

UNDER THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES AND THE INSTITUTION RULES AND ARBITRATION RULES OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

AND

THE TRADE PROMOTION AGREEMENT BETWEEN THE REPUBLIC OF PANAMA AND THE UNITED STATES OF AMERICA DATED 31 OCTOBER 2012

ICSID Case No. ARB/20/31

Regarding a dispute between

(1) IBT GROUP, LLC,

(2) IBT, LLC,

Claimants,

-and-

The Republic of Panama

Respondent.

REQUEST FOR PROVISIONAL MEASURES

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I. INTRODUCTION

1. Claimants IBT Group, LLC (“**IBT Group**”), and IBT, LLC (“**IBT LLC**”, and collectively the “**Claimants**” or “**IBT**”) submit this Request for Provisional Measures (the “**Request**”) to the Secretary-General of the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) pursuant to Article 47 of the ICSID Convention (the “**Convention**”) and Rule 39 of the ICSID Arbitration Rules (the “**ICSID Rules**”).
2. As set out further in the Claimants’ Amended Request for Arbitration dated 11 August 2020 (the “**Request for Arbitration**”), IBT Group, LLC and IBT, LLC formed the CEFERE Consortium (the “**CEFERE Consortium**”) to bid on and, after awarding, execute Contract No. 11-DAJTL-2017 (the “**Contract**”) for the design and construction of a Women’s Rehabilitation Center (the “**Rehabilitation Center**”) in Panama. As explained further below, upon being awarded the project and entering into the Contract, the CEFERE Consortium executed a performance guaranty and an endorsed extension to guarantee compliance with the Contract by the CEFERE Consortium.
3. After significant unjustified delays on the part of Panama, however, and despite the Claimants’ best efforts to complete construction of the Rehabilitation Center, Panama improperly moved to administratively resolve the Contract in January 2020.
4. Along with its notice of termination in January 2020, Panama included a notice of execution of the performance guaranty and disqualified the CEFERE Consortium and its members from continuing to execute contracts with Panama for a period of three years.
5. Although the Claimants attempted to appeal the illegal termination of the Contract, however, a Panamanian administrative court, under false pretenses as explained below, upheld the termination of the Contract and ratified the execution of the guaranty and the disqualification of the CEFERE Consortium and its members. Other legal remedies that the Claimants have attempted under Panamanian law have been denied and/or delayed.

6. The Claimants seek these provisional measures in order to maintain the *status quo* and avoid aggravating the dispute between the parties and causing Claimants further harm. This is in accord with the purposes of Article 47 of the ICSID Convention and Article 39 of the ICSID Arbitration Rules. Further, Respondent will suffer no prejudice if the requested provisional measures are granted, as whatever rights it may have pursuant to the performance bond and to prohibit IBT from contracting with Panama would not be affected. Claimants, however, continue to suffer serious damage due to the execution of the performance guaranty and the disqualification to which they have been unjustly subjected.
7. For the reasons set out below, the Claimants respectfully request that the Tribunal:
- a) Order the Respondent to immediately suspend all efforts to execute on the performance guaranty, either by subrogation to the contractor or collection thereof, while consideration of the present Request is pending; and
 - b) Issue an order directing the Respondent to refrain, until a final award is rendered in the present arbitration proceeding, from continuing with enforcement of any guaranties issued by the CEFERE Consortium, including the performance guaranty, either by subrogation to the contractor or collection thereof, until a final award is made in these arbitration proceedings; and
 - c) Order the Respondent to formally suspend its order disqualifying IBT from contracting in Panama for the pendency of this arbitration in exchange for an agreement from the Claimants to not tender on further contracts with Panama for the same period.¹

¹ Although Rule 39 says, in the English text, that a tribunal may "recommend" provisional measures, tribunals have recognized since the tribunal's decision on provisional measures in *Maffezini v. Spain* that a tribunal's authority to rule on provisional measures is "no less binding than that of a final award" and thus that "the word 'recommend' [is] of equivalent value to the word 'order'." See *Maffezini v. Spain*,

II. BACKGROUND OF THE REQUEST

8. On 11 May 2017, the CEFERE Consortium and the Ministry of Government (“**Mingob**”) signed Contract No. 11-DAJTL-2017 for the execution of the Study, Design, Construction, and Equipment of the New Women’s Rehabilitation Center in Pacora, Panama.

A. The CEFERE Consortium Acquired a Performance Guaranty

9. Pursuant to the Contract, on that same day the CEFERE Consortium acquired a performance guaranty (*Fianza de Cumplimiento*) from the Compañía Internacional de Seguros S.A. in the amount of B/. 13,813,012.20 (the “**Bond**”).² By its terms, the Bond was valid for the original term of the Contract (until January 2019), plus one year in the event of a need to correct defects.
10. In the event of a breach, the Bond provided that the covered State entities – Mingob and the Comptroller General – should notify the CEFERE Consortium and the insurance company “*dentro de los treinta (30) días hábiles siguientes a la fecha en que tuvo conocimiento de alguna de las causales que puedan dar lugar a la resolución administrativa del contrato o que se haya dado inicio a las diligencias de investigación para el mismo fin, lo que ocurra primero.*”³
11. Consequently, it was incumbent on Mingob, in the event that it opted to administratively terminate the Contract, to notify the Compañía Internacional de Seguros within 30 days from the time that a cause for administrative resolution of the Contract arose.

ICSID Case No. ARB/97/7, Decision on Provisional Measures (Procedural Order No. 2), 28 October 1999, ¶ 9 (**Anexo 1**).

2 See Fianza de Cumplimiento, Policy No. 070-001-000016556-000000, issued to Consorcio Cefere Panama and confirmed by IBT, LLC and IBT Group, LLC (the “**Bond**”) (**Anexo 2**). This is the equivalent of USD 13,813,012.20. The Panamanian Balboa is tied to the U.S. Dollar.

3 *Id.*

12. The policy further provided that in the event of any extensions, additions, or modifications in the Contract, Mingob should notify the insurance company, which should manifest its consent by issuing a corresponding endorsement.⁴
13. As detailed in the Request for Arbitration, unjustified delays solely attributable to Mingob commencing at the very beginning of the project forced the CEFERE Consortium to request an extension of time to complete construction of the Rehabilitation Center on 6 June 2018, about eight months before it was otherwise scheduled to be completed. Shortly thereafter, on 10 August 2018, before the original term of the Contract expired, the Office of the Comptroller General arbitrarily and anticipatorily recommended that Mingob execute on the Bond.
14. On 4 February 2019, the CEFERE Consortium renewed its request for an extension, which Mingob granted on 28 February 2019. Pursuant to Addendum 1 to the Contract, the time for completion was extended to 8 February 2020.⁵
15. While negotiations with Mingob for the extension of the Contract were ongoing, the CEFERE Consortium twice reached out to Compania Internacional de Seguros to extend the validity of the Bond. The first endorsement was signed on 17 January 2019, when the Bond would have otherwise expired, and extended its validity until 7 May 2019 (the "**First Endorsement**").⁶
16. On 19 February 2019, after it renewed its extension request, the CEFERE Consortium wrote to Compania Internacional de Seguros, S.A. to endorse the Bond and extend it through 8 February 2020 (the "**Second Endorsement**").⁷
17. The Second Endorsement came into force after Addendum No. 1 of the Contract extended the term of the Contract until 8 February 2020. As a

4 *Id.*

5 See Contract No. 11-DAJTL-2017 dated 11 May 2017, Addendum 1, endorsed by the Comptroller General 27 February 2019, Exhibit CE-4 to the Request for Arbitration.

6 See First Endorsement, dated 17 January 2019 (**Anexo 3**).

7 See Second Endorsement, dated 15 February 2019 (**Anexo 4**). Note that the document is styled as a Replacement of the First Endorsement.

consequence the Second Endorsement extended the Bond through 8 February 2020 and named as its beneficiaries Mingob and the Comptroller General.

B. MINGOB Administratively Terminated the Contract

18. On 16 January 2020, Mingob issued Resolution No. 011-R-006 (the “**Termination Resolution**”), which administratively terminated the Contract, disqualified the CEFERE Consortium and its members from contracting in Panama for a period of three years, and ordered, among other things, that the Compañía Internacional de Seguros, S.A. be notified of the effect of the Termination Resolution in order to execute on the Bond.⁸
19. The Termination Resolution, however, referred only to the First Endorsement of the Bond that expired on 7 May 2019, more than eight months before the issuance of the Termination Resolution. The First Endorsement never entered into force and was returned to the insurance company.
20. In the Termination Resolution, which administratively terminated the Contract, Mingob relied, in part, on an argument that the Bond had expired. It did not, however, mention the Second Endorsement of the Bond, which did extend the date of validity of the Bond.

C. The Appeal before the TACP

21. On 27 January 2020, the CEFERE Consortium announced in writing its intent to appeal the administrative resolution of the Contract, and timely filed its appeal on 28 January 2020 before the Tribunal Administrativo de Contrataciones Públicas (“**TACP**”).
22. After an expeditious, suspicious and unusual appeal process, during a recently decreed State of Emergency due to COVID-19, the TACP issued its decision on 7 April 2020 via Resolution No. 074-2020-Pleno/TACP, confirming the administrative resolution of the Contract issued by Mingob through the Termination Resolution.

8 See Resolution No. 011-R-006 (**Anexo 5**).

23. In its decision, the TACP specifically noted that the Bond had been extended by adding, "*but this was only valid until 7 May 2019.*" The TACP continued:

*Mal puede este Tribunal entrar a ponderar si la actuación del MINISTERIO DE GOBIERNO conlleva a un feliz término del contrato, cuando el contratista **ha fallado en aportar en debida forma el endoso de la fianza**, enarbolando con ello su propio desinterés en cumplir con los términos del Contrato de Obra No. 11-DAJTL-2017 de 11 de mayo de 2017.*⁹ (emphasis added)

Thus, one of the grounds on which the TACP confirmed the termination of the Contract was the incorrect determination that the Bond had expired, as both Mingob and the TACP completely ignored the Second Endorsement in their respective decisions.

24. The TACP also expressly upheld the disqualification of the CEFERE Consortium and its member companies, "*de conformidad a la parte motiva de la presente decision administrativa.*"¹⁰ That disqualification went into effect following the TACP decision and has been published on PanamaCompra.¹¹
25. As a result, not only the CEFERE Consortium but also its two member companies, IBT Group, LLC and IBT, LLC, are disqualified from entering into new contracts with Panama for a period of three years. That information will remain publicly available on PanamaCompra for the same period of time and is accessible to any public entity seeking information on IBT Group as a potential contracting partner. This negatively affects the Claimants as state entities typically require that potential contractors disclose the existence of any such disqualification by another country.

D. MINGOB's Attempts to Execute the Bond

26. On 17 July 2020, Mingob sent Compania Internacional de Seguros, S.A. note No. OAL-MG-001053-20 (dated 10 July 2020), presenting a claim on the Bond

9 TACP Decision dated 7 April 2020, Exhibit CLA-2 to the Request for Arbitration.

10 *Id.*

11 Screenshot from PanamaCompra (**Anexo 6**).

- and the First Endorsement.¹² The note also made no mention of the Second Endorsement, which extended the Bond through 8 February 2020.
27. To justify the execution of the First Endorsement, Mingob presented a ridiculous argument claiming that an Endorsement does not expire until the Contract works are completed. In other words, according to Mingob, when a contract is administratively terminated and the contractor cannot complete the work, the bond (and any endorsement) is automatically extended indefinitely, regardless of its expiration date.
28. Given the absurdity and unsustainability of the argument described in the previous paragraph, on 22 July 2020, Mingob sent Compania Internacional de Seguros, S.A. Note No. MG-OAL-2004-2020, clarifying its 10 July claim to acknowledge the Second Endorsement and the extension of the Bond through 8 February 2020.¹³
29. In any event, and regardless of Mingob's acknowledgement that the Bond was in place until 8 February 2020, the Bond, including the extension created by the Second Endorsement, expired several months before Mingob formally attempted to execute on it in July 2020. In addition, Mingob failed to follow the procedure set out in the policy by not notifying Compania Internacional de Seguros of the administrative resolution of the Contract within 30 days of the TACP confirming the Termination Resolution on 7 April 2020; consequently, Mingob was required to notify the insurance company by 7 May 2020. It was not permitted to wait until July as it did.
30. Any execution of the Bond would irreparably harm not only the CEFERE Consortium, but also its member companies. If Panama is successful in executing the Bond, the resulting execution would cause irreversible harm to both IBT Group's reputation and its future ability to obtain guaranties. The execution of more than USD 13 million would raise IBT Group's future interest rates and make it much harder for IBT to obtain and/or secure future

12 See Note No. OAL-MG-001053-20, dated 10 July 2020 (Anexo 7).

13 See Note No. MG-OAL-2004-2020 dated 22 July 2020 (Anexo 8).

construction and infrastructure projects, not only in Panama, but in many other parts of the world where CEFERE Consortium member companies operate.

E. THE CEFERE Consortium has been Forced to Take Legal Action

31. To date, Mingob continues to attempt to execute on the Bond. In order to prevent the execution of the Bond and given the urgency of the case, and given that the TACP ruling was issued during a period of National Emergency, the CEFERE Consortium filed an action for appeal on Constitutional Guarantees (*amparo*) on 21 April 2020 against the TACP order that confirmed the administrative resolution of the Contract. That Appeal was summarily rejected by the Plenary of the Supreme Court of Justice in a ruling dated 2 June 2020.
32. In addition, again with the purpose of preventing the execution of the Bond, the Claimants submitted an appeal, styled as a contentious administrative process of plenary jurisdiction, including a request for suspension of the disqualification, to the Third Chamber of the Supreme Court of Justice on 5 June 2020, by CEFERE Consortium against the TACP administrative resolution and act of confirmation. The CEFERE Consortium also presented a second action of appeal (a second *amparo*) before the Plenary of the Supreme Court for the protection of its Constitutional Guarantees against Mingob's attempt to execute the Bond on 5 August 2020.¹⁴
33. The Claimants are prepared, however, to stay the two pending actions (the contentious administrative process and the second *amparo*) and the request for provisional suspension submitted in conjunction with the contentious-administrative process of plenary jurisdiction once this Tribunal is constituted and rules on the present Request. In conformity with the TPA, the Claimants will withdraw any request in the pending proceedings not seeking provisional measures.

14 The TPA, Article 10.18(3) expressly allows a claimant to "initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration."

III. CLAIMANTS ARE ENTITLED TO PROVISIONAL MEASURES

A. The Tribunal is Competent to Grant Provisional Measures

34. The Claimants commenced this arbitration under the auspices of the ICSID Convention and the ICSID Rules, and pursuant to Article 10.16(3)(a) of the TPA. The arbitration was registered by ICSID on 26 August 2020.
35. Article 47 of the ICSID Convention empowers a Tribunal to "*recommend any provisional measures which should be taken to preserve the respective rights of either party.*" ICSID Rule 39 likewise empowers the Tribunal to recommend provisional measures at the request of a party, and, pursuant to Rule 39(2), "*[t]he Tribunal shall give priority to the consideration of a request made.*"
36. Moreover, Article 10.20(8) of the TPA expressly authorizes the Tribunal to "*order an interim measure of protection to preserve the rights of a disputing party.*"¹⁵
37. Neither the ICSID Convention nor the TPA defines provisional or interim measures. It is evident from the drafting of the ICSID Convention, however, that preservation of the *status quo* was one of the original purposes for which provisional measures were contemplated.¹⁶

B. The Request Complies with the Requirements for Provisional Measures

38. The present Request complies with all requirements for provisional measures under the ICSID Convention. The Claimants have already demonstrated, in their Request for Arbitration, that the Tribunal has *prima facie* jurisdiction over the dispute between the Parties. In addition, the Request is reasonably related to the dispute at issue in the arbitration, and the Claimants' need is necessary and urgent.

15 TPA, Art. 10.20(8), Exhibit CLA-1 to the Request for Arbitration.

16 See C. Schreuer, *The ICSID Convention: A Commentary* (2009), Article 47, pp. 778-79 ¶¶ 73-74 (**Anexo 9**).

1. The Tribunal has *Prima Facie* Jurisdiction to Hear the Parties' Dispute

39. It is an accepted pre-requisite of a recommendation for provisional measures that the Tribunal possess *prima facie* jurisdiction over the Parties' dispute. As the tribunal noted in *Millicom International v. Senegal*, the *prima facie* finding of jurisdiction is necessary to balance the need for urgent interim relief with the interest in non-frivolous litigation:

the mere fact that a party contests the jurisdiction of an arbitral tribunal to which the case is referred is insufficient to deprive that tribunal of the jurisdiction to order provisional measures. If the contrary were to be accepted, it would be easy for a party to raise any jurisdictional objection in order to deprive in practice a large part of the institution's competence...

That said, on the other hand, it is not enough for one party to bring proceedings to establish the jurisdiction of the Arbitral Tribunal before which an application for provisional measures has been brought. The solution would be every bit as indefensible.

*In order to take account of these conflicting interests, it is accepted practice for the Arbitral Tribunal to find that it holds at least *prima facie* jurisdiction to rule on the merits. This implies that the Arbitral Tribunal cannot and must not examine in depth the claims and arguments submitted on the merits of the case; it must confine itself to an initial analysis, i.e. "at first sight".¹⁷*

40. The need for a showing of only *prima facie* jurisdiction is also supported by the case law of the International Court of Justice, from whose statute Article 47 of the ICSID Convention is derived.¹⁸ As the International Court of Justice found in the *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*:

*[I]n dealing with a request for provisional measures the Court need not finally satisfy itself that it has jurisdiction on the merits of the case but will not indicate such measures unless there is, *prima**

17 *Millicom International Operations B.V. and Sentel GSM S.A. v. Republic of Senegal*, ICSID Case No. ARB/08/20, Decision on the Application of Provisional Measures, 9 December 2009, ¶ 42 (**Anexo 10**).

18 See C. Schreuer, *The ICSID Convention: A Commentary* (2009), Article 47, pp. 758-59 ¶ 1 (**Anexo 9**).

*facie, a basis on which the jurisdiction of the Court might be established.*¹⁹

41. As set out in the Request for Arbitration, the Tribunal has at minimum *prima facie* jurisdiction over the dispute between the Parties. First, Panama is a Party to the TPA²⁰ and the Claimants are companies constituted in the United States, which is also a Party to the TPA.²¹ Further, the Claimants have investments in Panama, which consist of (i) an enterprise formed in Panama; (ii) a construction and management contract signed with Panama; (iii) licenses, authorizations, permits and other rights; and (iv) movable and immovable property and related property rights.²² The dispute between the Parties arises directly out of those investments.²³ In addition, the Request meets all of the jurisdictional requirements of the ICSID Convention.²⁴
42. The Claimants take note of the Respondent's letter to the ICSID Secretariat dated 4 September 2020 and the accompanying email dated 7 September 2020, in which Panama *inter alia* contends that notice of the dispute was deficient and notes that it "*reserva plenamente sus derechos en virtud de los diversos Tratados invocados, del Derecho Internacional y cualquier norma*

19 *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Order, 23 January 2007, ¶ 24 (**Anexo 11**). Notably, the fact that a case may present novel issues of jurisdiction or admissibility does not preclude a court or tribunal from finding that it has *prima facie* jurisdiction and ordering provisional measures. In its most recent decision ordering provisional measures, the ICJ found that it had *prima facie* jurisdiction despite the fact that the applicant's claim depended on a novel theory of standing – that a state party to the Genocide Convention may invoke alleged breaches of the convention even if it is not "specially affected" by them. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order, 23 January 2020, ¶¶ 39-42 (**Anexo 12**).

20 See Request for Arbitration, ¶¶ 60-61.

21 *Id.* ¶¶ 62-63.

22 *Id.* ¶¶ 64-65.

23 *Id.* ¶ 66.

24 *Id.* ¶¶ 72-77. Finally, the Claimants note that the Contract contains no dispute resolution clause, so there is no question of conflicting jurisdiction with respect to their umbrella clause claims and their claims under the Investment Authorization and Investment Agreement provisions of the TPA – even assuming *arguendo* that the presence of a dispute resolution clause would bear on the Tribunal's jurisdiction over these claims.

aplicable en relación con este asunto, incluidos entre otros, su derecho a objetar la jurisdicción arbitral y/o la admisibilidad de sus reclamaciones."

43. However, an objection to jurisdiction or admissibility – let alone a reservation of rights to object to jurisdiction or admissibility – does not preclude a tribunal from considering a motion for provisional measures. As Professor Schreuer explains, "[g]iving priority to a request for provisional measures means that it has to take precedence over any other issues pending before the tribunal. Where a party has raised jurisdictional objections, the tribunal may have to decide on provisional measures before having ruled on its own jurisdiction."²⁵ As the tribunal in *Pey Casado v. Chile I* explained, the argument that a tribunal whose jurisdiction is contested could not rule on provisional measures

*cannot seriously be sustained; it is not only contrary to the applicable texts, but also to the common sense consideration that such a thesis would deprive of all effectiveness and usefulness the institution of provisional measures, the necessity of which in both domestic and international matters is universally recognized.*²⁶

2. The Standard Applicable to Provisional Measures

44. Pursuant to Article 47 of the ICSID Convention and Article 39 of the ICSID Rules, "[t]he circumstances under which provisional measures are required...are those in which the measures are necessary to preserve a party's rights and that need is urgent."²⁷ Provisional measures are considered necessary "where the actions of a party 'are capable of causing or of threatening irreparable prejudice to the rights invoked'" and urgent "where

25 C. Schreuer, *The ICSID Convention: A Commentary* (2009), Article 47, p. 771 ¶ 46 (Anexo 9).

26 *Victor Pey Casado and President Allende Foundation v. Republic of Chile I*, ICSID Case No. ARB/98/2, Decision on Provisional Measures, 25 September 2001, ¶ 6 (Anexo 13) ("No podría sustentarse este argumento seriamente; éste no sólo se contrapone a los textos escritos aplicables, sino también a la consideración de sentido común de que tal tesis despojaría de toda eficacia a la institución jurídica de las medidas provisionales, cuya necesidad ha sido universalmente reconocida en el derecho interno e internacional.")

27 *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 3, 18 January 2005, ¶ 8 (Anexo 14).

'action prejudicial to the rights of either party is likely to be taken before such final decision is taken.'"²⁸

45. In other words, according to the tribunal in *Perenco v. Ecuador*, "[p]rovisional measures will be granted if necessary, at the time of the decision, to preserve the effectiveness and integrity of the proceedings and avoid severe aggravation of the dispute."²⁹
46. In addition, some ICSID tribunals have recognized a third requirement, that the measure requested be intended to "*preserve the rights the protection of which has been sought*" in the arbitration.³⁰ The tribunal in *Quiborax v. Bolivia* explained that "*the rights to be preserved by provisional measures are not limited to those which form the subject matter of the dispute, but may extend to procedural rights, including the general right to the preservation of the status quo and to the non-aggravation of the dispute.*"³¹
47. Citing to the decision in *Plama v. Bulgaria*, the *Quiborax* tribunal agreed that:

*The rights to be preserved must relate to the requesting party's ability to have its claims and requests for relief in the arbitration fairly considered and decided by the arbitral tribunal and for any arbitral decision which grants to the Claimant the relief it seeks to be effective and able to be carried out. Thus the rights to be preserved by provisional measures are circumscribed by the requesting party's claims and requests for relief. They may be general rights, such as the rights to due process or the right not to have the dispute aggravated, but those general rights must be related to the specific disputes in arbitration, which, in turn, are defined by the Claimant's claims and requests for relief to date.*³²

28 *Id.*

29 *Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009, ¶ 43 (**Anexo 15**).

30 *See Millicom International Operations B.V. and Sentel GSM S.A. v. Republic of Senegal*, ICSID Case No. ARB/08/20, Decision on the Application of Provisional Measures, 9 December 2009, ¶ 44 (**Anexo 10**).

31 *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 117 (**Anexo 16**).

32 *Id.* ¶ 118 (citing *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No.

48. As set out further below, the Claimants' requested measures are related to the disputes in arbitration, and the measures are necessary and urgent to avoid severe aggravation of the dispute.

C. The Tribunal Should Prevent the Aggravation of the Dispute

1. The Requested Measures would Preserve Claimants' Rights and Protect their Business

49. As Professor Schreuer notes, "[t]he purpose of provisional measures is to induce behaviour by the parties that is conducive to a successful outcome of the proceedings such as...preserving the parties' rights...and generally keeping the peace."³³ The requested measures would protect (i) the Claimants' right to preservation of the *status quo* and non-aggravation of the dispute, (ii) the Claimants' ability to operate their business in Latin America; (iii) the procedural integrity of the arbitration proceedings, and (iv) the right to exclusivity of the ICSID proceedings in accordance with Article 26 of the ICSID Convention, which provides:

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.

50. As a necessary and legally required part of the process of establishing their investment in the CEFERE Consortium in Panama, the Claimants obtained the Bond to guarantee their compliance with the contract to build the Rehabilitation Center. When the Contract was extended, the Claimants renewed the Bond to ensure its availability through the end date of the Contract.
51. Nevertheless, Mingob administratively terminated the Contract illegally, based in part on its misrepresentation of the validity of the Bond. That misrepresentation was perpetuated by the TACP, which based its decision that the Contract was properly terminated due particularly to the Claimants' supposed failure to properly renew or extend the Bond. As set out in the

ARB/03/24, Order, 6 September 2005, ¶ 40).

33 C. Schreuer, *The ICSID Convention: A Commentary* (2009), Article 47, p. 759 ¶ 2 (Anexo 9).

Request for Arbitration, the TACP's decision, followed by the Supreme Court's summary dismissal on the merits of the appeal of guarantees presented by the Claimants, and the unjustified delay in processing both the request for suspension filed with the Third Chamber of the Supreme Court and the second Guarantee Appeal constitute a denial of justice.

52. The disqualification of the Claimants from public contracting, which was already published in the PanamaCompra portal, together with the Respondent's now **persistent attempts to execute on the Bond** serve only to further aggravate the dispute between the Parties. That aggravation – essentially allowing the Respondent to unilaterally engage in biased and self-help measures at the local level – threatens the integrity and exclusivity of the present arbitration. Article 47 of the ICSID Convention authorizes provisional measures to prohibit "*any action that...entails either having either party take justice into their own hands.*"³⁴
53. As noted above, the Claimants have already been forced to file two appeals for constitutional guarantees (*amparos*) before the Plenary of the Supreme Court of Justice and a request for suspension before the Third Chamber of the Supreme Court of Justice of Panama to suspend the disqualification and the process of execution of the Bond. If Panama continues with the execution of the Bond, the Respondent could receive more than USD 13.8 million from the Claimants' assets without any ruling from the Tribunal on the merits of the dispute.
54. Indeed, **if the Respondent avails itself of the amount of the Bond, the collection of that amount would constitute an "other remedy" for purposes of Article 26 of the ICSID Convention.** The Respondent would obtain the benefit of funds which it should have access to only in the event of Claimants' failure to perform under the Contract, a matter in dispute before this Tribunal, before the Tribunal renders a decision on whether the Claimants in fact failed to perform. As the

34 *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) I*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007, ¶ 55 (**Anexo 17**).

tribunal noted in *Tokios Tokelés v. Ukraine*, Article 26 of the ICSID Convention preserves the exclusivity of arbitral proceedings "to the exclusion of any other remedy, whether domestic or international, judicial or administrative."³⁵

55. The Claimants' requested measures do not require the Tribunal to pre-judge any aspect of the dispute before it. To the contrary, preventing the Respondent from executing on the Bond and ordering the suspension of the disqualification of the CEFERE Consortium and its member companies ensures that no aspect of the dispute, including most notably the Claimants' Denial of Justice claim, is pre-judged, either for or against the Claimants.
56. Allowing the disqualification to remain in effect for the pendency of the arbitration assumes that the administrative termination of the Contract was properly carried out, as the publication of the disqualification on PanamaCompra followed only after the TACP issued its ruling. Recognizing, however, that ordering the suspension of the effect of a court ruling in Panama alters the *status quo* as of the filing of this arbitration, when the disqualification was in effect, the Claimants are prepared to agree that they will, for the pendency of the arbitration (*i.e.* for the same period of time that the suspension of the disqualification is in effect), refrain from participating in any tenders for public contracts in Panama. As a consequence, the *status quo* in fact will not be altered in Panama, and there will be no aggravation of the dispute by virtue of the existence of an official suspension evidenced in PanamaCompra.
57. Nevertheless, the disqualification would affect the capacity of the Claimants to invest and develop public works in other countries. Therefore, suspending it is the only way to avoid further damages while the merits of the dispute are being decided.

35 *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 3, 18 January 2005, ¶ 7 (Anexo 14).

2. The Requested Measures are Necessary

58. Absent an order suspending the effect of the disqualification of the CEFERE Consortium and its member companies and prohibiting Panama from calling on the Bond by means of collection or subrogation, the Claimants face a very real risk that they will have to pay the amount of the Bond to Mingob and of seeing their ability to conduct their business throughout Latin America (the construction of public works) negatively affected.
59. Both the disqualification and Mingob's efforts to obtain the guaranty are already affecting the Claimants: Mingob has contacted Compania Internacional de Seguros to execute the Bond, and the disqualification was publicized on PanamaCompra.

a) The Measures to Halt Execution of the Bond are Necessary

60. The tribunal in *Saipem v. Bangladesh* was similarly tasked with considering whether provisional measures were appropriate to halt litigation in Bangladesh to collect on a warranty bond. Saipem had executed the warranty bond in exchange for the return of half of the funds retained from each progress payment by Petrobangla, its Bangladeshi contract partner, following completion of the project. The warranty bond was issued by an Italian bank. Given the "risk that [Saipem] may be required to pay to the Italian bank the amount that the Bangladeshi bank may have to pay to Petrobangla," the tribunal found that there was both necessity and urgency in granting the requested measures.³⁶
61. An award of damages would be insufficient to compensate the Claimants for the harm of allowing the Respondent to execute the Bond and disqualify them from executing public contracts in Panama.³⁷ First, it is evident that the

36 *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 March 2007, ¶¶ 181-82 (Anexo 18).

37 As the *Perenco* tribunal recognized, Article 47 "does not lay down a test of irreparable loss and the authorities do not warrant so narrow a construction." Nevertheless, "[w]here action by one party may cause loss to the other which may not be capable of

ongoing dispute over the Bond has become a matter of public interest in Panama.³⁸ The Claimants thus face reputational harms that cannot be compensated with a monetary award alone. Second, the Respondent's engagement in self-help remedies is a direct and uncompensable threat to the integrity of the arbitration proceedings.

62. Panama's ongoing attempts to execute the Bond through collection and/or subrogation of the contractor, and the disqualification against contracting assessed on the CEFERE Consortium upset the *status quo* between the Parties and threatens the exclusivity and integrity of the arbitration proceedings. Allowing the Respondent resort to a domestic remedy that is only available to it due to the actions complained of in this arbitration undercuts the exclusivity of the remedy afforded by this Tribunal and threatens the Claimants' financial ability to proceed with the arbitration. That prejudice to these arbitral proceedings is irreparable.

b) Suspension of the Disqualification is Necessary

63. An award of damages would never be sufficient to compensate for the reputational harms that face the CEFERE Consortium and its member companies as a result of the disqualification. As explained above, the publication of the disqualification on PanamaCompra and the requirement of disclosure of any such measures pose serious and very current threats to IBT's reputation and ability to enter into new public contracts throughout Latin America.

3. The Claimants are Entitled to Urgent Relief

64. The tribunal in *Azurix v. Argentina* explained that, although Article 47 of the ICSID Convention does not specify the degree of urgency necessary to grant

being made good by an eventual award of damages, the test in the Article is likely to be met." See *Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009, ¶ 43 (Anexo 15).

38 See, e.g., *IBT Group recurre a la Corte Suprema por caso de carcel de mujeres*, La Prensa, 17 August 2020 (Anexo 19).

provisional measures, "*urgency is related to the imminent possibility that the rights of a party be prejudiced before the tribunal has rendered its award.*"³⁹ ICSID tribunals have widely accepted that if the requested measure relates to the integrity of the proceedings or to the non-aggravation of the dispute, it is always urgent.⁴⁰

65. It is evident that the Respondent's efforts to execute the Bond through collection and/or contractor subrogation, can be completed before the resolution of the arbitration at hand, causing irreparable harm to the Claimants. The disqualification of the Claimants is already having effects. Any action by Panama in furtherance to the TACP order the Claimants have complained of before this Tribunal would constitute an aggravation of the Parties' dispute.
66. Absent an order from the Tribunal directing Respondent to refrain from executing on the Bond and suspending the effect of the disqualification, nothing would prevent Panama from collecting the full Bond amount – over USD 13 million – before the Tribunal's final award is rendered. This would cause very serious damage by making it impossible for the CEFERE Consortium to continue to contract with Panama, thus detracting from the value of its investment.

IV. APPLICATION FOR THE SECRETARY-GENERAL TO FIX TIME LIMITS FOR OBSERVATIONS ON THE REQUEST

67. Pursuant to ICSID Arbitration Rule 39(5):

If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present

39 C. Schreuer, *The ICSID Convention: A Commentary* (2009), Article 47, p. 776, ¶ 66 (citing *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Decision on Provisional Measures, 6 August 2003, ¶ 33) (**Anexo 9**).

40 See *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 153 (**Anexo 16**); *Valle Verde Sociedad Financiera S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/18, Decision on Provisional Measures, 25 January 2016, ¶ 86, n. 39 (**Anexo 20**).

observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.

68. The Claimants hereby respectfully request that, as a Tribunal is not yet constituted in the above-captioned proceedings, the Secretary-General fix time limits for both Parties to present observations on the Request.

V. PROVISIONAL MEASURES REQUESTED

69. For these reasons, the Claimants respectfully request that the Tribunal:
- a) Order the Respondent to immediately suspend all efforts to execute the Bond through collection or contractor subrogation while consideration of the present Request is pending; and
 - b) Issue an order directing the Respondent to refrain, until a final award is rendered in the present proceeding, from continuing with enforcement of any guaranties issued by the CEFERE Consortium, including the Bond.
 - c) order the Respondent to formally suspend its order disqualifying IBT from contracting in Panama for the pendency of this arbitration in exchange for an agreement from the Claimants to not tender on further new contracts in Panama for the same period.

Respectfully submitted,



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Appendix 1: List of Fact Exhibits

Exhibit No.	Date	Document Description
Anexo 2	10 May 2017	Fianza de Cumplimiento, Policy No. 070-001-000016556-000000, issued to Consorcio Cefere Panama and confirmed by IBT, LLC and IBT Group, LLC
Anexo 3	17 January 2019	First Endorsement
Anexo 4	15 February 2019	Second Endorsement, styled as a Replacement of the First Endorsement
Anexo 5	16 January 2020	Resolution No. 011-R-006
Anexo 6	19 October 2020	Screenshot from PanamaCompra
Anexo 7	10 July 2020	Note No. OAL-MG-001053-20
Anexo 8	22 July 2020	Note No. MG-OAL-2004-2020
Anexo 19	17 August 2020	<i>IBT Group recurre a la Corte Suprema por caso de carcel de mujeres</i> , La Prensa, 17 August 2020

Appendix 2: List of Legal Authorities

Exhibit No.	Date	Document Description
Anexo 1	28 October 1999	<i>Maffezini v. Spain</i> , ICSID Case No. ARB/97/7, Decision on Provisional Measures (Procedural Order No. 2), 28 October 1999
Anexo 9	2009	C. Schreuer, <i>The ICSID Convention: A Commentary</i> (2009), Article 47
Anexo 10	9 December 2009	<i>Millicom International Operations B.V. and Sentel GSM S.A. v. Republic of Senegal</i> , ICSID Case No. ARB/08/20, Decision on the Application of Provisional Measures, 9 December 2009
Anexo 11	23 January 2007	<i>Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)</i> , Order, 23 January 2007
Anexo 12	23 January 2020	<i>Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)</i> , Order, 23 January 2020
Anexo 13	25 September 2001	<i>Victor Pey Casado and President Allende Foundation v. Republic of Chile I</i> , ICSID Case No. ARB/98/2, Decision on Provisional Measures, 25 September 2001
Anexo 14	18 January 2005	<i>Tokios Tokeles v. Ukraine</i> , ARB/02/18, Procedural Order No. 3, 18 January 2005
Anexo 15	8 May 2009	<i>Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador</i> , ICSID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009
Anexo 16	26 February 2010	<i>Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia</i> , ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010
Anexo 17	19 November 2007	<i>City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos de Ecuador (Petroecuador) I</i> , ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007
Anexo 18	21 March 2007	<i>Saipem S.p.A. v. The People's Republic of Bangladesh</i> , ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007
Anexo 20	25 January 2016	<i>Valle Verde Sociedad Financiera S.L. v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB/12/18, Decision on Provisional Measures, 25 January 2016