

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

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**ICSID CASE NO. ARB/16/42**

**OMEGA ENGINEERING LLC**

and

**OSCAR RIVERA**

*Claimants*

v.

**REPUBLIC OF PANAMA**

*Respondent*

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**I.**

**THE REPUBLIC OF PANAMA'S OBJECTIONS  
TO THE TRIBUNAL'S JURISDICTION**

**II.**

**THE REPUBLIC OF PANAMA'S COUNTER-MEMORIAL ON THE MERITS**

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**7 January 2019**

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1. The Republic of Panama (“**Panama**” or “**Respondent**”) hereby submits its Objections to the Tribunal’s Jurisdiction and its Counter-Memorial on the Merits, in response to the Memorial (“**Claimants’ Memorial**”) filed on June 25, 2018 by Claimants Omega Engineering LLC (“**Omega**”) and Oscar Rivera (“**Mr. Rivera**”, collectively, the “**Claimants**”). This submission is divided into three main sections: (a) Introduction and Statement of Facts; (b) Panama’s Objections to the Tribunal’s Jurisdiction; and (c) Panama’s Counter-Memorial on the Merits.

2. This submission is accompanied and supported by the following witness statements and expert reports:

- **Jorge Villalba:** Mr. Villalba is Chief of the Organized Crime Division for the Panamanian Public Prosecutor and a specialist in financial crimes. He was seconded to the Panamanian National Assembly and conducted the corruption investigation into Supreme Court Justice Alejandro Moncada Luna. Upon his return to the Public Prosecutor’s office, Mr. Villalba oversaw the corruption investigation into Mr. Rivera and Omega.
- **Dr. James Edward Bernard Véliz:** Dr. Bernard is the Legal Director in the Comptroller General’s office. He is involved in the review and oversight of public works projects.
- **Vielsa Ríos:** Ms. Ríos is the Administrative Secretary of the Panamanian Supreme Court. She was involved in the tender and administration of the La Chorrera project.
- **Nessim Barsallo Abrego:** Mr. Barsallo is the Sub-Director of Administration for Special Projects at the Panamanian Ministry of Health. He was involved in the tender and administration of the three MINSa CAPSI projects Omega undertook for the Ministry.
- **Carmen Chen:** Ms. Chen is a Legal Advisor with the National Institute of Culture. She was involved in the administration of the Ciudad de las Artes project.

- **Eric Díaz:** Mr. Díaz is the Legal Advisor to the General Secretariat at the Municipality of Panama. He was involved in the supervision and termination of the contract for the two public market projects Omega undertook for the Municipality.
- **Dr. Daniel Flores:** Dr. Flores is an economist and quantum expert with Quadrant Economics. He provides expert testimony in response to the reports of Compass Lexecon and Greg McKinnon.

## I. INTRODUCTION

3. International investment law is a limited system of law intended to protect qualified investors who make qualified investments from certain proscribed sovereign acts. A claimant may invoke the substantive protections of an investment treaty only if all three of these factors are satisfied. Likewise, a state consents to arbitrate disputes only where each of these factors is met. And, an ICSID tribunal can assert jurisdiction only where these factors, as well as the specific requirements set forth in the applicable investment treaty and Article 25 of the ICSID Convention are satisfied. None of the relevant factors is met here.

4. As a threshold matter, the Claimants procured their so-called “investments” through bribery and corruption. The evidence proves that the Claimants made at least two corrupt payments to Justice Alejandro Moncada Luna – then the President of the Panamanian Supreme Court and the person who awarded Omega a contract to construct a courthouse in La Chorrera, Panama. Those corrupt payments disqualify the Claimants as “investors” and means that their activities within Panama do not qualify as “investments” within the meaning of the Treaty Between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investments (the “**BIT**”) and the United States-Panama Trade Protection Agreement (the “**TPA**”).<sup>1</sup>

5. Arbitral tribunals have consistently dismissed cases where claimants have procured their supposed “investments” through corruption. As detailed below, tribunals faced with such circumstances have held that a claimant may not invoke the substantive protections of an

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<sup>1</sup> The BIT (CL-0001) was signed on October 27, 1982, and entered into force on May 30, 1991. The TPA (CL-0003) entered into force on October 31, 2012.

investment treaty because the tribunal lacks jurisdiction over the dispute or the claims asserted by the claimant were not admissible.<sup>2</sup> Regardless of the specific reasons cited by the tribunal, the result was the same – the case was dismissed. The weight of authority, therefore, dictates that the Tribunal should dismiss all claims asserted by the Claimants in this arbitration.

6. Even if the Claimants did qualify as “investors” who had made proper “investments,” their claims still should be dismissed. International investment law is not a substitute for the commercial laws of a host country. Correspondingly, international investment arbitration is not a substitute for dispute-resolution mechanisms agreed to by the parties. The Claimants’ case is premised on their claim that “[o]utstanding invoices from the Omega Consortium went completely unpaid,” that Panama failed to provide required change orders or approved plans, and that Panama “declared default on their largest contract, and wrongfully terminated or abandoned the others.”<sup>3</sup> These are inherently commercial disputes, well within the scope of the commercial dispute resolution provisions of each of Omega’s contracts. The Claimants do not suggest that Panama enacted any laws or regulations prohibiting payments or otherwise adversely affecting their contracts. Rather, they attempt to link individual commercial actions taken by different government ministries and transform them into a pattern of targeted harassment by the Respondent. Those efforts fail.

7. First, the evidence shows that the government institutions that the Claimants contracted with worked diligently with the Claimants on their projects. While the Claimants’ projects encountered the ordinary delays and issues that arise in every construction project, it is clear that through early October 2014, the parties worked to resolve these issues commercially.<sup>4</sup> Beginning in early October 2014, however, the Claimants’ conduct changed – around the time that the government’s investigation into Justice Moncada Luna’s corruption became public.<sup>5</sup>

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<sup>2</sup> See discussion *infra* at Section III(A)(3)(b).

<sup>3</sup> Claimants’ Memorial ¶ 3.

<sup>4</sup> Claimants’ Memorial ¶¶ 51-52.

<sup>5</sup> Varela Demands that Magistrate Moncada Luna explain his Enrichment, LA ESTRELLA DE PANAMA dated Sept. 30, 2014 (R-0001); Gustavo A. Aparicio, They ask for trial for Alejandro Moncada Luna dated Oct. 1, 2014, LA PRENSA (R-0002); Jorge Fernández, National Assembly Opens Proceedings Against Alejandro Moncada Luna, LA PRENSA (Oct. 9, 2014) (R-0003).

The evidence shows that at that time the Claimants abandoned their projects and fled Panama: work was stopped, efforts to communicate with the Claimants failed, and requests to interview Mr. Rivera and other representatives of the Claimants as part of the corruption investigation into Justice Moncada Luna were refused.

8. Second, the evidence does not support the Claimants' allegations that they were targeted or harassed in any way. According to the Claimants, they were targeted because Mr. Rivera refused to make a campaign contribution to then-candidate (now President) Juan Carlos Varela in 2012. There is no credible evidence that this request ever happened. Although Mr. Rivera references this request in his witness statement, there is not a single contemporaneous email, letter, or document in evidence confirming his account. In addition, Panama's witnesses confirm that their respective ministries were never directed or asked to take any adverse actions against the Claimants.

9. The Claimants not only have failed to establish the jurisdictional basis for their case and their entitlement on the merits, they also have failed to prove their entitlement to the amount of compensation they seek. The Claimants seek US\$ 81.58 million in compensation.<sup>6</sup> This amount is broken into three categories: US\$ 8.7 million for moneys allegedly owed on existing contracts; US\$ 46.7 million as compensation for profits lost on "potential new contracts;" and US\$ 26.18 million as pre-award interest. Dr. Daniel Flores, of Quadrant Economics, has presented an expert report demonstrating that each of those numbers is grossly overstated and entirely unsupported. With respect to existing contracts, the Claimants were provided advance payments on work that was never completed when they abandoned the country. A fair accounting, therefore, shows that the Claimants would be owed substantially less – if anything at all – on their existing projects. With respect to the "potential new contracts," the Claimants' entire claim is speculative and based on unreliable and unsubstantiated assumptions. Finally, the Claimants' interest calculation is based on an incorrect and unsupportable interest rate.

10. Under the circumstances, the Claimants' case does not withstand scrutiny. While the Claimants adopt the role of victim, the reality is that they engaged in bribery and then walked out on their contracts, leaving the Panamanian government with unfinished projects and underserved

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<sup>6</sup> Claimants' Memorial ¶ 236(c)(ii).

communities without access to needed medical, judicial, and cultural services. Omega is a contractor that bought its way into Panama, took on more projects than it could handle, and then attempted to operate in Panama with virtually no physical or revenue generating assets.

11. This case is nothing more than an abuse of the international investment law system. The Claimants engaged in conduct that deprived them of the protections of the BIT and TPA. They are attempting to hold Panama liable, at international law, for ordinary commercial conduct. And they are demanding unsupported and overstated levels of compensation. The Tribunal should not condone this conduct, and should dismiss the Claimants' case in its entirety or deny their claims on the merits.

## II. STATEMENT OF FACTS

12. The Claimants have asserted claims relating to eight public works contracts entered into with six government institutions in Panama: the Judicial Authority; the Ministry of Health; the National Institute of Culture; the Ministry of the Presidency; the Municipality of Panama; and the Municipality of Colón.<sup>7</sup> They allege that invoices went unpaid, applications to extend the contracts went unsigned, and contracts were either terminated or allowed to expire. As discussed below, however, the reality of the Claimants' projects is far different than what they allege. The evidence shows that each of the relevant government institutions worked to assist the Claimants in their projects. While issues common to construction projects arose, the government institutions worked, where possible, to find commercial solutions.

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<sup>7</sup> Contract No. 077 (2011), dated Sept. 22, 2011 (**C-0028-Resubmitted**); Contract No. 083 (2011), dated Sept. 22, 2011 (**C-0030-Resubmitted**); Contract No. 085 (2011), dated Sept. 22, 2011 (**C-0031-Resubmitted**); Contract No. 43 (2012), dated Aug. 17, 2012 (**C-0034-Resubmitted**); and Contract No. 093-12, dated July 6, 2012 (**C-0042**). Collectively, these five contracts are referred to as the "**BIT Contracts**" and the claims relating to these five contracts are referred to as the "**BIT Claims**." The remaining three contracts Contract No. 150/2012 dated Nov. 22, 2012 (**C-0048**); Contract No. 01-13 dated Jan. 24, 2013 (**C-0051-Resubmitted**); Contract No. 857-2013 dated Sept. 12, 2013 (**C-0056**) are referred to collectively as the "**TPA Contracts**" and claims relating to these three contracts are referred to as the "**TPA Claims**." References to "claims" generally includes claims arising under all eight contracts.

## A. THE ROLE OF THE COMPTROLLER GENERAL

13. In Panama, the Comptroller General is a constitutionally created, independent agency within the national government.<sup>8</sup> The Comptroller General is responsible for overseeing commercial contracts entered into by national and local authorities.<sup>9</sup> It will review contracts, requests for payment, and requests to amend or extend government contracts to ensure that they are commercially, financially, technically, and legally sound. To accomplish this, each contract, payment request, and amendment to a contract are reviewed by four divisions within the Comptroller General's office: Budget; Engineering; Commercial/Financial; and Legal.<sup>10</sup>



14. The Comptroller General's Budget office will review a contract or application to determine whether the contract value or the amount of the payment requested is within the contract amounts and within the amounts budgeted to the specific government ministry that is a party to the contract.<sup>11</sup>

15. The Engineering office reviews the document to determine whether the work proposed to be done is feasible from a technical and engineering perspective.<sup>12</sup> For example, if the

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<sup>8</sup> Constitution of Panama (C-0060-Resubmitted), Art. 279. The Comptroller General is appointed by the Panamanian National Assembly and may be removed only by the National Assembly. The Comptroller General does not report directly to the President of Panama and is not subject to instruction or direction from the Executive Branch. While the Comptroller General is permitted to attend cabinet meetings, he does not vote on any government measures. This is to ensure the independence of the office. *See* Ley 32 of Nov. 8, 1984, Title I, Arts. 1-2 (“Ley 32”) (C-0059-Resubmitted) (The Comptroller General is an independent State entity); First Witness Statement of Dr. James Edward Bernard Véliz dated Jan. 7, 2018 (“Bernard Statement”), ¶ 8.

<sup>9</sup> Bernard Statement ¶ 9.

<sup>10</sup> Bernard Statement ¶ 9. *See generally*, Ley 32, (R-0110) Title V, Chap. IV, Art. 60 (providing that the agency of the Comptroller General is divided by specialization into offices with uniquely prescribed duties).

<sup>11</sup> Bernard Statement ¶ 10. *See* Ley 32 (R-0110), Title IV, Ch. V, Art. 37 (providing that it is the duty of the Comptroller General's Office to examine and ensure the availability of public funds and examine related accounting books and registries).

<sup>12</sup> Bernard Statement ¶ 11.

government proposed to enter into a contract to build a 200-mile highway and the contract provided that the works would be performed using 1,000 cubic yards of concrete, the Comptroller General's engineers would raise questions or reject the contract outright because it is not technically feasible to construct a highway of that distance with that amount of concrete.<sup>13</sup> Payment applications are reviewed to determine whether the work performed meets the contractual specifications and is otherwise technically sound.<sup>14</sup>

16. The Commercial and Financial office assesses the commercial and financial reasonableness of a contract or application to extend or modify a contract.<sup>15</sup> For example, if the contractor in the highway example above proposes to complete the project in 30 days, the reviewers in this division will question the commercial feasibility of this proposal, knowing that it is not possible to complete the project in that period of time.<sup>16</sup> If the contractor proposed to complete the project for \$10 per mile, the reviewers would raise questions since they would understand that the cost of materials and labor would far exceed the amount proposed.<sup>17</sup> Similarly, for example, if a ministry is building multiple projects and the reviewers determine that one contractor is charging substantially more per square foot than other contractors, the reviewers will raise questions regarding the financial and commercial reasonableness of the contract.<sup>18</sup>

17. The Legal office examines whether contract provisions are valid as a matter of Panamanian law.<sup>19</sup> Reviewers will check to make sure that the proper parties have signed the

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<sup>13</sup> Bernard Statement ¶ 11.

<sup>14</sup> Bernard Statement ¶ 11.

<sup>15</sup> Bernard Statement ¶ 12. *See* Bernal H., et al., *Manual De Derecho Administrativo Panameno* (2013) (**R-0004**), Ch. V, Art. 1.6.3 (providing that when reviewing contracts, the Comptroller General may make request additional information or documents that it considers incomplete or missing and may make inquiries when it determines that the amount of a contract or transaction is inappropriate or excessive).

<sup>16</sup> Bernard Statement ¶ 12.

<sup>17</sup> Bernard Statement ¶ 12.

<sup>18</sup> Bernard Statement ¶ 12.

<sup>19</sup> Bernard Statement ¶ 13; Ley 32 (**C-0059-Resubmitted**), Title III, Art. 11 (describing the Comptroller General Office's duty to ensure that public funds and acts are used and performed in accordance with the law); *see also* *Manual De Derecho Administrativo Panameno* (**R-0004**), Chap. V, Art. 1.6.3 (specifying

relevant document and that all required documentation is attached – *e.g.*, they will look to see whether the contractor has the requisite insurance policies in place and has procured the necessary licenses to do business.<sup>20</sup>

18. If any of the offices raises questions or concerns, the Comptroller General will return the contract, application, or payment request to the relevant ministry for clarification.<sup>21</sup> If the concerns are sufficiently serious, the Comptroller General’s office may reject the document. If, however, the contract, application, or payment request is acceptable, the Comptroller General will endorse it.<sup>22</sup>

## **B. THE RESPONDENTS’ PROJECTS**

### **1. THE JUDICIAL AUTHORITY’S LA CHORRERA PROJECT**

19. On November 22, 2012, Panama and Omega entered into a contract for the construction of a courthouse in the La Chorrera district in Panama (“**La Chorrera Project**” or “**La Chorrera Contract**”).<sup>23</sup> The La Chorrera facility was designed to be a three-story, 15,730.57 m<sup>2</sup> building with judicial offices, hearing rooms, offices for clerks and staff, archives, and common spaces.<sup>24</sup> Unfortunately, the courthouse was never completed. Omega fled the country and abandoned the La Chorrera Project, leaving the Judicial Authority and the people of Panama – [REDACTED] [REDACTED] with a half-completed, deteriorating building and no recourse to the security bonds that Omega allowed to expire.

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that in exercising its contractual review functions, the Comptroller General’s Office must verify whether the necessary steps prior to the selection of a contractor).

<sup>20</sup> Bernard Statement ¶ 13.

<sup>21</sup> Bernard Statement ¶ 14. *See Manual De Derecho Administrativo Panameno (R-0004)*, Ch. V, Art. 1.6.3 (providing that during its process of reviewing contracts and invoices, the Comptroller General’s Office may request additional information and documentation when, *inter alia*, it determines that something is missing or incomplete or a contract amount is inappropriate or excessive).

<sup>22</sup> Bernard Statement ¶ 14; Ley 32 (**R-0110**), Title IV, Ch. VI, Art. 48. (providing that the Comptroller General endorses all contracts involving public entities and public assets, unless it finds endorsement is not justified).

<sup>23</sup> Contract No. 150/2012 dated Nov. 22, 2012 (**C-0048-Resubmitted**).

<sup>24</sup> Witness Statement of Vielsa Rios dated Jan. 4, 2019 (“**Rios Statement**”) ¶ 13.

20. It is in connection with this courthouse project that Omega's corrupt business practices are most clearly evidenced: Panama will prove that Omega "kicked back" a substantial portion of its receipts under its contract with the Judicial Authority to the Panamanian Supreme Court Justice who had the responsibility to award this contract. Significantly, that disgraced Supreme Court Justice pled guilty with respect to Omega's payments. (This sad history is addressed below, at **Section II(C)(3).**)

21. The La Chorrera Project was initiated by Panama's Judicial Authority in 2012 when it determined that a courthouse and ancillary facilities were needed to serve the La Chorrera district, a judicial district in Panama that at the time had approximately 161,400 residents and over 4,000 active cases.<sup>25</sup> To initiate the bidding process for the project, the then-President of the Supreme Court, Justice Alejandro Moncada Luna, selected and established an evaluation commission of three individuals to review and evaluate bids for construction of the courthouse.<sup>26</sup> Thereafter, the Judicial Authority published a Request for Proposals (an "RFP") and bids were accepted through October 1, 2012.<sup>27</sup> A week later, the commission provided Justice Moncada Luna with its assessment of the four contractors that bid on the project,<sup>28</sup> and on October 17, 2012, Justice Moncada Luna issued a resolution selecting Omega as the contractor for the La Chorrera Project.<sup>29</sup>

22. On November 22, 2012, the Judicial Authority executed the contract with Omega.<sup>30</sup> After the Comptroller General's endorsement on December 27, 2012, Justice Moncada Luna signed the Order to Proceed on January 15, 2013.<sup>31</sup>

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<sup>25</sup> Rios Statement ¶10.

<sup>26</sup> Administrative Resolution No. 082/2012 dated Sept. 18, 2012 (**R-0005**).

<sup>27</sup> Tender Abbreviated for Best Value for "Construction of A Building for the Regional Judicial Unit of the District of La Chorrera," No. 2012-0-30-0-08-AV-004833 (2012) (**C-0024-Resubmitted**) (the "Tender"); Rios Statement ¶ 11.

<sup>28</sup> Report of the Evaluation Commission dated Oct. 9, 2012 (**C-0083-Resubmitted**); *see* Rios Statement ¶ 11.

<sup>29</sup> 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**).

<sup>30</sup> Contract No. 150/2012 (**C-0048-Resubmitted**).

23. The La Chorrera Project [REDACTED] was a procurement and construction contract that required Omega to perform all work related to the procurement of materials and construction of the project, as to which the Judicial Authority would provide the building design.<sup>32</sup> Omega was required to complete the project 540 days from the initiation date, so by July 9, 2014.<sup>33</sup>

**a. Payments on the La Chorrera Project**

24. On April 4, 2013, after the Order to Proceed was signed by Justice Moncada Luna, the Judicial Authority advanced Omega [REDACTED]

[REDACTED].<sup>34</sup> Omega was supposed to use the advance payment to initiate work on this specific project; however, Omega did not use all of the funds for that purpose. Instead, on [REDACTED], Omega transferred [REDACTED] of the advance payment to PR Solutions, S.A., a company also owned by Mr. Rivera.<sup>35</sup> That same day, those funds were transferred from PR Solutions, S.A. to Reyna y Asociados, a Panamanian law firm, and, ultimately, to the personal benefit of Justice Moncada Luna.<sup>36</sup> While Omega offers an unproven story that this money was used to make a land purchase, Panama will prove that the funds were used to bribe Justice Moncada Luna in

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<sup>31</sup> Contract No. 150/2012 (C-0048-Resubmitted); Order to Proceed for Contract No. 150/2012 dated Jan. 15, 2013 (C-0151); Rios Statement ¶ 12. The Claimants allege that “Mr. Moncada Luna had – and could have – zero influence over the contractor the Government had chosen for the construction” and suggest his involvement was limited to signing the contract as a “mere formality.” Evident from the process described above, this is blatantly untrue. Justice Moncada Luna was involved at each step. He selected and established the evaluation commission; decided, based on the evaluation of his hand selected commissioners, who would be awarded the contract; and ultimately, executed the contract and the Order to Proceed.

<sup>32</sup> Contract No. 150/2012 (C-0048-Resubmitted), Cl. 4; Rios Statement ¶ 13.

<sup>33</sup> Contract No. 150/2012 (C-0048-Resubmitted), Cl. 2; see Order to Proceed for Contract No. 150/2012 (C-0151); Rios Statement ¶ 14.

<sup>34</sup> Payment Table for Contract No. 150/2012 from the Accounting and Finance Department in the Judicial Authority (R-0007); Contract 150/2012 (C-0048-Resubmitted), Cl. 5.

<sup>35</sup> Witness Statement of Jorge Villalba (“Villalba Statement”) ¶ 23.

<sup>36</sup> Villalba Statement ¶ 23; see Claimants’ Memorial ¶¶ 92-98, n. 217 (citing Villalba’s Expert Report of June 5, 2015 (“Villalba Report”) (C-0081)).



Omega's invoices on time with just three exceptions; those three invoices were all paid within the following month.<sup>43</sup>

**b. Ordinary Construction Delays on the La Chorrera Project**

28. The La Chorrera Project sustained a number of delays, which are common in the construction industry in Panama. These delays were handled no differently during the Martinelli and Varela administrations and were, in fact, less frequent during the Varela administration. The Judicial Authority was consistent in its generous grants of time and other accommodations to Omega to ensure the La Chorrera Project was completed as smoothly as possible.

29. Some of the delays on the La Chorrera Project resulted from rainy days and processing times for the environmental impact study.<sup>44</sup> However, no matter the cause or fault for any delay on the La Chorrera Project, the Judicial Authority worked to accommodate Omega, reduce the delay's impact on the work by applying for provisional permits where possible, and to extend Omega's time to complete the project, all without levying any delay penalties.<sup>45</sup> This ensured that Omega could continue construction with minimal, if any, delay.

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<sup>43</sup> Payment Table for Contract No. 150/2012 from the Accounting and Finance Department in the Judicial Authority (**R-0007**) (Invoice No. 13 (5 days late), Invoice No. 7 (4 days late), and Invoice No. 6 (15 days late)); Rios Statement ¶ 23. The Claimants' Memorial incorrectly states that after July 2014, all invoices were "suddenly refused without explanation," Claimants' Memorial ¶ 80; however, this is simply untrue as payments were made to Omega throughout the fall and winter of 2014. Payment Table for Contract No. 150/2012 from the Accounting and Finance Department in the Judicial Authority. (**R-0007**) (showing Omega was paid in the summer and fall of 2014); Rios Statement ¶ 23.

<sup>44</sup> Claimants' Memorial ¶ 58; Rios Statement ¶¶ 22-24 (describing that the La Chorrera Project did sustain delays due to usual rain – not attributable to either party and expected in Panama, delays due to fire code changes that required alterations in the designs but provisional permits were issued that allowed Omega to continue work during this period, delays due to an issue related to ownership of the worksite – not attributable to the contractor or the owner).

<sup>45</sup> See Rios Statement ¶¶ 22-24; see also Letter: 2014 04 08 – P007-037: *Request for Addendum concerning Time Extension* dated Apr. 8, 2014 [*sic*] (**C-0065-Resubmitted**) (letter erroneously dated 2013) (requesting 63 calendar days in consideration of unanticipated time for processing documentation necessary for approval of Environmental Impact Assessment by ANAM, not attributed to developer or contractor); Addendum No. 2 to Contract 150/2012 dated Oct. 24, 2014 (**R-0008**) (providing extra days); see General Services Department of the Judicial Authority Report with the state of the *Construction of a Building for the Regional Judicial Unit in the Chorrera District up to March 10, 2015* dated Mar. 11, 2015 (**R-0009**), pp. 1-2 (showing Addendum No. 2 provided Omega with 18 days for rain between May and October and the proposed Addendum No. 3 planned to provide Omega with 2 additional days for ran from May to December of 2014); Email Chain between Elena Jaen of the Judicial Authority and Francisco Feliu of Omega dated May 7, 2015 (**R-0010**) (presenting Omega with Addendum No. 3 which would have provided an even greater extension of time for Omega to complete the work but Omega refused to sign).

30. There was no correlation between these delays and the change in Panama’s presidential administration. President Varela was not sworn into office until July 1, 2014, while these delays occurred – by the Claimants’ own admission – in April of 2013 and May of 2014.<sup>46</sup>

**c. Addendum No. 2 Grants Omega a 260-Day Extension of Time**

31. It is undisputed that throughout the La Chorrera Project, the Judicial Authority was extraordinarily generous in granting lengthy extensions of time.<sup>47</sup> The project was originally to be completed in 540 days. However, even though only a small portion of the delay was attributable to the Judicial Authority, on October 27, 2014, the parties entered into Addendum No. 2, which granted Omega 260 additional days to complete its works, making the contract completion date March 25, 2015. This increased the total number of days Omega had to complete the La Chorrera Project to 800.<sup>48</sup>

32. The Claimants allege that Addendum No. 2 was entered into in May 2014.<sup>49</sup> However, the document shows that the Judicial Authority signed Addendum No. 2 on October 27, 2014 and that the addendum was endorsed by the Comptroller General on December 23, 2014.<sup>50</sup>

33. This timing is very relevant. The Claimants suggest that they were the subject of targeted harassment by President Varela’s administration and that contracts were terminated or

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<sup>46</sup> Claimants’ Memorial ¶¶ 71-72, n. 161. The Claimants’ contradict themselves when they state that “in late 2014 [Panama] began to refuse to issue certain permits and plans” and thereby, “deliberately obstructed the progress of several of the Projects” and then attempt to support this statement by referencing Panama’s failure to timely approve construction plans and an environmental impact statement on the La Chorrera Project, which occurred – by their own citations – in April 2013 and May 2014, well before Varela was sworn into office and certainly not “late in 2014.” Claimants’ Memorial ¶¶ 71-72.

<sup>47</sup> See Addendum No. 2 to Contract 150/2012 dated Oct. 24, 2014 (**R-0008**); Table VIII. Expert Report of Compass Lexecon dated June 25, 2018, p. 29 (showing that the La Chorrera Project was extended from an initial period of 18 months to a revised period of 37 months).

<sup>48</sup> Addendum No. 2 to Contract 150/2012 dated Oct. 24, 2014 (**R-0008**).

<sup>49</sup> Claimants’ Memorial ¶ 52 (“The Government was sometimes slow to address these issues. For example, the MC Rios Sereno, MC Kuna Yala, MC Puerto Caimito, Mercado Público de Colón, and La Chorrera contracts technically expired before the Omega Consortium was able to renegotiate formal extensions to them. Ultimately, in these cases, this did not prove an insurmountable hurdle because all Parties (acting under the previous Administration) worked together to find a workable solution. In the end, by May 2014, the Omega Consortium had successfully negotiated and signed amendments to all these Contracts extending the completion deadlines and allowing recovery for additional costs incurred.”).

<sup>50</sup> Addendum No. 2 to Contract 150/2012 dated Oct. 24, 2014 (**R-0008**).

abandoned after President Varela took office. Indeed, with respect to the La Chorrera Project, the Claimants allege that the project effectively came to an end when the Varela administration “allowed” the contract to lapse on July 9, 2014.<sup>51</sup> In reality, the project continued throughout the summer and fall of 2014. And, Addendum No. 2 – which granted Omega an extension of almost 50% of the total contract duration – was signed in October 2014, three months after President Varela took office.

**d. Omega Suddenly Stops Work on the La Chorrera Project**

34. Beginning in October of 2014, Omega’s behavior shifted. Over the next two months, Omega stopped work on the project, declined to reinstate work even when a valid addendum was in place, and was no longer willing to negotiate in good faith with the Judicial Authority to ensure the La Chorrera Project was completed.

35. Then, on December 17, 2014, the Judicial Authority received an unexpected letter from Omega unilaterally declaring it was suspending work on the La Chorrera Project, supposedly due to the delay in the Comptroller General’s endorsement of Addendum No. 2.<sup>52</sup> Omega had no credible basis to stop work.<sup>53</sup> At that point, it had been only 61 days since the revised Addendum No. 2 was signed by Omega and the Judicial Authority.<sup>54</sup> Moreover, Omega was being paid for work done during this time period,<sup>55</sup> and it was not approaching the extended March 25, 2015 completion date.<sup>56</sup> As described above, Addendum No. 2 was endorsed by the Comptroller General’s office only six days later on December 23, 2014.<sup>57</sup>

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<sup>51</sup> Claimants’ Memorial ¶ 76.

<sup>52</sup> Note No. 2014 12 17 – P007-055, Notification of Temporary Recess from Omega to Judicial Authority dated Dec. 17, 2014 (C-0367).

<sup>53</sup> Rios Statement ¶ 27.

<sup>54</sup> Addendum No. 2 was signed on October 24, 2014.

<sup>55</sup> See Payment Table for Contract No. 150/2012 from the Accounting and Finance Department in the Judicial Authority. (R-0007) (payments were made to Omega in summer and fall of 2014).

<sup>56</sup> Addendum No. 2 extended the project by 260 for a completion date of March 25, 2015.

<sup>57</sup> Addendum No. 2 to Contract 150/2012 dated Oct. 24, 2014 (R-0008).

36. On December 29, 2014, the Judicial Authority responded that Omega could not unilaterally suspend work on the grounds of delay in the endorsement of Addendum No. 2 from the Comptroller General's office.<sup>58</sup> This delay was not attributable to the Judicial Authority and was in fact, no "delay" at all but well within the usual timing for endorsement of such a long extension of time on a large public works project. Once Omega received the notice that Addendum No. 2 was endorsed, it submitted a letter to the Judicial Authority stating that it would restart work on the La Chorrera Project on January 12, 2015.<sup>59</sup> However, Omega never restarted work and has not completed any work on the courthouse since December of 2014.<sup>60</sup>

37. Instead of reinitiating work, Omega wrote to the Judicial Authority on January 15, 2015 demanding an additional 310 days to complete the La Chorrera project. This would have brought the total number of days Omega had to complete the project to 1,110.<sup>61</sup> Although Omega had just been granted an additional 260 days and had refused to work, it claimed it was entitled to this additional time due to rain, delays in the endorsement of Addendum No. 2, and modifications in several of the systems to be constructed on the worksite.<sup>62</sup>

38. After this long passage of time without progress at the worksite, the Judicial Authority determined the project should be terminated before the performance bond and advance payment bond posted by Omega expired. The bonds were scheduled to expire on March 25, 2015 and, as a result, on March 11, 2015, the Judicial Authority informed Omega that it would be terminating the contract for the La Chorrera Project if Omega did not perform.<sup>63</sup>

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<sup>58</sup> Note No. 1832/S.A./2014 from Judicial Authority to the Omega Engineering Consortium dated Dec. 29, 2014 (**C-0368**).

<sup>59</sup> 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**).

<sup>60</sup> Rios Statement ¶ 29.

<sup>61</sup> Rios Statement ¶ 30; Note N. 2014 01 15 – P007-058 from Omega to Judicial Authority dated Jan. 15, 2015 [*sic*] (**R-0012**) (erroneously dated 2014).

<sup>62</sup> Rios Statement ¶ 30; *see* Report from the General Services Department dated Mar. 11, 2015 (**R-0009**), p. 2; Note N. 2014 01 15 – P007-058 from Omega to Judicial Authority dated Jan. 15, 2015 [*sic*] (**R-0012**) (erroneously dated 2014).

<sup>63</sup> Rios Statement at ¶ 31; Letter N. P.C.S.J./604/2015 from the Judicial Authority to Omega dated Mar. 11, 2015 (**R-0013**); *see* Letter VEPT-FIA-079-2015 from ASSA to Judicial Authority dated Oct. 22, 2015 (**R-0014**) (noting bond expired on March 25, 2015).

39. Omega responded on March 18, 2015, threatening the Judicial Authority with ICSID arbitration if it terminated the contract.<sup>64</sup> Omega’s reaction and immediate leap to threats of ICSID arbitration was strange, as the dispute resolution clause in the La Chorrera Contract called for disputes to be submitted to the Judicial Authority first for resolution and if the contractor was not satisfied with such resolution, it could commence *ad hoc* commercial arbitration.<sup>65</sup>

40. The Claimants emphasize in their Memorial that Omega received notice that the Comptroller General endorsed Addendum No. 2 “only after the Judiciary had notified the Omega Consortium of its intention to unilaterally terminate the Contract for default.”<sup>66</sup> Again, the Claimants have their dates wrong. Omega received notice – by its own admission – that Addendum No. 2 had been endorsed by, at the latest, January 12, 2015,<sup>67</sup> not on February 6, 2015 as they allege in their Memorial. Regardless, it was after both of these dates and after three months of Omega inactivity on the La Chorrera Project when the Judicial Authority decided to terminate the contract on March 11, 2015.<sup>68</sup>

41. After receiving Omega’s March 18, 2015 letter, the Judicial Authority graciously gave Omega a second chance and negotiated what the Judicial Authority perceived as a good faith resolution.<sup>69</sup> Omega promised to renew its bonds and reinstate work on the project in exchange for an extension of an additional 202 days, which would bring the total time allocated to Omega

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<sup>64</sup> Rios Statement ¶ 31; Letter Responding to N. P.C.S.J./604/2015 from the Judicial Authority to Omega dated Mar. 18, 2015, pp. 13-14 (**R-0015**).

<sup>65</sup> Tender (**C-0024-Resubmitted**), Art. 49 (stating that if the contractor requested arbitration, the parties would have 72 hours to agree on a single arbitrator, but if no agreement was reached, the parties would each select an arbitrator and those two arbitrators would select the third, noting that arbitrators would preferably be engineers or architects).

<sup>66</sup> Claimants’ Memorial ¶ 80 (emphasis in original).

<sup>67</sup> 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**) (stating that Omega is “grateful for the Judicial Authority’s support in finally obtaining the Comptroller-General’s endorsement on Addendum No. 3 (December 19, 2014)” and informing the Judicial Authority that it would resume work at its regular hours).

<sup>68</sup> Letter N. P.C.S.J./604/2015 from the Judicial Authority to Omega dated Mar. 11, 2015 (**R-0013**); Rios Statement ¶ 31.

<sup>69</sup> Rios Statement ¶ 32.

to complete the project to 1,002 days.<sup>70</sup> The Judicial Authority agreed to those terms and stopped the termination process.<sup>71</sup>

**e. Omega Abandons the La Chorrera Project**

42. However, Omega's promises were not in earnest. Omega never reinitiated work or renewed the bonds. The Judicial Authority even increased the grant of time to Omega, ultimately offering Omega an additional 492 days for a total of 1,292 days for completion of the project.<sup>72</sup> Omega refused to sign the addendum offering these extensions (Addendum No. 3), despite the fact that the Judicial Authority presented it to Omega multiple times over the nine months between May 2015 and January 2016.<sup>73</sup>

43. On January 28, 2016, the Judicial Authority sent its Chief Legal Officer to Omega's Panama offices in a last attempt to obtain Omega's signature on Addendum No. 3.<sup>74</sup> When she arrived, however, the offices were empty and she was informed that the offices were almost

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<sup>70</sup> Rios Statement ¶ 32; Note N. P.C.S.J./746/2015 dated Mar. 25, 2015 from President of the Supreme Court to Omega (C-0248) (suggesting a new completion date of October 12, 2015).

<sup>71</sup> Letter No. 366/DSG/2015 from General Services Dep't to Chief Legal Officer of the Judicial Authority dated Apr. 17, 2015 (R-0016).

<sup>72</sup> See Letter No. 950/DALSA/2015 from Judicial Authority to Omega dated Sept. 24, 2015 (R-0017) the Judicial Authority offered an extension of 492 days which would have brought the total completion time to 1,292 days – almost 250% of the original time).

<sup>73</sup> See e.g., Letter No. 402/DSG/2015 dated Apr. 27, 2015 (R-0018) (offering an additional 232 days which would have given Omega 1,032 total days to complete the project almost twice the original amount of time); Email Chain between Elena Jaen of the Judicial Authority and Francisco Feliu of Omega dated May 7, 2015 (R-0010) (informing Omega that a copy of Addendum was ready to be signed); Letter No. 765/DALSA/2015 from the Judicial Authority to Omega dated Aug. 10, 2015 (R-0019) (presenting the above offer); see Note No. 1744/P.C.S.J./2016 dated Aug. 18, 2016 from Judiciary to Minister of Commerce and Industries (C-0163) (on September 24, 2015, the Judicial Authority offered an extension of 492 days which would have brought the total completion time to 1,292 days – almost 250% of the original time); Letter No. 150/P.C.S.J/2016 from Judicial Authority to Omega dated Jan. 26, 2016 (R-0020) (stating that in response to Omega's request for an additional extension of time, the Judicial Authority drafted and sent Addendum No. 3 to Omega on September 24, 2015 which has not been signed by Omega and requesting that Omega reinitiate work on the project).

<sup>74</sup> Rios Statement ¶ 36; Report from Elena Jaen to Maria Elena Grimaldo of the Judicial Authority regarding N. 150/P.C.S.J/2016 of January 26, 2016 to Oscar Ivan Rivera Rivera, Legal Representative of the Omega Consortium dated Jan. 28, 2016 (R-0021).

always empty.<sup>75</sup> To ensure Omega would receive the Addendum and letter, the Judicial Authority uploaded it to PanamaCompra.<sup>76</sup> But Omega never executed the Addendum and it was clear that Omega had abandoned the La Chorrera Project.

44. The Judicial Authority was surprised by Omega's abandonment of the project. Throughout negotiations, Omega indicated that it would execute Addendum No. 3 and renew the bonds.<sup>77</sup> It was apparent that Omega had not been dealing in good faith. Omega allowed the bonds to expire, leaving the Judicial Authority with no recourse to call on the bonds to have the insurer or a new contractor complete construction of the La Chorrera courthouse.

45. The La Chorrera Project was an important project for the Judicial Authority. It has been a burden on Panama's judicial system to be without a regional courthouse in such a populous and litigious district.<sup>78</sup> Such a project is a rare undertaking for the Judicial Authority, which infrequently constructs a building of this size. In fact, since 2012, the Judicial Authority has only begun two projects valued at over US\$ 1 million.<sup>79</sup>

#### **f. Omega Owes Panama Money on the La Chorrera Project**

46. Ultimately, the La Chorrera Project, which was supposed to be completed in approximately a year and a half, was only 55% complete after almost four years. In fact, Omega

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<sup>75</sup> Rios Statement ¶¶ 36; Report from Elena Jaen to Maria Elena Grimaldo of the Judicial Authority regarding N. 150/P.C.S.J/2016 of January 26, 2016 to Oscar Ivan Rivera Rivera, Legal Representative of the Omega Consortium dated Jan. 28, 2016 (**R-0021**).

<sup>76</sup> See Note No. 1744/P.C.S.J/2016 dated Aug. 18, 2016 (**C-0163**), p. 3.

<sup>77</sup> Rios Statement ¶¶ 30-36; Email Chain between Elena Jaen of the Judicial Authority and Francisco Feliu of Omega dated May 11-12, 2015 (**R-0022**).

<sup>78</sup> See Tender for Bids (**C-0024-Resubmitted**) ("Because of the reasons above, and to advocate for the social interests of the thousands of people who face the need to attend hearings and other judicial proceedings each day, and also to carry out administrative proceedings in the facilities that today occupy the instances of the Judicial Branch within the district of La Chorrera, it is urgently required to build [the La Chorrera courthouse]. . . . [B]y not having these buildings, they would be prolonging and intensifying the existing issue, for this purpose it is necessary to handle this public call with efficiency, effectiveness, and speed . . . .").

<sup>79</sup> See Contract No. 077/2016 dated Nov. 30, 2016 (**R-0023**) (Santa Maria contract for design, procurement, and construction of a training center valued at US\$ 7,117,687.40); see Order to Proceed, Contract No. 013/2017 dated Mar. 13, 2017 (**R-0024**) (Coclé contract for design and construction of a courthouse valued at US\$ 2,415,616).

has been overcompensated, on the basis of a comparison of the percentage of project completion and the funds advanced, [REDACTED].<sup>80</sup>

## 2. THE MINISTRY OF HEALTH MINSA CAPSI PROJECTS

47. In the mid-2000s, the Ministry of Health initiated a public works program to construct 21 regional health facilities throughout Panama to expand available health care to many regions of the country.<sup>81</sup> These projects are collectively referred to as the MINSA CAPSI Projects and are critical to Panama's health care system.<sup>82</sup> The State built the first of these facilities to assess the scope of work and costs of completion, while the remaining 20 projects were put out for public bid as engineering, procurement, and construction (EPC) projects, which also required the winning contractors to finance their respective projects.<sup>83</sup> The MINSA CAPSI facilities are primary care facilities that include services such as laboratory capabilities, basic imaging, and in some cases, minor surgery capabilities and maternity wards. In comparison to a traditional hospital, the MINSA CAPSI facilities are smaller in size and provide a more limited scope of services.<sup>84</sup>

48. For purposes of the public bids, the MINSA CAPSI Projects were broken into two tranches of 10 facilities each, both put out for bid in 2010.<sup>85</sup> Omega bid for nine projects in the first tranche and won none.<sup>86</sup> Omega also bid for nine projects in the second tranche and was awarded three contracts.<sup>87</sup> Under these contracts, Omega was to design, construct, furnish, and finance three health care facilities, in Rio Sereno, Kuna Yala, and Puerto Caimito (collectively, "**Omega's MINSA CAPSI Projects**") and individually, the "**Rio Sereno Project**," "**Kuna Yala**

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<sup>80</sup> Rios Statement ¶ 37; Letter N. 355/S.A./2016 from Judicial Authority to Superintendent of Security and Reinsurance of Panama dated Mar. 11, 2016 (**R-0025**).

<sup>81</sup> First Witness Statement of Nessim Abrego Barsallo dated Jan. 7, 2019 ("**Barsallo Statement**"), ¶ 8.

<sup>82</sup> Barsallo Statement ¶ 8.

<sup>83</sup> Barsallo Statement ¶ 8.

<sup>84</sup> Barsallo Statement ¶ 9.

<sup>85</sup> Barsallo Statement ¶ 10.

<sup>86</sup> Barsallo Statement ¶ 11.

<sup>87</sup> Barsallo Statement ¶ 11.

**Project,”** and **“Puerto Caimito Project,”** respectively).<sup>88</sup> Rio Sereno is a rural town near Panama’s border with Costa Rica. Puerto Caimito is a small coastal town located approximately 42 kilometers west of Panama City, and Kuna Yala is a coastal area in the north-east region of Panama and is home to an indigenous and traditionally underserved people, the Gunas.<sup>89</sup> Due to the great need for improved health care facilities in rural communities, Omega’s MINSA CAPSI Projects are important to the Ministry.<sup>90</sup>

49. Seven companies (including Omega) bid on the projects in the second tranche; however, only six of them met the minimum requirements necessary to be awarded a contract.<sup>91</sup> Of these companies, only three bid on the Rio Sereno and Kuna Yala Projects and only two bid on the Puerto Caimito Project.<sup>92</sup> All 20 of the MINSA CAPSI projects put out for public bid were awarded to a foreign contractor or a consortium with a foreign contractor.<sup>93</sup>

50. To date, 14 of the 20 MINSA CAPSI projects put out for public bid have been completed.<sup>94</sup> Seven of those projects were operational prior to the election of President Varela, and the remaining seven were completed after the election. Of the remaining six projects, two are still in progress and likely to be completed in 2019, one is in the process of negotiations to reinstate work, and three – the Omega Projects – were abandoned. The Ministry worked closely with its contractors to assist where possible and to help get the projects completed. Omega was

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<sup>88</sup> 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**”).

<sup>89</sup> Barsallo Statement ¶ 20.

<sup>90</sup> Barsallo Statement ¶ 21.

<sup>91</sup> Barsallo Statement ¶ 12; *see* Minutes to the Opening of Proposal Envelopes dated Jan. 17, 2011 (**C-0026-resubmitted**); *see* Report from the Evaluation Commission Public Act N° 2010-0-12-0-99-AV-003042, undated (**C-0349**), p. 2 (concluding that Consorcio Becsa Eduinter did not comply with the mandatory requirements and was disqualified).

<sup>92</sup> Barsallo Statement ¶ 12; Report from the Evaluation Commission Public Act N° 2010-0-12-0-99-AV-003042, undated (**C-0349**), pp. 3-4.

<sup>93</sup> Barsallo Statement ¶ 13.

<sup>94</sup> Barsallo Statement ¶ 14.

the only contractor working on the MINSA CAPSI Projects with the Ministry of Health that permanently abandoned the country and its projects.<sup>95</sup>

51. The MINSA CAPSI projects all operated under the same contract structure and payment processes. The Ministry of Health initially required the contractors to obtain financing for 90% of the contract value, while the Ministry of Health would pay the remaining 10% directly to the contractor as an advance payment. The Ministry learned in April 2011, however, that the funds needed to make the advance payments on the MINSA CAPSI projects had not been allocated to the budget.<sup>96</sup> Consequently, each contractor was required to obtain bank financing for the full amount of their respective contracts, including the 10% advance payment.<sup>97</sup>

52. On April 5, 2011, the Ministry of Health notified Omega of this change and informed Omega that it would need to secure financing for the advance payment on each of its contracts.<sup>98</sup> Omega agreed on the condition that the advance payment be increased from 10% to 20% of the contracts' value, a condition accepted by the Ministry.<sup>99</sup>

**a. Initiation of Omega's MINSA CAPSI Projects**

53. On September 22, 2011, the Ministry and Omega executed the three contracts,<sup>100</sup> and the next day, the parties entered into Addenda No. 1 to all three contracts to incorporate the new

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<sup>95</sup> See Barsallo Statement ¶ 14.

<sup>96</sup> Barsallo Statement ¶ 15.

<sup>97</sup> Barsallo Statement ¶ 15.

<sup>98</sup> Barsallo Statement ¶ 21; Note No. 749-DMS/DAPE-2011 from Ministry of Health to Omega dated Apr. 5, 2011 (C-0141).

<sup>99</sup> Barsallo Statement ¶ 21.

<sup>100</sup> Barsallo Statement ¶ 21; 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, 201 (C-0031).

financing arrangement.<sup>101</sup> The Comptroller General endorsed the contracts and addenda on October 26, 2011 and the Orders to Proceed were issued the next day, October 27, 2011.<sup>102</sup>

54. Each of Omega’s MINSA CAPSI Projects was to be completed by no later than January 28, 2013 – 15 months (or 458 days) from the date of the Order to Proceed.<sup>103</sup> Omega was required to develop the plans for the facilities to meet the Ministry of Health’s specifications and requirements; procure all materials necessary to construct and operate the facilities; perform all construction; install all equipment; source and train all personnel necessary to complete its works; and finance the projects.<sup>104</sup>

55. After the Orders to Proceed were issued, Omega received substantial advance payments from its financing entity for the three projects, [REDACTED]

[REDACTED] The remainder of the amount owed on each contract would be paid in accordance with Omega’s progress through the issuance of “Certificates of No Objection” (“CNO”) by the Ministry of Health – the same process for each of the 20 MINSA CAPSI projects put out for public bid.<sup>106</sup> To initiate payment, Omega would prepare a report detailing work completed on the project, which would be reviewed at the project site by inspectors from the Ministry of Health and the Comptroller General’s office.<sup>107</sup> If both sets of inspectors confirmed that the information in the report matched the on-site conditions, it would be approved and submitted to the Minister of Health’s Office for further review. The Minister would check to

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<sup>101</sup> Barsallo Statement ¶ 21; Addendum No. 1 to Contract No. 077 (2011) dated Sept. 23, 2011 (C-0142); Addendum No. 1 to Contract No. 083 (2011) dated Sept. 23, 2011 (C-0143); Addendum No. 1 to Contract No. 085 (2011) dated Sept. 23, 2011 (C-0144).

<sup>102</sup> Barsallo Statement ¶ 21; Order to Proceed for Contract No. 077 (2011) dated Oct. 27, 2011 (C-0145); Order to Proceed for Contract No. 083 (2011) dated Oct. 27, 2011 (C-0146); Order to Proceed for Contract No. 085 (2011) dated Oct. 27, 2011 (C-0147).

<sup>103</sup> Barsallo Statement ¶ 23; Contract No. 077 (2011) dated Sept. 22, 2011 (C-0028), Cl. 3; Contract No. 083 (2011) dated Sept. 22, 2011 (C-0031), Cl. 3; Contract No. 085 (2011) dated Sept. 22, 2011 (C-0031), Cl. 3.

<sup>104</sup> Barsallo Statement ¶ 23.

<sup>105</sup> Barsallo Statement ¶ 24.

<sup>106</sup> Barsallo Statement ¶¶ 16-18, 24.

<sup>107</sup> Barsallo Statement ¶ 16.

ensure the payment amounts were in compliance with the contract, the proper supporting documents were provided, and any other contractual requirements (such as issues related to taxes and insurance) were in place. If the report was approved, the Ministry of Health would issue a CNO and send it to the Comptroller General's office for final review and endorsement.<sup>108</sup>

56. As discussed, the Comptroller General provides oversight and final approval on requests for payment.<sup>109</sup> His office reviews requests for payment for errors, omissions, and compliance with the contractual requirements. Occasionally, the Comptroller General's office will return a request for payment to obtain additional information or clarification on certain points. If the Comptroller General endorsed a CNO, the Ministry of Health would issue the endorsed CNO to Omega, which Omega could then present to its financing bank to receive payment.<sup>110</sup>

57. Under the contracts, Omega had to provide a completion bond for each project equal to 20% of the value of that contract. Omega was required to keep the completion bond valid for three years after construction was complete. Additionally, Omega was required to provide bonds to secure the advance payments, which were to remain effective until thirty days after the contracts' expiration or until full reimbursement of the advance was recovered by the State.<sup>111</sup>

58. In addition to reviewing CNOs, the Comptroller General was responsible for providing oversight and final approval on requests to amend any of the contractual terms, as it does on all public works contracts.<sup>112</sup> The Comptroller General reviews amendment requests for errors, omissions, and elements outside of the contractual requirements, among others. It is not unusual for the Comptroller General to return a request for an amendment with instructions to provide additional information or missing materials.<sup>113</sup> Under the Panamanian law governing public

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<sup>108</sup> Barsallo Statement ¶ 17.

<sup>109</sup> Barsallo Statement ¶ 17

<sup>110</sup> Barsallo Statement ¶¶ 17-18.

<sup>111</sup> Barsallo Statement ¶ 25; Contract No. 077 (2011) dated Sept. 22, 2011 (C-0028), Cl. 22; Contract No. 083 (2011) dated Sept. 22, 2011 (C-0030), Cl. 22; Contract No. 085 (2011) dated Sept. 22, 2011 (C-0031), Cl. 22.

<sup>112</sup> See Barsallo Statement ¶ 17; Bernard Statement ¶ 9.

<sup>113</sup> Barsallo Statement ¶¶ 17, 19; Bernard Statement ¶¶ 14-15.

works contracts, work on the projects must continue while an amendment request is under review.<sup>114</sup> This can be difficult for contractors if they have a requested extension of time and the completion date in the original contract passes while the extension request is under review. Pending the endorsement of the addendum, the contractor is still obligated to work on the project, even though this can mean they will not receive payment until after the addendum is endorsed.

**b. Execution of Omega’s MINSA CAPSI Projects during the Martinelli Administration**

59. Omega’s MINSA CAPSI Projects experienced a number of early delays.<sup>115</sup> Contrary to the Claimants’ contention that none of these delays pertained to Omega,<sup>116</sup> some were in fact attributable to the Claimants.<sup>117</sup> For example, Omega had issues with several of its subcontractors, which caused a slowdown in the work.<sup>118</sup> Other delays were attributable to the Ministry, such as the length of time it took to approve the list of medical equipment to be installed in the facilities, or the length of time it took to approve requests for extensions of time.<sup>119</sup> Nevertheless, these delays were ordinary construction delays and were resolved without much controversy.<sup>120</sup>

60. In some instances, the delay in approving a request for an extension of time resulted in periods where Panama was unable to pay the Claimants because their contract had technically expired. During those times, Omega elected to slow its work, which added to the amount of time needed to complete the projects.<sup>121</sup> However, when the Ministry of Health was responsible for

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<sup>114</sup> Barsallo Statement ¶ 19; Law 22 of June 27, 2006, Art. 77.4 (**R-0026**) (applicable to Omega’s MINSA CAPSI projects).

<sup>115</sup> Barsallo Statement ¶¶ 26-38.

<sup>116</sup> *See* Claimants’ Memorial ¶ 51.

<sup>117</sup> *See* Barsallo Statement ¶ 26.

<sup>118</sup> Barsallo Statement ¶ 26.

<sup>119</sup> Barsallo Statement ¶¶ 26-27.

<sup>120</sup> *See* Claimants’ Memorial ¶ 58.

<sup>121</sup> Barsallo Statement ¶ 30 (Omega claimed to be unable to make progress on the Rio Sereno Project between August 13, 2013 and January 14, 2014); Barsallo Statement ¶ 34 (failing to work at full capacity on the Puerto Caimito Project between August 2, 2013 and January 13, 2014).

the delay, it allocated Omega (and other contractors) additional time to complete their projects<sup>122</sup> and issued all CNOs owed to Omega after the extensions of time were approved.<sup>123</sup>

61. Panama was generous in granting extensions of time to Omega on each of its projects with the Ministry of Health, even though it often took time for the extensions to be negotiated and executed. For example:

- On the Rio Sereno Project, in 2012 and 2013, Panama granted and approved two extensions of time to Omega – Addenda No. 2 and No. 3 – amounting to 794 total days for Omega to complete the project, versus the original schedule of 498 days.<sup>124</sup> The Ministry of Health agreed to Omega’s requests for extensions of time as part of a good-faith effort to accommodate Omega and give them the flexibility to finish the project on time.<sup>125</sup> Both of these addenda were endorsed by the Comptroller General approximately five months after they were signed by the Ministry of Health and Omega.<sup>126</sup> Following its usual practice, the Comptroller General’s office returned Addendum No. 3 at least once on finding the document was missing a signature and there was an error in the number of

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<sup>122</sup> Barsallo Statement ¶¶ 26-39; Claimants’ Memorial ¶ 52 (Claimants agree stating that “[Panama] was slow at times to address these issues. For example, [all three MINSAs CAPSI Contracts] technically expired before the Omega Consortium was able to renegotiate formal extensions to them. Ultimately [...] this did not prove an insurmountable hurdle because all Parties (acting under the previous Administration) worked together to find a workable solution.”); *see* Claimants’ Memorial ¶ 52, n. 126 (noting that “[t]he most common reason for these delays was simply the Government’s internal bureaucracy; which would generally cause the relevant Government agency to be late in approving issues that needed approval[.]”); *see also* Claimants’ Memorial ¶ 56, 58 (stating that during the Martinelli Administration, all CNOs owed to Omega were issued and the issues were “nothing out of the ordinary in the construction industry in the region and were resolved without major controversy”).

<sup>123</sup> Claimants’ Memorial ¶ 56 (noting that all CNOs owed to Omega were issued during the Martinelli Administration).

<sup>124</sup> The contract was originally for 458 days. Barsallo Statement ¶¶ 23, 30; Addendum No. 2 to Contract No. 077 (2011) dated Feb. 21, 2013 (C-0169) (increasing the total to 647 days); Addendum No. 3 to Contract No. 077 (2011) dated Aug. 13, 2013 (C-0170) (increasing the total to 794 days); Addendum No. 4 to Contract No. 077 (2011) dated May 7, 2014 (C-0106-resubmitted) (increasing the total to 1065 days, however, note that this final addendum was never endorsed by the Comptroller General).

<sup>125</sup> Barsallo Statement ¶ 30.

<sup>126</sup> Barsallo Statement ¶ 29-30; Addendum No. 2 to Contract No. 077 (2011) dated Feb. 21, 2013 (C-0169) (signed Feb. 21, 2013 and endorsed July 2, 2013); Addendum No. 3 to Contract No. 077 (2011) dated Aug. 13, 2013 (C-0170) (signed Aug. 13, 2013 and endorsed Jan. 4, 2014).

days the contract was to be extended.<sup>127</sup> While the contract expired on August 5, 2013, while still under review, Addendum No. 3 was ultimately endorsed by the Comptroller General on January 14, 2014. Although Omega's invoices were not paid during the August-to-January period, it continued to work on the project.<sup>128</sup>

- On the Puerto Caimito Project, in 2012 and 2013, the Ministry of Health granted Omega two extensions of time – Addenda No. 2 and No. 3 – that, like the Rio Sereno project, increased the completion period to 794 days.<sup>129</sup> These too were endorsed by the Comptroller General approximately five months after they were signed by the Ministry of Health and Omega.<sup>130</sup> Similar to the Rio Sereno Project, during the period between the expiration of the contract (August 12, 2013) and endorsement (January 13, 2014) of Addendum No. 3, Omega was not receiving payments from the Ministry, but continued working (even though at reduced capacity).<sup>131</sup>
- On the Kuna Yala Project, in 2013, the Ministry of Health granted an extension of 518 days to Omega to compete the project.<sup>132</sup> The Ministry and Omega entered into Addendum No. 2, formalizing the extension on July 18, 2013.<sup>133</sup> The Comptroller General endorsed the Addendum about three months later. During the period between expiration of the contract (January 28, 2013) and endorsement

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<sup>127</sup> See Barsallo Statement ¶ 30, n. 36 (citing Memorandum No. 2568-2013-DAEF dated Oct. 4, 2013) (**R-0030**).

<sup>128</sup> Barsallo Statement ¶ 30.

<sup>129</sup> Barsallo Statement ¶¶ 31-32; Addendum No. 2 to Contract No. 85 (2011) dated Feb. 22, 2013 (C-0268) (providing a total number of 654 days); Addendum No. 3 to Contract No. 085 (2011) dated Aug. 2, 2013 (**R-0031**) (providing a total of 794 days).

<sup>130</sup> Addendum No. 2 to Contract No. 85 (2011) dated Feb. 22, 2013 (C-0268) (signed Feb. 22, 2013 and endorsed July 5, 2013); Addendum No. 3 to Contract No. 085 (2011) dated Aug. 2, 2013 (**R-0031**) (signed Aug. 2, 2013 and endorsed Jan. 13, 2014).

<sup>131</sup> Barsallo Statement ¶ 34; See CNOs 17-19 (**C-0267**) pp. 62-69 (Omega only advanced the project 11.87% during this period, indicating that they were working much less than the normal working hours).

<sup>132</sup> Barsallo Statement ¶ 36.

<sup>133</sup> Barsallo Statement ¶ 36; Addendum No. 2 to Contract No. 083 (2011) dated July 18, 2013 (**C-0263**) (signed July 18, 2013 and endorsed Oct. 9, 2013).

(October 9, 2013) of Addendum No. 2, Omega continued working at reduced capacity.<sup>134</sup>

62. These examples demonstrate both the lengths that the Ministry went to in order to ensure that Omega had sufficient time to complete its projects and Omega's initial willingness to work through commercial issues, such as periods of delayed payment.<sup>135</sup> Indeed, during the Martinelli Administration, Omega continued to work on the projects (as mandated by law) even when it took substantial time for addenda to be endorsed and it was without a valid contract for extended periods of time.<sup>136</sup> However, in approximately October 2014 Omega's attitude changed.

63. On all three projects, the Ministry of Health and Omega entered into addenda on May 7, 2014.<sup>137</sup> Each gave Omega an extension of time (the Rio Sereno Project extended until September 27, 2014, the Kuna Yala Project extended until June 30, 2014, and the Puerto Caimito Project extended until August 4, 2014).<sup>138</sup> The Addenda were sent to the Comptroller General's office on May 19, 2014.<sup>139</sup>

64. When these Addenda were sent to the Comptroller General's office in May of 2014, former President Ricardo Martinelli and Gioconda Torres – the Comptroller General under President Martinelli's administration – were still in office. President Varela was sworn into office two months later on July 1, 2014, and Ms. Torres would remain in office until December

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<sup>134</sup> Over the nine months, Addendum No. 2 was pending Omega completed 18.72% of the project or an average of only 2% per month. *Compare* CNO No. 10 (C-0260), p. 69 (Omega had completed 24.61% of the Kuna Yala Project up to January 27, 2013) *with* CNO 18 (C-0260), p. 17 (By September 30, 2013, Omega had completed 43.33% of the project.).

<sup>135</sup> Barsallo Statement ¶¶ 26-39.

<sup>136</sup> Omega was without a valid contract on the Kuna Yala project while Addendum No. 2 was pending for nine months, and Omega was without a valid contract on the Puerto Caimito and Rio Sereno Projects while Addenda No. 3 were pending for each for about five months. *See* Law 22 of June 27, 2006 (R-0026), Art. 77.4.

<sup>137</sup> Barsallo Statement ¶ 39.

<sup>138</sup> *See* 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).

<sup>139</sup> Barsallo Statement ¶ 39.

31, 2014.<sup>140</sup> However, the Addenda remained unendorsed throughout Mr. Martinelli's and Ms. Torres' remaining time in office.<sup>141</sup>

**c. Execution of Omega's MINSA CAPSI Projects under the Varela Administration**

65. On July 1, 2014, President Varela was sworn into office. The Claimants allege that once President Varela was sworn in, circumstances changed and they were the victims of a politically motivated vendetta by the Varela Administration against Omega.<sup>142</sup> This is not the case.<sup>143</sup> Panama continued working with Omega with the goal of completing the MINSA CAPSI Projects as smoothly and efficiently as possible.<sup>144</sup> Any slowing in the endorsement of payments or addenda was the result of the administrative transition period, the unfortunate illness of Ms. Torres (the outgoing Comptroller General), complications in the Ministry's budget, and the lack of valid contracts to substantiate invoices. Moreover, as Panama continued working with Omega, it was Omega's behavior that shifted, culminating in Omega's abandonment of the projects and the country.

**i. After the Election, the Ministry of Health Continued with its Generous and Helpful Approach to Omega's MINSA CAPSI Projects**

66. After President Varela took office, the Ministry of Health continued handling Omega's MINSA CAPSI Projects in the same way it had during the Martinelli Administration, and consistently negotiated with Omega for reasonable extensions of time and additional costs on the three projects.<sup>145</sup> Indeed, as Mr. Barsallo testifies, the Ministry of Health was not asked or

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<sup>140</sup> Barsallo Statement ¶ 40.

<sup>141</sup> Letter MINSA-50 from the Omega Consortium to Panama's Ministry of Health dated July 29, 2014 (C-0069), p. 3.

<sup>142</sup> See Claimants' Memorial ¶¶ 43-44, 50, 75-77, 85-87.

<sup>143</sup> See Barsallo Statement ¶ 41 (stating that he is unaware of an evidence of targeting of Omega by the Varela Administration); see Barsallo Statement ¶ 46 ("As a Ministry, we did not make any changes in the way we handled Omega's MINSA CAPSI Projects after Varela was sworn into office.").

<sup>144</sup> Barsallo Statement ¶ 46.

<sup>145</sup> Barsallo Statement ¶ 46.

instructed to terminate or hinder Omega's projects.<sup>146</sup> It was always in the Ministry's interest to have its health centers completed as soon as possible and would have been contrary to its purpose and function to inhibit their construction.<sup>147</sup>

67. The Ministry's continued commitment to the projects is evidenced by the work it undertook during that period. For example, in July of 2014, the Rio Sereno Coordinator for the Ministry of Health prepared and Omega accepted a technical justification report including an evaluation of the time and costs remaining on the project, in which the parties agreed an extension of 244 days would be appropriate and agreed to an award of costs for project delays.<sup>148</sup> The Ministry also tried to propel Omega's MINSAs CAPSI Projects forward by requesting a work plan from Omega for completion of the three projects on August 11, 2014 and when it received no response from Omega, followed up on September 3, 2014.<sup>149</sup> The Ministry did so in an attempt to align the contractual schedule with the actual progress onsite, because even though the completion date had passed and the contract had expired work was still being performed.<sup>150</sup>

68. In addition, in the third and fourth quarters of 2014, the Ministry took several meaningful steps to augment negotiations, including preparing a joint technical report with Omega supporting its requests for extensions of time and costs on the Rio Sereno Project,<sup>151</sup> and continuously requesting and compiling information on Omega's real time schedule for completing the three projects in order to align the project schedule with the actual onsite progress.<sup>152</sup>

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<sup>146</sup> Barsallo Statement ¶ 41.

<sup>147</sup> Barsallo Statement ¶¶ 8, 20-21, 41.

<sup>148</sup> Barsallo Statement ¶ 47; Minutes of Meeting between Ministry of Health and Omega Engineering, Inc. dated July 18, 2014 (C-0361), p. 1-3.

<sup>149</sup> Nota No. 024 DI-DIS 2014 from the Ministry of Health to Omega dated Sept. 3, 2014 (R-0032).

<sup>150</sup> Barsallo Statement ¶ 48.

<sup>151</sup> Barsallo Statement ¶ 47; Minutes of Meeting between Ministry of Health and Omega Engineering, Inc. dated July 18, 2014 (C-0361), p. 1-3.

<sup>152</sup> Barsallo Statement ¶¶ 48-49; Nota No. 024 DI-DIS 2014 from the Ministry of Health to Omega dated Sept. 3, 2014 (R-0032); Nota No. 011 DI-DIS-MINSA from Ministry of Health to Omega dated Sept. 11, 2014 (R-0033).

69. Despite the Ministry’s efforts to work with Omega – and its willingness to grant time when needed – the Claimants allege that Panama “refused to engage in any meaningful negotiations” after President Varela took office.<sup>153</sup> In fact, the Ministry of Health repeatedly engaged in negotiations to finish the projects as efficiently as possible, as it had done over the course of the projects and reached out to the Claimants several times during this period.<sup>154</sup>

**ii. Approvals of Addenda and CNOs during the Administrative Transition Period and Budgetary Complications in 2014 and 2015**

70. The slowdowns in the Comptroller General’s review and approval of addenda and payments in the third and fourth quarters of 2014 and the start of 2015, were due to three factors: (i) the transition between the administrations; (ii) the illness of the Comptroller General appointed by President Martinelli; and (iii) budgetary issues, which pushed certain funds expected by the Ministry in 2014 to 2015.

71. First, between July 2014 and December 2014, the Comptroller General’s office took longer to approve all contractors’ addenda and payment certificates. When there is a change in the administration, the incoming administration will usually do a full audit of the ongoing projects prior to approving invoices or addenda. The outgoing Comptroller General usually slows approvals so that the incoming Comptroller General can consider the pending request as part of its audit. This is the usual practice in Panama and well understood by companies contracting on public works projects, including Omega.<sup>155</sup>

72. Second, the typical delays caused by the transition between Presidential administrations were further complicated by that fact that the outgoing Comptroller General was suffering from terminal cancer during the transition period, which unfortunately affected the efficiency of the office.<sup>156</sup> As a result, any slowing of the typical rate of approvals was due not to political ill will

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<sup>153</sup> Claimants’ Memorial ¶ 86 (emphasis in original).

<sup>154</sup> Barsallo Statement ¶¶ 46-49.

<sup>155</sup> Barsallo Statement ¶ 43; *see* Witness Statement of Oscar I. Rivera Rivera (“**Rivera Statement**”), ¶ 72 (stating he “always suspected that the change in Administration would create delays”).

<sup>156</sup> Barsallo Statement ¶ 44.

but rather to the burden of changing an entire administration and Ms. Torres' illness.<sup>157</sup> This slowdown was not unique to Omega; other contractors were affected by Ms. Torres' illness and the transition as well.<sup>158</sup>

73. Third, payments were slower than usual on Omega's MINSA CAPSI Projects at the end of 2014 and beginning of 2015, as a result of budgetary issues and delays in the endorsement of addenda needed to substantiate the invoices.<sup>159</sup> Under Panama's budgetary rules, if the Ministry does not spend its budget for the year in progress, it is not given that amount the next year for that particular project. Therefore, if invoices are not paid before the end of the fiscal year (which is the last day in April), then the Ministry's funds are lost for that project. The Ministry was unable to make payments within the fiscal year for the amounts due to Omega, as well as many other contractors who were in the same situation. As a result, those funds were removed from the Ministry's 2015 budget. This created a back-log in the flow of payments. Nevertheless, the Ministry worked with the Ministry of Economy and Finance ("MEF") to remedy the situation so that it could remunerate the contractors owed for work on the MINSA CAPSI projects.<sup>160</sup>

74. Contrary to the Claimants' allegation that after President Varela assumed office in July 2014 Omega received no CNOs for work already performed,<sup>161</sup> several payments were made to Omega after President Varela was sworn into office.<sup>162</sup> In fact, multiple CNOs were issued to Omega even after it left the project sites in October of 2014.<sup>163</sup> For example, on the Kuna Yala Project, three CNOs [REDACTED] were delivered to Omega in October and

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<sup>157</sup> Barsallo Statement ¶ 45.

<sup>158</sup> *See generally*, Barsallo Statement ¶¶ 42-45.

<sup>159</sup> Barsallo Statement ¶ 56.

<sup>160</sup> Barsallo Statement ¶ 57.

<sup>161</sup> Rivera Statement ¶ 78.

<sup>162</sup> Barsallo Statement ¶¶ 58, 60.

<sup>163</sup> Barsallo Statement ¶ 60. *See* Claimants' Memorial ¶ 44 (noting Claimants' stopped on-site operations on its MINSA CAPSI projects in October 2014).

November 2014,<sup>164</sup> and on the Rio Sereno Project, a CNO [REDACTED] was delivered to Omega on March 26, 2015.<sup>165</sup>

75. Moreover, contrary to the Claimants' allegations, the Comptroller General's return of addenda for clarifications, omissions, and substantiation were not "pretext[ual]" but were rather a normal part of the process.<sup>166</sup> As explained above, it was not unusual for the Comptroller General to return an addendum with observations that mandate additional documentation or information.<sup>167</sup> The Claimants' allege that the new administration's Comptroller General placed several obstacles in the way of issuance of the approvals of the three addenda executed by the Ministry of Health and Omega on May 7, 2014, by "requesting a number of documents from the Omega Consortium that he already had, and the rejection of perfectly reasonable requests from the Omega Consortium based on nothing more than pretexts."<sup>168</sup> However, the Claimants misrepresent the situation in two respects: (1) the addenda were signed in May 2014, well before the Comptroller General for the new administration took office in January of 2015, consequently, the delay in endorsement falls squarely during tenure of the Comptroller General for the Martinelli Administration who would have had seven months to endorse the addenda prior to the new Comptroller General entering office, and (2) the Comptroller General did not reject the addenda on mere pretext, but rather made well-reasoned requests for supplementation and support for Omega's requests.

76. For example, in the letter cited by the Claimants from the Comptroller General to the Ministry of Health regarding Addendum No. 4 to the Puerto Caimito Project, the Comptroller General returned the addendum requesting that the Ministry of Health and Omega provide the

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<sup>164</sup> Certificates of No Objection for Contract No. 083 (2011), various dates (C-0260) (CNO No. 22 endorsed by the Comptroller General on Oct. 8, 2014 [REDACTED]; CNO No. 23 endorsed by the Comptroller General on Oct. 13, 2014 [REDACTED]; CNO No. 24 endorsed by the Comptroller General on Nov. 11, 2014 [REDACTED])

<sup>165</sup> Barsallo Statement ¶ 58; Certificates of No Objections for Contract No. 077 (2011), various dates (C-0252) (CNO No. 15 endorsed on Mar. 26, 2015).

<sup>166</sup> Claimants' Memorial ¶ 84, n. 193 (citing to Letter No. 695-15-LEG-F.J.PREV. from the Comptroller General to the Ministry of Health dated Apr. 17, 2015 (C-0176)).

<sup>167</sup> See *supra* Section II.B.2.a.

<sup>168</sup> Claimants' Memorial ¶ 84.

change order indicating medical devices to be purchased needed to be supplemented by a technical data sheet; an explanation of why those particular devices and equipment were needed; the Omega-Ciracet Consortium association agreement; documents proving the existence and legal representation of the foreign companies that made up the Omega-Ciracet Consortium; and the valid compliance bond.<sup>169</sup> The Claimants allege that this was an example of the Comptroller General in the new administration’s purely pre-textual refusal to endorse addenda.<sup>170</sup> However, these documents were required to approve the addendum, and although the Claimants may have provided a few documents with the initial contract, the addendum was stored separately from the initial contract with a different code number – the typical practice in the Comptroller General’s office – making it difficult to find documents submitted with the initial contract, especially given the transition in administrations. The Claimants provide no other examples of the alleged pre-textual refusal.<sup>171</sup>

### **iii. Omega Abandons the Projects in the Fall of 2014**

77. Omega’s approach to the normal delays in the endorsements of the contract addenda and payment approvals on the MINSA CAPSI Projects shifted in the fall of 2014. With at least three years of experience working in Panama, it was certainly apparent that it took time for the Comptroller General’s office to review and endorse addenda and in some cases additional information was requested before the addenda would be approved. Additionally, Omega was aware that the transition period between administrations was likely to slow down processing.<sup>172</sup>

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<sup>169</sup> Claimants’ Memorial ¶ 84, n. 193 (citing to Letter No. 695-15-LEG-F.J.PREV. from the Comptroller General to the Ministry of Health dated Apr. 17, 2015 (C-0176)).

<sup>170</sup> Claimants’ Memorial ¶ 84 (alleging that this was an example of the new Comptroller General’s purely “pretext[ual]” refusal to endorse the addendum for the Puerto Caimito Contract that he refused in April of 2015 to endorse an addendum that was missing a required certificate which Claimants allege had been “provided during the bidding process and formed an integral part of the MC Puerto Caimito Contract file, something which was already in the Comptroller-General’s possession.”).

<sup>171</sup> The Claimants do allege that the Comptroller General also “rejected the change order extending the deadline for the Rio Sereno Contract, once again on the most unconvincing of justifications” but do not describe these justifications and in fact cite to the letter related to the Puerto Caimito project. Claimants’ Memorial ¶ 84 n. 193-194 (citing to the same Letter No. 695-15-LEG-F.J.PREV. from the Comptroller General to the Ministry of Health dated Apr. 17, 2015 (C-0176) which was related to the Puerto Caimito Project and not the Rio Sereno Project).

<sup>172</sup> Rivera Statement ¶ 72 (stating he “always suspected that the change in Administration would create delays”).

However, instead of responding to such delays by submitting requests for extensions of time and prolongation costs while continuing work,<sup>173</sup> Omega stopped work altogether in October of 2014.<sup>174</sup>

78. Despite the Ministry of Health’s requests and efforts to negotiate an agreement and keep the work moving forward, Omega never returned to the projects and they remain incomplete.<sup>175</sup> According to the records of the Comptroller General’s office, Omega has completed 78.9% of the work on the Rio Sereno Project, 50.14% of the work on the Kuna Yala Project, and 71.83% of the work on the Puerto Caimito Project.<sup>176</sup>

### 3. THE NATIONAL INSTITUTE OF CULTURE CIUDAD DE LAS ARTES PROJECT

79. The National Institute of Culture of Panama (“INAC”) was created in 1974 to promote and coordinate cultural and artistic activities throughout the country. It works under the direction of Panama’s Ministry of Education.<sup>177</sup>

80. INAC currently operates five art schools in Panama City which serve approximately 5,000 students. These facilities, which are in need of replacement and upgrade, are not sufficient to promote artistic and cultural education in Panama. As a result, INAC has long planned to build a new, large-scale education facility in Curundú, Panama City – the *Ciudad de las Artes*, or City of Arts (the “**Ciudad de las Artes Project**”). The City of Arts will be a cutting-edge facility, equipped with the latest technological advances that will include separate buildings housing theater, plastic arts, music, and dance schools, as well as a museum, a performance

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<sup>173</sup> See *supra* Section II.B.2.b (noting that Omega often had to wait months for its addenda to be endorsed by the Comptroller General and often experienced long periods where it would not receive payment while the original contract had expired and an addendum was pending, but nevertheless, Omega continued work on the projects (albeit at reduced capacity)).

<sup>174</sup> Claimants’ Memorial ¶ 44; see Letter No. MINSAs-54 from the Omega Consortium to the Ministry of Health dated Oct. 31, 2014 (C-0173) (notifying the Ministry of Health it would begin reducing personnel on the Projects).

<sup>175</sup> Barsallo Statement ¶¶ 46-62.

<sup>176</sup> Barsallo Statement ¶ 62; see COBE Summaries on the Rio Sereno, Kuna Yala, and Puerto Caimito Projects (R-0027) - (R-0029).

<sup>177</sup> See National Institute of Culture Website (C-0037-Resubmitted); Law No. 63 “Creating the National Institute of Culture,” Official Gazette dated June 25, 1974 (C-0038-Resubmitted), Art. 1.

theatre, and a multi-purpose auditorium. The City of Arts will be a significant step forward in Panama’s promotion of the arts, and it is therefore of critical importance to the country.<sup>178</sup>

81. The Ciudad de las Artes Project is the largest construction project ever undertaken by INAC. Before 2012, INAC’s construction projects were minor and of very limited technical complexity – in fact, the price of INAC’s projects tended to be well below US\$ 1 million. Since 2012, however, INAC has begun to undertake larger projects, among which the Ciudad de las Artes Project is the largest and most costly.<sup>179</sup>

**a. The Ciudad de las Artes Contract**

82. Omega was awarded a turnkey contract for the City of Arts on May 11, 2012 (the “**Ciudad de las Artes Contract**”).<sup>180</sup> The contract was executed on July 6, 2012, and it was endorsed by the Comptroller General on September 19, 2012.<sup>181</sup>

83. According to the original terms of the Ciudad de las Artes Contract, Omega was to finance the project in its entirety and would have 645 days from the date of the notice to proceed to complete it.<sup>182</sup> [REDACTED].<sup>183</sup>

84. The Ciudad de las Artes Contract stipulated that INAC was obligated to provide a lump-sum payment for the project’s full price once the project had been concluded and accepted by INAC. In order for Omega to receive partial disbursements from its bank, the contract provided that Omega would need to submit certificates of partial payment (*cuentas de pagos parciales* or “**CPPs**”) to INAC together with its monthly progress reports, which would be subject to approval by INAC and the Comptroller General’s office. Once approved by those two entities, Omega was entitled to assign the CPPs to its bank, and to receive partial disbursements. While a precise date for payment of the lump-sum by INAC was not specified in the Ciudad de las Artes

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<sup>178</sup> Witness Statement of Carmen Chen dated Jan. 4, 2019 (“**Chen Statement**”), ¶ 9.

<sup>179</sup> Chen Statement ¶ 10.

<sup>180</sup> Resolution No. 184-12 DG/DAJ from INAC dated May 11, 2012 (**C-0041-Resubmitted**).

<sup>181</sup> Contract No. 093-12 dated July 6, 2012 (**C-0042-Resubmitted**).

<sup>182</sup> Contract No. 093-12 dated July 6, 2012 (**C-0042-Resubmitted**), Cls. 5 & 10.

<sup>183</sup> Contract No. 093-12 dated July 6, 2012 (**C-0042-Resubmitted**), Cl. 35.

Contract, the contract's original terms provided that the payment was to be made in 2014, using funds to be assigned by the MEF to INAC's budget for that year.<sup>184</sup>

85. As required by the Ciudad de las Artes Contract and Panamanian law, Omega provided a performance guarantee for its works. This guarantee [REDACTED], and was underwritten by ASSA Compañía de Seguros, S.A. ("ASSA").<sup>185</sup>

86. INAC issued an initial notice to proceed on September 27, 2012.<sup>186</sup> However, as explained below, this first notice to proceed was replaced with a second notice to proceed issued on April 22, 2013. Under the second notice, Omega had until January 27, 2015 (645 days) to complete the project.

**b. Changes to the Contract's Payment Structure and the Project's Date of Commencement**

87. Shortly after the initial notice to proceed had been issued, INAC realized that it lacked an internal set of rules governing the use of CPPs as a payment mechanism. The Ciudad de las Artes Project was the first turnkey project undertaken by INAC and, as such, CPPs had not previously been used by INAC. To remedy this, INAC issued Resolution No. 016-12 J.D. on November 22, 2012, which regulates the issuance of credits with respect to INAC projects, and adopts procedures for the registration and notification of the assignment of such credits.<sup>187</sup>

88. Once this resolution was issued, INAC and Omega negotiated Addendum No. 1,<sup>188</sup> which provided for two main changes to the Ciudad de las Artes Contract.

89. First, INAC agreed to provide Omega with an advance payment covering 20% of the contract's price, [REDACTED]. INAC would recover the advance payment by deducting 20% from each subsequent CPP submitted by Omega until the advance

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<sup>184</sup> Contract No. 093-12 dated July 6, 2012 (C-0042-Resubmitted), Cl. 35.

<sup>185</sup> Completion Bond No. 85B64510, executed between ASSA and Omega for the Ciudad de las Artes Project dated June 26, 2012 (R-0034).

<sup>186</sup> Order to Proceed for Contract No. 093-12 dated Sept. 27, 2012 (C-0113).

<sup>187</sup> Resolution No. 016-12 J.D. dated Nov. 22, 2012 (R-0035).

<sup>188</sup> Addendum No. 1 to Contract No. 093-12 dated Apr. 16, 2013 (C-0167).

payment had been fully recouped.<sup>189</sup> This advance payment mechanism was unusual. It was not provided for in either the Ciudad de las Artes Contract or the Request for Proposals issued by INAC. Omega, however, specifically requested a 20% advance payment in its bid for the Ciudad de las Artes Project. Omega's proposal was accepted and INAC agreed to Addendum No. 1 to accommodate Omega's request.<sup>190</sup> In return, Omega agreed to obtain a bond covering the full amount of the advance payment.<sup>191</sup>

90. Second, INAC and Omega agreed to re-set the date of commencement and completion of the Ciudad de las Artes Project. Thus, Addendum No. 1 provided that a new notice to proceed would be issued once Addendum No. 1 was approved by the Comptroller General, and that INAC's lump-sum payment would be made on March 31, 2015, using funds to be assigned by the MEF to INAC's budget for 2015.<sup>192</sup>

91. The Claimants argue that, because the 2015 budget of Panama's National Assembly dated September 2014 did not make any reference to the Ciudad de las Artes Project, the government had decided by that date that it would not continue with the project, as INAC would not be able to make the lump-sum payment due in March 2015.<sup>193</sup> That is incorrect.

92. The fact that the National Assembly's budget does not explicitly refer to the Ciudad de las Artes Project does not mean that the project was excluded from the budget. In fact, the National Assembly's budgets typically do not refer to specific projects,<sup>194</sup> as it would be unfeasible to refer to every single project being developed by the Panamanian State in a given year.

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<sup>189</sup> Addendum No. 1 to Contract No. 093-12 dated Apr. 16, 2013 (C-0167), pp. 3-4.

<sup>190</sup> Addendum No. 1 to Contract No. 093-12 dated April 16, 2013 (C-0167), pp. 1-2.

<sup>191</sup> Addendum No. 1 to Contract No. 093-12 dated April 16, 2013 (C-0167), p. 3.

<sup>192</sup> Addendum No. 1 to Contract No. 093-12 dated April 16, 2013 (C-0167), pp. 2-4.

<sup>193</sup> Claimants' Memorial ¶ 79.

<sup>194</sup> *See generally* 2015 Budget presented by Panama's National Assembly dated Sept. 8, 2014 (C-0067-Resubmitted).

93. The National Assembly, in fact, did assign a budget for the Ciudad de las Artes Project for 2015.<sup>195</sup> While 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: INAC requested and received additional funds during the first few months of 2015 since the 2015 budget initially allocated to INAC was not sufficient to pay the amount owed to Omega's bank for the approved CPPs it had purchased from Omega (an issue which is further discussed below).<sup>196</sup>

94. Addendum No. 1 was endorsed by the Comptroller General on April 16, 2013. INAC then issued the second and definitive notice to proceed on April 22, 2013,<sup>197</sup> and work on the Ciudad de las Artes Project began thereafter.

### c. Omega's Default and Abandonment of the Project

95. INAC engaged Sosa Arquitectos Urbanistas Consultores, S.A. ("**Sosa**"), a construction project management firm, to act as an inspector on the Ciudad de las Artes Project. Sosa's main role was to supervise the project on behalf of INAC and ensure that Omega's construction works were adequate, met the required standards, and complied with the Ciudad de las Artes Contract.<sup>198</sup>

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<sup>195</sup> In Panama, government institutions submit draft budgets to the MEF, which then makes a recommendation to the National Assembly. The National Assembly then allocates budgets based on the MEF's recommendations. On April 30, 2014, INAC presented its Draft Budget for 2015 to the MEF, which included a request for the Ciudad de las Artes Project's full price (US\$ 54,628,000). *See* INAC Draft Budget for the Fiscal Year 2015 dated Apr. 30, 2014 (**R-0036**), p. 7. The MEF subsequently recommended US\$ 14,679,000 for INAC's capital investments, of which US\$ 10 million were for the Ciudad de las Artes Project. *See* Ministry of Economy and Finance, National Budget Direction, Monthly Assignment of Expenditure Budget, 2015 (**R-0037**), p. 3. The National Assembly ultimately allocated the full amount that the MEF recommended for INAC's capital investments (US\$ 14,679,000), as reflected in the National Assembly's budget for 2015. *See* 2015 Budget presented by Panama's National Assembly dated Sept. 8, 2014 (**C-0067-Resubmitted**), pp. 30, 33, 37.

<sup>196</sup> *See* Letter from INAC to the MEF dated Mar. 3, 2015 (**R-0038**); 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**).

<sup>197</sup> Notice to Proceed for Contract No. 093-12 dated Apr. 22, 2013 (**C-0150**).

<sup>198</sup> *See* Contract No. 049-13 between INAC and Sosa dated Feb. 7, 2013 (**R-0041**).

96. In early August 2014, Sosa began warning INAC of serious deficiencies in Omega's work and performance. The first of these warnings came on August 4, 2014, when Sosa informed INAC of the following:

[. . .] we have seen a significant reduction in the Project's workforce and no progress whatsoever on the Dance, Parking Lots and Auditorium Buildings [. . .]

We have formally requested the Contractor to inform us why this situation came to be and if there are any sort of issues with the subcontractor, Constructora ARCO, as we have noticed that a lot of workers have been fired and equipment is being returned. So far we have not received a formal response from the Omega Consortium. The situation is alarming given that productivity on the project is low, and the project is being significantly delayed.

The Project's Request for Proposals, which forms an integral part of the Construction Contract, provides at page 59 that one of the grounds for default is: "*Not having enough personnel required to perform the works in a satisfactory manner within the specified timeframe*", which is why we recommend that INAC meet with the General Contractor immediately so that the latter may explain the project's ongoing situation and the actions that will be taken to remedy the ensuing delays.<sup>199</sup>

97. Approximately one week later, in a letter to Omega dated August 12, 2014, Sosa reiterated its "enormous concern due to the significant reduction in the works on the Dance, Auditorium and Parking Lot Buildings, and generally on the rest of the Project."<sup>200</sup> Furthermore, Sosa requested Omega to clarify the status of its main subcontractor, Arco, given that Sosa understood that Arco would no longer be working on the project.<sup>201</sup> Omega did not respond to this letter.

98. On September 2, 2014, Sosa reported that only 38 workers were on site that day and requested that Omega clarify when the normal pace of the construction works would resume.

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<sup>199</sup> Letter from Sosa to INAC dated Aug. 4, 2014 (R-0042).

<sup>200</sup> Letter from Sosa to Omega dated Aug. 12, 2014 (R-0043).

<sup>201</sup> Letter from Sosa to Omega dated Aug. 12, 2014 (R-0043).

Sosa also reminded Omega that it was in breach of Clause 45(7) of the Ciudad de las Artes Contract by not having sufficient personnel to perform the required works.<sup>202</sup>

99. Omega's response to these complaints was defensive and unsatisfactory. On September 5, 2014, Omega responded to Sosa's letter of September 2, 2014, arguing that its workforce reduction and diminishing productivity levels were a "direct consequence of the administrative measures that we have been forced to take due to the lack of answers and the delays with respect to the [CPPs] submitted to date [ . . . ] At the moment, we are owed [REDACTED] [ . . . ]."<sup>203</sup> Omega further denied breaching Clause 45(7) of the contract, noting that the "current workforce, equipment and machinery levels on the site are in accordance with the revised and established work plan which we find adequate based on the conditions and progress on the project."<sup>204</sup> As further explained below, Omega repeatedly tried to excuse its poor performance by claiming a lack of funds. This excuse, however, was inconsistent with the facts, as Omega had been provided with a 20% advance payment and, even today, has a positive balance vis-à-vis INAC.

100. Additional issues continued to surface with Omega's performance. For example, on October 8, 2014, Sosa reprimanded Omega for working on the Music Building without Sosa's prior authorization and deviating from the project's layouts.<sup>205</sup> Later that month, on October 28, 2014, Sosa criticized Omega for not replacing materials used to construct a beam in the Theatre Building, as Sosa had expressly requested. The materials used by Omega to construct the beam were highly deteriorated, thereby increasing the chance that the beam would fail and collapse. According to Sosa, Omega's failure to replace the deteriorated materials represented "not only a risk for the preparation of that element, but puts the lives of everyone working there at risk."<sup>206</sup> Once Sosa insisted that replacing the materials was "not negotiable," Omega replied that it understood that the materials it had used were appropriate and that "any contingency is our

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<sup>202</sup> Letter from Sosa to Omega dated Sept. 2, 2014 (R-0044).

<sup>203</sup> Letter from Omega to Sosa dated Sept. 5, 2014 (R-0045).

<sup>204</sup> Letter from Omega to Sosa dated Sept. 5, 2014 (R-0045).

<sup>205</sup> Letter from Sosa to Omega dated Oct. 8, 2014 (R-0046).

<sup>206</sup> Email chain between Sosa and Omega dated Oct. 28, 2014 (R-0047).

responsibility and we will repair any element that so requires.”<sup>207</sup> A few days later, on October 31, 2014, Sosa further complained that Omega’s concrete pouring in a seismic beam in the Music Building had undergone certain changes and had been performed without Sosa’s authorization, which was in breach of the Ciudad de las Artes Contract.<sup>208</sup>

101. Sosa continued to alert both INAC and Omega of Omega’s diminishing workforce and low productivity levels. On October 31, 2014, Sosa again wrote to Omega noting that only 61 workers were on site that day, and expressing “concern due to the significant decrease in the project’s progress since the departure of [Arco] at the end of August this year.”<sup>209</sup> Then, on November 11, 2014, Sosa informed INAC that it had further identified a significant decrease in Omega’s workforce, once again characterizing the situation as “alarming”.<sup>210</sup>

102. During its inspection of the site on November 21, 2014, Sosa became aware that Omega had removed all of its personnel and had suspended the works in their entirety. By that date, Omega had completely abandoned the Ciudad de las Artes Project without INAC’s or Sosa’s authorization.<sup>211</sup>

103. As noted above, Omega’s excuse for its low productivity levels and diminished workforce was that INAC stopped approving CPPs starting in mid-2014, and that therefore Omega was not able to collect those partial disbursements from its bank. While certain CPPs were not approved by INAC, this in no way should have affected the quality and progress of Omega’s work given that, as explained below, Omega was consistently and extensively over-funded thanks to the CPPs INAC had already approved, which Omega assigned to its bank.

104. 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. This included CPP No. 1,

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<sup>207</sup> Email chain between Sosa and Omega dated Oct. 28, 2014 (**R-0047**).

<sup>208</sup> Letter SA-CDA-116-14 from Sosa to Omega dated Oct. 31, 2014 (**R-0107**). *See also* Letter from Sosa to INAC dated Oct. 27, 2014 (**R-0049**).

<sup>209</sup> Letter SA-CDA-117-14 from Sosa to Omega dated Oct. 31, 2014 (**R-0048**).

<sup>210</sup> Letter from Sosa to INAC dated Nov. 11, 2014 (**R-0050**).

<sup>211</sup> *See* Resolution No. 391-14 DG-DAJ dated Dec. 23, 2014 (**C-0044**), p. 4.

which authorized the 20% advance payment to Omega. In total, Omega was paid [REDACTED] [REDACTED] by virtue of INAC's approval of CPPs 1 to 12,<sup>212</sup> and an [REDACTED] by way of ITBMS payments for CPPs 1 to 9.<sup>213</sup> This represented over 32% of the total contract price. By contrast, as of August 31, 2014,<sup>214</sup> Omega had completed only 24% of the project.<sup>215</sup> Thus, Omega was overpaid at the time it was complaining it did not have adequate funds to work on the project.

105. CPPs 13 to 20 submitted by Omega were not approved. As routinely done by Panamanian government institutions when a new administration takes office, INAC undertook a review of all of the ongoing projects begun under the previous administration, and was concerned about the poor and inadequate performance shown by Omega to date. Indeed, INAC's senior management was quite concerned by Sosa's correspondence, which showed serious problems with Omega's work starting in the first week of August 2014.

106. INAC's rejection of those CPPs should not have affected Omega's performance, as Omega was at all times over-funded. As noted above, Omega collected from its bank [REDACTED] [REDACTED] as the result of INAC's approval of CPPs 1 to 12, and an additional [REDACTED] from INAC by way of ITBMS payments for CPPs 1 to 9, [REDACTED]

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<sup>212</sup> See CPP No.1 dated May 16, 2013 (C-0168); CPP No. 2 dated Aug. 7, 2013 (C-0286), pp. 13, 50; CPP No. 3 dated Aug. 7, 2013 (C-0286), pp. 17, 55; CPP No. 4 dated Oct. 31, 2013 (C-0286), pp. 3, 34; CPP No. 5 dated Dec. 3, 2013 (C-0286), pp. 5, 37; CPP No. 6 dated Dec. 11, 2013 (C-0286), pp. 21, 61; CPP No. 7 dated Dec. 11, 2013 (C-0286), pp. 7, 40; CPP No. 8 dated Feb. 10, 2014 (C-0286), pp. 9, 44; CPP No. 9 dated February 10, 2014 (C-0286), pp. 25, 67; CPP No. 10 dated Mar. 14, 2014 (C-0286), pp. 27, 70; CPP No. 11 dated Apr. 14, 2014 (C-0286), pp. 29, 73; CPP No. 12 dated May 16, 2014 (C-0286), pp. 11, 47.

<sup>213</sup> See ITBMS Check dated May 14, 2014 (C-0239); Letter from Sosa to INAC dated Dec. 10, 2014 (R-0051), p. 2 (noting that Omega had acknowledged to Sosa that INAC had made the ITBMS payments for CPPs 1 to 9). In Panama, State entities are obligated to retain 50% of the value of the ITBMS for each invoice or equivalent document submitted by a contractor, with the remaining 50% to be paid to the contractor. For the norm applicable at the time of the Ciudad de las Artes Contract, see MEF Executive Decree No. 91 dated Aug. 25, 2010 (R-0052), Article 14 (which modified Article 19 of MEF Executive Decree No. 84 dated August 26, 2005).

<sup>214</sup> That is, the period covered through CPP No. 17.

<sup>215</sup> Letter from Sosa to INAC dated Dec. 10, 2014 (R-0051).

**d. INAC's Termination of the Contract**

107. As a result of Omega's default and abandonment of the Ciudad de las Artes Project, and given that Omega's completion bond was due to expire on January 27, 2015 (the project's expected date of completion), INAC terminated the Ciudad de las Artes Contract by Resolution No. 391-14 DG/DAJ of December 23, 2014 (the "**Termination Resolution**").<sup>216</sup> On December 26, 2014, INAC informed ASSA of the contract's termination,<sup>217</sup> and on February 12, 2015, INAC officially informed ASSA that it had decided to call Omega's completion bond.<sup>218</sup>

108. The Claimants allege that the contract was improperly terminated by INAC, that Omega was never given proper notice of its breaches of contract, and that Omega was not properly notified of the Termination Resolution.<sup>219</sup> Each of these complaints is commercial in nature and, as explained below, each is incorrect.

109. First, as noted above, INAC terminated the Ciudad de las Artes Contract based on Omega's default and abandonment of the project. Omega was repeatedly informed by Sosa that its performance was deficient and that it was in breach of its contractual obligations. Omega, however, failed to remedy any of these breaches – including those that presented significant health and safety issues. Rather, Omega tried to shift blame for its shortcomings to INAC and focused on the non-approval of certain CPPs. Omega's mantra, however, ignored the fact that the pay it had already received outpaced its performance on the project.

110. Second, Omega was properly notified of the Termination Resolution. INAC followed the general administrative procedure under Panamanian law,<sup>220</sup> which provides that resolutions

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<sup>216</sup> 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.

<sup>217</sup> Letter No. 364-14/D.A.J. from National Institute of Culture to ASSA dated Dec. 26, 2014 (**C-0379**).

<sup>218</sup> Letter No. 056/D.A.J. from INAC to ASSA dated Feb. 12, 2015 (**R-0097**).

<sup>219</sup> Claimants' Memorial ¶¶ 79, 109.

<sup>220</sup> See Law 38 of July 31, 2000 (**R-0053**), Arts. 89-91, 94.

should be notified by edict. INAC attempted to go beyond this requirement by hand delivering the Termination Resolution to Omega's offices in Panama City. Omega, however, had abandoned its offices and there were no personnel present to receive the resolution. INAC, therefore, posted Edict No. 001 notifying Omega of the Termination Resolution on the front door of Omega's office on January 27, 2015, as provided for in Panamanian law.<sup>221</sup>

111. Third, the Claimants acknowledge that they were informed and fully aware of the Termination Resolution as early as December 29, 2014, weeks before they were officially notified of the resolution by edict.<sup>222</sup> The Claimants, therefore, cannot argue that they suffered any prejudice as a result of the means by which they were formally notified that the Ciudad de las Artes Contract had been terminated.

112. Fourth, Omega did not challenge the Termination Resolution under Panamanian law, as it had the right to do. Rather, on March 25, 2015, Omega's outside legal counsel, Icaza, González-Ruíz & Alemán ("**IGRA**"), requested INAC to certify that the Termination Resolution was duly executed, which INAC acceded to.<sup>223</sup> IGRA then filed an application for administrative review (*recurso de revisión administrativa*) under Panama's general administrative procedure and requested that INAC's Board of Directors overturn the Termination Resolution.<sup>224</sup> IGRA's application was denied by INAC's Board of Directors on July 19, 2016.<sup>225</sup> Omega was notified of the denial on August 12, 2016.<sup>226</sup> Omega had five days from the date it was notified of the denial to challenge the Termination Resolution before Panama's Administrative Tribunal for Public Procurement.<sup>227</sup> Omega chose not to exercise this procedural right, allowing the Termination Resolution to become final.<sup>228</sup>

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<sup>221</sup> Edict No. 001 of the National Institute of Culture (**C-0243**). *See also* Chen Statement, ¶¶ 15-17.

<sup>222</sup> Claimants' Memorial, ¶ 109.

<sup>223</sup> INAC certification requested by IGRA dated Mar. 25, 2015 (**R-0054**).

<sup>224</sup> Omega's Application for Administrative Review dated Mar. 26, 2015 (**R-0055**).

<sup>225</sup> Resolution No. 025-16 J.D. dated July 19, 2016 (**R-0056**).

<sup>226</sup> *See* IGRA notification of Resolution No. 025-16 J.D, dated Aug. 12, 2016 (**R-0098**).

<sup>227</sup> *See* Law 22 of 2006 (**R-0026**), Art. 131.

<sup>228</sup> *See* Law 38 of July 31, 2000 (**R-0053**), Art. 46. *See also* Chen Statement, ¶¶ 18-19.

113. On March 4, 2015, soon after the Ciudad de las Artes Contract had been terminated, ASSA (the issuer of Omega's performance guarantee) acknowledged the contract's termination and INAC's decision to draw on Omega's completion bond. Based on this, ASSA elected to exercise its right under the bond to replace Omega and to assume Omega's obligations to complete the Ciudad de las Artes Project.<sup>229</sup>

114. On August 31, 2018, ASSA and INAC executed (i) an agreement by which ASSA officially replaced Omega under the contract,<sup>230</sup> and (ii) Addendum No. 2, by which they amended certain clauses of the contract.<sup>231</sup>

115. ASSA has since entered into a subcontract with a new construction company to restart work on the Ciudad de las Artes Project. On October 8, 2018, INAC issued a notice for the continuation of the works, and work on the project has now resumed, under the control of ASSA and without participation by Omega.<sup>232</sup>

**e. Omega's Outstanding Financial Debt to INAC**

116. Omega collected [REDACTED] from its bank by way of the advance payment in CPP No. 1.<sup>233</sup> INAC, however, [REDACTED]. This means that Omega owes INAC [REDACTED] from the advance payment.<sup>234</sup>

117. In addition, Omega was paid [REDACTED] in CPPs 2 to 12 for work performed through March 31, 2014. Even after subtracting the amounts in CPPs 13 to 20

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<sup>229</sup> Letter from ASSA to INAC dated Mar. 4, 2015 (**R-0057**).

<sup>230</sup> Agreement between INAC and ASSA to replace the contractor dated Aug. 31, 2018 (**R-0058**).

<sup>231</sup> Addendum No. 2 to the Ciudad de las Artes Contract dated Aug. 31, 2018 (**R-0059**).

<sup>232</sup> Chen Statement, ¶ 22.

<sup>233</sup> See CPP No.1 dated May 16, 2013 (**C-0168**).

<sup>234</sup> See CPP No. 2 dated Aug. 7, 2013 (**C-0286**), pp. 13, 50; CPP No. 3 dated Aug. 7, 2013 (**C-0286**), pp. 17, 55; CPP No. 4 dated Oct. 31, 2013 (**C-0286**), pp. 3, 34; CPP No. 5 dated Dec. 3, 2013 (**C-0286**), pp. 5, 37; CPP No. 6 dated Dec. 11, 2013 (**C-0286**), pp. 21, 61; CPP No. 7 dated Dec. 11, 2013 (**C-0286**), pp. 7, 40; CPP No. 8 dated Feb. 10, 2014 (**C-0286**), pp. 9, 44; CPP No. 9 dated Feb. 10, 2014 (**C-0286**), pp. 25, 67; CPP No. 10 dated Mar. 14, 2014 (**C-0286**), pp. 27, 70; CPP No. 11 dated Apr. 14, 2014 (**C-0286**), pp. 29, 73; CPP No. 12 dated May 16, 2014 (**C-0286**), pp. 11, 47.

that Omega did not collect [REDACTED]), Omega continues to owe INAC a grand total of [REDACTED]

#### **4. THE MINISTRY OF THE PRESIDENCY MERCADO PÚBLICO DE COLÓN PROJECT**

118. In August 2011, the Ministry of the Presidency issued a Request for Proposals for the construction and furnishing of a public market in the city of Colón, on the Atlantic coast of Panama (the “**Ministry of the Presidency Project**” or “**Colón Public Market**”).<sup>235</sup> The Colón Public Market was to be a large, modern public market where the people of Colón would be able to purchase a variety of food products, and it was conceived to replace the outdated existing facilities in Colón.<sup>236</sup>

##### **a. The Ministry of the Presidency Contract**

119. The Ministry of the Presidency Project was awarded to Omega on October 10, 2011.<sup>237</sup> Omega and the Ministry of the Presidency executed the contract on August 17, 2012 (the “**Ministry of the Presidency Contract**”), and it was approved by the Comptroller General the same day.<sup>238</sup>

120. Pursuant to the Ministry of the Presidency Contract, the project’s total price was set at [REDACTED]. Omega was given an advanced payment of [REDACTED] 10% of the total contract price.<sup>239</sup> Subsequent payments were to be invoiced by Omega together with its

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<sup>235</sup> The Ministry of the Presidency was created in 1958 and is tasked with (i) coordinating the functions of the other ministries, and (ii) handling communication between the President and the Council of Ministers (*Consejo de Gabinete*) on the one hand, and all other Panamanian State institutions on the other. *See* Law 15 of Jan. 28, 1958 creating the Ministry of the Presidency of the Republic (**R-0060**).

<sup>236</sup> *See* Request for Proposals No. 2011-0-03-0-03-AV-006870 “Construcción y Equipamiento del Mercado Público de la Ciudad de Colón, Provincia de Colón” dated 2011 (**C-0032**).

<sup>237</sup> Resolution of Adjudication No. 124-2011 dated Oct. 10, 2011 (**C-0033**).

<sup>238</sup> Contract No. 043 (2012) dated Aug. 17, 2012 (**C-0034**).

<sup>239</sup> Contract No. 043 (2012) dated Aug. 17, 2012 (**C-0034**), Clause 68. *See also* Claimants’ Memorial, ¶ 78.

progress reports.<sup>240</sup> In accordance with the contract, Omega would have 15 months to complete the project from the date of the notice to proceed.<sup>241</sup>

**b. Commencement and Subsequent Suspension of the Project**

121. The Ministry of the Presidency issued a notice to proceed on September 7, 2012.<sup>242</sup> On December 12, 2012, however, prior to the commencement of construction, the Ministry of the Presidency officially suspended the Colón Public Market project. As explained by the Ministry in its suspension letter to Omega, the suspension was necessary because the Ministry had been unable to remove and relocate the vendors occupying the old market comprising the construction site for the new Colón Public Market.<sup>243</sup>

122. The Ministry of the Presidency based its decision to suspend the Colón Public Market on Clause 72 of the Ministry of the Presidency Contract,<sup>244</sup> which provides that:

THE GOVERNMENT may, by written notice to THE CONTRACTOR, order THE CONTRACTOR to suspend performance of any or all of its obligations according to THE CONTRACT for the time period that THE GOVERNMENT determines necessary or desirable at its own convenience. This notice shall specify the obligation whose performance must be suspended, the effective date and the reasons for it.

THE CONTRACTOR shall then suspend performance of said obligation, except for those that are necessary for the care and preservation of the Works, until THE GOVERNMENT orders in writing that said performance is to be resumed.<sup>245</sup>

123. Even though the project had been suspended, the Ministry of the Presidency asked Omega to continue processing three specific sets of documents related to the project: (i) the

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<sup>240</sup> Contract No. 043 (2012) dated Aug. 17, 2012 (C-0034), Clause 68.

<sup>241</sup> Contract No. 043 (2012) dated Aug. 17, 2012 (C-0034), Clause 6.

<sup>242</sup> Notice to Proceed for Contract No. 043 (2012) dated Sept. 7, 2012 (C-0148).

<sup>243</sup> Letter from the Ministry of Presidency to the Omega Consortium dated Dec. 13, 2012 (C-0363).

<sup>244</sup> See Letter from the Ministry of Presidency to the Omega Consortium dated Dec. 13, 2012 (C-0363), p. 2.

<sup>245</sup> Contract No. 043 (2012) dated Aug. 17, 2012 (C-0034), Clause 72.

Security and Health Manual, (ii) the Environmental Impact Assessment, and (iii) the Quality Control Manual and related documents.<sup>246</sup>

124. The Ministry of the Presidency Project has not been re-activated. As a result, Omega never commenced major work, and never presented any invoices for this project.<sup>247</sup>

**c. Omega Continues to Retain the Advance Payment**

125. As noted above, Omega received an advance payment of [REDACTED] from the Ministry of the Presidency, even though it performed little work on the Colón Public Market project. Omega still retains the full amount.

126. Omega complains that “the Government has not reimbursed the Omega Consortium for the expenses it has incurred as a direct result of being forced to keep the project alive during the suspension.”<sup>248</sup> In June 2015, Omega quantified and claimed these expenses in the amount of [REDACTED]<sup>249</sup> Even assuming that these expenses have been correctly calculated, when off-set against the advance payment Omega received from the Ministry of the Presidency, Omega still owes the Ministry [REDACTED]

127. The fact that the Ministry of the Presidency Project was even included as part of the Claimants’ case is surprising. The facts clearly demonstrate that (i) the contract was suspended lawfully, and remained suspended through the Martinelli administration and into the Varela administration, (ii) Omega did not perform or invoice any work on this project, and (iii) the Ministry of the Presidency paid Omega a significant advance payment which Omega continues to retain, and which far exceeds any expenses that Omega may have incurred as a result of the Ministry’s suspension of the project.

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<sup>246</sup> Letter from the Ministry of Presidency to the Omega Consortium dated Dec. 13, 2012 (C-0363), p. 1.

<sup>247</sup> See Claimants’ Memorial, ¶ 45.

<sup>248</sup> Claimants’ Memorial, ¶ 78.

<sup>249</sup> 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. There, Omega claimed (i) [REDACTED] for the processing of a new Environmental Impact Assessment, and (ii) [REDACTED] for administrative expenses during a number of months.

## 5. THE MUNICIPALITY OF COLÓN PROJECT

128. In November 2012, the Municipality of Colón issued a Request for Proposals for the design, construction and furnishing of a new municipal palace to house the city's government (the "**Municipality of Colón Project**" or "**Colón Municipal Palace**").<sup>250</sup> The project was awarded to Omega on December 5, 2012,<sup>251</sup> and the contract was executed by the Municipality of Colón and Omega on January 24, 2013 (the "**Municipality of Colón Contract**").<sup>252</sup> The Municipality of Colón Contract was endorsed by the Comptroller General's office on July 2, 2013,<sup>253</sup> and the Municipality issued a notice to proceed on July 31, 2013.<sup>254</sup>

### a. The Municipality of Colón Contract

129. Pursuant to the Municipality of Colón Contract, Omega was to complete the project within a 24-month period and would be paid [REDACTED].<sup>255</sup> As stipulated in the contract, Omega was to receive an advance payment worth 30% of the contract's price, after which Omega would submit monthly payment applications from which the Municipality would deduct 30% until the advance payment had been fully recouped. Omega's payment applications were subject to approval from the Municipality of Colón and the Comptroller General's office.<sup>256</sup>

130. Construction on the Municipality of Colón Project never began due to a decision to change the project site.<sup>257</sup> Changes such as this are explicitly foreseen and permitted by the Municipality of Colón Contract.<sup>258</sup>

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<sup>250</sup> 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).

<sup>251</sup> Resolution No. 132 from the Municipality of Colón dated Dec. 5, 2012 (C-0050).

<sup>252</sup> Contract No. 01-13 dated Jan. 24, 2013 (C-0051).

<sup>253</sup> Contract No. 01-13 dated Jan. 24, 2013 (C-0051).

<sup>254</sup> Notice to Proceed for Contract 01-13 (C-0152).

<sup>255</sup> Contract No. 01-13 dated Jan. 24, 2013 (C-0051), Clauses 12 & 13.

<sup>256</sup> Contract No. 01-13 dated Jan. 24, 2013 (C-0051), Clause 13.

<sup>257</sup> See Claimants' Memorial, ¶ 83; Letter from the Omega Consortium to the Mayor of the Municipality of Colón dated Oct. 2, 2014 (C-0178).

131. After collecting the advance payment, Omega submitted a total of four payment applications for certain design and other work it had performed on the project.<sup>259</sup> The first and second of these payment applications were paid by the Municipality of Colón; however, the third and fourth payment applications were not.<sup>260</sup> As explained below, the advance payment that Omega received far exceeds the value of Omega’s unpaid payment applications, meaning that Omega continues to owe the Municipality of Colón in excess [REDACTED]

**b. The Claimants Acknowledge a Financial Debt to the Municipality in Relation to this Contract**

132. As Mr. McKinnon notes in his report, Omega received a [REDACTED] advance payment on the Municipality of Colón Project. After deducting 30% of the value of each of the payment applications submitted by Omega, the balance of the advance payment amounts [REDACTED] favor of the Municipality. Omega’s payment applications that went unpaid, on the other hand, amount to [REDACTED]. As acknowledged by Mr. McKinnon, this means that Omega continues to owe the Municipality a total of [REDACTED].<sup>261</sup>

133. However, Mr. McKinnon arrives at a further conclusion worthy of attention. According to Mr. McKinnon, had the Municipality of Colón Project been completed, Omega would have incurred losses amounting to a staggering [REDACTED].<sup>262</sup> It is surprising that the Claimants even include the Municipality of Colón Project as part of their claim in this arbitration.

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<sup>258</sup> See Contract No. 01-13 dated Jan. 24, 2013 (C-0051), Clause 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 [ . . . ]”).

<sup>259</sup> See Payment Applications for Contract No. 01-13 (C-0298).

<sup>260</sup> See Checks for Contract No. 01-13 (C-0256); McKinnon Report, Annex 1, p. 22, Table 13.

<sup>261</sup> See McKinnon Report, Annex 1, p. 1, Table 1, columns H and K. See also McKinnon Report, Annex 1, p. 22, Table 13.

<sup>262</sup> See McKinnon Report, p. 6, Table 1, columns D and E; McKinnon Report, Annex 2, p. 1.

## 6. THE MUNICIPALITY OF PANAMA PROJECTS

134. In September 2013, Omega entered into a contract with the Municipality of Panama (the “**Municipality of Panama Contract**”) for the design, construction and furnishing of two public markets, the Pacora Market and the Juan Díaz Market (the “**Panama Markets**”). The Panama Markets were to be open-air plazas with enclosed stands where local vendors would sell their products to the people living in the towns (*corregimientos*) of Pacora and Juan Díaz, which are located within the Municipality of Panama. These markets would include vending plazas, loading docks, trash disposal areas, restrooms, refrigeration facilities, and administrative offices. Each of the markets would comprise approximately 800 square meters.<sup>263</sup>

135. Pursuant to the Municipality of Panama Contract, Omega was to design, construct, and furnish the Panama Markets for a total price of [REDACTED].<sup>264</sup> The contract provided that Omega would receive an advance payment of 20% of the contract’s price ([REDACTED]) after which Omega would submit invoices with its monthly progress reports for both of the Panama Markets collectively, which the Municipality would pay when and if each invoice was approved by the Municipality and the Comptroller General.<sup>265</sup>

136. Omega was given 300 days from the date of the notice to proceed to complete the Pacora Market, and 360 days to complete the Juan Díaz Market.<sup>266</sup> The contract was approved by the Comptroller General on September 12, 2013,<sup>267</sup> and the Municipality issued the notice to proceed on September 18, 2013.<sup>268</sup>

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<sup>263</sup> Witness Statement of Eric Díaz dated Jan. 4, 2019 (“**Díaz Statement**”), ¶ 8.

<sup>264</sup> Contract No. 857-2013 dated Sept. 12, 2013 (**C-0056-Resubmitted**), Cls. 1 & 8.

<sup>265</sup> Contract No. 857-2013 dated Sept. 12, 2013 (**C-0056-Resubmitted**), Cl. 8; Request for Proposals No. 2013-5-76-0-08-AV-004644 dated Mar. 2013 (**R-0099**), pp. 19-20, Ch. II, Cl. 11.

<sup>266</sup> Contract No. 857-2013 dated Sept. 12, 2013 (**C-0056-Resubmitted**), Cl. 4. The translation of this exhibit submitted by the Claimants incorrectly states that the term for delivery of the Juan Díaz Market was 365 days.

<sup>267</sup> Contract No. 857-2013 dated Sept. 12, 2013 (**C-0056-Resubmitted**).

<sup>268</sup> Notice to Proceed for Contract No. 857-2013 dated Sept. 18, 2013 (**C-0153**).

**a. Omega’s Design Flaws and Ensuing Difficulties in Approving Payments to Omega**

137. Pursuant to its obligation to design the Panama Markets, Omega was required to develop and present complete designs comprising, among other things, all of the necessary permits, certificates and technical studies.<sup>269</sup> As explained by Mr. Díaz – a legal advisor in the Municipality office who is well acquainted with the Panama Markets – Omega’s design of each of the Panama Markets was deficient and lacked some of the necessary permits and certificates.<sup>270</sup>

138. Omega’s design of the Pacora Market lacked the necessary soil use certificate from the Ministry of Housing. Without this certificate, the Municipality’s Directorate of Projects and Construction was unable to fully approve Omega’s design.<sup>271</sup> As discussed in Subsection (c) below, the Municipality went to great lengths to assist Omega in obtaining the soil use certificate, even though it was not contractually required to do so.

139. The Juan Díaz Market, on the other hand, was to be designed and constructed on a site where the neighboring land was not owned by the Municipality. As the market’s designer, Omega was required to find solutions to allow individuals to adequately access the market once it had been completed. One possible solution would have been for Omega to obtain a right of way (*servidumbre de tránsito*) from the Authority for Transit and Land Transportation. Omega, however, did not provide any solution to this issue as part of its design of the Juan Díaz Market. As with the Pacora Market, Omega’s failure to provide a solution meant that the design of the

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<sup>269</sup> See e.g., Contract No. 857-2013 dated Sept. 12, 2013 (**C-0056-Resubmitted**), Cl. 6 (“THE CONTRACTOR formally agrees to execute the services and supplies referred to herein [ . . . ]”); *Id.*, Cl. 11 (“THE CONTRACTOR fully and expressly exonerates and releases THE MUNICIPALITY regarding third parties on all civil, employment, tax or any other type of liability that may arise based on the execution of this contract”); Request for Proposals No. 2013-5-76-0-08-AV-004644 dated Mar. 2013 (**R-0099**), p. 10, Ch. II, Cl. 2 (“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”); *Id.*, p. 32, Ch. III, Introduction (stating that the contractor is obligated to “provide all the [ . . . ] paperwork” and to develop “complete” designs); *Id.*, p. 33, Ch. III, Cl. 1 (“The total scope of the works consists of, but is not limited exclusively to, the following points or necessary works [ . . . ]: -Preparation of the design and layout for the market building [ . . . ] -Preparation and approval of the technical studies regarding: (a) Environmental impact [ . . . ] (b) Soil [ . . . ]”).

<sup>270</sup> See generally Díaz Statement, Section IV.

<sup>271</sup> See Díaz Statement ¶ 12.

Juan Díaz Market could not be approved in its entirety by the Municipality’s Directorate of Projects and Construction.<sup>272</sup>

140. Since Omega’s designs were not capable of being fully approved, the Comptroller General’s office, in turn, could not endorse the payment applications submitted by Omega. This situation was correctable if Omega took the steps necessary to secure the necessary certificates and correct its design issues. Without such corrective measures, Omega’s payment applications on the Municipality of Panama Contract were not approved – including those that Omega submitted and were processed during the Martinelli administration.<sup>273</sup>

**b. The Municipality’s Suspension of the Juan Díaz Market**

141. In July 2014, the Mayor of Panama City instructed the Municipality to review all public works contracts signed by the Municipality during the prior administration to ensure that they were being properly executed.<sup>274</sup> “[T]his is routine practice in State institutions throughout Panama during transition periods between administrations”<sup>275</sup> and is intended to give the incoming administration insight into the state of public works projects.

142. Based on this review, it was determined that the Juan Díaz Market was not commercially viable due to Omega’s flawed design and its failure to provide solutions for access to the market once it had been completed. As such, on September 2, 2014, the Municipality wrote to Omega requesting that it suspend work on the Juan Díaz Market so that the Municipality could perform a further review of that project.<sup>276</sup>

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<sup>272</sup> See Díaz Statement ¶ 13.

<sup>273</sup> See Díaz Statement ¶ 14.

<sup>274</sup> Díaz Statement ¶ 15.

<sup>275</sup> Díaz Statement, ¶ 15.

<sup>276</sup> Letter No. S.G.-087-A from the Municipality of Panama to the Omega Consortium dated Sept. 2, 2014 (C-0058-Resubmitted).

143. Omega duly complied with the Municipality's request, informing the Municipality on September 5, 2014 that work on the Juan Díaz Market would be suspended and staff on the project would be demobilized.<sup>277</sup>

**c. The Municipality's Efforts to Assist Omega with Respect to the Pacora Market**

144. Once work on the Juan Díaz Market had been suspended, the Municipality and Omega continued working together with a view to completing the Pacora Market.

145. The Claimants allege that the Municipality "continuously ignored" Omega's requests for assistance in obtaining the soil use certificate from the Ministry of Housing that was required for the completion of the Pacora Market.<sup>278</sup> The reality is that the Municipality cooperated fully with Omega in relation to the soil use certificate and the Pacora Market more generally, going above and beyond the level of support contractually required.<sup>279</sup>

146. As testified by Mr. Díaz, the Municipality of Panama is mindful that the Ministry of Housing can take several months to process certificates or permits.<sup>280</sup> In an effort to speed this process along, the Municipality's Directorate of Projects and Construction follows up with the Ministry of Housing on a weekly basis regarding all pending certificates and permits for all of the projects being developed by the Municipality. Omega's soil use certificate was included in those weekly follow-up efforts.<sup>281</sup> As explained below, however, the Municipality's efforts to assist Omega went much further.

147. The request for the soil use certificate was filed at the Ministry of Housing in June 2014.<sup>282</sup> On July 28, 2014, the Ministry of Housing wrote to the Municipality noting that the

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<sup>277</sup> Letter No. MAP-5-09-14 from the Omega Consortium to Panama's Office of the Mayor dated Sept. 5, 2014 (C-0071-Resubmitted).

<sup>278</sup> Claimants' Memorial ¶ 73. *See also* Rivera Statement ¶ 75.

<sup>279</sup> *See generally* Díaz Statement, Section VI.

<sup>280</sup> Díaz Statement ¶ 20.

<sup>281</sup> Díaz Statement ¶ 20.

<sup>282</sup> Letter from the Municipality of Panama to the Ministry of Housing dated June 19, 2014 (R-0100).

certificate would need to be processed using a different procedure (*trámite para Esquema de Ordenamiento Territorial*) than the one originally requested.<sup>283</sup> 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.<sup>284</sup>

148. On September 5, 2014, Omega wrote to the Municipality requesting assistance in the processing of the certificate, which had been with the Ministry of Housing for processing since June 2014.<sup>285</sup> As explained above, by then, the Municipality was already engaged in discussions with the Ministry with a view to expediting the processing of the certificate. These efforts continued after Omega's September 5, 2014 request for assistance.

149. On October 13, 2014, the Mayor of Panama City himself intervened in the discussions between the Municipality and the Ministry of Housing, reiterating the Municipality's request that the Ministry approve the certificate.<sup>286</sup> The Ministry of Housing was still not convinced, and on October 17, 2014, it decided to convene a meeting with the residents and land-owners of the areas close to the Pacora Market site to consider and discuss the soil use certificate request. To this end, the Ministry requested that the Municipality (i) publish a notice convening the meeting in a national newspaper, and (ii) attend the meeting to explain and substantiate the soil use certificate request before the attendees.<sup>287</sup> The Municipality duly convened and held the meeting,<sup>288</sup> and on July 7, 2015, the Ministry of Housing issued a resolution granting the soil use certificate.<sup>289</sup> As discussed below, however, by that date Omega had already abandoned the Pacora Market and the Municipality of Panama Contract.

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<sup>283</sup> Letter from the Ministry of Housing to the Municipality of Panama dated July 28, 2014 (**R-0101**).

<sup>284</sup> Letter from the Municipality of Panama to the Ministry of Housing dated Aug. 28, 2014 (**R-0102**).

<sup>285</sup> Letter No. MAP-5-09-14 from the Omega Consortium to Panama's Office of the Mayor dated Sept. 5, 2014 (**C-0071-Resubmitted**).

<sup>286</sup> Letter from the Mayor of Panama City to the Ministry of Housing dated Oct. 13, 2014 (**R-0103**).

<sup>287</sup> Letter from the Ministry of Housing to the Municipality of Panama dated Oct. 17, 2014 (**R-0104**).

<sup>288</sup> Letter from the Municipality of Panama to the Ministry of Housing dated Oct. 27, 2014 (**R-0105**).

<sup>289</sup> Resolution No. 412-2015 from the Ministry of Housing dated July 7, 2015 (**R-0106**).

150. In addition, the Municipality sought to deal with the Ministry of Housing's regular timeline for the issuance of certificates by working with Omega to extend the contract's term so that Omega could have an opportunity to complete the Pacora Market. Contractually, Omega was responsible for delays to the project relating to the receipt of permits or certificates.<sup>290</sup> Despite this, the Municipality was willing to give Omega a 239-day extension of time based largely (*i.e.*, 200 of the 239 days requested by Omega) on the slow receipt of the soil use certificate.<sup>291</sup> Thus, in September 2014, the Municipality began negotiating Addendum No. 2 to the contract to give Omega the time necessary to complete the Pacora Market.<sup>292</sup> Addendum No. 2 was agreed to in November 2014 and was sent to the Comptroller General's office for endorsement.<sup>293</sup>

151. The Municipality and Omega continued to hold discussions regarding the Pacora Market through the first few months of 2015. However, while Addendum No. 2 was pending endorsement by the Comptroller General, and despite the efforts the Municipality had expended to allow Omega to see the Pacora Market through to completion, by April 2015 Omega simply disappeared, abandoning the Panama Markets and the Municipality of Panama Contract.<sup>294</sup>

152. Overall, Omega made an insufficient amount of progress on the Panama Markets. On the Juan Díaz Market, Omega only reached approximately 54% progress by the date work on the market was suspended (September 2, 2014), even though it was to have been completed by September 15, 2014. On the Pacora Market, Omega only attained 73% progress by August 31, 2014, although this project was originally due to be completed by July 17, 2014.<sup>295</sup>

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<sup>290</sup> See *e.g.*, Contract No. 857-2013 dated Sept. 12, 2013 (**C-0056-Resubmitted**), Cl. 6; *Id.*, Cl. 11; Request for Proposals No. 2013-5-76-0-08-AV-004644 dated Mar. 2013 (**R-0099**), p. 10, Ch. II, Clause 2; *Id.*, p. 32, Ch. III, Introduction; *Id.*, p. 33, Ch. III, Cl. 1.

<sup>291</sup> Letter No. MUPA-5-09-14 from the Omega Consortium to City Hall dated Sept. 15, 2014 (**C-0235**).

<sup>292</sup> See Díaz Statement ¶ 25.

<sup>293</sup> Email chain between the Municipality of Panama and Omega dated Nov. 27, 2014 (**R-0061**). See also Díaz Statement ¶ 26.

<sup>294</sup> See Díaz Statement ¶ 27.

<sup>295</sup> See Resolution No. C-10-2017 dated Jan. 11, 2017 (**C-0234**), p. 3.

**d. The Municipality’s Termination of the Contract**

153. In August 2016, the Municipality of Panama notified Omega of its intent to terminate the Municipality of Panama Contract.<sup>296</sup> The resolution officially terminating the contract was signed in January 2017.<sup>297</sup>

154. The Claimants suggest that the Municipality terminated the contract in retaliation for the Claimants’ initiation of the present arbitral proceedings against the Republic.<sup>298</sup> That allegation is false. Mr. Díaz, who was directly involved in the termination of the Municipality of Panama Contract, has testified that the contract was terminated as part of the Mayor of Panama City’s broader initiative to reactivate the markets awarded during the previous administration that had been abandoned and left unfinished by the original contractors.<sup>299</sup> To do so, the prior contracts had to be terminated and reissued to new contractors. Omega’s projects were not the only ones that suffered this same fate. Two other markets, the Chilibre Market and the Pueblo Nuevo Market, which were begun by the Spanish construction company Oligarry, were also abandoned, with the result that their contracts were terminated and the projects retendered.<sup>300</sup>

155. The manner in which the Municipality of Panama Contract was terminated is not out of the ordinary – in fact, the Municipality often terminates contracts in thematic groups, and the period of time between the notification of intention to terminate and the termination itself varies, although it frequently extends several months.<sup>301</sup>

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<sup>296</sup> See Letter from City Hall for the District of Panama to the Omega Consortium dated Aug. 19, 2016 (C-0237); Díaz Statement ¶ 30.

<sup>297</sup> See Resolution No. C-10-2017 dated Jan. 11, 2017 (C-0234); Díaz Statement ¶ 31.

<sup>298</sup> See Claimants’ Memorial ¶¶ 73, 81-82. See also Rivera Statement ¶¶ 121-122.

<sup>299</sup> Díaz Statement ¶¶ 30-31.

<sup>300</sup> Díaz Statement ¶ 30.

<sup>301</sup> Díaz Statement ¶ 32.

### C. PANAMANIAN INVESTIGATIONS PROVE THAT THE CLAIMANTS ARE CORRUPT

156. The administration of Panamanian President Ricardo Martinelli suffered from corruption.<sup>302</sup> In July 2014, President Varela took office with a stated goal of reducing corruption within the country and prosecuting officials who benefitted from corrupt activities.<sup>303</sup>

157. Supreme Court Justice Alejandro Moncada Luna was one of the public officials from the Martinelli administration prosecuted for corruption. At the time of his prosecution, Justice Moncada Luna was the President of the Panamanian Supreme Court. In that role, Justice Moncada Luna both heard cases and served as the administrative head of the court, in which capacity he had the authority to award contracts and approve invoices for court projects.

158. In July 2014, the National Bar Association and the Pro Justice Citizens Alliance of Panama filed an ethical complaint against Justice Moncada Luna.<sup>304</sup> It was public knowledge that Justice Moncada Luna owned two luxury apartments valued at approximately US\$ 1.6 million.<sup>305</sup> The groups raised questions about how Justice Moncada Luna could afford to purchase those apartments on his modest government salary.<sup>306</sup>

159. Under the Panamanian Constitution, the National Assembly has sole jurisdiction to investigate and prosecute Supreme Court justices.<sup>307</sup> In October 2014, the National Assembly designated Congressman Pedro Miguel Gonzalez to oversee the investigation into Justice Moncada Luna.<sup>308</sup> Congressman Gonzalez asked Jorge Villalba to lead the investigation. At the time, Mr. Villalba was the Chief of the Organized Crime Division for the Panamanian Public

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<sup>302</sup> Tracy Wilkinson, *In Panama, corruption inquiries grow after president's tenure ends*, LA TIMES dated May 23, 2015 (R-0108).

<sup>303</sup> *Opponent will investigate the misuse of government funds by Martinelli's government if he wins the presidential election*, FOX NEWS LATINO dated Apr. 15, 2014 (C-0204); *Panamanian candidate will investigate the management of funds during Martinelli's government*, LA VANGUARDIA dated Apr. 15, 2014 (C-0225).

<sup>304</sup> Villalba Statement ¶ 12.

<sup>305</sup> Villalba Statement ¶ 13.

<sup>306</sup> Villalba Statement ¶ 13.

<sup>307</sup> Villalba Statement ¶ 14.

<sup>308</sup> Villalba Statement ¶ 14.

Prosecutor's office, where he oversaw investigations into financial crimes and money laundering. At Congressman Gonzalez's request, Mr. Villalba was seconded to the National Assembly and headed the team of investigators looking into Justice Moncada Luna's affairs.

160. When the investigation started, the National Assembly had only the information provided by the National Bar Association and the Pro Justice Citizens Alliance of Panama in their complaint.<sup>309</sup> This included statements and emails from Justice Moncada Luna's office coordinator at the Supreme Court, press articles raising concerns over Justice Moncada Luna's ownership of the two apartments, corporate registration certificates for companies owned or controlled by Justice Moncada Luna and his wife, and the public financial disclosure statement Justice Moncada Luna was required to file under Panamanian law.<sup>310</sup>

161. At Mr. Villalba's direction, the National Assembly subpoenaed financial and bank records relating to Justice Moncada Luna.<sup>311</sup> In addition, the investigators took a two-pronged approach to identifying whether Justice Moncada Luna received unlawful payments. First, they reviewed each judgment issued by Justice Moncada Luna to see whether any decisions appeared to have been compromised for the benefit of a particular litigant. If so, potential connections between Justice Moncada Luna and the relevant parties would be investigated.<sup>312</sup>

162. Second, and more relevant here, the investigators identified vendors who provided services to the Judicial Authority.<sup>313</sup> As noted, Justice Moncada Luna's role as President of the Supreme Court meant that he had authority to award contracts and approve invoices for the Judicial Authority – two potential sources of corruption. The investigators identified vendors by the size of their contracts and the value of payments made by the Judicial Authority. Omega was one of the largest vendors identified, due to the size of the La Chorrera Project.<sup>314</sup>

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<sup>309</sup> Villalba Statement ¶ 16.

<sup>310</sup> Criminal Complaint against Moncada Luna dated 10 July 2014 (C-0373).

<sup>311</sup> Villalba Statement ¶ 17.

<sup>312</sup> Villalba Statement ¶ 18.

<sup>313</sup> Villalba Statement ¶ 18.

<sup>314</sup> Villalba Statement ¶ 19.

163. Once the vendors were identified, the investigators examined court records to determine when payments were made by the Judicial Authority to the vendors.<sup>315</sup> With this information in hand, the investigators subpoenaed bank records for each of the vendors – including Omega – to see whether any subsequent transactions by the vendor were suspect.<sup>316</sup>

164. Based on these records, Mr. Villalba and his team identified two transactions in which large payments flowed from the Judicial Authority to Omega and then to the personal benefit of Justice Moncada Luna.<sup>317</sup>

### 1. The First Corrupt Transaction

165. The first corrupt transaction occurred between April and May of 2013. As discussed above, on April 4, 2013, Omega received an advance payment from the Judiciary of ██████████ ██████████.<sup>318</sup> A series of transfers quickly followed, which resulted in ██████████ of that payment to Omega being used to pay down a mortgage debt of Corporación Celestial, S.A. – a corporation owned by Justice Moncada Luna’s wife – on a luxury apartment in the Ocean Sky complex.<sup>319</sup> That mortgage had been obtained by Corporación Celestial S.A. to pay off a prior mortgage on the Ocean Sky apartment.<sup>320</sup> The Ocean Sky apartment had been purchased by Justice Moncada Luna and his wife, through Corporación Celestial, in September 2010 for US\$ 545,000.<sup>321</sup>

166. The mortgage loan to Corporación Celestial, S.A. had a term of 23 years and payments were to be made on a monthly basis to the mortgagee bank. The bank would automatically withdraw US\$ 1,056.68 from Justice Moncada Luna’s monthly pay check; in addition, periodic

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<sup>315</sup> Villalba Statement ¶ 20.

<sup>316</sup> Villalba Statement ¶ 20.

<sup>317</sup> Villalba Statement ¶¶ 21-24. Mr. Villalba’s team identified suspicious payments from other vendors as well. Those payments were investigated, but are not relevant to the issues in dispute in this matter.

<sup>318</sup> Villalba Statement ¶ 21; Villalba Report (R-0062), p. 22; Expert Report of Julio Aguirre Guevara dated Mar. 2, 2015 (“Aguirre Expert Report”) (R-0063) p. 13.

<sup>319</sup> Villalba Statement ¶ 21; Villalba Report (R-0062), pp. 17-24; Aguirre Expert Report (R-0063) pp. 13-16.

<sup>320</sup> Villalba Report (R-0062), p. 17.

<sup>321</sup> Aguirre Expert Report (R-0063), p. 9.

payments would be made by Corporación Celestial, S.A. Between December 2010 and August 2013, payments on the loan totaling US\$ 28,530.36 were made by Corporación Celestial, S.A. and Justice Moncada Luna.<sup>322</sup> The balance of the loan, amounting to US\$ 147,936.74, was paid off on May 23, 2013, using in substantial part the [REDACTED] funneled from Omega to Corporación Celestial, S.A.<sup>323</sup> That series of transfers is detailed below<sup>324</sup>:

- Omega received a notice to proceed on the La Chorrera Project on January 15, 2013. The notice to proceed was signed by Justice Moncada Luna.
- On April 4, 2013, Omega received an advance payment of [REDACTED] from the Judicial Authority for the La Chorrera Project, which was deposited into Omega's account at BAC International Bank Inc.
- On April 25, 2013, Omega transferred [REDACTED] to the account, also at BAC International Bank Inc., of PR Solutions, S.A., a company also owned by Mr. Rivera. Immediately prior to that transfer, that account held just [REDACTED]
- On that same day, PR Solutions S.A. transferred [REDACTED] to an account at HSBC in the name of Reyna y Asociados, a law firm in Panama that handles real estate matters. Immediately prior to that transfer, that account contained US\$ 1,852.84.
- On May 3, 2013, Reyna y Asociados purchased a cashiers' check in the amount of [REDACTED], using funds from its HSBC account. The cashiers' check was made payable to Corporación Sarelam, S.A., and on that same day, was deposited into Corporación Sarelam, S.A.'s account at Universal Bank.
- On May 23, 2013, Corporación Sarelam, S.A. transferred US\$ 148,000 from its account at Universal Bank to an account at the same bank in the name of Fundación Ricala.
- On that same date, Fundación Ricala purchased a cashiers' check in the amount of US\$ 147,936.74 made it payable to Banco Nacional de Panama. Those funds were used to cancel the mortgage debt of Corporación Celestial, S.A. (which had been guaranteed by Justice Moncada Luna) with respect to the Moncada Luna's PH Ocean Sky apartment.

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<sup>322</sup> Villalba Report (R-0062), pp. 17-18.

<sup>323</sup> Villalba Report (R-0062), pp. 17-24.

<sup>324</sup> Villalba Statement ¶ 21.

## 2. The Second Corrupt Transaction

167. Two months later, on July 10, 2013, Omega received a further payment of [REDACTED] from the Judicial Authority, again for the La Chorrera Project. Based on Mr. Villalba's investigation, the National Assembly was able to establish that [REDACTED] from that payment was used to reduce the mortgage debt of Corporación Alpil S.A., another company controlled by Mrs. Moncada Luna.<sup>325</sup> Corporación Alpil S.A. had a mortgage debt on a second apartment in the possession of Justice Moncada Luna and his wife. That apartment, located in the Santorini Complex, was purchased in January 2013 for US\$ 1,179,200. Details of the second series of transfers are set out below.<sup>326</sup>

- On July 10, 2013, Omega received [REDACTED] from the Judicial Authority in connection with the La Chorrera Project, deposited into Omega's account at BAC International Bank.
- On July 13, 2013, Omega transferred [REDACTED] from its account at BAC International Bank to PR Solutions, S.A.'s account at the same bank.
- On that same date, PR Solutions, S.A. issued and certified a check in the amount of [REDACTED] payable to Reyna y Asociados. That check was deposited into Reyna y Asociados' account at HSBC.
- On July 17 and July 18, 2013, Reyna y Asociados issued two checks, each in the amount of US\$ 75,000, payable to Corporación Sarelam, S.A. Those checks were deposited into Corporación Sarelam, S.A.'s account at Universal Bank.
- On July 18, 2013 Corporación Sarelam, S.A. transferred US\$ 130,000 to an account at Universal Bank held by Summer Venture Inc.
- On that same date, Summer Venture Inc. purchased a cashiers' check in the amount of US\$ 130,000 payable to Desarrollo Coco del Mar, S.A., the developer of the Santorini project. That check was then delivered to Desarrollo Coco del Mar, S.A., who then credited that amount against the debt owed to it by Corporación Alpil S.A. for the purchase of the Moncada Luna's Santorini apartment.

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<sup>325</sup> Villalba Report (R-0062), at pp. 17-18.

<sup>326</sup> Villalba Statement ¶ 23.

### 3. Justice Moncada Luna Pleads Guilty with Respect to the Omega Payments

168. Once all of the records had been collected under the supervision of Mr. Villalba, the National Assembly engaged Julio Aguirre, a forensic analyst specializing in money-laundering, to prepare an expert report “that facilitates the understanding of the origin of the money used for the payment, amortization or cancellation of commitments or debts for the acquisition of certain assets in possession or property of the Supreme Court Justice Alejandro Moncada Luna Carvajal, as well as related to the money accounts located in the Panamanian Financial Center, of which Supreme Court Justice Alejandro Moncada Luna Carvajal is the owner, user, or financial beneficiary.”<sup>327</sup>

169. Mr. Aguirre was provided with all of the documentation collected during the course of Mr. Villalba’s investigation. Based on his analysis of this documentation, Mr. Aguirre confirmed that, on two separate occasions, money was transferred from the Judicial Authority to Omega and then, through a series of accounts, to the benefit of Justice Moncada Luna. Mr. Villalba agrees with Mr. Aguirre’s conclusions.<sup>328</sup>

170. When presented with the results of the National Assembly’s investigation, Justice Moncada Luna pled guilty to the crimes of making false statements and unjust enrichment, and acknowledged that he had been unjustly enriched by the receipt of money that allowed him to purchase the Ocean Sky and Santorini apartments.<sup>329</sup> He was sentenced to 60 months in prison and both apartments were seized by the state. In exchange for his plea agreement, the National Assembly agreed not to prosecute Justice Moncada Luna for other crimes.

171. During the course of the National Assembly’s investigation, it collected evidence of financial crimes committed by Omega. However, the National Assembly’s jurisdiction was limited to Justice Moncada Luna, and it lacked authority to prosecute Mr. Rivera and Omega.<sup>330</sup>

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<sup>327</sup> Villalba Report (R-0062), p. 4

<sup>328</sup> Villalba Statement ¶ 26; Aguirre Expert Report, (R-0063) pp. 7-8, 21-22.

<sup>329</sup> Plea Bargain of Justice Alejandro Moncada Luna dated Feb. 23, 2015 (“**Plea Bargain**”) (R-0064) (pleading guilty to the crime of unjust enrichment and agreeing to the confiscation of the PH Ocean Sky and PH Santorini apartments as part of his sentence); see Villalba Statement ¶ 27.

<sup>330</sup> Villalba Statement ¶¶ 28, 38.

Accordingly, the National Assembly referred its investigation to the Public Prosecutor's office and shared the evidence it had collected.

172. Mr. Villalba returned to the Public Prosecutor's office upon completion of the National Assembly's investigation and was placed in charge of the Omega investigation.<sup>331</sup> Investigations were initiated by the Organized Crime and the separate Anti-Corruption divisions within the Public Prosecutor's office, which were authorized to bring different charges against Omega.<sup>332</sup>

173. On June 15, 2015, the Public Prosecutor's office subpoenaed Mr. Rivera and representatives from Omega to submit to interviews regarding the two transfers detailed above. Both Mr. Rivera and Omega refused to appear or to submit written statements; of course, by then, Mr. Rivera and Omega's other representatives in Panama had fled.<sup>333</sup>

174. Prior to September 2016, Panama operated an inquisitorial system of justice, in which courts are involved in the investigation of facts and the determination of charges to be brought against a criminal suspect.<sup>334</sup> As a result, the Panamanian courts were involved in the Public Prosecutor's investigation into entities found to have made illegal payments to Justice Moncada Luna – including Mr. Rivera and Omega.

175. Attorneys for certain of the parties under investigation petitioned the courts to dismiss the Public Prosecutor's corruption investigations. On June 30, 2015, a court of first instance dismissed that petition.<sup>335</sup> On September 23, 2016, however, an appellate court overturned the lower court's decision and directed that the investigation be terminated because, in the court's opinion, the plea agreement entered into by Justice Moncada Luna covered not only Justice

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<sup>331</sup> Villalba Statement ¶¶ 27-28.

<sup>332</sup> Villalba Statement ¶ 29.

<sup>333</sup> Villalba Statement ¶ 30.

<sup>334</sup> Beginning in September 2016, Panama implemented an adversarial system of justice, which is similar to the system of justice found in the United States. Now, parties are represented by neutral advocates before an impartial decision maker. The decision to bring criminal charges, therefore, rests solely with the prosecutor's office.

<sup>335</sup> See 2<sup>nd</sup> Ruling Instr. No. 140, Second Superior Court of the First Judicial District dated Sept. 23, 2016 (C-0008-Resubmitted) (stating that "Motion No. 18 of June 30, 2015 issued by the Sixteenth Circuit Criminal Court of the First Circuit of the Province of Panama declares without merit the motion for invalidation ... [of] ... "the legal proceedings concerning money laundering").

Moncada Luna but also entities identified as having been part of the underlying payment scheme.<sup>336</sup> The Public Prosecutor's office appealed the court's decision and that appeal is pending.<sup>337</sup> While the appeal is pending, the investigations into Mr. Rivera, Omega, and other entities have been suspended. Precautionary measures taken as part of the investigations, however, remain in place. As such, bank accounts identified as having been the source of unlawful payments remain frozen and preventative detention notices remain in place.

**D. THE CLAIMANTS FLED PANAMA IN THE WAKE OF THE MONCADA LUNA INVESTIGATION**

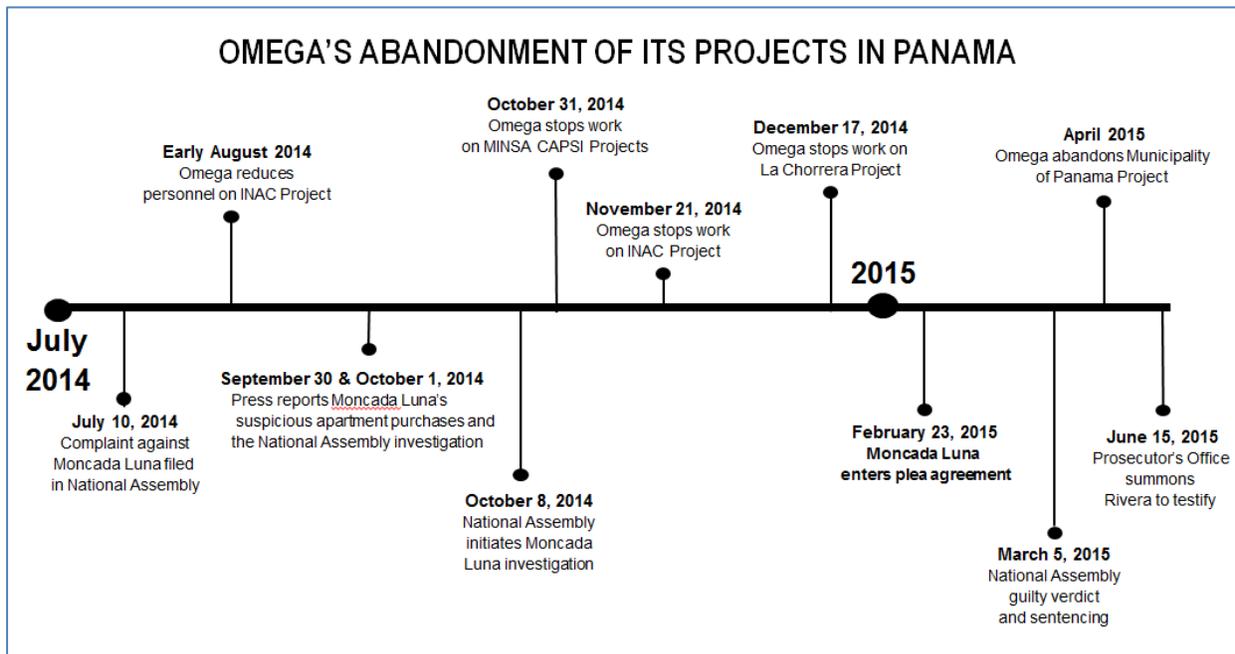
176. As discussed above, Omega's conduct changed dramatically in and around October 2014. Prior to that, Omega worked with the relevant ministries to address commercial issues. Beginning in October 2014, however, Omega no longer was willing to work through issues on the projects commercially. Rather, Omega systematically began to abandon the projects and flee from Panama. Notably, and not coincidentally, Omega's change in conduct occurred just after the corruption investigation into Justice Moncada Luna became public.

177. Omega's flight from the projects is evident in the following graphic, which pulls together key events described above:

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<sup>336</sup> See generally 2<sup>nd</sup> Ruling Instr. No. 140, Second Superior Court of the First Judicial District dated Sept. 23, 2016 (**C-0008-Resubmitted**).

<sup>337</sup> Villalba Statement ¶ 36.



#### **E. THE APPLICABLE DISPUTE RESOLUTION CLAUSES IN THE BIT AND TPA**

178. In the period from June 1991 through October 23, 2012, qualifying foreign investments between the United States and Panama were regulated by the BIT. Investments made after that date may fall within the scope of the TPA, which supplements and supplants the BIT in several respects. Notably, Article 1.3 of the TPA suspended the BIT's dispute resolution provision with respect to investments made after the TPA entered into force.<sup>338</sup> Investments existing as of the TPA's effective date, however, were granted a 10-year sunset period, during which investment disputes may be brought under the BIT.<sup>339</sup>

179. The five BIT Contracts were executed prior to October 31, 2012: the three Ministry of Health Contracts (all dated September 9, 2011), the Ciudad de las Artes Contract (July 6, 2012)

<sup>338</sup> TPA (CL-0003) Art. 1.3, ¶ 2 (“Articles VII and VIII of the Treaty Between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investments, with Annex and Agreed Minutes, signed at Washington on October 27, 1982 (the “Treaty”) shall be suspended on the date of entry into force of this Agreement.”).

<sup>339</sup> TPA (CL-0003) Art. 1.3, ¶ 3 (stating that for 10 years beginning on the date of entry into force of the TPA, “Article VII and VIII of the [BIT] shall not be suspended: (i) in the case of investments covered by the [BIT] as of the date of entry into force of [the TPA]; and . . . Article VII of the Treaty shall not be suspended in the case of a dispute that arises on or after the date of entry into force of [the TPA] out of an investment agreement that was in effect before the date of entry into force of [the TPA], that is otherwise eligible to be submitted for settlement under Article VII of the [BIT].”).

and the Ministry of the Presidency Contract (August 17, 2012). Claims relating to these contracts are governed by Article VII of the BIT, which establishes the procedures agreed by Panama and the United States for resolving disputes between an investor and a state Party.

180. The three TPA Contracts were executed after the TPA entered into force: the La Chorrera Contract (November 22, 2012); the Municipality of Colón Contract (January 24, 2013); and the Municipality of Panama Contract (September 12, 2013). Claims relating to these three contracts are governed by Article 10.15 of the TPA.

181. In order for the Tribunal to have jurisdiction over specific claims, the Claimants will have to demonstrate that they meet the requirements of Article VII of the BIT for the BIT Claims and Article 10.15 of the TPA for the TPA Claims. The failure to meet these requirements means that the conditions of Panama's consent to arbitrate will not have been met and the Tribunal will lack jurisdiction over the related claims.

182. In addition, because the Claimants have brought their case under the ICSID Rules, their claims must meet the requirements of Article 25 of the ICSID Convention. If the claims fail to meet the requirements of either the relevant investment treaty or Article 25, the Tribunal will not have jurisdiction and the case must be dismissed.

**THE REPUBLIC OF PANAMA'S  
OBJECTIONS TO THE TRIBUNAL'S JURISDICTION**

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

183. As noted above, international investment law is a limited system of law designed to regulate the treatment by states of qualified investors who make qualified investments within the meaning of applicable investment treaties or laws. A state that chooses to participate in this system consents to provide substantive protections to investors and to arbitrate disputes with those investors under certain limited circumstances defined in the relevant investment treaty or law.<sup>340</sup> In addition, the jurisdiction of ICSID tribunals is constrained by the requirements of Article 25 of the ICSID Convention. Here, there are four reasons why the Tribunal does not have jurisdiction over the claims advanced by the Claimants. The first three apply to all of the Claimants' claims. The fourth applies to the claims asserted under the BIT's dispute resolution clause.

184. First, the evidence establishes that the Claimants procured one or more of the contracts that constitute their alleged "investment" in Panama through corruption. Panama has not consented to arbitrate disputes with corrupt foreign entities that procure their "investments" in Panama in direct contravention with Panamanian law. As a result, neither Mr. Rivera nor Omega is entitled to substantive protections under the BIT or the TPA, nor may they bring claims against Panama under those treaties.

185. Second, the Claimants have asserted commercial claims that are not protected under the BIT or the TPA. The crux of their claims is that Omega was not paid for work performed under eight construction contracts and that certain of these contracts were terminated or abandoned by Panama. It is well settled, however, that a breach of a contract by a state does not necessarily give rise to liability under international law. In an effort to transform alleged contract breaches into something more, the Claimants suggest that they were the victims of a targeted campaign of

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<sup>340</sup> See, e.g., *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Decision on Jurisdiction (July 17, 2003) (**RL-0001**), ¶ 42 ("[T]he applicable jurisdictional provisions are only those of the [ICSID] Convention and the BIT . . ."); *Daimler Financial Services v. Argentina*, ICSID Case No. ARB/05/1, Award (Aug. 22 2012) (**RL-0002**), ¶ 50 ("[I]t is clear that, independent of any law chosen by the parties with respect to the merits of their claims, jurisdictional issues, including the existence of an investment, the presence of an eligible investor and the parties' consent to arbitration, must be determined by reference to the legal instruments establishing jurisdiction and by general international law.").

harassment by Panama intended to destroy their investments.<sup>341</sup> The Claimants, though, present no evidence to support their contention. Rather, the evidence shows that the Claimants elected to abandon their Projects, leaving the works unfinished and each in disrepair. The only dispute here is a straightforward set of contract claims.

186. Third, the Claimants assert that Panama subjected Mr. Rivera to criminal investigations as part of its harassment campaign. In order for the Tribunal to have jurisdiction over that claim, the Claimants must show that the criminal investigations arose directly out of Mr. Rivera's investments. They cannot meet this burden, as the evidence clearly shows that the investigation into the Claimants was a byproduct of an unrelated inquiry into public corruption by Panamanian Supreme Court Justice Alejandro Moncada Luna. That investigation was not initiated because Mr. Rivera was an investor or had investments in Panama.

187. Fourth, Article VII(2) of the BIT provides that in the event a "dispute cannot be resolved through consultation and negotiation, then the dispute shall be submitted for settlement in accordance with the applicable dispute-resolution settlement procedures upon which [the disputing parties] have previously agreed."<sup>342</sup> The contracts at issue in this arbitration each contain agreed and mandatory dispute-resolution procedures. As a result, the claims asserted by Mr. Rivera and Omega under the BIT must be resolved as the parties agreed in their contracts, and their claims must be dismissed here.

188. Accordingly, for these many reasons, Panama submits that the Tribunal does not have jurisdiction over the Claimants' claims. Those claims, therefore, should be dismissed.

#### **A. THE CLAIMANTS ACQUIRED THEIR INVESTMENTS THROUGH CORRUPTION**

189. The payment of a bribe to a public official is a violation of both Panamanian law and international public policy.<sup>343</sup> International investment law does not protect persons or entities who procure investment through bribes or other corrupt activity. This is true regardless of

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<sup>341</sup> See Claimants' Memorial ¶¶ 1, 70.

<sup>342</sup> BIT (CL-0001), Art. VII(2) (emphasis added).

<sup>343</sup> Criminal Code Article 347, Mizrachi & Pujol, S.A., eds., *Criminal Code*, Second Unique Text of the Law 14 of 2007 (RL-0039); *World Duty Free Company Ltd. v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006) (RL-0003), ¶ 57.

whether the relevant investment treaties include an express provision requiring that investments be formed in accordance with domestic or international law.

### 1. Corrupt Payments by Claimants

190. As detailed above, the Claimants’ corrupt payments came to light in the course of the legislative investigation into allegations of corruption against Supreme Court Justice Alejandro Moncada Luna.<sup>344</sup> That investigation disclosed two significant corrupt payments made by Omega for the personal benefit of Justice Moncada Luna.

191. The corrupt nature of the two payments identified by the National Assembly is clear on their face. As the following graphics illustrate, there was a straight-line transfer of funds from the Judicial Authority to Omega to accounts personally benefitting Justice Moncada Luna, where the payments were used to purchase residential real estate for Justice Moncada Luna:

#### TRANSFER 1: PH SKY APARTMENT



#### TRANSFER 2: SANTORINI APARTMENT



192. Of course, Corporación Celestial S.A. and Corporación Alpil S.A. were both fronts for Justice and Mrs. Moncada Luna. They were owned and controlled by the Moncada Luna’s for purposes of hiding money transfers.

<sup>344</sup> Justice Moncada Luna was investigated by the Panamanian National Assembly and criminally charged with corruption, money laundering, unjust enrichment, and making false statements.

193. Mr. Aguirre details in his expert report how these transfers contain multiple hallmarks of money laundering and corrupt activity, including payments made through shell companies, short-term payments to third parties, and the use of state funds for the benefit of a state employee.<sup>345</sup>

194. Mr. Aguirre's report was presented to the National Assembly in conjunction with its investigation of Justice Moncada Luna. Ultimately, Justice Moncada Luna pled guilty to charges of making false statements and unjust enrichment, and the two apartments purchased by Justice Moncada Luna and his wife with payments from Omega were confiscated by the Panamanian government.<sup>346</sup>

195. The National Assembly's prosecutorial jurisdiction extended only to the prosecution of Justice Moncada Luna; accordingly, it referred its findings regarding Omega and other entities to the Public Prosecutor's office. Mr. Villalba, who, as discussed above, helped lead the National Assembly investigation into Justice Moncada Luna, returned to his position at the Public Prosecutor's office and, given his role in the National Assembly investigation, was tasked with leading the investigation into Omega and the other identified companies.

196. As discussed above, the National Prosecutor's investigation into Mr. Rivera and others has been suspended, while the government challenges the court ruling that Justice Moncada Luna's plea agreement somehow covered third parties identified during the course of the investigation. Although the broader investigation into Mr. Rivera's and Omega's activities is not complete, the information available to date provides incontrovertible evidence of corruption by Omega and Mr. Rivera with respect to their work in Panama. That conduct deprives the Tribunal of jurisdiction over this case.

## **2. Omega's Corrupt Payments Violate Panamanian Law**

197. Corruption in its various forms is illegal in Panama, which of course maintains criminal laws against the payment to and receipt of bribes by public officials, unjust enrichment, money

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<sup>345</sup> Aguirre Expert Report (**R-0063**), pp. 13-20.

<sup>346</sup> Plea Bargain (**R-0064**); National Assembly Guilty Verdict No. 1 dated Mar. 5, 2015 (**R-0083**).

laundering, and other related activities.<sup>347</sup> The Claimants’ actions, therefore, directly violate Panamanian law.

198. Omega undertook contractual obligations to abide by Panama’s laws. Significantly, Omega agreed in the La Chorrera Contract with the Judicial Authority (the contract signed by Justice Moncada Luna) to “faithfully comply with all laws, decrees, provincial ordinances, municipal agreements, current legal provisions and assume all expenses established therein, without any additional cost” to the government counterparty.<sup>348</sup> Similarly, in the MINSA CAPSI Contracts, Omega agreed to “fully comply with all laws, legal decrees, cabinet decrees, and other current Panamanian rules in the execution of the work” and to “report any corrupt or fraudulent practice which it may learn of with regard to the enforcement of” the contracts and “to not engage in actions violating current laws and that may violate provisions on transparency and honesty in the management of the government.”<sup>349</sup>

199. The contract with the Ministry of the Presidency prohibits the payment of bribes to public officials:

The Contractor warrants, agrees, and states that neither it nor any part related to it has incurred or shall incur, directly or indirectly, in any of the following conduct: pay, give, deliver, receive, promise, or agree to any handout, kickback, bribe, gift, contribution or illegal commissions or other things of value under any modality or has paid or will pay, directly or indirectly, unlawful amounts as awards or incentives, in local or foreign currency, in Panama or in any other place where this conduct is related to the Contract or in any other place in violation of applicable laws, which includes but is not limited to any Panamanian anticorruption laws or any other similar Panamanian law to . . . .<sup>350</sup>

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<sup>347</sup> 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**).

<sup>348</sup> La Chorrera Contract (**C-0048-Resubmitted**), Art. 14; Contract 857-2013 with the Municipality of Panama (**C-0056-Resubmitted**), Art. 21.

<sup>349</sup> Contract No. 077 (**C-0028-Resubmitted**), Contract No. 083 (C-0030-Resubmitted); Contract No. 085 (**C-0031-Resubmitted**), Arts. 18, 80.

<sup>350</sup> Contract 043 (**C-0034-Resubmitted**), Art. 85.11.

200. The Claimants payments to Justice Moncada Luna violated Panamanian law and, thus, caused Omega to breach its various agreements. Under the circumstances, the Claimants' actions deprive them of both the substantive protections accorded under the BIT and the right to arbitrate claims against Panama.

### 3. Omega's Bribery Requires Dismissal

201. Investments made illegally or corruptly cannot be protected in arbitration. As noted above, this is true regardless of whether the tribunal considers the issue to be matter of jurisdiction or of admissibility. In either instance, the claims advanced by the Claimants should be dismissed.

#### a. Omega's Bribes Deprive the Tribunal of Jurisdiction over the Claimants' Case

202. Bribery of a state official is a violation of international public policy.<sup>351</sup> The procurement of investments through bribery or other corrupt means, therefore, runs afoul of the international legal order.<sup>352</sup> Arbitral tribunals dealing with similar circumstances routinely hold that the presence of corruption in the award of a contract or the establishment of an investment deprives the claimant of protection under the relevant treaty and deprives the tribunal of jurisdiction.

203. In *World Duty Free Co. Ltd. v. The Republic of Kenya*, the claimant brought a US\$ 500 million claim against Kenya for the expropriation of a contract to operate duty free concessions at Kenya's international airports.<sup>353</sup> During the course of the proceedings, evidence emerged that the concession contract had been procured through the payment of a cash bribe to the former president of Kenya, Daniel Arap Moi. The tribunal dismissed World Duty Free's claims on jurisdictional grounds, holding that a contract procured by a bribe was void as a matter of law.<sup>354</sup> The tribunal further found that the procurement of contracts through bribery violated

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<sup>351</sup> See, e.g., *World Duty Free Co. Ltd. v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006) (RL-0003), ¶ 57.

<sup>352</sup> *World Duty Free v. Kenya* (RL-0003), ¶ 57 (“[C]laims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.”).

<sup>353</sup> *World Duty Free v. Kenya* (RL-0003), ¶ 78.

<sup>354</sup> *World Duty Free v. Kenya* (RL-0003), ¶ 179.

international public policy and that the claimant could not “maintain any of its pleaded claims . . . as a matter of *ordre public international* and public policy under the contract’s applicable law.”<sup>355</sup>

204. In *Spentex v. Uzbekistan*, a Dutch subsidiary of an Indian textiles company brought a case alleging that Uzbekistan expropriated its investments in two textile companies.<sup>356</sup> Uzbekistan argued that the tribunal lacked jurisdiction because evidence suggested that the claimant procured its investment through corruption.<sup>357</sup> Although Uzbekistan presented no evidence that bribes were paid, it was able to show that two days prior to submission of its tender to acquire the textile companies, Spentex engaged two consulting firms allegedly to assist with the tender process.<sup>358</sup> Despite “strikingly high” payments made to the consulting firms for two days work, Spentex refused to produce the consultant’s work product or invoices, or bank records of the payments made.<sup>359</sup> Based on these red flags, the tribunal concluded that the only reasonable explanation for Spentex to have engaged the consultants was to make unlawful payments to ensure the tenders were successful.<sup>360</sup> Here, Panama was able to trace the payment of state funds from the Judicial Authority to Omega to accounts personally controlled by Justice Moncada Luna and his wife, and finally to the purchase of luxury apartments.

205. Consistent with the principles discussed in *World Duty Free* and *Spentex*, the tribunal in *Phoenix Action v. Czech Republic* held:

In the Tribunal’s view, States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws. If a State, for example, restricts foreign investment in a sector

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<sup>355</sup> *World Duty Free v. Kenya* (RL-0003), ¶ 188.

<sup>356</sup> *Spentex Netherlands, B.V. v. Republic of Uzbekistan*, ICSID Case No. ARB/13/26, Award (Dec. 27, 2016) (RL-0004) (noting that treating corruption as either an issue of admissibility or jurisdiction would result in dismissal of claims) (not public, see <https://www.iareporter.com/articles/in-newly-unearthed-uzbekistan-ruling-exorbitant-fees-promised-to-consultants-on-eve-of-tender-process-are-viewed-by-tribunal-as-evidence-of-corruption-leading-to-dismissal-of-all-claims-under-dutch/>) (last visited on Oct. 31, 2018).

<sup>357</sup> *Spentex Netherlands, B.V. v. Uzbekistan* (RL-0004).

<sup>358</sup> *Spentex Netherlands, B.V. v. Uzbekistan* (RL-0004).

<sup>359</sup> *Spentex Netherlands, B.V. v. Uzbekistan* (RL-0004).

<sup>360</sup> *Spentex Netherlands, B.V. v. Uzbekistan* (RL-0004).

of its economy and a foreign investor disregards such restriction, the investment cannot be protected under the ICSID/BIT system. These are illegal investments according to the national law of the host State and cannot be protected through an ICSID arbitral process. And it is the Tribunal's view that this condition – the conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the BIT.<sup>361</sup>

206. As support for its holding, the tribunal noted that, “the purpose of the international mechanism of protection of investment through ICSID arbitration cannot be to protect investments made in violation of the laws of the host state or investments not made in good faith, obtained for example through misrepresentations, concealment, or corruption.”<sup>362</sup> Rather, as the tribunal stated, “the purpose of international protection is to protect legal and bona fide investments.”<sup>363</sup>

207. The tribunal in *Hamester v. Ghana* similarly held that consent to arbitration and ICSID jurisdiction did not exist where an investment was made illegally:

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.<sup>364</sup>

208. In sum, tribunals have overwhelmingly agreed that claimants cannot seek the protection of investment treaties or the safe harbor of international arbitration when they have procured their investments through corrupt or illegal means. Notably, these tribunals have made clear that their findings apply regardless of whether the relevant treaty specifically includes language

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<sup>361</sup> *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/05, Award (Apr. 15, 2009) (RL-0005), ¶ 101.

<sup>362</sup> *Phoenix Action, Ltd. v. Czech Republic* (RL-0005), ¶ 100.

<sup>363</sup> *Phoenix Action, Ltd. v. Czech Republic* (RL-0005), ¶ 100.

<sup>364</sup> *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. See also *David Minnotte and Robert Lewis v. Poland*, ICSID Case No. ARB(AF)/10/1, Award (May 16, 2014) (RL-0007), ¶¶ 131-32 (holding that it was “generally accepted” that legality and good faith were critical requirements that applied regardless of treaty terms.”).

requiring that investments be made in accordance with law.<sup>365</sup> Panama has presented overwhelming evidence that the Claimants used state funds to bribe Justice Moncada Luna. The only reasonable purpose for doing so was to secure investments within Panama. As a result, the Claimants have forfeited their entitlement to substantive protection under the BIT and TPA, and the Tribunal has been deprived of jurisdiction over this case.

**b. The Payment of Bribes Renders the Claimants' Case Inadmissible**

209. Even if the Tribunal were to find that it has jurisdiction over the claims put forward by the Claimants, it should decline to hear them because the payment of bribes renders those claims inadmissible.

210. The Claimants can proceed with their claims only if the Tribunal has jurisdiction and their claims are admissible.<sup>366</sup> When confronted with evidence of corruption or illegality in the procurement of an investment, some tribunals have treated the issue as one of admissibility and not jurisdiction. Regardless, the outcome was the same. Thus, for example, in dismissing the claims in *Incesya v. El Salvador*, the tribunal held that 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."<sup>367</sup>

211. Similarly, the tribunal in *Plama v. Bulgaria* rejected as inadmissible claims tainted by the claimant's illegal actions:

The 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

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<sup>365</sup> See also, e.g., *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (Aug. 27, 2008) (RL-0008), ¶¶ 143-44.

<sup>366</sup> 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.

<sup>367</sup> *Incesya Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (Aug. 2, 2006) (CL-0067), ¶ 244.

international public policy – that a contract obtained by wrongful means (fraudulent inducement) should not be enforced by a tribunal.<sup>368</sup>

212. The tribunal in *Churchill Mining v. Indonesia* likewise found that claims arising out of forgeries and fraudulent activities were inadmissible as a matter of public international law.<sup>369</sup>

213. Ultimately, whether the Tribunal were to address this issue as a matter of jurisdiction or admissibility, the outcome should be the same. In both instances, the Tribunal’s objective must be to decide the issue in a manner that best serves the law. As the tribunal in *Metal-Tech v. Uzbekistan* stated, 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.”<sup>370</sup> Here, the Claimants have engaged in acts of bribery that are directly related to their investments. The Tribunal should not allow them to now seek protections under the Treaty for those investments, but should, instead, dismiss their claims.

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

214. It is well settled that a breach of a contract by a state or state-entity will not necessarily give rise to liability under international law.<sup>371</sup> For liability under international law to attach, the state must have acted in a sovereign capacity and breached the agreements in a manner that could only be carried out by a government.<sup>372</sup>

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<sup>368</sup> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (Aug. 27, 2008) (**RL-0008**), ¶¶ 143-44.

<sup>369</sup> *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**), ¶ 508.

<sup>370</sup> *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award (Oct. 4, 2013) (**RL-0011**), ¶ 389.

<sup>371</sup> *See, e.g., Impregilo S.p.A v. Argentine Republic*, ICSID Case No. ARB/07/17, Award (June 21, 2011) (**CL-0083**), ¶ 177 (“As a general rule, a violation of a contract is not a violation of international law.”).

<sup>372</sup> *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 (dismissing a claim that Paraguay’s failure to pay invoices due under a contract was a breach of the FET requirements on the grounds that Paraguay had not acted “in a manner that is qualitatively different from an ordinary contracting party” and finding that “[s]omething more than a mere breach of contract is needed” to give rise to a treaty breach”).

215. Here, the Claimants seek to hold Panama liable under international law for “[o]utstanding invoices from the Omega Consortium [that] went completely unpaid,” because Panama failed to provide required change orders or approved plans, and because Panama “declared default on their largest contract, and wrongfully terminated or abandoned the others.”<sup>373</sup> Setting aside the merits of these claims, that alleged conduct is commercial in nature. There is nothing inherently sovereign in allegedly failing to pay invoices, refusing to provide change orders, terminating contracts, or declaring a contractor to be in default. To the contrary, these are precisely the types of activities that private actors take with respect to commercial contracts every day.

216. In an effort to overcome this defect in their claims, the Claimants argue that Panama’s alleged “breach of its obligations under the Contracts also amount to a breach of the ‘umbrella clauses’ found in the BIT and the TPA.”<sup>374</sup> That argument fails for at least three reasons.

217. First, the TPA does not include an umbrella clause. The Claimants’ statement, therefore, is wrong. The Claimants attempt to cure their misstatement in a footnote by asserting that they may export the BIT’s umbrella clause to the TPA “via the TPA’s MFN provision.”<sup>375</sup> The Claimants, however, provide no support, analysis, or discussion to substantiate that dubious assertion.

218. Most Favored Nation provisions are intended to prevent a host country from discriminating against foreign investors from one country in favor of foreign investors from other countries:

Most-favoured-nation treatment is a treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, no less favourable than treatment extended by the granting State or to a third State or to a person or things in the same relationship with that third State.<sup>376</sup>

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<sup>373</sup> Claimants’ Memorial ¶ 3.

<sup>374</sup> Claimants’ Memorial ¶ 188.

<sup>375</sup> Claimants’ Memorial ¶ 188, n. 468.

<sup>376</sup> International Law Commission, *Yearbook of the International Law Commission*, 1978 (RL-0013), Vol. II, Part 2, p. 21.

219. This principle is reflected in the language of the TPA’s MFN provision, which states that “[e]ach party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”<sup>377</sup> The term “non-Party” means an investor from a country other than Panama or the United States, the parties to the TPA. As applied to Panama, the plain meaning of this provision is that Panama must treat investments made by US investors no less favorably than it accords similarly-situated investments from non-US investors.

220. Here, the Claimants have not invoked the TPA’s MFN provision because they claim that Panama has accorded investors from another country better treatment; rather, they are seeking to import into the TPA a provision from an earlier-in-time treaty between the same parties, Panama and the United States. However, Panama and the United States chose to exclude an umbrella clause from their TPA. If the Tribunal were to permit the Claimants to import the Panama-US BIT’s umbrella clause into the TPA, it would mean that two countries would never be able to modify their obligations as between each other. That clearly cannot be the case, and the Claimants offer no support for their position.

221. Second, it is without question that, in the absence of an umbrella clause, the Tribunal would lack jurisdiction over commercial claims arising out of an alleged breach of contract. Claims predicated on Panama’s alleged breach of the TPA Contracts, therefore, are outside the scope of the Tribunal’s jurisdiction. Recognizing this, the Claimants are attempting to fabricate jurisdiction over the TPA Claims by importing the BIT’s umbrella clause into the TPA.

222. Arbitral tribunals have routinely held that parties may not use an MFN provision to create jurisdiction where it otherwise would not exist. This issue typically arises in cases where a claimant is attempting to import a broader dispute resolution clause from one treaty into another treaty<sup>378</sup> or is attempting to expand a BIT’s scope of application.<sup>379</sup> The same principles apply

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<sup>377</sup> TPA (CL-0003), Art. 10.4 (emphasis added).

<sup>378</sup> 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).

here. The Claimants are attempting to expand the scope of the TPA’s application to simple breach of contract claims. This goes beyond questions of substantive protection and implicates the scope of the Parties’ consent to arbitrate. By removing the umbrella clause from the TPA, Panama and the United States chose not to elevate commercial claims to the level of a treaty breach. In addition, through this choice, Panama and the United States made clear that they did not consent to arbitrate breach of contract claims as part of the TPA’s dispute resolution process. The Claimants’ actions, therefore, are designed to create jurisdiction in circumstances that fall outside of the parties’ consent to arbitrate.

223. Third, the BIT’s umbrella clause does not automatically transform a breach of the Claimants’ contracts into a treaty breach. As the annulment committee in *Vivendi v. Argentina* noted, “whether there has been a breach of the BIT and whether there has been a breach of contract are different questions.”<sup>380</sup> It is necessary to treat these as separate questions because, as the tribunal in *El Paso v. Argentina* found, an umbrella clause “will not extend the Treaty protection to breaches of an ordinary commercial contract entered into by the State or State-owned entity, but will cover additional investment protections contractually agreed to by the State as a sovereign – such as a stabilization clause – inserted into an investment agreement.”<sup>381</sup>

224. Article II(2) of the BIT provides, in relevant part, 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.”<sup>382</sup> The tribunal in *SGS v. Pakistan* addressed similar language. There, the umbrella clause stated that “[e]ach Contracting Party shall constantly guarantee the observance of the

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<sup>379</sup> See, e.g., *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 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.”).

<sup>380</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment (July 3, 2002) (**RL-0019**), ¶ 96.

<sup>381</sup> *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction (Apr. 27, 2006) (**RL-0020**), ¶ 81.

<sup>382</sup> BIT (**CL-0001**), Art. II(2).

commitments it has entered into with respect to the investments of the investors of the Contracting Party.”<sup>383</sup> The tribunal found that the language of the umbrella clause was “susceptible of almost indefinite expansion” and, thus, required “clear and convincing evidence that” the parties intended for the specific breaches alleged by the claimant to be covered by the clause.<sup>384</sup>

225. In *SGS v. Philippines*, the tribunal found that contract breaches could give rise to a treaty breach on the basis of an umbrella clause providing that, “[e]ach Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party.”<sup>385</sup> The tribunal found, however, that “the general provisions of BITs should not, unless clearly expressed to do so, override specific and exclusive dispute settlement arrangements made in the investment contract itself.”<sup>386</sup> Each of the Claimants’ contracts contain clear and agreed dispute resolution provisions. Moreover, Article VII(2) of the BIT expressly provides that “investment dispute[s]” under the BIT “shall be submitted for resolution” in accordance with those contractual dispute resolution provisions. Thus, the restriction set forth by the tribunal in *SGS v. Philippines* is clearly implicated.

226. The restriction established in *SGS v. Philippines* has been endorsed by subsequent tribunals. In *BIVAC v. Paraguay*, for example, the tribunal held that if an umbrella clause imports a contractual obligation to make a payment, it must also import the obligation to respect the contract’s dispute resolution clause.<sup>387</sup> In other words, a claimant cannot cherry-pick among the provisions it wishes the tribunal to enforce within a contract-based claim; it cannot seek to benefit from a substantive right contained in the contract, while avoiding the burden of the

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<sup>383</sup> *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction (Aug. 6, 2003) (**RL-0021**), ¶ 163.

<sup>384</sup> *SGS v. Pakistan* (**RL-0021**), ¶ 167.

<sup>385</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (Jan. 29, 2004) (**RL-0022**), ¶ 115.

<sup>386</sup> *SGS v. Philippines* (**RL-0022**), ¶ 134.

<sup>387</sup> *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction (May 29, 2009) (**RL-0023**), ¶ 142.

contractually-agreed dispute resolution mechanism. That is precisely what the Claimants here are attempting to do.

227. Even if the Tribunal were to find that the alleged breaches of contract by Panama rose to the level of a treaty breach, it should limit the remedies available for those breaches to those available under the contract.<sup>388</sup> The Claimants, therefore, would be entitled to damages they can prove for breach of their existing contracts. They would have no right to claim lost profits from “potential new contracts.”

**C. THE TRIBUNAL LACKS JURISDICTION OVER CLAIMS RELATING TO PANAMA’S CRIMINAL INVESTIGATION AS THEY DO NOT ARISE DIRECTLY OUT OF AN INVESTMENT**

228. Panama’s consent to arbitrate disputes under the BIT and TPA is limited. Unlike some investment treaties that cover disputes arising out of an investor’s activities within a country, the consent contained within the BIT and TPA extends only to “investment disputes.”<sup>389</sup>

229. On top of that, Article 25 of the ICSID Convention restricts the jurisdiction of ICSID tribunals to legal disputes “arising directly out of an investment.”<sup>390</sup> This requires there to be a close connection between the investment and the dispute.<sup>391</sup>

230. The Claimants argue that the criminal investigation into Mr. Rivera and Omega are part of a series of actions by Panama that violated the BIT and TPA. The Claimants’ reliance on the criminal investigations as the foundation of any claim against Panama, however, is misplaced; the criminal investigations did not arise directly out of any so-called “investment” by the Claimants. As detailed above, Mr. Rivera and Omega were first identified by Panamanian criminal enforcement authorities as parties of interest as the result of the investigation of Justice Moncada Luna and the bank transactions by which he illegally acquired two luxury apartments.

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<sup>388</sup> *SGS v. Philippines* (RL-0022), ¶ 127 (finding that, while the umbrella clause may give a tribunal jurisdiction over a contract-breach claim, the measure of damages that may be owed by the Philippines would be determined in reference to the contract and not the treaty).

<sup>389</sup> BIT (CL-0001), Art. VII; TPA (CL-0003), Art. 10.16.

<sup>390</sup> ICSID Convention (CL-0004), Art. 25(1).

<sup>391</sup> Christoph Schreuer, *The ICSID Convention: A Commentary*, (2d Ed. Cambridge University Press 2009) (CL-0117), Art. 25, ¶ 85.

As the Claimants acknowledge, that investigation was “triggered by a complaint filed by members of Panama’s Bar Association . . . alleging that Mr. Moncada Luna had acquired two luxury condominiums through companies owned and managed by his wife” and that he did not earn sufficient income from his government salary to afford those properties.<sup>392</sup>

231. At the time the Moncada Luna investigation commenced, the Panamanian authorities had no information connecting Mr. Rivera to Justice Moncada Luna’s corruption.<sup>393</sup> During the investigation, however, a clear connection became evident between money paid to Omega by the Judicial Authority and money used by Justice Moncada Luna to purchase the two luxury units. It was only the cash movements in accounts controlled by Mr. Rivera, and not Omega’s construction activities, that enmeshed the Claimants in the Moncada Luna criminal investigation.

232. The Claimants falsely characterize Panama’s actions as a “[s]eries of bogus criminal investigations.”<sup>394</sup> The reality is that the first investigation, undertaken by the Panamanian National Assembly, was jurisdictionally confined to Justice Moncada Luna. Although the National Assembly discovered the trail of corrupt payments from Omega to Justice Moncada Luna, the National Assembly had no authority to prosecute the non-governmental parties inhabiting that trail. The National Assembly, therefore, referred its findings to the National Prosecutor for further actions. Two divisions within the National Prosecutor’s office opened investigations into the Claimants’ activities: the anti-corruption division and the organized crime division. Both of these investigations were the result of the referral from the National Assembly’s office.

233. These undisputed facts make it clear that the criminal investigations into the Claimants did not arise “directly out of an investment” as required by Article 25 of the ICSID Convention, but were the product of an investigation into public corruption. As they did not arise out of an investment, disputes relating to the investigations do not qualify as “investment disputes” under the BIT or TPA. Accordingly, the Tribunal should dismiss all claims relating to Panama’s criminal investigation in to the Claimants.

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<sup>392</sup> Claimants’ Memorial ¶ 89.

<sup>393</sup> Villalba Statement ¶¶ 16, 37.

<sup>394</sup> Claimants’ Memorial p. 50, Subheading D.

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

234. Alternatively, the Claimants' BIT Claims must be dismissed because the BIT expressly requires that "investment disputes" be resolved in accordance with dispute-settlement procedures previously agreed between the parties. Article VII(2) of the Panama/US BIT states:

In the event of an investment dispute between a Party and a national or company of the other Party with respect to an investment of such national or company in the territory of the first Party, the parties to the dispute shall initially seek to resolve it by consultation and negotiation, agree to rely upon non-binding, third-party procedures, such as the fact finding facility available under the Rules of the Additional Facility ("Additional Facility") of the International Centre for Settlement of Investment Disputes ("Centre"). **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. Such procedures may provide for recourse to international arbitration using a forum such as the Inter-American Commercial Arbitration Commission.** 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 domestic law of such Party and treaties and other international agreements regarding enforcement of arbitral awards to which such Party has adhered.<sup>395</sup>

235. The original version of Article VII(3), the following section in the BIT, provided that a claimant can "consent in writing to the submission of" a dispute to the ICSID Additional Facility.<sup>396</sup> Article VII(3) was amended in 2000, following Panama's accession to the ICSID Convention, to allow for the submission of disputes to ICSID, UNCITRAL, and the ICSID Additional Facility.<sup>397</sup> But, notably, no changes were made to Article VII(2), leaving unaltered the obligation to resolve "investment dispute[s]" through the dispute-settlement procedures

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<sup>395</sup> BIT (CL-0001), Art. VII(2) (emphasis added).

<sup>396</sup> BIT (CL-0001), Art. VII(3)(a).

<sup>397</sup> See Protocol between the Government of the United States of America and the Government of the Republic of Panama Amending the Treaty Concerning the Treatment and Protection of Investments of Oct. 27, 1982, signed on June 1, 2000 and entered into force May 30, 2001 (CL-0002), Art. 1.

previously agreed between a claimant and a host state. Here, the Claimants and the host state agreed to various different forums for a commercial arbitration, and not ICSID.

236. Article 31 of the Vienna Convention on the Law of Treaties requires that treaties be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>398</sup> Moreover, it is well settled within the context of investment arbitration that, when interpreting treaties, tribunals should not adopt interpretations that render provisions meaningless, thereby failing to give effect to the parties’ expressed intent.<sup>399</sup>

237. The plain meaning of Article VII(2) is clear. First, the claimant and the host state must seek to resolve “investment dispute[s]” through “consultation and negotiation.”<sup>400</sup> Second, where the “investor” and the host state have entered into contracts containing agreed “dispute-settlement procedures,” and an “investment dispute” is not resolved through consultation and negotiation, that dispute “shall be submitted for settlement in accordance with the” previously agreed procedures, which can include international arbitration.<sup>401</sup>

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<sup>398</sup> Vienna Convention on the Law of Treaties, Art. 31, UN Doc. A/Conf.39/27, 1155 UNTS 331, 8 ILM 679 (1969) (CL-0030).

<sup>399</sup> See, e.g., *PNG Sustainable Development Program LTD v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Award (May 5, 2015) (RL-0024), ¶¶ 267-69 (“Effet utile has been recognized as one of the principles of treaty interpretation under international law”); *PNG v. Papua New Guinea* (RL-0024), ¶ 267 (“Under general principles of statutory interpretation, a legal text should be interpreted in such a way that a reason and a meaning can be attributed to every word in the text.”) (quoting *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Preliminary Objections to Jurisdiction (Apr. 14, 1988), ¶ 94); *Tidewater Inc. et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction (Feb. 8, 2013) (RL-0026), ¶¶ 134-40 (agreeing “that, in interpreting an instrument of consent for the purpose of Article 25(1) of the ICSID Convention, applying the principle of good faith, it should strive to avoid an interpretation that either (i) leads to an impossibility or absurdity or (ii) empties the provision of the legal effect intended by the state”); *Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction (Dec. 30, 2010) (RL-0027), ¶ 107 (“The Tribunal recalls that, as recognized by the International Court of Justice, ‘the principle of effectiveness has an important role in the law of treaties.’ As stated by the tribunal in the *Eureko v. Poland* case, ‘[i]t is a cardinal rule of interpretation of treaties that each and every clause of a treaty is to be interpreted as meaningful rather than meaningless.’ The International Court of Justice and ICSID Tribunals have applied that principle in a number of treaty cases.”) (citations omitted).

<sup>400</sup> BIT (CL-0001), Art. VII(2).

<sup>401</sup> BIT (CL-0001), Art. VII(2).

238. The use of the phrase “shall be submitted for settlement” renders this obligation mandatory, leaving no room for interpretation or alternative measures. By referencing forums such as the “Inter-American Commercial Arbitration Commission,” Panama and the United States provided an example of an institution they considered appropriate for resolving “investment dispute[s]” under the BIT. The use of the term “such as,” however, makes clear that the reference to the Inter-American Commercial Arbitration Commission was illustrative, and that the investor and host state were free to agree to other forums (both arbitral and judicial) in their contracts. The explicit reference to a commercial institution also shows that the two countries accepted that “investment dispute[s]” could be resolved outside of ICSID, UNCITRAL, or the ICSID Additional Facility – forums specified in the amended BIT.

239. The Claimants have acknowledged that the BIT Contracts are subject to the “dispute resolution provisions of the BIT.”<sup>402</sup> As such, the BIT Claims are subject to the procedures set forth in Article VII(2). For example, the MINSA CAPSI Contracts each contain provisions mandating that disputes be resolved through arbitration conducted under the Rules of Arbitration of the International Chamber of Commerce.<sup>403</sup>

All disputes regarding the formation, execution, construction, and termination of this contract that are not resolved directly by the parties shall be resolved through arbitration conducted in accordance with the Arbitration Rules of the International Chamber of Commerce.

240. The contracts governing both the Ciudad de las Artes Project and the Ministry of the Presidency Project contain clauses requiring that disputes be resolved before the Panamanian courts. Thus, the Ciudad de las Artes Contract provides:

This Contract Shall Be Governed and Interpreted in Accordance with the Laws of Panama and for all purposes of this Contract. THE PARTIES have chosen Panama City, Panama, as special domicile, and state that they shall submit to the Jurisdiction of Panamanian Courts.

Any claim that arises due to the interpretation or enforcement of this Contract shall be resolved by mutual agreement between The Parties, and

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<sup>402</sup> Claimants’ Memorial ¶ 118.

<sup>403</sup> 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.

if it cannot be resolved in this way, the dispute shall be submitted to the Panamanian courts.<sup>404</sup>

241. Likewise, the Ministry of the Presidency Contract provides the following:

This Contract shall be governed and interpreted in accordance with the Laws of Panama and for all purposes of this Contract, THE PARTIES have chosen Panama City, Panama as special domicile, and state that they shall submit to the Jurisdiction of Panamanian Courts.

Any claim that arises due to the interpretation or enforcement of this Contract shall be resolved by mutual agreement between The Parties, and if it cannot be resolved in this way, the dispute shall be submitted to the Panamanian courts.<sup>405</sup>

242. As can be seen, the contracts at issue that are subject to the BIT all contain “dispute settlement procedures” that were “previously agreed” by the Claimants and Panama.<sup>406</sup> The plain language of Article VII(2) therefore requires the Claimants to pursue their Claims in accordance with those previously agreed procedures.<sup>407</sup>

243. The Claimants’ obligation to submit the BIT Claims for resolution pursuant to the contractually-agreed dispute resolution procedures is not diminished by the language of Article VII(3). As amended, Article VII(3) provides that, after a period of six month from the date on which a dispute arose has elapsed, a “national or company” may “consent in writing to the submission of the dispute” to ICSID, UNCITRAL, or the ICSID Additional Facility. However, that provision would apply only in cases where a claimant has not previously agreed to “dispute settlement procedures” with Panama or the United States and, thus, falls outside the scope of Article VII(2). Where such “previously agreed” procedures exist, as here, they must be followed.

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<sup>404</sup> Contract No. 093-12 dated July 6, 2012 (**C-0042-Resubmitted**), Cl. 42.

<sup>405</sup> Contract No. 043 (2012) (**C-0034-Resubmitted**), Cl. 78.

<sup>406</sup> BIT (**CL-0001**), Art. VII(2).

<sup>407</sup> It should be noted that the contracts subject to the TPA also contain previously agreed dispute settlement procedures. *See* Tender Abbreviated for Best Value for “Construction of A Building for the Regional Judicial Unit of the District of La Chorrera,” No. 2012-0-30-0-08-AV-004833 dated 2012 (**C-0024-Resubmitted**), General Conditions, Art. 49; Contract No. 01-13 dated Jan. 24, 2013 (**C-0051**), Cl. 22; Contract No. 857-2013 dated Sept. 12, 2013 (**C-0056**), Cls. 13 & 15.

244. If the Tribunal were to hold that Article VII(3) permits claimants who have previously agreed to contractual dispute resolution procedures with Panama or the United States to bypass those procedures, it would render Article VII(2) meaningless. Such an interpretation would violate Article 31 of the Vienna Convention and fundamental principles of treaty interpretation. Accordingly, the BIT Claims must be dismissed on the basis of the previously agreed dispute resolution procedures, which deprive the Tribunal of jurisdiction.

245. In short, this case should be dismissed, as it cannot proceed in this forum.

**PANAMA'S COUNTER-MEMORIAL ON THE MERITS**

#### IV. PANAMAS' 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"

246. The Claimants repeatedly state that they were the victim of harassing and retaliatory acts taken by President Varela and his administration, which is clearly a foundational element of their entire case.<sup>408</sup> Indeed, the Claimants assert that their investments were operating smoothly prior to Mr. Varela's election and that any issues that may have arisen on the Projects were the type of ordinary commercial issues routinely experienced in construction projects.<sup>409</sup>

247. While the Claimants repeatedly suggest that they were victimized by President Varela's administration, the facts do not support their conspiratorial theories.

248. First, as discussed above and reiterated in the sections below, representatives from all of the Ministries and municipalities that have testified have affirmed that they were neither asked nor instructed to interfere with or obstruct the Claimants' Projects.<sup>410</sup> To the contrary, the witnesses have testified about the steps they took to work with the Claimants to help them

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<sup>408</sup> See, e.g., Claimants' Memorial ¶ 1 ("This dispute pertains to a series of measures targeted against Mr. Oscar Rivera . . . and his company and investments by the Government of Panama."); Claimants' Memorial ¶ 3 ("When Mr. Varela assumed the office of the Presidency in July 2014, the new Government promptly targeted Mr. Rivera and the Omega Consortium, whose contracts had each been awarded during the previous administration, with a number of hostile measures."); Claimants' Memorial ¶ 3 ("In the midst of this pattern of targeted measures, the Government zeroed in on Mr. Rivera and Omega Panama with baseless criminal investigations, and launched a highly-public campaign aimed at sullyng their international reputation."); Claimants' Memorial p. 28 ("IV. Claimants' Investment In Panama was Progressing Well Until President Varela Assumed Office in 2014"); Claimants' Memorial p. 38 ("VI. Upon Taking Office, the Varela Administration Launched an Orchestrated Campaign of Harassment Against Claimants and their Investment.").

<sup>409</sup> See, e.g., Claimants' Memorial ¶ 147.

<sup>410</sup> Barsallo Statement ¶ 41 ("The Health Ministry was not asked or instructed to terminate or hinder Omega's projects..."); Rios Statement ¶ 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."); Diaz Statement, ¶ 29 ("I was never asked to take any retaliatory or adverse measures against Omega, and I am not aware of anyone at the Municipality being asked the same."); Chen Statement, ¶ 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."); Bernard Statement ¶¶ 17-18 ("I am not aware of anyone in the Comptroller General's office who was asked or directed to take any negative actions towards Mr. Rivera, Omega, or their projects.").

address the delays and other commercial issues that arose. Ultimately, though, it was Omega that stopped cooperating and abandoned the projects.

249. Second, the Claimants' theories are undermined by undisputed facts. For example, as part of their fair and equitable treatment claim, the Claimants allege that the government was delayed in providing permits and approved construction plans.<sup>411</sup> To support their allegation, the Claimants cite two letters in which they seek an extension of time for problems that arose on the La Chorrera Project. The first letter is dated April 8, 2013<sup>412</sup> and the second letter is dated May 15, 2014.<sup>413</sup> In both cases, the extension requests are predicated on conduct that predates the letters. President Varela was elected to office on May 4, 2014 and was sworn in on July 1, 2014. The Claimants, therefore, are attempting to prove a pattern of harassment by the Varela administration through conduct that occurred months prior to his taking office.

250. Third, the Claimants have no direct evidence of this supposed campaign of harassment. Instead, they infer its existence by attempting to piece together disparate decisions taken with respect to distinct projects by individual government institutions acting independently. While the Claimants speak in generalizations about their treatment, they fail to address the commercial reasons underlying the various issues that were faced and decisions that were taken on the projects. As the facts described above show, each ministry worked closely with the Claimants to resolve issues and to keep the work moving forward. Applications for extensions of time or payment were returned or rejected only where they lacked sufficient documentation, required clarification, or had commercial issues that needed to be resolved. This was true for Omega and for all public works contracts in Panama.

251. Finally, the Claimants' suggestion that they were unfairly targeted through criminal investigations fails in the face of irrefutable documentary evidence proving two corrupt payments made by Mr. Rivera and Omega to Justice Moncada Luna. Bank records show the movement of money from the Judicial Authority, through Mr. Rivera's companies and,

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<sup>411</sup> Claimants' Memorial ¶ 166.

<sup>412</sup> Claimants' Memorial ¶ 72, n. 161 (citing to Letter No. 2014 04 08 – P007-037 from the Omega Consortium to the Judiciary (C-0065-Resubmitted)).

<sup>413</sup> See Letter No. 2014 05 15 – P007-045 from the Omega Consortium to the Judiciary, dated May 15, 2014 (C-0066-Resubmitted).

ultimately to accounts for the benefit of Justice Moncada Luna. In both documented cases of bribery, the money was used to pay for two luxury apartments that, in his plea agreement, Justice Moncada Luna acknowledged were acquired unlawfully and were the basis of his guilty plea to charges of unjust enrichment and making false statements.<sup>414</sup>

## **B. PANAMA DID NOT EXPROPRIATE THE CLAIMANTS' INVESTMENTS**

252. The Claimants argue that Panama indirectly expropriated their contractual rights in the BIT and TPA contracts, their investment in Omega Panama, and the goodwill and know-how that they invested into Omega Panama.<sup>415</sup>

253. The acts alleged to have effectuated this expropriation, however, are nothing more than a series of purported contractual breaches or otherwise legitimate government actions. Indeed, according to the Claimants, Panama's "cessation of payments on the Contracts, its termination or suspension of those Contracts, its illegal declaration of default in the *Ciudad de las Artes* Contract, and its refusal to issue necessary licenses and approvals on the others constituted an expropriation of Claimants' contractual rights."<sup>416</sup> With respect to their investment in Omega Panama, the Claimants again point to the refusal to pay invoices and the termination of contracts as the basis for their expropriation claim. In addition, though, they also point to the criminal investigations of Mr. Rivera and the freezing of Omega Panama's bank accounts that occurred as part of that investigation.

254. The Claimants' expropriation claim fails as both a matter of fact and law. Panama acted in a commercial capacity when taking decisions with respect to Claimants' Contracts. Moreover, as shown above, the Claimants became involved in criminal investigations as a result of the corruption investigation into Justice Moncada Luna. Neither Mr. Rivera nor Omega would have been the subject of any investigation if bank records had not conclusively established that Omega

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<sup>414</sup> Plea Bargain (**R-0064**) (pleading guilty to the crime of unjust enrichment and agreeing to the confiscation of the PH Ocean Sky and PH Santorini apartments as part of his sentence); National Assembly Guilty Verdict No. 1 dated Mar. 5, 2015 (**R-0083**), p. 3 ("Based on what was stated at the hearing, [Justice Moncada Luna] admitted that he had purchased properties of considerable value which were identified and substantiated by the Prosecutor. For that reason, the agreed primary penalty of sixty – 60 – months of prison will be imposed upon him....").

<sup>415</sup> Claimants' Memorial ¶¶ 147-154.

<sup>416</sup> Claimants' Memorial ¶ 146.

corruptly funneled moneys paid to it by the Judiciary to Justice Moncada Luna. The Claimants can hardly complain that the consequences of their unlawful activity resulted in the investigation of their activities and the seizure of their bank accounts.

255. It is well settled that a breach of contract by a state will not necessarily give rise to liability under international law. As the tribunal in *AWG v. Argentina* explained:

In investor-State arbitrations which involve breaches of contracts concluded between a claimant and a host government, tribunals have made a distinction between *acta iure imperii* and *acta iure gestionis*, that is to say, actions by a State in exercise of its sovereign powers and actions of a State as a contracting party. It is the use by a State of its sovereign powers that gives rise to treaty breaches, while actions as a contracting party merely give rise to contract claims not ordinarily covered by an investment treaty . . . . However, the mere fact that there is some government involvement in the events that lead to the termination of a contract does not necessarily mean that such termination is the result of an exercise of sovereign powers.<sup>417</sup>

256. In the face of this authority, the Claimants correctly acknowledge that “not all breaches of contract by States will be found to be expropriatory” and that only acts taken by a State in its sovereign capacity (and not in a commercial capacity) can give rise to an expropriation.<sup>418</sup>

257. The tribunal in *Parkerings v. Lithuania* identified three “cumulative conditions” that must be present in order for an alleged breach of a contract by a state to support a claim of expropriation. First, 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.”<sup>419</sup>

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<sup>417</sup> *AWG Group Ltd. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability (July 20, 2010) (CL-0011) ¶ 153; *Vanessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award (RL-0017), ¶ 209 (Jan. 16, 2013) (“[i]t is well established that, in order to amount to an expropriation under international law, it is necessary that the conduct of the State should go beyond that which an ordinary contracting party could adopt”); *Impregilo S.p.A. v. Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction (Apr. 22, 2005) (RL-0030), ¶ 267; Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (2d ed. 2012) (CL-0006), p. 128 (“[n]ot every failure by a government to perform a contract amounts to an expropriation even if the violation leads to a loss of rights under the contract. A simple breach of contract at the hands of the state is not an expropriation”).

<sup>418</sup> Claimants’ Memorial ¶ 144.

<sup>419</sup> *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (Sept. 11, 2007) (CL-0041), ¶ 443.

Accordingly, the breach must be the direct result of an exercise of its sovereign authority.<sup>420</sup> 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.”<sup>421</sup> The Claimants complain of four types of acts relating to the Contracts: (i) failure to pay invoices; (ii) the termination or suspension of the Contracts; (iii) the declaration of default in the Ciudad de las Artes Contract; and (iv) the refusal to issue necessary approvals.<sup>422</sup> As explained in detail above, each of these acts is inherently commercial in nature and is precisely the type of act that any party to a contract could undertake. The Claimants have presented no evidence to support their allegation that any action was directed towards them for political reasons. Every action complained of was grounded in the contracts or was the product of the Claimants’ own commercial failures.

258. Second, a domestic tribunal should, as a preliminary matter, determine whether a breach of domestic law has occurred. Indeed, the *Parkerings* tribunal made clear that “a preliminary determination of the existence of a contractual breach under domestic law is, in most cases, a prerequisite.”<sup>423</sup> The 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 state is alleged to have deprived the investor – legally or practically – from seeking a remedy before an appropriate dispute resolution forum.<sup>424</sup> In the former circumstance, the investor “should, as a general rule, sue [the alleged breaching party] in the appropriate forum to remedy the breach.”<sup>425</sup> That step should be excused, however, only if the investor could show that it was deprived of its ability to seek a remedy before the appropriate forum.<sup>426</sup>

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<sup>420</sup> *Parkerings v. Lithuania (CL-0041)*, ¶ 443.

<sup>421</sup> *Parkerings v. Lithuania (CL-0041)*, ¶ 443.

<sup>422</sup> Claimants’ Memorial ¶ 146.

<sup>423</sup> *Parkerings v. Lithuania (CL-0041)*, ¶ 448.

<sup>424</sup> *See Parkerings v. Lithuania (CL-0041)*, ¶ 449.

<sup>425</sup> *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

259. As discussed above, each of the Claimants' Contracts contains an agreed procedure for resolving disputes. Three of those agreements provide for arbitration administered by one or more international institutions;<sup>427</sup> one provides for *ad hoc* arbitration;<sup>428</sup> and four provide for disputes to be resolved by Panamanian courts.<sup>429</sup> The Claimants do not allege that they were deprived of their ability to pursue remedies through these contractually-agreed mechanisms. Indeed, even where Panama formally terminated an agreement, the dispute resolution mechanism specified in that agreement remained available to the Claimants. They simply chose to ignore those mechanisms.

260. Even if the Claimants could somehow be excused for their failure to pursue their contractual remedies and obtain a determination that Panama's actions breached some or all of the Contracts, the Tribunal should still find that they have not met the standard articulated by the *Parkerings* tribunal. The Claimants have made no effort to prove that Panama's alleged conduct breaches the Contracts. There is no discussion in their submission of Panamanian contract law or the specific facts relating to each instance where the Claimants assert an invoice went unpaid, an extension was denied, a plan or permit was withheld, or a contract was terminated. Rather, they baldly assert that breaches have occurred. There can be no doubt that the Claimants bear the burden of proving each element of their claims. Because the Claimants rely on the alleged breach of contract as a basis for their expropriation claim, proving the existence of that breach is a fundamental and unavoidable element of their burden. They have not met that burden. As a result, there is no basis upon which the Tribunal can determine the existence of a breach, let

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the present case, the Claimants did not lose its contractual rights, which it was free to pursue before the contractually chosen forum.”).

<sup>426</sup> See *Parkerings v. Lithuania* (CL-0041), ¶ 449.

<sup>427</sup> 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.

<sup>428</sup> Tender Abbreviated for Best Value for “Construction of A Building for the Regional Judicial Unit of the District of La Chorrera,” No. 2012-0-30-0-08-AV-004833 dated 2012 (C-0024 resubmitted), Art. 49 (stating that if the contractor requested arbitration, the parties would have 72 hours to agree on a single arbitrator, but if no agreement was reached, the parties would each select an arbitrator and those two arbitrators would select the third, noting that arbitrators would preferably be engineers or architects).

<sup>429</sup> See Contract No. 093-12 dated July 6, 2012 (C-0042), Cl. 42; Contract No. 043 (2012) dated Aug. 19, 2012 (C-0034-Resubmitted), Cl. 78; Contract 857-2013 dated Sept. 12, 2013 (C-0056-Resubmitted), Arts. 13, 15; Contract No. 01-13 dated Jan. 24, 2013 (C-0051-Resubmitted), Art. 22.

alone whether that breach was caused by Panama acting in a commercial or sovereign capacity. This alone is sufficient to deny Panama's expropriation claim.

261. Third, the alleged breach of the contract must give rise to a substantial decrease or deprivation of the value of the investment.<sup>430</sup> As Dr. Flores describes in his expert report, Omega Panama – the investment at issue – had “zero value to a potential willing buyer.”<sup>431</sup> The company had virtually no revenue generating assets, whether tangible or intangible. With respect to tangible assets, it owned very little machinery and, by its own admission, subcontracted for all necessary labor and equipment on its projects. Similarly, it had no valuable intangible assets. Omega Panama did not have an exclusive license to work on government projects, but, instead, was one of thousands of contractors in Panama bidding for a limited number of contracts. Likewise, its license to operate in Panama held no real value. As Dr. Flores notes, Panama is consistently ranked as one of the easiest countries in the world in which to establish a new business.<sup>432</sup> Omega Panama (like every other company that wanted to bid on public works contracts) simply had to complete the paperwork, pay the nominal fees, and obtain the necessary permits – a process that can take as little as six days.<sup>433</sup>

262. 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 – therefore, are extremely limited and, certainly do not constitute a substantial decrease or deprivation in the value of Omega Panama as a company.

263. Under the circumstances, it is clear that the Claimants have not satisfied any – let alone all – of the conditions necessary to prove an expropriation occurred. The Claimants' expropriation claim, therefore, should be denied.

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<sup>430</sup> *Parkerings v. Lithuania* (CL-0041), ¶¶ 440, 443-456.

<sup>431</sup> Expert report of Dr. Daniel Flores (“**Dr. Flores Report**”), Section III(A), ¶ 23.

<sup>432</sup> Dr. Flores Report ¶ 20, n. 18.

<sup>433</sup> Dr. Flores Report ¶ 20.

### C. PANAMA TREATED THE CLAIMANTS' INVESTMENTS FAIRLY AND EQUITABLY

264. The Claimants argue that the Republic treated them unfairly and inequitably by: (i) frustrating their “legitimate expectations that the State would comply with its contractual commitments;” (ii) harassing and coercing the Claimants and their investment; and (iii) treating the Claimants arbitrarily, unreasonably, and inconsistently.<sup>434</sup> Their arguments, however, are predicated on both a mischaracterization of the relevant fair and equitable treatment standard and factual inaccuracies. As a result, the Claimants’ fair and equitable treatment claim fails as both a matter of fact and law.

#### 1. Both the BIT and the TPA Contain Narrow Fair and Equitable Treatment Provisions that are Linked to Customary International Law Norms

265. Both the BIT and TPA contain provisions dealing with the fair and equitable treatment of foreign investments. 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.<sup>435</sup>

266. The TPA’s fair and equitable treatment provision provides that:

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.<sup>436</sup>

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<sup>434</sup> See Claimants’ Memorial ¶¶ 160-177.

<sup>435</sup> BIT (CL-0001), Art. II(2).

<sup>436</sup> TPA (CL-0003), Arts. 10.4(1); 10.4(2).

267. The Claimants argue that Panama “violated Article II.2 of the BIT,” which provides that “investment of nationals and companies of either Party shall at all times be accorded fair and equitable treatment.”<sup>437</sup> Notably, the Claimants fail to quote the remainder of Article II.2, which limits the scope of Panama’s and the United States’ fair and equitable treatment obligations to the standards required by “applicable national laws and international law.”<sup>438</sup>

268. The Claimants also ignore in its entirety the TPA’s fair and equitable treatment provision. Although stating in a footnote that the TPA contains a “narrower definition of FET,” the Claimants believe they can avoid this language by importing Article II.2 of the BIT and applying that to the TPA Contracts and TPA Claims.<sup>439</sup> It is remarkable that the Claimants offer such a sweeping proposition in a footnote and without any discussion, argument, or support. In any event, the Claimants’ argument is wrong for two reasons.

269. First, the Claimant’s assertion that the MFN provision in the BIT is broader than the one in the TPA is incorrect. When Article II.2 is read in its entirety – and not solely the cherry-picked version the Claimants misleadingly quoted – it is clear that Panama’s fair and equitable treatment obligation is no greater than that required by international law. That is precisely the same standard set out in the TPA, which states that fair and equitable treatment shall be provided “in accordance with customary international law.”<sup>440</sup> While the TPA includes additional language intended to provide “greater certainty” as to the scope of this commitment, that language neither expands nor reduces the breadth of Panama’s obligations. It does make clear, however, that the express reference to fair and equitable treatment in the TPA does not create any “additional substantive rights” for a claimant beyond those provided by the minimum standard of treatment under international law. The fact that such explanatory language is not included in the BIT likewise does not alter the scope of Panama’s obligations under that treaty.

270. Second, even if BIT Article II.2 was materially broader than Article 10.4 of the TPA, the TPA’s MFN provision does not permit the incorporation of provisions from the BIT. Rather, as

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<sup>437</sup> Claimants’ Memorial ¶ 160.

<sup>438</sup> BIT (CL-0001), Art. II(2).

<sup>439</sup> Claimants’ Memorial ¶ 160, n. 363.

<sup>440</sup> TPA (CL-0003), Art. 10.5(1).

discussed above, the purpose of the MFN provision is to ensure that U.S. investors in Panama are not treated worse than investors from another country. It does not preclude Panama and the United States from amending the terms of their respective investment obligations as between themselves.

**a. The Customary International Law Obligation of Fair and Equitable Treatment is not Predicated on an Investor’s Legitimate Expectations**

271. The Claimants’ argument that they were treated unfairly and inequitably because their “legitimate expectations” were frustrated is unfounded. Where the language of the relevant investment treaty links the fair and equitable treatment standard to international law – as it does here – the concept of “legitimate expectations” does not govern the question of whether a state has breached its fair and equitable treatment obligations. Rather, the question is whether the state has provided the minimum standard of treatment required under international law.

272. Traditionally, international law has established a high threshold for determining that a state has breached its minimum standard of treatment – and, hence, fair and equitable treatment – obligations. As articulated by the claims commission in *Neer v. United Mexican States*,

[T]he propriety of the governmental acts should be put to the test of international standards . . . . [T]he treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from the deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial.<sup>441</sup>

273. While first developed in the context of a criminal investigation, investment tribunals have adopted and incorporated the *Neer* standard into international investment law. For example, the tribunal in *Waste Management v. Mexico* held that the minimum standard of treatment is violated only when “the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and

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<sup>441</sup> *Neer v. United Mexican States (U.S. v. Mex.)*, 4 R.I.A.A. 60 (Gen. Claims Comm’n 1926) (RL-0028), ¶ 4.

exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome that offends judicial propriety.”<sup>442</sup>

274. In *Genin v. Estonia*, the claimant asserted that Estonia’s actions violated the fair and equitable treatment provision of the US-Estonia BIT, which provides that investments “shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than required by international law.”<sup>443</sup> The tribunal found that, while the “exact content” of the fair and equitable treatment standard is “not clear,” it “understood it to require an ‘international minimum standard’ that is separate from domestic law, but that, is indeed, a minimum standard.”<sup>444</sup> It found, therefore, that a government 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.”<sup>445</sup>

275. In *Saluka v. The Czech Republic*, the tribunal addressed the distinction between treaties that expressly connect the fair and equitable treatment standard to international law and those that do not.<sup>446</sup> In cases where a treaty links the two standards together, the tribunal noted that the “minimum standard” of treatment obligation under international law provides only “a minimum guarantee to foreign investors, even where the State follows a policy that is in principle opposed to foreign investment.”<sup>447</sup> The “minimum standard of fair and equitable treatment” therefore, “may provide no more than ‘minimal’ protection.”<sup>448</sup> As such, “in order to violate that standard, States’ conduct may have to display a relatively higher degree of inappropriateness.”<sup>449</sup> By

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<sup>442</sup> *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004) (CL-0033), ¶ 98.

<sup>443</sup> *Alex Genin et al v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award (June 25, 2001) (RL-0029), ¶ 367.

<sup>444</sup> *Genin v. Estonia* (RL-0029), ¶ 367 (emphasis in original).

<sup>445</sup> *Genin v. Estonia* (RL-0029), ¶ 367.

<sup>446</sup> *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award (Mar. 17, 2006) (CL-0038), ¶ 292.

<sup>447</sup> *Saluka Investments v. The Czech Republic* (CL-0038), ¶ 292.

<sup>448</sup> *Saluka Investments v. The Czech Republic* (CL-0038), ¶ 292.

<sup>449</sup> *Saluka Investments v. The Czech Republic* (CL-0038), ¶ 292.

contrast, the tribunal noted that, in cases where the treaty does not expressly link fair and equitable treatment standard to international law, “it may be sufficient that States’ conduct display a relatively lower degree of inappropriateness” in order to violate that standard.<sup>450</sup>

276. Here, both the TPA and the BIT link the fair and equitable treatment standards to international law. As such, the protections available to the Claimants’ under this standard are “minimal.” In order to hold Panama liable for a breach of this standard, the tribunal would have to find that Panama acted in bad faith towards the Claimants, and that Panama’s conduct was so grossly arbitrary, unfair, unjust, and discriminatory as to outrage and offend judicial propriety. There simply is no evidence to support such a finding. To the contrary, the evidence shows a government that, through its ministries and municipalities, worked with Omega to advance its Projects. Where commercial issues arose regarding delays and costs on those Projects, they were addressed in accordance with the contractual requirements. Where appropriate, Panama acknowledged responsibility for delays and provided extensions of time and additional compensation. Indeed, the evidence shows that in certain circumstances, Panama provided more relief than was even requested by the Claimants.

277. No matter how the Claimants attempt to present their claims, they all center on how these commercial issues were addressed on the Projects. The Claimants point to three acts that they believe support their position that Panama breached its fair and equitable treatment obligations. First, the Claimants argue that payment certificates were “progressively withheld” by the Comptroller General’s office.<sup>451</sup> As discussed above, payment delays occurred frequently on the Claimants’ Projects (and, indeed, all public works projects in Panama). The Comptroller General’s office had a contractual and legal obligation to review and approve all payments. In doing so, the Comptroller General was acting in a commercial capacity by ensuring that the payments were merited under the Contracts. The fact that the disputed payment requests had been approved by the ministries for whom the work was being performed was a necessary, but not a sufficient step in the approval process. Rather than wait for the approvals to be granted or provide the information requested by the Comptroller General’s office in order to secure

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<sup>450</sup> *Saluka Investments v. The Czech Republic (CL-0038)*, ¶ 293.

<sup>451</sup> Claimants’ Memorial ¶ 165.

approval of the disputed payments, the Claimants simply left their projects and abandoned their works.

278. Second, the Claimants allege that the government failed to provide certain plans and permits contemplated in the tender documents.<sup>452</sup> In particular, the Claimants argue that the “Government” failed to “timely provide approved construction plans” on the La Chorrera Project.<sup>453</sup> To support this argument, the Claimants cite two documents. The first is a letter dated April 8, 2013 in which Omega seeks an extension of time for, among other things, delays in the approval of construction plans.<sup>454</sup> The second is a letter dated May 15, 2014 in which Omega again seeks an extension of time for a variety of reasons, including the purported delay in approving certain plans. Notably, however, both letters refer to conduct that occurred well in advance of when the letters were sent – in other words, conduct that occurred in 2013 and early 2014. The Claimants would have the Tribunal believe that they are the victims of a targeted campaign of harassment and misconduct by the Varela administration; however, the conduct they use to support their claim occurred before President Varela was even elected, let alone was sworn into office.

279. The Claimants also allege that the Municipality of Panama did not assist Omega in obtaining a soil use certificate from the Ministry of Housing required for one of its market projects. As explained above, the Municipality made every effort to assist Omega in obtaining this certificate. When the Ministry of Housing finally issued the certificate thanks to the Municipality’s efforts, however, Omega had already abandoned the project three months prior.

280. Third, the Claimants argue that, “within months of President Varela’s inauguration, the government effectively terminated or allowed to lapse all but one of the Contracts.”<sup>455</sup> As discussed above, it was not unusual for Omega’s Contracts to lapse while extensions of time requests were pending before the relevant ministry or the Comptroller General. This occurred

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<sup>452</sup> Claimants’ Memorial ¶ 166.

<sup>453</sup> Claimants’ Memorial ¶ 72.

<sup>454</sup> Claimants’ Memorial ¶ 72, n. 161(citing to Letter No. 2014 04 08 – P007-037 from the Omega Consortium to the Judiciary (C-0065-Resubmitted)).

<sup>455</sup> Claimants’ Memorial ¶ 167.

during both the Martinelli and Varela administrations and was a commercial reality of the Projects. The fact that this also occurred during the transition period between the Martinelli and Varela administrations should not have come as a surprise to the Claimants. It certainly was nothing new, nor did it signal a change in how the Claimants' Projects were treated. The only change was in how the Claimants reacted. As discussed above, by early October 2014 – right around the time that the investigation into Justice Moncada Luna was made public – the Claimants stopped working with the Ministries and used the payment delays and lapses in the Contracts as excuses to walk off the job and flee the country.

281. Although the Claimants seek to ascribe some nefarious intent to Panama's actions, none exists. Panama wanted to complete the public works projects given to Omega. Omega, like every other contractor working on public works projects at the time, faced delays in progress and payment during and after the transition from the Martinelli administration to the Varela administration. Those delays were ordinary and compensable under each of the Project contracts. To the extent that Omega believed that Panama breached its contractual obligations as a result of those delays, it could have (and should have) pursued remedies through the contractually-agreed dispute resolution mechanisms.

282. Whether viewed individually or as a collective, the allegations underlying the Claimants' arguments do not make a breach of Panama's fair and equitable treatment obligation an issue.

**b. The Claimants' So-Called "Expectations" are not Protected Under the BIT or TPA**

283. Even if the Tribunal were to consider the appropriate fair and equitable treatment standard to be measured against an investor's "legitimate expectations," the Claimants' expectations here do not constitute expectations that are protected under the BIT or TPA.

284. The Claimants' "expectations" with respect to their investments were simply that Panama would not breach its contracts. Indeed, according to the Claimants, they "entered into eight Contracts for Projects with different Panamanian government entities. Claimants had every expectation that these *pacta* would be *servanda*."<sup>456</sup> The Claimants' argument fails.

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<sup>456</sup> Claimants' Memorial ¶ 164.

285. The Claimants' expectations focus solely on Panama's compliance with its commercial obligations under the Contracts. As such, they are attempting to transform ordinary commercial behavior into a type of conduct that is protected by international law. There simply is no support for that proposition. To the contrary, tribunals have routinely held that not every breach of a law or an agreement gives rise to a violation of a treaty. In *Duke Energy v. Ecuador*, the tribunal noted that "most of the Claimants' allegations under" the treaty's fair and equitable treatment requirement "deal[ ] with the non-compliance of the Respondent's contractual obligations."<sup>457</sup> The tribunal went on to hold that it is "a well-established principle that in and of itself a violation of a contract does not amount to a violation of a treaty. This is only natural since treaty and contract breaches are different things, responding to different tests, subject to different rules."<sup>458</sup> For this reason, the tribunal found that state acts, such as delays in the establishment of – and the poor implementation of – payment trusts, the irregular imposition of contract fines and the non-payment of interest on law payments due under the contract "did not involve the exercise of sovereign power on the part" of the state; rather, "[t]hese acts constitute conduct which any contract party could adopt; they are thus not capable of amounting to a breach of fair and equitable treatment."<sup>459</sup>

286. In *AWG v. Argentina*, the tribunal denied a claim that Argentina's termination of a concession agreement breached the treaty's fair and equitable treatment requirement:

Argentina's termination of the Concession was done pursuant to its contract with AASA. The Tribunal, as stated above, has no jurisdiction to judge whether Argentina's termination of the Concession breached the Concession Contract . . . . Whether Argentina breached the Concession Contract by terminating it is a matter for the dispute resolution procedures provided in that contract. In viewing the circumstances as [a] whole and the situation as it existed at the time of the termination, the tribunal finds the record insufficient to establish that Argentina's treatment of the Claimants' investments in terminating the Concession attained the level of

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<sup>457</sup> *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (Aug. 18, 2008) (CL-0037), ¶ 342.

<sup>458</sup> *See Duke Energy v. Ecuador* (CL-0037), ¶ 343.

<sup>459</sup> *Duke Energy v. Ecuador* (CL-0037), ¶ 348.

violating the fair and equitable standards required by the three applicable BITs.<sup>460</sup>

287. In *Saluka v. The Czech Republic*, the tribunal held that “the Treaty cannot be interpreted so as to penalize each and every breach by the Government 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.”<sup>461</sup> In *Impregilo v. Pakistan*, the claimant based several of its treaty claims on allegations that Pakistan had breached various contractual obligations. With respect to the claimant’s fair and equitable treatment claim, the tribunal held that claims alleging the breach of a contract were “not capable of constituting ‘unfair or inequitable treatment’ or ‘unjustified or discriminatory measures’” because they “concern the implementation of the” parties’ contracts and “do not involve any issue beyond the application of a contract and the conduct of the contracting parties.”<sup>462</sup> According to the tribunal, “the matter does not concern any exercise of ‘*puissance publique*’ by the State” and thus, does “not enter within the purview of Article 2(2) of the BIT.”<sup>463</sup> Notably, the *Impregilo* tribunal addressed this issue as a matter of jurisdiction, which only bolsters Panama’s jurisdictional objections set forth above. The tribunal’s reasoning is equally valid, however, in the context of a merits assessment.

288. The *Parkerings v. Lithuania* tribunal took this principle further by holding that:

Under certain very limited circumstances, a substantial breach of a contract could constitute a violation of a treaty. So far, case law has offered very few illustrations of such a situation. In most cases, a preliminary determination by a competent court as to whether the contract was breached under municipal law is necessary. This preliminary determination is even more necessary if the parties to the contract have agreed on a specific forum for all disputes arising out of the contract. For the avoidance of doubt, the requirement is not dependent upon the parties to the contract being the same as the parties to the arbitration.<sup>464</sup>

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<sup>460</sup> *AWG Group Ltd. v. The Argentine Republic*, UNCITRAL Arbitration, Decision on Liability (July 30, 2010) (CL-0011), ¶ 246.

<sup>461</sup> *Saluka Investments v. The Czech Republic* (CL-0038), ¶ 442.

<sup>462</sup> *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction (Apr. 22, 2005) (RL-0030), ¶ 268.

<sup>463</sup> *Impregilo S.p.A. v. Pakistan* (RL-0030), ¶¶ 268-269.

<sup>464</sup> *Parkerings v. Lithuania* (CL-0041), ¶ 316.

289. In *Waste Management v. Mexico*, the tribunal was confronted with allegations that Mexico had breached the fair and equitable treatment standard by failing to make certain contractual payments and to satisfy other contractual obligations.<sup>465</sup> The record showed, however, that the government took a number of actions to comply with its contractual obligations.<sup>466</sup> The tribunal balanced the facts to determine whether “the conduct of the parties concerned and the general consequences” were “caused ... in circumstances amounting to a breach of the minimum standard of treatment embodied in Article 1105.”<sup>467</sup> The Tribunal found that the treaty had not been breached, on the grounds that Mexico had performed some of its contractual obligations and worked with the investor to find “alternative solutions to the problems both parties faced.”<sup>468</sup> The tribunal noted that Mexico’s “most important default was its failure to pay.”<sup>469</sup> It held, however, that “even the persistent non-payment of debts by a municipality is not to be equated with a violation of Article 1105, provided that it does not amount to an outright and unjustified repudiation of the transaction and provided that some remedy is open to the creditor to address the problem.”<sup>470</sup>

290. Nothing in the present case suggests that it rises to one of the “very limited circumstances” referred to by the *Parkerings* tribunal. As discussed above, each of the ministries and agencies worked closely with Omega to address problems as they arose on the Projects. Where the works were delayed, extensions of time were granted. Where payments were delayed, the Ministries provided assistance to get the necessary approvals or to provide additional time and compensation to offset the cash-flow problems caused by the delayed payments. Panama, through its ministries and agencies, was an active participant in these Projects and worked diligently to accommodate the Claimants’ needs. Even if certain of Panama’s actions may have breached its contractual obligations (which is not admitted), those actions were neither persistent

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<sup>465</sup> See *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004) (CL-0033), ¶¶ 109-111.

<sup>466</sup> *Waste Management v. Mexico* (CL-0033), ¶ 110.

<sup>467</sup> *Waste Management v. Mexico* (CL-0033), ¶ 114.

<sup>468</sup> *Waste Management v. Mexico* (CL-0033), ¶ 115.

<sup>469</sup> *Waste Management v. Mexico* (CL-0033), ¶ 115.

<sup>470</sup> *Waste Management v. Mexico* (CL-0033), ¶ 115.

nor sufficiently egregious to give rise to international liability under the BIT. Moreover, a remedy was available to the Claimants to address any perceived breach. The Claimants at any time could have sought redress through the dispute resolution provision agreed in each contract. They chose not to do so. As such, they have not obtained a preliminary determination establishing that Panama's conduct breached any of the Contracts, let alone constituted a "substantial breach." The Claimants, therefore, have not met the most fundamental requirements of their claim and have provided no basis for this Tribunal to find that Panama has breached its obligations to provide fair and equitable treatment.

**c. The Claimants and Their Investments Were Not Harassed**

291. The Claimants allege that they were subjected to harassment and coercion as a result of the Comptroller General's "refusals to approve all of the various Contract payments," "threats from criminal investigations," and the denial of information relating to payments, permits and licenses.<sup>471</sup> To support their allegation, the Claimants rely on a single case – *Pope & Talbot v. Canada*.<sup>472</sup> Their reliance on that case is unfounded.

292. In *Pope & Talbot*, the claimant asserted claims that challenged Canada's allocation of softwood lumber exports to the United States.<sup>473</sup> These allocations were implemented by Canada to fulfill its obligations under the Softwood Lumber Agreement entered into between Canada and the United States. The claimants were unsatisfied with the allocation of export permits and claimed that Canada's conduct violated its obligations under NAFTA.

293. To determine the quota allocations, the Canadian government engaged in an extensive review of each company's business, historical sales, costs, and market share. The Tribunal found this to be a government intrusion into the day-to-day operations of the company that was "more like combat than cooperative regulation."<sup>474</sup>

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<sup>471</sup> See Claimants' Memorial ¶ 171 (emphasis in original).

<sup>472</sup> See Claimants' Memorial ¶ 170.

<sup>473</sup> *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2 (Apr. 10, 2001) (CL-0046).

<sup>474</sup> See *Pope & Talbot, Inc. v. Canada* (CL-0046), ¶ 181.

294. The Canadian government's conduct in *Pope & Talbot* is not at all comparable to the conduct of the parties in this arbitration. As an initial matter, this case does not involve the application of regulatory or legislative authority. Rather, it involves the commercial conduct of contracting parties. That alone is sufficient to render *Pope & Talbot* inapposite. In addition, though, the evidence clearly shows that the relevant Panamanian government institutions worked cooperatively with Omega to resolve issues on their Projects. Information and assistance was provided, and accommodations of time and compensation were granted. Despite this, in October of 2014, the Claimants began to stop working with the government and refused to continue within the process that had been in place since the outset of their works.

295. The Claimants' suggestion that the Comptroller General's denial of payment requests was a form of harassment is without support. The Comptroller General had an obligation to review each payment request and application to amend a contract to ensure that the requests complied with all contractual requirements. As part of this, the Comptroller General was within its rights to request additional information or clarification when it was unsure whether those requirements had been met. This process took several months and was carried out in the same manner over the entire course of the Claimants' works.

296. Likewise, the Claimants' suggestion that the criminal investigations were a form of harassment is equally without merit. The Claimants became the subject of an investigation as a result of Panama's investigation into Justice Moncada Luna. And, even then, the Claimants only came to Panama's attention because the evidence showed that Omega had used state funds to make two corrupt payments to Justice Moncada Luna. In the face of evidence that the Claimants had bribed a public official, Panama had a duty and obligation to further investigate the Claimants' actions. The Claimants' purported explanation – *i.e.*, that Mr. Rivera was attempting to purchase land to develop and has no idea how it ended up in the hands of Justice Moncada Luna – was disproven by the Public Prosecutor's investigation. Record evidence clearly shows the flow of money from Omega to Justice Moncada Luna. And, by contrast, there is no evidence to support the existence of an actual land development deal.

297. Lastly, the Claimants' suggestion that they were harassed because they were denied information relating to payments, permits, and licenses is simply wrong. According to the

Claimants, the alleged harassment began after the election of President Varela in May of 2014 and was the result of the Claimants alleged refusal to provide a campaign contribution. As “evidence” for their claim that they were harassed by the denial of information relating to permits and licenses, however, the Claimants point to activities occurring before President Varela was elected. For example, the Claimants stated that “the La Chorrera Contract required the Government to timely provide approved construction plans as well as an environmental study before the Omega Consortium could commence construction.”<sup>475</sup> Despite this, they claim that the government “without offering any justification, failed to provide approved construction plans, effectively barring the Omega Consortium from fulfilling its contractual obligations.”<sup>476</sup> Again, as support for these claims, the Claimants cite to letters from April 2013 and May 2014 – both of which pre-date President Varela’s time in office. The purported “evidence” upon which the Claimants rely, therefore, fails to support their claim.

298. Beyond that, even where the Claimants point to actions that occurred after July 2014, they have failed to show that the government’s actions were anything more than commercial in nature. For example, the Claimants point to the Municipality of Panama’s alleged refusal to respond to Omega’s requests for information.<sup>477</sup> Even if this were true (and the evidence shows that it is not), there is no evidence suggesting that the Municipality of Panama was acting in anything other than a commercial capacity. Indeed, refusing to respond to a contractual counterparty and, ultimately, threatening to terminate a contract, is the type of conduct that any commercial actor can undertake. Such conduct is hardly sovereign in nature and certainly not indicative of harassment.

**d. The Claimants Were Not Treated Arbitrarily, Unreasonably, and Inconsistently**

299. The Claimants argue that Panama breached its fair and equitable treatment obligations by treating them arbitrarily, unreasonably, inconsistently, and with a lack of transparency or good

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<sup>475</sup> Claimants’ Memorial ¶ 72 (emphasis added).

<sup>476</sup> Claimants’ Memorial ¶ 72.

<sup>477</sup> Claimants’ Memorial ¶ 73.

faith.<sup>478</sup> According to the Claimants, these elements of the fair and equitable treatment standard “fill gaps which may be left by other treaty standards in order to obtain the level of investor protection intended by the treaties.”<sup>479</sup> The Claimants provide no case law or other authority to support their position that these types of conduct should be used to fill any gaps in the BIT or TPA.<sup>480</sup>

300. The BIT contains a specific treaty provision protecting against unreasonable, arbitrary, or discriminatory conduct.<sup>481</sup> As a result, it is difficult for the Claimants to argue that any gaps exist that should be filled by the incorporation of these concepts into the fair and equitable treatment standard. In addition, as discussed in Section IV(D) below, Panama’s conduct was not unreasonable, arbitrary, or discriminatory in any way. Moreover, Panama did not act in bad faith or without transparency. Panama’s actions were taken in accordance with its contractual obligations and the decisions of the various ministries were explained in communications with the Claimants.

**e. Panama Has Not Committed a “Creeping Violation” of its Fair and Equitable Treatment Obligation**

301. The Claimants argue that, “taken together,” the allegations against Panama constitute a “creeping violation of the FET standard.”<sup>482</sup> While the Claimants appropriately recognize that none of the allegations they have leveled against Panama are sufficient to violate this obligation on their own, they are incorrect that the sum total of those allegations transforms them into a treaty breach.

302. The concept of a creeping FET violation was first articulated by the tribunal in *El Paso v. Argentina*.<sup>483</sup> There, the tribunal held that none of the government’s actions alone was sufficient

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<sup>478</sup> See Claimants’ Memorial, Section IX.B.3.

<sup>479</sup> See Claimants’ Memorial ¶ 173.

<sup>480</sup> See Claimants’ Memorial ¶¶ 173-174.

<sup>481</sup> BIT (CL-0001), Art II(2).

<sup>482</sup> Claimants’ Memorial ¶ 179.

<sup>483</sup> *El Paso Energy International Co. v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award (Oct. 31, 2011) (CL-0056), ¶ 516-19.

to violate the treaty.<sup>484</sup> The tribunal, however, proceeded to look at the actions as a whole to determine whether their cumulative effect could give rise to a treaty violation.<sup>485</sup> In an effort to support its conception of a creeping violation of the FET standard, the *El Paso* tribunal relied heavily on the notion of “composite acts” as set forth in Article 15 of the International Law Commission’s Draft Articles on State Responsibility (“ILC Articles”).<sup>486</sup> The *El Paso* tribunal’s reliance on Article 15 of the ILC Articles, however, is misplaced.

303. Article 15 provides:

Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omission defined in aggregate as wrongful occurs when the action or omissions which, taken with the other actions or omissions, is sufficient to constitute a wrongful act.
2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligations.<sup>487</sup>

304. The Commentaries to the ILC Articles clarify that:

Composite acts covered by Article 15 are limited to breaches of obligations which concern some aggregate of conduct and not individual acts as such. In other words, their focus is a ‘series of acts or omissions defined in aggregate as wrongful.’ Examples include the obligations concerning genocide, apartheid or crimes against humanity, systematic acts of racial discrimination, systematic acts of discrimination prohibited by a trade agreement, etc.<sup>488</sup>

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<sup>484</sup> See *El Paso v. Argentina* (CL-0056), ¶ 516-19.

<sup>485</sup> See *El Paso v. Argentina* (CL-0056), ¶ 516-19.

<sup>486</sup> See *El Paso v. Argentina* (CL-0056), ¶¶ 516-19.

<sup>487</sup> International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, available at [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf). (last visited Jan. 6, 2019) (CL-0092)

<sup>488</sup> ILC Articles (CL-0092), p. 62.

305. As this commentary makes clear, the term “composite act” refers to obligations that can only be breached through a series of acts rather than through an individual act. Composite acts, therefore, exist solely where a systemic policy unites the whole of the actions into a single determined wrongful act.<sup>489</sup> This stands in contrast to the concept of “simple repeated acts,” in which individual lawful acts, unconnected by a common motive or systematic policy, are repeated.<sup>490</sup> In that case, there is no international law basis to cumulate the effect of the lawful activities. Rather, they must be measured on their own merits.

306. As discussed above, the Claimants cite a series of commercial actions, taken by different ministries at different times over the course of years, in connection with separate and distinct commercial contracts. The nature of these actions does not fit within the ILC’s conception of a “composite act.” Moreover, many of the actions complained of occurred well before the Varela administration was in office and, thus, could not be part of any “systematic plan” conjured up by the Claimants. Accordingly, there is no legal basis upon which to find that Panama has committed a creeping breach of its fair and equitable treatment obligations.

**D. PANAMA HAS NOT BREACHED ITS OBLIGATION TO PROVIDE FULL PROTECTION AND SECURITY IN ACCORDANCE WITH THE PANAMA-US BIT AND TPA**

307. The Claimants allege that Panama failed to provide full protection and security in relation to its investments. In support of their allegation, the Claimants point to Panama’s purported breaches of contract and the initiation of criminal investigations against Omega and Mr. Rivera. Again, the Claimants attempt to transform ordinary commercial conduct and legitimate police activity into treaty violations. The Claimants’ efforts here, however, are no more successful than they were above.

**1. The Treaty Standards**

308. The Panama-US BIT and the TPA both contain provisions providing for full protection and security. Article II(2) of the BIT states:

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<sup>489</sup> See, e.g., Jean Salmon, *Duration of the Breach*, in *The Law of International Responsibility* (James Crawford *et al.*, eds. 2010) (RL-0031), p. 338, 391.

<sup>490</sup> See Jean Salmon, *Duration of the Breach*, in *The Law of International Responsibility* (James Crawford *et al.*, eds. 2010) (RL-0031), p. 338, 391.

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. The treatment, protection and security of investment shall be in accordance with applicable national laws and international law.<sup>491</sup>

309. Article 10.5(1) of the TPA provides that “[e]ach Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.”<sup>492</sup> Article 10.5(2) of the TPA goes on to clarify that “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.”<sup>493</sup>

310. As with the fair and equitable treatment standard, the requirement to provide full protection and security is linked to the minimum standard of treatment found in international law. As a standard found in customary international law, full protection and security has traditionally applied “when the foreign investment has been affected by civil strife and physical violence . . . and obliges the host State to adopt all reasonable measures to protect assets and property from threats or attacks which may target particularly foreigners or certain groups of foreigners.”<sup>494</sup> The standard, however, “is not meant to cover just any kind of impairment of an investor’s investment, but to protect more specifically the physical integrity of an investment against interference by use of force.”<sup>495</sup>

311. Similarly, in *Eastern Sugar v. Czech Republic*, the tribunal found that the full protection and security standard protected investors only from violence stemming from third parties:

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 investor from third parties in the cases cited by the Parties, mobs, insurgents, rented thugs and others engaged in physical violence against

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<sup>491</sup> BIT (CL-0001), Art. II(2).

<sup>492</sup> TPA (CL-0003), Art. 10.5(1).

<sup>493</sup> TPA (CL-0003), Art. 10.5(2).

<sup>494</sup> *Saluka v. Czech Republic*, UNCITRAL, Partial Award (Mar. 17, 2006) (CL-0038), ¶¶ 483, 484.

<sup>495</sup> *Saluka v. Czech Republic* (CL-0038), ¶ 484.

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.<sup>496</sup>

312. The standard does not impose strict liability on states. Rather, it requires a level of diligence in attempting to ensure that foreign investments are not harmed by violence caused by state actors or private parties. For example, in *Lauder v. Czech Republic*, the tribunal found that full protection and security standard “obliges the Parties to exercise such due diligence in the protection of foreign investment as reasonable under the circumstances.”<sup>497</sup> In the same vein, in *Paushok v. Mongolia*, the tribunal agreed with the earlier *Asian Agricultural Products Ltd v. Sri Lanka*<sup>498</sup> and *American Manufacturing & Trading Inc. v. Zaire*<sup>499</sup> tribunals, that the standard of full protection and security impose an obligation of vigilance and due diligence upon the government:

The minimum standard of vigilance and care set by international law comprises duty of prevention and a duty of repression. A well-established aspect of the international standard of treatment is that States must exercise ‘due diligence’ to prevent wrongful injuries to the person or property of aliens within their territory, and if they did not succeed, to exercise at least ‘due diligence’ to punish such injuries. . . . The obligation to show ‘due diligence’ does not mean that the State has to prevent any injury whatsoever. Rather, the obligation is generally understood as requiring that the State take reasonable actions within its power to avoid injury when it is, or should be, aware that there is a risk of injury. The precise

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<sup>496</sup> *Eastern Sugar B.V. v. The Czech Republic*, SCC Case No. 088/2004, Partial Award (Mar. 27, 2007) (**RL-0032**) ¶ 203.

<sup>497</sup> *Lauder v. Czech Republic*, UNCITRAL, Final Award (Sept. 3, 2001) (**RL-0033**), ¶ 308.

<sup>498</sup> “The ‘due diligence’ is nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances.” *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award (June 27, 1990) (**CL-0060**), 30 ILM at 558.

<sup>499</sup> “These treatments of protection and security of investment required by the provisions of the BIT of which AMT is beneficiary must be in conformity with its applicable national laws and must not be any less than those recognized by international law. For the Tribunal, this last requirement is fundamental for the determination of the responsibility of Zaire. It is thus an objective obligation which must not be inferior to the minimum standard of vigilance and of care required by international law.” *American Manufacturing & Trading, Inc. (AMT) v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award (Feb. 21, 1997) (**CL-0061**), ¶ 6.06.

degree of care, of what is ‘reasonable’ or ‘due’, depends in part of the circumstances.<sup>500</sup>

313. The Claimants argue that the full protection and security standard goes beyond protection against physical injury to cover legal protection as well. The cases cited by the Claimants, however, do not support their position. For example, the Claimants cite *Asian Agricultural Products v. Sri Lanka* for the proposition that a state must exercise due diligence to ensure “reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances.”<sup>501</sup> In that case, the tribunal was tasked with determining whether the Sri Lankan government did enough to prevent harm from occurring to the claimant’s investment from physical violence – namely, a “counter-insurgency action undertaken by the governmental security forces.”<sup>502</sup> It did not extend a state’s fair and equitable treatment obligation beyond the traditional notions of physical security. And, while the tribunal did reference “due diligence” as part of a state’s obligations, it did so in the context of what steps a state must take to prevent physical harm to an investor.<sup>503</sup>

314. The Claimants also cite *American Manufacturing & Trading v. Zaire* in support of their position. In that case, the investor owned and operated a facility that produced and sold automotive and dry cell batteries. The industrial facility where those batteries were manufactured was destroyed and looted “by certain members of the Zairian armed forces,” who “broke into the commercial complex and the stores, destroyed, damaged and carried away all the finished goods and almost all of the raw materials and objects of value found on the premises.”<sup>504</sup> The tribunal held Zaire liable for failing to protect the investor’s property from destruction and for further attempting to avoid liability for compensation by invoking provisions

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<sup>500</sup> *Paushok et al. v. Mongolia*, UNCITRAL, Award on Jurisdiction and Liability (Apr. 28, 2011) (**RL-0034**), ¶¶ 324, 325.

<sup>501</sup> Claimants’ Memorial ¶ 180, n. 444.

<sup>502</sup> *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award (June 27, 1990) (**CL-0060**), ¶ 67.

<sup>503</sup> *See Asian Agricultural Products v. Sri Lanka* (**CL-0060**), ¶¶ 65-67.

<sup>504</sup> *American Manufacturing & Trading Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award (Feb. 21, 1997) (**CL-0061**) ¶¶ 3.03-3.04.

of its domestic law.<sup>505</sup> The tribunal acknowledged that Zaire owed a duty of vigilance to ensure that these destructive actions did not occur and, given the gross abdication of that duty by the Zairian government, felt it unnecessary to address the scope of the standards attached to this duty under international law.<sup>506</sup>

315. While some tribunals have found that the full protection and security standard includes legal protection as well as physical protection, no tribunal has expanded the concept as broadly as the Claimants propose in this case. Indeed, in each of those cases, the tribunals were concerned with the exercise of regulatory authority. None of the cases cited by the Claimants held that a state breaches its obligations when it acts in a commercial capacity, even where such actions might cause financial harm to a contractual counterparty. Rather, they focus on the reasonableness and legitimacy of the state's regulatory conduct. Even then, states are not held to a strict liability standard and are free to regulate in ways that are reasonable and consistent with their public policy objectives. As the tribunal in *Telenor Communications AS v. Hungary* explained, although the full protection and security standard may go beyond physical security, it “does not protect against a state's right to legislate or regulate in a manner which may negatively affect a claimant's investment, provided that the state acts reasonably in the circumstances with a view to achieving objectively rational public policy goals.”<sup>507</sup> The state's duty, therefore, is no more than to provide a “reasonable measure of prevention which a well-administered government could be expected to exercise under similar circumstances.”<sup>508</sup>

## **2. The Facts Show Panama has Not Breached its Obligation to Provide Full Protection and Security**

316. As noted, the Claimants link their full protection and security claim to two types of alleged misconduct: (1) Panama's criminal investigation into Omega and Mr. Rivera; and (2) Panama's alleged breaches of contract. The facts demonstrate, however, that Panama's actions were entirely appropriate and do not violate its full protection and security obligations.

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<sup>505</sup> See *American Manufacturing & Trading Inc. v. Zaire* (CL-0061), ¶ 6.05.

<sup>506</sup> See *American Manufacturing & Trading Inc. v. Zaire* (CL-0061), ¶ 6.07.

<sup>507</sup> *Telenor Communications AS v. Hungary* (RL-0016), ¶¶ 13.3.1-13.3.3.

<sup>508</sup> *Telenor Communications AS v. Hungary* (RL-0016), ¶ 13.3.3.

**a. The Criminal Investigations into Mr. Rivera’s and Omega’s Conduct Did Not Breach the Full Protection and Security Requirement**

317. The Claimants argue that the criminal investigations into Mr. Rivera and Omega fit within the traditional notion of full protection and security.<sup>509</sup> The traditional notions of full protection and security, however, address only the state’s duty to protect an investor from violence caused by state actors or private parties.<sup>510</sup> There is no suggestion of physical violence by any entity and, as such, the claims put forward by the Claimants fail on their face. Moreover, the circumstances surrounding the investigations reveal that Panama’s actions were nothing more than a legitimate exercise of its police authority – something not precluded by the full protection and security obligation.

318. As discussed above, the criminal investigations at issue did not originate with Omega or Mr. Rivera. Rather, they derived from a criminal investigation into Justice Moncada Luna. Omega and Mr. Rivera became involved only after record evidence established two instances in which they funneled money from the La Chorrera Project to accounts owned by or held for the benefit of Justice Moncada Luna. As part of its investigation of Justice Moncada Luna, the Panamanian National Assembly determined that these actions violated Panamanian law. As such, Panama has legitimate grounds to initiate investigations directly into Mr. Rivera and Omega. Because the National Assembly’s jurisdiction was limited to investigating Justice Moncada Luna, the Public Prosecutor’s office was charged with looking into Mr. Rivera’s and Omega’s conduct.

319. In an effort to bolster their claim, the Claimants mischaracterize the events and circumstances surrounding the relevant investigations. First, the Claimants state that the “Designated Prosecutor in the first of these criminal investigations . . . confirmed that there were no grounds to indict either Mr. Rivera or Omega Panama.”<sup>511</sup> The “first” criminal investigation refers to the investigation of Justice Moncada Luna. The “Designated Prosecutor” was Congressman González, of the Panamanian National Assembly. The National Assembly’s

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<sup>509</sup> See Claimants’ Memorial ¶¶ 180-81.

<sup>510</sup> See, e.g., *Saluka v. Czech Republic (CL-0038)* ¶¶ 483, 484.

<sup>511</sup> Claimants’ Memorial ¶ 184.

jurisdiction was constitutionally limited to investigating Justice Moncada Luna. Congressman González, therefore, had no authority to indict Mr. Rivera or Omega and, certainly, he made no findings as to whether there were grounds to do so. Rather, Congressman González referred the matter to the Public Prosecutor's office for further investigation.

320. As discussed above, the "second" and "third" investigations referred to by the Claimants actually were investigations brought by two separate divisions within the Public Prosecutor's office – anticorruption and organized crime. Although both of these divisions were investigating similar conduct, their respective investigations would have led to separate and distinct criminal charges. Due to the financial nature of the Claimants' crimes, the Panamanian authorities froze Omega's bank accounts in Panama. In addition, documents were collected and efforts were made to interview Mr. Rivera and other Omega personnel. As Mr. Rivera acknowledges, however, he fled Panama during this period and refused to cooperate with the authorities.

321. Under the circumstances, the investigation of Mr. Rivera and Omega – and the consequent steps taken in the exercise of the state's police powers – do not breach the full protection and security obligations under the BIT and TPA. Those standards do not preclude a state from enforcing its criminal laws, particularly where record evidence – here bank records and the guilty plea of Justice Moncada Luna – links the target of an investigation to demonstrably corrupt and unlawful payments.

**b. Panama's Commercial Actions Regarding the Claimants' Contracts Do Not Violate its Full Protection and Security Obligations**

322. The Claimants argue that the withholding of payments and termination of the Contracts constitute "clear violations of the full protection and security standard with respect to" their investments.<sup>512</sup> In the Claimants' view, such actions mean that "while Respondent had initially endorsed the legal and commercial security of Claimants' investment, it later decided not to protect it."<sup>513</sup> While the Claimants desperately attempt to ascribe sovereign authority to Panama's actions, they cannot do so. They do not (and cannot) point to a single regulation,

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<sup>512</sup> Claimants' Memorial ¶ 183.

<sup>513</sup> Claimants' Memorial ¶ 183.

administrative rule, or other sovereign act advanced against their investments, and there is no suggestion that Panama prevented the Claimants from seeking recourse under the dispute resolution provisions agreed in their Contracts, or deprived them of any other measure of due process. Rather, the evidence shows that Panama worked closely with the Claimants to complete their Projects. Where necessary and appropriate, Panama extended the Claimants' contractual deadlines and granted additional compensation. Where, however, requests for payment or extensions of time were incomplete or contained some other error, requests were either delayed or denied, as permitted under the Contracts. In addition, Panama rightfully chose to allow the Contracts to lapse or to terminate the Contracts when it became clear that the Claimants no longer were working in good faith towards completion. As described above, by October 2014 – around the time when the investigation into Justice Moncada Luna became public – the Claimants made clear that they would not work with the relevant ministries or municipalities to overcome issues and complete the works. They abandoned their responsibilities, fled the county, and left Panama with uncompleted projects. In the face of this, Panama's decision to terminate the Contracts or allow them to lapse is entirely – and commercially – justified.

323. The sum total of the Claimants' complaint that they were deprived of full protection and security is that they were not paid and that their Contracts either were terminated or allowed to lapse.<sup>514</sup> This does not rise to the level of sovereign conduct envisioned by those tribunals that have been willing to expand the traditional notions of full protection and security to cover legal protections. If this were sufficient to trigger international liability, states entering into commercial contracts with private entities would be placed in an untenable position.

324. Moreover, the expansion of the full protection and security protection in the manner suggested by the Claimants would encroach on the requirements imposed by the fair-and-equitable treatment standard.<sup>515</sup> On this point, the *Enron v. Argentina* tribunal noted that it could not “exclude as a matter of principle that there might be cases where a broader interpretation [of the full protection and security standard] could be justified, but then it becomes difficult to distinguish such situation from one resulting in the breach of fair and equitable treatment, and

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<sup>514</sup> Claimants' Memorial ¶ 183.

<sup>515</sup> See *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award (Dec. 7, 2011) (RL-0035) ¶ 320.

even from some form of expropriation.”<sup>516</sup> Similarly, in *PSEG v. Turkey*, the tribunal was “mindful of the fact that [the full protection and security] standard has developed in the context of the physical safety of persons and installations, and only exceptionally will it be related to the broader ambit noted in *CME*. To the extent that there is such an exceptional situation, the connection with fair and equitable treatment becomes a very close one.”<sup>517</sup>

325. Under the circumstances, the Claimants’ argument that Panama has breached its obligation to provide full protection and security fails. The Claimants have not established legal or factual entitlement on the merits of this claim and, as such, this claim should be denied.

**E. PANAMA DID NOT SUBJECT CLAIMANTS’ INVESTMENTS TO UNREASONABLE, ARBITRARY AND DISCRIMINATORY MEASURES**

326. In addition to the claims addressed above, the Claimants also suggest that Panama’s actions were unreasonable, arbitrary, and discriminatory.<sup>518</sup> Although the Claimants purport to set forth “standards” defining unreasonable, arbitrary, and discriminatory conduct, they do not show how those standards apply to the facts and circumstances of this case. Rather, they simply assert that “the same conduct that breaches the FET obligation also breaches these Treaty provisions.”<sup>519</sup>

327. The Claimants state that “arbitrary conduct includes that which is not based on legal standards but on excess discretion, prejudice or personal preference, and taken for reasons that are different from those put forward by the decision maker.”<sup>520</sup> The Claimants’ position does not fully capture the concept of “arbitrariness” under international law. In an often-quoted passage, the International Court of Justice held in the *ELSI* case that:

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

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<sup>516</sup> *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, ICSID Case No.ARB/01/3, Award (May 22, 2007) (CL-0094) ¶ 286.

<sup>517</sup> *PSEG v. Turkey*, ICSID Case No ARB/02/5, Award (Jan. 19, 2007) (CL-0039), ¶ 258 (emphasis added).

<sup>518</sup> *See* Claimants’ Memorial, Section IX(D).

<sup>519</sup> Claimants’ Memorial ¶ 187.

<sup>520</sup> Claimants’ Memorial ¶ 186.

due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.<sup>521</sup>

328. As the ICJ makes clear, state conduct 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. Here, the Claimants do not even attempt to make this showing.

329. The Claimants suggest that “unreasonable” conduct “is found where the justification for a State act is linked to domestic politics rather than a legitimate policy objective.”<sup>522</sup> As support for their “standard,” the Claimants cite a discussion of the “fair and equitable treatment” standard by the tribunal in *Eureko v. Poland*.<sup>523</sup> The Claimants’ reliance on this case, therefore, does not support their position. Rather, it is understood that 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.”<sup>524</sup> 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.

330. 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.”<sup>525</sup> The Claimants here have not done so.

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<sup>521</sup> *Eletronica Sicula S.p.A. (ELSI) v. Italy (United States of America v. Italy)*, International Court of Justice, Judgment (July 20, 1989) (RL-0036), ¶ 76.

<sup>522</sup> Claimants’ Memorial ¶ 186.

<sup>523</sup> See Claimants’ Memorial ¶ 186 (citing *Eureko B.v. v. Poland*, Ad Hoc Arbitration, Partial Award (Aug. 19, 2005) (CL-0020), ¶ 233).

<sup>524</sup> *National Grid P.L.C. v. The Argentine Republic* (UNCITRAL), Award (Nov. 3, 2008) (CL-0089), ¶ 197.

<sup>525</sup> *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.

331. 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.”<sup>526</sup> 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.<sup>527</sup>

332. While differential treatment is necessary, it is not sufficient. Tribunals have emphasized that discrimination requires more than differential treatment:

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.”<sup>528</sup>

333. 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.

334. 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. The Tribunal has no legal or factual basis to find that Panama’s conduct was unreasonable, arbitrary, or discriminatory. As such, the claims presented by the Claimants should be denied.

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<sup>526</sup> Claimants’ Memorial ¶ 186.

<sup>527</sup> 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).

<sup>528</sup> *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).

**V. THE CLAIMANTS HAVE NOT ESTABLISHED THEIR ENTITLEMENT TO THE COMPENSATION CLAIMED**

335. The Claimants seek compensation in the amount of [REDACTED].<sup>529</sup> This amount is comprised of: (a) [REDACTED] for “losses under the existing Contracts,” (b) [REDACTED] for “losses on potential new contracts,” and (c) [REDACTED] in pre-award interest at a rate of 11.65%, compounded annually. The Claimants are not entitled to any of the compensation they seek.

336. First, the Claimants’ investments are founded on corruption. As such, the Claimants have forfeited any claim to protection or compensation under the BIT and TPA.

337. Second, the Claimants have not established their legal and factual entitlement on the merits. As such, and in the absence of any demonstrated treaty violation, the Tribunal has no authority to award compensation.

338. Third, the compensation claimed by the Claimants is grossly overstated. As demonstrated below and in the expert submission of Dr. Daniel Flores, the amounts sought by the Claimants are predicated on flawed assumptions. When viewed appropriately, the most the Claimants could be awarded – assuming that they were entitled to protections under the BIT and TPA, and had established entitlement on the merits – is US\$ 7.1 million. This includes, at most, a small percentage of the amounts claimed on the “existing contracts.” The Claimants, however, are not entitled to any compensation for purported lost future projects, and certainly have not established entitlement to their claimed interest or costs.

339. In this section, Panama sets forth the applicable principles for the assessment of compensation. (A) It then demonstrates why the amount of compensation claimed by the Claimants is overstated. (B) Finally, it demonstrates why the Claimants are not entitled to compound interest at the rate they have proffered. (C)

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<sup>529</sup> Claimants’ Memorial ¶ 236(c)(ii).

## A. THE COMPENSATION POTENTIALLY AVAILABLE UNDER THE BIT AND TPA

340. The BIT and the TPA both expressly provide the standards of compensation applicable in cases of expropriation. The TPA provides that compensation shall be “equivalent to the fair market value of the expropriated investment immediately before the expropriation took place.”<sup>530</sup> The BIT provides that compensation “shall amount to the full value of the expropriated investment immediately before the expropriatory action became known.”<sup>531</sup> It is generally accepted that the concept of “full value” is equivalent to the “fair market value” of an asset.<sup>532</sup> Here, the asset in question is Omega Panama.<sup>533</sup>

341. Neither treaty contains a compensation standard expressly applicable to breaches of other treaty protections. The purpose of awarding the fair market value of an asset is to make a Claimant whole. Claimants cannot seek to be made more than whole by seeking more than the fair market value of an asset expropriated or otherwise the subject of a treaty breach. Tribunals, therefore, commonly apply the expropriation standard to other forms of treaty breach. For example, in *Metalclad v. Mexico*, the tribunal held that Mexico had expropriated the claimant’s property and breached the minimum standard of treatment required by NAFTA. It quantified damages based on the standard for expropriation set out in the treaty, noting that “the damages arising under NAFTA, Article 1105 and the compensation due under NAFTA Article 1110 would be the same since both situations involve the complete frustration of the operation of the” asset.<sup>534</sup>

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<sup>530</sup> TPA (CL-0003), Art. 10.7(2)(b).

<sup>531</sup> BIT (CL-0001), Art. IV(1).

<sup>532</sup> *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award (Mar. 14, 2003) (CL-0021), ¶ 493 (“In the view of the Tribunal, ‘fair market value’ equates with ‘just compensation’ that represents the ‘genuine value’ of the property affected.”); *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/16, Award (Oct. 7, 2003) (RL-0041), ¶ 12.1.1 (“Despite the diversity of vague and indefinite terms, there is a growing agreement on a standard of compensation that more closely approximates to a ‘fair market value’ (or its equivalent) of the property taken.”).

<sup>533</sup> The Claimants indicate that the value of their alleged investment is the value of Omega Panama. For purposes of this discussion, Panama refers to Omega Panama when referring to the “investment” to be valued.

<sup>534</sup> *See Metalclad Corporation v. The United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/97/1 (Aug. 30, 2000) (CL-0017), ¶ 113.

342. Despite a recognition that the fair market value of an asset applies as a measure of compensation broadly, tribunals have made clear that compensation for breaches of contract adjudicated under an umbrella clause should be contractual in nature and not treaty based.<sup>535</sup> As such, if the Tribunal were to find solely that Panama had breached its obligations under the BIT's umbrella clause, the only measure of compensation it could possibly award would be the amounts claimed to be outstanding under the BIT Contracts.

**B. THE COMPENSATION CLAIMED BY THE CLAIMANTS IS GROSSLY OVERSTATED**

**1. The Amounts Claimed to be Owed for Works Allegedly Performed on the Projects are Overstated and Unsupported**

343. The Claimants argue that they are entitled to ██████████ in relation to their existing contracts with Panama. To compute this amount, they apply pre-award interest to unpaid progress billings, compute a “present value of expected future cashflows on uncompleted projects,” and compute the “present value of [any] advance payments received.”<sup>536</sup>

344. Dr. Flores opines, however, that the Claimants' methodology is flawed in three principal respects. A detailed discussion is provided in Dr. Flores' report, in summary, though, he concludes that:

- The Claimants incorrectly discount advances that were made to Omega prior to the Valuation Date.
- The Claimants overestimate the present value of the alleged future cashflows by underestimating the future risks to those cashflows.
- The Claimants use an incorrect “prejudgment interest” rate in their calculation.

345. In addition to the methodological flaws, Dr. Flores also opines that the Claimants' calculations are based on insufficient and incomplete evidence. The documentation provided by

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<sup>535</sup> *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Award (Feb. 10, 2012) (**RL-0025**), Section VI.C.

<sup>536</sup> Dr. Flores Report ¶ 97 (citing Compass Lexecon Report ¶ 74).

the Claimants does not support and – in some instances contradicts – the positions taken by the Claimants in their calculation.<sup>537</sup>

## **2. The Compensation Claimed for Potential New Contracts is Unsupported and Speculative**

346. The Claimants seek ██████████ in compensation for “potential new contracts” that Omega will not be awarded in the future because of Panama’s alleged treaty breaches. This amount purportedly reflects the “Claimants’ interest in Omega Panama as a going concern.”<sup>538</sup> To calculate the claimed amount of compensation, Compass Lexecon (the Claimants’ damages expert) used a Discounted Cash Flow (“DCF”) analysis to forecast Omega Panama’s future cash flows and discount them back to their net present value.<sup>539</sup> According to Compass Lexecon, this approach is appropriate because Omega Panama was a going concern that, but for Panama’s allegedly unlawful actions, would have had “an established track record of ten completed projects in the country.”<sup>540</sup>

347. The Claimants’ efforts to obtain money for lost future contracts are fatally flawed. The fair-market value standard requires that the Claimants “at a minimum, establish that (i) Omega Panama possessed income generating assets that a hypothetical buyer would be willing to buy; (ii) the cash flows projected by Compass Lexecon are reasonable; and (iii) its discount rate adequately reflects the business risks facing Omega Panama.”<sup>541</sup> Dr. Flores has explained why none of these requirements has been met.

348. First, Omega Panama did not possess assets that a hypothetical buyer would have been willing to pay for. As Dr. Flores explains, these assets can either be tangible – such as large construction equipment or a building – or intangible – such as a patent, exclusive license or concession, or well-established brand.<sup>542</sup> Omega Panama had none of these. By the Claimants’

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<sup>537</sup> See generally, Dr. Flores Report, Section II(B).

<sup>538</sup> Claimants’ Memorial ¶ 232; Compass Lexecon Report ¶ 12.

<sup>539</sup> Claimants’ Memorial ¶ 221.

<sup>540</sup> Claimants’ Memorial ¶ 219; Compass Lexecon Report ¶ 59.

<sup>541</sup> Dr. Flores Report ¶ 14.

<sup>542</sup> Dr. Flores Report ¶ 16.



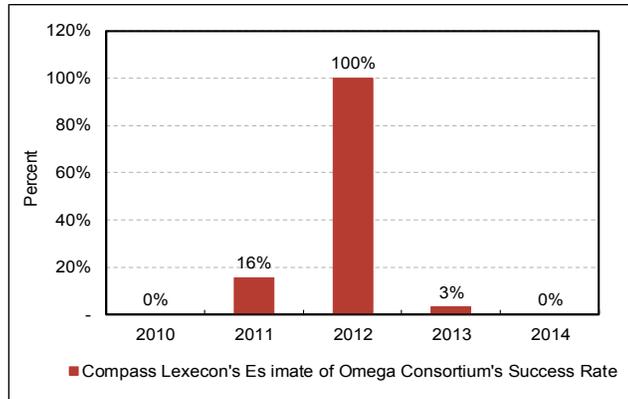
the period of the year prior to when Omega claims it was targeted by the new Varela administration), Omega did not bid on a single project.<sup>548</sup>

352. The erratic record of Omega Panama’s bid success is shown in the following graphics prepared by Dr. Flores, which show the wide fluctuations in yearly success rates on Omega’s bids.

**Figure 9**  
**Omega Panama’s Public Works Bid History**<sup>549</sup>

	2009	2010	2011	2012	2013	2014
	(1)	(2)	(3)	(4)	(5)	(6)
(US\$ Millions, Unless Otherwise Stated)						
1. Tendered Bids	-	176.4	336.8	87.1	61.4	-
2. % of Gov. Expense	-	8.8%	12.7%	2.6%	1.7%	-
3. Won Bids	-	-	52.5	87.1	2.0	-
<b>4. Success Rate</b>	-	<b>0.0%</b>	<b>15.6%</b>	<b>100%</b>	<b>3.2%</b>	-
5. Total Bids Submitted (Qty)	-	14	21	3	4	-

**Figure 10**  
**Omega Panama’s Volatile Success Rate**<sup>550</sup>



353. In addition, the Claimants’ cash flow projections assume a rate of public works spending that is inconsistent with historical data. According to the Claimants, Panama can reasonably be expected to expend 8.5% of its gross domestic product on public works projects forever.

<sup>548</sup> Dr. Flores Report ¶ 71.

<sup>549</sup> Dr. Flores Report ¶ 70, Figure 9.

<sup>550</sup> Dr. Flores Report ¶ 72, Figure 10.

Historically, however, Panama has committed far less than this percentage to its public works projects.<sup>551</sup> The Martinelli administration represents an aberration in which widespread corruption resulted in significantly more being spent on public works projects.<sup>552</sup> Government projections for future spending after the Martinelli administration show a downturn in public works projects and a reversion to historical norms.<sup>553</sup> The Claimants ignore this fact and seize on a number that most inflates their compensation claims – even though it has no factual support.

354. Further, the Claimants assume a profit margin for their “potential new contracts” that is unsustainable. The Claimants submit that the gross margin on their future profits would be 13.2%.<sup>554</sup> Dr. Flores shows, however, that the average gross profit margin recorded by Omega between 2011 and 2013 – as shown in its audited financial statements – was 10.7%. The Claimants’ attempts to inflate their profits, therefore, fail.<sup>555</sup>

355. Third, the Claimants’ discount rate is unreasonable. The Claimants have used a discount rate of 11.65%. This rate is based on the Claimants’ assessment of the “cost of equity of a company in the engineering and construction industry in Panama.” Dr. Flores, however, demonstrates that this rate is incorrectly based on data from “publicly traded shares of large, liquid, US-based companies.”<sup>556</sup> Omega Panama, by contrast, is a small, privately held company based in Panama. It is well understood that the cost of equity for smaller, less liquid companies will be higher than for large, publicly-traded companies whose shares are freely traded. Thus, to accurately reflect the cost of equity that a company like Omega Panama would incur, appropriate adjustments need to be made to reflect its smaller, illiquid state. When such adjustments are made, and the country risks associated with Panama are added, Dr. Flores concludes that a

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<sup>551</sup> Dr. Flores Report ¶ 61, Figure 6.

<sup>552</sup> Dr. Flores Report ¶ 65, Figure 7.

<sup>553</sup> Dr. Flores Report ¶ 67, Figure 8.

<sup>554</sup> Dr. Flores Report ¶ 78.

<sup>555</sup> Dr. Flores Report ¶ 80 (citing Valuation Model, tab, “1 – Omega P&L,” cell E25 (QE-0002)).

<sup>556</sup> Dr. Flores Report ¶ 84.

discount rate of between 18% and 23% should be applied.<sup>557</sup> When the correct discount rate is applied, the value of any potential future contracts is reduced substantially.

**C. THE CLAIMANTS' PROPOSED INTEREST RATE AND REQUEST FOR COMPOUND INTEREST IS UNREASONABLE AND INCORRECT**

**1. Pre-Award Interest Should Not Exceed the Yield on the Six-Month US Treasury Bill**

356. 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 the pre-award interest at the rate they have claimed. Indeed, as with the Claimants' entire request for compensation, the amount of interest that they seek is grossly overstated and unsupported.

357. The Claimants assert that they are entitled to pre-award interest at a rate of 11.65%, compounded annually. They believe this rate is "commercially reasonable," because it reflects the cost of equity for an established general contractor operating in Panama.<sup>558</sup> That is wrong.

358. First, 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. Indeed, as Mark Kantor – a leading authority on damages in international arbitration – wrote, 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

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<sup>557</sup> Dr. Flores Report ¶ 90.

<sup>558</sup> Compass Lexecon Report ¶¶ 109-111.

“risk-free” rate (such as the rate for US Treasuries) or a statutory rate for pre-judgment interest.<sup>559</sup>

359. The Claimants’ methodology does more than simply bring an amount owed forward. Rather, “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.”<sup>560</sup> As Dr. Flores explains, pre-award interest is intended to 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.”<sup>561</sup> However, the amount of interest awarded should reflect only the time value of money and not any risk that may have been associated with the investment.<sup>562</sup> Thus, “[a]ny compensation that the Tribunal could eventually award to the Claimants is not subject to the *ex ante* risks that are captured in the cost of equity.”<sup>563</sup>

360. Second, the Claimants’ use of the cost of equity as the basis for its interest calculation does not constitute a “commercially reasonable rate” within the meaning of the TPA.<sup>564</sup> Dr. Flores opines that 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.”<sup>565</sup> 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.<sup>566</sup> The tribunal in *Vestey v. Venezuela* reached a similar conclusion. In that case, the UK-Venezuela BIT provided that interest be paid at a “normal commercial rate,”

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<sup>559</sup> Mark Kantor, “Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence” (Kluwer Law International, 2008) (QE-0032), p. 49.

<sup>560</sup> Dr. Flores Report ¶ 107.

<sup>561</sup> Dr. Flores Report ¶ 103.

<sup>562</sup> Dr. Flores Report ¶ 103.

<sup>563</sup> Dr. Flores Report ¶ 107.

<sup>564</sup> Dr. Flores Report ¶¶ 111-12.

<sup>565</sup> Dr. Flores Report ¶ 111.

<sup>566</sup> Dr. Flores Report ¶ 111-12.

and the tribunal held that the yields on a six-month US Treasury bill adequately reflected this rate.<sup>567</sup>

## 2. Compound Interest Should Not Be Awarded

361. The Claimants argue that any pre-award interest should be compounded annually. That is wrong. If the Tribunal awards pre-award interest, it should be simple in nature.<sup>568</sup> There is no overarching international law principle requiring an award of compound interest in investment disputes.<sup>569</sup> In the absence of such a principle, tribunals have regularly looked to domestic law to determine whether compound interest would be appropriate.<sup>570</sup> Panamanian law does not permit

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<sup>567</sup> Dr. Flores Report ¶ 111 (citing *Vestey Group Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award (Apr. 15, 2016) (**QE-0033**), ¶¶ 328, 446).

<sup>568</sup> *Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (Apr. 8, 2013) (**RL-0040**) ¶¶ 617-620 (confirming that Article 38 of the ILC's Articles on State Responsibility "confirms that the general view in international law is in favour of simple and not compound interest, although other commentators suggest the trend in investment arbitration is in favour of compound interest" and awarding simple interest where Claimant did "not justif[y] compound interest").

<sup>569</sup> *Duke Energy v. Ecuador* (**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* (**CL-0021**), ¶¶ 627 & 644 ("no 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); *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC 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).

<sup>570</sup> *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/OS/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 CA (Aucoven) v. 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

compound interest absent an express agreement by the parties. Article 223 of the Commercial Code of Panama provides that compound interest does not allow a “claim of compound interest, save when agreed to by contract.” Where, however, the type of interest is not expressly stated, it shall be “legal” or simple interest.<sup>571</sup>

362. Here, none of the project agreements provide for compound interest. Similarly, compound interest is not specifically provided for in either the BIT or TPA. While the TPA references interest at a “commercially reasonable rate,” that phrase has been held to require “only simple interest” and not compound interest.<sup>572</sup>

## **VI. COSTS**

363. 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.

364. Panama reserves the right to address costs more specifically following the hearing in this matter or the issuance of a final award, as the Tribunal may direct.

## **VII. CONCLUSION AND REQUEST FOR RELIEF**

365. 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, thus, 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

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(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.”).

<sup>571</sup> Commercial Code, Art. 223, *published in Mizrachi & Pujol, S.A., Código de Comercio Ley No. 2* (Aug, 2011) (**RL-0038**).

<sup>572</sup> *Archer Daniels Midland v. The United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award (Nov. 21, 2007) (**CL-0087**), ¶¶ 295-296 (finding the NAFTA expropriation provision providing that compensation should include interest at a “commercially reasonable rate” demanded “only simple interest, rather than compound should be awarded” – although it considered important that the Claimant’s property was not indirectly or directly expropriated).

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.

366. 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.
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 procedures 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: January 7, 2019

Respectfully submitted,

SHEARMAN & STERLING LLP

A handwritten signature in black ink, appearing to read 'H. Weisburg', written over a horizontal line.

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