

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 24-cv-21097-KMM

REPUBLIC OF PANAMA,)

 Petitioner,)

 v.)

OMEGA ENGINEERING LLC and)
OSCAR RIVERA,)

 Respondents.)

DECLARATION OF DIEGO HERRERA DUTARY ON PANAMANIAN LAW

Diego Herrera Dutari, male, Panamanian, bearer of the ID No.8-311-301 and with license to practice law No. 2375, being duly sworn, declares:

1. I am fifty-four years old and am competent to make this Declaration. The opinions included in this Declaration are based on my personal knowledge.

1. I am a lawyer admitted to practice in Panama, and partner of Galindo, Arias & Lopez, a Panamanian law firm. I have a law degree (LL.B) from Universidad Santa Maria La Antigua of Panama (1991), a Masters of Law (LL.M) from Tulane University (1993), and a Masters of Business Administration (MBA) from INCAE Business School (1995).

2. I understand and assume for purposes of this declaration that Panama, as a respondent, won the ICSID arbitration entitled *Omega Engineering LLC and Oscar Rivera v. Republic of Panama*, and was awarded fees and costs in that case in the approximate amount of US\$ 4.8 million. I also understand that the claimants in that ICSID arbitration (who are the Respondents in this Florida action) have paid no part of that award. I further understand that, in this case, the Respondents contend that they do not have to pay on the ICSID award because there was a “settlement” between Panama and the Respondents that excused such payment, although there is no signed settlement agreement or approval of such settlement by the various elements of the Panamanian government identified below.

3. I have reviewed the following laws to provide this declaration:

- (a) Political Constitution of the Republic of Panama;
- (b) Panama Judicial Code;
- (c) Law No. 38 of July 31, 2000;
- (d) Law No.97 of December 21, 1998; and
- (e) Law 32 of November 8, 1984 (as amended by Law 351 of 2022).

Copies of each of these provisions, in certified English translation and in the original, are attached at Exhibit 1 hereto.

4. I have also reviewed the Petition to recognize and enforce the ICSID Arbitration Award filed in this Florida action (*Republic of Panama v. Omega Engineering LLC and Oscar Rivera*), the memorandum of law filed on behalf of Panama in support of the pending Petition, and the Respondents' answer. Panama is a civil law jurisdiction with an impartial court system and the civil code of Panama recognizes all of the causes of action alleged in the Respondent's counterclaim.

5. As a practicing attorney for more than thirty-three years and having been involved in other cases in which the Republic of Panama is a Party, I am familiar with Panamanian law with respect to the settlement of disputes between the Government of Panama and private entities. In summary, settlements with the Government are not effective unless:

- (a) there is a written and executed settlement agreement between the Government and the relevant private entity; while not specified in our law, it is usual practice that such settlement agreements be executed before being considered for approval by the Cabinet;
- (b) that settlement agreement has been approved by (1) the relevant ministry (including here, the Ministry of Health), (2) the Ministry of Economy and Finance, (3) the Attorney General, and (4) the President and Cabinet Council of Panama;
- (c) the settlement agreement approval by the abovementioned authorities has received the confirmation by the Comptroller General; and
- (c) the resolution of approval of the President and Cabinet Council has been published in Panama's Official Gazette.

The approval process is not ministerial in nature. Each party involved has the authority to reject a proposed settlement. As a result, an effective settlement cannot have been consummated with the Government of Panama unless and until all steps in the approval process are concluded.

6. **Signed settlement agreement:** Pursuant to Article 201, Paragraph 1 of Law 38 of July 31, 2000, every decision from a public authority shall be in writing, unless the law establishes otherwise. Paragraph 90 of the same article provides the following requirements that a decision from a public authority must fulfill to be effective and executable: (1) a number, (2) date of

issuance, (3) name of the issuing authority, (4) a recitation of the facts and criteria used to issue the resolution, and (5) the authority's signature.

The settlement of a claim by the Government would be construed as such a decision, and no exception to the writing requirement exists that would apply to settlements by a public authority.

7. **Approval of the Ministry of Health:** Pursuant to Article 1092 of the Panama Judicial Code, representatives of the State can withdraw claims filed by the State or against it if they obtain the authorization of the Cabinet Council. Panamanian entities that act on behalf of the State in judicial proceedings (according to Article 1092 of the Panama Judicial Code) and arbitrations (according to Article 202 of the Constitution) must approve settlement agreements before submitting them to the Ministry of Economy and Finance, which, if it approves, will then send them to the Cabinet Council for approval.

Based on the information provided to me, a principal representative of the State in the relevant arbitration is the Ministry of Health. Therefore, the Ministry of Health must approve the settlement agreement before proceeding to the next steps, including involving the Ministry of Economy and Finance, as explained below.

8. **Approval of Ministry of Economy and Finance:** Pursuant to Article 2 of Law No. 97 of December 21, 1998, the Ministry of Economy and Finance is responsible for the 'administration of the budget of the public sector,' the 'administration and management of public expenses,' and leading the Financial Administration of the State. Therefore, according to the binding opinion of the Attorney General for the Administration, the Ministry of Economy and Finance must approve the settlement of arbitrations where Panama is a party and that involve public funds.¹

9. **Approval of President and Cabinet Council; Attorney General:** Article 200 of the Constitution of Panama recites the constitutional duties of the Cabinet Council² which includes the following:

The functions of the Cabinet Council are:...

4. *Agree with the President of the Republic for the settlement or the submission to arbitration of the litigation in which the State is a party, for which the favorable opinion of the Attorney General shall be necessary.*

This provision is construed to apply to settlement agreements with the State, and mandates that the President and his Cabinet, in considering a settlement, first obtain from the Attorney General a resolution with its favorable opinion as to the settlement. If the Attorney General's reply is favorable, the President and the Cabinet Council must then vote on the matter and authorize the government entity representing the State in the proceeding being settled to settle it.

¹ Opinion C-061-24 of April 8, 2024, issued by the Attorney General for the Administration.

² The Cabinet Counsel is the highest entity of the executive branch of the government, and it is comprised of the President and his ministers.

10. **Confirmation of Comptroller General:** Pursuant to article 280 of the Constitution of Panama, the Comptroller General is responsible for the oversight and control of all allocations of public funds. Further, article 55 of Law 32 of November 8, 1984 (as amended by Law 351 of 2022), states that the Comptroller General shall “ *endorse the forms, the accounts against the National Treasury and the contracts that the Nation celebrates and that involve the expenditure of public funds or affection of public assets.*”

Accordingly, the Comptroller General is required to countersign any agreement involving the relinquishment of the State's right to recover money. As the draft settlement agreement with Respondents would have had Panama relinquish its claims to more than US\$ 4.8 million, the conformation by the Comptroller General would have been mandatory to the consummation of such settlement.

11. **Publication in Official Gazette:** The authorization of settlement of the President and the Cabinet Council must be issued in the form of a Cabinet resolution or decree. That resolution or decree must then be published in the Official Gazette to be effective.

I have examined the Official Gazette and can confirm that there has been no such publication with respect to a settlement agreement between Panama and Respondents, or either of them.

12. Again, without **all** of these steps having been concluded, there cannot be a settlement in force between the Government of Panama and any other person or entity. Accordingly, in my opinion, there is no settlement in place between the Republic of Panama and the respondents.

13. This declaration is rendered based on the laws currently in force and as interpreted in the Republic of Panama as of the date of this declaration. We do not claim to be experts on, nor are we generally familiar with or qualified to express legal opinions based on, any law other than the laws of Panama. Accordingly, we express no legal opinion herein based on any other laws.

I verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 13 June 2024


