

**IN THE MATTER OF AN ARBITRATION
UNDER THE ARBITRATION RULES OF THE INTERNATIONAL CENTRE
FOR SETTLEMENT OF INVESTMENT DISPUTES**

**OMEGA ENGINEERING LLC
AND
MR. OSCAR RIVERA
*CLAIMANTS***

v.

**THE REPUBLIC OF PANAMA
*RESPONDENT***

CLAIMANTS' SUBMISSION ON COSTS

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Claimants hereby submit their Submission and Statement of Costs incurred in prosecution of their claims in accordance with the Tribunal’s Procedural Order No. 4 dated 6 October 2020, as amended by the Tribunal’s letter of 22 December 2020. As detailed below, Respondent’s conduct in this proceeding warrants an adverse cost award against Respondent.

The ICSID Convention and Arbitration Rules give tribunals broad discretion to allocate legal fees and costs, so long as there is no agreement by the parties.¹ In exercising their discretion, arbitral tribunals have generally followed two main approaches.² Traditionally, tribunals have taken the approach that, as long as the parties acted in good faith and not in an abusive manner during the proceeding, each party should pay its own legal fees and costs.³ Some recent awards have adhered to the “follow the event” approach, under which the unsuccessful party pays all, or a portion, of the successful party’s reasonable fees and costs.⁴ Absent a clear indication from the parties, however, “it would be incorrect . . . to consider that one approach clearly prevail[s] over the other.”⁵ The Parties here have not entered into a previous agreement, and thus the Tribunal has broad discretion to determine which Party (if any) should bear the proceeding’s fees and costs and in what proportion.

¹ See ICSID Convention, art. 61(2); ICSID Arbitration Rules, art. 28(1). Tribunals concur that, absent an agreement of the parties, tribunals have broad discretion in allocating legal fees and costs. See, e.g., *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, dated 27 Sept. 2017 (“*Caratube*”) (CL-0212), ¶ 1250; *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, dated 26 July 2018 (“*Gavrilovic*”) (CL-0199), ¶ 1300; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, dated 27 Aug. 2008 (RL-0008), ¶ 316.

² *Caratube* (CL-0212), ¶ 1253.

³ *Gavrilovic* (CL-0199), ¶ 1316; *Ortiz Construcciones y Proyectos S.A. v. People’s Democratic Republic of Algeria*, ICSID Case No. ARB/17/1, Award, 29 Apr. 2020 (CL-0285), ¶¶ 437-38.

⁴ See, e.g., *Gavrilovic* (CL-0199), ¶ 1316.

⁵ *UAB E Energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Dissenting Opinion on Costs, 22 Dec. 2017 (“*UAB*”) (CL-0286), ¶ 11.

Irrespective of the approach followed, “a party’s procedural conduct should be taken into account in the allocation of costs.”⁶ Examples of inappropriate conduct include corruption allegations that are not subsequently supported by credible evidence while at the same time withholding other relevant evidence,⁷ and tactics that “increase[] costs unnecessarily.”⁸ Respondent engaged in this type of conduct. In particular, Respondent’s improper conduct in relation to the evidence (or lack thereof) in support of its key jurisdictional objection—*i.e.*, its illegality/corruption defense⁹; its decision to put forth witnesses lacking first-hand knowledge of the events¹⁰; and its behavior with respect to President Varela’s refusal twice to appear for cross-examination¹¹ caused unnecessary expense,¹² as explained below.

⁶ *Gavrilovic* (CL-0199), ¶ 1317. *See also Caratube* (CL-0212), ¶ 1253 (explaining that “another criterion commonly adopted [by arbitral tribunals] is the general conduct of a party and the more or less serious nature of the case it has defended”); *UAB* (CL-0286), ¶ 15 (explaining that in determining the allocation of costs, tribunals must take into account “the behavior of the parties during the proceedings”).

⁷ *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award, 22 Oct. 2018 (CL-0287), ¶ 399 (“It is not appropriate for a Party to make such serious allegations of corruption and then not only fail to support it with credible evidence but to withhold from the opposing party documents which shed significant light on the conduct of the individual at the center of the bribery allegations.”).

⁸ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Award, 7 Feb. 2007 (QE-0109), ¶ 620.

⁹ The Republic of Panama’s Objections to the Tribunal’s Jurisdiction and Counter-Memorial on the Merits dated 7 Jan. 2019 (“**Resp.’s Counter-Mem.**”), § III.A; The Republic of Panama’s Reply in Support of its Objections to the Tribunal’s Jurisdiction and Rejoinder on the Merits dated 18 Nov. 2019 (“**Resp.’s Rej.**”), § II.A; Expert Report of Mr. Roy Pollitt dated 15 Nov. 2019 (“**Pollitt**”), at 34-36; Tr. 1/87:12-91:22; Tr. 8/1768:18-1769:7. *See* Letter from Claimants to the Tribunal dated 9 Dec. 2019; Letter from Respondent to the Tribunal dated 12 Dec. 2019; Letter from Claimants to the Tribunal dated 13 Dec. 2019; Procedural Order No. 2 dated 18 Dec. 2019, at 4-5.

¹⁰ Claimants’ Reply on the Merits and Counter-Memorial on Preliminary Objections dated 30 May 2019 (“**Clis’ Reply**”), ¶ 174; Claimants’ Rejoinder on Preliminary Objections dated 20 Jan. 2020 (“**Clis’ Rej.**”), ¶ 152; Claimants’ Post-Hearing Submission dated 8 Jan. 2021 (“**Clis’ PHB**”), ¶ 49; First Witness Statement of Eric Diaz dated 7 Jan. 2019 (“**Diaz 1**”); Witness Statement of Fernando Duque dated 13 Nov. 2019 (“**Duque**”); First Witness Statement of Mr. Frankie J. Lopez dated 27 May 2019 (“**Lopez 1**”), ¶ 134; Second Witness Statement of Mr. Frankie J. Lopez dated 17 Jan. 2020 (“**Lopez 2**”), ¶ 11; Tr. 3/699:4-699:15; Tr. 3/704:9-17.

¹¹ Letter from Respondent to the Tribunal dated 19 Feb. 2020; Letter from Respondent to the Tribunal dated 1 Oct. 2020; Letter from Claimants to the Tribunal dated 7 Oct. 2020; Procedural Order No. 5 dated 8 Oct. 2020, ¶ 2.

¹² Letter from Claimants to the Tribunal dated 7 Oct. 2020, at 8; Letter from Claimants to the Tribunal dated 9 Dec. 2019, at 2, 5-6.

First, Respondent’s key jurisdictional objection that Claimants procured their investment through corruption by obtaining the La Chorrera Contract through bribery and money laundering is unsupported by the evidence.¹³ Yet Respondent has stubbornly forged ahead with this defense causing unnecessary expense to Claimants.¹⁴ None of Panama’s witnesses ever testified that any of the Contracts were secured through corruption (quite the opposite).¹⁵ And with respect to the criminal investigations against Mr. Rivera and Omega Panama, Respondent’s own main witness, Mr. Villalba, admitted that the evidence on which the investigations relied was incomplete (at best).¹⁶ Further, Respondent’s own courts dismissed or nullified these investigations because of insufficient evidence to even bring charges—let alone prove guilt¹⁷—and the United States denied Panama’s extradition request because it lacked sufficient evidence to link Mr. Rivera with Panama’s money laundering accusation and to justify his preliminary arrest.¹⁸ Ignoring this evidence, Respondent nevertheless remained steadfast on its pursuit of its defense that Claimants obtained the La Chorrera Contract through corruption. But, as the tribunal would recall, despite Respondent providing additional documents—some 400 of them—and other evidence to its expert, Mr. Pollitt, that it had not produced to Claimants or the Tribunal (in contravention of the

¹³ Cls’ Reply ¶¶ 280-90, §§ II, V.E.2-3; Cls’ Rej. § II.A.1; First Expert Report of Ms. Alison Jimenez dated 13 May 2019 (“**Jimenez 1**”), at 25; Second Expert Report of Ms. Alison Jimenez dated 17 Jan. 2020 (“**Jimenez 2**”), at 48-49; Tr. 1/43:4-48:8; Tr. 8/1607:8-1608:12.

¹⁴ Resp.’s Counter-Mem. § III.A; Resp.’s Rej. § II.A; Pollitt at 34-36; Tr. 1/87:12-91:22, 8/1768:18-1769:7.

¹⁵ See Cls’ Rej. ¶¶ 23, 40; Cls’ PHB ¶ 74.

¹⁶ Tr. 3/662:10-18 (admitting that “half the pages of this document are missing” from the document he “used for purposes of [his] investigation,” which was “a key document” for his financial transaction analysis). See also Tr. 3/541:4-543:17.

¹⁷ Tr. 9/2009:19-2010:13.

¹⁸ Letter from Panama’s Foreign Affairs Ministry to Panama’s Office of the Attorney General attaching the U.S. State Department’s Denial of Panama’s Request of a Provisional Arrest for the Purpose of Extraditing Mr. Rivera dated 29 Feb. 2016 (C-0900); Cls’ Rej. ¶ 24; Jimenez 2 at 23; see also Tr. 1/51:6-52:4; Tr. 9/2007:15-2008:3.

Tribunal's Order),¹⁹ *no evidence of corruption* came out of these documents. To the contrary, the documents revealed the United States' response to Panama's request for Mr. Rivera's extradition, which neither Mr. Pollitt nor Respondent took into account, let alone addressed. Respondent's insistence on pursuing its unsupported defense greatly increased the cost required for the arbitration.

Second, Respondent inexplicably failed to put forth key witnesses who were only available to Respondent. Respondent, for example, failed to present INAC's Director Ms. Nunez as a witness, even though she (and no one else) had first-hand knowledge of the alleged issues leading to the termination of the Ciudad de las Artes Project. Respondent also failed to present MINSA's Minister, who is the key person with first-hand knowledge of all issues relating to the MINSA Contracts. Instead it presented Mr. Barsallo²⁰—a lower level official who admittedly lacked decision power at MINSA.²¹ Moreover, Respondent proffered witness statements from officials who were not even working at the relevant Ministry during the relevant times, and thus could not speak about any issues pertaining to this arbitration.²² Yet Claimants still had to address those witnesses' testimony at increased expense.

Third, President Varela's last minute refusals to appear for cross-examination, and Respondent's failure to present alternative solutions to make President Varela available, caused

¹⁹ Letter from Claimants to the Tribunal dated 9 Dec. 2019; Letter from Respondent to the Tribunal dated 12 Dec. 2019; Letter from Claimants to the Tribunal dated 13 Dec. 2019; Procedural Order No. 2 dated 18 Dec. 2019, at 4-5.

²⁰ Resp.'s Counter-Mem. § II.B.2; Tr 1/116:14. *See generally* First Witness Statement of Nessim Barsallo Abrego dated 7 Jan. 2019; Second Witness Statement of Nessim Barsallo Abrego dated 18 Nov. 2019.

²¹ Tr. 3/704:9-17 (testifying that he "did not even have final decision-making power or initial decision-making powers"). *See also* Tr. 3/699:4-699:15.

²² Cls' Reply ¶ 174; Cls' PHB ¶ 49; Lopez 1 ¶ 134; Diaz 1; Duque.

unnecessary expense and hindered Claimants' ability to fairly present their case.²³ Indeed, Claimants put forward considerable efforts to prepare to cross-examine a former head of State—not once, but twice—which was all for naught when former-President Varela refused to testify as a result of his own criminal conduct. There can be no doubt that Respondent must reimburse Claimants for this item of costs, in particular.

In sum, Respondent's dilatory and improper conduct throughout this proceeding caused Claimants to incur unnecessary and significant expenses. An adverse cost award against Respondent is therefore warranted irrespective of the approach followed by the Tribunal, and irrespective of the identity of the winning party.

Claimants incurred US\$ [REDACTED] in fees for legal representation and other arbitral costs in the amount of US\$ [REDACTED], totaling US\$ [REDACTED], of which Claimants incurred US\$ [REDACTED] in preparation for President Varela's testimony.²⁴ The breakdown of all fees and costs is provided below.

Respectfully submitted,



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²³ See Letter from Claimants to the Tribunal dated 7 Oct. 2020, at 3-5.

²⁴ See Annex A – Statement of Fees and Costs. Fees and costs represent incurred amounts.

ANNEX A
STATEMENT OF FEES AND COSTS

I. Total Fees:

Description	Hours Incurred	Amount Incurred, US\$
JONES DAY		
Partner Fees, Jones Day		
Associate Fees, Jones Day		
Paralegal & Clerk Fees, Jones Day		
<i>TOTAL, Jones Day</i>		
SHOOK, HARDY & BACON (“SHB”) / INTERNATIONAL DISPUTE RESOURCES (“IDR”)		
Member Fees, International Dispute Resources		
Partner Fees, Shook, Hardy & Bacon		
Of Counsel Fees, Shook, Hardy & Bacon		
Paralegal & Clerk Fees, Shook, Hardy & Bacon		
<i>TOTAL, SHB and IDR</i>		
TOTAL²⁵		

II. Total Costs

Description	Amount Incurred, US\$
JONES DAY	
Payment to ICSID	
Expert and Consultant Fees	
Corruption Defense (Alison Jimenez, ARC Consulting, Jose Antonio Moreno Molina, Jose Maria Gimeno Feliu, and Orlando Perez)	
Panamanian Law	
Construction / Accounting	
Quantum	
Transportation, Meals and Lodging	
Translation services	
Other expenses (duplication, delivery, discovery, etc.)	
<i>TOTAL, Jones Day</i>	
SHB / IDR	
Transportation, Meals and Lodging, IDR	
Other expenses (duplication, delivery, discovery, etc.), IDR	
Transportation, Meals and Lodging, SHB	
Other expenses (duplication, delivery, discovery, etc.), SHB	
<i>TOTAL, SHB and IDR</i>	
TOTAL	

²⁵ The total fees associated with preparing for President Varela’s testimony are US\$ [REDACTED] (of which US\$ [REDACTED] were incurred by Jones Day as follows: Partner fees US\$ [REDACTED] ([REDACTED] hours), Associate fees US\$ [REDACTED] ([REDACTED] hours), Staff fees US\$ [REDACTED] ([REDACTED] hours)); and US\$ [REDACTED] by Shook, Hardy & Bacon in Of Counsel fees).