

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Enel Colombia S.A. (formerly ESSA2 SpA) and Enel Green Power Costa Rica S.A.

v.

Republic of Costa Rica

(ICSID Case No. ARB/21/49)

PROCEDURAL ORDER No. 1

Members of the Tribunal

Prof. Albert Jan van den Berg, President of the Tribunal

Ms. Elisabeth Eljuri, Arbitrator

Prof. Raúl E. Vinuesa, Arbitrator

Secretary of the Tribunal

Ms. Ana Constanza Conover Blancas

Assistant to the Tribunal

Ms. Emily Hay

20 December 2022

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Introduction

The first session of the Tribunal was held on 5 December 2022, at 9 a.m. EDT, by video conference. The session was adjourned at 10:30 a.m. EDT.

A recording of the session was made and deposited in the archives of ICSID. The recording was distributed to the Members of the Tribunal and the parties.

Participating in the conference were:

Members of the Tribunal:

Prof. Albert Jan van den Berg, President of the Tribunal
Ms. Elisabeth Eljuri, Arbitrator
Prof. Raúl E. Vinuesa, Arbitrator

ICSID Secretariat:

Ms. Ana Constanza Conover Blancas, Tribunal Secretary

On behalf of the Claimants:

Mr. José Ignacio García Cueto, Clifford Chance US LLP
Ms. Florencia Bohl, Clifford Chance US LLP
Ms. Francesca Salerno, Enel Colombia S.A. and Enel Green Power Costa Rica S.A.
Ms. Lucrezia Albanese, Enel Colombia S.A. and Enel Green Power Costa Rica S.A.
Ms. Olga Masinovska, Enel Colombia S.A. and Enel Green Power Costa Rica S.A.
Mr. Daniel Muñoz, Enel Colombia S.A. and Enel Green Power Costa Rica S.A.
Mr. Mauricio Garita, Enel Colombia S.A. and Enel Green Power Costa Rica S.A.

On behalf of the Respondent:

Mr. Paolo Di Rosa, Arnold & Porter Kaye Scholer LLP
Mr. Patricio Grané Labat, Arnold & Porter Kaye Scholer LLP
Ms. Natalia Giraldo Carrillo, Arnold & Porter Kaye Scholer LLP
Ms. Adriana González, Ministerio de Comercio Exterior (COMEX), Republic of Costa Rica
Ms. Arianna Arce, Ministerio de Comercio Exterior (COMEX), Republic of Costa Rica
Ms. Marisol Montero, Ministerio de Comercio Exterior (COMEX), Republic of Costa Rica

The Tribunal and the parties considered the following:

- The draft procedural order circulated by the Tribunal Secretary on 1 November 2022;
- The parties' comments on the draft procedural order received on 30 November 2022, indicating the items on which they agreed and their respective positions regarding the items on which they did not agree;

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- The discussions between the Tribunal and the parties during the first session on 5 December 2022;
- The revised draft procedural order circulated by the Tribunal Secretary on 9 December 2022; and
- The parties' comments on the revised draft procedural order received on 16 December 2022, indicating certain agreed edits and their respective positions regarding the items on which they did not agree.

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

Order

Pursuant to ICSID Arbitration Rules 19 and 20, this first Procedural Order sets out the procedural rules that govern this arbitration. The timetable is attached as **Annex A**.

1. Applicable Arbitration Rules
Convention Article 44

- 1.1 These proceedings are conducted in accordance with the ICSID Arbitration Rules in force as of 10 April 2006.
- 1.2 The Claimants invoke as the instrument of consent to ICSID arbitration the Agreement between the Republic of Chile and the Republic of Costa Rica on the Promotion and Reciprocal Protection of Investments, which has been in force since 8 July 2000 ("**BIT**"). The request for arbitration was submitted by ESSA2 SpA (a company organized under the laws of Chile) and Enel Green Power Costa Rica S.A. (a company organized under the laws of Costa Rica) against the Republic of Costa Rica. By letter of 12 May 2022, the Claimants informed ICSID that Enel Colombia S.A. (a company organized under the laws of Colombia) became the successor for all legal purposes to ESSA2 SpA.
- 1.3 Also by letter of 12 May 2022 and during the first session, the Claimants indicated that they reserved their rights to invoke the applicability of the Free Trade Agreement between Colombia and Costa Rica entered into force on 1 August 2016 ("**FTA**"). In turn, the Respondent noted during the first session the need to adjust the procedural rules that govern this arbitration should the provisions of the FTA become applicable to this case. The Respondent reserved its right to raise objections to the Tribunal's jurisdiction with respect to the BIT and the FTA.

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2. Constitution of the Tribunal and Tribunal Members' Declarations

Arbitration Rule 6

- 2.1. The Tribunal was constituted on 24 October 2022 in accordance with the ICSID Convention and the ICSID Arbitration Rules. The parties confirmed that the Tribunal was properly constituted and that no party has any objection to the appointment of any Member of the Tribunal.
- 2.2. The Members of the Tribunal timely submitted their signed declarations in accordance with ICSID Arbitration Rule 6(2). Copies of these declarations were distributed to the parties by the ICSID Secretariat on 24 October 2022.
- 2.3. The Members of the Tribunal confirmed that they have sufficient availability during the next 24 months to dedicate to this case.

3. Fees and Expenses of Tribunal Members

Convention Article 60; Administrative and Financial Regulation 14; ICSID Schedule of Fees; Memorandum on Fees and Expenses

- 3.1. The fees and expenses of each Tribunal Member shall be determined and paid in accordance with the ICSID Schedule of Fees and the Memorandum on Fees and Expenses of ICSID Arbitrators in force at the time the fees and expenses are incurred.
- 3.2. Pursuant to ICSID Administrative and Financial Regulation 14, under the Memorandum on Fees and Expenses, from 1 July 2022, each Tribunal Member is entitled to:
 - 3.2.1. US\$500 (five hundred United States dollars) per hour of work performed in connection with the proceeding, including each hour spent participating in hearings, sessions and meetings;
 - 3.2.2. US\$900 (nine hundred United States dollars) as a *per diem* for each day spent away from their city of residence while traveling in connection with a proceeding when overnight lodging is required. This covers all personal expenses, including lodging, tax on lodging, service charges, meals, gratuities, in-city transportation, laundry, personal communications and internet;
 - 3.2.3. US\$250 (two hundred fifty United States dollars) for each hour of travel and a *per diem* allowance of US\$200 (two hundred United States dollars) for travel to and from a hearing on a day when lodging is not required. For work performed during travel, Members may charge the hourly rate for

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work (US\$500) in lieu of the hourly rate for travel. For day trips not requiring overnight lodging, Members are also entitled to a *per diem* of US\$200; and

- 3.2.4. reimbursement for the costs of air and ground transportation to and from the city where the hearing, session or meeting is held.
 - 3.3. Non-refundable expenses incurred due to postponement or cancellation of a hearing shall be reimbursed, e.g., the lesser of (a) actual non-refundable cost or (b) US\$900 *per diem*.
 - 3.4. Each Tribunal Member shall submit his/her detailed claims for fees and expenses to the ICSID Secretariat on a quarterly basis or more frequently. Claims for work performed must be declared in a detailed, itemized format and appended to the Claim for Fees and Expenses form.
4. Presence and Quorum
Arbitration Rules 14(2) and 20(1)(a)
 - 4.1. The presence of all Members of the Tribunal constitutes a quorum for its sittings, including by any appropriate means of communication.
5. Rulings of the Tribunal
Convention Article 48(1); Arbitration Rules 16, 19 and 20
 - 5.1. Decisions of the Tribunal shall be taken by a majority of the Members of the Tribunal.
 - 5.2. ICSID Arbitration Rule 16(2) applies to decisions taken by correspondence, except that where the matter is urgent and consultation with the other Members of the Tribunal is not practicable, the President may decide procedural matters without consulting the other Members, subject to possible reconsideration of such decision by the full Tribunal.
 - 5.3. The Tribunal will draft and issue all rulings, including the award, within a reasonable time period. With the exception of any award, if a decision on any matter has not been issued within two months of the final submission on that matter, the Tribunal will provide the parties with status updates every month. The Tribunal shall endeavor to issue any award within six months of the final oral or written submissions (including post-hearing briefs, if any). If the award has not been issued within six months of the final submissions, the Tribunal will provide the parties with status updates every month.

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- 5.4. The President is authorized to issue procedural orders on behalf of the Tribunal, subject to Section 5.1 above.
- 5.5. The Tribunal's rulings on procedural matters may be communicated to the parties by the Tribunal Secretary electronically by letter or email.
- 5.6. Any ruling of the Tribunal, including the certified copy of the award, will be dispatched electronically to the parties.

6. Power to Fix Time Limits
Arbitration Rule 26(1)

- 6.1. The President may fix and extend time limits for the completion of the various steps in the proceeding.
- 6.2. In exercising this power, the President shall consult with the other Members of the Tribunal. If the matter is urgent, the President may fix or extend time limits without consulting the other Members, subject to possible reconsideration of such decision by the full Tribunal.

7. Tribunal Secretary
Administrative and Financial Regulation 28 (entered into force on 1 July 2022)

- 7.1. The Tribunal Secretary is Ms. Ana Constanza Conover Blancas, Legal Counsel, ICSID, or such other person as ICSID may notify the Tribunal and the parties at a given time.
- 7.2. To send copies of communications by email, mail, and courier/parcel deliveries to the Tribunal Secretary, the contact details are:

Ms. Ana Constanza Conover Blancas
ICSID
MSN C3-300
1818 H Street, N.W.
Washington, D.C. 20433
U.S.A.
Tel.: + 1 (202) 473 9042
Fax: + 1 (202) 522-2615
Email: aconover@worldbank.org
Paralegal name: Ms. Ayling Kocchiu
Paralegal email: akocchiu@worldbank.org

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

Ms. Ana Constanza Conover Blancas
ICSID
1225 Connecticut Ave. N.W.
(World Bank C Building)
3rd Floor
Washington, D.C. 20036
U.S.A.
Tel.: +1 (202) 458-1534

8. Assistant to the Tribunal

- 8.1. By letter dated 2 November 2022, the President explained to the parties that he considered that it would benefit the overall cost and time efficiency of the proceedings if the Tribunal had an assistant. The President proposed, with the approval of the other Members of the Tribunal, that Ms. Emily Hay of the firm Hanotiau & van den Berg be appointed as Assistant to the Tribunal. Ms. Hay's *curriculum vitae* was distributed to the parties.
- 8.2. The President further explained that the assistant would (i) undertake only such specific tasks as are assigned to her by the Tribunal, such as (a) assisting the Tribunal in the review of the evidence and of the issues in dispute, including through the review of submissions and evidence, preparation of summaries and/or memoranda, and research on specific factual or legal issues so as long as it does not involve decision-making; (b) assisting the Tribunal in the preparation and communication of its decisions to the parties, under the direction of and supervision of the Tribunal or its presiding arbitrator; (c) providing other support to the Tribunal or its Members, especially its presiding arbitrator, at any time, especially during hearings, which the assistant to the Tribunal may attend; (d) liaising with the Tribunal Secretary and the ICSID Secretariat regarding any of these tasks; and (e) research of specific issues of law and organization of case documents; and (ii) be subject to the same independence, impartiality, and confidentiality obligations as the Members of the Tribunal and sign a declaration to that effect.
- 8.3. The parties consented to the appointment of Ms. Emily Hay as Assistant to the Tribunal during the first session.
- 8.4. The parties also agreed that Ms. Emily Hay would not charge for her time on this matter, but would be reimbursed for reasonable expenses incurred in connection with attending meetings and hearings, in accordance with Administrative and Financial Regulation 14 and the ICSID Memorandum on the Fees and Expenses.

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9. Representation of the Parties

Arbitration Rule 18

9.1. Each party shall be represented by its counsel (below).

For Claimants

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For Respondent

Ms. Adriana González
Dispute Resolution Coordinator
Ms. Arianna Arce
Ms. Marisol Montero
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arianna.arce@comex.go.cr
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and

Mr. Paolo Di Rosa
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Mr. Patricio Grané Labat
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London EC2N 1HQ, UK
Patricio.Grane@arnoldporter.com

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Hernan.ChiribogaNovillo@CliffordChance.com

- 9.2. Communications destined for the Republic of Costa Rica shall also be sent to xEnelCR@arnoldporter.com and Natalia.Giraldo-Carrillo@arnoldporter.com.
- 9.3. Each party shall be represented by its counsel (above) and may designate additional agents, counsel, or advocates by notifying the Tribunal and the Tribunal Secretary promptly of such designation. The designation of such representatives shall be respected, unless the Tribunal determines that it would affect the integrity of the proceeding. In the event that a change in the representation of a party may create a conflict of interest, or a reasonable appearance of a conflict of interest with one or more of the arbitrators, the Arbitral Tribunal may, after consulting with the parties, take appropriate measures to safeguard the integrity and stability of the proceeding, including by preventing the participation of the new representative.

10. Apportionment of Costs and Advance Payments to ICSID

Convention Article 61(2); Administrative and Financial Regulation 14; Arbitration Rule 28

- 10.1. The parties shall cover the direct costs of the proceeding in equal parts, without prejudice to the final decision of the Tribunal as to the allocation of costs.
- 10.2. By letter of 25 October 2022, ICSID requested that each party pay US\$150,000 to cover the initial costs of the proceeding. ICSID received Claimants' payment on 22 November 2022 and the Respondent's payment on 28 October 2022 and 23 November 2022.
- 10.3. ICSID shall request further advances as needed. Such requests shall be accompanied by a detailed interim statement of account.
- 10.4. Within 5 business days of the date of this Order, if a party benefits from the provision of funds or other material support for the pursuit or defense of its case in these proceedings, by a natural or juridical person that is not a party to the dispute ("**third-party funder**"), that party shall make a declaration to that effect and disclose to the Tribunal the name and address of the third-party funder, and provide the terms of the funding (including in relation to any award on costs).
- 10.5. Each Party shall have a continuing obligation to disclose any changes to the information referred to in the preceding paragraph, occurring after any initial disclosure, including commencement or termination of the third-party funding arrangement, within five business days of the relevant change occurring.

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11. Place of Proceeding

Convention Articles 62 and 63; Arbitration Rule 13(3)

- 11.1. Washington, D.C. shall be the place of the proceeding.
- 11.2. The hearings will take place in Washington D.C., unless the parties agree otherwise or the Tribunal considers it appropriate.
- 11.3. The Tribunal, after consulting with the parties, may decide to hold the hearing by video conference in accordance with Sections 21.2 and 21.3 below.
- 11.4. The Tribunal members may deliberate at any place and by any appropriate means they consider convenient.

12. Procedural Languages, Translation and Interpretation

Arbitration Rules 20(1)(b) and 22

- 12.1. English and Spanish are the procedural languages of the arbitration.
- 12.2. Routine, administrative, or procedural correspondence addressed to or sent by the ICSID Secretariat may be in either procedural language.

For the Parties' Pleadings

- 12.3. Any written requests or applications shall be submitted in either procedural language. If the request or application is in Spanish, an English translation shall be filed within seven business days.
- 12.4. Expert opinions and witness statements may be submitted in either procedural language, provided that if submitted in Spanish, a translation into English shall be submitted within 30 calendar days. Any other accompanying documentation (e.g., exhibits, legal authorities, annexes to expert opinions, etc.) shall be submitted in either procedural language, and its translation to the other procedural language is optional unless ordered by the Tribunal.
- 12.5. If a document is lengthy and relevant only in part, it is sufficient to translate only relevant parts, provided that the Tribunal may require a fuller or a complete translation at the request of any party or on its own initiative.
- 12.6. Translations need not be certified unless there is a dispute as to the translation provided and the Tribunal orders a certified version. The party that submitted the relevant document shall cover the initial cost of the certified translation, without

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prejudice to the Tribunal's authority to allocate such cost differently in an order or award.

- 12.7. Documents exchanged between the parties under Section 16 below ("Production of Documents") may be produced in the original language and need not be translated.

For Hearings

- 12.8. The Hearing shall be conducted in Spanish and English with simultaneous interpretation into the other procedural language. Transcripts shall be taken in both languages.
- 12.9. The testimony of a witness called for examination during the hearing who prefers to give evidence in a language other than English or Spanish shall be interpreted, simultaneously if possible.
- 12.10. The parties will notify the Tribunal, as soon as possible, and no later than at the pre-hearing organizational meeting (*see* Section 20 below), which witnesses, or experts require interpretation.
- 12.11. The costs of interpretation will be paid from the advance payments made by the parties, without prejudice to the decision of the Tribunal as to which party shall ultimately bear those costs. ICSID will hire interpreters for the hearing, but the parties will be consulted about the interpreters whose hiring is proposed.

For the Tribunal's Documents Except the Award

- 12.12. The Tribunal may initially make any procedural order or decision in one procedural language, and subsequently issue that order or decision in the other procedural language. Both language versions shall be equally authentic.

For the Tribunal's Award

- 12.13. The Tribunal shall render the award in English and Spanish simultaneously. Both language versions shall be equally authentic.

13. Routing of Communications

- 13.1. Each party's written communications shall be transmitted by email or other electronic means to the Tribunal, opposing party, Assistant to the Tribunal, and Tribunal Secretary.

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- 13.2. Electronic versions of communications to be filed simultaneously —either by order of the Tribunal or agreement of the Parties— shall be transmitted to the Tribunal Secretary only, who shall send them to the opposing party, the Tribunal, and Assistant to the Tribunal.
- 13.3. The Tribunal Secretary or Assistant to the Tribunal shall not be copied on communications between the parties when such communications are not intended to be transmitted to the Tribunal.
- 13.4. The email addresses of the Members of the Tribunal are:

Prof. Albert Jan van den Berg
ajvandenbergh@hvdb.com

Ms. Elisabeth Eljuri
elisabeth.eljuri@outlook.com

Prof. Raúl E. Vinuesa
raul.vinuesa43@gmail.com

14. Number of Copies and Method of Filing of Parties' Pleadings
Arbitration Rules 20(1)(d) and 23

- 14.1. By the relevant filing date the parties shall submit by email to the Members of the Tribunal, opposing party, the Assistant to the Tribunal, and the Tribunal Secretary an electronic version of the pleading, witness statements, expert reports, and an index of all the supporting documentation attached to the pleading.¹ If the electronic version of the pleading, witness statements, expert reports, and index exceeds 25 MB, the parties shall submit the documentation in multiple emails, each not exceeding 25 MBs.
- 14.2. Within the next five business days, the parties shall upload the pleading with all the supporting documentation (including exhibits and legal authorities) and updated index to ICSID's file sharing platform (the "**Electronic Filing**").
- 14.3. For the avoidance of doubt, the Electronic Filing process indicated in this subparagraph is applicable both to the original language submission and to any subsequent translations (subject to Section 12.4 above) agreed by the parties.
- 14.4. The pleadings, witness statements, expert reports, exhibits, and legal authorities shall be submitted in electronic format only, except that within three business days of the filing date, the relevant party shall courier to Ms. Eljuri and Professor Vinuesa one (1) bound hard copy in A4/letter format of the pleading, the witness statements and the expert reports (excluding exhibits and legal authorities) at the following addresses:

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

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Ms. Elisabeth Eljuri

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Coral Gables
Florida 33143
United States of America

Prof. Raúl E. Vinuesa

Alsina 2360
San Isidro
Buenos Aires 1642
Argentina

- 14.5. Electronic versions of pleadings, witness statements, expert reports, exhibits and legal authorities shall be text searchable (i.e., OCR PDF or Word).
- 14.6. All pleadings shall be accompanied by a cumulative index hyperlinked to all the supporting documentation that the party has submitted up to the date of the pleading. The index shall indicate the document number, the pleading with which it was submitted and the language of the document. The naming conventions contained in **Annex B** shall be followed. The cumulative hyperlinked index shall be uploaded to the file sharing platform created by ICSID within five business days of the relevant filing.
- 14.7. At the conclusion of the written phase of the proceeding, on a date to be determined by the Tribunal, or at any other time the Tribunal or the Tribunal Secretary so requests, the parties shall courier to the ICSID Secretariat at the address indicated at Section 7.2 or 7.3 above and to each Member of the Tribunal and the Assistant to the Tribunal at the addresses indicated at Section 14.4 above and below a USB drive containing an electronic copy of the entire case file (including pleadings, witness statements, expert reports, exhibits, legal authorities and Tribunal decisions and orders to date) with a consolidated hyperlinked index of all documents:

Professor Albert Jan van den Berg

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Belgium

Ms. Emily Hay

Hanotiau & van den Berg
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- 14.8. The official date of receipt of a pleading or communication shall be the day on which the electronic file is sent to the Tribunal Secretary by email.
- 14.9. A filing shall be deemed timely if sent by a party by 11:59 PM, Washington, D.C. time, on the relevant date.

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15. Number and Sequence of Pleadings

Arbitration Rules 20(1)(c), 20(1)(e), 29 and 31

- 15.1. The number and sequence of the pleadings shall be as provided in the Procedural Calendar attached as **Annex A**. The parties will submit the pleadings by the deadlines established in the Procedural Calendar. Annex A contains two Scenarios, depending on whether a document production phase takes place (Scenario A with Document Production; Scenario B with No Document Production) (see Section 16 below).
- 15.2. In the first exchange of submissions (Memorial and Counter-Memorial), the parties shall set forth all the facts and legal arguments on which they intend to rely. Allegations of fact and legal arguments shall be presented in a detailed and comprehensive manner.
- 15.3. In their second exchange of submissions (Reply and Rejoinder), the parties shall limit themselves to responding to allegations of fact and legal arguments made by the other party in the previous submission by the other party, unless new facts have arisen after the first exchange of submissions which justify new allegations of fact and/or legal arguments.
- 15.4. For each factual allegation, the parties shall, whenever possible, identify the evidence adduced or to be adduced in support of that allegation, in accordance with Section 17 below. Following each legal argument, the parties shall, whenever possible, identify the legal authority adduced in support of that argument.
- 15.5. All written submissions shall be divided into consecutively numbered paragraphs.
- 15.6. A hearing will take place in accordance with the terms of Section 21 below and the Procedural Calendar (**Annex A**).

16. Production of Documents

Convention Article 43(a); Arbitration Rules 24 and 33-36

- 16.1. Following the first exchange of submissions (viz., Memorial, Counter-Memorial), either party may promptly apply to the Tribunal to request a document production phase by the relevant deadline set forth in **Annex A**. This application shall explain the need of the document production phase, set forth the contended facts upon which documents will be requested and its materialness for the case. The Tribunal will decide upon such application after hearing the other party. In the event that such application is granted, document production will take place in accordance with the following provisions of this Section 16 and the relevant time limits in **Annex A**,

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Scenario A. In the event of no document production phase, the relevant time limits in Annex A, Scenario B shall apply.

- 16.2. The IBA (International Bar Association (“**IBA**”) Rules on the Taking of Evidence in International Arbitration (adopted by a resolution of the IBA Council on 17 December 2020) (“**IBA Rules**”) will be used as nonbinding guidance in this case by the Tribunal and the parties for any evidentiary question.
- 16.3. Within the time limit set out in the Procedural Calendar in **Annex A**, Scenario A, a party may submit to the other party (without copying the Members of the Tribunal, the Tribunal Secretary, or Assistant to the Tribunal) a request to produce a *limited* number of documents or narrow categories of documents within the other party’s possession, custody, or control, in accordance with the IBA Rules. The request shall identify with *precision* each document or *narrow* category of documents sought and establish its relevance to the case and materiality to the outcome. Document requests are not “fishing licenses” for broadly framed and wide-reaching requests equivalent to general discovery under common law civil procedural rules. Article 3(3)(a) of the IBA Rules provides that documents may be requested only if they “are reasonably believed to exist” by the requesting Party. The IBA Rules do not authorize requests intended to probe whether responsive documents exist, or to establish that there are none. Further, a requester’s generic statements that all of its requests are for documents “believed to exist” is not sufficient, particularly in cases involving wide-ranging and broadly-worded requests.
- 16.4. Consistent with the Tribunal’s powers and duties under Article 9(2) of the IBA Rules, which provides that a Tribunal shall exempt documents from disclosure on account of “legal impediment or privilege under the legal or ethical rules determined by the Tribunal to be applicable” or where it finds compelling grounds of “special political or institutional sensitivity [...],” the Tribunal shall give due consideration to the domestic legislation of the parties.
- 16.5. The requests to produce, responses, and replies and any applications to the Tribunal shall be made in the form of a Stern Schedule in the format set out in **Annex C** hereto. An electronic MS Word version of the Stern Schedule is to be transmitted to the party to whom the request is made and, when requesting the Tribunal’s decision, to the Tribunal.
- 16.6. Each request for a document shall contain:
- 16.6.1. A description that is sufficient to identify the specific document and its subject matter, or else a sufficiently detailed description of the specific category of documents reasonably believed to exist;

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- 16.6.2. A precise declaration as to why the documents sought are relevant to the dispute and material to the outcome of the case; and
- 16.6.3. A declaration that the documents sought are not within the requesting party's possession, custody, or control, as well as a declaration stating the requesting party's reasons for believing that the documents sought are within the other party's possession, custody, or control.
- 16.7. Within the time limit set out in the Procedural Calendar, using row C of the schedule provided by the first party (the "**Requesting Party**"), the party to whom the request is made (the "**Requested Party**") shall either confirm that it will produce the requested documents that are in its possession, custody, or control; or set forth its objections to the production sought and the reasons for such objections. At this stage, the Stern Schedule should be sent to the first party only (not to the Tribunal, ICSID Secretariat, the Assistant to the Tribunal, or the Tribunal Secretary).
- 16.8. Within the time limit set out in the Procedural Calendar (**Annex A**, Scenario A), the Requesting Party shall reply to the Requested Party's objections in row D of the same schedule. Such reply shall be limited to answering specific objections made in row C. Each party shall then file simultaneously (in accordance with Section 13.3 above) with the Tribunal the completed schedule (in both MS Word and PDF formats).
- 16.9. The Tribunal shall endeavor to resolve any contested document requests on or before the relevant date set out in the Procedural Calendar (**Annex A**, Scenario A), having regard to all of the surrounding circumstances, as well as the requirements under this section and the IBA Rules (particularly, but not limited, to specificity, materiality, and any rules on legal privilege and confidentiality).
- 16.10. Within the time limit set out in the Procedural Calendar (**Annex A**, Scenario A), documents shall be produced which are responsive to requests for which no objection has been made, and where objections have been made, documents shall be produced to the extent directed by the Tribunal. Documents shall be produced to the Requesting Party without copying the Tribunal.
- 16.11. Documents produced in accordance with this Section (either voluntarily or pursuant to Tribunal order) shall not be considered to be part of the record unless and until a party subsequently files them as exhibits in accordance with the Procedural Calendar (**Annex A**, Scenario A) or with any other applicable procedural order or decision.
- 16.12. The Tribunal shall have discretion to order a party to produce documents or other evidence without regard to whether the documents or evidence have been requested by the other party. In the event the Tribunal intends to exercise that discretion, it

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will give due notice to the parties and provide them with an opportunity to make submissions as to whether the Tribunal should exercise its discretion in the particular circumstances.

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

16.14. At any time in the proceeding, upon good cause shown, a party can request the production of documents either by agreement of the parties or by applying to the Tribunal.

17. Submission of Documents

Convention Article 44; Arbitration Rule 24

17.1. The Memorial and Counter-Memorial shall be accompanied by the supporting documentation relied upon by the parties, including exhibits and legal authorities. Further supporting documentation relied upon by the parties in rebuttal shall be submitted with the Reply and Rejoinder.

17.2. The documents shall be submitted in the manner and form set forth in Section 14 above.

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

17.3.1. Should a party request leave to file additional or responsive documents, that party may not annex the documents that it seeks to file to its request.

17.3.2. To the greatest extent possible, the parties shall abstain from presenting new documents in the period immediately preceding the hearing. As the hearing approaches, the Tribunal shall require increasingly exceptional circumstances to submit new documents.

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

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- 17.4. The Tribunal may call upon the parties to produce documents or other evidence in accordance with ICSID Arbitration Rule 34(2).
- 17.5. The documents shall be submitted in the following form:
- 17.5.1. Exhibits shall be numbered consecutively throughout these proceedings.
- 17.5.2. The number of each exhibit containing a document produced by the Claimants shall be preceded by the letter “C-” for factual exhibits and “CL-” for legal exhibits containing authorities. The number for each exhibit containing a document produced by the Respondent shall be preceded by the letter “R-” for factual exhibits and “RL-” for legal exhibits containing authorities.
- 17.5.3. Exhibits and legal authorities shall be submitted in PDF format and start with the number “C-0001” and “R-0001,” and “CL-0001” and “RL-0001” respectively. If the exhibit is submitted in only one language, it shall have the suffix “ENG” or “SPA” depending upon whether that language is English or Spanish, respectively. If the exhibit is submitted in both English and Spanish, it shall have the suffix of its original language first followed by the suffix of the translated language (e.g., C-0002 SPA/ENG). The number of the exhibit or legal authority shall appear on the first page of the document, and shall be incorporated into the file name in accordance with Section 17.5.4.
- 17.5.4. Electronic files and the accompanying indexes shall follow the naming conventions contained in **Annex B**.
- 17.6. Copies of documentary evidence shall be assumed to be authentic unless specifically objected to by a party, in which case the Tribunal will determine whether authentication is necessary.
- 17.7. The parties shall file all documents only once by attaching them to their pleadings. Documents need not be resubmitted with subsequent pleadings, witness statements, or expert reports, even if referred to therein.
- 17.8. Demonstrative exhibits (such as charts, tabulations, etc.) and PowerPoint or other slide presentations may be used at any hearing (by either the parties or an expert), provided they contain no new evidence nor new calculations. Each party and experts shall number their demonstrative exhibits consecutively, and indicate on each demonstrative exhibit the number of the document(s) on the record from which it is derived. The party or expert submitting such exhibits or slide presentations shall provide them in electronic and, if requested, hard copy format to the other party, the Tribunal Members, the Tribunal Secretary, Assistant to the

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Tribunal, the court reporters and interpreters prior to their use at the hearing, at a time to be decided at the pre-hearing organizational meeting.

18. Witness Statements and Expert Reports

Convention Article 43(a); Arbitration Rule 24

- 18.1. Witness statements and expert reports shall be filed together with the parties' pleadings.
- 18.2. Neither party shall be permitted to submit any testimony that has not been filed with the written submissions, unless the Tribunal determines that exceptional circumstances exist based on a reasoned written request followed by observations from the other party (following the procedure outlined in Section 17.3 above).
- 18.3. Each witness statement shall contain numbered paragraphs, be signed and dated by the witness, and include:
 - 18.3.1. A disclosure statement detailing any past and present relations of the witness with any party, counsel or Member of the Tribunal;
 - 18.3.2. A description of the witness' position and qualifications, if relevant;
 - 18.3.3. A full detailed description of the facts, and source of the witness's information as to those facts, sufficient to serve as that witness's evidence in the matter in dispute;
 - 18.3.4. A statement as to the language in which the witness statement was originally prepared and the language in which the witness anticipates giving testimony at the hearing; and
 - 18.3.5. Any documents on which the witness relies that have not already been submitted (which shall be submitted with sequential numbering, as part of the relevant Party's pleading).
 - 18.3.6. An affirmation of the truth of the witness statement.
- 18.4. Witness statements shall be submitted in a searchable electronic file format and have consecutive numbering on pages, headings and paragraphs.
- 18.5. It shall not be improper for a party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them.

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- 18.6. Expert reports shall contain numbered paragraphs, be signed and dated, and contain:
- 18.6.1. The full name of the expert;
 - 18.6.2. A disclosure statement detailing any past and present relations of the expert with any party, counsel or Member of the Tribunal;
 - 18.6.3. A brief description of the expert's qualifications;
 - 18.6.4. A brief description of the instructions pursuant to which he or she is providing his or her opinions and conclusions;
 - 18.6.5. A statement of the facts on which he or she is basing his or her expert opinions and conclusions;
 - 18.6.6. His or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions;
 - 18.6.7. The documents relied on by the expert in the preparation of his or her report, which shall be provided as annexes to the report (which may have their own sequential numbering); any spreadsheet or table shall be editable and all formulae visible; data used in the creation of spreadsheets and tables should indicate its source; and
 - 18.6.8. An affirmation of his or her genuine belief on the opinions expressed in the report.
- 18.7. Expert reports shall be submitted in a searchable electronic file format and have consecutive numbering of pages, headings and paragraphs, as well as a detailed table of contents.
- 18.8. Personal privacy data shall be minimized where possible in witness and expert statements. Birthdates, passport numbers, tax identification numbers and personal identification numbers shall not be necessary unless specifically ordered by the Tribunal.

19. Examination of Witnesses and Experts
Arbitration Rules 35 and 36

- 19.1. The parties agree that all matters addressed in this section may be revisited at the pre-hearing organizational meeting, as appropriate.

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- 19.2. Any person may present evidence as a witness, including a party or a party's officer, employee, or other representative. A party may be called upon by the opposing party to produce at the hearing for cross-examination any factual or expert witness whose written testimony has been advanced with the pleadings.
- 19.3. In accordance with Section 18.1 above, each party will submit its witness statements together with its written submission. The witness statement shall be numbered independently from other documents and properly identified (including the language of the statement). If a party submits more than one witness statement by the same witness, the subsequent witness statement shall be identified as "Second Witness Statement," "Third Witness Statement," and so on.
- 19.4. Each party shall be responsible for securing the appearance of its own witnesses to the hearing, except when the other party has waived cross-examination of a witness and the Tribunal does not direct his or her appearance. If a witness or expert who was presented by a party has not been called by the other party or by the Tribunal for examination at the hearing, the presenting party may not call such witness or expert to testify at the hearing, except for good cause shown (for example, where a party seeks to present a witness not otherwise called to offer corrections or clarifications that may be necessary to prevent a misunderstanding of that witness's written statement or to address facts that occurred after the witness signed the witness statement). If a witness or expert who has been called by the other party or by the Tribunal for examination at the hearing is not available for the hearing, the Tribunal shall decide what weight, if any, to give to the witness statement or expert report, taking into account the entire record and all the relevant circumstances, including the fact that the witness was not subject to cross-examination.
- 19.5. Each party shall notify the other party of the witnesses or experts it intends to cross-examine by the date set out in the Procedural Calendar (**Annex A**). The Tribunal shall then identify the remaining witnesses or experts (if any) that it wishes to call for examination.
- 19.6. The facts contained in the written statement of a witness or expert whose cross-examination has been waived by the other party, or not called by the Tribunal, shall not be deemed to have been accepted or established by the sole fact that no cross-examination has been requested. The Tribunal will assess the weight of the witness statement or expert report taking into account the entire record and all the relevant circumstances.
- 19.7. Each party shall be responsible for the practical arrangements, cost, and availability of any witness it offers. The Tribunal will decide upon the appropriate allocation of any related costs in the final award.

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- 19.8. The Tribunal may allow a witness to appear and be examined by videoconference, provided that there exist valid and exceptional reasons that prevents the witness from appearing in person. In such an event, the Tribunal will issue appropriate directions for the witness's examination by videoconference.
- 19.9. The order in which the witnesses and experts shall be heard shall be discussed at the pre-hearing organizational meeting.
- 19.10. At the hearing, the examination of each witness shall proceed as follows:
- 19.10.1. A factual witness shall make the declaration provided in Rule 35(2) of the Arbitration Rules, while an expert witness shall make the declaration set out in Rule 35(3) of the Arbitration Rules.
- 19.10.2. Witnesses giving oral testimony may first be examined in direct examination. Direct examination of factual witnesses shall be brief (e.g., 10 minutes) and limited to introducing the witness, confirming the accuracy of and completeness of the witness's written statement(s), offering any corrections or clarifications that may be necessary to prevent a misunderstanding of that witness's written direct testimony, highlighting briefly the key points of his or her witness statement, and addressing any relevant development that occurred after the witness signed the witness statement. In lieu of direct examination, an expert may provide a brief presentation of the key points of his or her report.
- 19.10.3. Cross-examination shall not go beyond the subject matter of the witness statements and matters affecting the witness's credibility. Upon a motivated request, the Tribunal in its discretion may allow limited inquiry into additional matters.
- 19.10.4. The party who has presented the witness may then re-examine the witness only with respect to any matters or issues arising out of the cross-examination ("**redirect examination**"), followed in appropriate circumstances by the possibility of re-cross-examination on matters or issues arising out of the redirect examination.
- 19.10.5. The Tribunal may examine the witness at any time, either before, during, or after examination by one of the parties.
- 19.10.6. Subject to a different agreement by the parties or decision of the Tribunal, a fact witness (other than a party representative), prior to his or her examination, shall not be present in the hearing room during oral testimony and arguments, read the transcript of oral testimony or argument, or be informed of its contents. Expert witnesses shall be allowed in the hearing room at any time, including during the cross-examination of other factual

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or expert witnesses. Party representatives who are also fact witnesses may be present during opening arguments, but not during the testimony of fact witnesses testifying before him or her. Such party representatives should testify first, to the extent possible.

19.11. The Tribunal shall, at all times, have complete control over the procedure for the examination of witnesses. In particular, but without limiting the foregoing, the Tribunal may in its discretion:

19.11.1. Limit or refuse the right of a party to examine a witness when it appears that a question has been addressed by other evidence or is irrelevant; or

19.11.2. Direct that a witness be recalled for further examination at any time.

19.12. The rules set forth above with respect to the examination of witnesses shall apply *mutatis mutandis* to the examination of party-appointed experts, except that in lieu of direct examination the expert may provide a brief presentation of the key points of his or her report.

20. Pre-Hearing Organizational Meetings

Arbitration Rule 13

20.1. A pre-hearing organizational meeting shall be held on the date set out in the Procedural Calendar included as **Annex A**. It shall comprise a videoconference between the Tribunal, or its President, and the parties and should resolve any outstanding procedural, administrative, and logistical matters in preparation for the hearing.

20.2. At a date to be determined by the Tribunal, and in any event no later than the date of the pre-hearing conference, the parties shall submit to the Tribunal jointly – or, where they are unable to agree, separately – a proposal regarding a daily schedule for the hearing.

21. Hearings

Arbitration Rules 20(1)(e) and 32

21.1. A hearing will take place in accordance with the terms of this section and the Procedural Calendar (**Annex A**). The oral procedure shall consist of a hearing for examination of witnesses and experts, if any, and for oral arguments.

21.2. Hearings may be held in-person or by any other means of communication as determined by the Tribunal after consultation with the parties. An in-person hearing

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shall be held at a place to be determined in accordance with Section 11 above. The Tribunal shall, if at all possible, participate in the merit hearings in person.

- 21.3. Having due regard to the views of the parties and the specific circumstances of the case, including any relevant travel restrictions and/or social distancing health and safety measures, the Tribunal may decide to hold a hearing remotely or in a hybrid form.
- 21.4. At a procedural status conference to be held on the date mentioned in the relevant item of the timetable, the parties and the Tribunal will discuss whether the circumstances at that time make it difficult, burdensome, or dangerous to have an in-person merits hearing and whether a virtual hearing may be a preferable option, considering all the circumstances.
- 21.5. The hearing shall take place allowing for reasonably sufficient time after the filing of the last written submission.
- 21.6. The Members of the Tribunal shall reserve at least one day after the hearing to determine the next steps and to hold deliberations.
- 21.7. In principle, each party shall have equal time to be used during the hearing, subject to a discussion in the pre-hearing organizational meeting, taking into account the number of witnesses and experts and the time available for the hearing.
- 21.8. Hearings shall be closed to the public.
- 21.9. To facilitate references to the main documents on which the parties intend to rely at the hearing, the parties shall use their best efforts to agree on and prepare a joint electronic hearing bundle containing only a set of essential factual/legal documents on which the parties are most likely to rely, together with a table of contents for such bundle. In the event that the parties are unable to agree on a joint hearing bundle, each party shall incorporate the documents that it considers appropriate to the joint bundle. The documents in the bundle referenced in this paragraph shall be identified by using the exhibit or legal authority numbers recorded over the course of the arbitration. Each Tribunal Member, the Tribunal Secretary, the Assistant to the Tribunal, the interpreters and court reporters shall receive an electronic copy of the electronic hearing bundle at a time to be determined during the pre-hearing organizational meeting.

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22. Records of Hearings and Sessions

Arbitration Rules 13 and 20(1)(g)

- 22.1. Sound recordings shall be made of all hearings and sessions. The sound recordings shall be provided to the parties and the Tribunal Members.
- 22.2. Verbatim transcripts in the procedural languages shall be made of any hearing and session other than sessions on procedural issues. Unless otherwise agreed by the parties or ordered by the Tribunal, the verbatim transcripts shall, if possible, be available in real-time using LiveNote or similar software, and electronic transcripts shall be provided to the parties and the Tribunal on a same-day basis.
- 22.3. The parties shall agree on any corrections to the transcripts within 30 calendar days of the later of the dates of the receipt of the sound recordings and transcripts. The agreed corrections may be entered by the court reporter in the transcripts (“**revised transcripts**”). The Tribunal shall decide upon any disagreement between the parties and any correction adopted by the Tribunal shall be entered by the court reporter in the revised transcripts.

23. Post-Hearing Memorials and Statements of Costs

Convention Article 44; Arbitration Rule 28(2)

- 23.1. In consultation with the Parties, the Tribunal will determine at the end of the hearing whether there shall be post-hearing submissions. If so, the Tribunal will address the filing date, length, format, and content of the post-hearing submissions.
- 23.2. The Tribunal will issue directions on the Parties’ statements of costs at the end of the hearing.

24. Public Access to Documents

Convention Article 48(5); Administrative and Financial Regulation 25; Arbitration Rule 48(4)

- 24.1. The parties consent to the publication by ICSID of the award and other documents issued by the Tribunal, subject to the redaction of confidential information. Unless the parties otherwise agree, and always subject to the deletion of confidential information, the other documents submitted to the Tribunal shall be publicly available after the hearing referred to in §21 above takes place.

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25. Data Privacy

- 25.1. The Members of the Tribunal, the parties and their representatives acknowledge that the processing of their personal data is necessary for the purposes of this arbitration proceeding.
- 25.2. The Members of the Tribunal, the parties and their representatives agree to comply with all applicable data protection and privacy regulations, including providing appropriate notice to data subjects whose personal data will be processed in the arbitration proceeding, where necessary. Should compliance with applicable law require action from another participant in the arbitration proceeding, the parties are invited to bring that to the attention of that other participant and/or to apply to the Tribunal for specific data protection measures to be put in place.
- 25.3. Each of the parties and their representatives shall indemnify and hold harmless the Tribunal with respect to any breach of applicable data protection and privacy regulations by the party or its representatives in relation to the arbitration proceedings.

26. Disability Inclusion

- 26.1. The parties will advise the Tribunal if there are any disability considerations amongst the parties, witnesses, counsel or other participants which need to be taken into account in establishing the arbitral procedure, including the hearing.

On behalf of the Tribunal,

[Signed]

Prof. Albert Jan van den Berg
President of the Tribunal
Date: 20 December 2022

Procedural Order No. 1– Annex A

Annex A

Procedural Calendar

See attachments.

Procedural Order No. 1– Annex B

Annex B

Electronic File Naming Guidelines

Please follow these guidelines when naming electronic files and for the accompanying Consolidated Hyperlinked Index. The examples provided (in *italics*) are for demonstration purposes only and should be adapted to the relevant phase of the case.

All pleadings and accompanying documentation shall indicate the LANGUAGE in which they are submitted (e.g. SPA=Spanish; FR=French; ENG= English). Such indication should be reflected both i) in the name used to identify each individual electronic file and ii) in the Consolidated Hyperlinked Index (which shall be attached to each submission).

For cases with a single procedural language, the “LANGUAGE” designation may be omitted, except for documents in a language other than the procedural language and the corresponding translations.

SUBMISSION TYPE	ELECTRONIC FILE NAMING GUIDELINES
MAIN PLEADINGS	Title of Pleading–LANGUAGE
	<i>Memorial on Jurisdiction-FR</i>
	<i>Counter-Memorial on the Merits and Memorial on Jurisdiction-SPA</i>
	<i>Reply on Annulment-FR</i>
	<i>Rejoinder on Quantum-ENG</i>
SUPPORTING DOCUMENTATION	C-####–LANGUAGE
	R-####–LANGUAGE
	To be produced sequentially throughout the case.
	CLAIMANT’S FACTUAL EXHIBITS
	<i>C-0001-ENG</i>
	<i>C-0002-SPA</i>
	RESPONDENT’S FACTUAL EXHIBITS
	<i>R-0001-FR</i>
<i>R-0002-SPA</i>	
Legal Authorities	CL-####–LANGUAGE
	RL-####–LANGUAGE
	To be produced sequentially throughout the case.
	CLAIMANT’S LEGAL AUTHORITIES
	<i>CL-0001-ENG</i>
	<i>CL-0002-FR</i>
	RESPONDENT’S LEGAL AUTHORITIES
	<i>RL-0001-SPA</i>
<i>RL-0002-ENG</i>	
Witness Statements	Witness Statement-Name of Witness-Name of Submission-LANGUAGE
	<i>Witness Statement-Maria Jones-Memorial on Jurisdiction-SPA</i>
	<i>Witness Statement-Maria Jones-Reply on Jurisdiction-[Second Statement]-ENG</i>
Expert Reports	Expert Report-Name of Expert-Type-Name of Submission-LANGUAGE
	<i>Expert Report-Lucia Smith-Valuation-Memorial on Quantum-ENG</i>
	<i>Expert Report-Lucia Smith-Valuation-Reply on Quantum-[Second Report]-ENG</i>
Legal Opinions	Legal Opinion-Name of Expert-Name of Submission-LANGUAGE
	<i>Legal Opinion-Tom Kaine-Counter-Memorial on the Merits-FR</i>

*Enel Colombia S.A. (formerly ESSA2 SpA) and Enel Green Power Costa Rica S.A.
v. Republic of Costa Rica
(ICSID Case No. ARB/21/49)*

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SUBMISSION TYPE	ELECTRONIC FILE NAMING GUIDELINES
	<i>Legal Opinion-Tom Kaine-Rejoinder on the Merits-[Second Opinion]-FR</i>
Exhibits to Witness Statements, Expert Reports, Legal Opinions	WITNESS/EXPERT INITIALS-###
	<i>For exhibits filed with the Witness Statement of [Maria Jones]</i>
	<i>MJ-0001</i>
	<i>MJ-0002</i>
	<i>For exhibits filed with the Legal Opinion of [Tom Kaine]</i>
	<i>TK-0001</i>
	<i>TK-0002</i>
	<i>For exhibits filed with the Expert Report of [Lucia Smith]</i>
	<i>LS-0001</i>
<i>LS-0002</i>	
INDICES	Consolidated Hyperlinked Index
	Index of Exhibits-C-#### to C-####
	<i>Index of Exhibits-C-0001 to C-0023</i>
	Index of Legal Authorities-RLA-### to RLA-###
	<i>Index of Legal Authorities-RLA-0001 to RLA-0023</i>
OTHER APPLICATIONS	Name of Application-[Party]-LANGUAGE
	<i>Preliminary Objections under Rule 41(5)-SPA</i>
	<i>Request for Bifurcation-ENG</i>
	<i>Request for Provisional Measures-[Respondent]-SPA</i>
	<i>Request for Production of Documents-[Claimant]-SPA</i>
	<i>Request for Stay of Enforcement-FR</i>
	<i>Request for Discontinuance-[Claimant]-ENG</i>
	<i>Post-Hearing Brief-[Claimant]-SPA</i>
	<i>Costs Submissions-[Respondent]-ENG</i>
<i>Observations to Request for [XX]-[Claimant]-SPA</i>	

Procedural Order No. 1– Annex C

Annex C

Stern Schedule

Document Request No. {#}	
A. Documents or category of documents (requesting Party)	
B. Relevance and materiality, including references to submissions (requesting Party)	
C. Responses and/or Objections to document request (other Party)	
D. Reply to objections and request for resolution (requesting Party)	
E. Decision of the Tribunal	

Document Request No. {#}	
A. Documents or category of documents (requesting Party)	
B. Relevance and materiality, including references to submissions (requesting Party)	

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Document Request No. {#}	
C. Responses and/or Objections to document request (other Party)	
D. Reply to objections and request for resolution (requesting Party)	
E. Decision of the Tribunal	