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IBA ARBITRATION COMMITTEE

IBA Site Visit Model Protocol for International Arbitration

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Foreword

In the experience of the Working Group for the Site Visit Model Protocol (the ‘Working Group’), site visits can be a helpful procedural tool in international arbitrations. They serve two general purposes. First, a visit to the project’s site can give an arbitral tribunal a better understanding of the project, providing important context for the parties’ submissions. Second, a site visit can facilitate the gathering of evidence. Used in this way, site visits can play a vital role in giving the parties equal access to evidence, which may otherwise be in the hands of one party alone. The accessibility of evidence, in turn, will ensure that the arbitral tribunal has a more complete factual record on which to base its award.

The purpose for which the site visit is arranged will drive a decision about its procedural contours and necessary attendance. If the site visit is intended to provide context for the parties’ dispute, the presence of the arbitral tribunal will be paramount, and the process may include walkthroughs with questions and comments. If the site visit is intended for evidence gathering, the presence of the parties’ respective experts will be key, and the process may focus on steps such as inspections, process monitoring, sample collection, or data extraction. In either case, the parties’ counsel and representatives will likely be present. Moreover, third parties such as site owners or operators (if not a party) may also be involved.

To assist parties in discussing and organising their site visit, this Site Visit Model Protocol for International Arbitration (the ‘Model Protocol’) sets out the Working Group’s understanding of best international practice for the conduct of site visits.

The Model Protocol does not elaborate on the reasons or the thresholds to agree or order a site visit. Rather, once a site visit has been agreed or ordered, the Model Protocol is intended to serve as a strong starting point for the parties’ discussion. However, it is not comprehensive and it should be adapted to the needs of the parties’ case. Indeed, the dispute’s specific context and industry, such as construction and engineering, manufacturing and supply, mining and metals, and energy, may necessitate different site procedures which parties and arbitral tribunals should consider.

Whatever the dispute, in the Working Group’s experience a thorough upfront discussion will always be helpful to avoid problems that could otherwise arise in the practical conduct of the site visit. It is therefore advisable that the parties discuss the future site visit in detail, using the Model Protocol as a starting point, to lower the risk of any ‘disputes within disputes’ about the site visit that may have a detrimental effect on the overall cost and efficiency of arbitral proceedings.

To inform and structure the parties’ discussions, the Model Protocol provides a set of default clauses in the form of Articles, which regulate key issues that are likely to arise. Each Article is accompanied by Drafting Notes, which will provide the parties with more information and suggestions on procedural matters that should be considered.

The Articles presented in the Model Protocol address:

- Article 1:** the form of the protocol as a party agreement or a procedural order;
- Article 2:** participants in the site visit, including whether the arbitral tribunal should be present and any limitation on the number of participants permitted;
- Article 3:** mode of participation, whether in-person, remote, or hybrid;
- Article 4:** time and place of the site visit;
- Article 5:** the purpose of the site visit, scope, and itinerary, including any expected expert activities;
- Article 6:** sampling, inspection, and testing
- Article 7:** preparatory work that should be carried out prior to, or during, the site visit;
- Article 8:** logistics, including transport and security;
- Article 9:** general guiding principles to decide any site visit-related disputes, including confidentiality and the impact of the site visit on the operations at the site;
- Article 10:** rules that govern the taking of evidence, including the admissibility of accessed evidence;
- Article 11:** compliance with the protocol;
- Article 12:** costs of the site visit; and
- Article 13:** post-site visit steps such as site visit reports.

This project would not have been possible without the support of the IBA Arbitration Committee, as well as all the institutional and individual contributors who generously provided their feedback and insight during the period of public consultation in October and November 2023. While there are too many to name individually, the Working Group acknowledges their contribution and sincerely thanks them.

The Working Group hopes that the Model Protocol will assist the arbitral community in better understanding and regulating site visits to ensure understanding of the projects and access to evidence, all towards the goal of ensuring a fair, efficient, and productive arbitral process.

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Co-Chairs of the Working Group for the Site Visit Model Protocol

September 2024

Article 1. Site Visit Protocol

1. Claimant and Respondent (each a 'Party', together the 'Parties') have agreed on the following protocol (the 'Site Visit Protocol') for the visit (the 'Site Visit') of [project] at [address or location, country] (the 'Site').

Or

1. The Arbitral Tribunal has issued this Procedural Order No. [*] (the 'Site Visit Protocol') to regulate the visit (the 'Site Visit') of [project] at [address or location, country] (the 'Site').
2. The Site Visit shall take place in the context of the legal proceedings in [arbitration case number and arbitral institution, if applicable] between the Parties (the 'Arbitration').
3. The Site Visit Protocol supplements any provisions in the arbitration agreement, the applicable arbitral rules, or the procedural orders issued in the Arbitration that relate to visits of the Site. As regards the Site Visit, in the case of any inconsistency or conflict between the Site Visit Protocol and other rules, the Site Visit Protocol shall prevail.

Drafting Note with Article 1

General

Conducting a Site Visit may add time and cost to the arbitral proceedings. For this reason, in the Working Group's experience, it is highly beneficial to discuss and regulate any planned Site Visit through a Site Visit Protocol in advance. Upfront regulation increases the likelihood that the Site Visit will be conducted in a cost-effective manner, efficiently and without unnecessary disruptions due to misunderstandings. The Parties are therefore encouraged to thoroughly consider any potential issues.

Paragraph 1

By form, a Site Visit Protocol is typically: (i) a Party agreement; (ii) a procedural order issued by the Arbitral Tribunal; or (iii) a hybrid of the two, where the Party agreement is subsequently ratified by the Arbitral Tribunal and issued as a consent procedural order. This Model Protocol can be used with any of these forms. Depending on the chosen form, the language of the Articles and the signature blocks at the end of the Model Protocol may need to be adapted.

If the Parties express an intention to conduct a Site Visit but do not request that a Site Visit Protocol be issued, the Arbitral Tribunal may initiate on its own accord the discussion about the Site Visit Protocol to ensure a fair process and avoid any procedural difficulties in the future. It may be helpful for the Parties to confer using this Model Protocol as a starting point. With this approach, the Arbitral Tribunal's time would be focused on deciding only the areas of disagreement between the Parties.

Paragraph 3

This clarifies the order of priority in respect of provisions relevant to the Site Visit. While the Site Visit Protocol does not seek to amend provisions relevant to the Arbitration more broadly, to the extent that any pre-existing rules may directly affect the conduct of the Site Visit, the Parties may want to explicitly regulate how such rules should be applied and in what priority in relation to the Site Visit Protocol.

Article 2. Participants

1. The following persons shall participate in the Site Visit (the 'Participants'):
 - (i) On behalf of Claimant: *[experts]* (the 'Claimant's Experts'), *[party representatives]*, and *[legal counsel]* (the 'Claimant's Representatives') and *[others joining on behalf of the Claimant]*.
 - (ii) On behalf of Respondent: *[experts]* (the 'Respondent's Experts'; the Claimants' Experts and the Respondents' Experts together the 'Expert Participants'), *[party representatives]*, and *[legal counsel]* (the 'Respondent's Representatives') and *[others joining on behalf of Respondent]*.

(together (i) and (ii), the 'Party Participants')
 - (iii) On behalf of the Arbitral Tribunal: *[arbitrators or arbitrator representatives, such as tribunal secretaries]* (the 'Arbitral Tribunal Participants').
2. The Participants shall be limited to *[number]* per Party, *[number]* for the Arbitral Tribunal Participants, and *[number]* in total. For the avoidance of doubt, the personnel present and engaged in business activities on the Site shall not be treated as Participants.

Drafting Note with Article 2

General

As part of the preparation for the Site Visit, the Parties should carefully consider the role and the identity of the Participants. The Site Visit's nature and purpose will usually define the types of Participants that may be necessary for the productive conduct of the Site Visit. For example, the Participants may include: (i) the Experts only; (ii) the Parties and the Experts; (iii) the Parties and the Arbitral Tribunal; or (iv) the Parties, the Experts, and the Arbitral Tribunal. Once the Participants are defined, the language of the Articles throughout the Site Visit Protocol may need to be amended.

Paragraph 1

In the experience of the Working Group, the participation of the Arbitral Tribunal in the Site Visit would likely facilitate an efficient conduct of the Site Visit as it would induce compliance with the Site Visit Protocol. However, a Site Visit that takes place before the Arbitration has commenced would necessarily not include the Arbitral Tribunal Participants. Pre-Arbitration Site Visits are typically, by nature, exploratory works and investigations. If the Parties decide to conduct a pre-Arbitration Site Visit, they should consider how the fair conduct of the Site Visit should be ensured, as well as whether and how the information and material obtained might be used in the future Arbitration.

Once the Arbitration has commenced, if the Arbitral Tribunal Participants are taking part in the Site Visit, their participation will necessitate a careful consideration by the Parties. Typical issues to consider include what communication, if any, should be allowed between the Arbitral Tribunal Participants and the other Participants during the Site Visit. In that respect, the Parties should refer to Article 10 of the Model Protocol. In addition, where the Arbitral Tribunal comprises a three-member panel and the Arbitral Tribunal delegates one member to attend as the Arbitral Tribunal Participant, due consideration will need to be given to the purpose and scope of the Site Visit, the permissible scope of discussions with the Arbitral Tribunal Participant, and the record of the Site Visit.

When defining the Participants, the Parties should carefully consider all potential Participants. The list provided in the Model Protocol is not exhaustive. For example, in addition to the Expert Participants, the Arbitral Tribunal may have appointed an Expert in the Arbitration and, thus, this may prompt amendments to Article 2, Paragraph 1, among others.

The Parties should also consider whether it is appropriate to define the Participants by name, role and function, or both. In some circumstances, a name may be required due to reasons such as security, mandatory access requirements, or confidentiality. However, defining the Participants by their names may create difficulties if the notified Participant becomes unavailable. To account for that risk, if the Participants are defined by name, the Parties may wish to add a provision that allows the appointing Party to nominate a replacement Participant if the notified Participant becomes unavailable. An alternative solution may be to include with the Site Visit Protocol a separate schedule listing the potential Participants, which may more readily be amended should changes be required, or to envisage that the identity of the Participants will be notified by the Parties in advance of the Site Visit.

While the Participants here are defined by reference to their role in the Arbitration (Claimant, Respondent or the Arbitral Tribunal), in some cases the Participants may include third parties who are not directly involved in the Arbitration, but nevertheless may be present at the Site Visit, either because they have a legal interest in attending the Site Visit (eg, an insurer) or because their attendance is necessary for commercial reasons (eg, the owner of the Site or the employed personnel). The Arbitral Tribunal's jurisdiction and power over third parties will be necessarily much more limited than the power over the Parties. Third parties are therefore regulated separately, in Article 9, Paragraph 1.

The category of Participants described in square brackets as '*others*' may include various Participants engaged to support or assist the Participants. Depending on the Site and the circumstances of the dispute, these may include translators, technicians, sampling and packaging assistants, camera and video recording professionals, or security details. Where appropriate, the Parties should consider whether certain categories of such Participants, such as translators, can be appointed by the Parties jointly to save time and cost.

Paragraph 2

Depending on the size, nature, and location of the activities at the Site, there may be a legitimate reason to limit the number of Participants, or to limit the duration of the Site Visit, as set out in Article 4, Paragraph 1. The reason may be a legitimate commercial concern (such as the Site Visit having a significant impact on the project or commercial operations) or a reason associated with health, safety, security, and environmental concerns. The Parties should seek to achieve a balance between a process that is fair and enables access to evidence, and the commercial interests of the owner or operator of the Site.

Article 3. Remote Participants

1. If the technology is available and accessible, any Participant may choose to attend the Site Visit remotely, for example via telephone, audio, or video link, instead of in-person (the 'Remote Participant').
2. The Remote Participants shall clearly identify themselves by name and position when joining the Site Visit remotely. No person other than the identified Remote Participant may join the Site Visit remotely.
3. The Remote Participant [*shall / shall not*] be counted for the purpose of establishing the maximum number of Participants as set out in Article 2, Paragraph 2.
4. All logistical arrangements for the remote connection shall be the responsibility of the Remote Participant's appointing Party, if the Remote Participant is a Party Participant, or the Parties jointly, if the Remote Participant is an Arbitral Tribunal Participant.
5. While technological, internet connectivity, or similar problems may affect the Remote Participant's ability to attend the Site Visit, such problems [*shall / shall not*] be allowed to delay or disrupt the conduct of the Site Visit. The Site Visit [*may / may not*] at any time proceed with the in-person Participants only.

Drafting Note with Article 3

General

With real-time video and audio sharing, any Site Visit can be hybrid (if some Participants are joining in-person and some remotely) or fully remote (if all Participants are joining remotely). However, depending on the purpose of the Site Visit and the nature of the project, not every Site Visit can be appropriately conducted as a remote Site Visit. For example, Site Visits that necessitate an in-person task or activity (such as the collection of samples or physical inspection) will require at least some Participants to be present physically on the Site. Also, the location of some Sites may make real-time video and/or audio sharing impractical.

Enabling remote participation will necessarily require additional consideration and logistical arrangements. The Parties should keep in mind that some Sites (such as remote mining or energy sites) may not offer internet connection without an additional mobile or satellite modem or similar technological solutions that establish data transfers using a communications satellite as a relay. Moreover, the region or country in which the project is located may not have appropriate infrastructure to enable the remote exchange.

If the Parties expect that technology may create an issue, then it may be safer to conduct the Site Visit in-person only. An in-person Site Visit may be complemented by an audio or video recording, which could then be viewed later, subject to Article 10 and Article 13.

Finally, automated aerial vehicles, or drones, may supplement or enhance a Site Visit by providing real-time aerial surveillance, capturing detailed imagery, and facilitating remote inspections. To date, the use of drones in this context has faced challenges due to stringent regulations aimed at safeguarding privacy and security. However, their use, as well as the use of virtual reality and augmented technology, for evidence visualisation is inevitable. In such circumstances, a number of the remote and hybrid considerations addressed in the Site Visit Protocol will remain relevant but additional safeguards, including those to ensure compliance with regulatory legal framework and to protect the integrity of the proceedings and the evidence, will need to be considered and incorporated into the Site Visit Protocol.

Paragraph 5

It may be beneficial to explicitly regulate the effect of a poor or failed connection on the conduct of the Site Visit. To this end, language may be inserted in Article 3, Paragraph 5 to consider whether the Site Visit should continue or be halted if a Remote Participant loses connection. The Parties may wish to consider whether: (i) the Remote Participant is a Party Participant or a Tribunal Participant; and (ii) the Remote Participant is the only representative of the Party or the Arbitral Tribunal who is attending the Site Visit.

The Parties may also want to agree on additional 'buffer days' outside of the agreed Site Visit dates to account for any technological disruptions or to continue and finalise an interrupted Site Visit.

Article 4. Time and Place

1. The Site Visit shall take place on [*date / date range*].
2. The area within which the Site Visit shall take place is [*area*].

Drafting Note with Article 4

General

The timing of the Site Visit may be an extremely important issue for the Parties. Generally, to avoid procedural disruptions, the Parties should seek to decide as early as possible whether they wish to conduct a Site Visit and, if so, when and in which area(s) of the Site it should take place. While the Site Visits would generally take place prior to any evidentiary hearing, to the extent that the Site Visit takes place after the hearing, it would be essential that the Parties and the Arbitral Tribunal consider the scope and purpose of the Site Visit, the treatment of evidence, and any subsequent procedural steps.

Paragraph 1

In some cases, the issues in dispute will be sufficiently well known to the Parties early on in the Arbitration, such as at the time of the Request for Arbitration/Answer. Accordingly, the need for a Site Visit may already be apparent at an early stage of arbitral proceedings. In such circumstances, even if it is not possible to agree on the exact dates and details, the need for a Site Visit should be raised as early as possible, for example, at the first procedural hearing/case management conference and ahead of the first procedural order. In other cases, the need for a Site Visit may become apparent later in the Arbitration.

While some Site Visits, depending on their nature and purpose, may take place prior to the commencement of the Arbitration, this Model Protocol focuses on Site Visits that take place during the pendency of arbitral proceedings. Within that scope, an opportune time for a Site Visit may be between the first and second round of written submissions. At that time, the Parties will already be aware of the key issues in the case but will still have sufficient time to incorporate any Site Visit findings into the second round of written submissions or present them at the hearing.

Sometimes, Site Visits may take place shortly before or even during the hearing. This option is considered less favourable given that it will almost inevitably cause procedural disruptions. Namely, the Parties would need to assess how and when they would make submissions concerning the evidence obtained or observed during the Site Visit. Generally, conducting the Site Visit after the written submissions have already been exchanged may necessitate further exchanges of written submissions and the postponement of the hearing. However, it may be insightful for the Arbitral Tribunal should it not otherwise have had an opportunity to see the subject matter of the dispute.

Other factors that may affect the timing of a Site Visit are: the availability of the proposed Participants; the availability and condition of the Site; the complexity or time-sensitivity of the issues; and the purpose of the Site Visit, for instance whether it is intended for evidence gathering or simply to obtain a visual impression of the Site. The Parties should keep in mind that some sites are located in regions which are exposed to severe weather conditions or weather fluctuations, and therefore it may be that a Site Visit can only take place during limited periods in any given year. By contrast, the issues in dispute may require that the Site Visit take place at a specific time of year to align with the presence of certain climatic or other conditions (eg, prevailing wind direction or wet/dry season).

The Parties should consider whether it may be more appropriate to define the time of the Site Visit through fixed dates or a more flexible date window. What may matter is the ability or willingness of the Site operator/owner to grant access to the Site, the nature of operations on the ground, as well as the availability of the Participants. Moreover, the length of the Site Visit may affect the commercial functioning of the project or owner company. For some projects, pausing or modifying the work at the Site even for a limited amount of time may cause significant disruptions or financial consequences. As noted in the Drafting Note with Article 2, Paragraph 2, these competing interests need to be balanced.

Paragraph 2

An upfront agreement as to the area(s) where the Site Visit should take place may prevent future disagreements, especially during the conduct of the Site Visit. However, it may be practically difficult for the Party who has not yet seen the Site to agree on any specific geographical boundaries for the conduct of the Site Visit. If the Parties can agree on the relevant areas, the demarcation of areas could be achieved by reference to: physical boundaries, maps, GPS coordinates, plans or drawings, among others. Generally, the Parties should keep in mind that some projects include vast areas of underutilised or unutilised terrain. Accordingly, appropriate travel and logistical arrangements should be made, in respect of which the Parties are referred to Article 8.

Article 5. Purpose, Scope, and Itinerary

1. The purpose of the Site Visit is [purpose].
2. The Participants shall conduct the Site Visit in accordance with the itinerary [at Schedule [•]] [to be agreed [number] of Days in advance of the Site Visit] (the 'Itinerary').
3. The list of tasks [in Schedule [•]] [to be agreed by the Parties [number] of days in advance of the Site Visit] shall be carried out in accordance with the Itinerary.
4. At the minimum, the Site Visit is envisaged to include the following tasks:
 - (i) [Orientation and Site access meeting for the Participants]
 - (ii) [Guided tour of the Site]
 - (iii) [Observing and process monitoring]
 - (iv) [Opening up of the structures]
 - (v) [Sampling]
 - (vi) [Surveying]
 - (vii) [Document review]
 - (viii) [Data extraction]
 - (ix) [Inspecting and testing]
 - (x) [Interview of the Site-based technical personnel to better understand the project and its operations]
 - (xi) [Wrap-up meeting for the Participants]

Drafting Note with Article 5

General

In practice, the purpose of Site Visits can vary significantly. For example, the purpose may be:

- to observe or monitor a process (eg, the commissioning of an industrial plant in the construction and engineering sector or the production of a product in the manufacturing sector);
- to collect samples;
- to investigate or test (which may be destructive or non-destructive in nature (eg, the extraction of ore in the mining and metals sector or the extraction of material relevant to defective installations in the construction and engineering sector)); and/or
- to extract data (cross industry where specialised software is required to extract data).

The specific purpose of the Site Visit will necessarily influence the content of the Itinerary and the list of tasks to be undertaken in accordance with the Itinerary. When incorporated into a final Site Visit Protocol, Article 5 will necessarily need to be updated to reflect the circumstance of any individual Arbitration and the Site Visit. The Working Group considered it relevant to include Article 5, in addition to the Itinerary and the concept of a list of tasks, to provide flexibility for the Itinerary and the list of tasks to be agreed at a later date. In practice, such an approach is beneficial as it is likely to ensure that the Itinerary and list of tasks are specific and accurate; a better understanding of what is required is gained in preparation for the Site Visit.

While the Parties should ideally discuss and agree on a detailed Itinerary and list of tasks in advance of the Site Visit, it may be that at the time of negotiating the Site Visit Protocol, the Parties are unable to do so comprehensively, for example, due to unequal or inadequate knowledge of the Site or the project. Accordingly, Article 5, Paragraph 2 and Paragraph 3, envisage that the Itinerary and the list of tasks will either be immediately available with the Site Visit Protocol as a Schedule or in some cases where it is appropriate to have a list of tasks distinct from the Itinerary (eg, where Preparatory Work in Article 7, Paragraph 1 is contemplated), as multiple schedules or agreed later.

Paragraph 2

When discussing and drafting the Itinerary, the Parties should set out the plan for each day of the Site Visit, including (to the extent possible, and with the ability to depart reasonably from any timetable) its start and end time, meeting points, and tasks. The Parties should consider adding: security access points; induction details; breaks for meals or convenience; transport; and meetings with on-site personnel or Participants (depending on the agreement and industry needs). For Site Visits that take place in a remote location, the meals and breaks may need to be planned accordingly.

When considering the number of days of the Site Visit, the Parties should keep in mind that certain tasks require more time to prepare and/or execute. In addition, if certain tasks (eg, sampling, inspection and testing), require significant planning owing to the size or the location of the samples, the Parties may wish to consider arranging appropriate drop-off and pick-up points, keeping in mind the requirements of chain of custody that may affect the credibility of any sampling and testing results.

Depending on the status of the project, there may be limited windows within which certain tasks can be performed. The Itinerary and the list of tasks will have to consider such windows and the daily operations and constraints at the Site more generally.

In the experience of the Working Group, it is often helpful to start the Site Visit with a meeting between the Parties and their respective Participants to familiarise them with the plan, the required equipment, safety procedures, and any logistical notes and similar details. To the extent that any Arbitral Tribunal Participants are present, daily orientation meetings can be used to familiarise them with the Site and the project. Introductions or short presentations, recapping on the previous day, for instance, may be given by counsel (and in some instances, with Expert input). However, there is a risk that such meetings may turn into mini hearings with extensive advocacy, if not regulated appropriately. The Parties should carefully consider to what extent they want to allow advocacy, if any, at the Site Visit.

Paragraphs 3 and 4

As noted above, the list of tasks is intended to complement the Itinerary. Such tasks may be carried out prior to (see Article 7), or during, the Site Visit.

Without being exhaustive, the list of tasks in Article 5, Paragraph 4 seeks to provide illustrative examples of tasks that may be performed during the Site Visit. Not all of the tasks listed are likely to be undertaken during any single Site Visit. Rather, the Parties should adapt the type and number of tasks to their own Arbitration and Site Visit.

Each of the listed tasks will entail its own procedural requirements and preparatory steps. For example, the parties should consider:

1. at the orientation meeting for the Participants:
 - (i) health, safety and security;
 - (ii) environmental measures and risks;
 - (iii) the logistics and schedule of the Site Visit;
 - (iv) whether the presence of non-Participants may be necessary (eg, safety personnel);
or
 - (v) concerns that the Participants may have.
2. a guided tour of the Site, with scheduled stops at areas of interest, to enable the participants to familiarise themselves with the project;
3. for observing and process monitoring:
 - (i) the selection and availability of the processes to be observed and monitored;
 - (ii) the methods and criteria for observation and monitoring;
 - (iii) the recording and documentation of the observations and findings;
 - (iv) the verification and validation of the results;
 - (v) the potential impact of the observation and monitoring on the normal operation of the Site;
4. the coordination and cooperation with the Site personnel;
5. for the opening up of the structures:
 - (i) identify exactly where opening up is to take place and its scope;
 - (ii) who will perform the opening up and under whose direction;
 - (iii) how the process will be recorded; and
 - (iv) how safe access is to be achieved, for example by permanent means of access or by temporary means including fixed (eg, scaffolding) or mobile means (eg, cherry picker);
6. for sampling, inspection and testing, refer to Article 6;

7. for surveying, the requirements for photographs and photograph file storage, including:
 - (i) whether photographs will be retained by the owner of the site and released later;
 - (ii) specific setting requirements, (eg, that the cameras should be set to date imprint setting with the correct time and date);
 - (iii) whether caution should be exercised when using cameras and flash in certain areas that may be perilous (eg, on board tankers and other non-gas free areas);
 - (iv) that photograph images may be cropped and visibility-enhanced but may not be altered as to content;
 - (v) that photographs taken during the Site Visit should be stored on a suitable back-up storage device in the event that further photographs are required for analysis at some time in the future;
 - (vi) that all photographs taken are uploaded to a common location for use by all Participants; and
 - (vii) that surveyors must exercise appropriate safety precautions, including using suitable protective equipment (eg, helmet, goggles/safety glasses, safety boots, gloves, flashlight etc);
8. for document review;
 - (i) the identification and location of the documents to be reviewed;
 - (ii) the access and security arrangements for the documents;
 - (iii) the format and language of the documents;
 - (iv) the relevance and reliability of the documents;
 - (v) the copying and scanning of the documents;
 - (vi) the protection of confidentiality and privilege; and
 - (vii) whether lawyers should be present to make and respond to objections;
9. for data extraction;
 - (i) whether the data obtained may include regular documents or only highly technical industry data (eg, data held through specialised software, such as mining geodata, or industrial plant centralised systems); and
 - (ii) if the technical data is to be accessed, how it may be collected and stored for transport after the Site Visit is finished;

10. for inspecting and testing;
 - (i) the selection and preparation of the items or materials to be inspected and tested;
 - (ii) the standards and procedures for inspection and testing;
 - (iii) the equipment and personnel required for inspection and testing (and whether such equipment needs to be calibrated in advance);
 - (iv) the recording and reporting of the inspection and testing results;
 - (v) the quality control and assurance of the inspection and testing;
 - (vi) the preservation and disposal of the inspected and tested items or materials; and
 - (vii) the interpretation and implication of the inspection and testing results.

The types of tasks that should be included in the Site Visit will also depend on the industry of the dispute. To that end, by way of example, the Parties may consider the following additional tasks per industry.

- In construction and engineering arbitrations:
 - inspecting and measuring the physical condition;
 - quality assessments related to the performance of the works;
 - materials used, equipment installed, or systems used;
 - identifying and documenting any defects, deviations, or non-conformities;
 - testing or verifying the compliance, functionality, or suitability of the works, materials, equipment, or systems;
 - collecting or analysing any samples, data, or records;
 - interviewing or consulting with any technical personnel, contractors, or consultants involved in the project; and
 - preparing or reviewing any drawings, calculations, or reports.
- In manufacturing arbitrations:
 - inspecting and evaluating the design, production, and quality control processes and systems of the manufacturing facility, the products, or the components;
 - identifying and documenting any defects, faults, or failures;
 - testing or verifying the compliance, functionality, or suitability of the products or components;

- collecting or analysing any samples, data, or records;
 - interviewing or consulting with any technical personnel, suppliers, or customers involved in the manufacturing industry; and
 - preparing or reviewing any specifications, standards, or reports.
- In mining and metals arbitrations:
 - inspecting and evaluating the design, operations, and production of the mining plant or its products and components;
 - identifying and documenting any defects, faults, or failures;
 - testing or verifying the compliance, functionality, or suitability of the equipment or chemical reagents;
 - collecting and analysing samples, data, or records;
 - interviewing or consulting with any technical personnel involved in the mining operations;
 - preparing or reviewing any specifications, standards, or reports, visiting surrounding areas and local communities;
 - inspecting pits and underground mines, tailings facilities, dumps, pads water supply and discharge structures, power plants and transmission lines, and other supporting infrastructure; and
 - inspecting procedures for environmental monitoring and compliance.
 - In energy arbitrations:
 - inspecting and evaluating the design, operations, and production of the energy facility or its products and components;
 - identifying and documenting any defects, faults, or failures;
 - testing or verifying the compliance, functionality, or suitability of the equipment or fuel sources;
 - collecting and analysing samples, data, or records;
 - interviewing or consulting with any technical personnel, regulators, or customers involved in the energy industry; and
 - preparing or reviewing any contracts, tariffs, or reports.

Article 6. Sampling, Inspection, and Testing

1. The Expert Participants may collect up to *[number]* samples ('Collected Samples') for testing.
2. Any Party may engage an independent and certified laboratory specialised in testing (the 'Laboratory') to inspect and test the Collected Samples.
3. The method of collecting samples shall be *[describe]*.
4. The relevant Expert Participants shall jointly prepare, review, and sign a schedule that lists and identifies all Collected Samples in accordance with the template document *[agreed by the Parties [time] before the Site Visit] [set out at Schedule [•]]*.
5. The Parties agree that *[company]*, or another reputable and independent company specialised in testing, inspection, and certification, shall oversee the delivery of the Collected Samples.
6. The Collected Samples shall be individually placed in *[type of container]*. *[Claimant/Respondent/company referred to in paragraph 5. above]* shall provide the *[type of container]*. The *[type of container]* shall then be sealed with numbered tags and equipped with tamper-evident seals.
7. Once the Collected Samples are sealed, *[company referred to in paragraph 5 above]* shall take custody of the Collected Samples for transit from the Site to the Laboratory, ensuring their chain of custody throughout.
8. Each Party reserves the right to have a representative present at the Laboratory upon receipt and unsealing of the Collected Samples. However, the absence of such representative shall not prevent the Laboratory process from continuing.
9. The Parties shall procure that the Laboratory release simultaneously to both Parties copies of any reports, including interim reports, documenting ongoing test work and the results of any tests.
10. To enable each Party to undertake additional testing after the conclusion of the Site Visit, the Parties shall ensure that the Laboratory shall in all cases where possible preserve:
 - (i) Sufficient material from each tested Collected Sample until *[date]*.
 - (ii) The Collected Samples, which have not been tested, until *[date]*.

Drafting Note with Article 6

General

This Article may be relevant for different tasks listed in Article 5, Paragraph 4, including any Laboratory-related sampling, inspection, and testing. The term 'Collected Samples' may therefore apply to any material collected during the undertaken tasks.

The Parties should consider whether they can agree to use the same Laboratory/Laboratories for the purpose of saving cost. However, in practice, the Parties may have concerns about the neutrality and independence of some Laboratories, given that many major Laboratories located near the Site may have a close commercial relationship with the Site owner or operator, who may be a Party in the Arbitration. This concern may lead the Parties to select different Laboratory/Laboratories for the testing. For this reason, Article 6, Paragraph 10 envisages that any Party may also undertake additional testing. This protection may encourage the Parties to agree initially to one joint Laboratory and, only if it becomes necessary, later use a different provider.

Paragraph 4

In order to preserve the chain of custody and ensure that any Laboratory process can be followed by the Parties, it is advisable to agree a template schedule identifying the Collected Samples by their description, extraction location and dates, container seal numbers, and the responsible Expert Participant, among others.

Article 7. Preparatory Work

- 1. To the extent that preparatory work is required to ensure proper access to the Site and conduct of the Site Visit, the Parties shall agree on the scope of preparatory work and identify the Party responsible for the completion of each step in the preparatory work.**
- 2. All preparatory work shall be completed [*time*] in advance of the Site Visit.**

Drafting Note with Article 7

General

To ensure a productive and efficient Site Visit, some Site Visits may require advance preparatory work (eg, access to the Site, preparatory work to facilitate work to be undertaken by Expert Participants).

While advance preparatory work may be beneficial, it may also create issues such as creating the opportunity for tampering with evidence, causing undue delays that protract the dispute or the conduct of the Site Visit, or aggravating the dispute between the Parties prior to the Site Visit. Accordingly, to the extent any preparatory work is required, it may require separate regulation.

To the extent the Parties agree on, or the Arbitral Tribunal orders, that preparatory work is required, the Parties should detail the personnel (eg, third party, site owner, or site operator), items of equipment and documentation that should be available to undertake the preparatory work for, or in support of, the Site Visit. The Parties may also want to list the relevant third-party specialist companies who should be on Site or available at the time of the preparatory works.

Article 8. Transport, Security, and Logistics

1. The Parties shall be responsible and make the appropriate arrangements as follows:
 - (i) [Party] shall be responsible for: [add].
 - (ii) [Party] shall be responsible for: [add].
1. Each Participant individually shall be responsible for: [add].
2. The Participants shall comply with the following health, safety, security, and environmental measures:
 - (i) [Site-related measures].
 - (ii) [Country-related measures].
3. Each Participant shall sign a waiver of liability [at Schedule [•]] or [to be agreed by the Parties and third parties [time] before the Site Visit].
4. Each Party shall procure that any person attending the Site Visit on behalf of such Party, including any person undertaking the preparatory work or providing support in relation to the Site Visit, comply with the health, safety, security, and environmental measures listed in Paragraph 3.

Drafting Note with Article 8

General

Each Site Visit will be unique in terms of the steps required for its organisation and conduct. Article 8 seeks to highlight some of the key logistical issues. For example, some matters that may need to be regulated include:

- transportation and security to, from, and at the site, and for access to the site;
- food and drink;
- travel, visa, and immigration regulations;
- customs, import and export permits;
- health, safety, security, and environment requirements, as well as certain training or qualifications;

- public health requirements, such as vaccination certificates and/or protocols;
- dress code at the site, including any safety gear;
- purchase of ancillary materials to facilitate certain tasks (eg, sampling bags); and
- type and number of vehicles.

Paragraph 1

It is likely that the Party who controls the Site or is present in the jurisdiction where the Site is located will be best placed to assist with matters of transport, security, and logistics. To the extent that a third party owns the Site, the language of Article 8, Paragraph 1 will need to be adapted. That said, if one Party is better placed to liaise with the third party-owner, the drafting of the Site Visit Protocol may take that into account, noting the Party's obligation of cooperation and best efforts to ensure cooperation by third parties as noted in Article 9, Paragraph 1.

Paragraph 3

Most sites are regulated by health, safety, security, and environment standards, as well as country-related standards. The Participants will need to comply with them and in some cases undergo training or certification requirements before being granted access to the Site. The Parties should also consider if more stringent measures should be applied for certain areas of the Site or in respect of Participants performing certain tasks (eg, areas or tasks considered perilous or requiring specialist expertise). Article 8, Paragraph 3 may be amended to cater for any additional requirements or measures.

Paragraph 4

Site owners may require the Participants to sign a waiver of liability, particularly in circumstances where the owner is not a Party to the arbitration. In such circumstances, Article 8, Paragraph 4 foresees that such waiver may be attached as a Schedule to the Site Visit Protocol or agreed at a later date.

Article 9. Guiding Principles

1. To ensure fair, efficient, and productive conduct of the Site Visit, the Parties shall: (1) confer with each other in good faith; (2) cooperate with each other fully and transparently; (3) act in a timely and cost-efficient manner; and (4) use best efforts to induce third parties' cooperation to achieve the purpose of this Site Visit Protocol in the context of the Arbitration.
2. All Participants shall conduct the Site Visit at the same time, and no Participant shall engage in any tasks listed in the Itinerary without the relevant Participants from both Parties [and the Arbitral Tribunal Participant] present. However, an unexcused absence of any Participant from any task set out in the Itinerary shall not delay, impede, or prevent other Participants from conducting the Site Visit.
3. [The Arbitral Tribunal] [All] Participants shall be accompanied by both the Claimant's Representatives and the Respondent's Representatives where reasonably possible.
4. The [Arbitral Tribunal] Participants shall not have discussions about the Arbitration with either Party Representatives unless the Representatives of the other Party are present.
5. Subject to the tasks listed in the Itinerary, the Site Visit shall be conducted so as to avoid unreasonably impacting the condition or the functioning of the Site.
6. Oral pleadings or testimony on the merits of the Parties' claims and defences [shall] [shall not] be allowed during the Site Visit. The Parties and the Arbitral Tribunal shall have daily debrief sessions to discuss procedural matters related to the conduct of the Site Visit, including logistics for the following day.
7. The existence and conduct of the Site Visit as well as any information and material accessed during or in relation with the Site Visit [shall] [shall not] be kept confidential.

Drafting Note with Article 9

General

Article 9 provides a set of basic guiding principles to ensure a fair, efficient, and productive conduct of the Site Visit. Any dispute or issue that may arise during the Site Visit that is not explicitly regulated by the Site Visit Protocol should be resolved by reference to the guiding principles.

Paragraph 1

While Article 9, Paragraph 1 provides a starting point (and it is likely that the principles included in Article 9, Paragraph 1 are already encapsulated in the applicable arbitration rules, such as institutional rules or the national arbitration law), the Parties may consider whether any additional principles should be explicitly mentioned in the Site Visit Protocol.

Paragraph 2

The Parties should consider the position in Article 9, Paragraph 2 against the alternative where due to non-participation of any, or any essential, Participant the Site Visit would be postponed.

The following alternative language may also be considered: 'In case of an excused absence of any Participant from any task set out in the Itinerary, such task shall, to the extent possible, be postponed to a later time when all Participants are able to attend, unless the Parties agree otherwise. In case of disagreement between the Parties, they may refer the issue to the Arbitral Tribunal [which shall decide in accordance with Article 11, Paragraph 2].'

Paragraph 4

The Parties should keep in mind that in certain jurisdictions legal counsel of a Party may not be permitted to communicate directly with the opposing Party who is represented but may only do so through the opposing Party's legal counsel. In such circumstances, Article 2, Paragraph 1 and Article 9, Paragraph 4 should adequately reflect this restriction.

Paragraph 5

The Parties should consider whether it would be appropriate to document (via photographs or video) the status and condition of the Site prior to the beginning and after the conclusion of the Site Visit. Such evidence may be relevant in case there is an objection as to the damage and destruction of the Site. However, any regulation should take into account that certain tasks such as destructive testing, if such task is agreed or ordered, will necessarily impact the Site. The Parties may consider whether a positive obligation to repair would be appropriate and, if so, who should discharge it and when.

The Parties may also consider whether insurance arrangements should be agreed and in place before the Site Visit. For example, each Party may be required to procure insurance or make other adequate support arrangements for its own Participants, with both Parties procuring insurance or making other adequate support arrangements for the Arbitral Tribunal Participants.

Paragraph 6

In the experience of the Working Group, counsel often has differing views as to whether oral advocacy should be permitted during the Site Visit and by whom. On one hand, the Parties may have a joint desire to prevent the Site Visit from turning into a mini hearing. On the other hand, without at least some oral explanation during the Site Visit (whether by experts or counsel), the Arbitral Tribunal Participants may not grasp the relevance of what they are seeing, and may therefore benefit less from the Site Visit as a whole. The Parties should consider these and other considerations when discussing the regulation under Article 9, Paragraph 6.

Paragraph 7

Depending on the Parties' agreement and the applicable law, the Arbitration in relation to which the Site Visit takes place may or may not be confidential. However, regardless of the confidentiality of the Arbitration, the Parties may regulate the confidentiality of their Site Visit. For example, the Parties could agree that the existence and conduct of the Site Visit as well as any materials and information obtained during the Site Visit shall be treated as confidential. In that case, the Parties may enter into a separate confidentiality agreement in an appropriate form and this provision of Article 9, Paragraph 7 may be adapted to include a reference to a confidentiality agreement, which could be attached as a Schedule to the Site Visit Protocol.

The Parties should consider whether their confidentiality agreement should include: (i) an obligation on the Parties to procure that the Participants, third parties, and Laboratories (as set out in Article 6) engaged in respect of the Site Visit sign a confidentiality agreement in the form agreed between the Parties; and (ii) a provision that no Participant or third party shall be granted access to the Site and no Laboratory shall be sent Collected Samples until such confidentiality agreement has been signed and sent to the opposing Party and/or the Site owner/operator. Further to the extent that materials and information obtained during the Site Visit are reviewed by others (eg, persons employed by a Party who did not attend the Site Visit and, thus, are not Participants), a confidentiality agreement should be signed. Care should be taken to avoid inconsistencies should a confidentiality regime already be in place.

Article 10. Evidence

1. **All communications between a Party’s legal counsel and its Participants during the Site Visit are presumed to be subject to legal impediment or privilege.**
2. **Considering the purpose, scope, and Itinerary in Article 5, each Party may record, whether by taking notes, photographs, videos, and/or audio recordings, the content of interviews with or statements by Site-based technical personnel and the subject matter [*observed, monitored, sampled, surveyed, reviewed, extracted, inspected or tested*], provided always that such records are created in compliance with Article 9, paragraph 7 and Article 10, paragraph 1. Such records or their content may be used as, and admitted into evidence, subject to the Arbitral Tribunal’s assessment of the evidence.**

Drafting Note with Article 10

General

The evidentiary purpose of the site visit should be established at the outset. Is the site visit intended to be a framework for assessing evidence? Alternatively, is the site visit intended to become evidence on record and, thus, may be relied upon by the arbitral tribunal in its award? Article 10 has been drafted to provide model language for the situation where it is agreed or ordered that the site visit and records of the site visit are to become part of the evidentiary record. However, to the extent that the site visit is intended to be a framework for assessing evidence only, this purpose should be stated and Article 10, paragraph 2 amended accordingly.

Paragraph 1

Considering the nature of a Site Visit and the risk that communications may be overheard, Article 10, Paragraph 1 is drafted on the basis that communications between Parties’ legal counsel and their respective Participants are presumed to be subject to legal impediment or privilege. Communication that is subject to ‘legal impediment or privilege’ may be declared inadmissible as evidence.

The Working Group adopted the broad language of ‘legal impediment or privilege’ used in the IBA Rules on the Taking of Evidence in International Arbitration and considered it preferable to leave the regulation, timing, and assessment of the applicable legal or ethical rules to be addressed by the Arbitral Tribunal in the context of the wider Arbitration.

Paragraph 2

This Paragraph is drafted to ensure that records obtained during the course of the Site Visit are admissible as evidence. However, to the extent that communications between the Parties' legal counsel and their respective Participants are recorded, they are subject to the presumption contained in Article 10, Paragraph 1. In addition, any records would need to comply with the confidentiality obligations in Article 9, Paragraph 7.

As regards the nature of such records, Article 10, Paragraph 2 contemplates a wide range of evidence, including notes, photographs, videos, and/or audio recordings. The language is also broad and thus covers both documentary and electronic records.

The Paragraph's purpose is to strike a balance between preserving the purpose of the Site Visit as set out in Article 5, on one hand, and the concerns a Party may have in respect of the use of records as evidence in the Arbitration, on the other. In the experience of the Working Group, owners of the Site may be concerned that certain interviews with, or statements made by, Site-based personnel may be used by a Party as an admission of fact or liability. This concern is balanced with the reality that certain interviews with, or statements made by, Site-based personnel may clarify matters to the benefit of the Site owner, which may not have been adequately addressed in the Arbitration. In addition, should the Site owner be a Party in the Arbitration, provided the Site Visit occurs between the first and second round of submissions and before the Hearing, such interviews or statements can be clarified through further documentary or witness evidence, if required.

Any attempted regulation of a statement or comment, for example, that such statement or comment shall not be deemed an admission of fact or liability, is likely to be futile because subsequent attempts by a Party to distance oneself from a statement or comment, if made by a person working for a Party, may be difficult and lack credibility. As a result, the Working Group drafted Article 10, Paragraph 2 on the basis that all records, including statements and comments made in interviews, shall be admissible as evidence subject to the Arbitral Tribunal's assessment (ie, of relevance, materiality and weight) of such evidence.

As addressed in the General Drafting Note above, Article 10, Paragraph 2 will need to be amended accordingly if the Site Visit is not intended to form part of the evidentiary record.

Article 11. Compliance with the Protocol

1. Any objection to the manner in which the Site Visit is conducted must be raised as soon as reasonably practical with the Arbitral Tribunal, either through the Arbitral Tribunal Participant (in-person or remotely) or by email or telephone if no Arbitral Tribunal Participant is present.
2. Should any Party raise an objection that, if upheld, would prevent or materially change the conduct of the Site Visit, the Arbitral Tribunal shall rule on that objection as a matter of urgency and in any case within *[time period]* so that the Site Visit may continue and finish in accordance with Article 4. The Parties agree that an urgent ruling, in accordance with this Paragraph 2, may be handed down orally and shall not require reasoning. On a Party's request, the Arbitral Tribunal's reasoning may follow.

Drafting Note with Article 11

General

The Parties should consider whether it might be appropriate to define sanctions and consequences for non-compliance with the Site Visit Protocol. Sanctions may range from an order for compliance to the application of adverse inference principles. As it is difficult to predict all instances of non-compliance and the appropriate sanctions, the Parties may also decide to leave this matter to the Arbitral Tribunal.

Article 12. Costs of the Site Visit

1. The following costs associated with the Site Visit shall be borne by the Parties in equal amounts:
 - (i) [*shared costs*].
2. The following costs associated with the Site Visit shall be borne by each Party:
 - (i) [*Party-specific costs*].
3. Each Party reserves all rights to request from the Arbitral Tribunal an order on the allocation of costs and expenses incurred in connection with the Site Visit.

Drafting Note with Article 12

General

The parties should negotiate and consider which costs should be shared and which shall be borne by each party separately. In practice, shared costs often include the cost of advance preparatory work, including third-party and equipment costs, food and drink during the site visit, transport, security and equipment or plant hire. The Party-specific costs may include flights, visas and accommodation. Some costs (eg, security and transport) may fall into both categories. Moreover, depending on the size and location of the Site, some accommodation/food costs may initially fall on the third-party owner or operator and be reimbursed later, depending on the Party agreement or the Arbitral Tribunal order.

Article 13. Post-Site Visit Matters

1. **Within [time] after the end of the Site Visit, each Party shall make available to the other Party all video and photographic records obtained during the Site Visit as well as any documents or data obtained from the Site.**
2. **Subject to Article 10, each Party may, in its discretion, file a written Site Visit Report [with their next written submission].**

Drafting Note with Article 13

General

To the extent that video and photographic, as well as other, records of the Site Visit are permitted, the Parties may wish to further particularise any post-Site Visit matters that are relevant for their Site Visit and Arbitration. This regulation may include access to photographs, videos, and audio recordings, documents and/or data obtained from third parties, including a third-party owner, and the filing and use of any Site Visit Report.

While not provided for in Article 13, it may be considered appropriate for the Arbitral Tribunal to formalise its observations during the Site Visit. In such circumstances, Article 13, Paragraph 1 would be amended to include the Arbitral Tribunal's observations, for example, in a form of minutes, which would be shared with the Parties for comment.

Paragraph 2

This Paragraph envisages that the Parties would have an opportunity to file a written Site Visit Report following the Site Visit. As already addressed in Article 4 and the associated *Drafting Note*, the timing of the Site Visit will be a relevant factor in the Parties' assessment as to whether a Site Visit Report is appropriate. Article 13, Paragraph 2 is drafted expressly subject to Article 10 and therefore: (i) the presumption regarding communications between Participants and their respective legal counsel being subject to legal impediment or privilege applies to Site Visit Reports; and (ii) the decision regarding the treatment of the Site Visit and records of the Site Visit as evidence (or not) will need to be factored into the drafting of Article 13. The Parties should consider whether the Site Visit Report should be assessed as evidence by the Arbitral Tribunal, or whether it should be treated as submission.

[Schedules to Site Visit Protocol]

Drafting Note in respect of Schedules

As identified above, the Parties may wish to agree to certain Schedules to complement the Site Visit Protocol. Such Schedules may be agreed at the time the Site Visit Protocol is finalised or at a later stage.

In particular, Schedules included with the Site Visit Protocol may include an Itinerary (see, Article 5, Paragraph 2), a list of tasks (see, Article 5, Paragraph 3), a template table for Collected Samples (see, Article 6, Paragraph 4), a waiver of liability (see, Article 8, Paragraph 4), and confidentiality agreement (see Article 9, Paragraph 7), among others.

Seat of arbitration: [seat]

Agreed by the Parties:

The Claimant

The Respondent

[Name]

[Name]

Date: _____

Date: _____

OR

Issued on behalf of the Arbitral Tribunal:

[Name] [Date]

[Name] [Date]

[Name] [Date]

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