INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE NO. ARB/16/42

OMEGA ENGINEERING LLC

and

OSCAR RIVERA

Claimants

v.

REPUBLIC OF PANAMA

Respondent

I.

REPLY IN SUPPORT OF THE REPUBLIC OF PANAMA'S OBJECTIONS TO THE TRIBUNAL'S JURISDICTION

II.

THE REPUBLIC OF PANAMA'S REJOINDER ON THE MERITS

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18 November 2019

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1. The Republic of Panama ("**Panama**" or "**Respondent**") submits this Reply in support of its Objections to the Tribunal's Jurisdiction and its Rejoinder on the Merits.[1] This submission is filed in response to the Reply on the Merits and Counter-Memorial on Preliminary Objections ("**Reply**") filed on May 30, 2019 by the Claimants Omega Engineering LLC and Oscar Rivera ("**Mr. Rivera**" and, collectively, the "**Claimants**").

2. This submission is accompanied by the following reply witness statements:

- **Second Witness Statement of Jorge Villalba:** addressing the Justice Moncada Luna corruption case.
- **Second Witness Statement of Vielsa Rios:** addressing the La Chorrera Project.
- **Second Witness Statement of Nessim Barsallo Abrego:** addressing the Ministry of Health Projects.
- **Second Witness Statement of Eric Díaz:** addressing the Municipality of Panama Public Market Project.

In addition, Panama is presenting the following additional fact witnesses:

- **First Witness Statement of Juan Carlos Varela:** Mr. Varela was the President of the Republic of Panama from July 1, 2014 to June 30, 2019.
- **First Witness Statement of Fernando Duque:** Mr. Duque was the Secretary of the Cold Chain within the Ministry of the Presidency. (The Cold Chain was Panama's countrywide commercial food refrigeration project.) He oversaw both Panama's broader Cold Chain Project and the public Market Project in Colón undertaken by the Omega Consortium. Mr. Duque currently is the Markets Director for the Municipality of Panama.

[1] Terms defined in Panama's (I) Objections to the Tribunal's Jurisdiction and (II) Counter-Memorial on the Merits maintain their defined meaning. Panama defines a number of new terms to refer to the "Omega" entities—*i.e.*, Omega Engineering LLC ("**Omega US**"), Omega Engineering Inc. ("**Omega Panama**"), and the consortium formed by those corporate entities (the "**Omega Consortium**" or "**Omega**").

- **First Witness Statement of Ivan Zarak**: Mr. Zarak was Vice Minister of Economy for the Republic of Panama from July 1, 2014 to December 31, 2017. He was directly involved in Panama's budget process.

- **First Witness Statement of Yadisel Buendía:** Ms. Buendía was the Project Supervisor of the Ciudad de las Artes Project from November 2013 to December 2014. She was involved in inspection of the project on a daily basis.

Panama is also presenting the following expert reports:

- **Second Expert Report of Dr. Daniel Flores:** Dr. Flores is providing expert testimony in response to the reports of Compass Lexecon and Greg McKinnon.

- **First Expert Report of Roy Pollitt:** Mr. Pollitt is a Managing Director and Head of Investigations for the Americas at Exiger LLC. Prior to joining Exiger, Mr. Pollitt was a Special Agent of the Federal Bureau of Investigation for 17 years, with a principal focus on the investigation of financial crimes. He provides expert testimony in response to the report of Alison Jimenez.

- **First Expert Report of Adan Arnulfo Arjona:** Mr. Arjona is a former Chief Justice of the Panamanian Supreme Court, and is addressing the Claimants' supposed real estate transaction.

I. INTRODUCTION

3. Panama established in its Counter-Memorial that the Claimants' case is "nothing more than an abuse of the international investment law system."[2] The extent of the Claimants' abuse, however, was not fully revealed until their Reply submission. Perhaps most glaring is the extent to which the Claimants have mis-portrayed themselves as innocent victims of Panama's allegedly unlawful behavior. The facts reveal, however, that the Claimants procured investments through the payment of bribes. It is beyond debate that Mr. Rivera transferred money received from the Judicial Authority for work on the La Chorrera Project through a known launderer to

[2] Respondent's Counter-Memorial ¶ 11.

Justice Moncada Luna. The Claimants do not deny that money was transferred, but argue that the money was used to purchase land that Mr. Rivera wanted to develop. The facts again prove that to be a lie. The purported land transaction is a sham, intended to obscure the true recipient—ex-Justice Moncada Luna. As a consequence of this and related arguments, the Tribunal lacks jurisdiction to hear this case.

4. The Claimants also cast themselves as victims of a "campaign of harassment" by President Varela. As support for this, the Claimants argue that invoices were not paid, contractual addenda were not approved, and they were treated materially differently under President Varela's administration than they were under President Martinelli's administration—all supposedly motivated by President Varela's personal vendetta against the Claimants. Again, the facts prove these allegations false. President Varela has denied taking any adverse action against the Claimants, and contemporaneous records establish that all of the Claimants' complaints relate to nothing more than routine commercial problems encountered in the course of their works for various governmental agencies. These problems were addressed by the relevant ministries until the Claimants simply abandoned Panama. On the merits too, this case should be dismissed.

5. In addition, the Claimants make outrageous demands for compensation. In their Reply, the Claimants for the first time ask the Tribunal to award them "at least US$ 30 million" for "moral damages." On top of this, the Claimants request roughly [redacted] as compensation for Omega Panama's future lost contracts. To support this request, however, the Claimants rely on a badly misleading expert report that does not value Omega Panama, but instead values a confused hodge-podge of Omega Panama, Omega US, and various third parties. This valuation is wrong as a matter of fact, economic principle, and law, and should be rejected in its entirety.

6. Panama addresses each of these issues in detail below. In doing so, Panama establishes five points that demonstrate why the Claimants' case fails:

- The Claimants paid bribes to Justice Moncada Luna in exchange for an award of the La Chorrera Contract. This conduct taints all of the Claimants' investments in Panama and deprives the Tribunal of jurisdiction over their claims.

- The Claimants' claims are the subject of multiple other jurisdictional defects that require dismissal of some or all of their claims. Indeed, the Claimants' case focuses on a series of commercial disputes that are outside the scope of Panama's consent to arbitrate and fall under previously-agreed dispute resolution provisions that must be honored.

- The Claimants' argument that Panama's actions were sovereign in nature is unfounded, and the project disputes before the Tribunal are simply straightforward contract issues, subject to contract remedies provided in the relevant contract. More specifically, President Varela did not request a US$ 600,000 campaign contribution from Mr. Rivera, or threaten to harm the Claimants' investments, or target the Claimants or otherwise engage in the alleged campaign of harassment against them.

- The Claimants' quantum demands are outrageous and unsupported. The Claimants' newly-quantified demand for moral damages is untimely and unfounded. The Claimants also seek compensation for "losses on new contracts estimated at [redacted] as of December 23, 2014 . . . relat[ing] to Omega Panama's capacity to generate new contracts, based on the historical performance of the company."[3] The Claimants' valuation, however, does not actually value Omega Panama, but inappropriately and misleadingly incorporates values from Omega US and third parties. As such, even if the Tribunal were to find that Panama breached its treaty obligations, the Claimants still would not be entitled to receive compensation, as they have failed to meet their evidentiary burden.

7. The Claimants should be held accountable for their abuse of the international investment law system. Their case should be dismissed for a lack of jurisdiction. In the event any claims are allowed to proceed to the merits, they should be denied. And, if the Tribunal were to find that Panama had breached its treaty obligations in any way, it should not award the Claimants any compensation.

[3] Second Compass Lexecon Report ¶ 2(b).

REPLY IN SUPPORT OF THE REPUBLIC OF PANAMA'S
OBJECTIONS TO THE TRIBUNAL'S JURISDICTION

II. THE ARBITRAL TRIBUNAL LACKS JURISDICTION TO DECIDE THE CLAIMS SUBMITTED BY THE CLAIMANTS

8. ICSID tribunals possess limited jurisdiction. International investment law is not a substitute for the local laws of a host jurisdiction and does not give parties an unrestricted ability to submit claims to arbitration. Parties may not seek recourse through ICSID to resolve ordinary commercial disputes or under other circumstances that fall outside the scope of a state's consent to arbitrate treaty disputes. Likewise, individuals and companies may not access the substantive protections found in investment treaties—including the right to submit disputes to investment arbitration—when they procure their purported "investments" through bribery and corruption. But, in a gross abuse of the international investment law system, the Claimants are attempting to do just that.

9. In its Jurisdictional Objection, Panama established four grounds that preclude the Tribunal from exercising jurisdiction over the Claimants' claims, either in whole or in part: (1) the Claimants procured their investment through bribery and corruption; (2) the Claimants are asserting commercial claims that fall outside the scope of the BIT and the TPA; (3) the Claimants' claims must be resolved through contractually agreed dispute resolution mechanisms; and (4) any dispute relating to the criminal investigation do not arise directly out of an investment.[4]

10. The Claimants have offered no credible or persuasive defenses to any of these grounds for dismissal. Rather, the Claimants present cherry-picked arguments that ignore critical facts, mischaracterize the law and legal standards, and rely on evidence that actually confirms Panama's positions.

A. THE CLAIMANTS ARE CORRUPT, PRECLUDING TREATY RELIEF

11. It is now established that the Claimants made corrupt payments to obtain their work in Panama. While corruption is often hidden in the shadows, the Claimants' illicit payments to ex-Justice Moncada Luna in connection with the La Chorrera courthouse project ("**La Chorrera**

[4] Respondent's Counter-Memorial ¶¶ 183-88.

Project") have been revealed in minute detail, and led to Justice Moncada Luna's criminal conviction and multi-year prison term. As a result, this case should be summarily dismissed.

1. The Claimants Bribed Panamanian Justice Moncada Luna

12. Panama demonstrated in its Counter-Memorial that two corrupt payments were made by the Claimants to Justice Moncada Luna. The Claimants have not been able to refute the proof of bribery. Instead, they try to distract the Tribunal by focusing on irrelevancies and offering the thinnest of explanations for why US$ 500,000 in funds paid to Omega Panama by the Judiciary was transferred into the hands of criminals. These explanations, however, do not withstand scrutiny. The overwhelming evidence clearly shows money flowing from the Judicial Authority to the Claimants, through a cut-out (Reyna, a professional money launderer[5]) and into a bank account unquestionably controlled by Justice Moncada Luna. This evidence is overwhelming, as Justice Moncada Luna had bank records for the relevant bank account in his chambers, and was photographed withdrawing money at an ATM from that account.

a. Justice Moncada Luna Was Corrupt

i. Justice Moncada Luna Ran the La Chorrera Contract Award Process

13. Justice Moncada Luna controlled the bidding and contract award process for the La Chorrera Project.[6] He had ultimate authority over the bidding process, including the substance of the request for proposals, criteria for contractor evaluation, appointment and oversight of the evaluation committee, and the selection of the contractor.[7]

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5 *See* Expert Report of Roy Pollitt ("**Pollitt Report**"), p. 4 (noting that Reyna was "a lawyer with ties to several of Panama's then ongoing corruption schemes involving high-profile individuals"); National Assembly Testimony of Maria Gabriela Reyna López dated July 14, 2015 (**C-0089)**, p. 9 (admitting that she "regularly . . . prepare[s] supporting documentation relating to payments" after the payments occur"); Addendum to Inquiry Statement of Jorge Enrique Espino Mendez dated July 3, 2015 (**R-0126**), pp. 10-11 (noting that he was told by Nicolas Corcione to meet with Reyna to determine how to cover up a payment made to a company implicated in the investigations into Justice Moncada Luna).

6 *See* Second Witness Statement of Vielsa Rios dated Nov. 15, 2019 ("**Rios II**") ¶¶ 5-6. Contract No. 150/2012 dated Nov. 22, 2012 (**C-0048**) (the "**La Chorrera Contract**").

7 *See* Rios II, Section II; First Witness Statement of Vielsa Rios dated Jan. 7, 2019 ("**Rios I**") ¶¶ 2, 11-12.

14. Justice Moncada Luna asserted his control from the drafting phase of the request for proposals. When the internal departments at the Judicial Authority presented the request for proposals for the La Chorrera Contract to Justice Moncada Luna, he rejected the proposal to finance the project through a loan from the Inter-American Development Bank ("**IADB**"), which the Judicial Authority had secured to fund several projects, including this one.[8] Justice Moncada Luna ordered that the request for proposals be re-drafted using the Judicial Authority's annual budget instead, which meant that the IADB would have no involvement in selection of the contractor.[9] By making this change, Justice Moncada Luna ensured that he would have complete control over which contractor was hired for the La Chorrera Project, without input from any external party.[10]

15. Once the request for proposals was final, Justice Moncada Luna selected and appointed the three members of Judicial Authority's evaluation committee.[11] This was unusual, as it was customary for the Administrative Secretary to select the evaluation committee for the Judicial Authority's projects.[12] Justice Moncada Luna, however, operated the Judicial Authority differently, to ensure that "[h]e exercised [his] authority to the fullest extent and in all administrative respects."[13] To further guarantee his control over the selection process, Justice Moncada Luna appointed Arelys de Caballini, his friend and the sister of his long-time personal assistant and lawyer, Ana Beatriz Bouche Gonzalez, as the head of the evaluation committee.[14] Justice Moncada Luna then selected Ms. Caballini's subordinates, architects Raul de Obaldia and

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8 Rios II ¶ 6; *See* Improvement Program of the Administration of Justice IDB-OJ II Stage, dated 2008 – 2013 (**R-0129**), p. 2.

9 Rios II ¶ 6.

10 *See* Rios II ¶ 8; Improvement Program of the Administration of Justice IDB-OJ II Stage, dated 2008 – 2013 (**R-0129**), p. 2. (noting that the funds originally allocated from the Inter-American Development Bank for use on this project could not be used because they did not comply with the bidding requirements of the bank which required different bidding criteria and the opening of the bid to contractors outside of Panama).

11 *See* Rios II ¶ 5.

12 Rios II ¶ 5.

13 Rios II ¶ 5; *see* National Assembly Interview of Vielsa Rios dated Dec. 2, 2014 (**R-0127**), p. 2.

14 *See* Rios II ¶ 5; National Assembly Interview of Vielsa Rios dated Dec. 2, 2014 (**R-0127**), p. 2.

Farah Urena, as the remaining members of the committee.[15] Ms. Caballini led the committee and communicated directly with Justice Moncada Luna.[16]

16. After Justice Moncada Luna constituted the evaluation committee, companies submitted their bids and the committee began the review process. After conducting its review, the committee provided Justice Moncada Luna with its recommendations.[17] Justice Moncada Luna then reviewed the recommendations and, on October 17, 2012, selected Omega as the winning bidder.[18] In November 2012, Justice Moncada Luna signed the La Chorrera Contract.[19] He then executed the Order to Proceed on January 15, 2013.[20] The contract price was US$ 16,495,000.[21]

ii. Moncada Luna Controlled Corrupt Bank Accounts, Including the Account of Sarelan Corporation, S.A.

17. Panamanian authorities established that contemporaneously with supervising the award of the La Chorrera Contract to the Omega Consortium, Moncada Luna caused Sarelan Corporation, S.A. ("**Sarelan**") to be formed and to open a bank account, under his control and for his benefit.

18. *First*, Justice Moncada Luna organized the incorporation of Sarelan. Ms. Bouche, Moncada Luna's personal assistant and lawyer—and the sister of Ms. Caballini, the head of the evaluation committee for the La Chorrera Contract, testified that, in November of 2012, Justice Moncada Luna directed her to create Sarelan.[22]

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15 *See* Rios II ¶ 5; Administrative Resolution No. 082/2012 dated Sept. 18, 2012 (**R-0005**).

16 *See* Rios II ¶ 5; National Assembly Interview of Vielsa Rios dated Dec. 2, 2014 (**R-0127**), pp. 2-3.

17 Report of the Evaluation Commission dated Oct. 9, 2012 (**C-0083**).

18 Rios I ¶ 12; Administrative Resolution No. 092/2012 for determination of the Abbreviated Bid for Best Value No. 2012-0-30-08-AV-004833 dated Oct. 17, 2012 (**R-0006**); Contract No. 150/2012 dated Nov. 22, 2012 (**C-0048**).

19 Contract No. 150/2012 dated Nov. 22, 2012 (**C-0048**); *see* Rios I ¶ 12.

20 Order to Proceed to Contract No. 150/2012 dated Jan. 15, 2013 (**C-0151**).

21 Contract No. 150/2012 dated Nov. 22, 2012 (**C-0048**), p. 2; *see* Rios I ¶ 12.

22 National Assembly Testimony of Ana Bouche dated Nov. 28, 2014 (**R-0128**) at minutes 3:00 - 7:00; Second Witness Statement of Jorge Villalba dated Nov. 14, 2019 ("**Villalba II**") ¶¶ 6-10.

19. On Justice Moncada Luna's instructions, Ms. Bouche prepared all the requisite corporate documentation.[23] Justice Moncada Luna then appointed people close to him to be Sarelan's corporate officers[24] He asked Ms. Bouche to appoint one of her family members as the president of the company; she selected her aunt, Xenia del Carmen González.[25] Justice Moncada Luna then asked Humberto Elías Juárez Barahona, his friend of over 20 years, to be the secretary of Sarelan.[26] Justice Moncada Luna then appointed the mother of one of his sons as the treasurer.[27] Ms. Bouche further testified that on January 24, 2013, Justice Moncada Luna requested that she have share certificates prepared granting 100% of the shares of Sarelan to Justice Moncada Luna.[28] She personally delivered these certificates to the president of Sarelan for signature and then hand-delivered the executed certificates to Justice Moncada Luna.[29] Moreover, certificates stating that Justice Moncada Luna was the legal agent of Sarelan were discovered in Justice Moncada Luna's chambers.[30]

20. *Second*, the National Assembly and Public Prosecutor's office uncovered overwhelming evidence that Justice Moncada Luna controlled and was the ultimate beneficiary of Sarelan's bank account. During Ms. Bouche's testimony before the National Assembly, the Designated Prosecutor showed her the forms that were filed to open Sarelan's bank account with Banco Universal, which Ms. Bouche identified as bearing Justice Moncada Luna's handwriting.[31]

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23 National Assembly Testimony of Ana Bouche dated Nov. 28, 2014 (**R-0128**) at minutes 3:00 - 7:00.

24 National Assembly Testimony of Ana Bouche dated Nov. 28, 2014 (**R-0128**) at minutes 3:00 - 7:00.

25 National Assembly Testimony of Ana Bouche dated Nov. 28, 2014 (**R-0128**) at minutes 3:00 - 7:00.

26 National Assembly Testimony of Ana Bouche dated Nov. 28, 2014 (**R-0128**) at minutes 3:00 - 7:00.

27 National Assembly Testimony of Ana Bouche dated Nov. 28, 2014 (**R-0128**) at minutes 3:00 - 7:00.

28 National Assembly Testimony of Ana Bouche dated Nov. 28, 2014 (**R-0128**) at minutes 7:00 - 7:49, 14:42-15:40.

29 National Assembly Testimony of Ana Bouche dated Nov. 28, 2014 (**R-0128**) at minutes 7:49 - 8:44.

30 Villalba II ¶ 9.

31 Villalba II ¶ 8; National Assembly Testimony of Ana Bouche dated Nov. 28, 2014 (**R-0128**) at minutes 16:00 - 17:22.

Additionally, the Public Prosecutor's office found that Justice Moncada Luna had the ATM card to Sarelan's account, from which he had been periodically withdrawing cash.[32]

21. Significantly, the National Assembly's investigators obtained videos of Justice Moncada Luna withdrawing funds from Sarelan's account at a Banco Universal automated teller.[33] Based on this evidence, the Designated Prosecutor for the National Assembly and the Public Prosecutor's office determined that Justice Moncada Luna had control over and was the beneficiary of Sarelan's account.[34]

b. The First Advance Payment by the Judicial Authority to Omega Engineering

22. The La Chorrera Contract provided that the Judicial Authority would make an advance payment to Omega Panama of 15% of the contract price.[35] Accordingly, on April 3, 2013, US$ 2,393,316 was remitted by the Judicial Authority to Omega Panama, where it was deposited, on April 4, to Omega Panama's account at Banco BAC de Panamá ("**BAC Bank**").[36]

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32 Villalba II ¶ 8; Inquiry Resolution No. 4015 dated June 15, 2015 (**R-0113**), pp. 59-60, 65-70 (explaining that Justice Moncada Luna used the Sarelan debit card to make withdrawals through ATMs from Sarelan's account).

33 Villalba II ¶ 9; Inquiry Resolution 40-15 dated June 15, 2015 (**R-0113**), p. 60 (video evidence from Banco Universal's ATM shows Justice Moncada Luna making withdrawals from a Sarelan account).

34 *See e.g.*, Villalba II ¶ 10; National Assembly Interview with Maria Gabriela Reyna López dated Jan. 27, 2015 (**R-0139**), p. 7 ("SARELAN CORPORATION, S.A. at Banco Universal, which according to the investigations of this office, was created by Alejandro Moncada Luna and its final beneficiary is Alejandro Moncada Luna."); Inquiry Resolution 40-15 dated June 15, 2015 (**R-0113**), pp. 63, 66, 68, 71 (determining that Justice Moncada Luna was the individual who made transactions using the debit card corresponding to the account of Sarelan Corporation and concluding that Justice Moncada Luna was "the real beneficiary of the aforementioned account[]").

35 Contract No. 150/2012 dated Nov. 22, 2012 (**C-0048)**, at Cl. 5.

36 A compilation of the bank account statements and related documentation reflecting the transfers of bribe money by Mr. Rivera to Justice Moncada Luna cited in this section can be found at (**R-0114**). As to this initial transfer, *see* Compilation of Bank Account Statements and Documentation of Transfers from Oscar Rivera to Justice Moncada Luna (**R-0114**), pp. 2-3; *see also* First Witness Statement of Jorge Villalba dated Jan. 7, 2019 ("**Villalba I**") ¶ 21; Rios I ¶ 15.

Note that the amount paid by the Judicial Administration to Omega Panama ($2,393,316) is slightly less than 15% of the contract amount (which would have been $2,474,250). The difference is the result of the application of the Panamanian value added tax. *See* Respondent's Counter-Memorial ¶ 24; Rios II ¶ 23, n. 31.

c. The Transfer by Omega to PR Solutions and then to Reyna

23. On April 25, 2013, Omega Panama wire transferred, from that same BAC Bank account, US$ 250,000 to PR Solutions, another company owned by Mr. Rivera, which, prior to that transfer, had a bank balance of just US$[redacted].[37] That same day and in the very next transaction, PR Solutions transferred US$ 250,000 by check to Reyna y Asociados, a company controlled by Mariela Gabriela Reyna López. Prior to the deposit of the check, Ms. Reyna's bank balance was US$[redacted] Following the deposit, the balance grew to US$[redacted].[38]

d. The Transfer by Reyna to Sarelan, Justice Moncada Luna's Company

24. Between the April 25, 2013 deposit of US$ 250,000 into the Reyna account by Mr. Rivera's PR Solutions and May 3, 2013, the total of other credits to the Reyna account was just [redacted].[39] On May 3, 2013, the Reyna account was debited to fund the purchase of a cashier's check for US$ 125,000, made payable to Sarelan.[40] That cashier's check was deposited into Sarelan's account at Universal Bank on May 4, 2013.[41]

25. In short, US$ 125,000 went from accounts controlled by Mr. Rivera to Justice Moncada Luna, through the otherwise empty Reyna y Asociados account. Justice Moncada Luna then channeled this money through several other accounts and, on May 23, 2013, used the money to

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37 *See* Compilation of Bank Account Statements and Documentation of Transfers from Oscar Rivera to Justice Moncada Luna (**R-0114**), pp. 4-5; *see also* Villalba I ¶ 21.

38 *See* Compilation of Bank Account Statements and Documentation of Transfers from Oscar Rivera to Justice Moncada Luna (**R-0114**), pp. 6-8; *see also* Villalba I ¶ 21.

39 *See* Compilation of Bank Account Statements and Documentation of Transfers from Oscar Rivera to Justice Moncada Luna (**R-0114**), p. 8.

40 *See* Compilation of Bank Account Statements and Documentation of Transfers from Oscar Rivera to Justice Moncada Luna (**R-0114**), pp. 9-10.

41 *See* Compilation of Bank Account Statements and Documentation of Transfers from Oscar Rivera to Justice Moncada Luna (**R-0114**), p. 11; *see also* Villalba I ¶ 21; Jorge Enrique Villalba, *Preliminary Financial Analysis Report in Case No. 049-15* dated June 5, 2015 (**R-0062**), p. 19.

reduce the mortgage loan his wife had obtained to purchase a luxury condominium in the PH Ocean Sky complex in Panama City.[42]

e. The Second Advance Payment by the Judicial Authority to Omega Panama

26. The Judicial Authority remitted a second payment to Omega Panama on July 10, 2013, in the amount of US$ [redacted] This payment likewise went to Omega Panama's account at BAC Bank and was credited on July 11, 2013.[43]

f. The Second Transfer by Omega Panama to PR Solutions and then to Reyna

27. The next day, on July 12, 2013, Omega Panama wire transferred, from that same BAC Bank account, $250,000 to PR Solutions.[44] Then, on July 16, in the next transaction in the PR Solutions account, PR Solutions transferred that same $250,000 to Reyna y Asociados.[45]

g. The Second Transfer by Reyna to Sarelan, Justice Moncada Luna's Company

28. Immediately thereafter, on July 17, 2013 and again on July 18, 2013, the Reyna y Asociados account was debited to fund the issuance of two cashier's checks, each for $75,000, payable to Sarelan, the company controlled by Justice Moncada Luna.[46] Both cashier's checks were deposited into Justice Moncada Luna's Sarelan account at Banco Universal.[47] Thereafter,

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42 Villalba I ¶ 21; Jorge Enrique Villalba, *Preliminary Financial Analysis Report in Case No. 049-15* dated June 5, 2015 (**R-0062**), p. 19

43 *See* Compilation of Bank Account Statements and Documentation of Transfers from Oscar Rivera to Justice Moncada Luna (**R-0114**), pp. 13-14. *See also* Villalba I ¶ 23; Jorge Enrique Villalba, *Preliminary Financial Analysis Report in Case No. 049-15* dated June 5, 2015 (**R-0062**), p. 34.

44 *See* Compilation of Bank Account Statements and Documentation of Transfers from Oscar Rivera to Justice Moncada Luna (**R-0114**), p. 15; Villalba I ¶ 23.

45 *See* Compilation of Bank Account Statements and Documentation of Transfers from Oscar Rivera to Justice Moncada Luna (**R-0114**), pp. 17-19; Villalba I ¶ 23.

46 *See* Compilation of Bank Account Statements and Documentation of Transfers from Oscar Rivera to Justice Moncada Luna (**R-0114**), pp. 20-22.

47 *See* Compilation of Bank Account Statements and Documentation of Transfers from Oscar Rivera to Justice Moncada Luna (**R-0114**), p. 23; Villalba I ¶ 23; Jorge Enrique Villalba, *Preliminary Financial Analysis Report in Case No. 049-15* dated June 5, 2015 (**R-0062**), pp. 34, 52.

Justice Moncada Luna channeled US$ 130,000 of that money to pay off the mortgage on a second luxury condominium, this one at the PH Santorini complex.[48]

h. The Criminal Conviction and Imprisonment of Justice Moncada Luna

29. As this chronology makes clear, money moved rapidly from Rivera-controlled accounts to Justice Moncada Luna's Sarelan, through Reyna y Asociados. In the first instance, the bribe money was debited from Mr. Rivera's PR Solutions account on April 25, 2013 and credited to Sarelan on May 3, 2013; in the second instance, it was debited from PR Solutions on July 16, 2013 and credited to Sarelan on July 18 and 19, 2013.

30. Justice Moncada Luna pled guilty in 2015 to unjust enrichment and making false statements, and was incarcerated for 60 months.[49] Justice Moncada Luna was also required to surrender the PH Ocean Sky and PH Santorini apartments he acquired partly through the bribes paid to him by Mr. Rivera and Omega Panama.[50]

31. In the face of the Claimants' proven participation in the bribery of Justice Moncada Luna, the Claimants nevertheless argue they have nothing to do with it, and are blameless.[51] In a curious and self-defeating fashion, the Claimants ask the following questions, suggesting this rhetorical exercise wins the case for them.[52] It certainly does not, as the answers we supply make clear:

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48 Villalba I ¶¶ 23-24.

49 Criminal Complaint Against Moncada Luna dated July 10, 2014 (**C-0373**); Plea Bargain of Alejandro Moncada Luna dated Feb. 23, 2015 (**R-0064**); Settlement Agreement Between Moncada Luna and the Republic of Panama date Feb. 23, 2015(**C-0205**).

50 Plea Bargain of Alejandro Moncada Luna dated Feb. 23, 2015 (**R-0064**); Settlement Agreement Between Moncada Luna and the Republic of Panama date Feb. 23, 2015(**C-0205**).

51 While of little relevance in the current circumstances, the Claimants argue that the Tribunal should here apply a criminal law standard of proof, one of "clear and convincing evidence," to the mass of evidence establishing the Claimants' acts of bribery. *Cf.*, Claimants' Reply ¶ 281. However, that standard, many tribunals recognize, is inapplicable in the non-criminal context of treaty cases, where the test is more appropriately "reasonable certainty." *See, e.g.*, *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award (Oct. 4, 2013) (**RL-0011**), ¶ 243.

52 Reply ¶ 283 (emphasis in original).

Q: "*why* [did] Claimants allegedly bribe[ ] Mr. Moncada Luna"?

A: To secure their role in the La Chorrera Project, over which Justice Moncada Luna had control.

Q: "*what* the dollar amount was"?

A: The bribe paid to Justice Moncada Luna by Omega was at least US$ 275,000 (a bribe of US$ 125,000 followed by two bribes of US$ 75,000 each), as detailed above.

Q: "*how* the agreement was reached"?

A: Currently a mystery, but one of little relevance. In view of the incontrovertible bank records and Justice Moncada Luna's guilty plea, the Omega-to-Moncada Luna payments cannot be denied.

Q: "*how* or even *whether* Mr. Moncada Luna abused his role as a government official in exchange for a payment"?

A: The Claimants cannot possibly be suggesting that the Claimants' payments to Justice Moncada Luna could have had a "non-abusive" non-criminal nature. In any event, Justice Moncada Luna lost his position, pled guilty to unjust enrichment and perjury, and gave up his two apartments, all deriving from receipt of Omega Panama's bribes. There can be no doubt: Omega Panama paid bribes to Justice Moncada Luna, for which he went to prison.

32. But the Claimants allege, over and over, that the National Assembly's Designated Prosecutor "dismissed the allegations" of bribery against Mr. Rivera and Omega Panama, and "specifically absolved Claimants of any wrongdoing." That is clearly false.[53]

[53] The Claimants make this false assertion at least 19 times. By way of example only: Request for Arbitration ¶ 43 ("[T]he prosecutor leading the investigation into Mr. Moncada Luna (the 'Designated Prosecutor'), ultimately and publicly dismissed the allegation of any involvement by Mr. Rivera or the Omega Consortium[.]"); Claimants' Memorial ¶ 99 ("[T]he Designated Prosecutor *publicly affirmed* that Omega and Mr. Rivera were *not* linked to Mr. Moncada Luna's assets.") (emphasis in original); First Witness Statement of Oscar I. Rivera dated June 25, 2018 ("**Rivera I**") ¶ 101 ("The Designated Prosecutor expressly affirmed that neither Omega Panama nor I had anything to do with the crimes committed by Mr.

33. As Respondent explained in its Counter-Memorial, the National Assembly only had jurisdiction over Justice Moncada Luna.[54] Accordingly, the Designated Prosecutor did not have the authority to reach a determination as to the guilt or innocence of Mr. Rivera, Omega Panama or PR Solutions. What the Designated Prosecutor did say in the context of convicting Justice Moncada Luna was that, he, as the prosecutor for the National Assembly, no longer had a basis to maintain a freeze on the bank accounts of Omega and PR Solutions. However, he went on to say that that "other entities of the Panamanian State have jurisdiction to make juridical decisions [with respect to those bank accounts]."[55] All the Designated Prosecutor was doing was acknowledging that his particular investigative role had ended, not that the Claimants were guilt-free and off the hook.[56]

2. The Claimants' Reply to Proof of Their Corruption Is Unconvincing

34. The Claimants' primary reply to this overwhelming proof of their bribery of Justice Moncada Luna is that they were buying some land, and have no idea how their money so obviously ended up in the hands of a crooked judge. Indeed, according to the Claimants, this entire chain of events is nothing more than "sheer happenstance."[57] However, examination of the supposed land sale proves that it was a fiction.

Moncada Luna"); Claimants' Reply ¶ 17 ("To the contrary, Respondent's own Prosecutor specifically absolved Claimants of any wrongdoing."); Witness Statement of Frankie J. López dated May 27, 2019 ("**López**") ¶ 94 ("[T]he Prosecutor himself publicly admitted he was not able to verify that there had been any type of relationship between these parties, and we were discharged from the investigation.")

54 Respondent's Counter-Memorial ¶ 171; Villalba I ¶ 28.

55 Sentencing Hearing of Mr. Moncada Luna dated Mar. 5, 2015 (**C-0085**); Villalba II ¶ 17.

56 Of course, the prosecutors who did have jurisdiction to prosecute Mr. Rivera and Omega did seek to freeze the relevant bank accounts. *See* Notice by the Special Prosecutor Against Organized Crime dated Apr. 17, 2015 **(R-0115**) (noting that the Article 252 of the Panamanian Criminal Procedure Code requires that property related to the crime of money laundering be provisionally apprehended pending the ruling of a competent judge); *see also* Notice by the Special Prosecutor Against Organized Crime dated June 5, 2015 (**R-0116**) (citing the same provision in placing the accounts of Omega and PR Solutions under the control of the Ministry of Economy and Finance).

57 Claimants' Reply ¶ 8.

a. The Claimants' "Land Deal" Was Fake

35. In an effort to disguise its bribery of Justice Moncada Luna, the Claimants say that the money that went directly from Rivera-controlled accounts to Reyna really went to buy a piece of land (called Finca 35659), and not to Justice Moncada Luna.[58] That pretext can be dismissed in view of the clearly documented flow of funds set forth above, all of which occurred in immediate proximity to the dates on which Omega Panama was paid by the Judicial Authority.

36. In addition, a review of the details of Mr. Rivera's supposed acquisition of Finca 35659 supports the bribery conclusion. Most notably, the principal evidentiary support for the land acquisition is a supposed contract, which is replete with defects and uneconomic features, and which is addressed in the accompanying opinion of Justice Arjona. Notably, that contract was never placed into the land record, and Mr. Rivera has admitted he never in fact took title to the land.[59]

37. A key fact casting doubt on Mr. Rivera's supposed land purchase is the dramatic difference between the high price allegedly paid by Mr. Rivera and the price paid for the land by the alleged seller just a few years earlier. JR Bocas Investments, Inc. ("**JR Bocas**"), Mr. Rivera's supposed seller, bought Finca 35659 in 2008 for just US$ 30,000.[60] Five years later, Mr. Rivera purported to purchase that same piece of land for US$ 1 million, a 3,300% increase in price.[61] That is just not credible.

38. The Claimants also attempt to support their alternative land acquisition story, in the face of the incontrovertible evidence of bribery, through "testimony" supposedly coming from Maria Gabriela Reyna. However, Ms. Reyna is not a witness, is sketchy and unreliable, and is not

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58 Rivera I ¶ 100; López ¶¶ 90, 94. "Finca" means ranch in Spanish.

59 Second Witness Statement of Oscar I. Rivera dated May 27, 2019 ("**Rivera II**") ¶ 13.

60 Public Deed No. 338 dated Feb. 15, 2008 (**R-0117**).

61 Sale and Purchase Agreement between JR Bocas Investments, Inc. and Punela Development Corp. dated Apr. 2013 ("**Purchase and Sale Promise Agreement**") (**C-0078)**.

subject to cross-examination. Accordingly, her "testimony" should be stricken and, certainly, wholly disregarded.[62]

39. Among multiple defects, some of the Reyna "evidence" offered by the Claimants is not even from her. For example, the Claimants rely on an email they state unequivocally comes from Reyna.[63] In fact, that email comes from "Gaby <minigap@gmail.com>."[64] Reyna is nowhere around to clear up this mystery.

40. As to the substance of Ms. Reyna's supposed "testimony," she makes clear that she was in the dark as to who was who, and that she was not in the position to exculpate anyone: "I cannot affirm, accuse or deny whether there was or not any illicit act on the part of Corcione, Mr. Calvo, even Concepto y Espacios or any other person involved in this investigation."[65] However, Ms. Reyna does confirm that she moved money from "OMEGA" to Justice Moncada Luna's "SARELAN," just as described above.[66] Nowhere does she "testify" that there was an actual and effective real estate transaction between Mr. Rivera or any of his companies and JR Bocas.[67] Further, the Claimants' contention that Ms. Reyna was "absolved" of wrongdoing is bogus, as no document in the record does that.[68] In sum, the so-called evidence emanating from Ms. Reyna, who is not subject to cross-examination, is of no value and should be stricken and disregarded.[69]

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62 It appears that Reyna's business is preparing post-dated documentation of financial transactions, which sounds a lot like money laundering. *See* Supplemental Declaration of Maria Gabriela Reyna López dated July 14, 2015 (**C-0089)**, p. 9.

63 *See* Email from Maria Gabriela Reyna to Frankie López date Jan. 28, 2015 (**C-0210**), cited at Claimants' Reply ¶ 285, n. 838.

64 "Minigap" appears to be a brand of, or a manufacturer of, starter pistols, whose relationship to this matter is unknown.

65 *See* Supplemental Declaration of Maria Gabriela Reyna López dated July 14, 2015 (**C-0089)**, p. 15.

66 Supplemental Declaration of Maria Gabriela Reyna López dated July 14, 2015 (**C-0089)**, pp. 3-4 (English translation).

67 *See* Claimants' Reply ¶ 7.

68 *Cf.* Claimants' Reply ¶ 285, n. 837.

69 In an effort to diligence Claimants' supposed land transaction, Respondent's counsel tried to locate Jo Reynolds, the American woman who is the supposed equity holder in the alleged seller of Finca 35659, JR Bocas. Investigation Report Prepared by Joe López dated Sept. 30, 2019 (**R-0118**). She was reported to

41. In a final effort to support his story that he was really buying land and not bribing Justice Moncada Luna, Mr. Rivera pompously announces that when this arbitration is over, he is going to recover the money he supposedly paid for the land: "As soon as the present case is finished and I am permitted freely to return to Panama, I intend to pursue all legal remedies in Panama to have these funds returned to me."[70] But, as the well-represented Mr. Rivera doubtless knows, he has already let the statute of limitations run on any claims that he may have relating to the purported land transaction.[71]

i. The Arjona Opinion Undermines the Legitimacy of the Claimants' Alleged Real Estate Transaction

42. Panama has filed the opinion of Adan Arnulfo Arjona, a former Chief Justice of the Supreme Court of Panama with expertise in Panamanian real estate transactions, to address the "inexplicably careless" contractual documentation filed by the Claimants in support of their supposed land purchase, being primarily a supposed "Purchase and Sale Promise Agreement."[72] Justice Arjona has found comprehensive defects in this documentation that are "inconsistent with the minimum reasonable standard of diligence and dedication that is usually observed in Panama in high value transactions, as is the case at hand."[73] Such defects cast doubt on the legitimacy of the contract and the legitimacy of the transaction as a whole. Indeed, any examination of the supposed land purchase, beyond its deceptively legitimate face, suggests that the transaction is nothing but a decoy to hide the Claimants' bribe.

43. The defects in the "Purchase and Sale Promise Agreement" include at least the following critical flaws:

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reside in San Diego, California. However, attempts to locate her, including through the efforts of a private investigator, were unsuccessful. Investigation Report Prepared by Joe López dated Sept. 30, 2019 (**R-0118**). The Claimants claim that the validity of their supposed land transaction is supported by the fact that they allegedly hired a reputable Panamanian law firm to assist them. Claimants' Reply at ¶ 249. However, that firm's invoices, cited by the Claimants as supposed proof, were inconsequential in amount and prove nothing.

70 Rivera I ¶ 98.

71 Expert Report of Adan Arnulfo Arjona L. ("**Arjona Report**") ¶¶ 71-72.

72 Purchase and Sale Promise Agreement (**C-0078)**; Arjona Report ¶ 15.

73 Arjona Report ¶ 15.

- **Signatures Are Not Authenticated or Shown to be Authorized by Either the Selling or Purchasing Shareholders:** The signatures on the Agreement were not authenticated before a notary, or established to have been authorized by the shareholders of the corporate seller or the corporate buyer—the former being a "best practice" in the Panamanian market and the latter being specifically required by Panamanian law.[74] According to Justice Arjona, this results "in relative nullity and gives rise to an action to rescind the acts or contract in question."[75]

- **The Agreement is Not Dated:** The Agreement, in its last paragraph, recites a month and year of execution (April 2013), but not the date of signature.[76] In the opinion of Justice Arjona, this is a critical flaw, as numerous obligations in the Agreement fall due on dates calculated based on the missing date of signature, and therefore cannot be calculated. For example, the dates for signing the Deed of Sale, the delivery of the payments, and cancellation of the preexisting mortgage cannot be calculated under this Agreement—thus leaving many terms of performance "veiled in uncertainty."[77] Justice Arjona cannot recall ever having previously seen a similar contract with such an omission.[78]

- **The Parties Failed to Enter into a Deed of Sale:** The Parties agreed to enter into a Deed of Sale within 180 days of the execution of the Agreement.[79] A Deed of Sale is a purchase and sales contract that must be executed in the form of a public deed, which is therefore subject to filing in the public registry.[80] The Parties' failure to enter into a Deed of Sale and file it into the public registry created a situation "that

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74 Arjona Report ¶¶ 18, 37.

75 Arjona Report ¶ 18. *See also* Arjona Report ¶¶ 14, 37-38, 55-60.

76 Purchase and Sale Promise Agreement dated Apr. 2013 (**C-0078)**.

77 Arjona Report ¶¶ 19, 61-63.

78 Arjona Report ¶ 20.

79 Purchase and Sale Promise Agreement dated Apr. 2013 (**C-0078)**, Cl. 3.

80 Arjona Report ¶ 9(c), 12, 14.

was extremely unfavorable to the interests of the Promissory Purchaser."[81] Among other negative consequences, the inability to file a Deed of Sale with the public registry prejudices the enforceability of the land sale—removing guarantees of exclusive ownership and specific performance in the event that the Promissory Seller fails to comply with its obligations.[82] Justice Arjona found it "striking" that Punela Development Corp., the Rivera entity intended to be the ultimate owner, failed to avail itself of such "highly effective legal protections to [its] interests"—particularly with a high-value transaction such as this one.[83]

- **The Agreement is Expired:** The Agreement requires that the parties enter into a Deed of Sale within 180 days of execution of the Agreement.[84] By any definition of when the execution occurred, there has been no Deed of Sale, no subsequent transfer of land, and no valid extension of the Agreement. An addendum dated September 3, 2013 would have extended the term of the Agreement to April 2, 2015, at the latest.[85] However, as Justice Arjona notes, the addendum "does not appear to have particular value or significance" as it was not signed by the authorized representative for Punela Development Corp.[86] Even if the extension was valid, the Agreement would still be expired, as no land transfer occurred by April 2, 2015.

- **The Agreement is Subject to an Exorbitant and Unprecedented Advance Deposit:** The Agreement provides for an advance payment on the purchase price of US$ 500,000 or 50%.[87] Justice Arjona finds this to be "striking and unusual, and is

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81 Arjona Report ¶ 14.

82 Arjona Report ¶¶ 41-44.

83 Arjona Report ¶¶ 46-47.

84 Purchase and Sale Promise Agreement dated Apr. 2013 (**C-0078)**, Cl. 3.

85 Extension to the Purchase-Sale Agreement for Tonosi Land dated Sept. 3, 2013 ("**Meeting of the Minds Agreement**") (**C-0374**).

86 Arjona Report ¶ 9(d)-(e).

87 Purchase and Sale Promise Agreement dated Apr. 2013 (**C-0078)**, Cl. 2(a)-(b).

not in accordance with the standard generally observed in Panama…."[88] Justice Arjona points out that the advance usually agreed to in Panama is 10 to 15%, and notes that he has never seen a contract calling for a 50% advance.[89] It is especially prejudicial for a promissory purchaser to provide for such a large advance payment when the Agreement lacks elementary legal protections for the promissory purchaser.

44. Justice Arjona also identified a number of important documents and methods of pre-purchase diligence that are central to an effective conveyancing under the Agreement, as well Panamanian best practices, and that simply do not exist here. These include:

- **No "Irrevocable Promise of Payment Letter":** The Agreement requires the buyer supply such a letter, issued by a "General Faculties local Bank," to guarantee the second payment of US$ 250,000.[90] However, no such letter exists.

- **No "Meeting of the Minds" Agreement:** Both of the Claimants' real estate experts, Messrs. Ponce and Chong (discussed below), and their witness, Mr. López, refer to a "meeting of the minds" agreement between the Buyer and Seller as finalizing the Finca 35659 transaction and extending the term of the Sale and Purchase Promise Agreement.[91] However, as discussed above, and as Mr. Rivera admits,[92] the meeting of the minds agreement was never signed by an authorized representative of the purchaser.

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88 Arjona Report ¶ 16. As Justice Arjona notes, the Agreement contains an egregious error, in that it provides in numeric form that US$ 750,000 is payable to the seller upon filing of the deed, while it specifies in words that "five hundred thousand American dollars" are due at that time. Arjona Report ¶ 52; Purchase and Sale Promise Agreement dated Apr. 2013 (**C-0078)**, Cl. 2(c). This extreme lack of care is highly suggestive of a fictitious agreement.

89 Arjona Report ¶ 17.

90 Sale and Purchase Agreement dated Apr. 2013 (**C-0078**) Cl. 2(c); *see* Arjona Report ¶¶ 53-54.

91 Meeting of the Minds Agreement (**C-0374**). *See* Expert Report of Fidel Ponce and Arturo Chong ("**Ponce and Chong**") ¶¶ 7.4, 9; López ¶ 91.

92 *See* Arjona Report ¶ 9(d); Rivera I ¶ 97 ("The Seller asked for an extension of time . . . but we refused").

- **No Land Survey:** Purchasers of real state will generally commission a land survey to confirm the metes and bounds of the property to be purchased.[93] A purchaser is likely to commission such a survey when considering a particularly large plot of land, as is the case here. However, no such survey was completed.

- **No Topographical Survey:** For plots of land with varying elevations, as is the case with respect to Finca 35659, a purchaser would be expected to commission a topographical study.[94] Such a study is essential to determining how much of the land is usable for development.[95] There is no evidence that Punela Development Corp. conducted a topographical study before making its alleged purchase.

- **No Appraisal:** Notwithstanding the value of the transaction, it is common for purchasers to commission a land appraisal before purchasing land to verify whether the purchase price fairly and accurately represents the value of the land.[96] Given the size and purchase price of Finca 35659, Justice Arjona found it "unusual" that no appraisal had been performed. Further, Justice Arjona notes that the absence of an appraisal is "especially odd" when the supposed seller, JR Bocas, bought the property for US$ 30,000 in 2008 and proposed to sell it to Mr. Rivera at a 3,000+% mark-up just five years later.[97]

45. Perhaps most striking is that despite the failure of JR Bocas to comply with the obligations it assumed under the Purchase and Sale Promise Agreement, the Claimants have not brought any claim to JR Bocas for its breach, as the Claimants concede.[98] Justice Arjona found it "completely unusual" that the Claimants assert a breach of the alleged Purchase and Sale Promise Agreement, yet they have neither sent a written communication to JR Bocas advising of

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93 Arjona Report ¶ 64.

94 Arjona Report ¶ 67.

95 Arjona Report ¶ 67.

96 Arjona Report ¶¶ 64, 66.

97 Arjona Report ¶ 66.

98 *See* Arjona Report ¶¶ 21-22; Rivera I ¶ 98.

the termination of the Agreement nor demanded the return of the US$ 500,000 advance deposit.[99] Further, Justice Arjona notes that it is "equally unusual and inexplicable" that the Claimants failed to formalize any legal claim against JR Bocas over nearly six years[100]—and that they have allowed the prescriptive period for such a claim to lapse.[101] The Claimants have allowed US$ 500,000 to disappear without so much as a demand letter—defying the conduct of any prudent purchaser and evidencing their corrupt intent.

46. In short, the documentation of the supposed land acquisition by Mr. Rivera lacks multiple essential documents, lacks the diligence that a prudent purchaser would exercise, and is otherwise almost laughably defective—resulting in "relative nullity" of the alleged contract, as established in the testimony of Justice Arjona. The Claimants' alleged land purchase was a sham transaction to designed to disguise the bribes paid to Justice Moncada Luna.

ii. The Ponce and Chong Opinion Is Irrelevant

47. The Claimants have filed the opinion of two Panamanian real estate operatives, Fidel Ponce and Arturo Chong, to validate their supposed purchase of land. This opinion, however, is of no value to the Tribunal, as its authors were misled by the Claimants about the actual state of the transaction documentation and provide no meaningful valuation. When contrasted to the abundant proof that Omega was paying bribes to Justice Moncada Luna, it is clear that the Finca 35659 "transaction" was a fake bit of paperwork thought to be sufficient to mask the bribes.

48. Messrs. Ponce and Chong provide a single-page opinion with respect to the documentation supposedly used by Mr. Rivera to acquire Finca 35659.[102] However, their very general opinion is based on an incorrect understanding of the facts. For example, they assume that the purchase agreement was accompanied by a bank letter of payment, which Messrs. Ponce

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99 Arjona Report ¶ 75.

100 Arjona Report ¶ 76.

101 Arjona Report ¶¶ 70-73. Justice Arjona estimates that the five-year prescriptive period would have expired by September 29, 2018, absent any evidence that the period was otherwise interrupted.

102 *See* Expert Report of Fidel Ponce and Arturo Chong ("**Ponce and Chong Report**"), p. 32.

and Chong consider fundamental to an enforceable contract for the purchase of land in Panama.[103] However, there is no such document in the record.

49. Further, Messrs. Ponce and Chong assume that the purchase agreement was supplemented by a "Meeting of the Minds Agreement," which they consider central to their opinion as to the regularity of this contractual arrangement.[104] However, as the Claimants admit, that document was never executed and is therefore irrelevant.[105] Messrs. Ponce and Chong either were misled by the Claimants in the course of preparing their opinion or chose to ignore the absence of critical elements needed to support their opinion. Either way, their opinion should be disregarded.

50. Separately, the valuation offered by Messrs. Ponce and Chong is vague and anecdotal at best. Even if it were accurate, it would not establish that Mr. Rivera's supposed purchase ever took place.

51. One of the more glaring defects in Messrs. Ponce and Chong's efforts to value Finca 35659 is the fact that they are attempting to value the land six years after the alleged transaction occurred. Even under ideal circumstances, it is difficult to value land after so many years. The circumstances surrounding Finca 35659, however, were hardly ideal, as the land is located in an undeveloped area, seemingly without electricity, and is accessible only by "deteriorated" roads.[106] Messrs. Ponce and Chong fail to address whether they can competently look back that many years, which many valuers refuse to do. Of course, their post-dated valuation only highlights the fact that Mr. Rivera did not obtain a contemporaneous appraisal in 2013, which any seasoned developer, which Mr. Rivera claims to have been, would have required. Likewise, Mr. Rivera seems to have never obtained a topographical study of Finca 35659, meaning he had

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103 Ponce and Chong Report, p. 32; *id.* at p. 3.

104 Ponce and Chong Report, p. 32.

105 The "Meeting of the Minds Agreement" (**C-0374**), was never signed, as the Claimants confirm (*see* Claimants' Memorial at ¶ 95; Rivera I at ¶ 97). Mr. López says it was signed, but provides no citations and is clearly wrong. López at ¶ 91. Of course, Mr. Rivera admits he never took title to Finca 35659. Rivera II at ¶ 13.

106 Ponce and Chong Report, p. 19.

no way of knowing how much of that hilly property was suitable for development, surely a highly relevant factor.

52. In addition, Messrs. Ponce and Chong rely on other post-valuation events in setting their value.[107] Notably, some of these events—such as the electrification of the property—occurred as late as 2019 and, therefore, should not have been considered when valuing land as of 2013.[108] They also admit that, since 2013, land prices have "decelerated" and that sellers "are open to lower offers," casting further doubt on their post-dated valuation.[109]

53. As to their valuation of Finca 35659 itself, Messrs. Ponce and Chong look back at a very small number of properties and repeatedly focus on non-comparable tracts. Comparable transaction analyses are inherently complex and limited. The value of the comparison depends entirely on the level of comparability among the properties chosen. The greater the differences between the properties, the less likely they are to be comparable for valuation purposes. It is critical, therefore, that a valuer address any differences, control for them in their valuation, and explain how those differences affected their ultimate conclusions. Messrs. Ponce and Chong do none of this. Rather, they looked at only four supposedly "comparable properties," but failed to provide the level of data necessary to verify that the properties are actually comparable to Finca 35659.[110] For example, two of the four properties are of a vastly different size, being just one hectare each, while Finca 35659 is approximately eight hectares.[111] The other two "comparables" appear (although details are sketchy) to have already been sub-divided into residential parcels, and in the case of Comparable C, houses seem to have been constructed.[112] Of course, Finca 35659 was being "used as a cattle farm," a very different state of

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107 *See* Ponce and Chong Report, p. 24.

108 Ponce and Chong Report, p. 24 (date of access to electric power).

109 Ponce and Chong Report, p. 60.

110 Ponce and Chong Report, pp. 25-26.

111 Ponce and Chong Report , pp. 23, 26-27 ("Comparables" A and D)

112 Ponce and Chong Report, pp. 25-26 ("Comparables" B and C).

development.[113] Messrs. Ponce and Chong do not address or account for these differences in their opinion.

54. But most shockingly, the prices cited by Messrs. Ponce and Chong on these "comparables" are, in three of the four instances cited, "asking" prices and not actual sales prices, rendering them entirely irrelevant for a valuation.[114] In short, the Ponce and Chong report does not rely on even one meaningful comparable, and should be disregarded.

iii. The Jimenez Opinion on "Money Laundering and Corruption" Does Not Aid the Claimants

55. The Claimants also offer the opinion of Alison K. Jimenez in support of their position that they did not engage in money laundering and corruption. The Jimenez opinion, however, does not (and does not even attempt to) exonerate the Claimants from their wrongdoing. Rather, it seeks to distract the Tribunal by focusing on various irrelevancies, while disregarding the incontrovertible proof of the flow of bribe money from Mr. Rivera to Justice Moncada Luna. The opinion of Roy Pollitt, offered by Respondents and discussed below, also addresses Ms. Jimenez' shortcomings.

56. Ms. Jimenez is guilty of many failings:

- **Ms. Jimenez Ignores Justice Moncada Luna's Conviction:** Ms. Jimenez disregards the inconvenient fact that the recipient of Mr. Rivera's bribes, Justice Moncada Luna, pled guilty to unjust enrichment and false statements, was incarcerated and was forced to give up the two apartments paid for, in part, with the bribe money received from Mr. Rivera.

- **Ms. Jimenez Ignores Incontrovertible Proof of the Payment of Bribes:** Ms. Jimenez complains that evidence showing corrupt communications and agreements between Mr. Rivera and Justice Moncada Luna is missing.[115] While there is no

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113 Ponce and Chong Report, p. 23.

114 *See* Ponce and Chong Report, pp. 25-27 ("Comparables" B, C and D).

115 Expert Report of Alison Jimenez ("**Jimenez**"), pp. 7, 9-10.

recording of their communications, there is incontrovertible proof of the movement, twice, of money directly from the Judicial Authority through the Rivera-controlled accounts of Omega Panama and PR Solutions to Reyna y Asociados then to Justice Moncada Luna's company Sarelan. Ms. Jimenez's suggestion that there is no evidence as to the purpose of these illicit payments is specious; these payments were made immediately following receipt by Omega Panama of payments from the Judicial Authority, authorized in a contract signed by Justice Moncada Luna. Justice Moncada Luna both failed to disclose these receipts, notwithstanding his obligation to do so, and used them to pay his personal debts.[116]

- **Ms. Jimenez Ignores Justice Moncada Luna's Control Over Sarelan:** Ms. Jimenez ignores, or was unaware of, the fact that Justice Moncada Luna controlled Sarelan, and as a result argued that Justice Moncada Luna was more "tangential" from Mr. Rivera than he actually was.[117] In fact, only Reyna y Asociados stood between Rivera-controlled accounts and Moncada Luna-controlled accounts.

- **Ms. Jimenez Ignores Proof that Rivera-Controlled Funds Went to Justice Moncada Luna:** Ms. Jimenez repeatedly argues that it was "inconclusive" that Mr. Rivera's money went to Justice Moncada Luna.[118] But, as detailed above, in the first bribe payment, money from the Omega Panama account was deposited to the PR Solutions account and then the Reyna y Asociados accounts when they were both otherwise virtually without funds. It is clear, therefore, that the only money that could have been moved to Sarelan via PR Solutions and Reyna y Asociados was from Omega Panama.[119] While both the PR Solutions and the Reyna y Asociados accounts had somewhat higher balances at the time of the second transfer from Omega Panama, their balances were both below the $150,000 transferred from Reyna y

116 Villalba II ¶ 5.

117 Jimenez, pp. 7-8; as to Justice Moncada Luna's control over Sarelan, *see* Villalba II ¶¶ 6-11.

118 Jimenez, p. 9.

119 Compilation of Bank Account Statements and Documentation of Transfers from Oscar Rivera to Justice Moncada Luna (**R-0114**), pp. 5-8.

Asociados to Sarelan, making it clear that a substantial portion of the money that went to Justice Moncada Luna in the second transfer also came from Omega Panama.[120]

- **Ms. Jimenez Focuses on Irrelevancies:** Ms. Jimenez appears to consider it a defense to the bribery of Justice Moncada Luna that the Omega Panama account had sufficient funds prior to the receipt of the two Judicial Authority payments to pay the two bribes to Justice Moncada Luna.[121] How this helps Mr. Rivera and Omega Panama is a mystery. In any event, it is quite clear that Mr. Rivera waited until after the Judicial Authority paid Omega Panama to fund the PR Solutions and then the Reyna y Asociados accounts, from which money then went into Justice Moncada Luna's pocket via Sarelan.

  Jimenez also focuses on the fact that Reyna did not use all of the money she received from Mr. Rivera to pay bribes to Justice Moncada Luna.[122] The relevance of this point is unclear. As Mr. Pollitt notes, cut-outs (which is what Reyna was) often take a percentage of the money transferred through them as a fee for their services. In any event, it is clear that a meaningful portion of the Rivera money was used to bribe Justice Moncada Luna. Likewise, Ms. Jimenez makes much of the fact that some pages from the Reyna y Asociados bank statements are missing. That is regrettable but irrelevant, as the Justice Moncada Luna bribes paid through the Reyna y Asociados account are included on the available bank statement pages.

57. In sum, the Ms. Jimenez opinion proceeds by expressing grave concern that irrelevant points are not clarified, while disregarding incontrovertible proof of the payment and receipt of bribes. It should also be disregarded.[123]

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120 Compilation of Bank Account Statements and Documentation of Transfers from Oscar Rivera to Justice Moncada Luna (**R-0114**), pp. 16, 19.

121 Jimenez, pp. 12-14.

122 Jimenez, p. 15.

123 The Claimants have also filed a report of Professor Orlando Pérez addressing the political history of Panama. Dr. Pérez's opines that the Panamanian judicial system suffers from corruption, including

iv. The Pollitt Opinion Establishes that the Claimants were Engaged in Criminal Misbehavior

58. In response to the Jimenez opinion, Panama offers the opinion of Roy Pollitt, a former Special Agent at the Federal Bureau of Investigation and Managing Director at Exiger LLC. Mr. Pollitt has extensive experience in the investigation of fraud, money laundering and similar crimes.[124]

59. Mr. Pollitt has carefully considered the extensive record compiled by the Panamanian prosecutors, as well as the bank documentation revealing the movement of funds from the Judiciary, through the accounts of Omega Panama, PR Solutions and Reyna y Asociados, to Justice Moncada Luna's Sarelan. On the basis of that documentation, Mr. Pollitt has concluded:

> [I]t is clear that the transactional behavior by Omega Panama exhibits indicia of illicit payment and money laundering relating to the unjust enrichment of Justice Moncada Luna. Further, I have identified that of the $500,000 in transfers that Omega Panama made to middlemen, a material portion of these illicit funds was funneled to Justice Moncada Luna, directly contributing to his unjust enrichment.[125]
>
> Based on my experience, the nature, timing, and flow of these funds demonstrates behavior typically associated with kick back, corruption and money laundering schemes….[126]

"myriad forms of bribery." Expert Report of Orlando J. Pérez at ¶ 17. While the Republic does not accept this unlimited indictment, it is certainly true with respect to Omega, Mr. Rivera and Justice Moncada Luna. The Pérez opinion is otherwise irrelevant.

124 *See* Expert Report of Roy Pollitt ("**Pollitt Report**"), Appendix A (Mr. Pollitt's *curriculum vitae*).

125 Pollitt Report, p. 4.

126 Pollitt Report, pp. 4-5.

60. In support of these conclusions, Mr. Pollitt also concluded, on the basis of a full review of the extensive underlying record, the following:

- Ms. Reyna, a professional money launderer, "provided her services to help transfer and launder the payments relating to the unjust and illicit enrichment of Justice Moncada Luna."[127]

- "Justice Moncada Luna directed the incorporation of Sarelan, the opening of the Sarelan bank accounts, directing the flow of funds and directly benefitting from the payments made from Omega Panama to Sarelan."[128]

- Funds remitted to Sarelan from Omega's account were used in the "paydown of a mortgage and the outstanding balance on two apartment units owned by companies held by Justice Moncada Luna's wife."[129]

- The Omega Panama-to-Moncada Luna bribery scheme was identical in its structure to other bribery schemes undertaken by corrupt bidders on other Judiciary projects and in which Justice Moncada Luna also collected bribes.[130]

- The Jimenez opinion, in its effort to rebut proof that Mr. Rivera engaged in corrupt acts in relation to Justice Moncada Luna, is seriously flawed, in both disregarding critical evidence and concentrating on irrelevancies.[131]

61. In tandem with the overwhelming proof of the bank transfers that moved money from Omega to Justice Moncada Luna, and the fatal imperfections in the fake real estate documentation relied upon by the Claimants, the opinion of Mr. Pollitt further confirms the Claimants' misconduct in connection with the La Chorrera Project.

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127 Pollitt Report, p. 5.

128 Pollitt Report, p. 5.

129 Pollitt Report, p. 5.

130 Pollitt Report, pp. 23-25.

131 Pollitt Report, pp. 25-34.

3. Having Proven the Claimants' Corruption, Dismissal of this Case Is Required

62. As established above, the Claimants engaged in corruption when they bribed Justice Moncada Luna for the purpose of obtaining the La Chorrera Contract. The Claimants' illegal and corrupt payments violated both Panamanian law and international public policy, and thus leave the Claimants without recourse to this Tribunal.[132] Regardless of whether the issue is treated as jurisdictional or a matter of admissibility, relevant authority requires the dismissal of the claims advanced by the Claimants.

63. The Claimants argue that Panama's insistence that the Tribunal dismiss all claims is misplaced, because Panama did not set forth separate allegations of illegal conduct on each of the remaining contracts.[133] However, they also claim that: "[a]s a matter of both fact and international law, Claimants made a unitary investment in Panama, that includes but is not limited to all of the individual Contracts entered into by the Omega Consortium with Panama's various Government agencies."[134] Notwithstanding the Claimants' contradiction and misplaced invocation of the unity of their investment, Panama need not make separate allegations as to each contract. As discussed below, non-compliance with Panamanian law was endemic to the Claimants' investments—such that corruption in procuring one investment clearly violates others. Thus, despite differences between individual contracts, they share a common core in requiring lawful conduct. As such, the Tribunal should not allow the Claimants attempt to have it both ways by claiming that the Tribunal should not dismiss all of their claims because each contract is different, while also claiming that the Tribunal should have jurisdiction over all of their claims by treating the contracts as a unitary investment. The Tribunal should consider the pervasive effect of the Claimants' illegal conduct on the entirety of their investment.

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132 *See* Respondent's Counter-Memorial. ¶¶ 201-213.

133 Claimants' Reply ¶¶ 296-97 ("[t]he other projects relate to *different* governmental agencies, have *different* contracts with *different* payment terms and *different* schedules, are worth *different* values, and are situated in *different* locations").

134 Claimants' Reply ¶ 349 (emphasis added). *But see infra* at Section III.C.4 (discussing the ways that the Claimants misapply "unity of investment" doctrine in this case).

64. Panama submits that the Claimants' corruption in obtaining the La Chorrera Contract constitutes illegal acts tainting the Claimants' investments and depriving the Tribunal of jurisdiction. Even if the Tribunal finds it has jurisdiction, it should find that the claims are inadmissible. Either finding should result in the dismissal of the Claimants' entire case.

65. Alternatively, the Tribunal should dismiss the claims related to the La Chorrera Contract, all subsequent contracts, as well as all claims relating to future contracts.

66. If the Tribunal determines that the Claimants procured a portion, but not all, of their investments through bribery and corruption, and elects to allow certain claims to proceed on the merits, the Tribunal should still dismiss all allegations made by the Claimants regarding the alleged illegality of Panama's criminal investigation. Indeed, the evidence clearly demonstrates that Panama was well within its rights to investigate Mr. Rivera and Omega Panama for their involvement in the illegal payment scheme with Justice Moncada Luna. The Claimants cannot, therefore, argue that Panama's actions violate the BIT or TPA. A review of the Claimants' submissions, however, makes clear that allegations regarding the criminal investigation are integral to their substantive claims and their claim for moral damages. Those allegations should be dismissed and any claims that proceed on the merits must be judged solely on the Claimants' remaining arguments.

a. The Claimants' Corrupt Acts Deprived Them of Protections under the BIT and TPA

67. Tribunals have consistently found that corruption and illegal acts by an investor deprives the investor of treaty protection, and thus the tribunal's competence to hear that investor's case. (The Claimants recognize this elementary principle of international law.[135]) For example, in *World Duty Free v. Kenya*, the tribunal dismissed the claimant's case on jurisdictional grounds upon proof that the claimant paid a bribe to the Kenyan president to procure a contract—in violation English and Kenyan law, as well as international public policy.[136] The tribunal held

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135 *See* Claimants' Reply ¶ 292.

136 *World Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/007, Award (Oct. 4, 2006) (**RL-0003**), ¶¶ 57, 179. *See also Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award (June 18, 2010) (**RL-0006**), ¶ 123 ("An investment will not be protected if it has been

that "claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal."[137] The payment of a bribe similarly violates Panamanian law,[138] and thus the Claimants' payment of bribes to Justice Moncada Luna prevents them from pursuing their claims in in this arbitral tribunal.

68. In accord with *World Duty Free*, the tribunal in *Hamester v. Ghana* found that investments procured illegally will not enjoy treaty protection, nor will an ICSID tribunal have jurisdiction over claims arising from an illegal investment. In explaining this widely-accepted principle, the tribunal stated:

> An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host state's law […] These are general principles that exist independently of specific language to this effect in the Treaty.[139]

69. The tribunal in *Phoenix Action, Ltd. v. Czech Republic* similarly found that violations of the laws of the host State and international public policy via corruption in the making of an investment deprives an investor of treaty protection as well as the tribunal's jurisdiction.[140] The tribunal held:

> There is no doubt that the requirement of the conformity with law is important in respect of the access to the substantive provisions on the protection of the investor under the BIT. This access can be denied through a decision on the merits. However, if it is manifest that the

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created in violation of national and or international principles of good faith; by way of corruption, fraud, or deceitful conduct. . . . It will also not be protected if it is made in violation of the host State's law.").

137 *World Duty Free v. Kenya* (**RL-0003**), ¶ 57.

138 Criminal Code Title X, Ch. II (Corruption of Public Servants), Ch. III (Unjust Enrichment), Title VII, Ch. IV (Money Laundering Crimes), Mizrachi & Pujol, S.A., *eds.*, *Criminal Code*, Second Unique Text of the Law 14 of 2007 (**RL-0039**).

139 *Gustav F.W. Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award (June 18, 2010) (**RL-0006**) ¶¶ 123-24.

140 *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/05, Award (Apr. 15, 2009) (**RL-0005**), ¶¶ 100-04.

> investment has been performed in violation of the law, it is in line with judicial economy not to assert jurisdiction.[141]
>
> [T]he core lesson is that the purpose of the international protection through ICSID arbitration cannot be granted to investments that are made contrary to law."[142]

70. The tribunal in *Inceysa v. Salvador* also found that illegality in the making of an investment deprives an investor form treaty protection, the claimant's investment "cannot, under any circumstances, enjoy the protection of the BIT . . . No legal system based on rational grounds allows the party that committed a chain of clearly illegal acts to benefit from them."[143] Consequently, the *Inceysa* tribunal dismissed the claims of a claimant that procured a construction contract by making fraudulent misrepresentations during the bidding process, finding that the claimants' investment violated international public policy "from the time it made its investment."[144] The tribunal in *Hamester* likewise examined "whether the [claimant's] investment was illegal from its very inception," when the claimant procured contract by submitted false invoices.[145] The analyses of the cited tribunals proves instructive for the present case.

71. The Claimants' bribery with regard to the La Chorrera Contract was aimed at procuring that contract and thus rendered that investment "illegal from its very inception." In exchange for the award of the La Chorrera Contract, the Claimants clearly agreed to and did bribe Justice Moncada Luna, the man responsible for selection of the winning contractor, and who was paid promptly out of the first two payments made to Omega by the Judicial Authority. In view of this timing, the Claimants' argument that the La Chorrera Contract could not have been obtained by corruption because the corrupt payments were made after the contract was signed is without

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141 *Phoenix Action, Ltd. v. Czech Republic* (**RL-0005**), ¶ 104.

142 *Phoenix Action, Ltd. v. Czech Republic* (**RL-0005**), ¶ 102.

143 *Inceysa Vallisoletana S.L v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (August 2, 2006) (**CL-0067**), ¶ 244.

144 *Inceysa v. El Salvador* (**CL-0067**), ¶ 339.

145 *Hamester v. Ghana* (**RL-0006**), ¶¶ 129, 131.

merit, as the evidence clearly establishes that the corrupt payment was made in conjunction with award of the contract.[146]

72. That this Tribunal should examine the full range of the Claimants' illegal conduct in determining the Tribunal's jurisdiction finds support in the cases cited by the Claimants. Those cases were reasoned based on the language of the relevant BITs, which is distinguishable here. Namely, the BIT and the TPA in the present case contain no language imposing temporal restriction on the range of illegal conduct a tribunal can consider for jurisdictional purposes. To be clear, the notion that illegal investments will not be protected by treaties or the ICSID dispute settlement mechanism is a "general principle[ ] that exist[s] independently of specific language to this effect in the Treaty."[147] While a treaty may impose temporal restrictions as to when illegality may remove protection under the treaty, the absence of language barring illegal investments does not alter accepted principles of international law. Thus, where there is no language limiting when an investment must violate the host State's law to lose treaty protection, a tribunal has no reason to read in a temporal restriction. Conversely, the cases cited by the Claimants involved BITs with temporal restrictions. For example, in *Hamester v. Ghana*, the tribunal examined language in the Germany-Ghana BIT, stating that "[t]his Treaty shall also apply to investments made . . . consistent with the [host State's] legislation," to determine whether such investments must be legal at the making, or "initiation," of the investment or during the performance of the investment to receive protection under the BIT.[148] In finding that that the BIT referred to the initiation of an investment, the tribunal found that legality in the performance of an investment did not bear on the tribunal's jurisdiction where the BIT only addressed legality in the initiation of an investment, but not "legality in the subsequent life or performance."[149] In a similar fashion, the tribunal in *Metal-Tech v. Uzbekistan* found that the

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146 While the payments themselves were made after the contract was signed, this fact bears little on the illegality of the investment as a whole, as the Claimants were still in violation of Panamanian law at the signing of the contract. Indeed, the Panamanian Criminal Code provides that an individual commits corruption of a public servant when he "in any way offers, promises or gives a donation, promise, money or any other benefit or advantage to a public official." Criminal Code Article 347, Mizrachi & Pujol, S.A., eds., *Criminal Code*, Second Unique Text of the Law 14 of 2007 (**RL-0039**).

147 *Hamester v. Ghana* (**RL-0006**), ¶¶ 123-24.

148 *Hamester v. Ghana* (**RL-0006**), ¶ 126.

149 *Hamester v. Ghana* (**RL-0006**), ¶ 127.

phrase "implemented in accordance with the [host state's] law" in the Israel-Uzbekistan BIT referred to legality in the "establishment" of the investment.[150] There, illegal conduct in the operation of an investment was immaterial when "Article 1 [of the BIT] simply does not address whether or not the investment must be operated lawfully after it is in place."[151]

73. Far from creating a bright-line rule, the above tribunals demonstrated that "[t]he precise effect of any such express condition will obviously depend upon the wording used."[152] This Tribunal, then, may consider—and deny jurisdiction based upon—any and all of the Claimants' corrupt acts. Ultimately, such consideration should lead to the deprivation of protection under the BIT and TPA as well as the dismissal of the Claimants' claims.

74. The Claimants articulate an unsupported standard that "[i]n the rare instance in which an investment arbitral tribunal dismisses an entire case on the basis of illegality, the illegality must stand at the core of the investment's establishment."[153] Applying this rule, they maintain that "Respondent's allegations are not at the core of the Claimants' entire investment."[154] The Claimants are incorrect and not even the fabricated standard they set forth will allow their claims to be heard by this Tribunal. As Respondent has explained, Omega contractually undertook to abide by Panama's laws and that compliance with those laws—including anticorruption laws—formed a central element of the Claimants' investments, being explicitly required in five of the eight contracts.[155] The effects of the Claimants' bribery and corruption are thus pervasive—violating the majority of their contracts, in addition to Panamanian law and international public

150 *Metal-Tech v. Uzbekistan* (**RL-0011**), ¶ 185.

151 *Metal-Tech v. Uzbekistan* (**RL-0011**), ¶ 193.

152 *Hamester v. Ghana* (**RL-0006**), ¶ 125.

153 Claimants' Reply ¶ 298.

154 Claimants' Reply ¶ 299.

155 Respondent's Counter-Memorial. ¶ 198; La Chorrera Contract (**C-0048)** (Judicial Authority), Art. 14; Contract No. 857-2013 dated Sept. 12, 2013 (**C-0056)**, Art. 21. (Municipality of Panama); Contract No. 077 (2011) dated Sept. 22, 2011 (**C-0028)**, Contract No. 083 (2011) dated Sept. 22, 2011(**C-0030)**; Contract No. 085(2011) dated Sept. 22, 2011 **(C-0031)**, Arts. 18, 80 (MINSA).

policy. Such acts manifestly "stand at the core" of the Claimants' investment and deprives their claims of protection the Tribunal's jurisdiction.

b. The Claimants' Corrupt Acts Rendered Their Claims Inadmissible

75. Even if the Tribunal finds that it has jurisdiction, the Tribunal must find that the claims are admissible before the Claimants may proceed on the merits.[156] The Tribunal should find that the Claimants' corruption renders their claims inadmissible and thus the claims should be dismissed.

76. In *Churchill Mining v. Indonesia*, the tribunal held that the claimants' fraud and forgeries committed to obtain four mining contracts in Indonesia rendered the claimants' claims inadmissible—finding that the forgeries were "essential to the making and conduct of the [investment]" and were thus "inadmissible as a matter of international public policy."[157]

77. In *Plama v. Bulgaria*, the claimant purchased shares in a refinery, subject to the consent of the Bulgarian Privatization Agency.[158] Bulgaria argued that representatives of the claimant obtained the refinery shares by fraudulently concealing and misrepresenting who owned the claimant, and thus that the claimant's investment was not protected by the Energy Charter Treaty ("**ECT**"). The tribunal initially held that it had jurisdiction, in part because the Respondent did not raise its jurisdictional challenge based on the claimant's misrepresentations until the hearing.[159] Although the tribunal had jurisdiction, it declined to hear the claims, finding that the

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156 *See, e.g.*, *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug 4. 2011) (**RL-0009**), ¶ 504.

157 *Churchill Mining PLC and Planet Mining Pty. Ltd. v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award (Dec. 6, 2016) (**RL-0010**), ¶¶ 507-08, 528.

158 *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (Aug. 27, 2008) (**RL-0008**), ¶ 57.

159 *Plama Consortium v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (Feb. 8, 2005) (**CL-0198**), ¶ 129.

claimant's fraudulent misrepresentation in procuring its investment "precludes the application of the protections of the ECT."[160] Specifically, the tribunal held:

> [T]he tribunal has decided that the investment was obtained by deceitful conduct that is in violation of Bulgarian law. The Tribunal is of the view that granting the ECT's protections to Claimant's investment would be contrary to the principle of *nemo auditor propriam turpitudinem allegans* invoked above. It would also be contrary to the basic notion of international public policy—that a contract obtained by wrongful means (fraudulent inducement) should not be enforced by a tribunal.[161]

78. Notably, the *Plama* tribunal found that even though the ECT did not contain a provision explicitly requiring conformity with the law, "[t]his does not mean . . . that the protections provided for the by the ECT cover all kinds of investments, including those contrary to domestic or international law."[162] As with jurisdiction, conduct violating the laws of the host state and international public policy precludes an investor's protection under a treaty and precludes addressing the merits of claims based on that conduct—notwithstanding the absence of language to that effect in an applicable BIT. Thus, where the Claimants' corruption violated both Panamanian law and international public policy, their claims are outside of the protections of the BIT and the TPA, even if the tribunal has jurisdiction.[163]

79. Notably, neither of the *Plama* or *Churchill Mining* tribunals held that the question of admissibility was subject to a temporal restriction on the illegal conduct. As the Claimants admit, "[t]he [*Churchill Mining*] tribunal did not perform a detailed temporal analysis[.]"[164] While the Claimants argue that the timing of illegal conduct is relevant to the admissibility of a

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160 *Plama v. Bulgaria* (**RL-0008**), ¶ 135.

161 *Plama v. Bulgaria* (**RL-0008**), ¶ 143.

162 *Plama v. Bulgaria* (**RL-0008**), ¶ 138.

163 *Cf. Spentex Netherlands, B.V. v. Republic of Uzbekistan*, ICSID Case No. ARB/13/26, Award (Dec. 27, 2016) (**RL-0004**) (noting that it was not necessary to distinguish between treating corruption as an issue of admissibility or jurisdiction, as either would result in dismissal of claims) (not public, *see* https://www.iareporter.com/articles/in-newly-unearthed-uzbekistanruling-exorbitant-fees-promised-to-consultants-on-eve-of-tender-process-are-viewed-by-tribunal-asevidence-of-corruption-leading-to-dismissal-of-all-claims-under-dutch/) (last visited on Nov. 10, 2019).

164 Claimants' Reply ¶ 303.

claim,[165] they fail to cite any cases holding an investor's claims admissible on the basis that on the illegal conduct occurred during, instead of at the inception of, the performance of an investment.

c. The Tribunal Should Find the Claimants' Case Inadmissible

80. Whether the Tribunal assesses the Claimants' illegal conduct as a matter of jurisdiction or admissibility, the result is the same—the Claimants' claims should be dismissed. As articulated by *World Duty Free* in the context of jurisdiction and *Plama* in the context of admissibility, claims tainted by violations of the host State's law and international public policy—such as bribery and corruption—cannot be heard on the merits. Put simply, tribunals must "ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act."[166] The Claimants engaged in acts of bribery that are directly related to their investments and directly in violation of Panamanian law and international public policy. While the Claimants' acts were corrupt from the initiation of their investment, the timing of such acts in no way limits the Tribunal from exercising its charge to ensure the promotion of the rule of law by dismissing all of the Claimants' claims.

81. While the Claimants' acts of corruption have a pervasive effect on their investments, the Tribunal alternatively should at least dismiss claims related to the La Chorrera Contract, to all subsequent contracts and to all future damages. The Claimants engaged in corruption of a public official by paying a bribe for the benefit of Justice Moncada Luna to procure the La Chorrera Contract. The Claimants' subsequent contracts are similarly tainted by the bribery in connection with the La Chorrera Contract. By engaging in bribery to obtain a government contract, the Claimants prejudiced the fairness of subsequent bidding proceedings by establishing an expectation of continued bribery—upon which contractual counterparties may have relied. As such, contracts entered into after the La Chorrera Contract should likewise be deprived of treaty protection.

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165 Claimants' Reply ¶ 302.

166 *Metal-Tech v. Uzbekistan* (**RL-0011**), ¶ 389.

B. THE CLAIMANTS HAVE ASSERTED COMMERCIAL CLAIMS THAT ARE NOT PROTECTED UNDER THE BIT OR THE TPA

82. The Claimants have submitted a series of commercial claims that are outside the scope of the Tribunal's jurisdiction. Indeed, the Claimants' case theory is that Panama violated its international treaty obligations because invoices were unpaid, change orders and proposed plans were not approved, and two government agencies declared the Claimants to be in default for failure to carry out their contractual obligations.[167]

83. In their Reply, the Claimants attempt to disguise their claims through assertions of sovereign action and nefarious intent. However, there is no evidence that the various ministries and municipalities acted in anything but a commercial manner when dealing with the Claimants' projects. And, as discussed above, the government was fully justified in exercising its police powers to investigate Mr. Rivera's and Omega Panama's corrupt activities.

1. The Claimants' Submissions Confirm the Commercial Nature of Their Claims

84. The Claimants principally allege that their projects faced three different problems: (a) unpaid invoices;[168] (b) refusals to amend or extend contracts;[169] and (c) the allegedly improper termination or abandonment of contracts.[170] Setting aside the merits of their allegations, these problems are fundamentally commercial. Contracting parties, whether private or governmental, experience conduct of this type. There is nothing inherently sovereign in the failure to timely pay invoices, deny requests for contract extensions or amendments, or terminate contracts.

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167 *See* Jurisdictional Objection ¶ 215 (citing Claimants' Memorial ¶ 3).

168 *See, e.g.*, Request for Arbitration ¶¶ 2,4, 20-29, 32-34; Claimants' Memorial at ¶¶ 3, 43-44, 46, 70; Rivera I ¶¶ 70, 73; Claimants' Reply ¶¶ 5, 145, 188; López ¶¶ 122, 138.

169 *See, e.g.*, Request for Arbitration ¶¶ 2, 30; Claimants' Memorial ¶¶ 3, 43-44, 46; Rivera I ¶¶ 70, 72; Claimants' Reply ¶¶ 5, 145; López ¶¶ 105, 108.

170 *See, e.g.*, Request for Arbitration ¶¶ 2, 22, 34, 70; Claimants' Memorial ¶¶ 3, 4, 70; Rivera I ¶¶ 118, 120, 122; Claimants' Reply ¶¶ 5, 175, 204, 206, 208; López ¶¶ 100, 108, 130.

a. The MINSA CAPSI Health Facility Projects

85. Panama has demonstrated the commercial nature of the problems that occurred on the Claimants' MINSA CAPSI Projects.[171] The Claimants broadly agree that the problems they faced were commercial,[172] but allege that the nature of the problems changed after President Varela's election. That allegation is undermined by the project records and by the Claimants' own submissions.

86. During the Martinelli Administration, the Claimants' MINSA CAPSI Projects experienced delays typical to large, commercial construction projects: rain; issues with subcontractors; approvals of necessary equipment; approvals of construction plans; slow issuance of CNOs; and approvals of addenda for extensions of time and costs.[173] Each project also experienced its own unique commercial issues. The Rio Sereno Project was delayed because of changes to the scope of work, the demolition of the cafeteria, and relocation of staff.[174] The Puerto Caimito Project was delayed by floods in the La Chorrera district, labor strikes, and changes to the scope of the work.[175] And the Kuna Yala Project was delayed by electricity outages and site access issues.[176]

87. All contractors working on MINSA CAPSI Projects also had to deal with the often lengthy process of getting paid and obtaining addenda to their contracts reflecting changes in the scope of work, price, or completion period. While complex, the Claimants faced no greater challenges in this process than did any other contractor involved in a large construction

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171 *See, e.g.,* Respondent's Counter-Memorial ¶¶ 60-61, 63-64, 70-73; First Witness Statement of Nessim Barsallo Abrego dated Jan. 7, 2019 ("**Barsallo I**") ¶¶ 42-45.

172 *See, e.g.,* Claimants' Memorial ¶¶ 51-52, 56, 58; Claimants' Reply ¶¶ 42-46.

173 Barsallo I ¶¶ 26-40; López ¶¶ 41-45.

174 Barsallo I ¶¶ 29; Letter from Omega to MINSA, Regarding pending issues from meeting on Friday, January 18, 2013 dated Mar. 6, 2013 (**C-0155**), p. 2.

175 López ¶ 45; Barsallo I ¶ 31; *see Paralyzed health center due to debt,* LA PRENSA dated Mar. 26, 2013 https://impresa.prensa.com/nacionales/Paralizan-centro-salud-deuda_0_3624387626.html (last visited Nov. 17, 2019) (**R-0147**) (workers paralyze the Puerto Caimito Project for "the third time since the work began, demanding payment of back wages" from a subcontractor of Omega Panama)/

176 Barsallo I ¶ 36; Letter from Omega to MINSA, Regarding pending issues from meeting on Friday, January 18, 2013 dated Mar. 6, 2013 (**C-0155**), p. 1; Letter No. MINSA-KY-69 from Omega to MINSA dated Feb. 16, 2014 (**C-0354**); First Witness Statement of Karina Mirones dated May 14, 2019 ("**Mirones**") ¶ 6.

project.[177] Nevertheless, the Ministry of Health worked with Omega to ensure it had adequate time and resources to complete its work.[178]

88. The Claimants argue that the nature of the problems changed after President Varela took office. The evidence, however, shows that the work—and problems—remained the same between administrations. The Ministry of Health and the Claimants continued to work to resolve delays and payment issues on the project long after President Varela took office. Indeed, in July 2015 (a year after President Varela took office), Ana Graciela Medina—the Claimants' outside counsel—met with "Minister Terrientes" and "Minister Díaz " from the Ministry of Health.[179]

[redacted][180] Before moving forward, however, the Claimants had to address certain commercial issues. In particular, [redacted]

[redacted]

177 Claimants' Memorial ¶ 52; Barsallo I ¶¶ 29-37; *see* Rivera I ¶ 54; López ¶¶ 41-45. Approvals of extensions of time on each of the Claimants' MINSA CAPSI Projects were lengthy during the Martinelli Administration. On the Rio Sereno Project, it took almost a year – from November 2012 to July 2013 – to negotiate and finalize Addendum No. 2 and similarly, it took five months – from August 2013 to January 2014 – to negotiate and finalize Addendum No. 3. *See* Addendum No. 3 to Contract No. 077 (2001) dated Aug. 13, 2013 (**C-0170**), p. 9; Barsallo I ¶¶ 29-30. On the Puerto Caimito Project, negotiation and finalization of Addendum No. 2 took six months and the same process took seven months for Addendum No. 3. Barsallo I ¶¶ 31-34. On the Kuna Yala Project, the negotiation and finalization process for Addendum No. 2 took four months. Barsallo I ¶ 36.

178 Barsallo I ¶ 38.

179 Email from Ana Graciela Medina to Oscar Rivera and Frankie López dated July 30, 2015 (**C-0701**).

180 Email from Ana Graciela Medina to Oscar Rivera and Frankie López dated July 30, 2015 (**C-0701**).

[redacted]

89. Once this information was provided, [redacted]"[184] Several meetings were held after this date, but the parties were unable to resolve the outstanding issues.

90. As Ms. Medina's report makes clear, the problems confronting the Rio Sereno and Puerto Caimito projects were purely commercial. The cost of the Claimants' projects exceeded the average cost of other MINSA projects, and the scope of the change orders, outstanding payments, and pending negotiations was unclear.

91. With respect to the "Carti CAPSI" (*i.e.*, the Kuna Yala Project)—the Claimants' third project—[redacted]

181 Email from Ana Graciela Medina to Oscar Rivera and Frankie López dated July 30, 2015 (**C-0701**).

182 Email from Ana Graciela Medina to Oscar Rivera and Frankie López dated July 30, 2015 (**C-0701**).

183 Email from Ana Graciela Medina to Oscar Rivera and Frankie López dated July 30, 2015 (**C-0701**).

184 Email from Ana Graciela Medina to Oscar Rivera and Frankie López dated July 30, 2015 (**C-0701**).

[redacted]

92. According to Ms. Medina, [redacted][190] As this report shows, the "Carti CAPSI" Project became commercially unviable and undesirable where it was to be located. There is no suggestion that the project was affected by President Varela or any inappropriate political considerations.

b. The Ciudad de las Artes Project

93. The Claimants' contract for the Ciudad de las Artes Project was terminated by the National Institute of Culture ("**INAC**"). The Claimants allege that this termination was a

185 Email from Ana Graciela Medina to Oscar Rivera and Frankie López dated July 30, 2015 (**C-0701**).

186 Email from Ana Graciela Medina to Oscar Rivera and Frankie López dated July 30, 2015 (**C-0701**).

187 Email from Ana Graciela Medina to Oscar Rivera and Frankie López dated July 30, 2015 (**C-0701**).

188 Email from Ana Graciela Medina to Oscar Rivera and Frankie López dated July 30, 2015 (**C-0701**).

189 Email from Ana Graciela Medina to Oscar Rivera and Frankie López dated July 30, 2015 (**C-0701**).

190 Email from Ana Graciela Medina to Oscar Rivera and Frankie López dated July 30, 2015 (**C-0701**).

product of President Varela's so-called campaign of harassment.[191] Panama, however, has already demonstrated, as addressed elsewhere, that the decision to terminate the Claimants' contract was based on commercial considerations.[192] As discussed in detail below, Omega began to withdraw from the project and to experience significant productivity declines in mid-2014.[193] Sosa Arquitectos Urbanistas Consultores, S.A., the independent inspector on the project, noticed these problems and repeatedly informed Omega that it was failing to meet its contractual obligations.[194] By November 2014, Omega had abandoned the project altogether and, as such, INAC had no choice but to terminate the contract and draw on Omega's performance bond.[195]

94. The evidence clearly shows that INAC had legitimate concerns regarding Omega's performance. Those concerns ultimately led to the cancellation of Omega's contract. The Claimants question whether INAC properly terminated their contract. That question, however, is not one properly presented to this Tribunal.

c. The Ministry of the Presidency—Colón Public Market

95. The Municipality of Colón also suffered from commercial problems. The Colón Public Market was intended to be part of the broader "Cold Chain" project.[196] Historically, Panama had difficulty preserving perishable products as they were delivered to consumers because of a lack of centralized refrigeration centers throughout the country's agricultural regions. The Cold Chain project was intended to address this problem by building cold storage facilities in Panama's main agricultural centers and a series of refrigerated markets and supply centers to aid in the distribution and sale of perishable goods.[197]

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191 *See, e.g.*, Request for Arbitration ¶¶ 30, 34; Claimants' Memorial ¶ 79; Claimants' Reply ¶¶ 204-211.

192 *See, e.g.*, Respondent's Counter-Memorial ¶¶ 107-112.

193 *See infra* Section III.B.4.

194 *Infra* Section III.B.4.

195 *Infra* Section III.B.4.

196 First Witness Statement of Fernando Duque dated Nov. 13, 2019 ("**Duque**") ¶ 2.

197 Duque ¶ 11.

96. The new Colón Public Market was to be built on the site of the existing public market, which, at that time, was occupied by various tenants.[198] The Ministry of the Presidency's plan was to relocate the market's tenants to a temporary facility that would be constructed on another site. The construction of the temporary market and the relocation of the existing market's tenants, therefore, had to occur before construction of the new market could begin.

97. The Claimants were awarded the Colón Public Market contract on October 10, 2011 and were issued a notice to proceed on September 7, 2012.[199] The Ministry of the Presidency originally expected that the temporary market would be constructed and the tenants relocated by early 2012. That expectation, however, was frustrated on two accounts. *First*, the Ministry experienced significant delays in negotiating the contract to construct the temporary market. The land on which the temporary market was to be built was privately owned and the owner refused to agree to terms satisfactory to the Ministry. After several months of negotiation, the Ministry arranged to rent the property. This delayed the construction of the temporary market by months.

98. *Second*, as construction on the temporary market was progressing, the Ministry made efforts to relocate the existing market's tenants.[200] Those tenants, however, refused to vacate the premises and engaged in a series of protests, demanding greater accommodations. Ministry officials met with all interested parties in an effort to resolve the dispute; however, those efforts were unsuccessful.[201] A decision was taken not to move forward with the project until the relocation issue could be resolved.[202]

99. The Ministry was aware that the Claimants had been issued an order to proceed, but could not construct their market in the face of these problems. As a result, the Ministry suspended the portion of the Claimants' contract requiring them to construct the market. The Ministry had the right to [redacted]

198 Duque ¶ 14.

199 Resolution of Adjudication No. 124-2011 dated Oct. 10, 2011 (**C-0033)**; Notice to Proceed for Contract No. 043 (2012) dated Sept. 7, 2012 (**C-0148)**.

200 Duque ¶ 17.

201 Duque ¶ 17.

202 Duque ¶ 17.

period that the Government determines necessary or desirable at its own convenience."[203] During the suspension period, the Claimants could carry out only those functions "necessary for the care and preservation of the Works" and would be compensated for reasonable costs incurred as a result of the suspension.[204]

100. While the construction portion of the contract was suspended, the Ministry requested that the Claimants carry on with pre-construction activities, including the development of necessary manuals and the completion of relevant studies. In carrying out this work, the Ministry expected that the Claimants would scale back their personnel and other costs associated with the construction phase of the project, as required by their contract.

101. The Claimants would be entitled to compensation for the work performed on the non-suspended portions of the contract and for reasonable costs incurred as a result of the suspension.[205] To this end, the Ministry and the Claimants discussed an addendum to the contract that would extend the completion date and would add the delay-related costs to the contract price. A draft addendum was prepared, but discussions did not proceed to the point where the addendum could be signed. The main problem was that the Claimants refused to renew the security bond for the project, without which, a new addendum could not be signed.

102. The problems with the Colón Cold Chain project are undeniably commercial in nature and began more than two years prior to the election of President Varela. To the extent the Claimants believe they are entitled to payment for outstanding work performed or for costs incurred during the suspension period, they could have—and should have—sought recourse through the Panamanian courts, as provided for in their contract.[206]

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203 Contract No. 043 (2012) dated Aug. 17, 2012 (**C-0034)**, Art. 72.

204 Contract No. 043 (2012) dated Aug. 17, 2012 (**C-0034)**, Art. 72.

205 Contract No. 043 (2012) dated Aug. 17, 2012 (**C-0034)**, Art. 73.

206 Contract No. 043 (2012) dated Aug. 17, 2012 (**C-0034)**, Art. 78.

d. The La Chorrera Courthouse Project

103. The problems the Claimants faced on the La Chorrera courthouse project were all commercial in nature. The Claimants admit that the "[c]ontract experienced delays . . . but they were [] delays typical of large construction contracts," including "delays in obtaining environmental licenses, due to rain, design changes, lack of information, labor strikes and some delays in payments."[207] The parties resolved the issues and delays on the La Chorrera Project through contractual negotiations, which resulted in Addendum No. 2.[208] And, the Judicial Authority paid Omega for work completed on the Project throughout both the Martinelli and the Varela administrations.[209]

104. The Judicial Authority also acted commercially when it issued its intent to terminate the contract on March 11, 2015, by which time Omega was nearly three months beyond the date it had stopped work on the project and was about to allow the advance payment and performance bonds to expire. Faced with these facts, any reasonable project owner would have concluded that its contractor had abandoned the project and that it was commercially expedient to terminate the contract due to the contractor's failure to perform, as the Judicial Authority.[210] The notice of intent gave Omega five business days to respond and present evidence as to why the Judicial Authority should continue the project with Omega.[211] Omega responded, late of course, on March 18, 2015 and argued that it should be allowed to continue on the project because the Judicial Authority had failed to "comply with its obligations under the contract," delayed the approval of plans, delayed payments, and prolonged negotiations of extensions of time.[212] While Omega responded to the Judicial Authority's letter, it was clear that it had no intention of carrying out its works. In the letter, Omega alleged that it had been denied fair and equitable

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207 López ¶ 60.

208 Addendum No. 2 to Contract No. 150/2012 dated Jan. 13, 2015 (**C-0562**).

209 *See* López ¶ 96.

210 Letter No. P.C.S.J./604/2015 from Supreme Court of Justice to Omega dated Mar. 11, 2015 (**R-0013**).

211 Letter No. P.C.S.J./604/2015 from Supreme Court of Justice to Omega dated Mar. 11, 2015 (**R-0013**).

212 *See generally* Letter No. P007-60 from Omega to the Judicial Authority dated Mar. 18, 2015 (**R-0015**), ¶¶ 13-50.

treatment, thereby making clear that Omega was in litigation mode and was more interested in making a record than in carrying forward with its projects.

105. Despite this, the Judicial Authority wanted the La Chorrera courthouse built and recognized that moving forward with the Claimants was the least bad option available to achieve this objective.[213] The Judicial Authority, therefore, granted Omega's request to extend the contract for an additional 202 days, provided that Omega renewed the compliance and advance payment bonds—both of which were absolute contractual requirements.[214] The 202-day extension was on top of the 260 days of extension already given to Omega.[215] While the Judicial Authority was contractually responsible for some of the delay days, there are numerous instances where days were granted to Omega for issues that fell under Omega's responsibility, including rain events and subcontractor problems. As Ms. Rios testifies, the Judicial Authority wanted the project completed and was willing to go to great lengths to have Omega finish.[216]

106. Over the next few months, the parties attempted to negotiate a third addendum but the parties came to an impasse and negotiations stalled. Omega characterized the Judicial Authority's proposals "relating to extensions [as] unacceptable to the Omega Consortium" because they disagreed with the Judicial Authority about whether the extension of time and other issues should be addressed in one addendum or in two separate addenda.[217] Despite the Judicial Authority's numerous attempts to finalize the addendum in 2015 and 2016, Omega never

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213 The Claimants argue that the Judicial Authority's willingness to continue with it in 2015 undermines Panama's claims that the Claimants bribed Justice Moncada Luna. That is false. While Panama was aware of Mr. Rivera's and Omega Panama's involvement in the unjust enrichment scheme involving Justice Moncada Luna, the investigation into Mr. Rivera and Omega Panama was still pending at the time the Judicial Authority revoked its termination. The Claimants' argument puts Panama in an untenable situation, as surely the Claimants would have accused Panama of breaching its treaty obligations if it the Judicial Authority had terminated the La Chorrera Contract based on the investigation of Mr. Rivera and the Claimants. Thus, under the Claimants' theory, Panama could never have acted appropriately.

214 Letter No. P.C.S.J./746/2015 from the Supreme Court to Omega Engineering, Inc. dated Mar. 25, 2015 (**C-0248**).

215 *See* Addendum No. 2 to Contract No. 150/2012 dated Oct, 24, 2014 (**R-0008**).

216 Second Witness Statement of Vielsa Rios dated Nov. 15, 2019 ("**Rios II**") ¶¶ 15, 17, 21.

217 López ¶¶ 102-103.

renewed the bonds and never restarted work on the project.[218] Like all the other delays and issues on the project, this contractual negotiation deadlock between Omega and the Judicial Authority was purely commercial in nature.

e. The Municipality of Colón Project

107. In 2012, the Municipality of Colón undertook a project to construct a new Municipal Palace building. A request for proposals was issued in November 2012,[219] and a consortium of Omega US and Omega Panama was the only contractor who submitted a bid for the project.[220] The Municipality decided to move forward despite the lack of competitive bids and awarded the work to Omega. A contract for US$ 16,050,000 between the Municipality and Omega was executed on January 24, 2013 and was endorsed by the Comptroller General on July 2, 2013.[221] The Municipality issued an order to proceed on July 31, 2013.[222] Omega was given an advance payment of US$ 4,815,000 (30% of the contract price) and had 24 months to complete the project.[223]

108. The original plans called for Omega to tear down the existing Municipal Palace and construct a new facility in its place.[224] Before that could be done, however, a temporary structure had to be built to house Municipality employees during the construction process.

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218 *See* Letter N. 150/P.C.S.J/2016 from Judicial Authority to Omega dated Jan 26. 2016 (**R-0020**); Memorandum N. 161.2016-DALSA dated Jan. 26, 2016 (**R-0082**).

219 Request for Proposals No. 2012-5-16-516-03-AV-000218 "Diseño, Desarrollo de Planos, Demolición del Actual y Construcción con Equipamiento Completo del Nuevo Palacio Municipal Ubicado en la Calle 11 y 12 Santa Isabel en el Distrito de Colón" dated Nov. 2012 (**C-0049)**.

220 *See* Resolution No. 132 from the Municipality of Colón dated Nov. 23, 2012 (**C-0050**).

221 Contract No. 01-13 dated Jan. 24, 2013 (**C-0051**).

222 Order to Proceed for Contract No. 01-13 dated July 31, 2013 (**C-0152**).

223 Contract No. 01-13 dated Jan. 24, 2013 (**C-0051**), Cls. 12-13.

224 Request for Proposals No. 2012-5-16-516-03-AV-000218 "Diseño, Desarrollo de Planos, Demolición del Actual y Construcción con Equipamiento Completo del Nuevo Palacio Municipal Ubicado en la Calle 11 y 12 Santa Isabel en el Distrito de Colón" dated Nov. 2012 (**C-0049)**, Cl. 1.2.1, pp. 4-5.

Construction of the temporary facilities fell within the scope of Omega's work,[225] and Omega completed them on April 30, 2014.[226]

109. The Municipal Palace project faced several distinct problems of a commercial nature. *First*, the quality of the temporary facilities built by Omega was terrible. Federico Policani, the Mayor of Colón from 2014–2019, described the facility in a September 2015 letter to Omega as "deficient" and "unsafe too, because it is basically a wooden barrack like those of the North American army, with gypsum divisions and tinplate coat (zinc plates) without any windows, which under no circumstances can be used to house public offices. [The facilities are] a risk to the safety of collaborators and taxpayers […]."[227] The Municipality informed Omega of its concerns regarding the quality of the temporary works.[228] Omega attempts to minimize these concerns by noting that the temporary facilities ultimately were used by the Municipality.[229] Due to the unsafe conditions of the building, however, it could only be used as a storage facility and to house a maintenance workshop, and not, as the Claimants suggest, as the headquarters of the city's government. As a matter of fact, the Municipality's headquarters have temporarily been moved to a provisional office located at Ft. Espinar (formerly known as Ft. Gulick, when the United States had a military presence in Panama) while the old Municipal Palace is being renovated, and not to Omega's poorly constructed temporary facilities.

110. *Second*, the project experienced a number of issues when, in July 2014, the Municipal Council of Colón decided to analyze the possibility of moving the construction of the Municipal Palace to a different location.[230] By doing this, Municipality employees could continue to work in the old building while the new Municipal Palace was constructed. This decision, therefore,

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225 Request for Proposals No. 2012-5-16-516-03-AV-000218 "Diseño, Desarrollo de Planos, Demolición del Actual y Construcción con Equipamiento Completo del Nuevo Palacio Municipal Ubicado en la Calle 11 y 12 Santa Isabel en el Distrito de Colón" dated Nov. 2012 (**C-0049)**, Ch. V, Annex, pp. 43-44.

226 Letter No. 2015 19 06 P08-013 from the Omega Consortium to the Mayor of the Municipality of Colón dated June 19, 2015 (**C-0180)**, p. 1.

227 Letter No. AL-55/15 from the Municipality of Colón to Omega dated Sept. 2, 2015 (**C-0703**).

228 Letter No. AL-55/15 from the Municipality of Colón to Omega dated Sept. 2, 2015 (**C-0703**)

229 *See* Claimants' Reply ¶ 180.

230 Letter No. 2015 19 06 P08-013 from the Omega Consortium to the Mayor of the Municipality of Colón dated June 19, 2015 (**C-0180)**, p. 2.

mitigated some of the problems caused by the defective temporary facility that Omega constructed and meant that the Municipal government would end up having two buildings.

111. Omega was informed of the change in plans on July 23, 2014, when the Municipal Council requested that Omega present an alternative plan for how to construct the Municipal Palace on the new site.[231] Omega expressed concerns about additional costs associated with the requested changes.[232] The Municipality, however, was committed to working with Omega to make the change as cost-neutral as possible. For example, with the change in site, Omega would no longer have to tear down the existing government building, thereby reducing its overall costs.[233]

112. After the Municipal Council made the initial decision to move the project, the Council had second thoughts, in mid-November 2014, as to whether the new Palace should be built on the new site, or rather remain on the site of the old Palace.[234] The Municipality continued to discuss this issue and, ultimately, the decision was taken on March 2, 2015 to move the project to the new site.[235]

113. Having made that decision, the Municipality also informed Omega that it wanted to execute an addendum to the contract reflecting the change in location.[236] In June 2015—more than three months later—Omega requested a meeting to negotiate the addendum and that an additional 18 months be granted to complete the project.[237] The parties were unable to reach an

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231 Letter No. 2015 19 06 P08-013 from the Omega Consortium to the Mayor of the Municipality of Colón dated June 19, 2015 (**C-0180**).

232 Letter No. 2015 19 06 P08-013 from the Omega Consortium to the Mayor of the Municipality of Colón dated June 19, 2015 (**C-0180)**, p. 2.

233 Letter No. AL-55/15 from the Municipality of Colón to Omega dated Sept. 2, 2015 (**C-0703**).

234 Letter from Omega to the Mayor of the Municipality of Colón dated Dec. 16, 2014 (**C-0616**).

235 Reply ¶ 178; Letter No. 2015 19 06 P08-013 from the Omega Consortium to the Mayor of the Municipality of Colón dated June 19, 2015 (**C-0180)**.

236 Reply ¶ 178; Letter No. 2015 19 06 P08-013 from the Omega Consortium to the Mayor of the Municipality of Colón dated 19 June 2015 (**C-0180)**.

237 Letter No. 2015 19 06 P08-013 from the Omega Consortium to the Mayor of the Municipality of Colón dated June 19, 2015 (**C-0180)**, p. 1 (noting that it is responding to the Municipality's Note. No. AL-10/15 of March 2, 2015).

agreement on the terms of the addendum and the Municipality's contract with Omega expired on July 31, 2015. The bonds that Omega had secured for the project expired at the same time. Despite this, on September 2, 2015, the Municipality wrote to Omega and indicated that it would be willing to continue negotiating an addendum to the contract if, within a period of five business days, Omega would renew the bonds for an additional 24 months.[238] Omega wrote to the Municipality insisting that a number of new commercial terms be added to the contract. Omega, however, did not renew the bonds and gave no indication of its intent to do so.[239] The Municipality could not proceed with discussions if the bonds were not in place, as they were a necessary condition of any public works contract.

114. In total, Omega was paid almost US$ 7 million on the Municipal Palace project—over US$ 4.5 million in an advance payment and US$ 2.2 million in payments under the contract. Of that amount, Omega still withholds over US$ 1 million for work it never performed.[240] In return, the Municipality received a glorified storage shed.

115. It is clear that the Municipal Palace project was plagued by commercial problems. An owner (the Municipality) rightfully changed the scope of work by deciding to move the project. Discussions regarding the effect of this change on the contractor's works were held and, ultimately, the parties were unable to reach an agreement on the terms and conditions of the new work. The Claimants' assertion that Mayor Policani was "directed by the Presidency to terminate the Contracts with the Omega Consortium because the other ministries were doing the same" is simply untrue. As Mayor Policani stated in a letter to Omega in September 2015, he wanted to make progress on the project and "start the construction of the new Municipal Palace as soon as possible".[241] Furthermore, the Municipality of Colón is a regional governmental entity, independent from the central Panamanian government; President Varela, therefore, would

238 Letter No. AL-55/15 from the Municipality of Colón to Omega dated Sept. 2, 2015 (**C-0703**).

239 Letter No. P08-014 from Omega to the Municipality of Colón dated Sept. 28, 2015 (**C-0610**).

240 *See* McKinnon Report, Annex 1, p. 1, Table 1, Columns H and K; *Id.*, Annex 1, p. 22, Table 13.

241 Letter No. AL-55/15 from the Municipality of Colón to Omega dated Sept. 2, 2015 (**C-0703**).

have had no authority to "direct" Mayor Policani or anyone else at the Municipality to take actions against Omega.

116. It is perfectly clear that what transpired on this project is a purely commercial dispute that should properly be resolved in accordance with the Municipality of Colón Contract's dispute resolution clause.[242] International investment law was not intended to resolve disputes of this nature. All claims relating to the Municipality of Colón, therefore, should be dismissed.

f. The Municipality of Panama Public Market Projects

117. The circumstances surrounding the Pacora and Juan Díaz Markets (the "**Municipality of Panama Contract**" and the "**Panama City Markets**") again demonstrate the commercial nature of the Claimants' complaints. In particular: (i) Omega's invoices went unpaid from the very beginning of the project due to Omega's design deficiencies and failure to comply with the contract, which further compelled the Municipality to suspend the Juan Díaz Market; (ii) the Municipality and Omega negotiated an addendum to extend the contract's term so that Omega could complete the Pacora Market, only for Omega to abandon that project when the addendum was pending endorsement by the Comptroller General; and (iii) the Municipality lawfully terminated the contract due to Omega's default more than a year after Omega had abandoned the contract.

i. The Claimants Failed to Meet Their Contractual Obligations to the Municipality of Panama

118. Mr. Rivera alleges that Omega's projects generally went well prior to President Varela's inauguration into office, but that "as soon as the Varela administration took office in July 2014, the incumbent Comptroller General refused to endorse *any* of our pending Contract amendments and payment applications."[243] But the facts with respect to the Pacora and Juan Díaz Markets proves the falsity of this statement.

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242 Contract No. 01-13 dated Jan. 24, 2013 (**C-0051**), Cl. 22 ("[a]ny dispute or conflict that may arise with regard to this contract shall be exclusively submitted to the competence and jurisdiction of the Panamanian courts.").

243 Rivera I ¶ 55. *See also* Rivera I ¶¶ 54, 76; López ¶¶ 64; 133.

119. Omega's performance was deficient from the very beginning. As early as February 2014—months before President Varela was elected—the Municipality identified serious problems with Omega's performance, including design deficiencies, unauthorized suspensions of the works, demobilizations of personnel, and construction delays, which Omega itself acknowledged.[244] For example, contractors working with the Municipality are generally responsible for obtaining all necessary licenses and permits as was true of Omega.[245] However, Omega did not obtain the requisite soil use certificate from the Ministry of Housing for the Pacora Market. The Claimants acknowledge that, without this certificate, the Municipality could not approve Omega's design, and in turn, the Comptroller General could not endorse Omega's payment applications.[246] Despite not being contractually obligated to do so, the Municipality went out of its way to assist Omega in obtaining the certificate as expeditiously as possible. However, when the certificate was finally issued in July 2015, Omega had already abandoned the contract and the Pacora Market.[247]

120. The Juan Díaz Market was even more troublesome. That project was tendered during President Martinelli's administration and was located on a site surrounded by privately owned land, which caused access problems.[248] Omega was contractually and legally obligated to resolve this problem and obtain all necessary rights of way to allow access to the market.[249]

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244 Memorandum No. 26-2014 from Jonathan Rodriguez to Juan Manuel Vazquez dated Apr. 16, 2014 (**C-0561**).

245 *See* First Witness Statement of Eric Díaz dated Jan. 7, 2019 ("**Díaz I**") ¶¶ 11-12; Second Witness Statement of Eric Díaz dated Nov. 18, 2019 ("**Díaz II**") ¶¶ 7-13. *See also* Request for Proposals No. 2013-5-76-0-08-AV-004644 dated Mar. 2013 (**R-0099)**, p. 32, Ch. III, Introduction; *Id*., p. 10, Ch. II, Cl. 2; *Id*., p. 38, Ch. III, Cl. 3.8.

246 Claimants' Reply ¶ 170.

247 *See* Díaz I ¶¶ 18-23. *See also* Letter from the Municipality of Panama to the Ministry of Housing dated Aug. 28, 2014 (**R-0102**); Letter from the Mayor of Panama City to the Ministry of Housing dated Oct. 13, 2014 (**R-0103**); Letter from the Municipality of Panama to the Ministry of Housing dated Oct. 27, 2014 (**R-0105**); Resolution No. 412-2015 from the Ministry of Housing dated July 7, 2015 (**R-0106**).

248 *See* Díaz I ¶ 13; Díaz II ¶¶ 11-12; *Blandon Stops Construction in 6 of the Mercados Periféricos*, EL SIGLO dated Nov. 6, 2014 (**C-0608**). *See also* Claimants' Reply ¶ 168.

249 *See* Díaz I ¶ 13; Díaz II ¶¶ 7-8, 13. *See also* Request for Proposals No. 2013-5-76-0-08-AV-004644 dated Mar. 2013 (**R-0099)**, p. 38, Ch. III, Cl. 3.8; Agreement No. 116 of 1996 of the Municipal Council of Panama City dated July 9, 1996 (**R-0119**) at Arts. 4(3.06.01), 4(3.15).

Omega failed to do so, however, which rendered the land inaccessible and the Juan Díaz Market commercially unviable. The Municipality was thus compelled to suspend that project.[250]

121. Thus, the Claimants are wrong to suggest that the Pacora and Juan Díaz Market Projects were going well prior to President Varela's election. Those projects started poorly and never recovered.

122. It is equally wrong for the Claimants to suggest that the election of President Varela led to the non-payment of their invoices. Omega's invoices were rejected from the outset of the project (during the Martinelli Administration) because Omega did not do its job. Omega failed to obtain necessary permits and rights of way, and proffered designs that did not comply with its contractual obligations or Panamanian law.[251] The Comptroller General is the final check to ensure that contractors have met their commercial and legal obligations before they are paid.[252] Where, as was the case here, the contractor's performance was deficient, contractual obligations were not met, and the designs proffered by the contractor violated local law, the Comptroller General had the right to deny payment unless and until these deficiencies were corrected.

ii. Omega Abandoned the Pacora and Juan Díaz Market Projects

123. Despite Omega's failures, the Municipality of Panama was willing to extend the contract's term in order to allow Omega to complete the Pacora Market. The Municipality's generosity in this regard is notable. In late 2014 (after President Varela was elected), the Municipality agreed to extend the completion date for the Pacora Market by 239 days.[253] Of this amount, 200 were linked to Omega's failure to timely secure the soil use certificate from the Ministry of Housing.[254] As noted, Omega was solely responsible for obtaining this certificate

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250 *See* Díaz I ¶¶ 13-17; Díaz II ¶¶ 14, 18. *See also* Letter No. S.G.-087-A from the Municipality of Panama to the Omega Consortium dated Sept. 2, 2014 (**C-0058)**; Addendum No. 2 to Contract No. 857-2013 dated 2014 (**R-0125**), p. 2.

251 *See* Díaz I ¶¶ 11-14; Díaz II ¶¶ 7-13.

252 First Witness Statement of Dr. James Edward Bernard Véliz dated Jan. 7, 2019 ("**Bernard**") ¶ 9.

253 Email chain between the Municipality of Panama and Omega dated Nov. 27, 2014 (**R-0061**); Díaz I ¶¶ 25-26; Díaz II ¶ 17.

254 Letter No. MUPA-5-09-14 from the Omega Consortium to City Hall dated Sept. 15, 2014 (**C-0235**).

and, thus, was responsible for any delays associated with its procurement.[255] The Municipality granted the additional time, however, because of its desire to complete the project.[256]

124. The addendum extending the contract's term was forwarded to the Comptroller General's office for endorsement. Omega, however, abandoned the Municipality of Panama Contract and the Pacora Market while the Comptroller General was studying the addendum.[257] The Municipality and Omega clearly acted as commercial actors in negotiating this addendum, which the Comptroller General ultimately did not have a chance to endorse in light of the Claimants' abandonment of the contract.

iii. The Municipality Lawfully Terminated Omega's Contract

125. The Municipality of Panama's decision to terminate its contract with Omega was commercial in nature. As testified by Eric Díaz, a former legal advisor at the Municipality, Omega abandoned the contract in April 2015, having achieved an unacceptably low level of progress.[258] Since the Mayor of Panama City was eager to see the Pacora Market through to completion, he had no choice but to terminate Omega's contract in order revive that project by re-tendering it to another contractor. The Municipality of Panama Contract, thus, was terminated in January 2017, and the Pacora Market was awarded to a new contractor in April 2018.[259] The Municipality acted as any reasonable project owner would in these circumstances.

126. As is clear from the foregoing discussion, the events on which the Claimants base their allegations stem from Omega's commercial failures as a party to the Municipality of Panama Contract. The Municipality not only acted transparently, it went out of its way to help Omega continue working on the projects. When Omega abandoned the contract in default of its

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255 *See* Díaz I ¶¶ 24-26; Díaz II ¶¶ 7-8; Addendum No. 2 to Contract No. 857-2013 dated 2014 (**R-0125**), p. 2.

256 Email chain between the Municipality of Panama and Omega dated Nov. 27, 2014 (**R-0061**); Díaz I ¶¶ 25-26; Díaz II ¶ 17.

257 *See* Díaz I ¶¶ 26-27; Díaz II ¶ 17.

258 *See* Díaz I ¶¶ 27-28; Díaz II ¶ 17.

259 *See* Díaz I ¶¶ 29-32; Díaz II ¶ 17. *See also* Resolution No. C-10-2017 dated Jan. 11, 2017 (**C-0234**); *See* Requisition No. 544 "For the Refurbishing Project of the Pacora Peripheral Market" dated Mar. 27, 2018 (**R-0120**); Municipality of Panama, Resolution No. C-070 dated Apr. 23, 2018 (**R-0121**).

obligations, the Municipality had no choice but to terminate the contract to allow a new contractor to complete the Pacora Market.

2. The Claimants' Efforts to Ascribe Sovereign Intent or Action to the Commercial Problems Afflicting Their Contracts Fails

127. In an effort to transform the commercial problems they faced into treaty violations, the Claimants purport to "focus on acts and omissions which are *distinctly sovereign.*"[260] In doing so, the Claimants disregard the actual realities of their claims.

128. The Claimants argue that the commercial issues described above were the product of a campaign of harassment stemming from President Varela's displeasure with either Mr. Rivera's refusal to make a campaign contribution or Omega's affiliation with the Martinelli administration. To support these arguments, the Claimants conjure a grand conspiracy involving multiple government ministries, municipalities, and institutions. The Claimants, however, provide nothing to support their arguments beyond supposition, hearsay, and speculation.

129. Panama addresses the Claimants' allegations of targeted harassment in Section III.A below and will not repeat its arguments here. However, the Claimants' focus on supposedly "sovereign" actions by Panama does not support their claims or transform this dispute into one that properly falls under the BIT and TPA. For example, the Claimants complain about the criminal investigation undertaken against Omega and Mr. Rivera. Those complaints are unfounded. As described above, the criminal investigations initiated against the Claimants were the result of evidence showing unlawful payments made by the Claimants to Justice Moncada Luna. Governments have an inherent right to exercise their police powers.[261] Governments,

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260 Claimants' Reply ¶ 321 (emphasis in original).

261 *See Suez v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability (July 30, 2010) (**CL-0011**), ¶ 128 ("As numerous cases have pointed out, in evaluating a claim of expropriation, it is important to recognize a State's legitimate right to regulate and exercise its police power in the interests of the public welfare.") (emphasis added); *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006) (**CL-0191**), ¶ 195 ("With respect to the power of the State to adopt its policies, it can generally be said that the State has the right to adopt measures having a social or general welfare purpose."). *See also Fireman's Fund Ins Co. v United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award (July 17, 2006) (**RL-0044**), ¶ 176 (noting that "whether the measure is within the recognized police powers of the host State" is relevant to "distinguish between a compensable expropriation and a non-compensable regulation by a host State").

therefore, are not subject to international liability when the exercise of those powers implicates a foreign investor or foreign investment, causing financial harm.[262] International investment law was never intended to hold governments liable for such actions.[263]

130. The Claimants also complain about instances where Panama refused to issue a license or permit, denied contract addenda, or allowed a contract to expire.[264] Again, these complaints are unfounded. While the issuance of licenses and permits is a governmental task, the refusal to issue a license or permit does not automatically give rise to international liability. Governments may choose not to issue a license or permit for commercial reasons, such as a contractor's failure to provide the necessary paperwork, the absence of relevant studies, or doubts regarding the commercial viability of the project. The Juan Díaz Market Project is a clear example of this, as the project was permanently suspended because the physical location did not allow full access to the site.

131. Thus, the Claimants cannot simply assert a failure to issue a license or permit, as commercial considerations can underlie each of these decisions. These decisions must be scrutinized on their merits and cannot simply be labeled as *per se* sovereign.[265] The Claimants,

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262 *See Suez v. Argentina* (**CL-0011**), ¶ 128 ("[T]he principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are commonly accepted as within the police power of States forms part of customary law today.") (quoting *Saluka Investments B.V. v. The Czech Republic* (UNCITRAL), Partial Award (Mar. 17, 2006), ¶ 262) (internal quotation marks omitted); *LG&E Energy Corp. v. Argentine Republic* (**CL-0191**), ¶ 195 (noting that, when a exercises its police powers, "the measure must be accepted without any imposition of liability, except in cases where the State's action is obviously disproportionate to the need being addressed."); *El Paso v. Argentina*, ICSID Case No. ARB/03/15, Award, (Oct. 31, 2011) (**CL-0056**), ¶ 241 (quoting same).

263 *See Restatement (Third) of the Foreign Relations Law of the United States*, American Law Institute, Volume 1, 1987, Section 712, Comment g (**RL-0045**) ("A state is not responsible for loss of property or for other economic disadvantage resulting from . . . [an] action of the kind that is commonly accepted as within the police power of the states"). *Cf. Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award (Nov. 3, 2015) (**CL-0215**), ¶ 444 ("To impose international liability in such a context would significantly undermine States' long-recognised right to reasonably exercise their police powers to enforce existing laws.").

264 *See, e.g.*, Claimants' Memorial ¶ 3, 70, 72-73, 76, 78-85; Rivera I ¶ 72-73, 75, 118; Claimants' Reply ¶ 5, 151-55, 167, 170, 178, 194; Rivera II ¶¶ 17, 38.

265 *See Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction (Oct. 9, 2012) (**RL-0012**), ¶¶ 267-68 (to determine whether alleged conduct is an exercise of sovereign authority "it is

therefore, bear the burden of demonstrating that each decision it challenges lacks any commercial justification and was taken solely for impermissible governmental purposes.

132. In *Saluka v. Czech Republic,* the Tribunal recognized the fundamental concept that governments cannot be held liable for "each and every breach" of "the rules or regulations to which it is subject and for which the investor may normally seek redress before the courts of the host State."[266] The tribunal in *Impregilo v. Pakistan* expanded on this notion by denying jurisdiction over claims grounded in contractual breaches because they did "not involve any issue beyond the application of a contract, and the conduct of the contracting parties."[267]

133. Here, the Claimants principally challenge Panama's conduct under their various contracts. While they may allege that their problems were caused either because they refused to make a campaign contribution to Juan Carlos Varela or because of their affiliation with President Martinelli, they have presented no evidence to substantiate these allegations. Rather, they rely on uninformed speculation, unnamed sources, and statements from individuals not called as witnesses in this proceeding.

134. Mr. López—the Claimants' primary witness on this point—offers nothing to support his claim that the Claimants were targeted because of the refused campaign contribution. As discussed below, Mr. López was not present at the meeting where the alleged campaign contribution took place and claims to have only heard about it from Mr. Rivera several days later.[268] Notably, however, Mr. López has no knowledge whether Mr. Rivera ever discussed this issue with anyone else and Mr. López never refers to the topic again. Moreover, there are no written communications between Mr. López and Mr. Rivera regarding the alleged campaign

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necessary to determine whether the conduct goes beyond that of a contracting party . . . [and] consider both the nature of the act and its motivation.").

266 *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award (Mar. 17, 2006) **(CL-0038)**, ¶ 442.

267 *Impregilo S.p.A. v. Islamic republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction (Apr. 22, 2005) **(RL-0030)**, ¶ 268.

268 López ¶ 70.

contribution and threat, no emails to the Claimants' lawyers or advisors regarding the issue,[269] and no documents recording Mr. Varela's alleged request and threat.

135. Mr. López similarly provides no credible support for the Claimants' assertion that they were targeted for their affiliation with the Martinelli administration. Rather, Mr. López refers to statements or instructions supposedly made to third parties and then conveyed to him regarding the reasons why the Claimants' projects were failing.[270] This is the definition of hearsay. Mr. López then refers to statements supposedly made by unnamed "public officials," an anonymous "engineer working in the La Chorrera Judiciary," "one of the Municipal Council of Colón's legal counsel," and "all the people in the Ministries and Government agencies who told me that there was an intention on the part of the Government to act against Oscar [Rivera] and his companies[.]"[271] Mr. López's vague and unattributed statements are not evidence and should be accorded no weight.

136. The Claimants also rely on edited and partial transcripts of text-based WhatsApp communications between (a) Oscar Rivera and Ana Graciela Medina, (b) Frankie López and Ana Graciela Medina, and (c) Frankie López and Nessim Barsallo.[272] These transcripts are inherently problematic, as they provide only select portions of the broader conversations,[273] and, thus, the individual snippets of communications are presented out of context. For example, in the transcripts of communications between Mr. López and Mr. Barsallo, Mr. Barsallo refers to instructions regarding the Claimants' projects as coming from the Presidency.[274] Mr. Barsallo explains, however, he had no knowledge of any such instructions.[275] Mr. Barsallo and Mr.

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269 The Claimants cannot argue that such materials were withheld on privileged grounds, as they have waived privilege on a series of communications with their counsel in this matter.

270 López ¶ 73.

271 López ¶¶ 73-74.

272 Claimants' Reply ¶¶ 68-69; 72-76; 103-04.

273 The Claimants only produced these transcripts in their Reply submission, which was filed after the discovery period in this case had expired.

274 WhatsApp message between Frankie López and Nessim Barsallo dated Mar. 3, 2016 (**C-0681**), p. 1.

275 Second Witness Statement of Nessim Barsallo Abrego ("**Barsallo II**") ¶ 38; Barsallo I ¶ 41. *See* WhatsApp message between Frankie López and Nessim Barsallo dated Mar. 3, 2016 (**C-0681**), p. 1. *See*

Lopez had a long history of communicating via WhatsApp and, as Mr. Barsallo describes, these sessions often were opportunities for Mr. Lopez to vent about his frustrations. Mr. Barsallo, who considered Mr. Lopez a friend at the time, often commiserated with Mr. Lopez in these conversations.[276] The statement that instructions had come from the Presidency falls into that category. Similarly, in one of the transcripts, Mr. Barsallo reports to Mr. López that anti-corruption investigators had requested documents regarding the Claimants MINSA CAPSI Projects.[277] That request related to an erroneous article that had been published in the *La Prensa*, which incorrectly reported that the Health Ministry had approved addenda significantly increasing the total cost of several MINSA CAPSI Projects, including two of Omega's projects.[278] No further inquiries were made after the authorities were provided accurate information.

137. As can be seen, the Claimants lack any credible evidence that the problems encountered on their projects were the product of sovereign action or intent. This stands in stark contrast to the weight of evidence demonstrating the commercial nature of Panama's actions with respect to these projects. Under the circumstances, the Claimants have failed to meet their burden. The claims asserted in this arbitration are commercial in nature and fall outside the scope of the Tribunal's jurisdiction.

3. The Claimants' Umbrella Clause Arguments Do Not Justify the Exercise of Jurisdiction in this Arbitration

138. The Claimants' have asserted claims under Article II(2) of the BIT, which provides that "[e]ach Party shall observe any obligation it may have entered in with regard to investment of nationals or companies of the other Party."[279] When the United States and Panama renegotiated

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also Claimants' Reply ¶ 104 ("[H]e <u>believed</u> that the Comptroller General's Office had orders from the Presidency . . .") (emphasis added).

276 Barsallo II ¶¶ 36-38.

277 WhatsApp message between Frankie López and Nessim Barsallo dated Mar. 3, 2016 (**C-0681**), p. 1.

278 Barsallo II ¶ 40; s*ee* Eric Ariel Montenegro, *Proyectos millonarios, sin concluir en Panamá Oeste,* LA PRENSA (March 2, 2016) https://www.prensa.com/buscador/?text=omega+engineering (last visited Nov. 17, 2019) (**R-0146**) (the caption for the article can still be seen when a search is conducted of the La Prensa website)).

279 BIT (**CL-0001**), Art. II(2).

the terms of their investment agreement and entered into the TPA, they chose not to include an umbrella clause. The Claimants argue, however, that they may import an umbrella clause into the TPA from other BITs to which Panama is a party.[280]

139. The Claimants' efforts to import an umbrella clause into the TPA for purposes of this arbitration is inappropriate because doing so would create jurisdiction over claims where jurisdiction otherwise would not exist. As Panama made clear in its Counter-Memorial, arbitral tribunals have routinely held that parties may not use an MFN provision to create jurisdiction over a claim.[281] This issue typically arises in situations where a claimant is attempting to import a broader dispute resolution clause from one treaty into another or, as is the case here, is attempting to expand the scope of an investment treaty's application.[282]

140. The Claimants assert that they "do not invoke an umbrella clause to gain any additional jurisdictional rights," but merely "urge the Tribunal" to give the text of the "TPA's MFN clause effect as a *substantive* right."[283] That is not accurate. The Tribunal may only resolve disputes that fall within its jurisdiction. When Panama and the United States enacted the TPA, they made clear that disputes brought under the TPA are governed by the TPA dispute resolution clause and disputes brought under the BIT are governed by the BIT's dispute resolution clause for a period of 10 years. Thus, a tribunal must satisfy itself that it has jurisdiction over claims brought under *each treaty*. The absence of an umbrella clause in the TPA means that neither Panama nor the United States consented to protect contractual obligations or to arbitrate disputes involving such

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280 Claimants' Reply ¶ 327.

281 Respondent's Counter-Memorial ¶ 222.

282 *See, e.g.*, *Renta 4 SVSA et al v. Russia*, SCC Case No. V 024/2007, Award (Mar. 20, 2009) (**RL-0014**); *Tza Yap Shum v. Peru*, ICSID Case No. ARB/07/6, Award (June 19, 2009) (**RL-0015**); *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award (Sept. 13, 2006) (**RL-0016**). *Vanessa Ventures Ltd. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award (Jan. 16, 2013) (**RL-0017**) (rejecting the claimant's attempt to expand the definition of "investment" within the Canada-Venezuela BIT through the use of an MFN provision); *M.C.I. Power Group L.C. and New Turbine Inc. v. Ecuador*, ICSID Case No. ARB/03/6, Award (July 31, 2007) (**RL-0018**) (rejecting the claimants' attempt to expand the temporal scope of the Ecuador-US BIT to cover investments made before the treaty entered into force); *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003) (**CL-0047**) (rejecting the claimant's attempt to use the Mexico-Spain BIT's MFN clause to retroactively apply the protections of the BIT to an investment predating the treaty, which was not covered by the BIT's protection").

283 Claimants' Reply ¶ 328 (emphasis in original).

obligations under any circumstances. The Claimants, however, would have the tribunal import an umbrella clause into the TPA, thereby expanding the scope of protection agreed to by the parties and creating jurisdiction over a class of disputes that otherwise does not exist.

141. Allowing the Claimants to import an umbrella clause into the TPA would also be problematic due to the unique procedural posture of this case. The Claimants have asserted claims under two treaties in effect between the same parties at different times. The United States and Panama specifically renegotiated the scope of their treaty obligations towards each other in the TPA. In doing so, the parties modified and, in some cases, narrowed the scope of their respective obligations. If the Tribunal allows the Claimants to import an umbrella clause into the TPA through the MFN provision, it will effectively moot the changes that Panama and the United States agreed to when enacting the TPA. Indeed, such a decision would effectively preclude parties from amending the scope of their treaty obligations towards each other. That clearly was never the intent of the most favored nation provision. As such, the Claimants argue for an inappropriate use of the MFN provision, which should be rejected.

142. Similarly, the BIT's umbrella clause does not require the Tribunal to hear commercial claims brought under that treaty. Indeed, the mere presence of an umbrella clause does not permit a party or an arbitral tribunal to presume that breaches of contract rise to the level of a treaty breach. This issue was addressed by the annulment committee in *Vivendi v. Argentina*.[284] In that case, the annulment committee addressed the relationship between a breach of contract and breach of treaty.[285] It noted that the umbrella clause in the Argentina-France BIT did not relate directly to the breach of a municipal contract, but "set an independent standard."[286] Accordingly, the annulment committee found that:

> whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case

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284 *Compañia de Aguas del Aconquja S.A. and Vivendi Universal v Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment (July 3, 2002) (**RL-0019**).

285 *Vivendi v. Argentina* (**RL-0019**), ¶¶ 95-96.

286 *Vivendi v. Argentina* (**RL-0019**), ¶ 95.

> of the BIT, by international law; in the case of the [contract], by the proper law of the contract . . . .[287]

143. The tribunal in *El Paso v. Argentina* similarly found that an umbrella clause "will not extend the Treaty protection to breaches of ordinary commercial contract entered into by the State or a State-owned entity, but will cover additional investment protections contractually agreed by the State as a sovereign—such as a stabilization clause—inserted in an investment agreement."[288]

144. The Claimants do not dispute these fundamental principles, but instead, focus on cases in which ICSID tribunals found specific contract breaches to also have breached the relevant investment treaties.[289] Those cases do not control and have not addressed key questions relevant here.

145. The Claimants cite to *Noble Ventures Inc. v. Romania* for the proposition that umbrella clauses are "usually seen as transforming municipal law obligations into obligations directly cognizable in international law."[290] In that case, the claimant entered into a privatization agreement with a state-owned entity of the Romanian government regarding the acquisition, management, and operation of a steel mill and other related assets. The government was accused of breaching several of its obligations under the privatization agreement.

146. In reaching its decision, the *Noble Ventures* tribunal noted that umbrella clauses were exceptions to the "well established rule of general international law that in normal circumstances *per se* a breach of a contract by the State does not give rise to direct international responsibility on the part of the State."[291] As such, the tribunal made clear that umbrella clauses, "as with any other exception to established general rules of law . . . can as a consequence proceed only from a

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287 *Vivendi v. Argentina* (**RL-0019**), ¶ 96.

288 *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction (Apr. 27, 2006) (**RL-0020**), ¶ 81.

289 Claimants' Reply ¶ 329.

290 Claimants' Reply ¶ 329 (quoting *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award (Oct. 12, 2005) (**CL-0078**), ¶ 53).

291 *Nobel Ventures v. Romania* (**CL-0078**), ¶ 53.

strict, if not indeed restrictive, interpretation of its terms[.]"[292] Ultimately, the *Noble Ventures* tribunal found that the claimant's breach of contract rose to the level of a treaty breach. However, the tribunal made clear that it was not "express[ing] any definitive conclusion as to whether therefore, despite the consequences of the exceptional nature of umbrella clauses," the umbrella clause in that case "perfectly assimilates to breach of the BIT *any* breach by the host state of *any* contractual obligation as determined by its municipal law *or* whether the expression 'any obligation,' despite its apparent breadth, must be understood to be subject to some limitation in the light of the nature and objects of the BIT."[293] In other words, the tribunal found that, in the context of that case, the government's specific breaches of the privatization agreement were sufficient to constitute a treaty breach. It did not, however, detract from the general principles set out by the *Vivendi* annulment committee and the *El Paso* tribunal. To the contrary, the *Nobel Ventures* tribunal made clear that umbrella clauses must be read "strict[ly], if not indeed restrictive[ly]."[294]

147. Here, the Claimants did not enter into a privatization (or analogous) agreement, but instead were awarded a series of ordinary construction contracts, each with its own explicit dispute resolution provision. The alleged breaches do not relate to specific investment-related promises made to the Claimants, but to whether the relevant government ministries or municipalities timely paid invoices, approved contract amendments, or properly terminated agreements. Such alleged breaches are fundamentally different from the failure of a government to honor specific obligations made in privatization agreements designed to facilitate foreign investment. The object and purpose of international law was never to subject governments to international liability for breaches of this type.

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292 *Noble Ventures v. Romania* (**CL-0078**), ¶ 55.

293 *Noble Ventures v. Romania* (**CL-0078**), ¶ 61 (emphasis in original).

294 *Noble Ventures v. Romania* (**CL-0078**), ¶ 55.

C. THE BIT CLAIMS MUST BE RESOLVED UNDER PREVIOUSLY AGREED DISPUTE RESOLUTION MECHANISMS

148. If the Tribunal finds that the Claimants' claims are not commercial in nature, but are investment disputes within the meaning of the BIT and TPA, it should still dismiss all claims governed by the BIT's dispute resolution provision.

149. As the Tribunal will recall, five of the contracts at issue in this arbitration were signed prior to October 31, 2012, during the period when the Panama-US BIT was in effect. The remaining three contracts were signed after October 31, 2012, the date on which the TPA entered into force. It is agreed that "the dispute resolution provisions of the BIT apply to the five Contracts concluded prior to the TPA's entry into force, and the dispute resolution provisions of the TPA apply to the Claimants' three remaining Contracts."[295] Accordingly, the Claimants must satisfy the requirements set forth in the dispute resolution provisions of each of these treaties in order to bring the relevant claims to arbitration. The Claimants have failed to satisfy the requirements of the BIT's dispute resolution provision.

150. Article VII(2) of the BIT provides that "in the event of an investment dispute," the parties shall first attempt to resolve the dispute through "consultation and negotiation." If the dispute cannot be resolved in that manner, the treaty sets out explicit rules governing how disputes are to be addressed:

> If the dispute cannot be resolved through consultation and negotiation, then the dispute shall be submitted for settlement in accordance with the applicable dispute-settlement procedures upon which they have previously agreed. … With respect to expropriation by either party, any dispute-settlement procedures specified in an investment agreement between such Party and such national or company shall remain binding and shall be enforceable in accordance with, inter alia, the terms of the investment agreement, relevant provisions of the domestic laws of such Party and treaties and other international agreements regarding enforcement of arbitral awards to which such Party has adhered.[296]

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295 Request for Arbitration ¶ 52.

296 BIT (**CL-0001**), Art. VII(2) (emphasis added).

151. Article VII(2), therefore, establishes three fundamental rules governing the resolution of investment disputes arising under the BIT. *First*, parties must attempt to resolve "investment disputes" through negotiations. Article VII(1) defines the term "investment dispute" to mean, *inter alia*, "(c) a dispute involving . . . an alleged breach of any right conferred or created by this Treaty with respect to an investment."[297] *Second*, if negotiations fail, those "investment disputes" must be resolved through the "previously agreed" dispute resolution mechanisms. *Third*, even in circumstances in which the dispute involves the expropriation of an "investment agreement," the "previously agreed" dispute resolution mechanism in the underlying agreement still governs.

1. The Claimants' Position Confirms that this Dispute Falls Within the Scope of Article VII(2)

152. As its plain text makes clear, the Article VII(2) forum selection mechanism applies without limitation to disputes in which an investor alleges that a right conferred or created by the BIT has been breached. However, striving to avoid the dispute resolution mechanisms to which they explicitly agreed, Claimants appear to take the position that Article VII(2) does not apply because they are making an investment claim under the Panama-US BIT.[298] Indeed, the Claimants argue that Panama's objection "disregards the fundamental nature of this 'dispute,' [*i.e.*, the dispute currently before the Tribunal] which is an investment dispute within the meaning of the BIT," governed by international law.[299]

153. The Claimants' argument is clearly inconsistent with the plain terms of Article VII(2), which allocate investment disputes to "the applicable dispute-settlement procedures upon which they have previously agreed." The BIT makes this standing allocation very clear later in Article VII(2), in the course of discussing expropriation claims, where it provides that "any dispute

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297 BIT (**CL-0001**), Art. VII(1).

298 *See* Claimants' Reply ¶ 343.

299 Claimants' Reply ¶ 343.

settlement procedures specified in an investment agreement … shall remain binding ….”[300] Article VII(2) does not admit to any exception.

154. Further, in making this argument, the Claimants rely on the definition of investment agreement set out in Article VII(1).[301] The Claimants, therefore, effectively concede that claims relating to the five contracts signed during the BIT era are governed by Article VII(2). While the Claimants are doubtless unhappy that they are relegated to the differing dispute resolution provisions in the multiple contracts that they have breached, that creates no exception to the mandatory forum provision of the BIT.

2. The Claimants Cannot Avoid the Requirements of Article VII(2) Simply Because of Who Signed the Relevant Agreements

155. The Claimants also argue that Article VII(2) should not apply because the parties to the arbitration are nominally different from the parties to the five contracts subject to the BIT that contain mandatory dispute resolution procedures. According to the Claimants, although Mr. Rivera signed all of those contracts, he did not do so in his personal capacity but on behalf of other legal entities.[302] Specifically, the three MINSA CAPSI Contracts were signed by Mr. Rivera on behalf of Omega Engineering Inc. (*i.e.*, Omega Panama). The Colón Public Market and the Ciudad de las Artes Contracts were signed by Mr. Rivera on behalf of both Claimant Omega Engineering LLC and Omega Engineering Inc.

156. The Claimants are attempting to hide behind irrelevant corporate veils.

a. Mr. Rivera’s Companies Are Interchangeable

157. Omega is a privately held, family business started by Mr. Rivera’s father. In October 2006, Mr. Rivera took control of Omega US, and is its sole shareholder, president, and chief

300 BIT (**CL-0001**), Art. VII(2).

301 Claimants’ Reply ¶ 343.

302 Claimants’ Reply ¶ 345, n. 982.

operating officer.[303] As the Claimants freely admit, Omega US was directly involved in all of the bids at issue in this case.[304]

158. In 2009, Mr. Rivera incorporated Omega Panama under the laws of Panama. At all times (including when the relevant contracts were signed), Mr. Rivera was Panama's "100% shareholder, and he had full control of [the company]."[305] According to the Claimants, Omega Panama "participated in all relevant Government tenders in Panama alongside Omega U.S."[306] Indeed, according to the Claimants, it was essential that both companies participate in the tender because "Omega Panama was a newly registered company without its own track record."[307]

159. Mr. Rivera relied heavily on Omega US's credentials when making its bids. As the Claimants boast, "[t]hanks to Omega U.S.'s bonding capacity, solid financials, track record, project portfolio, and other specifications customarily used by project owners to evaluate bid proposals," Mr. Rivera was able "to bid for larger Panamanian projects."[308] Therefore, "all bids for large public projects in Panama were made through a consortium consisting of Omega Panama and Omega U.S."[309] "The Omega Consortium that ended up bidding on public projects in Panama therefore consisted of: (i) Omega U.S., providing vast experience in the construction sector and excellent goodwill built up over decades of successful operations in Puerto Rico and the Caribbean; [and] (ii) Omega Panama, satisfying the local company requirement included in many of the tenders and providing the legal and economic structure to manage the construction projects locally…."[310] Accordingly, the Claimants held out Omega U.S. as acritical component

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303 Rivera I ¶ 5; Request for Arbitration ¶ 12, n. 20; Omega Engineering Organizational Chart (**C-0109**); Omega U.S.'s Corporate Profile (**C-0012**).

304 Claimants' Memorial ¶ 27.

305 Claimants' Memorial ¶ 32, n. 53.

306 Claimants' Memorial ¶ 116 (emphasis added).

307 Claimants' Memorial ¶ 34.

308 Claimants' Memorial ¶ 34.

309 Claimants' Memorial ¶ 32 (emphasis in original).

310 Claimants' Memorial ¶ 33.

in all of the "Omega" bids, such that Panama was intended to and would reasonably have relied on the participation of Omega U.S.

160. Mr. Rivera's domination over all of the Omega entities is further evidenced by the extent to which he treated funds earned by any "Omega" entity as fungible and available for his own personal use. While Mr. Rivera's assistant Mr. López testified that the "Omega Panama account was used almost exclusively for matters related to the public works contracts,"[311] he goes on to admit that, to purchase property for his personal benefit, Mr. Rivera would simply "transfer[ ] [money] from Omega Panama" to PR Solutions (another Rivera company).[312] Mr. Rivera clearly scrambled all of his money, freely using "project" money to acquire personal real estate. (Likewise, the criminal investigation of Justice Moncada Luna established that funds transferred from the "Omega Panama" account to PR Solutions was used to bribe Justice Moncada Luna, again showing Mr. Rivera's habit of commingling his multiple accounts.)[313]

b. Mr. Rivera Is the Alter Ego of Omega

161. As shown above, both Mr. Rivera and Omega US were highly visible and essential components of the Omega Group's bidding process and, in their own words, were integral in successfully winning bids. That fact alone would be sufficient to bind Mr. Rivera and Omega US to the contracts based on Mr. Rivera's own admissions or under equitable principles of estoppel. Beyond that, however, Mr. Rivera exercised complete control over all Omega entities, used those entities for his personal projects and gain, and diverted funds paid to Omega entities under public works contracts for his own personal use. Mr. Rivera was, in fact, the alter ego of each Omega entity and, thus, any corporate veil between and among those entities should be pierced for purposes of these proceedings.

162. It is well settled that corporate veils may be pierced as a matter of international law. The International Court of Justice recognized this principle in the *Barcelona Traction* case when it

311 López ¶ 90.

312 López ¶ 90.

313 *See generally* Julio Aguirre's Money Laundering Expert Report for the National Assembly dated Mar. 2, 2015 ("**Aguirre Report**") (**R-0063**).

held that "the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law."[314] Thus, according to the ICJ, the corporate veil may be lifted under international law "to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or obligations."[315]

163. Traditionally, the corporate veil will be pierced where an individual is shown to be the alter ego of a corporate entity, where funds comingled for corporate and private use, or where the corporate form is used to hide relevant facts from or defraud a creditor. Each of these factors is satisfied here. *First*, Mr. Rivera is the sole shareholder, president, and chief executive of both Omega US and Omega Panama (being, together, the entities on whose behalf Mr. Rivera signed the five relevant contracts).[316] He controls every aspect of those companies.

164. *Second*, Omega does not maintain any financial distinction between Omega US and Panama. During the document production phase of this proceeding, Panama requested that the Claimants produce "Bank records of Omega U.S., Omega Panama, and PR Solutions, S.A. from 2010 to 2015."[317] The Claimants objected to this request on the grounds that "Omega did not use a separate bank account for each Project it was completing across the various jurisdictions in which it was operating."[318] The Claimants were clearly admitting to the co-mingling of funds paid to different Omega entities. Moreover, as detailed above and in the López witness statement, Omega Panama received funds that were payable to Omega US, and then funneled that money, paid for public works projects, into unrelated Rivera accounts for unrelated land development deals.[319] More specifically, Mr. López testified that project money owed, at least in

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314 *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, Case No. 1970 I.C.J. 3, Judgment (Feb. 5, 1970) (**RL-0048**), ¶ 58.

315 *Barcelona Traction* (**RL-0048**), ¶ 56.

316 Request for Arbitration ¶ 12, n. 20; Omega Engineering Organizational Chart (**C-0109**); Omega U.S.'s Corporate Profile (**C-0012**).

317 Respondent's Request for Document Production, Request No. 3.

318 Respondent's Request for Document Production, Request No. 3.

319 *See* López ¶ 90; *supra* at Sections II.A.1.b.- II.A.1.g.

part, to Omega US was transferred from Omega Panama—an account supposedly "used almost exclusively for matters related to public works contracts"—to PR Solutions for Mr. Rivera to use for his unrelated personal business.[320]

165. Panama disputes that the money transferred from Omega Panama to PR Solutions was in fact used to purchase land, but rather was funneled into accounts controlled by Justice Moncada Luna as bribe money.[321] Regardless, Mr. Rivera either diverted government funds for his personal use or to bribe the Chief Justice. Either scenario would support piercing of the corporate veil.

166. *Third*, the Claimants admit to disguising the Omega entities' activities in Panama. When Mr. Rivera first entered Panama, he admittedly placed bids in the name of PR Solutions, to obscure the fact that Omega entities would perform the work. The Claimants state that this was done to "protect" Omega,[322] by shielding Omega's reputation from the consequences of its poor performance on these early projects. As a result of this scheme, Panama and other potential employers would not be presented with complete information and would not be able to objectively assess Omega's qualifications in future bids if something went wrong on the PR Solutions projects.

167. Under these circumstances, the Claimants' invocation of corporate separateness would constitute both a misuse of the "privileges of legal personality" and permit the Claimants to evade the "legal requirements" and "obligations" set forth in Article VII(2) of the BIT. The Claimants, therefore, cannot argue that they are not properly a "party" within the meaning of Article VII(2). Corporate veils were never intended to shield parties from liability or obligations under such circumstances.

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320 López ¶ 90.

321 *See supra* at Section II.A.2.a ("**The Claimants' 'Land Deal' Was Fake**").

322 Claimants' Memorial ¶¶ 29-31.

c. The Group of Companies Doctrine Binds Non-Signatories to the Relevant Agreements' Dispute Resolution Provisions

168. The "Group of Companies" doctrine likewise would bind the Claimants to the five agreements governed by the BIT's dispute resolution provisions. Like the concepts of alter ego and equitable estoppel, the Group of Companies doctrine permits tribunals to bind non-signatories to dispute resolution clauses (and other substantive obligations of a contract) where the facts show that it would be inequitable and unfair not to do so.

169. The doctrine arose in the context of a commercial arbitration between Dow Chemical France and ISOVER Saint Gobain.[323] In that case, the tribunal had to determine whether an arbitration agreement could be invoked by (a) the non-signatory parent and (b) non-signatory subsidiary of the party that signed the contract.[324] The tribunal ultimately ruled that the non-signatories could bind themselves to the agreement when "the circumstances and documents . . . show that such application [of the arbitration clause to a non-signatory] conforms to the mutual intent of the parties."[325] The parties' intent can be discerned by the non-signatory's "conclusion, performance, [negotiation], or termination of the contracts."[326] Where a non-signatory has played a role in these functions, the tribunal held that the non-signatory could be bound to the arbitration agreement, "irrespective of the distinct juridical identity of each of its members."[327]

170. In the ICSID context, the tribunal in *Getma v. Guinea* applied the Group of Companies doctrine to bind three non-signatory parties to an arbitration agreement. In that case, the tribunal focused on the actions of the various parties—signatories and non-signatories alike—in determining whether their concerted actions were sufficient to apply the Group of Companies doctrine. The tribunal found it compelling that the Claimants acknowledged that the "investment" at issue was "exclusively the product of each" of the relevant parties' "contribution

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323 *Dow Chemical France, v. ISOVER Saint Gobain*, ICC Case No. 4131, Interim ICC Award, (Sept. 23, 1982) (**RL-0049**), p. 136.

324 *Dow v. ISOVER* (**RL-0049**), pp. 136-137.

325 *Dow v. ISOVER* (**RL-0049**), p. 136-37.

326 *Dow v. ISOVER* (**RL-0049**), p. 136.

327 *Dow v. ISOVER* (**RL-0049**), p. 136.

to the execution of the Concession Agreement."[328] In addition, each of the parties was involved in bidding for the project and negotiating the contract and, as such, were acting as "an association or group whose members have undertaken jointly to execute the obligations of the Concession Agreement together."[329] The tribunal noted that, "[e]ven if this joint and several commitment was not made in writing," "participation in the negotiations on the part of natural persons with double roles, but representing in fact also companies who are clearly participating in the execution of the Agreement . . . warrants that these companies which did not sign the agreement be bound by the Agreement, if not joint and severally, at least each for its part, and also by the Arbitration Clause."[330]

171. Similarly, in *Klöckner v. Cameroon*, the claimant was a shareholder in a joint venture company that entered into an agreement with the government of Cameroon.[331] There the ICSID tribunal had to determine whether it had jurisdiction when the shareholder was not a party to the disputed contract. The tribunal found that it did have jurisdiction because, although Klöckner had not signed, it negotiated the contract and the contract "was concluded in Klöckner's interest."[332] This finding is consistent with the conclusions of Christoph Schreuer, who noted that within ICSID, non-signatories may be bound by an arbitration agreement when "the [non-signatory] company acts in the preparation and possibly the implementation of the investment operation."[333]

172. As shown above, Mr. Rivera and Omega US were intimately involved in the bidding process, contract negotiations, and execution of the every contract at issue in this arbitration. Indeed, the Claimants admit that they could only bid on these projects because of "Omega U.S.'s bonding capacity, solid financials, track record, project portfolio, and other specifications

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328 *Getma International v. Republic of Guinea* [II], ICSID Case No. ARB/11/29, Decision Regarding Jurisdiction (Dec. 29, 2012) (**RL-0050**), ¶¶ 170-171.

329 *Getma v. Guinea* (**RL-0050)**, ¶ 173.

330 *Getma v. Guinea* (**RL-0050)**, ¶ 174.

331 *Klöckner Industrie-Anlagen GmbH and Others v. Cameroon*, ICSID Case No. ARB/81/2, Award, 2 ICSID Reports 9 (Oct. 21, 1983) (**RL-0051**).

332 *Klöckner v. Cameroon*, 2 ICSID Reports (**RL-0051**), at 17.

333 Christoph Schreuer, THE ICSID CONVENTION: A COMMENTARY (2001) (**RL-0052**), Art. 25 ¶ 39.

customarily used by project owners to evaluate bid proposals[.]"[334] Mr. Rivera and Omega US, therefore, held themselves out as integral pieces of the projects. Moreover, each of the contracts specifically referenced the "Omega Consortium," which consisted both of Omega US and Omega Panama.[335] It was reasonably understood by Panama that Mr. Rivera and Omega US would be involved in the execution of the projects. As such, each of the factors relevant for the application of the Group of Companies doctrine has been met.

d. The Fact that the Contracts Were Signed by Panamanian Ministries or Municipalities Does Not Negate the Applicability of Article VII(2)

173. The fact that the Claimants signed contracts with various Panamanian ministries and municipalities likewise does not shield them from the requirements of Article VII(2). The Claimants seek to hold Panama liable under international law for the actions of these ministries and municipalities. Indeed, in their Request for Arbitration, the Claimants state that "[t]he construction contracts which form the factual predicate to the present dispute were signed between, on the one hand, private companies owned and controlled by Mr. Oscar Rivera . . . and on the other hand, authorized agents of the Panamanian Government."[336] The Claimants cannot, on the one hand, attribute liability for the actions of ministries and municipalities to the state while, on the other hand, claim that they are wholly different and distinct entities for purposes of Article VII(2).

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334 Claimants' Memorial ¶ 34.

335 *See* Contract No. 083 (2011) dated Sept. 22, 2011 (**C-0030)**, p. 1 (noting that Omega Panama was the head company of the Omega-Ciracet Consortium which included both Omega Panama and Omega US, as well as Ciracet Corp); Contract No. 077 (2011) dated Sept. 22, 2011 (**C-0028)**, p. 1 (same); Contract No. 085 (2011) dated Sept. 22, 2011 (**C-0031)**, p. 1 (same); Contract No. 093-12 dated July 6, 2012 (**C-0042)**, p. 1 (noting that Omega Panama was acting as the leader of the Omega Consortium, comprised of Omega US and Omega Panama); Contract No. 043 (2012) dated Aug. 17, 2012 (**C-0034)**, p. 1 (noting that the Omega Consortium was comprised of Omega US and Omega Panama); Contract No. 01-13 dated Jan. 24, 2013 (**C-0051**), p. 1 (same); Contract No. 857-2013 dated Sept. 12, 2013 (**C-0056)**, p. 1 (same); Contract No. 150/2012 dated Nov. 22, 2012 (**C-0048)**, p. 1 (noting that the "Omega Engineering Consortium" was comprised of Omega US, Omega Panama and Cielo Grande, S.A.).

336 Request for Arbitration ¶ 3.

3. Application of Article VII(2) Would Not Undermine the Object and Intent of the BIT

174. The Claimants also argue that Panama's position would undermine the object and intent of the BIT.[337] That is not true. The Claimants wrongly assume that the BIT is intended to protect all investments from all adverse actions at all times. In reality, when negotiating investment treaties, States define the precise scope of investment protections they will provide. Thus, each treaty will identify which types of investments are protected, the substantive rights to be conferred, and which disputes may be resolved through arbitration.

175. Here, Panama and the United States expressly defined which investment disputes may go to arbitration and which may not. Under Article VII(2), where a private investor and a government party to an investment dispute have previously agreed to resolve their disputes through specific dispute resolution mechanisms, those mechanisms must be followed. Where, however, there are no agreements between the private party and the government entity, Article VII(3) provides that the investor may choose to submit its dispute directly to international arbitration. Thus, international arbitration is available to a defined segment of potential investors. The Claimants, however, do not fall into that segment.

4. The Unity of Investment Concept Does Not Apply in this Case

176. Finally, the Claimants argue that the claims governed by the BIT's dispute resolution mechanism should not be dismissed because of the Unity of Investment doctrine.[338] According to the Claimants, the Tribunal should not treat the five contracts subject to the BIT's dispute resolution procedure differently than the three contracts subject to the TPA's dispute resolution

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337 Claimants' Reply ¶¶ 346-47.

338 Claimants' Reply ¶ 348.

procedure because they "made a unitary investment in Panama."[339] There is no basis for the Claimants' position.

177. The Unity of Investment doctrine provides that, in determining its jurisdiction, Tribunals may look at an overall investment instead of its component parts.[340] However, this doctrine applies in cases where each individual component of an investment "forms an integral part of an overall operation."[341] Indeed, the components of an investment must be "closely related and cannot be disassociated from [one another]" before a Tribunal can consider application of the doctrine.[342]

178. The principles underlying this doctrine were explained by the tribunal in *CSOB v. Slovakia*, which stated:

> [a]n investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment. Hence, a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment.[343]

179. Despite this finding, the *CSOB* tribunal made clear that the application of the Unity of Investment doctrine did not mean that a tribunal "automatically acquires jurisdiction with regard to each agreement concluded to implement the wider investment operation."[344] Instead, "claims

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339 Claimants' Reply ¶¶ 348-349.

340 *See Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction (May 24, 1999) (**RL-0053**), ¶ 72.

341 *CSOB v. Slovakia* (**RL-0053**), ¶ 80.

342 *CSOB v. Slovakia* (**RL-0053**), ¶ 72.

343 *CSOB v. Slovakia* (**RL-0053**), ¶ 279.

344 *CSOB v. Slovakia*, ICSID Case No. ARB/97/4, Decision on Respondent's Further and Partial Objection to Jurisdiction (Dec. 1, 2000) (**RL-0054**), ¶ 28.

of different violations of an investment may be subject to different jurisdictional objections," and "different types of claims require different jurisdictional analyses."[345]

180. Similarly in *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, the claimant contracted to reconstruct and operate a government ship. The claimant and Ukraine entered into a series of agreements relating to the overall transaction. Each of those contracts contained elements of the overall services that were to be provided to Ukraine as part of the engagement. As such, the Tribunal found that it was "not necessary to parse each component of the overall transaction" when a tribunal is "presented with claims . . . arising out of . . . interrelated contracts."[346]

181. The Claimants' reliance on the Unity of Investment doctrine here is completely unfounded. *First*, Panama has not disputed that the contracts signed by the Claimants are "investments" within the meaning of the BIT and TPA.[347] Rather, Panama's position is that the disputes arising under these five contracts must be resolved in accordance with their individual express terms, as required by Article VII(2). The Unity of Investment doctrine does not apply in this situation.

182. *Second*, even if the Unity of Investment doctrine could apply in principle in this case, the requirements for applying that doctrine have not been met. That doctrine applies in situations where each individual piece of a particular activity is indispensable to that activity's function. Here, the Claimants' investments consists of eight contracts for eight separate projects with five

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345 *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award (May 18, 2010) (**RL-0055**), ¶ 97.

346 *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction (Mar. 8, 2010) (**CL-0218**), ¶ 92.

347 In their Request for Arbitration, the Claimants describe their "investment" as "Claimants' Contractual Investments" and then proceed to give a short summary of each of these eight contracts. Request for Arbitration ¶¶ 18-26. Likewise, in their Memorial, the Claimants equate their "investment" with the eight contracts at issue in this arbitration. For example, in Section IV of their Memorial, entitled "Claimants' Investment in Panama was Progressing Well Until President Varela Assumed Office in 2014," the Claimants state that "[b]efore the Varela Administration assumed office (*i.e.*, during the Martinelli Administration), the Projects were generally progressing as expected . . . ." Claimants' Memorial ¶ 51 (emphasis added). The term "Projects" is defined as the eight contracts at issue in this arbitration. Claimants' Memorial ¶ 41. Further, the Claimants consistently refer to the alleged treatment of their contracts when describing Panama's purportedly unlawful conduct. Claimants' Memorial, Sect. VI.

different government ministries or municipalities entered into over a period of multiple years. The Claimants' contracts are not interdependent, interrelated, or inseparable. They are stand-alone agreements that have no bearing on any other project. As such, the rationale underlying the unity of investment concept does not apply in this case.

183. *Third*, as mentioned, this case presents unusual, if not unique, circumstance in which the contracts serving as the Claimants' investments were entered into at different times and are subject to different investment treaties. [348] As the Claimants acknowledge in their Request for Arbitration, "the dispute resolution provisions of the BIT apply to the five Contracts concluded prior to the TPA's entry into force, and the dispute resolution provisions of the TPA apply to the Claimants remaining Contract."[349] The dispute resolution provisions in the BIT and TPA are different and subject investments made under those treaties to different requirements. The existence of Article VII(2) in the BIT and the absence of a similar provision in the TPA is a clear example of this differential treatment.

184. It is a fundamental principal of international law that tribunals must interpret treaties in accordance with their plain meaning.[350] Tribunals likewise may not interpret treaties in a way that renders provisions meaningless.[351] To satisfy these principles, the Tribunal must ensure that the Claimants' claims meet the requirements of the specific dispute resolution clause to which they are subject. If they do not, the Tribunal lacks jurisdiction over those claims, as the

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348 Request for Arbitration ¶¶ 18-26 (describing the Claimants "Contractual Investments").

349 Request for Arbitration ¶ 52.

350 *El Paso v. Argentina* (**CL-0056**), ¶ 559 ("The Tribunal cannot accept the [party's] interpretation, which goes against the plain meaning of the text . . . ."); *Impregilo S.p.A v. Argentine Republic* (**CL-0083**), ¶ 341 (same); Andrew Newcombe and Luis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, KLUWER LAW INTERNATIONAL (2009) (**RL-0046**), p. 11, ¶ 2.28 ("The starting point of any analysis must be the ordinary meaning of its terms."); *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case. No. AA 227, Interim Award on Jurisdiction and Admissibility (Nov. 30, 2009) (**RL-0047**), ¶ 384 ("[A] treaty must be interpreted first on the basis of its plain language.").

351 *Cemex Caracas Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction (Dec. 30, 2010) (**RL-0027**) ¶ 107 ("[I]t is a cardinal rule of the interpretation of treaties that each and every operative clause is to be treated as meaningful rather than meaningless.") (quoting *Eureko B.V. v. Republic of Poland*, Ad Hoc Arbitration, Partial Award, (Aug. 19, 2005), ¶ 248); *Emilio Agustín Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction (Jan. 25, 2000) (**RL-0056**), ¶ 248 ("Claimant's interpretation of [the BIT provision] would deprive this provision of any meaning, a result that would not be compatible with generally accepted principles of treaty interpretation [.]").

requirements set forth in the dispute resolution provisions define the scope of Panama's consent to arbitrate. Such requirements cannot be avoided through the Unity of Investment concept.

185. For each of these reasons, the Tribunal should dismiss all claims raised under the BIT on the grounds that they must be resolved in accordance with previously agreed dispute resolution provisions.

D. THE TRIBUNAL LACKS JURISDICTION OVER CLAIMS RELATING TO PANAMA'S CRIMINAL INVESTIGATION, WHICH DO NOT ARISE DIRECTLY OUT OF AN INVESTMENT

186. It is undisputed that an ICSID tribunal has jurisdictions only over legal disputes that arise "directly out of an investment."[352] As shown by Panama in its Jurisdictional Objections, the Tribunal lacks jurisdiction over allegations regarding the criminal investigations initiated by Panama against Mr. Rivera and Omega because those investigations did not arise directly out of the Claimants' investment.

187. The Claimants challenge Panama's position on three grounds. *First*, they claim that this is only a "*partial* jurisdictional objection."[353] In this regard, the Claimants are correct. The fact that this specific argument is only a "partial" jurisdictional objection, however, does not mean that it is any less valid or that it is not capable of eliminating issues that are improperly before the Tribunal. If the Tribunal agrees that allegations regarding Panama's criminal investigation of Mr. Rivera and Omega are outside the scope of its jurisdiction, but denies Panama's broader jurisdictional objections, the Tribunal must dismiss these allegations and disregard them when deciding the merits of the Claimants' claims.

188. *Second*, the Claimants argue that the criminal investigation into Mr. Rivera arose directly out of the Claimants investment. In making this argument, the Claimants misconstrue what the concept of "arising directly out of an investment" means. Panama initially investigated Justice Moncada Luna based on complaints filed by Panamanian bar associations regarding Justice Moncada Luna's questionable ownership of two luxury condominiums. These investigations

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352 ICSID Convention (**CL-0004**), Art. 25.

353 Claimants' Reply ¶ 335 (emphasis in original).

uncovered suspicious payments from various contractors, including the Claimants, to Justice Moncada Luna. At the time the investigation started, Panamanian officials had no idea whether they would uncover any criminal activity by Justice Moncada Luna or whether any third parties might be involved. The National Assembly's investigation was limited in scope to Justice Moncada Luna. Other parties—including the Claimants—that were found to have been involved were referred to the National Prosecutor's office for further investigation. The specific investigation into the Claimants, therefore, was a byproduct of the criminal investigation and prosecution of Justice Moncada Luna, and certainly did not arise directly out of the Claimants' investments.

189. *Third*, the Claimants argue that "[t]he Panamanian authorities initiated the investigations as part of a multi-faceted effort *to destroy Claimants' investments*."[354] This statement is obviously wrong. Under the Claimants' theory, the Panamanian government initiated a criminal investigation of its Chief Justice solely to damage the investments of a single foreign investor. Moreover, since the criminal investigation into Mr. Rivera and Omega was the product of the investigation into Justice Moncada Luna, Claimants' theory would require Panama to have had advance knowledge of the payments made by the Claimants to Justice Moncada Luna, such that the government could then justify its subsequent investigation of the Claimants' activities. Of course, if Panama had such knowledge, and had the desire to "destroy Claimants' investments," it would have been easier to initiate an investigation into the Claimants directly and to forego the Justice Moncada Luna investigation entirely.

190. The Claimants have fabricated the notion of a highly implausible conspiracy to destroy their investments. The Tribunal must reject it out of hand.

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191. For the many above stated reasons, the Request for Arbitration and this proceeding should be dismissed on the basis of a lack of jurisdiction.

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354 Claimants' Reply ¶ 337 (emphasis in original).

THE REPUBLIC OF PANAMA'S REJOINDER ON THE MERITS

III. PANAMA'S CONDUCT COMPLIES WITH ITS OBLIGATIONS UNDER THE BIT AND TPA

A. PANAMA DID NOT ENGAGE IN A "CAMPAIGN OF HARASSMENT AGAINST CLAIMANTS AND THEIR INVESTMENT"

192. The Claimants persist in their notion that Panama undertook a "campaign of harassment against Claimants and their investment."[355] There is no evidence of such instructions or that a "targeted campaign of harassment" ever occurred. The Claimants, however, concede that there is no direct evidence of this campaign. Rather, they state that the "breadth and timing" of actions that they consider to be in breach of the BIT and TPA "cannot be coincidental," but that "the more likely—indeed, the only—explanation is that President Varela instructed his loyalists within the Government to execute a targeted campaign of harassment against Claimants' investment."[356] Supposition does not substitute for evidence, and states may not be held liable for breaches of international investment law in the absence of a clear preponderance of the evidence.[357]

1. President Varela Denies the Claimants' Allegations

193. President Varela has provided testimony directly responding to the Claimants allegations.[358] In his witness statement, President Varela expressly states that, while he "knew Mr. Oscar Rivera," he "never requested any amount for my presidential campaign or for any

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355 *See, e.g.*, Request for Arbitration ¶ 27; Claimants' Memorial, Section VI ("**UPON TAKING OFFICE, THE VARELA ADMINISTRATION LAUNCHED AN ORCHESTRATED CAMPAIGN OF HARASSMENT AGAINST CLAIMANTS AND THEIR INVESTMENT**"); Claimants' Reply ¶¶ 3, 5, 271, 347, 365.

356 Claimants' Reply ¶ 5.

357 *See Unglaube v. Republic of Costa Rica*, ICSID Case Nos. ARB/08/1 and ARB/09/20, Award (May 16, 2012) (**CL-0095**), ¶¶ 33-35 ("[T]here is a nearly universal practice among international arbitration tribunals to require each party to prove the facts which it advances in support of its own case . . . . The degree to which evidence must be proven can generally be summarized as . . . a preponderance of the evidence. . . . A claimant ultimately cannot prevail without meeting these minimum standards."); *Glencore International A.G. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award (Aug. 27, 2019) (**RL-0058**), ¶ 669 ("As for the standard to be applied to assess the evidence, the Tribunal perceives no reason to depart from the traditional standard of preponderance of the evidence, since neither the Treaty nor the ICSID Arbitration Rules impose a different standard."); *Caratube Int'l Oil Co. LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award (Sept. 27, 2017) (**CL-0212**), ¶ 1151 ("Claimants . . . must thus show that it is more probable than not, by a preponderance of evidence, that the facts they allege are true.").

358 Witness Statement of Juan Carlos Varela Rodriguez dated Oct. 7, 2019 ("**Varela**").

other purpose" from Mr. Rivera.[359] As such, any suggestion that President Varela asked Mr. Rivera "for a campaign contribution of six hundred thousand U.S. dollars" is "categorically false."[360]

194. President Varela further testifies that "[a]ny allegation regarding attacks on Mr. Oscar Rivera or his investments in Panama facilitated by me during my presidential term are totally unfounded and false."[361] Any decision by Mr. Rivera to "suspend his investments in Panama," therefore, "had absolutely nothing to do with [President Varela's] conduct as President of the Republic of Panama."[362]

195. President Varela's testimony should end the inquiry into whether the Claimants were targeted by Panama for any reason. As discussed below, however, the Claimants' position is undermined by the testimony of Panama's other witnesses and the complete lack of evidence supporting their allegations.

2. The Claimants Have Presented No Evidence Supporting Their Allegations

196. In their Memorial, the Claimants allege that President Varela targeted the Claimants because of their failure to make a US$ 600,000 campaign contribution.[363] In its Counter-Memorial, however, Panama demonstrated the unfounded nature of this allegation and the utter lack of evidence underlying it. Not surprisingly, the Claimants all but abandoned the argument that they were targeted because of the alleged refusal to make a campaign contribution. There is virtually no mention of this issue in the Claimants' Reply memorial and the Claimants present no

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359 Varela ¶ 5.

360 Varela ¶¶ 3-4

361 Varela ¶ 7.

362 Varela ¶ 6.

363 Claimants' Memorial ¶¶ 68-69 (alleging that, upon Mr. Rivera's refusal to make the campaign contribution, President Varela "stated, coldly, that he knew very well that some of the Omega Consortium Projects would not be finished by the time the new government assumed power and that, in Panama it is very often hard to collect on contracts awarded by the previous Administration" and that, "[t]rue to his work, once Mr. Varela came to power, his administration began a concerted and organized campaign of harassment against Mr. Rivera and his companies, which culminated in the decimation of Claimants' investment in Panama and abroad.")

evidence to support their allegation. Mr. Rivera offers nothing new in his second witness statement to support that a campaign contribution was ever solicited or that a threat was ever made. Rather, he simply asserts that Panama "***does not deny*** that President Varela pursued [him] and met with me at La Trona restaurant."[364] That statement is irrelevant and nonsensical. A meeting at a restaurant is not the same as a solicitation for a campaign contribution and does not equate to a threat of retaliation if the campaign contribution is not given. Mr. Rivera's statement, therefore, simply confirms that he has no real evidence to substantiate his outrageous allegation against Mr. Varela.

197. The Claimants' attempt to bolster Mr. Rivera's statements with testimony from Mr. López also fails. Mr. López admits that he was not at the restaurant when the alleged campaign contribution was requested and, in fact, did not personally see Mr. Varela at the restaurant. [365] Mr. López cannot even remember whether the event occurred at the end of 2012 or beginning of 2013—a period of several months.[366] Mr. López further states that he was not told about the alleged campaign contribution until for a couple days after the request supposedly was made, and that he does not know whether Mr. Rivera told anyone else. [367] Mr. López's testimony in this regard is not evidence.

198. In addition, the Claimants have not submitted any documents supporting their allegation that a campaign contribution was solicited or that threats were made. Mr. Rivera has not exhibited a single email, text message, or WhatsApp transcript between himself and anyone else supporting his claims. It is quite remarkable that, despite having supposedly been so troubled by President Varela's request, Mr. Rivera would not have reached out to Ana Graciela Medina (who supposedly arranged the meeting), or any other lawyer or confidante to make a record of the events and seek guidance.

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364 Rivera II ¶ 40 (emphasis in original).

365 López ¶ 69.

366 López ¶ 69.

367 López ¶ 70.

199. Perhaps because of the complete absence of evidence supporting their allegations, the Claimants change tack in their Reply and argue that, alternatively, they were targeted because of their prior affiliations with the Martinelli administration.[368] Again, the Claimants provide no credible evidence to support their allegation.

200. There are no documents establishing that the Claimants were targeted for harassment because of their affiliation with the Martinelli administration. The Claimants' only real effort to address this issue is through the testimony of Mr. López. As noted above, however, Mr. López's testimony is nothing more than hearsay and unsubstantiated statements attributed to unidentified speakers. Indeed, the sum total of the Claimants' so-called "evidence" is: (a) a collection of statements or instructions supposedly made to third parties and related to Mr. López; and (b) statements supposedly made by unnamed "public officials," an anonymous "engineer working in the La Chorrera Judiciary," "one of the Municipal Council of Colón's legal counsel," and "all the people in the Ministries and Government agencies who told me that there was an intention on the part of the Government to act against Oscar [Rivera] and his companies."[369] These statements are not evidence.

201. Moreover, they are directly contradicted by Panama's witnesses in this case. Representatives from the Ministry of Health, the Judiciary, the Municipality of Panama, INAC, the Comptroller General's office, and President Varela himself have testified that they were never asked or instructed by anyone in the Varela administration to take any adverse actions against the Claimants. Those statements fundamentally undermine the Claimants' position.

202. Mr. López testifies that Federico Policani "told me personally [that] he had been directed by the Presidency to terminate the Contracts with the Omega Consortium because the other ministries were doing the same."[370] Mr. Policani was the Mayor of Colón at the time when the Claimants' project to construct a new Municipal Palace in the city was ongoing. The Claimants'

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368 *See*, *e.g.*, Claimants' Reply ¶¶ 1-2, 10, 62, 69, 74-75, 94; Claimants Reply at Section V ("**PRESIDENT VARELA AND HIS ADMINISTRATION BEGIN A MULTI-FLANKED ATTACK AGAINST MR. RIVERA AND THE OMEGA CONSORTIUM AS PART OF PRESIDENT VARELA'S ANTI-MARTINELLI VENDETTA**").

369 López ¶ 73.

370 López ¶ 73.

allegation is untrue and unreliable. As described below, Mr. Policani expressed, as late as mid-2015, his desire for the Omega Consortium to continue with the project, and the Municipality's commitment to working with the Omega Consortium to ensure the contract was duly extended.[371] Moreover, the Municipality of Colón is an independent branch of the government and is not directly answerable to anyone in the Presidency. President Varela, therefore, would have had no authority to "direct" Mr. Policani or anyone else at the Municipality to take actions against the Omega Consortium. It is clear that Mr. Lopez's testimony is false.

B. THE CLAIMANTS' ALLEGATIONS REGARDING EACH OF THE PROJECTS LACK MERIT

1. The Municipality of Panama Public Market Projects

203. Omega's performance on its contract with the Municipality of Panama for the design, construction and furnishing of the Pacora and the Juan Díaz Public Markets was poor from the very beginning. Initially, Omega failed to deliver compliant designs, which obstructed progress on the projects and prevented the Comptroller General's office from approving any of Omega's payment applications. Then, once construction work on the projects commenced, Omega failed to devote sufficient personnel and to keep the projects on schedule. Omega's flawed performance culminated with its abandonment of the Municipality of Panama Contract in April 2015.

204. In their Reply, the Claimants try to obscure Omega's deficiencies in a variety of ways. For example, the Claimants deny that Omega was contractually bound to deliver certain permits and certificates as part of the markets' design. This argument, however, is predicated on a flawed reading of the Municipality of Panama Contract and Panamanian law, and the Claimants fail to invoke a single provision of the contract in support of their allegations. The Claimants also allege that the Municipality suddenly became uncooperative as soon as José Isabel Blandón, who was elected Mayor of Panama City on the same day as Mr. Varela was elected President, took office. The Claimants, however, ignore substantial documentary evidence submitted by Panama proving that was not the case. Finally, the Claimants argue that Mayor Blandón was

371 *See infra* Section III.B.6.

politically motivated to harm Omega, but again their allegations are thoroughly refuted by the evidence.

205. Below, Panama will demonstrate that all of the setbacks experienced on the Panama City Markets were commercial in nature, were caused by Omega's deficient execution of the contract, and that Mayor Blandón's administration acted transparently and fully cooperated with Omega with a view to making progress on the markets. In the end, despite the Municipality's efforts, Omega abandoned the contract, and the Municipality had no choice but to terminate it in order to allow another company to resume the works.

a. Omega Failed to Provide Complete Designs

206. Panama and Mr. Díaz have each explained that the root cause of the most significant issues on the Pacora and Juan Díaz Markets was Omega's deficient design work. Omega was contractually obligated to develop and present complete designs of the markets that included, among other things, all of the necessary permits, certificates and technical studies, but its designs were incomplete or flawed.[372] In their Reply, the Claimants dispute that Omega had this obligation, and deny that Omega failed to deliver complete designs of the markets.[373] The Claimants, however, provide no evidentiary support for this allegation, and even fail to specify the provisions of the Municipality of Panama Contract on which they rely.

i. Omega Failed to Obtain the Soil Use Certificate for the Pacora Market

207. The Parties agree that the Pacora Market lacked a requisite soil use certificate from the Ministry of Housing.[374] The Claimants, however, argue that Omega was only responsible for submitting an application for the soil use certificate, and not for obtaining and delivering it to the Municipality. In support of this argument, the Claimants point out that the Municipality, not

372 Respondent's Counter-Memorial ¶¶ 137-140. *See also* Díaz I ¶¶ 11-14.

373 Claimants' Reply ¶¶ 170, 174. *See also* López ¶¶ 139-143.

374 *See* Respondent's Counter-Memorial ¶ 138; Claimants' Reply ¶¶ 126, 170-173.

Omega, had competence to follow up with the Ministry of Housing regarding the certificate.[375] The Claimants are wrong: Omega was contractually obligated to obtain the soil use certificate.

208. The request for proposals for the Municipality of Panama Contract (which is incorporated into the contract[376]) is very clear in providing that the contractor is obligated to provide "complete" designs,[377] which includes obtaining and delivering all permits and licenses that are necessary for the execution of the works:

> The Proponent to whom the present tender is awarded shall have exclusive responsibility for complying satisfactorily with the technical requirements demanded in this Request for Proposals.[378]
>
> […]
>
> 3.8 Permits, Rules and Costs. All permits and licenses that are necessary for the execution of the works will be obtained and covered by the contractor […] The contractor shall remain acquainted with the Laws, Agreements, Decrees and Rules applicable to construction and which are in force in the Municipal and National entities […][379]

209. As explained by Mr. Díaz, this is standard language in the Municipality's requests for proposals for constructions projects, and it is understood to encompass permits such as the soil use certificate.[380] The contract is thus clear: Omega, and not the Municipality, was contractually responsible for <u>obtaining</u> the soil use certificate.

210. Also, as a practical matter, the Claimants' argument makes no sense. Under their theory, Omega's only responsibility was to submit an application. The Municipality was responsible for ensuring that the Ministry of Housing—a separate institution under a different level of

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375 Claimants' Reply ¶¶ 170-174. *See also* López ¶¶ 139-143.

376 Contract No. 857-2013 dated Sept. 12, 2013 (**C-0056)**, Cls. 1& 2.

377 Request for Proposals No. 2013-5-76-0-08-AV-004644 dated Mar. 2013 (**R-0099)**, p. 32, Ch. III, Introduction.

378 Request for Proposals No. 2013-5-76-0-08-AV-004644 dated Mar. 2013 (**R-0099)**, p. 10, Ch. II, Cl. 2.

379 Request for Proposals No. 2013-5-76-0-08-AV-004644 dated Mar. 2013 (**R-0099)**, p. 38, Ch. III, Cl. 3.8.

380 Díaz II ¶ 9.

government—issued the certificate. The Municipality has no authority over the Ministry of Housing and cannot compel any decisions to be taken. Moreover, the Ministry of Housing will judge Omega's entitlement to the soil certificate based on the information in the application. If Omega fails to provide adequate information or the Ministry requires new or amended information, the Municipality of Panama cannot address the issue. It is common sense, therefore, that the party who submits the application is the party responsible for obtaining the certificate.

211. Panama explained in its Counter-Memorial that, while obtaining the certificate was not the Municipality's contractual responsibility, the Municipality made substantial efforts and fully cooperated with Omega to help procure the certificate.[381] The Claimants and Mr. López, however, continue to allege in the Reply that the Municipality did not assist Omega in obtaining the certificate,[382] and assert that "the contemporaneous record proves" that to be the case.[383] This is an astonishing claim, given that (i) Panama relied precisely on the contemporaneous record to prove that the Municipality did go to great lengths to assist Omega in obtaining the soil use certificate, and (ii) the Claimants and Mr. López have completely refused to engage with that evidence.[384]

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381 *See generally* Respondent's Counter-Memorial ¶¶ 144-149. *See also* Díaz I ¶¶ 18-28.

382 *See* Claimants' Reply ¶¶ 169-174; López ¶¶ 138, 143.

383 Claimants' Reply ¶ 174.

384 In their Reply, the Claimants only make a minor, passing reference to one of the contemporaneous documents submitted by Panama in its Counter-Memorial, without actually attempting to refute it. *See* Claimants' Reply ¶ 174, n. 524 (citing Letter from the Municipality of Panama to the Ministry of Housing dated Oct. 27, 2014 (**R-0105**)). Likewise, Mr. López does not even address Panama's evidence.

212. To recall, the Municipality of Panama assisted Omega with respect to the soil use certificate by following up with the Ministry of Housing on a weekly basis regarding the status of the certificate,[385] and through the following additional efforts:[386]

- On July 28, 2014, the Ministry of Housing wrote to the Municipality noting that the certificate would need to be processed using a different procedure (*trámite para Esquema de Ordenamiento Territorial*) than the one originally requested.[387]

- On August 28, 2014, the Municipality replied, stating the reasons why the Ministry's proposal to use a different procedure was unfounded, and insisting that the certificate be processed using the requested procedure.[388]

- On October 13, 2014, Mayor Blandón himself intervened in the discussions between the Municipality and the Ministry of Housing, reiterating the Municipality's request that the Ministry approve the certificate.[389]

- The Ministry of Housing was still not convinced, and on October 17, 2014, it decided to convene a meeting with the residents and landowners of the areas close to the Pacora Market site to consider and discuss the soil use certificate request.[390]

- The Municipality duly convened and held the meeting,[391] and on July 7, 2015, the Ministry of Housing issued a resolution granting the soil use certificate.[392] By that date, however, Omega had already abandoned the contract.

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385 Díaz I ¶¶ 19-20.

386 *See* Díaz I ¶¶ 21-23.

387 Letter from the Ministry of Housing to the Municipality of Panama dated July 28, 2014 (**R-0101**).

388 Letter from the Municipality of Panama to the Ministry of Housing dated Aug. 28, 2014 (**R-0102**).

389 Letter from the Mayor of Panama City to the Ministry of Housing dated Oct. 13, 2014 (**R-0103**).

390 Letter from the Ministry of Housing to the Municipality of Panama dated Oct. 17, 2014 (**R-0104**).

391 Letter from the Municipality of Panama to the Ministry of Housing dated Oct. 27, 2014 (**R-0105**).

392 Resolution No. 412-2015 from the Ministry of Housing dated July 7, 2015 (**R-0106**).

213. Based on the foregoing, it is clear that Omega failed to comply with its contractual obligation to procure the soil use certificate for the Pacora Market, and that the Municipality fully cooperated with Omega to obtain the certificate as expeditiously as possible.

ii. Omega Failed to Resolve the Accessibility Issues Pertaining to the Juan Díaz Market

214. The Claimants also failed to deliver a compliant design of the Juan Díaz Market. The Juan Díaz Market was to be located on a site encircled by land not owned by the Municipality, which meant that Omega was required to find a way for individuals and vehicles to access the market, such as obtaining a right of way.[393] The Claimants argue in their Reply that Omega had no such contractual obligation, that it was not aware that it was expected to obtain a right of way, and that if anyone was in a position to obtain a right of way, it was the Municipality.[394] In addition, Mr. López claims that "[t]his is the first time [he] heard about this alleged responsibility on [Omega's] part,"[395] and claims that Mr. Díaz's testimony in this regard is "absurd or he simply does not know the content of the Contracts."[396] However, it is the Claimants and Mr. López who ignore the content of the Municipality of Panama Contract and of Panamanian law.

215. As Mr. Díaz explains in his second witness statement, the site where the Juan Díaz Market was to be constructed was selected and included in the contract's request for proposals by Mayor Roxana Méndez, who served during President Martinelli's term in office.[397] The project's site was clearly specified and demarcated in the request for proposals.[398] As already

393 *See* Respondent's Counter-Memorial ¶ 139; Díaz I ¶ 13.

394 Claimants' Reply ¶¶ 167, 171.

395 López ¶ 135.

396 López ¶¶ 134-135.

397 Díaz II ¶ 12.

398 Request for Proposals No. 2013-5-76-0-08-AV-004644 dated Mar. 2013, Annex, Regional Location of the Juan Díaz Site (**R-0130**).

noted, the project's site lacked access routes, as it was encircled by privately-owned land. Mr. Díaz, who has visited the site, testifies that the site's inaccessibility is immediately apparent.[399]

216. As noted above, in executing the contract, Omega was required to develop and submit complete designs. Mr. Díaz explains that, to accomplish this, Omega was legally obligated to consider solutions to the site's accessibility issues, one of which was to procure a right of way. According to Agreement No. 116 of 1996 of the Municipal Council of Panama City, which was in force at the time Omega was to develop the designs of the markets, developers of new construction projects were obligated to prepare, as a prerequisite to obtaining a construction permit, a preliminary design (*anteproyecto*) detailing the site's location, the "[e]asement and construction line of the access route", and "the existence of easements within the site (waterways, rainwater, rights of way, […])".[400] Therefore, as part of the design phase, Omega was required to investigate whether the Juan Díaz project site was the beneficiary of a right of way, and if it was not, to obtain one.[401]

217. Omega cannot excuse itself by claiming it was unaware of the foregoing obligation, as it was contractually obliged to "remain acquainted with the Laws, Agreements, Decrees and Rules applicable to construction and which are in force in the Municipal and National entities[.]"[402] Omega, however, failed to do so.

b. Omega's Construction Work was Defective from the Outset

218. The Claimants allege that the Panama City Markets were "progressing very well" during President Martinelli's administration (*i.e.* prior to Mayor Blandón taking office).[403] As demonstrated in the foregoing discussion, that is false—Omega's design work, which was performed at the very beginning of the projects, was deficient and had serious repercussions on

399 Díaz II ¶ 12.

400 *See* Agreement No. 116 of 1996 of the Municipal Council of Panama City dated July 9, 1996 (**R-0119**), Arts. 4(3.06.01) & 4(3.15).

401 Díaz II ¶ 13.

402 Request for Proposals No. 2013-5-76-0-08-AV-004644 dated Mar. 2013 (**R-0099)**, p. 38, Ch. III, Cl. 3.8.

403 *See* Claimants' Reply ¶ 164. *See also* López ¶ 133; Claimants' Reply ¶ 60.

the projects' subsequent development. To make matters worse, Omega's construction work was also flawed from the start.

219. In support of their claim that the projects were progressing well prior to Mayor Blandón's administration, the Claimants rely on a single email from May 2014 where Jonathan Rodríguez, a former employee of the Municipality, discussed Omega's construction work and noted that "we have to back up the company; they're giving it all they have for the boss to inaugurate the project. Let us all go an extra mile."[404] That email does not establish that Omega's construction work was adequate—it merely demonstrates the Municipality's desire to work with Omega to complete the projects, and Omega's belated efforts to correct its previous shortcomings.

220. Indeed, in an earlier memorandum dated April 2014 (also during the Martinelli administration), Mr. Rodríguez himself noted that the Municipality had identified serious problems with Omega's construction work as early as February 2014, including unauthorized suspensions of the works, demobilizations of personnel, and construction delays, which Omega itself acknowledged.[405] Mr. Rodríguez added that "members of the community informed us that [the foreman] is never present at the projects," and "what the company took almost 6 months to achieve, another company in charge of other markets took less than 1 month, in the same conditions, and the works have already commenced."[406] Mr. Rodríguez further stressed that the Municipality felt "concern[ed] regarding the management of the project" but that "the company has not made any commitment" to correct the issues at hand.[407]

221. The Claimants have acknowledged the existence of this memorandum, yet have not even attempted to refute the deficiencies in Omega's construction work identified by Mr. Rodríguez.[408]

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404 Emails between the Omega Consortium to the City of Panama dated May 15, 2014 (**C-0552**).

405 Memorandum No. 26-2014 from Jonathan Rodriguez to Juan Manuel Vazquez dated Apr. 16, 2014 (**C-0561**).

406 Memorandum No. 26-2014 from Jonathan Rodriguez to Juan Manuel Vazquez dated Apr. 16, 2014 (**C-0561**), pp. 2-3.

407 Memorandum No. 26-2014 from Jonathan Rodriguez to Juan Manuel Vazquez dated Apr. 16, 2014 (**C-0561**), p. 2.

408 *See* Claimants' Reply ¶ 60, n. 200.

c. The Municipality's Treatment of Omega was not Politically Motivated

222. As can be seen from the discussion above, the problems confronting the Pacora and Juan Díaz Markets were commercial in nature. The lack of access roads to the Juan Díaz Market and Omega's failure to procure a right of way presented an unavoidable obstacle to that project, which is why Mayor Blandón decided to suspend the project in September 2014.[409] On the other hand, the Municipality and Omega continued working towards the completion of the Pacora Market despite the slow processing of the soil use certificate.[410]

223. The Claimants and Mr. López argue that the Municipality's treatment of Omega was politically motivated. Mr. López claims that Mayor Blandón and Guillermo Bermúdez (Mayor Blandón's Secretary General) told Mr. López that the Mayor did not want either of the markets. Moreover, according to Mr. López, Mayor Blandón wanted to scrap the Juan Díaz Market altogether to build a storehouse on that project's site.[411] The Claimants further argue that Mayor Blandón re-tendered the Juan Díaz Market and awarded it to a new contractor to be developed in a different location.[412] All of those allegations are incorrect.

224. *First*, the Claimants have not submitted any proof that the Municipality was politically biased against Omega. Mr. López's statements regarding what Mayor Blandón and Mr. Bermúdez allegedly told him are, at best, unsubstantiated hearsay that does not even conform with the evidentiary record. Mr. Díaz, on the other hand, has testified in both of his witness statements that he was never asked to take any adverse measures against Omega, and is not aware of anyone at the Municipality being asked to do so.[413]

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409 Letter No. S.G.-087-A from the Municipality of Panama to the Omega Consortium dated Sept. 2, 2014 (**C-0058)**; Addendum No. 2 to Contract No. 857-2013 (**R-0125**), p. 2.

410 *See* Díaz I ¶¶ 18-28.

411 López Statement ¶ 137. *See also* Claimants' Reply ¶ 164.

412 Claimants' Reply ¶ 168.

413 Díaz I ¶ 29. Díaz II ¶ 16.

225. *Second*, as testified by Mr. Díaz, it is simply false that Mayor Blandón did not want the Panama City Markets.[414] Mayor Blandón always intended to complete the Pacora Market, which is why the Municipality went to great lengths to assist Omega in obtaining the required soil use certificate, and granted Omega a 239-day extension of time in late 2014, even though the majority of that extension (200 days) was based on the time it was taking to process the soil use certificate, for which Omega was contractually liable.[415] By March 2015, the Comptroller General's office was still studying the addendum extending the Pacora Market's term, and noting corrections and modifications that needed to be made to the addendum and its supporting documentation.[416] The following month, in April 2015, Omega abandoned the Municipality of Panama Contract. Thus, in order to complete the Pacora Market, Mayor Blandón had no choice but to re-tender the project, which was awarded to another company in April 2018.[417]

226. The Juan Díaz Market, on the other hand, was suspended due to the accessibility issues that Omega was unwilling to resolve, which were identified during the office-wide project review requested by Mayor Blandón upon assuming office.[418] The site simply was not viable for a public market. The fact that the decision to suspend the market was based on the site's inaccessibility is evident from documents signed by Mr. López,[419] and is supported by press reports submitted by the Claimants showing that Mayor Blandón suspended work on six of the eight peripheral markets awarded during the previous administration (including the Juan Díaz Market), involving multiple different contractors, "due to the lack of access routes."[420]

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414 Díaz II ¶ 17.

415 *See* Díaz I ¶¶ 18-28. *See also* Respondent's Counter-Memorial ¶¶ 144-152.

416 *See* Memorandum No. 1360-15-LEG-F.J.PREV. from Jaime Perez to Arnulfo Him dated Mar. 4, 2015 (**C-0741**).

417 *See* Requisition No. 544 "For the Refurbishing Project of the Pacora Peripheral Market" dated Mar. 27, 2018 (**R-0120**); Municipality of Panama, Resolution No. C-070 dated Apr. 23, 2018 (**R-0121**).

418 *See* Díaz I ¶¶ 15-16; Respondent's Counter-Memorial ¶¶ 141-142.

419 Addendum No. 2 to Contract No. 857-2013 dated 2014 (**R-0125**), p. 2.

420 *Blandon Stops Construction in 6 of the Mercados Periféricos*, EL SIGLO dated Nov. 6, 2014 (**C-0608**). *See also The Mayor's Office Will Issue a New Request for Proposals for the Mercados Periféricos in the First Semester of 2016*, LA ESTRELLA dated Jan. 1, 2016 (**C-0702**).

Unsurprisingly, the Claimants have now acknowledged that the Juan Díaz Market's site "was not suitable for construction and lacked an access road."[421]

227. *Third*, contrary to the Claimants' allegation, the Municipality has never re-tendered the Juan Díaz Market or awarded it to a new contractor.[422] It is therefore not true that Mayor Blandón suspended that project simply to push Omega out.

228. *Fourth*, the fact that Omega's payment applications on both markets went unapproved from the very beginning proves that Mayor Blandón was not politically motivated. After claiming in their Memorial that payments on all of Omega's projects suddenly stopped being approved when President Varela took office,[423] the Claimants have backtracked and now acknowledge that, on this contract, even payment applications submitted during the Martinelli administration went unapproved.[424]

229. The deficiencies in Omega's designs of the markets arose during the Martinelli administration and persisted into President Varela's term. Those deficiencies prevented the Municipality from approving the designs, which in turn meant that the Comptroller General's office was unable to endorse any of the payment applications submitted by Omega.[425] It is therefore nonsensical for Mr. López to claim that Mr. Bermúdez told him "that he had instructions to wait for the result of the investigation of Judge Moncada Luna before allowing the Municipality to review our payment applications."[426] Based on the foregoing, it is undeniable that the Municipality and the Comptroller General's office acted consistently during both the Martinelli and Varela administrations, and were not politically motivated.

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421 Reply ¶ 168.

422 Díaz II ¶ 19.

423 Claimants' Memorial ¶¶ 58, 70, 74-75; Rivera I ¶¶ 54-55, 76.

424 *See* Claimants' Reply ¶ 170; López ¶ 138.

425 Díaz II ¶ 20.

426 López ¶ 73.

d. Omega Abandoned the Contract in April 2015

230. Mr. Díaz explained in his first witness statement, "in April 2015 Omega simply disappeared, abandoning the Markets and the Contract."[427] The Claimants deny this in their Reply, and rely on a letter from Omega to the Municipality dated April 8, 2015, and various alleged follow-ups to that letter through June 1, 2015, as proof that Omega did not abandon the contract in April 2015.[428] That letter and the alleged follow-ups are irrelevant.

231. Mr. Díaz reiterates in his second witness statement that the Claimants abandoned the Municipality of Panama Contract in April 2015.[429] He also explains that he had never seen the alleged follow-ups to the Claimants' letter of April 8, 2015 before becoming involved in this arbitration.[430] In fact, those alleged follow-ups are simply identical copies of the letter with dubious hand-written and computer-generated notes that purport to signal that a follow-up was sent, and they do not even have a stamp from the Municipality confirming receipt.[431]

232. In any event, the Claimants do not deny that Omega had stopped construction work and abandoned the site of the Pacora Market (the one ongoing project after the Juan Díaz Market was suspended) by April 2015. To the contrary, Mr. Rivera acknowledges that Omega "abandon[ed] some projects in the country in October [2014] and the rest in November 2014," and that Omega's permanent employees remained until January 2015, when Omega "la[id] everybody off."[432] While Mr. López tries to stretch Omega's continuance somewhat further, he nevertheless admits that in April 2015 Omega dismissed "almost all" of its personnel, including

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427 Díaz I ¶ 27. *See also* Díaz II ¶ 17.

428 *See* Reply ¶ 24. *See also* López ¶ 144; Letter from the Omega Consortium to City Hall of Panama dated Apr. 8, 2015 (**C-0184**); Follow-up to Letter No. P010 – 2015 4 08 – 010 dated Jun. 1, 2015 (**C-0612**).

429 Díaz II ¶ 17.

430 Díaz II ¶ 22.

431 *See* Letter from the Omega Consortium to City Hall of Panama dated Apr. 8, 2015 (**C-0184**); Follow-up to Letter No. P010 – 2015 4 08 – 010 dated Jun. 1, 2015 (**C-0612**). *See also* Díaz II ¶ 22.

432 Rivera I ¶ 129.

engineers and construction workers, and that only five employees in administrative or executive roles remained thereafter.[433]

233. By the time Omega abandoned the contract, it had accomplished an unacceptably low level of progress on the markets, in breach of its contractual obligations.[434] And, as the foregoing discussion demonstrates, Omega had also breached its obligations in myriad other ways, both in terms of design and construction. Since Mayor Blandón was eager to see the Pacora Market through to completion, he had no choice but to terminate Omega's contract in order to revive that project by re-tendering it to another contractor. The Municipality of Panama Contract, thus, was terminated in January 2017,[435] and the Pacora Market was awarded to a new contractor in April 2018.[436]

2. The MINSA CAPSI Health Facility Projects

234. In its Counter-Memorial, Panama demonstrated that the Claimants' MINSA CAPSI Projects—the Rio Sereno Project, the Kuna Yala Project, and the Puerto Caimito Project[437]—were plagued by commercial problems and under-performance.[438] The Claimants do not rebut Panama's evidence but, instead, continue to spin a tale that distorts actual events and mischaracterizes Panama's position. In the following sections, Panama corrects the record by showing that (1) Panama treated the Omega Consortium the same during the Martinelli and Varela Administrations; (2) the Omega Consortium abandoned its MINSA CAPSI Projects in October of 2014; and (3) the Claimants fail to show that the Presidency targeted Omega's MINSA CAPSI Projects.

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433 López ¶ 79.

434 *See* Díaz I ¶ 28; Resolution No. C-10-2017 dated Jan. 11, 2017 (**C-0234**), p. 3.

435 Resolution No. C-10-2017 dated Jan. 11, 2017 (**C-0234**). *See also* Díaz I ¶¶ 29-32.

436 *See* Requisition No. 544 "For the Refurbishing Project of the Pacora Peripheral Market," Mar. 27, 2018 (**R-0120**); Municipality of Panama, Resolution No. C-070, Apr. 23, 2018 (**R-0121**).

437 Contract No. 077/2011 dated Sept. 22, 2011 (**C-0028**) ("**Rio Sereno Contract**"); Contract No. 083/2011 dated Sept. 22, 2011 (**C-0030**) ("**Kuna Yala Contract**"); Contract No. 085 (2011) dated Sept. 22, 2011 (**C-0031**) ("**Puerto Caimito Contract**").

438 Respondent's Counter-Memorial ¶¶ 59-62.

a. Panama Treated the Omega Consortium the Same During the Martinelli and Varela Administrations

235. The Claimants allege that Panama treated their MINSA CAPSI Projects differently during the Martinelli and Varela administrations, and that the differences in treatment were evidence of targeting by the Presidency. [439] The Claimants' evidence, however, fail to support their claim.

236. The Claimants acknowledge that their MINSA CAPSI Projects experienced problems during both the Martinelli and the Varela administrations.[440] During both periods, changes were made to the scope of work, payment applications were delayed, and the Comptroller General insisted that additional information be provided as a condition of granting contract extensions. However, to prevail on their case theory, the Claimants must show that the problems facing the projects under the Varela administration were materially different from those encountered under the Martinelli administration. To do this, the Claimants attempt to distinguish between events occurring under the two administrations, for example, by labelling problems faced during the Martinelli administration as commercial in nature, while problems encountered during the Varela administration are supposedly sovereign. The Claimants' arguments are misleading and unsupported by the evidence.

237. The Claimants argue that "[a]ll of the delays in the three MINSA CAPSI Projects were eventually resolved *prior* to the change in Administration by the signing and endorsement of new [addenda]."[441] That statement is false.

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439 Claimants' Reply ¶¶ 46, 91, 119-123, 140-142; 148-155.

440 *See supra* Section II.B.I (discussing commercial issues on the MINSA CAPSI Projects during the Martinelli Administration); Respondent's Counter-Memorial ¶ 59; *see* Barsallo I ¶¶ 26-37 (discussing that prior to the change in administration the Projects all had multiple addenda for additional time: Rio Sereno and Puerto Caimito Projects had two addenda for extensions of time and one for time and costs pending in the Comptroller General's office and the Kuna Yala Project had one addendum for an extension of time and one pending in the Comptroller General's office for time and costs). The Claimants have agreed that there were several commercial issues on the project. *See* Claimants' Reply ¶¶ 43-44; Claimants' Memorial ¶ 51; Rivera I ¶ 48; Mirones ¶ 6; López ¶¶ 41-45.

441 Claimants' Reply ¶ 45 (emphasis added).

238. Delays on a construction project are "resolved" either when a contractor enacts a recovery plan sufficient to allow it to catch up on its works or the owner grants the contractor an extension of time. Delays to the Claimants' MINSA CAPSI Projects that occurred during the Martinelli Administration were not all resolved before the change in administration. At no time did the Claimants carry out an acceleration plan or minimize the delays through their performance. And, while extensions were granted for some of the delays, a number of the Claimants' delay-related claims remained unresolved at the end of President Martinelli's term.[442] Specifically, addenda signed by the Claimants and the Ministry of Health on May 7, 2014 were not endorsed during the last two months of Martinelli's presidency or under the Comptroller General appointed by the Martinelli Administration, who remained in office until the end of December 2014.[443] During that time, President Martinelli's Comptroller General's office identified several deficiencies with the addenda and raised a number of concerns with MINSA.[444] Clearly, the delays on these projects had not been resolved prior to the change in administration.

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442 For example, issues with access to electricity on the Kuna Yala Project continued to plague the project and cause delays. *Compare* Mirones ¶ 6 *with* Email from Ana Graciela Medina to Oscar Rivera and Frankie López dated July 30, 2015 (**C-0701**). Compensation and additional time for delays in demolition of a cafeteria on the Rio Sereno work site was unresolved before the change in administration. *Compare* Letter from Omega to MINSA, Regarding pending issues from meeting on Friday, January 18, 2013 dated Mar. 6, 2013 (**C-0155**), p. 2 *with* Minutes of Meeting between Ministry of Health and Omega Engineering, Inc. dated July 18, 2014 (**C-0361**), pp. 1-3. Likewise, compensation and additional time for delays in approvals of medical equipment was unresolved prior to the change in administration and delays in approvals of medical equipment on all the projects continued through the Varela Administration. *Compare* Barsallo I ¶ 26 *with* Minutes of Meeting between Ministry of Health and Omega Engineering, Inc. dated July 18, 2014 (**C-0361**), pp. 1-3; Addendum No. 4 to Contract No. 77 (2011) dated Nov. 17, 2014 (**C-0249**) (approving and integrating a new list of medical equipment into the contract); Addendum No. 3 to Contract No. 083 (2011) dated Nov. 17, 2014 (**C-0522**) (same).

443 Addendum No. 4 to Contract No. 077 (2011) dated May 7, 2014 (**C-0106**); Addendum No. 3 to Contract No. 083 (2011) dated May 7, 2014 (**C-0107**); Addendum No. 4 to Contract No. 085 (2011) dated May 7, 2014 (**C-0171**).

444 *See e.g.*, Memorandum No. 4243-LEG-F.J.PREV from the Legal Division to the Director of General Auditing dated Jun. 26, 2014 (**C-0737**); Memorandum No. 3247/2014-DMySC-R.P. from Accounting Director to Economic Director (June 5, 2014) (**C-0751**); Letter No. 3081-2014 dated July 10, 2014 (**C-0686**); Memorandum No. 1541-2014-DAEF Evaluation Report of Addendum No. 4 issued by the Comptroller's office dated Jun. 10, 2014 (**C-0687**); Evaluation Report of Addendum No. 4 issued by Comptroller's office dated Jun. 10, 2014 (**C-0687**); Memorandum No. 3702-2014-DMySC-R.P. from Accounting Director to Legal Director dated June 17, 2014 (**C-0739**); Memorandum No. 1480-2014-DAEF from Economic Director to Legal Director dated June 5, 2014 (**C-0750**). *See* Barsallo II ¶ 15.

239. The Claimants also allege that President Varela's administration allowed the contracts on all three of its MINSA CAPSI Projects to expire. [445] That too is false. Records show that the contracts for all three projects expired during the Martinelli Administration.[446] The Contracts for the Rio Sereno and Puerto Caimito Projects, expired in December 2013, seven months before President Varela took office, and the contract for the Kuna Yala Project lapsed in June 2014, also prior to the change in administration. [447]

240. The Claimants contend that they agreed to shorter extensions of time than requested.[448] The Claimants, however, do not cite to a single instance in which this occurred, instead relying on a generic and unsupported statement by Mr. López.[449]

241. In any event, it is unclear how this allegation is even relevant. The Claimants do not suggest (and, certainly have not shown) that they were coerced into agreeing to fewer days than were requested. If they believed they were contractually entitled to every day that they requested, the Claimants could have had their entitlement determined through the contractual arbitration provision.[450] The reality is, however, that contractors frequently ask for longer

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445 Claimants' Reply ¶¶ 45-46; Claimants' Memorial ¶ 76 (alleging that the projects expired in August and September of 2014 when it really was the unendorsed addenda that expired then).

446 Claimants' Reply ¶¶ 45-46; Claimants' Memorial ¶ 76 (alleging that the projects expired in August and September of 2014 when it really was the unendorsed addenda that expired then).

447 Addendum No. 3 to Contract No. 077 (2011) dated May 7, 2014 (**C-0170**), p. 1 (explaining that Addendum No. 3 extended the Rio Sereno Project deadline to December 30, 2013); *see* Addendum No. 4 to Contract No. 085-2011 dated May 7, 2014 (**C-0171**), p. 2 (explaining that Addendum No. 3 to the Puerto Caimito Project was adopted on January 13, 2014, 14 days after its expiration); Addendum No. 2 to Contract No. 083 (2011) dated July 18. 2013 (**C-0263**), p. 1 (the Claimants mistranslate this date as September 15, 2013 – it is June 30, 2014).

448 Claimants' Reply ¶ 45.

449 Claimants' Reply ¶ 45; *See* López ¶ 42 ("When the Omega Consortium requested time extensions due to the aforementioned factors, we had to negotiate with the Government agency's personnel, even though these delays were not attributable to the Omega Consortium. When we agreed with the Government on a certain amount of days (generally fewer than the original number), it was not because we admitted responsibility for the delays, but simply because the Omega Consortium wanted to continue working and finish the Contracts.").

450 The dispute resolution clauses for all of Omega's MINSA CAPSI Contracts provided arbitration under the Rules of the International Chamber of Commerce. *See* Contract No. 077 (2011) dated Sept. 22, 2011 (**C-0028**), Cl. 75; Contract No. 083 (2011) dated Sept. 22, 2011 (**C-0030**), Cl. 75; Contract No. 085 (2011) dated Sept. 22, 2011 (**C-0031**), Cl. 75.

extensions that they are entitled as part of a negotiating process. As Mr. Barsallo explains, all contractors can ask for additional time but it does not mean that MINSA has to agree to the number of days requested.[451] MINSA's technical team must review the requests and assess the true number of days the contractor is due. It is not uncommon for contracts to overstate the number of days they are seeking, expecting the number would be cut back by MINSA's engineers.

242. Finally, the Claimants allege that they were treated differently by MINSA and the Comptroller General's office after President Varela took office.[452] The Claimants' allegation is unfounded. As shown below, when the actions of MINSA and the Comptroller General during the Martinelli and Varela Administrations are compared, it is clear that they operated in the same manner under both Administrations, but with the routine slowdown during the transition in administrations as is always the case.[453]

b. The Approval and Review Process for Addenda Remained Unchanged

243. The Claimants' main argument that they were treated differently after President Varela took office is that pending addenda were returned for pre-textual reasons and that "[t]hese types of [] requests from the Comptroller General had never been made during the approval of the previous [addenda]."[454] That is wrong. The majority of the letters and memoranda that the Claimants cite to as "evidence" of addenda being returned for pre-textual reasons during the Varela Administration were actually drafted and sent to MINSA during the Martinelli Administration, in May and June of 2014.[455] In fact, only three of the seven letters that the Claimants point to were sent during the Varela Administration.[456] Further, addenda were

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451 Barsallo II ¶ 8.

452 Claimants' Reply ¶¶ 46, 118-123, 146-155.

453 Barsallo II ¶ 9; Barsallo I ¶¶ 42-45; Respondent's Counter-Memorial ¶¶ 66-69.

454 López ¶ 112; Claimants' Reply ¶¶ 118-123.

455 President Varela did not take office until July 2014. *See* Claimants' Reply ¶ 119-123.

456 *Compare* Memorandum No. 4243-LEG-F.J.PREV from Legal Division to Director of General Auditing dated June 26, 2014 (**C-0737**); Memorandum No. 3247/2014-DMySC-R.P. from Accounting Director to Economic Director dated June 5, 2014 (**C-0751**); Memorandum No. 3702-2014-DMySC-R.P. from the Accounting Director to the Legal Director dated June 17, 2014 (**C-0739**) Memorandum No. 1480-2014-

returned to MINSA and the Claimants by the Comptroller General during the Varela administration for the same reasons they were returned during the Martinelli Administration. For example, during the Martinelli Administration, the Comptroller General's office returned Addenda No. 2 for all three projects for spelling errors, to change the name of the legal representative of Circacet Corp., and to request a copy of a missing passport.[457] Similarly, Addenda No. 3 to the Puerto Caimito and Rio Sereno Projects were returned to correct discrepancies between the number of days written in letters versus numbers in the addenda, a missing document in the project folder, and the need to extend the validity of the bonds.[458]

244. These were not "prext[ual]" reasons but were part of the normal process, as explained in Panama's Counter-Memorial.[459] Moreover, these were not minor errors, as the addenda would define the parties' rights on a going forward basis. An error in the number of extension days, therefore, is significant and could lead to a dispute at a later date. It was important, therefore, to correct these errors before the addenda were finalized. Catching these errors and ensuring that they are corrected is one of the Comptroller General's core responsibilities.[460] The Claimants were well aware of this and had experienced this type of oversight throughout their projects.

DAEF from Economic Director to Legal Director dated June 5, 2014 (**C-0750**); *with* Note No. 695-15-LEG-F.J.PREV from Comptroller General's Office to MINSA dated Apr. 17, 2015 (**C-0176**); Letter No. 3340-2014-DFG-UCEF from Comptroller General to MINSA dated July 31, 2014 (**C-0685**); Letter No. 3081-2014 dated July 10, 2014 (**C-0686**).

457 Memorandum No. 3096-LEG.F.J.-PREV from Director of the Legal Dep't of the Comptroller General's Office to General Services Dep't of the Comptroller General's Office dated May 1, 2013 (**R-0131**); Note No. 2516-2013-DFG-UCEF from the Comptroller General to MINSA dated May 10, 2013 (**R-0132**); Letter DVMS-N. 1364-2013 from MINSA to the Comptroller General dated June 4, 2013 (**R-0133**); Letter DVMS N. 613-2013 from MINSA to the Comptroller General dated June 21, 2013 (**R-0134**).

458 *See* Memorandum No. 2583-2013-DAEF from the Economy and Finance Dep't to Legal Dep't of Comptroller General's Office dated Oct. 7, 2013 (**R-0135**) (corrections included (a) a scrivener's error in the number of days for project completion which had been mistakenly written as "six hundred and fifty four" days instead of "seven hundred and ninety four" days; (b) an error in the length of time the completion bond was valid; and (c) failure to attach the renewed completion bond); Letter No. 4429-2013-DFG-UCEF from the Comptroller General to MINSA dated Oct. 28, 2013 (**R-0136**) (returned for a scrivener's error, a missing document in the folder, and the need to extend validity of the bonds).

459 Respondent's Counter-Memorial ¶¶ 75-76.

460 *See* Bernard ¶¶ 9-15.

245. Also, as explained above the majority of the instances that the Claimants invoke occurred during the Martinelli administration:

- **Addendum No. 3 to the Kuna Yala Project***:* In June 2014 (during the Martinelli Administration) the legal division of the Comptroller General's office observed that the addendum needed to be revised because: (1) the addendum modified the object of the contract, which is not legally permitted (Art. 77, paragraph 1 of Law No. 22 (June 27, 2006); (2) Clause 1 of the addendum made reference to additional expenses but did not link specific expenses to the various addenda that had been submitted; (3) there was a blank space in Clause 6 of the addendum which modified the number of the budget item to which the expenses would be charged; (4) the "contractual equilibrium report" was not signed by inspection representatives of MINSA; and (5) the report supporting Omega's extended presence on the project was not signed by inspection representatives of MINSA.[461] All of these corrections required by the legal department were legitimate and necessary for a valid contract.

  In addition to the legal division's observations, the Comptroller General's office noted that there were proposed corrections from various departments within the Comptroller General's office including, the engineering department (dated May 29, 2014), the economic and finance department (dated June 20, 2014), and the accounting department (dated June 5, 2014). On June 5, 2014, for example, the accounting department stated that the addendum "is not admissible from a budgetary perspective" because it "extends the time and the amount of the contract. However, it does not show the budget allocation for 2014."[462] The failure to show the budget allocation for an addendum requesting additional costs is certainly a legitimate issue in a contract requesting millions of dollars in additional payments. Under the circumstances, the Comptroller General's office reasonably sent a letter to MINSA

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461 Memorandum No. 4243-LEG-F.J.PREV from the Legal Division to the Director of General Auditing dated June 26, 2014 (**C-0737**); *see* Article 77(1) of Law 22 of June 27, 2006 (**R-0026**).

462 Memorandum No. 3247/2014-DMySC-R.P. from Accounting Director to Economic Director dated June 5, 2014 (**C-0751**).

asking whether MINSA wanted to continue with this addendum.[463] The Comptroller General's office requested these corrections in May and June—during the Martinelli Administration and prior to President Varela taking office.

- **Addendum No. 4 to the Rio Sereno Project:** On July 10, 2014, The Comptroller General's office returned Addendum No. 4 to the Rio Sereno Project. In that addendum, the Claimants asked for US$ [redacted] in additional costs and an extension of time. The amount of additional costs very high and, as such, required scrutiny. The Comptroller General, therefore, instructed MINSA to explain the methodology used to calculate the additional costs due to the extended deadline and Omega's financing of the advanced payment.[464] Additionally, the Comptroller General noted that it needed MINSA to add an explanation of the events that occurred and reasons to modify the contract's time and costs.[465]

  The economic and financial division of the Comptroller General's office prepared an evaluation report dated June 10, 2014, which was attached to the Comptroller General's instructions. This report explained the Comptroller General's specific concerns with the addendum and why it could not assess its economic and financial viability without the requested additional information.

  The report also explained that the amount of US$ [redacted] requested by Omega for its extended presence on the project was based on the administrative costs the company assumed due to delay in validation of Addenda Nos. 2 and 3. However, the Comptroller General's office found that monetary compensation was unjustified, because the delay in formalizing Addenda Nos. 2 and 3 did not impact the work schedule, so Omega was not contractually entitled to these costs under Clause 64(b).[466] Additionally, the Comptroller General's report found it needed additional

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463 *See* Letter No. 3340-2014-DFG-UCEF from Comptroller General to MINSA dated July 31, 2014 (**C-0685**).

464 Letter No. 3081-2014 dated July 10, 2014 (**C-0686**).

465 Letter No. 3081-2014 dated July 10, 2014 (**C-0686**).

466 Memorandum No. 1541-2014-DAEF Evaluation Report of Addendum No. 4 issued by the Comptroller's office dated Jun. 10, 2014 (**C-0687**), p. 3; *see* Contract No. 077 (2011) dated Sept. 22, 2011 (**C-0028)**, Cl.

detail regarding Omega's work (past and future) on the project; the addendum was missing the number of the budget itemed designated for the additional costs in 2014; the reports for time and costs and contractual balance were not signed by MINSA officers; the price adjustment chart for 2013 was missing from the file, and a note signed by the Minister of Health supporting and explaining the increase in costs and the validity of the addendum was not attached.[467] The merits of the addendum could be addressed only after these material problems were fixed.[468] Again, these requested modifications and concerns were justified and legitimate and were of similar character to those experienced by Omega in the past; they were also requested during the Martinelli administration.

- **Addendum No. 4 to the Puerto Caimito Project:** This addendum was also returned several times for corrections and for additional information. In June 2014 (during the Martinelli Administration), the accounting division of the Comptroller General's office noted that the addendum could not be approved because (a) it was missing the budget allocated for the payments to be made in 2014, and (b) the amounts registered in the National Integrated System of Financial Administration of Panama (SIAFPA), where MINSA keeps its financial records, did not match the amount of the increase in the addendum.[469] On June 5, 2014 (still during the Martinelli Administration), the economic and financial division of the Comptroller General's office noted that the addendum was missing several items: it failed to mention the new budget line that would be used to pay for the increase in costs; one of the clauses needed modification because the amount listed was internally inconsistent; the addendum did not include a summary of prior addenda with their respective amounts; the technical justification from Omega for the increase in $[redacted] was not attached; and they needed a note

64 (the Contractor is only due compensation if "a delay in to the work schedule is caused" by the Government).

467 Evaluation Report of Addendum No. 4 issued by Comptroller's office dated Jun. 10, 2014 (**C-0687**), p. 3.

468 Evaluation Report of Addendum No. 4 issued by Comptroller's office dated Jun. 10, 2014 (**C-0687**), p. 3.

469 Memorandum No. 3702-2014-DMySC-R.P. from Accounting Director to Legal Director dated June 17, 2014 (**C-0739**).

from the Minister of Health explaining the increase in costs and validity of the addendum.[470] Only after these items were remedied could the economic and financial division address the merits of the addendum.[471]

The addendum also needed a change order specifying the medical devices that were to be purchased, supplemented by a technical data sheet; an explanation of why those devices and equipment were needed; information related to the contractor's incorporation and certification to do business in Panama; and endorsement of the compliance bond to ensure its validity corresponded with the period of execution of the contract prior to endorsement.[472] These are legitimate reasons to return a contract extension for corrections, as well as reasons similar to those provided by the Comptroller General in the past.

246. It may have taken the Comptroller General's office some time to review these addenda, but as described in Panama's Counter-Memorial, this was a function of many factors, including: the transition between Presidents in July 2014 and Comptroller Generals at the end of 2014; the need for the new administration to review pending projects to understand their progress and issues;[473] the illness of the Comptroller General from the Martinelli Administration; and the change in the fiscal year.[474] The slow-down in approval of the addenda also had to do with the character of the addenda themselves. None of the previous addenda on Omega's MINSA CAPSI Projects had been for additional costs.[475] In contrast, <u>all</u> of the addenda pending when the

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470 Memorandum No. 1480-2014-DAEF from Economic Director to Legal Director dated June 5, 2014 (**C-0750**).

471 Memorandum No. 1480-2014-DAEF from Economic Director to Legal Director dated June 5, 2014 (**C-0750**).

472 Note No. 695-15-LEG-F.J.PREV. from the Comptroller General to MINSA dated Apr. 17, 2015 (**C-0176**).

473 The Claimants also insinuate that there was something unusual about the Comptroller General sending a letter to the new Minister of Health after the administration change, requesting the Minister review a pending addendum. As Mr. Barsallo, who worked through three changes in ministers at the Ministry of Health, explains, it is common practice when there is a change in ministers, for the Comptroller General's office to return pending addenda to the relevant ministries for their review and is part of MINSA's review process. Barsallo II ¶ 10.

474 Barsallo I ¶¶ 42-45; Respondent's Counter-Memorial ¶¶ 65, 70-73.

475 *See* Addendum No. 1 to Contract No. 083 (2011) dated Sept. 23, 2011 (**C-0143**); Addendum No. 2 to Contract No. 083 (2011) dated July 18, 2013 (**C-0263**); Addendum No. 1 to Contract No. 085 (2011) dated

administration changed contained large increases in costs—an additional US$ [redacted] in Addendum No. 3 to the Kuna Yala Project (84% of the total original contract price); (b) an additional US$ [redacted] in Addendum No. 4 to the Rio Sereno Project [redacted] of the total original contract price); and (c) an additional US$ [redacted] in Addendum No. 4 to the Puerto Caimito Project [redacted] of the total original contract price). [476] The magnitude of the additional costs requested meant greater scrutiny and longer process times.

c. The Approval and Review Process for Payment Applications and CNOs Remained the Same

247. The Claimants complain not only about addenda, but also the treatment of their payment applications.[477] According to the Claimants, payment applications and Certificates of No Objection ("**CNOs**") were processed slowly and went unpaid as part of the Varela Administration's attack on their projects.[478]

248. The Claimants argue that "[t]he [new] Comptroller [under President Varela] did not endorse any of the CNOs."[479] That is false. The Comptroller General who took office in

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Sept. 23, 2011 (**C-0144**); Addendum No. 2 to Contract No. 085 (2011) dated Feb. 22, 2013 (**C-0268**); Addendum No. 3 to Contract No. 085 (2011) dated May 7, 2014 (**C-0108**); Addendum No. 1 to Contract No. 077 (2011) dated Sept. 23, 2011 (**C-0142**); Addendum No. 2 to Contract No. 077 (2011) dated Feb. 21, 2013 (**C-0169**); Addendum No. 3 to Contract No. 077 (2011) dated Aug. 13, 2013 (**C-0170**).

476 Addendum No. 3 to Contract No. 083 (2011) dated May 7, 2014 (**C-0107**) (requesting US$ [redacted] in additional costs as compared to the original contract price of US$ [redacted]); Addendum No. 4 to Contract No. 077 (2011) dated May 7, 2014 (**C-0106**) (requesting US$ [redacted] in additional costs as compared to the original contract price of US$ [redacted]; Addendum No. 4 to Contract No. 085 (2011) dated May 7, 2014 (**C-0171**) (requesting US$ [redacted] in additional costs as compared to the original contract price of US$ [redacted]).

477 Payments on the MINSA CAPSI Projects were conducted through the following process: Omega would submit a payment application detailing work completed on the project, which would be reviewed by inspectors on the project site from MINSA and the Comptroller General. If the inspectors approved, it would be submitted to the Minister of Health for review. If approved, MINSA would issue a CNO and send it to the Comptroller General's office for review and endorsement. Respondent's Counter-Memorial ¶ 55.

478 Claimants' Reply at Section V, ¶¶ 95-96 (alleging that "[t]he Comptroller General stopped approving change orders and payment applications…" and that this was part of President Varela's "multi-flanked attack against Mr. Rivera and the Omega Consortium"); *see also* Reply ¶¶ 140-142.

479 López ¶ 115; Claimants' Reply ¶ 92 (inaccurately saying that the last payments received for the Rio Sereno Contract were in August 2014); *but see* Claimants' Reply ¶ 140, n. 419 (noting in a footnote that the Comptroller General's office did endorse CNO No. 15 for the Rio Sereno Project during the Varela Administration).

January 2015 endorsed CNO No. 15 on the Rio Sereno Project in March 2015, and the Omega Consortium was paid US$ [redacted].[480] In addition, in October and November of 2014, the Comptroller General approved three CNOs for the Kuna Yala Project, totaling US$ [redacted].[481]

249. Payment applications were delayed or denied throughout the MINSA CAPSI Projects for a variety of reasons—none of which had anything to do with an alleged campaign of harassment against the Claimants.[482] *First*, as noted, payment applications on the Claimants' MINSA CAPSI Projects typically ranged from between US$ 100,000 and US$ 300,000.[483] The payment applications cited by the Claimants as evidence of harassment, however, fell well outside that range. Indeed, three of the four unapproved payment applications on the Puerto Caimito Project were for over US$ [redacted];[484] all three of the unapproved payments for the Rio Sereno Project were for over US$ [redacted];[485] and two of the three unapproved payments for the Kuna Yala Project were for nearly US$ [redacted] and US$ [redacted], respectively.[486] Requests of this size require careful review and take longer to approve than smaller requests.[487]

250. CNO No. 15 to the Rio Sereno Project is a good example. The Claimants presented MINSA with their payment application for US$ [redacted] on April 8, 2014—which was the

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480 *See* Certificates of No Objections for Contract No. 077 (2011) (**C-0252**), p. 70.

481 Certificates of No Objection for Contract No. 083 (2011) (**C-0260**), pp. 21-23 (CNO No. 22 endorsed on Oct. 8, 2014 for US$ [redacted]; CNO No. 23 endorsed on Oct. 13, 2014 for US$ [redacted]; CNO No. 24 endorsed on Nov. 11, 2014 for US$ [redacted]).

482 Barsallo I ¶¶ 42-45.

483 *See* Expert Report of Greg A. McKinnon ("**McKinnon Report**"), Annex 1, pp. 4, 8, 12 (prior to this point, the largest payments on the Projects were for around $500,000 and these were few and far between).

484 Payment Application ("**Pay App.**") No. 19 of US$ [redacted], Pay App. No. 20 of US$ [redacted] and Pay App. No. 21 of US$ [redacted] *See* McKinnon Report, Annex 1, p. 12 (prior to these three payment applications, the largest request was for US$ [redacted]

485 Pay App. No. 15 for [redacted] Pay App. No. 16 for US$ [redacted] and Pay App. No. 17 for US$ [redacted] *See* McKinnon Report, Annex 1, p. 4.

486 Pay App. No. 20 for [redacted] and Pay App. No. 24 for US$ [redacted]; *See* McKinnon Report, Annex 1, p. 8.

487 Barsallo II ¶ 23.

largest request presented on that project up to that point.[488] The payment application was ultimately endorsed and the Omega Consortium was paid on March 26, 2015—a year after the application was filed.

251. *Second*, almost all of the payment applications cited by the Claimants as evidence of harassment were submitted on the same day. On October 31, 2014, the Claimants submitted seven payment applications totaling US$ [redacted][489] On that same day, the Omega Consortium sent a letter to MINSA stating that it would be reducing personnel on these projects until the contractual issues were resolved.[490] Later, in December 2014, the Omega Consortium informed MINSA that it would be suspending work on the MINSA CAPSI Projects.[491] With many large requests on the same day, simultaneous with announcement of staff reductions, meant the requests were necessarily going to be reviewed with additional scrutiny.[492]

252. It is clear from the record that the Claimants had effectively abandoned their projects in Panama by the end of 2014 and were in "litigation mode." As Mr. Rivera himself testifies, the Omega Consortium "abandon[ed] some projects in the country in October and the rest in late November of 2014."[493] It is not surprising, therefore, that the Claimants would dump several outrageously large and unsupported payment applications on MINSA at the time in an effort to fabricate evidence in support of their claims.[494]

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488 CNO No. 15 for Contract No. 077 (2011) (**C-0252**), p. 70.

489 *See* McKinnon Report, Annex 1, p. 4, 8, 12 (submitting three payment applications on the Rio Sereno Project, one payment application on the Kuna Yala Project, and three payment applications on the Puerto Caimito Project).

490 Letter No. MINSA-54 from the Omega to MINSA dated Oct. 31, 2014 (**C-0173**).

491 Letter MINSA-55PC from Omega to MINSA dated Dec. 18, 2014 (**R-0092**); Letter MINSA-55RS from Omega to MINSA dated Dec. 18, 2014 (**C-0371**); Letter MINSA-55KY from Omega to MINSA dated Dec. 18, 2014 (**R-0093**).

492 Barsallo II ¶ 24.

493 Rivera I ¶ 129.

494 The Claimants incorrectly allege that Payment Applications Nos. 15, 16, 17 on the Rio Sereno Project, which were all submitted on October 31, 2014, were signed by MINSA but never endorsed by the Comptroller General. The Claimants, therefore, conclude that "the only inference that can be drawn is that they fell victim to President Varela's vendetta." Claimants' Reply ¶ 140. This is incorrect. MINSA did not approve any of these payment applications. *See* Rio Sereno Pay. Apps. Nos. 15-17 (**C-0255**) at pp. 32, 35,

253. *Third*, many of the unapproved payment applications were for work allegedly done under pending addenda for additional costs on the projects. Since these addenda had not been endorsed by the Comptroller General's office, they were not binding contracts. The Omega Consortium was not entitled to these payments and only would have been if addenda had been approved. Likewise, MINSA could not approve payment applications for work completed under these pending addenda.[495]

254. *Fourth*, just like with the addenda discussed above, the Comptroller General's office returned several CNOs with requests for corrections. For example, CNO No. 20 on the Puerto Caimito Project[496] was returned for corrections by the Comptroller Generals during the Martinelli and Varela Administrations for the same reason: it was submitted for endorsement after its expiration date.[497] The Comptroller General appointed by the Martinelli Administration said that the CNO did comply with Executive Decree No. 1433; "however, it is being submitted for endorsement after its expiration date,"[498] and the Comptroller General appointed by the Varela Administration said that the CNO did not comply with Executive Decree No. 1433 because the CNO was submitted for endorsement after its expiration date.[499] The Claimants argue that the slightly different way the Comptroller Generals articulate the same issue amounted to an inconsistency in the treatment of CNO No. 20. [500] It is clear, however, that both

39-40, 43, 47-48, 50-51 (the payment applications are signed by Omega but none are signed by representatives of MINSA). Without MINSA's signature, the payment applications were not valid and the Comptroller General's office could not endorse them.

495 Barsallo II ¶ 21; *See* McKinnon Report, Annex 1, p. 4-5, 8-9, 12.

496 Corresponding to Pay App. No. 19.

497 Note No. 180-15-DFG from Comptroller General under Varela Administration to MINSA dated Jan. 23, 2015 (**C-0601**); Note No. 2667-2014-DFG-UCEF from Comptroller General under Martinelli Administration to MINSA dated May 26, 2014 (**C-0698**).

498 Note No. 2667-2014-DFG-UCEF from Comptroller General under Martinelli Administration to MINSA dated May 26, 2014 (**C-0698**).

499 Note No. 180-15-DFG from Comptroller General under Varela Administration to MINSA dated Jan. 23, 2015 (**C-0601**).

500 Claimants' Reply ¶ 142.

Comptroller Generals were describing the same problem and treated the CNO in the same way—returning it to MINSA because it was submitted for endorsement after its expiration date.[501]

255. Payment Application No. 20 to the Kuna Yala Project was also returned by the Comptroller General's office for wholly legitimate reasons: to correct scriveners' errors; to supply a missing chart comparing the amount of the contractor's requests against the total progress made on the project; and to supply a list of the medical equipment.[502] The Comptroller General's office routinely returned payment applications for these reasons. It is especially important that the paperwork be correct for a payment in the amount sought—nearly US$ [redacted].[503]

d. MINSA Remained Communicative and Active in Pursuing Completion of the Projects

256. The Claimants contend that MINSA's response to communications "became slower and, in many instances, non-existent."[504] To support this position, the Claimants' allege that MINSA failed to communicate with the Omega Consortium between October and December 2014. However, the Claimants' allegation can be reduced to a complaint that MINSA did not respond

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501 *Compare* Letter from Comptroller General under Varela Administration dated Jan. 23, 2015 (**C-0601**) (The CNO "does not comply with the provisions in Executive Decree No. 1433 of December 13, 2010; since, it is being submitted for endorsement after the expiration date thereof. Therefore, it is the responsibility of the agency under your charge to define any administrative actions….") *with* Letter from Comptroller General under Martinelli Administration dated May 26, 2014 (**C-0698**) ("In this regard, we hereby inform you that said [CNO] complies with the Executive Decree No. 1433 of December 13, 2010; however, it is being submitted for endorsement after its expiration date (March 30, 2014). Consequently, the entity you are in charge of shall define administrative actions regarding the process of these documents before the financial entities…").

502 Note No. 5053-2014-DFG-UCEF from the Comptroller General to the Minister of Health dated Sept. 16, 2014 (**C-0682**) (requesting a correction to the number of the note referred to in the first paragraph of the CNO, requesting a comparative chart of the amount the contractor requests against the total amounts presented in the advancement charts approved by MINSA, and requesting a list of the medical equipment presented in the contractor's original proposal as well as the current list with the amounts); Note No. 2785-15 DFG from the Comptroller General to the Minister of Health dated Apr. 20, 2015 (**C-0697**) (requesting the attachment of a list of the medical certificates related to the technical specifications of the biomedical equipment and a list of where the equipment was located).

503 Barsallo II ¶ 26; McKinnon Report, Annex 1, p. 8.

504 Claimants' Reply ¶ 151.

to just two letters.[505] This complaint is particularly odd due both to the small number of letters at issue and, as Mr. Barsallo testifies, the fact that MINSA was in contact with the Omega Consortium during this October - December period by email, phone, and in-person meetings, and finalized several addenda and CNOs.[506]

257. The Claimants also allege that the budgetary issues that MINSA was experiencing with regard to the MINSA CAPSI Projects were "mere pretext" or "a result of the Comptroller General's endorsement delays."[507] This is untrue. As described above, many of the addenda were returned to MINSA because the Claimants failed to include relevant and required budgetary information.[508] The Claimants cannot reasonably expect their applications to be endorsed when they fail to provide necessary information. Furthermore, as Mr. Barsallo explained in his first statement, there were budgetary issues caused by the carryover of addenda and payment applications into the next year.[509]

258. In addition, the Claimants argue that "MINSA no longer intended to work with [them] on the MINSA CAPSI Projects."[510] According to the Claimants, this was confirmed during a meeting in July 2015 between Ana Graciela Medina (the Omega Consortium's lawyer) and MINSA representatives, where the MINSA representatives discussed the commercial difficulties

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505 Barsallo II ¶ 28; López ¶ 109 (citing Letter No. MINSA-KY-82 from Omega to MINSA dated Oct. 28, 2014 (**C-0575**); Letter No. MINSA-RS-62ET from Omega to MINSA dated Nov. 28, 2014 (**C-0584**)).

506 *See* CNOs for Contract No. 083 (2011) (**C-0260**) (CNO Nos. 22, 23, and 24 to the Kuna Yala Project were endorsed in October and November of 2014); Addendum No. 4 to Contract No. 077 (2011) dated Nov. 17, 2014 (**C-0249**) (Addendum No. 4 to the Rio Sereno Project was signed by MINSA in November 2014 and endorsed by the Comptroller General in December 2014); Addendum No. 4 to Contract No. 085 (2011) dated 2014 (**C-0257**) (Addendum No. 5 to the Puerto Caimito Project was signed by MINSA in November 2014). *See* Claimants' Reply ¶ 123); Addendum No. 3 to Contract No. 083 (2011) dated Nov. 17, 2014 (**C-0522**) (Addendum No. 3 to the Kuna Yala Project was signed by MINSA in November 2014 and endorsed by the Comptroller General in December 2014); *see also* Barsallo II ¶¶ 28-29.

507 Claimants' Reply ¶ 113.

508 *See e.g.*, Memorandum No. 3702-2014-DMySC-R.P. from Accounting Director to Legal Director dated Jun. 17, 2014 (**C-0739**); Memorandum No. 1480-2014-DAEF from Economic Director to Legal Director dated Jun. 5, 2014 (**C-0750**); Evaluation Report of Change Order No. 4 issued by the Comptroller General's office dated Jun. 10, 2014 (**C-0687**); Memorandum No. 4243-LEG-F.J.PREV from Legal Division to Director of General Auditing dated Jun. 26, 2014 (**C-0737**); Memorandum No. 3247/2014-DMySC-R.P. from Accounting Director to Economic Director dated Jun. 5, 2014 (**C-0751**).

509 Barsallo I ¶ 57.

510 Claimants' Reply ¶ 154.

plaguing the Kuna Yala Project.[511] As explained above in Section II.B.1, these were commercial issues that had impacted the project throughout the Martinelli and Varela Administrations and had nothing to do with any targeting or influence of the Presidency on the Kuna Yala Project.[512] Ms. Medina reported that MINSA "[did not] know what to do with this construction project" because "[t]here is no staff…to work at this facility;" "[t]he community has shown no interest in using the facility;" there is a "problem of access to the electricity supply;" and "[i]t is [] not feasible to move the regional [center] to Carti, because the relocation of staff is made difficult due to the distance."[513] She further advised that "[i]f you really want to reactivate this project" the Claimants should have made "a proposal to the MINSA regarding the supply of electricity and the use of these facilities because they do not have any ideas or solutions."[514] Ms. Medina also confirmed that MINSA was "interested in completing the CAPSIS on Puerto Caimito and Rio Sereno" and that "[t]he Minister of MINSA said he had no problem with Omega itself finishing both projects."[515] She explained that MINSA was interested in meeting to discuss the issue of the high cost per square meter and the status of the addenda "required to complete these projects."[516]

259. In sum, MINSA and the Comptroller General's office treated the Claimants in the same manner throughout the MINSA CAPSI Projects. Approvals may have taken longer during certain periods, but as described above, many factors, including the particular addenda and payment requests, affected the processing times. Ultimately, Panama continued to work with the Claimants with the hope of completing the projects.

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511 Claimants' Reply ¶ 154.

512 *See supra* Section II.B.1 (citing Email from Ana Graciela Medina to Oscar Rivera and Frankie López dated July 30, 2015 (**C-0701**)).

513 Email from Ana Graciela Medina to Oscar Rivera and Frankie López dated July 30, 2015 (**C-0701**).

514 Email from Ana Graciela Medina to Oscar Rivera and Frankie López dated July 30, 2015 (**C-0701**).

515 Email from Ana Graciela Medina to Oscar Rivera and Frankie López dated July 30, 2015 (**C-0701**).

516 Email from Ana Graciela Medina to Oscar Rivera and Frankie López dated July 30, 2015 (**C-0701**).

e. Omega Abandoned its MINSA CAPSI Projects in 2014

260. The Claimants argue that it is "untrue" that "'[b]eginning in early October 2014" their "conduct changed" and shortly thereafter, 'Claimants' abandoned their projects and fled Panama.'"[517] They, further, allege that Panama "simply ignores evidence unequivocally demonstrating that the Claimants remained in Panama to work with the Government and sought to keep the Projects going long after the investigation of Judge Moncada Luna began."[518]

261. As noted above, Mr. Rivera has testified that all of Omega's projects were abandoned by November 2014: the Omega Consortium "abandon[ed] some projects in the country in October [2014] and the rest in late November 2014."[519] Any question as to when and whether Omega abandoned the MINSA CAPSI Projects ends there.

262. As Mr. Rivera himself testifies, the Claimants also confirm in their Memorial that they stopped working on the MINSA CAPSI Projects in October 2014—"[t]he Omega Consortium continued on-site operations *until* October 2014."[520] This is confirmed by the Claimants' payment applications. Payment Application No. 23 to the Kuna Yala Project shows that the Omega Consortium had completed 67.82% of the project by June 30, 2014.[521] In its next payment application submitted on October 31, 2014, the Omega Consortium again reported completing 67.82%, showing no progress on the work between July 1 and October 31, 2014.[522] The Omega Consortium's final payment application, submitted on December 31, 2014, reported that a total of 67.83% had been completed.[523] The Claimants, therefore, reported only a 00.01% advance in the six-months between July 1 and December 1, 2014. No further payment applications were submitted on the Kuna Yala Project. Based on these records, it would be

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517 Claimants' Reply ¶ 20 (quoting Respondent's Counter-Memorial ¶ 7).

518 Claimants' Reply ¶ 20 (quoting Respondent's Counter-Memorial ¶ 7).

519 Rivera I ¶ 129.

520 Claimants' Memorial ¶ 44.

521 Certificates of No Objection for Contract No. 083 (2011) (**C-0260), p**. 23 (CNO No. 24, covering the period between June 1, 2014 and June 30, 2014 showing an advance of 67.82% in the work).

522 Pay Apps. Nos. 23, 24, 25 to the Kuna Yala Project (**C-0336**), pp. 1, 147-67.

523 Pay Apps. Nos. 23, 24, 25 to the Kuna Yala Project (**C-0336**), pp. 1, 147-67.

reasonable to say that Omega abandoned the Kuna Yala Project in June 2014, and there can be no doubt that they were gone by October 2014.

263. On the Puerto Caimito and Rio Sereno Projects, the Claimants also stopped work on or about October 31, 2014 and did not thereafter submit any payment applications for work on either of these projects.[524] Had the Omega Consortium continued working, it would have submitted applications for payment on these projects.

264. The Omega Consortium's actions in October and December of 2014 also clearly signaled that it was quitting the MINSA CAPSI Projects. On October 31, 2014, the Omega Consortium submitted a letter to MINSA that it would "begin a process of personnel reduction in the projects over the next weeks until the contracts are [] clarified" and presented an extraordinary payment request for US$ [redacted] to MINSA.[525] In December 2014, it again wrote to MINSA to say that it would be suspending work, suspending the purchase of products, and reducing personnel.[526] It is unclear what personnel Omega was referring to in these letters, as the payment applications show that no work had been done on site after October 2014. In any event, Omega's letters made clear that Omega was done with the MINSA CAPSI Projects unless Panama approved the pending addenda, which included additional costs of over US$ [redacted], and paid Omega's unapproved payment applications of over US$ [redacted].[527]

265. The Claimants so-called "evidence" that "unequivocally demonstrate[es] that Claimants remained in Panama to work with the Government…" only shows that Omega was corresponding with MINSA. None of the letters cited by the Claimants provide direct evidence

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524 McKinnon Report, Annex 1, p. 4 (the Claimants' last Pay Apps. on the Rio Sereno Project, were Nos. 15, 16, and 17, which were all submitted on Oct. 31, 2014); McKinnon Report, Annex 1, p. 12 (the Claimants' last Pay Apps. on the Puerto Caimito Project, were Nos. 20, 21, and 22, which were all submitted on Oct. 31, 2014).

525 Letter No. MINSA-54 from Omega to MINSA dated Oct. 31, 2014 (**C-0173**).

526 Letter MINSA-55PC from Omega to MINSA dated Dec. 18, 2014 (**R-0092**); Letter MINSA-55RS from Omega to MINSA dated Dec. 18, 2014 (**C-0371**); Letter MINSA-55KY from Omega to MINSA dated Dec. 18, 2014 (**R-0093**).

527 Barsallo II ¶ 34; s*ee* Addendum No. 3 to Contract No. 083 (2011) dated May 7, 2014 (**C-0107**) (US$ [redacted] in additional costs); Addendum No. 4 to Contract No. 077 (2011) dated May 7, 2014 (**C-0106**) (US$ [redacted] in additional costs); Addendum No. 4 to Contract No. 085 (2011) dated May 7, 2014 (**C-0171**) (US$ [redacted] in additional costs).

that Omega was physically working on the projects.[528] In fact, the majority of these letters relate only to the Omega Consortium's efforts to collect payments and note that the Omega Consortium is suspending work or pulling workers off the project.[529]

f. The Claimants Fail to Show that President Varela Targeted Omega's MINSA CAPSI Projects

266. The Claimants allege that President Varela and his office targeted Omega's MINSA CAPSI Projects. As support for this allegation, the Claimants argue (a) that counsel for the Presidency, Rogelio Saltarín and his colleagues, were "hired with a mandate to persecute Mr. Varela's enemies" and did so through a series of meetings with MINSA officials that targeted Omega;[530] and (b) the Comptroller General's office had orders from the Presidency "to ignore all requests by the Omega Consortium."[531] The Claimants' purported evidence, however, fails to support these claims.

i. Meetings between Saltarín, Arias y Asociados and MINSA Regarding all MINSA CAPSI Projects

267. The Claimants allege that the Ministry of the Presidency hired Rogerio Saltarín and his law firm, Saltarín, Arias y Asociados "to investigate and manufacture evidence against those seen as political enemies [of President Varela], including Claimants."[532] This is not what Saltarín, Arias, y Asociados was hired to do and is not the work that they performed.

268. The Ministry of the Presidency hired Saltarín, Arias y Asociados to provide counseling on criminal and administrative matters to the Ministry of the Presidency and various governmental entities.[533] The firm's work largely focused on evaluating the status of a broad

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528 Claimants' Reply ¶ 21, n. 46.

529 Letter No. MINSA-54 from Omega to MINSA dated Oct. 31, 2014 (**C-0173**); Letter MINSA-56 from Omega to MINSA dated Jan. 20, 2015 (**C-0583**); Letter No. MINSA-60 from Omega to MINSA dated Oct. 27, 2015 (**C-0588**).

530 Claimants' Reply ¶¶ 91-94.

531 Claimants' Reply ¶ 104.

532 Claimants' Reply at Section IV(D).

533 Activity Report from Saltarín, Arias y Asociados to Ministry of the Presidency at June 25, 2018 (**C-0617**).

range of public contracts held with multiple government institutions and assisting these entities with related legal actions.[534] According to Saltarín, Arias y Asociados' activity report, the firm had nine meetings with MINSA.[535] Only two of these were related to the MINSA CAPSI Projects—MINSA's public-works program to construct 20 regional health facilities throughout Panama, which include the Omega Consortium's three projects.[536] The first meeting about the MINSA CAPSI Projects was held in August 2014 with the Minister of Health, the Heads of Cabinet, and the MINSA work team.[537] The second was a follow-up meeting held in March 2015 with the director of MINSA's legal department.[538] Both meetings are described as encompassing an "[a]ssement of the status of the hospitals and MINSA CAPSIS. All the contracts of each of the 5 hospitals and 20 MINSA CAPSIS in question are received for later review."[539] There is no evidence that these meetings were targeting any one of these 25 projects, let alone Omega's three MINSA CAPSI Projects, or that the Presidency directed Mr. Saltarín or his colleagues to "persecute Mr. Varela's enemies."[540] This is confirmed by Mr. Barsallo, MINSA's Sub-Director of Special Projects at the time, who testified that while he was aware of the meetings with Mr. Saltarín, and in fact, attended one, he has no knowledge of "Mr. Saltarín or anyone associated with the Presidency targeting Omega or its Projects."[541]

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534 *See generally* Activity Report from Saltarín, Arias y Asociados to Ministry of the Presidency dated June 25, 2018 (**C-0617**).

535 Claimants' Reply ¶ 88; Activity Report from Saltarín, Arias y Asociados to Ministry of the Presidency dated June 25, 2018 (**C-0617**), pp. 5, 12.

536 Activity Report from Saltarín, Arias y Asociados to Ministry of the Presidency dated June 25, 2018 (**C-0617**), pp. 5, 12. Claimants' Reply ¶¶ 88-90 (The Claimants are inconsistent in their Reply regarding the number of meetings held related to the MINSA CAPSI Projects – they first say that there were two and then that there were three, including one in July 2014. On review of the documents, it appears a July 2014 meeting was held between the Minister of Health and Saltarín, Arias y Asociados for the "coordination of work" but there is no mention of the MINSA CAPSI Projects (**C-0617**), p. 22).

537 Activity Report from Saltarín, Arias y Asociados to Ministry of the Presidency dated June 25, 2018 (**C-0617**), pp. 5, 12.

538 Activity Report from Saltarín, Arias y Asociados to Ministry of the Presidency dated June 25, 2018 (**C-0617**), pp. 5, 12.

539 Activity Report from Saltarín, Arias y Asociados to Ministry of the Presidency dated June 25, 2018 (**C-0617**), pp. 5, 12.

540 *See* Claimants' Reply ¶ 94.

541 Barsallo II ¶ 41.

269. It is hardly unusual for a new President to have a representative conduct meetings with officials of a ministry to discuss and evaluate the status of ongoing projects. In the case of the MINSA CAPSI Projects, the Ministry of Health had numerous projects ongoing throughout the country which were worth nearly half a billion dollars.[542] There is nothing odd about the newly elected President having a representative evaluate such a large government investment in healthcare.[543]

270. The Claimants also falsely suggest that the meetings held between Mr. Saltarín and officials from MINSA were the reason that the Comptroller General's office did not endorse various addenda and payment applications.[544] Beyond mere speculation, the Claimants present no evidence of this.[545] Moreover, their allegations are illogical, unsupported by the documents that they cite, and temporally implausible. The Claimants' theory that Mr. Saltarín's meetings with MINSA affected the Comptroller General's decision whether to endorse addenda or payment applications is nonsensical, and the Claimants do not even attempt to explain how this even could have happened.

271. The Claimants allege that "[o]nce Mr. Saltarín started 'investigating' … [t]he Omega Consortium was unable to obtain endorsements from the Comptroller General's Office for various [addenda] presented in each of the Projects."[546] One of the addenda that Claimants cite to, however, was in fact endorsed by the Comptroller General after Mr. Saltarin's so-called investigation began.[547] With regard to the other two addenda, there is no causal connection between Mr. Saltarín's meetings and the Comptroller General's decisions. The Claimants were unable to obtain endorsements of their addenda long before Mr. Saltarín met with MINSA in

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542 Barsallo II ¶ 42.

543 Barsallo II ¶ 42.

544 Claimants' Reply ¶ 92.

545 Claimants' Reply ¶ 92; *see also* Barsallo II ¶ 41 (stating he has "no knowledge of Mr. Saltarín or anyone associated with the Presidency targeting Omega or its Projects").

546 Claimants' Reply ¶ 92.

547 Claimants' Reply ¶ 92, n. 297 (citing Addendum No. 3 to Contract No. 077 (2011) dated Aug. 13, 2013 (**C-0170**) (endorsed Jan. 13, 2014)).

August 2014 and March 2015.[548] As explained above, the Comptroller General's office responded to Omega's three addenda submitted on May 7, 2014 in May and June of 2014—within the Martinelli Administration and well before Mr. Saltarín's meetings with MINSA—with various observations as to why these addenda, which greatly increased the costs of the projects, could not be endorsed and needed to be corrected.[549]

272. The Claimants further insinuate that "[p]ayments on the MINSA CAPSI Contracts were virtually stopped" due to Mr. Saltarín's meetings with MINSA officials. There is no evidence linking Mr. Saltarín's meetings to a change in behavior by MINSA towards Omega, let alone proof that it caused any payment application to be denied. The Claimants try to show this by alleging that they no longer received payments for the Puerto Caimito Project after May 2014. Their argument fails, as May 2014 was well before Mr. Saltarín met with MINSA officials.[550]

273. The Claimants then allege they no longer received payments after August 2014 on the Rio Sereno Project due to these same meetings.[551] The Claimants are wrong. The Comptroller General's office made a payment for US$ [redacted] on the Rio Sereno Project on March 26, 2015, after Mr. Saltarín's meetings with MINSA officials.[552]

274. The Claimants stretch even further to try to make the payments on the Kuna Yala Project fit their theory, claiming that the Comptroller General's decision not to endorse a payment application for work in March 2014 is evidence of the influence of Mr. Saltarin's meetings.[553] Remarkably, the Claimants make this argument while ignoring the fact that Omega continued to

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548 Claimants' Reply ¶ 90 (citing Activity Report from Saltarín, Arias y Asociados to Ministry of the Presidency dated June 25, 2018 (**C-0617**)).

549 *Supra* Section III.B.2.b; Barsallo II ¶¶ 11-15.

550 Additionally, the source that the Claimants cite does not even provide support for their contention that the last payment was made in May 2014. Claimants' Reply ¶ 92 (citing McKinnon Report, Annex 1, pp. 4, 13.)

551 Again, the Claimants' citation does not provide support for their contention about the date of the last payment on the Rio Sereno Project. Claimants' Reply ¶ 92 (citing McKinnon Report, Annex 1, pp. 4, 13).

552 Certificates of No Objections for Contract No. 077 (2011) (**C-0252**), pp. 70-71.

553 Claimants' Reply ¶ 92 (citing McKinnon Report, Annex 1, pp. 4, 13).

be paid three more times on this project and that the Comptroller General's office returned Payment Application No. 20 several times for legitimate corrections.[554]

275. The two meetings held between Saltarín, Arias, y Asociados and MINSA employees did not specifically target Omega's MINSA CAPSI Projects and did not and could not have had an impact on the Comptroller General's decisions to approve or reject addenda and payment applications.

g. The Comptroller General Did Not Receive Instructions from the Presidency to Ignore the Omega Consortium's Requests on the MINSA CAPSI Projects

276. The Claimants attempt to show that the Comptroller General's office received orders from the Presidency to "ignore all requests by the Omega Consortium" by citing an excerpt of a WhatsApp conversation between Frankie López and Mr. Barsallo and an excerpt of a WhatsApp conversation between Mr. López and Ana Graciela Medina, the Omega Consortium's attorney.[555] These efforts fail for several reasons.

277. The WhatsApp messages between Mr. Lopez and Mr. Barsallo on March 3, 2016 have been presented out of context.[556] Mr. Barsallo developed personal friendships with Mr. Lopez and the Omega Consortium team while working on Omega's MINSA CAPSI Projects.[557] They would socialize outside of work and message each other via WhatsApp with jokes, personal conversations, and the occasional comment about the projects. During these interactions, the Omega Consortium's team expressed their frustrations with the Comptroller General's lengthy

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554 Barsallo II ¶ 26; s*ee* Note No. 5053-2014-DFG-UCEF from the Comptroller General to the Minister of Health dated Sept. 16, 2014 (**C-0682**) (requesting a correction to the number of the note referred to in the first paragraph of the CNO, requesting a comparative chart of the amount the contractor requests against the total amounts presented in the advancement charts approved by MINSA, and requesting a list of the medical equipment presented in the contractor's original proposal as well as the current list with the amounts); Note No. 2785-15 DFG from the Comptroller General to the Minister of Health dated Apr. 20, 2015 (**C-0697**) (requesting the attachment of a list of the medical certificates related to the technical specifications of the biomedical equipment and a list of where the equipment was located).

555 Claimants' Reply ¶ 104.

556 Barsallo II ¶¶ 35-38; WhatsApp message between Frankie López and Nessim Barsallo dated Mar. 3, 2016 (**C-0681**).

557 Barsallo II ¶¶ 36, 38.

approval process and told Mr. Barsallo their theories about why the Comptroller General's office was taking a long time to endorse addenda.[558] These conversations were the only source of Mr. Barsallo's comments in the WhatsApp messages. He has no knowledge of any involvement of President Varela or the Presidency in influencing the Comptroller General or on Omega's MINSA CAPSI Projects.[559] This is evident when Mr. Barsallo asks Mr. Lopez, "[w]hat's happening at the Comptroller?"[560] As Mr. Barsallo explains, his comments were made only to echo what the Omega Consortium team had been telling him, and they were made in gest to support a frustrated friend.[561] When he says to Mr. Lopez that he "conclude[s] they have orders" and "[t]hat comes from the Presidency," he repeating what he heard from the contractor's team;[562] and he has confirmed that he had "no knowledge of any orders from the Presidency or anyone to the Comptroller General's office."[563]

278. To provide additional context, this conversation occurred only a week before the Claimants served Panama with the notice of intent to arbitrate on March 11, 2016.[564] It is clear that the Claimants were manipulating Mr. Barsallo to make these statements in the hope that they could be used in this arbitration. This conversation, which was scripted and excerpted by the Claimants and relies on an individual who had no knowledge of involvement of the Presidency on these projects, does not provide any reliable support to the Claimants' allegations.

279. The Claimants' reliance on a WhatsApp exchange between Ms. Medina and Mr. López from May 20, 2015 is unhelpful. Again, this transcript is presented with no context and Ms. Medina is not testifying. The Claimants are relying on the truth of Ms. Medina's characterization of a conversation that she allegedly had with an unnamed individual or group of

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558 Barsallo II ¶ 38.

559 Barsallo II ¶ 38.

560 Barsallo II ¶ 38; WhatsApp message between Frankie López and Nessim Barsallo dated Mar. 3, 2016 (**C-0681**).

561 Barsallo II ¶ 38.

562 Barsallo II ¶ 38; WhatsApp message between Frankie López and Nessim Barsallo dated Mar. 3, 2016 (**C-0681**).

563 Barsallo II ¶ 38.

564 Notice of Intent to Arbitrate dated Mar. 11, 2016 (**C-0103**).

individuals who [redacted].[565] Of course, the Tribunal has no ability to assess her credibility.

280. In any event, these statements do not support the Claimants' contention that "the Comptroller General's Office had orders from the Presidency . . . to ignore all requests by the Omega Consortium."[566] There is no mention of President Varela or anyone acting on his behalf in these statements. Furthermore, the Claimants mischaracterize the conversation by breaking it into two and stating that it took place over the span of two weeks, while the underlying exhibit shows the conversation took place on the same day.[567] Tellingly, the one line that the Claimants leave out of the message in their Reply Memorial is Mr. López's cryptic question [redacted]"[568] There is no explanation as to what this refers to and the Claimants' decision to split the conversation into two at this point to only exclude this line suggests it may have a meaning that undermines their argument. Panama, however, will not have the opportunity to ask Ms. Medina what picture she received from Mr. López and what its relevance is to this conversation. These messages should be disregarded. And as Panama has repeatedly articulated, there was no political targeting by the Presidency on Omega's MINSA CAPSI Projects.[569]

281. Throughout the Martinelli and the Varela Administrations, MINSA and the Comptroller General's office worked in a consistent manner to resolve the commercial issues plaguing the MINSA CAPSI Projects, to negotiate and finalize addenda, and to review and process Omega's

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565 WhatsApp messages between Ana Graciela Medina and Frankie López dated May 20, 2015 (**C-0555**) (for example, "they told me all omega files are frozen and to be audited because apparently it's a company of the children of RM"; "They told me not to ask any more about these accounts"; "they told me there are four") (emphasis added).

566 Claimants' Reply ¶ 104.

567 Claimants' Reply ¶¶ 74-75 (mischaracterizing the conversation between Mr. López and Ms. Medina by alleging that the conversation took place over the span of two weeks when it all took place on May 20, 2015: "Ms. Medina repeated the same reference to 'children of Martinelli' again two weeks later").

568 WhatsApp messages between Ana Graciela Medina and Frankie López dated May 20, 2015 (**C-0555**).

569 Respondent's Counter-Memorial ¶ 248; Barsallo I ¶ 41; Barsallo II ¶¶ 35-42.

payment requests. MINSA remained committed to addressing these issues and completing the projects even after the Omega Consortium stopped all work at the end of 2014.

3. The La Chorrera Courthouse Project

282. Panama demonstrated in its Counter-Memorial that the Judicial Authority consistently worked with Omega to facilitate the construction of the La Chorrera courthouse throughout the Martinelli and the Varela Administrations.[570] Indeed, the evidence shows that the Judicial Authority and Comptroller General's office made all payments due to the Omega Consortium and willingly negotiated and executed contractual addenda. The evidence further shows, however, that the Claimants abandoned the project in December of 2014 and never returned, despite the Judicial Authority's efforts.

283. While the Claimants cannot rebut this evidence, they attempt to distract and distort the issues through mischaracterization and misrepresentation. Panama must therefore correct the record regarding: (1) project requirements and delays; (2) Omega's abandonment of the project; (3) the Judicial Authority's consistent devotion to the project throughout both presidential administrations; and (4) the lack of any targeting by the Presidency of the La Chorrera Project.

a. Project Requirements and Delays

284. The Claimants make several false statements about their obligations as a contractor, the Judicial Authority's discretion to grant or deny requests for extensions of time, and the negotiation and endorsement process for Addendum No. 2, which was for a 260-day extension of time.

285. *First*, the Claimants complain that the Judicial Authority was not "generous" and did not "tr[y] to accommodate the Omega Consortium" by granting Omega's "reasonable" requests for extended time.[571] The Claimants miss the point. Reasonableness is not the test for whether an extension of time should be granted. Rather, the test is whether the contractor has demonstrated that delays to the critical path were caused by the owner or third parties for which the contractor

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570 Contract 150/2012 dated Nov. 22, 2012 (**C-0048**).

571 López ¶ 97.

is not responsible. While the contractor may consider its request reasonable, the facts may be that the contractor has no entitlement to additional time.[572] Here, the Judicial Authority was willing to grant the Claimants additional time even when a rigorous review of the merits would have shown that the Claimants bore the risk of certain delay events included in their requests. Rather than haggle over days or engage in protracted fights over extensions, the Judicial Authority granted more time because of its desire to have the Claimants complete their work. The Claimants are wrong, therefore, when they suggest that the Judicial Authority was not generous and did not try to accommodate Omega.

286. *Second*, the Claimants complain about delays relating to the issuance of permits and studies. Omega was contractually obligated to assist in this process. The Claimants, however, argue that they were under no such obligation.[573] The Claimants' argument, is refuted by both the La Chorrera Contract and Request for Proposals (incorporated by reference into the contract), which both specifically state that the contractor "will request, manage, and pay for all necessary permits for the execution of the project."[574] This is yet another example of the Claimants' efforts to blame Panama for their own failings and to disavow their clear contractual obligations.

287. *Third*, the Claimants make several inaccurate assertions related to the timing and legitimacy of the approval process for Addendum No. 2. As Panama described in its Counter-Memorial, the Omega Consortium and the Judicial Authority entered into Addendum No. 2 for a 260-day extension of time and submitted the addendum to the Comptroller General's office on

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572 *See e.g.*, Request for Proposals No. 2012-0-30-0-08-AV-00483 dated 2012 ("**Request for Proposals**"), Ch. II, Cl. 46.6.9 (**R-0137**) (requiring approval from the inspector to add inefficiencies in the work or rain days to the calendar); Request for Proposals, at Cl. 50 (**R-0137**). (noting that extensions may be granted by the Judicial Authority for any documented cause which the inspector finds justified).

573 López ¶ 60.

574 Request for Proposals (**R-0137**), Ch. II, Cl. 27.2 (stating that "the contractor's work includes . . . [acquiring] permits, authorizations, [and] licenses"); *id.* Ch. III (Technical Specifications), Cl. 1.1 (the CONTRACTOR . . . shall request, manage and pay for all Permits needed for the execution and occupation of the Project); Contract 150/2012 dated Nov. 22, 2012 (**C-0048**), Cl. 4 ("THE CONTRACTOR shall pay for all permits and licenses necessary for the performance of the work"); Cl. 14 ("THE CONTRACTOR agrees to faithfully comply with all laws, decrees, provincial ordinances, municipal agreements, current legal provisions and assume all expenses established therein, without any additional cost borne by THE GOVERNMENT.").

August 21, 2014.[575] On October 2, 2014, the Comptroller General returned the addendum explaining that since the extension of time moved the completion date into 2015 (a new fiscal year), the parties needed to adjust the payment schedule so that funds available in 2014 could be transferred to the budget for the 2015 fiscal year.[576] The change required a certificate from the Ministry of Economy and Finance and additional documentation for the Comptroller General.[577] After making the necessary corrections and collecting the required documentation, the parties signed an amended Addendum No. 2 on October 24, 2014.[578] Two months later, on December 23, 2014, the Comptroller General endorsed the addendum.[579]

288. The Claimants' complaints regarding the processing and handling of Addendum No. 2 are both curious and unfounded.[580] As Panama described in its Counter-Memorial, there is no "standard time" in Panama for the processing and endorsement of a contract addendum. Each addendum must be reviewed on a case-by-case basis and the processing time depends on the number of addenda pending at the Comptroller General's office, the sufficiency of the paperwork, the length and complexity of the changes requested, and the commercial need for the addendum. The processing time for this Addendum No. 2 was relatively fast. The total

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575 Letter No. 1211/S.A./2014 from the Judicial Authority to the Comptroller General dated Aug. 21, 2014 (**R-0073**).

576 *See* Rios I ¶ 25; Form 128325-129440 from Comptroller General to the Judicial Authority dated Oct. 2, 2014 (**R-0074**).

577 *See* Letter No. 1614/S.A./2014 from Judicial Authority to Comptroller General dated Oct. 27, 2014 (**R-0078**); Form 128325-129440 from Comptroller General to the Judicial Authority dated Oct. 2, 2014 (**R-0074**); Letter DIPRENA-DPSG-GC-8184 from MEF to Judicial Authority dated Oct. 20, 2014 (**R-0075**); Letter re Remedy Action Regarding Addendum No. 2 to Contract No. 150/2012 from Judicial Authority's Prosecutor's Office to the Legal Department at the Judicial Authority dated Oct. 2, 2014 (**R-0076**); Letter No. 1549/S.A./2014 from Administrative Secretary of the Supreme Court to Director of the National Budget at MEF dated Oct. 14, 2014 (**R-0077**).

578 Addendum No. 2 to Contract 150/2012 dated Oct. 24, 2014 (**R-0008**).

579 Addendum No. 2 to Contract 150/2012 dated Oct. 24, 2014 (**R-0008**).

580 Respondent's Counter-Memorial ¶¶ 31-32; Rios I ¶¶ 24-26. The Claimants allege that the Judicial Authority approved the addendum in May 2014. *See* Claimants' Reply ¶ 128. This is not true. The Omega Consortium requested an addendum in May but the parties continued to negotiate to formalize the addendum, ultimately signing it in August 2014. *See* Note 2014 0 5 15 – P007-045 *Request for Addendum of Time Extension* dated May 15, 2014 (**C-0066**).

endorsement process took four months from the initial submission of the addendum to the Comptroller General in August 2014.[581]

289. The Claimants also argue that the changes requested by the Comptroller General's office were pretextual.[582] That is false. Contractual payment schedules must align with the funds allocated to the project. This is true in any public or private construction project. The Comptroller General's office, therefore, reasonably asked that the schedule in Addendum No. 2 be amended to ensure that the necessary funds would be available for the La Chorrera Project in 2015.[583]

b. The Omega Consortium Abandoned the La Chorrera Project

290. Panama established that the Omega Consortium abandoned the La Chorrera Project no later than December 2014.[584] The Claimants attempt, but are unable, to contradict this fact.[585]

291. In mid-December, Omega informed the Judicial Authority that it was stopping work on the courthouse because of what they perceived to be a delay in the Comptroller General's endorsement of Addendum No. 2.[586] Omega wrote, "[p]reliminarily we will be in recess from *December 20, 2014 until January 12, 2015*. Subsequent to this, we will evaluate the situation, continuing to wait for some favorable answer or instruction in order to complete the referenced

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581 Letter No. 1211/S.A./2014 from the Judicial Authority to the Comptroller General dated Aug. 21, 2014 (**R-0073**) (attaching the first version of Addendum No. 2); Addendum No. 2 to Contract 150/2012 dated Oct. 24, 2014 (**R-0008**) (endorsed December 23, 2014).

582 Claimants' Reply ¶¶ 128-31.

583 Letter DIPRENA-DPSG-GC-8184 from MEF to Judicial Authority dated Oct. 20, 2014 (**R-0075**). (approving request for certificate of budgetary availability); Letter re Remedy Action Regarding Addendum No. 2 to Contract No. 150/2012 from Judicial Authority's Prosecutor's Office to the Legal Department at the Judicial Authority dated Oct. 2, 2014 (**R-0076**) (requesting all payments on the project through October 2014 be attached with their supporting documents and approvals to determine the amount of the budget pending for payments in 2014 and being considered in the addendum); Letter No. 1549/S.A./2014 from Judicial Authority to Director of the National Budget at MEF dated Oct. 14, 2014 (**R-0077**) (showing the proposed payments for Addendum No. 2 in 2015).

584 Respondent's Counter-Memorial ¶¶ 34-44; Rios I ¶¶ 27-36; Rios II ¶¶ 13-14.

585 Claimants' Reply ¶¶ 20-21, 25.

586 Respondent's Counter-Memorial ¶¶ 35-36 (citing Note No. 2014 12 17 – P007-055, Notification of Temporary Recess from Omega to Judicial Authority dated Dec. 17, 2014 (**C-0367**)).

project."[587] Shortly thereafter, on December 23, 2014, Addendum No. 2 was endorsed.[588] On January 12, 2015, Omega told the Judicial Authority that it's "offices, projects and operations have newly begun operations during their regular hours" on the La Chorrera Project.[589] That statement, however, proved to be untrue, and the evidence clearly shows that work ceased on the project by December 2014.[590] In fact, Mr. Rivera himself admits that the Omega Consortium "abandon[ed] some projects in the country in October and the rest [of the projects] in late November 2014."[591] Moreover, the last payment application presented by Omega was for work performed between July 1 and December 31, 2014.[592]

292. The Claimants make two assertions in support of their contention that the Omega Consortium continued work on the La Chorrera Project into 2015:[593] (1) they state that Omega had employees and subcontractors on the construction site into February 2015 and; (2) they contend that "the Omega Consortium worked on the Project at least until late October 2015."[594] As described above, the Claimants directly contradict this by admitting they "abandon[ed]" all projects by "late November 2014" and had laid off all employees by January 2015.[595] Moreover, the Claimants provide no support for either of their statements. *First*, they provide no description of any work completed after December 31, or contemporaneous reports setting out the progress achieved thereafter, or requests for payment for work completed between December 2014 and February 2015.

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587 Note No. 2014 12 17 – P007-055, Notification of Temporary Recess from Omega to Judicial Authority dated Dec. 17, 2014 (**C-0367**) (emphasis in original).

588 Addendum No. 2 to Contract 150/2012 dated Oct. 24, 2014 (**R-0008**).

589 Letter 2015 01 12 – P-007-057, Restart of Regular Hours in the Construction of the La Chorrera Project from Omega to the Judicial Authority dated Jan. 12, 2015 (**R-0011**).

590 Rios I ¶¶ 27-36; Rios II ¶¶ 13-14.

591 Rivera I ¶ 129.

592 Payment Applications for Contract No. 150/2012 (**C-0344**), pp. 1-11 (Payment Application No. 13).

593 López ¶ 99 (citing Email chain between Genaro Matias and Frankie López dated Jan. 29, 2015) (**C-0566**)); Claimants' Reply ¶ 25.

594 Claimants' Reply ¶ 25.

595 Rivera I ¶ 129.

293. *Second*, the documents and testimony that the Claimants rely on in support of their position are inapposite. In their Reply Memorial, the Claimants incorrectly say, "Respondent acknowledges that there were still employees and subcontractors on the La Chorrera construction site into February 2015."[596] The Claimants' support for this statement is a cite to the testimony of Mr. López relating to a baseball stadium in Puerto Rico, having nothing to do with the La Chorrera Project or any document or testimony of the Respondent's witnesses.[597] Assuming that the Claimants meant to cite to paragraph 99 (not paragraph 10) of Mr. López's statement, they mischaracterize what he says. He says nothing about Panama "acknowledge[ing]" anything about work on the La Chorrera Project, and the email he references for support was between employees of the Omega Consortium and did not include employees of the Judiciary.[598] Moreover, that email—which contains a vague and brief conversation between Omega employees about a request by someone named "Checa" for "$4k…regarding the Judiciary … to pay the payroll tomorrow" [599]—does not support Mr. López's contention that "in February 2015, [Omega] had employees and subcontractors on site."[600] Mr. López provides no explanation of who these alleged employees or subcontractors were, what work they were allegedly doing, or when they completed that work.[601] Then, the Claimants try to support the allegation that the "Omega Consortium worked on the Project at least until late October 2015" with a letter from Omega to the Judicial Authority requesting a 560-day extension of time.[602] Nowhere in that letter does Omega assert that it was still working on the La Chorrera Project. Similarly, no payment applications, progress reports, or other records showing work being done up to October 2015 have ever been presented.

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596 Claimants' Reply ¶ 25 (citing López ¶ 10).

597 López ¶ 10. We note that many of the Claimants' citations in their Reply Memorial to the Rivera and López witness statements are incorrect.

598 López ¶ 99 (citing Email chain between Genaro Matias and Frankie López dated Jan. 29, 2015) (**C-0566**).

599 López ¶ 99 (citing Email chain between Genaro Matias and Frankie López dated Jan. 29, 2015) (**C-0566**).

600 López ¶ 99 (citing Email chain between Genaro Matias and Frankie López dated Jan. 29, 2015) (**C-0566**).

601 *See* López ¶ 99.

602 Claimants' Reply ¶ 25 (citing Letter from Omega to Judicial Authority in response to Nota: 2015 10 29 - P007-067 Proposal of Addendum No. 3 dated Oct. 29, 2015 (**R-0081**)).

294. Although negotiations between the parties continued, Omega never restarted work on the La Chorrera Project after their December 2014 exit. The Omega Consortium also stopped negotiating with the Judicial Authority in 2015, while the Judicial Authority continued efforts to negotiate an addendum through 2016 in hopes that the project would be completed.[603] Mr. López, Omega Consortium's Project Manager, admits that in his testimony, stating "[a]lthough at the end of 2015 it appeared that the Judiciary was finally coming around to our position, by then we were no longer able to formalize the [addendum] because of the total uncertainty we had with respect to all the other Ministries."[604] Indeed, Mr. López concedes that it was Omega's choice not to move forward on the La Chorrera Project. Ultimately, the Omega Consortium abandoned the La Chorrera Project—having received US$ [redacted] in overcompensation[605] — and left the Judicial Authority with no bonds to call on to complete the project. [606]

c. The Judicial Authority Continued Working with the Omega Consortium into the Varela Administration

295. The Claimants allege that after the change in administration, the Judicial Authority's "attitude towards the Omega Consortium [] drastically changed."[607] Again, false. The Judicial Authority worked very hard to have the La Chorrera Project completed throughout both the Martinelli and the Varela Administrations.[608]

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603 Respondent's Counter-Memorial ¶¶ 42-44; Rios II ¶¶ 19-21.

604 López ¶ 105.

605 Rios II ¶¶ 13-14, 23-24. Mr. McKinnon (the Claimants' expert) calculates that the Omega Consortium is still owed US$ 42,347.61 on the La Chorrera Project. McKinnon Annex 1, p. 1 Table 1, p. 19. The Judicial Authority, however, paid the full amount of Payment Application No. 13 for work on the project, although an amount was withheld by the Ministry of Economy and Finance to ensure payment of the Omega Consortium's debts to the Social Security Administration. Even if this was considered to be an amount outstanding to the Omega Consortium on the project, Omega would still have retained US$ 1,372,424. In Panama's Counter-Memorial and Rios' first statement, Panama relied on Rios' Note No. 355/S.A./2016 for the approximate remaining balance retained by the Omega Consortium. This was an approximation and the amount calculated by Mr. McKinnon (the Claimants' expert) should be relied on instead. *See* Note No. 355/S.A./2016 from Judicial Authority to Superintendent of Insurance and Reinsurance of Panama dated Mar. 11, 2016 (**R-0025**); Respondent's Counter-Memorial ¶ 46.

606 Respondent's Counter-Memorial ¶ 46; *see* Rios II ¶ 18.

607 Claimants' Reply ¶¶ 156.

608 Rios I ¶¶ 21-36, 38; Rios II ¶¶ 15-24.

296. The Judicial Authority's actions during the Varela Administration demonstrate its continued commitment to the La Chorrera Project. In August of 2014, the Judicial Authority negotiated and executed Addendum No. 2, granting an additional seven months of time to the Omega Consortium. Then, in October 2014, on receiving mandatory corrections from the Comptroller General's office, the Judicial Authority worked with the Omega Consortium to revise and sign an amended addendum.[609] In December 2014, the Comptroller General endorsed Addendum No. 2.[610] With regard to payments, the Judicial Authority and the Comptroller General's office paid all of the payment applications submitted by the Omega Consortium during the Varela Administration, amounting to over US$ [redacted] for work on the La Chorrera Project.[611]

297. The Claimants also allege that the Judicial Authority failed to compensate them for the Omega Consortium's work on the La Chorrera Project from July 2014 to December 2014, in the amount of US$ [redacted][612] That too is false, as the Judicial Authority made that payment, in October 2015.[613] The Omega Consortium, however, owed the Social Security Administration for failure to pay its mandatory contributions. The Omega Consortium, therefore, requested that

609 Addendum No. 2 to Contract 150/2012 dated Oct. 24, 2014 (**R-0008**); Letter No. 1614/S.A./2014 from Judicial Authority to Comptroller General dated Oct. 27, 2014 (**R-0078**); Form 128325-129440 from Comptroller General to the Judicial Authority dated Oct. 2, 2014 (**R-0074**); Letter DIPRENA-DPSG-GC-8184 from MEF to Judicial Authority dated Oct. 20, 2014 (**R-0075**); Letter re Remedy Action Regarding Addendum No. 2 to Contract No. 150/2012 from Judicial Authority's Prosecutor's Office to the Legal Department at the Judicial Authority dated Oct. 2, 2014 (**R-0076**); Letter No. 1549/S.A./2014 from Administrative Secretary of the Supreme Court to Director of the National Budget at MEF dated Oct. 14, 2014 (**R-0077**).

610 *See* Addendum No. 2 to Contract No. 150/2012 dated Oct. 24, 2014 (**R-0008**) (endorsed in December 2014 during the Varela Administration).

611 McKinnon Report, Annex 1, Table 11, p. 19 (showing Payment Applications Nos. 11, 12, and 13 were paid in July 2014, August 2014, and January 2015 for a total of over US$ [redacted] during the Varela Administration).

612 López ¶ 98.

613 *See* McKinnon Report, Annex 1, Table 11, p. 19 (showing payment 13 was completed through Check # 14952 and # 14972); CSS – Receipt 324963 – Payment 28 Oct. 2015 – Ck 14952 – OJ (**C-0340**) (showing that Check #14952 paid on October 27, 2015); Omega Engineering, Inc. Receipt D00899504 Tax Payment – C001269267 Lic Com – Pago 30 Oct. 2015 – Ck 14972 – OJ dated Oct. 30, 2015 (**C-0342**), p. 3 (showing that Check #14972 was paid on October 30, 2015).

the payment by the Judicial Authority be made directly to the Treasury Department to satisfy that obligation.[614]

298. The Claimants also fail to present any evidence of the alleged change in behavior towards them after President Varela took office. While the Claimants argue that they sent "repeated (unanswered) letters" to the Judicial Authority requesting support for endorsement of Addendum No. 2,[615] they cite to only one letter to which the Judicial Authority allegedly did not respond.[616] On December 29, 2014, however, the Judicial Authority responded to Claimants' letter about the status of Addendum No. 2 and confirmed that it had undertaken all the necessary steps to have the addendum endorsed.[617] The Claimants make a similar allegation regarding a letter supposedly sent to the Judicial Authority in August 2014, but fail to provide a citation to or a copy of that letter.[618] Throughout the project, the Judicial Authority maintained contact with the Omega Consortium and considered their concerns.[619]

299. The Claimants further allege that by March 2015, the Judicial Authority's support for the La Chorrera Project had "completely evaporated."[620] This is untrue. The Judicial Authority wanted—and continues to want—the La Chorrera courthouse to be completed. By March 2015, the Omega Consortium had not made any progress on the project over the prior three months and

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614 CSS – Receipt 324963 – Payment 28 Oct. 2015 – Ck 14952 – OJ (**C-0340**); Omega Engineering, Inc. Receipt D00899504 Tax Payment – C001269267 Lic Com – Pago 30 Oct. 2015 – Ck 14972 – OJ dated Oct. 30, 2015 (**C-0342**), p. 3; Memorandum No. 203 02 1761 from Chief of Legal Tax Department to General Director of Revenue, dated Sept. 25, 2015 (**C-0342**), p. 7; Memorandum No. 201-02-1142-DGI from General Director of Revenue to Head of Payment Department dated Oct. 29, 2015 (**C-0342**), pp. 5-6; *see* Letter No. FL-06-015 from Omega to Social Security Administration dated June 15, 2015 (**C-0556**), p. 2.

615 Claimants' Reply ¶ 157 (citing Letter from Omega to Judiciary, Note: 2014 11 27 – P007-053 dated Nov. 27, 2014 (**C-0366**)).

616 Claimants' Reply ¶ 157 (citing Letter from Omega to Judiciary, Note: 2014 11 27 – P007-053 dated 27 Nov. 2014 (**C-0366**)).

617 Note N. 1832/S.A./2014 Judicial Authority to Omega dated December 29, 2014 (**C-0368**).

618 López ¶ 99.

619 Rios II ¶¶ 16-17; Rios I ¶ 21-36, 38; Respondent's Counter-Memorial ¶¶ 28-29.

620 Claimants' Reply ¶ 159.

their bonds were about to expire.[621] Without valid bonds, the Judicial Authority would have no recourse to call on the bonds to have a new contractor or insurer finish the project.[622] These events forced the Judicial Authority to issue a letter of intent to terminate the project.[623]

300. On receiving a response from the Omega Consortium in which they threatened arbitration, the Judicial Authority gave the Omega Consortium a second chance to negotiate an addendum and suspended the termination.[624] The Judicial Authority offered the Omega Consortium an additional 202 days—nearly seven months—to complete the project, provided the Omega Consortium renewed the bonds.[625] The Omega Consortium, however, never renewed the bonds or reinitiated work on the project.[626] Instead, the Claimants argue that the offer was insufficient because it was not enough time, and the addendum did not address the backlog in payment on the La Chorrera Project.[627] However, the additional time was certainly sufficient. The Omega Consortium initially had 540 days (a year and a half) to complete the project and, by this point, had spent over two years on the project. With this extension, the Omega Consortium would have had 1,002 days to complete the project (an extra year of time), which should have been sufficient.[628] Moreover, by signing the addendum, the Omega Consortium would have been able to collect on outstanding payments that they complain were not addressed in the

621 Rios II ¶ 18.

622 *See* Rios I ¶ 16.

623 *See* Rios II ¶ 18; Letter N. P.C.S.J./604/2015 from the Judicial Authority to Omega dated Mar. 11, 2015 (**R-0013**).

624 *See* Letter Responding to N. P.C.S.J./604/2015 from the Judicial Authority to Omega dated Mar. 18, 2015 (**R-0015**); Note N. P.C.S.J./746/2015 dated Mar. 25, 2015 from President of the Supreme Court to Omega (**C-0248**).

625 *See* Letter Responding to N. P.C.S.J./604/2015 from the Judicial Authority to Omega dated Mar. 18, 2015 (**R-0015**); Note N. P.C.S.J./746/2015 dated Mar. 25, 2015 from President of the Supreme Court to Omega (**C-0248**).

626 Rios I ¶ 32; Rios II ¶ 19.

627 Claimants' Reply ¶ 160.

628 Rios II ¶¶ 19-20.

addendum. Notably, there was nearly US$ [redacted] left for the project at this time,[629] and therefore, no need for an increase in costs at that point.

301. Contrary to the Omega Consortium's allegations that the Judicial Authority's attitude changed about the project, the Omega Consortium was the one who terminated the negotiations with the Judicial Authority.[630] As Mr. López has testified, "[a]lthough at the end of 2015 it appeared that the Judiciary was finally coming around to our position, by then we were no longer able to formalize the [addendum] because of the total uncertainty we had with respect to all the other Ministries."[631] Throughout 2015 and 2016, the Judicial Authority continued efforts to negotiate an addendum, always hoping that the project would be completed.[632]

d. The Presidency Did Not Target or Influence the La Chorrera Project

302. The Claimants' allege that the La Chorrera Project was targeted by the Varela Administration.[633] However, the Claimants fail to support this theory: the Judicial Authority continued its commitment to the La Chorrera Project well into the Varela Administration and long after the Omega Consortium's December 2014 abandonment of the project;[634] the

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629 Rios II ¶ 20.

630 López ¶ 105; Rios II ¶ 21.

631 López ¶ 105. *See also* Rios II ¶ 21.

632 Respondent's Counter-Memorial ¶¶ 42-44. The Claimants argue that Panama "endorsed" the Claimants' corrupt actions, because the Judicial Authority "continued to work with [them] to try to restart work on the La Chorrera Contract…." Claimants' Reply ¶ 316, n. 905 (citing Rivera II ¶ 16). However, Omega started work on the La Chorrera Project on January 15, 2013 and had finished about 50% of the courthouse before abandoning the project in December 2014. By the winter of 2015, when Omega's connection to the corruption scheme became public, a substantial part of the project had been completed. *See* Rivera I ¶ 85 (Mr. Rivera alleges that he himself did not know about Omega's connection to the investigation until January 2015). On February 23, 2015, Justice Moncada Luna was convicted by the National Assembly, but the public prosecutor's office continued its investigation into Omega and other entities involved in the scheme. *See* Plea Bargain of Justice Alejandro Moncada Luna dated Feb. 23, 2015 (**R-0064**). This put the Judicial Authority in a tough spot – it had a substantial portion of its courthouse completed but a contractor under investigation. Anxious to have the project completed, the Judicial Authority tried to move forward with the project and continued negotiating with Omega. However, these efforts failed and the project was never restarted. In 2016, the criminal investigations into Omega and the other entities and individuals involved in Justice Moncada Luna's corrupt scheme were suspended and remain suspended, while an appeal related to a procedural issue is pending in the Panamanian courts. Villalba I ¶ 36.

633 *See* Claimants' Reply ¶¶ 95, 128, 156, 269-70.

634 *See supra* Section III.B.3.

Comptroller General endorsed Addendum No. 2 for a 260-day extension and all payment applications submitted during the Varela Administration;[635] and Ms. Rios has testified that the Judicial Authority was "never asked by anyone in President Varela's Administration to take any adverse action against the Claimants or to harm the Project in any way."[636]

303. Given that the Judicial Authority made full payment due to the Omega Consortium, leaving it with a surplus of $1.4 million, it is surprising that the Claimants have even raised the La Chorrera Project in this arbitration.

4. The Ciudad de las Artes Project

304. The Ciudad de las Artes Contract was a US$ 54 million turnkey contract between a consortium of Omega and Panama's National Institute of Culture ("**INAC**").[637] The Omega Consortium received an advance payment worth 20% of the contract price, almost US$ 11 million.[638] Given this massive financial head start, INAC expected that the project would progress smoothly. That did not happen.

305. Increasingly serious issues began to surface with Omega's performance around the middle of 2014. Most significantly, Omega's workforce and productivity levels fell dramatically through November 2014, when it abandoned the project by permanently suspending the works

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635 *See* Addendum No. 2 to Contract No. 150/2012 dated Oct. 24, 2014 (**R-0008**) (endorsed December 23, 2014); McKinnon Report, Annex 1, Table 11, p. 19 (all payments were completed on the project, including three payment applications during the Varela Administration totaling over US$ 1 million).

636 Rios II ¶ 25; Rios I ¶ 38. Mr. López, the Omega Consortium Project Manager, alleges in his testimony that an unnamed engineer from the Judicial Authority told him that President Varela directed the engineer to terminate the contract with the Omega Consortium because the other ministries were doing the same. López ¶ 73. Mr. López makes this statement with no indication of who the individual is, no documentary evidence, no context, or date as to when this occurred. This provides the Tribunal with no ability to assess the credibility of this statement. Moreover, the veracity of this statement is highly questionable. It would be exceedingly odd for the President of Panama to communicate directly with an engineer within one of the ministries and further, the engineer would have no power to carry out this alleged directive to "terminate" the contract with the Omega Consortium. Ms. Rios, Administrative Secretary of the Judicial Authority at the time and, present, has testified that she has no knowledge of this ever being said by an engineer at the Judicial Authority. Rios II ¶ 26.

637 Respondent's Counter-Memorial ¶¶ 80, 83 (citing Contract No. 093-12 dated July 6, 2012 (**C-0042**), Cl. 35).

638 Respondent's Counter-Memorial ¶¶ 88-89. *See also* Addendum No. 1 to Contract No. 093-12 dated Apr. 16, 2013 (**C-0167**).

and removing all personnel from the project site.[639] In light of these breaches, INAC was compelled to terminate the Ciudad de las Artes Contract.[640] To this day, Omega's primary excuse for defaulting on the contract is that it lacked funds to keep the project running on course.[641] However, the facts show that Omega was always over-funded on this project thanks to the advance payment it received, to the point that it continues to owe INAC several million dollars for work it never performed.[642]

306. In their Reply, the Claimants attempt to justify Omega's breaches and condemn INAC's termination of the contract in a variety of ways, all of which fail. Below, Panama disproves the Claimants' allegations that Omega was justified in breaching and abandoning the contract, and will establish that Omega defaulted on the Ciudad de las Artes Contract; establishes that the manner in which INAC terminated the Ciudad de las Artes Contract was appropriate and that, contrary to the Claimants' complaints of procedural mistreatment, the Claimants' due process rights were fully safeguarded throughout the termination process; and refutes the Claimants' allegation that INAC conspired with the Ministry of Economy and Finance ("**MEF**"), at the behest of President Varela, to deprive the project of the budget it needed to survive, with the sole intention to harm the Claimants.

a. Omega Defaulted on the Contract

307. Panama established in its Counter-Memorial that Omega defaulted on the Ciudad de las Artes Contract and abandoned the project in November 2014.[643] As shown, Omega's performance began to deteriorate significantly in mid-2014. This drop in performance was noticed and reported by Sosa Arquitectos Urbanistas Consultores, S.A. ("**Sosa**"), the independent engineer and inspector on the project. This reporting coincided with an internal review of the

639 Respondent's Counter-Memorial ¶¶ 95-106.

640 Respondent's Counter-Memorial ¶¶ 107-115.

641 *See generally* Claimants' Reply ¶¶ 212-16. *See also* Rivera II ¶¶ 29-30, 32; López ¶¶ 119-22.

642 Respondent's Counter-Memorial ¶¶ 103-06, 116-17.

643 Respondent's Counter-Memorial ¶¶ 95-106.

project by INAC, as is typically conducted when a government administration changes. Ultimately, Omega simply walked away from the project.[644]

308. The Claimants' response to these charges is both contradictory and unsupported. The Claimants falsely accuse Sosa of being directed by INAC to fabricate excuses that INAC could use to terminate the contract, yet they rely on Sosa's opinions regularly when it seemingly suits their case.[645] The Claimants also attempt to excuse their deficient performance by alleging that INAC cut their much-needed cash flow; however, the record shows that Omega was over-funded on this project, invalidating this excuse for their poor performance.[646]

i. The Review of Projects Conducted by the Incoming INAC Administration in Mid-2014 Raised Concerns

309. INAC's administration changed in mid-2014. As is customary during institutional transitions, the incoming INAC administration reviewed all ongoing projects. Its review of the Ciudad de las Artes Project raised serious red flags.[647] The Claimants argue that INAC could not have had any concerns regarding its performance in mid-2014 because its internal review did not begin until December 2014.[648] The Claimants are confusing two different project reviews and, as such, are wrong.

310. In mid-2014, INAC initiated the standard review of ongoing projects routinely conducted by Panamanian government entities when a new administration takes office.[649] Yadisel Buendía, Sosa's team leader on the INAC project from November 2013 to December 2014, testifies that the incoming INAC administration conducted this review upon taking office.[650] One of INAC's

644 Respondent's Counter-Memorial ¶¶ 95-106.

645 *See, e.g.*, Claimants' Reply ¶¶ 214, 216, 218.

646 Respondent's Counter-Memorial ¶¶ 103-06, 116-17.

647 Respondent's Counter-Memorial, ¶ 105. *See also* Buendía ¶ 18-19.

648 Claimants' Reply ¶ 191.

649 *See, e.g.*, Díaz 1 ¶ 15; Buendía ¶ 18.

650 Buendía ¶ 18.

principal concerns was that Omega's progress on the project was far below the expected level based on the amounts already paid by INAC.[651]

311. In December 2014, INAC requested that the Comptroller General's office conduct a formal "audit" of the project.[652] INAC remained concerned about the significant gap between the amounts paid to Omega and its progress, as well as Omega's abandonment of the works. Indeed, in the months between when INAC conducted its internal review and requested the audit from the Comptroller General, Omega's manpower and progress both fell dramatically, to the point that Omega removed all construction personnel.

312. INAC's internal review in mid-2014 coincided with repeated warnings from Sosa of serious deficiencies in Omega's work starting in the first week of August 2014. Based on the concerns stemming from INAC's internal review and Sosa's warnings, INAC started withholding approval of Omega's payment applications (also called certificates of partial payment, or "**CPPs**").[653] Thus, between May 16, 2013 and May 16, 2014, INAC approved the 12 CPPs submitted by Omega, which covered Omega's work through March 31, 2014 and totaled US$ [redacted] (exclusive of value-added tax, or ITBMS).[654] This included CPP No. 1, which authorized the 20% advance payment to Omega. CPPs 13 to 20 submitted by Omega, on the other hand, were withheld by INAC due to Omega's serious performance issues.[655]

ii. Sosa Reported Serious Problems with Omega's Performance Starting in Early August 2014

313. As explained in Panama's Counter-Memorial, on August 4, 2014, Sosa began reporting on serious problems regarding Omega's performance.[656] In their Reply, the Claimants seek to

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651 Buendía ¶ 19.

652 *See* Note No. DG-2020 from INAC to the Comptroller General's Office dated Dec. 11, 2014 (**C-0705**). *See also* Note No. DG-011 from INAC to the Comptroller General's Office dated Jan. 7, 2015 (**C-0706**).

653 Buendía ¶ 17-19.

654 Omega was also paid an additional US$ 549,387 by way of ITBMS payments for CPPs 1 to 9. *See* Respondent's Counter-Memorial, ¶ 104.

655 *See* Respondent's Counter-Memorial ¶¶ 104-105.

656 *See* Respondent's Counter-Memorial ¶¶ 95-102.

minimize the seriousness of Sosa's complaints, arguing that Sosa's criticisms focused on "trivialities" and "mundane aspects of an ongoing construction project."[657] The contemporaneous record proves the Claimants wrong: Omega's deficiencies, as reported by Sosa, were extremely serious.

314. The gravity of Omega's deficiencies is immediately apparent from Sosa's correspondence starting in August 2014, which focused on the sharp decline in Omega's productivity levels and on-site workforce.[658] For example, Sosa's first warning, on August 4, 2014, noted that there had been a "significant reduction in the Project's workforce and no progress whatsoever" on three of the project's six new buildings, that "a lot of workers have been fired and equipment is being returned," and that the "situation is alarming given that productivity on the project is low, and the project is being significantly delayed."[659] By November 11, 2014, just 10 days before Omega abandoned the project, Sosa continued to report that "once again a significant decline in the workforce has been noted" on the project, and that the "situation is yet again alarming, since work productivity is low, and the project is accumulating significant delays."[660]

315. Ms. Buendía, who inspected the project on a daily basis and prepared most of Sosa's correspondence, confirms that Sosa's concerns regarding the sharp decline in Omega's productivity levels and on-site workforce were extremely serious.[661] According to Ms. Buendía, "[t]hese were major deficiencies, as without the necessary personnel working at a satisfactory pace, there was no way that Omega could keep the Project on schedule."[662] Ms. Buendía goes

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657 Claimants' Reply ¶¶ 192, 223. *See also* López ¶ 129.

658 *See, e.g.*, Letter from Sosa to INAC dated Aug. 4, 2014 (**R-0042**); Letter from Sosa to Omega dated Aug. 12, 2014 (**R-0043**); Letter from Sosa to INAC dated Aug. 21, 2014 (**C-0592**); Letter from Sosa to Omega dated Aug. 21, 2014 (**C-0596**); Letter from Sosa to Omega dated Sept. 2, 2014 (**R-0044**); Letter SA-CDA-117-14 from Sosa to Omega dated Oct. 31, 2014 (**R-0048**); Letter from Sosa to INAC dated Nov. 11, 2014 (**R-0050**); Letter from Sosa to INAC dated Dec. 5, 2014 (**C-0715**); Letter from Sosa to INAC dated Dec. 10, 2014 (**R-0051**).

659 Letter from Sosa to INAC dated Aug. 4, 2014 (**R-0042**).

660 Letter from Sosa to INAC dated Nov. 11, 2014 (**R-0050**).

661 *See generally* Buendía ¶¶ 6-8.

662 Buendía ¶ 7.

on to explain that, "[w]hile Sosa also complained about other, more ordinary construction issues, there is no question that our main complaints starting in early August 2014 were on serious deficiencies by Omega that required urgent remediation. Omega itself acknowledged, at the time, that Sosa's complaints were serious, although the justifications for their deficiencies were unsatisfactory."[663]

316. According to Ms. Buendía, Omega's issues were caused largely due to a falling-out between Omega and its main construction subcontractor, Arco y Asociados, S.A., which led to Omega dismissing Arco in late July 2014. Sosa asked Omega on several occasions for an explanation as to why their relationship with Arco deteriorated, but Sosa never received a response.[664]

317. Once Sosa had identified the main problems affecting Omega, Sosa worked with Omega to try to get the Ciudad de las Artes Project back on track. Together, Sosa and Omega devised a recovery plan in early September 2014, by which Omega would bring productivity and workforce on the project back to adequate levels.[665] Omega, however, did not meet its commitments under that plan.[666] Omega's productivity and workforce levels kept declining until November 21, 2014, when Sosa witnessed during its daily inspection that work on the project had been completely abandoned.[667]

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663 Buendía ¶ 7. *See also* Letter from Omega to Sosa dated Sept. 5, 2014 (**R-0045)** ("As we have told you on several occasions, [your concern over the number of employees] is a direct consequence of the administrative measures that we have been forced to take due to the lack of answers and delays with respect to the progress payment accounts submitted to date […] The change in work execution strategy and opting to rescind a subcontract has never resulted in a breach of Clause #45.7. For this purpose, we have submitted a recovery plan […] We reiterate our commitment to and interest in remedying this situation as quickly as possible, assuming our responsibility and obligations under the contract in question. As the progress payment accounts are settled, we will be in a position to proportionally inject the necessary funds and personnel according to the work plan to make up this lost time […] We appreciate your prompt attention to and collaboration on the matters mentioned above to avoid further setbacks.")

664 Buendía ¶ 7.

665 *See* Letter from Omega to Sosa dated Sept. 5, 2014 (**R-0045)**.

666 Buendía ¶ 8. *See also* Monthly Report from Sosa to INAC dated Oct. 2014 (**C-0524**), pp. 41, 44.

667 Buendía ¶ 8.

iii. Sosa's Concerns Regarding Omega's Performance Were Legitimate

318. In an effort to undermine the damning effect of Sosa's criticisms, the Claimants attack Sosa's professionalism.[668] They accuse Sosa of being directed by INAC to "creat[e] a paper trail [...] to justify INAC's intended termination of the Contract."[669] This accusation is undermined not just by the evidence, but by the Claimants' own case theory.

319. Ms. Buendía explains that, "Sosa was never directed by any INAC official to lie or fabricate in its reporting of Omega's performance. Had Sosa been directed to do so, we would have refused—acceding to such a request would have been unprofessional, but also would have been contrary to Sosa's interest, as it would have obstructed the execution of our contract with INAC."[670] Ms. Buendía further notes that "Omega itself duly acknowledged that our criticism of their performance was legitimate, even agreeing to implement a recovery plan to correct Omega's performance issues and get the Project back on track."[671]

320. Moreover, the Claimants' accusation against Sosa is belied by their own allegations. While the Claimants argue that Sosa became an instrument in INAC's alleged conspiracy against Omega starting in mid-2014, they conveniently make exceptions to Sosa's supposed dishonesty when it suits them.[672] For example, in an attempt to prove that INAC was to blame for Omega's shortcomings, the Claimants rely on Sosa's recommendations that INAC should stop withholding certain of Omega's CPPs[673] (an issue discussed further below). The Claimants cannot have it both ways.

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668 *See* Claimants' Reply ¶¶ 192, 222-226.

669 Claimants' Reply ¶¶ 223-224. *See also* Rivera ¶ 31; López ¶ 129.

670 Buendía ¶ 10.

671 Buendía ¶ 10.

672 *See, e.g.*, Claimants' Reply ¶¶ 214, 216, 218.

673 *See* Claimants' Reply ¶ 214.

321. To support their attack on Sosa's credibility, the Claimants allege that Sosa's conduct changed suspiciously in two ways once the new INAC administration took office. Those allegations are also wrong.

322. *First*, the Claimants argue that once Sosa started criticizing Omega's performance, Sosa's communications began focusing on legal issues (namely, on the grounds for termination of the Ciudad de las Artes Contract), instead of technical ones, which the Claimants suggest was beyond the scope of Sosa's contract with INAC.[674] Sosa's role, however, included ensuring that Omega complied with its contractual obligations.[675] Sosa's contract requires Sosa to "[e]nsure that the Contractor's performance complies with [its] contractual requirements with INAC", and "[v]erify and document the Contractor's performance."[676] As part of these obligations, Sosa had a duty to alert INAC if Omega was in breach of the Ciudad de las Artes Contract,[677] which Sosa did repeatedly starting in August 2014. Ms. Buendía testifies that, during the project, Omega never complained that Sosa was overstepping its role by pointing out Omega's contractual breaches to INAC.[678] Under the circumstances, the Claimants' *post hoc* criticisms of Sosa are unfounded.

323. *Second*, the Claimants and Mr. López allege that once the INAC administration changed, Sosa "curiously" stopped attending project meetings, including the initial meeting between Omega and the new INAC administration.[679] That is false.

324. As testified by Ms. Buendía, due to the nature of Sosa's work, the great majority of project meetings Sosa attended were with INAC's and Omega's technical teams. Ms. Buendía personally attended the majority of those meetings on behalf of Sosa throughout the project (and

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674 Claimants' Reply ¶¶ 192, 224-225. *See also* Rivera, ¶ 31; López, ¶ 129.

675 Request for Proposals No. 2012-1-30-0-08-AV-003776 dated 2012 (**R-0138**), pp. 46-47; Contract No. 049-13 between INAC and Sosa dated Feb. 7, 2013 (**R-0041**), Cls. 1, 3.

676 Request for Proposals No. 2012-1-30-0-08-AV-003776 dated 2012 (**R-0138**), pp. 46-47. *See also* Contract No. 049-13 between INAC and Sosa dated Feb. 7, 2013 (**R-0041**), Cls. 1, 3.

677 Buendía ¶¶ 12-13.

678 Buendía ¶ 13.

679 Claimants' Reply ¶¶ 192, 222. *See also* López ¶¶ 121, 128.

regardless of administration).[680] On the other hand, the fact that Sosa did not attend Omega's initial meeting with the new INAC directive team is irrelevant, as that meeting was just a general meeting for the contractor and the new administration to get to know one another. In fact, Ms. Buendía explains that Sosa had a separate introductory meeting with the new administration, which Omega did not attend.[681] In the words of Ms. Buendía: "it is the first time I have ever heard Omega make this allegation […] I am surprised that Omega's Mr. López would even make these allegations, as he was hardly involved in the Project (nor was Mr. Rivera), and never to my recollection attended Project meetings with Sosa."[682]

325. As can be seen, Sosa appropriately reported serious problems with Omega's performance. The fact that Sosa began reporting in August 2014 that Omega may have been in default was not suspicious—it was simply a reflection of the conditions that Sosa witnessed during its daily inspections of the Ciudad de las Artes Project.

iv. Omega Defaulted on the Contract and Abandoned the Project in November 2014

326. As already noted, Omega's productivity and workforce levels kept declining until November 21, 2014, when Sosa found that work on the project had been completely abandoned.[683] Based on Sosa's reports, INAC determined that Omega defaulted on the Ciudad de las Artes Contract in multiple ways, including by not having enough personnel required to perform the works in a satisfactory manner, and abandoning the works without INAC's

680 Buendía ¶ 16.

681 Buendía ¶ 16.

682 Buendía ¶¶ 15-16.

683 *See* Resolution No. 391-14 DG/DAJ dated Dec. 23, 2014 (**C-0044**), p. 4.

authorization.[684] Consequently, INAC decided to terminate the contract on December 23, 2014.[685]

327. The Claimants effectively acknowledge that Omega breached its contractual obligations and abandoned the project, but seek to excuse Omega's default by arguing that "any non-compliance on Omega's part was *due to non-payment on the INAC's part*."[686] As explained in Panama's Counter-Memorial[687] and further detailed below, this excuse is entirely without merit because Omega was at all times amply over-funded on this project, to the point that it continues to withhold approximately US$ [redacted] owed to INAC for work Omega never performed.

328. In support of this excuse for their default, the Claimants rely on communications in which Sosa informed INAC that it should stop withholding Omega's CPPs, as that was affecting Omega's cash flow.[688] However, in most of those very communications Sosa not only criticizes Omega for its decreasing productivity, slow progress, diminished workforce and lack of responsiveness, but also warns INAC that Omega may be in breach of the contract due to those deficiencies.[689] The Claimants' excuse, therefore, is undermined by the very evidence on which they rely.

329. Ms. Buendía, who has over 15 years of experience managing projects such as the Ciudad de las Artes Project, further testifies that any temporary disruption in cash flow stemming from

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684 *See* Resolution No. 391-14 DG/DAJ dated Dec. 23, 2014 (**C-0044**). INAC based its decision on the following grounds for termination established in Clause 45 of the Contract: 45(1) (non-compliance with the project's schedule and any other condition set forth in the Contract or the RFP); 45(3) (the contractor's failure to carry out the Contract with the necessary diligence to guarantee its satisfactory completion within the specified timeframe); 45(5) (abandonment or suspension of the works without INAC's authorization); 45(6) (refusal to comply with indications and instructions provided by INAC or the inspector); and 45(7) (not having enough personnel required to perform the works in a satisfactory manner within the specified timeframe). *See* Contract No. 093-12 dated July 6, 2012 (**C-0042**), Cl. 45.

685 *See* Resolution No. 391-14 DG/DAJ dated Dec. 23, 2014 (**C-0044**).

686 Claimants' Reply ¶ 212 (emphasis in original). *See generally* Reply ¶¶ 212-216. *See also* Rivera ¶¶ 29-30, 32; López ¶¶ 119-122.

687 Claimants' Reply ¶¶ 103-106, 116-117.

688 Claimants' Reply ¶ 214. *See also* Rivera ¶ 32; López ¶ 119.

689 *See, e.g.*, Letter from Sosa to INAC dated Aug. 21, 2014 (**C-0592**), p. 2; Letter from Sosa to INAC dated Dec. 5, 2014 (**C-0715**); Monthly report from Sosa to INAC dated Oct. 2014 (**C-0524**).

INAC's non-approval of CPPs "should not have been a problem for Omega."[690] Indeed, Ms. Buendía explains that, as reflected in Sosa's contemporaneous communications,[691] Sosa:

> [was] firmly of the view that Omega was significantly over-funded thanks to the advance payment it had received. Disruptions in cash flow are a common occurrence on large-scale construction projects, and certainly something that a contractor like Omega should have anticipated. A sophisticated and well-run contractor would have managed that advance payment as a safeguard against cash flow issues on the Project. As such, we repeatedly told Omega that they should continue working on the Project at a normal pace (just as Sosa did). Omega, however, did not heed our requests.[692]

330. The Claimants attempt to disprove that they were over-funded by arguing that Panama's claim is belied by their quantum expert, Dr. Flores, who noted in his first report that "Pay Apps 12 through 19 [*i.e.*, CPPs 13 to 20] were signed by Omega and INAC, but they have outstanding balances."[693] The claim that Dr. Flores' statement proves that Omega was not over-funded is disingenuous. It is clear that what Dr. Flores meant in the quoted excerpt is that CPPs 13 to 20 were not paid by INAC, something that Panama has never denied, and which was clearly set out in the Counter-Memorial.[694] The Claimants' misleading interpretation of Dr. Flores' report is incorrect.

331. Mr. Rivera also attempts to refute that Omega was over-funded by arguing that Panama's claim "[f]undamentally misrepresents how these Contracts (and the construction industry generally) work […] Whether or not Panama had 'overpaid' for what had been done in the Projects is a self-contradictory pretext, as that was precisely the intent of the advance payment to

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690 Buendía ¶ 20.

691 *See, e.g.*, Letter from Sosa to INAC dated Dec. 10, 2014 (**R-0051**); Letter from Sosa to INAC dated Dec. 16, 2014 (**C-0717**).

692 Buendía ¶ 20. *See also* Letter from Sosa to INAC dated Dec. 16, 2014 (**C-0717**) ("8. The spirit of approving a partial payment certificate to the Contractor (Down Payment) is precisely to provide a cash flow so that the design and [construction works] are successfully undertaken, and to keep an ongoing flow of works and for the construction works to progress efficiently, which is not the case [at hand].").

693 Reply ¶ 219 (quoting Flores 1 ¶ 143(iv)).

694 Respondent's Counter-Memorial ¶¶ 105-106.

which Panama had obligated itself."[695] Notably, Mr. Rivera does not deny that Omega was significantly overpaid on the Ciudad de las Artes Project—to the contrary, he seems to admit that was meant to be the case. Nor does Mr. Rivera address the fundamental purpose of a substantial advance payment like the one paid to Omega; namely, it is intended to provide cash for mobilization and start-up costs, while at the same time providing a financial cushion to cover periods of reduced cash flow. Thus, Omega should have had sufficient funds available to it for use on the Ciudad de las Artes Project at all times. The only conceivable excuse for not having such funds available would be that Mr. Rivera used INAC-related funds for other purposes. As shown with the La Chorrera Project, Mr. Rivera seemingly was quite willing to use project funds to pay government officials or, if the Claimants' meritless defense were to be believed, for personal projects. In either case, the Claimants cannot divert project funds and then claim that they are unable to work because of a shortfall in cashflow.

332. Panama noted in its Counter-Memorial that Omega was paid over US$ [redacted] (exclusive of ITBMS) on the project, which represented over [redacted] of the total contract price. By contrast, as of August 31, 2014, Omega had completed only [redacted] of the project.[696] The Claimants do not dispute those figures. Omega continues to withhold almost US$ [redacted] which Omega owes INAC for work it never performed.[697] The Claimants make only a half-hearted effort to dispute this last figure in their Reply; they simply make reference, in a footnote, to Mr. McKinnon's statement that "[t]he outstanding balance of progress billings is $ [redacted]"[698] That statement, however, does not assist the Claimants, as the figure does not capture the total balance between the parties since it does not take into account the advance payment Omega received in excess of US$ [redacted].[699] Based on the above, Omega's

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695 Rivera II ¶ 38.

696 Respondent's Counter-Memorial ¶ 104.

697 Respondent's Counter-Memorial ¶¶ 116-117.

698 Claimants' Reply ¶ 219, n. 648 (quoting McKinnon 1, Annex 1, ¶ 18).

699 In the same footnote, the Claimants also refer to Mr. McKinnon's figure for "value of the work at cessation" (US$ [redacted]) and contrast that with the figure for "total payment" (US$ [redacted]. The figure for "value of the work at cessation," however, is merely a hypothetical used by Mr. McKinnon as part of his damages calculations, and it is not reflective of what actually occurred on the project. The figure is therefore irrelevant to determine the final balance on the project. *See* Reply ¶ 219, n. 648.

complaints regarding a lack of cash flow are inconsistent with the facts, and there was no valid reason for Omega to default on the contract.

333. The Claimants advance other arguments to try to justify their default, all of which fail.

334. *First*, the Claimants once again conveniently rely on Sosa's opinions, and allege that Tomás Sosa, the Director of Sosa, who has a has a high-level managerial role within the company, asserted that "there were no technical merits for the INAC to terminate the Contract for default and recommended that the INAC negotiate with Claimants and continue the Project."[700]

335. To begin with, this is yet another example of the Claimants wanting to have their cake and eat it too—after trying to disqualify Sosa as liars, they rely on Sosa's statements when it seemingly assists them. There is no proof that Mr. Sosa ever adopted that position—the Claimants rely on two emails between third parties on which Mr. Sosa is not even copied.[701] The Claimants, however, ignore a letter signed by Mr. Sosa in which he states that "[w]orkforce reduction that has been taking place since July 2014 and the subsequent total halt of works from 22nd November 2014 contravene [the contract], and results in an event of default according to what is established in Clause No. 45, # 5 and 7."[702] Further, Ms. Buendía testifies that "[a]s the person involved in the day-to-day management of the Project, I can reiterate that Omega was in default, and that there was a valid basis for INAC to terminate the INAC-Omega contract."[703]

336. *Second*, the Claimants allege that their sharp and steady reduction of personnel starting in August 2014 did not breach of the contract because "[t]he Contract contains no explicit numerical requirement for workers onsite."[704] This is not a credible response. Contracts rarely, if ever, require a contractor to have a specific number of workers on site. Rather, they obligate

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700 Claimants' Reply ¶ 216. *See also* Rivera II ¶ 36.

701 *See* Email from ASSA to Travelers on December 30, 2014 at 11:04 a.m. (**C-0527**); Email from ASSA to Travelers on December 30, 2014 at 11:46 a.m. (**C-0528**).

702 *See* Letter from Sosa to INAC dated Dec. 16, 2014 (**C-0717**), ¶ 9. *See also id*., ¶¶ 10, 12.

703 Buendía ¶ 14.

704 Claimants' Reply ¶ 220.

the contractor to have a workforce sufficient to complete the project in accordance with the project schedule and specifications. The Ciudad de las Artes Contract was no different, as it provided that Omega guaranteed that the workforce on the project would be "adequate and sufficient to conform with this Contract's requirements."[705] Omega clearly did not meet this requirement. As noted above, Sosa determined that Omega's workforce was insufficient to carry out the works in accordance with Omega's contractual requirements.[706] Sosa was not alone in viewing Omega's diminishing workforce as problematic. Omega itself acknowledged at the time that its decline in workforce was a serious problem.[707]

337. *Third*, the Claimants argue that INAC unjustifiably ignored Omega's requests for an extension of time and change order, which Omega submitted on July 15, 2014, and Omega's subsequent follow-up efforts to get INAC's approval.[708] That is false; INAC replied to both of Omega's requests by letter on September 9, 2014, and provided a detailed response to Omega's change order request. Specifically, INAC asked that Omega provide it with a calculation of the daily operational costs so that INAC could analyze whether the requested extension was viable.[709]

338. The Claimants allege that Omega "once again request[ed] additional costs and an extension of time" in September 2014, but that INAC did not respond,[710] and that in October 2014 Omega sent INAC a new request for an extension, to which INAC replied, albeit "without

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705 Contract No. 093-12 dated July 6, 2012 (**C-0042**), Cl. 18.

706 Buendía ¶¶ 6-8, 14.

707 *See* Letter from Omega to Sosa dated Oct. 31, 2014 (**C-0714**) ("In view of this situation, the non-compliance by INAC of the referenced contract prevents OMEGA from continuing making progress according to the work schedule and, at the same time, [in accordance with the requirements] set forth in Clause #45, paragraph 7, 'not having the necessary amount of staff to successfully perform the work requested within the established timeframe.'").

708 Claimants' Reply ¶¶ 189, 218.

709 Note No. DG/107 from INAC to the Omega Consortium dated Sep. 9, 2014 (**C-0073)**.

710 Claimants' Reply ¶ 198. *See also* Letter No. SOSA-0-5-2014 from the Omega Consortium to Sosa dated Sept. 17, 2014 (**C-0546**).

any commitment to work toward a solution on any of the issues Claimants had raised."[711] That, again, is incorrect. Omega's September 2014 letter was not a new request, but rather a follow-up to its original request.[712] By the time Omega sent that letter to INAC (September 17, 2014), Omega had responded to Omega's request eight days prior. Omega's October 2014 letter, also, was not a new request, but a notification that Omega would finally provide INAC with the daily operational costs that INAC had requested more than a month before so that INAC could analyze the viability of Omega's extension of time request.[713] Thus, if anyone was at fault for delaying progress on Omega's extension of time request, it was Omega itself.

339. *Fourth*, the Claimants allege that INAC "failed to review and approve construction drawings, which were needed to obtain the corresponding construction permits to continue the Project."[714] That is incorrect; there were no construction drawings pending approval that prevented construction work from moving forward. To the contrary, by the time it abandoned the project in November 2014, Omega was permitted (and required) to continue the construction works based on the partial construction permits it had already received.[715]

340. *Fifth*, the Claimants argue that Rogelio Saltarín, a consultant to the Ministry of the Presidency, allegedly influenced INAC to undermine the Ciudad de las Artes Contract to the

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711 Claimants' Reply ¶ 198. *See also* Letter No. INAC-N16-2014 from Omega to INAC dated Oct. 16, 2014 (**C-0597**).

712 Letter No. SOSA-0-5-2014 from the Omega Consortium to Sosa dated Sept. 17, 2014 (**C-0546**).

713 Letter No. INAC-N16-2014 from Omega to INAC dated Oct. 16, 2014 (**C-0597**) ("[…] our intention is to be able to formalize as soon as possible a change order exclusively referred to the time extension issue. Opportunely we will submit for your approval the daily operational costs that would be covered in a subsequent change order. Since the end date for the contract in reference would be January 27th 2015, we consider it adequate to ensure that the contract remains in force so that the development of the work is not further affected.") (emphasis added).

714 Claimants' Reply ¶ 218. *See also* Sosa Architects - Minutes of Meeting for Ciudad de las Artes dated Nov. 28, 2014 (**C-0602**).

715 *See* Construction Permit No. P.C. 543-2014 issued to Omega Engineering Inc. dated June 5, 2014 (**R-0142**); Construction Permit No. P.C. 970-2013 issued to Constructora Arco y Asociados, S.A. dated Aug. 23, 2013 (**R-0143**); Construction Permit No. P.C. 206-2014 issued to Constructora Arco y Asociados, S.A. dated Mar. 6, 2014 (**R-0144**).

detriment of Omega.[716] Mr. Saltarín's involvement with the Ciudad de las Artes Contract, however, was inconsequential and had no effect whatsoever on the Claimants.

341. According to the Claimants, Mr. Saltarín's role was "to gather evidence for the Ministry [of the Presidency] in pursuit of criminal proceedings."[717] However, they do not mention that Mr. Saltarín's role was focused on investigating and reporting on wrongdoing committed by public officials (not contractors) during the Martinelli administration.[718]

342. Also, it is clear from Mr. Saltarín's activity report that his work regarding the Ciudad de las Artes Contract was superficial and did not comprise any investigation into Omega's conduct. Mr. Saltarín simply reported having met with INAC on four occasions (three of which included discussion of the Ciudad de las Artes Contract), during which he "coordinat[ed] work," "[received] documentation related to the [Ciudad de las Artes Contract] for evaluation," and "assess[ed] the [Ciudad de las Artes Contract]."[719] The work Mr. Saltarín performed in relation to this contract, therefore, had no bearing on the Claimants' works.

343. *Sixth*, the Claimants deny that they abandoned the project on November 21, 2014 because Omega continued to communicate and correspond with INAC after that date.[720] The Claimants, however, do not challenge that Omega stopped the works in their entirety and removed all on-site personnel as of that date. In fact, Mr. Rivera has acknowledged that Omega "abandon[ed] some projects in the country in October [2014] and the rest in November 2014."[721] Moreover, Ms. Buendía confirms that "Omega's productivity and workforce levels kept declining until November 21, 2014, when we witnessed during our daily inspection that construction work on

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716 *See* Claimants' Reply ¶¶ 88-91. *See generally* Claimants' Reply ¶¶ 85-94.

717 Claimants' Reply ¶ 87.

718 Saltarín, the Man who Put Together the Files of the Attorney General's Office, LA ESTRELLA DE PANAMÁ dated Oct. 1, 2018 (**C-0672**), pp. 3-4 ("[Mr. Saltarín's] work was oriented towards becoming the person responsible of high-profile corruption cases in connection to members of the Martinelli Administration").

719 *See* Activity Report from Saltarín, Arias y Asociados to Ministry of the Presidency dated June 25, 2018 (**C-0617**), pp. 6, 17, 33.

720 Claimants' Reply ¶ 221; López, ¶ 123.

721 Rivera I ¶ 129.

the Project had been completely stopped, keeping only the administrative staff and the security agent."[722] The fact that Omega's administrative representatives continued to correspond with INAC after November 21, 2014 does not negate the fact that Omega abandoned the project on that date in violation of the contract.

344. *Seventh*, the Claimants argue that the testimony of María Eugenia Herrera, who was the Director of INAC from July 2009 to July 2014 proves they did not default on the INAC project.[723] Ms. Herrera's testimony, however, says nothing of relevance to this (or any material) issue. Indeed, her testimony is limited to suggesting that she had not heard of problems with Omega during her time at INAC. Ms. Herrera, however left INAC in July 2014 and admits to having no knowledge of what happened on the project after that date.[724] Ms. Herrera, therefore, was not involved in the project when the major problems with Omega's work surfaced (early August 2014) or when INAC terminated the contract (December 2014). Her testimony simply does not address the performance issues that resulted in Omega's default.

b. INAC Properly Terminated the Contract

345. In view of Omega's default, INAC terminated the Ciudad de las Artes Contract by Resolution No. 391-14 DG/DAJ of December 23, 2014 (the "**Termination Resolution**").[725] On December 26, 2014, INAC informed ASSA of the contract's termination,[726] and on February 12, 2015, INAC officially informed ASSA that it had decided to call Omega's completion bond.[727]

346. Panama showed in its Counter-Memorial that INAC properly terminated the Ciudad de las Artes Contract.[728] In their Reply, however, the Claimants continue to complain that INAC

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722 Buendía ¶ 8.

723 Claimants' Reply ¶ 228. *See also* First Witness Statement of Maria Eugenia Herrera dated May 13, 2019 ("**Herrera**").

724 Herrera ¶ 3.

725 Resolution No. 391-14 DG-DAJ dated Dec. 23, 2014 (**C-0044**).

726 Letter No. 364-14/D.A.J. from National Institute of Culture to ASSA dated Dec. 26, 2014 (**C-0379**).

727 Letter No. 056/D.A.J. from INAC to ASSA dated Feb. 12, 2015 (**R-0097**).

728 Respondent's Counter-Memorial ¶¶ 107-113.

allegedly failed to comply with a number of procedural requirements under Panamanian law, which supposedly interfered with the Claimants' procedural rights. On this basis, the Claimants argue that the contract's termination was unlawful.[729]

347. Below, Panama explains why the termination of the Ciudad de las Artes Contract was conducted in an appropriate manner, and how the Claimants' procedural rights were fully safeguarded throughout the termination process.

i. The Procedural Rules Applicable to the Contract's Termination

348. As an initial matter, the Parties disagree as to the procedural rules under Panamanian law applicable to the contract's termination process. The Claimants allege that Law 22 of 2006 applied, and that INAC failed to follow the procedural requirements provided therein.[730] Panama, however, contends that the general administrative procedure established in Law 38 of 2000 was applicable.[731] INAC's application of Law 38 was appropriate for three main reasons.

349. *First*, the Claimants are wrong when they argue that the general administrative procedure in Law 38 is applicable only to one specific administrative agency called the *Procuraduría de la Administración*.[732] Law 38 serves three distinct purposes: (i) it approves the Organic Statute of the *Procuraduría de la Administración*, (ii) it regulates the general administrative procedure, and (iii) it prescribes certain special legal provisions. Each of these matters is enacted in a separate chapter of Law 38,[733] and the very first provision of the general administrative procedure specifies that the procedure applies to all Panamanian State entities, which includes INAC.[734]

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729 Claimants' Reply ¶¶ 204-211.

730 Reply ¶¶ 204-209.

731 Respondent's Counter-Memorial ¶¶ 110-112.

732 Reply ¶ 209.

733 *See* Law 38 of July 31, 2000 (**R-0053)**, pp. 1, 10, 60.

734 *See* Law 38 of July 31, 2000 (**R-0053)**, Art. 34 ("The administrative acts of all public entities will be performed in accordance with the norms of informality, impartiality, uniformity, economy, promptness, and efficiency […]") (emphasis added).

350. *Second*, through their actions during the termination process, the Claimants accepted that the procedure in Law 38 was applicable. Indeed, as explained below, instead of using the remedies available to them under Law 22 to challenge the Termination Resolution, the Claimants chose to pursue the remedies under Law 38. Thus, the Claimants cannot argue belatedly, in this arbitration, that the procedure in Law 38 was inapplicable.

351. *Third*, as is also explained in further detail below, whatever the applicable procedure may have been, INAC effectively met or exceeded the procedural requirements under both Law 22 and Law 38, such that the Claimants' due process rights were fully safeguarded throughout the termination process. The Claimants, therefore, suffered no prejudice by virtue of the manner in which INAC carried out the termination of the contract, and cannot claim that their treaty-based rights were violated as a result.

352. *Fourth*, in any event, regardless of whether Law 22 or Law 38 were used to terminate Omega, it is clear that the termination was motivated and justified by Omega's performance problems. The termination, therefore, was for commercial reasons that simply do not give rise to international liability.

ii. INAC Complied with the Pre-Termination Due Process Requirements

353. The Claimants argue that INAC failed to comply with the pre-termination due process requirements set forth in Articles 116(1) and 116(2) of Law 22.[735] That is incorrect.

354. Article 116(1) of Law 22 provides that a State entity intending to terminate a contract "may" provide the contractor with an undefined period of time to correct the problems on which the termination would be based, "[provided it is] feasible."[736] It is clear that this is not a requirement, but rather a measure that a public entity may take at its discretion. In any event, Omega was provided a period of several months during which it could have corrected the problems that led to the contract's termination: Sosa warned Omega, in writing, that it may be in breach of the Ciudad de las Artes Contract due to its sharp decrease in workforce and

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735 Claimants' Reply ¶¶ 204-205.

736 Law 22 of 2006 (**C-0280**), Art. 116(1).

productivity levels as early as August 21, 2014, that is, four months prior to the Termination Resolution.[737] Omega acknowledged Sosa's warnings, even committing to implement a recovery plan in September 2014 intended to remedy its performance issues.[738] Unfortunately, however, Omega failed to comply with that recovery plan.[739]

355. Based on the above, INAC gave Omega a generous amount of time to correct the performance issues that led to the termination of the contract, in keeping with Article 116(1) of Law 22.

356. For its part, Article 116(2) of Law 22 provides that if a State entity is considering terminating a contract, it shall notify the contractor of the reasons for its decision, granting the contractor five working days to reply and present relevant evidence.[740] INAC likewise complied with this requirement: as noted above, Omega was informed as early as August 21, 2014 that its significant decrease in workforce and productivity levels was in breach of the Ciudad de las Artes Contract, and that the termination of the contract was being considered.[741] Omega committed to implement a recovery plan to try to correct those breaches, but it failed to comply with that plan. Thus, INAC complied with Article 116(2) of Law 22.

357. In light of the foregoing considerations, INAC met, and effectively exceeded, the pre-termination due process requirements in Law 22. The Claimants' complaints are, therefore, without merit.

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737 Letter from Sosa to Omega dated Aug. 21, 2014 (**C-0596**). *See also* Letter from Sosa to Omega dated Sept. 2, 2014 (**R-0044**).

738 *See* Letter from Omega to Sosa dated Sept. 5, 2014 (**R-0045)**.

739 *See* Monthly report from Sosa to INAC dated Oct. 2014 (**C-0524**), pp. 41, 44; Resolution No. 391-14 DG-DAJ dated Dec. 23, 2014 (**C-0044**).

740 Law 22 of 2006 (**C-0280**), Art. 116(2).

741 *See* Letter from Sosa to Omega dated Aug. 21, 2014 (**C-0596**); Letter from Sosa to Omega dated Sept. 2, 2014 (**R-0044**). *See also* Letter from Sosa to Omega dated Aug. 12, 2014 (**R-0043**); Letter SA-CDA-117-14 from Sosa to Omega dated Oct. 31, 2014 (**R-0048**).

iii. INAC Complied with the Due Process Requirements During the Termination

358. The Claimants allege that INAC violated Decree 366 of 2006 and Article 129 of Law 22, which provide that resolutions issued by State entities in the performance of a contract shall be notified using the electronic system of public procurement, "PanamaCompra."[742] The Claimants also allege that INAC deprived Omega of the five-day window from the date of notification to challenge the Termination Resolution before the Administrative Tribunal for Public Procurement (*Tribunal Administrativo de Contrataciones Públicas*, or "**TACP**"), as provided by Article 116(4) of Law 22.[743] As explained below, INAC met or exceeded these rules, and the Claimants' due process rights were fully safeguarded during the contract's termination process.

359. *First*, as Panama noted in its Counter-Memorial, INAC followed the notification procedure in Law 38,[744] which provided the Claimants with a higher degree of procedural safeguard than notification via PanamaCompra, as established in Law 22.[745] INAC attempted to hand-deliver the Termination Resolution to Omega at its offices in Panama City during working hours on two separate occasions, on January 23 and 26, 2015, but Omega's representatives were not present on either date.[746] INAC therefore proceeded to post Edict No. 001, notifying Omega of the Termination Resolution, on the front door of Omega's office on January 27, 2015.[747]

360. The Claimants protest that INAC did not notify them of the Termination Resolution through PanamaCompra. But in reality, that formality had no effect on the Claimants and their ability to exercise their procedural rights. The Claimants acknowledge that they were informed and fully aware of the issuance of the Termination Resolution as early as December 29, 2014, just six days after the resolution was issued and four weeks before they were officially notified of

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742 Claimants' Reply ¶¶ 206-207.

743 Claimants' Reply ¶¶ 206-209.

744 Respondent's Counter-Memorial ¶ 110.

745 *See* Law 38 of July 31, 2000 (**R-0053)**, Arts. 89-91, 94.

746 *See* INAC Notification Report dated Jan. 23, 2015 (**R-0140**); INAC Notification Report dated Jan. 26, 2015 (**R-0141**).

747 Edict No. 001 of the National Institute of Culture dated Jan. 27, 2015 (**C-0243**).

the resolution by edict.[748] Moreover, the Claimants cannot complain that they were not officially notified, since they now also admit that they "found the edict" the "same day" that it was posted on the front door of Omega's office (*i.e.*, January 27, 2015).[749] The Claimants, thus, were officially—and actually—notified of the Termination Resolution, and were in a position to challenge the resolution, as they eventually did.

361. *Second*, the Claimants argue that "[b]y failing to properly inform Claimants of the termination, the INAC necessarily deprived Claimants of the five-day window of time needed to consider any necessary appeal [under Article 116(4) of Law 22]."[750] That conclusion is mistaken, and it is belied by the Claimants' own actions.

362. As noted above, the Claimants were properly informed of the contract's termination. The Claimants, therefore, could have challenged the Termination Resolution under Law 22 within the relevant five-day window, but chose not to. Interestingly, however, the Claimants did challenge the Termination Resolution on March 26, 2015 under the general administrative procedure in Law 38,[751] after having requested that INAC certify that the Termination Resolution was duly executed.[752] That challenge was denied by the INAC Board of Directors.[753] Subsequently, the Claimants had one last opportunity to challenge the Termination Resolution before the TACP.[754] The Claimants, however, chose not to exercise that procedural right, allowing the Termination Resolution to become final.[755]

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748 Claimants' Memorial ¶ 109; Claimants' Reply ¶ 207, nn. 606, 607.

749 Claimants' Reply ¶ 207.

750 Claimants' Reply ¶ 208.

751 Omega's Application for Administrative Review dated Mar. 26, 2015 (**R-0055**).

752 INAC certification requested by IGRA dated Mar. 25, 2015 (**R-0054**).

753 Resolution No. 025-16 J.D. dated July 19, 2016 (**R-0056**). Omega was notified of the INAC Board of Directors' denial on August 12, 2016. *See* IGRA Notification of Resolution No. 025-16 J.D, dated Aug. 12, 2016 (**R-0098**).

754 *See* Law 22 of 2006 (**R-0026**), Art. 131.

755 *See* Law 38 of July 31, 2000 (**R-0053**), Art. 46.

363. The Claimants also allege that "[a]s of 6 March 2015—three months after the termination resolution was issued—the INAC acknowledged that the administrative resolution terminating the Ciudad de las Artes Contract was still '*pending notification*.'"[756] The evidence, however, shows that the Claimants' allegation is false. The Claimants cite a document from the Comptroller General's office dated March 6, 2015, which refers to an INAC letter from January 26, 2015, *i.e.*, the day before the Claimants were officially notified of the Termination Resolution. In the INAC letter, INAC asked the Comptroller General certain questions regarding the term of Omega's bonds, adding that, as of January 26, 2015, the Termination Resolution was "pending notification."[757] The Comptroller General's office, therefore, was not stating that the termination was still pending notification as of March 6, 2015.

364. It is clear that the Claimants' due process rights were fully safeguarded during the termination process. The Claimants were properly informed of the contract's termination, and were able to exercise their procedural rights under Panamanian law. The Claimants' allegations, therefore, fail.

iv. INAC Complied with the Principles of Good Faith and "Logical Reasonableness"

365. The Claimants allege that INAC violated the principles of good faith and "logical reasonableness" under Panamanian law in terminating the Ciudad de las Artes Contract. The Claimants do not explain the content of the "logical reasonableness" principle, although they allege that it is "tied […] to the obligation of good faith."[758] According to the Claimants, INAC violated those principles by not paying Omega for work performed, not negotiating in good faith, "deploying" Sosa to "invent" reasons to terminate the contract, not granting requests for extensions of time, failing to provide notice of the impending termination, failing to invite the

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[756] Claimants' Reply ¶ 208 (citing Note No. 21-15 ING-DUB-DIR from the Comptroller General's Office to Mariana Nuñez dated Mar. 6, 2015 (**C-0670**)).

[757] INAC Letter No. DG-038 to the Comptroller General dated Jan. 26, 2015 (**R-0145**).

[758] Claimants' Reply ¶ 210.

Claimants to address the termination, failing to provide the Claimants with an opportunity to file an appeal, and not allocating a proper budget for the project.[759]

366. In the foregoing sections, Panama has demonstrated that INAC's actions were appropriate and lawful, disproving the Claimants' allegation that INAC violated the principles of good faith and "logical reasonableness" in terminating the Ciudad de las Artes Contract. The testimony of Panama's witnesses who were involved with the Ciudad de las Artes Project—Yadisel Buendía,[760] Iván Zarak,[761] and Carmen Chen[762]—also confirms that INAC, and the Panamanian government more generally, acted in good faith. In the following section, Panama will address the Claimants' allegations regarding the allocation of the project's budget, and will demonstrate that both INAC and the MEF acted lawfully and in good faith in that regard.

c. The MEF Did Not Target the Claimants Using the Ciudad de las Artes Project's Budget

367. The Ciudad de las Artes Contract was a turnkey contract, meaning that Omega was to finance the project in its entirety.[763] In order for Omega to receive partial disbursements from its bank, Omega was to submit CPPs to INAC together with its monthly progress reports, which were subject to approval by INAC and the Comptroller General's office.[764] Once approved, Omega could assign the CPPs to its bank, who would pay Omega and then collect from the government.[765] According to Addendum No. 1 to the contract, INAC was to pay all of the CPPs

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759 Claimants' Reply ¶¶ 210-211.

760 Buendía ¶¶ 17, 21 ("In my view, INAC did not act with the intent to harm Omega or the Project […] I have no doubt that INAC Director Mariana Núñez wanted to see the Project through to completion – she told me so on multiple occasions. In my view, any obstacles that Omega faced on the Project were not extraordinary, especially during governmental transition periods in Panama.")

761 Zarak ¶¶ 13, 18 ("I never saw any evidence of hostility by the government, including by President Varela himself, towards Omega, Mr. Rivera, or any of Omega's projects in Panama […] the MEF cooperated with INAC to ensure that it procured sufficient funds to pay the CPPs due on March 31, 2015 on the Ciudad de las Artes Project, without hindrance or delay.")

762 Chen ¶ 14 ("I never received any instructions to harm Omega in any way, and I am not aware of anyone at INAC having received instructions of that kind.")

763 Contract No. 093-12 dated July 6, 2012 (**C-0042)**, Cls. 5, 10, 35.

764 Respondent's Counter-Memorial ¶ 84.

765 Respondent's Counter-Memorial ¶ 84.

endorsed by the Comptroller General's office (up to the project's full price) on March 31, 2015, using funds assigned to INAC's budget for 2015.[766]

368. In their Memorial, the Claimants argued that the government did not assign a budget to INAC for the Ciudad de las Artes Project for 2015. The Claimants, therefore, take the position that the government decided not to continue with the project by September 2014 (the date on which the MEF submitted its budget recommendation to the National Assembly), as INAC would not be able to make the payment due in March 2015.[767]

369. Panama explained in its Counter-Memorial that INAC requested a budget for the project's full price of approximately US$ 54 million for 2015, and that the government did assign a budget for the Ciudad de las Artes Project. That budget, however, was in the amount of US$ 10 million, which did not cover the project's full price.[768] As Panama explained, "[w]hile that budget was lower than the amount requested, the fact of the matter is that State budgets in Panama are subject to adjustments, and institutions are capable of requesting additional budgetary allocations depending on their needs. That is precisely what occurred on this project […]."[769]

370. In their Reply, the Claimants again complain about INAC's budget for 2015, and greatly exaggerate the issue's significance. The Claimants allege that "the Varela Administration hatched a plan to secretly sabotage" the Ciudad de las Artes Project by using the MEF to "slash" the project's budget. Thus, according to the Claimants, the MEF and INAC acted in concert as soon as President Varela took office to make sure that the project's 2015 budget was insufficient to cover INAC's payment due that year (which the Claimants allege would necessarily be for the project's full price), all with the sole intent of harming the Claimants.[770] There was nothing conspiratorial about the way the project's budget for 2015 was handled. The fact that INAC was

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766 Addendum No. 1 to Contract No. 093-12 dated April 16, 2013 (**C-0167**), pp. 2-4.

767 Claimants' Memorial ¶ 79.

768 Respondent's Counter-Memorial ¶¶ 92-93 and n. 195.

769 Respondent's Counter-Memorial ¶ 93.

770 *See generally* Claimants' Reply ¶¶ 117, 195-202, 226-227.

initially assigned a budget that did not cover the project's full price did not mean that the MEF intended to harm the Claimants, and the Claimants did not suffer any impact as a result.

i. Panama's Budget and Budgetary Allocations to Government Entities

371. The Claimants' position fails to properly account for how Panama determines its annual budget and how that budget is managed over the course of a year. Iván Zarak, who was Vice Minister of Economy at the MEF during President Varela's administration and was in charge of the Ministry's Budget Directorship, testifies that the budget process is complex and involves multiple steps.[771] Initially, each government entity prepares its own yearly budget for the upcoming year, which is generally sub-divided into capital investments (which includes construction projects) and operational costs. Each government entity then delivers its budget proposals to the MEF, which considers them in the context of the broader general budget requirements, projected income from taxes and non-tax revenue, Panama Canal Authority dividends and royalties, and the deficit ceiling allotted in the Social and Fiscal Responsibility Law. Having considered these factors, the MEF provides the entities with comments and counter-proposals at the line item level. This process begins in the month of April of the preceding year.[772]

372. As Mr. Zarak explains, government entities tend to request budgets exceeding their yearly execution capacity, oftentimes in amounts up to twice their assigned budget for the previous year. "Therefore, the MEF's counter-proposals are usually substantially lower than the incoming proposals prepared by the individual entities."[773]

373. The magnitude of the differences between the budget proposals of the many units of the Panamanian government and the MEF's recommendations can be seen in a spreadsheet comparing these figures for 2015 for every Panamanian State entity, which was prepared by the

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771 *See generally* Zarak ¶¶ 5-11.

772 Zarak ¶ 5.

773 Zarak ¶ 6.

MEF for purposes of this arbitration.[774] As is clear by looking at Columns H and I of that spreadsheet (which represent each entity's budget proposals and the MEF's recommendations, respectively), the MEF recommended a lower budget than that requested by practically every single government entity in 2015.[775] That includes the Office of the President, for which the MEF recommended US$ 608 million compared to the US$ 707 million requested.[776] In some cases, the MEF's recommendation was less than half of what the entity requested—for example, the Institute for Agricultural Marketing requested US$ 205 million, and the MEF recommended US$ 52 million (or 25% of the amount requested),[777] and EGESA, the national electrical power generation company, requested US$ 105 million, and the MEF recommended US$ 40 million (or 38% of the amount requested).[778]

374. Mr. Zarak goes on to explain that, in the case of budgetary allocations for construction projects for which the contractor provides financing, including those using CPPs as a payment mechanism, the MEF will usually recommend that money be allocated to cover payments due for CPPs that have been endorsed by the Comptroller General and have a payment date falling within the relevant budgetary year. According to Mr. Zarak, "[d]etermining the specific amount of funds that a government entity will need for CPPs on a given project can sometimes be difficult since it is impossible to know in April of the preceding year how a specific project will progress, and whether and when the Comptroller General will endorse CPPs. Therefore, the amount recommended by the MEF for such projects is often necessarily based on an estimate."[779]

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774 *See* Comparison of 2015 Budget Proposals and MEF Recommendations (**R-0112**). This spreadsheet lists all of the Panamanian State entities and the general budgetary items that make up each entity's total budget (such as operational costs (*funcionamiento*), capital investments (*inversión*), or debt service (*servicio de la deuda*)) in Column G; the amounts requested by each entity (total and with respect to each general budgetary item) in Column H; and the amounts recommended by the MEF (total and with respect to each general budgetary item) in Column I. *See* Zarak ¶ 6, n. 1.

775 *See* Comparison of 2015 Budget Proposals and MEF Recommendations (**R-0112**), Columns H and I.

776 *See* Comparison of 2015 Budget Proposals and MEF Recommendations (**R-0112**), Row 25.

777 *See* Comparison of 2015 Budget Proposals and MEF Recommendations (**R-0112**), Row 246.

778 *See* Comparison of 2015 Budget Proposals and MEF Recommendations (**R-0112**), Row 249.

779 Zarak ¶ 7.

375. Once the MEF has had the opportunity to discuss budget proposals with all the government entities, the MEF presents the general budget to the cabinet for discussion and approval. Prior to its approval, the cabinet usually reassigns some of the budgetary allocations among the various government entities. After the cabinet provides its approval, the MEF submits its recommendation for the yearly general budget to Panama's National Assembly. The National Assembly's Budget Committee usually invites all entities to explain or clarify their budget requests. Once the National Assembly has deliberated, it will send its own recommendations on the general budget back to the MEF for further evaluation, after which the National Assembly and the MEF usually reach a compromise. Once that agreement between the National Assembly and the MEF has been reached, the general budget is again submitted to the cabinet, and later to the National Assembly, for final approval, which generally occurs by July 31, except on the first year of a presidential term, during which the MEF typically submits the general budget to the National Assembly for final approval by mid-August.[780] To illustrate the magnitude of the general budget, the general budget for 2015 was set at approximately US$ 19.5 billion, consisting of US$ 9 billion for capital investments and US$ 10.5 billion for operational costs.[781]

376. As noted above, Panama's budget is a projection, made in approximately July (or August, on the first year of a presidential term), of the government's expenditures for the following year. That means that the budget, as originally enacted, is not set in stone. Rather, as Mr. Zarak points out, "actual expenditures will vary substantially from that projection, with many government entities either exceeding or falling short of their expected expenses or income. In reality, managing the approved budget requires continuing adjustment by the State as the year goes by."[782]

377. When an entity of the Panamanian government requires additional funds during the course of a year, there are two ways in which it can obtain additional budgetary allocations.

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780 Zarak ¶ 8.

781 *See* Law 36 of 2014 (Budget Law for 2015) (**C-0711**), Title I, Ch. I, Art. 1. *See also* Comparison of 2015 Budget Proposals and MEF Recommendations (**R-0112**), Cell I2 (*Total Public Sector – Recommended*).

782 Zarak ¶ 10.

First, there may be a budget line transfer (*traslado de partida*), by which funds from one budget line are transferred to another budget line, either within an institution or from one institution with a budget surplus to another institution with insufficient funds.[783] *Second*, an institution may exceptionally request that additional funds be allocated to it directly from the general budget (*créditos adicionales*). The latter requests may be granted provided that there is a surplus of revenue in the general budget.[784] Mr. Zarak, who was directly involved in managing the country's budget for over three years, testifies that "[b]y far, the most commonly used mechanism is budget line transfers. These types of transfers are requested and processed throughout the course of the year, with thousands of such requests in any given year. Depending upon the amount involved, these transfers may require the consent of the National Assembly's Budget Committee, which remains in session year-round to accommodate such requests."[785]

378. As can be seen from the foregoing discussion, preparing Panama's general budget involves a complex process where multiple government institutions are engaged in discussions concerning funding for a great deal of line items, months in advance of when those funds will be used. Consequently, it is not unusual that the budget originally approved for a government entity may change.

ii. The MEF Did Not Target or Harm the Claimants

379. The Claimants contend that the MEF purposely recommended a 2015 budget for the Ciudad de las Artes Project falling short of the project's full price to sabotage the contract and harm the Claimants.[786] That is false.

380. *First*, Mr. Zarak, who was directly involved in making the MEF's recommendation for INAC's 2015 budget, testifies that he "never saw any evidence of hostility by the government,

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783 *See* Law 36 of 2014 (Budget Law for 2015) (**R-0111**), Art. 284.

784 *See* Law 36 of 2014 (Budget Law for 2015) (**R-0111**), Arts. 286-287.

785 Zarak ¶ 11.

786 *See generally* Claimants' Reply ¶¶ 117, 195-202, 226-227.

including by President Varela himself, towards Omega, Mr. Rivera, or any of Omega's projects in Panama."[787]

381. Mr. Zarak explains that, by September 2014, when the MEF presented its budget recommendation to the National Assembly, the MEF was aware that the Ciudad de las Artes Project was significantly behind schedule and that there were issues with the contractor's performance. In fact, based on these factors, the Ciudad de las Artes Project was considered a high-risk project by the MEF.[788] The Claimants note that in 2012 and 2013 the MEF had told INAC that it should plan to procure funding for the project's full price for the fiscal year 2015,[789] and argue that the MEF's "decision to cut the budget is an inexplicable *volte-face*."[790] Contrary to this assertion, however, it would have made no sense for the MEF to recommend a 2015 budget for the project's full price given the project's mounting delays due to Omega's deficiencies. Indeed, even Omega itself desired, at the time, that the contract be extended for 582 days,[791] meaning that Omega understood that there was no way the project could be completed and paid for in 2015 (let alone by January 2015, the original date of completion).

382. As described above, the MEF often cannot precisely assess how much money a government entity will need for CPPs on a given project and, thus, makes its allocations based on estimates.[792] Also, as Mr. Zarak explains, due to the complex nature of the budgetary allocation process, the amounts required for specific projects on a given year are not always comprehensively communicated to the MEF, especially in the case of smaller, decentralized

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787 Zarak ¶ 13.

788 Zarak ¶ 15.

789 *See* Letter from Ministry of Economy and Finance to INAC, dated Mar. 20, 2012 (**C-0149**); Letter No. DdCP-DE-088 from the Ministry of Economy and Finance to INAC dated Feb. 1, 2013 (**C-0540**)

790 Claimants' Reply ¶ 201.

791 Letter from Omega to INAC dated Feb. 3, 2015 (**C-0185**), ¶ 19 ("Based on the most recent revision of the work schedule, the impacts not attributable to OMEGA and extensively documented, require an extension of time of 582 days, from the completion of the required addendum to the Contract.").

792 Zarak ¶ 7.

institutions such as INAC, with which communication channels are more limited than with full-fledged ministries.[793]

383. Based on the above, and taking into account the project's delays and the ongoing problems with Omega's performance, the MEF did not have complete visibility as to the amount of money that INAC would need for the Ciudad de las Artes Project in 2015 based on the CPPs that would be due that year. The MEF, therefore, recommended a 2015 budget for the project in an amount below that requested by INAC.[794]

384. *Second*, the Claimants note that in October 2014 INAC issued instructions to evaluate the legality of the CPP payment mechanism, and argue that INAC "triggered" that analysis "only because it knew it would not have the funds to pay for the Ciudad de las Artes Contract" based on the MEF's budget recommendation, which was issued in September 2014.[795] That analysis, however, was completely unrelated to the project's budget.

385. As Panama noted in its Counter-Memorial, the Ciudad de las Artes Project is the largest and most complex project ever undertaken by INAC, as well as INAC's first turnkey project. In turn, this was the first time INAC ever used CPPs as a payment mechanism.[796] When the new INAC administration took office in mid-2014, they too were unacquainted with the CPP payment mechanism. INAC understood that Omega had requested that payment of CPPs for the contract's full price be made in advance, which led INAC to inquire into the legality of the CPP mechanism.[797] That inquiry, therefore, was not part of an alleged plan by INAC and the MEF to "sabotage" the Ciudad de las Artes Contract.

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793 Zarak ¶ 16.

794 Zarak ¶¶ 14-17.

795 Claimants' Reply ¶ 213.

796 *See* Claimants' Reply ¶¶ 81, 87.

797 Letter from Omega to Sosa dated Dec. 22, 2014 (**C-0600**), ¶ 3, pp. 2-3 ("it is important to highlight that [in] item three (3) of the Note, [reference is made] to Clause No. 35 [on] Price and Manner of Payment of the Contract, as amended by the [Addendum], [providing] that the INSTITUTE will make only one payment of all CPP issued according to the Contract and the Regulations for the price agreed herein. However, you have misunderstood the fact that Omega has not requested [] payment [in] advance of the total Price of the Contract. On the contrary, Omega has only insisted on fulfillment of the obligation by the Institute to acknowledge the Work Progress Reports, and the subsequent issuance of the CPP to the pertinent entity, a

386. *Third*, the Claimants allege that "[a]dding to the evidence of the agency's hostile behavior, the INAC began to refuse to disburse payment for CPPs Nos. 1-12, which *already* had been endorsed by the INAC and the Comptroller General (during the Martinelli Administration), and which the Omega Consortium *already* had assigned to Credit Suisse (meaning Credit Suisse had already advanced the funds to the Omega Consortium)."[798] According to the Claimants, INAC's "refusal to pay Credit Suisse could have resulted in the Omega Consortium losing its financing for the Project."[799] The Claimants' allegation is predicated on a hypothetical result that never occurred: the Claimants argue that INAC's alleged actions "could," but in fact did not, affect Omega's financing on the project. The fact of the matter is that Omega assigned approved CPPs to Credit Suisse and timely received partial disbursements.

387. As Panama noted in its Counter-Memorial, INAC needed additional funds during the first few months of 2015 to pay the approved CPPs that Omega had assigned to Credit Suisse. Thus, contrary to the Claimants' accusation of "hostile behavior," INAC duly requested additional funds through a budget line transfer,[800] receiving the MEF's full cooperation to ensure that it procured the funds without hindrance or delay.[801] As noted above, budget line transfers are a commonly used mechanism by which government entities increase or decrease their budgets throughout the course of a year—indeed, "thousands" of such requests are made and processed

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document required to perform partial reimbursements by the Financial Institution to Omega, so that there are necessary flows to continue with the work. There is clearly a firm mechanism, and an obligation by the Institute to fulfill the above-mentioned procedures, but so far, no answer has been received with respect to these reports, in spite of the repeated communications sent to Omega for this purpose.") (emphasis added).

798 Claimants' Reply ¶ 193.

799 Claimants' Reply ¶ 193.

800 Respondent's Counter-Memorial ¶ 93. *See also* Letter from INAC to the MEF dated Mar. 3, 2015 (**R-0038**); Letter No. DG/122 from INAC to the Minister of Education dated Mar. 13, 2015 (**C-0606**); Letter No. 2764-15 DFG from the Comptroller General to INAC dated Apr. 7, 2015 (**R-0039**); Letter No. 2766-15 DFG from the Comptroller General to INAC dated Apr. 7, 2015 (**R-0040**).

801 *See* Zarak ¶ 17 ("the MEF cooperated with INAC to ensure that it procured sufficient funds to pay the CPPs due on March 31, 2015 on the Ciudad de las Artes Project, without hindrance or delay. Of all the financial obligations of the Panamanian State, CPPs, as well as any other financial obligation that carries interest (such as bonds and loans) have the highest order of precedence out of all the State's expenditures, as they represent Panama's good standing as a creditor with international banks.")

each year.[802] The Claimants, therefore, clearly exaggerate the significance of the MEF's initial budget recommendation to INAC for 2015.

388. Finally, the Claimants misinterpret Panamanian law when they allege that the MEF violated Article 19(6) of Law 22 of 2011.[803] That article provides that "State entities shall initiate procedures for the selection of contractors or through exceptional proceedings, when permitted by law, only when they have the corresponding budget entries or availability."[804] Clearly, the MEF could not have violated that provision, as it is aimed at entities who are preparing to select contractors, which in this case would be INAC. INAC, too, did not violate that provision, as it did have budgetary availability when it selected Omega as contractor in 2012.[805] The fact that, three years later, budgetary allocations for the project may have changed, does not violate that article nor it should be considered a shocking occurrence.

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389. As set out in this section, all of the Claimants' allegations regarding the Ciudad de las Artes Project are baseless. Omega's performance began to seriously deteriorate in early August 2014, until it abandoned the contract in November 2014. Due to Omega's default, INAC was justified in terminating the Ciudad de las Artes Contract. INAC terminated the contract appropriately and lawfully, ensuring that the Claimants' due process rights were fully safeguarded. The Claimants' other allegations of mistreatment, notably, that the MEF targeted Omega using the project's 2015 budget, are similarly refuted by the facts.

5. The Ministry of the Presidency—Colón Public Market

390. Panama demonstrated in its Counter-Memorial and in Section II.B.1.c above that the issues affecting the Omega Consortium's project to construct a new public market in the city of Colón ("**Colón Public Market Project**") with the Ministry of the Presidency and Secretary of

802 Zarak ¶ 11.

803 Claimants' Reply ¶ 198.

804 Law 22 of 2006 (**C-280)**, Art. 116(6).

805 *See* Letter from Ministry of Economy and Finance to INAC dated Mar. 20, 2012 (**C-0149**).

the Cold Chain were commercial in nature.[806] Due to these commercial issues, the project was lawfully suspended in 2012 and expired in March 2014, long before President Varela took office.[807] Although the parties tried to negotiate to restart the project, commercial issues continued to bar its reactivation and the project never began.[808] Given these issues, the Omega Consortium did not perform or invoice any work on the project—it only submitted expenses related to administrative costs in June 2015 for US$ [redacted].[809] These expenses are more than covered by the advance payment of US$ [redacted] that the Omega Consortium has retained.[810]

391. The Claimants do not rebut the fact that this project experienced commercial problems and was not started during either the Martinelli or Varela Administrations. However, they attempt to make this project fit their theory of the case by continuing to misrepresent events and make allegations unsupported by the evidence.

a. The Commercial Issues on the Colón Market Project Were Not Resolved During the Martinelli Administration

392. As the Claimants admit, the Colón Public Market Project faced serious commercial issues during the Martinelli Administration. That project continued to face commercial issues during the Varela administration as well.

393. As Panama has explained in Section II.B.1.c, the Claimants were awarded the Colón Public Market Project in October 2011 and the order to proceed was issued on September 7, 2012.[811] The new market was to be built on the site of the existing public market, which, at that

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806 *See supra* Section II.B.1.c; Respondent's Counter-Memorial ¶¶ 121-124.

807 Claimants' Memorial ¶ 76 (chart showing the project expired March 1, 2014); *see* Notice to Proceed dated Sept. 7, 2012 (**C-0148**) (providing 18 months for execution of the project which was March 1, 2014).

808 Duque ¶¶ 14-19.

809 *See* Letter 2015 06 19 P004-62 from the Omega Consortium to the Ministry of the Presidency dated June 19, 2015 (**C-0064**), pp. 3-4 (expenses were for processing of environmental impact assessment and administrative expenses during the first few months). Since "no work was ever billed on" this project, the Claimants have limited their claim under this contract to lost profits. Claimants' Memorial ¶ 45.

810 Respondent's Counter-Memorial ¶ 125.

811 Adjudication Resolution No. 124-2011 dated Oct. 10, 2011 (**C-0033**); Notice to Proceed for Contract No. 043 (2012) dated Sept. 7, 2012 (**C-0148**).

time, was occupied by various tenants.[812] The Ministry of the Presidency's plan was to relocate the market's tenants to a temporary facility that would be constructed on another site. This meant the temporary market had to be built and the market's tenants moved before construction could begin on the Omega Consortium's project. The Ministry of the Presidency initially expected that the temporary market would be constructed and the tenants relocated by early 2012. That expectation, however, was frustrated by (1) significant delays in negotiating the contract to construct the temporary market, as the owner of the land refused to agree to terms satisfactory to the Ministry, and (2) once the contract for the land was negotiated, the refusal of the current tenants to vacate the premises.[813] Despite the Ministry's best efforts to accommodate the tenants, they were unsuccessful and the Ministry decided not to move forward with the project until the relocation issue could be resolved.[814]

394. As a result, the Ministry suspended the portion of the Omega Consortium's contract requiring them to construct the market. Pursuant to the contract, the Ministry had the right to "suspend performance of any or all of its obligations" for "the time period that the Government determines to be necessary or desirable at its own convenience."[815] During the suspension period, the Ministry requested that the Claimants carry on with pre-construction activities, including the development of necessary manuals and the completion of relevant studies.[816] In carrying out this work, the Ministry expected that the Claimants would scale back their personnel and other costs associated with the construction phase of the project, as required by their contract.[817] The Claimants were entitled to compensation for the work performed on the non-suspended portions of the contract and for reasonable costs incurred as a result of the suspension.[818]

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812 Duque ¶ 14.

813 Duque ¶¶ 15, 17.

814 Duque ¶ 17.

815 Contract No. 043 (2012) dated Aug. 17, 2012 (**C-0034)**, Art. 72.

816 Duque ¶ 16.

817 Duque ¶ 16.

818 Contract No. 043 (2012) dated Aug. 17, 2012 (**C-0034)**, Art. 73.

395. In the first quarter of 2014, the Ministry and the Claimants discussed an addendum to the contract that would extend the completion date and would add the delay-related costs to the contract price.[819] A draft addendum was prepared, but discussions did not proceed to the point where the addendum could be signed.[820] A condition of signing the addendum, however, was that the Claimants renew the security bond for the project. [821] They did not do so and, as a result, negotiations stalled.

396. The Claimants allege that "by May 2014, the Omega Consortium had successfully negotiated and signed" an addendum to this project.[822] That is false. Addendum No. 1 was not formalized during the Martinelli Administration and was not signed in May 2014. The addendum exhibited by the Claimants is neither signed nor dated by the Ministry of the Presidency.[823] Moreover, the email chain that the Claimants argue proves the addendum was signed, clearly shows that in May 2014 the Ministry of the Presidency and the Omega Consortium were still discussing how to compute the new completion date in order for the Omega Consortium to request an updated bond.[824] Those discussions would have been unnecessary if the addendum was signed, since both an agreement on a completion date and the renewal of the bond were preconditions to signing any addendum extending the contract period. It is clear, therefore, that the Colón Public Market Project was still suspended with no valid contract and no addendum approved by the Ministry at end of the Martinelli administration.

819 Duque ¶ 18.

820 Addendum No. 1 to Contract No. 43 (2012) dated 2014 (**C-0277**) (the addendum was never signed or dated by the Ministry of the Presidency).

821 *See* Email chain between Jose Mandakaras, Maruquel Madrid and Frankie López dated May 13, 2014 (**C-0544**) (discussing the need for and processing of a new bond).

822 Claimants' Memorial ¶ 52.

823 Addendum No. 1 to Contract No. 43 (2012) dated 2014 (**C-0277**).

824 Email chain between Jose Mandakaras, Maruquel Madrid and Frankie López dated May 13, 2014 (**C-0544**).

b. The Varela Administration Did Not and Could Not Have Influenced the Project

397. Throughout the Varela Administration, the Ministry of the Presidency continued to work with the Omega Consortium to fix the commercial issues that had plagued the project since 2012. However, the parties were never able to negotiate an addendum and the project was never restarted. The Claimants allege that the failure to agree on an addendum is evidence of a political vendetta by President Varela. That is absurd.

398. *First*, as noted, the Claimants' position is grounded on the false premise that an addendum was signed in May 2014 and all it needed was the approval of the Comptroller General's office.[825] The addendum was never approved or signed by the Ministry of the Presidency and never sent to the Comptroller General's office during the Martinelli Administration due to the commercial issues that continued to plague the project.[826] The Claimants ignore their own role in the failure of the addendum negotiations. As discussed, Panamanian governmental entities cannot enter into a public works contract without having a security bond in place.[827] The Claimants' refusal to renew their security bond effectively killed their participation in this project.

399. *Second*, the Claimants allege that the Ministry of the Presidency and the Secretary of the Cold Chain were unwilling to work with the Omega Consortium once Mr. Varela became President.[828] The Claimants attempt to prove this by arguing that the Ministry of the Presidency "stopped responding to the Omega Consortium's messages."[829] The Claimants, however, cite to one email from the Omega Consortium to the Ministry of the Presidency, which was sent on July 2, 2014—one day after President Varela took office. In this email, the Omega Consortium employee asks "[c]ould you please confirm the status of the Colón Market Change Order, and if

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825 Claimants' Reply ¶ 57.

826 Addendum No. 1 to Contract No. 43 (2012) dated 2014 (**C-0277**).

827 This requirement is not unique to Panamanian entities, but is a standard requirement in large scale construction projects, whether public or private.

828 Claimants' Reply ¶ 182.

829 Claimants' Reply ¶ 183 (citing Email Chain between Jose Mandarakas and Frankie López (Omega) to Maruquel Madrid (MoP) dated July 2, 2014 (**C-0694**)).

possible the SCAFIT number? Thanks and I look forward to receive your comments."[830] Given that this was sent one day after the change of Administration, it is absurd for the Claimants to use it to support the allegation that the Ministry of the Presidency "stopped" responding to the Omega Consortium after President Varela took office. Moreover, the email appears to be a routine check-in regarding the status of the addendum; there is no indication that the Ministry of the Presidency had "stopped responding" to the Omega Consortium.

400. *Third*, the Claimants complain that the employees newly hired by the Varela Administration were not aware of the Colón Public Market Project, so it took a few months for them to get updated on the issues facing the project and to schedule a meeting with the Omega Consortium.[831] This period of employee turnover is not unique to the Varela Administration. With each the change in administration, many employees hired by the previous administration leave positions in the government and new officials are appointed by officials in the new administration. During this transition, it does take time for new employees to become acquainted with the ongoing projects. There is nothing abnormal or sinister about the time it took for the new administration's employees to get up to speed and reach out to the Omega Consortium about the project. Also, it is unclear how the Claimants were prejudiced by the delay in setting up these meetings. If an addendum had been agreed, any delays would have been accounted for in the new project schedule.

401. The Claimants also allege that a meeting in July 2015 between Mr. Saltarín and the Manager of the Secretary of the Cold Chain "to discuss the contracts for the construction of the markets for this Agency," including the Colón Public Market Project, caused a "sudden and diametric change in the Government's attitude towards" the Claimants and their contract.[832] The Claimants themselves admit, however, that Mr. Saltarín met with the Secretary of the Cold Chain to discuss the contracts for the construction of *all* the Cold Chain markets. As Mr. Duque

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830 Email Chain between Jose Mandarakas and Frankie López (Omega) to Maruquel Madrid (MoP) dated July 2014 (**C-0694**).

831 López ¶ 151.

832 Reply ¶ 93 (Activity Report from Saltarín, Arias y Asociados to Ministry of the Presidency dated 25 June 2018 (**C-0617**), p. 44) (Claimants incorrectly cite to the exhibit – the meeting in July 2015 is discussed on page 57).

explains in his witness statement, the Omega Consortium's Colón Public Market Project was only one of a broader project to build refrigerated markets nationwide.[833] It is hardly unusual that a representative of the Ministry of the Presidency would meet with the manager of one of the agencies within the ministry to discuss the status of a nationwide project. There is nothing about that meeting that suggests it was directed at the Claimants or their project.

402. The Claimants are also unable to substantiate their claim that there was any change in the government's attitude towards the Omega Consortium in July 2015. The only alleged evidence of this that the Claimants present is a letter from the Comptroller General to ASSA, the insurer holding the Claimants' bonds, informing ASSA that the bonds were about to expire and if they were not renewed, the Government would have to terminate the project.[834] This was not a "threat" to the Omega Consortium but a routine message that if the bonds were not renewed, the Government would have no alternative but to call on the bonds. Further, valid bonds were necessary for the Omega Consortium to execute an addendum with the Ministry of the Presidency. If the Omega Consortium was intending to execute an addendum and start work on the project, it would have gone ahead and renewed its bonds. The truth of the matter is that by July 2015, the Omega Consortium had abandoned the projects and was uninterested in executing an addendum to start work.[835]

403. The Claimants also allege that once President Varela took office, he "gave Odebrecht" Omega's Mercado Publico de Colón Contract.[836] That is false and the project was never restarted and the Cold Chain market was never built.[837] Instead, the existing depilated market, is one of the buildings that was renovated, but not as a Cold Chain facility and only long after Omega had admittedly abandoned the projects in October and November 2014.[838]

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833 First Witness Statement of Fernando Duque dated Nov. 13, 2019 ("**Duque**") ¶¶ 12-13.

834 Claimants' Reply ¶ 93.

835 *See* Rivera I ¶ 129 (abandoning all projects by November 2014 and letting employees go in January 2015).

836 Claimants' Reply ¶ 79.

837 Duque ¶ 22.

838 Rivera I ¶ 129 (stating that the Omega Consortium abandoned all its projects by November 2014). Duque ¶ 22 (citing Ministry of Housing and Land Management, *The Work Begins in the Public Market of Colón as Part of the Urban Renewal*, MIVIOT.GOB.PA dated June 5, 2018,

404. The problems with the Colón Cold Chain project were undeniably commercial in nature and began more than two years before President Varela took office. The Ministry of the Presidency continued to work with the Omega Consortium to find a solution during the Varela Administration; however, the project continued to experience commercial issues and could not be restarted. To the extent that Claimants believe they are entitled to payment for expenses incurred during the suspension period, they should have sought recourse through the Panamanian courts, as provided for in their contract.[839]

6. The Municipality of Colón Project

405. In 2012, given the poor condition of its existing offices, the Municipality of Colón undertook a project to construct a new Municipal Palace building where the Municipality's employees would work and where citizens could come for assistance (the "**Municipal Palace Project**"). A request for proposals was issued in November 2012,[840] and a consortium of Omega U.S. and Omega Panama was the only contractor who submitted a bid for the project.[841] The Municipality decided to move forward despite the lack of competitive bids and awarded the work to Omega.

406. On January 24, 2013, the Municipality of Colón and Omega executed a contract for the Municipal Palace Project, which was endorsed by the Comptroller General on July 2, 2013 (the "**Municipality of Colón Contract**").[842] The contract gave Omega 24 months to complete the Municipal Palace Project, for a total price of US$ 16,050,000, including an advanced payment

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https://www.miviot.gob.pa/index.php/2018/06/05/dan-inicio-a-los-trabajos-en-el-mercado-publico-de-Colón-como-parte-de-la-renovacion-urbana/ (**R-0124**)).

839 Contract No. 043 (2012) dated Aug. 17, 2012 (**C-0034)**, Art. 78.

840 Request for Proposals No. 2012-5-16-516-03-AV-000218 "Design, Development of Plants, Demolition of Current Structures and Construction with Complete Equipment of the New Municipal Palace Located at Calle 11 7 12 Santa Isabel in the District of Colón" dated Nov. 2012 (**C-0049)**.

841 Resolution No. 132 from the Municipality of Colón dated Nov. 23, 2012 (**C-0050)** (the Omega Consortium consisted of Omega Panama (99%) and Omega-U.S. (1%)).

842 Contract 01-13 dated Jan. 24, 2013 (**C-0051)**.

worth 30% of the contract price (US$ 4,815,000).[843] The order to proceed was issued on July 31, 2013.[844]

407. The original plans called for Omega to tear down the existing Municipal Palace and construct a new facility in its place.[845] Before that could be done, however, a temporary structure had to be built to house Municipality employees during the construction process. Construction of the temporary facilities fell within the scope of Omega's work,[846] and Omega completed them on April 30, 2014.[847]

408. In July 2014, the Municipal Council of Colón decided to analyze the possibility of moving the construction of the Municipal Palace to a different location. The Council, therefore, requested that Omega present an alternative plan to construct the Municipal Palace on another site selected by the Council.[848] Omega submitted its alternative proposal on August 27, 2014.[849]

a. The Issues Impacting the Project Were Not Pretextual or Political

409. The Claimants' complaints regarding this project focus on the Municipal Council's decision to consider changing the project's site, and the events following that decision. The Claimants argue that the decision was pretextual, and that the Municipality of Colón (specifically, Mayor Federico Policani) used it as an excuse to obstruct the project to Omega's

843 Contract 01-13 dated Jan. 24, 2013 (**C-0051**), Cls. 12-13.

844 Order to Proceed for Contract No. 01-13 dated July 31, 2013 (**C-0152**).

845 Request for Proposals No. 2012-5-16-516-03-AV-000218 "Design, Development of Plants, Demolition of Current Structures and Construction with Complete Equipment of the New Municipal Palace Located at Calle 11 7 12 Santa Isabel in the District of Colón" dated Nov. 2012 (**C-0049)**, Cl. 1.2.1, pp. 4-5.

846 Request for Proposals No. 2012-5-16-516-03-AV-000218 "Design, Development of Plants, Demolition of Current Structures and Construction with Complete Equipment of the New Municipal Palace Located at Calle 11 7 12 Santa Isabel in the District of Colón" dated Nov. 2012 (**C-0049)**, Ch. V, Annex, pp. 43-44.

847 Letter No. 2015 19 06 P08-013 from the Omega Consortium to the Mayor of the Municipality of Colón dated June 19, 2015 (**C-0180)**, p. 1.

848 Letter from Omega to the Mayor of the Municipality of Colón dated Dec. 16, 2014 (**C-0616**).

849 Letter from Omega to the Mayor of the Municipality of Colón dated Dec. 16, 2014 (**C-0616**).

detriment.[850] The Claimants complain that Mayor Policani and the Municipal Council were unable to come to a definitive decision regarding whether to change the project site, suggesting that this indecision was engineered simply to harm the Claimants.[851]

410. The Claimants further argue that the Municipality was allegedly unresponsive and uncooperative, ignoring Omega's calls for a decision regarding the project site to be made so that the project could move forward.[852] And, in support of these allegations, Mr. López contends that Mayor Policani and another unidentified individual working at the Municipal Council told him that there were instructions from the Presidency to sabotage Omega's contract.[853] As explained below, the Claimants' allegations are refuted by the evidence.

411. *First*, the delay by the Municipality of Colón in coming to a decision regarding the project's site was not a politically motivated move to harm Omega. The Claimants misleadingly try to pin the blame for the indecision on Mayor Policani, alleging that he was the instigator of the site's relocation and the one leading the charge in failing to come to a decision.[854] However, the evidence shows that it was the Municipal Council, a multi-member local legislative body, that requested, on July 23, 2014, that Omega submit an alternative proposal to construct the Municipal Palace on the new site.[855] The evidence also shows that it was the Municipal Council, once again, that had second thoughts about changing the project's site. The Council communicated its indecision about whether to go ahead with the relocation of the site to Omega during a meeting on November 14, 2014.[856]

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850 Claimants' Reply ¶¶ 176-81; López ¶¶ 147-50.

851 Claimants' Reply ¶¶ 177-79; López ¶¶ 147-48.

852 Claimants' Reply ¶¶ 177-79; López ¶¶ 149.

853 López ¶ 73.

854 Claimants' Reply ¶¶ 176-79.

855 Letter from Omega to the Mayor of the Municipality of Colón dated Dec. 16, 2014 (**C-0616**) ("As you are aware, in a meeting with the City Council held on July 23, 2014, we were instructed to submit an alternative in order to build the referenced project on the lot located at Calle 5ta, corner of Amador Guerrero and Justo Arosemena. On August 27, 2014, a proposal was submitted which included some preliminary designs for their due approval.") (emphasis added).

856 Letter from Omega to the Mayor of the Municipality of Colón dated Dec. 16, 2014 (**C-0616**) ("Despite several efforts and arrangements made with the City Engineering Department, on Friday November 14,

412. The delay in coming to a decision regarding the project's site, therefore, was not a politically biased move against Omega orchestrated by Mayor Policani; it was simply the result of a debate in a legislative, multi-member government body. The government of Colón was fully entitled under the Municipality of Colón Contract to make such changes to the project.[857] As the Claimants note in their Reply, the Municipality formally confirmed its intention to change the project's site on March 2, 2015.[858]

413. *Second*, it is false that the Municipality of Colón became unresponsive and uncooperative after President Varela took office. The record shows that, in spite of the ongoing legislative debate regarding the project's site, Mayor Policani and the Municipal Council were fully responsive and cooperative in the interest of the project.

414. As noted above, after Omega submitted its proposal for the alternative project site on August 27, 2014, Omega held a meeting with the Municipal Council on November 14, 2014, during which the Council informed Omega that it was unsure about moving the project's site. Omega later had another meeting with the Municipality of Colón authorities on January 26, 2015 in which the project was discussed, including the forthcoming official confirmation of the final project site, as well as a future addendum to extend the contract and reflect the change of site.[859]

2014, we participated in a meeting [requested by] the councilmembers, in which the possible intention of overruling the request for relocation was communicated.") (Emphasis added).

857 See Contract No. 01-13 dated Jan. 24, 2013 (**C-0051)**, Cl. 15 ("FIFTEENTH: MODIFICATIONS TO THE WORKS. If deemed necessary to introduce [changes to] THE WORKS described in the technical specifications, these changes shall be made with adjustments to the total prices, calculated based on the unit prices previously agreed to between the contracting parties. [The aforementioned] changes may be done in the following way: - If THE MUNICIPALITY deems it convenient, in which case the only requirement shall be to communicate this to THE CONTRACTOR in writing and then to jointly calculate the adjustments to the total cost and proceed with the respective addendum to the Contract [. . .]").

858 Claimants' Reply ¶ 178; Letter No. 2015 19 06 P08-013 from the Omega Consortium to the Mayor of the Municipality of Colón dated June 19, 2015 (**C-0180)**. Contrary to the Claimants' allegation, the Municipal Council, in its letter of June 25, 2015 to Omega, did not ask Omega "whether it was going to complete the Project at the *original* construction site" – the construction site had already been defined. *See* Claimants' Reply ¶ 179. In its letter, the Municipal Council simply requested that Omega "stipulate when the works will begin and the project's current state, as well as any observation you deem relevant to this Honorable Council." *See* Letter No. 101-01-49 from the City Council of Colón to the Omega Consortium dated June 25, 2015 (**C-0181**).

859 Letter from the Omega Consortium to the Mayor of the Municipality of Colón dated Feb. 5, 2015 (**C-0179**).

On March 2, 2015, the Municipality sent a letter to Omega officially confirming its decision to change the site and its willingness to negotiate an addendum to the contract.[860]

415. After the project site had been defined and news of the Claimants' involvement in the Moncada Luna corruption scandal came to light, the Municipal Council was rightly concerned about the future of the project, and wrote to Omega to "request a confirmation that your company is willing to comply with the operations stipulated in the [Municipality of Colón Contract]."[861] In response, Omega simply forwarded a letter it had written to Mayor Policani on June 19, 2015.[862]

416. On September 2, 2015, Mayor Policani wrote to Omega, noting that the Municipality of Colón wanted to begin construction works as soon as possible, requesting that Omega renew its completion bond for an additional 24 months within a 5-day period, and inviting Omega to subsequently negotiate an addendum.[863] Omega responded almost one month later, on September 28, 2015, not having renewed its bond nor addressing the other issues raised by Mayor Policani in his letter.[864] Given Omega's refusal to renew the bonds—the condition precedent to negotiating a new addendum—the Municipality declined to engage in further discussions and negotiations halted between the parties.

417. The above timeline demonstrates that the Municipality of Colón authorities were responsive and fully cooperative with Omega with a view to making progress on the project. In the end, once the Municipality had communicated its official decision regarding the project site and had reasonably asked Omega to extend its completion bond so that the project could move forward, it was Omega who became unresponsive.

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860 Claimants' Reply ¶ 178; Letter No. 2015 19 06 P08-013 from the Omega Consortium to the Mayor of the Municipality of Colón dated 19 June 2015 (**C-0180)**.

861 Letter No. 101-01-49 from the City Council of Colón to the Omega Consortium dated June 25, 2015 (**C-0181**).

862 Letter No. 2015 02 07 P-08-014 from Omega to the Municipal Council of Colón dated Jul. 2, 2015 (**C-0182**); Letter No. 2015 19 06 P08-013 from Omega to the Colón Mayor dated Jun. 19, 2015 (**C-0180)**.

863 Letter No. AL-55/15 from the Municipality of Colón to Omega dated Sept. 2, 2015 (**C-0703**).

864 Letter No. P08-014 from Omega to the Municipality of Colón dated Sept. 28, 2015 (**C-0610**).

418. *Third*, Mr. López alleges that Mayor Policani and an unidentified "legal counsel" to the Municipal Council told him that there were instructions from the Presidency to sabotage Omega's contract. That allegation is belied by the evidence. As noted above, both Mayor Policani and the Municipal Council expressed, as late as mid-2015, their desire for Omega to continue with the works, and their willingness to work with Omega to ensure that the contract was duly extended. Furthermore, the Municipality of Colón is a regional governmental entity, independent from the central Panamanian government. President Varela, therefore, would have had no authority to "direct" Mayor Policani or anyone else at the Municipality to take actions against Omega.

419. *Fourth*, the Claimants suggest that Mayor Policani's criticism of the temporary facilities Omega constructed is suspicious, as Omega alleges that it never before heard any criticism regarding the facilities, and that the Municipality is currently using them.[865] Mayor Policani strongly criticized Omega's temporary facilities in his letter of September 2, 2015, noting that they were "deficient" and "unsafe too, because it is basically a wooden barrack like those of the North American army, with gypsum divisions and tinplate coat (zinc plates) without any windows, which under no circumstances can be used to house public offices. It would be a risk to the safety of collaborators and taxpayers that we are not going to take."[866]

420. Notably, the Claimants do not deny the merits of Mayor Policani's criticism; they limit themselves to expressing surprise because Omega "had not [previously] received any complaints."[867] Contrary to the Claimants' suggestion, the temporary facilities are <u>not</u> currently being used to house the city's government; they are being used as a storage facility and workshop for some of the Municipality's maintenance personnel. The Claimants correctly point out that the Municipality has re-commenced the Municipal Palace Project by re-tendering it to another company.[868] After Omega failed to engage with the Municipality, with a view to completing the project on the new site, the Municipality decided instead to refurbish and

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865 Claimants' Reply ¶¶ 180-81.

866 Letter No. AL-55/15 from the Municipality of Colón to Omega dated Sept. 2, 2015 (**C-0703**).

867 Claimants' Reply ¶ 180.

868 Reply ¶ 181.

renovate the old Municipal Palace under a new contract. When work on that new contract began, the Municipality moved its headquarters to provisional offices located at Ft. Espinar (formerly known as Ft. Gulick, when the United States had a military presence in Panama), not to Omega's poorly constructed temporary facilities.

421. Finally, it is false that this project only started suffering (alleged) problems in mid-2014, when President Varela took office, as the Claimants allege.[869] To the contrary, the Claimants fail to properly acknowledge problems and delays that the project suffered during President Martinelli's administration. For example, there was a seven-month delay between the date the parties signed the contract and the order to proceed, followed by another six months in which Omega was unable to access the construction site.[870] This amounted to a delay exceeding one year. The Claimants curiously do not attribute these delays to political ill will but instead describe them as "typical" delays and praise the Municipality for its responsiveness and "positive attitude toward the project" until July 2014.[871] The Claimants' view of the project's history is clearly distorted.

b. The Claimants Were Overpaid and Acknowledge a Financial Debt to the Municipality

422. As noted above, the Claimants received an advance payment in excess of US$ 4.5 million. After collecting the advance payment, Omega submitted a total of four payment applications.[872] The first and second payment applications were paid by the Municipality of Colón; however, the third and fourth were not.[873]

423. Panama noted in its Counter-Memorial that the Claimants acknowledged a financial debt to the Municipality, as their expert, Mr. McKinnon, acknowledged a total balance in favor of

869 Claimants' Reply ¶¶ 58-59.

870 López ¶¶ 61-63.

871 Claimants' Reply ¶ 59.

872 Payment Applications for Contract No. 01-13 (**C-0298**).

873 Checks for Contract No. 01-13 (**C-0256**); McKinnon Report, Annex 1, p. 22, Table 13.

Omega in the amount of US$ [redacted].[874] Moreover, Mr. McKinnon acknowledged that, had the Municipal Palace Project been completed, Omega would have incurred losses amounting to a staggering US$ [redacted].[875]

424. The Claimants have not refuted the above figures in their Reply. They simply remark that "both the advance payment *and* the later payment applications *were required by the Contract*."[876] The fact, therefore, remains: Omega received a significant amount of money on this project, and it performed a limited amount of work due to a lack of consensus within the Colón Municipal Council regarding the definitive site where the Municipal Palace was to be constructed. In the end, Omega suffered no prejudice whatsoever on this project, and it left with an undeserved profit of over US$ [redacted]

C. PANAMA DID NOT EXPROPRIATE THE CLAIMANTS' INVESTMENTS

1. The Claimants Have Not Proven a Taking

425. Expropriations are defined as takings done for a public purpose, with due process, in a non-discriminatory manner, and with the payment of compensation. In their Reply, the Claimants focus on whether the alleged expropriation of their assets in Panama satisfies the public purpose, due process, discrimination, and compensation elements of this definition.[877] Their focus is misplaced, however, as the Claimants' assets were *not taken*. The condition-precedent to an expropriation, therefore, is absent.

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874 Counter-Memorial ¶ 132. *See also* McKinnon Report, Annex 1, p. 1, Table 1, Columns H and K; *Id.*, Annex 1, p. 22, Table 13.

875 Counter-Memorial ¶ 133. *See also* McKinnon Report, p. 6, Table 1, Columns D and E; McKinnon Report, Annex 2, p. 1.

876 Reply ¶ 138.

877 Claimants' Reply ¶¶ 354-363. In any event, the Claimants' have not shown that the test of an expropriation has not been met Indeed, the Claimants have abandoned their claim that they were treated discriminatorily and have made no effort to demonstrate that they were treated differently than other similarly-situated contractors. In addition, the Claimants had the ability to challenge actions relating to their contracts and the criminal investigations in Panamanian courts. Their choice not to do so does not mean that due process was not afforded. And, lastly, the fact that compensation has not been paid does not mean that a treaty breach has occurred. Thus, in the absence of a formal expropriation decree, there has been no finding an expropriation occurred and no legal basis for the Claimants to demand compensation.

426. In an effort to distract from this hole in their case, the Claimants mount two irrelevant and unpersuasive attacks in their Reply. *First*, the Claimants argue that their investment in Panama "transcended" their eight contracts with Panama state entities, and that Omega Panama was "the core component of their investment."[878] As discussed above, however, the Claimants' fluctuating view of their investment is self-contradictory. When describing their investment in their Request for Arbitration and Memorial, the Claimants focus primarily on their contracts,[879] with Omega Panama described as a minor entity that merely "satisfy[ed] the local company requirement included in many of the tenders and provid[ed] the legal and economic structure to manage the construction projects locally."[880] But Claimants now argue that Omega Panama is the core of their investment.[881] The reality is that Omega Panama was just a shell corporation with minimal assets and through which money was channeled, and that checked a procedural box in the bidding process.[882]

427. *Second*, the Claimants try to avoid the fundamental rule that not all breaches of contract give rise to international liability. A proven breach of contract—or even a series of contract breaches—will not constitute a taking without clear evidence of sovereign action. As Panama argued in its Counter-Memorial, there are three "cumulative conditions" that must be present for an alleged breach of a contract by a state to support a claim of expropriation.[883]

a. There Must Be Sovereign Action

428. The State must act "not only in its capacity as a party to the agreement, but also in its capacity of sovereign authority, that is to say using its sovereign power."[884] Indeed, "[i]t is an

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878 Claimants' Reply ¶ 365.

879 Request for Arbitration ¶¶ 18-26; Claimants' Memorial ¶¶ 41-50.

880 Claimants' Memorial ¶ 33.

881 Claimants' Reply ¶ 365.

882 A detailed discussion of the Omega Panama's role in Panama is provided below in Section IV.

883 Respondent's Counter-Memorial ¶¶ 257-62. *See also, e.g, See, e.g., Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction (Oct. 9, 2012) (**RL-0012**), ¶ 246.

884 *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (Sept. 11, 2007) (**CL-0041**), ¶ 443.

uncontroversial rule that if a state breaches a contract with a foreign investor in a capacity as a traditional contracting party (e.g., the state does not make payments due on the contract), the issue is one of contract breach that will be resolved in accordance with the law and forum specified in the contract (and/or as may be provided, supplemented or modified by principles of applicable law).[885] In such cases, there will be no state action and, thus, the state's conduct will not amount to an expropriation or other breach of international law.[886] Accordingly, the breach must be the direct result of an exercise of its sovereign authority.[887] A state or state instrumentality that "simply breaches an agreement, even grossly, acting as any other contracting party might have done, possibly wrongfully, is therefore not expropriating the other party."[888] Claimants' focus on three core claims—untimely payment of invoices; untimely approval of contract addenda; and the termination of contracts. Each of these acts is inherently commercial and an act that any contract party could undertake. Thus, even if various ministries and municipalities the Claimants contracted with did precisely what has been alleged, their actions still would not be a taking and would not give rise to international liability. Every action complained of was grounded in the contracts or was the product of the Claimants' own commercial failures.

b. There Must Be a Domestic Adjudication of Contract Breach

429. Another prerequisite to an expropriation in the present circumstances is that a breach of domestic contract law has been established. As the *Parkerings* tribunal stated, "a preliminary determination of the existence of a contractual breach under domestic law is, in most cases, a prerequisite."[889] That tribunal further drew a distinction between situations where, as here, an investor alleges that the host-state breached its contractual obligations and situations where the

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885 Lise Johnson & Oleksandr Volkov, *Investor-State Contracts, Host-State "Commitments" and the Myth of Stability in International Law*, (**RL-0072**), p. 5; *Impregilo S.p.A. v. Argentina*, ICSID Case No. ARB/07/17, Award (June 21, 2011) (**CL-0083**), ¶ 177.

886 *See, e.g.*, F.A. Mann, *State Contracts and State Responsibility*, 54 Am. J. Int'l. L. 572, 574 (1960) (**RL-0073**).

887 *Parkerings v. Lithuania* (**CL-0041**), ¶ 443.

888 *Parkerings v. Lithuania* (**CL-0041**), ¶ 443.

889 *Parkerings v. Lithuania* (**CL-0041**), ¶ 448.

state also deprived the investor of the ability to seek a remedy before an appropriate dispute resolution forum.[890] In the former circumstance, the investor "should, as a general rule, sue [the alleged breaching party] in the appropriate forum to remedy the breach."[891] That step is only excused if the investor can show that it was deprived of its ability to seek a remedy before the appropriate forum.[892] Claimants cannot make that showing.

430. The Claimants argue—without support—that the *Parkerings* rule is "a minority opinion" and that "an international wrong that amounts to a treaty breach need not also be a breach of domestic law."[893] While that may be true in other circumstances, here it is not, where Claimants are arguing that a breach of contract rises to the level of a treaty breach. International law specifically recognizes that a breach of contract alone does not give rise to international liability.[894] The question, therefore, is how to determine when a breach of contract is also something more. That is a question that falls outside the general principle relied upon by the Claimants, and is precisely the issue addressed by the *Parkerings* tribunal.

431. The Claimants argue mistakenly that "requiring a claimant to litigate its claim in domestic courts would essentially create a requirement to exhaust local remedies."[895] A claimant would not be required to litigate whether the government's actions breached its treaty obligations in the local courts and would not be required to litigate elements of its claims not tied to the alleged contract breach. However, in a situation where a claimant is arguing that a contract breach rises to the level of a treaty breach, the *Parkerings* tribunal correctly held that claimants

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890 *See Parkerings v. Lithuania* (**CL-0041**), ¶ 449.

891 *Parkerings v. Lithuania* (**CL-0041**), ¶ 448. *See also Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004) (**CL-0033**), ¶ 175 ("It is one thing to expropriate a right under a contract and another to fail to comply with the contract. Non-compliance by a government with contractual obligations is not the same thing as, or equivalent or tantamount to, an expropriation. In the present case, the Claimants did not lose its contractual rights, which it was free to pursue before the contractually chosen forum.").

892 *See Parkerings v. Lithuania* (**CL-0041**), ¶ 449.

893 Claimants' Reply ¶ 368.

894 *See, e.g., Impregilo S.p.A v. Argentina*, ICSID Case No. ARB/07/17, Award (June 21, 2011) ¶ 117 ("As a general rule, a violation of a contract is not a violation of international law.")

895 Claimants' Reply ¶ 369.

must have the predicate question—whether the contract has been breached—decided by a local court prior to addressing the alleged treaty violation.

432. There is a further problem with the Claimants' position: while they argue that Panama has breached its contractual obligations they also say that they "have not alleged a breach of contract under domestic law" but only "international law breaches of 'rights conferred or created" by the BIT.[896] The Claimants cannot have it both ways, arguing on one hand that an expropriation occurred because "Respondent breached all of the Contracts Claimants held with various government agencies,"[897] while on the other that they are not asserting breach of contract claims that must be decided under Panamanian law. But there can be no doubt that alleged breaches of contract underlie each of the Claimants' claims—and constitute the entirety of the Claimants' umbrella clause claims. The Claimants' failure to even address whether Panama's actions constitute breaches of contract as a matter of Panamanian law leaves the Tribunal without any basis to determine the fundamental predicate to the Claimants' claims. The Claimants' claims, therefore, must be denied.

c. There Must Be a Substantial Deprivation

433. The alleged breach of contract must also give rise to a substantial decrease or deprivation of the value of the investment.[898] That did not happen here. Dr. Flores showed in his first report, Omega Panama—the core of the Claimants' investment—had "zero value to a potential willing buyer."[899] In his second report, Dr. Flores' emphasizes the point that Claimants have not actually proffered a value for Omega Panama, but instead have offered a bastardized value that homogenizes elements from Omega Panama, Omega US, and the various third parties that Omega Panama partnered with in their bids.[900] They had to do this because Omega Panama—

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896 Claimants' Reply ¶ 343.

897 Claimants' Reply ¶ 374.

898 *Parkerings v. Lithuania* (**CL-0041**), ¶¶ 440, 443-456.

899 First Expert report of Dr. Daniel Flores ("**First Quadrant Report**"), Section III.A, ¶ 23.

900 Second Expert Report of Dr. Daniel Flores ("**Second Quadrant Report**") ¶¶ 26-30.

which the Claimants concede only serves as a locally-incorporated entity on projects—has no material value to a hypothetical buyer on a stand-alone basis.[901]

434. If Panama breached its contracts with the Claimants (which Panama denies and which has not been established as a matter of Panamanian law), any damages would be limited to those available under the contracts. As described above and as Dr. Flores demonstrates in his report, Omega was overpaid due to the fact that it received substantial advance payments in each of the projects that were started. Its contractual damages—if any—are extremely limited and certainly do not constitute a substantial decrease or deprivation in the value of Omega Panama as a company.

435. Expropriation is a sovereign act. The acts at issue in this arbitration are unquestionably commercial in nature. The Claimants, therefore, have not proven that a taking occurred and, as such, their expropriation claim must fail.

2. There Has Not Been a Creeping Expropriation

436. The Claimants argue that Panama's "collective actions were a creeping expropriation of Claimants' *entire* investment in Panama."[902] In support of this argument, the Claimants "urge the Tribunal to bear in mind that [they] won their various Contracts, fair and square, by consistently outscoring their competitors in financial capacity, and Omega Panama's revenues went from [redacted] within three years after Claimants made their investments."[903] This statement is irrelevant and inaccurate. *First*, as proven above, the Claimants procured at least one of their major contract through bribery—hardly "fair and square."

437. *Second*, as discussed below and in Dr. Flores' second report, the Claimants' characterization of Omega Panama is misleading and unsupportable. Mr. Rivera incorporated

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901 Second Quadrant Report ¶¶ 30, 144.

902 Claimants' Reply ¶ 373 (emphasis in original).

903 Claimants' Reply ¶ 374.

Omega Panama to meet the technical requirements of Panama's public works bidding process.[904] Little to nothing was invested in that company prior to Mr. Rivera's abandonment of the Panamanian market in 2014.[905] Omega Panama was, as the Claimants describe, simply one piece of Mr. Rivera's greater plan to open regional offices in various jurisdictions to expand "*Omega U.S.'s* presence until it became a regional, and ultimately global, competitor."[906] Omega Panama had—and, as of the December 31, 2014 valuation date, continued to have—no independent experience, no financial capacity, no bonding capacity, and no proven ability to compete in the Panamanian market as a stand-alone entity.[907]

438. *Third*, the Claimants argue that the creeping expropriation occurred when "Respondent breached all of the Contracts' Claimants held with various Government agencies; it halted or reversed payments and rejected other reasonable requests related to work Claimants had already performed; it inexplicably refused permits and plans contemplated in the tender documents of several Contracts; and within months it terminated all but one of Claimants' contracts or purposefully allowed them to lapse."[908] These are all commercial actions taken by various ministries and municipalities in their capacity as commercial actors. While the Claimants argue that the actions were taken "almost simultaneously," the facts set forth in Panama's Counter-Memorial and above show that the problems affecting the Claimants' projects began as early as 2012 and persisted until late 2014, when the Claimants abandoned Panama.

D. PANAMA TREATED THE CLAIMANTS' INVESTMENTS FAIRLY AND EQUITABLY

439. Panama did not treat the Claimants unfairly or inequitably, either directly or in a creeping manner. The Claimants' arguments to the contrary mischaracterize both the facts and the relevant legal standards.

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904 Claimants' Memorial ¶ 34.

905 Second Quadrant Report ¶ 26.

906 Claimants' Memorial ¶ 34.

907 *See infra* Section IV.A. *See also* Second Quadrant Report ¶¶ 52-53.

908 Claimants' Reply ¶ 374.

440. The Claimants argue that "[t]his case provides a paradigm example of an FET violation," as "Panama went out of its way to attract Claimants' investment by promising to protect those investments through a series of legal commitments."[909] That contention is false. Panama did not target or invite the Claimants to enter the Panamanian market. There were no specific negotiations with the Claimants or promises made to entice the Claimants to invest in Panama. Rather, as Mr. López testified, the Claimants did so in response to generic public statements that Panama was experiencing a "construction boom" around 2010.[910]

441. Similarly, there are no stabilization agreements between Panama and the Claimants, or other agreements that reflect explicit promises made to the Claimants. The Claimants were not given unique rights to invest or work in particular areas. Rather, the Claimants participated in the open public works bidding process made available by Panama to any interested party.

1. The Claimants Apply an Incorrect Standard for the Fair and Equitable Treatment Analysis

442. The Claimants argue that the BIT and TPA provide for "a broad and flexible standard of fair and equitable treatment."[911] Panama demonstrated in its Counter-Memorial, however, that both treaties contain fair and equitable treatment provisions that narrowly define the contracting states' obligations and limit the fair and equitable treatment standard to that set by customary international law. This is made clear in the plain language of both treaties. Article II(2) of the BIT states:

> Investors of nationals and companies of either Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Party. The treatment, protection and security of investment shall be in accordance with applicable national laws and international law.[912]

443. The TPA's fair and equitable treatment provision provides that:

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909 Claimants' Reply ¶ 375.

910 López ¶ 22.

911 Claimants' Reply ¶ 378.

912 BIT (**CL-0001**), Art. II(2).

> 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
>
> 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.[913]

444. This text stands in contrast with treaty provisions that do not make reference to or link the fair and equitable treatment standard to customary international law norms. Where states have chosen to include such language or to connect the two principles, tribunals have consistently held that the scope of the states' fair and equitable treatment obligations is limited, and that Claimants must meet a high burden to show that these obligations have been breached.[914] Governments would violate this standard only where their actions "show[ed] a willful neglect of duty, an insufficiency of action falling far below international standard, or even subjective bad faith."[915]

445. Here, the Claimants' allegations relate to the untimely payment of invoices, the denial of contract addenda, and the termination of contracts or projects. These actions do not constitute a willful neglect of duty or fall below the international minimum standard of treatment. They are commercial actions taken in the context of troubled projects. Moreover, the Claimants had available contractual remedies if they believed that these actions were in breach of Panama's contractual obligations.

2. The Claimants' Legitimate Expectations Have Not Been Undermined

446. The Claimants argue that, even if the language of the BIT and TPA link fair and equitable treatment to international law standards, those standards have evolved to reflect a protection of

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913 TPA (**CL-0003**), Arts. 10.4(1); 10.4(2).

914 *See, e.g., Alex Genin et al v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award (June 25, 2001) (**RL-0029**), ¶ 367; *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award (Mar. 17, 2006) (**CL-0038**), ¶ 292

915 *Genin v. Estonia* (**RL-0029**), ¶ 367.

an investor's legitimate expectations.[916] Even if the Claimants' position were correct, it is clear that Panama's actions did not undermine any legitimate expectations the Claimants may have held.

447. There is no bright-line rule or definition of what constitutes a legitimate expectation. Tribunals, therefore, are forced to examine the specific circumstances of each case to determine whether the expectations held by a claimant are reasonable in the context of that investment.[917] However, tribunals have held that an "expectation is legitimate if the investor received an explicit promise or guarantee from the host state, or if implicitly, the host state made assurances or representation that the investor took into account in making the investment."[918]

448. According to the Claimants, their investments consist of Omega Panama and the contracts at issue in this arbitration.[919] Omega Panama was incorporated in October 2010. Mr. Rivera testified that Panama was one of several countries he considered for expansion.[920] Mr. Rivera ultimately chose Panama because he felt "it was the most suitable market in which to begin our expansion" and the Panamanian government "was about to initiate a significant public works program."[921] According to Mr. Rivera, he held "kick-off meetings with local bankers, insurance companies and accountants who had particular expertise in the business sector."[922] He did not meet with representatives from the Panamanian government or receive any specific government assurances or promises that induced him to choose Panama as a market. As noted, there were no stabilization or other agreements between Panama and Mr. Rivera that would have

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916 Claimants' Reply ¶ 382.

917 *Parkerings v. Lithuania* (**CL-0041**), ¶ 333; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002) **(CL-0035)**, ¶ 118.

918 *Parkerings v. Lithuania* (**CL-0041**), ¶ 331.

919 The Claimants also make references to good will and experience provided by Omega US as being part of their investment. *See, e.g.*, Claimants' Memorial ¶ 39, 107, 123-24. The Claimants, however, do not make any claims specific to these investments and do not seek compensation in relation to these so-called investments. Their focus is limited entirely to Omega Panama and the contracts.

920 Rivera I ¶ 14.

921 Rivera I ¶ 15.

922 Rivera I ¶ 16.

shaped his expectations regarding the investment environment in Panama. In sum, Panama did nothing to induce Mr. Rivera to invest in its territory and made no promises that could have set legitimate expectations with respect to Omega Panama.

449. The Claimants cannot rely on the public works contracts eventually awarded to the consortium of Omega Panama and Omega US to set their expectations as of the incorporation of Omega Panama. Those contracts post-date Omega Panama's incorporation and were entirely uncertain at the time Omega Panama was formed. At the time Mr. Rivera decided to invest in Panama, he had no basis to know which public works projects he would be awarded (if any) or what the terms of the specific contracts would be.

450. Similarly, at the time the eight contracts were awarded, Panama did not make any specific promises or offer any inducements to the Claimants that would have formed legitimate expectations. The eight contracts do not contain stabilization clauses. Panama did not expressly solicit the Claimants to bid on any project or waive its public procurement process to award the Claimants a no-bid contract. The Claimants took part in a public bidding process made available by Panama to any interested party. The fact that the Claimants felt compelled to bribe a Supreme Court justice to ensure success in the bidding process shows that no prior promises or representations about their entitlement to the contract or how their projects would proceed had been made.

451. In the face of these issues, the only "expectation" that the Claimants put forward is the generalized notion of *pacta sunt servanda*—that Panama would abide by its contractual obligations.[923] This argument fails. Assumptions made regarding state conduct that are based on such generalized principles do not provide a basis for setting legitimate expectations in a fair and equitable treatment analysis. As discussed above, such expectations can only be the product of specific promises and inducements made that caused an investor to invest.

[923] Claimants' Reply ¶ 389.

452. Moreover, as Professor Schreuer has noted, allowing the concept of *pacta sunt servanda* to set an investor's legitimate expectations for purposes of a fair and equitable treatment analysis would lead to illogical results:

> [P]acta sunt servanda would seem to be an obvious application of the stability requirement that is so prominent in the fair and equitable treatment standard. Taken to its logical conclusion this argument would put all agreements between the investor and the host State under the protection of the FET standard. If this position were to be accepted, the FET Standard would be nothing less than a broadly interpreted umbrella clause.[924]

453. The Claimants also allege that the fair and equitable treatment standard has been violated because Panama failed to perform its contractual commitments "in good faith;" failed to provide the Claimants with "due notice of proceedings affecting their rights" in canceling the INAC contract; "acted with bias and bad faith in carrying out President Varela's personal vendetta against the Claimants;" and treated the Claimants discriminatorily.[925]

454. Panama has demonstrated throughout its submissions that these allegations lack any factual or legal foundation. Both the documents and Panama's witnesses demonstrate the good faith applied at all times when dealing with the Claimants.[926] President Varela has denied that he

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924 Christoph Schreuer, *Fair and Equitable Treatment (FET): Interactions with Other Standards*, in Selected Standards of Treatment Available under the Energy Charter Treaty (Schreuer, Friedland, & Park, 2008) (**RL-0069)**, p. 91.

925 Claimants' Reply ¶¶ 395-398.

926 *See e.g.*, Barsallo I ¶¶ 41, 46 (MINSA "continued to work with Omega with the goal of completing the projects as smoothly and efficiently as possible and consistently negotiated with Omega for reasonable extensions of time and additional costs on the three projects" throughout the Varela Administration); Email from Ana Graciela Medina to Oscar Rivera and Frankie López dated July 30, 2015 (**C-0701**) (detailing MINSA's continuing efforts in July 2015 to resolve the commercial issues plaguing Omega's MINSA CAPSI Projects and re-initiate work); Rios I ¶ 38 ("We in the Judicial Authority were never asked by anyone in President Varela's administration to take any adverse action against the Claimants or to harm the Project in any way. In fact … the Judicial Authority worked very hard to have the Project completed even after President Varela took office…."); Rios II ¶¶ 15-21 (describing "the lengths that the Judicial Authority was willing to go to in order to have the project completed"); Letter No. 150/P.C.S.J/2016 from Judicial Authority to Omega dated Jan. 26, 2016 (**R-0020**) (the Judicial Authority continued to negotiate an addendum and re-initiate work on the La Chorrera Project as late as January 2016); Diaz II ¶¶ 16-20 ("I never heard or saw anything that suggested that Mayor Blandon or anyone else intended to adversely affect Omega….Mayor Blandon always intended to complete the Pacora Market, which is why the Municipality went to great lengths to assist Omega…."); Chen ¶ 14 ("I never received any instructions to harm Omega in any way, and I am not aware of anyone at INAC having received instructions of that kind."); Buendía, ¶¶ 17, 21 ("In my view, INAC did not act with the intent to harm Omega or the Project […] I have no doubt that INAC Director Mariana Núñez wanted to see the Project through to completion – she told me so on

had was a personal vendetta against the Claimants.[927] INAC provided the Claimants with more notice and due process regarding the termination of their contract than the standards the Claimants argue were required by law.[928] And, the Claimants cannot generically compare their treatment to other contractors on other projects. Decisions regarding payment applications, addenda, permits, plans, and whether to proceed with a project are made on a project-by-project basis. Variables such as the quality of a contractor's performance, responsibility for delays, sufficiency of documentation, and commercial need for the project all factor into these decisions and affect the overall conduct of the project. The Claimants have not even attempted to demonstrate that other contractors were sufficiently similarly situated to support a claim of discriminatory treatment.

3. The Claimants Were Not Targeted or Harassed

455. The Claimants persist in their mantra that they were targeted by a campaign of harassment. Specifically, the Claimants allege that "Government officials carried out that threat by depriving Claimants of their contractual rights to payment and other benefits" and "intimidated Claimants by abusing its police powers and initiating groundless criminal investigations against the Claimants, leading to unwarranted detention notices and an INTERPOL red notice."[929]

456. Although the Claimants claim that Panama "has no real answer to these charges" the reality is that Panama has disproven every aspect of the Claimants' allegations. Panama did not deprive the Claimants of any contractual rights. As discussed above, the Claimants' projects

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multiple occasions. In my view, any obstacles that Omega faced on the Project were not extraordinary, especially during governmental transition periods in Panama."); Zarak, ¶¶ 13, 18 ("I never saw any evidence of hostility by the government, including by President Varela himself, towards Omega, Mr. Rivera, or any of Omega's projects in Panama […] the MEF cooperated with INAC to ensure that it procured sufficient funds to pay the CPPs due on March 31, 2015 on the Ciudad de las Artes Project, without hindrance or delay.""); Duque ¶ 20 ("The problems with the Colón Cold Chain Market began well before President Varela was elected....To my knowledge, this had nothing to do with the Claimants or President Varela).

927 Varela ¶ 7.

928 First Witness Statement of Carmen Chen dated Jan. 7, 2019 ("**Chen**") ¶¶ 13-20; *see supra* Section III.B.4.b; *See* INAC Notification Report dated Jan. 23, 2015 (**R-0140**); INAC Notification Report dated Jan. 26, 2015 (**R-0141**). Edict No. 001 of the National Institute of Culture dated Jan. 27, 2015 (**C-0243**).

929 Claimants' Reply ¶ 401.

faced a number of commercial issues and experienced the same procedural delays and inquiries applicable to every public works project in Panama. To the extent the Claimants believed their contractual rights were breached, they had recourse through the contracts either to arbitration or the Panamanian courts.

457. Moreover, there was no targeting or campaign of harassment. Each of Panama's witnesses—including President Varela—has denied that the Claimants' projects were targeted or harassed in any way.[930] The Claimants have presented no documents that support their notion of targeting or harassment; rather, the project documents and even emails from the Claimants' own counsel show that the various ministries and municipalities were working in good faith with the Claimants to move projects forward.[931] And, Panama has proven the reasonableness of its criminal investigations into Mr. Rivera and the Omega entities. It is established that Mr. Rivera transferred money received from the Judicial Authority into accounts owned and controlled by Justice Moncada Luna.[932] Panama had a duty to investigate these crimes and, in doing so, was entitled to exercise its police powers to freeze assets that may have been involved in the criminal activity and take steps to ensure Mr. Rivera's participation in the investigation.

458. The Claimants suggest that they were the victim of "combative treatment at the hands of Respondent after President Varela took office"—all of which supposedly occurred because Mr. Rivera refused to make a US$ 600,000 campaign contribution.[933] Aside from Mr. Rivera's disproven allegation, the Claimants have presented no evidence to support their claim. Mr. Rivera did not write to anybody about President Varela's alleged request—including Ana Graciela Medina, the person who supposedly arranged the meeting between Mr. Rivera and President Varela. None of the Claimants' witnesses were present when this request supposedly was made and Mr. Rivera does not claim to have told Mr. López—the head of Omega's

930 *See* Chen ¶ 14; Bernard ¶¶ 18-19; Diaz I ¶ 29; Diaz II ¶ 15; Barsallo I ¶ 41; Rios I ¶38; Rios II ¶ 25; Duque ¶ 20; Zarak ¶¶ 12-14; Varela ¶ 6; Buendía ¶ 17.

931 Email from Ana Graciela Medina to Oscar Rivera and Frankie López dated July 30, 2015 (**C-0701**).

932 *Supra* Section II.A.1.

933 Claimants' Reply ¶ 404.

Panamanian operations—about the request for days.[934] Under the circumstances, the Claimants simply have not proven that the events supposedly giving rise to the campaign of harassment even occurred.

4. The Claimants Were Not Treated Arbitrarily, Unreasonably, Inconsistently, Non-Transparently or 'Not in Good Faith'

459. In their Memorial, the Claimants allege that Panama breached BIT Article II(2)'s prohibition against arbitrary and discriminatory measures.[935] Panama demonstrated in its Counter-Memorial that these allegations are groundless. In their Reply, the Claimants abandon their Article II(2) claim in this regard but now attempt to fold their allegations into their claim that Panama breached its fair and equitable treatment obligations.[936] That claim also is without merit.

460. In their Memorial, the Claimants argued that allegations of arbitrary, unreasonable, inconsistent, and opaque conduct by a government are appropriately included within the protections provided through a fair and equitable treatment clause, because they "'fill[ ] gaps which may be left' by other treaty standards 'in order to obtain the level of investor protection intended by the treaties.'"[937] In other words, the inclusion of these provisions in a fair and equitable treatment analysis would ensure that such contract was addressed where a treaty does not explicitly provide protections against arbitrary or unreasonable conduct. [938]

461. The Claimants do not cite to any awards that have reached a similar conclusion. In any event, there is no need to incorporate "gap fillers" into the fair and equitable treatment standards in this case. The BIT contains a specific treaty provision protecting against unreasonable, arbitrary, or discriminatory conduct.[939] The Claimants previously argued that they could import

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934 López ¶ 70.

935 Claimants' Memorial ¶ 185.

936 Claimants' Reply ¶¶ 407-412.

937 *See* Claimants' Memorial ¶ 173 (quoting Rudolf Dolzer, *Fair & Equitable Treatment: A Key Standard in Investment Treaties*, 39 THE INT'L L. 87, 90 (2005) (**CL-0049**)).

938 *See* Claimants' Memorial ¶¶ 173-174.

939 BIT (**CL-0001**), Art II(2).

these provisions into the TPA through that treaty's most-favored nation provision.[940] As a result, no gaps exist to be filled by the incorporation of these concepts into the fair and equitable treatment standard. If the Tribunal were to allow the Claimants to import that provision into the TPA, there would be no gaps to fill. And, if the Tribunal rejected the use of the TPA's MFN provision to import a broader standard into the TPA because of the unique procedural posture of this case—*i.e.*, where there are two treaties applicable in this case in force between the same parties and the later-in-time treaty narrows certain protections granted by the earlier-in-time treaty—the Claimants would have no basis to claim protection against this type of treatment.

462. In addition, Panama's conduct was never arbitrary, unreasonable, or discriminatory, nor did Panama act in bad faith or without transparency. As the ICJ has established:

> Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. . . . It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.[941]

463. State conduct, therefore, will not be deemed arbitrary simply because it was taken with a degree of discretion. Rather, the claimant must show that the state has willfully disregarded due process and has taken an action that offends fundamental notions of judicial propriety. The Claimants do not even attempt to make that showing.

464. The Claimants assert unsubstantiated allegations that they were treated differently after President Varela took office because they were "children of Martinelli."[942] As support for this, they suggest that the Municipality of Panama changed its behavior towards the Claimants because the "new mayor was from the same political party as President Varela."[943] These allegations lack any factual support and conflict with the evidence that (i) none of Omega's invoices were endorsed by the Comptroller General, including those submitted and processed

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940 Claimants' Memorial ¶ 185 fn. 462.

941 *Elettronica Sicula S.p.A. (ELSI) v. Italy (United States of America v. Italy)*, International Court of Justice, Judgment (July 20, 1989) (**RL-0036**), ¶ 76.

942 Claimants' Reply ¶ 406.

943 Claimants' Reply ¶ 406.

during President Martinelli's administration, due to Omega's deficient designs of the Panama City Markets, and (ii) Omega failed to acquire a right of way and a soil use certificate needed for its designs to be approved.

465. Panama's conduct similarly was not unreasonable. The word "unreasonable" typically is used interchangeably with the words "arbitrary" and "unjustified" in bilateral investment treaties. For example, in *National Grid v. Argentina*, the tribunal held that the plain meaning of the terms unreasonable and arbitrary "is substantially the same in the sense of something done capriciously, without reason."[944] This means that conduct will be deemed unreasonable only if it meets the same high standard for arbitrariness articulated by the International Court of Justice in the *ELSI* case. A claimant bears the onus of demonstrating clear unreasonableness of state action, as a "finding of arbitrariness requires that some important measure of impropriety is manifest."[945] As shown above, the Claimants here have not done so.

466. With respect to the issue of discriminatory treatment, the Claimants state that "discriminatory measures are found where similarly-situated persons are treated in a different manner without reasonable or justifiable grounds."[946] The basic standard for assessing a claim of discriminatory treatment is well-established:

> The concept of discrimination entails two elements: first, the measures directed against a particular party must be for reasons unrelated to the substance of the matter, for example, the company's nationality. Second, discrimination entails like persons being treated in an inequivalent manner.[947]

467. While differential treatment is necessary, it is not sufficient. Tribunals have emphasized that discrimination requires more than differential treatment:

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944 *National Grid P.L.C. v. The Argentine Republic* (UNCITRAL), Award (Nov. 3, 2008) (**CL-0089**), ¶ 197.

945 *Enron Corporation and Ponderosa Assets, LP v. The Argentine Republic*, ICSID Case No. ARB/01/3, Award (May 22, 2007) (**CL-0094**), ¶ 281; *Sempra Energy International v. The Argentine Republic*, ICSID Case No ARB/02/16, Award (Sept. 28, 2007) (**CL-0086**), ¶ 318.

946 Claimants' Memorial ¶ 186.

947 A.F.M. Maniruzzaman, *Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview*, 8 J. TRANSNAT'L L & POL' Y 57, 59 (Fall 1998) (**RL-0037**).

> To amount to discrimination, a case must be treated differently from similar cases without justification; a measure must be "discriminatory and expose[s] the claimant to sectional or racial prejudice"; or a measure must "target Claimants' investments specifically as foreign investments."[948]

468. The Claimants make no effort to establish how Panama's conduct towards them was different than other similarly situated entities—indeed, the Claimants do not even attempt to define the applicable class of similarly situated entities, the scope of conduct to be measured, or how such differential treatment was unjustified.

469. The Claimants' failure to address the relevant legal standards or to even attempt to establish the factual basis for their arguments is fatal to their claims that they were treated unreasonably, arbitrarily, or without transparency. There is no basis, therefore, to find that the Claimants were treated unfairly or inequitably because of such conduct.

E. PANAMA HAS NOT BREACHED ITS OBLIGATION TO PROVIDE FULL PROTECTION AND SECURITY

470. The Claimants' Reply adds nothing new to their unpersuasive argument that they were deprived of full protection and security in Panama. Both the BIT and TPA link the full protection and security protections to customary international law and, thus, limit the scope of this protection to instances where a "foreign investment has been affected by civil strife and physical violence."[949] This standard "obliges the host state to adopt all reasonable measures to protect assets and property from threats or attaches which may target foreigners or certain groups of foreigners."[950] It does not, however, "cover just any kind of impairment of an investor's investment," but "protect[s] more specifically the physical integrity of an investment against interference by use of force."[951]

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948 *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, (Jan. 14, 2010) (**CL-0064**), ¶ 261 (citing *LG&E Capital Corp. and LG&E International Inc. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006) (**CL-0108**), ¶ 147).

949 *Saluka v. Czech Republic*, UNCITRAL, Partial Award (Mar. 17, 2006) (**CL-0038**), ¶ 483.

950 *Saluka v. Czech Republic* (**CL-0038**), ¶ 484.

951 *Saluka v. Czech Republic* (**CL-0038**), ¶ 484. *See also Eastern Sugar B.V. v. The Czech Republic*, SCC Case No. 088/2004, Partial Award (Mar. 27, 2007) (**RL-0032**), ¶ 203 ("As the Tribunal understands it, the criterion in Art. 3(2) of the [Czech-Netherlands BIT] concerns the obligation of the host state to protect the

471. As they do with the fair and equitable treatment standard, the Claimants wrongly argue that the BIT's full protection and security provision is not connected to customary international law; rather, the Claimants argue that while the BIT says that states must only provide full protection and security "in accordance with" international law, they are "not limited by them."[952] The Claimants' strained interpretations fails.

472. Similarly, although the Claimants' acknowledge that Article 10.5 of the TPA links full protection and security to customary international law, they argue that they may import a broader standard into the TPA through its MFN provision.[953] As Panama made clear in its Counter-Memorial, the Claimants' argument would lead to absurd results. This case is unusual in its procedural posture; claims have been brought under two treaties between the same signatory states but in force at different points of time. Panama and the United States adjusted the scope of their reciprocal investment obligations when the TPA entered into force. In doing so, Panama and the United States agreed to limit, narrow, or abandon certain protections. The Claimants' are now attempting to nullify that agreement, by allowing themselves to import into the TPA provisions from the BIT that the two states had revised. If permitted, that would set the precedent that countries could never change the scope of protections they agree to provide to each other's investors. The most favored nation provision was not intended to create such a barrier.

473. In any event and regardless of the standard applied, the Claimants have not alleged facts sufficient to prove a breach of the full protection and security requirement. They simply repeat their formulaic mantra that Panama breached its contractual obligations, subjected the Claimants to criminal investigations, froze bank accounts, and terminated contracts.[954] As proven in Panama's Counter-Memorial and above, none of those allegations has merit. Panama did not

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investor from third parties in the cases cited by the Parties, mobs, insurgents, rented thugs and others engaged in physical violence against the investor in violation of the state monopoly of physical force. Thus, where a host state fails to grant full protection and security, it fails to act to prevent actions by third parties that it is required to prevent.") (emphasis in original).

952 Claimants' Reply ¶ 420.

953 Claimants' Reply ¶ 420.

954 Claimants' Reply ¶ 421.

breach its contractual obligations and, if even if it did, such conduct does not give rise to international liability. Moreover, it is established that the Claimants made at least two corrupt payments to Justice Moncada Luna and that the supposed land transaction offered as a defense was a sham.[955] Any investigation relating to those payments, therefore, was entirely appropriate.

474. The Claimants also argue that Panama wrongly used sovereign power to terminate contracts.[956] Again, as shown above, the Claimants' argument is unfounded. Both INAC and the Municipality of Panama terminated their contracts with the consortium of Omega US and Omega Panama for commercial reasons. In the Ciudad de las Artes Project, Omega failed to meet the performance standards required by the contracts.[957] With respect to the Municipality of Panama's Market Projects, the Claimants failed to acquire necessary rights of way, failed to obtain necessary certificates (the responsibility for which fell entirely within the scope of their work), and failed to provide adequate designs that met the contracts' requirements.[958] Under those circumstances, both INAC and the Municipality of Panama had a contractual and legal right to declare the Claimants to be in default and to terminate the contracts. The fact that INAC and the Municipality of Panama terminated the contracts through decrees does not create international liability when there is a clear contractual basis for the termination.

475. The Claimants finally argue that "[e]ight properly won, carefully negotiated Contracts have failed to provide [them] with any security as to their rights."[959] *First*, the Claimants' suggestion that their contracts were "properly won," has been disproven. The Claimants are corrupt. *Second*, while the Claimants focus on the purported deprivation of their rights under these eight contracts, they studiously ignore their obligations. Panama has demonstrated the breadth of the Claimants' contractual failures—poor performance, delays, insufficient manpower, and abandoning their works.[960] The Claimants' rights go hand-in-hand with these

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955 *Supra* Sections II.A.1 - II.A.2.

956 Claimants' Reply ¶ 431.

957 Buendía ¶¶ 6-16; *supra* Section III.B.4.a.

958 Diaz II ¶¶ 6-13; *supra* Sections III.B.1.a.i - III.B.1.a.ii.

959 Claimants' Reply ¶ 433.

960 Respondent's Counter-Memorial Section II.B; *supra* Sections III.B.1 (Municipality of Panama Project); III.B.2 (MINSA CAPSI Projects); III.B.3 (La Chorrera Project); III.B.4 (Ciudad de Las Artes Project);

obligations. Each ministry and municipality that contracted with the Claimants held the Claimants accountable for their contractual obligations. When the Claimants failed to meet those obligations, or when commercial circumstances changed on a project, the ministries and municipalities exercised their respective contractual rights. The exercise of these rights in no way deprived the Claimants of full protection and security. The Claimants' claim, therefore, should be dismissed.

F. PANAMA DID NOT BREACH THE UMBRELLA CLAUSE

476. The Claimants argue that Panama's actions have breached the BIT's umbrella clause, and that Panama has not challenged this claim on the merits. That suggestion is absurd. Panama's defense throughout this proceeding is that it acted entirely consistently with its contractual obligations. This has been shown through the project records and the testimony of Panama's witnesses.

477. It is in fact the Claimants who have failed to meet their burden. As discussed above, the Claimants have presented internally inconsistent and incompatible arguments. On the one hand, the Claimants profess that they are not asserting breach of contract claims: "Claimants have not alleged a breach of contract under domestic law; they have alleged international law breaches of rights conferred or created by this Treaty with respect to an investment."[961] On the other hand, the Claimants' claims—including their umbrella clause claim—are predicated on an assertion that Panama breached its contractual obligations: "Respondent's breaches of its obligations under the Contracts also amount to a breach of the 'umbrella clauses' found in the BIT and TPA."[962] They support their umbrella clause claim by reference to the doctrine of *pacta sunt servanda* and argue that Panama breached the umbrella clause by repeatedly refusing to make

III.B.5 (Ministry of the Presidency — Colón Public Market Project); III.B.6 (Municipality of Colón Project).

961 Claimants' Reply ¶ 343.

962 Claimants' Memorial ¶ 188.

required payments for work, failing to clear project premises, failing to issue permits and licenses, and failing to allow contract extensions, all in violation of the Contracts.[963]

478. The Claimants have taken the position that the umbrella clause elevates a breach of contract into a treaty breach. A finding of a contract breach, therefore, is a condition precedent to an umbrella clause claim—the latter cannot exist without the former. If, despite the Claimants' rhetoric, they have not asserted an "alleged a breach of contract under domestic law," the Claimants have failed to allege an umbrella clause claim.

479. Even if the Claimants were to assert that Panama has breached its contractual obligations, their umbrella clause claim would still fail. The Claimants bear the burden of proving that the contracts were breached, but have presented no argument that Panama's actions breached the contracts as a matter of Panamanian, or any other, law. There is no discussion of the Panamanian law of contract. There is no discussion of how, in the absence of an overarching rule of international contract law, international law treats questions of contract breaches. There is no analysis of whether the dollar amounts or time extensions sought by Claimants complied with contractual and Panamanian legal requirements. The Claimants simply say that because they asked for payment or a contract extension, they were entitled to receive it. But that is not enough to make out a claim at law.

480. For these reasons, the Claimants' umbrella clause claim fails.

IV. THE CLAIMANTS HAVE NOT ESTABLISHED THEIR ENTITLEMENT TO ANY COMPENSATION

481. Panama demonstrated in its Counter-Memorial that the Claimants' requested compensation was grossly overstated, factually indefensible, economically unsupportable, and inconsistent with the law. Now, while failing to refute Panama's substantive challenges to their quantum claim, the Claimants *increase* the amount they seek by "at least $30 million" in a newly quantified claim for moral damages.

963 Claimants' Memorial ¶ 193.

482. The Claimants, through their greed, are attempting to make a mockery of the international investment law system. As discussed below and in the Second Report of Quadrant Economics, the Claimants have predicated their quantum claim on unreasonable assumptions, while ignoring basic rules of valuation and material facts that undermine their position. The Claimants, therefore, have not met their legal burden and have not proven their claim for compensation. The Claimants' quantum claim should be denied in its entirety.

A. THE COMPENSATION CLAIMED BY THE CLAIMANTS IS GROSSLY OVERSTATED

1. The Compensation Claimed for Potential New Contracts Is Unsupported

483. The Claimants seek US$ [redacted] in compensation for lost revenue associated with prospective contracts.[964] According to the Claimants, this number reflects the fair-market value of *Omega Panama* on a going-forward basis. That is absurd.

484. The Claimants derive their purported value through a discounted cash flow ("DCF") analysis. A DCF analysis seeks to determine the free cash flows of an entity over time and to discount those cash flows back to their net present value. To do this, the analysis considers projected revenues and costs, as well as numerous variables that affect the relevant discount rate. Because a DCF analysis projects cash flows into the future, it must rely on assumptions as to the company's future revenues and costs. The reliability of any DCF analysis, therefore, turns on the reasonableness of those assumptions. The assumptions relied on by the Claimants' are unreasonable and unreliable. In fact, the Claimants DCF analysis does not value Omega Panama individually, but instead values (albeit incorrectly) the consortium of Omega Panama, Omega US, and third parties that bid on public works projects in Panama.

485. In the Second Report of Quadrant Economics, Dr. Flores discusses in detail the significant flaws in the Claimants' DCF analysis. Those flaws fall into four categories: (a) the Claimants do not value Omega Panama; (b) the Claimants' assumptions regarding the levels of future capital spending in Panama are wrong; (c) the Claimants' analysis of competitive bid data

964 Claimants' Reply ¶ 468.

is flawed; and (d) the Claimants' incorrectly apply the principles underlying a fair-market value analysis.

a. The Claimants Do Not Value Omega Panama

486. The Claimants DCF analysis and purported valuation of Omega Panama is fundamentally and fatally flawed. Indeed, the Claimants do not even value Omega Panama, but through their defective analysis more closely value a consortium of Omega Panama, Omega US and, in some cases, the third parties that collaborated with the Omega entities on their bids.

487. It is undisputed that the parties are attempting to establish the fair-market value of Omega Panama. Compass Lexecon states that "[l]osses on new contracts estimated at US$ [redacted] as of December 23, 2014 . . . relate to Omega Panama's capacity to generate new contracts, based on the historical performance of the company[.]"[965] This is consistent with the approach taken by Compass Lexecon in its first report, where it stated that Claimants' value derives from Omega Panama's ability to continue as a "going concern, bidding and winning further construction contracts in Panama from December 2014 onwards."[966]

488. It also is undisputed that the fair-market value of an asset is the:

> amount a willing buyer would normally pay to a willing seller after taking into account the nature of the investment, the circumstances in which it would operate in the future and its specific characteristics, including the period in which it has been in existence, the proportion of tangible assets in the total investment and other relevant factors pertinent to the specific circumstances of each case.[967]

489. The objective, therefore, is to establish the price that a hypothetical buyer would pay a hypothetical seller for Omega Panama as of December 23, 2014 based on the factors described

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965 Second Expert Report of Pablo López Zadicoff & Sebastian Zuccon ("**Second Compass Lexecon Report**") ¶ 2(b).

966 First Expert Report of Pablo López Zadicoff & Sebastian Zuccon ("**First Compass Lexecon Report**") ¶ 10.

967 Second Compass Lexecon Report ¶ 47; *see* First Quadrant Report ¶ 16; Second Quadrant Report ¶ 19.

above.[968] According to Compass Lexecon, Omega Panama's value resides in its reputation business contacts, and superior financial capacity, as reflected by a "proven track record."[969] The problem, however, is that "Omega Panama did not possess the assets, neither tangible nor intangible, upon which Compass Lexecon claims to have based its valuation."[970]

490. A hypothetical buyer of Omega Panama would consider only those factors that are unique to Omega Panama. That buyer would ignore the support or backing supplied by Omega US or third parties on bids, as that support and backing would not be transferred with Omega Panama after the sale. Omega Panama's value to a hypothetical buyer, therefore, is limited to just that one company's performance as a stand-alone entity. And, as Dr. Flores concludes, Omega Panama has zero value as a stand-alone entity—"[n]o hypothetical willing buyer would have paid to acquire Omega Panama because it did not possess any valuable tangible or intangible assets."[971]

491. Compass Lexecon's analysis combines factors from Omega Panama, Omega US, and the third parties with whom the Omega entities partnered to form their various consortia.[972] This is evident throughout Compass Lexecon's report. For example, Compass Lexecon states that "Omega Panama won 10 out of 42 public contract bids in which it participated[.]"[973] That is not true. As the table below shows, Omega Panama made ten bids as a stand-alone entity (none of which it won). On all of the remaining bids, Omega Panama partnered with Omega US, a third party, or, in some cases, both Omega US and a third party.[974]

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968 December 23, 2014 is the valuation date used by the Claimants. Panama has not objected to this date for valuation purposes.

969 First Compass Lexecon Report ¶¶ 64-65; Second Quadrant Report ¶ 23.

970 Second Quadrant Report ¶ 26.

971 Second Compass Lexecon Report ¶ 8.

972 Second Compass Lexecon Report ¶ 27.

973 Second Compass Lexecon Report ¶ 60.

974 Second Quadrant Report ¶ 28. The Claimants refer to 42 bids. One of those bids was cancelled. As such, Quadrant's analysis focuses only on the 41 bids that went through to a final decision.

	Bids	Won	Lost
Omega Panama w/ <u>and</u> w/o a Partner	**41**	**10**	**31**
Omega Panama w/ Partner	31	10	21
Omega Panama w/ Both Omega US & Third Party	*20*	*5*	*15*
Omega Panama w/ Third Party Only (excl. Omega US)	*3*	*0*	*3*
Omega Panama w/ Omega US Only (excl. Third Party)	*8*	*5*	*3*
Omega Panama w/o Partner	10	0	10

492. Despite all of Compass Lexecon's rhetoric about Omega Panama's successes, it did not win a single project as a stand-alone company or when it partnered with a third party other than Omega US. This is not surprising given the limited function that Omega Panama played in the overall picture. As Claimants admit, Omega Panama's role in the bidding process was limited to "satisfying the local company requirement included in many of the tenders and providing the legal and economic structure to manage the construction projects locally."[975] It was Omega US that supplied "bonding capacity, solid financials, track record, project portfolio, and other specifications customarily used by project owners to evaluate bid proposals."[976] As such, "all bids for large public projects in Panama were made through a consortium consisting of Omega Panama *and* Omega U.S."[977]

493. The hypothetical buyer in this valuation exercise, of course, is not buying the Omega consortium, but Omega Panama. It is a fundamental error, therefore, to include elements from the consortium in the valuation.[978] This error permeates Compass Lexecon's analysis. For example, Compass Lexecon highlights the "financial statements provided by Omega Panama, which attest to its success rate over time."[979] Those financial statements, however, reflect

975 Claimants' Memorial ¶ 33.

976 Claimants' Memorial ¶ 34. *See also* Second Compass Lexecon Report ¶ 28.

977 Claimants' Memorial ¶ 32 (emphasis in original).

978 As Dr. Flores explains, "Compass Lexecon's valuation of Omega Panama diverges from the FMV standard because it: (i) Attributes intangible assets to Omega Panama that it did not possess. In particular, to support its valuation, Compass Lexecon relies on assets that according to Claimants themselves belong to Omega U.S., not Omega Panama"). Second Quadrant Report ¶ 24.

979 Second Compass Lexecon ¶ 60.

earnings from projects won by the consortium discussed above. As history shows, those projects would not have been won by Omega Panama on its own, and the revenues generated on those projects flow through Omega Panama simply by virtue of the fact that it is the locally incorporated entity within the consortium. Also, as discussed above, Mr. Rivera felt free to treat Omega Panama's revenues as fungible with his personal funds and to freely transfer hundreds of thousands of dollars from Omega Panama to bribe government officials (or, if the Claimants' groundless defense were ever to be believed, to purchase land for development outside of Omega).

494. Similarly, although Compass Lexecon purports to value Omega Panama, it relies on the "Claimants' bidding performance" as evidence of their "competitive advantage."[980] The Claimants, of course, are Mr. Rivera and Omega US—not Omega Panama—and, therefore, are irrelevant to the valuation. Omega Panama presented no "competitive advantage" to Omega US and, in fact, was viewed as a detriment. According to Claimants, "[w]hile it carried the Omega name, Omega Panama was a newly registered company without its own track record. This created an issue for Omega Panama when bidding and, ultimately, from mid-2010, all bids for large public projects in Panama were made through a consortium consisting of Omega Panama and Omega US."[981] It was only "[t]hanks to Omega U.S.'s bonding capacity, solid financials, track record, project portfolio, and other specifications" that the Omega consortium were able win any bids.[982]

495. Moreover, it is apparent that Mr. Rivera had no intention of expanding Omega Panama's role as a stand-alone entity. The Claimants admit that Mr. Rivera's "ultimate objective was to replicate the strategy" used in Panama—*i.e.*, create a locally incorporated entity that is supported by Omega US—"in other jurisdictions by expanding Omega U.S.'s presence until it became a

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980 Second Compass Lexecon Report, p. 27, Sect. III.2.2.

981 Claimants' Memorial ¶ 32 (emphasis in original).

982 Claimants' Memorial ¶ 34. As Dr. Flores points out in his Second Quadrant Report, Compass Lexecon states that "the bidding processes require years of experience and certain level of construction projects in the past. In the case of Omega Panama, this was achieved through the Omega Consortium, through the participation of Omega US, a company that put its reputation and industry standing at risk in Panama." Second Quadrant Report ¶ 30 (citing Second Compass Lexecon Report, fn. 54).

regional, and ultimately global, competitor."[983] Thus, it cannot be said that Omega US transferred any of its own intangible assets to Omega Panama.[984]

496. Compass Lexecon's analysis, therefore, is misleading. When Compass Lexecon states that "Claimants had a solid financial standing" or "Claimants had valuable experience," it is not focusing on the asset that is being valued, but is relying on third-party factors that do not exist in Omega Panama as a stand-alone entity and could not be acquired by a hypothetical buyer of Omega Panama.[985]

497. It is also misleading for Compass Lexecon to state that it would be "costly and require[] time" to "replicat[e] Omega Panama's intangible assets," which Compass Lexecon asserts are its experience, relationships, financing, and reputation.[986] *First*, according to Compass Lexecon, these assets "allowed [Omega Panama] to win 10 of 42 (or 24%) public works bids."[987] As has been shown, Omega Panama did not win a single bid; bids were won only by a consortium of entities in which Omega Panama was the junior partner.

498. *Second*, Omega Panama did not have its own experience, financing, or reputation, all of which resided in Omega US. And, as the evidence shows, the only relationship that appeared to matter for Omega Panama was its relationship with Omega US. Omega Panama lost all three of the bids it submitted with a partner other than Omega US, and all 10 bids it submitted alone.

499. *Third*, it is incorrect to state that it would be "costly and require[ ] time" to replicate what Omega Panama brought to the bidding process. Omega Panama was incorporated on October 26, 2010. Of the 42 bids that Omega Panama participated in (either independently or as part of a consortium), 14 were submitted in 2010 and 21 were submitted in 2011.[988] Only three contracts

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983 Claimants' Memorial ¶ 34.

984 Second Quadrant Report ¶ 8 ("even Omega U.S. failed to deliver the intangible assets that according to Compass Lexecon gave Omega Panama its value.").

985 Second Compass Lexecon Report, pp. 28, 30.

986 Second Compass Lexecon Report ¶¶ 79-80.

987 Second Compass Lexecon Report ¶ 79.

988 First Quadrant Report ¶ 71.

were submitted in 2012, four in 2013, and none in 2014.[989] Thus, over 80% of the bids in which Omega Panama participated (either on its own or as part of the consortium) were submitted *before* Omega Panama was two years old. In addition, as of December 2013 (when over 80% of the bids were submitted), Omega Panama had only US$ [redacted] in "income-generating assets," including, office equipment, computer equipment, and motor vehicles.[990] In 2012, Omega Panama paid a total of US$ [redacted] in salaries and, in 2013, that figure dropped to US$ [redacted].[991] These facts contradict Compass Lexecon's conclusion that it would be timely and costly for a new entrant to the market to replicate the assets that Omega Panama had at the valuation date.

500. The Claimants do not suggest anywhere in their submissions that, as of December 31, 2014 (the valuation date), Omega Panama had broken free of its dependency on Omega US or was capable of winning bids on its own. A rational, hypothetical buyer would be aware of this fact and would value Omega Panama on its own merits, without taking into account the values that may have come from its association with Omega US or other third parties. Compass Lexecon's reliance on these values, therefore, results in a valuation that is meaningless and should be disregarded.

b. To the Extent that Omega Panama Offered Any Intrinsic Value as a Stand-Alone Entity, that Value Was Limited to a Short Ramp-Up Period

501. Dr. Flores explains that any value Omega Panama may have beyond its limited role as a locally-incorporated entity would be limited to a ramp-up period.[992] The value during this period is the delta between whatever intrinsic value Omega Panama may offer on the valuation date and, as compared to the position of a new entrant to the market on that same date. To the extent that there is any delta at all, its value would be temporally limited. While it is true that a new

989 *See* First Quadrant Report ¶ 71.

990 First Quadrant Report ¶ 43.

991 First Quadrant Report ¶ 44. The minimum wage in Panama in 2013 was US$ 461 per month. At this rate, Omega Panama's salary expenditures would have been sufficient to employ 19 full-time employees at minimum wage. To the extent that Omega Panama paid more than minimum wage, the number of employees that could be supported by this salary expenditure would go down. First Quadrant Report ¶ 44.

992 Second Quadrant Report ¶ 43, Figure 3.

entrant to the Panamanian market would have to develop relationships and experience in Panama on its own, that entrant would develop these assets to a level equivalent to those possessed by Omega Panama in short order. [993] Relationships, for example, normalize over time. A local contractor, financial institution, or project owner will not necessarily value relationships with one entity more than another simply because the former had been in business in Panama longer. Rather, the value of the relationship will depend on a variety of factors that are not time related, such as personal connections, the quality of service provided, etc. And, there is no basis to suggest that Omega Panama would have greater experience than a new market entrant for very long.

502. Compass Lexecon presumes that a new market entrant will enter Panama with no experience at all. In reality, a new entrant into the Panamanian market is likely to be an experienced international contractor looking to expand its global footprint. Thus, it will bring its own experience to the market. And, within Panama itself, the new entrant could surpass Omega Panama in experience depending on the number of projects it is awarded in any given year compared to those awarded to Omega Panama. Compass Lexecon ignores all of this and takes the simplistic (and incorrect) view that Omega Panama will enjoy a unique comparative advantage forever.[994]

c. The Claimants' Assumptions Regarding Future Levels of Public Works Spending in Panama Are Wrong

503. Historically, Panama spends no more than 6% of GDP on central government capital expenditures.[995] The one glaring exception to this historical trend occurred during President Martinelli's administration (2009-2014), when Panama spent roughly 11% of GDP on these projects.[996] In projecting potential future cash flows, the Claimants ignore virtually all of the historical data and rely instead on the aberrational period between 2009-2014.[997] By taking this

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993 Second Quadrant Report ¶ 42.

994 Second Compass Lexecon Report ¶¶ 80-81; Second Quadrant Report ¶ 41.

995 First Quadrant Report ¶¶ 59-60; Second Quadrant Report ¶ 95.

996 First Quadrant Report ¶ 65, Figure 7.

997 First Quadrant Report ¶ 58.

approach, the Claimants have artificially increased the amount of money projected to be spent by Panama on public works projects into perpetuity.

504. As Dr. Flores explains, the Claimants' focus on the 2009-2014 period is wrong for several reasons. *First*, it ignored historical trends, which is something that a reasonable hypothetical buyer would not do.[998] Buyers will consider all relevant data and seek to both identify and control for aberrations when determining value.

505. *Second*, the Claimants have offered no evidence suggesting that the high levels of spending during the Martinelli administration will continue into perpetuity. The evidence, in fact, suggests to the contrary. After succeeding President Martinelli, President Varela instituted a policy of fiscal discipline designed to combat Panama's growing public debt.[999] President Varela released a 2015-2019 Strategic Plan for Panama that provided a contemporaneous forecast for central government capital expenditures. According to that Plan, Panama's capital expenditures would revert back to approximately 5-7% of GDP, which is consistent with historical norms.[1000]

506. *Third*, the Claimants' suggestion that a hypothetical buyer would ignore relevant information in favor of a subset of aberrational data is contradicted by Mr. Rivera's own conduct. When Mr. Rivera decided to invest in Panama, he relied heavily on statements by the government that Panama intended to "initiate a significant public works program."[1001] Mr. López also noted that the decision to enter Panama was based on the upturn in construction spending at the time—"[i]t was a very good time for the construction sector in the country, which was experiencing a construction 'boom.'"[1002]

507. A hypothetical buyer on December 23, 2014 likewise would place significant weight on contemporaneous statements about Panama's projected capital spending plans. At that time, a

998 First Quadrant Report ¶ 70.

999 First Quadrant Report ¶¶ 62-63.

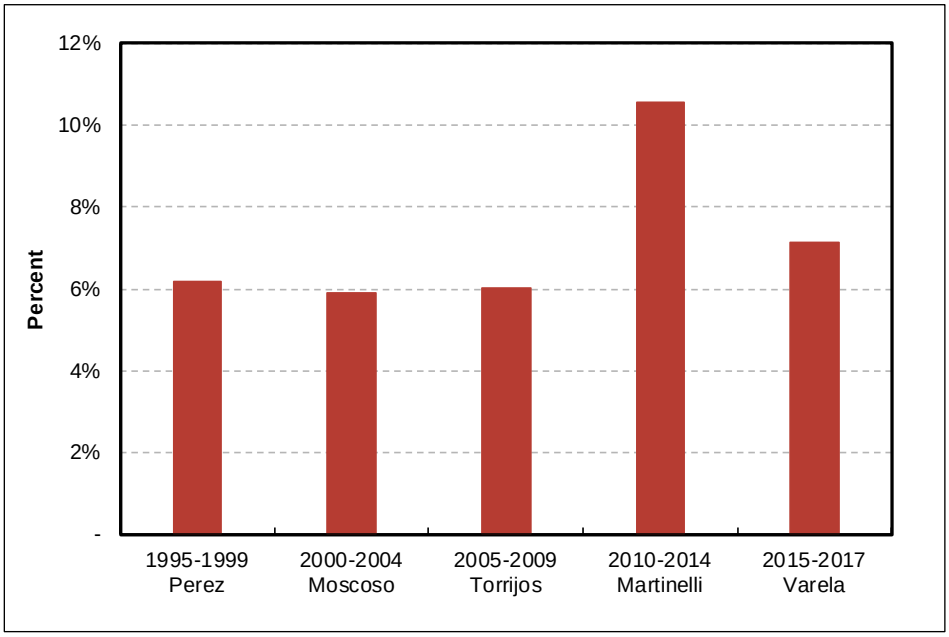
1000 First Quadrant Report ¶ 66, n. 108 (citing Strategic Plan 2015-2019 **[QE-0027]**).

1001 Rivera I ¶ 15.

1002 López ¶ 17.

buyer would have been aware of President Varela's desires to curtail spending, increase fiscal discipline, and rationalize public works projects in the country. The Claimants cannot credibly suggest that a reasonable buyer would ignore this data in favor of data from 2009-2014 showing capital expenditures at levels that almost double historical norms or projected levels.[1003]

NFPS Capital Expenditures as Percentage of GDP by Administration 1995-2017[1004]



508. A rational buyer will look to discern the real value of an asset and, in doing so, will consider all relevant evidence. A rational buyer, therefore, will not fixate on data or time periods that are not reflective of historic norms or consistent with reliable projections of future behavior. The only entity that would rely on such data is one who is looking to maximize value for purposes other than a hypothetical arm's-length transaction. It is not surprising, therefore, that Claimants, through their "independent" expert, have done so.

509. In an effort to minimize the effect of its error, Compass Lexecon suggests that, even if Panama were to reduce its overall capital expenditure budget, spending on smaller projects like

[1003] Second Quadrant Report ¶ 94.

[1004] Second Quadrant Report ¶ 97, Figure 11.

the ones bid on by the Omega Consortium would remain steady.[1005] As Dr. Flores points out, this argument is unsupported and inconsistent with Compass Lexecon's own methodology, which uses a ratio of public capital expenditures to GDP to determine Omega Panama's target market, without accounting for differences in the size of projects.[1006]

510. Compass Lexecon also concludes that Omega Panama would have offset any decrease in public works projects with private sector projects.[1007] However, the record shows that Omega US and Omega Panama had no ability to penetrate the private sector construction market.[1008] In addition, the Claimants' own statements make clear that Omega's objective were to operate in the public sector market, as both Mr. Rivera and Mr. López testify that public works projects were Omega US and Omega Panama's main targets.[1009]

d. The Claimants' Analysis of Competitive Bid Data Is Flawed

511. In purporting to value Omega Panama, Compass Lexecon looks at "competitive bid data" for the bids in which Omega Panama participated. This analysis is flawed on multiple levels. *First*, as described above, Compass Lexecon does not control for the influence that Omega US and third-party partners had on the bids. As such, Compass Lexecon does not measure Omega Panama's competitiveness in these bids as a stand-alone entity.

512. *Second*, Compass Lexecon takes a simplistic view of the bid data, resulting in misleading conclusions. For example, Compass Lexecon states that "Omega Panama had an overwhelmingly better [financial] performance than" its competitors.[1010] Setting aside the fact that Compass Lexecon did not actually measure Omega Panama's performance, its conclusions with respect to Omega's competitors are unfounded. For example, when examining financial capacity, Compass Lexecon only took into account when a company received a perfect score of

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1005 Second Compass Lexecon Report ¶¶ 102(b), 104.

1006 Second Quadrant Report ¶¶ 105-06.

1007 Second Compass Lexecon Report ¶ 106.

1008 First Quadrant Report ¶ 31; Second Quadrant Report ¶ 110.

1009 Rivera I ¶ 19; López ¶ 19; Claimants' Reply ¶ 30.

1010 Second Compass Lexecon Report ¶ 70.

30 points.[1011] If a company did not receive 30 points, Compass Lexecon concludes that it is not financially competitive.[1012] This is wrong. Semi—one of the companies that competed in bids with the Omega consortium—received 27 out of 30 points (or, a score of 90%).[1013] Under Compass Lexecon's analysis, however, Semi gets a zero in each of these cases and is considered to be financially deficient.

513. Similarly, Comsa—another competitor—received perfect scores in two out of three bids.[1014] It did not receive a perfect score on the last bid because a bank reference letter submitted by Comsa was not addressed explicitly to the entity soliciting the bid.[1015] This is was clearly a clerical error that had no bearing on the financial capability of Comsa, but Compass Lexecon nevertheless argues that Comsa's financial strength was less than Omega Panama's because it received fewer perfect scores. This type of misleading analysis defines Compass Lexecon's approach.

514. The flaws in Compass Lexecon's approach are made abundantly clear when the Omega consortium's competitors are examined. Dr. Flores provides a comprehensive look at some of the companies involved in the same bids as the Omega consortium.[1016] This analysis shows that companies, large international contractors, with decades of experience, were competing for projects. For example, the IBT Group is a Spanish contractor, with subsidiaries in Miami, Paris, and London.[1017] It operated in over 30 countries, had revenues in 2014 of US$ 204 million (more than ten times the revenues generated by Omega Panama), and was able to offer customers financing from multilateral organizations such as the United Nations and World Bank, as well as

1011 Second Quadrant Report ¶ 63; Second Compass Lexecon Report ¶ 70.

1012 Second Quadrant Report ¶ 63; *see* Second Compass Lexecon Report ¶ 70.

1013 Second Quadrant Report ¶ 65.

1014 Second Quadrant Report ¶ 65.

1015 Second Quadrant Report ¶ 65.

1016 Second Quadrant Report ¶ 56.

1017 Second Quadrant Report ¶ 56.

financial institutions like Deutsche Bank, Bank of America, Merrill Lynch, BBVA, and Banco Sabadell, Caixa Bank, and BNP Paribas.[1018]

515. Other competitors included FCC Construccion, S.A., which has been in operation for 120 years, with operations in 21 countries, and revenues in 2014 of € 2.08 billion.[1019] Similarly, Acciona S.A. is a multinational construction company that has been in business for over 80 years, with operations in more than 40 countries, and construction revenues in 2014 of € 2.63 billion.[1020]

516. These companies stand in stark contrast to Omega Panama, a locally-incorporated entity, with [redacted] employees and roughly [redacted] in tangible assets. Despite this contrast, Compass Lexecon concludes that Omega Panama had a comparative advantage over its competitors. That conclusion is absurd and reflects the lengths to which Compass Lexecon will go to inflate its valuation.

e. The Claimants Improperly Applied the Principles of a Fair-Market Value Analysis

517. The fair-market value called for by the BIT and TPA is the price that a hypothetical buyer would pay a hypothetical seller for the relevant asset. The use of hypothetical buyers and sellers is important, as it assumes that both parties are rational economic actors with reasonable expectations acting freely. [1021] As such, it removes the emotional element that an actual buyer or seller injects into the analysis.

518. Panama's valuation assumes both a hypothetical buyer and hypothetical seller. The Claimants' valuation, by contrast, assesses the price that a hypothetical buyer would pay the Claimants if the Claimants were to sell Omega Panama. In doing so, the Claimants have taken the position that they can set the value for Omega Panama and that a hypothetical buyer would

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1018 Second Quadrant Report ¶ 56.

1019 Second Quadrant Report ¶ 56.

1020 Second Quadrant Report ¶ 56.

1021 *See* Second Quadrant Report ¶¶ 50-51.

have to pay their price.[1022] That position defies logic. Buyers and sellers assess value independently. If a seller asks more for an asset that a buyer is willing to pay, the asset will remain unsold. Moreover, the absence of a willing buyer at the seller's price proves that the fair-market value of the asset is lower than the price demanded by the seller.[1023] Compass Lexecon ignores this and takes the invalid position that the Claimants can unilaterally determine the value of Omega Panama.

2. The Amounts Claimed to Be Owed for Works Allegedly Performed on the Projects Are Overstated and Unsupported

519. Dr. Flores demonstrated in his first report why the US$ [redacted] million that Claimants' argue is due on the existing contracts is overstated. Namely, the Claimants have used an inappropriately high rate to compound the amount of money owed to the valuation date; overstated the amount of expected future cash flows; discounted future cash flows to the valuation date using an incorrect cost of equity; and failed to account for the offsetting effects of advances paid to the Claimants for yet unbilled future work.[1024]

520. Compass Lexecon fails to adequately address Dr. Flores' criticisms. Rather, Compass Lexecon mischaracterizes Dr. Flores' positions and persists in its use of inappropriate methodologies. For example, Compass Lexecon alleges that Dr. Flores believes a zero interest rate should be used to compound the amounts owed on prior work to the Valuation Date.[1025] That is wrong. Dr. Flores argues that the risk-free rate should be used rather than Omega's weighted cost of capital.[1026] Similarly, Compass Lexecon argues that Dr. Flores incorrectly included amounts retained by Panama in the advances to be offset by future invoices.[1027] As

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1022 Second Quadrant Report ¶ 50; *see* Second Compass Lexecon Report ¶¶ 6, 54.

1023 *See* Second Quadrant Report ¶ 51.

1024 First Quadrant Report ¶¶ 97-112.

1025 Second Compass Lexecon Report ¶ 37.

1026 Second Quadrant Report ¶ 173.

1027 Second Compass Lexecon Report ¶ 34.

Dr. Flores explains, however, those amounts are documented as separate amounts received by Omega Panama.

521. In his second report, Dr. Flores addresses in detail the methodological flaws that persist in Compass Lexecon's valuation. In addition, he addresses the continuing insufficiency in the Claimants' evidence.[1028] Ultimately. Dr. Flores concludes that the Claimants would be owed at most US$ [redacted] for their existing contracts claim.[1029]

B. THE CLAIMANTS' DEMANDS FOR "MORAL DAMAGES" ARE UNSUPPORTED AND UNJUSTIFIED

522. The Claimants raised the notion of moral damages in their Memorial. They did not attempt, however, to quantify those damages or include an amount for moral damages in their request for relief. Rather, they sought compensation for all damages and losses they allegedly sustained and quantified those losses at US$ 81.58 million, an amount calculated by their quantum experts as the interest-adjusted sum of amounts owed on outstanding invoices and amounts owed on future contracts.[1030]

523. Remarkably, the Claimants now "demand an award of moral damages at least as high as [ ] US$ 30 million," and claim that Panama does not contest their entitlement to such damages.[1031] That is simply false. The Claimants' failure to quantify the amount of moral damages they sought or to specifically request an award of moral damages in their first Memorial meant that a request for moral damages was never properly placed before the Tribunal. The Claimants, therefore, should be precluded from crystalizing their request at this late juncture and the Tribunal should dismiss their demand out of hand.

1028 Second Quadrant Report ¶ 173.

1029 Second Quadrant Report ¶ 173.

1030 Claimants' Memorial ¶ 235; First Compass Lexecon Report ¶ 113, Table XVII.

1031 Claimants' Reply ¶ 457.

524. Although Panama believes that the Tribunal should not recognize the Claimants' moral damages claim, it sets out below why the Claimants' demand for moral damages is legally unfounded and factually unsupported.

1. The Tribunal Lacks Jurisdiction to Consider Moral Damages

525. The Claimants—Mr. Rivera and Omega US—seek moral damages for harms they purportedly sustained because of Panama's allegedly unlawful conduct. As demonstrated above, Panama has not engaged in any unlawful conduct and, thus, the Claimants are not entitled to damages or compensation in any form. However, even if the Tribunal were to conclude that Panama had breached its treaty obligations, the Claimants still would not be entitled to recover moral damages because the BIT and TPA protect investments and not investors.

526. The Claimants assert four claims against Panama: (a) expropriation without compensation; (b) failure to provide fair and equitable treatment; (c) breach of a prohibition against unreasonable and arbitrary measures; and (d) breach of the umbrella clause.[1032] The BIT and TPA make clear, however, that protections accorded in respect of these obligations extend only to investments and not to investors.

- **Expropriation**
  - **BIT Art. IV:** "*Investment of a national or a company of either Party* shall not be expropriated, nationalized, or subjected to any other direct or indirect measure having an effect equivalent to expropriation or nationalization in the territory of another party . . . .
  - **TPA Art. 10.7**: "Neither Party may expropriate or nationalize *a covered investment* either directly or indirectly through measures equivalent to expropriation or nationalization . . . ."

[1032] Claimants' Request for Arbitration ¶¶ 70-73

- **Fair & Equitable Treatment**

  - **BIT Art. II(2):** "*Investment of nationals and companies of either Party* shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Party."

  - **BIT Art. II(3):** "Each Party agrees to provide fair and equitable treatment and, in particular, the treatment provided for in paragraph 1 of this Article, to *privately owned or controlled investment* of nationals or companies of the other Party . . . ."

  - **TPA Art. 10.5:** "Each Party shall accord to *covered investment* treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."

- **Unreasonable and Arbitrary Treatment**:

  - **BIT Art. II(2)**: "Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal *of investment* made by nationals or companies of the other Party."

  - **TPA:** The TPA does not include a prohibition against unreasonable or arbitrary measures. The Claimants, however, argue that such projections may be imported from other treaties using the TPA's MFN provision.[1033]

- **Umbrella Clause:**

  - **BIT Art. II(2)**, however, provides: "Each Party shall observe any obligation it may have entered in with regard to *investment of nationals or companies of the other Party*."

[1033] Claimants' Request for Arbitration ¶ 72, n. 145.

- **TPA:** The TPA does not include an umbrella clause. The Claimants' argue, however, that the Umbrella Clause from other Panama BITs may be incorporated through the MFN provision. [1034] The Claimants specifically reference the bilateral investment treaty between Panama and the United Kingdom of Great Britain and Northern Ireland, which provides that "neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal *of investments* in its territory of nationals or companies of the other Contracting Party."[1035] Thus, even if the Tribunal were to import the language from the Panama-UK BIT, it would not change the result.

527. The language that states use in investment treaties has meaning. Through that language, states define the scope of their obligations and their consent to arbitrate. Tribunals, therefore, must give effect to that language. As the tribunal in *Tokios Tokėles* made clear, tribunals may not expand or limit the scope of obligations in ways that are "not found in the text" of the relevant investment treaty.[1036]

528. The BIT limits all substantive protections to investments and does not specifically grant protections to investors.[1037] By contrast, the TPA specifies which protections extend only to investments and which extend to both investors and investments. While the protections described above are limited to investments, Articles 10.3(1) and 10.4(a) of the TPA expressly extend the obligations to provide National Treatment and Most-Favored Nation treatment to both investments and investors.[1038] Panama and the United States, therefore, considered and

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1034 Claimants' Request for Arbitration ¶ 72, n. 145.

1035 Claimants' Request for Arbitration ¶ 72, n. 145.

1036 *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (Apr. 29, 2004) (**CL-0193**), ¶ 36.

1037 *See, e.g.*, BIT Art. II(1) (**CL-0001**) ("Each Party shall maintain favorable conditions for investment in its territory . . . Each Party shall permit and treat such investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country).

1038 TPA Arts. 10.3(1) and 10.4(1) (**CL-0003**).

expressly identified which protections should apply to investors and which should be limited to investments.[1039]

529. It has been reported that the tribunal in *Gunes Tekstil Konfeksiyon Sanayi ve Ticaret Limited Sirketi and others v. Republic of Uzbekistan* refused to consider a claimant's request for moral damages precisely on these grounds. As reported, the claimants sought an award of US$ 180 million for moral damages arising out of physical abuse by the government.[1040] That tribunal, however, rejected that claim on the grounds that the BIT protects only investments and not investors.

530. The Tribunal, therefore, should deny the Claimants' moral damages claim for lack of jurisdiction.

2. The Claimants Have Not Shown the Exceptional Circumstances Warranted to Consider Moral Damages

531. Even if the Tribunal were to determine that it had jurisdiction to consider the Claimants' request for moral damages, the claim should still be dismissed. Moral damages are an extraordinary remedy that should be awarded only in exceptional circumstances. [1041] In *Joseph Charles Lemire v. Ukraine*, the Tribunal held that moral damages should be considered only when the state's conduct is grave and results in the substantial deterioration of a person's health and well-being.[1042] The tribunal in *Frank Charles Arif v. Republic of Moldova* advanced this notion, when it held that:

1039 TPA Art. 10.1(1) provides that "[t]his Chapter applies to measures adopted or maintained by a Party relating to: (a) investors of the other Party; (b) covered investments; and (c) with respect to Articles 10.9 and 10.11, all investments in the territory of the Party. This language reflects and supports the distinct treatment accorded to investors and investments within Article 10.

1040 Cosmo Sanderson, *Uzbekistan Liable for Seizure of Shopping Mall*, Global Arbitration Review (Oct. 9, 2019) (**RL-0057**).

1041 *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award (Mar. 28, 2011) (**CL-0202**), ¶ 333; *Waguih Elie George Saig & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (June 1, 2009) (**CL-0032**), ¶ 545 ("[I]t appears that the recovery of punitive and moral damages is reserved for extreme cases of egregious behaviour.").

1042 *Lemire v. Ukraine* (**CL-0202**), ¶ 333. At least one tribunal has held that moral damages may not be awarded "for damage inflicted to a juridical person." *Iurii Bogdanov et al v. Republic of Moldova*, SCC Arbitration Proceeding, Award (Sept. 22, 2005) (**RL-0059**), ¶ 61.

> A breach of contract or any wrongful act can lead to a sentiment of frustration and affront with the victim. A pecuniary premium for compensation for such sentiment, in addition to the compensation of economic damage, would have an enormous impact on the system of contractual and tortious relations. It would systematically create financial advantages for the victim, which go beyond the traditional concept of compensation. The fundamental balance of the allocation of risks would be distorted. It would have similar effects if permitted in investment arbitration. The Tribunal therefore is aligning itself to the majority of arbitral decisions and holds that compensation for moral damages can only be awarded in exceptional cases, when both the conduct of the violator and the prejudice of the victim are grave and substantial.[1043]

532. Here, the Claimants argue that they suffered reputational harm and lost business opportunities as a result of the "'cancellation of contracts' and bogus criminal charges."[1044] Panama does not accept the Claimants' characterization of their "losses," nor the supposed cause thereof. Regardless, whatever losses the Claimants may have suffered were the direct result of their own misconduct and inability to honor their contractual obligations in Panama.

533. *First*, there was nothing "bogus" about the criminal investigations of Mr. Rivera and Omega. As shown above, these investigations evolved out of the National Assembly's investigation into the criminal activities of Justice Moncada Luna. Evidence uncovered in that investigation showed that, on at least two occasions, Mr. Rivera transferred funds paid to him by the Judiciary for use on the La Chorrera Project to Justice Moncada Luna.[1045] Such payments are crimes under Panamanian law and, thus, it was a legitimate exercise of the state's police powers for Panama to investigate and bring charges.[1046]

534. As part of the National Assembly's investigation, Panama froze bank accounts that were implicated in the unlawful payments to Justice Moncada Luna.[1047] Omega's accounts

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1043 *Frank Charles Arif v. Republic of Moldova,* ICSID Case No. ARB/11/23, Award (Apr. 8, 2013) (**RL-0040**), ¶ 592.

1044 Claimants' Memorial ¶ 209.

1045 *See supra* at Sections II.A.1-II.A.3; Pollitt Report at pp. 10-21.

1046 Criminal Code Article 347, Mizrachi & Pujol, S.A., eds., *Criminal Code,* Second Unique Text of the Law 14 of 2007 (**RL-0039**).

1047 Villalba II ¶ 17; Rivera ¶ 85.

were identified as having been the source of funds that flowed to Justice Moncada Luna and, thus, were frozen by the National Assembly.[1048] After Justice Moncada Luna pled guilty, the National Assembly referred the evidence surrounding Mr. Rivera's and Omega's conduct to the Federal Prosecutor for further investigation.[1049] The Federal Prosecutor maintained the freeze on Omega's bank accounts pending the outcome of their investigation.[1050] Again, this is an ordinary exercise of police powers linked to the reasonable conduct of a criminal investigation.

535. While conducting its investigation, the Federal Prosecutor sought to interview Mr. Rivera and other Omega employees.[1051] Mr. Rivera refused to cooperate and fled Panama. A criminal detention order was issued in response to Mr. Rivera's actions.[1052] Mr. Rivera was never detained, as he had fled Panama for the United States. Panama subsequently attempted to extradite Mr. Rivera from the United States to Panama and, when that effort was unsuccessful, temporarily issued an Interpol Red Notice.[1053] That Red Notice, however, was later removed.[1054]

536. *Second*, as shown in Panama's Counter-Memorial and reiterated above, INAC rightfully terminated its contract with Omega and drew on the performance bond provided to secure completion of the project. These rights are commonly included in large construction contracts, and were clearly spelled out in the Ciudad de las Artes Contract.[1055] The Claimants,

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1048 Villalba I ¶¶ 21-24.

1049 Villalba I ¶ 28.

1050 *See* Notice by the Special Prosecutor Against Organized Crime dated Apr. 17, 2015 (**R-0115**). The Federal Prosecutor's investigations into Mr. Rivera and other contracts implicated in Justice Moncada Luna's crimes were suspended by the Panamanian courts. That decision is currently under appeal and, thus, the investigation remains suspended. The freeze orders issued as part of the investigation remain in place during the suspension period.

1051 Villalba I ¶ 30.

1052 Resolution of Detention No. 052-15 dated Aug. 25, 2015 (**C-0093**).

1053 Letter from Secretariat to the Commission for the Control of Interpol's Files dated Mar. 24, 2016 (**C-0219**); Letter from the Commission for the Control of Interpol's Files dated Dec. 13, 2016 (**C-0220**).

1054 Letter from the Commission for the Control of Interpol's Files dated Dec. 13, 2016 (**C-0220**).

1055 Contract No. 093-12 dated July 6, 2012 (**C-0042)**, Cl. 45.

therefore, were fully aware of the potential consequences of their failure to meet their contractual obligations on the Ciudad de las Artes Project.

537. The Claimants suggest that the declaration of default and the calling of the bond on the Ciudad de las Artes Project triggered a series of events that deprived them of the ability to obtain financing, future bonding, and, in essence, future work.[1056] This is an extraordinary claim given the perfectly ordinary nature of this contractual remedy. Even if the Tribunal determined that INAC breached its contractual obligations when it terminated the contract, it still could not award moral damages. Mere contract breaches do not give rise to the extraordinary circumstances required to award such damages.

3. The Claimants Have Not Proven the Alleged Losses Supporting their Moral Damages Claim

538. While Tribunals have been willing to consider moral damages in certain circumstances, they have consistently held Claimants to a high burden of proof in establishing their entitlement to such damages.[1057] For example, in *Frank Charles Arif v. Moldova*, the claimant alleged that "he and his companies [were] mistreated and harassed, not only by the court proceedings and decisions at the instigation of competitors, but also by endless attempts of state authorities to intimidate him and his business."[1058] Mr. Arif claimed that his offices and homes were raided repeatedly over a nine-month period "under the pretext of an investigation for tax evasion" and that his banks and business partners were informed of the criminal investigations.[1059] Mr. Arif further alleged that the investigations did not bring "any results," were not "terminated," and forced him to "leave the country, fearing for his personal

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1056 Claimants' Reply ¶¶ 231-34.

1057 *Anatolie Stati et al v. Republic of Kazakhstan*, SCC Case No. V (116/2101), Award (Dec. 19, 2013) (**CL-0059**), ¶¶ 1782 ("Claimants, having the burden of proof, must meet a very high threshold to show a liability for moral damages."); *Oxus Gold v. Uzbekistan*, UNCITRAL, Award (Dec. 7, 2015) (**CL-0137**), ¶ 894 ("Moral damages have been considered admissible under international law . . . but the bar for recovery of such damages has been set high and they have been awarded only in exceptional circumstances.")

1058 *Arif v. Moldova* (**RL-0040**), ¶ 595.

1059 *Arif v. Moldova* (**RL-0040**), ¶ 595.

security."[1060] The Tribunal rejected Mr. Arif's claims for moral damages on the grounds that the allegations did not rise to the level of exceptional circumstances.[1061]

539. In *Stati v. Kazakhstan*, the Tribunal found that the President of Kazakhstan issued a direct order to his deputy Prime Minister and the Head of the Agency of the Republic of Kazakhstan for Fighting Economic and Corruption Crimes ("the Financial Police") to "thoroughly check [the Claimant's] company's work and to take decision on its further work in the best interest of the country."[1062] Shortly thereafter, further orders were issued by the Deputy Prime Minister and "the Financial Police ordered the commencement of numerous audits and investigations of Anatolie Stati" and his companies."[1063] These included a series of audits and inspections by the country's tax, customs, mining and minerals, and law enforcement agencies.[1064] Formal criminal investigations into the claimant's companies were initiated. Summonses were issued for the claimant and several of his employees, and "repeated

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1060 *Arif v. Moldova* (**RL-0040**), ¶ 595.

1061 Tribunals have rejected claims for moral damages in the vast majority of cases either on the grounds that the circumstances involved were not "exceptional," or that the claimant has failed to meet its evidentiary burden. *See, e.g.*, *Bogdanov v. Moldova* (**RL-0059**), § 5.2; *M. Meerapfel Söhne AG v. Central African Republic*, ICSID Case No. ARB/07/10, Award (May 12, 2011) (**RL-0060**), ¶¶ 414, 431-35; *Société Ouest Africaine des BétonsIndustriels (SOABI) v. Senegal*, ICSID Case No. ARB/82/1, Award (Feb. 25, 1988), 2 ICSID Rep. 190 (1993) (**RL-0061**), ¶¶ 6.22, 10.02; *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003), 10 ICSID Rep. 134 (2006) (**CL-0047**), ¶ 198; *Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award (May 6, 2013) (**CL-0126**), ¶¶ 289-93; *Victor Pey Casado & Foundation "Presidente Allende" v. Republic of Chile*, ICSID Case No. ARB/98/2, Award (May 8, 2008), ¶¶ 27, 266, 689, 704 (**RL-0062**) (*see also Victor Pey Casado & Foundation "Presidente Allende" v. Republic of Chile*, ICSID Case No. ARB/98/2 (Resubmission Proceeding), Award (Sept. 13, 2016) (**RL-0063**), ¶ 243); *Valeri Belokon v. Kyrgyz Republic*, UNCITRAL Arbitration Proceeding, Award (Oct. 24, 2014) (**RL-0064**), ¶¶ 317-18; *AHS Niger et al. v. Republic of Niger*, ICSID Case No. ARB/11/11, Award (July 15, 2013) (**RL-0065**), ¶¶ 148-49; *Oxus Gold v. Uzbekistan*, UNCITRAL Arbitration Proceeding, Award (Dec. 17, 2015) (**CL-0137**), ¶¶ 895, 901; *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award (Mar. 10, 2015) (**CL-0164**), ¶¶ 908-17; *Hassan Awdi et al. v. Romania*, ICSID Case No. ARB/10/13, Award (Mar. 2, 2015) (**CL-0096**), ¶¶ 460-66, 501-03, 516; *Adel A Hamadi Al Tamimi v. Sultanate of Oma*n, ICSID Case No. ARB/11/33, Award (Nov. 3, 2015) (**CL-0215**), ¶¶ 249-56; *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award (Feb. 26, 2014) (**RL-0066**), ¶¶ 277, 506; *Quiborax S.A. & Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award (Sept. 16, 2015), ¶¶ 597-819; *Convial Callao S.A. & CCI—Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2, Final Award (May 21, 2013) (**RL-0067**), ¶¶ 233-36, 357.

1062 *Stati v. Kazakhstan* (**CL-0059**), ¶ 950.

1063 *Stati v. Kazakhstan* (**CL-0059**), ¶ 952.

1064 *Stati v. Kazakhstan* (**CL-0059**), ¶¶ 952-1000

interrogations" were carried out.[1065] Various employees were arrested and assets frozen.[1066] Despite this, the tribunal rejected the claimants' request for moral damages. Although the tribunal found that the conduct violated the treaty's requirement to provide fair and equitable treatment, it stated that this did not *per se* "mean that moral damages are due.[1067] Rather, the tribunal examined the facts against the high standard for proving moral damages and held that the "Claimants have not fulfilled their burden of proof."[1068]

540. Here, the Claimants have neither proven that they suffered losses compensable by moral damages nor connected their claimed "losses" to Panama's conduct. *First,* the Claimants state in their Reply that they "have lost valuable business opportunities worth tens of millions of dollars (beyond the new contracts in Panama which are explicitly claimed)."[1069] They offer no proof of the "tens of millions of dollars" they supposedly lost. Rather, they rely principally on a January 28, 2015 letter from the Smithsonian Institution informing "Omega" that it was not selected to work on "the Smithsonian's Tropical Research Institute (STRI), Panama."[1070] The letter states that "all proposals and interviews were carefully evaluated in accordance with the criteria established in the solicitation" and identified the three firms that were "determined to be the most highly qualified."[1071] The letter goes on to "thank" Omega for its participation in the bid process and encourage Omega to "remain interested in working with the SI and continue to respond to all solicitations of interest to your company." [1072]

1065 *Stati v. Kazakhstan* (**CL-0059**), ¶¶ 992, 995, 998.

1066 *Stati v. Kazakhstan* (**CL-0059**), ¶ 1039-40, 1044.

1067 *Stati v. Kazakhstan* (**CL-0059**), ¶ 1785.

1068 *Stati v. Kazakhstan* (**CL-0059**), ¶ 1786.

1069 Claimants' Reply ¶ 457, *citing* Claimants' Memorial ¶ 114. The Claimants refer to the transmittal email from the Smithsonian Institution, which is dated February 9, 2015. Claimants Memorial ¶ 114, citing (**C-380)**. The transmittal email simply refers the Claimants to see the attached letter, which is dated January 28, 2015. Letter from Smithsonian Institution to Omega, dated Jan 28, 2015 **(C-0381)**.

1070 Letter from Smithsonian Institution to Omega, dated Jan 28, 2015 **(C-0381)**.

1071 Letter from Smithsonian Institution to Omega, dated Jan 28, 2015 **(C-0381)**.

1072 Letter from Smithsonian Institution to Omega, dated Jan 28, 2015 **(C-0381)**.

541. There is nothing in this letter suggesting that Omega was disqualified from consideration for any reason other than a lack of qualifications. Omega had not been awarded any private contracts in Panama and, thus, had no record of working in Panama in the private sector. Even in the public sector, Omega lost far more bids than it won. Thus, there could have been no assurances that Omega would have been considered for this project. Moreover, there is no reason to believe that the Smithsonian Institution's Office of Contracting and Personal Property Management (which is based in Arlington, Virginia) would have had any knowledge of the issues affecting Mr. Rivera and Omega in Panama. According to Mr. Rivera, he did not learn of the criminal investigation into Omega until January 22, 2015 when Mr. López called to inform him that certain bank accounts had been frozen.[1073] Even then, the information was not in the public domain. Omega's bid to the Smithsonian would have been submitted well before January 22, 2015 and would not have been influenced by any of these issues.[1074]

542. Similarly, there is no reason to suspect that the Smithsonian Institution would have had any knowledge of the default declared by INAC against the Claimants. The Claimants note that they received an email from ASSA (their surety provider) on December 27, 2014 informing them that INAC had declared Omega to be in default.[1075] The Claimants, however, spent "a month of negotiations" attempting to persuade INAC not to terminate the contract and it was not until January 27, 2015—one day before the Smithsonian Institution letter was dated—that "a notification of the Decision of Default was posted on the front door of Omega Panama's offices."[1076] Further, it was not until February 9, 2015—almost two weeks after the Smithsonian letter was written—that the Claimants surety provider informed the Claimants that it would not support bids by Omega U.S.[1077]

543. *Second*, the Claimants state that on February 9, 2015 they were informed that their "bid bond" for a project in Puerto Rico had been denied and, as a result, they lost "an

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[1073] Rivera I ¶ 85.

[1074] The Claimants provide no evidence as to when their bid was submitted or what information was provided.

[1075] Claimants' Memorial ¶ 109.

[1076] Claimants' Memorial ¶ 109.

[1077] Claimants' Memorial ¶ 111

important opportunity to generate future revenue."[1078] The Claimants' discuss this project as if it had already been won. That is not the case. The Claimants had not even presented their bid on the project and had no idea whether they would have been awarded the contract. Any suggestion otherwise is pure speculation.

544. *Third*, the Claimants state that they are subject to "claims or potential claims as a result of" Panama's actions.[1079] Specifically, the Claimants note that they are facing (or imminently will face) termination fees from Credit Suisse in relation to the Ciudad de las Artes Project, "a potential indemnity claim due to losses by Claimants' surety company" as a result of the termination of the Ciudad de las Artes Project, and "potential indemnity claims due to losses by Claimants' surety company in the US as a result of the reputational harm inflicted on Claimants by Respondent."[1080] To date, the Claimants have suffered no losses as a result of these "claims or potential claims." Any suggestion that they might suffer losses in relation to such claims in the future is speculation. Moreover, if the Claimants do suffer losses of this type and such losses can be directly attributed to treaty violations by Panama (which Panama denies), they would be considered direct damages sustained by the Claimants, not moral damages.

545. Fourth, the Claimants allege that they "have been unable to secure financing and bonding" as a result of Panama's action.[1081] As support for this, they note that in February 2015, Travelers informed the Claimants that it would "not be supporting bonds for Omega U.S." due to Panama's declaration of default on the Ciudad de las Artes Project.[1082] It is not credible to suggest that a large and sophisticated bonding company would terminate its global business with a contractor simply because the contractor defaulted on a single project. If that were the normal practice, contractors would never use the same bonding company for multiple projects, for fear that a single default could upset their entire business. Instead, if a project is defaulted and a bond is called, the bonding company and the contractor normally will work out a process by which the

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1078 Claimants' Memorial ¶ 110.

1079 Claimants' Reply ¶ 457.

1080 Claimants' Reply ¶ 457, n. 1280.

1081 Claimants' Reply ¶ 457 (citing Claimants' Memorial ¶ 113).

1082 Claimants' Memorial ¶ 113.

bonding company is made whole. This assumes, however, that the contractor is otherwise financially healthy and has not shown a pattern of performance issues over time.

546. Here, Omega US began experiencing significant problems years before Claimants defaulted on the INAC project. In 2010, the Office of the Comptroller General of Puerto Rico issued a report regarding structural deficiencies in the Coliseo de Puerto Rico project.[1083] Claimants tout this project as a "large-scale, complex Puerto Rican construction project[] [that they] led on behalf of Omega U.S."[1084] The report, however, details significant structural defects, including cracked concrete and exposed structural steel.[1085] This report was public and was available to Omega's bonding company and banks.

547. In 2013, Omega US went through a very public and messy fight with Oriental Bank, which had provided Omega US a line of credit. Omega overextended the line of credit and failed to make timely payments.[1086] In the face of Omega US' failure to pay, Oriental Bank filed a formal demand letter with Omega US on April 4, 2013.[1087] Six months later, having received no material repayment, Oriental Bank obtained an order from a Puerto Rico court authorizing it to seize Omega US' assets.[1088] Again, these actions were public and available to Omega's bonding company and banks.

548. In July 2014, the president of the Infrastructure Financing Authority in Puerto Rico sent Omega US a letter regarding inconsistencies and irregularities in Omega US' finances. The Authority identified discrepancies between the information in Omega US' financial statements and the financial information provided in Omega US' proposal for a US$ 11 million contract.[1089] Specifically, the Authority was deeply concerned that as of February 2013, all of

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1083 Government of Puerto Rico, Informe de Auditoría CP-10-26 dated Apr. 8, 2010 **[QE-0092]**.

1084 Rivera I ¶ 10.

1085 Government of Puerto Rico, Informe de Auditoría CP-10-26 dated Apr. 8, 2010 **[QE-0092]**, p. 14.

1086 Second Quadrant Report ¶ 76.

1087 Second Quadrant Report ¶ 76.

1088 Second Quadrant Report ¶ 76.

1089 Second Quadrant Report ¶ 77.

Omega's lines of credit had been canceled by the issuing banks.[1090] Indeed, according to Omega US' financial statements, the lines of credit not only were cancelled, but the balances on those lines exceeded their limit and were overdue.[1091] News reports indicate that Omega had obtained the contract despite the fact that "economic instability is reflected in documents that the company submitted to [the Authority] to complete the auction.[1092]

549. While the Claimants tout the supposedly pristine reputation of Omega US and suggest that the only tarnish to that reputation comes from Panama's allegedly unlawful actions, the facts paint an entirely different picture. Omega US was a company that struggled—both operationally and financially—for years prior to its entry into the Panamanian market. Projects that the Claimants point to as successes were mired in problems. All of these factors necessarily affect the Claimants' ability to secure bonding and financing. Banks and bonding companies would not ignore this history when deciding whether to do business with Omega US. As such, the Claimants' efforts to blame all of its problems on INAC's declaration of default fail.

550. *Fifth*, the Claimants suggest that their reputations were damaged and that they have not been able to generate income since 2015.[1093] As shown above, any damage to Omega US' reputation occurred long before 2015. If anything, Omega US' conduct in Panama is consistent with its prior history of overstating its financial health in order to win a bid, underperforming, and, ultimately, leaving projects in disarray.

551. With respect to Mr. Rivera, the Claimants' suggestion that his reputation has been harmed and that he has been unable to generate income is directly contradicted by the testimony of Mr. Tony Burke. Mr. Burke testified that he met Mr. Rivera in "mid-2018."[1094] Mr. Burke was "immediately impressed" by Mr. Rivera's "depth of knowledge of, and contacts in, the

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1090 Second Quadrant Report ¶ 77.

1091 Second Quadrant Report ¶ 77 (citing **[QE-0102]**, Estadio Libre Asociado de Puerto Rico Email to Omega, July 21, 2014.

1092 Second Quadrant Report ¶ 78 (citing [**QE-0103**], *Omega abandona proyecto Paseo Puerta de Tierra y entra compañía con pobres credenciales*).

1093 Claimants' Reply ¶ 457.

1094 Witness Statement of Tony Burke dated May 16, 2019 ("**Burke**") ¶ 3.

construction industry."[1095] During their meetings, Mr. Rivera shared with Mr. Burke his "complex legal dispute with the Panamanian Government."[1096] Despite this, Mr. Burke believed that Mr. Rivera was "the perfect individual to take over my position as CEO and run the firm" and hired Mr. Rivera in August 2018.[1097]

552. During his time at Burke Construction, Mr. Rivera "was instrumental in opening new markets in Puerto Rico, Suriname, and the Caribbean."[1098] He "led negotiations for a new US$ 36 million hotel in Bradenton, Florida; identified, prepared and won a US$ 6.5 million bid in the U.S. Virgin Islands; guided the company's efforts to establish a subsidiary in Puerto Rico which is currently expecting the award of two contracts worth US$ 7 million and US$ 25 million . . . and he is assisting us in our efforts to secure more than US$ 50 million of additional work."[1099]

553. Mr. Rivera apparently left Burke Construction in April 2019 "to work for a larger construction company."[1100] Mr. Burke, nevertheless, continues to believe that Mr. Rivera "has the tools to succeed in this business and that he, himself, is a comparative and competitive advantage for any company in the construction industry."[1101] He further views Mr. Rivera "like a partner" and looks forward to partnering with Mr. Rivera when he "is back leading his own construction company."[1102]

554. Mr. Burke's testimony undermines any suggestion that Mr. Rivera's reputation has been destroyed or that Mr. Rivera cannot earn an income. Mr. Rivera is employed (and,

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1095 Burke ¶ 6.

1096 Burke ¶ 6.

1097 Burke ¶¶ 6-7.

1098 Burke ¶ 9.

1099 Burke ¶ 9.

1100 Burke ¶ 7.

1101 Burke ¶ 10.

1102 Burke ¶ 9.

thus, employable), and has proven successful in negotiating new deals in jurisdictions where he previously operated and where he suggests his reputations has been damaged.

555. The Claimants have not demonstrated their legal or factual entitlement to moral damages, which should be denied.

C. THE CLAIMANTS' PROPOSED INTEREST RATE AND REQUEST FOR COMPOUND INTEREST IS UNREASONABLE AND INCORRECT

1. Interest Should Not Exceed the Yield on the Six-Month US Treasury Bill

556. The Claimants have not proven their case on the merits or established their entitlement to the compensation claimed. As such, they are not entitled to an award of interest on any amount. Even if the Claimants had established their entitlement to some measure of compensation, they still would not be entitled to interest at the rate they have claimed, which is grossly overstated and unsupported.

557. The Claimants continue to assert that they are entitled to interest at a rate of 11.65%, compounded annually, and maintain that this rate is "commercially reasonable" because it reflects the cost of equity for an established general contractor operating in Panama.[1103] That is wrong. As Dr. Flores showed in his first report, the Claimants' use of the cost of equity as the basis for calculating interest is inconsistent with the basic principles underlying the awarding of pre-award interest. The purpose of pre-award interest is to bring forward an amount owed from the date on which the amount was owed to the date of the award:

> Historic earnings must be "brought forward" to the valuation date by means of an interest rate, while future earnings are discounted back to the valuation date by means of a discount rate. The interest rate used for bringing historical amounts forward will clearly not contain the same risk factors as the discount rate used to present value future amounts. As a practical matter, the interest rate used for the historical amount is often a

[1103] Second Compass Lexecon Report ¶ 129w.

> "risk-free" rate (such as the rate for US Treasuries) or a statutory rate for pre-judgment interest.[1104]

558. The Claimants' methodology, however, rewards them for risks they did not incur. As Dr. Flores explains, "by choosing the cost of equity as an interest rate, Compass Lexecon proposes that [the] Claimant[s] should earn a return for business risks they have not faced."[1105] Interest should compensate a plaintiff for the time elapsed between the date on which the facts that give rise to compensation took place and the date on which the compensation is awarded.[1106] It should reflect only the time value of money and not any risk that may have been associated with the investment.[1107]

559. In addition, as explained in Panama's Counter-Memorial, the Claimants' use of the cost of equity as the basis for their interest calculation does not constitute a "commercially reasonable rate" within the meaning of the TPA.[1108] A "commercially reasonable rate" is one that is "generally available to investors" and that the specific rate will "depend on the risk profile of the financial product generating the interest payments."[1109] Arbitral awards generally are not exposed to the types of business or commercial risks other financial instruments face. As such, Dr. Flores concludes that the yield of a six-month or one-year US Treasury bill would constitute a "commercially reasonable rate" in this case.[1110]

560. Several tribunals have adopted the approach advocated by Dr. Flores. As noted in Panama's Counter-Memorial, the tribunal in *Vestey v. Venezuela* held that the yields on a six-month US Treasury bill were a normal commercial rate, as called for in the UK-Venezuela

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1104 Mark Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (Kluwer Law International, 2008) (**RL-0070**) **[QE-0032]**, p. 49.

1105 First Quadrant Report ¶ 107.

1106 First Quadrant Report ¶ 103.

1107 First Quadrant Report ¶ 103.

1108 First Quadrant Report ¶¶ 111-12.

1109 First Quadrant Report ¶ 111.

1110 First Quadrant Report ¶ 111-12.

BIT.[1111] The tribunal further recognized that interest should not compensate for risks not actually borne by the claimant:

> The function of reparation is to compensate the victim for its actual losses. It is not to reward for risks which it does not bear . . . the award should reestablish the situation which would in all probability have existed but for the wrongful measures . . . the position it would have been if it had received compensation on [the Valuation Date] . . . . In that case, Vestey would have been able to make use of the funds received as compensation. At no point in that scenario would Vestey have borne the risk of Venezuela's sovereign default."[1112]

561. Similarly, in *Sistem v. Kyrgz Republic*, the tribunal stated that

> The proper role of the payment of interest is to fulfil [sic] the duty to compensate the Claimant for the whole of its loss. One cannot know what a Claimant would have done had it been paid USD 8.5 million in June 2005. It might have made spectacularly good, or disastrously bad decisions on the investment of such a sum. The cautious approach is to assume, in the absence of evidence to the contrary, that its loss would have been at least that of the principal sum plus interest gained from risk-free investments.[1113]

562. The tribunal in *Burlington Resources Inc. v. Ecuador* also found that the cost of capital was inappropriate as a basis for granting interest because it "includes a reward for all of the risks involved in doing business."[1114] As such, the tribunal determined that "the interest factor to be applied" up through the "date of actual payment of damages" is "a relatively low and risk-free rate of interest."[1115]

563. Under the circumstances, it is clear that the risk-free rate adopted by Dr. Flores is commercially reasonable, as it compensates the Claimants for the time value of money, but does

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1111 First Quadrant Report ¶ 111 (citing *Vestey Group Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award (Apr. 15, 2016) (**RL-0071**) **[QE-0033]**, ¶¶ 328, 446).

1112 *Vestey Group Ltd. v. Venezuela* (**RL-0071**) **[QE-0033]**, ¶¶ 440-441.

1113 *Sistem Mühendislik Inşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/01, Award (Sept. 9, 2009) (**CL-0099**) **[QE-0108]**, ¶ 194.

1114 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/05, Decision on Reconsideration and Award (Feb. 7, 2017) (**CL-0190**) **[QE-0109**], ¶¶ 532-533.

1115 *Burlington Resources Inc. v. Ecuador* (**CL-0190**) **[QE-0109]**, ¶¶ 532-533.

not reward them for risks they did not incur. By contrast, Compass Lexecon's use of the Claimants' cost of equity to calculate interest would provide the Claimants a windfall. The risk-free rate, therefore, is the appropriate rate of interests and, as the *Burlington Resources Inc.* tribunal made clear, is the rate that should be applied up through the "date of actual payment of damages"—i.e., both as pre-award and post-award interest.

2. Compound Interest Should Not Be Awarded

564. There is no overarching principle of international law requiring compound interest in investment disputes.[1116] While the Claimants do not challenge this fact, they argue that international investment disputes are governed by international law and, thus, the issue of whether compound interest should be awarded is a question of international law.[1117] The Claimants' argument, however, is nonsensical. International law cannot resolve an issue for which no international law rule exists. Thus, the Claimants cannot, on the one hand accept that international law does not specifically address the question of whether compound interest may be awarded, but, on the other hand insist that the Tribunal look to international law to resolve the question.

565. In the absence of a clear international law rule governing this issue, a number of tribunals have looked to domestic law to determine whether an award of compound interest is

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1116 *Duke Energy Electroquil Partners & Electroquil S.A. ("Duke") v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (Aug. 18, 2008) (**CL-0037**), ¶ 473 (concluding "the award of compound interest is not a principle of international law."); *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Final Award (Mar. 14, 2003) (**CL-0021**), ¶¶ 627, 644 ("[N]o uniform rule relating to interest has emerged from the practice in transnational arbitration…") (quoting *McCullough & Company v. The Ministry of Post, Telegraph and Telephone, The National Iranian Oil Company, and Bank Markazi* (1986), 11 Iran-US CTR 3, 28) (**RL-0068**); *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC, Arbitral Award (Dec. 16, 2003) (**RL-0042**), ¶¶ 5.1, 5.3 (awarding simple interest at 6% in accordance with the prevailing Latvian interest rate and noting "the question of remedies to compensate for losses or damages caused by the Respondent's violation of its obligations under Article 10 the Treaty [not related to expropriation] must primarily find its solution in accordance with established principles of customary international law. Such principles have authoritatively been restated in The International Law Commission's Draft Articles on State Responsibility. . ." which acknowledge compound interest is possible but is generally disapproved of).

1117 Claimants' Reply ¶ 465.

appropriate.[1118] The Claimants' only critique of these decisions is that they are old.[1119] The Claimants, however, cannot ignore the weight of these decisions simply because of their age.

566. Moreover, the Claimants' cannot avoid the relevance of these decisions to the current case. For example, in *Duke Energy v. Ecuador,* the tribunal found that Ecuador breached its obligations under an umbrella clause because it failed to timely comply with specific requirements of a Power Purchase Agreement.[1120] The tribunal refused to award compound interest on the grounds that it would be inconsistent with both the laws of Ecuador and the relevant BIT. According to the tribunal, "the prohibition against compound interest contained in the local law must be enforced especially considering Article VIII of the BIT which specifies that the Treaty shall not derogate from the laws and regulations of the host State."[1121] Here, Panamanian law does not permit compound interest unless "agreed to by contract."[1122] In addition, Article IX of the BIT provides that "[t]his Treaty shall not supersede, prejudice, or

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1118 *Duke Energy v. Ecuador* (**CL-0037**), ¶¶ 457, 473 (finding that "the prohibition of compound interest contained in local law must be enforced especially considering Article VIII of the BIT which specifies that the Treaty shall not derogate from the laws and regulations of the host State" and further stating that "the award of compound interest is not a principle of international law"); *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award (Feb. 6, 2008) (**CL-0075**), ¶¶ 294-95 (endorsing by implication the Respondents' argument that awarding compound interest is contrary to Yemeni law applicable to the relevant contracts and therefore, simple interest applied); *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No ARB/00/5, Award (Sept. 23, 2003) (**RL-0043**), ¶ 396 ("Having concluded that the applicable Venezuelan law [prohibiting compound interest unless the parties expressly agreed] combined with the pertinent contract provision does not allow a compound interest and that international law does not require it, the Tribunal can dispense with making a determination on whether the specific circumstances of the case prevent an award of compound interest in the present arbitration."); *CME Czech Republic B.V. v. Czech Republic*, (**CL-0021**), ¶¶ 621-647 (declining to award compound interest because under applicable Czech law, compound interest was only appropriate if there was an explicit agreement regarding interest between the parties and "neither the Treaty nor international law provide[d] for an interest rate to be applied"); *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award (May 20, 1992) (**CL-0077**), ¶ 222 (refusing to grant compound interest under Egyptian law, concluding based on Art. 42(1) of the ICSID Convention that "there is no rule of international law that would fix the rate of interest or proscribe the limitations imposed by Egyptian law.").

1119 Claimants' Reply ¶ 466.

1120 *Duke Energy v. Ecuador* (**CL-0037**), ¶ 471.

1121 *Duke Energy v. Ecuador* (**CL-0037**), ¶ 473.

1122 Respondent's Counter-Memorial ¶ 361 (citing Commercial Code, Art. 223, *published in* Mizrachi & Pujol, S.A., *Codigo de Comercio Ley No. 2* (Aug, 2011) (**RL-0038**)).

otherwise derogate from: (a) laws and regulations, administrative practices or procedures, or administrative adjudicatory decisions of either Party."[1123]

567. Under the circumstances, the Tribunal should only grant simple interest on any compensation awarded to the Claimants.

V. COSTS

568. The Tribunal has the authority to award costs to the prevailing party. For the reasons set forth above, Panama should prevail in this matter. The claims set forth by the Claimants should be dismissed for lack of jurisdiction or denied on the merits. In either case, Panama should be awarded the costs it has incurred in defending itself in this arbitration.

569. Panama reserves the right to address costs more specifically following the hearing in this matter or the issuance of a final award.

VI. CONCLUSION AND REQUEST FOR RELIEF

570. As demonstrated above, the Claimants are not entitled to the relief they have requested. As a threshold matter, the Claimants' investments were procured through corruption and as a result they have forfeited their right to claim protections under the BIT or TPA. Moreover, the Claimants have failed to establish their entitlement on the merits. The acts complained of are nothing more than a series of commercial disagreements. The Claimants' efforts to transform them into treaty violations are without merit. And, lastly, even if the Claimants' had proven their case on the merits, their claimed quantum is grossly overstated and unsupported.

571. For these reasons, Panama requests that the Tribunal enter an award:

1. Dismissing the Claimants' case for lack of jurisdiction on the grounds that the Claimants procured their investments in Panama through corruption and, as such, are not entitled to substantive protections under the BIT or TPA.

[1123] BIT Art. IX(1)(a) (**CL-0001**).

2. Dismissing the Claimants' case for lack of jurisdiction on the grounds that the Claimants have asserted commercial claims that do not fall within the scope of the BIT or TPA.

3. Dismissing the Claimants BIT Claims for lack of jurisdiction on the grounds that they must be resolved through previously agreed dispute resolution measures set forth in the relevant BIT Contracts.

4. Denying on the merits the claims presented by the Claimants.

5. Denying the Claimants the compensation requested.

6. Denying the Claimants any other relief sought

7. Awarding Panama all reasonable costs (including legal and expert fees) incurred in defense of this case.

8. Awarding Panama any additional relief the Tribunal deems appropriate.

Dated: November 18, 2019

Respectfully submitted,

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