

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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**United Utilities (Tallinn) B.V.**  
and  
**Aktsiaselts Tallinna Vesi**

Claimants

v.

**Republic of Estonia**

Respondent

(ICSID Case No. ARB/14/24)

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**PROCEDURAL ORDER No. 1**  
**Procedural Rules**

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Mr. Stephen L. Drymer, President of the Tribunal  
Prof. Brigitte Stern, Arbitrator  
Mr. David A.R. Williams, Arbitrator

***Secretary of the Tribunal***  
Mr. Paul-Jean Le Cannu

Date: 5 June 2015

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## **INTRODUCTION**

The first session of the Arbitral Tribunal was held on 5 May 2015, commencing at 9:05 a.m. (BST), at the International Dispute Resolution Centre, 70 Fleet Street, London EC4Y 1EU.

Participating in the first session were:

### Members of the Tribunal

Mr. Stephen L. Drymer, President of the Tribunal

Prof. Brigitte Stern, Arbitrator

Mr. David A.R. Williams, Arbitrator

### ICSID Secretariat:

Mr. Paul-Jean Le Cannu, Secretary of the Tribunal

### On behalf of the Claimants:

Mr. Matthew Weiniger QC, Herbert Smith Freehills LLP

Mr. Iain Maxwell, Herbert Smith Freehills LLP

Ms. Louise Barber, Herbert Smith Freehills LLP

Ms. Hafsa Zayyan, Herbert Smith Freehills LLP

### On behalf of the Respondent:

Ms. Ulla Saar, Ministry of Economic Affairs and Communications

Ms. Annika Talve, Ministry of Economic Affairs and Communications

Mr. Horst Daniel, Squire Patton Boggs LLP

Mr. Rostislav Pekař, Squire Patton Boggs, v.o.s.

Mr. Stephen P. Anway, Squire Patton Boggs LLP

Mr. Anton Sigal, OÜ Advokaadibüroo Red

The Tribunal and the parties considered the following:

- The Draft Agenda circulated by the Tribunal Secretary on 30 March 2015;
- The Draft Procedural Order circulated by the Tribunal Secretary on 30 March 2015;
- The parties' comments on the Draft Procedural Order, received by the Tribunal Secretary on 20 April 2015, indicating the items on which the parties agreed and their respective positions regarding the items on which they did not agree; and
- The parties' further comments on Article 14 of the Draft Procedural Order, received by the Tribunal Secretary on 1 May 2015, indicating the elements of the proposed Timetable for the arbitration on which the parties agreed and their respective positions regarding the elements on which they were not able to agree.

The session was adjourned at 11:55 am (BST).

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

Following the session, the Tribunal now issues the present order:

\* \* \*

## **ORDER**

Pursuant to ICSID Arbitration Rules 19 and 20, and further to consultation with the parties so as to ascertain their views on the matters addressed herein, the Tribunal issues this first Procedural Order (“**Procedural Order No. 1**”) setting out various aspects of the Procedural Rules and Timetable that govern this arbitration.

### **1. Applicable Arbitration Rules**

#### *Convention Article 44*

- 1.1. These proceedings are conducted in accordance with the ICSID Arbitration Rules in force as of April 10, 2006.

### **2. Constitution of the Tribunal and Tribunal Members’ Declarations**

#### *Arbitration Rule 6*

- 2.1. The Tribunal was constituted on March 19, 2015 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 March 19, 2015.
- 2.3. The addresses and other contact information of the Tribunal Members are as follows:

Mr. Stephen L. Drymer  
Woods LLP  
2000 McGill College Ave.  
Suite 1700  
Montréal, Québec H3A 3H3  
Canada

Tel.: +1 514 370 8745  
Email: [sdrymer@woods.qc.ca](mailto:sdrymer@woods.qc.ca)

Mr. David A. R. Williams, QC  
Bankside Chambers  
Level 22, Lumley Centre  
88 Shortland St.  
Auckland 1010  
New Zealand

Tel. +64 9 367 6896  
Email: [david.williams@darwilliams.co.nz](mailto:david.williams@darwilliams.co.nz)

Professor Brigitte Stern  
7, rue Pierre Nicole  
B3804  
75005 Paris  
France

Tel.: +33 1 40 46 93 79  
Email: [brigitte.stern@jstern.org](mailto:brigitte.stern@jstern.org)

**3. Fees and Expenses of Tribunal Members**

*Convention Article 60; Administrative and Financial Regulation 14; ICSID Schedule of Fees*

- 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. Under the current Schedule of Fees, each Tribunal Member receives:
  - 3.2.1. US\$3,000 for each day of meetings or each eight hours of other work performed in connection with the proceedings or *pro rata*; and
  - 3.2.2. subsistence allowances, reimbursement of travel, and other expenses pursuant to ICSID Administrative and Financial Regulation 14.
- 3.3. Each Tribunal Member shall submit his/her claims for fees and expenses to the ICSID Secretariat on a quarterly basis.
- 3.4. Non-refundable expenses incurred in connection with a hearing as a result of a postponement or cancellation of the hearing shall be reimbursed.
- 3.5. In addition the Arbitrators shall be entitled to a fee in respect of any hearing or meeting for which they are asked to reserve more than one day and which hearing or meeting is cancelled or postponed in whole or part, calculated as follows:
  - 3.5.1 Cancellation or postponement within 60 days of the first day of such hearing: 25% of the daily rate multiplied by the number of days reserved;
  - 3.5.2 Cancellation or postponement within 30 days of the first day of such hearing: 50% of the daily rate multiplied by the number of days reserved;
  - 3.5.3 Cancellation or postponement within 15 days of the first day of such hearing: 75% of the daily rate multiplied by the number of days reserved;
  - 3.5.4 Cancellation or postponement on or after the first day of such hearing: 90% of the daily rate multiplied by the number of days cancelled or postponed.

**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. Decisions and Procedural Rulings of the Tribunal**

*Convention Article 48(1); Arbitration Rules 16, 19 and 20*

- 5.1. In accordance with ICSID Arbitration Rule 16(1), and except as otherwise set out in this Procedural Order, decisions of the Tribunal shall be taken by a majority of the Members of the Tribunal.
- 5.2. In accordance with ICSID Arbitration Rule 16(2), decisions may be taken by correspondence among the Members of the Tribunal, provided that all of them are consulted.
- 5.3. Where the matter is urgent, the President is authorized to take procedural decisions on his own, subject to possible reconsideration of such decision by the full Tribunal.
- 5.4. The President is authorized to issue Procedural Orders and procedural decisions on behalf of the Tribunal.
- 5.5. The Tribunal's rulings on procedural matters may be communicated to the parties by the Tribunal Secretary in the form of a letter or email.

**6. Delegation of 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. Secretary of the Tribunal**

*Administrative and Financial Regulation 25*

- 7.1. The Tribunal Secretary is Paul-Jean Le Cannu, Legal Counsel, ICSID, or such other person as ICSID may notify the Tribunal and the parties from time to time.<sup>1</sup>
- 7.2. To send copies of communications by email, mail, and courier/parcel deliveries to the ICSID Secretariat, the contact details are:

Mr. Paul-Jean Le Cannu  
ICSID  
MSN J2-200  
1818 H Street, N.W.  
Washington, D.C. 20433  
USA

Tel.: + 1 (202) 473-0737  
Fax: + 1 (202) 522-2615  
Email: [pjlecannu@worldbank.org](mailto:pjlecannu@worldbank.org)  
Paralegal email: [ating@worldbank.org](mailto:ating@worldbank.org)

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

Mr. Paul-Jean Le Cannu  
701 18th Street, N.W. ("J Building")  
2nd Floor  
Washington, D.C. 20006

Tel.: + 1 (202) 458-4567

**8. Representation of the Parties**

*Arbitration Rule 18*

- 8.1. Each party shall be represented by its counsel (below) and may designate additional agents, counsel, or advocates by notifying the Tribunal and the Tribunal Secretary promptly of such designation.

**For Claimants**

Mr. Matthew Weiniger QC  
Mr. Iain Maxwell  
Ms. Louise Barber

**For Respondent**

Mr. Kristen Michal  
Minister of Economic Affairs and Infrastructure  
Mr. Ahti Kuningas

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<sup>1</sup> Originally, the Tribunal Secretary was Mr. James Claxton. By letter dated 30 April 2015 the ICSID Secretary-General informed the Tribunal and the parties that Mr. Claxton had accepted an appointment outside the Centre, and that Mr. Le Cannu had been appointed as Secretary of the Tribunal.

*Herbert Smith Freehills LLP*  
Exchange House  
Primrose Street  
London EC2A 2EG  
United Kingdom  
Tel.: +44 207 374 8000  
Fax: +44 207 374 0888  
Emails:  
[matthew.weiniger@hsf.com](mailto:matthew.weiniger@hsf.com)  
[jain.maxwell@hsf.com](mailto:jain.maxwell@hsf.com)  
[louise.barber@hsf.com](mailto:louise.barber@hsf.com)

and

Mr. Kaupo Lepasepp  
*Advokaadibüroo Sorainen AS*  
Kawe plaza, Pärnu mnt 15  
10141 Tallinn  
Estonia  
Tel.: +372 6 400 939  
Fax: +372 6 400 901  
Email:  
[kaupo.lepasepp@sorainen.com](mailto:kaupo.lepasepp@sorainen.com)

Ms. Ulla Saar  
Ms. Annika Talve  
*Ministry of Economic Affairs and Communications*  
Harju Street 11  
15072 Tallinn  
The Republic of Estonia  
Tel.: +372 6256351  
Emails:  
[ahti.kuningas@mkm.ee](mailto:ahti.kuningas@mkm.ee)  
[ulla.saar@mkm.ee](mailto:ulla.saar@mkm.ee)  
[annika.talve@mkm.ee](mailto:annika.talve@mkm.ee)

and

Mr. Marko Aavik  
Deputy Secretary General  
Mrs. Kristiina Rebane  
Ministry of Justice of the Republic of Estonia  
Tõnismägi 5a  
15191 Tallinn  
The Republic of Estonia  
Emails:  
[Marko.Aavik@just.ee](mailto:Marko.Aavik@just.ee)  
[Kristiina.Rebane@just.ee](mailto:Kristiina.Rebane@just.ee)

and

Mr. Horst Daniel  
*Squire Patton Boggs (US) LLP*  
Rechtsanwälte, Steuerberater  
Taunusanlage 17  
60325 Frankfurt am Main  
Germany  
Tel.: +49 69 17392 432  
Fax: +49 69 1739 2401  
Email: [horst.daniel@squirepb.com](mailto:horst.daniel@squirepb.com)

and

Mr. Rostislav Pekař  
*Squire Patton Boggs, v.o.s.*  
advokátní kancelář  
Václavské náměstí 57/813  
11000 Prague 1  
Czech Republic  
Tel.: +420 221 662 289  
Fax: +420.221.662.222



Email: [rostislav.pekar@squirepb.com](mailto:rostislav.pekar@squirepb.com)

and

Mr. Stephen P. Anway  
Squire Patton Boggs LLP  
30 Rockefeller Plaza 23rd Floor  
New York, NY 10112  
U.S.A.

Tel.: +1 646 557 5100

Fax: +1 646 557 5101

Email: [stephen.anway@squirepb.com](mailto:stephen.anway@squirepb.com)

and

Mr. Anton Sigal  
OÜ Advokaadibüroo Red  
Liivalaia 13  
10118 Tallinn  
Estonia

Tel.: +372 622 0000

Fax: +372 622 0001

Email: [anton.sigal@redbaltic.com](mailto:anton.sigal@redbaltic.com)

Also copy:

[eveli.lume@squirepb.com](mailto:eveli.lume@squirepb.com)

[maria.lokajova@squirepb.com](mailto:maria.lokajova@squirepb.com)

[ariane.sproedt@squirepb.com](mailto:ariane.sproedt@squirepb.com)

[chirag.mody@redbaltic.com](mailto:chirag.mody@redbaltic.com)

8.2. Notwithstanding the foregoing, any addition or change to a party's legal representation after the date of this Procedural Order must be notified to the other parties and to the Tribunal within 48 hours of such addition or change. The parties agree that, in order to ensure the integrity of the proceedings, the Tribunal may refuse to permit a party's added or changed legal representative to appear where the appearance of such legal representative could potentially give rise to the disqualification or resignation of a Member of the Tribunal.

## 9. **Apportionment of Costs and Advance Payments to ICSID**

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

9.1. The parties shall defray the direct costs of the proceeding in equal parts, without prejudice to the final decision of the Tribunal as to the allocation of costs.

- 9.2. By letter of March 30, 2015, ICSID requested that the Claimants (collectively) and Respondent pay US\$ 150,000.00 to defray the initial costs of the proceeding. By letter dated 24 April 2015 ICSID notified the parties and the Tribunal that it had received payment from both parties.<sup>2</sup>
- 9.3. ICSID shall request further advances as needed. Such requests shall be accompanied by a detailed interim statement of account.

**10. Place of Proceeding**

*Convention Articles 62 and 63; Administrative and Financial Regulation 26; Arbitration Rule 13(3)*

- 10.1. The place of the proceeding shall be the seat of the Centre in Washington, D.C., U.S.A.
- 10.2. Hearings or meetings with the parties shall be held at the World Bank Conference Centre in Paris, France to the extent possible.<sup>3</sup> If the World Bank Conference Centre in Paris is unavailable, hearings and meetings shall be held at another venue in Paris or at a venue in such other city in Europe as may be agreed by the parties or ordered by the Tribunal.
- 10.3. The Tribunal may meet and/or deliberate at any location it considers convenient.

**11. Procedural Language(s), Translation and Interpretation**

*Administrative and Financial Regulation 30(3) and (4); Arbitration Rules 20(1)(b) and 22*

- 11.1. The language of the proceeding (also referred to as the procedural language) is English.
- 11.2. Documents filed in any other language must be accompanied by a translation into English.
- 11.3. If the document is lengthy and relevant only in part, it is sufficient to translate only its 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.

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<sup>2</sup> Specifically, the letter acknowledged the receipt of US\$ 149,985.00 from the Claimants and US\$ 149,965.00 from the Respondent.

<sup>3</sup> The World Bank Conference Centre in Paris will be closed for renovation from July 13, 2015 to mid-October 2015 and July 1 to November 30, 2016.

- 11.4. Translations need not be certified unless there is a dispute as to the content of a translation provided and the party(ies) disputing the translation specifically request(s) a certified version.
- 11.5. Documents exchanged solely between the parties in a language other than English under §15 below (Production of Documents) need not be translated.
- 11.6. The testimony of a witness or expert called for examination during a hearing who gives evidence other than in the English language shall be interpreted simultaneously into English.
- 11.7. The parties will notify the Tribunal, as soon as possible, and no later than at the pre-hearing organizational meeting (see §0 below), which of their respective witnesses or experts called for examination at a hearing require interpretation.
- 11.8. The costs of the interpreter(s) will be paid from the advance payments made by the parties, without prejudice to the decision of the Tribunal as to which party(ies) shall ultimately bear those costs.

**12. Means and Routing of Communications**

*Administrative and Financial Regulation 24*

- 12.1. The ICSID Secretariat shall be the channel of written communications between the parties and the Tribunal.
- 12.2. Written communications intended for the Tribunal shall be transmitted by email or other electronic means to the Tribunal Secretary, who shall send them to the opposing party(ies) and the Tribunal.
- 12.3. The Tribunal Secretary shall not be copied on direct communications between the parties which are not intended to be transmitted to the Tribunal.

**13. Number of Copies and Method of Filing of Parties' Pleadings**

*Administrative and Financial Regulation 30; Arbitration Rules 20(1)(d) and 23*

- 13.1. By the relevant filing date, the parties shall submit by email to the Tribunal Secretary and the opposing party(ies) an electronic version of the pleading and all supporting witness statements, expert reports and a list of supporting exhibits and legal

authorities.<sup>4</sup>

- 13.2. Within three business days<sup>5</sup> from the filing date, the parties shall (i) upload the pleading with all of the supporting documentation, including exhibits and legal authorities, to the file sharing platform (“*Box folder*”) that will be created by ICSID for purposes of this case, and (ii) courier to the Tribunal Secretary:
- 13.2.1. one unbound hard copy in A4/Letter format<sup>6</sup> of the entire submission, including signed originals of the pleading, witness statements and expert reports, together with the supporting exhibits (but not including legal authorities);
- 13.2.2. one hard copy in A5 format of the entire submission, including the pleading, witness statements, expert reports, and exhibits (but not including legal authorities); and
- 13.2.3. two (minimum) USB drives, each with a full copy of the entire submission, including the pleading, witness statements, expert reports, exhibits and legal authorities.
- 13.3. At the same time, the parties shall courier to each Member of the Tribunal at the addresses indicated at §2.3 above and to the opposing party(ies):
- 13.3.1. as may be requested by the Tribunal Member or party, one hard copy in either A4 or A5 format of the entire submission, including the pleading, witness statements, expert reports and exhibits (but not including legal authorities);<sup>7</sup> and
- 13.3.2. one (minimum) USB drive with a full copy of the entire submission, including the pleading, witness statements, expert reports, exhibits and legal authorities.<sup>8</sup>
- 13.4. Deliveries to the Claimants shall be made at the following address:

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<sup>4</sup> Please note that the World Bank server does not accept emails larger than 25 MB.

<sup>5</sup> Saturday and Sunday shall not be considered business days.

<sup>6</sup> The A4 format is required for ICSID’s archiving.

<sup>7</sup> Professor Stern wishes to receive hard copy of the entire submission in A4 format single-sided, with the following reservation: as to the exhibits, Professor Stern would prefer to receive only the key documents in hard copy (see para. 13.4). The other exhibits shall be sent to Professor Stern in electronic format only. Mr. Williams wishes to receive hard copy of the entire submission, including exhibits, in A5 format single-sided. Mr. Drymer wishes to receive hard copy of the entire submission, including exhibits, in A5 format double-sided (to ensure that the Tribunal has available to it at least one hard copy version of the complete case file and record).

<sup>8</sup> Professor Stern wishes to receive a CD-ROM instead of a USB drive. Messrs. Williams and Drymer wish to receive a USB drive.

Mr. Matthew Weiniger  
Mr. Iain Maxwell  
Ms. Louise Barber  
*Herbert Smith Freehills LLP*  
Exchange House  
Primrose Street  
London EC2A 2EG  
United Kingdom

13.5. Deliveries to the Respondent shall be made at the following address:

Mr. Rostislav Pekař  
Ms. Mária Lokajová  
*Squire Patton Boggs, v.o.s.*  
advokátní kancelář  
Václavské náměstí 57/813  
11000 Prague 1  
Czech Republic

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- 13.6. Legal authorities shall be submitted in electronic format only, unless a hard copy is specifically requested by the Tribunal.
- 13.7. Electronic versions of all pleadings, witness statements and expert reports shall be submitted in text searchable (i.e., OCR PDF or Word) format. In addition, the parties will make their best efforts to submit any other documents in PDF searchable format.
- 13.8. Pleadings shall be accompanied by an index hyperlinked to the supporting documentation. Each party shall also indicate in each of its pleading which of its exhibits it considers to be a “Key Document”. This indication shall be subject to revision by the filing party.
- 13.9. The official date of receipt of a pleading or communication shall be the day on which the electronic version is sent to the Tribunal Secretary.
- 13.10. A filing shall be deemed timely if sent by a party by 11:59 p.m. (23:59) Washington, D.C. time, on the relevant date.

**14. Number and Sequence of Pleadings; Timetable**

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

- 14.1. The Procedural Timetable for the arbitration, including the number and sequence of pleadings and other procedural steps, the time limits within which pleadings and other materials are to be filed, and the date of the hearing, shall be determined in a further Procedural Order once the Tribunal has decided the Respondent’s Request

for Bifurcation as pleaded at the first session of the Tribunal.<sup>9</sup>

## 15. Production of Documents

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

- 15.1. The parties have agreed on a single general round of document production in these proceedings. Following the general round of document production, each party may seek the Tribunal's leave to submit additional requests for documents upon a reasoned written request followed by observations from the other party(ies).
- 15.2. The conduct of document production shall be guided by the International Bar Association Rules on the Taking of Evidence in International Arbitration (2010) (the "**IBA Rules**").
- 15.3. A request for production addressed to the opposing party(ies) shall identify each document or category of documents sought with precision, using the format of a modified Redfern Schedule, in both word and .pdf format. The requested party(ies) shall either produce the requested documents indicating so in the Redfern Schedule provided by the requesting party(ies) or set out in that same Redfern Schedule its (their) reasoned objections for not producing the responsive documents. The requesting party(ies) shall then reply to the objections using that same Redfern Schedule. A template of the modified Redfern Schedule is attached as Annex A.
- 15.4. The Tribunal will rule on the production of the documents or categories of documents in its discretion. It may be guided by Articles 3 and 9 of the IBA Rules.
- 15.5. All documents produced by a party to the other party(ies) shall be provided by way of electronic copy in their original language, each document being produced in a separate pdf file and each file being numbered consecutively, together with an index in English of the documents being produced. So far as reasonably practicable, documents shall be produced in the form of searchable pdf files.
- 15.6. Documents shall be produced directly to the opposing party(ies) without copying the Tribunal. Documents so communicated shall not be considered to be on record unless and until the requesting party(ies) subsequently file(s) them as exhibits in accordance with this procedural order.
- 15.7. If a party alleges that specific documents responsive to requests of the opposing

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<sup>9</sup> Respondent's Request for Bifurcation under Article 41(2) of the ICSID Convention, and its detailed submissions in support of its request, were set out in a letter to the Tribunal dated 1 May 2015. Claimants' submissions opposing the request were also submitted to the Tribunal on that date. The parties presented oral arguments on the issue at the first session of the Tribunal, on 5 May 2015.

party(ies) are protected by privilege and objects to disclosure on that basis, it (they) shall submit to the requesting party(ies) a privilege log specifying, for each document or category of documents, the type of privilege claimed for the document, including a brief explanation.

**16. Submission of Documents in Support of Pleadings**

*Convention Article 44; Administrative and Financial Regulation 30; Arbitration Rule 24*

- 16.1. Each pleading submitted by a party shall be accompanied by all of the documentary evidence (including witness statements, expert reports and exhibits) and legal authorities relied upon by the party in support of such pleading.
- 16.2. The documents shall be submitted in the manner and form set forth in §13 above.
- 16.3. No party shall be permitted to file additional or responsive documents after the filing of its respective last written pleading, save in exceptional circumstances, at the discretion of the Tribunal and in accordance with an order or directions issued by the Tribunal upon a reasoned written request followed by observations from the other party(ies).
  - 16.3.1. Should a party request leave to file such additional or responsive documents, that party shall not annex to its request the documents that it seeks to file.
  - 16.3.2. The Tribunal shall ensure that the opposing party(ies) is (are) afforded the opportunity to submit its (their) observations concerning a request to file additional documents, and, if the request is granted, concerning the documents themselves.
- 16.4. The Tribunal may call upon the parties to produce documents or other evidence in accordance with ICSID Arbitration Rule 34(2).
- 16.5. Exhibits and legal authorities shall be submitted in the following form:
  - 16.5.1. Exhibits and legal authorities shall be numbered consecutively throughout these proceedings.
  - 16.5.2. The number of each exhibit submitted by Claimants shall be preceded by the letter "C-", and the number of each legal authority submitted by Claimants shall be preceded by "CL-". The number of each exhibit submitted by Respondent shall be preceded by the letter "R-", and the number of each legal authority submitted by Respondent shall be preceded by "RL-".
  - 16.5.3. Each exhibit and legal authority shall have a divider with its identification number on the tab.

- 16.5.4. A party may produce several documents relating to the same subject matter within one exhibit, numbering each page of such exhibit separately and consecutively.
- 16.5.5. Exhibits and legal authorities shall also be submitted in PDF format and start with the numbers “C-1”, “CL-1”, “R-1” and “RL-1”, respectively.
- 16.6. Copies of documentary evidence shall be assumed to be authentic unless specifically and promptly objected to by a party, in which case the Tribunal will determine whether authentication is necessary. In particular, it shall be assumed that a document submitted to the Tribunal in the proceeding:
- 16.6.1 is what it purports to be;
- 16.6.2 was signed by any purported signatory shown on its face;
- 16.6.3 was sent by the purported author and/or received by any purported addressee shown on its face on the date shown; and
- 16.6.4 is a true copy of the original.
- 16.7. A party shall file a given document only once, accompanying the first of its pleadings in support of which the document is filed. Documents so filed need not be resubmitted with witness statements or subsequent pleadings even if referred to in such statements or pleadings.
- 16.8. Demonstrative exhibits (such as Power Point slides, charts, tabulations, etc.) may be used at any hearing, provided they contain no new evidence. Each party shall number its demonstrative exhibits consecutively, and indicate on each demonstrative exhibit the number(s) of the exhibit(s) or legal authority(ies) from which it is derived. The party submitting a demonstrative exhibit shall provide that exhibit in hard copy to the other party(ies), the Tribunal Members, the Tribunal Secretary, the court reporter(s) and interpreter(s) at the hearing.

**17. Witness Statements and Expert Reports**

*Convention Article 43(a); Arbitration Rule 24*

- 17.1. The Tribunal may consider the IBA Rules on the Taking of Evidence in International Arbitration 2010 (IBA Rules) as guidelines with respect to the taking of evidence from witnesses of fact and experts.
- 17.2. Each witness statement and expert report shall be filed together with the pleading in support of which it is submitted.
- 17.3. The Tribunal shall not admit a witness statement or expert report that is not filed



together with the pleading in support of which it is submitted, save in exceptional circumstances and at the Tribunal's discretion upon a reasoned written request followed by observations from the other party(ies).

- 17.4. Each witness statement and expert report shall be signed and dated by the witness or expert.
- 17.5. Witness statements and expert reports shall in principle constitute the direct evidence (evidence-in-chief) of the witness or expert in question.

## **18. Examination of Witnesses and Experts**

### *Arbitration Rules 35 and 36*

- 18.1. Except where specifically provided otherwise, the rules applicable to examination of witnesses of fact shall apply by analogy to experts.
- 18.2. Each party shall be responsible for summoning its own witnesses to the hearing, except when the other party(ies) has (have) waived cross-examination of a witness and the Tribunal does not direct his or her appearance.
- 18.3. The facts contained in the written statement of a witness whose cross-examination has been waived by the other party(ies) shall not be deemed established by the sole fact that no cross-examination has been requested. Unless the Tribunal determines that the witness must be heard, it will assess the weight of the written statement taking into account the entire record and all the relevant circumstances.
- 18.4. 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.
- 18.5. The Tribunal may summon to appear as a witness any person who may have knowledge of relevant facts and has not been offered as a witness by the parties.
- 18.6. If a witness fails to appear when first summoned to a hearing, the Tribunal may in its discretion summon the witness to appear a second time if satisfied that (i) there was a compelling reason for the first failure to appear and that the testimony of the witness is relevant; (ii) the testimony of the witness appears to be relevant to the adjudication of the dispute, and (iii) providing a second opportunity for the witness to appear will not unduly delay the proceedings.
- 18.7. Exceptionally, the Tribunal may allow a witness to be examined by videoconference.
- 18.8. The Tribunal may consider the written statement of a witness who provides a compelling reason for failing to appear when summoned to a hearing, or of a witness who was not called for cross-examination, having regard to all the surrounding

circumstances, including the fact that the witness was not subject to cross-examination. The Tribunal shall not consider the witness statement of a witness who fails to appear and does not provide a valid reason. For these purposes, it shall be understood that a witness whom the Tribunal has allowed to testify by videoconference has appeared at the hearing.

18.9. As a general rule and subject to other arrangements as may be agreed during the pre-hearing telephone conference or otherwise agreed and/or ordered by the Tribunal, fact witnesses shall be examined prior to expert witnesses, the Claimants' fact (expert) witnesses being examined prior to the Respondent's fact (expert) witnesses.

18.10. At the hearing, the examination of each witness shall proceed as follows:

18.10.1. The party that has presented the witness may conduct a *brief* direct examination of the witness in order to introduce the witness, ask the witness to confirm his or her witness statement and ask the witness to address new matters or evidence arising after his or her written statement was signed. Where the party intends to examine its witness on matters or evidence that have arisen after the witness's written statement was signed, the party shall notify the other party(ies) and the Tribunal of such matters no later than 10 days prior to the hearing, or, where such notice is not possible, as soon as the party becomes aware of such matters;

18.10.2. The opposing party(ies) may then cross-examine the witness;

18.10.3. The party who has presented the witness may then re-examine the witness with respect to any matters or issues arising out of the cross-examination;

18.10.4. The Tribunal may examine the witness at any time, either before, during or after examination by one of the parties;

18.10.5. The Tribunal may order two or more expert witnesses to be examined concurrently (witness conferencing).

18.11. Subject to a different agreement by the parties, a fact witness shall not be present in the hearing room during oral testimony and arguments, or read any transcript of any oral testimony or argument, prior to his or her examination. This limitation does not apply to expert witnesses.

18.12. Notwithstanding anything set out herein, the Tribunal shall, at all times, have complete control over the procedure for hearing a witness. The Tribunal may, in particular, in its discretion:

18.12.1. 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

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

**19. Pre-Hearing Meetings and Conferences**

*Arbitration Rules 13 and 21*

19.1. The Tribunal at its discretion (or the President on behalf of the Tribunal) may convene and hold one or more pre-hearing meetings with the parties, including a pre-hearing conference, in order to resolve any procedural, evidentiary, administrative, or logistical matter, with a view to expediting the proceeding and in preparation for the hearing. Such meetings or conferences may be held in person or by telephone or video conference, on dates to be determined after consultation with the parties.

**20. Hearings**

*Arbitration Rules 20(1)(e) and 32*

20.1. The oral procedure shall consist of a hearing or hearings for examination of witnesses and experts, if any, and for oral arguments.

20.2. Hearings shall be held at a location to be determined in accordance with §10 above.

20.3. Hearings shall take place in accordance with the Timetable, which shall be determined by the Tribunal in accordance with §14.1.

20.4. The Members of the Tribunal shall reserve at least one day after the hearings to determine the next steps and to hold deliberations.

20.5. Subject to change as may be agreed by the parties or ordered by the Tribunal, the principle of equal time shall in principle be observed at hearings through the use of a “chess-clock” system, with the Secretary of the Tribunal responsible for keeping the time.

20.6. Hearings shall be open to the public, subject to the following:

20.6.1. The parties shall confer with each other and shall notify the Tribunal of any agreement reached between them regarding the logistics and modalities of open hearings no later than **3 months prior to the start of the hearing**.

20.7. Hearings will be conducted according to a daily schedule to be determined by the Tribunal after consultation with the parties as described below.

20.8. At a date to be determined, 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.

20.9. At a date to be determined, and in any event no later than two weeks prior to the

hearing, the parties shall submit to the Tribunal jointly – or, where they are unable to agree, separately:

- 20.9.1. A chronology of relevant facts; and
- 20.9.2. A list and brief description of the individuals and entities who/which are part of the relevant factual background (“*dramatis personae*”).
- 20.9.3. A list of the substantive issues required to be determined by the Tribunal.

## **21. Records of Hearings and Sessions**

*Arbitration Rules 13 and 20(1)(g)*

- 21.1. Sound recordings shall be made of all hearings and sessions of the Tribunal with the parties. The sound recordings shall be provided to the parties and the Tribunal Members.
- 21.2. The Tribunal Secretary may prepare summary minutes of hearings and sessions upon request.
- 21.3. Verbatim transcripts in the procedural language 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 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.
- 21.4. The parties shall agree on any corrections to the transcripts within 14 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.

## **22. Post-Hearing Memorials and Statements of Costs**

*Convention Article 44; Arbitration Rule 28(2)*

- 22.1. At the end of the hearing, after consultation with the parties, the Tribunal shall determine whether:
  - 22.1.1. The parties shall file Post-Hearing Briefs and what their sequence and the timing of the filing shall be;
  - 22.1.2. The parties shall make any post-hearing oral submissions once they have filed

their Post-Hearing Briefs.

22.2. No additional evidence may be produced together with the Post-Hearing Briefs, except with leave from or at the request of the Tribunal.

22.3. The Tribunal may limit any Post-Hearing Briefs in scope and/or in length.

23. **Publication**

*Convention Article 48(5), Administrative and Financial Regulation 22, Arbitration Rule 48(4)*

23.1. The parties consent to ICSID publication of any Procedural Orders, Decisions, and Award issued in the present proceeding, subject to the redaction of confidential information.

24. **Good Faith**

24.1. The parties accept that they have a duty to arbitrate in good faith, which includes an obligation to co-operate with the opposing parties and the Tribunal. The parties further agree that the Tribunal may direct any party to do all such things during the proceedings as may be reasonably needed to enable an Award to be made properly, fairly and efficiently.

25. **Other Matters**

25.1. The terms of this Procedural Order may be varied or modified by the Tribunal, in whole or in part, after consultation with the parties.

For and on behalf of the Tribunal

[Signed]

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Stephen L. Drymer  
President of the Tribunal