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

OMEGA ENGINEERING LLC
AND
MR. OSCAR RIVERA
CLAIMANTS

v.

THE REPUBLIC OF PANAMA
RESPONDENT

CLAIMANTS' REPLY ON THE MERITS AND COUNTER-MEMORIAL ON PRELIMINARY OBJECTIONS

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I. INTRODUCTION

1. When Juan Carlos Varela ran for President in 2014, he swore he would stamp out any remnants of former President Ricardo Martinelli's administration.[1] Mr. Varela framed his anti-Martinelli campaign as an anti-corruption effort,[2] but the facts speak for themselves. Once elected, President Varela retaliated against those he viewed as loyal to Martinelli and not loyal to him—government officials and private individuals alike.[3]

2. That included Claimants, whom President Varela came to view as Martinelli supporters after Mr. Rivera declined then-candidate Varela's request for a massive campaign contribution while at the La Trona restaurant in Panama City.[4] Mr. Varela made it crystal clear that Mr. Rivera's investment in Panama would suffer if he refused to make the contribution.[5] And, after his election, President Varela followed through on that threat. Claimants had spent years building a successful investment in Panama centered around their Panamanian company, Omega Panama. But within months of President Varela's inauguration, Respondent began to destroy it.[6]

3. Shockingly, Respondent has *no* response to these serious allegations. Beyond cursorily dismissing them out of hand,[7] Respondent offers no evidence of its own to rebut the claim. This silence speaks volumes, as Mr. Rivera's refusal to pay Mr. Varela the requested campaign

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[1] *See* Claimants' Memorial dated 25 June 2018 ("**Cls' Mem.**"), ¶¶ 11-16.

[2] *Id.* ¶ 14.

[3] *Id.* ¶ 16.

[4] *Id.* ¶¶ 66-69.

[5] *Id.* ¶ 68.

[6] *Id.* § VI.

[7] *See* Respondent's Counter-Memorial dated 7 Jan. 2019 ("**Resp.'s Counter-Mem.**"), ¶ 8.

contribution was the motivation behind Respondent's campaign of harassment and interference. Indeed, it was the beginning of the end of Claimants' investment in Panama. Although each of Claimants' Projects were progressing well before President Varela's election, each of the government agencies Claimants interacted with changed their attitude toward Claimants as soon as President Varela began installing his loyalists at each agency and municipality.[8] Every agency almost simultaneously began to impede and interfere with Claimants' investment. Unsurprisingly, this multi-flanked campaign devastated Claimants' investment in Panama.[9] Contrary to what Respondent claims in its Counter-Memorial,[10] Claimants did not abandon the Projects; rather, Respondent brought the Projects grinding to a halt and sapped Claimants of their cash flow, knowing full well that this would prevent Claimants from completing the work required by the Contracts.

4. In its Counter-Memorial, Respondent attempts to distract from the breadth and severity of its wrongdoing by framing this case as merely a collection of mundane contract disputes rather than a breach of Respondent's treaty obligations.[11] But nothing could be further from the truth. When President Varela targeted the Claimants for retribution, he employed multiple arms of the Panamanian government to wreak havoc on Claimants' investment and bring Claimants to their knees. The Municipality of Panama, the Municipality of Colón, the Judiciary, the Ministry of the Economy, the Ministry of the Presidency, the Ministry of Health, the National Culture Institute ("**INAC**"), the Comptroller General's Office and the Prosecutor's Office acted in concert in order to interfere with

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[8] *See* Cls' Mem. § VI.

[9] *Id.* § VII.

[10] *See* Resp.'s Counter-Mem § II.D.

[11] *See id*. § II.B.

and destroy Claimants' investment.[12] The Ministry of Economy and Finance *slashed the funding* for the Ciudad de las Artes Contract. Then, the INAC issued a *Government resolution terminating* that Contract, which was Claimants' most valuable Contract in Panama.[13] These are not tools that a normal commercial actor has at its disposal. By exercising Respondent's sovereign authority to administratively cancel the Contract, the INAC effectively barred Claimants from bidding on future public works in Panama—essentially a death sentence for a Panamanian public contracting company like Omega Panama.

5. The breadth and timing of these government actions cannot be coincidental. The more likely—indeed, the *only*—explanation is that President Varela instructed his loyalists within the Government to execute a targeted campaign of harassment against Claimants' investment. Permits were improperly withheld. Meritorious change orders were left unendorsed. Payments already earned were delayed and then stopped altogether. By wrongfully starving Claimants of their cash flow, Respondent impeded Claimants' ability to continue performing on the Contracts. Then Respondent terminated each of the agreements or forced them to lapse, citing purely pretextual reasons that, at the end of the day, were not fairly attributable to Claimants. This was not just sharp elbowed commercial conduct—this was an example of a State using its sovereign authority to completely destroy the value of Claimants' investment in Panama. That is why Respondent's framing of these issues as mere contractual disputes misses the mark entirely. Claimants are not asserting eight different breach of contract claims. Claimants are asserting claims for a wide-ranging, intentional campaign of governmental harassment emanating from the highest levels of the Panamanian

[12] Cls' Mem. § VI.

[13] *See infra* § V.C.

Government in violation of international law and the Treaties, for which Respondent itself—rather than a handful of government agencies—is solely responsible.

6. In addition to sabotaging Claimants' Contracts, Respondent further targeted Claimants by launching not one, but *three* criminal inquiries involving Mr. Rivera, Omega Panama, and PR Solutions (another of Mr. Rivera's companies).[14] As a result of those investigations Omega Panama's and PR Solutions' bank accounts in Panama were frozen and a detention order and INTERPOL Red Notice were issued for Mr. Rivera, thus hampering his ability to travel to and from Panama to manage Claimants' investment.[15] Mr. Varela even went as far as getting his former attorney, hired directly by the Ministry of the Presidency, to work as a "parallel Attorney General" with the full range of government tools at its disposal and build a criminal case against Claimants and their investment. It bears repeating: these are not the actions of a normal commercial actor. Respondent abused its authority and criminal justice system to harass Claimants and drive them from Panama, thus putting the final nail in the coffin of Omega Panama and Claimants' investment. This had been President Varela's goal all along.

7. Rather than acknowledging that the criminal investigations wrongly harmed Claimants, Respondent doubled-down in its Counter-Memorial, arguing that this tribunal lacks jurisdiction because Claimants allegedly bribed former Justice Moncada Luna of the Panamanian Supreme Court.[16] But Respondent's allegations are wholly unsupported and riddled with omissions and inconsistencies. Respondent offers no evidence of any agreement (or relationship) between Mr. Rivera and Justice Moncada Luna. Respondent makes no attempt to explain how Justice Moncada

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[14] *Id.* § VI.D.

[15] *See infra* § IV.D.

[16] Resp.'s Counter-Mem. § III.A.

Luna could have possibly influenced the La Chorrera Contract, which was awarded after an independent, transparent, and thorough vetting process. In fact, Ms. Maria Gabriela Reyna Lopez, the attorney who allegedly orchestrated the corrupt transaction, expressly exculpated Claimants of any guilt while admitting she participated in Justice Moncada Luna's unjust enrichment schemes in other ways.[17] And the Prosecutor responsible for Panama's first investigation into Moncada Luna publicly announced that Mr. Rivera and his companies were not involved in any crimes. Nevertheless, Respondent makes no attempt to rebut Ms. Reyna's unequivocal testimony or the overwhelming documentary evidence that shows that Claimants did not engage in any wrongdoing. It simply ignores them.

8. Instead, Respondent relies on sheer happenstance to substantiate its claim. According to Respondent, this Tribunal is deprived of its jurisdiction because Mr. Rivera transferred money to a real estate law firm that transferred a *different* amount of money to a *different* entity that later transferred a *different* amount of money to *two different* entities that each applied *different* amounts of money to the mortgages on two of Justice Moncada Luna's apartments.[18] That is the entirety of Respondent's corruption claim. Nothing more. According to Respondent, this is irrefutable proof that Claimants investment was obtained through corruption—even though these unsupported allegations relate to *only* a single Contract (La Chorrera) entered into well *after* Claimants first established Omega Panama and their investment. In reality, this is a thin reed on which to place the bulk of Respondent's defense. *No* tribunal has ever dismissed a dispute for lack of jurisdiction based on corruption allegations that post-date the making of the investment, let alone based on such an

[17] Cls' Mem. ¶ 99; Supplemental Declaration of Maria Gabriela Reyna López dated 14 July 2015 (C-0089 resubmitted) at 8.

[18] *See* Resp.'s Counter-Mem. ¶¶ 166-167; *see also infra* ¶¶ 256-264.

attenuated chain of unsubstantiated allegations.

9. While Respondent's claim of corruption is clearly insufficient on its face, it completely falls apart when you dig beneath the surface. As Claimants will show below, Respondent's bare allegations of corruption could never support a finding of illegality under Panamanian (or any other) law.[19] Respondent has made no attempt to identify the "thing of value" Mr. Rivera allegedly wished to convey to Mr. Moncada Luna in exchange for the award of the La Chorrera Contract (over which, again, Mr. Moncada Luna had no influence). And the financial records on which Respondent relies are themselves severely defective.[20] They are missing multiple pages and any number of transactions that may have shed light on Mr. Moncada Luna's scheme and demonstrated that Mr. Rivera, Omega Panama, and PR Solutions did nothing wrong. Respondent also refuses to engage with the evidence that the funds Mr. Rivera transferred to Reyna y Asociados were intended for a legitimate real estate transaction, as Claimants will demonstrate below.[21] And if Respondent were serious about its corruption allegations against Claimants, it would have investigated the members of the vetting commission at the Judiciary that selected the Omega Consortium's proposal as the best one—but Respondent has not. The so-called "investigation" against Claimants is a sham meant to intimidate and harass. The evidence of wrongdoing simply is not there. That is why the investigations into Mr. Rivera, Omega Panama, and PR Solutions have gone nowhere despite stretching on for years. *Neither Mr. Rivera nor any other person or company related to Claimants has ever been indicted on any charge notwithstanding four years and three separate criminal investigations.* At bottom, the evidence does not come close to establishing that Claimants committed any corrupt act.

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[19] *See infra* ¶¶ 239-264, 284.

[20] *See infra* ¶¶ 256-264, 284.

[21] See *infra* ¶¶ 246-249, 287.

10. After stripping away Respondent's baseless arguments, the true narrative of this dispute is clear. President Varela targeted Claimants based on their perceived association with former President Martinelli, and their investment in Panama was destroyed as a result. Respondent has done little to rebut the core of Claimant's case. But before proceeding to the merits of the dispute, Claimants first must address some of the more egregious misrepresentations and inconsistencies Respondent raises in its Counter-Memorial (*see infra* Section II). Claimants will then return to their case in chief. Claimants spent years establishing their investment in Panama, which was progressing well before Mr. Varela's ascent to power (*see infra* Section III). As noted above, President Varela ran on an anti-Martinelli platform and immediately retaliated against anyone he believed to be associated with Martinelli (*see infra* Section IV). That (wrongly) included Claimants. Within a matter of months, all of the governmental agencies with which Claimants interacted on the various Projects changed their attitude toward Claimants and began to do everything in their power to terminate the Contracts or force them to lapse (*see infra* Section V). As a result, Claimants' investment in Panama was destroyed (*see infra* Section VI). Although Respondent attempts to avoid liability by conjuring up jurisdictional defenses, they are unavailing (*see infra* Section VII). Respondent expropriated Claimants' investment and breached its obligations to provide Fair and Equitable Treatment and Full Protection and Security, to refrain from discriminatory, arbitrary, or unreasonable treatment, and to comply with the treaties' umbrella clauses (*see infra* Section VIII). Claimants suffered massive losses as a result, and Respondent must provide full reparation of *at least* US$ 83.13 million (*see infra* Section IX).

11. This Reply Memorial on the Merits and Counter-Memorial on Preliminary Objections is supported by the following witness statements and expert reports:

- The Second Witness Statement of Mr. Oscar I. Rivera Rivera ("**Rivera 2**");[22]
- The Witness Statement of Mr. Frankie Lopez ("**Lopez**"), former manager and Legal Representative of Omega Panama;[23]
- The Witness Statement of Ms. Karina Mirones ("**Mirones**"), former Director of Special Projects at Panama's Ministry of Health;[24]
- The Witness Statement of Ms. Maria Eugenia Herrera ("**Herrera**"), former Director of Panama's National Institute of Culture;[25]
- The Witness Statement of Mr. Tony Burke ("**Burke**"), CEO at Burke Construction Group;[26]
- The Expert Report of Ms. Alison Jimenez, of the Bates Group, who is an expert in Anti-Money Laundering and Corruption ("**Jimenez**");[27]
- The Expert Report of Prof. José María Gimeno Feliú and Prof. José Antonio Moreno, who are experts in the public contract bidding process used inter alia, in Panama ("**Public Contracts Experts**");[28]

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[22] Second Witness Statement of Mr. Oscar I. Rivera Rivera dated 27 May 2019 ("**Rivera 2**").

[23] Witness Statement of Mr. Frankie López dated 27 May 2019 ("**López**").

[24] Witness Statement of Ms. Karina Mirones dated 14 May 2019 ("**Mirones**").

[25] Witness Statement of Ms. Maria Eugenia Herrera dated 13 May 2019 ("**Herrera**").

[26] Witness Statement of Mr. Tony Burke dated 16 May 2019 ("**Burke**").

[27] Expert Report of Ms. Alison K. Jimenez dated 13 May 2019 ("**Jimenez**").

[28] Expert Report of Prof. José María Gimeno Feliú & Prof. Jose Antonio Moreno Molina dated 17 Apr. 2019 ("**Public Contracts Experts**").

- The Expert Report of Messrs. Arturo Chong and Fidel Ponce, of ARC Consulting, who are experts in real estate transactions in Panama ("**Real Estate Experts**");[29]

- The Expert Report of Prof. Orlando Pérez, who is an expert in Panamanian history and politics ("**Pérez**");[30]

- The Second Expert Report of Mr. Greg McKinnon, of Hemming Morse, who is an expert in construction contract valuation ("**McKinnon Report 2**")[31]; and,

- The Second Expert Report of Messrs. Pablo Lopez-Zadicoff and Sebastian Zuccon, Compass Lexecon, Claimants' quantum experts ("**Damages Expert Report 2**").[32]

12. In addition, Claimants are hereby submitting 341 new and 5 resubmitted factual exhibits and 99 new and 5 resubmitted legal exhibits.

II. RESPONDENT'S COUNTER-MEMORIAL IS LADEN WITH EGREGIOUS FACTUAL MISREPRESENTATIONS AND INCONSISTENCIES THAT FAIL TO CONCEAL RESPONDENT'S BREACHES

13. In its Counter-Memorial, Respondent makes a series of baseless accusations and misrepresentations of the factual record in a smear campaign designed to distract the Tribunal from the key issue in this arbitration: the Varela Administration's unjustified and illegitimate multi-flank

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[29] Expert Report of Messrs. Arturo Chong and Fidel Ponce of ARC Consulting dated 16 May 2019 ("**Real Estate Experts**").

[30] Expert Report of Prof. Orlando J. Pérez dated 17 May 2019 ("**Pérez**")

[31] Second Expert Report of Mr. Greg McKinnon of Hemming Morse dated 27 May 2019 ("**McKinnon Report 2**") dated 27 May 2019.

[32] The Second Expert Report of Messrs. Pablo López-Zadicoff and Sebastian Zuccon, Compass Lexecon, Claimants' quantum experts ("**Damages Expert Report 2**") dated 27 May 2019.

attack against Mr. Rivera, his companies, and Claimants' investments in Panama. The severity of these accusations and misrepresentations cannot be overlooked; simultaneously, however, once they are dismantled, Respondent has no defense remaining to its conduct. As a result, Claimants will address the two most egregious categories of meritless accusations head-on, demonstrating as follows: (A) Claimants never engaged in any corruption in procuring their investments; and, (B) Claimants never abandoned their Projects upon realizing that an investigation against Judge Moncada Luna had begun, or otherwise.

A. Respondent's Allegations of Corruption Are Unsubstantiated and Reckless

14. The first and most egregious accusation is Respondent's baseless allegation that "Claimants procured their so-called 'investments' through bribery and corruption."[33] Respondent alleges, without any proof (and knowing it lacks any), that Claimants procured the entirety of their investment—all eight Contracts—through corruption.

15. This is patently untrue, and Respondent knows it; otherwise, it would have produced documents proving its allegation as ordered by the Tribunal in March 2019.[34] Respondent, however, produced none.[35] There is not a scintilla of evidence even tenuously suggesting that Claimants

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[33] Resp.'s Counter-Mem. ¶ 4; *see also id.* § III.A (naming the heading for the Section: "THE CLAIMANTS ACQUIRED THEIR INVESTMENTS THROUGH CORRUPTION").

[34] Tribunal's Decision on Claimants' Request for Production of Documents dated 19 Mar. 2019, Request No. 42 (ordering Respondent to "produce documents, to the extent not already produced, that are the basis for the contention in the Counter-Memorial at paragraph 184 that 'the evidence establishes that the Claimants procured one or more of the contracts that constitute their alleged 'investment' in Panama through corruption'").

[35] Despite the Tribunal's clear order to Respondent to produce this evidence, see Tribunal's Decision on Claimants' Request for Production of Documents dated 19 Mar. 2019, Request No. 42, Respondent has not produced one document responsive to this Request. Rule 34(2)(a) of the ICSID Arbitration Rules provides that this "Tribunal may . . . call upon the parties to produce documents, witnesses and experts." When a party fails to do so, the Rules further provide that the "Tribunal shall take formal note" of this failure. ICSID Arbitration Rule 34(2)(a). Indeed, in such circumstances, tribunals "may draw appropriate inferences from a party's non-production of evidence ordered." See, e.g., *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award dated 4 Oct. 2013 ("***Metal-Tech***") (RL-0011), ¶

procured any of the Contracts through corruption of any kind (save with respect to Respondent's unsupported accusation about the Unidad Judicial La Chorrera Contract, which is likewise baseless and addressed in detail in Claimants' Memorial and again below). In fact, even setting aside its failure to produce any documents to back up its claims, Respondent has failed to submit even testimony from a single witness willing to go on the record to corroborate Respondent's accusation. Considering that the Tribunal can assume that any diligent government would immediately seek to investigate and root out corruption in its ranks, it is clear that the reason Respondent has produced no legitimate evidence is because its accusations are simply false.

16. Fully appreciating the paucity of its evidence, Respondent instead nuances its corruption accusations by making them more pernicious. Specifically, it seeks to taint one specific contract, and then use its allegations in respect of that single contract to sully the remainder of Claimants' work in Panama. Thus, Respondent states at least eleven times[36] that either Mr. Rivera

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245. Article 9(5) of the IBA Rules of Evidence states clearly that where a party refuses to comply with a document production order, "the Arbitral Tribunal may infer that such document[s] would be adverse to the interests of that Party." IBA Rules on the Taking of Evidence in Int'l Arbitration (CL-0147), art. 9(5). See also BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL TRIBUNALS 323-25 (1987) (CL-0170). As such, the Tribunal should draw the adverse inference that Respondent cannot substantiate its criminal allegations against Mr. Rivera and his companies, as it either lacks any credible evidence to support its allegations or is actually in possession of evidence that disproves its claims.

[36] *See* Resp.'s Counter-Mem. ¶ 20 ("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"); *See* Resp.'s Counter-Mem. ¶ 24 ("[O]n April 25, 2013, Omega transferred US$ 250,000 of the advance payment to PR Solutions, S.A. a company also owned by Mr. Rivera. 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"); *See* Resp.'s Counter-Mem. ¶ 24 ("Panama will prove that the funds were used to bribe Justice Moncada Luna in exchange for the awarding of the La Chorrera Contract"); *see* Resp.'s Counter-Mem. n. 37 ("[E]vidence shows that the funds were transferred to Reyna y Asociados to conceal their eventual transfer through a series of sell companies and eventually to an account to cancel the mortgage debt of an apartment, PH Ocean Sky, owned by Justice Moncada Luna and his wife"); *See* Resp.'s Counter-Mem. ¶ 165 ("The first corrupt transaction occurred between April and May of 2013"); *See* Resp.'s Counter-Mem. ¶ 171 ("During the course of the National Assembly's investigation, it collected evidence of financial crimes committed by Omega"); *see* Resp.'s Counter-Mem. ¶ 190 ("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. That investigation disclosed two significant corrupt payments made by Omega for the personal

or the Omega Companies were somehow involved in the Moncada Luna corruption scandal. Respondent then ominously promises in the Counter-Memorial that "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."[37] Respondent, of course, proves nothing of the sort because its accusation is nothing more than empty rhetoric.

17. Two key facts demonstrate that Claimants never made any illegal payments to benefit Judge Moncada Luna or to influence the decision to award the Unidad Judicial La Chorrera Contract to the Omega Consortium. *First*, contrary to Respondent's assertions, Ms. Vielsa Ríos, the Administrative Secretary of the Panamanian Supreme Court, who "was involved in the tender and administration of the La Chorrera project,"[38] ***never*** accuses the Omega Consortium of procuring the Contract through corruption or even mentions anything untoward in the bidding process.[39] As the person overseeing the bidding process, it stands to reason that she would have been aware or at least suspicious if there was anything illicit or seemingly out of the ordinary in the process. But she says nothing in this regard. Indeed, she cannot even describe how Judge Moncada Luna could possibly have influenced the process to Claimants' benefit which would be a *sine qua non* if Respondent's

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benefit of Justice Moncada Luna"); *see* Resp.'s Counter-Mem. ¶ 191 ("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"); *see* Resp.'s Counter-Mem. ¶ 194 ("Ultimately, Justice Moncada Luna pled guilty to charges of making false statements and unjust enrichment, and the two apartments . . . were confiscated by the Panamanian Government"); *see* Villalba ¶ 21 ("In the case of Omega Engineering, we discovered two payments that were connected to payments made on the apartments purchased by Mrs. Moncada Luna and registered to Corporacion Celestial S.A. and Corporacion Alpil S.A."); *see* Villalba ¶ 24 ("Here again, money moved from Omega Engineering to the benefit of Justice Moncada Luna, this time in about a week's time).

[37] Resp.'s Counter-Mem. ¶ 20 (emphasis added).

[38] *Id*. ¶ 2.

[39] See generally Ríos.

theory was true. *Second*, despite launching three investigations involving Mr. Rivera or Omega Panama lasting over four years, Panama has ***never*** found Mr. Rivera or Omega Panama guilty of any wrong doing. Indeed, they have not even issued an indictment naming them as defendants. To the contrary, Respondent's own Prosecutor specifically absolved Claimants of any wrongdoing.[40] And in September 2016, Respondent's court ordered one of the investigations closed.[41]

18. Despite all this, Respondent baldly (and falsely) asserts that "the information available to date provides **incontrovertible evidence** of corruption by Omega and Mr. Rivera with respect to their work in Panama."[42] Yet, Respondent admits just a few pages later that there is no such incontrovertible evidence. Rather, the assertion is based on (at best) only an inference: "Panama has presented overwhelming evidence that the Claimants used state funds to bribe Justice Moncada Luna . . . [t]he **only reasonable** purpose for doing so was to secure investments within Panama."[43] If the evidence was incontrovertible, no reasonable inference would need to be made. This plainly demonstrates the unsupported, hyperbolic nature of Respondent's claims of corruption.

19. In reality, the "incontrovertible evidence" overwhelmingly shows that Claimants have not made any corrupt payments in relation to the La Chorrera Contract and that the pretextual Government investigations against Claimants were laden with methodological flaws, incomplete evidence, and flawed assumptions.[44] That its allegations of corruption fail on their face with regard

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[40] Cls' Mem. ¶ 99; see also *infra* ¶ 285.

[41] The court decision was appealed by the Prosecutor, but the Panamanian courts have yet to rule.

[42] Resp.'s Counter Mem. ¶ 196 (emphasis added).

[43] *Id*. ¶ 208 (emphasis added).

[44] *See infra* §§ V.E.2, V.E.3; *see also* Jimenez 3-4.

to the La Chorrera Contract reveals Respondent's bootstrapped allegations of corruption on the remainder of Claimants' investment in Panama for what they are: entirely false and reckless.

B. Unsubstantiated Allegations of Project Abandonment

20. Respondent also alleges that "[b]eginning in early October 2014, . . . the Claimants' conduct changed – around the time that the government's investigation into Justice Moncada Luna's corruption became public," at which point, "Claimants abandoned their projects and fled Panama."[45] This is likewise untrue.

21. In making this claim, Respondent simply ignores evidence unequivocally demonstrating that Claimants remained in Panama to work with the Government and sought to keep the Projects going long after the investigation of Judge Moncada Luna began.[46]

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[45] Rep's Counter-Mem. ¶ 7.

[46] Letter No. MINSA-54 from the Omega Consortium to the Ministry of Health dated 31 Oct. 2014 (C-0173); Letter No. MINSA-56 from Omega to MINSA dated 20 Jan. 2015 (C-0583); Letter No. MINSA-60 from Omega to MINSA dated 27 Oct. 2015 (C-0588); Letter No. INAC-N14-2014 from Omega to INAC dated 2 Oct. 2014 (C-0586); Letter No. INAC-N16-2014 from Omega to INAC dated 16 Oct. 2014 (C-0597); Letter No. Sosa-04-A-2014 from Omega to Sosa dated 11 Nov. 2014 (C-0624); Letter No. INAC-N18-2014 from Omega to INAC dated 21 Nov. 2014 (C-0599); Letter No. SOSA-07-D-2014 from Omega to Sosa dated 22 Dec. 2014 (C-0600); Letter No. SOSA-08-E-2015 from Omega to Sosa dated 23 Jan. 2015 (C-0598); Letter from the Omega Consortium to the National Institute of Culture dated 3 Feb. 2015 (C-0185); Letter from Frankie López to INAC dated 6 Feb. 2015 (C-0604); Letter No. INAC-020 from Omega to INAC dated 24 Feb. 2015 (C-0629); Letter No. INAC-021 from Omega to INAC dated 6 Mar. 2015 (C-0630); Letter No. INAC-022 from Omega to INAC dated 16 Mar. 2015 (C-0605); Letter No. MINSA-KY-82 from Omega to MINSA dated 28 Oct. 2014 (C-0575); Letter No. MINSA-KY-83ET from Omega to MINSA dated 28 Nov. 2014 (C-0175); Letter from Omega to Judicial Authority in response to Nota: 2015 10 29 - P007-067 Proposal of Addendum No. 3 dated 29 Oct. 2015 (R-0081); Letter No. 2015 01 12 –P007-056 from Omega to Ms. Vielsa Ríos dated 12 Jan. 2015 (C-0631); Letter Responding to N. P.C.S.J./604/2015 from the Judicial Authority to Omega dated 18 Mar. 2015 (R-0015 resubmitted); Letter No. P007-062 from Omega to the Judicial Authority dated 1 Apr. 2015 (C-0244); Letter from the Omega Consortium to the Judiciary dated 6 Apr. 2015 (C-0245); Letter No. P007-2015 05 05-064 from Omega to Ms. Vielsa Ríos dated 5 May 2015 (C-0632); Letter No. P007-064 from Omega to the Judicial Authority dated 10 Aug. 2015 (R-0069); Letter No. P007-065 from Omega to the Judiciary dated 13 Aug. 2015 (C-0633); Letter No. P007-066 from Omega to the Judicial Authority dated 28 Sep. 2015 (C-0247); Letter No. P004-62 from Omega to the Secretary of Cold Chain dated 19 Jun. 2015 (C-0064 resubmitted); Letter from the Omega Consortium to the Mayor of the Municipality of Colón dated 2 Oct. 2014 (C-0178); Letter No. P008-012 from Omega to the Colón Mayor dated 5 Feb. 2015 (C-0179); Letter No. P08-013 from Omega to the Colón Mayor dated 19 Jun. 2015 (C-0180); Letter No. P08-014 from Omega to the Municipal Council of Colón dated 2 Jul. 2015 (C-0182); Letter No. P08-014 from Omega to the Colón Mayor dated 28 Sep. 2015 (C-0610); Letter from the Omega Consortium to City Hall of Panama dated 8 Apr. 2015 (C-0184); Follow Up No. 6 to Letter No P010 2015 4 08 010 dated 1 Jun. 2015 (C-0612); Letter No. MINSA-PC-58ET from Omega to

22. To start, the MINSA CAPSI Projects were not abandoned in 2014, as Respondent claims.[47] Its own witness, Mr. Nessim Barsallo ("**Mr. Barsallo**"), explains that "the Omega Projects have not been worked on since *2015*,"[48] yet Respondent states in in its Counter-Memorial that "Omega stopped work altogether in *October of 2014*."[49] Respondent does not acknowledge this discrepancy between its representations to this Tribunal and the evidence it provides in alleged support. In any event, the evidence shows that as late as October 2015, far from having abandoned the Projects a year earlier, Claimants were still trying to work with MINSA to restart the Projects.[50]

23. Nor did the Omega Consortium abandon the Ciudad de las Artes Project on 21 November 2014, as Respondent claims.[51] To the contrary, the Omega Consortium sent a letter to the INAC on that very same day following up on an October 2014 letter requesting an extension of time for the Contract with the obvious desire to complete their work.[52] The evidence further shows that as late as March 2015, even *after* the INAC had illegally terminated the Contract by a sovereign administrative act, Claimants were still trying to resolve various issues with the Project.[53]

24. Respondent's allegation that the Omega Consortium abandoned the Municipality of

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MINSA dated 28 Nov. 2014 (C-0635); Letter No. MINSA-55PC from Omega to the Ministry of Health dated 18 Dec. 2014 (R-0092); Letter No. MINSA-RS-62ET from Omega to MINSA dated 28 Nov. 2014 (C-0584); Letter from the Omega Consortium to Ministry of Health dated 18 Dec. 2014 (C-0371); Letter No. MINSA-RS-064 from Omega to MINSA dated 4 Jun. 2015 (C-0186); Letter from Omega to SUNTRACS dated 1 Nov. 2015 (C-0589); *see also* Rivera 2 ¶¶ 15-16.

[47] Resp.'s Counter-Mem. ¶ 77.

[48] Barsallo ¶ 14.

[49] Resp.'s Counter-Mem. ¶ 77.

[50] *See, e.g.*, Letter No. MINSA-60 from Omega to MINSA dated 27 Oct. 2015 (C-0588).

[51] Resp.'s Counter-Mem. ¶ 102.

[52] López ¶ 126; Letter No. INAC N 18 2014 from Omega to INAC dated 21 Nov. 2014 (C-0599).

[53] Email from Frankie López to Mariana Nunez dated 7 Mar. 2015 (C-0634).

Panama Contract in April 2015 is likewise refuted by the record.[54] That same month, the Omega Consortium sent a letter to the City Hall of Panama requesting the Municipality's assistance to resolve problems that had surfaced during the execution of the Project. Far from abandoning the Contract, the Omega Consortium followed up on its April 2015 letter on *six* different occasions over the next three months: 14, 23, and 30 April; 8 and 20 May; and 1 June 2015.[55] The only response the Omega Consortium ever received from Respondent was a termination resolution signed in January 2017, coincidentally only twelve days after Claimants filed their Request for Arbitration with the ICSID Secretariat.[56]

25. Respondent's allegation that the Omega Consortium abandoned the La Chorrera Project on 17 December 2014[57] is also completely false. Respondent itself explained in numerous paragraphs of its Counter-Memorial that the Omega Consortium continued to work with the Judiciary until 29 October *2015* in an attempt to execute Change Order No. 3.[58] And Respondent acknowledges that there were still employees and subcontractors on the La Chorrera construction site into February 2015.[59] In fact, the Omega Consortium worked on the Project at least until late October 2015,[60] even though by then the Omega Consortium was owed over US$ [redacted] million in work performed on all of

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[54] Resp.'s Counter-Mem. ¶ 151.

[55] López ¶ 143; Letter from the Omega Consortium to City Hall of Panama dated 8 Apr. 2015 (C-0184).

[56] Cls' Mem. ¶ 82.

[57] Resp.'s Counter-Mem. ¶ 177.

[58] Ríos ¶ 34; Resp.'s Counter-Mem. ¶¶ 41-44; Letter from Omega to Judicial Authority in response to Nota: 2015 10 29 - P007-067 Proposal of Addendum No. 3 dated 29 Oct. 2015 (R-0081).

[59] López ¶ 10.

[60] Letter from Omega to Judicial Authority in response to Nota: 2015 10 29 - P007-067 Proposal of Addendum No. 3 dated 29 Oct. 2015 (R-0081).

the Projects, had lost its cash flow, had witnessed its bank accounts wrongfully (and perpetually) frozen due to the Moncada Luna investigation, and some Panamanian employees had initiated actions against Claimants in the Panamanian Ministry of Labor.[61]

26. It is therefore beyond question that Claimants did not "flee" Panama in late 2014;[62] nor did they abandon any of the Projects in the wake of the Moncada Luna investigation. That narrative is a fiction of Respondent's arbitration defense but it is belied by the record. Neither Mr. Rivera nor anyone from the Omega Companies had anything to fear regarding the investigation of Judge Moncada Luna because Claimants did nothing wrong. There was no reason for Claimants to think that they were going to be linked to Judge Moncada Luna just because he signed the La Chorrera Contract in his capacity as Head of the Judiciary.[63] Indeed, Respondent itself noted that "[a]t the time the Moncada Luna investigation commenced, the Panamanian authorities had no information connecting Mr. Rivera to Justice Moncada Luna's corruption."[64] That is because there is no such connection. Claimants' attitude and conduct toward their Panamanian investment never changed. Rather, it was the Government's attitude towards Claimants that changed after President Varela entered office and began his targeted campaign of governmental harassment.[65]

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27. The foregoing misrepresentations were among the most egregious in Respondent's Counter-Memorial, and they go to the core of Respondent's defenses. But Respondent's Counter-

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[61] López ¶ 108.

[62] *See* Rivera 2 ¶ 15.

[63] Ríos ¶ 12 (explaining that "at Justice Moncada Luna's direction, and *in accordance with the Law* of Public Contracts, the Judiciary executed the La Chorrera Contract with Omega on November 22, 2012"); *see also* López ¶ 60; Rivera 2 ¶ 10.

[64] Resp.'s Counter-Mem. ¶ 231.

[65] *See infra* § VI.C.3.

Memorial is laden with still further misrepresentations and omissions in a clear attempt to obscure the truth, in the hope that Respondent may avoid liability for its illegal acts against Claimants. Claimants therefore must return to the beginning to clarify the factual record.

III. CLAIMANTS BUILT A SUCCESSFUL INVESTMENT IN PANAMA AND WERE POISED TO CONTINUE GROWING

28. Claimants spent years cultivating and growing their investment in Panama. Thanks to Claimants' expertise and experience, the Omega Consortium became an increasingly successful player in Panama's public works market with a proven track record (*see infra* Section III.A). Claimants fully expected the Contracts at issue in this dispute to be successful as well. Indeed, each of the Projects was progressing well until Mr. Varela was elected President (*see infra* Section III.B).

A. The Omega Consortium Was a Successful Player in Panama's Construction Market with Demonstrated Competitive Advantages over Its Competitors

29. Within a few years of establishing their investment in Panama, Claimants became a strong player in Panama's public works construction market. An overview of Claimants' investment in Panama is detailed in Claimants' Memorial,[66] but given Respondent's efforts to distort the facts and downplay Claimants' success in Panama,[67] Claimants must clarify the record. Claimants first decided to invest in Panama in 2009.[68] At the time, Puerto Rico's economy was just beginning to show signs of slowing down, so Claimants started looking for opportunities in Spanish-speaking countries in Latin America.[69] These efforts led Claimants to Panama. Unlike Puerto Rico's economy,

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[66] *See generally* Cls' Mem. § III.

[67] *See* Resp.'s Counter-Mem. § V.B.2; Expert Report of Dr. Daniel Flores dated 7 Jan. 2019 ("**Flores**"), § III.A.

[68] Cls' Mem. ¶ 60; Rivera 1 ¶ 21; López ¶ 17.

[69] López ¶ 17; Cls' Mem. ¶ 23.

Panama's economy was speeding up, driven largely by a construction "boom" during the Martinelli administration.[70]

30. Shortly thereafter, Mr. Rivera created two corporations in Panama: PR Solutions SA and Omega Panama.[71] Although Mr. Rivera planned for Omega Panama to become a prominent company in the public works construction industry, it initially worked as a subcontractor for privately owned projects. This allowed Mr. Rivera and his team to become more familiar with the market and build relationships in the industry. In 2010, Claimants started looking for and bidding on public works projects.[72]

31. The first public project Claimants won in Panama was for the Tocumen Airport.[73] Claimants used PR Solutions to bid on this project and execute it.[74] This project was a success.[75] Claimants were also bidding on more projects in Panama through a consortium between Omega Panama and Omega U.S. (the "**Omega Consortium**"), where Omega Panama represented 98%-99% of the Consortium and Omega U.S. 1%-2%.[76] The Omega Consortium won bids for ten other projects,

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[70] Cls' Mem. ¶ 20; Rivera 1 § III; López ¶ 17.

[71] Rivera 1 ¶ 2; Cls' Mem. ¶ 30, 32. Respondent's expert, Mr. Flores, makes much ado as to whether Omega Panama had started bidding on work before PR Solutions did so. Flores § III.A.1.c. This is nothing more than a distraction. Whether Claimants bid through Omega Panama or PR Solutions first is irrelevant to the key issue in this arbitration: that President Varela sought to destroy Claimants' investment in Panama through a concerted multi-flanked attack against Claimants and their investment. In any event, whether PR Solutions or the Omega Consortium were bidding, it was the same key team executing the contract. López ¶ 31.

[72] Cls' Mem. ¶ 27; López ¶ 19; Rivera 1 ¶ 18

[73] *See* Proposal Form for Malek International Airport dated 15 Mar. 2010 (C-0127); Letter from International Airport of Tocumen to Villarreal Cabrera dated 1 Oct. 2010 (C-0129).

[74] Rivera 1 ¶ 23; López ¶ 31; Cls' Mem. ¶ 30.

[75] López ¶ 32; Cls' Mem. ¶ 30; Rivera 1 ¶ 23.

[76] López ¶ 26; Cls' Mem. n.96; *see, e.g.*, Temporary Consortium Agreement for the Palacio Municipal de Colón Project dated 15 Nov. 2012 (C-0052); Temporary Consortium Agreement for the Ciudad de las Artes Project dated 5 Mar. 2012 (C-0043). Sometimes a third company would be brought into the Consortium to provide industry-specific expertise and experience. This external company would never represent more than 1% of the Consortium and acted as a

winning close to one out of four bids between 2010 and 2013.[77] Of the ten bids it won, it signed nine contracts[78] and successfully completed one of those (in addition to the PR Solutions Contract, which was also successfully completed).[79] The remaining eight contracts (the "**Contracts**" or "**Projects**") were progressing well until President Varela came to power.[80]

32. Claimants' track record in Panama up to July 2014 when President Varela took office was both impressive and improving. Two projects had been successfully completed, and the rest were progressing without any complaints regarding the Omega Consortium's work or execution of the Contracts outside the ordinary course.[81] It is telling that, despite Respondent's baseless insinuations, none of Respondent's witnesses in this arbitration—representing the INAC, the Judiciary, MINSA, and Municipality of Panama—have any negative comments about the work performed by the Omega Consortium prior to the Varela Administration.[82]

33. Claimants also had proven their capacity to continue growing their investment—*i.e.*, their success rate in winning public works bids in Panama. Since entering the Panamanian public works construction market, the Omega Consortium became an increasingly successful bidder in Panama. But Claimants' success should not be taken as evidence that it is easy for companies to break into Panama's public works market. In 2010, the Omega Consortium bid on the first tranche

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subcontractor to Omega Panama. *See* López ¶ 26 n.6.

[77] Damages Expert 2 ¶ 79.

[78] The Government cancelled one of the projects before the contract was signed. *See* Damages Expert 2 ¶ 46.

[79] *See* Cls' Mem. ¶¶ 30-31; Certificate of Final Acceptance of Contract No. 017/10 dated 24 Jan. 2012 (C-0023 resubmitted)

[80] Cls' Mem. ¶ 51; López ¶ 40; Rivera 1 ¶ 48.

[81] *See* Cls' Mem. § IV; *supra* ¶ 31.

[82] *See generally* Ríos, Barsallo, Chen, Díaz.

of MINSA CAPSI projects, which included ten contracts, but it did not win any of those bids.[83] Claimants quickly realized the Omega Consortium had to reinforce its experience in medical equipment to be successful in the MINSA CAPSI bids.[84] So when the Government issued the second tranche of MINSA CAPSI projects in 2011, the Omega Consortium added Ciracet, a recognized Puerto Rican company specializing in hospital equipment, to the Consortium.[85] This strategy paid off when the Omega Consortium won three of the MINSA CAPSI projects.[86] It was Claimants' ability to adapt through an experienced management team with depth in the industry that helped to catapult the Omega Consortium to success.[87]

34. Another source of the Omega Consortium's success was its ability to learn about and adapt to the nuances of Panama's bidding.[88] The bidding process used in Panama for the projects on which the Omega Consortium was bidding was "Licitación por Mejor Valor" or "Tender for Best Value."[89] This process is different from the one more generally used in Puerto Rico, which is based on the "best price" rather than the "best value,"[90] but it is common in other parts of the world. The best value bidding process that most of the bids in Panama follow means that price, although a very important factor, is not by itself the determining factor for a winning bid, which is also dependent on

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[83] López ¶ 19.

[84] *Id*.

[85] *Id*. As explained by the Claimants' Public Contracts Experts, the practice of bringing external expertise to a bidding company by adding a subcontractor to the consortium was allowed and encouraged in Panama's bidding process. Public Contracts Report at 18-19.

[86] López ¶ 19.

[87] *Id*. ¶ 27; *see* Omega Panama's Organizational Chart (C-0517).

[88] *Id*. ¶ 28.

[89] *Id*. ¶ 29; Public Contracts Experts at 22-23; *see also* Cls' Mem. ¶ 26.

[90] López ¶ 29; Public Contracts Experts at 22-23.

other factors, such as the technical, economic, administrative, and financial qualities offered by the bidders.[91] The bidder that obtains the highest score in the weighting methodology specified in the bid terms and conditions is then awarded the project, provided that it complies with the minimum mandatory requirements stated in the bid terms and conditions.[92] This is why in all Requests for Proposals, the requirements to bid had the same essential structure: the bidding company or consortium had to (1) show experience in similar projects, as well as qualified personnel in the company; (2) fulfill a financial requirement by showing certain information from the last three years (e.g., financial statements, credit availability); (3) satisfy certain price requirements; (4) complete all required legal paperwork; and (5) satisfy certain quality requirements.[93] Under this rubric, it was no coincidence that the Omega Consortium was successful. The Omega Consortium had unique attributes and qualities that gave it a competitive advantage over many of its competitors in Panama.[94]

35. To start, the Omega Consortium had an experienced team of Puerto Rican and Panamanian professionals with decades of relevant experience.[95] Mr. [redacted] led the bidding processes.[97] Frankie Lopez, the legal representative of the Consortium and General Manager in Panama, managed the day-to-day administration of operations, focusing on the execution

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[91] Public Contracts Report at 13.

[92] *Id*.

[93] *See id*. at 26; *see also* López ¶ 23.

[94] *See* López ¶¶ 27-29.

[95] *See* Omega Panama's Organizational Chart (C-0517); López ¶ 27.

[96] Mr. [redacted] colleagues often refer to him as [redacted] including in some of their witness statements, but Claimants will refer to him as [redacted] in this Reply.

[97] López ¶ 24; Omega Panama's Organizational Chart (C-0517).

of the Contracts.[98] At the time, Mr. Lopez had worked for Omega U.S. for 10 years before moving to Panama.[99] [redacted], who was in charge of securing the financing and bonds for the projects along with Mr. Rivera also had many years of experience.[100] For his part, Mr. Rivera had over 15 years of experience, not just working at Omega U.S., but running it and leading its growth in Puerto Rico.[101] This background gave Mr. Rivera "a unique set of capabilities, including leadership [and] the ability to strategize," which together with his "vast experience in the construction industry [and . . .] a deep understanding of the real estate development business and the financial markets" gave him the tools to build a successful construction business in Panama.[102] In all, the Claimants' core team had over 40 years of combined relevant experience.

36. In addition to its unique team and its understanding of the bidding process, the Omega Consortium had a competitive advantage based on its financial capacity. Having solid finances and the ability to secure financing are a precondition for winning public works tenders in Panama.[103] References from prestigious commercial and financial institutions and audited financial statements are key factors in the bidding processes.[104] Financial capacity represented, on average, 23% of the total possible score of the [redacted] tenders in which the Omega Consortium participated.[105] Compass

[98] López ¶ 21 ; Omega Panama's Organizational Chart (C-0517).

[99] López ¶ 14.

[100] *Id*. ¶ 24.

[101] Rivera 1 ¶ 9.

[102] Burke ¶¶ 7-8; Rivera 2 ¶¶ 20-21.

[103] Damages Expert Report 2 ¶ 70; Rivera 2 ¶¶ 20-21; *see* Public Contracts Experts at 26, # 2.

[104] Damages Expert Report 2 ¶ 69; Rivera 2 ¶¶ 20-21.

[105] Damages Expert Report 2 ¶ 67.

Lexecon's analysis of 40 of the bids in which the Omega Consortium participated demonstrates that, where a company bidding for a project was not awarded any points for financial capacity, that company would lose 95% of those bids,[106] irrespective of whether the company had offered the best price. During the bidding process, the Omega Consortium received consistently high scores in financial capacity. In 32 of the tenders in which it participated, the Omega Consortium received the highest score among the participants, achieving the highest possible score in 31 of them.[107]

37. The same can be said for experience, another key criterion in the bidding processes.[108] The importance of experience represents, on average, 22% of the total possible score of the 42 tenders in which the Omega Consortium participated.[109] As Compass Lexecon's analysis shows, in 90% of those tenders, it would have been impossible for the Omega Consortium to win without receiving points in the experience category.[110] The Omega Consortium achieved the maximum possible score in experience in 26 tenders, proving that it was capable of competing with companies that Respondent claims had "overwhelmingly more significant experience."[111] And the Omega Consortium's experience only improved over time.[112]

38. The Omega Consortium further benefited from the participation of both Omega U.S. and Omega Panama. Early on, Omega U.S. contributed with its more than twenty-five years of

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[106] Damages Expert Report 2 ¶ 67.

[107] Damages Expert Report 2 ¶ 69.

[108] Damages Expert Report 2 ¶ 72; *see* Public Contracts Experts at 4.

[109] Damages Expert Report 2 ¶ 73.

[110] Damages Expert Report 2 ¶ 73; *see* Rivera 2 ¶¶ 20-21.

[111] Flores ¶ 38; Damages Expert Report 2 ¶ 74.

[112] Damages Expert Report 2 ¶ 79-80; Damages Expert Report 2 Figure III.

experience in the construction industry, highly skilled personnel to execute the projects, excellent experience in key projects, and a strong economic capacity.[113] But Omega Panama also contributed to the Consortium in economic terms, since it was a better alternative regarding tax and tariffs issues.[114] The ability to leverage the strengths of each component of the business allowed the Omega Consortium to stand out among its competitors for public works contracts in Panama.[115]

39. Price was an important yet a particularly challenging factor in the bidding process. The Omega Consortium quickly learned that the proposal could not be too far above the reference price established by the Government in the Request for Proposals (which would be considered too expensive). Nor could it be significantly below it (which would be considered risky).[116] If a company made a proposal outside these margins, which were generally plus/minus 10% of the reference price given in the Request for Proposals, the company was either disqualified or received a lower score.[117] This is why having strong relationships with subcontractors and suppliers was key, as it allowed Claimants to manage costs and arrive at an appropriate price that would neither result in the bid being disqualified, nor jeopardize the execution of the contract.

40. Finally, Omega Panama's track record of success was also demonstrated through its financial statements. Since its incorporation in 2010, Omega Panama's revenues increased year after year. In 2011, Omega Panama earned US$ [redacted] million in revenue, but by 2013—only two years

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[113] López ¶ 28; Omega U.S.'s Corporate Profile (C-0012); Photographs of Omega's Projects, various dates (C-0615).

[114] López ¶ 27.

[115] *Id*. ¶ 28.

[116] *Id*. ¶ 30; *see* Public Contracts Experts at 33.

[117] López ¶ 30.

later—its revenue had increased to US$ [redacted] million.[118] This impressive growth was due to Claimants' ability to win and execute contracts.

41. This analysis is clear: the Omega Consortium's unique team, its ability to partner with knowledgeable subcontractors, its experience and its track record, financial standing, and understanding of the bidding process all demonstrated it was a strong player in Panama's construction market and that it had significant advantages over its competitors. Respondent's assertions that Claimants did not have a comparative advantage over their competitors in Panama is incorrect.[119] A new entrant into the market could not simply replicate Claimants' success.[120] Absent Respondent's interference through the arbitrary and unlawful acts that destroyed the their Panamanian investment, Claimants would have continued to grow and succeed in further tenders and projects.

B. The Omega Consortium's Existing Contracts Were Progressing Well Prior to the Change in Administration

42. Prior to President Varela's ascent to power, all the Omega Consortium's Projects were generally progressing as expected.[121] From time to time, the Omega Consortium faced regular course-of-business delays and other challenges that are typical for big construction projects. These problems were generally addressed based on the willingness of the different governmental agencies to work with the Omega Consortium to address the issue, and the tailored mechanisms contained in the Contracts to deal with delays to a particular project. Importantly, Respondent's witnesses do not assert otherwise.

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[118] Damages Expert Report 2, ¶ 60; Rivera 2 ¶ 19.

[119] Resp.'s Counter-Mem. ¶¶ 350-51; Flores ¶¶ 20-29.

[120] Rivera 2 ¶¶ 22-23.

[121] Cls' Mem. ¶51; Resp.'s Counter-Mem. ¶ 59.

1. *MINSA CAPSI Projects*

43. As described in Claimants' Memorial, and confirmed by Respondent's witness, Mr. Nessim Barsallo, the MINSA CAPSI Projects were progressing as expected in the construction industry during the Martinelli Presidency.[122] To be sure, normal course-of-business problems arose from time to time that delayed the Projects. If those delays became longer than expected, the Omega Consortium would reduce its workforce and slow down work in order to mitigate costs while negotiating with MINSA.[123] But, overall, issues were resolved without major controversy.[124] This gave the Omega Consortium the impression that the Government would work cooperatively with Claimants to resolve any problems. Occasionally the Contracts would expire while Claimants negotiated a change order[125] with MINSA for extensions of time or additional work, but Claimants were confident that these issues would be resolved promptly and the approvals of change orders and payments would be forthcoming. The Omega Consortium, therefore, was comfortable continuing to work, *albeit* in a reduced manner, while simultaneously seeking approvals from MINSA and the Comptroller General. Prior to the change in Administration, MINSA did not express concern when the Omega Consortium reduced its workforce while negotiating a change order with MINSA for

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[122] Cls' Mem. ¶¶ 43, 51, 58; Barsallo § V (explaining how the Omega Consortium and MINSA worked out the issues the MINSA CAPSI Projects had during the Martinelli administration); *cf* Mirones ¶ 6 (noting that the execution of the Contracts progressed normally).

[123] Barsallo ¶ 27; López ¶ 60; Cls' Mem ¶ 55.

[124] Barsallo ¶¶ 29-39

[125] A change order is an addition required to be made to a public works contract when the contract's term has been affected by delays not attributable to the contractor as well as by force majeure or unavoidable unforeseen events. *See* Law 22 dated 27 Jun. 2006 (C-0280 resubmitted), art. 81 (explaining that contractors have a right to time extensions when the delays are not attributable to the contractor or are caused by force majeure or unavoidable unforeseen events); *see also* Executive Decree No. 40 dated 10 Apr. 2015 (C-0572), art. 170 (stating that the Government agency has to attach to the change order file all the evidence proving the force majeure or unavoidable unforeseen events, or that the delays that affected the contract were not caused by the contractor).

additional costs or an extension of time.[126]

44. Delays in all three MINSA CAPSI Projects were caused during the Martinelli Administration by rain days, labor strikes, and delays in obtaining approvals from MINSA.[127] But, as can be expected, each MINSA CAPSI Project had its own issues. For instance, for the Rio Sereno Project, an environmental review in the construction area caused delays.[128] Similarly, having an unclear definition of medical equipment in the Contract caused delays.[129] And the Government's inability to relocate the workforce in the Rio Sereno facility likewise caused problems.[130] The Kuna Yala Contract presented problems of its own involving access to the construction site.[131] These problems were caused by the Kuna Yala residents who wanted better roads in the region in general, and found that the best way to pressure the Panamanian Government to build better roads was by preventing the Omega Consortium from accessing the construction site.[132] The Puerto Caimito Contract generally progressed as planned.[133]

45. All of the delays in the three MINSA CAPSI projects were eventually resolved prior

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[126] Barsallo ¶¶ 27; 34.

[127] Letter from the Omega Consortium to the Ministry of Health dated 6 Mar. 2013 (C-0155); Time and Costs compensation request to MINSA dated 25 Jan. 2013 (C-0269); Request for additional time and costs submitted by the Omega Consortium to the Ministry of Health and the Republic of Panama dated 19 July 2013 (C-0157).

[128] Letter from the Omega Consortium to the Ministry of Health dated 27 Nov. 2012 (C-0154).

[129] *Id*.

[130] *Id*.; Letter from the Omega Consortium to the Ministry of Health dated 6 Mar. 2013 (C-0155).

[131] Letter from the Omega Consortium to the Ministry of Health dated 6 Mar. 2013 (C-0155); Letter from the Omega Consortium to the Ministry of Health dated 28 June 2013 (C-0352); Request for Time extension and additional costs for Contract No. 83 (2011) dated 16 Oct. 2013 (C-0353); Letter from the Omega Consortium to the Ministry of Health dated 16 Feb. 2014 (C-0354).

[132] López ¶ 46; Letter from the Omega Consortium to the Ministry of Health dated 28 June 2013 (C-0352).

[133] Time and Costs compensation request to MINSA dated 25 Jan. 2013 (C-0269); Request for additional time and costs submitted by the Omega Consortium to the Ministry of Health and the Republic of Panama dated 19 July 2013 (C-0157); Letter from the Omega Consortium to the Ministry of Health dated 30 Dec. 2013 (C-0358).

to the change in Administration by the signing and endorsement of new change orders. During the Martinelli Presidency, the MINSA, through Mr. Nessim Barsallo, Ms. Karina Mirones, and other MINSA officials, was always willing to work with the Omega Consortium to resolve any problems that surfaced concerning the MINSA CAPSI Contracts, no matter how complex they were.[134] Of course, MINSA did not do this to "accommodate" the Omega Consortium, as Mr. Barsallo indicated in his Witness Statement.[135] Rather, MINSA approved the extensions of time or cost increases because the delays and scope changes were generally not imputed to the contractor.[136] As for its own side, the Omega Consortium always negotiated with MINSA and even agreed on shorter extensions than the ones requested just to be able to continue working and finish the contracts.[137] At the end of the day, the Omega Consortium was more interested in getting the change orders signed and endorsed, than it was in "winning" minor disputes.[138]

46. During that time, the Comptroller General's Office endorsed two change orders to the Rio Sereno Contract for extensions of time on 5 July 2013[139] and 13 January 2014.[140] It did the same, on the same dates, on the Puerto Caimito Contract.[141] For the Kuna Yala Contract, the Comptroller

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[134] López ¶ 43; Email from Frankie López to Oscar Rivera dated 21 Apr. 2013 (C-0156); Mirones ¶ 6.

[135] Barsallo ¶¶ 29-30; Resp.'s Counter-Mem. ¶ 61.

[136] Barsallo ¶ 31 (acknowledging that MINSA failed to to approve construction plans and changed the scope of the medical plan for the facility as well as medical equipment to be purchased); Rivera 2 ¶¶ 24-25.

[137] López ¶ 42.

[138] *Id*.

[139] Addendum No. 2 to Contract No. 077 (2011) dated 21 Feb. 2013 (C-0169).

[140] Addendum No. 3 to Contract No. 077 (2011) dated 13 Aug. 2013 (C-0170).

[141] Addendum No. 2 to Contract No. 085 (2011) dated 22 Feb. 2013 (C-0268); Addendum No. 3 to Contract No. 085 (C-0108 resubmitted).

General's Office endorsed a change order for an extension of time on 9 October 2013.[142] On 7 May 2014, the Omega Consortium and MINSA signed additional change orders for an extension of time on the three MINSA CAPSI Contracts.[143] Contrary to what had happened before, however, none of these change orders, which should have been approved in July or August 2014 after the Varela Administration took power, was ever endorsed by the Comptroller General's Office. As a result, the Omega Consortium was faced with the burden of working with expired contracts and without receiving payment for work performed.[144] Claimants' troubles with the MINSA CAPSI Projects would only become deeper as President Varela's campaign of retribution unfolded.

2. *Ciudad de las Artes Project*

47. The Ciudad de las Artes Project was also progressing well during the Martinelli Presidency, even though the start of the Project was rocky on the part of the INAC. The INAC did not have experience in leading a construction project of this magnitude, and many requirements and specifications stated in the Request for Proposals were not regulated by Panamanian law for the INAC, including the issuance of the Certificates of Partial Payments ("**CPP**").[145] As a result, the INAC had to fix the issues through an internal process while Claimants completed the project.[146] This process took the INAC almost seven months.[147] Unfortunately those seven months took place after the

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[142] Addendum No. 2 to Contract No. 083 (2011) dated 18 July 2013 (C-0263).

[143] Addendum No. 4 to Contract No. 077 (2011) dated 7 May 2014 (C-0106 resubmitted 2); Change Order No. 3 to the Contract No. 083 (2011) dated 17 Nov. 2014 (C-0522); Addendum No. 4 to Contract No. 085 (2011) dated 7 May 2014 (C-0171).

[144] *See infra* § V.A.

[145] López ¶ 54; Herrera ¶ 11.

[146] Herrera ¶ 11.

[147] *Id.*

issuance of the First Order to Proceed in September 2012,[148] which had triggered the issuance of bonds and insurance. And employees hired for the project had to be paid.[149] Once it solved its own internal problems, the INAC issued a new Order to Proceed.[150] After the INAC issued the Second Order to Proceed on 22 April 2013 and until Mr. Varela was inaugurated in July 2014, the Ciudad de las Artes Project progressed well.[151] Ms. Maria Eugenia Herrera, the INAC's Director until July 2014, explains that "Until I left my position as Director, in the summer of 2014, there were no major problems with the Omega Consortium's performance of the work."[152] Ms. Herrera further explains that the Omega Consortium's good work was the reason she "approved CPPs 1 to 12 . . . which were [later] validated by the Comptroller General" as well.[153]

48. Neither Ms. Chen—Respondent's witness representing the INAC in this Arbitration—nor the Project's external inspectors, had any complaints with the way the Omega Consortium was executing the Ciudad de las Artes Project.[154] The INAC even told Claimants it was grateful for the work performed by the Omega Consortium and its sub-contractors,[155] and Sosa Arquitectos ("**Sosa**"), the Project's inspectors, did not have any criticisms of the Omega Consortium's work as of 28 March

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[148] Order to Proceed for Contract No. 093-12 dated 27 Sept. 2012 (C-0113).

[149] López ¶ 55.

[150] Notice to Proceed for Contract No. 093-12 dated 22 Apr. 2013 (C-0150). The issuance of a second Order to Proceed created additional difficulties because the bonds and insurance coverage was tied (temporally) to the issuance of the First Order to Proceed, which took place 9 months earlier than the Second Order to Proceed.

[151] Minutes of a Meeting regarding the Ciudad de las Artes project dated 30 Jan. 2013 (C-0641).

[152] Herrera ¶ 12.

[153] *Id*.

[154] López ¶ 56.

[155] Letter No. 098-13 from INAC to Omega dated 19 Dec. 2013 (C-0636); Letter from Maruja Fabrega to Luis Pacheco dated 21 Feb. 2014 (C-0637).

2014.[156] Ms. Herrera confirms that "[n]either the project supervisor nor anybody at INAC notified [her] of any noncompliance by [the Omega Consortium]."[157] Sosa worked with Claimants until June 2014, but (as addressed below in Section V.B.6) it soon became clear that things were about to change with the new Administration.[158]

49. The Omega Consortium was paid for the work performed in the Ciudad de las Artes Project until June 2014—although those payments were usually delayed.[159] Ms. Chen was responsive until that time, and even assisted the Omega Consortium to obtain information about its pending payments.[160] The last payment the Omega Consortium received was for CPP No. 12 covering the month of April 2014 and delivered to the Omega Consortium in June of 2014.[161] However, once Mr. Varela was inaugurated and a new Director was appointed to the INAC, everything changed, and the Omega Consortium stopped receiving payments for the work completed on the Ciudad de las Artes Project.

50. As with the rest of the Projects, the Omega Consortium did not have any reasons to think that the Ciudad de las Artes Project would not be completed successfully. In fact, the INAC confirmed to the Omega Consortium that the internal meetings related to the Ciudad de las Artes Project had been positive. They explained, however, that it would be more "convenient" to present

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[156] Letter SA-CDA-029-14 from Sosa to Omega dated 28 Mar. 2014 (C-0638).

[157] Herrera ¶ 14.

[158] Email chain between Luis Pacheco and Yadisel Buendia dated 24 June 2014 (C-0639). Eng. Yadisel Buendia, from Sosa Arquitectos, told Omega it was convenient to present Omega's proposed Order of Change to the new administration.

[159] McKinnon Report 1, Annex 1, p.16

[160] Email chain between Omega and INAC dated 9 May 2013 (C-0680).

[161] McKinnon Report 1, Annex 1, p.16; *see also* Herrera ¶ 11.

the proposed changes to the new INAC Director, who was appointed by President Varela.[162] As would soon become clear, the new Director had no intention of working with Claimants.

3. *Unidad Judicial La Chorrera Project*

51. In September 2012, the Panamanian Judiciary issued a Request For Proposal ("**RFP**") for the construction of a judicial building in La Chorrera.[163] Mr. [redacted] reviewed the RFP, shared it with the Omega Consortium team, and attended the preliminary meeting for the tender on 19 September 2012.[164] As with the rest of the Contracts, the Omega Consortium diligently followed the tender process and submitted its proposal on 1 October 2012.[165] On 17 October 2012, after the report of the Vetting Commission,[166] which found that the Omega Consortium was the winning bidder, the Judiciary issued a resolution awarding the Contract to the Omega Consortium.[167]

52. No one from the Omega Consortium knew the members of the Vetting Commission of the La Chorrera Contract or Justice Moncada Luna.[168] The proposal presented by the Omega Consortium not only received the maximum amount of points (100) by the Vetting Commission, but was also the offer with the lowest price.[169] An independent study conducted by Professors José María

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[162] López ¶ 57.

[163] Request for Proposals No. 2012-0-30-0-08-AV-004833 "Construcción de un Edificio para la Unidad Judicial Regional de La Chorrera" dated 2012 (C-0024 resubmitted).

[164] Minutes of Previous Meeting and Approval Abbreviated Tender for Best Value No. 2012-0-30-0-08-AV-004833 dated 19 Sept. 2012 (C-0410).

[165] La Chorrera Constructions Consortium Proposal dated 1 Oct. 2012 (C-0412).

[166] Report from the Vetting Commission dated 9 Oct. 2012 (C-0083 resubmitted).

[167] Contract No. 150/2012 dated 22 Nov. 2012 (C-0048 resubmitted).

[168] López ¶ 56.

[169] Report from the Vetting Commission dated 9 Oct. 2012 (C-0083 resubmitted). Omega offered a price of $16,495,000.00, while Constructora Nova S.A. offered a price of $17,587,668.95, Constructora Corcione & Asociados $17,984,546.81, and Consorcio Construcciones La Chorrera $18,150,00.00.

Gimeno Feliú and Jose Antonio Moreno Molina, experts in public contracting from the Universities of Zaragoza and Castilla La-Mancha, shows that the Vetting Commission's assessment of the Omega Consortium's bid proposal was correct.[170] The Omega Consortium won this Contract fair and square;[171] corruption had nothing to do with it.[172] In fact, Ms. Vielsa Ríos, Administrative Secretary of the Supreme Court and witness for Panama in this arbitration, confirmed that she supervised the bidding process for this Contract, but at no point does she mention (or even hint) that she saw something illegal or out of the ordinary in the tendering or execution of this Contract.[173] The La Chorrera Contract was signed on 22 November 2012 and endorsed on 27 December 2012.[174]

53. This Project also faced delays typical of big construction projects during the Martinelli Administration. Some of the issues the Omega Consortium had to deal with were rain days, delays in obtaining environmental permits, design changes, labor strikes, and some delays in payments.[175] Due to those delays in payments, the Omega Consortium was forced to reduce the workforce on the construction site.[176] Nonetheless, in May 2014, the Judiciary paid most of the pending invoices and the Omega Consortium promptly reinitiated works and agreed to sign Change Order No. 2.[177] All of these typical problems and delays were solved together by the Omega Consortium and the Judiciary

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[170] *See* Public Works Contracts Report at 54.

[171] Letter No. 2013-03-11 - P007-005 from Omega to the Judiciary dated 11 Mar. 2013 (C-0640); Letter No. 2014 04 08 – P007-037 from the Omega Consortium to the Judiciary dated 8 Apr. 2013 (C-0065 resubmitted); Letter No. 2014 05 17 – P007-044 from Omega to the Judiciary dated 7 May 2014 (C-0549); López ¶ 58

[172] Resp.'s Counter-Mem. ¶ 20.

[173] See generally Ríos.

[174] Contract No. 150/2012 dated 22 Nov. 2012 (C-0048 resubmitted).

[175] López ¶ 61.

[176] Letter from the Omega Consortium to the Judicial Branch dated 16 Apr. 2014 (C-0164).

[177] López ¶ 61.

through good faith negotiations and a common interest to finish the Project. As such, when President Varela took office, this Project was progressing nicely.

4. *Mercado Público de Colón Project*

54. The Mercado Público de Colón Project was a project of the Ministry of the Presidency through the Secretary of Cold Chain for the construction and furnishing of a 38,600 square-foot public market in the city of Colón.[178]

55. This Project experienced early difficulties unrelated to the Omega Consortium because the Government was having trouble removing and relocating the existing market vendors from the construction site. As a result, the physical work on this Contract was temporarily suspended in December 2012.[179] The Ministry of the (Martinelli) Presidency nevertheless requested that the Omega Consortium continue drafting the relevant contractual documents and conducting the necessary pre-constructions studies until the situation could be resolved.[180] The Omega Consortium complied with the Ministry of the Presidency's request.[181]

56. Unlike the unlawful acts Respondent took after President Varela was elected, this earlier suspension did not appear to be designed to harm the Omega Consortium[182] because (1) the

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[178] Request for Proposals No. 2011-0-03-0—03-AV-006870 "Construccion y Equipamiento del Mercado Público de la Ciudad de Colón, Provincia de Colón" dated 2011 (C-0032 resubmitted).

[179] Letter from the Ministry of Presidency to the Omega Consortium dated 31 Dec. 2012 (C-0363 resubmitted). Respondent claims that this project was suspended, Resp.'s Counter-Mem. ¶ 121, but it fails to acknowledge that the suspension was temporary and only related to the physical work on the Project. As such, there was no reason for the Omega Consortium to believe that it would not start the physical works once the issues were resolved. In good faith, the Omega Consortium continued working on all the other (non-physical) aspects required by the Contract.

[180] Letter from the Ministry of Presidency to the Omega Consortium dated 31 Dec. 2012 (C-0363 resubmitted); Minutes of a Meeting between Omega and the Secretary of the Cold Chain representatives dated 18 Dec. 2012 (C-0642).

[181] Letter from Omega to ENSA dated 13 Nov. 2013 (C-0643).

[182] López ¶ 50.

suspension was temporary and (2) it applied only to physical work.[183] While the Ministry of the Presidency was relocating the vendors, the Omega Consortium attended technical meetings to solve other issues pertaining to the Contract.[184] Under the Martinelli Administration, the Ministry of the Presidency always displayed a willingness to work with the Omega Consortium and move forward with the Project. In November 2013, it confirmed that the delays were a result of the Government's temporary suspension and informed the Omega Consortium that the Project would be ready to start on 15 January 2014, and that the new contract period would be counted from this date.[185] The Government therefore acknowledged a delay of 33 months, counted from the date of the Order to Proceed (7 September 2012) and recognized that the extension of time and expenses incurred during the suspension were going to be formalized in a Change Order at the Omega Consortium's request.[186] Importantly, the Ministry of the Presidency confirmed that the delay was *not* attributable to the Omega Consortium.[187] The following day, the Omega Consortium accepted the proposed extension of time and confirmed that the resulting expenses were going to be requested separately.[188] The Change Order was processed during the first months of 2014, but the Project still did not start since the vendors in the Market had not been relocated and the construction plans had not been corrected by the Secretary of the Cold Chain.[189]

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[183] *Id*. ¶ 49.

[184] *Id*. ¶ 50.

[185] Letter 659-CF-2013 from the Ministry of the Presidency to the Omega Consortium dated 25 Nov. 2013 (C-0063 resubmitted 2) at 1.

[186] *Id*.

[187] *Id*. at 1-2.

[188] López ¶ 50.

[189] *Id*. ¶ 50; Email chain between Jose Mandakaras, Maruquel Madrid and Frankie López dated 13 May 2014

57. In April 2014, the Ministry of the Presidency confirmed that it had been instructed to process the Change Order. In May, the Ministry of the Presidency clarified that the extension would instead be for 41 months starting in July 2014, which meant that the completion date would be 20 January 2016.[190] The Project was therefore ready to start in earnest. All it needed was the approval of the Comptroller General's Office. Unfortunately, after Mr. Varela's inauguration, and despite the prior willingness of the Ministry of the Presidency to work with the Omega Consortium,[191] the Change Order was never approved. In July 2015, the Omega Consortium learned that the Varela Administration had never even sent a formalized copy of the Change Order to the Comptroller General's Office.[192] It was the beginning of a noticeable change in the Government's attitude toward the Mercado Público de Colón Project, which would only get worse.

5. *Municipal Palace of Colón Project*

58. In November 2012, the Municipality of Colón issued a Request for Proposal for the design, construction, and furnishing of a municipal hall and mayoral offices in the district of Colón.[193] The Project consisted of the construction of a new municipal hall in the same place where the old one was built. Thus, the Omega Consortium had the responsibility of retrofitting an existing warehouse in which the municipal employees could work during the demolition and reconstruction of the final

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(C-0544).

[190] López ¶ 50; Email chain between Jose Mandakaras, Maruquel Madrid and Frankie López dated 13 May 2014 (C-0544). See also Addendum No. 1 to Contract No. 043-2012 dated 2014 (C-0277).

[191] Email chain between Jose Mandakaras, Maruquel Madrid and Frankie López dated 13 May 2014 (C-0544); Letter from the Ministry of Presidency to the Omega Consortium dated 24 Mar. 2013 (C-0362).

[192] López ¶ 52.

[193] 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 resubmitted).

municipal hall. The Omega Consortium obtained the approval for the pre-project design and environmental impact study in 2013.[194] By January 2014 the designs of the new municipal hall were finalized.[195] And on 30 April 2014, the Omega Consortium completed work on the temporary facilities.[196]

59. As with the other Contracts, this Contract also experienced some typical delays not attributable to the Omega Consortium during the Martinelli Presidency. But the Municipality and the Omega Consortium worked together to resolve them. For example, the Order to Proceed was issued on 31 July 2013,[197] but the Omega Consortium only obtained access to the temporary facilities site six months later, on 13 January 2014.[198] In those six months the Omega Consortium presented the temporary facilities designs, filed applications for an environmental impact assessment and soil use studies, and requested access to the site. Until July 2014, the Municipality of Colón was responsive to Omega and showed a positive attitude towards the project. That changed, however, when President Varela entered office.

6. *Mercados Periféricos Project*

60. The Omega Consortium also bid on an RFP issued by the Municipality of Panama in March 2013 for the design, construction, and furnishing of two public markets: the Juan Diaz and the Pacora Markets. The Project started well and by May 2014 the Omega Consortium informed the

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[194] López ¶ 63

[195] Letter No. 2015 19 06 P08-013 from the Omega Consortium to the Mayor of the Municipality of Colón dated 19 June 2015 (C-0180 resubmitted).

[196] *Id*.

[197] Notice to Proceed for Contract 01-13 dated 31 July 2013 (C-0152).

[198] Letter No. 2015 19 06 P08-013 from the Omega Consortium to the Mayor of the Municipality of Colón dated 19 June 2015 (C-0180 resubmitted).

Municipality of Panama that it had made significant progress on both Markets.[199] The following day, Jonathan Rodriguez from the Municipality of Panama, who was in charge of the execution of the Project, confirmed the progress and told Maria Serracin, the inspector from the Municipality of Panama, that "as soon as you have [the blueprint approval] we need URGENT support with the Comptroller General's inspection – *we have to back up the company; they're giving it all they have for the boss to inaugurate the project*. Let us all go an extra mile."[200] That very same month, Ms. Serracin reached out to the Director of Works and Constructions to communicate to him that a Change Order adding 30 days to the Pacora Market and 90 days to the Juan Diaz Market was needed.[201] None of these delays were attributed to the Omega Consortium.[202] Ms. Serracin also contacted ASSA (the Omega Consortium's Surety Company) to request an extension of the bonds.[203] This again shows that the Omega Consortium's projects were progressing normally before President Varela took office.

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61. In sum, during the Martinelli Administration, the Projects were on track. Although there were some delays, and payment from Panama was not always forthcoming when expected, these issues were nothing out of the ordinary in the Panamanian construction industry and, more importantly, they were resolved without major controversy by Government agencies that were willing

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[199] López ¶ 65.

[200] Emails between the Omega Consortium to the City of Panama dated 15 May 2014 (C-0552); López ¶ 65. This demonstrates not only that the Municipality of Panama was happy with the work that the Omega Consortium was doing, but also that all the alleged issues that were a concern for the Municipality of Panama in April 2014 were successfully addressed by the Omega Consortium. *See* Memorandum No. 26-2014 from Jonathan Rodriguez to Juan Manuel Vazquez dated 16 Apr. 2014 (C-0561).

[201] Letter No. DEYD-1220-84-14 from Ms. Serracin to the Director of Works and Constructions dated 23 May 2014 (C-0553).

[202] *Id*. *See also* López ¶ 65.

[203] López ¶ 65.

to work with the Omega Consortium to successfully complete the Projects. Claimants therefore had every reason, in the summer of 2014, to expect that the Omega Consortium's Projects would be successful and that Claimants' operations in Panama would continue to grow. But unbeknownst to Claimants, this was all about change when President Varela entered office.

IV. A BITTER, PUBLIC FEUD DEVELOPED BETWEEN JUAN CARLOS VARELA AND RICARDO MARTINELLI—AND MR. RIVERA WAS TARGETED AS A RESULT

62. Claimants' positive momentum came to a halt when Mr. Varela was elected President and Claimants found themselves targeted as part of President Varela's public campaign to retaliate against his former political ally, Ricardo Martinelli, and anyone he considered connected to him. As set forth in further detail below, the seeds of the Varela-Martinelli rivalry were planted well before President Varela was elected, but it had grown into a public dispute by the time he ran for office. Mr. Varela issued public threats against anyone associated with President Martinelli (*see infra* Section IV.A). In the midst of that public dispute, then-Presidential Candidate Varela asked to meet with Mr. Rivera and demanded a sizeable campaign contribution; when Mr. Rivera declined, Mr. Varela accused him of supporting Martinelli and threatened to interfere with his investment in Panama (*see infra* Section IV.B). And upon entering office, President Varela followed up on his public and private threats, retaliating against anyone he perceived as loyal to Martinelli (*see infra* Section IV.C)—including Claimants.

A. Mr. Varela Openly Announced a Vendetta Against Anyone He Considered To Be Connected to Former President Martinelli

63. To fully appreciate the rift between these two men (and how Claimants became caught up in it), one must understand the broader political context in which it arose, as explained by Claimants' expert, Prof. Orlando Pérez. Panamanian politics has long been characterized by two dynamics: close links between business and political elites, as well as an often surprising degree of

partisanship.[204] Before entering politics, former President Martinelli was the owner of a chain of supermarkets known as Super 99,[205] while Mr. Varela's family owns the largest distillery in Panama.[206] Historically, there have been two political parties in Panama: the *Panameñista Party* ("**PP**") and the *Partido Democrático Revolucionario* ("**PDR**").[207] Mr. Martinelli founded the political party *Cambio Democrático* ("**CD**") while he was a business man, and Mr. Varela entered politics through the PP.[208]

64. When the elections of 2009 were approaching, the CD and PP feared that a divided opposition would allow the PDR to win.[209] So they struck a deal. Mr. Varela would run as Mr. Martinelli's vice-presidential candidate in 2009; then he would run as the coalition's chosen presidential candidate in 2014.[210] The parties agreed to the deal in January 2009 during the U.S. Embassy's Inauguration Day.[211] And it proved successful. The CD-PP alliance won the 2014 elections.

65. But the alliance was fragile from the beginning.[212] The PP thought they were going to rule the country along with the CD, but they were soon dispelled of that expectation. Although Mr. Martinelli appointed Mr. Varela as Minister of Foreign Relations and named other PP officials to his

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[204] Pérez ¶ 31.

[205] *Id.* ¶ 38.

[206] *Id.* ¶ 39.

[207] *Id.* ¶ 31.

[208] *Id.* ¶¶ 38-39.

[209] *Id.* ¶ 40.

[210] *Id.* ¶ 41.

[211] *Id.*

[212] *Id.* ¶ 39.

cabinet, he still kept Mr. Varela outside of his inner circle.[213] And by appointing Mr. Varela to be Foreign Minister, Mr. Martinelli ensured Mr. Varela would spend much of his time outside of the country, which kept Mr. Varela out of important meetings and decisions.[214] By 2011, the alliance began to weaken when Mr. Varela discovered that Mr. Martinelli intended to seek reelection in 2014.[215] But running for a second consecutive term would require amending the Panamanian Constitution, and Mr. Varela refused to support that effort.[216]

66. The Martinelli-Varela feud finally spilled into the public when Mr. Martinelli dismissed Mr. Varela as Foreign Minister.[217] Mr. Martinelli claimed that "Varela neglected his role as foreign minister due to wearing four hats, foreign minister, vice president, party president and candidate."[218] But soon after the dismissal, Mr. Varela and Mr. Martinelli began publicly accusing each other of corruption.[219] Mr. Martinelli viewed Mr. Varela as a hypocrite who used the CD's resources to advance his political ambitions. Mr. Varela saw Mr. Martinelli as a traitor who reneged on their 2009 deal.[220]

67. Having failed to pass the constitutional amendment, Mr. Martinelli could not seek reelection, and Mr. Varela ran for President in 2014. His campaign focused on how he was going to

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[213] *Id.* ¶ 39.

[214] *Id.* ¶ 40.

[215] *Id.* ¶ 40.

[216] *Id.* ¶ 45; *Chamber V: the road towards reelection*, LA ESTRELLA DE PANAMÁ dated 25 Jan. 2012 (C-0161).

[217] The President of Panama asks the Secretary of State for his resignation and unleashes a crisis, EL UNIVERSAL dated 30 Aug. 2011 (C-0121).

[218] Pérez ¶ 42.

[219] The President and Vice-President of Panama accuse each other of corruption, EL PAÍS dated 10 May 2012 (C-0124).

[220] Pérez ¶ 44.

"clean-up" Panama's corrupt political system, starting with the remnants of the Martinelli administration.[221] As part of that effort, "[Mr.] Varela promised to review every contract and decision made during the Martinelli administration."[222] After Mr. Varela won the 2014 elections, he began to execute on that promise.[223] But his anti-corruption campaign went beyond a mere review of contracts and decisions taken by the Martinelli Administration. It spawned into an open and aggressive vendetta against anyone President Varela considered to be connected to former President Martinelli.

B. Mr. Rivera Refused Then-Presidential Candidate Juan Carlos Varela's Request for a Very Large Campaign Contribution

68. It was in the midst of this public anti-Martinelli campaign that then-Presidential Candidate Varela requested to meet with Mr. Rivera and demanded a US$ 600,000 campaign contribution. Mr. Rivera had never met Mr. Varela until his Panamanian legal counsel and friend, Ana Graciela Medina of the IGRA Law Firm,[224] introduced the two men in 2011.[225] From that point

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[221] *Id*. ¶ 47.

[222] Id. ¶ 51; Opponent will investigate the misuse of government funds by Martinelli's government if he wins the presidential election, EFE dated 15 Apr. 2014 (C-0204); Panamanian candidate will investigate the management of funds during Martinelli's government, LA VANGUARDIA dated 15 Apr. 2014 (C-0225).

[223] Panamanians elect a conservative, Ricardo Martinelli, as the country's new president, EL PERIÓDICO EXTREMADURA dated 4 May 2009 (C-0115); Business is over, THE ECONOMIST dated 5 May 2014 (C-0187).

[224] For the avoidance of doubt, any communication between Mr. Rivera or any of his employees and his Panamanian legal counsel Ana Graciela Medina and the IGRA Law Firm are protected by attorney-client privilege. Mr. Rivera, as the client, may partially waive or authorize former employees to partially waive privilege at his sole discretion as a matter of Panamanian law. Partial waiver of privilege by Mr. Rivera should not be understood as a blanket waiver of privilege for all privileged communications and/or attorney work product. *See* art. 37 cl. 7 of the Panamanian Ethics Code dated 27 Jan. 2011 (C-0547) (stating "[i]t is an ethical breach for a lawyer to . . . [b]reach the legal professional privilege by disclosing information given by his client or a third party, unless his client authorized him to disclose it, or when the reason for disclosing the information was related to the lawyer's self-defense"); *see also* art. 13 of the Panamanian Civil Code dated 22 Aug. 1916 (C-0742) (stating "[w]hen there is no specific law regarding a particular issue, the applicable law will be the one that regulates similar matters, and in its absence, constitutional doctrine, general rules of law, and general custom, in accordance with Christian morality"); *Pedro Robustiano Borges Appeals in the Ordinary Process Initiated by Republic National Bank, Inc.* dated 27 May 1994 (C-0743) (stating that the holder of the privilege may partially waive it).

[225] Rivera 1 ¶ 62; Rivera 2 ¶ 40; *see also* WhatsApp messages from Ana Graciela Medina to Óscar Rivera dated

forward, Mr. Varela seemed to take a keen interest in Mr. Rivera and his investment in Panama. Among other things, Mr. Varela "offered his assistance," he inquired whether Mr. Rivera "had any contacts within the Government," and he sent Mr. Rivera a bottle of Centuria rum.[226] When Mr. Varela's presidential campaign began in earnest, he targeted Mr. Rivera for a large, monetary contribution. Both he and Ms. Medina repeatedly contacted Mr. Rivera in the fall of 2012[227] until Mr. Rivera relented and agreed to attend a meal at the La Trona restaurant.[228] At the dinner, Mr. Varela arrived with his assistants in tow (Rafael Flores and Raúl Sandoval). In front of all the guests, Mr. Varela asked Mr. Rivera for help in defeating Mr. Martinelli in the upcoming elections. He later cleared out the room to demand a $600,000 contribution.[229] When Mr. Rivera refused, Mr. Varela accused Mr. Rivera of supporting Mr. Martinelli and stated "coldly, that he knew very well that some of [Mr. Rivera's] projects would not be finished by the time the new Government assumed power and that, in Panama, it is often very hard to collect on contracts awarded by the previous Administration."[230]

69. Boiled down to its core, Mr. Rivera's experience with Mr. Varela is a paradigmatic example of sovereign abuse by a political actor—aggressive pursuit followed by a concrete solicitation, backed by a credible threat. This Governmental abuse of power and the resulting demise

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17 Sep. 2012 (C-0518).

[226] Rivera 1 ¶¶ 63, 65.

[227] *See* WhatsApp messages from Ana Graciela Medina to Óscar Rivera dated 17 Sep. 2012 (C-0518); Invitations from Mr. Varela to join WhatsApp chat dated 17 Sep. 2012 (C-0519).

[228] Rivera 1 ¶ 66.

[229] *Id*. ¶ 67.

[230] Rivera 1 ¶ 68.

of Claimants' investment and Claimants' reputation is precisely what the investor-state arbitration regime seeks to correct.

70. The Tribunal will be hard-pressed to find a response to any of these facts in Respondent's Counter-Memorial. Besides two brief comments on burden of proof,[231] Respondent ignores the subject entirely. To be clear, Respondent does *not* deny that the La Trona meeting occurred, *or even that then-Presidential Candidate Varela solicited a large campaign contribution from Mr. Rivera and threatened his Panamanian investment when Mr. Rivera declined.* Nor does Respondent submit any evidence to refute Mr. Rivera's testimony on this point. Respondent could have, for example, submitted a witness statement from Mr. Varela simply denying the allegation. It could have submitted a witness statement to the same effect from Mr. Flores or from Mr. Sandoval, Mr. Varela's two assistants in attendance at La Trona. It could have submitted Mr. Varela's calendar or candidate agenda to show his whereabouts on the relevant date. It could have disclosed copies of Mr. Varela's phone records to show whether he contacted Mr. Rivera. But Respondent has failed to submit *anything*.[232] And its silence speaks volumes, effectively confirming Mr. Rivera's testimony.

71. Respondent rests the entire weight of its defense on the following: "There is no

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[231] Resp.'s Counter-Mem. ¶ 8 ("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."); *id.*, ¶ 297 ("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.") (emphasis omitted).

[232] Claimants recognize that Respondent did not have a document-production obligation to submit certain evidence relating to the La Trona episode based on the Tribunal's Decision on Document Production dated 19 March 2019 (denying claimants' request nos. 1, 2, 6, and 7 because "Respondent affirms that any such documents would not be in its possession, custody or control"). The Tribunal's decision, however, in no way prevented Respondent from submitting evidence to support any defense it wished to make against Claimants' bribery allegations on the merits.

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."[233] The Tribunal will not be surprised to learn that Mr. Varela did not follow up on his contribution solicitation and threat to Mr. Rivera by memorializing his wrongdoing in an email or letter. To invite Claimants to produce such a paper trail is divorced from reality. Claimants have no need to produce further evidence because Mr. Rivera's testimony—which is *prima facie* evidence—stands unrebutted. Nevertheless, in light of Respondent's suggestion that Mr. Rivera's testimony is not "evidence," Claimants further submit with this Reply *additional* evidence in the form of text messages supporting Mr. Rivera's unrebutted testimony.

72. ***First***, text messages establish that Mr. Varela, while campaigning for election as President of Panama, actively sought contact with Mr. Rivera before the La Trona meal. Mr. Rivera's first witness statement provided that "[i]n the Fall of 2012, around September, I was contacted by Mr. Varela, but I did not respond—again because I feared this approach was intended to draw me into making a political contribution."[234] Text messages show that on 17 September 2012, [redacted] texted Mr. Rivera to tell him that Mr. Varela was trying to reach him. [redacted] sent a cell phone number [redacted] and then stated, "[redacted] followed by [redacted][235] The same day Mr. Rivera received two invitations from the very same number referred to by [redacted] to join a WhatsApp chat from a user named "Juan Carlos

[233] Resp.'s Counter-Mem. ¶ 8.

[234] Rivera 1 ¶ 66.

[235] WhatsApp messages from Ana Graciela Medina to Oscar Rivera dated 17 Sept. 2012 (C-0518).

Varela."[236] Consistent with Mr. Rivera's testimony, there is no record that he responded to Mr. Varela's invitation.[237]

73. ***Second***, contemporaneous communications show that Mr. Varela meant every word of the threat he conveyed to Mr. Rivera at La Trona. Again, Ms. Medina served as the Claimants' key source of information. [redacted][238] [redacted] then delivered an ominous message confirming the significance of the La Trona meeting to Claimants' future survival under the incoming Varela Administration: [redacted].[240] Bear in mind that [redacted] message came after she had just spent the election evening with Mr. Varela and absorbed his initial thoughts and emotions upon being elected President.

74. ***Third***, later correspondence from [redacted] in 2015 reflects Mr. Varela's suggestion at La Trona that Mr. Rivera's refusal to make a contribution to Mr. Varela's campaign made Mr. Rivera, in President Varela's mind at least, a Martinelli supporter. [redacted]

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[236] Invitations from Mr. Varela to join WhatsApp chat dated 17 Sept. 2012 (C-0519).

[237] *Id*.

[238] WhatsApp messages from Ana Graciela Medina to Frankie López dated 5 May 2014 (C-0644).

[239] Pérez ¶ 46.

[240] WhatsApp messages from Ana Graciela Medina to Frankie López dated 5 May 2014 (C-0644). [redacted]

[redacted]

[redacted] On 20 May 2015, the following exchange took place:

75. [redacted] repeated the same reference to [redacted] again two weeks later:

[241] WhatsApp messages between Ana Graciela Medina and Frankie López dated 20 May 2015 (C-0555).

[redacted]

76. This additional evidence, combined with Respondent's silence leaves no doubt that Claimants' account is accurate and that President Varela had a vendetta against Mr. Rivera and the Omega Consortium.

C. Upon Entering Office, President Varela Follows Through on His Threats Against Anyone Associated with Former-President Martinelli, Including Mr. Rivera

77. Of course, Claimants were not the only ones who drew the new President's ire. President Varela's retaliatory campaign began with the members of the CD. He started with Mr. Martinelli, his family, and friends,[243] continued with Martinelli's former Minister of Labor and Subsecretary of the CD, Alma Cortes,[244] former Social Development Minister, Guillermo Ferrufino,[245] other former public officials,[246] and seventeen people mostly related to the Martinelli Administration.[247] Journalist Álvaro Alvarado and television commenter José Isabel Blando were also targeted.[248] Other officials that President Varela said were going to be held accountable for their work during President Martinelli's Administration were Ms. Gioconda de Bianchini, former

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[242] *Id*.

[243] Public Letter from Mr. Martinelli to President Varela, undated (C-0645).

[244] The opposition party CD denounces political persecution from the Government, EL MUNDO dated 16 Aug. 2016 (C-0646); Martinelli's Party Announces More Protests Against Political Persecution, MAGAZINE LATINO dated 12 Aug. 2016 (C-0647); Cambio *Democrático* Denounces Political Persecution, PANAMA TODAY dated 13 Aug. 2016 (C-0648).

[245] Juan Carlos Varela's Thirst for Vengeance and Persecution on Display, PANAMA AMERICA dated 29 Apr. 2016 (C-0649).

[246] Varela and his Macabre Scheme of Political Persecution against Former Officials, PANAMA AMERICA dated 3 Oct. 2018 (C-0650)

[247] Opponents to the Varela Administration Denounce Political Persecution, HISPANTV dated 31 Jan. 2017 (C-0651).

[248] Camacho said that "political persecution" is Varela's priority, CRITICA dated 5 Dec. 2016 (C-0652).

Comptroller General, Ms. Ana Belfón, former Attorney General, and the Electoral Prosecutor, Mr. Eduardo Peñaloza.[249] Supporters of the CD party were also victims of President Varela's persecution. As Jose Luis "Popi" Varela (the President's brother) explained in a foreboding press release, "while he [Martinelli] is living his best life in Miami, a lot of his followers and families are suffering because he [refuses] to voluntarily face justice [in Panama.]"[250] According to former President Martinelli, President Varela was abusive in the way in which he persecuted people.[251]

78. In addition to these CD targets, Mr. Varela also turned his wrath on contractors who received public works contracts during the Martinelli Administration. Over time, Mr. Varela sabotaged the public works initiated during the Martinelli Administration,[252] as he had promised to do during his campaign. He utilized a number of methods to achieve this goal. He (1) engaged a consultant, Mr. Rogerio Saltarín's law firm (with Saltarín himself at the helm), to review and investigate the contracts, (2) ordered the different governmental agencies to prevent contractors from moving forward with their projects, (3) ordered the Comptroller General's Office not to endorse payments and addenda needed by the contractors to continue working, and (4) cut budgets to the governmental agencies that had been appropriated funds for the projects.[253] As explained by

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[249] *Opponent will investigate the misuse of government funds by Martinelli's government if he wins the presidential election*, EFE dated 15 Apr. 2014 (C-0204), at 2. Taking down the Comptroller General, the Attorney General, and Ayu Prado (the President of the Panamanian Supreme Court) effectively gave President Varela control of the country. By having appointed all Ministers, as well as the new Attorney General and Comptroller General, he could persecute people, including contractors, withoutany real opposition.

[250] '*Popi' admits they make 'suffer' followers of Martinelli*, DIA A DIA dated 13 Oct. 2016 (C-0653); Tweet of Popi Varela dated 13 Oct. 2016 (C-0654).

[251] Public Letter from Mr. Martinelli to President Varela, undated (C-0645).

[252] De Lima says that Mr. Varela destroyed all the works of the Martinelli Administration, NOTICIAS 7 DIAS dated 4 Jun. 2017 (C-0655).

[253] See *infra* § V.C.

Professor Perez, all of these actions were consistent with a pattern of behavior in which the Panamanian Government sought to place increasing roadblocks to the implementation of contracts to punish persons who did not support the Varela Government's interests,[254] like the Omega Consortium. It is consistent with President Varela's character and behavior to have reacted strongly against Mr. Rivera's decision to decline making a contribution to his campaign.[255]

79. While President Varela was targeting those he viewed as enemies, he was favoring those who had given him campaign contributions. For example, Odebrecht paid then-Presidential Candidate Varela $700,000 as a campaign contribution. It paid this through a US bank account in the name of a foundation called Fundación Don James.[256] Once he entered office, President Varela apparently gave Odebrecht at least one of the Omega Consortium's Contracts—*i.e.*, the Mercado Público de Colón Contract, which was managed by the Ministry of the Presidency.[257]

80. By September 2015, just over a year after his inauguration, Mr. Varela's administration had already detained 31 individuals, including former Government officials and Government contractors.[258] Many of those prisoners have accused the government of abusing the preventive detention process to keep political opponents in jail.[259] And they are not the only ones to level this criticism against the Panamanian Government. Panama's abuse of pre-trial detentions,

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[254] Pérez ¶ 54.

[255] *Id*. ¶ 53.

[256] *Id*. ¶ 32.

[257] Photographs of the Temporary Installations (C-0621).

[258] Porcel Demanded To Release Varela's Political Prisoners, PANAMÁ AMÉRICA dated 28 Sept. 2015 (C-0656).

[259] *Id*.

which can sometimes last up to five years, has caused international outcry.[260]

81. Mr. Varela also used Panama's criminal justice system to exact revenge against Mr. Martinelli. On 11 June 2018, the Panamanian government extradited Mr. Martinelli from the United States, and he has been detained ever since.[261] And as Claimants have discussed above and will touch upon in greater detail below, the Varela Administration abused the country's criminal justice apparatus to target and harass Mr. Rivera, Omega Panama, and PR Solutions. Although the Government has never issued an indictment against Mr. Rivera or any of the Omega Consortium entities, it has frozen Claimants' bank accounts in Panama[262] and issued a detention order and INTERPOL Red Notice for Mr. Rivera, preventing him from traveling to and from Panama to manage Claimants' investment.[263] Mr. Varela's pursuit of Mr. Martinelli and anyone perceived to be associated with him was relentless.

82. As time went on, it became clear that President Varela's culture of retribution infected every corner of his administration. On 5 April 2019, the Panamanian press published a disturbing audio recording from 2012 of Adolfo "Beby" Valderrama, a politician close to Varela, threatening to use Varela's power to jail Giacomo Tamburrelli, the director of a public program called the *Programa*

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[260] *Human rights developments*, HUMAN RIGHTS WATCH, undated (C-0657); *Committee against Torture considers report of Panama*, UNITED NATIONS NEWS dated 4 Aug. 2017 (C-0658); *Inside Panama's La Joya prison*, REUTERS dated 13 Apr. 2016 (C-0659); *Prisons: In Jail, But Not Sentenced*, AMERICAS QUARTERLY, undated (C-0660); *Report on the Use of Pretrial Detentions in America*, Inter-American Commission on Human Rights dated 30 Dec. 2013 (C-0661); *Presumption of Guilt: The Global Overuse of Pretrial Detention*, Open Society Foundations dated 2014 (C-0662).

[261] Former Panama President Martinelli extradited from US, BBC NEWS dated 11 June 2018 (C-0663).

[262] *See* Accounts allegedly belonging to Moncada Luna are currently seized, NOTICIAS 24 PANAMA dated 30 Jan. 2015 (C-0192).

[263] INTERPOL Red Notice Request from the Organized Crime Attorney's Office to Panamanian National Police dated 28 Aug. 2015. (C-0747).

de Ayuda Nacional, for his failure to pay US$ 500,000. Valderrama was then a deputy in the legislature and later ran for mayor of Panama City. Shortly after Varela came to power, Tamburrelli was detained as part of the new President's purported anti-corruption campaign.[264]

83. One of the first things President Varela did after he came to power was to promote the investigation of Mr. Moncada Luna, the President of the Supreme Court appointed by President Martinelli. Indeed, he had been laying the groundwork for the investigation even before his inauguration. During the campaign, Mr. Varela publicly threatened that he would call for the impeachment of Mr. Moncada Luna if he did not resign from the Supreme Court.[265]

84. Mr. Varela moved quickly to act on those threats. On 7 May 2014, just a few days after winning the election, president-elect Varela announced that he would sign a "governability agreement" with the "Partido Revolucionario Democrático" party to initiate a criminal trial against Judge Moncada Luna.[266] A few months after that ominous remark, Panamanian prosecutors obtained a statement from Judge Moncada Luna's former secretary that she received a check from Ricardo Calvo so Mr. Moncada Luna could pay the mortgage on one of his apartments.[267] On 20 October

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[264] 'Beby' Valderrama's Campaign assures that the candidate was wiretapped, LA ESTRELLA DE PANAMÁ dated 5 Apr. 2019 (C-0664). See also Beby Valderrama swore "to imprison" Giacomo Tamburrelli, EN SEGUNDOS, article and transcript of video dated 5 Apr. 2019 (C-0510). In fact, coercion against individuals and contractors is pervasive in Panamanian politics. On 11 February 2019, Mario Etchelecu, this year's presidential candidate from President Varela's political party, wrote on social media that five contractors have reported to him that a candidate for vice president "has contacted them directly to ask for money. [The vice presidential candidate] even insinuated that, if they give him money now, it will be easier for them to collect [progress payments] on their accounts further on." See Tweet from Mario Etchelecu dated 11 Feb. 2019 (C-0666).

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

[266] I would ask for the heads of public servants, EL SIGLO dated 7 May 2014 (C-0372).

[267] See, e.g., The connections that led to millionaire contracts, LA ESTRELLA DE PANAMA dated 4 Aug. 2015 (C-0745).

2014, Pedro Miguel Gonzalez, the prosecutor in charge of the investigation (the "**Designated Prosecutor**"), charged Judge Moncada Luna with unjust enrichment, corruption of public officials, money laundering, and forgery of public documents at a hearing before the Guarantee Judges.[268] The following year, on 23 February 2015, Judge Moncada Luna entered a plea agreement in which he pleaded guilty to only unjust enrichment and forgery of a public document.[269] Pursuant to that plea agreement, the Guarantee Judges sentenced Mr. Moncada Luna to 60 months in prison.[270] Unbeknownst to Claimants at the time (and as addressed below in Section V.E), the Moncada Luna investigation would give the Varela Administration an additional avenue to attack their investment in Panama.

D. Mr. Saltarín Is Hired by the Ministry of the Presidency to Investigate and Manufacture Evidence Against Those Seen as Political Enemies, Including Claimants

85. As part of his campaign to persecute his opponents, Mr. Varela and his administration ***directly hired*** a private lawyer, Mr. Rogelio Saltarín, and his law firm to essentially act as both a private investigator and Attorney General in furtherance of the new President's Vendetta.[271] But unlike the legitimate Attorney General, Mr. Saltarín was completely under the control of President

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[268] *See Charges filed against Justice Moncada Luna*, LA PRENSA dated 20 Oct. 2014 (C-0668). The Guarantee Judges are a panel of three legislators appointed as judges for a specific criminal investigation and/or trial involving High Level Government Officials, including Justices such as Justice Moncada Luna. Criminal Procedure Code of Panama dated 2014 (C-0088 resubmitted 2), art. 44 (explaining that Guarantee Judges control investigations that may affect or restrict fundamental rights of a defendant or a victim), art. 478 (explaining the National Assembly has jurisdiction over trials against Supreme Court Justices).

[269] Plea Bargain of Justice Alejandro Moncada Luna dated 23 Feb. 2015 (R-0064).

[270] Sentencing Hearing of Mr. Moncada Luna dated 5 Mar. 2015 (C-0085).

[271] Activity Report from Saltarín, Arias y Asociados to Ministry of the Presidency dated 25 June 2018 (C-0617) at 24.

Varela and the Ministry of the Presidency, and had access to any Government powers necessary to gather evidence and "build" criminal cases against individuals singled out by President Varela.[272] The surprisingly ample access that Mr. Saltarín received led to an uproar in national media, which referred to Mr. Saltarín's law firm as a "*parallel Attorney General's Office*."[273]

86. The relationship between President Varela and Mr. Saltarín was a long-standing and close one. Even before Mr. Varela became President, Mr. Saltarín already had close ties to several individuals who were key in the persecution of Claimants and their investment, including President Varela himself. According to the Panamanian press, in 2012 Mr. Saltarín represented Juan Carlos Varela in a lawsuit brought by then-President Ricardo Martinelli.[274] Mr. Saltarín also apparently represented Mr. Varela in a complaint related to the purchase of a yacht around 2010.[275] Press reports indicate that Mr. Saltarín was shortlisted by Mr. Varela at least twice to serve in high-level positions in the Panamanian government: in 2014 he was shortlisted to be nominated as Attorney General, and in 2018, after he had completed his assignment for the Presidency, President Varela shortlisted him

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[272] Activity Report from Saltarín, Arias y Asociados to Ministry of the Presidency dated 25 June 2018 (C-0617) at 24. Pursuant to the Tribunal's decision on 19 March 2019, Claimants' Request for Production of Documents No. 3, which sought documents in relation to Mr. Saltarín's services was denied. Thus, Claimants have relied on publicly available information and Claimants' own records that show Mr. Saltarín's ***direct involvement*** with Claimants and Claimants' Contracts, as shown in this Section and in § IV.A.

[273] Saltarín, the Man who Put Together the Files of the Attorney General's Office, LA ESTRELLA DE PANAMÁ dated 1 Oct. 2018 (C-0672); Parallel Public Ministry: Rogelio Saltarín's contract, PANAMÁ AMÉRICA dated 22 Oct. 2018 (C-0678).

[274] *See, e.g.*, *Varela Won't Wait for an Edict*, LA PRENSA dated 21 May 2012 (C-0671) (indicating that Rogelio Saltarín is in charge of Mr. Varela's defense for a suit brought by Ricardo Martinelli for $30 Million); *Saltarín, the Man who Put Together the Files of the Attorney General's Office,* LA ESTRELLA DE PANAMÁ dated 1 Oct. 2018 (C-0672) (indicating that Mr. Saltarín represented Mr. Varela against Mr. Martinelli).

[275] See, e.g., Saltarín, the Man who Put Together the Files of the Attorney General's Office, LA ESTRELLA DE PANAMÁ dated 1 Oct. 2018 (C-0672); Plan between Rolando López, Rogelio Saltarín and Kenia Porcell to create cases of political persecution revealed, PANAMA AMERICA dated 5 Oct. 2018 (C-0514).

to become a Justice of Panama's Supreme Court.[276]

87. In mid-2018, as Mr. Saltarín was being considered for the Panamanian Supreme Court, Panamanian press published a number of documents regarding at least two contracts for consulting services between the Ministry of the Presidency and Mr. Saltarín. Together, the contracts covered the period ***from July 2014 to December 2015***. The contracts were signed by Minister of the Presidency Álvaro Alemán and Mr. Saltarín's law firm,[277] and they specifically indicated that Mr. Saltarín's firm was to gather evidence for the Ministry in pursuit of criminal proceedings:

> The Consultant is obligated under this Contract to provide consulting services to the Ministry of the Presidency or other ministries or agencies of the State, as indicated by the Ministry, with an emphasis in consulting services in criminal law, including the review, analysis, preparation, ***[and] gathering of evidence for the pursuit of criminal law proceedings*** due to facts that become known to government officials that could be construed to be unlawful conduct.[278]

88. The two contracts also stipulated that the Ministry of the Presidency would offer Mr. Saltarín's law firm "the support that [Mr. Saltarín's law firm] requires," including "office space within the Ministry of the Presidency."[279] Mr. Saltarín's monthly reports on these Contracts confirm that he indeed used ample support from the Panamanian government, ***including Panama's intelligence***

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[276] See, e.g., Competition for the Position of Magistrate of the Court of Auditors opened, LA PRENSA dated 29 Nov. 2014 (C-0673); Saltarín, the Man who Put Together the Files of the Attorney General's Office, LA ESTRELLA DE PANAMÁ dated 1 Oct. 2018 (C-0672). According to a journalist for La Prensa, in October 2015 Mr. Saltarín and Pedro Miguel González, the Designated Prosecutor in the Moncada Luna investigation, were seen having lunch together. See Tal Cual, LA PRENSA dated 9 Oct. 2015 (C-0674).

[277] Saltarín 2014 Contract No. 063-14 with the Ministry of the Presidency dated 14 Nov. 2014 (C-0529); Saltarín 2015 Contract No. 16-2015 with the Ministry of the Presidency dated 7 Oct. 2015 (C-0613).

[278] Saltarín 2014 Contract No. 063-14 with the Ministry of the Presidency dated 14 Nov. 2014 (C-0529) (emphasis added); Saltarín 2015 Contract No. 16-2015 with the Ministry of the Presidency dated 7 Oct. 2015 (C-0613).

[279] Saltarín 2014 Contract No. 063-14 with the Ministry of the Presidency dated 14 Nov. 2014 (C-0529); Saltarín 2015 Contract No. 16-2015 with the Ministry of the Presidency dated 7 Oct. 2015 (C-0613).

apparatus.[280] Over the span of 18 months, Mr. Saltarín held meetings with dozens of Panamanian government agencies, including:[281]

- At least seven meetings with Mr. Varela personally;
- At least twenty-five meetings with Panama's National Security Council, which is an office within the Presidency[282] that has the ability to wiretap phone lines and communications.[283]
- At least ten meetings with Panama's Attorney General's Office;
- At least one meeting with Panama's Comptroller General;
- At least four meetings with the INAC, ***three of which included discussion of Ciudad de las Artes***;
- At least nine meetings with the MINSA, two of which included discussion of the CAPSI Projects; and,
- At least one meeting with the Secretary of Cold Chain to review documents related to the contracts for the construction of the markets.

89. Indeed, Mr. Saltarín soon turned the attention of his "parallel Attorney General's office" to Claimants and their Contracts. At least one of the above meetings involving Mr. Saltarín ***included a January 2015 meeting with Claimants and INAC representatives***. Mr. Saltarín's role was not

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[280] *See* Activity Report from Saltarín, Arias y Asociados to Ministry of the Presidency dated 25 June 2018 (C-0617).

[281] *Id*.

[282] *See* Public Security and National Defense Council, PANAMÁ TRAMITA (last accessed 3 May 2019) (C-0675).

[283] See, e.g., Former Martinelli's Security Officials on Trial for Illegal Wiretapping, AGENCIA EFE dated 28 Aug. 2015 (C-0676); Security Council is like a Political Police, TVN NOTICIAS dated 7 Dec. 2014 (C-0677).

known to Claimants at the time, and government officials from the INAC merely presented Mr. Saltarín as a "representative of the Ministry of the Presidency."[284] But behind the scenes, Mr. Saltarín targeted Claimants' two largest and most important projects in Panama—the three MINSA CAPSI Contracts and the Ciudad de las Artes Contract—as well as Claimants' Contract with the Ministry of the Presidency through the Secretary of Cold Chain. The combined value of the MINSA CAPSI and Ciudad de las Artes Contracts represented over 75% of the total value of all of the Omega Consortium's Contracts.[285] Attacking these four Contracts, which merely required the cooperation of two Government Ministries/Agencies and the Comptroller General, would virtually ensure the demise of Claimants' investment.

90. There is undisputable evidence that Mr. Saltarín met with the Minister of Health and representatives of the MINSA in July 2014,[286] August 2014,[287] and March 2015[288] to discuss and "evaluate" the MINSA CAPSI Projects. Mr. Saltarín similarly met with the Ms. Mariana Nuñez, INAC's new Director (appointed by President Varela in July 2014), during August 2014,[289] September 2014,[290] November 2014,[291] and March 2015[292] to "evaluate" the Ciudad de las Artes

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[284] *See* Email chain between Frankie López and Ian van Hoorde dated 14 Jan 2015 (C-0734); Email from INAC to Omega Consortium, dated 15 Jan. 2015 (C-0531).

[285] *See* McKinnon 1 Annex 2 (Column titled "Current Contract Price").

[286] Activity Report from Saltarín, Arias y Asociados to Ministry of the Presidency dated 25 June 2018 (C-0617), at 4.

[287] *Id*. at 6.

[288] *Id*. at 33.

[289] *Id*. at 6.

[290] *Id*. at 10.

[291] *Id*. at 17.

[292] *Id*. at 33.

Project. It is unclear why Mr. Saltarín would be investigating these Projects in particular unless his investigation was in furtherance of President Varela's vendetta.

91. In any event, soon after Mr. Saltarín started "investigating," the Ciudad de las Artes Project and the three MINSA CAPSI Projects all started experiencing significant issues and delays that could no longer be described as regular, course-of-business delays typical of big construction projects. With respect to the Ciudad de las Artes Project, the Omega Consortium simply ***stopped*** receiving payments; the Inspector, Sosa, started creating a paper trail of supposedly "alarming" deficiencies in the Project allegedly caused by the Omega Consortium (which were never there before);[293] and the National Assembly and the Minister of Economy and Finance unexpectedly and arbitrarily cut the budget for the Project.[294] It seems that, out of the blue and in a seemingly 180 degree turn, the Omega Consortium went from being an outstanding and reliable contractor, as the former INAC Director confirms,[295] to one whose work was allegedly riddled with deficient work. In fact, Maria Eugenia Herrera, the previous Director of INAC, confirms that "neither the project's supervisor nor anyone from INAC notified [her] of any noncompliace by [Omega Consortium]."[296]

92. The MINSA CAPSI Projects also suffered once Mr. Saltarín started "investigating." The Omega Consortium was unable to obtain endorsements from the Comptroller General's Office for various Change Orders presented in each of the Projects,[297] notwithstanding that they had already

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[293] Letter from Sosa to INAC dated 4 Aug. 2014 (R-0042).

[294] 2015 Budget presented by Panama's National Assembly dated 8 Sept. 2014 (C-0067 resubmitted); *see* § V.C.3.

[295] *See* Herrera ¶ 14 (explaining that at all times she had been satisfied with the Omega Consortium's work).

[296] *Id*. ¶ 14.

[297] Addendum No. 4 to Contract No. 077 (2011) dated 7 May 2014 (C-0106 resubmitted 2); Addendum No. 3 to Contract No. 077 (2011) dated 13 Aug. 2013 (C-0170); Addendum No. 3 to Contract No. 083 (2011) dated 26 Dec. 2014

approved by MINSA prior to the Varela Administration. This continued even when the Omega Consortium informed MINSA that the three CAPSI Projects were in a critical position due to the lack of a valid contract.[298] Payments on the MINSA CAPSI Contracts were virtually stopped, too. The last payments the Omega Consortium received for the Puerto Caimito and Rio Sereno Contracts was May 2014 and August 2014 respectively.[299] And, with respect to the Kuna Yala Contract, the government failed to pay a large invoice owed to Omega Consortium for work performed in March 2014.[300] A complete description of these actions is laid out in greater detail below in Section V.A.5.

93. Similarly, in July 2015 Mr. Saltarín met with the Manager of the Secretary of Cold Chain to discuss the contracts for the construction of the markets for this Agency, which included Claimants' Contract to build the Public Market of Colón ("*Mercado Público de* Colón").[301] Claimants were baffled when that same month the Comptroller General's Office threatened to terminate the Contract if the Omega Consortium did not renew the bonds,[302] even though just a month before, in June 2015, the Omega Consortium met with the Executive Secretary of Cold Chain to discuss the possibility of reinitiating works.[303] This sudden and diametric change in the Government's attitude towards Claimant and their Contract can only be explained by the change in

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(C-0107 resubmitted).

[298] Letter No. MINSA-54 from the Omega Consortium to the Ministry of Health dated 31 Oct. 2014 (C-0173).

[299] McKinnon Report 1, Annex 1, at 4, 13.

[300] *Id*. Annex 1, at 9.

[301] Activity Report from Saltarín, Arias y Asociados to Ministry of the Presidency dated 25 June 2018 (C-0617), at 44.

[302] Note No. 12031-15-ING-UFGOE from the Comptroller General's Office to ASSA dated 27 July 2015 (C-0623).

[303] López ¶ 137; Letter 2015 06 19 P004-62 from the Omega Consortium to the Ministry of the Presidency dated 19 June 2015 (C-0064 resubmitted); Email Chain between Onelia Delis, Andres Camargo and Francisco Feliu dated 27 May 2015 (C-0622).

Administration and Mr. Saltarín's involvement.

94. With the benefit of hindsight, and the now publicly available reports of Mr. Saltarín's work between July 2014 and December 2015, it is evident that it was no coincidence that the Omega Consortium started experiencing all these difficulties once Mr. Saltarín—who was hired with a mandate to persecute Mr. Varela's enemies—started investigating and reviewing the most important sets of Projects the Omega Consortium had in Panama. With the President's "parallel Attorney General" targeting the Omega Consortium's Projects, it was only a matter of time before the Government agencies involved in each Project executed on President Varela's vendetta against Claimants.

V. PRESIDENT VARELA AND HIS ADMINISTRATION BEGIN A MULTI-FLANKED ATTACK AGAINST MR. RIVERA AND THE OMEGA CONSORTIUM AS PART OF PRESIDENT VARELA'S ANTI-MARTINELLI VENDETTA

95. A combination of Government offices and officials—all working on the order of the Varela Administration—destroyed the value of Claimants' investment in short order. Within months of President Varela's inauguration, Claimants began encountering insurmountable roadblocks raised by multiple arms of the Panamanian Government. First, the Comptroller General stopped approving change orders and payment applications for work that had already been performed (*see infra* Section V.A) for nearly all of the Projects. Then the Government agencies, which up to the change in Administration had worked together with the Omega Consortium to advance the Projects, began an abrupt about-face (*see infra* Section V.B). Respondent took aim at Claimants' most valuable Contract—the Ciudad de las Artes Contract—discretely cutting the budget (*see infra* Section V.C) and then unlawfully administratively terminating the Contract through a uniquely sovereign act (*see infra* Section V.D). Shortly thereafter, the Varela Administration launched multiple criminal investigations that harmed not only Claimants' Panamanian investment but Mr. Rivera personally

(*see infra* Section V.E). At the same time, each of the Government agencies involved in the Projects either terminated the Contracts or forced them to lapse (*see infra* Section V.F). In light of the timing and breadth of the Government's actions—a concerted campaign of governmental harassment orchestrated at the highest level—there can be no doubt that President Varela had targeted Claimants and their investment in Panama.

A. The Comptroller General's Office Stops Change Order and Payment Endorsements in Virtually All of the Contracts Based on Mere Pretext

96. One of the first signs of trouble came from the Comptroller General. The Comptroller General's Office is supposed to be an independent auditing agency within the Panamanian Government. Its mission is to revise, regulate, and control the use of public funds and goods. It also examines, intervenes in, and terminates all the accounts related to those uses of public funds.[304] The Comptroller General's Office reviews contracts, requests for payment, and requests to amend or extend Government contracts to ensure that they are commercially, financially, technically, and legally sound.[305] It may do so at the request of the respective Government Ministry or Agency through the submission of a payment application or a request to amend or extend a Government contract.

97. Although the Comptroller General's Office is supposed to be independent of the Executive, this was not the case in practice during the Varela Administration. The Comptroller General is confirmed by the National Assembly, but he or she is informally nominated by the

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[304] Comptroller General's Office's Mission, *available at* https://www.contraloria.gob.pa/mision-y-vision.html (C-0679); Pérez at n.59.

[305] Resp.'s Counter-Mem. ¶ 13.

incoming President.[306] President Varela chose Mr. Humbert Arias for the role.[307] Mr. Humbert Arias was a loyal supporter of the President, having contributed to his campaign.[308] As soon as President Varela took office, he called for the resignation of the former Comptroller General and the immediate appointment of Mr. Humbert Arias in violation of Panamanian Law.[309] President Varela was not successful in effecting this change, but it was obvious that he had already begun to strong-arm the sitting Comptroller General through threats of removal and investigations. Removing or at least intimidating Gioconda Torres de Bianchini and appointing Federico Humbert Arias was consistent with President Varela's quest to target any public or private actors associated with Mr. Martinelli because the Office of the Comptroller General "has oversight authority over all government contracting."[310] This strategy would become evident through the actions, or inactions, of the Comptroller General with regard to Claimants' Contracts.

98. Respondent does not (and cannot) deny that there were "slowdowns in the Comptroller General's review and approval of [change orders] and payments in the third and fourth quarters of 2014 and the start of 2015,"[311] even though, as Mr. Bernard Veliz (Legal Director at the Comptroller General's Office) explains, "the Comptroller General's review should be completed within 30

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[306] Pérez ¶ 50; *Federico Humbert Arias, Juan Carlos Varela's Chosen One*, LA ESTRELLA DE PANAMA dated 31 Aug. 2014 (C-0509).

[307] Pérez ¶ 50; *Federico Humbert Arias, Juan Carlos Varela's Chosen One*, LA ESTRELLA DE PANAMA dated 31 Aug. 2014 (C-0509).

[308] Pérez ¶ 50.

[309] *Id*. ¶¶ 48-49; *Federico Humbert Arias, Juan Carlos Varela's Chosen One*, LA ESTRELLA DE PANAMA dated 31 Aug. 2014 (C-0509). Contrary to what Respondent's witness Dr. Veliz claims, Panamanian law permits only the Supreme Court to terminate the Comptroller General, not the National Assembly. Pérez ¶ 20.

[310] Pérez ¶ 53 at 25 (emphasis added).

[311] Resp.'s Counter-Mem. ¶ 70.

days."[312] Respondent attempts to justify the excessive and in many cases indefinite delays encountered by the Omega Consortium in three ways, relying on: "(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."[313] But, even if these excuses were true, and they are not (*see infra* Section V.A(1)-(3)), none of these are attributable to Claimants. They are *all* related to Governmental actions or inactions that led to the destruction of Claimants' investment, and should be viewed as an admission of Respondent's liability. In any event, Respondent's justifications are belied by the record, which shows that the Comptroller General's Office refused to endorse the Omega Consortium's change orders (*see infra* Section V.A(4)) and payment requests (*see infra* Section V.A(5)).

1. *Respondent's "Audit" Excuse Is An Unjustified Pretext*

99. Respondent alleges that the Comptroller General's Office does an *ex-officio* audit of all ongoing projects when there is a change in Presidential administrations.[314] According to Respondent, the alleged full audit done by the Comptroller General's Office between the Martinelli and Varela Administrations is what caused the delays suffered by the Omega Consortium.[315] This supposed audit, however, is a mere pretext for Respondent's unlawful actions.

100. As a preliminary matter, the delays suffered by Claimants were far from "typical,"

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[312] Veliz ¶ 15.

[313] Resp.'s Counter-Mem. ¶ 70.

[314] *Id*. ¶ 71.

[315] *Id*. ¶ 72.

despite Respondent's efforts to paint them as such.[316] Claimants waited for years (and in most cases indefinitely) for approval on virtually anything sent for endorsement to the Comptroller General's Office after the Varela Administration came to power. Most of the endorsements simply *never* came. And Respondent's excuse that the delays were a result of a so-called "audit" is unavailing. That the "audit" never happened is evident from the fact that Mr. Bernard Veliz, Respondent's witness on behalf of the Comptroller General's Office, does not mention such an "audit" *even once*.[317] Nor does he attempt to excuse the Comptroller General's delays based on an audit.[318] And despite being ordered to do so by the Tribunal, Respondent has failed to produce any documents demonstrating that any such "audit" ever took place.[319]

101. Even assuming that the alleged audit by the Comptroller General's Office occurred (which it did not), this audit would not have been consistent with Panamanian law. *First*, there is no legal mandate that the Comptroller General's Office ***must*** conduct an audit when there is a change in Presidential administrations. This is a decision the Comptroller General has the discretion to make based on its power as a Governmental Agency. *Second*, even if the Comptroller General decides to conduct a full audit of ongoing projects, there is a limit on the time the Comptroller General can take to complete it. Panama's Public Contracting Law requires the Government to act in an efficient and

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[316] *Id*.

[317] See generally Veliz.

[318] *Id*.

[319] *See* Tribunal's Decision on Claimants Request for Production of Documents dated 10 Mar. 2019, Req. 11 (the Tribunal directed Respondent "to produce documents evidencing that the Comptroller General Office's conducted an audit in the July 2014-July 2015 time frame regarding public works contracts."). No such documents have been produced. As such, the Tribunal should draw the adverse inference that such "audit" ever took place.

timely manner to avoid harming contractors,[320] which is in line with the Principle of Reasonableness under Panamanian law.[321] The delays suffered by the Omega Consortium while waiting for the Comptroller General's endorsement of payments and change orders were neither efficient nor reasonable; they caused substantial harm to Claimants and their investment. *Third*, neither the Omega Consortium, nor its representatives, ever received notification from the Comptroller General's Office informing it that the Comptroller General was conducting a full audit on the ongoing Projects.[322] Instead, the Omega Consortium spent valuable resources on a wild goose chase, reaching out to employees at the relevant Ministries and Government Agencies to see if anyone had news pertaining to the documents awaiting endorsement in the Comptroller General's Office.[323] At best, this shows a complete lack of transparency and due process.

102. In sum, the evidence shows that the so-called "audit" never took place. But, even if it did, the Comptroller General's Office fell short of the "efficient" and reasonable standard required by Panamanian law in conducting such an audit.[324]

103. As if more evidence that the alleged "audit" was nothing but mere pretext concocted by Respondent as a defense to this Arbitration was needed, Respondent's witness, Mr. Barsallo, in a

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[320] Law 22 (C-0280 resubmitted), art. 13, no. 7.

[321] Order No. 125-2018-Pleno TACP dated 11 Jun. 2018 (C-0738) (analyzing whether the administrative termination of a contract was reasonable and tying up the reasonability with a good faith concept). See also Article 13 of the Panamanian Civil Code dated 22 Aug. 1916 (C-0742) (stating "When there is no specific law in a particular issue, the applicable law will be the one that regulates similar matters, and in its absence, constitutional doctrine, general rules of law, and custom, in accordance with Christian morality").

[322] López ¶ 102. Claimants were aware that shortly after President Varela took office the Comptroller General sent back to the Agencies change orders and applications that were pending the Comptroller's signature. *See* Rivera 2 ¶ 27. However, this was not presented as a full audit and, certainly, not as an audit that would take years (or more) to complete. *See* Rivera 2 ¶ 27.

[323] Letter No. MINSA-51 from Omega to MINSA dated 30 Jul. 2014 (C-0523); Email Chain between Leopoldo Vega and Gabriel Cedeño dated 1 Apr. 2015 (C-0567).

[324] Comptroller General's Office's Mission, *available at* https://www.contraloria.gob.pa/mision-y-vision.html (C-0679).

text message exchange with Mr. Lopez on 3 March 2016 (about a week before Claimants submitted to Respondent their Notice of Intent to Arbitrate on 11 March 2016) makes it crystal clear:

> **Frankie J. Lopez**: Lo se [. . .] pero xndo pienso q todo esta resolviendose de repente se complica
> ["*I know [. . .] but when I think everything is getting resolved suddenly it gets complicated*"]
> **Nessim Barsallo**: Q pasa en contraloria
> ["*What's happening at the Comptroller [General's Office]*"]
> **Nessim Barsallo**: Es un complot?
> ["*Is it a conspiracy?*"]
> **Frankie J. Lopez**: Pareciera
> ["*It looks like it*"]
> **Nessim Barsallo**: Yo concluyo que tienen ordines
> ["*I conclude they have orders*"]
> **Frankie Lopez**: Disq tan verificando en legal bla bla bla por el caso
> ["*The say they're verifying in legal blah blah blah because of the case*"]
> . . .
> **Frankie J. Lopez**: Tu cabes algo?
> ["*Do you [know] anything*"]
> **Frankie J. Lopez**: Sabes*
> ["*Know**"]
> **Nessim Barsallo**: Eso es de presidencoa
> ["*That comes from the Presidency*"][325]

104. Mr. Barsallo's conclusion could not be more crystalline: he believed that the Comptroller General's Office had orders from the Presidency—presumably either President Varela or someone close to him in the President's Office—to ignore all requests by the Omega Consortium. And, it certainly appears that he was right. This was corroborated by [redacted] in 2015 when [redacted] told Mr. Lopez that, upon requesting information from the Comptroller General's Office on certain pending Omega Consortium accounts, [redacted]

[325] WhatsApp message between Frankie López and Nessim Barsallo dated 3 Mar. 2016 (C-0681).

[redacted]

105. This is because the so-called "audit" was nothing more than a strategy to destroy Claimants and their investment in Panama. Indeed, while the Comptroller General's Office was actively obstructing the Omega Consortium's Contracts, it was simultaneously favoring contractors that had made campaign contributions to President Varela, promptly endorsing their requests. A search of Panama's own public records demonstrates that the Comptroller General was actively and expediciously endorsing requests made by other contractors, such as Odebrecht, Constructora Meco, Bagatrac, and Constructora Rodsa.[327] What these four contractors have in common with each other (and what differentiates them from Claimants) is that each one of them made illicit payments to Panamanian Government officials, as their representatives have publicly admitted.[328] The benefits these contractors received in return for their payments are staggering, and the timing is telling:

a. Between President Varela's election on 5 May 2014 and 1 July 2014 (When President Varela took office), the Comptroller General's Office made ***at least 37 approvals***

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[326] WhatsApp messages between Ana Graciela Medina and Frankie López dated 20 May 2015 (C-0555); *see also supra* ¶ 78.

[327] *See* Public Records on the Comptroller General's Website for Odebrecht, Constructora MECO, Bagatrac, and Rodsa for Jan. 2014-Mar. 2015 (C-0746).

[328] Plea Agreement Between the United States Department of Justice and Odebrecht S.A., paras. 63-64 , dated 21 Dec. 2016 (admitting to bribe payments in Panama for several million dollars around "in or about and between" 2010 and 2014) (C-0748) *available at* https://www.justice.gov/opa/press-release/file/919916/download; Public Ministry Certification, dated 16 Mar. 2018 (C-0749)(showing that Meco's President stuck a plea deal with Panamanian prosecutors on 1 Dec. 2017); *Businessmen confess their bribes to Blue Apple*, LA PRENSA, dated 10 Mar. 2018 (C-0690) (reporting that President of Meco Carlos Cerdas, Juan Rodriguez of Constructora Rodsa, and Alberto Jurado of Bagatrac, admitted to Panamanian prosecutors to paying several million in bribes to Panamanian officials) *available at* https://impresa.prensa.com/panorama/Empresarios-confiesan-coimas-Blue-Apple_0_4981001922 html; Public Ministry Statement, dated 15 Jan. 2018 (C-0526) (indicating that an "investigation" officially started on 11 Sep. 2017 on Bagatrac, Meco, Rodsa, and other companies), *available at* http://ministerioPúblico.gob.pa/comunicado-caso-odebrecht-2/.

totaling US$ 124 million to these four companies, with an average processing time of ***only 12.9 days***.[329]

b. From the time the Administration changed on 1 July 2014 to 1 January 2015 (the last six months of Ms. Torres de Bianchini's term), the Comptroller General's Office made at least 4***9 approvals totaling over US$ 923 million*** to these four companies alone, with an average processing time of ***only 28 days***.[330]

- This included a December 2014 approval for US$ 782 million dollars for Odebrecht, which took the Comptroller General's Office only 8 days to approve.[331]
- It also included approvals totaling over US$ 20 million for MINSA projects for Odebrecht, every month from September 2014 to January 2015.[332]

c. And approvals for these four companies did not stop under Mr. Humbert Arias (President Varela's appointed Comptroller General), with at least 46 more approvals from January to March 2015 totaling US$ 148 million to these four companies, including 7 approvals just for Odebrecht and Constructora Meco totaling at least US$ 55 million in January alone, less than two weeks after Mr. Humbert took his position.

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[329] Public Records on the Comptroller General's Website for Odebrecht, Constructora MECO, Bagatrac, and Rodsa for Jan. 2014-Mar. 2015 (C-0746) at 1.

[330] *Id*.

[331] *See* Public Records on the Comptroller General's Website for Odebrecht, Constructora MECO, Bagatrac, and Rodsa for Jan. 2014-Mar. 2015 (C-0746) (Transaction 0-09-0-105093-2014).

[332] Public Records on the Comptroller General's Website for Odebrecht, Constructora MECO, Bagatrac, and Rodsa for Jan. 2014-Mar. 2015 (C-0746) at 2-4 (transaction details can be found at 5-185).

106. Thus, while Omega only received ***3 approvals*** for its eight Projects in the second half of 2014,[333] and ***none*** in 2015, this ratio dwarfs in comparison to that of companies like Odebrecht, which received 73 approvals for approximately five projects in the same time period.[334] Indeed, while Panama was looking for any reason it could to refuse approvals needed for Omega to continue the Projects, approvals for companies like Odebrecht kept coming in uninterrupted. The data leaves no doubt that Panama treated the Omega Consortium differently (and much worse) than the the companies who acceded to requests for illicit payments to Panamanian officials.

107. This also leaves no doubt that the alleged "audit" now claimed by Respondent was not a legitimate accounting, but rather a mere pretext to attack Claimants as perceived allies of former President Martinelli. Indeed, public allegations that these so-called audits conducted by the Comptroller General's Office were bogus and nothing more than an unfair and aggressive persecution by President Varela have since surfaced in the media.[335] Combined with Respondent's inability to produce any documents corroborating its claim that the Comptroller General's Office was conducting a formal audit of ***all*** Government contracts, it is evident that no such legitimate audit ever took place.

2. *Ms. Bianchini's Ilness Does Not Explain or Excuse the Comptroller General's Office's Conduct*

108. In a further, but equally unavailing, attempt to justify what was evidently a targeted campaign against Claimants and their investment, Respondent and Mr. Barsallo also claim that the

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[333] Change Order No. 4 to the Rio Sereno Contract (C-0249); Change Order No. 3 to the Kuna Yala Contract (C-0107 resubmitted); Change Order No. 2 to the La Chorrera Contract (R-0008) – Did extend the contract

[334] *See* Public Records on the Comptroller General's Website for Odebrecht, Constructora MECO, Bagatrac, and Rodsa for Jan. 2014-Mar. 2015 (C-0746).

[335] Public Letter from Mr. Martinelli to President Varela, undated (C-0645).

efficiency of the Comptroller General's Office decreased after Ms. Gioconda de Bianchini fell terminally ill.[336] To be sure, Claimants sympathize with Ms. Bianchini and her family, but Ms. Bianchini's illness should not have affected the normal work and progress of the Comptroller General's Office.[337] As one would expect, Panamanian law provides that the Sub-Comptroller General should replace the Comptroller General during temporary absences or accidents.[338] If Ms. Bianchini's work was severely affected by her illness, she should have been replaced by the Sub-Comptroller General during her incapacitation in order to maintain the efficiency of the Office. But that did not happen, at least not with respect to the Omega Consortium's Projects.

109. During the transition period between administrations, Ms. Bianchini was still signing documentation,[339] and endorsing change orders and payment applications for President Varela's supporters.[340] She just was not endorsing the Omega Consortium's pending payments and change orders.[341] This likely occurred because President Varela threatened Ms. Bianchini days after he won the election by accusing her of wrongdoing and asking her to resign.[342] To a person who was suffering from terminal cancer, the thought of losing her job and income, and facing potential criminal

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[336] Resp.'s Counter-Mem. ¶ 72; Barsallo ¶ 44.

[337] As of April 2016, the Comptroller General's Office had over three thousand employees. *See* List of Employees in the Comptroller General's Office, dated 1 Apr. 2016 (C-0665).

[338] Law 32 of 8 November 1984 (C-0480), art. 57(a).

[339] Letter No. 5053-2014.DFG-UCEF from Comptroller General to Ministry of Healthcare dated 16 Sep. 2014 (C-0682); Letter No. 5275-2014-DFG-UCEF from Comptroller General to Ministry of Health dated 14 Nov. 2014 (C-0683); Letter No. 2277-LEG.F.J.PREV. from Comptroller General to MINSA dated 12 Dec. 2014 (C-0684).

[340] *See supra* ¶¶ 106-07.

[341] With the exception of Addendum No. 2 to the La Chorrera contract, the Comptroller General's Office did not approve or endorse anything related to the Omega Consortium while Ms. Bianchini was still in office. López ¶ 72.

[342] Juan C. Varela Will Request the Resignation of Four Officials, LA PRENSA dated 6 May 2014 (C-0573); Varela Calls for Resignation of Senior Officials, LA PRENSA dated 7 May 2014 (C-0574); Pérez ¶¶ 48-49; López ¶ 108.

investigations, was likely very stressful, prompting her to accommodate the new President's whims. And, that Ms. Bianchini, and then Mr. Humbert Arias, were acting at the whim of President Varela is demonstrated by the staggering amount of change orders these Comptrollers endorsed in first nine months of President Varela's Administration.[343]

110. As mentioned above, Claimants eventually learned that the Comptroller General's Office was not going to endorse anything related to the Omega Consortium because President Varela thought that Claimants were connected to former President Martinelli.[344] That, of course, is false. But the perceived connection between Claimants and former President Martinelli—prompted by Mr. Rivera's refusal to pay a campaign contribution to then-Presidential Candidate Varela in exchange for protection of the Contracts—was enough of a basis for President Varela to target Claimants and their investment.[345]

3. *Respondent Has Not Produced Credible Evidence of "Budgetary Issues" as a Cause of the Comptroller General's Conduct*

111. As a third, and last-ditch reason to justify the arbitrary and unreasonable position taken by the Comptroller General towards Claimants and their Contracts, Respondent argues that "payments were slower than usual . . . 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."[346] Once again, Respondent's defense does nothing to absolve it of liability, as Respondent's "budgetary

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[343] *See supra* ¶¶ 106-07.

[344] [redacted] López ¶ 100.

[345] López ¶ 100.

[346] Resp.'s Counter-Mem. ¶ 70.

issues" excuse is belied by the evidence.

112. As a preliminary matter, however, it is important to note that only four out of the eight Omega Consortium Contracts are alleged to have suffered these so-called "budgetary issues." These were the three MINSA CAPSI Contracts and the Ciudad de las Artes Contract.[347] So even if said "budgetary issues" justified Repondent's conduct (and they do not), Respondent still cannot hide behind this excuse for endorsement delays suffered by the Omega Consortium in relation to its other Contracts, namely: the Mercado Público de Colón Contract (with the Ministry of the Presidency), the Mercados Periféricos Contract (with the Municipality of Panama), the Palacio Municipal de Colón Contract (with the Municipality of Colón), and the Unidad Judicial La Chorrera Contract (with the Judiciary)[348]

a. The So-Called "Budgetary Issues" with Respect to the MINSA CAPSI Contracts Are Mere Pretext and Attributable to Respondent

113. By and large, discussions among Respondent's various Government agencies regarding "budgetary issues" with respect to the MINSA CAPSI Contracts and the Ciudad de las Artes Contract were internal ones to which Claimants were not privy. Indeed, to the extent Claimants were made aware of such discussions, it was on a selective basis, per Panama's own agenda. As such, Claimants must rely on Respondent's document production to assess Respondent's claim of "budgetary issues." Those documents make clear that any "budgetary issues" were a creature of

[347] *Id*. ¶ 73, 92.

[348] Change Order No. 2 to the La Chorrera Contract, originally signed in May 2014, was returned by the Comptroller General's Office with budgetary observations. These were eventually resolved since in December 2014 Change Order No. 2 to the La Chorrera Contract was endorsed by the Comptroller General's Office. Further, in October 2014 the Judiciary already knew that the budget allocation for the Project was available. *See* Note. DIPRES No. 522/2012 from the Judiciary's Planning and Budget Director to the Judiciary's Legal Director dated 8 Oct. 2014 (C-0550).

Respondent's own making. With respect to the MINSA CAPSI Contacts, Respondent's own document production shows that the so-called "budgetary issues" were either mere pretext or a result of the Comptroller General's endorsement delays.

114. For example, Respondent has produced an internal document from the Ministry of Economy and Finance listing all of the MINSA CAPSI Projects, including the three Omega Consortium Contracts, and their respective 2014 budget item number.[349] This document is dated 20 November 2014, and shows that the budget had been allocated for the MINSA CAPSI Contracts in 2014. Although it is unclear from the document whether the Comptroller General's Office received it, Respondent also produced an internal memorandum from the Comptroller General's Legal Division to the Accounting Division, dated 5 December 2014, which states that Change Order No. 4 of the MINSA CAPSI Kuna Yala has been cleared from a budgetary perpective.[350] The Comptroller Gerenal's Office *must* therefore have been in possession of the budget line items for each Contract by 5 December 2014. At that point, there was no "budgetary" reason why the Comptroller General could not (and did not) endorse the Omega Consortium's payment applications in 2014. That the Comptroller General chose not to endorse these payment applications, as discussed in more detail below, shows that the "budgetary issues" were nothing but mere pretext.

115. Respondent's excuse that "if a ministry or State institution does not spend its budget for the year in progress, it is not given that amount next year for that particular project" is unavailing.

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[349] *See* Letter DPRENA/DP/SEYS/GC/9087 from the MEF Budget Director to the MINSA Finance Director dated 20 Nov. 2014 (C-0578).

[350] Memorandum No. 7331/2014-DMySC-RP from the Methods and Accounting Director of the Comptroller General's Office to the Legal Director of the Comptroller General's Office dated 5 Dec. 2014 (C-0565).

As shown above, it was the Government's own fault that these payment applications were carried over to the 2015 budget. Having created the so-called "budgetary issue," Respondent cannot now use it as a defense and, in doing so, benefit from his own wrong.[351]

b. The So-Called "Budgetary Issues" with Respect to the Ciudad de las Artes Contract Are Attributable to Respondent

116. The Ciudad de las Artes Project experienced a similar fate as the MINSA CAPSI Contracts. Respondent admits that CPPs No. 13 to 20 (corresponding to payment applications No. 12 to 19) submitted by the Omega Consortium between June and December 2014[352] were not endorsed.[353] Notably, these CPPs—as was customary—were for work completed by the Omega Consortium and approved by the INAC and the external inspector, Sosa. And Respondent has not claimed that there was a "budgetary issue" precluding approval of these CPPs.[354] Yet, the Comptroller General baselessly refused to endorse them in 2014.[355]

117. By creating this baseless excuse to avoid paying the Omega Consortium, the Government ensured that the CPPs would carry over to the 2015 Budget. And as discussed *infra*, the Ministry of Economy and Finance unlawfully slashed the 2015 budget for the Ciudad de las Artes Project.[356]

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[351] Charles T. Kotuby & Luke A. Sobota, General Principles Of Law And International Due Process ("**Kotuby & Sobota**") (CL-0081 resubmitted) at 119-30.

[352] McKinnon 1, Annex 1, at 16.

[353] Resp.'s Counter-Mem. ¶ 105.

[354] *See generally* Resp.'s Counter-Mem. ¶ 105.

[355] See supra ¶ 47.

[356] *See infra* § V.C.

4. *The Comptroller General's Office Stopped Endorsing the Omega Consortium's Change Orders Based on Pretextual Excuses.*[357]

118. The first Change Orders wrongly withheld by the Comptroller General were those pertaining to the MINSA CAPSI Projects. But, in the end, the rest of the Contracts suffered the same fate.

a. MINSA-CAPSI Contracts

119. Shortly before the change in Administration, on 7 May 2014, the Omega Consortium and MINSA agreed on an extension of time, which they memorialized in three Change Orders (one for each Contract) and sent to the Comptroller General's Office for endorsement—*i.e.*, Change Order No. 3 to the Kuna Yala Contract,[358] Change Order No. 4 to the Rio Sereno Contract,[359] and Change Order No. 4 to the Puerto Caimito Contract.[360] Despite the fact that the reasons for the extension of time were well documented and in no way attributable to the Omega Consortium, the Comptroller General never endorsed any of these Change Orders. For each, the Comptroller General gave a different, but equally pretextual and unjustified, excuse.

120. With respect to the Kuna Yala Contract, immediately after the Administration change, on 31 July 2014, the Comptroller General sent a letter to the new Minister of Health attaching Change Order No. 3 and requesting that the new MINSA administration *assess* the continuation of the

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[357] Cls' Mem. ¶ 84

[358] Addendum No. 3 to Contract No. 083 (2011) dated 26 Dec. 2014 (C-0107 resubmitted) (extending the Contract until 28 September 2014).

[359] Addendum No. 4 to Contract No. 077 (2011) dated 7 May 2014 (C-0106 resubmitted 2) (extending the Contract until 27 September 2014).

[360] Addendum No. 4 to Contract No. 085 (2011) dated 7 May 2014 (C-0171) (extending the Contract until 4 August 2014).

requested endorsement.[361] But there was nothing for the new Minister of Health to assess regarding the endorsement of Change Order No. 3 to the Kuna Yala Contract. This Change Order and its terms had already been negotiated and approved by the then-Minister of Health, approximately two months earlier. Ultimately, Change Order No. 3 to the Kuna Yala Contract was never endorsed, and the reasons given continued to be baseless and within Panamanian control, such as a missing signature by the MINSA inspectors or a missing explanation of the budgetary allocation.[362] Despite the Omega Consortium's continued efforts to get the Change Order endorsed,[363] its requests were ignored. The Omega Consortium had no choice but to work on the Kuna Yala Project without a valid Contract beginning 30 June 2014.[364] Still hoping to resolve the issue in good faith, the Omega Consortium signed a New Change order on 17 November 2014, which added new medical equipment but did not extend the period of the Contract.[365] This Change Order was endorsed on 26 December 2014,[366] likely because it did nothing to solve the problems with the validity of the Kuna Yala Contract, which directly affected the ability of the Omega Consortium to receive payment on work performed under an expired Contract.

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[361] Letter No. 3340-2014-DFG-UCEF from the CG Office to the Minister of Health dated 31 July 2014 (C-0685).

[362] *See* Memorandum No. 4243-LEG-F.J.PREV from the Legal Division of the Comptroller General's Office to the Director of General Auditing of the Comptroller General's Office dated 26 Jun. 2014 (C-0737) (stating "The General and Sustaining Report … is not signed by inspection representatives from MINSA"); Memorandum No. 3247/2014-DMySC-R.P. from the Accounting Director of the Comptroller General's Office to the Economic Director dated 5 Jun. 2014 (C-0738) (stating "It is important to note that Change Order No. 3 to Contract No. 083 (2011) extends the time and the amount of the contract. However, it does not show the budget allocation for 2014").

[363] Letter No. MINSA-KY-72R from the Omega Consortium to the Ministry of Health dated 22 Sept. 2014 (C-0174).

[364] 30 June 2014 was the last day of Addendum No. 2.

[365] Change Order No. 3 to the Contract No. 083 (2011) dated 17 Nov. 2014 (C-0522).

[366] *Id*.

121. The Rio Sereno Contract suffered the same fate. In this case, the Comptroller General sent a letter to the new Minister of Health, Francisco Terrientes, on 10 July 2014, identifying several pretextual excuses for refusing to endorse the Change Order. The Comptroller General claimed, for example, that the Omega Consortium had to "explain the events that occurred and were considered by the Administration as a reason to modify the contract's period and amount, invoking the Contractual Equilibrium clause."[367] But the Omega Consortium had already done so. In the Evaluation Report prepared by the Financial Division of the Comptroller General's Office with respect to Change Order No. 4, the Comptroller General's Office stated clearly that the file submitted by MINSA for this Change Order included reports by the Omega Consortium summarizing the reasons supporting the request for additional costs and extensions of time in relation to the Contractual Equilibrium clause.[368] The Omega Consortium had already provided both MINSA and the Comptroller General's Office with the very same reports that the Comptroller General's own Financial Division was now requesting. This was therefore nothing more than a pretext to avoid endorsing Change Order No. 4 to the Rio Sereno Contract. As it turns out, Change Order No. 4 was never endorsed by the Comptroller General.

122. Once Change Order No. 4 to the Rio Sereno Contract expired without being endorsed, the Omega Consortium tried to sign a new Change Order to extend the time of the Contract,[369] but this request was also ignored. So the Omega Consortium once again worked without a valid Contract

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[367] Letter No. 3081-2014 dated 10 July 2014 (C-0686).

[368] Evaluation Report of Change Order No. 4 issued by the Comptroller's office dated 10 Jun. 2014 (C-0687), at 3-4.

[369] Letter No. MINSA-RS-54R from Omega to MINSA dated 22 Sept. 2014 (C-0534).

for the Rio Sereno Project.[370] As it had done with the Kuna Yala Project, the Omega Consortium signed a new Change Order on 17 November 2014 that included new medical equipment but did not extend the period of the Contract.[371] This Change Order was promptly endorsed on 26 December 2014,[372] likely because, as with the Kuna Yala Contract, it did not resolve the Claimants' issues with respect to the Contract's expiration and the repercussions that had on payments for completed work.

123. Change Order No. 4 to the Puerto Caimito Contract was likewise never endorsed by the Comptroller General because of the similar pretextual excuses attributable to MINSA or within the exclusive responsibility of the Government,[373] just like those that had plagued the other two Contracts. For example, Respondent sought a number of documents from the Omega Consortium that had already been submitted to the Comptroller General's Office during the bidding process.[374] Despite these obstacles, the Omega Consortium had a true interest in continuing with the Project and

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[370] Addendum No. 2 to the Rio Sereno Contract expired on 5 August 2013. *See* Addendum No. 2 to Contract No. 077 (2011) dated 21 Feb. 2013 (C-0169).

[371] Addendum No. 4 to Contract No. 077 (2011) dated 17 Nov. 2014 (C-0249).

[372] *Id*.

[373] *See, e.g.*, Memorandum No. 3702-2014-DMySC-R.P. from the Accounting Director of the Comptroller General's Office to the Legal Director dated 17 Jun. 2014 (C-0739) (stating that "Clause 56 of Change Order No. 4 does not contain the budget item allocated for the payments to be made in the 2014 fiscal year"); Memorandum No. 1480-2014-DAEF from the Economic Director of the Comptroller General's Office to the Legal Director of the Comptroller General's Office dated 5 Jun. 2014 (C-0750) (stating that "The MINSA Note signed by Minister Javier Diaz explaining the increase and validity of Change Order No. 4 was not attached to the file"); Note No. 695-15-LEG-F.J.PREV from the Comptroller General's Office to the Minister of Health dated 17 Apr. 2015 (C-0176) (explaining that "documents evidencing the existence and legal representation of the foreign companies that make up the consortium must be provided, duly authenticated by the consul of the Republic of Panama or apostilled and the Civil Registry Certificate that certifies the existence and legal representation of the Panamanian company that form part of the consortium . . . .").

[374] *Compare* Resp.'s Counter-Mem. ¶ 76 (some of the documents mentioned by Respondent were 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 a valid compliance bond), *with* Cls' Mem. ¶ 84 (explaining that "the certificate [requested by the Comptroller General's Office] had been provided during the bidding process and formed an integral part of the MINSA CAPSI Puerto Caimito Contract file, something which was already in the Comptroller-General's possession").

thus decided to exclude the reimbursement of some expenses incurred in the preparation of Change Order No. 4 to the Puerto Caimito Contract in order to speed up its endorsement.[375] Unfortunately, the Omega Consortium's efforts were not enough, and the Change Order was never endorsed. On 17 November 2014, the Omega Consortium and MINSA signed a new Change Order to extended the Puerto Caimito Contract until 1 December 2014,[376] as this Project was nearly 90% complete.[377] But again, the Comptroller General's Office declined to endorse it. The Omega Consortium made a last ditch effort and, in November 2014, requested a new extension of time until 31 March 2015.[378] But this was not even entertained by MINSA, let alone the Comptroller General's Office.

b. Municipality of Panama Contract

124. The Omega Consortium also sought an extension of the Municipality of Panama Contract in September 2014.[379] At first, the Municipality of Panama was not cooperative in approving and signing the Change Order.[380] Eventually, however, the Municipality of Panama agreed to negotiate the Change Order, which was signed at the end of November 2014 and would extend the duration of the Contract by 239 days.[381]

125. Respondent asserts that despite the delay being attributable to the Omega Consortium,

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[375] Letter No. MINSA-PC-55 from Omega to MINSA dated 9 Sept. 2014 (C-0688).

[376] Addendum No. 5 to Contract No. 085 (2011) dated 2014 (C-0257).

[377] McKinnon Report 2 ¶ 46.

[378] Letter No. MINSA-PC-58ET from Omega to MINSA dated 28 Nov. 2014 (C-0635).

[379] Letter No. MUPA-5-09-14 from the Omega Consortium to City Hall dated 15 Sept. 2014 (C-0235).

[380] Email Chain between Frankie López and Betty Galvez (from the Municipality of Panama) dated 1 October 2014 (C-0689); López ¶ 136.

[381] Email Chain between Frankie López and Betty Galvez (from the Municipality of Panama) dated 26 Nov. 2014 (C-0691).

"the Municipality was willing to give Omega a 239-day extension."[382] This is false.

126. *First*, and as explained above, simply because a contractor requests an extension of time, does not automatically imply that the delay is attributable to the contractor. Rather, a contractor must evidence the reasons for the request, the Government Agency then evaluates the reasons for the time extension request to determine whether they are attributable to the contractor.[383] *Second*, the delay in this Project was the result of a series of issues that were exclusively under Respondent's control, such as the decision to suspend work on the Juan Diaz Market and the refusal of the Ministry of Housing to grant the required Soil Use Certificate even though the Omega Consortium had duly complied with all the requirements.[384] None of these issues were attributable to the Omega Consortium. *Third*, and importantly, Respondent omits that the new Mayor of Panama City (José Blandon), appointed by the Varela Administration and an outspoken supporter of the President, had told the Omega Consortium in July 2014 that he did not want the Project completed because he preferred a warehouse instead of a market at the site originally contemplated in the Contract and disapproved of the Projects because they were part of the Martinelli Administration.[385] But, Mayor Blandon could not change the purpose of the land so long as the Contract was in place, so the easiest way to achieve his wishes was to let the Contract expire (which would happen on 2 September 2014 without an extension) and get rid off the Omega Consortium and the Project.

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[382] Resp.'s Counter-Mem. ¶ 150.

[383] Law 22 (C-0280 resubmitted), arts. 81 (explaining that contractors have a right to time extensions when the delays are *not attributable to the contractor or are caused by force majeure or unavoidable unforeseen events*); *see* Executive Decree No. 40 dated 10 Apr. 2018 (C-0572), art. 170 (explaining that Government Agencies have five days to approve or reject time extension requests).

[384] *See infra* § V.B.3; López § VII.4.

[385] López ¶ 140.

127. Despite this, and through March 2015, the Omega Consortium continued to follow up with the Municipality of Panama to solve pending issues related to the Project, including the endorsement of the Change Order, but it never received a response.[386] And, unfortunately the Comptroller General's Office never endorsed the Change Order,[387] which Respondent also neglects to mention.[388]

c. Unidad Judicial La Chorrera Contract

128. The Omega Consortium also actively worked to get a time extension in the La Chorrera Contract.[389] Change Order No. 2 to the La Chorrera Contract was agreed and approved in May 2014.[390] Change Order No. 2 went to the Comptroller General's Office for endorsement on 21 August 2014.[391] And, although this Change Order was eventually endorsed by the Comptroller General, the process took *seven months*—far longer than the thirty days Mr. Bernard Veliz states it

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[386] Email Chain between Frankie López and Betty Galvez and Guillermo Bermudez (MoP) dated 3 Mar. 2015 (C-0693).

[387] Email Chain between Francisco Feliu and Frankie López dated 31 Dec. 2014 (C-0692). One of the reasons given by the Comptroller General's Office to reject the endorsement of the change order was that it needed an explanation of the future of the Juan Diaz Market Project, information that, of course, was beyond the Omega Consortium's knowledge. *See* Memorandum No. 1360-15-LEG-F.J.PREV. from Jaime Perez to Arnulfo Him dated 4 Mar. 2015, at #7 (C-0741).

[388] Resp.'s Counter-Mem. ¶ 150.

[389] Change Order No. 2 to the La Chorrera Contract was agreed to between the Omega Consortium and the Judiciary in light of delays that were not attributable to the Omega Consortium, including (1) processing additional documentation for the approval of the Environmental Impact Study by ANAM, (2) 18 days of rain, (3) delays in the collection of Payment Application No. 6, (4) design modifications in the AC system, and (5) national strike by SUNTRACS. *See* López ¶ 98.

[390] Cls' Mem. ¶ 80 (explaining that "by May 2014, the Omega Consortium and the Judiciary had agreed on Addendum No. 2 to the La Chorrera Contract"); Letter from the Omega Consortium to the Judiciary dated 27 Nov. 2014 (C-0366) ("By this means, we inform you that due to the lack of endorsement of Addendum No. 2, by extension of time of 260 calendar days, **which has been evaluated and approved by the Judicial Body since May 2014**, has prevented us from processing accounts for progress of work since July 2014.") (emphasis added).

[391] Letter No. 1211/S.A./2014 from the Judicial Authority to the Comptroller General dated 21 Aug. 2014 (R-0073).

should take,[392] or the two months Respondent claims it took.[393]

129. Ms. Vielsa Ríos, the Administrative Secretary of Panama's Supreme Court, confirms that Change Order No. 2 was sent to the Comptroller General's Office on 21 August 2014.[394] As Respondent is well aware, a Change Order is not sent to the Comptroller General until the parties (*i.e.*, the relevant Government Agency and the contractor) have agreed on the terms and have signed the Change Order. Ms. Ríos also confirms that when Change Order No. 2 was sent to the Comptroller, it had been signed by the Judiciary and the Omega Consortium.[395] Respondent's argument is therefore temporally impossible: if Change Order No. 2 was signed *before* 21 August 2014—as Respondent's own witness and contemporary documents state—it could not have been signed in October 2014, as Respondent claims.[396]

130. Ms. Ríos also acknowledges that the Comptroller General returned the Change Order on 2 October 2014 requesting that the Judiciary include a new payment schedule because the extension moved the ending date of the Contract to a new fiscal year (an issue not attributable to the Omega Consortium), and the Change Order was then ***re-signed*** by the parties on 24 October 2014 and ***re-sent*** to the Comptroller General for endorsement.[397]

131. Respondent's assertions are therefore both disingenuous and a mere distraction from

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[392] Veliz ¶ 15.

[393] Resp.'s Counter-Mem. ¶ 36. To justify this patently unreasonable delay, Respondent misrepresents the evidence and argues that Change Order No. 2 was signed on 24 October 2014 and endorsed by the Comptroller General on 23 December 2014, making it seem as though the endorsement process took only two months. Resp.'s Counter-Mem. ¶¶ 25-26. This is incorrect, and Respondent's witness, Ms. Ríos, as well as the documents demonstrate it.

[394] Ríos ¶ 25.

[395] *Id*. ¶ 25.

[396] Letter from the Omega Consortium to the Judiciary dated 27 Nov. 2014 (C-0366), at 1.

[397] Ríos ¶ 25.

the fact that the Comptroller General's Office was either unreasonably delaying or refusing endorsements on Change Orders related to the Omega Consortium's Projects.

5. *The Comptroller General's Office Refuses to Endorse Payment Requests for Work Completed and Approved by the Respective Government Agencies*

132. Not content with scuttling the pending Change Orders needed to maintain the validity of Claimants' Contracts, the Panamanian Government also decided to cut the flow of funds to the Omega Consortium by refusing to make payments that had already been earned and approved by the respective Government agencies and were waiting for endorsement by the Comptroller General when President Varela took office.[398]

133. The payment method of the Omega Projects varied depending on the type of contract. For owner-financed contracts (*e.g.*, Mercado Público de Colón, Unidad Judicial La Chorrera, Municipality of Colón, and Municipality of Panama),[399] the Omega Consortium would file a payment application with the respective Government agency, which would either query the invoice or grant approval. Upon issuance of Government agency approval, the Comptroller-General would then proceed to review the invoice and, if satisfied, endorse it.[400]

134. The mechanism for payment for the MINSA CAPSI Contracts was different and required several approvals. Each month the Omega Consortium was required to issue a Progress Certificate for each Contract, which would then be certified by the Ministry of Health's project inspectors.[401] This Certificate had to be approved by Ministry of Health officials and then by the

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[398] Cls' Mem. ¶ 74.

[399] *Id.* ¶ 55.

[400] *Id.*

[401] *Id.* ¶ 56.

Comptroller General's Office.[402] Upon approval of the Certificate, the Ministry of Health had to issue a Certificate of No Objection ("**CNO**"). The CNO was then sent to the Comptroller General's Office for endorsement.

135. The payment mechanism in the Ciudad de las Artes Contract was similar to the one used in the MINSA CAPSI Contracts. The one difference was that instead of issuing a CNO, the INAC would issue a Certificate of Partial Payment ("**CPP**"). The process for obtaining a CPP was similar to that required to obtain a CNO, with both the INAC and the Comptroller General required to provide an initial sign off on the Omega Consortium's payment requests, and then a subsequent endorsement by the Comptroller General's Office was required.[403]

136. But, irrespective of the payment mechanism used by a particular Contract, all required as a final step (at the very least) the endorsement of the payment applications by the Comptroller General's Office. Without this endorsement, payment could not be issued on completed work—whether through direct payment, a CNO, or a CPP. And, so, the Comptroller General was the gatekeeper for all payments to the Omega Consortium and the point where the Government could effect the most significant and devastating financial damage.[404]

137. Respondent does not deny that the Comptroller General refused to endorse nearly all of the payment applications for work already completed by the Omega Consortium in all of its

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[402] *Id*.

[403] Cls' Mem. ¶ 57

[404] Pérez ¶ 53 at 55 (explaining that "[s]ince the Comptroller General has oversight authority over all government contracting, using it to delay payments and to impose additional scrutiny would be consistent with an attempt to derail certain contracts").

Projects.[405] In fact, this is confirmed by Respondent's damages expert.[406] Respondent argues that this is irrelevant, however, because (according to Respondent) the Omega Consortium was overpaid and thus owes money to the Panamanian Government.[407] This is preposterous and an affront to the long-held principle of *pacta sunt servanda*.

138. With respect to the Municipality of Colón Contract, Respondent admits that the Comptroller General did not endorse Payment Applications No. 3 and 4 and, therefore, that these were not paid to the Omega Consortium.[408] The Payment Applications were submitted on 3 June 2014 and on 1 November 2014, respectively.[409] Respondent nevertheless argues that it is Claimants who owe money to the Panamanian Government because the Municipality of Colón made an advance payment to Claimants.[410] But both the advance payment ***and*** the later payment applications *were required by the Contract*. Nothing about the contractually required advance payment exonerates Respondent from its contractual obligation to also pay for the work performed by the Omega Consortium.[411]

139. Respondent also contends that it is Claimants' fault that Payment Applications No. 1 through 8 of the Municipality of Panama Contract were not paid to the Omega Consortium.[412] It

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[405] *See generally, e.g.*, Flores Appendix B.

[406] *Id*.

[407] Resp.'s Counter-Mem. ¶¶ 103-04, 262.

[408] McKinnon 1, Annex 1, p. 22.

[409] Resp.'s Counter-Mem. ¶ 131; McKinnon 1, Annex 1, p. 22.

[410] Resp.'s Counter-Mem. ¶ 131.

[411] *See* Rivera 2 ¶ 38; Contract No. 043 (2012) dated 17 Aug. 2012 (C-0034), cl. 7.

[412] McKinnon 1, Annex 1, p. 24.

attempts to support this contention by asserting that Claimants presented designs that were not capable of being approved by the Comptroller General's inspectors,[413] but these Payment Applications had already been approved by the *Municipality's* inspectors.[414] Respondent also argues that the Omega Consortium did not secure required certificates, including the Soil Use Certificate from the Ministry of Housing.[415] But, as explained above, the "Soil Use Certificate" could only be issued by the Ministry of Housing, which inexplicably failed to do so.[416] This is additional evidence of the Panamanian Government acting through coordinated Ministries and Agencies to give Claimants the run-around

140. With respect to the MINSA CAPSI Contracts, Payment Applications No. 15, 16, and 17 of the Rio Sereno Contract were presented on 31 October 2014.[417] They were received, signed, and stamped by the Ministry of Health.[418] Nonetheless, they were *never* endorsed by the Comptroller-General's Office.[419] Reasons for the Comptroller General's refusal to endorse the remaining CNOs

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[413] Resp.'s Counter-Mem. ¶ 140.

[414] Project Report DEYD-1220-79-14, undated (C-0695); Note. No. MUPA 15-04-15 from Omega to the Municipality of Panama dated 16 April 2015 (C-0568), at 2.

[415] Resp.'s Counter-Mem. ¶ 140.

[416] The Certificate was requested in June 2014, and three months later the Omega Consortium warned the Secretary General of the Office of the Mayor that the certificate was not progressing. Later, in January 2015, the Omega Consortium had a meeting with the Mayor's Office where the Omega Consortium expressed its concerns regarding the lack of progress of the Certificate of Soil Use. A follow-up note was sent after the meeting, on 20 February 2015. The Omega Consortium sent another letter on 8 April 2015 requesting the issuance of the Certificate, but despite sending follow up letters on 14 April, 23 April, 30 April, 8 May, 20 May and 1 June 2015, the Omega Consortium never received a response. López ¶ 125. *See also infra* § V.B.3; López ¶¶ 142-46.

[417] Invoice - Payment Application Rio Sereno (C-0255).

[418] *Id.*

[419] Thus, no CNOs were issued for these payment applications. During the Varela administration, the Comptroller General's Office only endorsed CNO No. 15 (corresponding to Payment Application No. 14), but it did so on 26 March 2015, one year after the CNO was signed and *two years* after the Omega Consortium completed the works for which it was getting paid, and only after the Omega Consortium requested assistance from the Minister of Health. *See* Certificates of No Objections for Contract No. 077 (2011) (C-0252), at 71; Letter No. MINSA-56 from Omega to MINSA

have never been provided to Claimants, and as such the only inference that can be drawn is that they fell victim to President Varela's vendetta.

141. Payment Applications No. 20, 24, and 25 of the Kuna Yala Contract were likewise never endorsed by the Comptroller General.[420] Payment Application No. 20 was sent back to the Ministry of Health based on mere pretext, such as a clerical error regarding the number of a letter in the Payment Application, despite the fact that the Comptroller General's financial division had already given the Payment Application the green light.[421] Payment Applications Nos. 24 and 25 were simply never signed by the Comptroller General's Office and never paid.[422]

142. Payment Applications No. 19, 20, 21 and 22 of the Puerto Caimito Contract were also never paid to the Omega Consortium.[423] The last three were signed by the Omega Consortium but were never signed by the Ministry of Health or the Comptroller General's Office.[424] On 23 January 2015, the Comptroller General, Mr. Humbert Arias, informed the Minister of Health that CNO No. 20 (corresponding to Payment Application No. 19) did not comply with Executive Decree No.

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dated 20 Jan. 2015 (C-0583). The CNO was signed on 29 April 2014, and it corresponded to the works completed from 1 December 2013 through 30 December 2013.

[420] McKinnon 1, Annex 1, p. 9.

[421] Letter No. 5053-2014-DFG-UCEF from the Comptroller General to the Minister of Health dated 16 September 2014 (C-0682) (stating "[c]orrect the first paragraph of the Medical Equipment Application since it mentions Note No. 3358-2014-DFG-UCEF instead of Note No. 3359-2014-DFG-UCER"); Memorandum No. 1056-2015 from the Comptroller General Office dated 26 Feb. 2015 (C-0696) ((stating "[b]ased on point two, the document proceeds in budgetary terms"); Note No. 2785-15 DFG from the Comptroller General to the Minister of Health dated 20 Apr. 2015 (C-0697) (stating "we inform you that you should submit a list with the medical certificated related to the technical specifications of the biomedical equipment, and identify where is that equipment located").

[422] Although CNOs No. 21, 22, and 23 of the Kuna Yala Project were issued after President Varela took office, their expiration dates were so close to the issuance date that the Omega Consortium could not cash them, as the bank reserved its right to cash the CNOs if the expiration date was imminent. López ¶ 116. In addition, these three CNOs were comparatively quite small.

[423] McKinnon 1, Annex 1, p. 12.

[424] Payment Applications for Contract No. 085 (2011) (C-0271), at 265-86.

1433.[425] The previous year, however, on 26 May 2014 (before President Varela was inaugurated), the former Comptroller General, Ms. Bianchini, explicitly said that the same CNO *did comply* with Executive Decree No. 1433.[426] This shows, once again, that the observations made by the new Comptroller General were mere pretexts to avoid paying the Omega Consortium.

143. A similar fate befell the Payment Applications submitted to the Comptroller General relating to the Ciudad de las Artes Project. Payment Applications No. 12 through 19 (corresponding to CPPs No. 13 through 20) were presented between May and December 2014 and received all required signatures, but they were never endorsed by the Comptroller General.[427] On 13 October 2014, Mr. Lopez informed the INAC Director that the Omega Consortium was owed US$ [redacted] at that time and that the Project was in need of additional cash flow.[428] The INAC replied to this email on 23 October 2014 stating that the CPPs were being evaluated.[429] Nonetheless, the CPPs were never approved, and the Omega Consortium never heard back from the INAC or the Comptroller General's Office.

144. In what was a final blow to Claimants ability to ever collect payment on work it had *already* performed, and which *already* had been approved by the relevant Government agency, the Panamanian Government refused to issue payments and endorsements until the Omega Consortium submitted a "Certificate of Good Standing" ("*Paz y Salvo*").[430] But this Certificate can be issued only

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[425] Note No. 1809-15-DFG from the Comptroller General to the Minister of Health dated 23 Jan. 2015 (C-0601).

[426] Letter No. 2667-2014-DFG-UCEF from the Comptroller General's Office to the Minister of Health dated 26 May 2014 (C-0698).

[427] McKinnon 1, Annex 1, p. 17.

[428] Email between Frankie López and Mariana Nunez dated 13 Oct. 2014 (C-0699).

[429] Letter DG/149 from INAC to the Omega Consortium dated 23 Oct. 2014 (C-0074 resubmitted).

[430] Letter No. FL-06-015 from the Omega Consortium to the Director of Caja de Seguro Social dated 15 June

when companies do not have any debts with the Social Security Administration ("*Caja de Seguro Social*") or other tax authorities. The Comptroller General's refusal to pay the Omega Consortium for over a year on virtually all of its Contracts naturally injured Claimants' cash flow to the point that they were illiquid, and the Omega Consortium thus owed the Social Security Administration just under US$ [redacted].[431] The Omega Consortium tried to work with the different Government agencies, including the Social Security Administration, to find ways of resolving the debt and obtaining the Certificate of Good Standing. On 15 June 2015, the Omega Consortium sent a letter to the Social Security Administration explaining that, because the Government had not made a payment for over a year for completed work and owed the Omega Consortium *over US$* [redacted] in completed work, the Omega Consortium was unable to pay its Social Security debt (which was at most 1.5% of the money the Government owed the Omega Consortium at the time) and had even been forced to reduce the work force.[432] The Omega Consortium explained that the Ministry of Economy and Finance only needed the Certificate of Good Standing to issue a payment on the La Chorrera Contract and that, once this was issued, the Omega Consortium could begin paying the Social Security Administration.[433] But, the Omega Consortium's requests to the Social Security Administration fell on deaf ears; there was to be no relief for Claimants from President Varela's Government.

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145. In sum, the Panamanian Government, acting through the Comptroller General, created

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2015 (C-0556); [redacted]

[431] Letter No. FL-06-015 from the Omega Consortium to the Director of Caja de Seguro Social dated 15 June 2015 (C-0556).

[432] *Id.*

[433] *Id.*

a vicious cycle where refusals to approve payments and change orders slowly strangled the Omega Consortium, eroding its liquidity and preventing it from continuing to work on the Projects. Unfortunately, there was no way out of the cycle; the Government's destructive attitude extended to each of the Government Agencies involved in the Projects and beyond.

B. The Government's Attitude Towards Claimants Began to Deteriorate Almost Immediately After the Heads of Each of the Government Agencies Changed to Varela Appointees

146. Prior to the change in Administration, the Government agencies with which the Omega Consortium interacted on a day-to-day basis had a cooperative attitude toward the Projects and the Omega Consortium. By way of example, Mr. Barsallo (from MINSA) affirms that "the Ministry consistently worked with Omega."[434] And, this is true—prior to July 2014, any issues with the Projects were typically and amicably resolved. This spirit of cooperation disappeared once President Varela took office. The Varela Administration began replacing not just the head of each Government agency, but also many of the technical staff, with Varela supporters and party loyalists. Soon thereafter it became clear that the Government's attitude towards the Omega Consortium and its Projects was no longer congenial.

147. Respondent claims, however, that it was the Omega Consortium's conduct that shifted in early October 2014.[435] Respondent attempts to connect the alleged change in the Omega Consortium's "conduct" with the time when the Moncada Luna investigation became public and accuses Claimants of fleeing the country in response. This is simply false.[436] As explained above,

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[434] Barsallo ¶ 38.

[435] Resp.'s Counter-Mem. ¶ 34.

[436] López ¶ 97.

the accusation that Claimants "fled" Panama in early October 2014 (or at any time for that matter) is not only unsubstantiated but also clearly refuted by the evidence.[437] Claimants' "conduct" never shifted. Until as late as October 2015, Claimants were still trying to work with the Government to find solutions to the problems and continue work on the Projects.[438] But, despite Claimants' best efforts, Respondent was simply not willing to work with Claimants during the Varela Presidency.

1. *The MINSA CAPSI Contracts*

148. The MINSA CAPSI Contracts and the change in MINSA's conduct towards the Omega Consortium and the Projects after July 2014 are representative of the attitude shift that took place in ***all*** of the Government agencies once the Varela Administration took office. As mentioned above, prior to the Varela Administration, the Ministry of Health, including Mr. Barsallo, always engaged in a collaborative way with the Omega Consortium to ensure that the Omega Consortium had "adequate time to complete the health clinics."[439] Even when there were disagreements, problems, or delays, there was never a reason to doubt that MINSA and the Omega Consortium were working together toward the same goal: successfully completing construction of the three health clinics.[440] This collaborative attitude changed immediately after President Varela took office.

149. Before discussing MINSA's change in attitude, it is worth clarifying again that an

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[437] *See supra* § II.B; *see also* López § VIII; Rivera 2 ¶¶ 12-13.

[438] López ¶ 157; *see also, e.g.*, Letter No. Sosa-04-A-2014 from Omega to Sosa dated 11 Nov. 2014 (C-0624); Letter No. INAC-N18-2014 from Omega to INAC dated 21 Nov. 2014 (C-0599); Letter No. INAC-022 from Omega to INAC dated 16 Mar. 2015 (C-0605); Letter from the Omega Consortium to City Hall of Panama dated 8 Apr. 2015 (C-0184); Letter No. P007-064 from the Omega Consortium to the Judiciary dated 10 Aug. 2015 (C-0246); Letter No. P007-066 from the Omega Consortium to the Judiciary dated 28 Sep. 2015 (C-0247); Letter from Omega to Judicial Authority in response to Nota: 2015 10 29-P007-067 Proposal of Addendum No. 3 dated 29 Oct. 2015 (R-0081).

[439] Barsallo ¶ 38; Resp.'s Counter-Mem. ¶ 61, first bullet.

[440] *See supra* § III.B.1; López ¶ 46.

extension of time in the form of a change order is not something that the MINSA, or any other Government agency, could approve merely as a way to "accommodate" or be "generous" towards the Omega Consortium.[441] Instead, time extensions should have been granted only when the reasons for the delay were not attributable to the Omega Consortium.[442] This is stipulated in Panama's Public Contracting Law, and it is not subjective.[443]

150. Respondent's Counter Memorial is laden with insinuations of MINSA's and the other Government agencies' alleged "generosity." This is, therefore, misleading at best. None of the extensions of time granted to the Omega Consortium were for delays attributable to the Consortium, and Respondent has not shown otherwise. This is indicative of the lack of candor with which Respondent has approached this arbitration.

151. Returning to MINSA's change in attitude towards Claimants, the record shows that after July 2014, MINSA's response to the Omega Consortium's communications became much slower and, in many instances, non-existent. For example, in September 2014, the Omega Consortium submitted a letter to MINSA with respect to a three-phase line that had to be installed in the Kuna Yala project. But by the end of October 2014, the Omega Consortium still had not received a response from MINSA.[444] Also, in January 2015, the Omega Consortium responded to a request from MINSA proposing to carry out an evaluation and update of the progress in each Project.[445] For

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[441] *See* Barsallo ¶¶ 29-30; Resp.'s Counter-Mem. ¶¶ 28-29, 31, 61, 89. 290; *see* Ríos ¶¶ 22-24.

[442] Law 22 (C-0280 resubmitted), arts. 81, 109; Executive Decree No. 40 dated 10 Apr. 2018 (C-0572), arts. 170, 171; *see also supra* n.383.

[443] *Id*.

[444] Letter No. MINSA-KY-82 from Omega to MINSA dated 28 Oct. 2014 (C-0575).

[445] Letter No. 007-DI-DIS-2015 from the Ministry of Health to Omega dated 2 Jan. 2015 (R-0095).

this, the Omega Consortium submitted an execution schedule, a breakdown by activity, and a projected cash flow,[446] but, once again, MINSA *never* responded.

152. Further, after the Change Orders signed on 7 May 2014 expired due to the Comptroller General's refusal to endorse them,[447] the Omega Consortium requested from MINSA three new Change Orders to extend the three MINSA CAPSI Contracts.[448] These Change Order requests were crucial to the Omega Consortium because, as explained by Mr. Barsallo, "if a contractor has requested an extension of time and the completion date passes while that extension is under review, the contract will be deemed to have expired. As a result, the contractor will not be able to have CNOs [for payment] processed for work conducted after the completion date."[449] Willfully disregarding this critical situation, MINSA, once more, simply did not to respond to Claimants' requests at all.

153. Not having those Change Orders put the Omega Consortium in an extremely difficult position because, as explained by Mr. Barsallo, it prevented the Omega Consortium from obtaining payment for their services. Nonetheless, the Omega Consortium continued to attempt to work with MINSA to complete the MINSA CAPSI Projects and submitted a "Project Completion Plan" for each of the them.[450] The proposal included the caveat that it was impossible to state an exact date for completion until a payment plan and the Contracts' extensions had been resolved.[451] Initially,

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[446] Letter MINSA-RS-63 dated 16 Jan. 2015 (R-0096).

[447] *See supra* Section § V.A.4.a.

[448] Letter No. MINSA-56 from Omega to MINSA dated 20 Jan. 2015 (C-0583).

[449] Barsallo ¶ 19.

[450] López ¶ 109; Letter No. MINSA-PC-56 from Omega to MINSA dated 11 Sep. 2014 (C-0581); Letter No. MINSA-PC-56 from Omega to Ministry of Health dated 11 Sept. 2014 (R-0094).

[451] López ¶ 109; Letter No. MINSA-PC-56 from Omega to MINSA dated 11 Sep. 2014 (C-0581); Letter No. MINSA-PC-56 from Omega to Ministry of Health dated 11 Sept. 2014 (R-0094).

MINSA seemed interested in resolving the situation, but it quickly lost interest. By the end of October 2014, without valid Contracts and eleven pending payment applications,[452] the Omega Consortium had no other option but to reduce its personnel, and it notified MINSA of this fact.[453] On previous occasions, when the Omega Consortium had to temporarily reduced personnel, it had never been a problem.[454] But in the post-Varela world, this reduction in personnel was allegedly deemed by MINSA to constitute the Omega Consortium's abandonment of the Projects.[455] This assertion cannot be reconciled with the letter the Omega Consortium sent to MINSA, which plainly refers to a *reduction* of personnel, and not to "stop[ing] work altogether in October of 2014," as Respondent claims.[456] In any event, further attempts to contact MINSA into 2015 also went ignored.[457] It was by then clear to the Omega Consortium that MINSA's attitude towards the Projects had fundamentally changed. And even though the Omega Consortium had every intention to fully reinitiate work, it could not do so without a commitment from MINSA and the Comptroller General's Office that future payments would be made.

154. The Omega Consortium's general suspicion that MINSA no longer intended to work

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[452] López ¶¶ 109, 144; Letter No. MINSA-54 from the Omega Consortium to the Ministry of Health dated 31 Oct. 2014 (C-0173).

[453] López ¶ 114; Barsallo ¶ 27

[454] *Cf.* Barsallo ¶ 27 (explaining that the Omega Consortium reduced the work force, but not alleging that this was a breach or an otherwise wrongful action).

[455] See Resp.'s Counter-Mem. n.174.

[456] *Id*. ¶ 77.

[457] López ¶ 109; Letter No. MINSA-KY-82 from Omega to MINSA dated 28 Oct. 2014 (C-0575); Letter No. MINSA-KY-83-ET from the Omega Consortium to the Ministry of Health dated 28 Nov. 2014 (C-0175); Letter No. MINSA-56 from Omega to MINSA dated 20 Jan. 2015. As noted above, the Omega Consortium and MINSA did manage to finalize a change order related to changing the medical requirement for the Rio Sereno facility, but that was the only thing that they were able to agree on during this period. *See* Addendum No. 4 to Contract No. 077 (2011) dated 17 Nov. 2014 (C-0249).

with it on the MINSA CAPSI Projects was at least partially confirmed in July 2015 by [redacted][458] According to Terrientes and Diaz, they would not complete the project because (1) there was no medical or administrative staff to attend the facility; (2) the community did not express any interest in using this facility and, on the contrary, they wanted to continue using health centers of the islands; (3) access to electricity was crucial and costly; and (4) it was not viable to move the regional staff to the new location.[459]

155. In October of 2015, the Omega Consortium notified MINSA that it was, by then, owed more than US$ 1.4 million for the Rio Sereno and the Kuna Yala Projects,[460] but, once again, this communication was ignored. In the end, the Omega Consortium was forced to release employees and allow the bonds to expire as a direct result of the lack of payment for the work it had performed on the MINSA-CAPSI Projects.[461] In short, it was MINSA, not Omega, that abandoned the three Projects once President Varela came to power.[462]

2. *The Unidad Judicial La Chorrera Contract*

156. The Judiciary's attitude towards the Omega Consortium likewise drastically changed after the Varela Administration took over. In fact, even Respondent admits that *before* July 2014 this

[458] [redacted]

[459] *Id.*

[460] Letter No. MINSA-60 from Omega to MINSA dated 27 Oct. 2015 (C-0588); López ¶ 116.

[461] López ¶ 117.

[462] *Id.*

Project was progressing as expected, save for some delays that are common in the construction industry, and that the Omega Consortium was receiving payment for work completed and approved by the Judiciary.[463]

157. The first sign of trouble became evident during the negotiation of Change Order No. 2, which had been approved and signed by the Judiciary in May 2014.[464] *First*, contrary to what Respondent alleges, the Judiciary did not agree to the extension of time out of sheer generosity.[465] Instead, it did so because the delays in question were not attributable to the Omega Consortium.[466] *Second*, Change Order No. 2 to the La Chorrera Contract had to be *re-signed* in October 2014,[467] after the Omega Consortium sent repeated (unanswered) letters[468] to the Judiciary to request support for the endorsement of the Change Order, because, as noted above, the Comptroller General refused to endorse it initially.

158. Despite the silence from the Judiciary and the fact that the La Correra Contract had by then expired, the Omega Consortium continued to work diligently on the Project (as it had always done) between July 2014[469] and mid-December 2014.[470] Eventually, however, this became an

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[463] *See* Resp.'s Counter-Mem. ¶¶ 25, 28-30.

[464] Cls' Mem. ¶ 80 (explaining that "by May 2014, the Omega Consortium and the Judiciary had agreed on Addendum No. 2 to the La Chorrera Contract"); Letter from the Omega Consortium to the Judiciary dated 27 Nov. 2014 (C-0366) ("By this means, we inform you that due to the lack of endorsement of Addendum No. 2, by extension of time of 260 calendar days, **which has been evaluated and approved by the Judicial Body since May 2014**, has prevented us from processing accounts for progress of work since July 2014.") (emphasis added).

[465] Resp.'s Counter-Mem ¶ 28.

[466] *See supra* ¶ 127.

[467] Change Order No. 2 to Contract No. 150/2012 dated 24 Oct. 2014 (R-0008).

[468] Letter from the Omega Consortium to the Judiciary dated 27 Nov. 2014 (C-0366).

[469] Expiring date of the Original Contract. *See* Contract No. 150/2012 dated 22 Nov. 2012 (C-0048 resubmitted).

[470] Day of endorsement of Addendum No. 2 to Contract No. 150/2012. *See* Addendum No. 2 to Contract

untenable situation that took a toll on the Omega Consortium and the advancement of the Project. Thus, on 17 December 2014, the Omega Consortium informed the Judiciary that it was forced to reduce its workforce because Change Order No. 2 (after its re-signing) was still not endorsed and thus payment applications could not be processed.[471] Only after this, on 23 December 2014, did the Government endorse Change Order No. 2.[472] And, true to its word, once the Omega Consortium was notified of the endorsement on 13 January 2015,[473] it reinitiated construction.[474]

159. But the Judiciary's support for the La Chorrera Project completely evaporated only two months later. On 11 March 2015, the Judiciary informed the Omega Consortium of its intention to unilaterally terminate the La Chorrera Contract, allegedly because the Omega Consortium had failed to comply with its obligations.[475] That allegation, however, was absolutely false. The Omega Consortium immediately responded to the Judiciary's letter, on 18 March 2015, explaining: (1) that the termination was not valid because the delays involved were attributable to the Judiciary; and (2) that the Omega Consortium's intention was to complete the Project upon issuance of pending plans, payments, and Contract extensions.[476] It is also misleading to say, as Respondent does, that the Omega Consortium replied to the Judiciary's termination letter by simply threatening the initiation of

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150/2012 dated 24 Oct. 2014 (R-0008).

[471] Letter from the Omega Consortium to the Judiciary dated 27 Nov. 2014 (C-0366).

[472] Letter No. 1093/DALSA/2014 from Judicial Authority to Omega dated 23 Dec. 2014 and received by Omega on 13 Jan. 2015 (R-0079).

[473] Addendum No. 2 to Contract 150/2012 dated 24 Oct. 2014 (R-0008).

[474] 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 12 Jan. 2015 (R-0011); López ¶ 98.

[475] Note No. P.C.S.J./604/2015 from the Judiciary to Oscar I. Rivera Rivera dated 11 March 2015 (R-0013).

[476] López ¶ 100; Letter Responding to N. P.C.S.J./604/2015 from the Judicial Authority to Omega dated 18 Mar. 2015 (R-0015 resubmitted).

an ICSID arbitration.[477] To the contrary, the Omega Consortium replied with a sixteen-page letter covering the background of the Contract and the circumstances that affected its execution, including the delays caused by the Judiciary.[478] A lone paragraph in the closing section of the letter mentioned a potential ICSID arbitration, but *only* if the parties were unable to reach a "fair and equitable agreement."[479] Far from a threat, this letter was an attempt by the Omega Consortium to persuade the Judiciary to work together with it to restart work on the Project.

160. In response, the Judiciary decided to temporarily suspend its decision to terminate the La Chorrera Contract and offered the Omega Consortium an extension of two hundred and two days,[480] surely knowing that this would be insufficient as it did not address (let alone solve) the lack of payment on the Contract. This extension therefore was neither a second chance nor a good faith resolution from the Judiciary, contrary to Respondent's current claims.[481] In fact, the Judiciary's Director of General Services acknowledged that the arguments raised in the termination resolution were wrong and issued a technical report on 17 April 2015 confirming that the Judiciary was responsible for (1) failure to provide the Omega Consortium with a copy of duly approved plans, (2) failure to make the payments owed to Omega, and (3) mistakes made in the process of approving plans.[482]

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[477] Resp.'s Counter-Mem. ¶ 39.

[478] López ¶ 100; Letter Responding to N. P.C.S.J./604/2015 from the Judicial Authority to Omega dated 18 Mar. 2015 (R-0015 resubmitted).

[479] López ¶ 101; Letter Responding to N. P.C.S.J./604/2015 from the Judicial Authority to Omega dated 18 Mar. 2015 (R-0015 resubmitted).

[480] Note No. P.C.S.J./746/2015 from the Supreme Court of Justice to Oscar I. Rivera Rivera dated 25 March 2015 (R-0248). *See also* Ríos ¶ 32.

[481] Resp.'s Counter-Mem. ¶ 41.

[482] Note No. 366/DSG/2015 from the General Services Department to the Director of Legal Advising of the

161. During the following months, the Omega Consortium tried to resolve its issues with the Judiciary,[483] but the most important ones, related to the Change Order, could not be resolved. The Judiciary proposed a new change order, Change Order No. 3, but the terms were unacceptable to the Omega Consortium since they did not address key budgetary, technical, and physical issues.[484] This was a *sine qua non* for the Omega Consortium because an extension of time was useless without payment, plans, and permits to continue construction. Unfortunately, the Judiciary ignored and rejected the Omega Consortium's concerns and sent the same draft Change Order several times,[485] merely changing the length of the extension and requesting that the Omega Construction renew the bonds.[486] In response, the Omega Consortium took the time to—once again—express its concerns with the Project and the proposed Change Order.[487] But instead of engaging in any sort of meaningful discussion, the Judiciary simply gave the Omega Consortium the run-around.[488]

162. The Omega Consortium dealt with the Judiciary in good faith at all times, always

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Judiciary dated 17 April 2015 (R-0016), at 2; López ¶ 102.

[483] Letter No. P007-062 from the Omega Consortium to the Judiciary dated 1 Apr. 2015 (C-0244) (asking whether the remaining issues related to construction plans and delayed payments could be resolved); Letter from the Omega Consortium to the Judiciary dated 6 Apr. 2015 (C-0245) (requesting a meeting with the Judiciary to resolve pending issues); Letter No. P007-064 from the Omega Consortium to the Judiciary dated 10 Aug. 2015 (C-0246) (requesting a 380-day extension to the contract, citing the lack of approved plans, rain days, lack of contract endorsement by the Comptroller General, and delays in obtaining necessary permits).

[484] Letter No. P007-066 from the Omega Consortium to the Judiciary dated 28 Sept. 2015 (C-0247); *see also* López ¶ 95. It should be noted that "Addendum No. 3" and "Change Order No. 3" refer to the same document.

[485] López ¶ 95. In August 2015, the Omega Consortium presented its concerns to the Judiciary once again, but these were completely ignored when Addendum No. 3 was sent in September of 2015. Letter No. P007-064 from Omega to the Judicial Authority dated 10 Aug. 2015 (C-0246); López ¶ 97.

[486] Letter No. 899/DALSA/2015 from the Judiciary to Omega dated 11 Sept. 2015 (C-0571); López ¶ 103.

[487] Letter No. P007-066 from the Omega Consortium to the Judiciary dated 28 Sept. 2015 (C-0247); López ¶ 104.

[488] Letter from Omega to Judicial Authority in response to Nota: 2015 10 29-P007-067 Proposal of Addendum No. 3 dated 29 Oct. 2015 (R-0081); López ¶ 105.

trying to resolve whatever problem arose and to continue working on the Project. It is incorrect that "Omega indicated that it would execute Addendum No. 3 and renew the bonds," but then failed to do so, as Respondent claims.[489] Rather, as the contemporaneous documents show, the Omega Consortium requested the draft of Change Order No. 3 to "review it *before* the Consortium's representative signs."[490] The Omega Consortium therefore never communicated to the Judiciary that it had decided to sign the Change Order, nor did it guarantee that it would renew the bonds.[491] In fact, the Omega Consortium explained to the Judiciary that the Change Order was being reviewed by the bonding company.[492]

163. In the end, by October 2015, this fruitless process had gone on for so long that the Omega Consortium could not continue; it was owed over US$ 20 million by the Panamanian Government for work performed; it no longer had cash flow; and the few payments made by the Judiciary were not delivered to the Omega Consortium, but rather seized to pay alleged debts to the Government.[493] All of this made it evident that the Judiciary's attitude towards Claimants had completely deteriorated.

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[489] Resp.'s Counter-Mem. ¶ 44.

[490] Email Chain between Elena Jaen of the Judicial Authority and Francisco Feliu of Omega dated 7 May 2015 (R-0010); Email Chain between Elena Jaen of the Judicial Authority and Francisco Feliu of Omega dated 11-12 May 2015 (R-0022); López ¶ 104.

[491] Email Chain between Elena Jaen of the Judicial Authority and Francisco Feliu of Omega dated 7 May 2015 (R-0010); Email Chain between Elena Jaen of the Judicial Authority and Francisco Feliu of Omega dated 11-12 May 2015 (R-0022); López ¶ 104.

[492] Email Chain between Elena Jaen of the Judicial Authority and Francisco Feliu of Omega dated 7 May 2015 (R-0010); Email Chain between Elena Jaen of the Judicial Authority and Francisco Feliu of Omega dated 11-12 May 2015 (R-0022); López ¶ 104.

[493] López ¶ 106. The Omega Consortium's bank accounts had been frozen due to the Moncada Luna investigation, and some Panamanian employees had initiated actions against the Omega Consortium with the Ministry of Labor. *See id*.

3. *The Mercados Periféricos Contract*

164. As previously explained, the Municipality of Panama Contract was progressing very well before July 2014. The Municipality of Panama had a cooperative attitude toward the Omega Consortium, and had openly confirmed that Claimants were working hard on the project.[494] As explained above, however, everything changed once Jose Isabel Blandon from the Panameñista Party became the new Mayor of the Municipality of Panama in July 2014.[495] Mr. Blandon was closely allied with President Varela, and he openly expressed to Mr. Lopez that he opposed the Omega Consortium's Project with the Municipality of Panama.[496] Mayor Balndon wanted to scrap the markets and construct warehouses on those sites instead.[497]

165. Shortly after Pesident Varela and Mayor Blandon took office, the Municipality of Panama suspended the Juan Diaz Market on 2 September 2014, marking the first of the Municipality's actions against the Project.[498] According to Respondent, the suspension was based on a decision of Mayor Blandon to review the Municipality's contracts,[499] and that *based on that review* "it was determined that the Juan Diaz 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."[500] This is

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[494] López ¶ 133.

[495] *Id*. ¶ 137.

[496] *Id*.

[497] *Id*.

[498] Note No. S.G.-087-A from the Office of the Mayor of Panama to the Omega Consortium dated 2 September 2014 (C-0058); López ¶ 121. The Omega Consortium diligently complied with the Municipality of Panama's request and stopped works on 5 September 2014. Note No. MAP-5-09-14 from Omega to the Municipality of Panama dated 5 Sep. 2014 (C-0071 resubmitted); López ¶ 136.

[499] Resp.'s Counter-Mem. ¶ 141.

[500] *Id*. ¶ 142.

demonstrably false.

166. *First*, in its suspension letter to the Omega Consortium, the Municipality stated that the goal of the suspension was "*to perform a complete analysis of the project* for the compliance of terms and conditions stated in [the] contract."[501] So the alleged review mentioned by Respondent in its Counter-Memorial did not happen until *after* the Municipality notified Claimants of the suspension (if it occurred at all).

167. *Second*, and contrary to Respondent's contention, the Omega Consortium was not required to find solutions to allow individuals to adequately access the market once it had been completed.[502] This was not a contractual obligation,[503] and at no point did the Municipality even suggest to the Omega Consortium that it was expected to obtain a right of way.[504] Indeed, it was the Panamanian Government, through the Municipality of Panama, that had the right to negotiate a right of way, not Claimants.[505]

168. *Third*, and importantly, the Omega Consortium *did not choose* the land where the Juan Diaz Market was supposed to be built; the Municipality of Panama did. But Mayor Blandon was hell-bent on cancelling this Project and found any excuse to terminate it.[506] Indeed, that the

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[501] Note No. S.G.-087-A from the Office of the Mayor of Panama to the Omega Consortium dated 2 September 2014 (C-0058 resubmitted); López ¶ 136.

[502] Resp.'s Counter-Mem. ¶ 139.

[503] Contract No. 857-2013 dated 12 Sept. 2013 (C-0056 resubmitted).

[504] López ¶ 135. Respondent and its witness Mr. Diaz make the bald assertion that "Omega was required to find solutions to allow individuals to adequately access the market once it had been completed" but do not provide any evidence in support. *See* Diaz ¶ 13; Resp.'s Counter-Mem. ¶ 139.

[505] López ¶ 135.

[506] *Blandon Stops Construction in 6 of the Mercados Periféricos*, EL SIGLO dated 6 Nov. 2014 (C-0608) (explaining that "[t]he former administration wanted to build one of these markets on the first land that it found").

suspension of work on the Juan Diaz Market was a politically motivated action against the Omega Consortium is evident from the fact that the Government today has apparently re-tendered the project, awarded it to a new contractor, and moved it to a different location because the land originally chosen by the Municipality was not suitable for construction and lacked an access road.[507] This proves that the Municipality likewise could have simply changed the construction site under the Contract with the Omega Consortium, which had already completed 50% of the work on the Juan Diaz Market,[508] but it chose not to do so. That choice is telling.

169. Once the Juan Diaz Market was suspended, the Omega Consortium continued working on the Pacora Market even though the Contract had expired. Completing the work, however, became a true challenge for the Omega Consortium because: (1) the Municipality of Panama did not assist Claimants in solving issues that only the Municipality could solve,[509] including the approval of plans and the issuance of some certificates and permits;[510] and (2) the Omega Consortium needed a Change Order extending the Contract, due to delays related to the lack of plan approvals, certificates, and labor strikes.[511]

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[507] *Id*. (stating that "[t]he works were also suspended in the market of Juan Díaz, because the land is not appropriate and there is no access route"); *The Mayor's Office Will Issue a New Request for Proposals for the Mercados Periféricos in the First Semester of 2016*, LA ESTRELLA dated 1 Jan. 2016 (C-0702) (stating that "[The Juan Diaz Market] will be located in the lands of the old Don Bosco station").

[508] Letter No. MAP-5-09-14 from the Omega Consortium to Panama's Office of the Mayor dated 5 Sept. 2014 (C-0071 resubmitted); López ¶ 136.

[509] López ¶ 138.

[510] Letter from Omega to Alcaldia de Panama" No. S.G.-087 from the Municipality of Panama to the Omega Consortium dated 2 Sept. 2014 (C-0058 resubmitted); Letter from the Omega Consortium to City Hall of Panama dated 8 Apr. 2015 (C-0184); López ¶ 138.

[511] Letter No. MUPA-5-09-14 from the Omega Consortium to City Hall dated 15 Sept. 2014 (C-0235); López ¶ 138.

170. As explained above, although the Omega Consortium was contractually responsible for ensuring that an application for the Soil Use Certificate was properly submitted, it had fulfilled that obligation[512] and could not be held responsible for the Government's refusal to properly issue the Certificate.[513] Receiving the Certificate of Soil Use from the Ministry of Housing was the most pressing issue the Omega Consortium had on this Project because, without the certificate, the ANAM could not endorse the Pacora Market plans and, in turn, the Comptroller General's Office would not approve payment applications.[514] The Municipality was made aware of this situation (repeatedly) but refused to act to push the Ministry of Housing to issue the Certificate.[515]

171. Indeed, prior to the change in Administration, Johnathan Rodriguez, the person in charge of overseeing this Project for the Municipality of Panama, had requested other Government officials to assist in getting the Certificate from the Ministry of Housing because the Omega Consortium was "giving it its all" to complete the Project on time.[516] But, just a few months later, after the Varela Administration came to power, the Municipality's cooperative attitude disappeared.

172. Three months after the Certificate's application was properly submitted, the Omega Consortium warned the Secretary General of the Municipality that no progress was being made with the Certificate and requested his intervention with the Ministry of Housing to solve this issue.[517] This

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[512] López ¶ 125.

[513] *See supra* § V.A.4.c.

[514] López ¶ 142.

[515] López ¶ 140; Follow-up to Letter No. P010 – 2015 4 08 – 010 dated 1 Jun. 2015 (C-0612).

[516] Emails between the Omega Consortium to the City of Panama dated 15 May 2014 (C-0552).

[517] Letter No. MAP-5-09-14 from the Omega Consortium to Panama's Office of the Mayor dated 5 Sep. 2014 (C-0071 resubmitted); López ¶ 140.

was not a minor point, since in September 2014, the Omega Consortium had to request an extension of time on the Municipality of Panama Contract and 200 days of the requested extension were attributed to the lack of issuance of this Certificate by the Ministry of Housing. [518]

173. Later, in January 2015, the Omega Consortium had a meeting with the Municipality of Panama where it expressed its concerns about the continued lack of progress in obtaining the Certificate.[519] Yet despite the Omega Consortium's efforts, the Certificate still was not issued. From February 2015 through June 2015, the Omega Consortium sent the Municipality of Panama no less than eight letters reiterating its concerns, requesting an update on the status of the Certificate, and trying to find solutions to continue the Project, but it *never once* received a response from the Municipality.[520]

174. Respondent and its witness, Mr. Diaz, claim that the Municipality cooperated fully with the Omega Consortium and that it went to great lengths to assist Omega in obtaining the Soil Use Certificate from the Ministry of Housing.[521] This is untrue. To start with, it is curious that Mr. Diaz is able to make such an assertion when, according to his testimony, he started working in the Municipality only in August 2016[522] and the problems with the Soil Use Certificate happened between 2014 and 2015. Further, as noted above, the contemporaneous record proves that the Municipality did *not* "cooperate" or go "to great lengths" to assist the Omega Consortium. As

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[518] Letter No. MUPA-5-09-14 from the Omega Consortium to City Hall dated 15 Sept. 2014 (C-0235); López ¶ 140.

[519] López ¶ 140.

[520] *See* Follow Up No. 6 to Letter No P010 2015 4 08 010 dated 1 June 2015 (C-0634); López ¶ 140.

[521] Resp.'s Counter-Mem. ¶ 128; Diaz ¶ 19.

[522] Diaz ¶ 6.

explained above, it was an agency of the Panamanian Government (the Ministry of Housing) that had the authority to issue the Certificate, and the Municipality of Panama had exclusive competence to follow up on the process and communicate with the Ministry of Housing about the matter.[523] This is evidenced by the fact the Ministry of Housing wrote to the *Municipality*, *not the Omega Consortium*, when the Ministry determined that the Certificate had to be processed using a different procedure.[524]

175. The attitude the Municipality of Panama had towards the Omega Consortium during the Varela Presidency made clear that the Municipality had no intention of working with Claimants on these Projects. On 19 August 2016, just over a month after the Panamanian Government was notified of the Omega Consortium's intention to initiate this arbitration, the Mayor of Panama expressed his intention to terminate the Contract.[525] The Municipality of Panama Contracts were unlawfully terminated by Municipality through an administrative resolution for supposed breach of Contract on 11 January 2017, shortly after Claimants filed their Request for Arbitration.[526] The consequences of this administrative termination were devastating as it further precluded Claimants from participating in any bids for Public Contracts in Panama for three years.[527]

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[523] López ¶ 141.

[524] Resp.'s Counter-Mem. ¶ 147. Respondent gives as an example of full cooperation with the Omega Consortium the fact that the Municipality of Panama convened a meeting with residents of the Pacora Market area to discuss the Soil Use Certificate. Resp.'s Counter-Mem. ¶ 149. But Respondent fails to share that *nine months went by* between said meeting, *see* Letter from the Municipality of Panama to the Ministry of Housing dated 27 Oct. 2014 (R-0105), and the final issuance of the Certificate. Resp.'s Counter-Mem. ¶ 149. There was no real cooperation from the Municipality.

[525] Letter from City Hall for the District of Panama to the Omega Consortium dated 19 Aug. 2016 (C-0237).

[526] Resolution No. C-10-2017 dated 11 Jan. 2017 (C-0234).

[527] *Id*. at 4, cl. 2; *see* List of Debarred Companies, PANAMACOMPRA (C-0443).

4. *The Municipal Palace of Colón Contract*

176. With the change of administration in July 2014, Mr. Federico Policani became the new Mayor of the City of Colón. After he was inaugurated, the Municipality of Colón informed the Omega Consortium that it wanted to change the construction site for the new Municipal Palace and asked Claimants to present an alternative proposal to build it on a new site.[528] Although the plans for the construction of the Municipal Palace on the original site had been ready since the beginning of 2014, the Omega Consortium complied with the Municipality's request and submitted the alternative proposal on 27 August 2014.[529]

177. As with other Government agencies, the Municipality of Colón's change in attitude manifested itself through ignoring (sometimes indefinitely) any communication from the Omega Consortium. So by early October 2014, the Omega Consortium still had not heard back from the Municipality regarding the alternative proposal it had requested. At that point, the Omega Consortium sent a letter directly to Mayor Policani asking him to confirm whether or not the construction site would be changed.[530] The following month, the Omega Consortium presented a new proposal, including preliminary designs and costs for the relocation of the project.[531] However, when Claimants finally met with the Municipality later that month, they were told that there was a possibility that the construction site was *not* going to change.[532]

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[528] Letter No. 2015 19 06 P08-013 from the Omega Consortium to the Mayor of the Municipality of Colón dated 19 June 2015 (C-0180 resubmitted), #3.

[529] *Id*.

[530] Letter from the Omega Consortium to the Mayor of the Municipality of Colón dated 2 Oct. 2014 (C-0178).

[531] López ¶ 147.

[532] Letter No. 2015 19 06 P08-013 from the Omega Consortium to the Mayor of the Municipality of Colón dated 19 June 2015 (C-0180 resubmitted), #4.

178. This game of musical chairs regarding the construction site continued into the following year. It was not until March 2015 that the Municipality finally confirmed that the Project site was going to be changed and that it was necessary to formalize a Change Order to the Contract.[533] Given the long delays in this Project as a result of the indecision regarding the relocation of the Project, the Contract expired and there were additional costs related to the site change and approval delays that needed to be included in a new Change Order.[534] But the Mayor's Office was uncooperative in approving thate Change Order and, indeed, never even replied to the Omega Consortium's requests.[535]

179. The pretextual nature of the construction site change came to light when, in June 2015, the Municipal Council asked the Omega Consortium whether it was going to complete the Project at the *original* construction site, apparently *unaware* of the Mayor's decision to change the site.[536] It seemed that the Mayor's office had failed to share its decision about the site change with other parts of its own Municipal Government. Concerned about the situation, the Omega Consortium sent a letter to the Mayor (again) on 19 June 2015 requesting a meeting to address all of the various matters related to the Project and to set a work plan for a timely solution.[537] The Omega Consortium did not receive a response to this letter.

180. Finally, as part of the Contract, the Omega Consortium was required to retrofit an

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[533] Letter No. 2015 19 06 P08-013 from the Omega Consortium to the Mayor of the Municipality of Colón dated 19 June 2015 (C-0180 resubmitted), #5.; Letter from the Omega Consortium to the Mayor of the Municipality of Colón dated 5 Feb. 2015 (C-0179).

[534] López ¶ 149.

[535] *Id*.

[536] Letter No. 101-01-49 from the City Council of Colón to the Omega Consortium dated 25 June 2015 (C-0181); López ¶ 149.

[537] Letter No. 2015 19 06 P08-013 from the Omega Consortium to the Mayor of the Municipality of Colón dated 19 June 2015 (C-0180 resubmitted), at 3; López ¶ 149.

existing warehouse into temporary office facilities so that the Municipality's employees would have a place to work while the Omega Consortium built the new Palace (which until March 2015 was supposed to be built on the same site as the old Palace). The temporary facilities were completed in early 2014, and the Omega Consortium never received any complaints related to them. In September 2015, however, the Municipality of Panama informed the Omega Consortium—for the first time—that the temporary facilities refurbished by the Omega Consortium were allegedly deficient and unsafe.[538] This certainly surprised Claimants since the temporary facilities had been completed sixteen months earlier and are currently being used by the Municipality as temporary offices.[539]

181. That the excuses were mere pretext becomes even more obvious when one considers the situation today. The new Municipal Palace is being constructed by a new contractor, Administration e Inversiones del Istmo S.A.,[540] through a new contract C5-045-17[541] on *the original site*, exactly where the Omega Consortium was told *not* to construct once President Varela took office.[542] Further, the Municipality of Colón is *still* using the temporary facilities refurbished by the Omega Consortium five years ago—the very same ones that were purportedly "unsafe and deficient."[543] The Panamanian Government, led by President Varela, simply did not want the Omega Consortium to work on the Project,[544] just as Mayor Policani had told Mr. Lopez soon after the change

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[538] Letter No. AL-55/15 from the Municipality of Colón to Omega dated 2 Sept. 2015 (C-0703).

[539] Letter No. P08-014 from Omega to the Municipality of Colón dated 28 Sept. 2015 (C-0610).

[540] SCAFID Status of Contract No. C5-045-17 (C-0619).

[541] Construction Poster by the Municipality of Colón (C-0620).

[542] Photographs of the Temporary Installations (C-0621).

[543] *Id*.

[544] López ¶ 73.

in Administration.[545]

5. *The Mercado Público de Colón Contract*

182. Once Mr. Varela became President in 2014, the Omega Consortium contacted the Secretary of Cold Chain (a subdivision of the Ministry of the Presidency in charge of the Colón Market Project) and the Ministry of the Presidency, whose newly appointed Minister was Álvaro Alemán. Claimants did so with the intention of maintaining the Contract and commencing construction on the Colón Market. Unfortunately, unbeknownst to Claimants at the time, the Ministry of the Presidency was no longer willing to work with the Omega Consortium.

183. As discussed earlier, one of the main issues with this Project was the Government's inability to relocate the merchants at the existing site, which resulted in the *temporary suspension* of the physical work. During this temporary suspension, the Omega Consortium periodically followed up with the Ministry of the Presidency on technical issues that were going to be needed once the merchants were moved from the project site.[546] In July 2014, however, the attitude of the Ministry of the Presidency changed drastically, and it stopped responding to the Omega Consortium's messages.[547]

184. Finally, in June 2015, the Omega Consortium was able to meet with the Executive Secretary of Cold Chain to discuss the possibility of reinitiating works.[548] The Omega Consortium

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[545] *Id*. (stating "[o]n one occasion, Colón's Mayor Federico Policani told me personally he had been directed by the Presidency to terminate the Contracts with the Omega Consortium because the other ministries were doing the same").

[546] López ¶ 152.

[547] Email Chain between Jose Mandarakas and Frankie López (Omega) to Maruquel Madrid (MoP) dated 2 July 2014 (C-0694).

[548] López ¶ 152; Letter 2015 06 19 P004-62 from the Omega Consortium to the Ministry of the Presidency dated 19 June 2015 (C-0064 resubmitted); Email Chain between Onelia Delis, Andres Camargo and Francisco Feliu dated 27

remained committed to doing so, as long as some terms of the Contract were modified to recover the economic balance of the Contract, including the reimbursement of expenses incurred by Claimants to maintain the staff during the Project's physical suspension, and an unconditional commitment that the Ministry of the Presidency would approve the Project plans on time.[549] The Omega Consortium was hopeful and decided to send a letter to the Ministry of the Presidency explaining what was needed in order to restart works,[550] but the Government simply refused to cooperate.

185. The following month, the Comptroller General's Office threatened to terminate the Contract if the Omega Consortium did not renew its bonds.[551] The Comptroller General must have been aware of the Ministry of the Presidency's temporary suspension of physical work on the Project and the fact that the Contract was no longer valid when it made this request. Without a valid Contract, Claimants simply could not renew the bonds to extend their period of validity.[552]

186. When Claimants sought an explanation, the Government made it clear that the Contract was doomed. On 16 July 2015, [redacted] told Mr. Lopez that [redacted] had met with Álvaro Alemán, the Minister of the Presidency and a former IGRA Partner, who had said that [redacted]

May 2015 (C-0622).

[549] Letter 2015 06 19 P004-62 from the Omega Consortium to the Ministry of the Presidency dated 19 June 2015 (C-0064 resubmitted); López ¶ 152.

[550] Letter 2015 06 19 P004-62 from the Omega Consortium to the Ministry of the Presidency dated 19 June 2015 (C-0064 resubmitted).

[551] Note No. 12031-15-ING-UFOGOE from the Comptroller General's Office to ASSA dated 27 July 2015 (C-0623); López ¶ 153.

[552] López ¶ 153.

[redacted]

187. Shortly thereafter, this Project was indeed abandoned by the Panamanian Government, and later given to Odebrecht,[554] a company that had contributed over US$ 700,000 to President Varela's campaign.[555]

6. *The Ciudad de las Artes Contract*

188. The progress of the Ciudad de las Artes project likewise began to deteriorate when President Varela appointed Mariana Nuñez as the new Director of the INAC in July 2014.[556] Ms. Nuñez hindered the Ciudad de las Artes Project by assuming an uncooperative attitude from the start.[557] Neither the plans, nor the payment applications, nor requests for extensions of time presented by the Omega Consortium were ever approved by INAC after July 2014.[558]

189. Upon her appointment, the Omega Consortium requested a meeting with Ms. Nuñez to present the Ciudad de las Artes Project and establish a channel of communication.[559] Claimants presented the Project and communicated pending issues, such as necessary time extensions and the determination of additional costs.[560] A critical issue for the Omega Consortium during the second half of 2014 was to agree with INAC on a Change Order to extend the Contract before it expired on 27 January 2015. Consequently, on 15 July 2014, the Omega Consortium presented a request to the

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[553] WhatsApp chat between Frankie López and Ana Graciela Medina, 16 July 2015 (C-0736).

[554] López ¶ 154.

[555] Pérez ¶ 32.

[556] López ¶ 119.

[557] *Id.*

[558] *Id.*

[559] Letter No. INAC-11 from Omega to INAC dated 31 July 2014 (C-0594); López ¶ 111.

[560] López ¶ 121.

INAC for an extension of time and additional costs.[561] The INAC responded to this letter two months later, rejecting part of the time extension and costs, specifically, US$ 597,360.99 of costs and 180 days of extended time.[562] In September 2014, the Omega Consortium sent a letter to the INAC once again requesting additional costs and an extension of time.[563] This time, however, the INAC did not respond at all. So in October 2014, the Omega Consortium sent a *new* request for an extension.[564] The INAC finally responded to the Omega Consortium by the end of October, stating that it would legally assess the Change Order request, but without any commitment to work toward a solution on any of the issues Claimants had raised. [565]

190. The lack of commitment and nonresponsive posture suggested to the Omega Consortium that the INAC had changed its attitude towards them and the Ciudad de las Artes Project. Indeed, even routine interactions became contentious. Near the end of November, for example, the Omega Consortium sent INAC notes that had been taken during a meeting on 23 October 2014,[566] to which INAC responded "who authorized you to take notes?" [567] This response likewise signaled to the Omega Consortium that the cooperative relationship between INAC and Omega had ended.

191. Around the same time the INAC stopped being responsive to the Omega Consortium's requests for extensions of time, Claimants stopped receiving payments for the work performed on the

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[561] Note No. DG/107 from INAC to the Omega Consortium dated 9 Sep. 2014 (C-0073 resubmitted).

[562] Note No. DG/107 from INAC to the Omega Consortium dated 9 Sep. 2014, at 5 (C-0073 resubmitted).

[563] Letter No. SOSA-0-5-2014 from the Omega Consortium to Sosa dated 17 Sep. 2014 (C-0546).

[564] Letter No. INAC-N16-2014 from Omega to INAC dated 16 Oct. 2014 (C-0597).

[565] López ¶ 111.

[566] Email Chain between Frankie López, Luis Pacheco, Mariana Nunez and Melva de Pimento dated 20 November 2014 (C-0704).

[567] *Id.*

Ciudad de las Artes Project.[568] Respondent suggests that one of the reasons why payments were not approved was that the INAC undertook a review of all the ongoing projects begun under the previous administration.[569] In its own document production, Respondent showed that the alleged audit was requested by INAC in written requests to the Comptroller General's Office first on 11 December 2014[570] and then again on 7 January 2015.[571] Documents also show that by 28 April 2015 the audit had not been completed.[572] The timeline of these events is critical. After all, payments to Claimants in the Ciudad de las Artes Project stopped in June 2014.[573] Those payments thus should not have been affected by an audit that was not even requested until six months later.

192. The timing of Sosa Arquitectos' complaints also evidenced a change in attitude from the INAC.[574] In August 2014, Sosa (the INAC's external inspector for the Project) began sending correspondence to INAC and to the Omega Consortium suggesting problems in the Project, focusing on trivialities.[575] Thereafter, Sosa started sending frequent letters opining on legal issues, especially those related to termination of the Contract.[576] This was curious since Sosa in the prior sixteen months had not sent daily letters and had rarely mentioned legal issues.[577] In addition, Sosa stopped

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[568] *See supra* § V.A.5.

[569] Resp.'s Counter-Mem. ¶ 105

[570] Note No. DG-2020 from INAC to the Comptroller General's Office dated 11 Dec. 2014 (C-0705).

[571] Note No. DG-011 from INAC to the Comptroller General's Office dated 7 Jan. 2015 (C-0706).

[572] Note No. 1,804-15-DINAG-DESAFPF form the Comptroller General's Office to INAC dated 28 April 2015 (C-0706).

[573] McKinnon 1, Annex 1, p. 16.

[574] López ¶ 128.

[575] *See infra* § VI.C.4.d.

[576] *See infra* § VI.C.4.d.

[577] López ¶ 129.

attending the Ciudad de las Artes Project meetings.[578] Sosa's sudden change in attitude is consistent with the INAC's new obstructionist posture. It appeared that Sosa had received a directive to find excuses to terminate the Contract.[579]

193. Adding to the evidence of the agency's hostile behavior, the INAC began to refuse to disburse payment for CPPs Nos. 1-12, which *already* had been endorsed by the INAC and the Comptroller General (during the Martinelli Administration), and which the Omega Consortium *already* had assigned to Credit Suisse (meaning Credit Suisse had already advanced the funds to the Omega Consortium). The INAC's refusal to pay Credit Suisse could have resulted in the Omega Consortium losing its financing for the Project. Given the severity of the situation, the Omega Consortium called a meeting with the INAC and Katyuska Correa, the Director of Public Credit at the Ministry of Economy and Finance. After the meeting, and realizing that failure to pay Credit Suisse could put the Government in default with one of the largest international banks, the INAC proceeded to pay the *very same* CPPs that it previously had *refused* to pay when the Omega Consortium had made its numerous requests.[580] The only difference was the realization by the INAC and the Ministry of Economy and Finance that those CPPs were a debt to Credit Suisse and not to the (disfavored and targetted) Omega Consortium.

194. In the end, all the time extensions and payment requests made by the Omega Consortium in the Ciudad de las Artes Project after July 2014 were rejected out of hand by Ms. Nuñez.

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[578] *Id*. ¶ 128.

[579] *See* Pérez ¶ 53 at 25 ("While the president himself might not have direct contact with project inspectors, it is very plausible that ministry and agency officials transmitted and acted upon Mr. Varela's direction to increase scrutiny of specific projects.").

[580] Letter No. INAC-022 from Omega to Mariana Nuñez dated 16 Mar. 2015 (C-0605); Letter No. DG/097 from INAC to the Minister of Economy and Finance dated 3 Mar. 2015 (R-0038); Letter No. DG/122 from INAC to the Minister of Education dated 13 Mar. 2015 (C-0606).

Unfortunately, the wrongfully denied extensions and payments were just the beginning of the illegality perpetrated against Claimants by the INAC's new Director and the Varela Administration. As had been the case with *all of the Government agencies* with which the Omega Consortium had Contracts, Claimants' relationship with the INAC had soured suddenly and inexplicably once President Varela took office. As shown below, Claimants' investment in Panama would never recover from this vicious, organized campaign.

C. The Ministry of Economy and Finance Unexpectedly and Arbitrarily Cuts the Budget for Claimants Largest Contract

195. Knowing that the Ciudad de las Artes Contract represented over a third of the total value of the Omega Consortium's Contracts, the Varela Administration hatched a plan to secretly sabotage it. Upon taking power in 2014, President Varela appointed Dulcidio de la Guardia as Minister of Economy and Finance.[581] But before his appointment, Minister de la Guardia and President Varela shared close political ties. Over 2013 and 2014, Minister de la Guardia made at least US$ 38,500 in campaign contributions to President Varela's Presidential campaign.[582] According to the Panamanian press, Minister de la Guardia was one of President Varela's closest advisors. At the moment of his appointment as Minister of Economy and Finance in 2014, Minister de la Guardia was a member of President Varela's political party, the Partido Panameñista, and one of the directors of the economic program within Mr. Varela's presidential campaign.[583]

196. Minister de la Guardia's appointment coincided with a sharp change in the

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[581] *Dulcidio De La Guardia Assumes the Charge of Minister of Economy and Finance*, NOTICIAS dated 1 Jul. 2014 (C-0708). In Panama, Ministers are named by the President and they serve at their pleasure. Panama Constitution (C-0060 resubmitted 2), art. 183.

[582] *See* List of Varela Campaign Contributions released by Partido Panameñista, 9 Feb. 2017 (C-0709) (showing that Mr. de la Guardia made at least the following contributions: US$ 1,000 on 4 March 2013; US$ 2,500 on 13 August 2013; US$ 15,000 on 29 Jan 2014; and US$ 20,000 on 14 April 2014).

[583] See The six men closest to Juan Carlos Varela, LA PRENSA dated 2 Jul. 2014 (C-0710).

Government's posture toward the Ciudad de las Artes Project. During the prior Administration, the Government of Panama represented to the Omega Consortium that the Ministry would pay for Ciudad de las Artes in full by 2015. Specifically, in March 2012, the Ministry told the INAC that it had no objection to the continuation of the selection procedure of the contractor, with special emphasis in accordance with the financial programming of the State and in compliance with the limits established in the Fiscal Social Law on Liability, that the total amount of this project remain the same, including financial costs, for the year 2015.[584] Thus, on Change Order No. 1, endorsed by the Comptroller General in April 2013, the INAC indicated that the Ministry of Economy and Finance itself had already assigned Budget Item N°1.30.1.1.703.02.10.511 for the project's "payment in full, scheduled for 2015."[585] Notably, the INAC director at the time (months before the Varela administration came to power) placed the completion of Ciudad de las Artes at the top of the INAC's goals for 2015.[586] Accordingly, on 30 April 2014, the INAC requested a budget of US$ 88,552,439.[587] This amount included US$ 54,628,000 for payment in full on the Ciudad de las Artes Project, which under the Omega Consortium's Contract was due in its entirety in 2015.[588]

197. But ***less than three months*** after President Varela came to power, and in violation of Panama's own laws, the Ministry of Economy under Minister de la Guardia reversed course. As

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[584] Letter No. DdCP/AL/238 from the Ministry of Economy and Finance to the National Institute of Culture dated 20 Mar. 2012 (C-0149).

[585] Addendum No. 1 to Contract No. 093-12 dated 16 Apr. 2013 (C-0167) at 5.

[586] *See* INAC Draft Budget for the Fiscal Year 2015 dated Apr. 30, 2014 (R-0036), at 5.

[587] *See id*. at 7.

[588] *See id*.; Contract No. 093-12 dated 28 Dec. 2014 (C-0042-SPA).

Panama admits,[589] on 10 September 2014, the Ministry of Economy and Finance ***without explanation*** recommended only US$ 14,679,000 for INAC's investment projects, of which only US$ 10 Million were allocated for the Ciudad de las Artes Project—*a fraction of the total value of the remaining payments owed on the Contract*.[590] Thus, the Varela Administration signaled that it had no intention to even come close to paying for the Ciudad de las Artes Project in 2015 as required. As generally occurs, the National Assembly followed the Ministry's recommended budget, thereby removing the funding for the Omega Consortium's largest Contract.[591]

198. By reducing the budget for the INAC's projects, the Ministry of Economy and Finance violated Law 22 of 2011 on Public Contracting, which requires the Government to allocate the required funds when signing a contract. Article 19 of that law requires state entities to have the necessary budget items or funds before selecting a contractor:

> State entities shall initiate procedures for the selection of contractors or through exceptional proceedings, when permitted by law, only when they have the corresponding budget entries or availability.[592]

199. If a Government agency requires additional funding above a certain amount, depending on what the budget law for the year in question stipulates, that agency would typically need to obtain authorization from various Government agencies in at least two branches of government. If the INAC, for example, wanted to obtain a budget allocation in 2015 for the full price

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[589] Resp.'s Counter-Mem. n.195.

[590] *See* Ministry of Economy and Finance, National Budget Direction, Monthly Assignment of Expenditure Budget, 2015 (R-0037), at 3; *The Minister of Economy presents a Budget before the National Assembly's Commission*, LA PRENSA dated 10 Sep. 2014 (C-0233). Contract No. 093-12 dated 6 Jul. 2012 (C-0042), at 31.

[591] *See* 2015 Budget presented by Panama's National Assembly dated 8 Sept. 2014 (C-0067 resubmitted), at 30, 33, 37.

[592] Law 22 on Public Contracting (2011) (C-0280 resubmitted), art. 19.

of the Ciudad de las Artes Project, pursuant to Article 289 of the Budget Law for 2015, the INAC would have had to obtain approval from four different entities in the executive and legislative branches: (i) the National Economic Council, (ii) the Comptroller General's Office, (iii) The President's Cabinet, and (iv) the National Assembly's Budget Commission.[593] The INAC never attempted to do so.

200. Respondent argues in its Counter-Memorial that Government institutions are capable of requesting additional budget allocations if needed,[594] implying that the Omega Consortium was overreacting to the INAC's lack of budget to complete the Project. But that is no answer. As already shown above, once the Varela Administration took control, no part of the Panamanian Government was willing to work with the Omega Consortium to ensure that its Projects were completed. Indeed, as already mentioned, the INAC (under the Varela Administration) used the revised budget to attempt to avoid making payments that were already fully approved during the Martinelli Administration.[595]

201. Moreover, the Ministry of Economy and Finance's decision to cut the budget is an inexplicable *volte-face* from what the Ministry and the INAC had expressly told the Omega Consortium about the Ciudad de las Artes Project in prior years, namely, that funds would be allocated

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[593] *See* Budget Law for 2014 to 2015 (C-0711), art. 289.

[594] Resp.'s Counter-Mem. ¶ 93

[595] By February 2015, the INAC admitted it did not even have funds to pay on CPPs 1-12 for work that Omega had already performed and that the previous Administration had already approved. See Letter from Banistmo to Credit Suisse and Omega Panama, dated 4 Feb. 2015 (C-0710). Only after Credit Suisse spoke to the INAC regarding the looming default date of 31 March 2015 did the INAC ask the Ministry of Economy and Finance for an additional budget item to pay for these CPPs. See Letter from Omega Panama to INAC, dated 16 March 2015 (C-0605). At the time, CPPs 13-19, also for work that the Omega Consortium had already performed, were still pending approval by the Government of Panama. Panama never paid the Omega Consortium for these CPPs, and paid Travelers for the Omega Consortium's work instead. *See infra* § V.C.

to pay for the entire cost of the Project in 2015.[596]

202. The actions of the Ministry of Economy and Finance in cutting the budget for the Ciudad de las Artes Contract are far from the type of actions that any commercial party could take. These were quintessential sovereign actions. And, as Professor Perez explains, "[t]he Minister of Economy and Finance serves at the pleasure of the president" and "[t]he [M]inistry controls the distribution of budget items and could alter, delay or stop disbursement of payments at its discretion *or at the behest of the executive.*"[597] That Minister de la Guardia was acting at the behest of the President became all the more obvious when Respondent took its next step—administratively terminating the Contract through a uniquely sovereign act.

D. The Government Unlawfully Issues an Administrative Resolution Terminating Claimants' Largest Contract

203. Respondent's true intentions to push Claimants out of the Ciudad de las Artes Project materialized on 23 December 2014, when it administratively terminated the Ciudad de las Artes Contract with the Omega Consortium. The termination was unlawful (*see infra* Section V.D.1), and even if it had been legal, it would have been unjustified because the INAC had failed to comply with its payment obligations (*see infra* Section V.D.2). As discussed below, the INAC had no independent basis to cancel the Contract (*see infra* Section V.D.3). Rather, it offered only pretextual (baseless) excuses (*see infra* Section V.D.4). As Claimants' witness verifies, the INAC's behavior was entirely illegitimate (*see infra* Section V.D.5). The wrongful administrative termination of the Ciudad de las Artes Contract—Claimants' most valuable Contract in Panama—had profound ramifications for their

[596] *See, e.g*, Letter from Ministry of Economy and Finance to INAC, dated 20 Mar. 2012 (C-0149); Letter No. DdCP-DE-088 from the Ministry of Economy and Finance to INAC dated 1 Feb. 2013 (C-0540); Email chain between Omega and INAC dated 4 July 2013 (C-0744); Addendum No. 1 to Contract No. 093-12 dated 16 Apr. 2013 (C-0167).

[597] Pérez ¶ 53 at 25.

investment in Panama and their business abroad (*see infra* Section V.D.6).

1. *The Termination of the Ciudad de las Artes Contract Was Unlawful*

204. The INAC violated Panamanian law (as well as international law and the Treaties) in a variety of ways by administratively terminating the Ciudad de las Artes Contract. ***First***, the INAC failed to comply with the *pre-termination* due process requirements set forth in Article 116 of Law No. 22.[598] That provision establishes the process the INAC was required to follow when administratively terminating the Cuidad de las Artes Contract. In particular, Article 116(1) required the INAC to grant the Omega Consortium a term of time to correct any problems.[599] Article 116(2) further provides that if the INAC intended to terminate the Contract administratively, it had to notify Claimants with the reasons for the decision and grant Claimants five working days to answer the charges and present relevant evidence in defense.[600]

205. The INAC entirely failed to comply with these pre-termination requirements. While the INAC and its external inspector, Sosa, did meet and correspond with Claimants in the weeks before the termination, there is no evidence that INAC provided any form of official warning that it was considering administrative termination, it indisputably did not grant Claimants time to address the issue, and it never invited Claimants to submit evidence in response to its contemplated termination. As Claimants told the INAC in contemporaneous correspondence,[601] the requirements of Law No. 22 are not just procedural technicalities or niceties—they constituted pre-conditions the

[598] Law No. 22 (C-0280 resubmitted), art. 116.

[599] *Id*. art. 116(1).

[600] *Id*. art. 116(2).

[601] Letter from Omega to INAC dated 3 Feb. 2015, at 9 (C-0185).

INAC had to fulfill before administratively terminating a contract. But Claimants' point fell on deaf ears.

206. ***Second***, the INAC failed to comply with its *termination* obligations with respect to the Cuidad de las Artes Contract as well. Executive Decree No. 366 mandates that notice of termination must be carried out through the electronic system of public procurement ("PanamaCompra").[602] Law No. 22 reinforces the requirement, stating: "All resolutions and other administrative decisions issued by the contracting entities during the contractor selection process and during performance of the contract, as well as those issued by the Administrative Court of Public Procurement, shall be published in the Electronic System for Public Procurement 'PanamaCompra.'"[603] And Article 116(4) of Law No. 22 required the INAC to give Claimants five working days to file an administrative appeal after receiving the mandatory notice of termination through the PanamaCompra system.[604]

207. Again, the INAC completely failed to comply with these requirements of Panamanian Law. In fact, Respondent *does not even allege* that it gave proper notice to the Omega Consortium by posting the termination resolution on PanamaCompra, nor could it, as this was never done. Respondent waited until 27 January 2015—*more than a month after issuing the termination resolution*—and then posted an edict on the front door of Claimants' office, claiming that the office had been "abandoned."[605] In fact, Claimants found the edict that same day, because, as explained by Mr. Lopez, the Omega Panama offices were not abandoned at all.[606] The fact that Claimants actually

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[602] Executive Decree No. 366, art. 147 (C-0418).

[603] Law No. 22, art. 129 (C-0280 resubmitted).

[604] Law No. 22, arts. 116, 129 (C-0280 resubmitted).

[605] Resp.'s Counter-Mem. ¶ 110.

[606] López ¶ 131. Respondent also suggests that Claimants suffered no prejudice from its defective notice because

received the edict, however, does not change the fact that Respondent completely failed to effect legal notice of its unilateral administrative termination.[607]

208. By failing to properly inform Claimants of the termination, the INAC necessarily deprived Claimants of the five-day window of time needed to consider any necessary appeal. And when Claimants did file an appeal for administrative review to challenge the improper notification, the INAC's Board of Directors specifically noted that "the appellant failed to submit evidence and its allegations within the corresponding procedural deadlines" and denied Claimants' appeal by referring the unlawful edict as the proper means of notification.[608] Yet the INAC's own contemporaneous

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Claimants became aware of the 23 December 2014 termination notice on 29 December 2014. Resp.'s Counter-Mem.¶ 111 (citing Cls' Mem. ¶ 109); Email from Ian van Hoorde to Frankie López dated 29 Dec. 2014 (C-0378). Even if it is true that Claimants received the notice on 29 December 2014, Respondent's argument on this point obviously does not assist Respondent, because that still was not in compliance with Panamanian law, and Claimants received it by way of an email from ASSA. *See* Email from Ian van Hoorde to Frankie López dated 29 Dec. 2014 (C-0378) (showing that ASSA forwarded INAC's notice to Claimants). Respondent cannot rely on third-party communications to evade its legal obligations.

[607] López ¶ 131. Respondent also suggests that Claimants suffered no prejudice from its defective notice because Claimants became aware of the 23 December 2014 termination notice on 29 December 2014. Resp.'s Counter-Mem.¶ 111 (citing Cls' Mem. ¶ 109); Email from Ian van Hoorde to Frankie López dated 29 Dec. 2014 (C-0378). Even if it is true that Claimants were informed of the termination resolution on 29 December 2014, Respondent's argument on this point obviously does not assist Respondent, because that still was not in compliance with Panamanian law, and Claimants received it by way of an email from ASSA. See Email from Ian van Hoorde to Frankie López dated 29 Dec. 2014 (C-0378) (showing that ASSA forwarded INAC's notice to Claimants). Respondent cannot rely on third-party communications to evade its legal obligations.

[608] Resolution No. 025-16 J.D. dated 19 July 2016 (R-0056). Respondent's Counter-Memorial notes that Claimants filed no challenge to that denial. Resp.'s Counter-Mem. ¶ 112; Omega's Application for Administrative Review dated 26 Mar. 2015 (R-0055); Resolution No. 025-16 J.D. dated 19 July 2016 (R-0056); IGRA notification of Resolution No. 025-16 J.D. dated 12 Aug. 2016 (R-0098). Claimants had ample reason not to pursue any further appeals based on three factors. First, any further challenge would have been futile as of August 2016 (when Claimants received notice of the denial) based on the grim overall status of Claimants' investments in Panama as of that time. Second, Claimants were advised against any further domestic legal proceedings based on the fork-in-the-road clause found in Article 10.18.2 of the TPA. Third, under Panamanian law when parties have agreed to submit themselves to the jurisdiction of an arbitration tribunal to settle their disputes, as Respondent and Claimants have done, the parties are confined to the exclusive jurisdiction of that forum. *See* TACP's "RESOLUCIÓN No. 154-2017-Pleno/TACP", dated 20 September 2017 (C-0712) ("having seen that the arbitral jurisdiction is accepted by the Constitution and the Law; and that the State can submit its controversies with particulars or third parties to that jurisdiction, it then becomes obligatory to comply with the arbitral clause stipulated in the Agreement that is part of the contract signed by the appellant company and the appellee; and there is a clear mandate of the law to all state institutions settling controversies to decline them in favor of an arbitral agreement, so this administrative institution with full jurisdiction and competence to settle conflicts related to public procurement, so

internal correspondence shows that Respondent was well aware that the Omega Consortium was never given proper notice. As of 6 March 2015—three months *after* the termination resolution was issued—the INAC acknowledged that the administrative resolution terminating the Ciudad de las Artes Contract was still "*pending notification*."[609]

209. In the face of this evidence—which proves that the Panamanian Government was aware of its failure to provide notice of the administrative termination—Respondent and its witness, Ms. Chen, nonetheless claim that "INAC followed the general administrative procedure under Panamanian law"[610] and actually went "beyond" the relevant legal requirements by hand delivering the notice to Claimants' offices.[611] Respondent further claims that if its hand-delivered notice was not received, it was *only* because Claimants' had "abandoned" Panama by that time (January 2015) and its offices were empty.[612] This argument is wrong, both legally and factually. The "general administrative procedure" Respondent cites does *not* govern this issue. Ms. Chen cites Law No. 38, but that law does not apply to a "general administrative procedure," as suggested by Ms. Chen[613]—it applies to only one specific administrative agency called the *Procuradoría de la Administración*.[614] And the Ciudad de las Artes Contract was not governed by Law No. 38 but was rather governed by Law No. 22. (In fact, the termination resolution "hand-delivered" by the INAC does not contain a

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shall proceed.").

[609] Note No. 21-15 ING-DUB-DIR from the Comptroller General's Office to Mariana Nuñez dated 6 Mar. 2015 (C-0670).

[610] Resp.'s Counter-Mem. ¶ 110 (citing Law 38 of July 31, 2000 (R-0053), arts. 89-91, 94); Chen ¶¶ 15-17.

[611] *Id*. ¶ 110; Chen ¶¶ 15-17.

[612] Resp.'s Counter-Mem. ¶ 110.

[613] Chen ¶¶ 15-17.

[614] *See* Law 38 of July 31, 2000 (R-0053), title page.

single reference to Law No. 38, but referred to Law No. 22 no less than seven times.)[615] The text of Law No. 38 also refutes Ms. Chen's theory, as it explicitly notes that Law No. 38 applies only as a lacuna filler.[616]

210. ***Third***, the INAC failed to comply with the requirements of "logical reasonableness" and "good faith" under Panamanian law in terminating (and, indeed, in executing) the Ciudad de las Artes Contract. Article 22 of Law No. 22 expressly states that public contracts shall be interpreted in good faith and in keeping with the equality and balance between the contractual parties,[617] and Addendum No. 1 to the Ciudad de las Artes Contract explicitly incorporates the concept of good faith as well.[618] Within the context of administrative law, and more narrowly, within the context of an administrative agency's exercise of its power to unilaterally terminate a public contract, the Government is also bound to follow the principle of "logical reasonableness."[619] A recent order from the Administrative Tribunal for Public Contracting ("TACP") is instructive. In Order 050-2019-Pleno/TACP dated March 26, 2019, the TACP applied a reasonableness ("razonabilidad") standard when setting aside an administrative resolution terminating a contract. The TACP discussed five principles, which in its opinion are conditions that the administration must meet in order to effectively exercise its unilateral termination rights under the Public Contracting Law: opportunity to cure; good

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[615] Resolution No. 391-14 DG/DAJ from INAC (C-0044 resubmitted), at 2, 5, 6, 7.

[616] Law No. 22, Art. 116 (C-0280 resubmitted) ("Las lagunas que se presenten en este procedimiento se suplirán con las disposiciones pertinentes del procedimiento administrativo de la Ley 38 de 2000."); Letter from Omega to INAC dated 3 Feb. 2015 (C-0185), at 9.

[617] Law No. 22 (C-0280 resubmitted), art. 22.

[618] Addendum No. 1 to Contract No. 093-12 dated 16 Apr. 2013 (C-0167), at 2.

[619] Deputy Judge Magistrate Martin Chen Wilson, *The Administrative Resolution of Public Contracts*, FORO Y JUSTICIA ADMINISTRATIVA, No. 3, Nov. 2009 (C-0740).

faith; reasonableness; estoppel; and mutuality of obligations. Notably, the TACP tied the reasonableness requirement to the obligation of good faith.[620]

211. As explained in the remainder of this section, the INAC's violations of this requirement are extensive. The INAC failed to pay Claimants for work already performed, it failed to allocate a proper budget for the Project, it failed to negotiate in good faith with Claimants, it deployed an inspector to find (or invent) reasons for it to terminate the contract, it failed to grant Claimants' reasonable requests for time extensions, it failed to provide notice of an impending termination, it failed to invite Claimants to address the termination, and it failed to provide Claimants with an opportunity to file an appeal.

2. *The INAC Failed to Comply with Its Payment Obligations*

212. As a thresholder matter, the Omega Consortium did not fail to comply with any aspect of the Ciudad de las Artes Contract. But even if it had, any non-compliance on Omega's part was *due to non-payment on the INAC's part*. As Mr. Lopez notes, "[s]ince Varela's Administration took power, the Omega Consortium never received a single payment corresponding to the Contract, and the amount owed was approximately US$ [redacted]."[621]

213. The record bears this out. As set forth above,[622] the INAC had been withholding CPP payments for work already performed. A meeting between the Omega Consortium and the INAC in mid-October 2014 was devoted largely to this issue.[623] Yet the INAC began the meeting by stating

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[620] Order 050-2019-Pleno/TACP dated 26 Mar. 2019 (C-0564).

[621] López ¶ 122.

[622] *See* § V.A.5.

[623] Meeting Minutes between Omega and INAC Representatives dated 23 Oct. 2014 (C-0595); *see also* Email from Frankie López to Mariana Nunez dated 13 Oct. 2014 (C-0699) ("I just wanted to drop a few lines to express our

that it had issued instructions to evaluate the "legality" of the INAC's CPP payment obligations and that Claimants were obligated to finish the Project *without* those contractually-required progress payments.[624] This explains why the INAC was uncomfortable when it found out, after the fact, that the Omega Consortium had memorialized the meeting in official minutes.[625] As evidenced by a news article the same day (and as already discussed above), the INAC triggered the "legality" analysis only because it knew it would not have the funds to pay for the Ciudad de las Artes Contract,[626] as was evident from the proposed budget sent to the National Assembly by the Ministry of Economy and Finance a month prior.[627]

214. Claimants also repeatedly told Sosa and the INAC that the Omega Consortium was owed money and therefore not in breach of the Contract.[628] More importantly, Sosa's contemporaneous communications *also* reflect the INAC's unfulfilled payment obligations and the effect that was having on the Project.[629] For example, Sosa observed in late September 2014 that the

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worry regarding the partial payment Accounts based on progress made. As of yet, we're still owed approximately $2,360,000.").

[624] Meeting Minutes between Omega and INAC Representatives dated 23 Oct. 2014 (C-0595); Letter DG/149 from INAC to the Omega Consortium dated 23 Oct. 2014 (C-0074).

[625] Email from Melva de Pimento to Luis Pacheco, et al. dated 31 Oct. 2014 (C-0713) ("[W]ho authorized you to take the minutes of the meeting and when?").

[626] See National Institute of Culture Requests an Additional $11M for 2015, LA PRENSA dated 23 Oct. 2014 (C-0114) at 2.

[627] *See* Ministry of Economy and Finance, National Budget Direction, Monthly Assignment of Expenditure Budget, 2015 (R-0037), at 3; *The Minister of Economy presents a Budget before the National Assembly's Commission*, LA PRENSA, dated 10 Sep. 2014 (C-0233).

[628] Letter from Omega to Sosa dated 5 Sept. 2014 (R-0045) ("At the moment, we are owed $ 2,169,813.09."); Letter from Omega to Sosa dated 31 Oct. 2014 (C-0714).

[629] Letter from Sosa to INAC dated 21 Aug. 2014 at 2 (C-0592), ¶ 2 (seeking to know INAC's position on a bill from Omega for $7.7 million); Letter from Sosa to Omega dated 25 Sept. 2014 (C-0593), Third Bullet (telling Omega to it had told INAC of the importance of responding to Omega about outstanding payments 13, 14, and 15); Letter from Sosa to INAC dated 5 Dec. 2014 (C-0715), at 3; *see also* Rivera 2, ¶ 32.

INAC's failure to approve the CPPs *"*is seriously affecting the cash flow of the Contractor."[630] And one of Sosa's monthly reports to the INAC warned in October 2014 that "it is important to give an answer to the Contractor regarding the approval of pending Partial Payment Accounts because "*the delay in this approval is affecting the Contractor's cash flow and provoking a reduction in productivity and delay in the Project*."[631]

215. Nevertheless, the INAC's termination resolution was based on the bad faith theory that the INAC had no obligations to pay Claimants at all until the Project was fully completed, and therefore any delays and suspension of work by Claimants as a result of the withheld payments constituted an event of default under the Contract. The termination resolution stated:

> [I]t is not observed in any of its clauses as having stipulated that the delays or lateness in the approval of partial payment accounts (CPP) by the contracting entity are grounds for contractor to reduce the personnel, let alone to suspend the execution of the project in its entirety, which is what CONSORCIO OMEGA has done to date . . . .[632]

216. But clause 35 of the Cuidad de las Artes Contract, which governs administrative termination, ***does not*** envision terminating the Contract on this basis.[633] And Addendum No. 1 to the Contract specifically incorporates a provision on good faith to protect the Contractor from the type of interpretation advanced by the INAC.[634] Even Sosa expressed the view that there were no technical

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[630] Letter from Sosa to Omega dated 25 Sep. 2014 (emphasis added) (C-0593).

[631] Monthly Report from Sosa to INAC, p. 44 (point 4) (Oct. 2014) (emphasis added) (C-0524).

[632] Resolution No. 391-14 DG/DAJ from INAC dated 23 Dec. 2014 (C-0044 resubmitted) at 5.

[633] Contract No. 093-12 dated 6 July 2012 (C-0042 resubmitted), Clause 45.

[634] Addendum No. 1 to Contract No. 093-12 dated 16 Apr. 2013, at 2 (C-0167) ("As we can see in this case, the proposal is clearly part of the foregoing contract; furthermore, when interpreting provisions on public contracts in the closet stipulations of the contracts, good faith is a rule for contract interpretation which has been invoked by the Third Chamber of the Supreme Court of Justice in several decisions, in accordance with Article 22 of the Sole Text of Law 22

merits for the INAC to terminate the Contract for default and recommended that the INAC negotiate with Claimants and continue the Project.[635]

3. *The INAC Had No Basis to Terminate the Contract*

217. The INAC's termination resolution referred to several different types of purported breaches—delays,[636] incomplete work,[637] insufficient personnel,[638] and non-communication.[639] Respondent's Counter-Memorial largely reiterates the same complaints.[640] None provided a legitimate basis for cancelling the Contract, neither then nor now.

218. With respect to the delays, nothing in the Contract prohibited Claimants' right to extend its term when delays were not caused by the Contractor. In fact, it did precisely the opposite,

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of the year 2006. *Good faith by the government is a principal that binds it to THE CONTRACTOR to avoid unfair results in strict application of the principle of legality*.") (emphasis added).

[635] Email from ASSA to Travelers on 30 December 2014 at 11:04AM (C-0527) ("The inspector, architect Thomas Sosa, simply stated that despite the possible inconveniences, he thinks there is no technical merit for INAC to terminate the contract due to non-compliance. He also expressed that he has recommended the INAC to negotiate the posible differences with OMEGA and to continue to work with OMEGA."); Email from ASSA to Travelers on 30 December 2014 at 11:46AM (C-0528) ("Architect Thomas Sosa told us he recommended to INAC not to issue an Administrative Resolution terminating the Contract for default.").

[636] Resolution No. 391-14 DG/DAJ from INAC dated 23 Dec. 2014 (C-0044 resubmitted), at 3 ("[T]he works in the project in question had to be maintained at a satisfactory pace."); *id.* (arguing that Omega "has breached without justification the aforementioned contract when maintaining a significant delay"); *id.* at 4 ("[T]he contractor did not follow the work schedule . . . ."); *id.* (claiming a delay of 13 months); *id.* at 5 (arguing that the Omega Consortium had no basis to "suspend the execution of the project" based on delay in CPP payments).

[637] *Id*. (claiming that Claimants had completed "24% of the total project, which represents a clear breach"); *id.* at 4 ("[T]he execution of the work percentage is, as of today, below the agreed contractual terms."); *id.* (claiming the Omega Consortium had been paid for 39% of the work, while executing only 24% of the work).

[638] *Id*. at 4 (claiming that the contractor did not have "the number of workers required" and "it did not maintain company personnel" and referring to a "lack of labor"); *id.* (claiming that the Omega Consortium "dispensed with the labor in the project"); *id.* at 5 (arguing that the Omega Consortium had no basis to "reduce the personnel" based on delay in CPP payments).

[639] *Id*. at 4 (arguing that Claimants "ignored the warning, recommendations, and observations made by . . . SOSA").

[640] Resp.'s Counter-Mem. ¶¶ 97, 99, 101-04, 106-07.

stating: "THE CONTRACTOR should also have the right to extend the Contract term for a period no greater than the delay, when the causes of the delays are not attributable to THE CONTRACTOR."[641] The record shows that the Omega Consortium properly applied for an extension of time on 15 July 2014 due to no fault of Claimants.[642] INAC ignored the request.[643] INAC also failed to review and approve construction drawings, which were needed to obtain the corresponding construction permits to continue the Project.[644] And again, even Sosa concluded in October 2014 that the delays were *not attributable to Claimants*, recommending that the requested time extension be granted and urging the INAC to review and approve certain plans so that Claimants could continue operations.[645]

219. As for the suggestion that Claimants were "over-funded" under the Contract,[646] the Tribunal need look no further than the testimony of the Parties' experts. Respondent's quantum expert admits that "Pay Apps 12 through 19 were signed by Omega and INAC, *but they have outstanding balances*,"[647] in keeping with the conclusions drawn by Claimants' expert.[648] Thus,

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[641] Contract No. 093-12 dated 6 July 2012 (C-0042 resubmitted), Clause 5. Request for Proposals 2012-1-30-0-08-LV-002784 "Contratación de los Estudios, Diseño, Suministro de Materiales, Mano de Obra, Equipo, Administración y Construcción del Proyecto Ciudad de las Artes" (C-0039 resubmitted), art. 9.2.2 (stating that the Contractor does not have responsibility for delays caused by INAC).

[642] Letter from Omega to Sosa dated 15 July 2014 (C-0292 resubmitted); *see also* Letter from Omega to INAC dated 3 Feb. 2015 (C-0185), ¶ 16.

[643] Letter from Omega to INAC dated 3 Feb. 2015 (C-0185), ¶ 16 ("To date, INAC has ignored our efforts and attempts to formalize the extension of time, nor have they justified their position.").

[644] *See* Sosa Architects - Minutes of Meeting for Ciudad de las Artes dated 28 Nov. 2014 (C-0602).

[645] *See* Monthly report from Sosa to INAC dated Oct. 2014 (C-0524), at 7 (point 2).

[646] Resp.'s Counter-Mem. ¶¶ 99, 103, 104, 106, 109, 116-17.

[647] Flores ¶ 143(iv) (emphasis added).

[648] McKinnon 1, Annex 1, Table 9; *id.*, Annex 1, ¶ 18 ("The outstanding balance of progress billings is $3,099,267.93."); *id.*, Annex 2, p. 2 (this document indicates that the "value of the work at cessation" was $17,562,735 and that the total payment was $17,982,638); McKinnon Report 2, ¶ 24 ("Dr. Flores' comment [about the Ciudad de las Artes contract] does not provide a basis for revising my conclusions.").

Respondent's claim that the Omega Consortium has an "outstanding financial debt to INAC" is belied by Respondent's own expert. Moreover, as already explained above, Panama was required to make ***all*** payments under the Contracts with the Omega Consortium, not just the advance payments.[649]

220. The Contract contains no explicit numerical requirement for workers onsite, thus disproving another of Respondent's claims that the Omega Consortium was in breach.[650] And Claimants explained in contemporaneous correspondence to Sosa that "[t]he 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"[651]—the key "condition," of course, being *lack of payment by the INAC*. The same communication went on: "As the progress payment accounts are settled, we will be in a position to proportionally inject the necessary funds and personnel according to the work plan to make up this lost time."[652] Mr. Lopez further elaborates on the direct causal relationship between the INAC's non-payment and the Omega Consortium's employees: "we had to reduce the Project workforce due to payment defaults."[653]

221. Finally, Respondent's assertion that Claimants were non-responsive or "abandoned" the project in late 2014[654] is also completely false, as demonstrated above. The record shows that the Omega Consortium wrote at least six letters to the INAC or Sosa between 4 August 2014 (when Sosa

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[649] *See* Contract No. 093-12 dated 6 July 2012 (C-0042 resubmitted), Clauses 6, 35.

[650] Contract No. 093-12 dated 6 July 2012 (C-0042 resubmitted), Clause 4; *see* Resp.'s Counter-Mem. ¶ 98.

[651] Letter from Omega to Sosa dated 5 Sept. 2014 (R-0045), at 2 (emphasis added).

[652] *Id*.

[653] López ¶ 60.

[654] Resp.'s Counter-Mem. ¶ 97 (arguing that "Omega did not respond" to Sosa's letter dated 12 August 2014); *id.* ¶ 102.

first raised complaints) and 23 December 2014 (when the INAC administratively terminated the Contract)[655]—not to mention emails[656] and meetings.[657] The following contemporaneous passage from one of the Omega Consortium's letters to Sosa is particularly apt: "We maintain verbal and written communication with your office's staff *virtually every day*, updating the projects details and situations."[658] As the evidence proves, it was the *INAC* that ignored *the Omega Consortium's* communications and abandoned the Project.[659]

4. *The Termination Was Pretextual*

222. The manner in which the INAC went about terminating the Contract reveals how calculated and pretextual it truly was. To begin with, the timing of Sosa's complaints raises red flags. The INAC originally hired Sosa to supervise the Ciudad de las Artes Contract in February 2013.[660] Yet Respondent's Counter-Memorial admits that "Sosa's correspondence . . . showed serious

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[655] *See* Letter from Omega to Sosa dated 5 Sept. 2014 (R-0045); Letter from Omega to INAC dated 2 Oct. 2014 (C-0586); Letter from Omega to INAC dated 16 Oct. 2014 (C-0597); Letter from Omega to Sosa dated 31 Oct. 2014 (C-0714); Letter from Omega to INAC dated 21 Nov. 2014 (C-0599); Letter from Omega to Sosa dated 22 Dec. 2014 (C-0600); *see also* Rivera 2 ¶ 31 ("My team diligently responded to Sosa's recommendations and letters in good faith.").

[656] *See*, *e.g.*, Email from Frankie López to Mariana Nunez dated 13 Oct. 2014 (C-0699); Email from Frankie López to Melva de Pimento dated 6 Nov. 2014 (C-0716).

[657] Meeting Minutes between Omega and INAC Representatives dated 23 Oct. 2014 (C-0595).

[658] Letter from Omega to Sosa dated 5 Sept. 2014 (R-0045) at 1 (emphasis added).

[659] *See, e.g.,* Letter No. SOSA-0-5-2014 from the Omega Consortium to Sosa dated 17 Sept. 2014 (C-0546 ("In our last meeting held on September 8th, we were told that the INAC would provide answers for these issues and, as of this date, we have not received any response."); Letter No. INAC-N14-2014 from Omega to INAC dated 2 Oct. 2014 (C-0586) ("[W]e respectfully insist on not to lose track of the matters requiring your attention, or request to know who will be the person making decisions on behalf of INAC."); Letter from Omega to INAC dated 3 Feb. 2015 (C-0185), ¶ 16 ("To date, INAC has ignored our efforts and attempts to formalize the extension of time, nor have they justified their position."); id. ¶ 20 (INAC has ignored the numerous efforts of OMEGA to collect these amounts and unilaterally decided to pay them at its discretion a clear breach of the CONTRACT."); id. ¶ 22 ("INAC has ignored and has not responded to the numerous efforts that OMEGA has made in order to address the problems that affect the progress of the work . . . .").

[660] Contract No. 049-13 between INAC and Sosa dated 7 Feb. 2013 (R-0041).

problems with the Omega Construction's work starting in the first week of August 2014"[661]—that is, just weeks after President Varela assumed office. Mr. Lopez further recalls that "[i]n fact, after the Administration changed, the Omega Consortium requested a meeting with the new director to present the Project and to establish a line of communication. Curiously, the external inspector Sosa did not participate in this meeting."[662]

223. Once Sosa began to send correspondence suggesting problems with the Project in August 2014,[663] its letters took on a strange, conflicted tone. Out of the blue, Sosa started creating a paper trail of supposedly "alarming" deficiencies in the Omega Consortium's performance. But the details of Sosa's letters suggest that it was grasping to find any actual problems. Most focus on mundane aspects of an ongoing construction project—concrete pouring methods, a tensioning joint, a crane permit, measurements, a single beam, and so forth—which, when raised by the inspectors, were always addressed by the Omega Consortium.[664]

224. Unsurprisingly, Mr. Rivera came to the distinct impression that Sosa had been tasked with cobbling together sufficient evidence of "problems" to justify the INAC's intended termination of the Contract.[665] Indeed, despite the fact that Sosa was hired as a *technical* inspector, its post-August 2014 letters focused much more on *legal* issues. In particular, Sosa's letters began to focus on Clause 45 of the Omega Consortium's Contract with the INAC—which is entitled "Administrative

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[661] Resp.'s Counter-Mem. ¶ 105; *see also id.*, ¶ 96.

[662] López ¶ 128.

[663] Letter from Sosa to INAC dated 4 Aug. 2014 (R-0042).

[664] Letter from Sosa to Omega dated 2 Sept. 2014 (R-0044); Letter from Sosa to Omega dated 8 Oct. 2014 (R-0046); Letter SA-CDA-114-14 from Sosa to INAC dated 27 Oct. 2014 (R-0049); *see also* Resp.'s Counter-Mem. ¶¶ 98-101.

[665] Rivera 2 ¶ 31.

Termination of the Contract Due to Breach by the Contractor."[666] Indeed, this is the provision that the INAC would soon use to wrongfully terminate the Omega Consortium's Contract.

225. Respondent's Counter-Memorial suggests that Sosa was within its proper domain in opining on legal issues. It describes "Sosa's main role" as having "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*."[667] In reality, the Ciudad de las Artes Contract both contemplated Sosa's role and limited that role: "The National Institute of Culture shall directly inspect the work through competent individuals or companies hired at any time, before or after the execution of the work, but under the direction of The National Institute of Culture. *THE INSPECTION shall be limited to completing the execution of the work in accordance with the tender documents*."[668] And Sosa's contract with the INAC also confined its role to "inspection and oversight services"[669]—not legal analysis of the Contract.

226. Finally, as noted in Claimants' Memorial[670] and above, the INAC's budget for 2015 provides further evidence that Sosa's "inspections" were mere pretext. While Claimants were not aware of it at the time, the INAC and Sosa were well aware that funding for the Cuidad de las Artes Project had been cut almost entirely from the 2015 budget by the Ministry of Economy and

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[666] Letter from Sosa to Omega dated 2 Sept. 2014 (R-0044); Letter No. SA-CDA-078-14 from Sosa to INAC dated 21 Aug. 2014 (citing cl. 45(1), (7) of the contract) (C-0592); Letter from Sosa to Omega dated 21 Aug. 2014 (C-0596); Letter from Sosa to INAC dated 10 Dec. 2014 at 2 (R-0051); Letter from Sosa to INAC dated 16 Dec. 2014, ¶ 9 (C-0717); *see also* Letter from Sosa to Omega dated 8 Oct. 2014 (R-0046); Email chain between Sosa and Omega dated 28 Oct. 2014 (R-0047).

[667] Resp.'s Counter-Mem. ¶ 95 (emphasis added).

[668] Contract No. 093-12 dated 6 July 2012 (C-0042), Clause 4 (emphasis added).

[669] Contract No. 049-13 between INAC and Sosa dated 7 Feb. 2013 (R-0041), First Clause, Third Clause.

[670] Cls' Mem. ¶ 79 & nn.341, 400.

Finance.[671] And officials from that Ministry were openly stating that the Ciudad de las Artes Project was on a list of "high-risk" projects that were "flawed, poorly executed and *questionable in terms of need*."[672]

227. Respondent seeks to lessen the impact of this damaging evidence by arguing that the "National Assembly, in fact, did assign a budget for the Ciudad de las Artes Project for 2015," but that it was "unfeasible" to mention it in the budget itself.[673] But the evidence cited by Respondent speaks for itself. It shows that the INAC sent a draft budget to the Ministry of Economy and Finance requesting the full price of the Ciudad de las Artes Project (US$ 54.6 million) on 30 April 2014—that is, *before President Varela was elected*.[674] It then shows that the Ministry of Economy and Finance reduced the amount allocated to the Cuidad de las Artes Project drastically, providing only US$ 10 Million, as reflected in the National Assembly's budget on 8 September 2014—*after* President Varela took office.[675] On 2 December 2014, this budget for 2015 was officially enacted into law. And there is no question that the US$10 million earmarked for the Project in 2015 was insufficient to satisfy the INAC's financial obligations under the Ciudad de las Artes Contract.[676] This proves that the Government had *already* decided to terminate the Project when the

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[671] 2015 Budget presented by Panama's National Assembly dated 8 Sept. 2014 (C-0067 resubmitted).

[672] *High risk projects are identified,* LA PRENSA dated 10 Sept. 2014 (C-0231) (emphasis added); *see also* Letter from Banistmo to Credit Suisse and Omega Panama dated 04 Feb. 2015 (C-0718) at 2, second bullet.

[673] Resp.'s Counter-Mem. ¶¶ 91-93.

[674] INAC Draft Budget for the Fiscal Year 2015 dated Apr. 30, 2014 (R-0036), at 7; *see also* Resp.'s Counter-Mem. n.195.

[675] Ministry of Economy and Finance, National Budget Direction, Monthly Assignment of Expenditure Budget, 2015 (R-0037), at 3; 2015 Budget presented by Panama's National Assembly dated Sept. 8, 2014 (C-0067 resubmitted), at 30, 33, 37; Resp.'s Counter-Mem. n.195.

[676] *See*, Law 36 of December 2, 2014 dated 2 Dec. 2012 at 33 (C-0719).

Administration changed.

5. *Claimants' Witnesses Confirm that the Termination Was Illegitimate*

228. Former INAC Director María Eugenia Herrera de Victoria has provided a witness statement in this case. Ms. Herrera was intimately involved in the Ciudad de las Artes Project until she stepped down in July 2014.[677] According to Ms. Herrera, there were no problems with Claimants' work on the Ciudad de las Artes Project during her tenure with the INAC. She has explained that the "Omega Engineering Consortium was at all times in compliance with its contractual obligations" and never breached any aspects of its Contract with the INAC.[678] Ms. Herrera was "satisfied with [Claimants'] work," and noted that "they took all proper administrative steps."[679] Accordingly, and as noted above,[680] Ms. Herrera never heard of any noncompliance.[681] The INAC's decision to terminate Claimants' Contract was "surprising" and "quite a disappointment" to Ms. Herrera."[682]

229. Mr. Rivera's testimony echoes that of Ms. Herrera. "[a]lthough the Project faced several significant problems since the beginning," these were not attributable to Claimants.[683] In fact, the INAC acknowledged that they themselves "were the source of all the problems and showed willingness to work together with [Claimants] to resolve the issues that were hindering [Claimants']

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[677] As noted in her witness statement, Ms. Herrera was a well-known professional dancer and Director of the National Ballet before being appointed Director of INAC—which appointment came from *both* Mr. Martinelli and Mr. Varela. Herrera ¶ 8.

[678] Herrera ¶¶ 12, 14.

[679] *Id*. ¶ 14.

[680] *See supra* § V.A.5.

[681] Herrera ¶ 13.

[682] Herrera ¶ 15.

[683] Rivera 2 ¶ 29; Herrera ¶ 12 ("Until I left my position as Director, in the summer of 2014, there were no major problems with the Omega Consortium's performance of the work.").

ability advance the Project."[684] Yet, "once the administration changed, the INAC became completely uncooperative."[685] Mr. Rivera's team was "puzzled and alarmed,"[686] as was ASSA.[687]

230. Mr. Lopez had similar impressions. He notes that neither Ms. Chen, nor the Government, nor the project inspectors (Sosa) even *hinted* that the Omega Consortium was not executing the Contract properly from its inception until Mr. Varela reached the Presidency.[688] But everything changed when President Varela named a new Director, who "made it her mission to obstruct the Omega Consortium's Contract."[689] From that point forward, Mr. Lopez recounts that the Omega Consortium did not receive a single payment relating to the INAC Contract, even though it was owed approximately US$ 3 million. That caused the Omega Consortium to have to release part of its labor force and suspend work.[690] But the Omega Consortium's intention was always to finish the Project. Given that the Omega Consortium responded to all of Sosa's concerns through 22 December 2014, Mr. Lopez found INAC's termination decision "surprising."[691]

6. *The Termination Had Profound Ramifications*

231. The INAC's termination resolution, issued on 23 December 2014, dealt a crippling blow to Claimants' investments beyond the Ciudad de las Artes Contract. It is undisputed that this Contract was by far the Claimants' largest one in Panama at over US$ 54 million. The monetary effect thus was immediate and extreme. But the nature of the INAC's sovereign termination of the

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[684] Rivera 2 ¶ 29.

[685] Rivera 2 ¶ 30.

[686] *Id*.

[687] *Id*. ¶ 36.

[688] López ¶ 54.

[689] *Id*. ¶ 111.

[690] *Id*. ¶ 111.

[691] *Id*. ¶ 112.

Contract undermined *the very viability* of Omega Panama. This is because Article 16 of the General Directorate of Public Contracting of Panama provides as follows:

> Incapacidad legal para contratar. Podrian contratar con las entidades estatales las personas naturales capaces conforme al Derecho Comun, y las personas juridicas legalmente constituidas sean nacionales o extranjeras, siempre que no se encuentren comprendidas dentro de alguna de las situaciones siguientes:
> . . .
> (7) Haberseles resuelto administrativamente un contrato por incumplimiento culposo o doloso, de acuerdo con el procedimiento establecido en la presente Ley, mientras dure la inhabilitacion.[692]

232. In other words, the INAC's administrative termination of the Ciudad de las Artes Contract precluded the Omega Consortium, which included both Omega U.S. and Omega Panama, from obtaining *any* new contracts from *any* Government agency in Panama. This was a devastating turn of events for Omega Panama, the *raison d'etre* for which was Government contracts for public works. Without the possibility to bid and enter into additional public works contracts in Panama, the Varela Administration, through the INAC, created an insurmountable obstacle for Claimants to continue as a going concern. And, combined with the fact that ***all*** of their other existing Projects were under attack, the INAC's administrative termination of the Ciudad de las Artes was fatal to Claimants survival as foreign investors in Panama.

233. The business community's reaction to the INAC cancellation was immediate and severe. Travelers Insurance informed Claimants that *due to the Declaration of Default* leveled by Respondent, Travelers would no longer support bids by Omega U.S.:

> The default ***on the largest job in Panama*** has the potential to put at risk ***both the Panama and PR operations*** if a resolution is not reached.

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[692] General Directorate of Public Contracting of Panama (C-0720), art. 16(7).

> Both companies could be at risk with this particular situation in Panama if the options to resolve do not involve a full release of Omega's obligations to the surety and the surety's obligations to the government.[693]

234. Around the same time, the Smithsonian Institution notified Omega that it had been eliminated from consideration as a provider of construction services for the Smithsonian Tropical Research Institute.[694] Thus, the wrongful termination of the Ciudad de las Artes Contract not only jeopardized Claimants' business in Panama, but also harmed their business abroad. It soon became clear, however, that the Government intended not only to harm Mr. Rivera's business interests, but also to go after him personally in ways that would severely damage his reputation and that of the Omega brand.

E. The Government Persecutes Claimants through a Series of Bogus Corruption and Money Laundering Investigations

235. Panama's campaign of criminal investigations has never served any purpose other than to harass and intimidate Claimants, as already set forth in Claimants' Memorial.[695] The evidence shows that Mr. Rivera engaged in a real estate transaction—a *perfectly legitimate* land purchase—through PR Solutions and another corporate vehicle (Punela Development Corp.).[696] Once the investigation against Supreme Court President Justice Moncada Luna began, the Panamanian Government under President Varela's control latched on to coincidental and tenuous links between Mr. Rivera's real estate transaction and Justice Moncada Luna. The Government then threw its full

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[693] Email from Travelers to AON dated 9 Feb. 2015 (C-0721) (emphasis added).

[694] *See* Email from Smithsonian Tropical Research Institute to Omega Engineering dated 9 Feb. 2015 (C-0380).

[695] Cls' Mem. ¶¶ 88-106.

[696] *See* Cls' Mem. ¶¶ 94-95.

weight behind the pretextual investigation to frame Claimants as criminals.

236. Respondent's Counter-Memorial completely evades the myriad of improprieties arising from the investigations, instead citing them as "irrefutable documentary evidence" "proving" "conclusively" two corrupt payments made by Claimants to Mr. Moncada Luna.[697] But from a procedural and methodological standpoint, the investigations have been profoundly flawed. The report submitted along with this Reply by Alison K. Jimenez, Claimants' expert on anti-money laundering and corruption, discusses those flaws in detail and points out the way in which the two main reports relating to the investigations relied upon by Respondent, authored by Mr. Jorge Villalba[698] and Mr. Julio Aguirre[699] ("**Respondent's Criminal Reports**"),[700] are based on defective analysis.[701] As discussed in further detail below, the conclusions set forth in Respondent's Criminal Reports are based on pretext (*see infra* Section V.F.1) and flawed bank transaction analyses, and feature illogical assumptions, contradictory interpretations of the same set of facts, and even mathematical errors (*see infra* Sections V.F.2-3).[702]

237. Finally and unfortunately for Claimants, the investigations achieved the Varela Administration's objectives. They harmed Claimants' investments in a manner that is unmistakable

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[697] Resp.'s Counter-Mem. ¶¶ 251, 254.

[698] Jorge Enrique Villalba, Preliminary Financial Analysis Report in Case No. 049-15 dated 5 June 2015 (R-0062).

[699] Julio Aguirre's Money Laundering Expert Report for the National Assembly dated 2 Mar. 2015 (R-0063).

[700] Mr. Villalba has also submitted a witness statement on behalf of Respondent in this arbitration ("**Villalba**").

[701] Jimenez at 3. To provide the most accurate assessment of the Aguirre and Villalba reports, Ms. Jimenez limited her review to those reports and to the information available to Messrs. Aguirre and Villalba at the time they wrote the reports.

[702] *Id*. at 3-4.

and irreversible (*see infra* Section V.F.4).

1. *The Criminal Investigations Were Entirely Pretextual*

238. Nothing in Respondent's Counter-Memorial changes the overwhelming evidence that the criminal investigations against Claimants were always pretextual and that Claimants were never involved in any criminality. Claimants did not engage in any wrongdoing,[703] and the evidence bears that out. Aside from the La Chorrera Contract signing ceremony, Claimants have never had any contact with Mr. Moncada Luna.[704] More importantly, the Government offers *absolutely no evidence* showing that Claimants knowingly or intentionally transferred funds to Mr. Moncada Luna or to any of his relatives for any purpose.[705] Likely for that reason, no indictment has ever been issued with respect to the allegations made by Respondent in this case. Indeed, this arbitration marks the first time Panama has ever actually articulated a "charge" against the Claimants.[706]

239. Nonetheless, Respondent frames the investigations as an inevitable event that its law enforcement personnel were compelled to pursue. It asserts that "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," thus "Panama had a duty and obligation to further investigate the Claimants' actions."[707] This is self-serving nonsense. A sober review of the evidence leads to only one conclusion—namely, that Panama used the investigations as a ploy to punish the

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[703] *See, e.g.*, Rivera 1 ¶ 89 (referring to the charges as "preposterous"); Cls' Mem. ¶ 97 (referring to the charges as "wholly absurd"); López ¶¶ 59, 85 ("absurd").

[704] Rivera 1 ¶¶ 85, 89 & n.135; Rivera 2 ¶ 10; López ¶ 86.

[705] *See* Cls' Mem. n.217.

[706] Rivera 2 ¶¶ 7, 14; Rivera 1 ¶ 112.

[707] Resp.'s Counter-Mem. ¶ 296.

Claimants pursuant to President Varela's vendetta.

240. The record is straight forward that the initial National Assembly investigation into Mr. Moncada Luna was fueled by political revenge, as noted above. Mr. Moncada Luna's prosecution stemmed from a deep-seated feud between outgoing President Martinelli and incoming President Varela.[708] Respondent does not contest the evidence showing that Mr. Varela called upon Mr. Moncada Luna to resign as early as 2012 or that Mr. Varela announced his desire to prosecute Mr. Moncada Luna days after being elected President.[709] Panama then leveraged the Moncada Luna investigation to freeze Claimants' bank accounts, thus furthering the President's vendetta against anyone he deemed as associated with Mr. Martinelli.

241. At the conclusion of that National Assembly proceeding, Panama's Designated Prosecutor declared that PR Solutions and Omega Panama were no more than "Affected Third Parties" in Moncada Luna's scheme.[710] Respondent's Counter-Memorial ignores this point entirely, and its witness, Mr. Villalba, takes great pains to avoid it.[711] Instead, he declares that—through carefully chosen words—that "[a]t no time did the National Assembly, the Public Prosecutor's office, or a court

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[708] Cls' Mem. ¶¶ 12-13.

[709] See, e.g., Cls' Mem. ¶¶ 13, 89-90; Juan Carlos Varela reitera que Moncada Luna debe renunciar por dignidad, LA PRENSA dated 21 June 2012 (C-0076 resubmitted); I would ask for the heads of public servants, EL SIGLO dated 7 May 2014 (C-0372); see also Opponent Will Investigate the Misuse of Government Funds by Martinelli's Government if He Wins the Presidential Election, FOX NEWS LATINO dated 15 Apr. 2014 (C-0204); Panamanian Candidate Will Investigate the Management of Funds During Martinelli's Government, LA VANGUARDIA dated 15 Apr. 2014 (C-0225).

[710] Cls' Mem. ¶ 99; Sentencing Hearing of Mr. Moncada Luna dated 5 Mar. 2015 (C-0085). An "Affected Third Party" is defined as, "an interested third party is understood as an individual or legal entity who, according to the laws, is not required to answer in either criminal or civil court as a result of having committed a criminal act, but who has assets affected by the proceedings." Panamanian Criminal Code dated 28 Aug. 2008 (C-0088 resubmitted 2), art. 106.

[711] Villalba ¶ 27.

find that Mr. Rivera and Omega Engineering *were not guilty* of the charges being investigated."[712] This is deliberately misleading at best. Of course no official body has ever "found" Claimants "not guilty of the charges being investigated"—neither Mr. Rivera, nor any of his companies or employees, has ever been charged or indicted for any offense. To the contrary, the Designated Prosecutor expressly declared at the conclusion of the National Assembly Investigation that "PR Solutions [and] Omega Engineering . . . are [among the] companies that are *not* linked to the unjustified enrichment charges against the judge."[713] In the same hearing, the prosecutor stated *twice* that he had no opposition to unfreezing Claimants' bank accounts.[714] That hardly seems like a statement a prosecutor would make if he still harbored doubts about Claimants' innocence and expected them to be charged with a crime.

242. Nonetheless, Respondent's authorities not only maintained the freeze on the accounts,[715] but also opened two *new* investigations under the authority of the Public Prosecutor's office, now including Mr. Rivera and Mr. Feliu as direct subjects. The Public Prosecutor's investigations were based on the same body of evidence as the National Assembly investigation, which had already concluded.[716] Indeed, Respondent admits the evidence in the later investigations

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[712] Villalba ¶ 39.

[713] Sentencing Hearing of Mr. Moncada Luna dated 5 Mar. 2015 (C-0085) , at 25:40 – 28:38; Rivera 1 ¶ 101; Claimants' Request for Arbitration dated 30 Nov. 2016 ("**Cls' RfA**") ¶¶ 43, 45; Cls' Mem. ¶¶ 99, 177, 184.

[714] Letter from Manuel Cedeño Miranda to Special Prosecutor of Organized Crime dated 10 June 2015 (C-0209), at 7 (attaching hearing transcript containing the following passage: "This Prosecutor´s Office IS NOT OPPOSED TO THE RELEASE OF SAID ACCOUNTS UPON THE CONCLUSION OF THESE PROCEEDINGS . . . . Thus, from this standpoint, this Prosecutor´s Office IS NOT OPPOSED TO THE REQUEST OF ANY OF THE PARTICIPATING THIRD PARTIES . . . .").

[715] *See* Verdict on Motion for Reconsideration dated 23 Mar. 2015 (C-0207), at 5.

[716] Rivera 1 ¶ 104; Cls' RfA ¶ 46; Cls' Mem. ¶¶ 171, 177.

was no different: "Accordingly, the National Assembly referred its investigation to the Public Prosecutor's office and *shared the evidence* it had collected."[717] Mr. Villalba does as well: "The materials collected by Congressman González were *the same materials* we would have collected if the investigation had originated in the Public Prosecutor's office."[718] That Respondent and its witness observe this point in such a matter-of-fact manner is bewildering. As noted in the Claimants' Memorial, the Panamanian Constitution and Criminal Code prohibit "double judging,"[719] as does the American Convention on Human Rights to which Panama is a member State.[720] Domestic guidelines of best practices for Panamanian prosecutors indicate the same.[721]

243. Mr. Villalba's role, in particular, deserves further attention. As he recounts, "I was directly involved in the investigation into Justice Moncada Luna for the National Assembly. I was *also* in charge of the Public Prosecutor's subsequent investigations of the Claimants and other entities identified by the National Assembly as having made payments to Justice Moncada Luna."[722] Mr.

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[717] Resp.'s Counter-Mem. ¶ 171 (emphasis added).

[718] Villalba ¶ 30 (emphasis added); *see also id.* at ¶ 28 ("Congressman González referred *the evidence and information* as to others involved, including Omega Engineering and its principal, to the Public Prosecutor's office for further action.") (emphasis added).

[719] Panamanian Constitution (C-0060 resubmitted 2) art. 32; Panamanian Criminal Code (C-0088 resubmitted 2), art. 7 ("No one can be criminally *investigated* or judged *more than once* for the same crime, even if the crime is given a different name.") (emphasis added); *see also* Cls' Mem. n.220.

[720] American Convention on Human Rights, adopted by Law No. 15 of 28 Oct. 1977 (C-0722), art. 8.4 ("An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.").

[721] "Agreement Negotiation Guide: Better Practices" (C-0723) ("In such case, the Prosecutor, when submitting the plea agreement, must also request the dismissal of other alleged facts, justifying or explaining the reasons for dismissal, either because it was not possible to prove the punishable fact or the relation of the suspect with the fact, or because the type of criminal offense that is subject-matter of the agreement, includes other alleged facts, or to state that according to the plea agreement and the bargained sentence, the prosecutor will refrain from pursuing criminal actions regarding the remaining facts and, as a consequence, will lead to its dismissal, provided, however, that the preceding does not entail that the agreement is deemed ineffective.").

[722] Villalba ¶¶ 2, 10, 28 (emphasis added); Resp.'s Counter-Mem. ¶¶ 2, 172.

Villalba points out that the National Assembly's jurisdiction was limited to the investigation of Justice Moncada Luna and that the two investigations within the Public Prosecutor's Office are conducted by two distinct divisions.[723] But those are distinctions without a difference. Mr. Villalba's return to Public Prosecutor's Office at the end of the National Assembly investigation and his subsequent assignment to an investigation based on the *same facts* cannot be proper. In fact, Panamanian law prohibits experts from opining on the same facts they have already evaluated in a separate legal proceeding.[724]

244. Of equal importance is the fact that Respondent's officials have ignored evidence concerning Ms. Reyna, the Panamanian lawyer who acted on behalf of the land owner in Mr. Rivera's real estate transaction.[725] Despite willingly incriminating herself and despite being offered a reduced sentence in exchange for incriminating her accomplices, Ms. Reyna ***twice*** absolved Omega-Panama and Mr. Rivera of any wrongdoing.[726] Other contemporaneous evidence shows that she apologized directly to Claimants.[727] Again, Respondent's Counter-Memorial ignores these important facts, as have its domestic prosecutors.

245. Finally, the Panamanian law enforcement authorities have shown remarkably little

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[723] Villalba ¶¶ 28, 29, 38; Resp.'s Counter-Mem. ¶ 172.

[724] Panamanian Criminal Code (C-0088 resubmitted 2) art. 50 (providing that judges may be challenged when they have intervened in an earlier legal proceeding); *id.*, art. 417 (providing that experts may be challenged for the same reasons as judges); Supreme Court of Justice of Panama Decision dated 18 Sept. 2008 (C-0724) (declaring the inability of an expert to act when the same person had ruled previously concerning the same facts that gave rise to the legal proceeding).

[725] Cls' Mem. ¶ 94.

[726] Supplemental Declaration of Maria Gabriela Reyna López dated 14 July 2014 (C-0089); Witness Confrontation Procedure between Maria Gabriela Reyna López and Jorge Enrique Espino Mendez dated 22 July 2015 (C-0090); Cls' RfA ¶ 45; Cls' Mem. ¶ 99.

[727] Email from Maria Gabriela Reyna to Frankie López dated 28 Jan. 2015 (C-0210); Rivera 1 ¶ 106; López ¶ 92.

interest in assessing the actual legitimacy of the real estate transaction that purportedly led to Claimants' involvement in the investigations. It is well-established that real estate ventures constitute a part of the Claimants' overall business model.[728] As Claimants explained in their Memorial, Mr. Rivera sought to purchase land to develop a vacation resort and residential homes tentatively called the "Verdanza Project" in the Tonosí region of Panama, as he had done with similar investments in Puerto Rico and the Dominican Republic.[729]

246. Respondent and its prosecutors have remarkably little to say about this. While insisting on an air tight corruption case against Claimants,[730] Respondent's Counter-Memorial devotes one sentence to the real estate transaction.[731] For his own part, Mr. Villalba admits that Claimants submitted some evidence concerning the Verdanza Project to the Public Prosecutor's office.[732] But he fails to mention that a Panamanian court denied Mr. Rivera's request to submit further evidence as "irrelevant":[733]

> [T]he Applicant presented evidence related to the preliminary sale of property 35659 located in Cañas, Tonosi, province of Los Santos, as well as its existence in the Public Registry; that the property effectively corresponded to JR BOCAS INVESTMENT, INC., a client of REYNA Y ASOCIADOS; financial records of the payments to such company

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[728] Rivera 1 ¶ 92-98; Cls' RfA ¶¶ 38-39; Cls' Mem. ¶¶ 92-95; López ¶ 89; Rivera 2 ¶¶ 10-13.

[729] Rivera 1 ¶ 92-98; Cls' RfA ¶¶ 38-39; Cls' Mem. ¶¶ 92-95; López ¶ 89; Rivera 2 ¶¶ 11-13.

[730] Resp.'s Counter-Mem. ¶¶ 251, 254.

[731] It simply notes that "Claimants[] allege the funds were transferred to Reyna y Asociados so that Mr. Rivera could purchase real estate to develop a vacation resort and residential homes, the 'Verdanza Project.'" Resp.'s Counter-Mem. n.37.

[732] Villalba ¶ 31; Letter from Franklin Amaya Jované to the Prosecutor Against Organized Crime, July 22, 2015 (R-0087); *see also* Omega's Evidence Submission to the Prosecutor against Organized Crime dated 7 Aug. 2015 (C-0216).

[733] To be clear, while Claimants are focusing on the evidence relating to the Verdanza projects, the court's ruling denied Mr. Rivera's request to submit *other types* of exculpatory evidence, as well. *See generally* Resolution Denying Evidence Request dated 4 Jan. 2016 (C-0217).

> for the acquisition of said land and also the documents for the project named VERDANZA RESIDENCES proposed to be carried out, once this was property was acquired, which consisted of a luxury residential development.
> . . .
> [T]he Office of the Special Prosecutor for Organized Crime considers that the evidence presented by the defense is irrelevant because it does not correspond to the subject of discussion in this investigation before us.
> . . .
> [T]his Court deems the motion of objection by [counsel for Mr. Rivera] unproven.[734]

247. Mr. Villalba suggests that the Public Prosecutor's Office satisfied its need to consider evidence about the Verdanza real estate transaction by "conduct[ing] its own investigation" of the issue.[735] Yet that "investigation" consisted only of (i) allegedly dispatching a special agent to the Los Santos province who could not find any applications or land relating to residences called "Verdanza,"[736] and (ii) allegedly searching (in vain) for a real estate registration for Ms. Reyna.[737]

248. These could hardly be described as legitimate efforts at considering exculpatory evidence. The law enforcement personnel involved were simply going through the motions, looking

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[734] Resolution Denying Evidence Request dated 4 Jan. 2016 (C-0217) , at 1-2, 3. Mr. Rivera through his attorney possess only a portion of the complete criminal file from Respondent's investigations of Mr. Rivera, Omega Panama, and PR Solutions. Claimants requested a complete copy of the criminal file, but that request was denied by the Tribunal. *See* Tribunal's Decision on Claimants' Request for Document Production, Request No.43. Nevertheless, Respondent has access to the complete file and has used portions of it in this arbitration. This puts Claimants at a severe disadvantage. As relevant here, Claimants do not have access to the criminal file from the period when Mr. Rivera attempted to submit evidence to the prosecutors investigating this matter. Those files would shed light on whether and the extent to which Respondent considered evidence that would plainly demonstrate Mr. Rivera's innocence.

[735] Villalba ¶ 31.

[736] *Id*. ¶¶ 32-33; Alexis Rodriguez, Legal Secretary of the Special Prosecutor's Office Against Organized Crime, Diligence Report dated 23 Nov. 2015 (R-0089); Alexis Rodriguez, Legal Secretary of the Special Prosecutor's Office Against Organized Crime, Diligence Report dated 23 Nov. 2015 (R-0088).

[737] Villalba ¶ 34; Esperanza L. Montenegro, General Secretary of the Special Prosecutor's Office Against Organized Crime, Diligence Transcript of Inspection dated 23 Nov. 2015 (R-0090), at 2.

to reinforce their views, and justifying the continuation of groundless investigations. Mr. Rivera explains that, of course, the investigators' search for Verdanza project applications would prove fruitless *because the project never materialized*.[738] It would have made no sense for him to obtain permits and registrations while the project was in its infancy.[739] The alleged "Visual Inspection Report" aimed at locating the Verdanza property is equally suspect, given its vague details and that it does not even refer to a specific address.[740] And the investigators' focus on Ms. Reyna's real estate credentials was, at the very least, misplaced, considering that *Ms. Reyna had already given two formal statements to legal authorities explaining that Omega-Panama and Mr. Rivera had done nothing unlawful when purchasing the land from her client*.[741] In any event, Claimants' Real Estate Experts have confirmed that, in Panama, the use of a real estate *lawyer* (like Ms. Reyna) in lieu of a real estate *agent* is common.[742]

249. Respondent's investigators do not seem to even have reviewed other evidence demonstrating that the land purchase was legitimate, such as the fact that Mr. Rivera engaged a

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[738] Rivera 2 ¶¶ 11-13.

[739] *Id.*

[740] Alexis Rodriguez, Legal Secretary of the Special Prosecutor's Office Against Organized Crime, Diligence Report dated 23 Nov. 2015 (R-0089) ("The Office sets forth that after performing the visual inspection at the Civil Works and Construction Department of the Municipality of Tonosí and speaking with Municipal Engineer Irving Rodríguez, we were directed as to how to arrive at where "Verdanza Residences" was supposedly constructed, to which end we went to downtown Tonosí, i.e., where the City Hall is located on the left, where sugar cane fields had been identified, with a view to finding the site Bella Vista, and were given the run-around when trying to locate that site, after various dead-ends and interviews with residents of the area who stated they were not familiar with that project, until we arrived at a place where the road no longer allowed us to continue because of its poor condition, not to mention the fact that since the day we arrived it had been raining.").

[741] Supplemental Declaration of Maria Gabriela Reyna López dated 14 July 2014 (C-0089); Witness Confrontation Procedure between Maria Gabriela Reyna López and Jorge Enrique Espino Mendez dated 22 July 2015 (C-0090); Cls' RfA ¶ 45; Cls' Mem. ¶ 99.

[742] Real Estate Experts at 3.

reputable law firm (IGRA—which was, indeed, closely connected to President Varela[743]) to draft the Purchase Agreement,[744] that the type of Purchase Agreement used and the conditions stipulated were typical of the Panamanian market,[745] that the region were Mr. Rivera purchased the land was an attractive region at the time for the type of investment Mr. Rivera intended,[746] and that the price paid by Mr. Rivera was in line with the prices for comparable land in the same region at that time.[747] Instead, and incorrectly, the investigators pretextually assumed the land purchase was illegitimate, as that was the finding that supported their mandate.

250. Even more importantly and as pointed out by Ms. Jimenez in her report, Panama's investigators exhibited fundamental errors in never even attempting to contact the seller of the land (JR Bocas Investments and Ms. Jo Reynolds).[748] The same bank records that form the entire premise for Respondent's criminal allegations contain the contact information for the sellers.[749] Yet Respondent's prosecutors and investigators never contacted them.

251. The pretextual investigations continue to this day. A Panamanian court annulled one of the investigations almost three years ago,[750] but Respondent has pursued an appeal that somehow

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[743] *See supra* ¶ 187.

[744] *See* Invoice from IGRA for Preparation of the Purchase of Finca, Contract No. 35659 dated 13 May 2013 (C-0558); Invoice from IGRA in relation to Punela Development Corp. dated 13 May 2013 (C-0559); Email from Ricardo Ceballos to Ana Graciela Medina dated 7 Jul. 2015 (C-0203); *see also* López ¶ 90.

[745] Real Estate Experts at 3, 32.

[746] *Id*. at 60.

[747] *Id*. at 60.

[748] Jimenez at 9.

[749] [redacted]

[750] Judgment of Panama's Second Superior Tribunal for the First Judicial District dated 23 Sept. 2016 (C-0008).

remains pending.[751] Notwithstanding that the object of Panama's criminal justice system is purportedly "prompt and fulfilled justice"[752] and that investigations are traditionally limited to four months,[753] Respondent has never closed the Public Prosecutor's investigations and it has maintained freezing orders over Claimants' bank accounts and detention notices with respect to Mr. Rivera for over four years.[754] This, too, demonstrates the pretextual nature of these investigations.

2. *Respondent's Corruption Analysis Is Deeply Flawed And Reckless*

252. Claimants' expert, Ms. Jimenez, has confirmed that Panama's criminal investigations failed to show—and certainly could not have proved—that Claimants engaged in corrupt acts in relation to former Justice Moncada Luna.[755]

253. Respondent's Criminal Reports both suffer from many of the same fatal flaws. To begin with, both rely entirely on bank transaction analysis as the sole element of alleged bribery. If the bank transaction analysis is incorrect, then the foundation for the corruption allegation disappears entirely.[756] Neither report explains specifically what "thing of value" Claimants allegedly offered to Mr. Moncada Luna, as neither states what amount of money was allegedly agreed to by the parties. And both reports lack critical evidence—for example, evidence showing communications between Claimants and Mr. Moncada Luna, showing that Claimants knew the funds transferred to Reyna Y

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[751] Rivera 1 ¶ 114.

[752] Procedural Code of Panama (C-0726), art. 7.

[753] Criminal Code of Panama (C-0727), art. 2033.

[754] Resp.'s Counter-Mem. ¶ 175 ("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."); *see also id.* ¶ 196.

[755] Jimenez at 4-9.

[756] *Id*. at 8.

Associados would somehow benefit Mr. Moncada Luna, showing that Mr. Moncada Luna abused his official position with respect to the La Chorrera Contract, or showing that anyone involved (besides the prosecutors) had implicated Claimants in a bribery scheme.[757]

254. Both Reports incorrectly conclude that the *coincidental* overlap of a particular real estate attorney (Ms. Reyna) creates a *causal* connection leading to corruption allegations against Claimants.[758] Critically, both reports also fail to determine if there was a legitimate reason for Claimants' transactions with Reyna Y Asociados (which there was—the land purchase). In particular, the investigators obtained in December 2014 a bank account transaction history for the stated real estate counter-party, JR Bocas Investments.[759] But as Ms. Jimenez points out, most of the odd-numbered pages for the JR Bocas Investments bank account transaction history are *missing from the record* beginning in May 2009, and Respondent's Criminal Reports do not reflect an attempt to contact the beneficial owner of JR Bocas Investments, Ms. Jo Reynolds, to confirm or deny the land purchase transactions, even though the bank records included contact information.[760]

255. In addition to these broader shortcomings, each of Respondent's Criminal Reports suffered from its own specific flaws. The Aguirre Report found similarities "to the activities associated with the concept of Corruption of Public Servants,"[761] and yet it did not explain the type of corruption (bribery, embezzlement, etc.), nor did it specify which "activities" were similar or who

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[757] *Id*. at 9.

[758] *Id*.

[759] [redacted]

[760] Jimenez at 10; [redacted]

[761] Julio Aguirre's Money Laundering Expert Report for the National Assembly dated 2 Mar. 2015 (R-0063), at 12, 16, 21.

was purportedly involved.[762] Worse still, the Aguirre Report failed to address the basic elements of bribery.[763] Among other things, it did not establish the nature of the alleged agreement between Claimants and Mr. Moncada Luna (*e.g.*, the *quid pro quo*); the dollar amount allegedly provided; when and how the supposed agreement was reached; and how Mr. Moncada Luna was purportedly able to purportedly influence official decision making.[764] And while the Aguirre Report refers to a "direct relationship" between State money and the apartments paid for on behalf of Mr. Moncada Luna's family,[765] Mr. Aguirre's own analysis places *at least three separate corporations* in between Claimants' payments to Reyna Y Associados for land and the payments for those apartments—*none of which were controlled by the Claimants*.[766] In the opinion of Ms. Jimenez, the relationship between Claimants and Mr. Moncada Luna is "tangential" at best, and certainly insufficient to establish the corruption alleged by Respondent.[767]

256. As for the Villalba Report, Mr. Villalba's witness statement explains that he started by "looking at all judgments issued by then-Judge Moncada Luna to see if it appeared that any judgments were changed or decided contrary to law so as to benefit a particular party,"[768] and yet the Villalba Report does not provide any detail about how that review was undertaken (for example, whether any

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[762] Jimenez at 7.

[763] *Id*.

[764] *Id*.

[765] Julio Aguirre's Money Laundering Expert Report for the National Assembly dated 2 Mar. 2015 (R-0063), at 22.

[766] Jimenez at 8.

[767] *Id*.

[768] Villalba ¶ 18.

bank records were analyzed, etc.).[769] The Villalba Report also excluded from review the possibility that an entity paid a bribe in advance of winning a contract, as well as the possibility that Mr. Moncada Luna embezzled the funds in question.[770] Like the Aguirre Report, the Villalba Report failed to address many of the required elements of bribery, including the alleged *quid pro quo* between Claimants and Mr. Moncada Luna; indeed Mr. Villalba's conclusion—that "money moved from Omega Engineering to the benefit of Justice Moncada Luna"[771]—is passive, encompassing actions not ascribed to *anyone*, let along *intentional* actions on the part of the Claimants.[772] His analysis flies in the face of the fact that bribery requires a *causal connection*—not a *mere coincidence*.

257. In short, Respondent's corruption allegations are completely baseless.

3. *Respondent's Money-Laundering Analysis Is Likewise Deeply Flawed And Reckless*

258. Ms. Jimenez likewise confirms that Panama failed to show—and certainly could not have proved—that Claimants engaged in money laundering.[773] As a threshold matter, one must take into account that corruption, and bribery specifically, are illegal activities which serve as predicate offenses to money laundering, and yet both of Respondent's Criminal Reports simply assumed corruption as a starting point. More directly, they assumed the underlying real estate transaction was unlawful, even though Ms. Jimenez notes that a financial crime investigator would properly seek documentation and review the evidence submitted to evaluate the legitimate business purposes

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[769] Jimenez at 8.

[770] *Id*.

[771] Villalba ¶ 24.

[772] Jimenez at 9.

[773] *Id*. at 3, 10-23.

involved.[774]

259. Starting with the Aguirre Report, Ms. Jimenez points out the flaws in how the Report linked State money and the apartments purchased. In particular, Mr. Aguirre failed to account for the fact that Omega Panama's bank account had more than enough funds to pay off the mortgage debts for both apartments in question prior to receiving the La Chorrera advance payment check.[775] Nor did Mr. Aguirre link any of the other payments totaling millions of dollars that Omega Panama received for the La Chorrera project to Mr. Moncada Luna or inquire as to whether Claimants had cash in other bank accounts that could have been used to pay bribes (had that been Claimants' intent, which it was not).[776]

260. Ms. Jimenez identifies especially problematic details concerning the Aguirre Report's bank transfer analysis relating to the Reyna Y Asociados account. The Aguirre Report relies on documentation from the Reyna account—like the JR Bocas account record—is missing every other page (although in the case of the Reyna account, it is the even-numbered pages that are missing).[777] In fact, Ms. Jimenez estimates that the Reyna bank records are missing more than 210 transactions and US$ 278,000 worth of withdrawals.[778]

261. With respect to the first allegedly illicit payment, the Aguirre Report did not account for half of the funds deposited by PR Solutions into Reyna's account.[779] With respect to the second

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[774] *Id*. at 11.

[775] *Id*. at 12.

[776] *Id*. at 14.

[777] *Id*. at 15; [redacted]

[778] Jimenez at 16.

[779] *Id*. at 15.

allegedly illicit payment , the Aguirre Report again failed to account for funds deposited into the Reyna account.[780] But it also disregarded US$ 200,000 that had been deposited into the Reyna account by someone named "Alexandre Tchervon," and even less logically, it concluded that one of the intermediary accounts between Reyna and the mortgage payments (Sarelan) used funds to pay off a mortgage *before* those funds had even been deposited into the Sarelan account.[781] In other words, the Aguirre Report draws patently nonsensical conclusions in order to make criminal findings against Claimants.

262. The Villalba transaction analysis is just as problematic. It contradicts the Aguirre Report in many respects (most glaringly, the two Reports do not agree on how much money was allegedly transferred from Claimants to Mr. Moncada Luna's benefit).[782] Like the Aguirre Report, it also relies on the incomplete Reyna bank statements; it fails to account for the fact that the Omega Panama bank account had more than enough funds to pay off the mortgage debts for both apartments in question prior to receiving the La Chorrera advance payment check (and in fact could have done so at almost any time in 2013) had that been Claimants' intent (which, again, it was not); and it fails to account for all of the money deposited by PR Solutions in the Reyna account.[783]

263. And, as noted above, Mr. Villalba's math simply does not add up. For example, his

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[780] *Id*. at 18-19.

[781] *Id*. at 17-18; Julio Aguirre's Money Laundering Expert Report for the National Assembly dated 2 Mar. 2015 (R-0063), at 17 ("At the time of the aforementioned transfers, the second check for SEVENTY-FIVE THOUSAND UNITED STATES DOLLARS (US$75,000.00), issued by REYNA Y ASOCIADOS, had not yet been deposited in the account.").

[782] *Id*. at 24; Julio Aguirre's Money Laundering Expert Report for the National Assembly dated 2 Mar. 2015 (R-0063), at 14, 17; Jorge Enrique Villalba, Preliminary Financial Analysis Report in Case No. 049-15 dated 5 June 2015 (R-0062), at 24, 39.

[783] Jimenez at 19.

report "oversources" at least one transfer. That is, it asserts that one intermediary (Summer Ventures) paid out more funds in bribes than it received.[784] The Villalba Report also suggests US$ 175,000 was used to pay off a US$ 148,000 mortgage debt,[785] but it provides no explanation for this discrepancy. In short, Respondent's Criminal Reports are every bit as unreliable with respect to their money laundering conclusions as they are with respect to their corruption conclusions. They are wholly unsupported and baseless.

4. *The Investigations Contributed to the Destruction of Claimants' Investments*

264. Notwithstanding the Criminal Reports' utter lack of merit, the record shows that news of the criminal investigations had severe ramifications on Claimants' investment in Panama and its business more generally. Two examples are particularly relevant.

265. First, as of June 2015, when the Public Prosecutor's office began investigating Mr. Rivera, Omega Panama, and PR Solutions, Claimants were in advanced discussions with Travelers concerning financing.[786] Yet when a meeting with Travelers took place in Miami on 21 June 2015, Travelers referred to a news article depicting Omega and Mr. Rivera as money launderers linked to Judge Moncada Luna,[787] and on 24 June 2015, Travelers indicated to Mr. Rivera that it was declining Omega's request for financial assistance.[788]

266. Second, on 7 September 2015, the Authority for the Financing of Infrastructure in

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[784] *Id*. at 20 & Table 7; Jorge Enrique Villalba, Preliminary Financial Analysis Report in Case No. 049-15 dated 5 June 2015 (R-0062), at 32 & Table A3.

[785] Jimenez at 19; Jorge Enrique Villalba, Preliminary Financial Analysis Report in Case No. 049-15 dated 5 June 2015 (R-0062), at Table 7.

[786] *See* Letter from Omega to Travelers dated 10 June 2015 (C-0728); Letter from Travelers to Omega dated 12 June 2015 (C-0729); Email from Travelers to Omega dated 12 June 2015 (C-0730); Email from Travelers to Omega dated 19 June 2015 (C-0731).

[787] See Freezing of accounts linked to money laundering, LA PRENSA dated 29 June 2015 (C-0732).

[788] *See* Letter from Travelers to Omega, dated 24 June 2015 (C-0733).

Puerto Rico ("**AFI**"), a public agency of the Puerto Rican government that had awarded Omega U.S. a contract for the construction of the *Paseo Puerta de Tierra* project, demanded that Mr. Rivera certify under penalty of perjury whether Mr. Rivera, Omega U.S., or any of its affiliates were the subject of a criminal investigation in Panama or elsewhere, among other questions. The purpose of the communication was to determine whether Omega U.S. was in compliance under a Puerto Rican statute that prohibits the award of public contracts to individuals involved in crimes related to public funds or property.[789] On the same day, AFI asked the Puerto Rican Department of Justice for help in determining whether Mr. Rivera was the subject of a criminal indictment or investigation in Panama.[790]

267. Throughout this unfair process, the Government has attempted to dissuade Claimants from asserting their rights. On 29 September 2015, Mr. Rivera presented a written complaint to the Attorney General's Office, raising violations of Mr. Rivera's human rights. But two days later, [redacted] told Mr. Rivera that President Varela and Álvaro Alemán, the Minister of the Presidency and a former IGRA partner, were [redacted].[791] Despite this veiled language, it was clear that Mr. Alemán wanted Claimants to know that the Government's harassment would only become worse if Claimants continued to assert their rights. These episodes demonstrate that Respondent's baseless investigations had chilling consequences for Claimants' investments both within and outside Panama. But as bad as that was, worse was still to come.

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[789] *See* Letter from the Puerto Rico Infrastructure Financing Authority to Oscar Rivera dated 7 Sept. 2015 (C-0096 resubmitted).

[790] *See* Letter from AFI to the PR Justice Department, dated 7 Sept. 2015 (C-0735).

[791] [redacted] Rivera 2 n.2

F. The Government Systematically and Without Cause Cancels, or Forces to Lapse, Each of the Remaining Contracts

268. It would be bad enough if Claimants faced only the Varela Administration's retaliatory investigations, but during this period Claimants also witnessed the collapse of ***all*** of their remaining Contracts. As discussed above, the Panamanian Government unreasonably and arbitrarily failed to honor its payment approval obligations and to grant the Omega Consortium routine extensions to Contracts for delays that were in no way attributable to the Omega Consortium.[792] Despite the already explained efforts of the Omega Consortium to formalize change orders and have them endorsed by the Comptroller General's Office, by March 2015—within nine months of President Varela's inauguration—Respondent had improperly forced six of the Omega Consortium's eight Contracts to lapse. The Ciudad de las Artes Contract had, of course, already been terminated by the INAC's unlawful and arbitrary administrative resolution (as discussed above), which left only the Municipality of Colón Contract. With respect to that one, the Government never vacated the old Municipal Palace so that the Omega Consortium could begin construction on the new one, eventually forcing the Municipality of Colón Contract to lapse in July 2015.[793]

269. As explained above, despite most of the Contracts having been forced to lapse, the Omega Consortium generally continued to work without a valid Contract for as long as it could. Thus, in order to drive the final nail into Omega Panama's coffin, the Government began to terminate some more of the Omega Consortium's Contracts without basis. For example, the Mayor of Panama expressed his intention to terminate the Municipality of Panama Contract on 19 August 2016, just

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[792] *See* §§ V.A.4, V.A.5.

[793] *See Supra* § V.B.4.

over a month after the Panamanian Government was notified of the Omega Consortium's intention to initiate this arbitration.[794] Then, on 11 January 2017—shortly after Claimants filed their Request for Arbitration—the Municipality of Panama issued an Administrative Resolution terminating the Contract for alleged breach.[795] The Judiciary also expressed its intention to terminate the La Chorrera Contract on 11 March 2015, though after Claimants sent a letter explaining that the action was unfair and arbitrary, the Judiciary decided to suspend the termination.[796] The remaining Contracts have not been formally terminated. That, however, has not stopped the Government from either awarding or transferring the Omega Consortium's Project to new contractors, effectively terminating them just the same. This was the fate of both the Municipality of Colón Contract and the Mercado Público de Colón Contract.[797]

270. Claimants, through the IGRA Law Firm as their counsel, continued to approach various Panamanian government agencies to obtain payment for work performed pursuant to their Contracts and to try to restart the Projects. But no matter where they turned, they were either rebuffed or ignored.[798] Given the timing and the breadth of Respondent's actions with respect to Claimants' contracts, one can only conclude that President Varela, acting though the Panamanian Government's Ministries and Agencies, targeted the Omega Consortium resulting in the complete destruction of Claimants' investment.

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[794] *See Supra* § V.B.3.

[795] Resolution No. C-10-2017 dated 11 Jan. 2017 (C-0234).

[796] *See Supra* § V.B.2.

[797] *See Supra* §§ V.B.4, V.B.5.

[798] [redacted]

VI. CLAIMANTS' INVESTMENT IN PANAMA WAS DECIMATED BY THE GOVERNMENT'S ATTACK AGAINST CLAIMANTS AND THEIR INVESTMENT

271. Thus, setting aside Respondent's misrepresentations and omissions, the tragic story of the demise of Claimants' investment in Panama becomes clear. At the La Trona meal in 2012, then-Candidate Varela demanded a massive campaign contribution from Mr. Rivera. When he refused, Mr. Varela hinted to Mr. Rivera that Claimants' investment would suffer as a result. And after the election, President Varela followed through on that thinly veiled threat. As shown above, at the urging of President Varela, the Panamanian government mounted a coordinated campaign of harassment against Claimants and their investment.[799] Sadly, that illegal campaign had its desired effect—it destroyed Omega Panama's existing business and prevented it from obtaining future business.[800]

272. Worse still, because part of Panama's attacks on Claimants included baseless criminal investigations, [801] asset freezes,[802] and detention notices against Mr. Rivera and Omega Panama,[803] the effects of Panama's wrongful acts were felt far beyond its borders, damaging Mr. Rivera's personal reputation and the Omega brand globally.[804] Indeed, Respondent went as far as to issue an INTERPOL Red Notice against Mr. Rivera, which prevented him from traveling internationally to manage Claimants' besieged investment in Panama. [805]

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[799] See supra § V.

[800] *See supra* § V.D.12; Cls' Mem. ¶¶ 107-15.

[801] *See* Cls' Mem. ¶¶ 88-106.

[802] *See* Cls' Mem. ¶ 91; Rivera ¶ 85; Email correspondence between Frankie López and others dated 22 Jan. 2015 – 7 Mar. 2015 (C-0188).

[803] *See* Cls' Mem. ¶ 102; Resolution of Detention No. 052-15 dated 25 Aug. 2015 (C-0093).

[804] *See supra* § V.E.4; Cls' Mem. ¶ 113-14.

[805] *See* Cls' Mem. ¶ 102; Letter from Secretariat to the Commission for the Control of Interpol's Files dated 24 Mar. 2016 (C-0219); Letter from the Commission for the Control of Interpol's Files dated 13 Dec. 2016 (C-0220); *see also Fiscalía pide a Interpol que emita 'alerta roja' para ubicar a 4 empresarios por caso Moncada Luna*, TVN NOTICIAS

273. In sum, Panama inflicted catastrophic damage on Claimants and their investment, from which they have not been able to recover. Importantly, Respondent does not dispute that its conduct was the cause of Claimants' injuries.[806] Below, Claimants will demonstrate that Respondent's unlawful campaign against Claimants violated the Treaties in numerous respects, and that Respondent is therefore liable to Claimants for at least US$ 81.58 million.

VII. THE ARBITRAL TRIBUNAL HAS JURISDICTION OVER ALL CLAIMS

274. Claimants have brought claims under both the BIT and the TPA and have demonstrated in their Memorial that Respondent breached a number of its obligations under both Treaties. As Claimants have already shown,[807] the jurisdictional prerequisites of the BIT, the TPA, and the ICSID Convention have been met.

275. Respondent raises four objections to the jurisdiction of the Tribunal and the admissibility of certain claims, all of which are limited in scope. Before addressing each of those four issues, Claimants wish to note all of the jurisdictional prerequisites that are *not* in dispute.

276. In particular, Respondent raises no arguments concerning jurisdiction *ratione personae*. Respondent does not contest that Panama is a contracting State to the BIT, the TPA, and the ICSID Convention. Nor does Respondent raise any arguments concerning the standing of Oscar

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dated 2 Sept. 2015 (C-0094 resubmitted).

[806] Respondent does suggest, however, that Claimants' quantum experts overestimated Claimants' entitlement to damages because "Omega Panama did not possess assets"—either tangible or intangible—"that a hypothetical buyer would have been willing to pay for." Resp.'s Counter-Mem. ¶ 348. To the extent Respondent is arguing that it did not cause the loss of value to Claimants' investment because that investment had no value in the first place, that is obviously incorrect. The Omega Consortium was awarded eight multi-million dollar public works contracts *by Respondent* before President Varela began his retaliatory campaign to destroy Claimants' investment. It is patently absurd to suggest that such a major player in the Panamanian public works industry would have no value whatsoever. As Compass Lexecon has explained, Omega Panama was a valuable going concern before 2014, *see* Damages Expert Report 1 ¶ 54, and Respondent's coordinated harassment campaign caused the complete destruction of the company's value.

[807] *See* Cls' Mem. § VIII.

Rivera and Omega U.S. as investors. Respondent, likewise, does not invoke defenses concerning jurisdiction *ratione temporis*. Every claim being advanced arose after the BIT and the TPA entered into force. In terms of jurisdiction *ratione voluntaris*, while Respondent does raise an illegality objection relating to its consent to arbitration (which is baseless, as set forth below), it does not dispute more generally that the BIT, the TPA, and the ICSID Convention bind Panama and establish standing offers to arbitrate claims at ICSID, or that Claimants have properly noticed and accepted those offers to arbitrate.

277. With that, Claimants will address each of the four jurisdictional arguments Respondent does raise in turn.

A. Respondent's Illegality Objection Does Not Impugn This Tribunal's Jurisdiction (and, in any Event, Fails on the Facts)

278. Respondent's first objection is based on the incorrect theory (both factually and legally) that Claimants procured one of their contracts through bribery and are thus not entitled to the protections of the BIT and the TPA. This argument is fatally defective on multiple levels.

279. As a threshold matter, Respondent's illegality objection has no foundation in the text of the BIT or the TPA. Many bilateral investment treaties specifically limit the scope of their coverage by defining covered investments as those made "in accordance with" host State law, statute, or regulation.[808] When respondent-States raise jurisdictional defenses based on illegality, they typically base their arguments on these sorts of clauses.[809] But neither Treaty at issue in this

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[808] *E.g.*, Agreement between the Government of the Republic of Kazakhstan and Government of the Republic of Uzbekistan on Promotion and Reciprocal Protection of Investments, dated 2 June 1997 (CL-0123) ("Agreement shall apply to investments . . . made in compliance with [host State] legislation.").

[809] *See Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/5, Award, 16 Aug. 2007 ("***Fraport***") (CL-0124), ¶¶ 282-83, 305, *Desert Line Projects LLC v. Yemen*, ICSID

arbitration contains an "in accordance with law" provision. While not explicitly conceding this point,[810] Respondent raises no textual argument to the contrary, instead relying on amorphous concepts such as "international public policy" and the "international legal order" as the basis for its position.[811] As discussed below, those concepts do not assist Respondent's objection.

1. *Respondent has failed to meet its burden of proof on its illegality defense*

280. Respondent's Counter-Memorial refers *not once* to the idea of burden of proof with respect to its jurisdictional argument concerning illegality.[812] That is nothing short of remarkable. Respondent's position, apparently, is that this Tribunal can take the extreme step of dismissing all claims before it and issue a publicly available award declaring Claimants to have committed criminal law violations—all without paying *any* attention to evidentiary standards.[813]

281. Try as it may to avoid this topic, it is *Respondent* that bears the burden of proving all

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Case No. ARB/05/17, Award, 6 Feb. 2008 ("***Desert Line Projects***") (CL-0075), ¶ 104 (describing those requirements as "well traversed" and "quite familiar"); *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Jurisdictional Decision, 29 Apr. 2004 (CL-0193), ¶ 84 (referring to such a restriction as a "common requirement in modern BITs"); *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 Aug. 2006 ("***Inceysa***") (CL-0067), ¶ 185 (referring to "accordance with laws" clauses as "commonly used").

[810] Resp.'s Counter-Mem. ¶ 189 ("International investment law does not protect persons or entities who procure investment through bribes or other corrupt activity. *This is true regardless of whether the relevant investment treaties include an express provision requiring that investments be formed in accordance with domestic or international law*.") (emphasis added).

[811] *Id.* ¶ 202.

[812] *Id.* ¶¶ 184, 189-213.

[813] Respondent does argue that *Claimants* bear the burden of proof elsewhere in its Counter-Memorial. *See id.* ¶ 186 ("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 . . . ."); *see also id.* ¶ 224 (suggesting that Claimants are required to establish their umbrella clause breaches by "clear and convincing" evidence); *id.* ¶ 260 ("There can be no doubt that the Claimants bear the burden of proving each element of their claims.").

of its defenses,[814] including the very serious allegations of illegality it has raised against Claimants.[815] It is an accepted principle of international law that "the graver the charge the more confidence must there be in the evidence relied on."[816] And given the weighty nature of bribery and corruption allegations in particular, tribunals require the party advancing such claims to prove them by "clear and convincing evidence."[817] Unsurprisingly, few tribunals have found evidence sufficient to support

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[814] Respondent does not dispute the well-established rule in international law that 'each Party bears the burden of proving the facts which it alleges.' *Churchill Mining v. Indonesia*, ICSID Case No. ARB/12/14, Award dated 6 Dec. 2016 ("***Churchill Mining*—Award**") (RL-0010), ¶ 238; *see also Waguih Elie George Siag & Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009 ("***Waguih***") (CL-0032), ¶ 315; *Vito G. Gallo v. Government of Canada*, PCA Case No. 55798, Award (Redacted), 15 Sept. 2011 ("***Gallo***") (CL-0125), ¶ 277 ("[I]f the respondent raises Defenses, . . . the Defenses can only succeed if supported by evidence marshalled by the Respondent."); *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 (CL-0126), ¶ 179 ("[I]f the respondent chooses to put forward fresh allegations of its own in order to counter or undermine the claimant's case, then by doing so the respondent takes upon itself the burden of proving what it has alleged."); *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010 (CL-0138), ¶ 194.

[815] *See Quiborax S.A. v. Plurinational State of Bolivia*, ICSID No. ARB/06/2, Decision on Jurisdiction, 27 Sept. 2012 (CL-0127), ¶ 259 ("[T]he Tribunal considers that the party alleging a breach of the legality requirement, *i.e.* the host State bears the burden of proof."); *Gustav F. W. Hamester GmbH & Co. K.G. v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010 ("***Hamester***") (RL-0006), ¶ 132 (finding that the "the Respondent has not fully discharged its burden of proof" with respect to its illegality defense); *Waguih* (CL-0032), ¶ 315; *Gallo* (CL-0125) ¶ 277, (stating that "if the respondent raises Defenses . . . the Defenses can only succeed if supported by evidence marshalled by the Respondent"); *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 (CL-0126), ¶ 179 ("[I]f the respondent chooses to put forward fresh allegations of its own in order to counter or undermine the claimant's case, then by doing so the respondent takes upon itself the burden of proving what it has alleged."); *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010 (CL-0138) ¶ 194 (holding that the Respondent failed to satisfy its burden of proof to show that the license in question was acquired by fraudulent means).

[816] Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), 2003 I.C.J. 161 (Nov. 6) (Separate Opinion of Judge Higgins) (CL-0128), ¶ 33; See Application of Convention on Prevention and Punishment of Crime of Genocide (Bosnia & Herzegovina v. Serbia & Montenegro), Judgment, 2007 I.C.J. REP. 43 (26 Feb.) (CL-0129), ¶ 209 ("[C]harges of exceptional gravity must be proved by evidence that is fully conclusive."), ¶ 210 ("… the Court requires proof at a high level of certainty appropriate to the seriousness of the allegation"); Application of Convention on Prevention and Punishment of Crime of Genocide (Croatia v. Serbia), Judgment, 2015 I.C.J. REP. 3 (3 Feb.) (CL-0130), ¶ 178.

[817] *See, e.g., Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 Dec. 2014 (CL-0131), ¶ 479 ("in view of the consequences of corruption on the investor's ability to claim the [treaty] protection, evidence must be clear and convincing so as to reasonably make-believe that the facts, as alleged, have occurred."); *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, 8 Oct. 2009 (CL-0051), ¶ 221 ("The seriousness of the accusation of corruption . . . demands clear and convincing evidence."); *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award, 23 Apr. 2012 ("***Oostergetel***") (CL-0132), ¶ 303,

allegations of illegality, and those that have (*e.g., World Duty Free v. Kenya*, *Inceysa v. El Salvador*) based those findings on evidence that was uncontestable. That is most definitely not the case here.

282. Respondent claims that it has shown "incontrovertible evidence of corruption by Omega and Mr. Rivera."[818] It repeats this theme at least 11 times.[819] But Respondent's allegations of illegality in this case are plagued with a variety of problems, as set forth in detail above.[820] On the most basic level, there is no evidence remotely suggesting that Claimants procured *any* of their Contracts through corruption of any kind, including the La Chorrera Contract. Claimants have submitted a detailed expert report concerning public bidding and concluding, after a blind assessment, that the Omega Consortium should have won that contract.[821] The Government offers absolutely *no* evidence showing that Claimants knowingly or intentionally transferred funds to Mr. Moncada Luna or to any of his relatives for *any* purpose (and, for the avoidance of doubt, Claimants refute the suggestion that they transferred any funds to Mr. Moncada Luna or his relatives). Respondent has failed to submit testimony from any witnesses to corroborate its empty illegality theory but instead relies on tenuous inferences, which fall apart when examined closely.

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n.149; *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Separate Opinion of Thomas Wälde, 1 Dec. 2005 (CL-0133), ¶ 117 (noting that tribunals frown upon Respondents "[i]nsinuating corruption but not submitting it for proper testing"); ALOYSIUS P. LLAMZON, CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION § 7.20 (2014) (excerpts) (CL-0134).

[818] Resp.'s Counter-Mem. ¶ 196; *see also id.* ¶ 191 (suggesting the corrupt payments it describes are "clear on their face"); *id.* ¶ 208 ("Panama has presented *overwhelming evidence* that the Claimants used state funds to bribe Justice Moncada Luna.") (emphasis added).

[819] *See id.* ¶¶ 20, 24, 165, 171, 190-91, 194 & n.37; Villalba ¶¶ 21, 24.

[820] *See supra* §§ II, V.E.2-3.

[821] *See* Public Contracts Experts at 3, 6, 36, 44, 47, 52 (explaining that Claimants' independent experts came to the exact same score as the Government Commission for Omega of 100); Rivera 2 ¶ 5 ("[B]ased on pre-established evaluation criteria, we rightfully won those competitions.").

283. From a methodological standpoint, the Villalba Report and the Aguirre Report, which form the basis of Respondent's illegality conclusions, are deeply flawed, as pointed out by Claimants' expert, Ms. Jimenez.[822] Both reports incorrectly conclude that the *coincidental* overlap of a particular real estate attorney (Ms. Reyna) between different transactions creates a *causal* connection leading to corruption allegations against Claimants. In addition, the Reports fail to address the elements of bribery, rely on incomplete bank statements, and suffer from mathematical errors and incomplete analysis.[823] Respondent has not so much as even articulated a *theory* by which the allegedly corrupt payments could have influenced the award of the La Chorrera Contract.[824] It does not specify, for example, *why* Claimants allegedly bribed Mr. Moncada Luna, *what* the dollar amount was, *when* or *how* the agreement was reached, or *how* or even *whether* Mr. Moncada Luna abused his role as a government official in exchange for a payment.[825] After all, Mr. Moncada Luna was not authorized to award the project to Claimants by fiat. Presumably he would have needed to direct the evaluation commission responsible for vetting the bids to award the Project to the Omega Consortium. But Respondent offers no testimony from members of the commission about any influence Mr. Moncada Luna may have exercised in relation to the La Chorrera Contract. And the record shows that none exists, as Claimants' experts have shown that the Omega Consortium won the La Chorrera Contract fair and square.[826] Indeed, Respondent's own witness, Ms. Vielsa Ríos, who oversaw the bidding

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[822] *See supra* § V.E.2-3.

[823] *See generally* Jimenez at 6-25.

[824] *See id*. at 6, 7.

[825] *See id*. at 7.

[826] *See* Public Contracts Experts Report at 52-53.

process for the La Chorrera Contract, does not so much as insinuate that there was anything untoward about the bidding process.[827] Respondent's officials also ignored the evidence demonstrating that the land transaction was legitimate, and a Panamanian court denied Mr. Rivera's request to submit such exculpatory evidence as "irrelevant."[828]

284. Respondent's conduct in the context of the criminal "investigations" is even more telling. It has *never* issued an indictment against *anyone* relating to alleged illegal conduct by Claimants. While maintaining the investigations for at least four years now, Respondent has *never even articulated* a formal charge against the Claimants. Respondent has also ignored an express declaration by the Designated Prosecutor in the National Assembly investigation, who stated that Claimants were "*not* linked to the unjustified enrichment charges against [Mr. Moncada Luna],"[829] and it has ignored the statements of the real estate attorney, Ms. Reyna, who incriminated herself and others in the same investigations—and yet made it equally clear that Claimants had no part in any illegality.[830] Nor does Respondent engage in any meaningful way[831] with the fact that its own courts annulled the investigations almost three years ago.[832] As Claimants' expert, Ms. Jimenez, confirms,

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[827] See supra ¶ 52; See generally Ríos.

[828] *See* Resolution Denying Evidence Request dated 4 Jan. 2016 (C-0217) at 3,5.

[829] Sentencing Hearing of Mr. Moncada Luna dated 5 Mar. 2015 (C-0085); Rivera 1 ¶ 101; Cls' RfA ¶¶ 43, 45; Cls' Mem. ¶¶ 99, 177, 184.

[830] Supplemental Declaration of Maria Gabriela Reyna López dated 14 July 2014 (C-0089 resubmitted); Witness Confrontation Procedure between Maria Gabriela Reyna López and Jorge Enrique Espino Mendez dated 22 July 2015 (C-0090); Cls' RfA ¶ 45; Cls' Mem. ¶ 99. The Panamanian law enforcement authorities have also failed to consider, and in fact have gone out of their way to avoid, exculpatory evidence relating to Claimants' legitimate real estate transaction, which provided the only plausible link between Claimants and the investigations in the first place. For example, the prosecutors never even attempted to contact the beneficial owner of the actual land involved in the real estate deal. Jimenez at 9-10.

[831] Resp.'s Counter-Mem. ¶ 196 (mentioning only that the investigation "has been suspended" while the government challenges a court ruling).

[832] Judgment of Panama's Second Superior Tribunal for the First Judicial District dated 23 Sept. 2016 (C-0008

Respondent's criminal investigation of Claimants has been woefully lacking and is incapable of supporting a finding of illegality on Claimants' part.[833]

285. Claimants, unlike Respondent, have no burden to meet in order to defeat Respondent's jurisdictional objection. Nonetheless, Claimants have put forward ample evidence to refute Respondent's allegations. As set forth above,[834] the evidence shows that real estate ventures constitute a normal part of Claimants' business model.[835] Mr. Rivera engaged in a legitimate real estate transaction in Panama.[836] Ms. Reyna—who is the only link between Claimants and Mr. Moncada Luna—has *twice* absolved Omega-Panama and Mr. Rivera of any wrongdoing,[837] and she apologized directly to Claimants.[838]

286. As set forth in the expert report submitted by ARC Consulting with this Reply, which includes a detailed discussion of real estate market conditions in Panama, the manner in which the real estate transaction took place is entirely normal in Panama.[839] Among other things, it is common practice for lawyers to represent each party during the process, and it is not necessary or required by law to use a real estate agent.[840] The sales price for the property in question was reasonable and within

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resubmitted).

[833] *See generally* Jimenez at 6-25.

[834] *See supra* ¶ 246.

[835] Rivera 1 ¶ 92-98; Cls' RfA ¶¶ 38-39; Cls' Mem. ¶¶ 92-95; López ¶ 81; Rivera 2 ¶¶ 8-11.

[836] Rivera 1 ¶ 92-98; Cls' RfA ¶¶ 38-39; Cls' Mem. ¶¶ 92-95; López ¶ 81; Rivera 2 ¶¶ 8-11.

[837] Supplemental Declaration of Maria Gabriela Reyna López dated 14 July 2014 (C-0089); Witness Confrontation Procedure between Maria Gabriela Reyna López and Jorge Enrique Espino Mendez dated 22 July 2015 (C-0090); Cls' RfA ¶ 45; Cls' Mem. ¶ 99.

[838] Email from Maria Gabriela Reyna to Frankie López dated 28 Jan. 2015 (C-0210); Rivera 1 ¶ 106; López ¶¶ 93, 96.

[839] *See generally* Real Estate Experts; *see also* Rivera 2 ¶ 12.

[840] Real Estate Experts at 3.

the market range in Cañas at the time of purchase.[841] And the method of payment was normal and attached conditions were also typical for the Panamanian real estate market.[842] In short, this was an entirely legitimate land deal, not a conspiracy to commit corruption.

287. The unsupported breadth of Respondent's illegality claims is just as astonishing. Although the Counter-Memorial vaguely asserts that Claimants procured "one or more of the contracts"[843] at issue through illegality, Respondent's jurisdictional objection is really just an attack on *one* contract, La Chorrera. There is *not even a hint* of evidence, or even an unsupported allegation by *any* of the witnesses, of any illegality concerning any of the other Contracts.[844] Nor is there any evidence of impropriety relating to the execution of the La Chorrera Contract itself. The awarding of that Contract followed a public and transparent bidding process and included a review by an independent, three-person "vetting commission" of architects. [845] Mr. Moncada Luna and Mr. Rivera (on behalf of the Omega Consortium) both signed the Contract, but aside from the La Chorrera signing ceremony, neither Mr. Rivera nor anyone related to the Claimants ever had any contact with Mr. Moncada Luna or the members of the vetting commission.[846] As noted by Respondent's witness,

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[841] *Id*. at 2, 23-32; *see also id.* at 16 (explaining that the real estate market in the region of Azuero is less developed than the real estate market in Panama City.").

[842] Real Estate Experts at 32 ("The percentages of each payment, the time frames in between payments, the penalties, the guarantees of payment through a certified bank check, the use of an irrevocable bank letter of payment, and the release of the final amount of funds after the registration of the Finca to its new owner under the property section of the public registry of Panama are common practice in Panamanian property transactions."); *see also id.* at 24.

[843] Resp.'s Counter-Mem. ¶ 184.

[844] *See supra* § II.A.

[845] Cls' Mem. ¶ 98 *see* Request for Proposals No. 2012-0-30-0-08-AV-004833 "Construcción de un Edificio para la Unidad Judicial Regional de La Chorrera" dated 2012 (C-0024 resubmitted); Report from the Vetting Commission dated 9 Oct. 2012 (C-0083 resubmitted); *see also* Administrative Resolution No. 082/2012 dated 18 Sept. 2012 (C-0084 resubmitted) (nominating the three architects to the vetting commission).

[846] Rivera 1 ¶¶ 85, 89 & n.135; Rivera 2 ¶ 10; López ¶¶ 85-96.

Vielsa Ríos, Mr. Moncada Luna executed the La Chorrera Contract "in accordance with the Law of Public Contracts."[847] And, more tellingly, the La Chorrera Contract was never terminated. If Panama actually believed that the Contract was procured through illegality, it would have rescinded it or terminated it. But it did not do so.

288. Respondent's allegations, in other words, fall far short of the types of allegations needed to sustain a successful jurisdictional defense. And innocent parties "unwittingly caught up" in "peripheral illegality" should not be subject to such an extreme dismissal of their claims, as Respondent's own legal authority admits.[848]

289. The very cases cited by Respondent support Claimants' position that the standard of proof is exceedingly high to prevail on such an objection. In *Inceysa v. El Salvador*[849] the tribunal found that the alleged illegality was "clear," "fully demonstrated," "fully proven," and "obvious."[850] Similarly, in *World Duty Free v. The Republic of Kenya*[851] the illegality was *admitted.*[852] And the tribunal in *Phoenix Action v. Czech Republic* emphasized that a tribunal can deny access to arbitration

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[847] Ríos ¶ 12.

[848] *World Duty Free Co. Ltd. v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 Oct. 2006 ("***World Duty Free***") (RL-0003), ¶ 178 (noting in dismissing the case that "[t]his is not a case where an innocent party has been unwittingly caught up in an incidental or peripheral illegality"). In fact, *World Duty Free* even suggested that the result would have been different if the claimant had bribed the Kenyan President because the President had coerced the claimant. *See id.*, ¶ 178 ("The bribe was not procured by coercion or oppression or force by the Kenyan President nor by 'undue influence'; and as regards any investment, there was at the material time no 'hostage factor' because there was then no investment or other commitment in Kenya by Mr. Ali or his principal."). In this case, the (incoming) President *did try* to coerce Claimants into paying an extremely large campaign contribution, which was refused. In these circumstances, the well-established doctrine of proportionality prohibits Respondent's attempt to deploy the illegality defense. *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 Mar. 2017 (CL-0145), ¶¶ 396, 413.

[849] *Inceysa* (CL-0067).

[850] *Inceysa* (CL-0067) ¶¶ 108, 109, 118.

[851] World Duty Free (RL-0003).

[852] *Id*. ¶¶ 130, 134.

only "if it is *manifest*" that the illegality is proven.[853]

290. Respondent does not acknowledge the weighty burden it faces to prove this claim because Respondent knows it cannot meet that burden. Claimants engaged in no illegality, so Respondent could not possibly prove otherwise. This defense fails as a matter of fact.

2. *The Tribunal Would Have Jurisdiction Even if Respondent Met its Burden of Proof*

291. Even ignoring Respondent's evidentiary shortcomings, its jurisdictional argument relating to illegality also suffers from two fatal defects as a matter of law.

292. <u>*First*</u>, Respondent's argument fails from a temporal standpoint. It is well-established that tribunals distinguish between illegality in the *formation* of an investment and illegality in the subsequent *operation* of the investment.[854] While the former may deprive an arbitral tribunal of jurisdiction, the latter does not.[855]

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[853] *Phoenix Action v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 Apr. 2009 ("***Phoenix Action***") (RL-0005), ¶¶ 102, 104 (emphasis added); *see also Metal-Tech v. Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 Oct. 2013 ("***Metal-Tech***") (RL-0011), ¶ 240 (noting that key evidence emerged in the hearing from the claimant's principal witness).

[854] See *Fraport* (CL-0124) ¶ 344-45 ("If, at the time of the initiation of the investment, there has been compliance with the law of the host state, allegations by the host state of violations of its law in the course of the investment, as a justification for state action with respect to the investment . . . could not deprive a tribunal acting under the authority of the BIT of its jurisdiction."); *Hamester* (RL-0006) ¶ 127 ("The Tribunal considers that a distinction has to be drawn between (1) legality as at the initiation of the investment . . . and (2) legality during the performance of the investment."); *Metal-Tech* (RL-0011) ¶¶ 185-193 (distinguishing between illegality in the establishment of an investment and illegality in the investment's operation).

[855] *See, e.g.*, *Fraport* (CL-0124) ¶ 345; *Hamester* (RL-0006) ¶¶ 127, 129 ("*If the JVA was obtained on the basis of fraud*, it is an illegal investment that does not benefit from the protection of the ICSID/BIT mechanism. However, the question whether fraudulent behaviour has been committed *during the performance of the joint-venture* is a different issue that has to be taken into account when judging the merits of the dispute."); *Metal-Tech* (RL-0011) ¶¶ 185-93 ("Essentially, the question is whether 'implemented' means 'established' or 'established and operated'. The Tribunal reaches the conclusion that it means the former . . . ."); *Oxus Gold v. Republic of Uzbekistan*, UNCITRAL, Final Award, 17 Dec. 2015 (CL-0137) ¶ 707 ("In order to lose the protection under the BIT, it is however necessary, as largely agreed in the above cited cases, that the illegality affects the 'making', i.e. arises when initiating the investment itself and not just when implementing and/or operating it."); *Yukos Universal Limited v. Russian Federation*, PCA Case No. AA 227, Final Award, 18 July 2014 ("***Yukos***") (CL-0135), ¶ 1354 (finding unpersuasive "Respondent's contention that the right to invoke the ECT must be denied to an investor not only in the case of illegality in the *making* of the investment but also in

293. Respondent does not account for this fundamental point. Its Counter-Memorial is littered with wholly unsupported allegations that Claimants "procured" or "acquired" or "made" their investment through illegal means.[856] Simply stating it, however, does not make it so. Respondent has not even articulated a factual narrative that Claimants' supposed illegality had *anything* to do with the initiation of its investments.

294. Respondent's lone (baseless and unsupported) allegation is that Claimants' obtained the La Chorrera Contract through bribery, but the mere sequence of events proves that wrong. The La Chorrera Contract was entered into on 22 November 2012[857] — *literally years* after Claimants

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its *performance*") (emphasis in original); *Copper Mesa Mining Corp. v. Ecuador*, PCA Case No. 2012-2, Award, 15 Mar. 2016 ("***Copper Mesa***") (CL-0140), ¶ 5.54 ("As regards violations of Ecuadorian law, in the Tribunal's view, the wording of the Treaty is confined, at most, to a jurisdictional bar applying to the time when the Claimant first made its investment. That was in 2004. The wording of Article 1(g) of the Treaty is clear: the phrase 'in accordance with the latter's laws' qualifies the earlier concept of the investment's ownership and control when made; and it does not extend to the subsequent operation, management or conduct of an investment."); *Khan Resources, Inc. v. Mongolia*, PCA Case No. 2011-09, Decision on Jurisdiction, 25 July 2012 (CL-0139), ¶ 384 ("However, there is no compelling reason to altogether deny the right to invoke the ECT to any investor who has breached the law of the host state in the course of its investment. The ECT contains no provision to this effect. If the investor acts illegally, the host state can impose upon it sanctions available under local law, as Mongolia indeed purports to have done by invalidating and refusing to re-register the Exploration License. However, if the investor believes these sanctions to be unjustified, it must have the possibility of challenging their validity. It would undermine the purpose and object of the Treaty to deny the investor the right to make its case before an arbitral tribunal based on the same alleged violations the existence of which the investor seeks to dispute on the merits."); *see also* ALOYSIUS P. LLAMZON, CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION §§ 7.30, 7.32 (2014) (CL-0134).

[856] Resp.'s Counter-Mem. ¶ 184 ("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."); *id.* ¶ 189 ("International investment law does not protect persons or entities who *procure* investment through bribes or other corrupt activity."); *id.* ¶ 201 ("Investments *made* illegally or corruptly cannot be protected in arbitration."); *id.* ¶ 203 (citing *World Duty Free* where a concession contract "had been *procured* through the payment of a cash bribe"); *id.* ¶ 204 (describing *Spentex* where the "claimant *procured* its investment through corruption"); *id.* ¶ 207 (referring to *Hamester* in which "jurisdiction did not exist where an investment was *made* illegally"); *id.* ¶ 208 ("[C]laimants 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."); *id.* (referring to treaties "requiring that investments be *made* in accordance with law"); *id.* ¶ 210 (argument for inadmissibility if there is "corruption or illegality in the *procurement* of an investment"); *id.* ¶ 211 (citing *Plama* where "the investment was *obtained* by deceitful conduct") (emphasis added in all foregoing).

[857] Contract No. 150/2012 dated 22 Nov. 2012 (C-0048 resubmitted).

first established their investment in Panama by incorporating Omega-Panama on 26 October 2009.[858] Worse yet, the payments allegedly forming the basis of Respondent's bribery allegations—*i.e.*, the payment made to purchase land in Cañas, Tonosi—took place *after* the La Chorrera Contract had already been awarded and signed. In Respondent's own words, "[t]he first corrupt transaction [i.e., land payment] occurred between April and May of 2013."[859] And the "second corrupt transaction [i.e., land payment]," according to Respondent, happened even after that (namely, between 10 July 2013 and 18 July 2013).[860] In other words, even accepting Respondent's allegations as true (which they are not), the supposedly unlawful conduct committed by Claimants would have occurred *four years after the initiation of Claimants' investment and four to eight months after it had already legally and transparently obtained the Contract at issue*.

295. Under no interpretation of those facts could Claimants be found to have "procured" the La Chorrera Contract, let alone their investment more generally, by bribery or corruption. Nor has Respondent even articulated a theory whereby payment followed some earlier illegality corresponding with the initiation of Claimants' investments. At best, Respondent has raised allegations about Claimants' conduct during the *operation* of the investment, which by law does *not* raise a jurisdictional issue.[861]

296. <u>*Second*</u>, Respondent asserts that the Tribunal should dismiss *all* of the Claimants' claims in this arbitration, but Respondent does not account for the fact that its illegality argument is

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[858] Public Registry of Omega Engineering Inc. dated 26 Oct. 2009 (C-0017).

[859] Resp.'s Counter-Mem. ¶ 165.

[860] *Id*. ¶ 167.

[861] *See supra* at § II.A.

linked to *only one* of eight construction Contracts (the La Chorrera Contract) at issue in this arbitration (as part of Claimants' broader, holistic investment in Panama). Beyond mere unsupported speculation and rhetoric, Respondent's Counter-Memorial *does not even attempt* to link its illegality argument with the other seven Contracts or more broadly with Claimants' investment in Panama.[862]

297. Nor could Respondent do so. The other projects relate to *different* governmental agencies, have *different* contracts with *different* payment terms and *different* schedules, are worth *different* values, and are situated in *different* locations. Most importantly, they followed *different* bidding processes and have absolutely *no relation* to the Judiciary or Mr. Moncada Luna, much less so to Ms. Reyna or to the legitimate real estate transaction used opportunistically by Respondent's prosecutors to initiate investigations against Claimants.

298. Accordingly, even if Respondent could prove that Claimants obtained the La Chorrera Contract in exchange for an allegedly corrupt payment (which it cannot), that would not nullify the validity of Claimants' entire investment in Panama. In the rare instance in which an investment arbitral tribunal dismisses an entire case on the basis of illegality,[863] the illegality must stand at the *core* of the investment's establishment. Again, the cases cited in Respondent's Counter-Memorial only serve to prove this point.[864] The tribunal in *World Duty Free* dismissed the entire case brought

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[862] The Counter-Memorial refers briefly and vaguely to the legality clauses in two contracts other than the La Chorrera Contract. *See* Resp.'s Counter-Mem. ¶ 198-99; *id.* ¶ 184 ("[T]he evidence establishes that the Claimants procured *one or more* of the contracts that constitute their alleged 'investment' in Panama through corruption.") (emphasis added).

[863] ALOYSIUS P. LLAMZON, CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION §§ 7.03 (2014) (CL-0134) (surveying almost 30 cases in which corruption was insinuated or overtly alleged and observing that only two tribunals had made an affirmative finding of corruption).

[864] In addition to *World Duty Free* and *Phoenix Action*, Respondent also discusses *Hamester v. Ghana* and *Spentex v. Uzbekistan*. *See* Resp.'s Counter-Mem. ¶ 204 & n.356. But the tribunal in *Hamester* did *not* decline jurisdiction. *See Hamester* (RL-0006) ¶¶ 132, 362(i). And *Spentex* is of limited value because the award is not even publicly available, and Respondent's argument concerning *Spentex* is based on a journalist's interpretation of the award.

by the claimant, but only because the claimant had expressly admitted to paying a $2 million bribe to the President of Kenya as direct consideration to obtain the key contract at stake in the arbitration, which also provided the arbitration clause giving rise to the investment dispute.[865] Likewise, the tribunal in *Phoenix Action v. Czech Republic* declined jurisdiction, but the entire investment serving as the foundation for the tribunal's jurisdiction was a sham; it consisted of a rearrangement of assets within a family, with no other economic activity, after the dispute had arisen, for the sole purpose of gaining access to ICSID jurisdiction.[866]

299. Here, by contrast, the allegations are literally unsupported, and even if credited, they pertain only to a small part of a very large investment and relate to conduct that occurred well after Claimants' initial investment was established. Respondent's allegations are not at the core of Claimants' entire investment, and Respondent's attempts to argue that they were through nothing more than simple *ipse dixit* are unavailing.

3. *Respondent's Inadmissibility Argument Is Fundamentally Incorrect*

300. Respondent raises an alternative—but equally unavailing—argument under the theory of "inadmissibility" based on the same corruption allegations.[867] It observes that, "[w]hen confronted with evidence of corruption or illegality . . . , some tribunals have treated the issue as one of

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See Resp.'s Counter-Mem. ¶ 204 & n.356. Even assuming that interpretation accurately reflects the award, it does not support Respondent's claim because the corrupt payments in *Spentex* were made immediately before the claimant submitted its bid to purchase the textile plants at the center of the dispute. The alleged corruption thus went to the core of the investment's establishment.

[865] *World Duty Free* (RL-0003) ¶¶ 6, 63, 66, 75, 105, 136, 192(1).

[866] *Phoenix Action* (RL-0005) ¶¶ 129, 136, 138-42.

[867] Resp.'s Counter-Mem. ¶¶ 209-13.

admissibility and not jurisdiction."[868] Of course, as noted above, Respondent's jurisdictional objection fails. Its inadmissibility argument fails as well.

301. Respondent has not explained whether the doctrine it alleges applies to illegality in the *making* of the investment or in its *operation*. As noted above, there has never been any illegality *at all* relating to Claimants' investment, and all the facts raised by Respondent's objection came long after the establishment of Claimants' investment.

302. The cases cited by Respondent only support Claimants' position.[869] Most of them do not even deal with inadmissibility and only relate to wrongful conduct by the investor in establishing the investment. In *Metal Tech v. Uzbekistan*, the tribunal assessed the illegality allegations only as a matter of jurisdiction (not inadmissibility),[870] and it rejected the notion that illegality in the operation of the investment was relevant to its analysis.[871] The tribunal in *Plama v. Bulgaria* also considered whether bad conduct on the part of the investor deprived the tribunal of jurisdiction[872] (rather than treating it as an inadmissibility issue).[873] The tribunal ultimately concluded it had jurisdiction, but

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[868] *Id*. ¶ 210.

[869] Respondent also includes a footnote to *Abaclat v. Argentina* for the proposition that a tribunal must find that it has jurisdiction and that the claims are admissible before a claimant can proceed. Resp.'s Counter-Mem. ¶ 210 n.366. But the *Abaclat* decision dealt with the novel concept of mass claims, and while the tribunal in that case did mention the idea of admissibility, it did not distinguish between that concept and jurisdiction, stating that "the difference between jurisdiction and admissibility issues is not always clear." *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 Aug. 2011 (RL-0009), ¶ 505.

[870] *Metal-Tech* (RL-0011) ¶¶ 117, 389.

[871] *Id*. ¶¶ 185-93. The tribunal declined jurisdiction because of illegality concerning the establishment of the investment. *Id.* ¶ 213, 372.

[872] *Plama Consortium v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction dated 8 Feb. 2005 (CL-0198), ¶¶ 229, 240(E); *Plama Consortium v. Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 Aug. 2008 ("*Plama Consortium*—Award") (RL-0008), ¶¶ 21(E), 75, 78, 97.

[873] *Id*. ¶¶ 87, 96.

held that that the claimant was not entitled to the substantive protections of the ECT in a merits award (because of blatant misrepresentations concerning the procurement of the investment).[874] And the tribunal in *Inceysa v. El Salvador* also addressed fraud by the investor as a jurisdictional issue (not an admissibility issue),[875] and the fraud occurred in the making of the investment.[876]

303. Only *Churchill Mining v. Indonesia* assessed illegality as a matter of admissibility,[877] but it did so in circumstances completely distinguishable from this dispute. That tribunal found that 34 documents — which consisted of 10 mining licenses and four decrees creating the rights for Claimants' entire investment[878] — had been forged.[879] The tribunal did not perform a detailed temporal analysis, but it made clear that the illegality "permeated the Claimants' investments" and constituted a "large scale fraudulent scheme implemented to *obtain* four coal mining concession areas."[880] As shown above, the facts of Churchill Mining could not be more distinguishable from the facts of this case, as even the (falsely) alleged illegality here pertains only to one Contract obtained years after Claimants initiated and grew their successful investment in Omega Panama.

304. In any event, even if this Tribunal were to find illegality (which it should not), that finding should not trigger dismissal. As one tribunal stated, "there is no compelling reason to altogether deny the right to invoke [an investment treaty] to any investor who has breached the law

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[874] *Id*. ¶¶ 116, 133-34, 325(3).

[875] *Inceysa* (CL-0067) ¶¶ 182, 207, 257, 339(2).

[876] *Id*. ¶¶ 53, 101, 193, 201, 207-08, 218, 234, 242, 257.

[877] *Churchill Mining*—Award (RL-0010), ¶¶ 507, 528, 557(3).

[878] *Id.* ¶¶ 510, 512, 528-29.

[879] *Id.* ¶¶ 254, 478

[880] *Id.* ¶¶ 507, 510 (emphasis added).

of the host state in the course of its investment. . . . If the investor acts illegally, the host state can impose upon it sanctions available under local law."[881] It is noteworthy that, as discussed above and below, notwithstanding many years of so-called investigations, Respondent has not even issued an indictment, let alone obtained a conviction, relating to the alleged "illegality" on which it bases its defense. This speaks volumes, not only about the baseless nature of Respondent's illegality claims, but also about the reasons why such a defense is not recognized.

305. In sum, Respondent's "admissibility" defense fails both as a matter of fact and of law.

4. *The Tribunal Should Deal With Any Finding of Illegality Through Principles of Proportionality and Contributory Fault*

306. Respondent's jurisdictional and inadmissibility objection would *still* be misconceived even assuming that Respondent could prove its allegations of illegality (and it cannot). The appropriate course of action for any wrongs committed by Claimants, either in the establishment of their investment or in the operation of their investment, would lie in principles of proportionality and contributory fault, rather than in principles of jurisdiction and inadmissibility.

307. To the extent that a respondent State raises allegations of illegality in the making of an investor's investment as a bar to the tribunal hearing the case, the tribunal hearing the dispute should consider whether dismissal would be a proportionate response. Here, to deny Claimants the protection of the Treaties for their entire investment based on unsupported allegations related to only one Contract would be grossly disproportionate and unfair. As has been noted by several commentators, the traditional "all or nothing" approach fails to account for any consideration of

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[881] *Khan Resources, Inc. v. Mongolia*, PCA Case No. 2011-09, Decision on Jurisdiction, 25 July 2012 (CL-0139), ¶ 384.

proportionality and thus introduces the significant risk that the punishment outweighs the crime.[882] Other commentators have noted that such a harsh approach might, in fact, "create a perverse incentive for states to continue to tolerate corruption among government officials."[883]

308. The tribunal in *Kim v. Uzbekistan* assessed allegations that the investors had not made their investment in compliance with the host State's law and rejected the all-or-nothing approach in favor of one that takes proportionality into account.[884] Acknowledging that it was "guided by the principle of proportionality,"[885] the tribunal held that it was required to "balance the object of promoting economic relations by providing a stable investment framework with the harsh consequence of denying the application of the [treaty] in total."[886]

309. More recently, in *Alvarez v. Panama*, the tribunal held that alleged illegality on the part of the claimant in the acquisition of an investment had to be assessed as part of a proportionality test.[887] As in *Kim*, the tribunal required some proportionality between the "nature of the infringement

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[882] *See* Charles N. Brower & Jawad Ahmad, *The State's Corruption Defense, Prosecutorial Efforts, and Anti-Corruption Norms in Investment Treaty Arbitration*, *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES §§ 18.02-03 (2d ed. 2018) (CL-0189); Mark W Friedman, Floriane Lavaud & Julianne J Marley, *Corruption in International Arbitration: Challenges and Consequences*, GAR, 29 Aug. 2017 (CL-0142) (citing to José María de la Jara & Eduardo Iñiguez, *The Case Against the Corruption Defense*, EFILA BLOG (16 May 2017) (CL-0143)).

[883] Mark W Friedman, Floriane Lavaud & Julianne J Marley, *Corruption in International Arbitration: Challenges and Consequences*, GAR, 29 Aug. 2017 (CL-0142) (citing to John R. Crook, *Remedies for Corruption*, 9(3) WORLD ARB. & MEDIATION REV. 303, 311 (2015) (CL-0144) (arguing that the all-or-nothing approach of the corruption defense as posing a jurisdictional bar is inequitable, allows for unjust enrichment, and has negative effects on the arbitration system).

[884] *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 Mar. 2017 (CL-0145), ¶¶ 377, 404, 410.

[885] *Id.* ¶ 413.

[886] *Id.* ¶¶ 396, 446, 449, 464, 485, 505, 541; *see also Metalpar v. Argentina*, ICSID Case No. ARB/03/5, Decision on Jurisdiction dated 27 Apr. 2006 (CL-0206), ¶¶ 83-84 ("It would be disproportionate to punish [a violation of local law by an investor] by denying the investor an essential protection such as access to ICSID tribunals.").

[887] Álvarez Y Marín Corporación S.A., Bartus Van Noordenne, Cornelis Willem Van Noordenne, Estudios Tributarios Ap S.A., Stichting Administratiekantoor Anbadi v. Panama, ICSID Case No. ARB/15/14, Award, 12 Oct.

and the seriousness of the sanction."[888] More specifically, the Tribunal in *Álvarez* concluded that "not every illegality results in the loss of international law protection because this is a severe and rigid sanction that should only be imposed if it represents a proportional response to an investor that, when making the investment, committed a grave violation of the host State law."[889] Further, the tribunal explained that "the gravity of the violation should be determined by the relevance of the law violated and the intention of the investor."[890]

310. These same considerations are relevant when a respondent alleges that an investor committed illegality in the operation of an investment. *Yukos v. Russian Federation* is on point. That tribunal assessed the illegalities allegedly committed by the claimants in that case within a contributory fault framework. The tribunal held that "Yukos' tax avoidance arrangements . . . made it possible for Respondent to invoke and rely on that conduct as a justification of its actions against . . . Yukos."[891] But the tribunal also found that the "conduct of the Russian Federation . . . was disproportionate and tantamount to expropriation of Claimants' investment in Yukos."[892] In the end, the tribunal assessed "to what extent and in what proportion [the claimants' conduct] contributed so as to lessen the responsibility of Respondent,"[893] and ultimately assigned a percentage of fault to

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2018 ("**Alvarez y Marín**") (CL-0146), ¶ 151 (explaining that general principles of law require that there is proportionality between the nature of the infraction and the severity of the punishment).

[888] Damien Charlotin and Facundo Perez Aznar, In previously-unseen Alvarez y Marin v. Panama award, reasons are revealed for why a majority declined to take jurisdiction over investment in indigenous territory – and why Grigera Naon dissented, IA REPORTER, 13 Mar 2019 (CL-0192).

[889] *Alvarez y Marín* (CL-0146) ¶ 156.

[890] *Id*.

[891] *Yukos* (CL-0135) ¶1614.

[892] *Id*. ¶ 1635.

[893] *Id*. ¶ 1635.

Claimants and reduced their damages accordingly.[894]

311. Similarly, the *Copper Mesa* tribunal decided to assess alleged wrongdoing by the claimant under the "doctrines of causation and contributory fault."[895] The tribunal concluded that "an award of damages may be reduced if the claiming party also committed a fault which contributed to the prejudice it suffered."[896] And the *Copper Mesa* tribunal concluded that this approach "deriv[ed] from a consistent line of international legal materials."[897] In the end, the tribunal then assessed the claimant's alleged illegalities and reduced its damages by a percentage.[898]

312. In this case, the allegations of illegality against Claimants are incomplete, pretextual, and (most importantly) patently false. But even if they were true, they would pertain to a small portion of the totality of Claimants' investment[899] and they would have occurred well after the establishment of the investment. As such, in the unlikely scenario that the Tribunal finds any illegality by Claimants (and it should not), the Tribunal should follow the reasoning in the cases set forth above and not

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[894] *Id*. ¶ 1637. Respondent would face a high threshold in trying to establish contributory fault in any event. *See* Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001) ("**ILC Articles**"), art. 39, cmt. 1; IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW (2d ed., 2014) (CL-0104 resubmitted), ¶ 3.243.

[895] *Copper Mesa* (CL-0140) ¶ 5.65.

[896] Id. ¶ 6.95 (quoting Occidental v. Ecuador).

[897] Id. ¶ 6.97 (citing Yukos, MTD v. Chile, Delagoa Bay Railway and Lillie Kling v. Mexico, ¶¶ 6.93-6.102).

[898] *Id*. ¶ 6.102. As with its claim that illegality deprives this tribunal of jurisdiction, Respondent carries a heavy burden to prove that Claimants are contributorily at fault. *See Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 Nov. 2017 (CL-0141), ¶ 568. Respondent must demonstrate that Claimants "materially contributed" to the damage they suffered "by some willful or negligent act or omission." Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001) ("**ILC Articles**") (CL-0092), art. 39, cmt. 1. Respondent has failed to meet that standard here for the reasons states above.

[899] Rivera 2 ¶¶ 8, 9 ("[N]one of the Panamanian agencies with which we contracted has ever suggested that the reason for ceasing performance of its obligations under the Contract was because the Omega Consortium had allegedly obtained the La Chorrera Contract through corruption. . . . . Indeed, Panama now claims that my companies and I procured all of the Contracts through corruption.")

deprive Claimants entirely of the benefits of the applicable Treaties, but rather craft a proportionate ruling—*on the merits*—balancing any allegations *actually proven* by Respondent against a reasonable reduction in damages for the Claimants.

5. *Respondent Should Be Estopped from Raising Illegality as a Defense*

313. Despite initiating three investigations that relate to these allegations, Respondent never comes close to proving—even within its own domestic framework—that Claimants were involved in any illegal conduct. Respondent should therefore be estopped from raising these allegation as a defense to its own illegal conduct.

314. "A considerable weight of authority supports the view that estoppel is a general principle of international law, resting on principles of good faith and consistency."[900] For example, in *Desert Line Projects*, the tribunal held the respondent was estopped from seeking judicial annulment of an earlier arbitral award after it pressured the claimant into accepting a settlement agreement that prevented either party from challenging the award — even though the tribunal ultimately concluded the settlement agreement was invalid.[901] "Having embarked on a successful campaign of pressuring the Claimant to accept a Settlement Agreement," the tribunal reasoned, "the Respondent is now estopped from seeking to achieve the same effects as those it sought by it campaign of pressure."[902] In light of this general principle of international law, it is not uncommon for tribunals to consider whether a Respondent state should be estopped when illegality defenses are

[900] Ian Brownlie, Principles Of Public International Law (8th ed. 2012) (CL-0148), at 420.

[901] *Desert Line Projects* (CL-0075) ¶¶ 208, 224.

[902] *Id.* ¶ 208.

raised in international arbitration.[903]

315. Here, Respondent's failure to prove its claims despite numerous investigations is telling. Respondent's prosecutors have access to the most detailed evidence of the allegedly corrupt scheme. And yet Respondent has not so much as issued an indictment accusing Claimants of any illegal conduct.[904] Nevertheless, Respondent now wishes to accomplish through this arbitration what it was unable to achieve in its own courts and receive the benefit of a dismissal based on an unproven allegation. Respondent should be estopped from arguing that this tribunal lacks jurisdiction based on conduct that would not support a conviction in Panama's courts.

316. Estoppel is further justified here because Respondent continued to treat the La Chorrera Contract as valid even after initiating the investigations of Claimants.[905] This is akin to the *Fraport* tribunal's assertion that one should "hold a government estopped from raising violations of its own law as a jurisdictional defense when it knowingly overlooked them and endorsed an investment which was not in compliance with its law."[906] Similarly, in *Desert Line Projects*, the tribunal held the respondent was estopped from asserting the claimant failed to comply with domestic law in the formation of its investment because the respondent's own head of state had "welcomed and

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[903] *See, e.g.*, *id.* ¶ 118; *Fraport* (CL-0124) ¶ 346.

[904] Rivera 2 ¶ 7 ("Many months and years have passed since Panama ordered Omega Panama's and PR Solutions's bank accounts to be seized and began a public-relations onslaught against me. Throughout this time, Panama has opened multiple investigations against my companies and me. And to this day, Panama has never charged me or any of my companies with any offense.").

[905] Rivera 2 ¶ 16 ("[T]he Judicial Organ continued to work with us to try to restart work under the La Chorrera Contract; in other words, Panama's judiciary was attempting to restart work (although under conditions unacceptable to us) on the very Contract that Panama now argues was obtained through corruption.").

[906] *Fraport* (CL-0124) ¶ 346.

approved the Claimant's investment . . . with all it entailed."[907]

317. Under the same logic, Respondent should be estopped here from raising illegality as a defense. Respondent began investigating Claimants on 20 March 2015.[908] But by Respondent's own admission, it continued to treat the La Chorrera Contract as valid well into 2016.[909] According to Respondent, the Judiciary's Chief Legal Officer visited Omega Panama's office on 28 January 2016 in an attempt to obtain a signature on an addendum to the La Chorrera Contract.[910]

318. Respondent cannot have it both ways. *Either* the contract was void *ab initio* due to illegality and Respondent's alleged efforts to cooperate with Claimants in the completion of the Project was mere window dressing, *or* Respondent fully expected to benefit from the Contract and its spurious investigations into Claimants were intended only to harass them and damage their reputation. This Tribunal should hold that Respondent is estopped from raising an illegality defense.

B. Respondent's "Commercial Claims" and "Umbrella Clause" Objections Fail

319. Respondent second jurisdictional objection is that Claimants have asserted commercial claims that are not protected under the BIT or the TPA. This objection is based on two mischaracterizations.[911] *First*, Respondent mischaracterizes the claims at stake in this arbitration as non-sovereign, commercial claims, and *second*, it mischaracterizes Claimants' position concerning the BIT's Umbrella Clause.

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[907] Desert Line Projects (CL-0075) ¶ 119.

[908] *See* Decision by Panama's 16th Circuit Court of the First Judicial Circuit dated 5 Jan. 2016 (C-0218), at 1.

[909] Resp.'s Counter-Mem. ¶ 43.

[910] Id.

[911] *Id.* ¶¶ 214-27.

1. *This Dispute Is Not Limited To Commercial Claims — It Addresses a Sovereign Campaign of Governmental Harassment*

320. Respondent seeks to convince the Tribunal that this is a simple breach-of-contract dispute involving unpaid invoices and no sovereign elements.[912] The factual allegations directly contradict Respondent's theory.

321. As set forth above, Claimants assert that various arms of the Panamanian government breached their contractual obligations vis-à-vis the Claimants. But Claimants' allegations span well beyond the four corners of those contracts and focus on acts and omissions which are *distinctively sovereign*. Claimants have shown that Respondent has used *all* the levers of the State, including agencies, ministries, elected officials, appointed officials, prosecutors, courts, contractors, and others—all the way up to the presidency—to systematically destroy Claimants' investments

322. Among other things: The Government failed to issue municipal permits and licenses, terminated Contracts by sovereign (administrative) resolution, and abused its law enforcement apparatus. Claimants were subjected to criminal investigations, detention orders, and Interpol notices; their freedom to travel was restricted, their documents were seized and bank accounts were frozen, and their employees were interrogated. A candidate for President expressly coerced Claimants through a campaign contribution request tied to a threat to destroy Claimants and their investment if the contribution was not made.[913] Once he was elected into office, he took advantage of Panama's lack of checks and balances[914] and his new Administration initiated a top-down campaign of

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[912] *Id.* ¶¶ 214-15.

[913] *See* Pérez ¶ 8 (describing Panama's *juega vivo* culture of "exploiting every angle and gaining every advantage"); *id.* ¶ 53 (stating that it is "not unreasonable or farfetched that Mr. Varela would have asked Mr. Rivera" for a $600,000 campaign contribution").

[914] Pérez ¶ 14 ("The government of Panama lacks systemic checks and balances that ensure accountability.

harassment from the highest levels of Government. Respondent terminated Claimants' largest Contract, and then a second Contract, by way of a sovereign administrative resolution, which precluded the Omega Consortium from bidding on any future projects.[915] Political actors of all levels, from mayors to agency officials, including the Comptroller General's Office, targeted Claimants. Even allegedly independent actors such as Mr. Saltarín carried out the Administration's orders,[916] creating a "parallel Attorney General's Office" to go after Claimants' investment and relying upon support from the government's intelligence arm to do so.[917] These are *not*, to take Respondent's words, "precisely the types of activities that private actors take with respect to commercial contracts every day."[918] Rather, they are the exact opposite. In fact, Respondent's own description of this dispute undermines its position. While the Counter-Memorial frames Claimants' arguments as related to "commercial activities,"[919] a few paragraphs later it acknowledges that the "harassing and retaliatory acts taken by President Varela and his administration" are the foundation of Claimants' entire case.[920]

Generally, the executive dominates other institutions since most government appointments are at the discretion of the president. The lack of a professional career civil service hinders accountability, transparency and bureaucratic efficiency.").

[915] *See supra* §§ V.D, V.F.

[916] Note that Mr. Saltarín's conduct vis-à-vis Claimants is therefore attributable to Panama under Article 8 of the ILC Articles on State Responsibility. ILC Articles (CL-0092), art. 8 ("The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."); *see also* Pérez ¶ 52 ("Mr. Saltarín was provided with unfettered powers and acted with total liberty.").

[917] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 Aug. 2007 (CL-0009), ¶¶ 5.3.4-.5, 5.5.3, 7.4.44-.45.

[918] Resp.'s Counter-Mem. ¶ 215.

[919] *Id*. ¶ 215.

[920] *Id*. ¶ 215.

323. In any event, even if Claimants' allegations were limited to the eight Contracts under consideration, those Contracts are expressly covered under the terms of the BIT and the TPA.[921] And it is well established that a respondent State's contractual behavior can amount to international wrongs.[922] As the *Bayindir v. Turkey* tribunal noted, "when the investor has a right under both the contract and the treaty, it has a self-standing right to pursue the remedy accorded by the treaty" if it so chooses.[923] "There is of course nothing unusual about an arbitral tribunal established under ICSID determining claims founded upon breach of a concession contract and based primarily upon host State law."[924] In fact, "for much of the first three decades of the life of the ICSID Convention, the claims entertained by ICSID tribunals were primarily founded on such a basis."[925]

324. Respondent cites[926] *Bureau Veritas v. Paraguay*[927] for the proposition that a tribunal should dismiss claims for a state's failure to pay invoices under a contract as a breach of fair and equitable treatment because Paraguay in that case had not acted "in a manner that is qualitatively

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[921] Treaty between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investment, signed on 27 Oct. 1982, entered into force on 30 May 1991 (CL-0001). This treaty was amended by the 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 27 October 1982, signed on 1 June 2000, entered into force on 14 May 2001 (CL-0002) (cumulatively the "**BIT**"), art. 1(d); TPA (CL-0003), art. 10.29.

[922] *See* CHRISTOPHER F. DUGAN, DON WALLACE JR., NOAH D. RUBINS & BORZU SABAHI, *Umbrella clauses*, in INVESTOR-STATE ARBITRATION (2008) (CL-0007 resubmitted) (citing Jennings, *State Contracts in International Law*, 37 BRIT. Y.B. INT'L L. 178, 182 (1961) (CL-0149); S. Schwebel, *International Protection of Contractual Arrangement*, 53 AM. SOC'Y INT'L L. PROC. 266 (1959) (CL-0150).

[923] Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, 27 Aug. 2009 (CL-0119).

[924] Campbell McLachlan et al., International Investment Arbitration § 4.129 (2d ed. 2017) (CL-0151).

[925] Campbell McLachlan et al., International Investment Arbitration § 4.129 (2d ed. 2017) (CL-0151).

[926] Resp.'s Counter-Mem. ¶ 214 & n.372.

[927] 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, 9 Oct. 2012 (RL-0012) ¶ 246.

different from an ordinary contracting party."[928] But that dispute was entirely distinguishable from the present one in that it involved only one contract and the entire arbitration revolved around a breach-of-contract claim for overdue payments under that one contract.[929] In fact, the tribunal went out of its way to emphasize this point, even tracing the claimant's allegations back to the request for arbitration and noting that "[t]he only acts alleged to give rise to the violation of the Treaty concern the alleged failure to make payments owing under the Contract."[930] Even more importantly, the tribunal specifically stated that *had* the claimant in that dispute advanced the types of allegations at stake here, it would have viewed the claims quite differently:

> It is important to recognize that beyond the refusal to pay there are no other acts that the Claimant really seeks to remedy. . . . There is no claim of the taking of a right under the Contract or of the Contract's unlawful discontinuance. There is no claim of harassment or interference with the Claimant's right to be present in Paraguay, through its representatives, or to carry on such commercial activities as it wishes to engage in. . . . . [N]o police powers [have been] used . . .[931]

325. Denying Claimants of their right to bring international law claims directly under the BIT and TPA would have troubling consequences for investors. Respondent States may enter into any number of agreements with the same investor. In the normal course, it may not be that substantial

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[928] Resp.'s Counter-Mem. ¶ 214.

[929] *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, 9 Oct. 2012 (RL-0012) ¶¶ 214, 216, 230, 237-38. In fact, that tribunal also did not dismiss its jurisdiction over the claimant's fair and equitable treatment claim but found that it had jurisdiction over that claim. *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, 29 May 2009 (RL-0023), ¶¶ 127, 162(b).

[930] *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, 9 Oct. 2012 (RL-0012) ¶ 243; *see also id.* ¶ 277 ("[T]he case is a contractual dispute, no more and no less.").

[931] *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, 9 Oct. 2012 (RL-0012) ¶¶ 240-41.

of a burden for an investor to litigate disputes that arise in whatever forum the parties agree to in their individual contract. The equities are completely different, however, when the State uses its sovereign authority to breach *all of an investor's contracts* within a short period of time, as Panama has done here. That is why it is important for investors to retain the arbitral remedy provided by the applicable investment treaties to capture all of a respondent's international law violations in one proceeding — a remedy that Respondent expressly consented to by signing and ratifying the BIT and the TPA. Respondent orchestrated a *wide-spread campaign of government harassment* with the aim to punish Mr. Rivera and completely destroy the value of Claimants' investment, including Claimants' Panamanian company, Omega Panama. Claimants would not be fully compensated if they were forced to resolve this sovereign dispute through eight separate one-off commercial arbitrations with individual governmental entities, none of which could address the damage done to the investment as a whole. As discussed further below,[932] the tribunal must consider "the[] claimed investments as component parts of a larger, integrated investment undertaking."[933] There is no question that Respondent's "Commercial Claims" objection fails.

2. *The Tribunal Has Jurisdiction Over All of Claimants' Umbrella Clause Claims*

326. Respondent also takes issue with Claimants' umbrella clause arguments as a jurisdictional matter.[934] The exact nature of Respondent's objection is not clear, but it would appear to consist of an argument that the Tribunal lacks jurisdiction over any umbrella clause claims arising

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[932] *See infra* § VII.D.

[933] *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 Mar. 2010 (CL-0218) ("***Inmaris*—Jurisdiction**"), ¶ 92;

[934] Resp.'s Counter-Mem. ¶¶ 217-27.

out of the TPA.[935] Claimants would point out that Respondent's argument on this point appears to target only what it refers to as "the TPA Contracts" and thus only constitutes a partial jurisdictional defense in any event.[936]

327. Regardless, Respondent's argument rests on a mischaracterization, or at the very least, a misunderstanding of Claimants' position.[937] It is nothing more than a straw man. It is undisputed that the BIT contains an umbrella clause and the TPA does not. Respondent describes Claimants as "asserting that they may export the BIT's umbrella clause to the TPA 'via the TPA's MFN provision.'"[938] A review of the Claimants' Memorial reveals that they argued no such thing. The relevant footnote cited by Respondent states: "Claimants may import, via the TPA's MFN clause the umbrella clause from *other treaties between Panama and <u>other</u> states*."[939] For the avoidance of doubt, Claimants do *not* seek to leverage the TPA's MFN provision to import the umbrella clause *from the U.S.-Panama BIT* into the U.S.-Panama TPA. Rather, they seek to import numerous *other* investment treaties ratified by Panama that include umbrella clauses. The Netherlands-Panama BIT, for example, includes an umbrella clause.[940] Thus, pursuant to the TPA's MFN provision, Respondent must afford

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[935] *Id*. ¶ 221 ("[I]n the absence of an umbrella clause, the Tribunal would lack jurisdiction over commercial claims arising out of an alleged breach of contract."). Note that Claimants also refute Respondent's additional argument concerning the umbrella clauses below.

[936] *Id*.; *see also* Cls' Mem. ¶ 118. The Contracts for the three MINSA CAPSI projects, Mercado Público de la Ciudad Colón, and Ciudad de las Artes were executed prior to the TPA entering into force. Only the and Órgano Judicial La Chorrera, Palacio Municipal, and Mercados Periféricos' Contracts were executed after the entry into force of the TPA.

[937] Resp.'s Counter-Mem. ¶¶ 217-20.

[938] *Id*. ¶ 217 (citing Cls' Mem. ¶ 188 n.468).

[939] Cls' Mem. ¶ 188 n.468 (emphasis added).

[940] Agreement on Encouragement and Reciprocal Protection of Investments Between the Republic of Panama and the Kingdom of the Netherlands, entered into force 1 Sept. 2001 (CL-0163), art. 3(4) ("Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party."); *see also* Cls' Mem. ¶ 188 n.468.

Claimants the same protections provided to third-party investors under the Netherlands-Panama BIT.

328. Respondent also suggests that Claimants are using the umbrella clause to expand the Tribunal's jurisdiction.[941] This, too, is incorrect. Claimants do not invoke an umbrella clause to gain any additional jurisdictional rights but simply to urge the Tribunal to give the text of the TPA's MFN clause effect as a *substantive* right, in line with the holdings of numerous tribunals.[942]

329. Finally, Respondent protests that the umbrella clause does not automatically transform a breach of contract into a treaty breach.[943] Yet many tribunals have held that an umbrella clause *does* elevate a breach of the claimant's contract into a treaty breach. In *Noble Ventures Inc. v. Romania*,[944] for example, the tribunal found that "[a]n umbrella clause is *usually* seen as transforming municipal law obligations into obligations directly cognizable in international law."[945] According to that tribunal, when bilateral investment treaties include an umbrella clause provision, "the host State may incur international responsibility by reason of a breach of its contractual obligations towards the

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[941] Resp.'s Counter-Mem. ¶¶ 221-23.

[942] EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic, ICSID Case No. ARB/03/23, Award, 11 June 2012 (CL-0180), ¶¶ 921-23; Arif v. Republic of Moldova, ICSID Case No. ARB/11123, Award, 8 Apr. 2013 (RL-0040), ¶ 396; MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, 25 May 2004 (CL-0031), ¶¶ 100-04, 179-89; Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, 27 Aug. 2009 (CL-0119), ¶ 159; CME Czech Republic B.V. (The Netherlands) v. The Czech Republic, UNCITRAL, Final Award, 14 Mar. 2003 (CL-0021), ¶ 500; Paushok et al. v. Mongolia, UNCITRAL Award on Jurisdiction and Liability, 28 Apr. 2011 (RL-0034), ¶ 602; White Industries Australia Limited v. Republic of India, UNCITRAL, Final Award, 30 November 2011 (CL-0090), ¶ 11.2.9; OAO Tatneft v. Ukraine, UNCITRAL, Award on the Merits, 29 July 2014 (CL-0194), ¶¶ 362-365; CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telcom Devas Mauritius Limited v. Republic of India, PCA Case No. 2013-09, Award on Jurisdiction and Merits, 25 July 2016 (CL-0195), ¶ 496; CHRISTOPHER F. DUGAN, DON WALLACE JR., NOAH RUBINS & BORZU SABAHI, INVESTOR-STATE ARBITRATION (2008) 417-25 (CL-0007 resubmitted).

[943] Resp.'s Counter-Mem., ¶ 223.

[944] *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 Oct. 2005 ("***Noble Ventures***") (CL-0078).

[945] *Id*. ¶ 53 (emphasis added).

private investor of the other party, the breach of contract being thus 'internationalized,' i.e. assimilated to a breach of the treaty."[946] There is no reason to hold otherwise in this dispute.

330. Respondent supports its narrow view of umbrella clauses by relying heavily on *SGS v. Pakistan*,[947] which adopted a more restrictive approach to interpreting umbrella clauses.[948] As Respondent acknowledges, other tribunals have disagreed with *SGS v. Pakistan*'s holding and reasoning. The tribunal in *SGS v. Philippines*,[949] for example, took an expansive approach to the umbrella clause issue, holding that the umbrella clause in the applicable BIT "makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments."[950] A subsequent tribunal, in *Eureko v. Poland*, compared the analyses in *SGS v. Pakistan* and *SGS v. Philippines* and found that the latter was more "cogent and convincing." Ultimately the tribunal in *Eureko* decided to follow the *Philippines'* tribunal's view of umbrella clauses.[951] Rudolf Dolzer and Christoph Schreuer also refer to *SGS v. Pakistan* as a case "which departed fundamentally from the conventional understanding of the [umbrella] clause."[952]

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[946] *Id.* ¶ 54.

[947] *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, 6 Aug. 2003 (RL-0021).

[948] The tribunal in that case took the position that a broad interpretation of an umbrella clause would prompt a flood of lawsuits, make other guarantees in investment treaties superfluous, suggest that umbrella clauses placed at the end of a treaty be included with the substantive provisions, and disregard forum selection clauses in investment agreements. *See id.* ¶¶ 166-69.

[949] *See, e.g.*, *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, 29 Jan. 2004 ("***SGS v. Philippines***") (RL-0022).

[950] *Id.* ¶ 128.

[951] *Eureko B.V. v. Republic of Poland*, Partial Award, 19 Aug. 2005 (CL-0020), ¶ 257.

[952] RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2d ed., 2012) ("**DOLZER & SCHREUER**") (CL-0006 resubmitted); *see also id.* at 171-72 ("The Tribunal made no reference to the modes

331. The reasoning in *SGS v. Philippines* was likewise expanded upon by other tribunals, including the tribunal in *SGS v. Paraguay*,[953] which fully embraced the reach of the umbrella clause.[954] The claimant in *SGS v. Paraguay* sued the state for a breach of the applicable treaty, even though its treaty-based claims were rooted in allegations that the State failed to perform contractual obligations.[955] The tribunal rejected the more restrictive view taken by the tribunal in *SGS v. Pakistan*.[956] Instead, hewing close to the text of the treaty, the *Paraguay* tribunal held that the umbrella clause "has no limitations on its face" and applies to a wide range of commitments "whether established by contract or by law, unilaterally or bilaterally."[957] The tribunal rejected the notion that only a narrow subset of "sovereign interference" supported a breach of an umbrella clause. "Logically," the tribunal explained, "one can characterize every act by a sovereign State as a 'sovereign act'—including the State's acts to breach or terminate contracts to which the State is a party."[958] Having rejected the respondent's argument that the claimant's claims were contractual rather than treaty claims, the tribunal concluded that "the Contract's forum selection clause is readily disposed of," because "Claimant has stated claims under the Treaty, and so the question before us is simply whether a contractual forum selection clause can divest this Tribunal of its jurisdiction to hear

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of interpretation laid down in Article 31 of the VCLT . . . . This decision was widely criticized.").

[953] *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 Feb. 2010 ("***SGS v. Paraguay***—Decision on Jurisdiction") (CL-0152).

[954] *Id*.

[955] *Id*. ¶¶ 130-42.

[956] *Id*. ¶ 169.

[957] *Id*. ¶ 167.

[958] *Id*. ¶ 135 Even if the Tribunal were to require a showing of "sovereign interference" with respect to umbrella clause claims, there is no question that Panama's conduct against Claimants satisfies that requirement. *See supra* § VII.B.1.

claims for breach of the Treaty."[959] "The answer," the tribunal explained, "is undoubtedly negative."[960]

332. The same logic applies to this dispute. The BIT's umbrella clause is worded broadly. "Each Party shall observe any obligation it may have entered in with regard to investment of nationals or companies of the other Party."[961] The BIT's use of the word "any" necessarily gives it an expansive scope. Similar to the BIT provision at issue in *SGS v. Paraguay*, the "obligation has no limitation on its face."[962] It does not exclude commercial contracts from its scope. And, like the BIT provision in *SGS v. Paraguay*, it "does not state that its constant guarantee of observance of such commitments may be breached only through actions that a commercial counterparty cannot take, through abuses of state power, or through exertions of undue government influence."[963] The umbrella clause does not "mean anything other than what it says"[964]—that the State must "observe any obligation it may have entered in with regard to investment of nationals or companies of the other Party." Claimants' contracts with Respondent fall within the scope of this clause, so this tribunal has jurisdiction to consider whether the Umbrella Clause was violated.

C. The Tribunal Has Jurisdiction Over Claims Relating to the Criminal Investigations

333. Respondent's third jurisdictional objection is that the criminal investigations against

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[959] *SGS v. Paraguay*—Decision on Jurisdiction (CL-0152) ¶ 138.

[960] *Id*.

[961] U.S.-Panama BIT, art. II.2. The Netherlands-Panama BIT is equally broad. *See* Agreement on Encouragement and Reciprocal Protection of Investments Between the Republic of Panama and the Kingdom of the Netherlands, entered into force 1 Sept. 2001 (CL-0163) art. 3(4) ("Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.").

[962] *SGS v. Paraguay*—Decision on Jurisdiction (CL-0152) ¶ 167.

[963] *Id.* ¶ 168.

[964] Id.

Mr. Rivera did not arise directly out of Mr. Rivera's investments, and thus the tribunal does not have jurisdiction over claims that relate to those investigations.

334. Three simple observations prove that this objection is utterly baseless.

335. *First*, Respondent does not say so, but this argument is also only a *partial* jurisdictional objection. The objection relates to Claimants' allegations concerning the criminal investigations, but Claimants also plainly assert that Respondent breached their rights in many ways that have nothing to do with the criminal investigations. Even assuming the Tribunal were to uphold Respondent's objection on this point (which it should not), it would continue to have jurisdiction over all of those other allegations.

336. *Second*, and more importantly, Respondent's argument is fundamentally and fatally flawed and inconsistent. Respondent's first jurisdictional challenge rests entirely on the assertion that there was illegality *in the making of Claimants' investments* in Panama.[965] And yet in Respondent's third jurisdictional objection, it insists that the criminal investigations that emerged from those *same allegations* are now somehow entirely unrelated to Claimants' investments. Respondent cannot have it both ways and its attempt to do so betrays a lack of candor and credibility.

337. *Third* and in any event, there is no doubt that, as a factual matter, the criminal investigations are related to Claimants' investment. The Panamanian authorities initiated the investigations as part of a multi-faceted effort *to destroy Claimants' investments*.[966] This alone

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[965] Resp.'s Counter-Mem. ¶¶ 189-213.

[966] And among the bank accounts frozen and investigated by the criminal authorities are those belonging to Omega Panama which is a Panamanian corporate entity that is part of Claimants' investment. *See* BIT (CL-0001; CL-0002), art. 1(d)(ii).

satisfies the *prima facie* standard necessary to establish jurisdiction and should put an end to this frivolous objection.[967] That Claimants (correctly) deny that they (or their Panamanian subsidiaries) committed any acts worthy of investigation does not change this conclusion.

338. Notably, Respondent cites not a single case to support this jurisdictional defense. That is unsurprising, because Respondent advances a radical proposition—namely that a tribunal should decline jurisdiction over claims that a state abused its authority by unlawfully trying to prosecute foreign investors otherwise protected under an investment treaty. Investment tribunals routinely exercise jurisdiction over such claims.[968] Were it otherwise, foreign investors would be required to seek relief within the very same host State court system supporting the unlawful investigation.[969]

339. Nor is there any merit to Respondent's assertion that the criminal allegations arose as a result of an unrelated criminal investigation into another individual (Mr. Moncada Luna).[970] On Respondent's *own (false) theory*, the investigations relate to the La Chorrera Contract—which is part of Claimants' investment in Panama.[971] Once again, Respondent seeks to have it both ways, betraying a lack of credibility. The investigations are undeniably tied to Claimants' investments in

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[967] *Phoenix Action* (RL-0005) ¶ 62 n.41 ("The Tribunal should be satisfied that, if the facts or the contention alleged by [the claimant] are ultimately proven true, they would be capable of constituting a violation of the BIT."); *Bayindir v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 Nov. 2005 (CL-0119), ¶ 194; *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 Mar. 2007 (CL-0153), ¶ 91.

[968] See, e.g., Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award, 30 I.L.M. 526 (1991), 27 June 1990 (CL-0060), ¶¶ 45-78; see generally Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Trading Ltd v. The Republic of Kazakhstan, SCC Case No. V (116/2010), Award, 19 Dec. 2013 (CL-0059).

[969] Pérez ¶ 17 ("The World Economic Forum ranks the independence of Panama's judicial system 132nd of the 144 countries evaluated.")

[970] Resp.'s Counter-Mem. ¶¶ 230-32.

[971] *Id.* ¶ 231.

Panama, and Respondent's jurisdictional objection is patently frivolous.

D. This Arbitration Is the Proper Venue for the Resolution of this Dispute

340. Respondent's fourth jurisdictional objection is that Claimants' claims against Respondent under the BIT must be resolved through the dispute-resolution mechanisms agreed upon by the contractual parties in the various underlying construction Contracts. This argument fails as well, because this arbitration is the *only* available venue for this particular dispute.

341. As with Respondent's other jurisdictional objections, this is a very narrow objection, which Respondent tries to paint with a very wide brush. It relates only to what Respondent refers to as the "BIT Claims,"[972] which it appears to define as claims relating to the MINSA, INAC, and Ministry of the Presidency Contracts.[973] While Claimants do not accept Respondent's allocation of Claimants' claims between the BIT and the TPA,[974] Claimants do accept Respondent's implicit concession that even if the Tribunal were to uphold Respondent's objection (which it should not), at least some of the claims would persist (for example, claims relating to the Palacio Municipal, Mercados Periféricos, and La Chorrera contracts, all of which were signed after the TPA went into force).[975] In the end, however, this is an academic distinction without a difference, because as described in further detail below, *all* of the present claims are arbitrable under the TPA anyway.

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[972] *Id*. ¶¶ 234, 244 ("[T]he 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. . . . Accordingly, *the BIT Claims* must be dismissed . . . .") (emphasis added).

[973] *See* Resp.'s Counter-Mem. ¶¶ 239-41 & nn.403-05 (referring to those contracts).

[974] For the avoidance of doubt, Claimants' position is that their claims cannot simply be divided up by contract because their "investment" is not simply comprised of eight Contracts and their claims encompass unlawful acts falling outside of the four corners of those Contracts.

[975] *See* TPA (CL-0003) (entered into force on 31 October 2012); Contract 01-13 dated 24 Jan. 2013 (C-0051); Contract No. 857-2013 dated 12 Sept. 2013 (C-0056); Contract No. 150/2012 dated 22 Nov. 2012 (C-0048).

342. Respondent's objection is based entirely on Article VII of the BIT. It describes an "investment dispute" as involving "an alleged breach of any right conferred or created by this Treaty with respect to an investment."[976] And it permits investors to "choose to consent in writing to the submission of the [investment] dispute . . . to the International Centre for the Settlement of Investment Disputes."[977] Respondent's objection rests on one sentence in Article VII(2) of the BIT, which states that "[i]f ***the dispute*** [meaning the "investment dispute"] cannot be resolved through consultation and negotiation, then [it] shall be submitted for settlement in accordance with the applicable dispute-settlement procedures upon which [the parties] have previously agreed." Respondent interprets this language as negating Claimants' ability to raise any claims before this Tribunal relating to the MINSA, INAC, and Ministry of the Presidency Contracts because those Contracts contain provisions providing for the resolution of disputes *relating to breaches of each specific Contract* other than through ICSID arbitration.[978]

343. Respondent's extreme interpretation disregards the fundamental nature of this "dispute," which is an "investment dispute" within the meaning of the BIT. Claimants have not alleged a breach of contract under domestic law; they have alleged *international law* breaches of "right[s] conferred or created by this Treaty with respect to an investment."[979] The claims relate to

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[976] BIT (CL-0001), art. VII(1).

[977] 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 27 October 1982, entered into force 14 May 2001 (CL-0002), Art. VII(3). Note that Panama was not yet a member State to the ICSID Convention when the BIT originally entered into force, therefore the United States and Panama entered into a Protocol after Panama had ratified the ICSID Convention to provide for ICSID arbitration in the BIT.

[978] Resp.'s Counter-Mem. ¶¶ 239-41.

[979] BIT (CL-0001), art. VII(1).

expropriation, fair and equitable treatment, full protection and security, and umbrella clause violations.

344. The "investment dispute" encompasses *all of Respondent's sovereign actions* taken against Claimants, namely Respondent's multi-flanked attack on Claimants and their Panamanian company, Omega Panama, across *all* of Claimants' Projects and beyond.[980] Indeed, much of Respondent's unlawful behavior fell completely outside of the contractual framework governing those Projects, such as Respondent's unlawful criminal investigations of Mr. Rivera and Omega Panama, bank freeze orders directed at Omega Panama and another of Mr. Rivera's companies, and detention notices against Mr. Rivera and one of his employees. Respondent's unlawful behavior—when viewed collectively—plainly demonstrates a pattern of sovereign abuse and harassment that goes well beyond the breach of any one Contract. This Tribunal exercises *exclusive* jurisdiction over *that "dispute"*—the one concerning Respondent's targeted campaign of governmental harassment, which destroyed Claimants' investment in Panama and unquestionably violated the Treaties and international law. There is no other forum that could possibly have jurisdiction over that "dispute."

345. Indeed, the "investment dispute" is between two Claimants (Mr. Oscar I. Rivera, a U.S. citizen, and Omega U.S., his wholly owned Puerto Rican-registered company, both of which are U.S. investors) and one Respondent (the Republic of Panama). Those are "the parties to the dispute" for purposes of Article VII(2) of the BIT. Critically, *there are no other* "applicable dispute-settlement procedures upon which they [i.e., the parties to the dispute] have previously agreed," because Article VII of the BIT is the only dispute resolution agreement in existence between Omega U.S. and Mr. Rivera, on the one hand, and the Republic of Panama, on the other. Respondent frames the dispute

[980] Rivera 2 ¶ 6 ("[A]ll of the Omega Consortium's Contracts were being negatively affected. When we indicated that we were going to seek protection under the Treaties, and their attacks against me and my companies only escalated."); *id.* ¶ 33 ("Omega was being attacked from all sides.").

resolution clauses in the five underlying Contracts as "applicable dispute-settlement procedures upon which they [i.e., the parties to the dispute] have previously agreed." But the Parties to *this* arbitration (Mr. Rivera, Omega U.S. and the Republic of Panama) did *not* previously agree to any dispute-settlement procedures for this wide-ranging "investment dispute" other than under the BIT. And the Contracts Respondent points to were not signed by Oscar Rivera in his personal capacity as a U.S. investor[981] or by Omega US.[982]

346. Under Respondent's crabbed interpretation of Article VII, if any investment included within it a contract (which Article 1 of the BIT *expressly* includes as an investment),[983] and that contract included an arbitration clause, regardless of the identity of the parties to that clause it would eviscerate the promise of investor-state arbitration in the BIT—no matter how "sovereign" or non-contractual the character of the Treaty breach. This cannot be, and, in fact, is not correct.

347. In fact, the baseless nature of Respondent's argument can best be seen when one considers the result of Respondent's interpretation of Article VII(2) of the BIT. If Respondent's argument were to be accepted, Claimants would have no claim at all. Rather, only the Omega Consortium, which was the signatory of the underlying Contracts, would be allowed to bring a claim,

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[981] Mr. Rivera signed the contracts on behalf of other legal entities.

[982] Contract No. 077 (2011) dated 22 Sept. 2011 (C-0028 resubmitted) (signed by Oscar Rivera on behalf of Omega Engineering, Inc. and Dr. Franklin Vergara (Health Minister)); Contract No. 083 (2011) dated 22 Sept. 2011 (C-0030 resubmitted) (signed by Oscar Rivera on behalf of Omega Engineering, Inc. and Dr. Franklin Vergara (Health Minister)); Contract No. 085 (2011) dated 22 Sept. 2011 (C-0031 resubmitted) (signed by Oscar Rivera on behalf of Omega Engineering, Inc. and Dr. Franklin Vergara (Health Minister)); Contract No. 043(2012) dated 17 Aug. 2012 (C-0034 resubmitted) (signed by Oscar Rivera on behalf of the Omega Consortium and Demetrio Papdimitriu (Ministry of the Presidency)); Contract No. 093-12 dated 6 July 2012 (C-0042 resubmitted) (signed by Oscar Rivera on behalf of the Omega Consortium and Maria Eugenia Herrera de Victoria (INAC).

[983] BIT (CL-0001), art. 1(d) ("'[I]nvestment' means every kind of investment, owned or controlled directly or indirectly, including . . . investment contracts, and includes . . . a claim to money or a claim to performance having economic value and associated with an investment; . . . *any right conferred by law or contract* . . . .") (emphasis added).

and even then the Consortium would be required to bring several separate claims, against several different Government agencies, in a variety of arbitral or judicial fora,[984] each of which could address only the elements of Respondent's unlawful conduct that constituted a breach of the particular Contract in question. And not one of those separate arbitrations would have jurisdiction to address Respondent's non-contractual misconduct (such as the pretextual and meritless criminal investigations and bank freezes), its decimation of Claimants' investment in Omega Panama, or its overarching, targeted campaign of harassment against Mr. Rivera as a result of President Varela's personal vendetta. In other words, the complete "investment dispute" between the Parties would never be heard, and Respondent would never be held accountable for the full scope of its unlawful acts. While it is understandable that Respondent would argue for such a result in order to escape liability for its actions, it is equally apparent that such a result would completely violate both the letter and the spirit of the BIT.

348. Respondent's objection, if granted, would also upend the basic principle of a unified and holistic investment. It is trite law that the Tribunal need not "parse each component part of the overall transaction" to determine what constitutes an investor's "investment" under a given treaty.[985] Instead, the tribunal "can step back to consider the[] claimed investments as component parts of a larger, integrated investment undertaking."[986] This principle has been followed by multiple

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[984] The contracts at issue call for dispute resolution through ICC arbitration and in the Panamanian court system. *See* Resp.'s Counter-Mem. ¶¶ 239-41; Contract No. 077 (2011) dated 22 Sept. 2011 (C-0028), clause 75 (ICC arbitration); Contract No. 083 (2011) dated 22 Sept. 2011 (C-0030), clause 75 (ICC arbitration); Contract No. 085 (2011) dated 22 Sept. 2011 (C-0031), clause 75 (ICC arbitration); Contract No. 043 (2012) dated 17 Aug. 2012 (C-0034), clause 78 (Panamanian court); Contract No. 093-12 dated 6 July 2012 (C-0042) (Panamanian court), clause 42.

[985] *Inmaris*—Jurisdiction (CL-0218), ¶ 92.

[986] *Id.*

investment tribunals.[987] For example, in *ADC v. Hungary* the tribunal held that "[i]n considering whether the present dispute falls within those which 'arise directly out of an investment' under the ICSID Convention, the Tribunal is entitled to, and does, look at the *totality of the transaction* as encompassed by the Project Agreements."[988] This tribunal should take the same approach when considering Claimants' investment in Panama. The fact that certain "measures" taken by Respondent may also have given rise to a breach of contract claim does not mean that those same measures did not also give rise to separate treaty breaches, especially when combined against the larger, holistic investment which includes Claimants' Panamanian company, Omega Panama.[989] To say, as Respondent does, that any measures that involve breaches of contract are excluded from review by this Tribunal (at least until another tribunal or court gives it permission) would significantly denigrate the Treaty and effectively rewrite it.[990] This is impermissible.

349. As a matter of both fact and international law, Claimants made a unitary investment in Panama, that includes but is not limited to all of the individual Contracts entered into by the Omega Consortium with Panama's various Government agencies. That investment also includes Omega

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[987] *See Joy Mining v. Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 Aug. 2004 (CL-0154), ¶ 54; *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 25 May 1999 (CL-0155), ¶ 72; *Mytilineos Holdings SA v. Serbia and Montenegro and Serbia*, UNCITRAL Arbitration, Partial Award on Jurisdiction, 8 Sept. 2008 (CL-0156), ¶ 120; *Saipem S.P.A. v. People's Republic of Bangaladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 Mar. 2007 (CL-0153), ¶ 110; *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 37 I.L.M. 1378 (1998), 11 July 1997 (CL-0157), ¶ 26.

[988] *ADC Affiliate Ltd. and ADC & ADMC Management Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 Oct. 2006 (CL-0028), ¶ 331 (emphasis omitted).

[989] *See Impregilo SpA v. Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction, 22 Apr. 2005 (CL-0083), ¶ 258; *Jan de Nul v. Republic of Egypt*, ICSID Case Co. ARB/04/13, Decision on Jurisdiction, 16 June 2006 (CL-0158), ¶ 80.

[990] *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, 29 Jan. 2004 (RL-0022), ¶ 132; *SGS v. Paraguay*—Decision on Jurisdiction (CL-0152), ¶ 183.

Panama. And this Tribunal has jurisdiction over the *entirety* of Claimants' investment. As such, the appropriate venue for the resolution of "the dispute," as addressed in Article VII(2) of the BIT, is not the mechanism laid out in the individual Contracts, which are but pieces of the investment, but rather the mechanism set up by the relevant Treaties to protector investments and investors as a whole.

350. In any event, this objection is more academic than practical, because even if this Tribunal found that contractual dispute resolution clauses prevented it from exercising jurisdiction over certain claims under *the BIT*, it would *still* be able to exercise jurisdiction over *all of those claims* under Article 10.16 of the TPA, which also provides for investor-State dispute resolution. Indeed, the TPA expressly protects "turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts" and "other tangible or intangible, movable or immovable property."[991] And its investor-State disputes settlement clause does not contain any language concerning previous "dispute-settlement procedures" like Article VII of the BIT.

351. The TPA also covers all the unlawful conduct at stake in this dispute. Article 10.1.3 states, "For greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement." The TPA entered into force on 31 October 2012, and Claimants do not allege that Respondent breached their rights through any actions or omissions before that date. Rather, Respondent began breaching the Treaties only after President Varela came to office in July 2014. Nor does Article 1.3(a)(i) of the TPA alter this analysis.[992] That provision provides investors holding preexisting

[991] TPA (CL-0003), art. 10.29.

[992] TPA, (CL-0003), art. 1.3(3)(a)(i) ("[F]or a period of ten years beginning on the date of entry into force of this Agreement, Articles VII and VIII of the Treaty shall not be suspended . . . in the case of investments covered by the Treaty as of the date of entry into force of this Agreement . . . .").

investments as of 31 October 2012 with the *option* — but not the *obligation* — to invoke the investor-State arbitration rights set forth in Article VII of the BIT, notwithstanding the *additional option* to invoke Article 10.16 of the TPA.

352. In sum, Respondent's fourth jurisdictional objection—like the previous three objections—fails on multiple grounds.

VIII. RESPONDENT, THROUGH ITS ILLEGAL ACTIONS AGAINST CLAIMANTS AND THEIR INVESTMENT, HAS BREACHED THE BIT AND THE TPA

353. Respondent breached its obligations under both the BIT and the TPA. As described above, Respondent has (1) unlawfully expropriated Claimants' investments (*see infra* Section VIII.A), (2) failed to afford Claimants' investments fair and equitable treatment (*see infra* Section VIII.B), (3) failed to provide Claimants' investments full protection and security (*see infra* Section VIII.C), and (4) breached the Treaties' umbrella and/or MFN clauses (*see infra* Section VIII.D). As a result of Respondent's unlawful behavior, Claimants' investments have been completely destroyed.[993]

A. Respondent Unlawfully Expropriated Claimants' Investment

354. Claimants demonstrated in their Memorial that Respondent unlawfully expropriated their investments in violation of the BIT and TPA.[994] Respondent's Counter-Memorial does not join issue with most of Claimants' arguments, and where it does, it fails to advance a meritorious defense.

355. Respondent's Counter-Memorial does not contest, for example, the fact that the BIT and the TPA prohibit indirect expropriation. Nor could it. The BIT and TPA prohibit not only "direct"

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[993] Rivera 2 ¶ 5 n.1 ("Mr. Varela came to power and began a campaign of harassment against my companies and me, which eventually destroyed my companies and my reputation."); *id.* ¶ 14 ("[M]y reputation and my businesses have been destroyed.").

[994] Cls' Mem. ¶¶ 136-59.

expropriations (*i.e.*, "the outright transfer of legal title of an investment" and the "physical seizure of property without compensation by a government"), but also "indirect expropriation" (*i.e.*, measures that "indirect[ly]" expropriate the investments of investors of the other Contracting Party or are "equivalent" to such measures).[995]

356. Respondent likewise does not challenge that Claimants' various interests in Panama qualify as "investments" protected from unlawful expropriation.[996] All of Claimants' tangible and intangible property are investments protected from unlawful expropriation.[997] The BIT expressly covers "a company or shares of stock or other interests in a company or interests in the assets thereof,"[998] such as Claimants' ownership of Omega Panama, and it specifically protects "any right[s] conferred [on Claimants] by law or contract" and any "claim to money" or to "performance having economic value,"[999] such as the rights arising out of Claimants' construction contracts. The TPA similarly protects Claimants' "enterprise" and "shares, stock, and other forms of equity participation in an enterprise," such as Omega Panama, and it also specifically covers "turnkey, construction, . . . and other similar contracts."[1000]

357. In addition, Respondent's Counter-Memorial does not even mention, let alone apply,

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[995] BIT (CL-0001). This treaty was amended by the 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 27 October 1982, signed on 1 June 2000, entered into force on 14 May 2001 (CL-0002) (cumulatively the "BIT"), art. IV(1); TPA (CL-0003), art. 10.7.

[996] *See* Cls' Mem. ¶¶ 137-40.

[997] BIT (CL-0001; CL-0002), art. I(d)(i); TPA (CL-0003), art. 10.29(h); *see also* Cls' Mem. § IX.A.1.

[998] BIT (CL-0001; CL-0002), art. I(d)(ii).

[999] BIT (CL-0001; CL-0002), art. I(d)(iii), (vi).

[1000] TPA (CL-0003), art. 10.29(a), (b), (e).

the relevant expropriation test reflected in both treaties, which requires host States to refrain from any expropriation other than one undertaken (1) for a public purpose, (2) with due process, (3) in a non-discriminatory manner, and (4) accompanied by prompt, adequate, and effective compensation.[1001] Respondent's silence on all four points serves as a tacit admission that it violated the Treaties' standards.

358. *First*, Respondent's challenged acts were not taken for a public purpose. It is difficult to imagine a scenario in which political vendettas, sovereign threats, intentionally breached public works contracts, meritless criminal investigations, and other such acts could actually serve the legitimate interests of the Panamanian people.

359. *Second*, Respondent violated Claimants' due process rights in a variety of ways, including by intentionally (and maliciously) breaching contractual obligations, wrongfully withholding required payments and permits, terminating agreements without notice, initiating baseless criminal investigations, illegally freezing bank accounts, and issuing pretextual detention notices. As noted in Claimants' Memorial, INTERPOL confirmed that upon request from Mr. Rivera's counsel it decided to withdraw the Red Notice issued (baselessly) against Mr. Rivera because the data concerning him was not compliant with INTERPOL's rules.[1002]

360. *Third*, Respondent's conduct was discriminatory. Claimants were targeted because of President Varela's personal animosity toward them. The evidence shows that they received improper treatment because they were viewed as "Children of Martinelli"[1003] and because Mr. Rivera had failed

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[1001] *See* BIT (CL-0001; CL-0002), art. IV(1); TPA (CL-0003), art. 10.7.1(a)-(d); *see also* Cls' Mem. ¶ 137.

[1002] Cls' Mem. ¶ 103.

[1003] *See supra* Section IV.B; Pérez ¶¶ 6, 52.

to acquiesce to then-Vice President Varela's request for a large campaign contribution.[1004]

361. Indeed, Respondent played favorites with similarly-situated contractors that did make unlawful payments to Panamanian officials. In the second half of 2014, *i.e.*, while Respondent was strangling Claimants economically by refusing to issue necessary approvals, Respondent awarded massive approvals to other government contractors like Odebrecht and Constructora MECO. In recent years, these other contractors have recently admitted making unlawful payments worth millions of dollars in in exchange for business on or around the same time period.[1005]

362. *Fourth*, Respondent has failed to compensate Claimants and has not even attempted to argue otherwise. Indeed, as will be addressed in more detail below, Respondent's *own quantum expert* admits that Claimants are owed US$ 7.1 million (though the actual number is higher).[1006]

363. Claimants are thus entitled not only to the compensation that might flow from a legal expropriation, but also to full reparation and damages that flow from an unlawful expropriation under international law.[1007]

1. *The Parkerings Case Is of No Assistance to Respondent*

364. Respondent defends itself against Claimants' claims of unlawful expropriation by trying to shift the focus away from its unlawful behavior and instead trying to frame Panama's actions as "commercial" rather than sovereign.[1008] To this end, Respondent relies primarily on just one case,

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[1004] *See* Pérez ¶ 16 (describing Panama's "lax or inexistent campaign finance laws").

[1005] *See supra* § V.A.1.

[1006] *See* Expert Report of Dr. Daniel Flores dated 7 Jan. 2019 ("**Flores**"), Fig. 1; *see also infra* § IX.

[1007] See infra § IX.

[1008] Resp.'s Counter-Mem. ¶¶ 252-63.

Parkerings v. Lithuania, and it points to three allegedly "cumulative conditions" it insists must be present for an alleged breach of a contract by a state to support a claim of expropriation.[1009] But the three-part test from *Parkerings* does not assist Respondent.

365. *First*, Respondent argues that the acts that led to this dispute were mere contractual breaches, not "sovereign acts."[1010] As already discussed,[1011] Respondent is incorrect and its argument is premised on a fundamental mischaracterization of the nature of Claimants' investment in Panama. Respondent describes Claimants' investment as nothing more than eight separate construction Contracts in an attempt to make Claimants' interactions with the Panamanian Government appear strictly "commercial." But Claimants' long-term commitment of capital and resources into Panama transcended those eight contracts. Claimants established their investment by incorporating Omega Panama on 26 October 2009[1012] and then expanded that investment over the course of many years, building a reputation and brand in Panama, hiring employees, incurring risk and debt, contributing to the infrastructure of the State in a variety of ways, and operating a successful, complex, and multi-faceted business. Omega Panama—not merely eight commercial contracts—has been the core component of Claimants' investment. It has served as the central point into which Claimants have invested their knowledge, energy, capital, and resources and through which Claimants have received valuable rights as reflected in the construction Contracts. Until President Varela took office, Omega Panama was on an upward trajectory. It had increased its revenues every year and received no

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[1009] *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 Sept. 2007 ("***Parkerings***") (CL-0041); *see also* Resp.'s Counter-Mem. ¶¶ 257-61.

[1010] Resp.'s Counter-Mem. ¶ 253.

[1011] *See generally* § VII.

[1012] Public Registry of Omega Engineering Inc. dated 26 Oct. 2009 (C-0017).

complaints from the Panamanian Government.[1013] All of this changed as of July 2014 when the new Administration took hold and carried out a comprehensive governmental campaign of harassment against Claimants which substantially (indeed, completely) deprived them of the use and enjoyment of their investment.

366. Given that background, Respondent's framing is not only incorrect but also misleading. Claimants did not view the Panamanian Government simply as their contractual counterpart on eight, one-off deals. Claimants and Respondent were not on equal footing, nor were their roles remotely analogous. Claimants were investors who were expanding into the Panamanian market and incurring risk and rewards along the way; Respondent was the gatekeeper with State control over all aspects of Claimants' investment in that market. And in that role, Respondent *did* exercise its sovereign powers and *did* eviscerate Claimants' entire business in Panama. In the words of the tribunal in *Siemens v. Argentina*, Claimants have not been merely "disappointed in the performance of the State in the execution of a contract but rather of interference in the contract execution through governmental action," or better stated, "superior governmental power."[1014]

367. That power resulted in at least seven different Panamanian governmental agencies breaching their respective obligations to Claimants *almost simultaneously* as part of a *deliberate State campaign* against Claimants. It manifested itself in a demand for a large campaign contribution and an accompanying threat from the individual who would become the President, and who was the Vice President at the time. Respondent employed tools available only to a sovereign in dismantling

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[1013] *See supra* § III.A.

[1014] *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 Feb. 2007 ("***Siemens***") (CL-0008), ¶ 253.

Claimants' investment: pretextual budget cuts, permitting problems, criminal investigations, frozen bank accounts, detention orders, and Interpol red notices, among other things. Claimants' fate was dictated by President Varela and his cronies, who did not act as mere private citizens but on behalf of the State.[1015] For instance, Minister de la Guardia, who gutted the funding to Claimants' Projects, did not do so as a private accountant; he did so to carry out President Varela's wishes as his Minister of the Economy and Finance (and after contributing US$ 38,500 to Mr. Varela's campaign).[1016] Even allegedly external agents working against Claimants, such as Mr. Saltarín, were given a State mandate, housed within Government office space, and given access to the country's national security and intelligence departments.[1017] In sum, Respondent used its superior state power to destroy Claimants' investments through sovereign acts. There was nothing purely commercial about Respondent's conduct.

368. *Second*, Respondent contends that it cannot be liable for expropriating a contract right unless Claimants first sought to establish that a breach of domestic law has occurred. But this position, echoed by the tribunal in *Parkerings*,[1018] is a minority opinion. More importantly, it is wrong. There are two main problems with requiring parties to first attempt to litigate in a domestic court before

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[1015] *See* Peréz ¶ 52 ("The appointment of loyal supporters to key positions, while not unusual for Panamanian presidents, gave Mr. Varela an opportunity to reverse any policy implemented or contract signed by the previous administration.").

[1016] *See supra* § V.C.; Peréz ¶ 15 n.11 (stating that Panama follows "a spoils system (also known as a patronage system)" in which "a political party, after winning an election, gives government civil service jobs to its supporters, friends, and relatives as a reward for working toward victory, and as an incentive to keep working for the party—as opposed to a merit system."); *see also id.* ¶¶ 26, 50 (describing Panama's "unchecked, role of money in the electoral process").

[1017] *See supra* § V.B; *see also* Peréz ¶ 53 ("Mr. Saltarín was provided with unfettered powers and acted with total liberty.").

[1018] *Parkerings* (CL-0041) ¶¶ 448, 449.

raising an expropriation claim in arbitration. To begin with, an international wrong that amounts to a treaty breach need not also be a breach of a domestic law.[1019] An expropriation may be perfectly legal under domestic law, but that is irrelevant to the assessment of the act by an international arbitral tribunal. Otherwise States could plead domestic law as a defense to an international wrong, something international law is loath to allow.

369. Additionally, requiring a claimant to litigate its claim in domestic courts would essentially create a requirement to exhaust local remedies. But neither international law,[1020] nor the BIT, nor the TPA contain such a requirement; in fact, the relevant Treaties require the opposite.[1021] Indeed, ICSID Annulment Committees have noted that Respondent's proposed approach stands "outside the *jurisprudence constante* under the ICSID Convention."[1022] As the tribunal in *Franck*

[1019] Antoine Goetz & Consorts et S.A. Affinage des Métaux v. Republic of Burundi, ICSID Case No. ARB/01/2, Award, 10 Feb. 1999 (CL-0179), ¶¶ 120-33; Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Ad hoc Committee Decision on the Application for Annulment of May 16, 1986, 25 I.L.M. 1439 (1986) (CL-0196) ¶ 20; LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 Oct. 2006, ¶ 94 (CL-0191); DOLZER & SCHREUER (CL-0006 resubmitted), at 290-93.

[1020] *Lanco International, Inc. v. The Argentine Republic*, ICSID Case No. ARB/97/6, Decision on Jurisdiction, 8 Dec. 1998, 40 I.L.M. 457 (2001) (CL-0159), ¶¶ 21-28; *Alpha Projecktholding v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 Nov. 2010 ("***Alpha Projecktholding***") (CL-0160), ¶ 411 ("Whether Claimant could have enforced its rights in local courts . . . is not relevant [to an expropriation claim] . . . . Claimant chose to seek a remedy through international arbitration instead, as it is entitled to do."); *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009 ("***Saipem*** – Award") (CL-0161), ¶¶ 180-81 ("As a matter of principle, exhaustion of local remedies does not apply in expropriation law . . .[This] case is one of expropriation.").

[1021] *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 27 October 1982, entered into force 14 May 2001 (CL-0002), art. VII(3) ("Once the national or company has so consented, either party to the dispute may institute proceedings before the Centre . . . , provided the dispute has not, for any reason, been submitted for resolution in accordance with any applicable dispute settlement procedures previously agreed to by the parties to the dispute, and the national or company concerned has not brought the dispute before the courts of justice, administrative tribunals or agencies of competent jurisdiction of either Party."); TPA (CL-0003), art. 10.18.2(b) (requiring the investor's written waiver "of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.").

[1022] *See, e.g., Helnan International Hotels A/S v. Arab Republic of Egypt* (Annulment Proceeding), ICSID Case

Charles Arif v. Moldova explained, "[t]he ICSID system is not intended to be a subsidiary system of dispute settlement in case the host State's legal system fails, but rather it is set up as an alternative to the host State's remedies in case of an investment dispute."[1023] So, Respondent fails on the second prong of its alleged test, too.

370. *Third*, Respondent relies on *Parkerings* to argue that only a *substantial* deprivation of a contract right by a respondent acting in its sovereign capacity could amount to an unlawful expropriation.[1024] Respondent argues that Claimants were deprived of nothing because their investment had "zero value to a potential willing buyer."[1025] This assertion is as false factually as it is wrong legally.

371. Respondent's evaluation of the investment's value (and thus the magnitude of the deprivation) is completely off the mark. As set forth above, the primary "investment" expropriated by Respondent was Omega Panama, which was a going concern that held valuable assets, including the construction Contracts. Those Contracts were also individually protected investments under the BIT and the TPA, and neither Treaty sets a different standard for the unlawful expropriation of such rights. In any event, tribunals have found an unlawful expropriation where governmental interference "has the effect of depriving the owner, in whole or in significant part, of the *use or reasonably-to-be-*

No. ARB/05/19, Decision of the ad hoc Committee, 14 June 2010 ("***Helnan International*** – Annulment") (CL-0162), ¶¶ 47, 49, 50; *Compania de Aguas del Aconquija SA. and Vivendi Universal (formerly Compagnie Generale des Eaux)* v. *Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002 (RL-0019), ¶¶ 102-05.

[1023] *Franck Charles Arif v. Moldova*, ICSID Case No. ARB/11/23, Award, 8 Apr. 2013 ("**Arif**") (RL-0040), ¶ 345.

[1024] Cls' Mem., ¶¶ 142, 144; Christoph Schreuer, *The Concept of Expropriation under the ETC and other Investment Protection Treaties* ("**Schreuer—*The Concept of Expropriation***") (CL-0013), ¶ 66; DOLZER & SCHREUER (CL-0006 resubmitted) at 128; ("Tribunals have found that the determining factor is whether the state acted in an official, governmental capacity."); *Siemens* (CL-0008) ¶¶ 247-53

[1025] Resp.'s Counter-Mem. ¶ 261.

expected economic benefit of property."[1026] In other words, the question of the property's existing value has no relevance to whether or not it has been unlawfully expropriated—that is an entirely separate question relevant only to reparation for the illegal act. And as will be discussed below with respect to quantum, Claimants' investment in Panama was far from "zero value."[1027]

372. Moreover, Claimants were not just *substantially* deprived of their investment—they were *completely* deprived of their investment.[1028] After President Varela took office, not only did the Government refuse to pay invoices, provide required approvals, allocate funds for Claimants' Projects, and issue necessary permits and licenses, but the Government also terminated, suspended, and/or allowed to lapse each of Claimants' Contracts. Claimants were forced to fire employees and halt operations. Respondent's own inspectors informed it that Respondent was "seriously affecting the cash flow of [Omega Panama]."[1029] Most dramatically, Respondent administratively terminated—through a sovereign act that can be taken only by the Panamanian State—two Contracts including Claimants' largest contract with INAC, which deprived Claimants of the ability to obtain future

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[1026] Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, 30 Aug. 2000 ("**Metalclad**") (CL-0017), ¶ 103; accord Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, et. al, IUSCT Case No. 7, Award No. 141-7- 2, 22 June 1984, 6 IRAN-U.S. CL. TRIB. REP. 219, 225 ("**Tippetts**") (CL-0016), at 225 (finding expropriation where "events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral"); Starrett Housing Corporation, Starrett Systems, Inc. and others v. The Government of the Islamic Republic of Iran, Bank Omaran and others, IUSCT Case No. 24 (ITL 32-24-1), Interlocutory Award No. 32-24-1, 19 Dec. 1983, 10 Y.B. COMM. ARB. 232 (Pieter Sanders ed., 1985) ("**Starrett**") (CL-0015), ¶ IV(b) (finding expropriation where rights are "rendered so useless that they must be deemed to have been expropriated); CME Czech Republic B.V. (The Netherlands) v. The Czech Republic, UNCITRAL, Partial Award, 13 Sept. 2001 ("**CME—Partial Award**") (CL-0019) (finding expropriation when the government's actions or omissions caused the deprivation of business value).

[1027] See infra § IX.

[1028] Cls' Mem. ¶¶ 147-51.

[1029] Letter No. SA-CDA-099-14 from Sosa to Omega dated 25 Sept. 2014 (C-0593).

contracts through 2020.[1030] That step, in combination with the baseless criminal investigations, bank freezes and detention notices, further deterred potential business partners even outside of Panama from engaging with Claimants.[1031] As of mid-2015,[1032] Respondent's unlawful actions had completely destroyed Claimants' investment and unquestionably effectuated an indirect expropriation.

2. *The cumulative effect of Respondent's acts constituted a creeping expropriation of Claimants' investment in Panama*

373. Respondent's collective actions were a creeping expropriation of Claimants' *entire* investment in Panama. A creeping expropriation involves "an incremental but cumulative encroachment on one or more of the range of recognized ownership rights until the measures involved lead to the effective negation of the owner's interest in the property."[1033] In *Biwater Gauff*, for example, the tribunal found an unlawful expropriation of contract rights where the state took "a series

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[1030] *See supra* § V.B.4.

[1031] *See supra* § V.E.

[1032] As of mid-2015, Claimants' bank accounts remained frozen notwithstanding the completion of the National Assembly investigation, Mr. Villalba had returned to the Public Prosecutor's office and initiated new investigations into the Claimants, and Mr. Rivera began receiving notices to attend interrogations. Villalba ¶¶ 10, 27; Letter from Manuel Cedeño Miranda to Special Prosecutor of Organized Crime dated 10 June 2015 (C-0209); Verdict on Motion for Reconsideration dated 23 Mar. 2015 (C-0207); Report of the Preliminary Financial Analysis of Case No. 049-15 by the Public Prosecutor for Organized Crime dated 5 June 2015 (C-0081 resubmitted), at 1; Rivera ¶ 104; Decision by Panama's 16th Circuit Court of the First Judicial Circuit dated 5 Jan. 2016 (C-0218), at 1; Citation for Oscar Rivera to Appear at the Public Ministry on 29 June 2015 dated 16 June 2015 (C-0211); Rivera 2 ¶ 16 ("I had employees in Panama until June 2015."); Resolution of Detention No. 052-15 dated 25 Aug. 2015 (C-0093); *Fiscalia pide a Interpol que emita 'alerta roja' para ubicar a 4 empresarios por caso Moncada Luna*, TVN NOTICIAS dated 2 Sept. 2015 (C-0094).

[1033] Schreuer – *Expropriation under the ECT* (CL-0013), ¶ 36 (quoting World Investment Report, United Nations Conference on Trade and Development 110 (2003)); *see also AWG Group Ltd. v. The Argentine Republic, UNCITRAL & Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A v. Argentine Republic,* ICSID Case No. ARB/03/19, Award, 9 Apr. 2015 ("***Vivendi II***") (CL-0084), ¶¶ 7.5.17, 7.5.31 (endorsing the definition of creeping expropriation as "the slow and incremental encroachment on one or more of the ownership rights of a foreign investor that diminishes the value of its investment" and confirming that "[i]t is well-established under international law that even if a single act or omission by a government may not constitute a violation of an international obligation, several acts taken together can warrant finding that such obligation has been breached"); *Siemens* (CL-0008), ¶ 263 ("By definition creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation."); *Compañía del Desarrollo de Santa Elena S.A. v. Costa Rica*, Award, 17 Feb. 2000 (CL-0102), ¶ 76 ("[A] measure or series of measures can still eventually amount to a taking, though the individual steps in the process do not . . . .").

of steps" that, when viewed as a whole, "could not be characterised as the ordinary behaviour of a contractual counterparty."[1034] The same is true in this case, where Respondent did not merely act as a commercial party that breached a contract; rather, it engaged in a concerted campaign of targeted governmental harassment involving numerous State agencies each engaging in frequent attacks that, when taken together, effected a creeping expropriation of the totality of Claimants' investment.[1035]

374. Claimants urge the Tribunal to bear in mind that Claimants won their various Contracts, fair and square,[1036] by consistently outscoring their competitors in financial capacity,[1037] and Omega Panama's revenues went from zero to almost US$ [redacted] million within three years after Claimants made their investment.[1038] But Respondent's actions and omissions after President Varela came to power deconstructed that financial strength piece by piece. Almost simultaneously, Respondent breached all of the Contracts' Claimants held with various Government agencies; it halted or reversed payments and rejected other reasonable requests related to work Claimants had already performed; it inexplicably refused permits and plans contemplated in the tender documents of several Contracts; and within months it terminated all but one of Claimants' Contracts or purposefully allowed them to lapse. All of these actions, coupled with sham criminal investigations, detention notices, coercion, and other bad faith acts destroyed the use and value of Omega Panama.

[1034] *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 ("**Biwater Gauff**") (CL-0054), ¶ 489.

[1035] Cls' Mem. ¶ 155; *see supra* § V.

[1036] *See generally* Public Contracts Experts.

[1037] *See supra* § III.A; *see also* Public Contracts Experts at 4, 26-28 (showing that financial capacity and experience were the most important bidding criteria).

[1038] *See supra* Section §III.A; *see also* Rivera 2 ¶ 19 ("[O]nly three years after I incorporated the company, Omega Panama's revenue had reached US$ 29.97 million."); *see also* Burke ¶ 10.

B. Respondent Failed To Accord Claimants Fair And Equitable Treatment

375. The Government's unlawful conduct likewise violated the guarantees of Fair and Equitable Treatment ("**FET**") set forth in the BIT and the TPA. This case provides a paradigm example of an FET violation. Panama went out of its way to attract Claimants' investment by promising to protect those investments through a series of legal commitments. But those promises turned out to be meaningless.[1039] Likely recognizing this, Respondent frustrated Claimants' legitimate expectations by evading its legal obligations through a series of actions that could only be described as arbitrary, unreasonable, and inconsistent harassment and coercion. As shown below, under any standard, Respondent's conduct violated Claimants' right to fair and equitable treatment.

376. Respondent's Counter-Memorial avoids discussing its unlawful conduct and instead devotes a great deal of attention to the legal standards. Respondent also relies on factual assertions that are divorced from reality and entirely unsupported. The following passage is representative:

> [T]he 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.[1040]

377. As set forth in detail below and in the factual portion of this submission, the evidence shows that Respondent's violations of Claimants' rights to fair and equitable treatment were well established. Respondent's FET defense fails on all counts.[1041]

[1039] Rivera 2 ¶ 6 ("After the Varela Administration took control of the Panamanian government in mid-2014, Panama systematically reneged on all its obligations toward my companies and me.").

[1040] *See, e.g.*, Resp.'s Counter-Mem. ¶ 276.

[1041] *Id.* ¶¶ 264-306.

1. *Respondent misstates the applicable FET standard*

378. Respondent was required to comply with a broad and flexible standard of fair and equitable treatment under the BIT and the TPA. It denies those standards and insists that Claimants must establish customary international law violations to prevail on their FET claims. Respondent is incorrect, but in any event, Respondent's conduct has breached even the standards it advocates.

379. Both the BIT and the TPA require Panama to provide Claimants with fair and equitable treatment. Article II(2) of the BIT provides an autonomous FET guarantee, in line with (or "in accordance with") with the "principles of international law," but not limited by them.[1042] And Article 10.5 of the TPA provides an FET guarantee linked with customary international law,[1043] but the MFN clause of that treaty[1044] permits Claimants to import a more generous FET provision, for example, from the Panama-Netherlands BIT.[1045]

380. Respondent disregards the plain text of Article II.2 of the BIT and insists that provision

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[1042] BIT (CL-0001; CL-0002), art. II(2) ("Investment of nationals and companies of either Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Party. The treatment, protection and security of investment shall be in accordance with applicable national laws and international law. Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investment made by nationals or companies of the other Party.").

[1043] TPA (CL-0003), art. 10.5.1-2 ("Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. 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.").

[1044] *Id.* art. 10.4.

[1045] Agreement on Encouragement and Reciprocal Protection of Investments Between the Republic of Panama and the Kingdom of the Netherlands, entered into force 1 Sept. 2001 (CL-0163), art. 3.1 ("Each Contracting Party shall ensure fair and equitable treatment of the investments of investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors.").

"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.'"[1046] Thus, Respondent claims, the BIT's FET provision imposes an obligation to accord fair and equitable treatment that "is no greater than that required by international law."[1047] According to Respondent, this is the same standard set out in the TPA.[1048]

381. Respondent is incorrect. Article II(2) of the BIT states only that the FET standard guaranteed under that treaty shall be "*in accordance*" with international law.[1049] It does not limit Respondent's FET obligation to a "minimal" standard, as suggested by Respondent;[1050] rather it clarifies that the BIT's FET standard should not be interpreted as *inconsistent* with international law.[1051] In other words, Article II(2) requires the State to provide fair and equitable treatment that is consistent with its obligations under international law. It does not require an investor to demonstrate that the State fell short of the "customary international law minimum" in order to establish liability. As Claimants explained in their Memorial, the provision's text and context, as well as the treaty's object and purpose, all support this reading.[1052] The BIT's FET obligation is a "broad"[1053] and

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[1046] Resp.'s Counter-Mem. ¶ 267.

[1047] *Id.* ¶ 269.

[1048] *Id.* ¶ 269.

[1049] BIT (CL-0001; CL-0002), Art. II(2) (emphasis added).

[1050] Resp.'s Counter-Mem. ¶ 276.

[1051] *See Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006 ("***Azurix***") (CL-0025), ¶ 361 (finding that the purpose of adding the qualification that investments will be accorded treatment no less than that required by international law permits an interpretation of the standard that is higher than what is required by international law (*i.e.*, the qualification sets a floor, not a ceiling)).

[1052] Cls' Mem. ¶ 160 (citing to Vienna Convention on the Law of Treaties, opened for signature 23 May 1969 (CL-0030), art. 31(1)).

[1053] Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15,

"flexible"[1054] standard that requires "State conduct that is legitimate, unbiased and just."[1055]

382. In any event, this interpretive debate focuses on a distinction without a difference. It is well-accepted that customary international law "is not frozen in time and that the minimum standard of treatment does evolve."[1056] Arbitral tribunals have acknowledged that the evolution of customary international law as it pertains to the treatment of foreign investors has largely "converged" with what was once called the 'autonomous' FET standard,[1057] such that the "whole discussion . . . has become dogmatic [because] there is no substantive difference in the level of protection afforded by both standards."[1058] Especially where (as here) the State's treatment of an investor violates its "solemn

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Award, 1 June 2009 (CL-0032), ¶ 450.

[1054] *See, e.g.*, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 Apr. 2004 ("***Waste Management***") (CL-0033), ¶ 99 (describing the standard as "a flexible one which must be adapted to the circumstances of each case").

[1055] *See, e.g.*, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2005 (CL-0031), ¶ 113 ("[F]air and equitable treatment should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment.").

[1056] *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 Jan 2003 ("***ADF***") (CL-0036), ¶ 179; *see also OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015 (CL-0164), ¶ 489.

[1057] *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015 (CL-0164), ¶ 489; *see also Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016 (CL-0165), ¶¶ 520-21.

[1058] *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016 (CL-0165), ¶ 520; *see also Biwater Gauff* (CL-0054) ¶ 592 ("[The] Arbitral Tribunal . . . accepts, as found by a number of previous arbitral tribunals and commentators, that the actual content of the treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law."); *Rumeli Telekom A.S. et al. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 (CL-0043), ¶ 611 ("this precision is more theoretical than real. [The Tribunal] shares the view of several ICSID tribunals that the treaty standard of fair and equitable treatment is not materially different from the minimum standard of treatment in customary international law."); *Azurix* (CL-0025) ¶ 361 ("the minimum requirement to satisfy this standard has evolved and the Tribunal considers that its content is substantially similar whether the terms are interpreted [as an autonomous standard] or in accordance with customary international law"); *Murphy Exploration & Production Co. v. Republic of Ecuador*, UNCITRAL, Partial Final Award, 6 May 2016 (CL-0166), ¶¶ 206-08 ("The Tribunal finds that there is no material difference between the customary international law standard and the FET standard under the present BIT"); *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 Mar. 2006 ("***Saluka***") (CL-0038), ¶ 291.

legal and contractual commitments," the "[t]reaty standard of [FET] . . . is not different from the international law minimum standard and its evolution under customary law."[1059]

383. Even if this Tribunal declines to adopt the so-called "convergence theory" of FET and decides that a customary international law standard governs this case (which it should not), Respondent has still nevertheless breached even that standard. The Tribunal in *Gold Reserve* applied an FET provision with a very similar phrase ("in accordance with the principles of international law") and determined that the "principles" guiding this standard could be found in "the comparative analysis of many domestic legal systems."[1060] Even NAFTA cases, which are often viewed as the high-water mark of a non-autonomous FET standard, have held that "customary international law on the treatment of aliens and their property, including investments," includes "more general principles and requirements, with normative consequences . . . derived from . . . th*e general principles of law recognized by civilized nations*."[1061] And Borchard's seminal work on *The Minimum Standard of the Treatment of Aliens* likewise acknowledges that it is "composed of the uniform practices of the civilized states."[1062] This juridical approach is borne of necessity. When looking for "state practice"

[1059] *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 Aug. 2008 ("**Duke Energy**") (CL-0037), ¶¶ 333, 337 (quoting *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 (CL-0097), ¶ 284). *See also id*. ¶ 362-63 (finding a violation of FET based on a violation of the State's "express guarantees" in its contractual commitments "considered as conditions precedent to its investment").

[1060] *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 Sept. 2014 ("***Gold Reserve***") (CL-0057) ¶ 565; *see also id.* ¶¶ 575-76.

[1061] *ADF* (CL-0036) ¶¶ 184-86 (emphasis in original, quoting *Mondev International Ltd. v. United States of America,* ICSID Case No. ARB(AF)/99/2, Award, 11 Oct. 2002 (CL-0035), ¶ 119); *see also Merrill & Ring Forestry L.P. v. The Government of Canada*, ICSID Case No. ICSID Case No. UNCT/07/1, Award, 31 March 2010 (CL-0167), ¶¶ 184-87.

[1062] Edwin Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 38 MICH. L. REV. 445, 448-49 (1940) (CL-0197).

concerning sovereign treatment of private parties and their property, a study of *inter*-state relations on the international plane can rarely provide the essential "principles and normative requirements" to articulate a useful legal standard; tribunals are thereby directed to seek such practice *in foro domestic* vis-à-vis private parties in order to discern the relevant *opinio juris*.[1063] Incidentally, this approach also gives expression to the precise language of the BIT, which guarantees FET to private, foreign investors "in accordance with applicable *national laws and international law*." In a case like this one, even if the FET standard is tethered to the "principles of international law" (properly construed to include all primary sources of that law),[1064] the autonomous/non-autonomous distinction still fades from relevance. This is a case where the investors seek to vindicate a few very basic and very general principles of law that are well-established and recognized as part of the corpus of international law:

384. *First*, States must perform their contracts with foreign investors in good faith (*pacta sunt servanda bona fides*), a principle so enshrined in domestic and international legal systems that substantiation of state practice and *opinio juris* is hardly required.[1065] *Second*, investors have the right to receive due notice of proceedings affecting their rights. This, too, has been deemed a core tenet of

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[1063] KOTUBY & SOBOTA (CL-0081 resubmitted) (noting that "General principles are in some ways conceptually similar to "international custom." The primary difference, . . . is that general principles derive from the positive laws promulgated *within* States. Custom, on the other hand, is typically moored in the practice *among* States"); Diehl, THE CORE STANDARD OF INTERNATIONAL INVESTMENT PROTECTION: FAIR AND EQUITABLE TREATMENT 178-79 (Wolters Kluwer 2012) (CL-0168) ("customary international law is largely shaped by the *outward* behavior of states as it is reflected in their practice on the international plane, whereas general principles of law find their pivotal underpinning in the *internal* structures of the State's own legal orders"); Conforti and Labella, AN INTRODUCTION TO INTERNATIONAL LAW 40 (Nijhoff: Leiden 2012) (CL-0169) ("State practice [with respect to general principles] consists exclusively of the existence and consistent application of [domestic] rules within the national legal systems" of states").

[1064] See *Merrill & Ring Forestry L.P. v. The Government of Canada*, ICSID Case No. ICSID Case No. UNCT/07/1, Award, 31 March 2010 (CL-0167), ¶ 184.

[1065] *See, e.g.,* KOTUBY & SOBOTA (CL-0081 resubmitted) at 89-101 (collecting and discussing sources of general principle); Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL TRIBUNALS 112-114 (Cambridge 1987) (CL-0170) (same).

international due process and thus a general principle of law which all civilized nations purport to honor.[1066] *Third*, a State cannot blow hot-and-cold, and arbitrarily act to frustrate expectations legitimately created by its previous consistent behavior or promises. A "comparative analysis of many domestic legal systems" supports this as a general principle, whether couched as a function of estoppel or good faith.[1067] *Fourth*, international law attaches "special importance to discriminatory violations of municipal law," so a State must ensure that official decisions are free from bias or prejudice against foreign investors.[1068]

385. As demonstrated, these general principles of law are all recognized and respected by States *in foro domestic*, thus constituting state practice and *opinio juris* to form part of the "principles of international law."[1069]

[1066] *See, e.g.,* KOTUBY & SOBOTA (CL-0081 resubmitted) at 160-63 (collecting and discussing sources of general principle); *see also Metalclad* (CL-0017), ¶¶ 91, 100-101; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 Apr. 2002 (CL-0171), ¶ 143.

[1067] *See* KOTUBY & SOBOTA (CL-0081 resubmitted) at 119-130 (collecting and discussing sources of general principle); Stephan W. Schill, *General Principles of Law and International Investment Law* 168-170, in Gazzini and Eric De Brabandere, INTERNATIONAL INVESTMENT LAW: THE SOURCES OF RIGHTS AND OBLIGATIONS (Nijhoff International Investment Law Series, Volume 1, 2012) (CL-0172); *see also Gold Reserve* (CL-0057) ¶¶ 575-76 (citing "the comparative analysis of many domestic legal systems"); *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Separate Opinion of Thomas Wälde, 1 Dec. 2005 (CL-0133), ¶¶ 28–30 (conducting a "comparative administrative law" survey, including decisions from EU authorities, the Court of Justice of the European Union and World Trade Organization panels, to demonstrate the "contemporary state practice and the minimum standards of national and international [administrative] law" on the issue of legitimate expectations).

[1068] *See* KOTUBY & SOBOTA (CL-0081 resubmitted) at 76-78, 174-75, 181-82 (collecting and discussing sources of general principle); *see also Loewen Grp., Inc. & Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003 (CL-0173), ¶ 135 ("a judgment is manifestly unjust … if it has been inspired by ill will towards foreigners as such or as citizens of a particular states" (citing Harvard Law School, *Research in International Law, Draft Convention on the Law of Responsibility of States for Damage Done in Their Territory to the Persons or Property of Foreigners*, 23 AM. J. INT'L L. 133, 174 (Special Supp. 1929)).

[1069] The sources cited above—the writings of scholars and arbitral decisions—are useful not because they evince international law themselves, but because they include examination of State practice and *opino juris*, just as Article 38 of the ICJ statute contemplates. *See* Statute of the International Court of Justice, 26 June 1945 (CL-0174), art. 38 (listing "judicial decisions and the teachings of the most highly qualified publicists of the various nations" as "subsidiary means for the determination of rules of law.").

386. In any event, Respondent's argument collapses on its own. Respondent relies on *Saluka v. The Czech Republic* to support its misinterpretation.[1070] But that tribunal did exactly what Claimants have proposed in this case: it assessed the "ordinary meaning" of the "fair and equitable treatment" provision applicable to that dispute[1071] and looked to the broader context of the treaty, including the "object and purpose" of the agreement.[1072] And it came to precisely the conclusion supported by Claimants here, deciding that the FET clause in the relevant BIT provided "an autonomous Treaty standard" and that the host State "has therefore assumed an obligation to treat a foreign investor's investment in a way that does not frustrate the investor's underlying legitimate and reasonable expectations."[1073] As the *Saluka* tribunal recognized, BITs are "designed to promote foreign direct investment," and as such, "investors' protection by the 'fair and equitable treatment' standard is meant to be a guarantee providing a positive incentive for foreign investors."[1074] Thus, in order to show a State violated the standard, "it may be sufficient that States' conduct displays a relatively lower degree of inappropriateness."[1075]

387. Respondent likewise relies on *Genin v. Estonia*[1076] and *Neer v. United Mexican States*,[1077] but the *Saluka* tribunal expressly considered these cases and rejected them. As the *Saluka*

[1070] *Saluka* (CL-0038).

[1071] *Id.* ¶ 297.

[1072] *Id.* ¶ 298-99.

[1073] *Id.* ¶ 309.

[1074] *Id.* ¶ 293.

[1075] *Saluka* (CL-0038) ¶ 293.

[1076] *Alex Genin et al v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001 ("***Genin***") (RL-0029).

[1077] *Neer v. United Mexican States* (U.S. v. Mex.), 4 R.I.A.A. 60 (Gen. Claims Comm'n 1926) ("***Neer***") (RL-0028).

tribunal observed, the standard adopted in *Genin* was "'*an*' international minimum standard, not . . . '*the*' international minimum standard."[1078] "Far from equating the BIT's standard with the customary minimum standard," the tribunal explained, "the *Genin* tribunal merely emphasised that the 'fair and equitable treatment' standard requires the Contracting States to accord to foreign investors treatment which does not fall below a certain minimum."[1079] As for the *Neer* formulation, which Respondent urges this tribunal to adopt, the *Saluka* tribunal concluded correctly that it "reflects the traditional, and not necessarily the contemporary, definition of the customary minimum standard."[1080]

388. Finally, with respect to the TPA, Respondent again mischaracterizes Claimants' position. As noted above, Article 10.5 of the TPA provides an FET guarantee linked with customary international law, but the MFN clause of that treaty permits Claimants to import a more generous FET provision. Respondent states that the "TPA's MFN provision does not permit the incorporation of provisions from the BIT."[1081] Respondent's argument rests on the faulty assumption that the only FET provision the TPA's MFN provision could incorporate would come from the U.S.-Panama BIT.[1082] But that is not the case. Panama has signed other BITs with other nations, such as the Netherlands-Panama BIT, which includes a broad, autonomous FET provision, stating that "[e]ach Contracting Party shall ensure fair and equitable treatment of the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation,

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[1078] *Saluka* (CL-0038) ¶ 295 (citing to *Genin* (RL-0029)) (emphasis added).

[1079] *Id.* ¶ 295.

[1080] *Id.* ¶ 295 (citing to *Neer* (RL-0028)).

[1081] Resp.'s Counter-Mem. ¶ 270.

[1082] *Id.* ¶ 270 (arguing that "the purpose of the MFN provision is to ensure that U.S. investors in Panama are not treated worse than investors from another country").

management, maintenance, use, enjoyment or disposal thereof by those investors."[1083] That broad standard, therefore, applies to this dispute. And there is no question that Respondent has violated it vis-à-vis Claimants.

2. *Respondent Could Not Frustrate Claimants' Legitimate Expectations and Contractual Rights*

389. As set forth in Claimants' Memorial,[1084] an important and legitimate expectation for any foreign investor is that a State will comply with its contractual commitments. Unquestionably, a breach of contract "which the State commits in the exercise of its sovereign power" constitutes a treaty violation.[1085]

390. Respondent's Counter-Memorial, once again, tries to avoid this matter by focusing on legal standards. It argues that "[w]here 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."[1086] This argument fails, of course, because, as established above, the BIT and the TPA do *not* require Claimants to satisfy customary international law standards to prevail on their FET claims.

391. And even if an investment treaty links the FET standard to international law, that

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[1083] Agreement on Encouragement and Reciprocal Protection of Investments Between the Republic of Panama and the Kingdom of the Netherlands, entered into force 1 Sept. 2001 (CL-0163), art. 3.1 ("Each Contracting Party shall ensure fair and equitable treatment of the investments of investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors.").

[1084] Cls' Mem. ¶¶ 162-68.

[1085] *Duke Energy* (CL-0037) ¶ 345.

[1086] Resp.'s Counter-Mem. ¶ 271.

standard still must incorporate an investor's legitimate expectations. As the tribunal in *Gold Reserve* explained after engaging in a thorough comparative analysis of many domestic systems, "the concept of legitimate expectations [exists] . . . in different legal traditions."[1087] The tribunal therefore held that consideration of the affected party's legitimate expectations is a general principle of international law, such that "expectations . . . reasonably or legitimately created for a private person by the constant behavior and/or promises of its legal partner, in particular when this partner is the public administration on which this private person is dependent" should be protected by the law.[1088]

392. Likewise *Saluka*, cited by Respondent,[1089] explained that the standard of "fair and equitable treatment" is "closely tied to the notion of legitimate expectations which is the *dominant element* of that standard."[1090] Many tribunals "consider the touchstone of fair and equitable treatment to be found in the legitimate and reasonable expectations of the Parties, which derive from the obligation of good faith."[1091] There is "no single tribunal on record that has steadfastly refused to

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[1087] *Gold Reserve* (CL-0057) ¶ 576.

[1088] *Id.*; *see also* Nitish Monebhurrun, Gold Reserve v. Bolivarian Republic of Venezuela*: Enshrining Legitimate Expectations as a General Principle of International Law?*, 32 J. OF INT'L ARB. 551 (2015) (CL-0175).

[1089] Resp.'s Counter-Mem. ¶ 275.

[1090] *Saluka* (CL-0038) ¶ 302 (emphasis added) (citing *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 ("***Tecmed***") (CL-0047); *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award, 14 Mar. 2003 (CL-0021); *Waste Management* (CL-0033)).

[1091] *El Paso Energy Int'l Co. v. Argentina*, ICSID Case No. ARB/03/5, Award, 31 Oct. 2011 ("***El Paso***") (CL-0056), ¶ 348; *see also id.* ("[T]he legitimate expectations of the investors have generally been considered central in the definition of FET, whatever its scope.") (emphasis added); *Duke Energy* (CL-0037), ¶¶ 339-40 (confirming legitimate expectations are an "essential element"); *PSEG Global Inc. et al. v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 Jan. 2007 ("***PSEG*—Award**") (CL-0039), ¶ 240 (characterizing legitimate expectations as the "most significant[]" element); *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, 8 Oct. 2009 (CL-0051), ¶¶ 216, 219, 245-46, 298 (describing legitimate expectations as "one of the major components" of FET); *TECMED* (CL-0047), ¶ 154; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010 (CL-0011), ¶ 226; *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 Mar. 2010 ("***Kardassopoulos***") (CL-0114), ¶¶ 434-52; *AES Summit Generation Ltd. & AES-Tisza Erömü Kft. v. Hungary*, ICSID Case No. ARB/07/22, Award, 23 Sep. 2010 (CL-0176), ¶ 9.3.25; *Enron Creditors Recovery Corp. and Ponderosa Assets,*

find that—at least in principle—[the FET] standard encompasses [the protection of] legitimate expectations."[1092]

393. Respondent also seeks to minimize its obligations by falling back on its mantra that the acts Claimants identify as FET breaches are "commercial" in nature, and thus fall outside the FET analysis. But they do not. *First*, as Claimants have already discussed, Respondent's actions were sovereign acts, not simply "commercial" ones.[1093] *Second*, even if they were merely contractual in nature, contracts between foreign investors and a state "generate . . . legal rights and therefore [legitimate] expectations of compliance," which deserve protections under the FET standard.[1094] A state's "obligation to observe contractual obligations towards . . . investor[s]," is undoubtedly part of the "more general [FET] standard."[1095]

3. *Respondent Violated Claimants' Rights to Fair and Equitable Treatment*

394. In any event, as the *Mondev* tribunal stated, a "judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case."[1096] The volume

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L.P. v. The Argentine Republic, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010 (CL-0177), ¶ 309; *Alpha Projektholding* (CL-0160) ¶¶ 420–22; *AES Summit Generation Ltd. & AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No.ARB/07/22, Decision of the Ad Hoc Committee on the Application for Annulment, 29 June 2012 (CL-0178), ¶ 80; *Antoine Goetz & Consorts et S.A. Affinage des Métaux v. Republic of Burundi*, ICSID Case No. ARB/01/2, Award, 21 June 2012 (CL-0179), ¶ 209; *EDF International SA, Saur International SA and Leon Participaciónes Argentinas SA v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012 (CL-0180), ¶¶ 354–55; *Arif* (RL-0040), ¶ 531; *see also* Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, 12 SANTA CLARA J. INTL L. 7, 14 (2014) (CL-0040).

[1092] Michele Potestà, Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept, 28 ICSID REV. 88, 100 (2013) (CL-0042).

[1093] See supra §V.

[1094] *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 Sept. 2008 (CL-0110), ¶ 261(iii).

[1095] *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award 12 Oct. 2005 (CL-0078), ¶ 182.

[1096] *Mondev International Ltd. v. United States of America,* ICSID Case No. ARB(AF)/99/2, Award, 11 Oct. 2002 (CL-0035), ¶ 118.

of evidence showing Respondent's FET breaches in this case is so high that there can be no doubt that Claimants meet whatever standard the Tribunal deems appropriate.

395. Respondent violated Claimants' rights in many ways.[1097] Respondent failed to perform its contractual commitments with Claimants in good faith, instead upending this principle when it repeatedly and willfully ignored its commitments to Claimants under eight different Contracts simultaneously.[1098] Respondent intentionally backtracked on eight binding legal commitments concerning eight different Projects. It either tried to rewrite the terms of the Contracts or simply ignored them and blamed the Claimants.

396. Respondent also failed to provide Claimants with due notice of proceedings affecting their rights in canceling Claimants' largest contract with INAC.[1099] Respondent arbitrarily acted to frustrate expectations legitimately created by its previous consistent behavior or promises considering that there were no major complaints regarding the Claimants' work or execution of any project until the Varela administration took over. It is telling that none of Respondent's witnesses (from INAC, the Judiciary, MINSA, and the Municipality of Panama) have any negative comments about the work performed by Claimants *prior to* the Varela administration.[1100] As of July 2014, everything changed, as Respondent systematically dismantled the rights and protections afforded to Claimants.

397. Respondent also acted with bias and in bad faith by carrying out President Varela's personal vendetta against Claimants in a multi-flank campaign to destroy their investments.[1101] When

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[1097] See generally supra Section §V.

[1098] *See supra* §§V.F; *see also* Mirones ¶ 7; Herrera ¶¶ 14-16.

[1099] *See supra* §V.D.

[1100] *See supra* § III.B.

[1101] *See supra* § V.B.

Claimants tried to engage with Respondent's various departments and agencies, each one of them failed to communicate with Claimants in good faith. Rather than negotiate, they acted unilaterally. They withheld payments and permits. They ignored reasonable requests for time extensions. The reasons provided for Respondent's non-performance were illogical, arbitrary, unreasonable, and pretextual. When Claimants pressed for answers, they obtained conflicting responses from conflicting branches of Government.

398. Respondent also treated claimaints discriminatorily. In the second half of 2014, i.e., in the same time period when Respondent was strangling Claimants economically, it was awarding massive approvals for other government contractors like Odebrecht and Constructora MECO. In recent years, these contractors admitted before U.S. or Panamanian prosecutors to making unlawful payments worth millions of dollars to Panamanian public officials in exchange for business on or around the same time period.[1102]

399. Besides offering a series of vague conclusory assertions with no citations to evidence,[1103] Respondent offers no explanation for these actions. It claims that Claimants "abandoned" their projects—but it was Respondent's treaty breaches that *forced* Claimants to leave Panama. Respondent also points to two letters by which Claimants sought extensions of time that were sent before President Varela's inauguration.[1104] But this does not undermine Claimant's FET claim. Although the letters were sent shortly before President Varela began his term, they requested

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[1102] *See supra* § V.A.1.

[1103] *See, e.g.*, Resp.'s Counter-Mem. ¶ 290 ("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.").

[1104] *Id.* ¶ 278.

approvals that, had Respondent taken the normal amount of time to respond, should have been granted in the ordinary course by the new administration. Thus, the Government's failure to approve the requests must be attributed to the Varela Administration, even though the letters arrived earlier.

400. The record leaves no doubt that Respondent violated Claimants' rights to fair and equitable treatment.

4. *Respondent Harassed Claimants and their Investment*

401. Respondent undoubtedly committed additional FET violations by harassing Claimants, as set forth in the Memorial[1105] and as expanded upon below. Then Vice-president Varela issued a demand for a large campaign contribution, followed by a thinly veiled threat. Government officials carried out that threat by depriving Claimants of their contractual rights to payment and other benefits. Multiple, separate agencies worked in unison to halt the operations on Claimants' Projects. And Respondent further intimidated Claimants by abusing its police powers and initiating groundless criminal investigations against the Claimants, leading to unwarranted detention notices and an INTERPOL red notice.

402. Respondent has no real answer to these charges.[1106] Once more, it offers generic statements that "the relevant Panamanian government institutions worked cooperatively with Omega to resolve issues on their Projects," along with the (passive voice) assertion that "[i]nformation and assistance was provided, and accommodations of time and compensation were granted."[1107] Unsurprisingly, Respondent offers no citations to evidence for these unsupported blanket assertions.

[1105] Cls' Mem. ¶¶ 169-72.

[1106] *Id.* ¶¶ 291-98.

[1107] *Id.* ¶ 294.

403. Respondent also tries to distinguish *Pope & Talbot v. Canada*, cited by Claimants, as a mere "regulatory" case with no bearing on the present dispute.[1108] Regulatory or not, *Pope & Talbot* is precisely on point for the very language from that award quoted in Respondent's Counter-Memorial—namely, that the tribunal found Canada to have breached its treaty obligations because its interactions with a foreign investor were "more like combat than cooperative regulation."[1109] Claimants in this arbitration endured the same type of "combative" treatment at the hands of Respondent after President Varela took office. At that point, it did not matter that Claimants had had a stellar track record of financial and operational success in Panama.[1110] The very same agencies, which had had no complaints about Claimants' work before July 2014, now viewed Claimants through the vindictive lens of the Varela Administration as "children of Martinelli" who were to be "combated" and prevented from succeeding.[1111]

404. This conduct breached all of the various standards for illegal harassment for purposes of an FET claim. Mr. Varela exercised "coercion," "intimidation," and "unreasonable pressure."[1112]

[1108] *Id.*

[1109] *Id.* ¶ 293 (citing *Pope & Talbot v. Canada*, NAFTA Award on the Merits of Phase 2 dated 10 Apr. 2001 ("***Pope & Talbot***") (CL-0046), ¶ 181).

[1110] *See supra* § III.A.

[1111] *See* Peréz ¶ 6 ("President Varela's animosity towards former President Martinelli could have been directed towards anyone President Varela thought was a close ally to or beneficiary from Mr. Martinelli, including the Claimants."); *Pope & Talbot* is also relevant for the other reasons mentioned in Claimants' Memorial in that the investment in that case was "subjected to threats," the investors had their "reasonable requests for pertinent information" denied, and they were forced to expend "unnecessary expense and disruption" due to the government's action. *See* Cls' Mem. ¶ 170 (citing *Pope & Talbot* (CL-0046), ¶ 181).

[1112] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 Aug. 2009 (CL-0181), ¶ 178; Rupert Joseph Binder v. Czech Republic, UNCITRAL, Final Award, 15 July 2011 (CL-0182), ¶ 447; Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Dissenting Opinion of Steven A. Hammond, 30 Mar. 2015 (CL-0183), ¶ 134; Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 Feb. 2017 (CL-0190), ¶ 171; see also Peréz ¶ 24 ("Taking advantage of people [in Panama] is more the norm rather than the exception,

While running for office, he repeatedly approached Mr. Rivera, both through Ms. Medina as a surrogate and eventually by sending Mr. Rivera text messages directly.[1113] He explicitly requested a large campaign contribution[1114] by demanding that Mr. Rivera give him no less than US$ 600,000.[1115] When Mr. Rivera refused to comply, then Vice-president Varela leveraged his position as the likely next head of state, who would have sovereign discretion over Claimants' investment, and issued a threat: "in Panama, it is often very hard to collect on contracts awarded by the previous Administration."[1116] Once elected, President Varela initiated "a deliberate campaign to punish" the Claimants.[1117] Government officials—all of whom ultimately answered to the President—suddenly found excuses for refusing to work with Claimants. Some agencies like INAC went so far as to demand that Claimants had no right to immediate payment in violation of a binding contract[1118] under the guise of a new "legal assessment."[1119] For the *coup de grâce*, Respondent flexed its police force powers and froze Claimants' bank accounts, issued detention notices, and subjected them to criminal investigations, all clearly acts that transcended a mere "unfriendly attitude" from State authorities,[1120]

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and foreigners with respectable balance sheets are a target.").

[1113] *See supra* § IV.B; *see also* Peréz ¶ 26 ("Panamanian politics have long been defined by close, almost incestuous, links between business and political elites."); Rivera 2 ¶ 40 ("Varela was indeed actively trying to contact me to request a large campaign donation.").

[1114] *See e.g.*, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 Oct. 2009 (CL-0051), ¶ 221.

[1115] *See supra* § IV; *see also* Peréz ¶ 53 (stating that it is "not unreasonable or farfetched that Mr. Varela would have asked Mr. Rivera" for a $600,000 campaign contribution").

[1116] Rivera 1 ¶¶ 67, 68.

[1117] *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007 (CL-0022), ¶ 123.

[1118] *See PSEG*—Award (CL-0039) ¶ 247; Rivera 2 ¶ 30 ("[T]he INAC insisted that we were obligated to continue work on the Project without pay").

[1119] See supra §V.D.4.

[1120] *M.C.I. Power Group and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31

and consisted of a campaign of harassment and an "abuse of power."[1121]

5. *Claimants Were Treated Arbitrarily, Unreasonably, Inconsistently, Non-transparently, and Not In Good Faith*

405. The evidence that Respondent acted arbitrarily, unreasonably, inconsistently, non-transparently, and not in good faith is overwhelming.[1122] For example:

406. Respondent acted arbitrarily. "Arbitrary" conduct includes that which is done without principle and "not based on legal standards but on excess of discretion, prejudice or personal preference."[1123] That Respondent's agencies were guided not by the merit of Claimants' work but by their identification as "children of Martinelli" is arbitrary on its face.[1124] Some individual examples stand out. The Municipality of Panama turned against Claimants not due to any legitimate issues with Claimants' work, but because the new mayor was from the same political party as President Varela.[1125] The Municipality of Colón feigned a need to change the construction site, not for any legitimate reason but rather to prevent Claimants from completing the Project; now that Claimants no longer control the Project, the original site has been reinstated.[1126] The Comptroller General stopped

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July 2007 (RL-0018), ¶ 371.

[1121] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 Jan. 2010 (CL-0064), ¶ 284; *see also Bosh International, Inc. and B&P, LTD Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 Oct. 2012 (CL-0184), ¶ 106.

[1122] The analysis immediately following this note also refutes Respondent's claims set forth in Section IV.E of its Counter-Memorial. Claimants also reiterate all of their arguments set forth in their Memorial concerning Respondent's obligations not to impair Claimants' investment through measures that are discriminatory, unreasonable, or arbitrary. *See, e.g.*, Cls' Mem. ¶¶ 185-87.

[1123] Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award, 4 Apr. 2016 (CL-0029) ¶¶ 577-78; see also, e.g., Siemens (CL-0008) ¶ 318.

[1124] See supra § IV.

[1125] *See supra* § V.A.4.

[1126] *See supra* § V.A.4.

endorsing the Omega Consortium's change orders on various projects based on pretext rather than reason.[1127] It also sent requests to other agencies like MINSA to "assess" change orders—when MINSA had already approved the very same change orders.[1128]

407. *Respondent acted unreasonably*. "Unreasonable" in this context refers to measures that are "lacking in justification" or not "appropriately tailored to the pursuit of [a] rational policy."[1129] It includes "retaliat[ion]" against a foreign investor, including for lawful behavior.[1130] Here, virtually *all* of Respondent's actions after July 2014 were unreasonable. Respondent's agencies suspended Claimants' Projects for months after President Varela came into office based on no rational ground whatsoever but merely under the guise of "assessing" the Omega Consortium's compliance.[1131] In a particularly extreme instance, the INAC "legally assessed" its contract with Claimants just to try to avoid making required payments, and it provided Claimants with no flexibility other than to accept its "assessment."[1132] Meanwhile, again without justification and less than three months after taking office in July 2014, the MEF under Mr. Varela slashed the Ciudad de las Artes budget line item that the MEF itself had assigned in 2012 and 2013.[1133] The INAC also deployed an inspector to the Ciudad de las Artes Project not to actually *inspect* Claimants' work but to find *legal*

[1127] *See supra* § V.A.4.

[1128] *See supra* § V.A.4; *see also* Rivera 2 ¶ 30 ("[T]he INAC wanted to get rid of the Omega Consortium, and was looking for any available excuse to do so. Nothing else could explain the abrupt change in behavior.").

[1129] Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20, Award, 11 Dec. 2013 (CL-0052), ¶ 525.

[1130] Kenneth J. Vandevelde, *A Unified Theory of Fair and Equitable Treatment*, 43 N.Y.U. J. INT'L L. & POL. 43 (2010) (CL-0050), at 54.

[1131] *See supra* § V.B.

[1132] *See supra* § V.D.

[1133] *See supra* § V.C.

justifications for INAC to terminate the contract.[1134] Worse yet, in the context of the criminal investigations, Respondent threw all reason to the wind, ignoring exculpatory evidence and statements from prosecutors and witnesses, all of whom confirmed that Claimants had no connection to Mr. Moncada Luna or any corruption. They forged ahead, devoid of any genuine policy purpose, and subjected Claimants to criminal investigations *out of spite*.[1135]

408. *Respondent acted inconsistently*. Host States breach this duty through "the inconsistency of action between two arms of the same Government vis-à-vis the same investor"[1136] Claimants found themselves repeatedly in a vicious cycle created by the different branches of the Panamanian government. Examples here are numerous.[1137] One arm of the Government commenced several criminal investigations arising out of the La Chorrera Contract, and yet another arm continued to move forward on the very contract that Claimants allegedly obtained through bribery.[1138] With respect to the Municipality of Colón contract, Claimants' payment applications were approved by the municipality's inspectors but not by the Comptroller General's inspectors—but only because the municipality failed to approve those same inspection plans.[1139] The INAC (under the direction of Ms.

[1134] *See supra* § V.D.4; *see also* Peréz ¶ 53 ("[I]t is very plausible that ministry and agency officials transmitted and acted upon Mr. Varela's direction to increase scrutiny of specific projects."); Rivera 2 ¶ 32 ("Sosa's attitude towards the Omega Consortium had changed with the new administration."); *id.* ¶ 36 ("Mr. Sosa himself agreed that there were no technical merits to terminate the Contract by default.").

[1135] *See supra* § V.E.

[1136] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 (CL-0031), ¶ 163; *see also EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award, 3 Feb. 2006 (CL-0053), ¶ 158; *Tecmed* (CL-0047) ¶ 154.

[1137] *See, e.g.*, Rivera 2 ¶ 28 ("[A]t the time – in other words, prior to this arbitration – the Government offered completely different explanations and excuses").

[1138] See supra § V.E.

[1139] *See supra* § V.B.4-5.

Herrera) had requested a full budget to pay for the Ciudad de las Artes Project in full in 2015, and the MEF indicated its "non-objection" and assigned a Budget line accordingly.[1140] But the MEF, ***less than three months after the Varela administration came in***, slashed the budget for the same project.[1141] The Comptroller General informed the Minister of Health that one of Claimants' CNOs did not comply with an executive order—when the former Comptroller General (under President Martinelli) had explicitly said that very same CNO complied with the very same executive order.[1142] The Municipality of Colón and the Municipal Council also gave Claimants conflicting answers as to the site of their construction project.[1143] This unmistakable pattern of inconsistency is indicative of a Government trying to comply with irrational instructions to undercut a disfavored foreign investor.

409. *Respondent acted without transparency*. Transparency in international investment law requires that "the legal framework for the investor's operations is readily apparent and that any decisions affecting the investor can be traced to that legal framework."[1144] The transparency obligation has also been interpreted to be violated by a "systematic attitude not to address" the investor's problems.[1145] Starting in July 2014, Respondent let Claimants' various Projects wither away without explanation. The Comptroller General allegedly conducted a full audit on Claimants'

[1140] See supra § V.C

[1141] *See supra* § V.C; *see also* Peréz ¶ 53 ("The Minister of Economy and Finance serves at the pleasure of the president").

[1142] *See supra* § V.B.1.

[1143] *See supra* § V.A.4.

[1144] DOLZER & SCHREUER (CL-0006 resubmitted) at 149; *see also Tecmed* (CL-0047) ¶ 154; *Metalclad* (CL-0017) ¶ 76.

[1145] *PSEG*—Award (CL-0039) ¶ 246.

Projects—but without ever informing the Claimants.[1146] Nobody ever told Claimants that the Comptroller General was not performing her duties due to sickness, as Respondent now claims.[1147] Agencies like the INAC became silent to Claimants' requests after Mr. Varela came into office.[1148] Respondent insisted that Claimants had not received certain payments because of an ongoing audit—but the evidence showed that said audit had not even commenced.[1149] Claimants never even learned why certain Projects were purportedly suspended until Respondent filed its Counter-Memorial in this arbitration.[1150] All of these actions and omissions violated Respondent's transparency obligation.

410. *Respondent acted without good faith*. The FET obligation "includes the general principle recognized in international law that the contracting parties must act in good faith, although bad faith on the part of the State is not required for its violation."[1151] Besides the allegations establishing Respondent's harassment set forth above,[1152] Respondent committed other acts showing it was not operating in good faith. For example, Respondent accused Claimants of "abandoning" their projects, when the contemporaneous evidence shows that Claimants were in touch virtually on a daily basis.[1153] The Comptroller General informed the Minister of Health that one of Claimants' payment applications complied with all relevant rules, but it refused to endorse it nonetheless because

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[1146] *See supra* § V.A.1; *see also* Rivera 2 ¶ 27 ("[W]e were certainly not told that a formal audit of all the Omega Consortium's Contracts would ensue.").

[1147] Rivera 2 ¶ 26 ("[T]his is the first time that I have heard the Government offer this as an explanation for the delays in Omega's Contracts.").

[1148] *See supra* § V.A.1.

[1149] *See supra* § V.A.1.

[1150] *See supra* § V.E.1.

[1151] *Biwater Gauff* (CL-0054) ¶ 602; *see also* Cls' Mem. ¶ 174 n.423.

[1152] *See supra* § VIII.B.4.

[1153] See supra § V.D.

the CNO was allegedly presented after its expiration date—even though Claimants had filed the application on time.[1154] Respondent also retaliated against Claimants in response to the Claimants' Request for Arbitration.[1155] In the Ciudad de las Artes project alone there is ample evidence: the MEF under Mr. Varela slashed the Ciudad de las Artes budget less than three months after taking office, despite the fact that (1) the MEF itself had previously assigned budget line entries in 2012 and 2013[1156] and (2) just a few months earlier, in 2014, the INAC requested those funds from the MEF to pay for the project in full when it was due, *i.e.*, in 2015.[1157] The termination resolution was based on the completely untenable and unfair theory that the Government had no obligation to pay Claimants until the project was fully complete;[1158] when Claimants took notes during an official meeting with government representatives, the agency responded by demanding to know who authorized notetaking;[1159] the inspector tasked with overseeing Claimants' Project stopped attending meetings once President Varela came into office and instead started writing unexpected letters claiming to find "alarming" (and false) "breaches" by Claimants;[1160] and the INAC admittedly knew it had failed to provide proper notice to Claimants of its termination of the parties' Contract by sovereign decree.[1161] All of these actions are consistent with what Professor Perez describes as Panama's culture of "juega

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[1154] *See supra* § V.A.4.

[1155] See supra § V.F.

[1156] *See supra* § V.C.

[1157] *See supra* § V.C.

[1158] *See supra* § V.D.3.

[1159] *See supra* § V.B.6.

[1160] *See supra* § V.D.4.

[1161] *See supra* § V.D.1.

vivo."[1162]

411. Respondent does not engage with Claimants' allegations and simply asserts that "Panama did not act in bad faith or without transparency."[1163] Needless to say, this defense is inadequate.

412. Respondent also quibbles with the idea that the FET standard includes such elements as arbitrary, unreasonable, inconsistent, and non-transparent conduct, as well as conduct taken without good faith.[1164] It points out that the BIT already contains a specific treaty provision protecting similar conduct,[1165] which just confirms that Respondent was obligated to follow those standards whether as part of the FET obligation or otherwise. In any event, numerous tribunals have held that the FET standard encompasses these standards.[1166]

6. *Respondent Has Committed a Creeping Violation of Its Fair and Equitable Treatment Obligation*

413. Even if Respondent's acts described above did not individually violate its FET obligations, all of the acts together certainly constituted a combined creeping violation of the FET

[1162] *See* Pérez ¶ 53 (explaining that not engaging in good faith with contractual partners by "delaying, obfuscating and manipulating negotiations" is consistent with the practice of "juega vivo").

[1163] Resp.'s Counter-Mem. ¶ 300.

[1164] Resp.'s Counter-Mem. ¶ 300.

[1165] *Id*.

[1166] *El Paso* (CL-0056), ¶ 373 ("[F]air and equitable treatment is a standard entailing reasonableness and proportionality. It ensures basically that the foreign investor is not unjustly treated, with due regard to all surrounding circumstances. FET is a means to guarantee justice to foreign investors."); *ADF* (CL-0036), ¶ 188 (noting that "idiosyncratic or aberrant and arbitrary" conduct violates FET); *Waste Management* (CL-0033), ¶ 98 (holding that FET "is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety"); *Biwater Gauff* (CL-0054), ¶ 602 ("[T]he conduct of the State must be . . . consistent and nondiscriminatory, that is, not based on unjustifiable distinctions or arbitrary."); *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, ICSID Administered Case, Award, 31 Mar. 2010 (CL-0167), ¶¶ 187, 213; *Saluka* (CL-0038), ¶ 309.

standard.

414. Respondent's Counter-Memorial has three responses to this point, all of which are unavailing.

415. *First*, Respondent—wrongly—asserts that Claimants "recognize that none of the allegations they have leveled against Panama are sufficient to violate this obligation on their own."[1167] That is absolutely incorrect. Claimants' Memorial argued *in the alternative* that "*[e]ven if, arguendo*, the FET obligation is not offended by [Respondent's individual actions]," "these coordinated and interrelated acts constitute a campaign of unfairness and inequity that violates the BIT and the TPA."[1168]

416. *Second*, Respondent takes issue with the legal theory behind a creeping FET violation. Respondent insists that Claimants must prove a "composite act," which it interprets as a "systemic policy [that] unites the whole of the actions [complained of] into a single determined wrongful act," in order to establish a creeping FET violation.[1169] Respondent cites to *El Paso v. Argentina*[1170] and to Article 15 of the ILC Draft Articles on State Responsibility for support.[1171] In fact, this notion of "systemic" acts comes from neither *El Paso* nor from Article 15 but from *the comments* to the ILC Articles, and those comments do not draw upon the international investment context but relate primarily to apartheid and genocide.[1172] In any event, the tribunal in *Pac Rim v. El Salvador* also

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[1167] Resp.'s Counter-Mem. ¶ 301.

[1168] Cls' Mem. ¶ 179 (emphasis added).

[1169] Resp.'s Counter-Mem. ¶ 305.

[1170] *El Paso* (CL-0056).

[1171] ILC Articles (CL-0092), art. 15.

[1172] *Id*.; *see also* Jean Salmon, *Duration of the Breach*, in The Law of International Responsibility (James

undercut the Respondent's notion that all of the acts within a "composite act" must share some unitary element, because it stated that "a composite act is composed of acts that are *legally different* from the composite act itself."[1173]

417. Much more pertinent to the creeping FET standard is the fact that liability is established by looking at *individual* acts, which may be *legal* on their own but constitute an international law violation when combined. Article 15 of the ILC Draft Articles confirms that the State's actions or omissions are only "defined *in the aggregate* as wrongful."[1174] The tribunal in *El Paso* clarified that the accumulation of *lawful* acts into a single "composite act" is exactly the ground upon which it based its findings.[1175] The tribunal held that "[a]lthough [the government measures] may be seen in isolation as reasonable measures to cope with a difficult economic situation, the measures examined can be viewed as cumulative steps which individually do not qualify as violations of FET, . . . , but which amount to a violation if their cumulative effect is considered."[1176] The *Pac Rim* tribunal had a similar analysis:

> [A] composite act is not the same, single act extending over a period of time, but is composed of a series of different acts that extend over that period; or, in other words, a composite act results from an aggregation of other acts and acquires a different legal characterisation from those other acts . . . .
> The fact that a composite act is composed of acts that are legally different from the composite act itself means that the composite act can comprise legal acts and still be unlawful or that it can comprise

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Crawford *et al.*, eds. 2010) (RL-0031), at 391 (referring to "'practice' or 'policy' which is systemic in character").

[1173] *Pac Rim Cayman LLC v. Ecuador*, ICSID Case No. ARB/09/12, Decision on Respondent's Jurisdictional Objections, 1 June 2012 ("***Pac Rim Cayman***") (CL-0185), ¶¶ 2.71, 2.67 (emphasis added).

[1174] ILC Articles (CL-0092), art. 15(1).

[1175] *El Paso* (CL-0056) ¶ 515.

[1176] *Id*.

> unlawful acts violating certain norms which are different from the legal norm violated by the composite act.[1177]

418. The evidence shows that the breadth of Respondent's improper acts constituted a creeping FET violation in the aggregate. In the months following the election of President Varela, Respondent unlawfully refused to pay invoices for work Claimants had already performed. It wrongfully denied Claimants permits and plans that were contemplated by the tender documents and were required for the Projects to proceed. The Comptroller General pretextually refused to provide necessary approvals for the Contracts, including for noncontroversial amendments. Panama slashed the budget for the Ciudad de las Artes Project without giving Claimants any indication that the funding had been cut. One by one, each of Claimants' Projects was terminated or simply forced to lapse. And while all this was going on, the Government launched three separate criminal investigations involving Claimants and their investment—even though, to this day, Respondent has been unable to credibly explain how Claimants could be linked to any crime. When viewed as a whole, considering the multiplicity of these actions and, critically, the fact that they were inherently inter-connected, coming from all sides of the Government and all at once, they cannot be viewed as fair and equitable treatment.

419. Although unnecessary, the evidence also establishes a "common motive or systematic policy"[1178] or "practice"[1179] taken by Panama against Claimants. The evidence proves that Claimants and their investment were targeted precisely *because* the Varela Administration adopted a practice of

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[1177] Pac Rim Cayman (CL-0185), ¶¶ 2.70-71; see also Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic, LCIA Case No. UN7927, Award on Preliminary Objections to Jurisdiction, 19 Sep. 2008 (CL-0186), § 91.

[1178] Resp.'s Counter-Mem. ¶ 305.

[1179] *Pac Rim Cayman LLC v. Ecuador*, ICSID Case No. ARB/09/12, Decision on Respondent's Jurisdictional Objections, 1 June 2012 (CL-0185), ¶¶ 2.78, 2.87.

retaliating against individuals and entities associated with (or merely perceived to be associated with) former President Martinelli. As such, Claimants have established a creeping FET violation even under the standards proposed by Respondent.

C. Respondent Deprived Claimants And Their Investment Of Full Protection And Security (FPS).

420. Respondent also breached its obligation to provide Claimants with full protection and security, as required by Article II(2) of the BIT and by Article 10.5 of the TPA. More specifically, Article II(2) of the BIT provides an FPS guarantee, much like the FET guarantee, in line with (or "in accordance with") the "principles of international law," but not limited by them.[1180] And Article 10.5 of the TPA provides an FPS guarantee linked with customary international law,[1181] but the MFN clause of that treaty[1182] permits Claimants to import a more generous FPS provision, for example from the Panama-UK BIT.[1183]

421. Respondent's violations of these FPS guarantees are numerous. Among other things,

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[1180] BIT (CL-0001), art. II(2) ("Investment of nationals and companies of either Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Party. The treatment, protection and security of investment shall be in accordance with applicable national laws and international law. Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investment made by nationals or companies of the other Party.").

[1181] TPA (CL-0003), art. 10.5(1)-(2)(b) ("Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. 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. The obligation in paragraph 1 to provide: . . . 'full protection and security' requires each Party to provide the level of police protection required under customary international law.").

[1182] *Id.* art. 10.4.

[1183] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Panama for the Promotion and Protection of Investments, entered into force 7 Nov. 1985 (CL-0187), art. 2(2) ("Investment of nationals or companies of either Contracting Party shall at all times be accorded . . . full protection and security in the territory of the other Contracting Party.").

Respondent subjected Claimants to baseless investigations, froze their bank accounts, issued detention orders and Interpol Notices, and infringed upon their rights to travel. Respondent also withdrew the entire legal framework intended to protect Claimants' investments. It breached its obligations under the framework, violated the terms of the various agreements, illegally coerced Claimants to complete projects without payment, infringed upon Claimants' due process rights, and more generally violated its own domestic laws in its treatment toward the Claimants.

422. In response to this damaging evidence, Respondent's Counter-Memorial falls back on its familiar defense, attempting to elevate the treaty standards and casting its actions and omissions as mere "commercial conduct" and "legitimate police activity."[1184] These arguments, too, are unavailing.

1. *Respondent's View of the Applicable Standard Is Overly Narrow*

423. Respondent misconstrues the relevant legal standard. It contends that the requirement to provide full protection and security is linked to the minimum standard of treatment found in international law. This position is incorrect for the same reasons already set forth above concerning FET treatment. In short, the BIT's FPS clause is not limited by international law standards. Neither is the TPA's, because of its MFN clause.

424. In any event, this is, again, a case where the investors seek to vindicate a few very basic and very general principles of law that are well-established and recognized as part of the corpus of international law: *First*, States cannot abuse their rights or take certain acts under the pretense of law but really for the illicit or malicious purpose to injure others.[1185] Respondent's President and law

[1184] Resp.'s Counter-Mem. ¶ 307.

[1185] KOTUBY & SOBOTA (CL-0081 resubmitted) at 108-09.

enforcement officials have violated this principle, acting with impunity and carrying out targeted and malicious investigations of the Claimants under the false pretense of bribery allegations. *Second*, States must follow the principle of proportionality requiring some articulable relationship between means and ends.[1186] "Although a State may of course exercise its contractual, regulatory, and police powers, the reasonableness of that exercise will be measured against the specific circumstances facing it."[1187] Respondent has carried out a willful campaign to punish and harass the Claimants by withdrawing their legal rights, paralyzing their finances, and threatening them with jail time for no good reason. *Third*, States must comply with basic good faith principles in their contractual relations (*pacta sunt servanda*).[1188] Respondent has violated this principle across all eight of Claimants' construction Contracts. *Fourth*, States must adhere to basic principles of due process, including by providing the right to be heard.[1189] Respondent has violated this principle in terminating Claimants' contractual rights without warning or notice, most significantly in the case of Claimants' largest contract for the Ciudad de las Artes Project.

425. Again, these general principles of law form part of the "principles of international law."[1190]

426. Respondent insists, however, that Claimants must establish that their investments have been "affected by civil strife and physical violence"[1191] to prove a violation of the FPS obligation,

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[1186] *Id.* at 114.

[1187] *Id.* at 116.

[1188] *Id.* at 88.

[1189] *Id.* at 69, 71.

[1190] *See supra* § VIII.B.

[1191] Resp.'s Counter-Mem. ¶¶ 310, 317.

which it claims exists only to protect "the physical integrity of an investment against interference by use of force."[1192] This is incorrect.

427. Numerous authorities have concluded that "the principle of full protection and security reaches beyond physical violence and requires legal protection for the investor."[1193] According to those authorities, "legal security" need not be expressly included in the language of the treaty. The usual formula of "full protection and security" is sufficient to guarantee the legal protection of an investor's rights.[1194] In *Azurix v. Argentina*,[1195] for example, the tribunal confirmed that "full protection and security may be breached even if no physical violence or damage occurs."[1196] It reasoned that full protection and security is not only a matter of "physical security," because the legal "stability afforded by a secure investment environment is as important from an investor's point of view."[1197] The tribunal concluded that when the terms "protection and security" are qualified by the term "full"—as is the case here—it extends the "content of this standard beyond physical security."[1198] The tribunal in *Siemens v. Argentina* similarly concluded that "full protection and security" must go beyond physical protection because the BIT's definition of an investment included

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[1192] Id.

[1193] *See, e.g.*, DOLZER & SCHREUER (CL-0006 resubmitted), at 163 (citing to *Ceskoslovenska Obchodni Banka A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Award, 29 Dec. 2004 (CL-0062), ¶ 170; *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award, 3 Nov. 2008 (CL-0089), ¶¶ 187-90; *Frontier Petroleum v. Czech Republic*, Final Award, 12 Nov. 2010 (CL-0055), ¶¶ 260-73; *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 Dec. 2010 (CL-0048), ¶ 343).

[1194] DOLZER & SCHREUER (CL-0006 resubmitted) at 163.

[1195] *Azurix* (CL-0025).

[1196] *Id.* ¶ 406.

[1197] *Id.* ¶ 408.

[1198] *Id.* ¶ 408.

intangible assets.[1199] As noted in Claimants' Memorial, the BIT and the TPA both protect both "tangible and "intangible" investments.[1200] It would be nonsensical to limit protection of an *intangible* investment to *physical* protection.

428. Respondent does not have a compelling response to this reasoning. It notes Claimants' reliance on *Asian Agricultural Products v. Sri Lanka*[1201] and *American Manufacturing & Trading v. Zaire*,[1202] both of which focused on the risk of physical harm to the investor. That is neither here nor there. The principle of "due diligence" that the *Asian Agricultural Products* and *American Manufacturing & Trading* tribunals discuss can readily be applied to non-physical threats. Indeed, Claimants cited these cases as support for the argument that a state may violate its FPS obligation by failing to engage in necessary "due diligence."[1203]

429. In any event, respected commentators[1204] and the tribunal in *Vivendi v. Argentina* observed, full protection and security "can apply to more than physical security of an investor or its property, because either could be subject to harassment without being physically harmed or seized."[1205] Other tribunals have also found that violence is not necessary to show there has been a

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[1199] *Siemens* (CL-0008), ¶ 303.

[1200] BIT (CL-0001; CL-0002), art I(1)(d)(i); TPA (CL-0003), art. 10.29.

[1201] *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990 (CL-0060).

[1202] *American Manufacturing & Trading Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 Feb. 1997 (CL-0061).

[1203] Cls' Mem. ¶ 180.

[1204] DOLZER & SCHREUER (CL-0006 resubmitted) at 162.

[1205] Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award, 20 Aug. 2007 (CL-0009), ¶ 7.4.17.

breach of the full protection and security standard.[1206] As already discussed, Claimants were the victims of a vicious campaign of targeted governmental harassment.

430. Respondent also took a number of actions that cannot be characterized as a legitimate use of police power. The criminal investigations into Claimants and their investment are and always have been pretextual and intended to intimidate and inflict harm upon the Claimants. Respondent's officials not only initiated several baseless investigations against Claimants but also purposefully turned a blind eye to exculpatory evidence at each step of the process. They ignored testimony from Ms. Reyna incriminating herself but twice absolving Claimants for any wrongdoing.[1207] Panamanian courts denied Claimants the right to submit exculpatory evidence into the record of the investigation as "irrelevant."[1208] And the State's investigators engaged in what was—at most—a half-hearted, superficial consideration of the real estate transaction supposedly linking the Claimants to bribery.[1209] All of the foregoing amounts to a clear FPS violation.

2. *Respondent's Actions Were Not Purely Commercial*

431. Nor can Respondent avoid the consequences of its illegal actions by invoking its

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[1206] *See, e.g.*, *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000 (CL-0010) ¶¶ 84-95 (finding a breach of the full protection and security obligation where the respondent permitted the physical occupation of the claimants' property, and further, did not limit the obligation to those circumstances); *Jack Rankin v. Islamic Republic of Iran*, IUSCT Case No. 10913, Award No. 326-10913-2, 3 Nov. 1987 (CL-0188) ¶ 30 (c) (holding that the Iranian revolutionary leaders made statements that were "inconsistent with the requirements of the Treaty of Amity and customary international law to accord protection and security" because they could have reasonably been expected to initiate "harassment", as well as, "violence" against foreigners and their property); *Eureko B.V. v. Republic of Poland*, Ad Hoc, Partial Award, 19 Aug. 2005 (CL-0020) ¶¶ 236-37 (noting that although it did not find the actions to be in breach of the full protection and security standard, if the actions of harassment "were to be repeated and sustained, it may well be that the responsibility of the [respondent] would be incurred by failure to prevent them").

[1207] *See supra* § V.E.

[1208] *See supra* § V.E.1.

[1209] *See supra* § V.E.

familiar refrain of "commercial conduct." As Claimants have already demonstrated,[1210] Respondent's actions go beyond mere commercial acts.[1211] Claimants' relationship to the Panamanian law enforcement personnel investigating them is hardly analogous to the business relationship between two merchants. Respondent has used multiple arms of the Panamanian government to harm Claimants' investment. The timing and scope of those acts suggests this was a coordinated sovereign act—not a series of separate, commercial decisions. Indeed, in terminating Claimants' largest Contract, the INAC exercised its purely sovereign powers to render an "administrative termination" that barred Claimants from bidding in Panama for a period of three years. Then, in unlawfully and arbitrarily terminating the Municipaly of Panama Contract through another administrative resolution on 11 January 2017,[1212] the Government ensured that neither Omega Panama nor Omega U.S. could bid for contracts in Panama for yet another three year period.[1213] This prohibition is still in effect today.[1214] Asserting that Claimants should have relied upon the Panamanian court system to confront these acts, as Respondent does,[1215] just shows the extent to which Respondent is in denial about its international law violations. In the same vein, Respondent argues that "the evidence shows that Panama worked closely with the Claimants to complete their Projects"[1216]—but, once again, Respondent fails to cite evidence.

[1210] *See* Cls' Mem. § V-VII.

[1211] *See supra* §§ V.C-F.

[1212] Resolution No. C-10-2017 dated 11 Jan. 2017 (C-0234).

[1213] *Id.* at 4, cl. 2; Law 22 dated 27 Jun. 2006 (C-0280 resubmitted) arts. 117, 118.

[1214] *See* List of Debarred Companies, PANAMACOMPRA (C-0443).

[1215] Resp.'s Counter-Mem. ¶¶ 281, 290.

[1216] *Id.* ¶ 322.

432. In any event, arbitral tribunals have held that "full protection" implies "a State's guarantee to stability in a secure environment," which includes both "physical," as well as "*commercial and legal*" protection.[1217] And rightfully so: if states could hide behind the commercial nature of their acts, investors would be vulnerable to treaty breaches without redress because states would never be held liable for any acts that had a commercial component.[1218]

433. To that end, the entire notion of legal security for the Claimants in Panama has proved meaningless. Eight properly won, carefully negotiated Contracts have failed to provide Claimants with any security as to their rights. In one extreme example, INAC tried to coerce Claimants into accepting an "interpretation" of the Contract that had nothing to do with the written legal obligations in the Contract and would have required Claimants to complete *all* remaining work on a $54 million project while receiving nothing.[1219] In another example, President Varela hired his private lawyer, Mr. Saltarín, to use government resources but operate outside of the State's official legal framework while targeting disfavored individuals such as Claimants.[1220] In sum, President Varela's retaliatory vendetta forced Claimants to operate in an environment of lawlessness completely devoid of commercial or legal protection or security. Respondent's defense to the FPS violation is as baseless as the others.

[1217] *Biwater Gauff* (CL-0054) ¶ 729.

[1218] Nor is it problematic to link the fair and equitable treatment standard with a State's obligation to provide full protection and security, as Respondent suggests. Resp.'s Counter-Mem. ¶ 324. Indeed, tribunals have "relied expressly upon the relationship between fair and equitable treatment and full protection and security." CHRISTOPHER F. DUGAN, DON WALLACE JR., NOAH RUBINS & BORZU SABAHI, INVESTOR-STATE ARBITRATION (2008) (CL-0007 resubmitted), at 539; *Azurix* (CL-0025) ¶¶ 406, 408.

[1219] *See supra* § V.D.3.

[1220] See supra § V.B.

D. Respondent has breached the Treaties' Umbrella Clauses (MFN claim)

434. While advancing *jurisdictional arguments* about Claimants' Umbrella Clause claims,[1221] Respondent's Counter-Memorial does not dispute or even address Claimants' Umbrella Clause arguments *on the merits*.[1222] Thus, assuming that the Tribunal finds that it has jurisdiction to consider Claimants' umbrella clause claims—which it should—it should automatically hold Respondent liable under the Treaties.

IX. RESPONDENT'S TREATY BREACHES CAUSED SUBSTANTIAL DAMAGE FOR WHICH CLAIMANTS ARE ENTITLED TO FULL REPARATION

435. As set forth in Claimants' Memorial,[1223] Respondent's acts and omissions caused <u>*all*</u> of the damages suffered by Claimants at stake in this arbitration. After being incorporated in 2009, Omega Panama became a prosperous and growing business enterprise on a clear upward trajectory. Everything changed, however, when President Varela assumed office in July 2014. Thereafter, various arms of the Panamanian Government worked in tandem to reverse all of Claimants' hard work and success.

436. Those unlawful sovereign acts breached Respondent's Treaty obligations and caused Claimants substantial damages and other harm. But for Respondent's unlawful conduct, Claimants still would have a thriving business enterprise in Panama today. As such, Claimants are entitled to

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[1221] Resp.'s Counter-Mem. ¶¶ 217-27, 234-45.

[1222] Cls' Mem. ¶¶ 188-93.

[1223] Cls' Mem. ¶¶ 195-235.

"full reparation,"[1224] meaning compensation that would "wipe out all the consequences"[1225] of Respondent's multiple wrongful acts and place Claimants in the position they would have been in "but for" those acts.

437. The Tribunal should note that both Parties use 23 December 2014 as the relevant date of valuation for this proceeding.[1226] Although the Government began its unlawful actions toward Claimants and their investment in July 2014, 23 December 2014 was the date the INAC administratively terminated Claimants' largest Contract for the Ciudad de las Artes Project,[1227] which legally prevented Claimants from bidding on any new public contracts in Panama and which set Omega Panama on the path toward irreversible destruction. It is at this point that Respondent brought Claimants' operations to "a standstill" and rendered their rights "practically useless."[1228] Any later date for the valuation of Claimants' damages would not "wipe out all the consequences of the illegal act."[1229] That said, for months (and even years) thereafter, Respondent continued to violate Claimants' rights through continued nonpayment, baseless criminal investigations, asset freezes, the issuance of

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[1224] *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 Sept. 2015 ("***Quiborax***") (CL-0085), ¶ 327 (citing to the ILC Articles (CL-0092), art. 31); *see also* Cls' Mem. § X.A.

[1225] Case Concerning the Factory at Chorzów (Germany v. Poland) Claim for Indemnity (Merits), 13 Sept. 1928, 17 PCIJ SERIES A 4 (1928) ("**Chorzów Factory—Merits**") (CL-0082), at 47; see also Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20, Award, 11 Dec. 2013 (CL-0052), ¶ 917 (citing to Chorzów Factory—Merits at 47).

[1226] *See* Damages Expert Report 1 ¶ 2; Damages Expert Report 2 ¶ 2; Flores at 5. Respondent's Counter-Memorial refers to the valuation date but without naming a specific date. *See* Resp.'s Counter-Mem. ¶ 344. It is clear from the Flores Report that Respondent accepts 23 December 2014 as the proper valuation date. *See* Flores at 5 (defining 23 December 2014 as the "Valuation Date").

[1227] Resolution No. 391-14 DG/DAJ from INAC dated 23 Dec. 2014 (C-0044 resubmitted).

[1228] *Crystallex* (CL-0029) ¶¶ 855-56; *see also* Cls' Mem. ¶ 206.

[1229] Chorzów Factory—Merits (CL-0082) at 47.

detention notices, INTERPOL red notices, and the many other abuses of its sovereign powers.

438. To be clear, the date of Respondent's treaty breaches is not necessarily the same as the date of valuation, nor does it need to be.[1230] Respondent engaged in a variety of unlawful acts in the context of different projects and through different branches of the Panamanian Government, but all as part of one concerted campaign of harassment. Respondent's various unlawful actions culminated in fully crystallized Treaty breaches by mid-2015. At that point, Respondent not only had reversed course on each of Claimants' Projects and precluded Claimants from bidding for additional public contracts in Panama, but it had also frozen Claimants' operating bank accounts, subjected them to criminal investigations and detention notices, and continued to strangle Claimants financially.[1231]

439. Respondent's unlawful acts against Claimants caused catastrophic injury to Claimants' investment. Under international law, Claimants are entitled to full reparation for the injury caused by Respondent's unlawful acts (*see infra* Section IX.A), which includes three heads of damages—*viz* (1) losses arising from existing Contracts; (2) losses arising from Future Contracts; and (3) moral

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[1230] *See* Cls' Mem. ¶ 205 (citing REISMAN & SLOANE (CL-0026) at 147 (explaining that the date of valuation and the date of expropriation need not coincide)).

[1231] *See supra* Section V.E. The Tribunal, of course, has full discretion to determine, based on its own assessment of Respondent's unlawful actions, at which point Claimants definitely suffered a substantial deprivation of their investment and/or other breaches of the Treaties. *See* DOLZER & SCHREUER (CL-0006 resubmitted), at 298 ("In the case of compensation, interest is normally due from the date of the expropriation, *although that date may be difficult to determine with indirect or creeping expropriations*. The appropriate date will be the day when the investor definitely lost control over the investment.") (emphasis added); *Phillips Petroleum v. Iran* (CL-0024) ¶ 100-01 ("The conclusion that the Claimant was deprived of its property by conduct attributable to the Government of Iran, including NIOC, rests on a series of concrete actions rather than any particular formal decree, as the formal acts merely ratified and legitimized the existing state of affairs. The Claimant suggests that the taking was complete by 29 September 1979, the date of the meeting when it was informed of the termination of the JSA. The Respondents contend that 11 August 1980, the date of the written notification informing the Claimant that the Special Committee had declared the JSA null and void, is the only date when the taking could be said to have been complete. *The Tribunal is not bound by the suggestions of the Parties in determining the date of the taking for purposes of liability, but rather must determine such date on its own, based on the facts of the case*.") (emphasis added).

damages—as well as compound pre- and post-award interest (*see infra* Section iX.B). In calculating their damages, Claimants have taken great efforts to employ a conservative methodology and a reasonable analysis (*see infra* Section IX.C). And Respondent's Criticisms of Claimants' Damages Analysis are meritless, and must fail (*see infra* Section IX.D).

A. Claimants Are Entitled to Full Reparation as a Matter of International Law

1. *Respondent Generally Does Not Dispute that Claimants are Entitled to Full Reparation under the Chorzów Factory Standard*

440. As explained in Claimants' Memorial, international law requires States to make full reparation for damages caused by their unlawful acts.[1232] According to the Permanent Court of International Justice's *Chorzów Factory* decision, "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[1233] This principle is also reflected in the International Law Commission's Draft Articles on State Responsibility ("**ILC Articles**"), which provide that the "responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."[1234] According to the ILC Articles, "[c]ompensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act" is to be "assessed on the basis of the 'fair market value' of the property lost."[1235]

441. Respondent generally does not dispute these foundational principles. Respondent does,

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[1232] Cls' Mem. ¶ 196.

[1233] *Chorzów Factory*—Merits (CL-0082), at 47.

[1234] ILC Articles (CL-0092), art. 31(1).

[1235] ILC Articles (CL-0092), art. 36, cmt. 22; *see also* SERGEY RIPINSKY & KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008) ("**RIPINSKY & WILLIAMS**") (CL-0093 resubmitted), at 183. The BIT and the TPA are not to the contrary. *See* Cls' Mem. ¶ 199.

however, point out that the Treaties at issue provide standards of compensation applicable in the expropriation context.[1236] That is partially correct. Under the BIT, "compensation [for a lawful expropriation] shall amount to the full value of the expropriated investment immediately before the expropriatory action became known."[1237] And under the TPA, "compensation paid [for a lawful expropriation] shall be no less than the fair market value on the date of expropriation."[1238] Respondent, however, suggests that those compensation provisions apply to *all* breaches of the Treaties.[1239] That is where Respondent goes wrong. The provisions, quoted above, apply only to *lawful* expropriations. Where a State *unlawfully* expropriates an investment (as Respondent has done here), the standard of compensation is the default *Chorzów Factory* standard of "full reparation."[1240] The same is true for non-expropriation breaches of an investment treaty, in which case tribunals may exercise considerable discretion in assessing compensation.[1241]

442. Claimants are also entitled to pre- and post-award interest. This principle is reflected in the ILC Articles, which provide for interest running "from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled."[1242] Tribunals have consistently applied

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[1236] Resp.'s Counter-Mem. ¶¶ 340-41.

[1237] BIT (CL-0001), art. IV(1).

[1238] TPA (CL-0003), art. 10.7(3).

[1239] Resp.'s Counter-Mem. ¶ 341.

[1240] *See, e.g.*, *ADC* (CL-0028) ¶¶ 483-84 ("Since the BIT does not contain any *lex specialis* rules that govern the issue of the standard for assessing damages in the case of an unlawful expropriation, the Tribunal is required to apply the default standard contained in customary international law in the present case. . . . The customary international law standard for the assessment of damages resulting from an unlawful act is set out in the decision of the PCIJ in the *Chorzów Factory* case . . . .").

[1241] *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award dated 16 Dec. 2002 (CL-0216), ¶ 197; *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award dated 14 July 2006 (CL-0025), ¶ 421.

[1242] ILC Articles (CL-0092), art. 38.

that principle in numerous investment treaty arbitrations.[1243] And both Treaties applicable to this dispute expressly require compensation for an expropriation to "include interest at a commercially reasonable rate."[1244]

443. Based on all of the above, to provide full reparation for Respondent's unlawful acts, Claimants must be compensated for the loss of the value of their investment, which includes losses on existing Contracts as well as the fair market value of the losses from future contracts, moral damages, and interest.

2. *Contrary to Respondent's Claims, there is No Different Standard for Claimants' Umbrella Clause Claims*

444. Contrary to Respondent's assertions, this full reparations standard of compensation applies even if the Tribunal were to conclude that Respondent breached only the umbrella clause. According to Respondent, in that scenario, "the only measure of compensation [the Tribunal] could possibly award would be the amounts claimed to be outstanding under the BIT Contracts."[1245]

445. In making this argument, Respondent fundamentally misapprehends how the umbrella clause operates in the Treaties. As the tribunal in *Noble Ventures, Inc. v. Romania* explained, an "umbrella clause is usually seen as transforming municipal law obligations into obligations directly cognizable in international law."[1246] As such, it "will give rise to the international responsibility of

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[1243] See, e.g., Quiborax (CL-0085) ¶ 523; LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Award, 25 July 2007 (CL-0108), ¶ 55; Vivendi II (CL-0009), ¶ 8.3.20; BG Group Plc. v. The Republic of Argentina, UNCITRAL, Award, 24 Dec. 2007 (CL-0109), ¶ 454; Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Award, 5 Sept. 2008 (CL-0110), ¶ 308; National Grid P.L.C. v. Argentine Republic, UNCITRAL, Award, 3 Nov. 2008 (CL-0089), ¶ 293.

[1244] BIT (CL-0001), art. IV(1); TPA (CL-0003), art. 10.7(3).

[1245] Resp.'s Counter-Mem. ¶ 342.

[1246] *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 Oct. 2005 (CL-0078), ¶ 53.

the host State" separate and apart from the State's obligation under municipal law for a breach of contract.[1247] It thus would make no sense to limit Claimants' damages to only the amounts owed on the Contracts. As discussed above, this is not merely a contract; it is an international investment dispute arising from a wide-ranging sovereign campaign of harassment and governed by Treaties and international law, including the international law of compensation.

446. Respondent relies, without explanation, on *SGS v. Paraguay*, where the tribunal awarded the claimant damages equal to the amount of the unpaid invoices at issue.[1248] But that decision is misleading. In *SGS v. Paraguay*, the claimant sought damages *only* for the unpaid invoices, which informed the tribunal's award.[1249]

447. To be sure, Claimants here seek more than unpaid invoices. Respondent's unlawful conduct deprived Omega Panama of the cash flow required to carry on operations in Panama, as well as its ability to continue as a going concern, precluding Claimants from bidding on additional Government contracts and destroying their reputations globally. In other words, Claimants suffered

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[1247] *Id.*; *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, 29 Jan. 2004 (RL-0022), ¶ 128 (concluding the applicable umbrella clause "makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments."); *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Award, 10 Feb. 2012 (RL-0025), ¶ 170 (concluding the applicable umbrella clause "'establishes an international obligation for the parties to the BIT to observe contractual obligation[s] with respect to investors' and that this interpretation is necessary to give the umbrella clause purpose and effect"); *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018 (CL-0199), ¶¶ 419-420 (agreeing with the claimants that "umbrella clause claims are treaty claims, because the umbrella clause 'provides an independent substantive protection for the Claimants under international law'"); *Oxus Gold Plc v. Republic of Uzbekistan, the State Committee of Uzbekistan for Geology & Mineral Resources and Navoi Mining & Metallurgical Kombinat*, UNCITRAL, Award, 17 Dec. 2015 (CL-0137), ¶ 365 ("Through an umbrella clause, the State assumes on the international level contractual obligations it might have entered into with a foreign investor.").

[1248] *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Award (Feb. 10, 2012) (RL-0025), § VI.C.

[1249] *Id.* ¶¶ 80, 154-56, 161, 168, 180.

injuries that went well beyond breaches of the specific Contracts at issue in this dispute. That is why simply repaying "amounts claimed to be outstanding under the BIT Contracts"[1250] would not provide full reparation for "the injury caused by the internationally wrongful act."[1251] Thus, if the Tribunal were to find only a breach of the umbrella clause, the calculation of damages would remain the same. The harm to Claimants was not limited to the amounts uncollected under the Contracts.

B. As a Matter of International Law, Full Reparation to Claimants Includes Three Heads of Damages, Plus Interest

448. Under international law, full reparation to Claimants must include: (1) damages arising from existing contracts, (2) damages arising from future contracts, (3) moral damages, and (4) interest. Each is addressed in turn.

1. *Claimants Are Entitled to Losses Arising from Existing Contracts, which Respondent Does Not Dispute*

449. Under the full reparation standard, Claimants are entitled to losses on existing contracts for work that was completed but went unpaid. Compass Lexecon computed the actual losses suffered in each of the Omega Consortium's eight Projects by determining the present value of the unpaid progress billings and the present value of the cash flows that Claimants would have earned before the projects were completed minus any advance payments already received by Claimants.[1252] Respondent does not seriously dispute that, upon a finding of liability, Claimants would be entitled to this head of damages as a matter of international law. Indeed, it concedes that Claimants have

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[1250] Resp.'s Counter-Mem. ¶ 342.

[1251] ILC Articles, (CL-0092), art. 31(1).

[1252] Damages Expert Report 1 ¶¶ 57, 74.

suffered losses on their existing Contracts,[1253] and the Parties only differ in their calculations of such losses by US$ 1.6 million.[1254] And as shown below in Section IX.D.1.

2. *Claimants Are also Legally Entitled to Losses from Future Contracts as a Matter of International Law, which Respondent does Not Dispute*

450. The full reparation standard also requires Claimants to be compensated for the fair market value ("**FMV**") of their investment, which includes losses from future contracts. In a case like this where the investment is a going concern, the preferred method to calculate the FMV of the value of the investment is the income approach through the application of a Discounted Cash Flow ("**DCF**") analysis. Under that approach, the sum of future cash flow is discounted back to present value using a discount rate. As noted in Claimants' Memorial, dozens of tribunals have adopted this method of valuation.[1255] Given the Omega Consortium's success in winning bids for government

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[1253] Resp.'s Counter-Mem. ¶ 338.

[1254] Resp.'s Counter-Mem. ¶ 338; Damages Expert Report 2 ¶¶ 3, 10; McKinnon Report 2 ¶ 5 ("Dr. Flores largely appears to agree with my analysis on which Compass Lexecon bases its calculation of damages on Existing Contracts.").

[1255] *See, e.g.*, *ADC* (CL-0028) ¶ 502 ("Like many other tribunals in cases such as the present one, the Tribunal prefers to apply the DCF method . . . ."); *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 (CL-0097), ¶ 411 ("The Tribunal has concluded that the discounted cash flow method i[s] the one that should be retained in the present instance."), ¶ 416 ("DCF techniques have been universally adopted, including by numerous arbitral tribunals, as an appropriate method for valuing business assets . . . ."); *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award, 3 Nov. 2008 (CL-0089), ¶ 275 ("[T]he Tribunal finds that there is a broad consensus that where, as here, the problem presented is not to fix the value of a fixed asset, but instead to determine the loss, if any, of fair market value of an operating business entity, there is considerable merit in using the Discounted Cash Flow (DCF) method."); *Sistem Mühendislik Inşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, 9 Sept. 2009 (CL-0099), ¶ 164; *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Trading Ltd v. The Republic of Kazakhstan*, SCC Case No. V (116/2010), Award, 19 Dec. 2013 (CL-0059), ¶ 1617; *Enron Corporation Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007 (CL-0094), ¶ 385 ("Since DCF reflects the companies' capacity to generate positive returns in the future, it appears as the appropriate method to value a 'going concern' as TGS. Moreover, there is convincing evidence that DCF is a sound tool used internationally to value companies, albeit that it is to be used with caution as it can give rise to speculation. It has also been constantly used by tribunals in establishing the fair market value of assets to determine compensation of breaches of international law."); *Quiborax* (CL-0085) ¶ 347; *Sapphire Int'l Petroleums Ltd. v. Nat'l Iranian Oil Co.*, Award, 35 INT'L. L. REP. 136 (1967) (CL-0070), at 185-89*; Karaha Bodas Co. LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, UNCITRAL, Final Award, 18 Dec. 2000, 16(3) MEALEY'S INT'L ARB. REP. (2001) (CL-0100), ¶¶ 112, 125-27; *Delagoa Bay and East African Railway Co. (US and Great Britain v. Portugal)*, Award, 30 Mar. 1990, excerpts reported in 3 MARJORIE WHITEMAN, DAMAGES IN INTERNATIONAL LAW 1694 (1943)

projects, generating revenue, and profitability, it is reasonable to assume that absent Respondent's unlawful acts, Claimants would have continued to succeed in earning business.[1256]

451. Respondent does not dispute that, upon a finding of liability, Claimants are entitled to the FMV of their investment.[1257] Nor does it dispute that the Discounted Cash Flow approach is the preferred method of calculating Full Market Value for investments like Omega Panama.[1258] Nor does Respondent argue that the Tribunal should adopt a different valuation date. Instead, Respondent takes issue *only* with how Compass Lexecon has applied the DCF method to Claimants' investment,[1259] which as discussed in the application section below (Section IX.D.2), is also incorrect.

3. *Claimants Are Likewise Entitled to Moral Damages, which Respondent Does not Dispute*

452. As set forth in Claimants' Memorial,[1260] full reparation for the injury caused by Respondent's unlawful acts entitles Claimants to moral damages, as well. Respondent's Counter-

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(CL-0101), at 1694, 1699-1700.

[1256] *Id.* ¶ 64.

[1257] Resp.'s Counter-Mem. ¶¶ 340.

[1258] *Id.* ¶ 346.

[1259] It is unclear, however, whether Respondent is suggesting that the use of a DCF analysis to determine the FMV of *Claimants' investment* is speculative. *See* Resp.'s Counter-Mem. § V.B.2, ¶ 347. If that is what Respondent is suggesting, Respondent is wrong. In any event, even if Respondent was not wrong, that would not mean that Claimants' damages would be nil (or close to it) as Respondent suggests, *id.* ¶ 338, because the Tribunal would still have discretion to apply the "loss of chance" doctrine as another means to provide Claimants with full reparation. *See, e.g.*, *Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Award, 18 Apr. 2017 (CL-0200), ¶ 217; *Southern Pacific Properties v. Egypt*, ICSID Case No. ARB/84/3, Award dated 20 May 1992 (CL-0091); *Sapphire International Petroleum v. National Iranian Oil Co.*, Award, 15 Mar. 1963 (CL-0071); *Himpurna California Energy Ltd. v PT. (Persero) Perusahaan Listruik Negara*, UNCITRAL Ad Hoc-Award, 4 May 1999 (CL-0201); *see also Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 Mar. 2011 (CL-0202), ¶ 251; *Flemingo Duty Free Shop Private Ltd. v. Poland*, UNCITRAL Rules Arbitration, Award, 12 Aug. 2016 (CL-0045); *Gemplus v. Mexico*, ICSID Cases Nos. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010 (CL-0203); RIPINSKY & WILLIAMS (CL-0093 resubmitted) at 291.

[1260] Cl's Mem. ¶¶ 207-10.

Memorial does not dispute Claimants on this point; in fact, it says absolutely nothing about moral damages.[1261] Respondent's silence on the matter is likely due to its recognition that it has no defense to moral damages in this case.

453. As the ILC Articles explain, States must compensate injured parties for "any damage, whether material *or moral*, caused by an internationally wrongful act of a State."[1262] Moral damages may include "mental suffering, injury to feelings, humiliation, shame, degradation, loss of social position *or injury to credit and reputation*."[1263] Indeed, because loss of reputation, goodwill, creditworthiness, or business opportunities can be thought of as material damages, tribunals have on occasion accepted such damages under a lower threshold than the "exceptional circumstances" generally applied to *other* types of moral damages.[1264] In *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, for example, the claimant sought moral damages based on what it viewed as bogus investigations by the Macedonian Securities and Exchange Commission.[1265] The

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[1261] *See generally* Resp.'s Counter-Mem. §§ V.A, V.B.

[1262] ILC Articles (CL-0092), art. 37, cmt. 3 (emphasis added).

[1263] *Id.* art. 36, cmt. 16 (quoting the *Lusitania Case*).

[1264] IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW (2d ed., 2014) (CL-0104 resubmitted), ¶ 5.364; *see also* Dumberry & Cusson, *Wrong Direction: 'Exceptional Circumstances' and Moral Damages in International Investment Arbitration*, 1(2) JOURNAL OF DAMAGES IN INTERNATIONAL ARBITRATION (2014) (CL-0204), at 55 ("To the extent that under international law a State must provide *full reparation* for *all damages*, it is conceptually difficult to understand why one certain type of damages should be treated differently. . . . There are simply no reasons why moral damages should not be subject to the same rules as other compensatory damages. Logically, no higher threshold of gravity or seriousness should therefore be required for findings a breach of international law in the context of moral damages claims. Thus, why should compensation be available only in 'exceptional circumstances' for moral damages when such compensation is available in 'normal' circumstances for material damages?"); *id.*, at 54 & n. 105 ("[T]here seems to be a consensus amongst scholars that the approach adopted by these tribunals regarding the 'exceptional circumstances' requirement represents 'a significant departure from established principles of international law concerning reparations.'") (quoting Bernd Ehle & Martin Dawidowic, *Moral Damages in Investment Arbitration, Commercial Arbitration and WTO Litigation* in WTO LITIGATION, INVESTMENT ARBITRATION, AND COMMERCIAL ARBITRATION 293, 304, 307, 310 (Vol. 43, 2013) (CL-0221)).

[1265] *Swisslion DOO Skopje v.* The *Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012 (CL-0107), ¶ 73(g).

tribunal agreed, observing that the investigations "diverted management's time and attention and reasonably could be expected to have had an effect on the investment's prospects."[1266] According to the tribunal, the "uncertainty that surrounded the investment as a result of the SEC procedures and criminal charges clouded its prospects."[1267] The tribunal therefore awarded damages for the cost of defending against the investigations, the diversion of management's time in responding to the investigations, and the lost sales resulting from the claimant's reputational injury.[1268] This is, of course, similar to what happened to Claimants and their investment in Panama.

454. In *Desert Line Projects v. Yemen*, the claimant sought moral damages based on threats and attacks on the physical integrity of the investment. According to the claimant, the respondent failed to protect the investment from "harassment and theft by armed groups."[1269] The respondent also "besieged the construction site . . . and arrested three managers of the Claimant, including the Chairman's son."[1270] Later the claimant's Chairman received a threatening phone call urging him to leave Yemen since his life was in danger.[1271] The claimant alleged that these acts along with the respondent's interference with the underlying investment led to "a significant injury to its credit and

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[1266] *Id.* ¶ 348.

[1267] *Id*. ¶ 349.

[1268] *Swisslion DOO Skopje v.* The *Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012 (CL-0107), ¶ 350. A number of recent arbitral awards dealing with moral damages do not discuss the "exceptional circumstances" standard, which suggests it is falling out of favor. *See, e.g.*, *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others*, Award, 22 Mar. 2013 (CL-0205); *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 (CL-0126), ¶ 289 ff.

[1269] *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 Feb. 2008 (CL-0075), ¶ 146.

[1270] *Id.* ¶ 185.

[1271] Id.

reputation."[1272] In light of these injuries, the tribunal awarded $1 million in moral damages, agreeing with the claimant that "its prejudice was substantial since it affected the physical health of the Claimant's executives and the Claimant's credit and reputation."[1273] Again, there are undeniable similarities between this case and Claimants' case.

455. Of course, the State's conduct need not be so dramatic to justify and award moral damages. Just the act of depriving an investor of the value of the investment may, in some circumstances, lead to reputational harm that could support the award of moral damages. In *Al-Kharafi v Libya*, the claimant was awarded approval to develop a long term tourism related project in Tripoli, but the respondent later backed out of the deal and ordered the claimant to stop work on the project.[1274] Given the size and duration of the project, the tribunal awarded the claimant $30 million in moral damages "as a result of the damages caused to its reputation in the stock market, as well as in the business and construction markets in Kuwait and around the world."[1275] Claimants, like the claimant in *Al-Kharafi*, likewise suffered catastrophic damage to the Omega brand.

456. Moral damages in investor-State cases are neither symbolic nor trifling. The amounts awarded can be significant depending on the unlawful acts of the State.[1276] This is particularly so when the case involves a personal vendetta using the criminal and prosecutorial force of the state. Here, Claimants were utterly destroyed, and Mr. Rivera was branded an international criminal with

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[1272] *Id.* ¶ 286.

[1273] *Id.* ¶ 290.

[1274] Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others, Award, 22 Mar. 2013 (CL-0205), ¶ 1-5.

[1275] *Id.* ¶¶ 368-69.

[1276] *Id.* ¶¶ 368-69 (awarding $30 million in moral damages); see also Damien Charlotin & Luke Eric Peterson, *Dutch Investor Prevails Over Vietnam, as Tribunal Awards $27 Million in Compensation*, $10 Million in Moral Damages and Sizable Legal Fees, INVESTMENT ARBITRATION REPORTER, 12 Apr. 2019 (CL-0219); Cosmo Sanderson, *Dutch National Wins Moral Damages Against Vietnam*, GLOBAL ARBITRATION REVIEW, 15 Apr. 2019 (CL-0220).

INTERPOL and on the Internet. He could not travel, start a new business, or get bonding or financing. His reputation was destroyed: Google searches of his name only reinforced Panama's false criminal allegations, and, as a result, decades of hard work building his reputation and business vanished overnight. The distinct nature of Respondent's international law delict—abuse of police powers based on unsupported facts and driven by personal malice—compels a high award of moral damages. Another recent award involving Vietnam, though not yet publicly available, shows how a different tribunal assessed similar circumstances through an aggressive (and entirely justified) award of moral damages. There, the state had abused its criminal apparatus by alleging a foreign investor had violated criminal bribery laws, and the tribunal responded by awarding the investor US $10 million in moral damages.[1277]

457. The extent of Claimants' losses cannot be overemphasized. As a result of Respondent's illegitimate acts, Claimants' reputations have been ruined. Banks worldwide have closed Claimants' accounts and have made demands against Claimants' investment.[1278] Claimants have lost valuable business opportunities worth tens of millions of dollars (beyond the new contracts in Panama which are explicitly claimed),[1279] and have been burdened with claims or potential claims as a result of Respondent's reckless violation of its international obligations.[1280] And Claimants have

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[1277] Damien Charlotin & Luke Eric Peterson, Dutch Investor Prevails Over Vietnam, as Tribunal Awards $27 Million in Compensation, $10 M in Moral Damages and Sizable Legal Fees, INVESTMENT ARBITRATION REPORTER (12 Apr. 2019) (CL-0219); Cosmo Sanderson, Dutch National Wins Moral Damages Against Vietnam, GLOBAL ARBITRATION REVIEW (15 Apr. 2019) (CL-0220).

[1278] Cls' Mem. ¶ 114.

[1279] *Id*. ¶ 110.

[1280] As a result of Respondent's unlawful actions, Claimants face (or imminently will face) the following claims:

1. a claim in the form of termination fees by its financing entity for the *Ciudad de las Artes* Project, *see* Demand Letter from Credit Suisse to Omega, dated 7 July 2016 (C-0582);

been unable to secure financing and bonding.[1281] Claimants have thus been unable to generate income since 2015.[1282] Given the substantial impact to Claimants' reputation, goodwill, and creditworthiness, it is telling (though perhaps unsurprising) that Respondent makes no attempt to dispute Claimants' entitlement to moral damages. Thus, Claimants should not only be awarded moral damages, but they should be awarded them in significant sums. While the Tribunal, of course, has discretion as to the amount of moral damages to be awarded,[1283] the facts of this case—and especially Panama's *intentionally wrongful* conduct aimed at destroying Claimants' business and reputation as part of President Varela's personal vendetta—demand an award of moral damages as least as high as the US$ 30 million award in *Al-Kharafi*.[1284]

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2. potential indemnity claims due to losses by Claimants' surety company as a result of Respondent's illegal termination of the *Ciudad de las Artes* Project, *see* Letter VPET-007-2015 from ASSA to the Omega Consortium dated 3 Mar. 2015 (C-0382); and

3. potential indemnity claims due to losses by Claimants' surety company in the US as a result of the reputational harm inflicted on Claimants by Respondent, see General Agreement of Indemnity executed between Travelers Casualty & Surety Company and Omega-U.S. dated 17 May 2010 (C-0100); Travelers Rider to General Agreement of Indemnity dated 24 Aug. 2011 (C-0618).

Full reparation requires that Respondent compensate Claimants for these losses, too, and Claimants reserve the right to update and/or quantify these losses and other moral damages claims as time progresses (before or at the Hearing on the Merits, which will take place in February 2020).

[1281] Cls' Mem. ¶ 113.

[1282] Cls' Mem. ¶ 110-15.

[1283] *See Hesham Talaat M. Al-Warraq v. Indonesia*, Award dated 15 Dec. 2014 (CL-0136), ¶ 653 (noting that "tribunals seem to enjoy an almost absolute discretion in the matter of determining the amount of moral damages") (internal quotation marks and citations omitted); *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 Feb. 2008 (CL-0075), ¶ 290 (assessing moral damages "based on the information at hand and . . . general principles" and bearing in mind the damages "in proportion to the vastness of the project"); *see also id.*, ¶ 289 (stating that moral damages may be "very real, and the mere fact that they are difficult to measure or estimate by monetary standards makes them none the less real and affords no reason why the injured person should not be compensated") (internal quotation marks and citations omitted).

[1284] *See Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others*, Award, 22 Mar. 2013 (CL-0205), ¶¶ 368-69 (awarding $30 million in moral damages).

4. *Claimants are Entitled to Compound Pre- and Post-Award Interest, which Respondent Generally Does Not Dispute*

458. Finally and as noted in Claimants' Memorial, Claimants are entitled to interest on their losses as a matter of international law.[1285] Under the ILC Articles, interest—which "runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled"—is part of the required "full reparation."[1286] Thus, to provide full reparation for Respondent's unlawful acts, Claimants are entitled to both pre- and post-award interest at the same rate (Claimants propose the rate of 11.65%, as explained in the application section below), and the interest should be compounded.

459. Respondent does not dispute that Claimants are entitled to commercially reasonable interest upon a finding of liability,[1287] but Respondent does advance two misguided legal arguments concerning these Claimants' entitlement to interest.

460. *First*, Respondent asserts that "[e]ven if 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."[1288] This argument is notable for what it does *not* say. In particular, Respondent only addresses *pre*-award interest—not *post*-award interest. Respondent does not dispute the

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[1285] Cls' Mem. § X.A.2.

[1286] JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (2002) (CL-0217), art. 38; *see also, e.g., Quiborax* (CL-0085), ¶ 523; *LG&E Energy Corp*., *LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007 ("***LG&E—Award***") (CL-0108), ¶ 55; *Vivendi II* (CL-0122), ¶ 8.3.20; *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Award, 24 Dec. 2007 ("***BG Group***") (CL-0109), ¶ 454; *Continental Casualty* (CL-0110), ¶ 308; *National Grid* (CL-0089), ¶ 293.

[1287] Resp.'s Counter-Mem. ¶¶ 360, 362.

[1288] Resp.'s Counter-Mem. ¶ 356 (emphasis added).

statement in Claimants' Memorial that "[i]nternational arbitral tribunals regularly award post-award interest, often applying the same interest rate for both pre-award and post-award interest."[1289] Nor could it.[1290] Because Respondent does not contest post-award interest at Claimants' proposed rate, the Tribunal should automatically apply such post-award interest to any award it issues.

461. With respect to pre-award interest, Respondent only challenges Claimants' "entitle[ment] to *pre*-award interest *at a [proposed] rate* of 11.65%."[1291] Instead, Respondent relies on *Vestey Group Ltd. v. Bolivarian Republic of Venezuela* to suggest that the Tribunal should adopt the interest rate of a six-month US Treasury bill (for pre-award interest).

462. Respondent's reliance on *Vestey* is misguided. The claimant's preferred interest rate in that case was not based on the claimant's own injury. Rather, the claimant argued the tribunal should award interest based on the yield of Venezuela's 15-year sovereign bonds because such a rate would "account for the fact that *Venezuela* . . . had use of the compensation amount since the day of injury, effectively compelling [the Claimant] to lend it funds without remuneration."[1292] If Venezuela had not had access to the money, the claimant reasoned, it would have been forced to borrow money

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[1289] Cls' Mem. ¶ 235; *see also BG Group* (CL-0109), ¶ 457; CME—Partial Award (CL-0019), ¶ 641; *El Paso* (CL-0056), ¶ 747; *Kardassopoulos* (CL-0114), ¶ 677-78; *Impregilo* (CL-0083), ¶¶ 382-386; *Khan*—Award (CL-0115), ¶ 426; *Quiborax* (CL-0085), ¶¶ 518; *Unglaube* (CL-0095), ¶ 326; *Vivendi II* (CL-0009), ¶¶ 9.2 *et seq*.; *Tecmed* (CL-0047), ¶¶ 196-97.

[1290] CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2d ed. 2017) (CL-0151) § 9.172 ("As long as the purpose of interest is seen as compensating the claimant for the cost of being deprived of its money, there should be no difference between pre- and post-award interest."); *Micula v. Romania*, ICSID Case No. ARB/05/20, Award dated 11 Dec. 2013 (CL-0052), ¶ 1269 ("[T]he Tribunal does not see why the cost of the deprivation of money (which interest compensates) should be different before and after the Award.").

[1291] Resp.'s Counter-Mem. ¶ 357 (emphasis added).

[1292] *Vestey Group Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award (Apr. 15, 2016) (QE-0033), ¶ 429 (emphasis added).

at the prevalent rate for its sovereign bonds. And the tribunal rejected this approach because it improperly focused on the possible enrichment of the Respondent rather than the injury suffered by the claimant. As the tribunal explained, "reparation focuses on making the victim whole . . . . '[T]he measure of compensation should reflect the claimant's loss rather than the defendant's gain.'"[1293]

463. Here, by contrast, Claimants focus on their own damages by anchoring the interest rate to Claimants' cost of equity. As explained in Claimants' Memorial, the "purpose of awarding pre-award interest is to compensate the damage resulting from the fact that, during the period of non-payment by the debtor, the *Claimants* are 'deprived of the use and disposition of that sum [they were] supposed to receive.'"[1294] Accordingly, Claimants' proposed an interest rate of 11.65% because that reflected "the cost of capital that is available in the marketplace for Claimants' specific type of investment."[1295] Nothing in *Vestey Group* is contrary to Claimants' reasoning here. As such, international law supports Claimants' request for pre- and post-award interest at a rate of 11.65%.

464. <u>*Second*</u>, Respondent takes issue with Claimants' entitlement to compound interest. According to Respondent, Panamanian law does not permit compound interest absent an express agreement by the parties.[1296] Because the Contracts and the relevant Treaties do not explicitly call for compound interest, Respondent claims only simple interest should apply.[1297] Respondent further asserts that awarding compound interest is disfavored investment treaty arbitration.[1298] Respondent's

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[1293] *Id.* ¶ 440.

[1294] Cls' Mem. ¶ 213 (quoting *Vivendi II* (CL-0009) ¶ 9.2.3).

[1295] Damages Expert Report § V.4; ¶ 110.

[1296] Resp.'s Counter-Mem. ¶ 361.

[1297] *Id.* ¶ 362.

[1298] *Id.* ¶ 361.

framing of the issue is wrong in every respect.

465. To begin with, this dispute is an *international investment dispute* governed by international law, including international law principles of compensation and interest. It is well established that the "consequences of internationally wrongful acts are governed by international law."[1299] As noted above, this ***not*** a contract dispute governed by Panamanian law or any other domestic law principles. It therefore would make little sense for Panama, having violated its international obligations, to avoid fully compensating the victim based on a narrow interpretation of its *own domestic law*.

466. Respondent also is wrong to assert that international arbitral tribunals are averse to awarding compound interest.[1300] All but one of the cases cited by Respondent for this proposition are more than a decade old.[1301] And Respondent's lone recent authority expressly recognizes that, at least according to some, "the trend in investment arbitration *is in favor of compound interest*."[1302] In reality, recent arbitral awards *overwhelmingly* favor compound interest.[1303] Some older awards do as

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[1299] *Vestey Group Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award (Apr. 15, 2016) (QE-0033), ¶ 447; *see also Quiborax* (CL-0085) ¶ 520 (concluding that international law, rather than Bolivia's national law, applies to the payment of compound interest for BIT claims).

[1300] *See* Resp.'s Counter-Mem. ¶¶ 361-62.

[1301] *See Id.* ¶¶ 361-62 nn.568-70.

[1302] *See Id.* ¶ 361 n.568 (citing Arif v. Republic of Moldova, ICSID Case No. ARB/11/23, Award (Apr. 8, 2013) (RL-0040) ¶¶ 617-620) (emphasis added).

[1303] *Hulley Enterprises Limited (Cyprus) v. Russia*, PCA Case No. AA 226, Final Award, 18 July 2014 (CL-0207), ¶ 1670 (recognizing that there is a trend away from only awarding simple interest to generally awarding compound interest); *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Award, 25 Feb. 2016 (CL-0208), ¶ 289 (same); *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 Dec. 2016 (CL-0209), ¶ 895 (same); *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 Feb. 2017 (CL-0190), ¶¶ 539-40 (same); *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/01, Award, 21 July 2017 (CL-0210), ¶ 1125 (same); *Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Award, 25 July 2017 (CL-0211), ¶ 822 (same); *Caratube International Oil Company LLP*

well.[1304] Thus, according to a recent commentary, "it is . . . reasonable to propose that an award of compound interest *should be the rule rather than the exception*."[1305]

467. This is because compound interest is grounded in commercial reality. As the tribunal in *Continental Casualty* explained, "[t]he time value of money in free market economies is measured in compound interest," so "simple interest cannot be relied upon to produce full reparation for a claimant's loss occasioned by delay in payment."[1306] Another recent tribunal explained that "compounding is a commercial reality firmly established in international commercial relations and therefore presumed to be a regular element of damages when money owed is withheld."[1307] For

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and Devincci Salah Hourani v. Republic of Kazakhstan, ICSID Case No. ARB/13/13, Award, 27 Sept. 2017 (CL-0212), ¶ 1226; *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited and Bangladesh Oil Gas and Mineral Corporation*, ICSID Case No. ARB/10/11 & ARB/10/18, Decision on Implementation of the Decision on the Payment Claim, 14 Sept. 2015 (CL-0213), ¶ 147 ("[I]n international commercial relations a claim for compound interest does not require any specific evidence."); *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award, 13 Mar. 2015 (CL-0214), ¶ 209 ("Since a commercial bank will typically compound interest due and unpaid on a quarterly basis, the Tribunal considers that its award of interest ought to be so compounded."); *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 Nov. 2015 (CL-0215), ¶ 481 (applying compound interest).

[1304] *See, e.g.*, *ADC* (CL-0028) ¶ 522 ("As to post-Award interest, contrary to Respondent's submission, the current trend in investor-State arbitration is to award compound interest. . . . [T]ribunals in investor-State arbitrations in recent times have recognized economic reality by awarding compound interest . . . ."); *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007 (CL-0108), ¶ 103; *Vivendi II* (CL-0009) ¶ 9.2.4 ("To the extent there has been a tendency of international tribunals to award only simple interest, this is changing, and the award of compound interest is no longer the exception to the rule."); *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 Feb. 2000 (CL-0102), ¶ 105; *PSEG Global Inc. et al. v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 Jan. 2007 (CL-0039), ¶ 348; *Walter Bau AG (In Liquidation) v. The Kingdom of Thailand*, UNCITRAL, Award, 1 July 2009 (CL-0058), ¶ 16.1.

[1305] CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION (2d ed. 2017) (CL-0151) § 9.188 (emphasis added).

[1306] *Continental Casualty* (CL-0110) ¶ 309; *see also Azurix* (CL-0025) ¶ 440; *Gold Reserve* (CL-0057) ¶ 854; *MTD*—Award (CL-0031) ¶ 251 ("[C]ompound interest is more in accordance with the reality of financial transactions and a closer approximation to the actual value lost by an investor."); *Hrvatska Elektroprivreda D.D. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Award, 17 Dec. 2015 (CL-0111), ¶ 539; *Quiborax* (CL-0085) ¶ 524; *El Paso* (CL-0056) ¶ 746; *Vivendi II* (CL-0009) ¶ 9.2.6; *Wena Hotels* (CL-0010) ¶ 129.

[1307] Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited and Bangladesh Oil Gas and Mineral Corporation, ICSID Case No. ARB/10/11 & ARB/10/18, Decision on

all of these reasons, international law demands that Claimants be awarded pre- and post-award compound interest at a reasonably commercial rate.

C. Claimants' Damages Analysis Reasonably and Conservatively Applies Full Reparations Standards

468. As set forth in the second report from Compass Lexecon, damages to Claimants amount to US$ 51.22 million as of December 23, 2014.[1308] This value is comprised of US$ [redacted] million of losses associated with existing contracts, and US$ [redacted] million related to the inability to continue as a going concern, and to bid and win new public sector contracts after December 2014.[1309] Applying a commercially reasonable interest rate of 11.65% to the total damages results in $83.13 million as of 15 May 2019.[1310]

469. Claimants' experts, acting on Claimants' instructions, have taken great efforts to employ a conservative methodology to support these findings. In particular, Claimants' experts assessed their damages for losses on future contracts by calculating Omega Panama's "gross profit margins" for 2014 onwards.[1311] In doing so, Claimants' experts chose *the most conservative contemporaneous data* to forecast the margins on future projects at [redacted].[1312] There are two potential bodies of evidence the quantum experts could have used for this exercise: (1) Omega Panama's job

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Implementation of the Decision on the Payment Claim, 14 Sept. 2015 (CL-0213), ¶ 147.

[1308] Damages Expert Report 2 ¶ 125.

[1309] *Id.* ¶ 125. The first Compass Lexecon report estimated Claimants' losses concerning new contracts at US$ [redacted] million as of 23 December 2014. Damages Expert Report 1 ¶¶ 12, 107; Damages Expert Report 2 ¶ 2(b). Claimants' experts have updated that value to US$ [redacted] in their second report. Damages Expert Report 2 ¶ 125.

[1310] Damages Expert Report 2 ¶¶ 8, 129.

[1311] *See Id.* ¶ 117.

[1312] Damages Expert Report 1 ¶ 99; McKinnon Report 2 ¶ 48 ("I used Omega Panama's audited financial statements in place of project-specific data based on instruction from counsel to choose the most conservative approach."); *id*. ¶¶ 49, 52; McKinnon Report 1 ¶¶ 24(c), 93.

cost estimate reports, or (2) the company's audited financial statements.[1313] The difference between these two is vital.

470. An analysis based solely on job cost estimate reports would result in a much higher profit margin of [redacted].[1314] Importantly, the job cost estimate reports were prepared at the time of each bid and thus constitute contemporaneous evidence from the time of the bidding process, showing Claimants' internal job cost estimates. As Compass Lexecon explains, the job cost estimate reports "needed to be realistic so that Omega Panama could make sure it was putting forward economically reasonable bids."[1315] And calculations based on those contemporaneous records would result in correspondingly higher damages.[1316] As Compass Lexecon observes, "Had we applied the [redacted] profit margin underlying Claimant's economic decision to participate in the bids to our valuation, damages would have increased to US$ [redacted] million as of the Date of Valuation (an increase of US$ [redacted] million over our base case)."[1317]

471. On the other hand, an analysis based solely on audited financial statements would result in a gross estimated margin of [redacted].[1318] The audited financial statements only reflect the first few years of Omega Panama's operations, but profit levels would be expected to stabilize at a higher

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[1313] McKinnon Report 1 ¶¶ 24(c), 93; McKinnon Report 2 ¶ 48

[1314] Damages Expert Report 1 ¶ 99.

[1315] Damages Expert Report 2 ¶ 120.

[1316] McKinnon Report 2 Table 2.

[1317] Damages Expert Report 2 ¶ 118; CLEX-32; *see also* McKinnon Report 2 ¶ 52 ("While I find that this alternative of US$ [redacted] based on Omega Panama's project specific estimated profit margins to be accurate and defensible, I was instructed to use the more conservative profit margins reported in Omega Panama's audited financial statements.").

[1318] Damages Expert Report 2 ¶ 117(a); Damages Expert Report 1 ¶ 99; McKinnon Report 1, ¶¶ 24(c), 93.

level after completing its initial contracts.

472. Claimants' experts followed a decidedly conservative path between the two approaches set forth above, and they forecasted the margins on future projects at [redacted] to account for, *inter alia*, the fact that the profit margin for first year of operation of Omega Panama, is lower than the average for the 2011-2013 period, as would be expected.[1319] This analysis is "conservative and consistent" with evidence in the construction sector.[1320] Indeed, the [redacted] profit margin is still significantly less than the [redacted] profit margin calculated contemporaneously by Omega Panama in the job cost estimate reports. Claimants ask the Tribunal to bear this significant element in mind as it assesses the reliability of Claimants' damages calculations (and Respondent's criticisms thereof, as discussed in detail below).

D. Respondent's Criticisms of Claimants' Damages Analysis are Meritless

473. Respondent advances certain criticisms to the manner in which Claimants' Damages Experts calculated the quantum of their losses. None of these criticisms has merit. Respondent's arguments are based on faulty analyses contained in Dr. Flores' report,[1321] as set forth in more detail below.

1. *The Amounts Claimed by Claimants for Works Performed Are Accurate and Supported*

474. Respondent concedes that Claimants have suffered losses on their existing

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[1319] Damages Expert Report 1 ¶ 99.

[1320] *Id.* ¶ 122 ("Prof. Damodaran reports gross margins (EBITDA without general, selling, and administrative expenses) of [redacted] for global construction companies in as of the Date of Valuation, confirming our estimate.") (internal citations omitted).

[1321] See generally, Flores.

Contracts.[1322] It estimates that value at US$ [redacted] million as of December 2014. [1323] This amount only differs by US$ 1.6 million from Claimants' estimate of US$ [redacted] million, and the difference relates to methodology and not to the underlying information.[1324]

475. Respondent advances three arguments in this regard. It asserts that (1) Claimants' Damages Experts incorrectly discounted advances prior to the valuation date; (2) Claimants' Experts overestimate the present value of future cash flows; and (3) Claimants' Experts use an incorrect "prejudgment interest" rate.[1325] In fact, Respondent's Counter-Memorial does not even offer a full argument on each of these points but only three conclusory bullet points without elaboration or citation.[1326] In any event, all three arguments fail.

476. *First*, Claimants have treated the advance payments appropriately. Claimants Damages Experts calculate that the credit due to Panama is worth US$ [redacted] million as of December 2014.[1327] Respondent, on the other hand, claims that the advance payments should be taken at a higher value of US$ [redacted] million. [1328] Again, the difference is relatively narrow, just over US$ 1 million.

477. Respondent's position improperly fails to account for the fact that advance payments should be treated in the same fashion as payments due. The former are meant to be credited toward the latter on a periodic basis until the Contract is completed. What this means is that the contractor

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[1322] Resp.'s Counter-Mem. ¶ 338.

[1323] *Id.* ¶ 338; Damages Expert Report 2 ¶ 3.

[1324] Damages Expert Report 2 ¶¶ 3, 10; McKinnon Report 2 ¶ 5 ("Dr. Flores largely appears to agree with my analysis on which Compass Lexecon bases its calculation of damages on Existing Contracts.").

[1325] Resp.'s Counter-Mem. ¶ 344.

[1326] Resp.'s Counter-Mem. ¶ 344.

[1327] Damages Expert Report 2 ¶ 32.

[1328] Flores ¶ 99; Damages Expert Report 2 ¶ 33; Valuation Model (QE-0002) III. Advanced Balance, cell H39.

receives an advance payment before any work is commenced, and as it receives payment on completed work a portion of the advance payment is credited to the completed work payment, meaning it is deducted from it. As Compass Lexecon notes, the inconsistency in Respondent's methodology is that Respondent treats advance payments at face value when in fact it should consider them as deductions to Omega Panama's payments for completed work into the future. Respondent and Claimants in fact agree that the payments that Omega Panama was entitled to receive after the date of valuation need to be discounted at the relevant financing cost. The problem is that while Claimants properly credit the advance payments against those future payments (*i.e.*, in the future), Respondent treats advance payments as a debt by Claimants due on the date of valuation, instead of as monies that should be credited against future payments due to Claimants.[1329] This is improper: the advance payments must be considered as *pari passu* deductions to payments due to Claimants and, as such, should be affected in the same fashion by the time value of money adjustments.[1330]

478. <u>*Second*</u>, Respondent is incorrect that Claimants overestimate the present value of future cash flows.[1331] As Compass Lexecon explains, the financing cost of Omega Panama is represented by the cost of equity, which is the financing cost economically linked to Claimants' investment, and thus should be applied to all financing considerations, both when they increase the amount of harm suffered by Claimants and when they reduce it.[1332] For example, given that the market-based financing cost of being deprived of US$ 1 for a year is at a minimum commensurate to

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[1329] Damages Expert Report 2 ¶¶ 33-34.

[1330] *See* Damages Expert Report 1, ¶ 58; Damages Expert Report 2 ¶ 35.

[1331] *See* McKinnon Report 2 ¶¶ 5-6.

[1332] Damages Expert Report 2 ¶ 14.

the financing gain of receiving US$ 1 one year in advance, the same rate should be used to discount and update past and future cash flow deprivations.[1333]

479. Respondent appears to agree with this premise but applies it in a selective fashion and only to future profits. Respondent considers the past due invoices payable to Omega Panama at their nominal value, without applying any type of update factor that recognizes the time value of money.[1334] Therefore, Respondent's approach implicitly assumes that Omega Panama suffered no harm, or finance cost, due to the delay in payment.[1335] This is plainly incorrect, as Compass Lexecon has demonstrated.

480. *Third*, Respondent takes issue with Claimants' proposed interest rate. As already demonstrated above in Section IX.B.4 there is no merit to this argument.

2. *The Compensation Claimed for Potential Future Contracts Is Supported and Accurate*

481. The first Compass Lexecon report calculated Claimants' losses concerning on future contracts at US$ [redacted] million as of 23 December 2014.[1336] Claimants' experts have now updated that value to US$ [redacted] million in their second report.[1337] Respondent, on the other hand, assigns no value at all to losses on future contracts. Key to the issue is Omega Panama's ability to generate valuable business into the future. It is uncontested that Omega Panama was able to win 10 competitive public works bids in the five years leading to the Date of Valuation and that it won a

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[1333] *Id.* ¶ 14.

[1334] Resp.'s Counter-Mem. ¶ 338.

[1335] *See* Damages Expert Report 2 ¶ 15(c); Flores ¶ 101.

[1336] Damages Expert Report 1 ¶¶ 12, 107; Damages Expert Report 2 ¶ 2(b).

[1337] Damages Expert Report 2 ¶ 125.

portfolio of Contracts worth over US$ [redacted] million.[1338] As such, Compass Lexecon has shown that the underlying premise to Respondent's position—*i.e.*, that Omega Panama's proven capacity to generate business would simply disappear as of the Date of Valuation—it is not credible.[1339]

482. Nor are the three specific arguments raised by Respondent with respect to this head of damage. *First*, Respondent argues that Omega Panama did not possess assets that a hypothetical buyer would have been willing to pay for, because it had no income-producing tangible assets and no special right or exclusive access to a limited recourse.[1340] Respondent also contends that the "cost of entry for foreign contractors seeking to work in Panama is low" and "can be accomplished in as little as six days."[1341] This is wrong.[1342]

483. Respondent's entire approach runs against the FMV principle in that it fails to consider the necessary element of a "willing seller," as required by long-held, standard FMV definitions.[1343] In other words, Respondent assumes that, absent its unlawful conduct, there can be a hypothetical transaction between a buyer and Claimants where, under no compulsion to sell, Claimants nevertheless would assign zero value to their company.[1344] With all due respect, that makes no sense.

[1338] *Id.* ¶ 105 n.113.

[1339] *Id.* ¶ 5.

[1340] Resp.'s Counter-Mem. ¶ 348.

[1341] Resp.'s Counter-Mem. ¶ 349.

[1342] Rivera 2 ¶ 18 (rejecting Panama's argument about "low barriers to entry"); *id.* ¶ 20 ("[A]ll the public bids for which the Omega Consortium tendered in Panama required the bidders to provide evidence of having successfully completed projects of similar scale and complexity. It is almost impossible for new construction companies to obtain government contracts . . . .").

[1343] Damages Expert Report 2 ¶ 43; World Bank. 1992. "Guidelines on the Treatment of Foreign Direct Investment." Foreign Investment Law Journal, Chapter IV: Expropriation and Unilateral Alterations or Termination of Contracts (C-0442; CLEX-36), ¶ 5; William C. Lieblich, *Determining the Economic Value of Expropriated Income-Producing Property in International Arbitration*, *in* 8(1) J. OF INT'L ARB. 59 (CL-0121; CLEX-13), at 74.

[1344] Damages Expert Report 2 ¶ 50.

Respondent has disregarded the word *willing* in the phrase "willing seller." Claimants, as a "willing seller," would have assigned a positive value (of millions of dollars) to their interest in Omega Panama.

484. More importantly, the evidence supports Claimants in this regard. Omega Panama grew quickly, and but for Respondent's unlawful conduct, it most likely would have continued to generate cash flows and profits in the future. Omega Panama won 10 out of the [redacted] public contract bids in which it participated,[1345] it had an average success rate of about 25% in its bids,[1346] it successfully completed one Contract and was in the process of concluding 8 more, and these Contracts were profitable.[1347] Claimants won Contracts for a total US$ [redacted] million (later revised to US$ [redacted] million) and earned gross profits of US$ [redacted] million.[1348] The company's proven track record of profitability and revenue generation,[1349] as well as its competitive advantages, would have allowed it to continue to win public sector contracts in Panama beyond 2014 in the absence of Respondent's unlawful conduct.[1350] Respondent's contrary position is based solely on the grossly flawed premise that a successful company would suddenly be unable to win any future bids.

[1345] *See* Flores ¶ 35; Rivera 2 ¶ 20 ("Omega Consortium, was a strong competitor in Panama's public contracts market, which a new company could not easily replicate."). The contract won and completed by PR Solutions (Tocumen International Airport) is not counted here. *See* Damages Expert Report 2 ¶ 44 n.40.

[1346] *See supra* Section III and in the following point below.

[1347] Omega Panama completed the Aeropuerto Internacional de Tocumen, Ampliación Lateral Norte construction works. The bid won with the Social Security Fund, Urgencia Dr. MAG – Colón, was cancelled before a final contract could ever be signed, while the remaining eight Contracts were ongoing, with varying degrees of completion. *See* Damages Expert Report 1 ¶¶ 39 and 46.

[1348] Damages Expert Report 2 ¶ 52; Damages Expert Report 1, Tables III and VI. *See also* CL Revised Valuation Model, sheet "Omega Pan. Income Statements" (C-0438; CLEX-32).

[1349] *See supra* Section III. Despite Omega Panama's track record of revenue generation and profitability, Respondent argues that Omega Panama had no value because it had no "income generating assets." Resp.'s Counter-Mem. ¶ 347. This is misleading. Construction companies do not require substantial investment in fixed assets because the value of a construction company is often based at least in part on its future cash flow. *See* Damages Expert Report ¶ 65.

[1350] Damages Expert Report 2 ¶ 52.

485. *Second*, Respondent asserts that the cash flow projections used by Omega Panama are "not reasonable" because Claimants' approximated success rate of 25% has "no foundation,"[1351] and Omega's track record was "spotty."[1352] This argument overlaps somewhat with the prior argument and fails just as clearly.

486. As noted above, during its participation in the Panamanian market for public works, Omega Panama competed in [redacted] bids for public infrastructure tenders, winning 10 of them.[1353] The observed success rate for the period was 21.4% in terms of value, and 23.8% in terms of number of bids; moreover, excluding the first year of Omega Panama's biddings, when it was unsuccessful, the success rate rises to 29.4% in terms of value (and 35.7% in terms of number of bids).[1354] For that reason, Compass Lexecon was well within reason (indeed, conservative) in assuming a success rate of 25%.[1355] Respondent's contrary position requires it to ignore the years 2010 and 2012 altogether and calculate Omega Panama's success rate based on 2011 and 2013.[1356] But that methodology is totally arbitrary and without justification. In particular, while it might make sense to ignore 2010 because Omega Panama had just been incorporated and entered into the Panamanian market at that time, Respondent's decision to ignore 2012 is a transparent (and improper) attempt to avoid the company's outstanding performance during that calendar year.[1357]

[1351] Resp.'s Counter-Mem. ¶ 350.

[1352] *Id.* ¶ 351.

[1353] Damages Expert Report 2 ¶ 44. The contract won and completed by PR Solutions (Tocumen International Airport) is not counted here.

[1354] Damages Expert Report 2 ¶ 110; Omega Panama's Historical Bids Evaluation Reports (C-0444; CLEX-38).

[1355] Damages Expert Report 2 ¶ 111.

[1356] Flores ¶ 76; Damages Expert Report 2 ¶¶ 112-14.

[1357] Damages Expert Report 2 ¶ 113.

487. Moreover, Omega Panama showed competitive advantages due to its financial capacity, bonding capacity, and experience in construction works.[1358] The evidence of this is irrefutable, particularly the evidence concerning the company's financial strength and experience. Omega Panama reached the maximum possible financial capacity score in 31 of 35 tenders in which it was evaluated; it achieved the maximum score among participants in 32 of those tenders; and it achieved the maximum score in Experience among participants as well as the maximum possible score in Experience in 26 of the 35 tenders in which it was evaluated.[1359] Respondent has no answer to these facts other than to suggest that none of this matters because the "cost of entry" in Panama is supposedly low given the (irrelevant) fact that incorporation of a company can take only six days.[1360] To articulate this argument is to refute it.

488. Respondent also asserts that Panama could not be expected to expend 8.5 percent of its gross domestic product on public works projects into the future because the Martinelli administration's high expenditures were an "aberration."[1361] It must be noted that Respondent does *not* dispute Compass Lexecon's capex-to-GDP methodology underlying this point, but only the calculation inputs.[1362] Respondent relies on a document entitled, "Panama's Strategic Plan 2015-2019" to suggest that the capex-to-GDP ratio would follow a downward trend during those years.[1363] But Respondent fails to note that the capital expenditure reflected in that document is higher than its

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[1358] *Id.* ¶ 44.

[1359] *Id.* ¶¶ 69, 74; *see also* Burke ¶ 10.

[1360] Resp.'s Counter-Mem. ¶ 349.

[1361] *Id.* ¶ 353.

[1362] Damages Expert Report 2 ¶ 100.

[1363] Flores' Valuation Model (QE-0002), sheet "2 - PEG Panama CAPEX".

own expert's estimates.[1364] And the previous version of this Plan underestimated the actual Government's capital expenditure for the relevant period by [redacted].[1365] This is unsurprising because Governments must show balanced budgets in their planning documents, but then have incentives to extend the budget to maximize social welfare.[1366] Respondent also ignores that general budget trends do not necessarily reflect the investment in small-medium size infrastructure (which was Omega Panama's market).[1367] Compass Lexecon identified at least US$[redacted] billion in bids in which Omega Panama could have participated in 2015 and 2016.[1368] Plus, there is no reason why Omega Panama could not have participated in private sector projects as well.[1369]

489. Respondent also submits that Claimants' gross margin for future projects would be [redacted]% rather than [redacted]%.[1370] But in arriving at this view, Respondent ignores the available and relevant information related to the eight ongoing Projects presented in the job costs reports. Those reports provide (a much higher) a detailed estimation of the gross profit margin that Omega Panama would have made but for Respondent's unlawful conduct.[1371] Moreover, Respondent's projection is biased because it does not take into consideration that Omega Panama's average gross profit margin

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[1364] Damages Expert Report 2 ¶ 102(a); Figures and Tables, sheet "CAPEX", rows 11 and 12 (C-0439; CLEX-33). *See also*, Plan Estratégico de Gobierno 2015-2019 (QE-0027), at 129.

[1365] There is only one Strategic Plan prior to Panama's Strategic Plan 2015-2019. *See* Plan Estratégico de Gobierno 2010-2014 (C-0448; CLEX-42), at 49. *See also,* Figures and Tables, sheet "CAPEX", cell C25 (C-0439; CLEX-33).

[1366] Damages Expert Report 2 ¶ 102(b).

[1367] *Id.* ¶ 104.

[1368] Damages Expert Report 2 ¶ 105.

[1369] *Id.* ¶ 106.

[1370] Resp.'s Counter-Mem. ¶ 354.

[1371] Damages Expert Report 2 ¶ 120.

is affected by its start-up year, which was lower than the average for the 2011-2013 period.[1372] In short, Respondent's second criticism likewise fails.

490. *Third*, Respondent argues that Claimants' discount rate of 11.65 percent is too low and should fall somewhere between 18 and 23 percent.[1373] As set forth in the first report from Compass Lexecon,[1374] the discount rate should be consistent with the cost of equity of a construction company in Panama. It should be calculated as follows: (i) 2.54%, representing a risk-free rate based on the average yield of 10-year Treasury bonds for 2014, should be added to (ii) 7.23%, representing the US-based industry risk, which should be added to (iii) 1.89%, representing the country risk premium based on the average Emerging Markets Bond Index (EMBI) spread for 2014.[1375]

491. To reach its higher discount rate of 18-23%, Respondent uses similar numbers for the first two factors noted above. It uses a risk-free rate of 2.56% (just above Claimants' proposed rate of 2.54%), and it uses an industry risk rate of 7.99% (just above Claimants' proposed rate of 7.23%).[1376] Respondent then adds a country risk premium of 4.52% (much higher than Claimants' rate of 1.89%), and it adds an unnecessary and duplicative "size premium" of 5.78%.[1377] Both of the latter two are incorrect.

492. Starting with the country risk premium, Respondent diverges from the Emerging Markets Bond Index (EMBI) spread for 2014 applied by Claimants and opts for a hybrid approach of

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[1372] *Id.* ¶ 121.

[1373] Resp.'s Counter-Mem. ¶ 355.

[1374] Damages Expert Report 1, ¶¶ 122, 135-36, Table XVIII.

[1375] Damages Expert Report 2 ¶ 19(a)-(c).

[1376] *Id.* Figure II.

[1377] *Id.* ¶ 20 & Figure II.

(i) a 1.5x multiplier factor to the sovereign debt spread and (ii) a country risk rating model.[1378] As Compass Lexecon explains, this is problematic because the sovereign debt spread approach (without the use of any multiplier) is the most widely used measure of country risk premium, and the multiplier should only be used on short-term investments, not on long-term investments.[1379] In addition, the country risk rating model engages a survey methodology which is inherently arbitrary because it is based on the subjective assessment of 100 bankers.[1380]

493. As for the additional risk premium, Respondent's insists that some additional value should be included in the cost of equity because Omega Panama is a small company, it is not publicly traded and thus requires an illiquidity premium, and it is not diversified.[1381] But it is not proper to compare the relative size of Omega Panama vis-à-vis U.S. companies, as that factor is *already* included in the Country Risk Premium (which accounts for the size of Panama's economy, as compared to the U.S. economy).[1382] Further, Compass Lexecon shows that it is not appropriate to consider some type of "illiquidity discount" because Claimants were not under pressure to sell, and Respondent's contrary approach is (once again) inconsistent with the FMV principle.[1383] And the Capital Asset Pricing Model does not reduce discount rates based on asets being diversified (investors do).[1384]

[1378] *Id.* ¶ 25.

[1379] *Id.* ¶ 26.

[1380] *Id.* ¶ 27.

[1381] *Id.* ¶ 28.

[1382] *Id.* ¶ 29(a).

[1383] *Id.* ¶ 29(b).

[1384] *Id.* ¶ 29(c).

494. So to summarize, as demonstrated fully in Compass Lexecon's second report, there is no merit to Respondent's criticisms of Claimants' calculation of losses on future contracts.

3. *Claimants' Proposed Interest Rate is Reasonable and Correct*

495. Claimants propose that the Tribunal apply the same interest rate represented by the cost of equity described above, which is the commercially reasonable rate of 11.65%.[1385] Respondent disagrees and suggests that the Tribunal should apply a risk-free interest rate. Such a rate would not fully compensate the Claimants for their losses.

496. *First*, Respondent contends that pre-award interest should "simply bring an amount owed forward" and "reflect only the time value of money and not any risk."[1386] But the use of a short-term risk-free rate would not fully compensate Claimants for the losses they suffered as a result of Respondent's unlawful measures, since the cost to Claimants of the deprivation of funds imposed by those measures is higher than a risk-free rate; thus, the cost of equity is a reasonable commercial rate for equity funding of Omega Panama's business.[1387]

497. Importantly, as discussed above in Section IX.B.4, Respondent does not contest Claimants' post-award interest rate. And, as explained by Compass Lexecon, there should be no difference between pre-award and post-award interest:

> The financing cost of Omega Panama is represented by the CoE, which is the financing cost economically linked to Claimants' investment, and thus should be applied to all financing considerations, both when they increase the amount of harm suffered by Claimants and when they reduce it. Given that the market-based financing cost of being deprived of US$ 1 for a year is at a minimum commensurate to the financing

[1385] *Id.* ¶ 8.

[1386] Resp.'s Counter-Mem. ¶¶ 358-59.

[1387] Damages Expert Report 2 ¶ 7.

> gain of receiving US$ 1 one year in advance, the same rate should be used to discount and update past and future cash flow deprivations.[1388]

498. *Second*, Respondent insists that a "commercially reasonable rate" is the yield of a six-month or one-year U.S. Treasury bill, because "[a]rbitral awards generally are not exposed to the types of business or commercial risks other financial instruments face."[1389] But as Compass Lexecon explains, "From an economic point of view, the rate that is commercially reasonable for Claimants' investment is the cost of financing its investment, which is an equity stake in a general contractor company operating *in Panama*. No market participant can finance such investment at a cost lower to the CoE, which is the appropriate interest rate in the case at hand."[1390]

499. The cost of equity reflects the financing cost effectively incurred by Claimants for having been deprived of their investment proceeds. Such financial cost, albeit not explicit like it would be in a debt document, is the economic cost of funding the investment which is tied up to the asset until Claimants receive compensation. This theory has been recognized by recent writings of Gotanda and Senechal and Escher,[1391] among others. As a result, a commercially reasonable interest rate applicable to Claimants' investment is one that reflects its financing cost: the cost of equity capital, which Compass Lexecon calculates as 11.65% as of December 23, 2014.[1392]

500. Like its other criticisms, there is no merit to Respondent's criticism of Claimants'

[1388] *Id.* ¶ 14.

[1389] Resp.'s Counter-Mem. ¶ 360.

[1390] Damages Expert Report 2 ¶ 127 (emphasis added).

[1391] *See* Susan Escher & Kurt Krueger, *The Cost of Carry and Prejudgment Interest*, 6(1) LITIGATION ECONOMIC REV. 12 (C-0400; CLEX-21); John Y. Gotanda & Thierry J. Sénéchal, *Interest as Damages*, 47(3) COLUMBIA J. OF TRANSNAT'L L. 491 (C-0401; CLEX-22).

[1392] Damages Expert Report 2 ¶ 129.

proposed interest rate.

* * *

501. In sum, the Tribunal should award damages to Claimants in the amount of US$ 51.22 million as of December 23, 2014,[1393] comprised of US$ [redacted] million of losses associated with existing contracts, and US$ [redacted] million related to the inability to continue as a going concern. Applying a compound commercially reasonable interest rate of 11.65% to the total damages results in at least US$ 83.13 million, plus moral damages as of 15 May 2019.[1394] While the amount of moral damages remains in the Tribunal's discretion, Claimants note that the facts of this case counsel in favor of a large award of at least US$ [redacted] million, as was rendered in the *Al-Kharafi* case.[1395] Claimants reserve the right to amend these amounts as the case progresses, and Compass Lexecon will provide updated damages calculations as necessary.

502. Finally, Claimants must note that—as demonstrated throughout this Reply—the defenses raised in Respondent's Counter-Memorial, and in particular its utterly baseless and unsupported allegations of criminal conduct by Claimants and a lack of sovereign conduct by Respondent, are frivolous at best. That Respondent has forced Claimants—and the Tribunal—to waste valuable resources considering and addressing these frivolous arguments must be subject to some type of economic sanction. As such, Claimants respectfully request that, in addition to an award of damages constituting full reparation, the Tribunal also award Claimants all of their costs and attorneys' fees and order Respondent to pay full costs for these proceedings.

[1393] *Id.* ¶ 125.

[1394] *Id.* ¶¶ 8, 129.

[1395] *See supra* § IX.B.

X. RELIEF REQUESTED

503. Claimants have demonstrated throughout this Reply (as well as in their Memorial) that Respondent's unlawful acts, in breach of the Treaties' requirements, caused catastrophic harm to Claimants and their investment in Panama. For all the reasons set forth above, Claimants respectfully request that the Tribunal grant the following relief:

a. A declaration that Respondent violated the BIT and/or the TPA in respect of Claimants' investment;

b. A declaration that the continued criminal investigations by Respondent's prosecutors against Omega and Mr. Rivera are a violation of the BIT and the TPA;

c. Remedies in the form of:

(i) Compensation to Claimants for all damages and losses they sustained associated with losses related to existing Contracts and Claimants inability to continue as a going concern, in the amount of *at least* **US$ 83.13 million**, which includes pre-award interest to 15 May 2019; and,

(ii) Compensation for moral damages suffered by Claimants, in the amount of *at least* **US$ [redacted] million**.

d. All costs and expenses of these proceedings, including attorneys' fees and expenses;

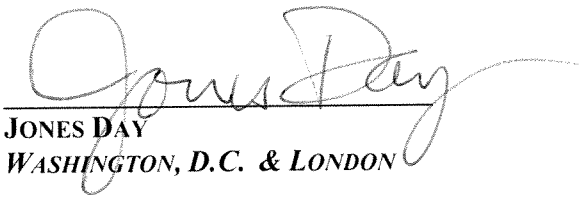
e. Pre-award and post-award compound interest for all damages and losses they sustained, at a commercially reasonable rate of *at least* **11.65%** compounded annually until the date of Respondent's full and final satisfaction of the award; and

f. Such other relief as the Arbitral Tribunal may deem appropriate in the circumstances.

504. Claimants expressly reserve the right to amend their request for relief during the course of this proceeding in any manner they deem appropriate, including seeking relief on additional

grounds.[1396] Moreover, as the damages caused by Respondent's wrongful conduct will continue to accrue throughout the course of this proceeding, Claimants expressly reserve the right to update their damages claims and calculations accordingly.

Respectfully submitted,



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[1396] Because there are, and may continue to be, third-party claims against Claimants arising out of the Government's unlawful conduct, Claimants expressly reserve the right to amend their damages claims to include any such losses that may arise from said third-party claims.