

[redacted][61]

34. In its Decision on the Emergency Application, the Tribunal noted that "Claimants have not provided evidence that any of their assets are currently under threat of harm."[62] [redacted]. As Respondent has proven – and the Tribunal already determined –, the CGR's collection efforts pose no real threat to Claimants' assets, [redacted].

- The Ruling with Fiscal Liability is joint and several, and so collection efforts of the amount set forth therein will not solely focus on Claimants.[63]

- Although the Ruling with Fiscal Liability became final at the administrative level, it is still subject to judicial review.[64] Claimants

[61] Emergency Application Reply, ¶ 9. In their Application, Claimants also argue that without the interim measures they would be "stripped" of [redacted] Claimants' Application, ¶ 149. However, as Respondent explained in its Memorial on Preliminary Objections, fiscal liability determined under Fiscal Liability Proceeding is independent and autonomous from any contractual liability that may arise from a breach of contractual obligations. *See e.g.* Memorial on Objections to Jurisdiction, ¶ 81. Thus, the Fiscal Liability Proceeding poses no threat of "irreparable harm" to Claimants' contractual rights.

[62] Decision on the Emergency Application, p. 3.

[63] Emergency Application Rejoinder, ¶ 41; Emergency Application Answer, ¶ 41, n. 63; Memorial on Preliminary Objections, 150, 255, 275, n. 515. Claimants' witnesses allege [redacted] **CWS-2**, Witness Statement of Steve Conway, ¶¶ 5, 10, 12; **CWS-3**, Witness Statement of Thomas Grell, ¶¶ 5, 10, 12. Claimants witnesses attempt to manufacture potential harm by falsely suggesting that Foster Wheeler and Process Consultants would be forced to pay the full amount of the Ruling with Fiscal Liability. However, as Colombia has explained, the Ruling with Fiscal Liability is joint and several. [redacted] There is not even a risk of attachment of a single asset, as the CGR has been unable to identify any that it could potentially attach. *See* ¶ 37, nn. 69-70, *infra*.

[64] **Ex. RL-24**, Administrative Code, Article 138; Emergency Application Answer, n. 70; Emergency Application Rejoinder, n. 66.

may initiate an annulment action against the Ruling with Fiscal Liability and may request a stay of enforcement to halt any collection efforts.[65]

- A request for a provisional stay of enforcement before the administrative adjudicatory jurisdiction would not require Foster Wheeler or Process Consultants to offer a bond.[66]

- The fact that the CGR[67] has been thus far – more than four years since the initiation of the Fiscal Liability Proceeding – unable to locate any assets of Claimants in Colombia[68] shows that enforcement against them will likely prove unsuccessful. [redacted][69]

- The CGR's efforts to identify assets of Claimants abroad have also failed so far.[70]

- Even though the CGR will renew its search for assets during the forced collection proceeding,[71] such a search is likely to be unsuccessful.[72]

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[65] **Ex. RL-24**, Administrative Code, Articles 229, 230(3); Emergency Application Answer, n. 70; Emergency Application Rejoinder, n. 66.

[66] **Ex. RL-24**, Administrative Code, Article 232 ("No bond shall be required in the case of a provisional stay of the effects of administrative acts, of proceedings aimed at the defense and protection of collective rights and interests, of *tutela* proceedings, nor when the applicant of the precautionary measure is a public entity") (translation from Spanish; emphasis added). Claimants' witness stated that a stay of enforcement before the administrative adjudicatory jurisdiction would not require Claimants to post a bond. **CWS-1**, Witness Statement of Cesar Torrente, ¶ 22. That is plainly incorrect.

[67] 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 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).

[68] The [redacted] is an additional indication that Claimants do not have an investment in Colombia. *See* Memorial on Preliminary Objections, ¶¶ 281-298.

[69] **CWS-3**, Witness Statement of Thomas Grell, ¶ 9.

[70] **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.

[71] Emergency Application Rejoinder, ¶ 41; Emergency Application Answer, ¶ 44; Memorial on Preliminary Objections, ¶ 117.

[72] Emergency Application Rejoinder, ¶ 41; Emergency Application Answer, ¶¶ 44-47.

Claimants are not likely to have acquired assets in Colombia, and the search for assets abroad faces enormous legal and practical hurdles.[73]

- The CGR does not currently have in place precautionary measures against assets owned by Claimants in Colombia or abroad,[74] despite having authority to do so.[75] That is unsurprising given that an asset must first be identified before it can be attached or seized.

- In the unlikely event that the CGR is able to identify assets owned by Claimants in a foreign jurisdiction [redacted],[76] attaching such assets is entirely another matter.[77] The CGR relies on cooperation mechanisms that are ill-suited for such purpose.[78]

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[73] For example, the CGR is regularly asked to identify the assets with respect to which it requires assistance *before* any assistance can be provided. *See e.g.* **Ex. R-95**, Letter from the U.S. Department of Justice to UNCOPI, April 22, 2019, p. 1.

[74] *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).

[75] **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 ("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).

[76] Emergency Application Reply, ¶ 6.

[77] It should be noted that 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.

[78] International instruments for cooperation currently in place are not well suited for the search of assets in non-criminal matters. *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. Memorial on Preliminary Objections, ¶¶ 81-82.

- The CGR must carry out any collection efforts of the Ruling with Fiscal Liability in accordance with the provisions set forth in the relevant Colombian laws and regulations,[79] and simply does not have authority to embark on a "worldwide litigation campaign" against Claimants.[80]

- [redacted], the CGR would have to first seize and then auction off the bulk of Claimants' total assets. If locating a single asset abroad has thus far – more than four years since the initiation of the Fiscal Liability Proceeding – proven hopeless, locating, attaching, and auctioning [redacted] Claimants assets is simply impossible.[81]

- Even if the CGR manages to attach any of Claimants' assets – either in Colombia or abroad – during the forced collection proceeding, it may only auction those assets after the courts of the administrative

[79] *See* **Ex. RL-24**, Law 1437 of 2011, which establishes the Code of Administrative Procedure and Administrative Adjudicatory Proceedings ("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, which establishes rules for the proper implementation of Legislative Act 04 of 2019 and the strengthening of fiscal control ("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 ("Resolution No. 778 of 2021"). *See also* Memorial on Preliminary Objections, ¶ 116; n. 143, *infra*.

[80] Emergency Application Rejoinder, ¶ 40; Emergency Application Answer, ¶ 49. *See also* Memorial on Preliminary Objections, ¶¶ 115-121.

[81] Claimants argue the CGR could "enforce the CGR Decision in US courts through conversion to a US judgment" (Claimants' Application, ¶ 28; Emergency Application Reply, ¶ 6), but it is unlikely a U.S. court would even enforce a foreign administrative decision like the Ruling with Fiscal Liability. In the U.S., enforcement of foreign judgments is governed by state law, and so recognition and enforcement mechanisms will vary from state to state. **Ex. RL-256**, Robert Lutz, A LAWYER'S HANDBOOK FOR ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND ABROAD (Cambridge University Press 2006), p. 9 ("state common law or the Recognition Act as enacted by the state legislature applies"). However, in general terms, U.S. laws on foreign judgments typically deal with court decisions, and U.S. courts will be much more reluctant to enforce administrative decisions like the Ruling with Fiscal Liability. *See* **Ex. RL-257**, Restatement of the Law Fourth: The Foreign Relations Law of the United States, § 481, cmt. f (4th 2019) ("Its application to decisions of administrative tribunals is less clear."). In any event, in any enforcement action, a two-step process would have to take place: 1) a U.S. court would have to recognize the Ruling with Fiscal Liability and convert it into a domestic judgement and 2) the moving party would then have to enforce and execute that judgment against Claimants. **Ex. RL-256**, R. Lutz, A LAWYER'S HANDBOOK FOR ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND ABROAD, p. 5. To have a foreign judgment recognized in the U.S., a party must file a complaint to initiate a court proceeding to convert it into a domestic money judgment. **Ex. RL-256**, R. Lutz, A LAWYER'S HANDBOOK FOR ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND ABROAD, p. 16. During that court proceeding, if Colombia ever initiated it, Claimants would be able to appear and present any defenses they may have to enforcement. **Ex. RL-256**, R. Lutz, A LAWYER'S HANDBOOK FOR ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND ABROAD, pp. 17-21.

adjudicatory jurisdiction rule on any annulment actions initiated by Claimants against the Ruling with Fiscal Liability.[82]

- If an asset owned by Claimants is attached and sold off, monetary damages would be an appropriate means to repair such damage.[83]

35. In sum, Claimants have failed to prove that the injunctive relief they seek is necessary to prevent an irreparable harm. In fact, the evidence shows that there is no threat of harm to Claimants, much less a threat of "irreparable" harm, and that Claimants have means to resist enforcement of the Ruling with Fiscal Liability under Colombian law.

(ii) The Provisional Measures Are Not Urgent

36. Claimants argue that the "provisional measures are urgent because the threatened harm will occur long before this arbitration concludes[, as] . . . Colombia has already taken steps to enforce the CGR Decision and is unwilling to agree not to seek enforcement action against FPJVC."[84] In deciding Claimants' Emergency Application, the Tribunal determined that "Claimants have failed to make a showing of the heightened level of urgency to grant the emergency temporary relief that they have requested."[85] The Tribunal should reach the same conclusion with respect to the Provisional Measures Application, as there is urgency whatsoever.

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[82] **CWS-1**, Witness Statement of Cesar Torrente, ¶ 32; **CWS-5**, Supplemental Witness Statement of Cesar Torrente, ¶ 16. *See also* Emergency Application Answer, ¶ 48, n. 70.

[83] *See* **Ex. CL-17**, *Plama*, ¶ 46 (indicating that a damage is not irreparable if it is monetarily compensable). None of these facts have 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. 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. *See* Emergency Application Rejoinder, n. 76.

[84] Claimants' Application, ¶ 28.

[85] Decision on the Emergency Application, p. 3.

37. The fact that the CGR is initiating enforcement proceedings of the Ruling with Fiscal Liability in accordance with Colombian law[86] – does not entail an imminent threat to Claimants' assets "urgently" requiring the provisional measures they seek.[87]

- As previously noted, Claimants may initiate an annulment action before Colombian courts against the Ruling with Fiscal Liability and may request a stay of enforcement to halt any collection efforts,[88] which would not require Foster Wheeler or Process Consultants to offer a bond.[89]

- The collection proceedings are in their early stages.[90] The CGR will first attempt to persuade the fiscally liable parties to pay voluntarily. The voluntary collection stage of the collection proceeding may last up to three months.

- During the forced collection stage that would eventually follow,[91] Claimants may resist enforcement by filing objections against the administrative act by which the payment order is issued.[92]

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[86] Memorial on Preliminary Objections, ¶¶ 115-121 (describing the "forced collection proceeding" that follows a ruling with fiscal liability).

[87] As Respondent explained in the Emergency Application Rejoinder, 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. 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." Emergency Application Rejoinder, n. 65; **Ex. R-94**, Letter from Respondent to Claimants, September 1, 2021. *See* **Ex. RL-6**, Political Constitution of the Republic of Colombia, after Legislative Act No. 4 of September 18, 2019 ("Current Constitution"), Article 6 (setting forth the constitutional principle that public authorities may only act within the scope of their competence). In any event, as Claimants' witness acknowledges, "[i]n accordance with the Colombian Constitution, the [CGR] is an autonomous organ that does not belong to any of the three branches of the State (the executive, legislative, or the judiciary).". **CWS-5**, Supplemental Witness Statement of Cesar Torrente, ¶ 6.

[88] **Ex. RL-24**, Administrative Code, Articles 138, 229, 230(3); Emergency Application Answer, n. 70; Emergency Application Rejoinder, n. 66.

[89] *See* n. 66, *supra*.

[90] 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. *See* Memorial on Preliminary Objections, ¶¶ 116-120; Emergency Application Answer, ¶¶ 39-43.

[91] **Ex. RL-33**, Decree Law 403 of 2020, Article 117; **Ex. RL-241**, Resolution No. 778 of 2021, Article 19.

[92] *See* 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, Article 114(5)

- If the CGR rejects such objections and orders the continuation of the execution and auction of any of Claimants' assets attached and seized (none have been located and there are currently no precautionary measures in force), Claimants may challenge such decision before the administrative adjudicatory jurisdiction.[93] The admission of such challenge has the effect of suspending the auction of the attached and seized assets.

38. For the foregoing reasons, there is no "urgency" justifying an order on provisional measures enjoining enforcement of the Ruling with Fiscal Liability.

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39. Knowing that they cannot make a showing of irreparable harm or prove that the relief they seek is urgent, Claimants argue that they need only show a "material risk" of harm[94] and that a "mere threat of recognition or enforcement proceedings, by itself,

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(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). Mr. Torrente's statements regarding the eventual failure of appeals or remedies still available to Claimants are purely speculative because Mr. Torrente has no specific knowledge of this case. Moreover, the witness statement does not focus on those elements directly perceived by Mr. Torrente, nor does it include material or substantial proof. *See* **CWS-1**, Witness Statement of Cesar Torrente, ¶¶ 9-28. It should be noted that, pursuant to Colombian law, public officials are held accountable for their individual decisions. *See* **Ex. RL-6**, Current Constitution, Articles 6, 83, 121, 123, 209. Therefore, subordination within the CGR does not imply that decisions within the CGR's offices are imposed by the Comptroller General, as Mr. Torrente also suggests. **CWS-1**, Witness Statement of Cesar Torrente, ¶ 13.

[93] 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**, Administrative Code, Article 138. Even without a stay of enforcement (which could be requested within the annulment proceeding), 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. **CWS-1**, Witness Statement of Cesar Torrente, ¶ 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* Emergency Application Answer, n. 70.

[94] Claimants Application, ¶ 130. Claimants cite to *PNG v. Papua New Guinea*, stating that "it is sufficient show only that there is a 'material risk' that the harm will occur." *Id*. However, Claimants omit the immediately following paragraph of the *PNG* decision, in which the tribunal remarked that "[o]f course, the harm alleged by the requesting party must not be purely hypothetical or theoretical. . . . Provisional measures are not meant to protect against any potential or hypothetical harm susceptible to result from uncertain actions. Rather, they are meant to protect the requesting party from imminent harm." **Ex. CL-30**, *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on Claimant's Request for Provisional Measures, January 21, 2015 ("*PNG*"), ¶

warrants urgent relief."[95] Claimants cannot elude their burden. The alleged harm they seek to "prevent" with their Provisional Measures Application is highly speculative and distant, and by no means "imminent". The Tribunal cannot grant interim relief based on mere conjectures of potential harm. As the tribunal in *Occidental v. Ecuador* aptly stated:

> Claimants are seeking a provisional measure in order to prevent an action which they are not even sure is being planned. This is not the purpose of a provisional measure. Provisional measures are not meant to protect against any potential or hypothetical harm susceptible to result from uncertain actions. Rather, they are meant to protect the requesting party from imminent harm.[96]

40. The absence of any actual threat of harm to their assets shows that the supposed necessity and urgency underlying Claimants' Provisional Measures Application is completely manufactured. Claimants proffered no evidence to demonstrate that the circumstances of this case meet the "absolute necessity and urgency" test to prevent an irreparable harm. There is no threat of irreparable harm because, as Respondent has shown, there is no real danger to Claimants' assets;[97] and there are procedures in place

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112. Furthermore, the *PNG* decision also confirms that ICSID tribunals only order provisional measures when they relate to damages that cannot be remedied by monetary compensation. *See* **Ex. CL-30**, *PNG*, ¶¶ 131, 158-162.

[95] Claimants' Application, ¶ 155. Claimants argue that "[t]he mere threat of recognition or enforcement proceedings, by itself, warrants urgent relief." *Id*. However, the only case cited in support of that proposition is *City Oriente v. Ecuador*. *See* Claimants' Application, ¶ 155. *City Oriente* does not support Claimants' Provisional Measures Application. First, although the *City Oriente* tribunal granted provisional measures, that case was not based on a treaty with a provision like Article 10.20.8 of the Treaty; it was a contract-based arbitration. *See* **Ex. CL-23**, *City Oriente*, ¶ 48 ("The Contract contains no provision whatsoever prohibiting the adoption of provisional measures"). Second, the *City Oriente* tribunal ordered provisional measures after the claimant argued that the Ecuador's Attorney General had announced the filing of a criminal complaint against City Oriente's representatives and managers. *Id.*, ¶ 12. In contrast, there is no imminent threat to Claimants or their assets stemming from the enforcement of the Ruling with Fiscal Liability.

[96] **Ex. CL-19**, *Occidental*, ¶ 89 (emphasis added). *See also* **Ex. CL-30**, *PNG*, ¶ 112 ("Of course, the harm alleged by the requesting party must not be purely hypothetical or theoretical.")

[97] *See* ¶¶ 2, 30-38, *supra*.

under Colombian law for Claimants to challenge the enforcement of the Ruling with Fiscal Liability.[98] The circumstances in this case simply do not justify the extraordinary step of granting the provisional measures that Claimants request here.

c. None of the Cases Cited by Claimants Aid Their Case

41. In support of the alleged "necessity" and "urgency" to prevent a purported irreparable harm, Claimants point out that (i) "[t]ribunals hearing investor-state claims frequently grant provisional measures to restrain sovereign States from enforcing disputed court judgments, fines, taxes and penalties finding that, in the absence of the interim measures, the investor would suffer irreparable harm – and that the prevention of such harm was necessary to preserve the *status quo* of the arbitration pending a final ruling on the merits";[99] (ii) "ICSID tribunals have held that provisional measures are also 'necessary' to preserve the contractual rights agreed upon by the parties", although "ICSID tribunals do not require that a claimant show it is in danger of losing its entire operation for provisional measures to be necessary";[100] and (iii) "[t]ribunals [also find provisional measures 'necessary' to order] the discontinuance of underlying, parallel proceedings when such proceedings risk aggravating the arbitration."[101] However, none of the cases cited by Claimants assist their position.

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[98] *See* ¶ 37, *supra.*

[99] Claimants' Application, ¶ 132.

[100] *Id.*, ¶ 139.

[101] *Id.*, ¶ 142. Moreover, Claimants refer to *Perenco v. Ecuador*, *Merck v. Ecuador*, *Lao Holdings v. Laos* and *Alghanim v. Jordan* to argue that, without provisional measures, Claimants will suffer irreparable loss. Claimants' Application, ¶¶ 146-149. However, all of these cases just show how weak Claimants' Provisional Measures Application is. Firstly, because none of these cases involved a provision like Article 10.20.8 of the Treaty. Secondly, because the facts underlying *Perenco*, *Merck*, *Lao Holdings,* and *Alghanim* are clearly different from the present case and/or do not help Claimants. *See* ¶¶ 42, 45, n. 145, *infra*; n. 28, *supra*. In *Lao Holdings*, the claimant requested to enjoin a measure which imposed a tax of 80% of its revenue – plus 10% VAT –, that would have been due just 4 months after the decision on provisional measures was rendered by the tribunal. *See* **Ex. CL-24**, *Lao Holdings N.V. v. Lao People's Democratic Republic (I)*, ICSID Case No. ARB(AF)/12/6, Decision on Claimant's Amended Application for Provisional

42. First, none of the cases cited by Claimants to support that "tribunals hearing investor-state claims frequently grant provisional measures to restrain sovereign States from enforcing disputed court judgments, fines, taxes and penalties" were based on investment treaties with a provision like Article 10.20.8 of the Treaty prohibiting the Tribunal from enjoining the application of the measure allegedly constituting a breach. That alone is enough to distinguish them.

43. Furthermore, none of those cases factually resemble the present case:

- *Chevron v. Ecuador*: as Claimants note, *Chevron* "proceeded under the UNCITRAL Rules",[102] which is a materially different legal framework from that imposed by the ICSID Convention. Furthermore, the decision on provisional measures was rendered to preserve the merits of the dispute and included interim measures related to acts that allegedly violated the Ecuador-U.S. BIT, which the Tribunal cannot grant here under Article 10.20.8 of the Treaty.[103]

Measures, September 17, 2013, ¶¶ 21, 30. Conversely, in this case, there is no urgency at all. *See* ¶¶ 36-39, *supra*. Moreover, the Ruling with Fiscal Liability is joint and several and there are – in addition to Claimants – sixteen fiscally liable parties, including 12 natural persons (two presidents and three vice presidents of Reficar, seven members of the board of directors of Reficar, including the president of Ecopetrol at the time of the relevant events) and four juridical persons (CB&I Colombiana S.A., CB&I UK Limited, Foster Wheeler and Process Consultants), so collection efforts of the amount set forth therein will not solely focus on Claimants. *See* **Ex. R-83**, Ruling with Fiscal Liability – Part 13: Resolutory, pp. 6230-6234. *See also* ¶ 34, *supra*.

[102] Claimants' Application, ¶ 133.

[103] In *Chevron*, the claimants alleged that Ecuador's actions in certain environmental liability proceedings violated the Ecuador–U.S. BIT. *See* **Ex. RL-258**, *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, PCA Case No. 2009-23, Claimants' Notice of Arbitration, September 23, 2009, ¶¶ 66-69. In their request for provisional measures, the claimants asked the tribunal to suspend the execution of the judgments issued in the environmental liability proceedings initiated against them in Ecuador. *See* **Ex. RL-259**, *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, PCA Case No. 2009-23, Claimants' Request for Interim Measures, April 1, 2010, ¶ 14. In other words, the claimants requested the suspension of the enforcement of Ecuador's act claimed to be in violation of the applicable treaty. In view of the atypical circumstances of that case – which led the tribunal to order the suspension of the enforcement of such judicial decision –, the tribunal decided that "[c]laimants shall be legally responsible, jointly and severally, to the [r]espondent for any costs or losses which the [r]espondent may suffer in performing its obligations under this order" and ordered that "as security for such contingent responsibility," the claimants should "deposit within thirty days of the date of this Second Interim Award the amount of US$ 50,000,000.00 (United States Dollars Fifty Million)." *See* **Ex. RL-260**, *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, PCA Case No. 2009-23, Order for Interim Measures, February 9, 2011, ¶ H; **Ex. RL-261**, *Chevron Corporation and Texaco Petroleum Company v.*

- *Bayindir v. Pakistan*: As Claimants also note, *Bayindir* involved an order from the tribunal recommending Pakistan to "take whatever steps may be necessary to ensure that [the Pakistan National Highway Authority] does not enforce any final judgment it may obtain from the Turkish courts with regard to the Mobilisation Advance Guarantees" (*i.e.*, a "bank guarantee that had been provided by the investor").[104] Claimants, however, fail to explain that the guarantee was "payable to [the Pakistan National Highway Authority] 'on his first demand without whatsoever right of objection on [the Bank's] part and without his first claim[ing] to the Contractor'."[105] In contrast, in this case the enforcement of the Ruling with Fiscal Liability is in its early stages and the CGR faced (and keeps facing) enormous practical hurdles in the search of assets to attach. Moreover, the CGR has not even found any kind of assets owned by Foster Wheeler or Process Consultants (either in Colombia or abroad) and, therefore, no precautionary measures against Claimants' assets are currently in force. Any additional search for assets will take time and do not immediately threaten Claimants' assets. Finally, any assets attached during the forced collection proceeding can only be auctioned off when all pending judicial reviews available to Claimants have concluded.[106]

- *Merck v. Ecuador*: *Merck* also proceeded under the UNCITRAL Rules (although Claimants omitted this fact), which is a legal framework materially different from that imposed by the ICSID Convention.[107] Moreover, the claimant in *Merck* submitted its second request for interim measures after a decision rendered by the Constitutional Court of Ecuador.[108] Quite differently, in this case Claimants will still have the opportunity to fully exercise their right of defense by filing objections, reconsiderations and challenges to resist the Ruling with Fiscal Liability and the CGR's collection efforts and there has been no judicial decision in the matter at issue.

Republic of Ecuador, PCA Case No. 2009-23, Second Interim Award on Interim Measures, February 16, 2012, ¶ 4.

[104] **Ex. CL-33**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, November 14, 2005, ¶ 46; Claimants' Application, ¶ 134.

[105] *Id.*, ¶ 18.

[106] *See* ¶¶ 34, 37, *supra*.

[107] **Ex. CL-34**, *Merck Sharp & Dohme (1.A.) LLC v. The Republic of Ecuador*, PCA Case No. 2012-10, Decision on Interim Measures, March 7, 2016, ¶¶ 57, 65 ("[t]he [t]ribunal's powers in respect of the grant of interim measures are those laid down in Article 26 of the UNCITRAL Rules, which authorizes it to 'take any interim measures it deems necessary in respect of the subject-matter of the dispute.").

[108] *Id.*, ¶ 7.

- <u>*Dan Cake v. Hungary*</u>: The irrelevance of *Dan Cake* is obvious, given that it has nothing to do with provisional measures.[109]

44. Second, the only case Claimants cite to support their allegation that "ICSID tribunals have held that provisional measures are also 'necessary' to preserve the contractual rights agreed upon by the parties" is *City Oriente*, which Respondent already distinguished.[110] In summary, *City Oriente* was not based on a treaty with a provision like Article 10.20.8 of the Treaty, but rather it was a contract-based arbitration.[111] Moreover, the *City Oriente* tribunal ordered provisional measures after the claimant argued that Ecuador's Attorney General had announced the filing of a criminal complaint against City Oriente's representatives and managers, and the State had demanded payments against assets physically within the country,[112] while in this case there is no imminent threat to

[109] Claimants acknowledge this, and refer to this case simply to state that "[i]n sum, the actions of State judicial and quasi-judicial bodies in violation of the obligation not to breach treaty-imposed requirements to act in a fair and equitable manner and not to deny justice have often been the subject of awards against the state." Claimants' Application, ¶ 137. Curiously, Claimants cite an excerpt from the *Dan Cake v. Hungary* award that in fact supports the denial of justice standard detailed in the Memorial on Preliminary Objections and further demonstrates that Claimants' claim has no merit. *See* ¶ 51, *infra*. *See also* Memorial on Preliminary Objections, ¶¶ 201-214. Claimants also cite *The Electricity Company of Sofia v. Bulgaria* case, which is not an investor-State case but a State-State dispute. *See* Claimants' Application, n. 145; *The Electricity Company of Sofia (Belgium) v. Bulgaria*, 1939 P.C.I.J. (ser. A/B) No. 79, Order on the Request for the Indication of Interim Measures of Protection, December 5, 1939 (Claimants did not submit a copy of this legal authority, but simply provided a link). In any event, *The Electricity Company of Sofia* case is completely inapposite. In that case, Belgium claimed that Bulgaria had violated international law by seeking to unilaterally change a certain tariff that had been applicable to the Electricity Company of Sofia, a Belgian company up until then. Belgium requested interim measures of protection, but later withdrew that request relying on a declaration of the Bulgarian Government acknowledging that the non-payment of the company could not lead to the application of any compulsory measure and that to obtain payment the Municipality of Sofia should bring an action before the Bulgarian courts. However, one year later, on the eve of the Second World War, the Municipality of Sofia brought that precise action against the company. In the present case, there is no imminent threat to Claimants' assets, and the Ruling Fiscal Liability is still subject to judicial review.

[110] *See* n. 56, *supra*.

[111] *See* **<u>Ex. CL-23</u>**, *City Oriente*, ¶ 48 ("The Contract contains no provision whatsoever prohibiting the adoption of provisional measures").

[112] *Id.*, ¶¶ 12, 24.

Claimants, their contractual rights or their assets stemming from the enforcement of the Ruling with Fiscal Liability.[113]

45. Third, none of the cases cited by Claimants to support that "[t]ribunals have ordered the discontinuance of underlying, parallel proceedings when such proceedings risk aggravating the arbitration" were based on treaties with a provision like Article 10.20.8 of the Treaty, which bars interim measures enjoining the application of the measure supposedly constituting a breach.[114] Furthermore, the facts in those cases are unlike the facts in this case:

- *Burlington v. Ecuador*: The provisional measures in that case were granted after Ecuador had already begun seizing assets physically within the country. According to *Burlington's* tribunal, "[i]f 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."[115] On the contrary, in this case the CGR has not even found any assets owned by Claimants, either in Colombia or abroad.

- *Perenco v. Ecuador*: Respondent has already distinguished *Perenco* several times.[116] 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".[117] Here, Respondent has failed to locate any assets in Colombia owned by Claimants and there is no imminent threat of attachment or seizure.

- *CSOB v. Slovak Republic*: *CSOB* does not support Claimants case either. In that case, the tribunal recommended that the respondent suspend certain bankruptcy proceedings initiated against the Slovak

[113] *See* n. 61, *supra*.

[114] Although the Czech Republic-Slovakia BIT (1992) – terminated and replaced by the Czech Republic-Slovakia BIT (2002) – is not publicly available, in the entire *CSOB v. Slovak Republic* decision there is no reference whatsoever to a provision similar to Article 10.20.8 of the Treaty.

[115] **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.

[116] *See* n. 28, *supra*. *See also* Emergency Application Answer, ¶ 24, 51.

[117] **Ex. CL-21**, *Perenco*, ¶¶ 23, 25, 46.

> Collection Company – where CSOB was the only creditor[118] –, as such bankruptcy proceedings would include determinations as to whether CSOB had a valid claim in the arbitration.[119] As in *Chevron v. Ecuador*, the decision was exclusively rendered to preserve the merits of the dispute and included measures related to acts that allegedly violated the applicable treaty, which this Tribunal cannot do under Article 10.20.8 of the Treaty. It should be noted that the *CSOB* tribunal does not refer in any part of its decision to the necessity "to [m]aintain the *[s]tatus [q]uo* and [p]revent [a]ggravation of the ICSID [a]rbitration", as Claimants try to suggest.

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46. In conclusion, Claimants have failed to meet their burden of proving that there is absolute necessity and urgency to prevent an irreparable harm. Thus, the Tribunal should dismiss Claimants' Provisional Measures Application.

(2) Claimants Have Not Established the *Prima Facie* Jurisdiction of the Tribunal

47. In their Application, Claimants state that it is well-established that a tribunal may grant provisional measures when there is a *prima facie* basis for its jurisdiction.[120] Respondent agrees with the need to satisfy this condition. However, as Claimants

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[118] **Ex. RL-262**, *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Procedural Order No. 2, September 9, 1998 ("*CSOB,* Procedural Order No. 2"), ¶ 4.

[119] In *CSOB v. Slovakia*, the tribunal initially "deferred '. . . Claimant's request for provisional measures with respect to the bankruptcy proceedings . . . pending the outcome of [c]laimant's application . . . for [its] suspension." **Ex. RL-262**, *CSOB*, Procedural Order No. 2, p. 3; **Ex. CL-20/CL-36**, *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Procedural Order No. 4, January 11, 1999 ("*CSOB,* Procedural Order No. 4"), ¶ 3. Just after the Bratislava Regional Court denied claimant's request for suspension of the bankruptcy proceedings, and claimants appealed that ruling before the Slovak Supreme Court, the tribunal recommend the suspension of the bankruptcy proceedings. The tribunal only based its decision on the fact "that the aforementioned bankruptcy proceedings might include determinations relating to the claims the [Slovak Collection Company] may have against the Slovak Republic under the [c]onsolidation [a]greement concluded between [CSOB] and the Slovak Republic." **Ex. CL-20/CL-36**, *CSOB*, Procedural Order No. 4, ¶ 6. Claimants filed *CSOB*, Procedural Order No. 4 twice under CL-20 and CL-36. Respondent will refer to *CSOB*, Procedural Order No. 4 in the form of "Ex. CL-20/CL-36".

[120] Claimants' Application, ¶ 106.

themselves acknowledge,[121] "it is not enough for one party to bring proceedings to establish the jurisdiction of the Arbitral Tribunal before which an application for provisional measures has been brought."[122] In this case, Claimants have failed to meet their burden of proof of showing that there is a *prima facie* basis for the Tribunal's jurisdiction.[123]

48. As Respondent explained in detail in its Memorial on Preliminary Objections, the Tribunal does not have jurisdiction over this case:[124]

- The Tribunal does not have jurisdiction *ratione voluntatis* over this case because Claimants did not comply with the requirements established in Article 10.16.1 of the Treaty for submitting a claim to arbitration thereunder: there is no breach of a substantive obligation of the Treaty or an investment agreement and Claimants have not incurred any loss or damage by reason of, or arising out of, that breach.[125] In fact, the Provisional Measures Application highlights the absence of an actual loss or damage arising out of the Fiscal Liability Proceeding, as the interim relief Claimants seek is aimed at "preventing" the supposed loss or damage that could stem from the enforcement of the Ruling with Fiscal Liability.[126]

- Claimants do not have a qualifying investment under the Treaty and the ICSID Convention because the Services Contract, which Claimants allege constitutes their "investment", does not qualify as an

[121] *Id*.

[122] **Ex. CL-26**, *Millicom International Operations B.V. and Sentel GSM SA v. Republic of Senegal*, ICSID Case No. ARB/08/20, Decision on the Application of Provisional Measures, December 9, 2009, ¶ 42 (emphasis added).

[123] *See* ¶ 22, *supra*. In addition, Claimants have not shown that the Tribunal has *prima facie* authority to grant the provisional measures they seek. *See* ¶¶ 6-17, *supra*.

[124] Moreover, Claimants definitively elected to submit their claim for breach of the Treaty's fair and equitable treatment ("FET") obligation before Colombian courts: in the first of the *acciones de tutela* brought before Colombian courts, Foster Wheeler and Process Consultants alleged not only a violation of due process as a fundamental right of Colombian law, but also a violation of due process as part of the FET obligation under the Treaty, which – under Annex 10-G of the Treaty – means that the election made by Claimants is definitive and that they cannot submit a claim for an alleged breach of FET to arbitration under the Treaty (as – pursuant to Article 10.17.1 of the Treaty – Colombia only consented "to the submission of a claim to arbitration under this Section [B] in accordance with this [Treaty]."). *See* Memorial on Preliminary Objections, ¶¶ 319-328.

[125] *See id.*, ¶¶ 168-261, n. 354.

[126] Claimants have acknowledged the absence of an actual loss or damage since the Notice of Arbitration. *See* Memorial on Preliminary Objections, ¶ 255.

"investment" under Article 25 of the ICSID Convention since it is an ordinary commercial contract for the provision of services that does not entail investment risk for Claimants.[127]

- Claimant FPJVC does not qualify as a "national of another Contracting State" under the ICSID Convention because FPJVC is – in Claimants' own words – a "contractual joint venture", and as such, it cannot be considered a "juridical person" for purposes of Article 25(2)(b) of the ICSID Convention.[128]

- Contrary to the express requirement in Article 10.16.2 of the Treaty, Claimants Foster Wheeler and Process Consultants did not send a notice of intent to submit the present dispute to arbitration, thus depriving this Tribunal of jurisdiction *ratione voluntatis* over their claims.[129]

- Claimants' did not effectively waive their right to initiate or continue proceedings with respect to the measure that they allege to be a breach of the substantive obligations under the Treaty. On the one hand, Claimants' "waiver" – submitted with their Notice of Arbitration – does not satisfy the formal requirements set forth by Article 10.18.2(b) of the Treaty since it contains a reservation of rights (which is not only impermissible, but empties the waiver of content). On the other hand, Foster Wheeler and Process Consultants have not effectively and materially complied with such "waiver" because not only have they continued to participate actively in the Fiscal Liability Proceeding, and have even appealed the Ruling with Fiscal Liability before the fiscal liability and administrative sanctions chamber of the CGR, but they have also – subsequent to filing their Notice of Arbitration – initiated two additional *acciones de tutela* before Colombian courts for alleged violations of due process with regard to the conduct of the Fiscal Liability Proceeding, all of which results in the lack jurisdiction *ratione voluntatis* of the Tribunal.[130]

49. All these objections show that Claimants have failed to meet their burden of proving that the Tribunal has *prima facie* jurisdiction over the dispute, and thus Claimants' Provisional Measures Application should be dismissed by the Tribunal.

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[127] *See* Memorial on Preliminary Objections, ¶¶ 281-298.

[128] *See id.*, ¶¶ 299-309.

[129] *See id.*, ¶¶ 310-318.

[130] *See id.*, ¶¶ 329-343.

(3) Claimants Have Not Made a *Prima Facie* Case on the Merits

50. Claimants argue that "ICSID tribunals typically do not consider the merits of the case when determining whether to grant provisional measures [and that t]he few tribunals that have considered the validity of the underlying allegations have required only that the claimant plead a facially plausible case."[131] According to Claimants, "the factual and legal bases for the Application far exceed the establishment of Claimants' *prima facie* case on the merits."[132]

51. Claimants, however, have failed to meet their burden to establish a *prima facie* case on the merits:

- Claimants' FET claim has no basis, since (i) the Treaty's FET standard only protects investments and not investors, and all of Claimants' claims are based on alleged acts, omissions and conduct by Colombia that would have affected only investors; (ii) in any event, Claimants plead their case on the basis of an incorrect FET standard, since the FET standard – under the Treaty – is limited to the minimum standard of treatment under customary international law, and none of Claimants' allegations is capable of violating the minimum standard of treatment; and (iii) ultimately, irrespective of the limited scope of the FET standard, there could not have been a denial of justice in this case, given that not even a judgment from a court of first instance has been rendered with respect to the Ruling with Fiscal Liability, and much less so has there been a fundamental breach of due process.[133]

- Claimants do not allege that their entire "investment" has been expropriated by Colombia, but merely that [redacted]

[131] Claimants' Application, ¶ 119. Claimants attempt to downplay the requirement of showing a *prima facie* case on the merits to obtain interim relief, but they do not cite a single case where a tribunal decided on a provisional measures request without looking into that requirement.

[132] *Id.*, ¶ 121.

[133] Memorial on Preliminary Objections, ¶¶ 186-214.

[redacted][134] and thus no *prima facie* case on expropriation has been made.

- Claimants' claim that Respondent allegedly violated the national treatment obligation under Article 10.3 of the Treaty, because they were given less favorable treatment than that accorded to the members of Ecopetrol's board of directors, is also completely baseless. From a simple analysis of Claimants' factual allegations and the undisputed facts of the case, it is clear that Claimants have failed to prove – even *prima facie* – that the conditions necessary for a breach of the national treatment obligation are met due to the fact that: (i) the Indictment Order (as well as the Ruling with Fiscal Liability that was issued after this Arbitration was initiated) involves both nationals and foreigners, and therefore does not have the "practical effect" of "creat[ing] a disproportionate benefit for nationals over non-nationals"; and (ii) "the measure, on its face" does not "appear[] to favour nationals over non-nationals."[135]

- Colombia's alleged breach of Article 10.4 of the Treaty – the most-favored-nation ("MFN") treatment obligation –, on grounds that Swiss investors could purportedly invoke the umbrella clause contained in the Colombia-Switzerland BIT while Claimants could not (given that the Treaty does not contain such a clause), has no basis either. Claimants' claims are not capable of constituting a *prima facie* breach of the Treaty's MFN obligation as (i) the MFN obligation is a standard of "treatment" and Claimants have failed to make a *prima facie* showing of a factual scenario in which third-country investors were accorded more favorable treatment, in like circumstances, than U.S. investors; (ii) the MFN clause of the Treaty cannot be used to import substantive obligations from other investment treaties (new rights) that are not found in the base treaty (*i.e.*, the Treaty), nor – if the importation of new rights were permitted – can such an importation be contrary to the public policy considerations taken into account by the Contracting Parties to the Treaty; (iii) even if the importation of an umbrella clause from another treaty were permitted, the umbrella clause of the Colombia-Switzerland BIT that Claimants seek to import does not grant consent to arbitrate claims for breaches of that umbrella clause; and (iv) in any event, even if the umbrella clause of the Colombia-Switzerland BIT could be imported in the manner requested by Claimants, it would be impossible to apply that clause in this case

[134] *Id.*, ¶¶ 215-224.

[135] *Id.*, ¶¶ 225-230.

because the requirements for its application are not met (*inter alia*, because Reficar is not an agency of the Colombian central government).[136]

- There could not have been a breach of an investment agreement, as Claimants also confusingly argue, since the Treaty does not grant jurisdiction to the Tribunal to hear alleged contractual breaches and, in any case, no investment agreement *prima facie* exists.[137]

52. Lastly, Claimants also argue that they have *prima facie* established that they have a right to the relief sought.[138] That is not true. As Respondent explained in its Memorial on Preliminary Objections, Claimants' claims fall outside the Tribunal's powers under Article 10.26 of the Treaty, because (i) the Tribunal is not empowered to award moral damages; (ii) the Tribunal is also not empowered to award non-monetary orders or injunctions; and (iii) the Tribunal cannot grant an offsetting award since it is not empowered to award hypothetical damages.[139]

53. In short, Claimants have not established a *prima facie* case on the merits, and thus their Provisional Measures Application must fail.

(4) Granting the Provisional Measures Application Would Cause Prejudice to Respondent and Third Parties

54. Claimants contend that "[t]he Tribunal is 'called upon to weigh the balance of inconvenience in the imposition of interim measures upon the parties.'"[140] Respondent largely agrees with this proposition and adds that, as stated in *Plama v. Bulgaria*, the

[136] *Id.*, ¶¶ 231-239.

[137] *Id.*, ¶¶ 240-250.

[138] Claimants' Application, ¶¶ 105, 117-118.

[139] Memorial on Preliminary Objections, ¶¶ 262-278.

[140] Claimants' Application, ¶ 157.

Tribunal must also not affect the rights of third parties.[141] Here, the granting of the Provisional Measures Application would cause prejudice to Respondent and to third parties.

55. On the one hand, granting the Provisional Measures Application would affect Respondent's sovereign right to enforce the Ruling with Fiscal Liability. 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.[142] 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.[143] Such enforcement will be carried out in accordance with Colombian law, which Respondent has a sovereign right to apply.[144] Colombia's right to enforce its domestic laws outweighs Claimants' feigned concern about the enforcement of the Ruling with Fiscal Liability.[145]

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[141] In *Plama v. Bulgaria*, the claimant requested that the tribunal order Bulgaria to stay insolvency proceedings initiated by third parties against it. **Ex. CL-17**, *Plama*, ¶ 2. In denying Plama's request, the tribunal took into account the fact that there was no identity between the parties to the arbitration and the parties to the domestic insolvency proceedings, and that third-party rights were involved. With regard to the latter, the tribunal stated that "it is significant that the parties to those [bankruptcy] proceedings and the parties to this arbitration are different. The bankruptcy proceedings are brought by private parties who are not involved in the present arbitration. The Tribunal is reluctant to recommend to a State that it order its courts to deny third parties the right to pursue their judicial remedies." *Id.*, ¶ 43.

[142] **Ex. RL-24**, Administrative Code, Article 88.

[143] *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**, Current Constitution, Article 268(5); **Ex. RL-8**, Prior Law 610 of 2000, Article 12; **Ex. RL-33**, Decree Law 403 of 2020, Article 117; Memorial on Preliminary Objections, ¶¶ 115-121.

[144] *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, ¶ 41.

[145] *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.") (emphasis added). The case *Alghanim v. Jordan* – repeatedly cited by Claimants – does not aid their Provisional Measures Application. Claimants' Application, ¶¶ 159-160; **Ex. RL-263**, *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Mr. Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of*

56. On the other hand, granting the Provisional Measures Application would also affect the other fourteen fiscally liable parties under the Ruling with Fiscal Liability. As Claimants correctly recognize, "the [Ruling with Fiscal Liability] is joint and severable."[146] Accordingly, issuing the provisional measures requested by Claimants would mean that the enforcement of the Ruling with Fiscal Liability would be limited to the remaining fiscally liable parties, excluding Claimants, which would change the *status quo* and affect the rights of third party.[147]

57. In sum, Claimants have failed to meet their burden of proving that granting the Provisional Measures Application would cause no prejudice to Respondent and third parties, nor that it would be proportional.

(5) Granting the Provisional Measures Application Would Cause the Tribunal to Prejudge the Merits

58. Even though Claimants do not expressly refer to this requirement independently,[148] in paragraph 117 of their Application, Claimants cite the case *Pey Casado v. Chile*, in which the tribunal warned against the danger of prejudging the merits of the claim. This requirement was further recognized by various ICSID tribunals. For instance, in *Caratube v. Kazakhstan II*, the tribunal stated that "the recommendation of the requested provisional measures must not prejudge the Tribunal's decision on the

Jordan, ICSID Case No. ARB/13/38, Order on Application for the Grant of Provisional Measures, November 24, 2014 ("*Alghanim*"). Like other cases on which their rely, the treaty at issue in *Alghanim* (Jordan-Kuwait BIT) does not contain a provision like Article 10.20.8 expressly prohibiting the tribunal from granting the provisional measures requested by Claimants. *See* ¶¶ 6-19, *supra*.

[146] Claimants' Application, ¶ 158.

[147] *See* ¶¶ 18-19, *supra*.

[148] *See* n. 44, *supra*.

merits of the case."[149] In this case, granting the Provisional Measures Application would necessarily require the Tribunal to prejudge the merits.

59. In their Notice of Arbitration, Claimants request that the Tribunal "issue a final award . . . 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."[150] Identically, in its Provisional Measures Application, Claimants request that the Tribunal issue "an order enjoining Respondent Colombia from enforcing, either locally or abroad, the [Ruling with Fiscal Liability] of the [CGR]."[151]

60. If the Tribunal grants the Provisional Measures Application, it will be prejudging this case because it will effectively grant Claimants the relief they are seeking without fully examining the merits. In other words, what Claimants seek with their Provisional Measures Application is to obtain the ultimate relief they are pursuing without having to prove their case.

61. Therefore, Claimants' Provisional Measures Application should also be dismissed for not complying with this requirement.

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[149] **Ex. RL-264**, *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan (II)*, ICSID Case No. ARB/13/13, Decision on the Claimants' Request for Provisional Measures, December 4, 2014, ¶ 100. *See also* **Ex. RL-265**, *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, August 13, 2014, ¶ 58 ("Before ordering any provisional measure, . . . under the ICSID Convention and the ICSID Arbitration Rules, . . . the tribunal in recommending provisional measures must not prejudge the dispute on the merits"); **Ex. RL-266**, *International Quantum Resources Limited et al. v. Democratic Republic of Congo*, ICSID Case No. ARB/10/21, Procedural Order No. 3 (Unofficial Translation), November 28, 2011, ¶ 40 ("We take them to mean that such a request [for provisional measures] may be admitted if it meets the following conditions: . . . The granting of the measures sought does not prejudge the merits of the case"); **Ex. RL 229**, *Maffezini,* ¶ 21 ("It would be improper for the Tribunal to pre-judge the Claimant's case by recommending provisional measures of this nature"); **Ex. CL-30**, *PNG*, ¶ 121 ("Granting a request for provisional measures must not involve the tribunal pre-judging the merits of the case").

[150] Notice of Arbitration, ¶ 216.

[151] Claimants' Application, ¶ 2.

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62. In sum, Claimants Provisional Measures Application must fail, as Claimants have not met their burden of proving each and every one of the cumulative requirements for interim protection to be granted: (1) the interim relief requested by Claimants is neither necessary nor urgent to prevent an irreparable harm; (2) the tribunal does not have *prima facie* jurisdiction over the dispute; (3) Claimants have not made a *prima facie* case on the merits; (4) granting the provisional measures Claimants request would prejudice not only Respondent but also other third parties; and (5) granting the provisional measures requested would cause the Tribunal to prejudge the merits of the dispute.

CONCLUSION

63. Claimants' Provisional Measures Application should be dismissed because Article 10.20.8 of the Treaty prohibits the Tribunal from ordering the injunctive relief requested by Claimants. Moreover, Claimants have also failed to prove each one of the five cumulative requirements for granting provisional measures.

64. Given the frivolous nature of Claimants' Provisional Measures 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

65. Respondent reserves the right to submit such additional evidence and arguments as it deems appropriate to supplement this Answer to the Provisional Measures 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.

Respectfully submitted,

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