

# **LAMM EXHIBIT 10**

INTERNATIONAL CENTRE FOR  
SETTLEMENT OF INVESTMENT DISPUTES

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Salini Impregilo S.p.A.

*Claimant*

v.

Republic of Panama

*Respondent*

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**Request for Arbitration**

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11 March 2020

**WHITE & CASE**  
Washington, D.C.

*Salini Impregilo S.p.A. v. Republic of Panama*

# Request for Arbitration

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*Salini Impregilo S.p.A. v. Republic of Panama*

## Request for Arbitration

1. Salini Impregilo S.p.A. (“Salini Impregilo” or “Claimant”), a national of Italy, hereby requests arbitration of an investment dispute with the Republic of Panama (“Panama” or the “Respondent” and together with Claimant, the “Parties”) under the Agreement between the Republic of Panama and the Italian Republic on the Promotion and Protection of Investments (the “BIT” or the “Treaty”).<sup>1</sup>
2. Salini Impregilo is a global leader in major, complex infrastructure projects. It made expansive investments in Panama over many years that contributed to the development of the economy and the country and the historic expansion of the Panama Canal. Without Salini Impregilo, the Panama Canal would not be the engine for economic growth that benefits Panama, its people, and the world. Salini Impregilo’s investments in Panama have included, among other things, establishing and holding shares of a project company (GUPC S.A.), provision of bank and corporate guarantees, provision of letters of credit, injection of direct cash contributions, and devotion of manpower and technical expertise (*i.e.*, engineering, management, and operational personnel) – all of which are protected under the Treaty.
3. Claimant respectfully requests that the Secretary-General of ICSID register this Request for Arbitration in accordance with Article 36 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the “ICSID Convention”) and Rules 1, 2, and 6(1) of the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the “Institution Rules”). As required by Rule 2(1)(f) of the ICSID Institution Rules, Claimant has taken all necessary internal actions to authorize this Request for Arbitration.<sup>2</sup>

### I. INTRODUCTION

4. This investment dispute arises out of Salini Impregilo’s investment in the Third Set of Locks for the Panama Canal (the “Project”), as part of Panama’s expansion of the Panama Canal (the “Canal”) as approved by the people of Panama, through a national referendum – for USD 5.2 billion. This

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<sup>1</sup> See Agreement between the Republic of Panama and the Italian Republic on the Promotion and Protection of Investments, signed in Venice on 6 February 2009 and entered into force on 4 October 2010, concluded in Spanish and Italian, and a translation into English (Exh. C-1).

<sup>2</sup> See Claimant’s Authorization to Commence Arbitration dated 30 Apr. 2018 (Exh. C-2). Salini Impregilo’s Chief Executive Officer has all necessary powers to commence this arbitration. See also Claimant’s Grant of Power of Attorney to Counsel (Exh. C-3).

engineering marvel was completed with Claimant's work, financing, and support, resulting in massive revenues to Panama's treasury and massive losses of Claimant's investment. This is a story of distortions, misdeeds, bad faith, and negligence, which resulted in the breach of several treaty provisions by Respondent that damaged Claimant. Although the investment of Salini Impregilo in Panama was a cornerstone of the Canal expansion, Respondent has deprived Claimant of its investment and the returns on its investment. Respondent in fact forced Claimant to invest additional funds in the Project, by abusing its sovereign power to avoid compliance with, and in violation of, Panamanian law, the BIT, and international law, and thereby exacerbating the harm suffered by Claimant.

5. Respondent's actions and omissions, through various State organs and the Panama Canal Authority ("ACP"), destroyed the value of Claimant's investment made during the Project in Panama and deprived Claimant of its investments. Respondent acted in bad faith and in breach of the BIT and international law, by failing to act transparently, making material misrepresentations, violating the existing legal framework and its obligations under Panamanian law, shifting onto Claimant the responsibility of financing the Project in an unreasonable, burdensome and arbitrary way, and discriminating against Claimant. Respondent thereby also failed to perform its undertakings and breached its obligations under international law, including the fair and equitable and non-discriminatory treatment principles, which protect Claimant's legitimate expectations, afford it with full protection and security, and prohibit Respondent from depriving Claimant of its investment without the required compensation.<sup>3</sup> While Claimant was not the Contractor, together with its partners it incorporated and held shares in the Contractor (GUPC S.A.), and it was the Guarantor and Investor in the landmark Panama Canal expansion project.
  
6. Respondent decided to hold a national referendum as the one century anniversary of its landmark "pathway between the seas" had approached, and the old locks' functionality lagged and the Panama Canal could not accommodate the demand, and the sheer size, of the vessels required for contemporary global trade. Respondent determined to undertake the Project as part of its expansion plan – which Claimant invested in, performed, and with extraordinary financial and engineering contributions, completed and handed over to Respondent. After Claimant's investments, and specifically due to

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<sup>3</sup> See, e.g., Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, 12 Santa Clara J. Int'l L. 7 (2014), at 15 (Exh. CL-2) (recognizing that, under international law, FET includes "good faith in the conduct of a party, consistency of conduct, transparency of rules, recognition of the scope and purpose of laws, due process, prohibition of harassment, a reasonable degree of stability and predictability of the legal system, . . . recognition of the legitimate expectation on the part of the investor . . . [and lack of] arbitrariness and discrimination"); see e.g., *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award dated 31 Oct. 2011 ¶ 348 (Exh. CL-3) ("There is an overwhelming trend to 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.").

Claimant's investments, the Republic of Panama is now the owner of an expanded Panama Canal that was completed in 2016 and handles "*neo-panamax*" vessels, generating exceptional revenues for Panama, while Claimant waits to be made whole for its investments. Today, the Panama Canal is one of the largest and most important civil infrastructure works in history – an extraordinary waterway connecting the Atlantic and Pacific oceans across the Isthmus of Panama.

7. The history of the Panama Canal and the expansion project attests to the Canal's importance to the Republic of Panama and Panama's absolute control over the Canal and all Canal matters. Shortly after achieving its independence from Colombia in 1903, Panama signed the Hay–Bunau-Varilla Treaty with the United States, in which it granted the United States the right to construct and administer the Canal for an indefinite period of time. Pursuant to this arrangement, the original Canal was constructed and opened to traffic in 1914 and operated thereafter by the United States for decades.<sup>4</sup> Following civil unrest and disputes over sovereignty of the Panama Canal Zone, however, the United States and Panama signed the Torrijos–Carter Treaties in 1977, which provided for the transfer of the Panama Canal to Respondent.<sup>5</sup> On 31 December 1999, after a period of joint Panamanian-American control, Respondent took over the Canal. Since then, Respondent has administered, operated, maintained, and sought to modernize the Canal.<sup>6</sup>
8. After transfer of control to Panama, the Constitution of Panama was amended to describe the Canal as “the inalienable patrimony of the Panamanian Nation.”<sup>7</sup> Indeed, Respondent established a particular legal framework governing the Canal, having created the Minister of State for Canal Affairs and established ACP as the entity responsible for operating, administering managing, preserving, and modernizing the Canal.<sup>8</sup> ACP is a legal entity under the public law, part of the Panamanian state and the Minister is Chair of the

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<sup>4</sup> The Hay–Bunau-Varilla Treaty was further amended in 1936 under the Arias–Roosevelt Treaty, which abrogated articles I (establishing that the United States would guarantee and maintain Panama's independence) and IV (granting the United States the authority to maintain public order in the cities of Panama and Colon). Under the Arias–Roosevelt Treaty, the United States also renounced its rights to use other lands and waters outside the Panama Canal Zone and increased the annual fee to be paid by the United States to Panama. Moreover, the Remon–Eisenhower Treaties of January 1955 introduced additional changes, including abrogating the United States' right to a monopoly for the construction of a railroad and other economic and tax related rights.

<sup>5</sup> Panama Canal Treaty, U.S.-Panama dated 7 Sept. 1977, 1280 U.N.T.S. 3 (Exh. C-7). During the period of U.S. administration, the Canal and Canal Zone were under U.S. Law, including the Army Corps of Engineers, government contracting and Federal acquisition regulations. Today the Panamanian law continues to rely on and refer to that body of law updated to reflect Panamanian law and policy.

<sup>6</sup> See Political Constitution of the Republic of Panama, Art. 316 (Exh. C-8).

<sup>7</sup> See Political Constitution of the Republic of Panama, Art. 315 (Exh. C-8).

<sup>8</sup> See Political Constitution of the Republic of Panama, Art. 316 (Exh. C-8); Law No. 28, “Approving the proposal for the construction of a third set of locks in the Panama Canal – which proposal was submitted by the Executive Branch – and establishing other provisions” dated 17 July 2006, Arts.7-8 (Exh. C-19).

Board, which performs a regulatory function. The expansion of the Canal was subject to public approval under the Constitution of Panama, and indeed, the Panamanians approved the Project in a national referendum that took place on 22 October 2006.<sup>9</sup> ACP is an organ of Panama with specific delegated authority to act as a regulator with respect to the operation and expansion of the Canal, or alternatively, an entity that exercises elements of governmental authority.

9. Respondent induced Claimant to make significant investments in connection with the Project – the central component of Respondent’s Canal expansion plan. Once Claimant had been induced to invest, however, Respondent engaged in a sustained pattern of bad faith conduct in violation of Panamanian law, good faith, and Claimant’s legitimate expectations. This, in turn, violated Respondent’s obligations to Claimant under the BIT and international law.
10. Respondent – through ACP and other state organs and instrumentalities – acted to destroy the value of Claimant’s investment in a manner that such acts and omissions, among other things, constitute violations of the BIT. In particular, Respondent’s acts from 2010 through 2016 deprived Claimant of its investment, by inducing Claimant to invest on false premises; using its sovereign powers to shield it from the financial consequences of its violations of law; engaging in further violations of law during the implementation of the Project concerning financing and resolution of claims; and enacting discriminatory and arbitrary legislation, all in violation of Respondent’s duties under Panamanian law, the BIT, and international law.<sup>10</sup>
11. Respondent’s abusive and discriminatory tactics exacerbated the financial onerosity of the Project in contradiction of Claimant’s legitimate expectations based on the existing legal and regulatory framework, as well as Respondent’s specific representations and assurances. Claimant alone had to contribute nearly USD 1 billion in cash to ensure the completion of the Project, along with additional financial security, while Respondent protracted the resolution of the disputes, imposed crushing financial burdens on Claimant, and failed to act in good faith and as required under Panamanian law, the BIT, and international law. Respondent’s actions substantially deprived Claimant of its investments in Panama, including the return it would have earned on its investment, and imposed enormous losses and reputational harm.
12. Claimant successfully completed the Project – with its own invested funds – and handed over the Project to Panama. Indeed, Claimant invested billions of dollars in the Project (including the forced investment of additional funds to

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<sup>9</sup> Executive Summary of the Contractor-Selection Process Third Set of Locks Project dated July 2009, at 3 (Exh. C-20); Law No. 28, “Approving the proposal for the construction of a third set of locks in the Panama Canal – which proposal was submitted by the Executive Branch – and establishing other provisions” dated 17 July 2006, Arts.7-8 (Exh. C-19).

<sup>10</sup> See Section IV below.

ensure the completion of the Project without payment from Respondent), as well as technical and managerial support, know-how, and goodwill. On June 26, 2016, Panama hosted a gala event to inaugurate the Canal's Third Set of Locks, at which Panama's President declared it "a historic moment for Panama," and pledged that revenue from the expanded Canal would improve the lives of Panamanians.<sup>11</sup> Since then Respondent has benefited greatly, with the expansion contributing billions of dollars *per annum* to Panama's economy.<sup>12</sup> Claimant, on the other hand, has yet to be compensated for the substantial contributions it has provided, and damages it has suffered.

13. The Project is already providing Respondent with significant financial and reputational benefits that are expected to increase over time. Indeed, the Canal has surpassed previous records for tonnage<sup>13</sup> and generated record tolls from *neo-panamax* ships.<sup>14</sup> In its first year of operations, for example, average traffic through the Canal reached 5.9 vessels per day (almost double ACP's original forecast of 2-3 vessels per day).<sup>15</sup> In 2017, the total tonnage crossing the Canal also increased by 22% from 2016, and is expected to continue an exponential increase through 2021.<sup>16</sup> Moreover, in fiscal year 2016 alone, the Canal generated over USD 2.4 billion in contributions to Respondent's economy.<sup>17</sup> In 2017, ACP's revenue grew by 15% from 2016, and ACP projected that its revenue would surpass USD 3 billion in 2018.<sup>18</sup> Indeed, ACP achieved an astounding USD 3.17 billion in revenues in 2018<sup>19</sup> and another USD 3.36 billion in 2019.<sup>20</sup>
14. Furthermore, the Project significantly increased the Canal's contributions to the National Treasury. In 2017, contributions to the National Treasury derived from revenue surpluses increased by 89.2% from 2016, and ACP's total

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<sup>11</sup> See *El canal de Panamá inauguró su ampliación y apunta hacia una nueva era*, EL UNIVERSO dated 26 June 2016 (Exh. C-61); *Panamá inaugura su Canal ampliado con un tercer carril que triplica la capacidad de carga*, RTVE NOTICIAS dated 26 June 2016 (Exh. C-62).

<sup>12</sup> ACP Annual Report 2016, at 290 (Exh. C-73).

<sup>13</sup> ACP Press Release, *Panama Canal sets daily tonnage record in February* dated 9 Mar. 2017 (Exh. C-50).

<sup>14</sup> *Containership pays nearly \$1 million toll to cross the expanded Panama Canal*, GCAPTAIN dated 5 July 2016 (Exh. C-51).

<sup>15</sup> Moody's Investors Service, Panama Canal Authority: Waterway's Expansion Boosts Revenues and Sparks Growth in New Business Segments, Underpinning High Credit Quality dated 22 Jan. 2018, at 3 (Exh. C-71).

<sup>16</sup> Moody's Investors Service, Panama Canal Authority: Waterway's Expansion Boosts Revenues and Sparks Growth in New Business Segments, Underpinning High Credit Quality dated 22 Jan. 2018, at 2 (Exh. C-71).

<sup>17</sup> ACP Annual Report 2016, at 290 (Exh. C-73).

<sup>18</sup> Moody's Investors Service, Panama Canal Authority: Waterway's Expansion Boosts Revenues and Sparks Growth in New Business Segments, Underpinning High Credit Quality dated 22 Jan. 2018, at 4 (Exh. C-71); see also ACP Annual Report 2017, at 15, 100 (Exh. C-74).

<sup>19</sup> ACP Annual Report 2018, at 4 (Exh. C-75).

<sup>20</sup> ACP Annual Report 2019, at 73 (Exh. C-76).

contributions to the National Treasury exceeded USD 1.65 billion.<sup>21</sup> In 2018, the Canal generated a record-breaking USD 1.7 billion in contributions to the National Treasury.<sup>22</sup> Contributions to the National Treasury are expected to increase to around USD 2 billion in 2021.<sup>23</sup> In contrast, Claimant continues to suffer substantial financial duress resulting from their investments made to ensure the Project's completion and the loss of those investments.

## II. THE PARTIES

15. Claimant is Salini Impregilo S.p.A., a legal entity organized in the territory of Italy, pursuant to the laws of Italy, and with its registered office in Milan, Italy, which has made an investment in Panama.<sup>24</sup> Claimant is the result of a merger between Impregilo S.p.A. and Salini S.p.A. in 2013. It is a global leader in the construction of major, complex projects, including water infrastructure projects, as summarized below. As a global leader in major projects, Salini Impregilo has operations in over fifty countries, and revenues of over EUR 5.4 billion in 2018, Claimant has been involved in the construction of about 230 dams and hydroelectric plants, and has completed approximately 2,000 projects around the world.

16. Claimant's principal place of business is:

Salini Impregilo S.p.A.  
Via dei Missaglia 97 - 20142  
Milano, Italia

17. As required by Rule 1 and 2 of the Institution Rules, Claimant has taken all necessary internal actions to authorize this Request for Arbitration.<sup>25</sup> Claimant is represented by, and requests that correspondence be addressed to:<sup>26</sup>

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<sup>21</sup> See ACP Annual Report 2016, at 290 (Exh. C-73) (reporting surplus payments to the National Treasury of USD 631 million); ACP Annual Report 2017, at 105 (Exh. C-74) (reporting surplus payments to the National Treasury of USD 1.194 billion); ACP Press Release, *Aportes del Canal de Panamá al Estado (año fiscal 2017)* dated 18 Dec. 2017 (Exh. C-72).

<sup>22</sup> ACP Annual Report 2018, at 79 (Exh. C-75); *El Canal Genera Más De \$11.100 mil millones*, EL SIGLO dated 15 Nov. 2017 (Exh. C-52).

<sup>23</sup> *The Panama Canal: wider impact*, THE ECONOMIST dated 18 June 2016, at 1 (Exh. C-53); see also *The World Bank in Panama: Context*, THE WORLD BANK dated 10 Oct. 2017 (Exh. C-54) (Taking into account the "expected additional traffic generated by the expanded Canal," the World Bank estimates that "Panama's growth is likely to remain one of the highest in Latin America" at 5.4% in 2018. Moreover, the World Bank concludes that Respondent is "well positioned to continue making progress towards the twin goals [of] ending extreme poverty and boosting shared prosperity.").

<sup>24</sup> Salini Impregilo S.p.A. Articles of Association dated 28 Feb. 2017, Art. 3 (Exh. C-4).

<sup>25</sup> See Claimant's Authorization to Commence Arbitration dated 30 Apr. 2018 (Exh. C-2).

<sup>26</sup> See Claimant's Grant of Power of Attorney to Counsel (Exh. C-3).

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[mdrossos@whitecase.com](mailto:mdrossos@whitecase.com)

18. Respondent is the Republic of Panama. To Claimant's knowledge, relevant contacts for Respondent, including its representatives for purposes of this arbitration, are the following:

His Excellency Laurentino Cortizo  
President of the Republic  
Palacio de las Garzas  
Corregimiento de San Felipe  
Presidencia de la República  
Panamá 1, República de Panamá  
Tel: +507-527-9600

His Excellency Juan Ricardo De Dianous  
Panamanian Ambassador to the United States  
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Fax: +1-202-483-8413

### III. JURISDICTION

19. This claim satisfies each of the conditions for jurisdiction set forth in Article 25(1) of the ICSID Convention, which states:

*The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.*

#### A. The Parties Are A Contracting State And A National Of Another Contracting State

20. Article 25(1) of the ICSID Convention provides for jurisdiction over a dispute "between a Contracting State (or any constituent subdivision or agency of a

Contracting State designated to the Centre by that State) and a national of another Contracting State.”<sup>27</sup>

21. Claimant is a company incorporated and constituted under the laws of Italy, which is a Contracting State to the ICSID Convention.<sup>28</sup> Claimant has a registered office in Italy and is an Italian investor within the meaning of Article I(2) of the BIT.<sup>29</sup>
22. Respondent is the Republic of Panama, a Contracting State to the ICSID Convention.<sup>30</sup> Respondent acted through various Panamanian State bodies, including ACP, to interfere with the Project and to discriminate against Claimant throughout the entire duration of the works, as shown below. In addition to the roles of other State organs, Respondent owns and controls ACP, which is another State organ of Panama, or alternatively, an entity that exercises elements of governmental authority of the Republic of Panama established by Title XIV of the Panamanian Constitution and the Organic Law No. 19 of June 11, 1997.
23. The status of ACP as a “State Organ” means that its acts and omissions are attributable to Panama under the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts (“ILC Articles”).<sup>31</sup> The term “State Organ” is defined in the ILC Articles as meaning “any person or entity which has that status in accordance with the internal law of the State” or “which is not an organ of the State . . . but which is empowered by the law of that State to exercise elements of the governmental authority” and is acting

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<sup>27</sup> ICSID Convention, Art. 25(1).

<sup>28</sup> See ICSID, List of Contracting States and Other Signatories to the Convention dated 12 Apr. 2016, at 2 (Exh. C-55) (listing entry into force of the ICSID Convention for Italy as 28 Apr. 1971); Salini Impregilo S.p.A. Articles of Association dated 28 Feb. 2017, Art. 3 (Exh. C-4).

<sup>29</sup> See BIT, Art. I(2) (Exh. C-1) (“The term ‘investor’ includes, for each Contracting Party, the following persons who have made or make investments in the territory of the other Contracting Party in accordance with this Agreement: [...] b) Any legal entity, for profit or otherwise, organized in the territory of a Contracting Party pursuant to the domestic laws of that Party, having its registered office in said territory, or directly or indirectly controlled by nationals of a Contracting Party or by legal entities whose registered office is located the territory of a Contracting Party and are organized in accordance with the laws of that Party.” “Il termine “investitore” comprende, per ognuna delle Parti Contraenti, le seguenti persone che abbiano effettuato o che effettuino investimenti nel territorio dell'altra Parte Contraente in conformità con il presente Accord: . . . b) qualsiasi persona giuridica, con o senza fini di lucro, costituita nel territorio di una delle Parti Contraenti in conformità con la legislazione interna di quest'ultima, e che abbia nello Stato stesso la sua sede legale o che sia gestita direttamente o indirettamente da cittadini di una delle Parti Contraenti o da persone giuridiche che abbiano la propria sede legale nel territorio di una delle Parti Contraenti e che siano costituite in conformità alla legislazione di queste.”).

<sup>30</sup> See ICSID, List of Contracting States and Other Signatories to the Convention dated 12 Apr. 2016, at 3 (Exh. C-55) (listing entry into force of the ICSID Convention for Panama as 8 May 1996).

<sup>31</sup> International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted in 2001 (“ILC Articles”), Arts. 4, 5, 7, 8 (Exh. CL-1).

in that capacity or which is “acting on the instructions of, or under the direction or control of[] th[e] State.”<sup>32</sup>

24. Notably, Respondent established ACP and delegated to it certain functions under a governmental structure to regulate, control, and administer the Canal and its expansion and assure Respondent’s enjoyment of the revenue stream it produces. Specifically, the Panamanian President and National Assembly appoint and remove all Canal administrators.<sup>33</sup> Additionally, myriad of factors underpin why the acts of ACP are fully attributable to Respondent including, *inter alia*:

- *The Panama Canal is* “an inalienable patrimony of the Panamanian nation”,<sup>34</sup> “the main economic resource of the Republic of Panama”,<sup>35</sup> and “a pillar in the human, social, and economic development of [Panama].”<sup>36</sup> The Panama Canal, its status and importance, as recognized by the Republic of Panama in the Constitution and other laws, leaves no doubt that the operation of the Canal, including the expansion plan, is within the State’s mandate, authority, and control.
- *The Panamanian State owns and controls the Panama Canal*, and various State organs are involved in the Panama Canal and were involved in the Panama Canal expansion project, from the President at the top and throughout the framework of the State.
- *The Panamanian State owns and controls the Panama Canal expansion project*, which pursuant to the Panamanian Constitution, was first approved by the Cabinet Council (Executive branch) and the National Assembly (Legislative branch), and then by Panamanian public in a national referendum.
- *ACP is a state-owned and state-run entity*, not a private company, that was established by the Panamanian Constitution to assume exclusive responsibility for the Canal.<sup>37</sup>

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<sup>32</sup> ILC Articles, Arts. 4, 5, 7, 8 (Exh. CL-1).

<sup>33</sup> Political Constitution of the Republic of Panama, Art. 318 (Exh. C-8); Law No. 19, “Whereby the Panama Canal Authority is Organized” dated 11 June 1997, Art. 13 (Exh. C-9).

<sup>34</sup> Political Constitution of the Republic of Panama, Art. 315 (Exh. C-8).

<sup>35</sup> Proposal for the Expansion of the Panama Canal: Third Set of Locks Project dated 24 Apr. 2006, p. 15 (Exh. C-10).

<sup>36</sup> Law No. 19, “Whereby the Panama Canal Authority is Organized” dated 11 June 1997, Preamble (Exh. C-9).

<sup>37</sup> *Expansion will be completed even if I have to go out with a pick and shovel*, EL PAIS dated 9 Jan. 2014 (Exh. C-44).

- ACP performs core functions of government, such as “the operation, administration, management, preservation, maintenance, improvement, and modernization of the Canal.”<sup>38</sup>
- ACP has a State purpose to maintain the Canal open for the “peaceful and uninterrupted transit of vessels from all nations of the world, without discrimination, in accordance with the conditions and requirements established in the National Constitution, international treaties, this Law, and the Regulations.”<sup>39</sup>
- ACP has regulatory authority to enact its own Contracting Regulations, which it did on 4 October 1999, and to make amendments to it, which only become effective after they are published in the “*Registro Del Canal de Panama*,” an official government publication signed by the Minister of the Republic of Panama for the Canal matters. Indeed, ACP unilaterally made amendments to its Contracting Regulations during the Project.
- ACP’s management is all State-appointed by either the Panamanian President, legislative branch, or both.<sup>40</sup>
- ACP is under an obligation to continuously report to the Legislature and the Executive Branch regarding, *inter alia*, its operations, budget, and spending.<sup>41</sup>
- ACP must make State contributions to the national treasury every year.<sup>42</sup>
- ACP is subject to State oversight by the Panamanian Cabinet, the Legislature, and the Comptroller General on, *inter alia*, budgetary and financial matters.<sup>43</sup>
- ACP receives tax exemptions, with few exceptions.<sup>44</sup>

25. Moreover, several organs of Respondent were involved directly in the development and representations regarding the Project. For example, ACP worked in “close coordination” with a group led by the First Vice President of Panama in examining possible sources of financing, including commercial banks and multilateral agencies.<sup>45</sup>

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<sup>38</sup> Law No. 19, Art. 4 (Exh. C-9).

<sup>39</sup> Law No. 19, Art. 5 (Exh. C-9).

<sup>40</sup> Law No. 19, Art. 13 (Exh. C-9).

<sup>41</sup> Law No. 19, Arts. 37, 39-40 (Exh. C-9).

<sup>42</sup> Law No. 19, Arts. 39, 41 (Exh. C-9); Law No. 28, Art. 2(3) (Exh. C-19).

<sup>43</sup> Law No. 19, Arts. 37, 39-40, 50 (Exh. C-9).

<sup>44</sup> Law No. 19, Art. 43 (Exh. C-9).

<sup>45</sup> Resolution No. ACP-JD-RM-08-352 dated 14 Oct. 2008, at 2 (Exh. C-25).

26. In similar circumstances, arbitral tribunals consistently have attributed actions to a State, after finding that factors such as state-ownership and governmental functions implied the actor was a “State Organ.”<sup>46</sup> Even where an actor was not deemed to be a State Organ, however, its actions were attributed to the State if the State instructed, directed, or controlled the actor in contractual relations with the investor.<sup>47</sup> The attribution of ACP’s actions to Panama thus is proper.

## B. The Parties Have Consented In Writing

27. Article 25(1) of the ICSID Convention provides jurisdiction over a dispute for which “which the parties to the dispute consent in writing to submit to the Centre.”
28. Respondent consented to submit legal disputes to arbitration pursuant to Article IX(3) of the BIT which provides that when disputes arising between a Contracting Party and investors:

3. . . . cannot be resolved amicably within six months from the date of the written request for conciliation, the investor concerned may submit the dispute to:

a) *The competent court of the Contracting Party;*

b) *An ad hoc Arbitral Tribunal in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL);*

c) *The “International Centre for Settlement of Investment Disputes” (ICSID), for implementation of the arbitration procedures established in the Washington Convention of 18 March 1965, on the “Settlement of*

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<sup>46</sup> See, e.g., *Helnan International Hotels A/S v. Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Objection to Jurisdiction dated 17 Oct. 2006 ¶¶ 91-95 (Exh. CL-4) (attributing the conduct of the Egyptian General Company for Tourism and Hotels to the State because it was empowered to exercise elements of governmental authority); *Eureko BV v. Republic of Poland, Ad Hoc*, Partial Award dated 19 Aug. 2005 ¶ 134 (Exh. CL-5) (finding that “whatever may be the status of the State Treasury in Polish law, in the perspective of international law . . . the Republic of Poland is responsible to Eureko for the actions of the State Treasury” because it acted under the clear authority of the Cabinet of Ministers); *M.C.I. Power Group L.C. and New Turbine Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award dated 31 July 2007 ¶ 225 (Exh. CL-6) (concluding that the actions of the Ecuadorian Institute for Electrification were attributable to the State in light of its institutional structure and composition as well as its functions); *Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova*, Award dated 22 Sept. 2005 (Exh. CL-7) (attributing the actions of the Department of Privatization to the State because it was a central Governmental body that was delegated by Governmental regulations to carry out state functions).

<sup>47</sup> See, e.g., *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award dated 22 Aug. 2017 ¶¶ 570, 593 (Exh. CL-8); *Ampal-American Israel Corp. and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss dated 21 Feb. 2017 ¶ 140 (Exh. CL-9).

*Investment Disputes between States and Nationals of other states.*<sup>48</sup>

29. Claimant notified Respondent of the existence of disputes under the BIT by letter dated 16 July 2015 (delivered on 22 July 2015), and invited Respondent to engage in consultations and negotiations in an attempt to resolve the disputes amicably pursuant to Article IX of the BIT. In particular, Claimant indicated it was available to meet at the earliest convenience of the President of Panama, and suggested any date between 27 July 2015 and 31 July 2015.<sup>49</sup>
30. Respondent acknowledged receipt of Claimant's letter on 28 July 2015, and indicated that the President was not available on the dates suggested by Claimant.<sup>50</sup>
31. Noting that its previous letter had constituted a formal notice of dispute, Claimant subsequently sent Respondent a letter dated 4 August 2015 stating that it sincerely hoped that an amicable solution could be found within six months, welcoming any constructive proposal, and again inviting Respondent to meet at its earliest convenience.<sup>51</sup> Respondent did not reply.
32. Despite repeated direct attempts to meet and negotiate by Claimant's CEO Pietro Salini, negotiations have failed to produce any agreed resolution. Over four years later, the disputes have not yet been resolved. Claimant has had to pursue all possible avenues to try to recover on its claims, and Respondent has protracted and avoided resolution.
33. Claimant provides its written consent through this Request for Arbitration, and the date of consent is the date of the Request. Thus, jurisdiction *ratione voluntatis* is present because the parties to this dispute have consented in writing in the BIT and the Request.
34. The breaches of the BIT that give rise to the present claims do not arise out of the contract between ACP and GUPC S.A. of 11 August 2009, or any other

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<sup>48</sup> See BIT, Art. IX(3) ("Nel caso in cui tali controversie non possano essere risolte in modo amichevole entro 6 mesi dalla data della richiesta di conciliazione presentata in forma scritta, l'investitore potrà sottoporre la controversia a:

a) il Tribunale competente della Parte Contraente;

b) un Tribunale arbitrale ad hoc, in osservanza del Regolamento arbitrale della Commissione per il Diritto Commerciale Internazionale (UNCITRAL);

c) il 'Centro Internazionale per il Regolamento delle Controversie relative ad Investimenti' (ICSID), per l'applicazione dei procedimenti arbitrali previsti dalla Convenzione di Washington del 18 marzo del 1965 riguardante il 'Regolamento delle Controversie relative agli Investimenti tra Stati e Cittadini di altri Stati.'").

<sup>49</sup> See Letter from Salini Impregilo to Panama regarding Notice of Dispute and Invitation to Resolve Amicably dated 16 July 2015, at 5 (Exh. C-56).

<sup>50</sup> See Letter from Panama to Salini Impregilo regarding Notice of Dispute and Invitation to Resolve Amicably dated 28 July 2015, at 1 (Exh. C-57).

<sup>51</sup> See Letter from Salini Impregilo to Panama regarding Notice of Dispute and Invitation to Resolve Amicably dated 4 Aug. 2015, at 1 (Exh. C-58).

contract between those parties. Salini Impregilo is not a party to the contract with ACP or any investment agreement; Salini Impregilo holds shares in GUPC S.A., the project company and the Contractor of the Project. Claimant asserts claims that are separate and distinct from, and without prejudice to, any claims that may be asserted by GUPC S.A. or its shareholders with respect to breaches of contractual obligations by ACP. Except as otherwise inconsistent with the BIT, Claimant hereby expressly reserves all its rights.

### C. The Dispute Arises Directly Out Of An Investment

35. Article 25(1) of the ICSID Convention provides for jurisdiction for any dispute “arising directly out of an investment.”
36. Claimant’s share ownership and participation in GUPC S.A., as well as its individual assets and contractual rights, cash contributions, loans and guarantees, industrial designs, technological know-how, good will, and reputation, among others, constitute investments in Panama within the meaning of Article I(1) of the BIT, which provides:<sup>52</sup>

*1. The term “investment” refers to all kinds of assets invested before or after the entry into force of this Agreement, or rights related to such investment, irrespective of the legal form chosen, provided that it was made in conformity with the laws and regulations of the Contracting Party in whose territory it was made, and comprises, in particular, but not exclusively:*

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<sup>52</sup> See BIT, Art. I(1) (“Con il termine ‘investimento’ si intende ogni tipo di bene investito anteriormente o successivamente all’entrata in vigore del presente Accordo, o i diritti correlati all’investimento medesimo, indipendentemente dalla forma giuridica scelta, sempre che sia stato effettuato in conformità con le leggi e i regolamenti della Parte Contraente nel cui territorio si è realizzato e includerà in particolare, ma non a titolo esclusivo:

- a) la proprietà di beni mobili ed immobili, così come gli altri diritti reali quali ipoteche, pegni e altri oneri;
- b) azioni, quote sociali, redditi di capitale e qualunque altro tipo di partecipazione in società;
- c) denaro, titoli di credito e qualsiasi altro titolo o documento di Stato o pubblico, così come prestiti che abbiano un valore economico direttamente connesso ad un investimento specifico. I crediti saranno inclusi solamente quando saranno regolarmente contrattati e documentati, in conformità alle disposizioni vigenti nello Stato dove tale investimento sia stato realizzato;
- d) diritti della proprietà intellettuale, inclusi i diritti d'autore ed i brevetti della proprietà industriale, quali patenti, disegni industriali, marchi commerciali o marchi di fabbrica, denominazioni commerciali, conoscenze tecnologiche, valore dell'avviamento (goodwill) e altri diritti simili;
- e) concessioni economiche conferite per legge o per contratto, e qualsiasi licenza e permesso conferiti in conformità alla Legge, includendo la prospezione, l'estrazione e lo sfruttamento delle risorse naturali.

Qualsiasi aumento del valore o modifica della forma in cui i beni siano investiti o reinvestiti, non altererà la loro natura di investimento ai sensi del Presente Accordo.”).

*(a) Ownership of movable and immovable property, as well as any other property rights such as mortgages, pledges, and other encumbrances;*

*(b) Shares, ownership interests, capital gains, and any other form of participation in companies;*

*(c) Money, claims to money, and any other State or public security or document, as well as loans having economic value directly linked to a specific investment. Credits shall be included only if regularly entered into and recorded, pursuant to the provisions in force in the State where the investment is made;*

*(d) Intellectual property rights, including copyrights and industrial property rights, such as patents, industrial designs, trademarks or service marks, trade names, technological know-how goodwill and other similar rights; and*

*(e) Economic concessions granted by law or contract, and any licenses and permits granted in accordance with the Law, including the prospecting, extraction, and exploitation of natural resources.*

37. Jurisdiction *ratione materiae* is proper because this dispute arises directly out of Claimant's investment in Panama in relation to the Project, which is protected under the BIT and covers, among others, its activities in connection with the Project, its ownership interest in, cash contributions, loans, and additional securities provided to GUPC S.A., Claimant's rights and interests in relation to the Contract and the Joint and Several Guarantee ("JSG") dated 31 May 2010,<sup>53</sup> among others, as well as Claimant's intellectual property rights, including technical and managerial expertise, know-how, goodwill, personnel, name, and reputation, among others.

#### **D. The Dispute Is Of A Legal Nature**

38. Article 25(1) of the ICSID Convention provides for jurisdiction over "any legal dispute." Because a legal dispute exists with respect to Respondent's compliance with its obligations under the BIT resulting in the deprivation of Claimant's investment, and because Claimant requests the application of legal remedies, jurisdiction is proper.

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<sup>53</sup> On 31 May 2010, Claimant and the other GUPC S.A. shareholders signed the JSG, and thereby guaranteed that they would be jointly and severally liable as "primary obligor[s]" of GUPC S.A.'s performance of the Contract. See Joint and Several Guarantee dated 31 May 2010, Sub-Clause 1.1(a) (Exh. C-70).

39. After having made its investment in Panama, Claimant was subject to unreasonable, bad faith, and discriminatory treatment by Panama that constituted breaches of the BIT, as summarized below.

## IV. THE DISPUTE

### A. Respondent Structured The Panama Canal Expansion Project To Induce Investment

40. Respondent induced Claimant's investment by, *inter alia*, establishing a legal framework for the operation and expansion of the Canal that imposed multiple duties on Respondent, and by making specific representations regarding the Project's financing, nature, design, scope, and method of claim and dispute resolution. When deciding to invest in Panama, the Claimant relied on this legal framework and the specific duties it created.
41. Respondent established an overarching constitutional and legal framework, as well as a Governmental structure, which recognize the Canal's importance to the State, and enable the State to regulate and profit from the Canal's ongoing operation. For example, Respondent passed an amendment to the Constitution in 1994, introducing a Chapter concerning the Panama Canal that included the creation of the Panama Canal Authority (ACP) as a public law entity to administer, maintain, and modernize the Canal on Respondent's behalf.<sup>54</sup>
42. Respondent subsequently enacted additional laws and regulations setting forth ACP's fundamental objectives, as well as its obligations to report information, transfer revenue, and process approvals, among other things.<sup>55</sup> In particular, Respondent established in its own laws that ACP, as an organ of Panama, or

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<sup>54</sup> Political Constitution of the Republic of Panama, Art. 316 (Exh. C-8). The amended Constitution sets forth ACP's additional governmental powers, including the participation in Respondent's national maritime strategy. *See* Political Constitution of the Republic of Panama, Arts. 317, 319-321 (Exh. C-8). In accordance with Article 317 of the Constitution, ACP also is part of Respondent's national maritime strategy, and in that context, is a member of the Executive Secretariat of the Inter-Institutional Consulting Commission for National Maritime Strategy. *Constituyen comisión de estrategia marítima en Panamá*, MUNDO MARÍTIMO dated 12 Oct. 2010 (Exh. C-17). The Executive Secretariat was established on 8 October 2010 and is formed by ACP, the Ministry of Commerce and Industry, the Ministry of Economy and Finance, the Panamanian Maritime Authority, the National Secretary of Science, Technology and Innovation, and the Panamanian Chamber of Commerce, among others. The purpose of this Executive Secretariat is to develop the maritime sector to increase the contributions of the maritime sector to Panama's growth domestic product. The ACP is part of the Panamanian State. *See* Judicial Code of the Republic of Panama dated 1 Apr. 1987, Art. 1940 (Exh. C-63) ("State should be understood to mean the Nation, the municipality or any autonomous or decentralized public entity . . .") (Free translation of the Spanish language original); *see also* Law No. 131 of 2013 "Que regula el arbitraje comercial nacional e internacional en Panamá" dated 31 Dec. 2013, Art. 5 (Exh. C-64) paragraph 3 ("Panamanian State. Is comprised by the National Government and its respective dependencies, as well as the legal entities of Public Law, autonomous and semi-autonomous entities, the state enterprises of Public Law, Private Law or mixed enterprises and the legal entities of Private Law that exercise state functions by Law, delegation, concession or authority of the State") (Free translation of the Spanish language original).

<sup>55</sup> Law No. 19, "Whereby the Panama Canal Authority is Organized" dated 11 June 1997, Art. 5 (Exh. C-9).

alternatively, an entity that exercise elements of governmental authority, had the following legal duties: (i) duty of good faith;<sup>56</sup> (ii) duty to act in accordance with the law;<sup>57</sup> (iii) duty to act in accordance with the principle of *venire contra factum proprium non valet*;<sup>58</sup> (iv) duties to act with impartiality and equity;<sup>59</sup> (v) duties to plan and inform;<sup>60</sup> (vi) duty of transparency;<sup>61</sup> (vii) duty of economy;<sup>62</sup> (viii) duty to restore the economic balance of the contract;<sup>63</sup> (ix) duty to refrain from creating burdens;<sup>64</sup> (x) duty to protect the right of a contractor;<sup>65</sup> and (xi) duty to collaborate.<sup>66</sup>

43. In 2006, President Martín Torrijos Espino announced the launch of a three-part expansion program for the Canal, which he publicly declared to be a “national project” and “an affair of State.”<sup>67</sup> This program called for the construction of two new lock complexes, and related works for the Canal (“Expansion Program”). Notably, Respondent’s preparation of the Expansion Program and the study of its alternatives dated back to 1987, when it established a Tripartite

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<sup>56</sup> Civil Code of the Republic of Panama, Art. 1109 (Exh. C-33).

<sup>57</sup> Political Constitution of the Republic of Panama, Art. 17 (Exh. C-8); *see also* Political Constitution of the Republic of Panama, Art. 18 (Exh. C-8).

<sup>58</sup> Civil Code of the Republic of Panama, Art. 1109 (Exh. C-33); Decision of the Supreme Court of Panama dated 9 Sept. 2008, at 3 (Exh. C-34); *see also* Decision of the Supreme Court of Panama dated 9 Sept. 2008, at 7 (Exh. C-34) (“[T]he principle of good faith should govern the State relations with their constituencies, thus allowing them to regain confidence in the administration, which according to Jesus Gonzalez Perez, is that in the procedure for issuing the act giving rise to the relations between administration and administered, it will not adopt a confusing and misleading conduct to later circumvent or misrepresent their obligations.”).

<sup>59</sup> *See* Law No. 19, “Whereby the Panama Canal Authority is Organized” dated 11 June 1997, Arts. 53(5), 53(6) (Exh. C-9); *see also id.* Art. 90.

<sup>60</sup> Law No. 22, “Regulating Public Contracting” dated 27 June 2006, Art. 19(8) (Exh. C-12).

<sup>61</sup> ACP’s Acquisition Regulation, Art. 130 (Exh. C-18); *see also* Law No. 22, “Regulating Public Contracting” dated 27 June 2006, Arts. 17-18 (Exh. C-12). Additionally, Law No. 28 states, “The Panama Canal Authority shall publish and make known through the media, including the Internet, all information that may allow bidders to know of and participate in the Agency’s public contracting acts.” Law No. 28, “Approving the proposal for the construction of a third set of locks in the Panama Canal – which proposal was submitted by the Executive Branch – and establishing other provisions” dated 17 July 2006, Art. 5 (Exh. C-19).

<sup>62</sup> ACP’s Acquisition Regulation, Art. 130 (Exh. C-18); Law No. 38, “That Approves the Organic Statute of the Attorney of the Administration and the General Administrative Procedure and Issues of their Special Provisions” dated 31 July 2000, Arts. 34, 36 (Exh. C-59); Law No. 22, “Regulating Public Contracting” dated 27 June 2006, Arts. 17, 19 (Exh. C-12).

<sup>63</sup> ACP’s Acquisition Regulation, Art. 133(5) (Exh. C-18); Law No. 22, “Regulating Public Contracting” dated 27 June 2006, Arts. 13(5), 21 (Exh. C-12); *see also* Civil Code of the Republic of Panama, Arts. 1161-A and 1161-B (Exh. C-33).

<sup>64</sup> ACP’s Acquisition Regulation, Art. 133(6) (Exh. C-18).

<sup>65</sup> ACP’s Acquisition Regulation, Art. 130 (Exh. C-18); Law No. 19, “Whereby the Panama Canal Authority is Organized” dated 11 June 1997, Art. 53 (Exh. C-9) (Which provides that ACP’s public procurement process has the following bases, “(5) impartiality in the decisions” and “(8) sufficient flexibility to allow decision-making in emergency situations.”).

<sup>66</sup> ACP’s Acquisition Regulation, Art. 130 (Exh. C-18); Civil Code of the Republic of Panama, Art. 1109 (Exh. C-33); *see also* Law No. 22, “Regulating Public Contracting” dated 27 June 2006, Art. 53 (Exh. C-12).

<sup>67</sup> *See* Transcript of speech by President Martín Torrijos Espino dated 24 Apr. 2006, p. 3 (Exh. C-65).

Commission between Panama, the United States, and Japan.<sup>68</sup> The Expansion Program aimed to create a new and wider parallel canal to accommodate larger Panamax vessels.

44. Respondent prepared and published its Proposal for the Expansion of the Panama Canal (“Proposal”) to secure the Panamanian public’s approval of the Expansion Program, and to further promote its investment to foreign investors.<sup>69</sup> Pursuant to the Panamanian Constitution, the Proposal was to be first approved by the Cabinet Council (Executive branch) and the National Assembly (Legislative branch), and then submitted to a national referendum.<sup>70</sup> Accordingly, Respondent’s Cabinet Council first approved the Proposal,<sup>71</sup> then it transmitted it to the National Assembly, which unanimously approved it by a vote of 72-0. Following the National Assembly’s approval, the proposal became Law No. 28, which required a referendum so that Panamanian citizens, through “free, universal, equal and secret vote,” could decide on the proposal for the “construction of the third set of locks.”<sup>72</sup> On 22 October 2006, Panamanians indeed participated in a national referendum and approved the Project.<sup>73</sup>
45. Throughout the preparation and approval of the Proposal, Respondent represented *publicly* that it had performed extensive studies and investigations—prepared with the assistance of external consultants—that considered myriad technical and financial aspects of the Expansion Program, and that it had “thorough knowledge of the project area’s geological conditions” following 10 years of study and related expenses of USD 50 million.<sup>74</sup> Regarding the financial premise of the Expansion Program,

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<sup>68</sup> See Decree Creating an Office in the Ministry of Foreign Affairs for Support of the Commission of Alternatives to the Panama Canal dated 15 Feb. 1987 (Exh. C-66); Executive Resolution of the Ministry of Foreign Affairs No. 1 recognizing the Commission of Studies for the Canal’s Alternatives dated 18 Feb. 1986 (Exh. C-67).

<sup>69</sup> Proposal for the Expansion of the Panama Canal: Third Set of Locks Project dated 24 Apr. 2006 (Exh. C-10).

<sup>70</sup> Political Constitution of the Republic of Panama, Art. 325 (Exh. C-8).

<sup>71</sup> Cabinet Resolution No. 58, “That Approves the Proposal of the Construction of the Third Set of Locks of the Panama Canal, Submitted by the Panama Canal Authority, and Issues Other Provisions” dated 26 June 2006, Art. 1 (Exh. C-14). The Cabinet issued a subsequent resolution on 10 July 2006 approving certain modifications to the bill. Cabinet Resolution No. 68, “Que Aprueba las Modificaciones al Proyecto de Ley ‘Que Aprueba la Propuesta de Construcción del Tercer Juego de Esclusulas en el Canal de Panamá, Sometida por el Órgano Ejecutivo, y Dicta Otras Disposiciones,’” dated 10 July 2006 (Exh. C-15).

<sup>72</sup> Law No. 28, “Approving the proposal for the construction of a third set of locks in the Panama Canal – which proposal was submitted by the Executive Branch – and establishing other provisions” dated 17 July 2006, Arts. 7-8 (Exh. C-19).

<sup>73</sup> Executive Summary of the Contractor-Selection Process Third Set of Locks Project dated July 2009, at 3 (Exh. C-20); Law No. 28, “Approving the proposal for the construction of a third set of locks in the Panama Canal – which proposal was submitted by the Executive Branch – and establishing other provisions” dated 17 July 2006, Arts. 7-8 (Exh. C-19).

<sup>74</sup> Proposal for the Expansion of the Panama Canal: Third Set of Locks Project dated 24 Apr. 2006, at 19 (Exh. C-10); see also *A Modern Wonder-Panama Canal Expansion Program: Overview*, BUSINESS

Respondent represented that: (i) it would cost approximately USD 5.25 billion, which included USD 3.35 billion for the new locks, and (ii) the financing “w[ould] be composed of a reasonable tolls increase . . . and external financing sources.”<sup>75</sup> The legal framework behind the Expansion Program in general and the Project in particular, as well as Respondent’s representations, were key to Claimant’s decision to invest in Panama.

## B. Claimant Invested In Panama

46. Following the Project’s approval in a national referendum, and public representation of a budget to be financed by Respondent, Respondent began the process of specifically seeking to induce investment by global leaders in the construction industry, including Claimant. As was subsequently discovered, Respondent’s efforts to induce investment involved misrepresentation and withholding of key information.

- In late 2007, Respondent began the procurement process for the Project by issuing a Request for Qualifications (“RFQ”).<sup>76</sup> Claimant participated in this process as part of the Grupo Unidos Por El Canal consortium (the “GUPC Consortium”),<sup>77</sup> which also included Sacyr Vallehermoso S.A.,<sup>78</sup> Jan De Nul N.V.,<sup>79</sup> and Constructora Urbana S.A.<sup>80</sup> Respondent evaluated the participating consortia, and prequalified them to participate in the next phase of the tender on 15 December 2007, *i.e.*, the RFP.<sup>81</sup>
- Claimant and its partners submitted their technical and price proposals for the Project. The GUPC Consortium’s price proposal of USD 3.22 billion was fully consistent with—and indeed, just

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EXCELLENCE dated 23 Feb. 2012, at 9-10 (Exh. C-13); Master Plan of the Panama Canal dated 7 June 2006, Clause 2.6 (Exh. C-11).

<sup>75</sup> Proposal for the Expansion of the Panama Canal: Third Set of Locks Project dated 24 Apr. 2006, at 10-11, 65 (Exh. C-10).

<sup>76</sup> Request For Qualifications for the Design-Build of the Third Set of Locks Project, Fifth Revision dated 8 Nov. 2007, at 12-13 (Exh. C-21).

<sup>77</sup> Impregilo S.p.A. participated in the tender before its merger with Salini S.p.A.

<sup>78</sup> Sacyr S.A. is a Spanish multinational infrastructures and services company, a member of the GUPC Consortium, and shareholder of GUPC S.A.

<sup>79</sup> Jan De Nul N.V. is a Belgian company, leading expert in dredging and marine construction activities. Jan De Nul N.V. is a member of the GUPC Consortium and shareholder of GUPC S.A.

<sup>80</sup> Constructora Urbana S.A. is a Panamanian construction company, a member of the GUPC Consortium, and shareholder of GUPC S.A. *See* Executive Summary of the Contractor-Selection Process Third Set of Locks Project dated July 2009, at 5 (Exh. C-20).

<sup>81</sup> *See* Executive Summary of the Contractor-Selection Process Third Set of Locks Project dated July 2009, at 4 (Exh. C-20).

under—Respondent’s estimated cost for the Project,<sup>82</sup> as well as the amount of funds that Respondent ultimately allocated for the Project (*i.e.*, USD 3.48 billion).<sup>83</sup> Respondent’s assessment of the cost, as well as Respondent’s validation of the GUPC Consortium’s price proposal through the “Price Verification Committee,”<sup>84</sup> further assured the Consortium that its estimates were correct and premised on reliable information regarding site conditions, scope of work, and costs.

- On 15 July 2009, Respondent awarded the Project to the GUPC Consortium, which had submitted the best technical proposal.<sup>85</sup> Subsequently, on 11 August 2009, the parties executed the Contract, which expressly incorporated the materials comprising the RFP package.<sup>86</sup> On 25 August 2009, Claimant and its partners commenced working on the Project.
- On 31 May 2010, because of practical and legal difficulties due to the lack of recognition for joint ventures or consortia as legal entities under Panamanian law, the Claimant and its partners assigned the Contract to GUPC S.A., a special purpose vehicle incorporated in Panama, in which Claimant held 48% of the shares.<sup>87</sup>
- On the same date, Claimant and the other GUPC S.A. shareholders entered into the JSG, in which they guaranteed that they would be jointly and severally liable for GUPC S.A.’s complete performance of the Contract, and remain liable until all liability for any arbitral award is resolved.<sup>88</sup>

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<sup>82</sup> As part of its Proposal, Respondent had estimated the Project to cost USD 3.35 billion.

<sup>83</sup> Respondent revealed this amount in July 2009 along with its decision on which consortium would be awarded the Contract. *See* Technical Evaluation – Final Report, Contracting Officer’s Report dated July 2009, at 39 (Exh. C-28).

<sup>84</sup> *See* Tender Receipt and Evaluation of Technical Proposals, Technical Evaluation – Final Report, Contracting Officer’s report dated July 2009, at 42 (Exh. C-28).

<sup>85</sup> Technical Evaluation – Final Report, Contracting Officer’s Report dated July 2009, at 6, 37 (Exh. C-28) (“[T]he contract was awarded to the consortium whose proposal . . . obtained the highest combined scores for technical and price aspects.”); ACP Press Release, *Panama Canal Announces “Best-Value” Proposal for the New Set of Locks Expansion Contract* dated 8 July 2009 (Exh. C-29); ACP Press Release, *Panama Canal Awards Locks Contract to “Grupo Unidos por el Canal”* dated 15 July 2009 (Exh. C-30). In parallel, Respondent publicly released an Executive Summary of the Contractor-Selection Process that further reiterated that Respondent, not the contractor, was responsible for the financing of the Project. Executive Summary of the Contractor-Selection Process Third Set of Locks Project dated July 2009, at 4 (Exh. C-20).

<sup>86</sup> Contract Agreement dated 11 Aug. 2009 (Exh. C-23).

<sup>87</sup> *See* Certificate of Incorporation of GUPC S.A. dated 23 Nov. 2009 (Exh. C-31).

<sup>88</sup> Indeed, Sub-Clause 1.7A.8 of the Conditions of Contract provides that the JSG and any other Guarantee provided by Claimant “shall remain valid and enforceable and in full force and effect until . . . all liability of the Contractor . . . is extinguished.” Conditions of Contract, as amended through Variation Order No. 188 dated 29 Dec. 2016, Cl. 1.7A.8 (Exh. C-24).

47. Claimant's investments in Panama include Claimant's interests in GUPC S.A. (through its direct shareholding of 48% of GUPC S.A.) and its rights and interests in relation to the Contract and the JSG, as well as its technical and managerial expertise, know-how, goodwill, personnel, name, and reputation, among others. Furthermore, Claimant made a substantial financial contribution to Panama, by providing over USD 1 billion in direct cash funding and financial securities to execute the Project.

### **C. Respondent Substantially Deprived Claimant Of Its Investment**

#### **1. Respondent Acted In Bad Faith**

48. Since investing in Panama, Claimant has learned that Respondent induced the investment in bad faith through representations as to the financing of the Project, the manner in which claims would be resolved, and by failing to disclose key costing information, as well as geotechnical and geological information (including with respect to the suitability of basalt for producing concrete aggregates, the fault-line conditions, the quality of the access channel base, the seismic conditions) in its possession.
49. Consistent with the Proposal and Law No. 28,<sup>89</sup> Respondent represented that it would pay the cost of executing the Project,<sup>90</sup> and the Project would be "executed in a spirit of mutual trust and cooperation without litigation and adversarial attitudes."<sup>91</sup> Respondent therefore promised a fair and effective dispute resolution mechanism so that GUPC S.A. would recover its entitlements to additional costs and extension of time, and by extension Claimant would benefit from its investments and not suffer losses.

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<sup>89</sup> Law No. 28, "Approving the proposal for the construction of a third set of locks in the Panama Canal – which proposal was submitted by the Executive Branch – and establishing other provisions" dated 17 July 2006, Art. 2(1) (Exh. C-19); *see also* Draft Law No. 224, "Que Aprueba La Propuesta De Construcción Del Tercer Juego De Esclusas En El Canal De Panamá, Sometida Por El Órgano Ejecutivo, Y Dicta Otras Disposiciones," Statement of Reasons dated 26 June 2006, at 7 (Exh. C-16) ("Subsection 1 [of Law 28] provides that it is the Canal's revenue that will cover the costs of construction and funding for the works. This is in line with the proposal for the third set of locks project.").

<sup>90</sup> *See e.g.*, AON Risk Services Inc., Insurance Assessment Report Panama Canal Operations and Expansion Program dated 11 June 2008, at 1-9 (Exh. C-26) ("The main revenue generating asset (the existing canal) is covered by loss of revenue insurance up to \$977 million; if the new locks and channel system is not completed as expected, revenues from the existing canal are expected to repay any borrowed funds."); Instructions to the Tenderers (as amended by Amendment No. 23) dated Feb. 2009, Sub-Clause A.1 ¶ 3 (Exh. C-68).

<sup>91</sup> Request For Qualifications for the Design-Build of the Third Set of Locks Project, Fifth Revision dated 8 Nov. 2007, at 10-11 (Exh. C-21).

50. Furthermore, Respondent's decision to expand the Canal was based on extensive studies and investigations conducted over decades<sup>92</sup>—prepared with the assistance of external consultants – that considered myriad technical and financial aspects.<sup>93</sup> Respondent's decision was also made on the basis of historical documentation received from the U.S. Government during the handover of the Canal, which included decades of data, engineering reports, as well as information concerning previous designs, excavations, and attempted developments in the very site where the Project subsequently was executed. Respondent's key officials, Mr. Quijano and Mr. Miguez were likely privy to all these U.S. Government documents.
51. However, contrary to its representations and undertaking, and unbeknownst to Claimant, Respondent devised and implemented a secret policy to deny 100% of Contractor claims. Respondent's plan for the Project, as revealed in a document called the Program Management Plan, dated March 2010 and signed by ACP's former-Administrator, stated that one of ACP's measures of success was that "100 percent of claims [were] decided in favor of the ACP."<sup>94</sup> This is contrary to Respondent's prior representations, the legal framework for the expansion of the Canal, and Claimant's legitimate expectations from the Project.
52. Moreover, Respondent failed to provide Claimant with accurate and complete information with respect to key components of the Project. For example, while the RFP package included certain detailed conceptual designs, drawings, and geotechnical data and reports,<sup>95</sup> Respondent failed to provide the tenderers certain studies that it had conducted in relation to the cost estimates of the Project, including those developed with the consulting group Parsons Brinkerhoff.<sup>96</sup>

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<sup>92</sup> Proposal for the Expansion of the Panama Canal: Third Set of Locks Project dated 24 Apr. 2006, at 5, 14-15 (Exh. C-10).

<sup>93</sup> Master Plan of the Panama Canal dated 7 June 2006, Clause 2.6 (Exh. C-11). These studies were conducted under the purview of Respondent's statutory duty to prepare all the necessary studies, analyses, and designs for the Project with diligence. *See* Law No. 38, "That Approves the Organic Statute of the Attorney of the Administration and the General Administrative Procedure and Issues of their Special Provisions" dated 31 July 2000, Arts. 34, 36 (Exh. C-59); ACP's Acquisition Regulation dated May 2011, Arts. 130, 131 (Exh. C-18). Additionally, the principle of economy is further developed in Law No. 22. *See* Law No. 22, "Regulating Public Contracting" dated 27 June 2006, Art. 19(8) (Exh. C-12) ("With sufficient time before the opening of the process of selecting the contractor, [the public body must] prepare the studies, designs and projects required, as well as the terms of reference and specifications, assuring that its preparation is not done in an incomplete, ambiguous or confusing manner.").

<sup>94</sup> ACP's Program Management Plan dated Mar. 2010, p. 1-15 (Exh. C-32).

<sup>95</sup> Request for Proposal for the Design and Construction of the Third Set of Locks, Table of Contents dated Dec. 2007 (Exh. C-22).

<sup>96</sup> AON Risk Services Inc., Insurance Assessment Report Panama Canal Operations and Expansion Program dated 11 June 2008, at 5-7 (Exh. C-26).

53. Indeed, even though Respondent possessed superior knowledge, many of the representations it made during the tender phase, including regarding the Project's financing, nature, duration, and scope, were inaccurate and incomplete, as Claimant would only subsequently discover.<sup>97</sup> Respondent has refused to produce relevant information, including documents that it inherited from the U.S. Government on at least two occasions. *First*, Respondent refused to provide relevant and material evidence in the context of 28 U.S.C. Section 1782 proceedings brought in the United States by GUPC S.A., arguing that GUPC S.A. should request the documents through one of the pending ICC cases. *Second*, after Claimant and its partners, jointly with GUPC S.A., requested production of the same set of documents in the ICC arbitration and the tribunal ordered their production, Respondent failed and refused to comply with key parts of the arbitral tribunal's order.<sup>98</sup> Respondent has thus deprived the tribunal of a full record of contemporaneous evidence, and acted contrary to its obligation to resolve disputes expeditiously and in good faith.<sup>99</sup>

## 2. Respondent Sought To Shield Itself Through Abuse Of Sovereign Power

54. After inducing Claimant's investment through its legal framework and representations regarding the Project, Respondent sought to use its sovereign power to shield itself from the resulting consequences, by breaching its obligations under Panamanian law, the BIT, and international law, including acting transparently and in accordance with its duties of good faith, planning and informing, and economy, among others.

55. In particular, Respondent took steps to attempt to limit its liability and shift risks to Claimant and its partners with respect to the geological and geotechnical conditions, and costing analyses, including but not limited to, the suitability of basalt for producing concrete aggregates, concrete mix design, the fault-lines, the access channel base, and the seismic conditions of the Project. Respondent also unilaterally modified ACP's Regulation.<sup>100</sup> The intended

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<sup>97</sup> Moreover, Respondent made such representations despite warnings made by Respondent's own external geotechnical consultants, which runs contrary to its obligations to act in good faith and with transparency, and to inform and plan.

<sup>98</sup> By refusing to produce relevant documents, Respondent effectively denied Claimant and its partners the opportunity to present their case before the ICC tribunal.

<sup>99</sup> Memorandum of Understanding for Completion of the Works dated 13 Mar. 2014, Annex A, Art. 9 (Exh. C-69).

<sup>100</sup> *See, e.g.*, ACP's Acquisition Regulation, Arts. 1B, 6D (Exh. C-18); RFP Amendment No. 15, Conditions of Contract dated Aug. 2008, Sub-Clauses 4.10, 4.12, 5.1 (Exh. C-27). In particular, Respondent repeatedly conditioned its acceptance of legitimate variations on GUPC S.A.'s agreement to waive future claims. For instance, as a precondition for agreeing to change GUPC S.A.'s nominated fabricator for the Lock Gates, Respondent demanded that GUPC S.A. sign a waiver releasing all of its claims "in relation to and arising out [of] or in any way in connection with the design, fabrication, transportation, installation or storage of the lock gates both up to date of this Variation Agreement and in the future." Variation Agreement No. 14 relating to Contract CMC-221427 for the Design and Construction of the Third Set of Locks dated 18 Mar. 2011, Clause 6 (Exh. C-77); *see also* Letter IAE-UPC-0559 from Respondent to GUPC dated 24 Mar. 2011, at 5 (Exh. C-78).

effect of these amendments was to limit tenderers' remedies and, thereby, erase the obligations under Panamanian law, the BIT, and international law that Respondent had breached.

56. Claimant ultimately discovered that Respondent made material incorrect representations regarding the conditions of the Project site, while at the same time using its sovereign power to shield itself from liability from such representations and impose additional risk and obligations onto Claimant.

### 3. Respondent Discriminated Against Claimant

57. As costs and delays attributable to Respondent continued to compound, Respondent discriminated against Claimant, including with specific and targeted legislation applicable only to the Project, a public campaign in which Respondent smeared Claimant, threatened to expel it, and falsely accused it of defrauding the State, and treatment less favorable than that afforded to other investors in Panama and even in the Canal expansion project. In particular:

- Respondent targeted Claimant with specific labor legislation. Without considering the Claimant or its partners' input, Respondent enacted Executive Decree No. 6, which increased wages exclusively for the Third Locks Expansion Program employees.<sup>101</sup>
- Respondent engaged in a smear campaign against Claimant and threatened to expel Claimant. ACP's Administrator, Mr. Quijano, for example, publicly and falsely stated that GUPC S.A. was nearing bankruptcy, that the shareholders were taking advantage of Panamanians, and that the GUPC S.A. shareholders purportedly thought "[Panamanians] still [wore] feathers on [their] heads."<sup>102</sup>

Several of Respondent's officials also threatened to expel Claimant and its partners from the Project and to replace them. One official stated to Reuters that "he expected the expansion to be taken out of the GUPC S.A.'s hands."<sup>103</sup>

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<sup>101</sup> Executive Decree No. 6 was issued by the Ministry of Labor and Labor Development and signed into law by President Martinelli and the Minister of Labor and Labor Development. Executive Decree No. 6, "That modifies the Executive Decree No. 3 of March 4 of 1980, whereby it is established the minimum salary for the canal activities related to the use, management, operation, maintenance, protection or defense of the Panama Canal" dated 23 Jan. 2012 (Exh. C-60).

<sup>102</sup> *Expansion will be completed even if I have to go out with a pick and shovel*, EL PAIS dated 9 Jan. 2014, at 1 (Exh. C-44); *see also Quijano fears that GUPC will declare bankruptcy*, CRITICA dated 31 July 2014 (Exh. C-43).

<sup>103</sup> *Insight – Lowball bid comes back to haunt Panama Canal expansion*, REUTERS dated 20 Jan. 2014, at 4 (Exh. C-46); *see also Minister insists that Panama Canal expansion will be completed in 2015*, THE TICO TIMES dated 22 Jan. 2014, at 2 (Exh. C-48); *Se rompen las negociaciones para encontrar una solución a la ampliación del Canal de Panamá*, RTVE.ES dated 5 Feb. 2014, at 4 (Exh. C-47).

- Respondent publicly accused Claimant and its partners of defrauding the State. On 1 January 2016, Mr. Quijano declared to public press that Claimant and its partners were submitting claims by which they attempted to fraudulently extort Panama's public funds. The false public accusation smeared Claimant's reputation.
- Respondent sought to require Claimant to waive claims in violation of its own law. In numerous instances in which the parties agreed to modify the Contract, Respondent asked GUPC S.A. to waive potential claims as a condition to agreeing to the variation, even though doing so was a clear violation of Panamanian law, the BIT, and international law. Respondent did not engage in this behavior with respect to other investors.
- Respondent discriminated against Claimant by implementing a secret policy to deny GUPC S.A.'s claims. From the outset of the Project, Respondent implemented a secret policy to deny 100% of GUPC S.A.'s claims, thereby shifting the financial burden of the Project to Claimant under the terms of the guarantee it was induced to execute. This policy, as memorialized in ACP's Project Management Plan dated 2010 and signed by Mr. Quijano, concerned and indeed was only applicable to the Contract with GUPC S.A., but *none* of the other contracts concluded as part of Respondent's Expansion plan.<sup>104</sup>
- Respondent discriminated against Claimant in favor of other investors. For example, the PAC-4 investors involved in a different component of the Expansion Program also encountered delays of more than two years caused by unforeseen site conditions and non-disclosures. However, in sharp contrast to its actions vis-à-vis Claimant and its partners, Respondent promptly agreed to indemnify the PAC-4 contractors in an amount equivalent to approximately 42% above the initial contract price. Respondent also provided an additional benefit to the PAC-4 investors by assuming the responsibility for final dredging of the Canal.<sup>105</sup> Moreover, despite nearly a year of repeated requests from Claimant for an update on the PAC-4 project so it could plan Works accordingly, Respondent failed to disclose—until May 16 May 2014—that the PAC-4 project had suffered serious delays.
- Respondent failed to provide support to Claimant for serious security and workforce issues in Panama during the Project. For instance, Claimant requested Respondent's help during October

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<sup>104</sup> ACP's Program Management Plan dated Mar. 2010, p. 1-15 (Exh. C-32).

<sup>105</sup> *Panamá paga a FCC lo que le niega a Sacyr en el Canal*, EL ECONOMISTA dated 10 Dec. 2016 (Exh. C-49).

2012 riots and again during a nationwide labor strike in April-May 2014, but Respondent failed to act on both occasions.

58. By discriminating against Claimant, Respondent breached its obligations under Panamanian law, the BIT, and international law.

#### **4. Respondent Increased The Financial Onerosity Of Claimant's Investment**

59. As the extent and consequences of Respondent's bad faith acts began to become apparent in 2011, GUPC S.A. sought to resolve the additional cost issues through recourse to the claims and dispute resolution mechanisms. However, as noted above, unbeknownst to Claimant, Respondent implemented a secret policy to deny 100% of GUPC S.A.'s claims to shift the financial burden of the Project onto Claimant (and other shareholders of GUPC S.A.). In furtherance of this policy, Respondent had undertaken to summarily reject GUPC S.A.'s claims. Over the course of the Project, out of nearly USD 4 billion in claims asserted by GUPC S.A., Respondent voluntarily paid only USD 3.8 million (approximately 0.1%).<sup>106</sup>
60. At the same time, and in spite of the representations made to investors prior to the commencement of the Project, Respondent leveraged its power and position and forced Claimant and the other GUPC S.A. shareholders to make cash contributions and provide managerial expertise under threats of legal action.<sup>107</sup>
- By late 2013, the problems stemming from Respondent's lack of transparency, failure to timely process interim payments to compensate GUPC S.A. (which would have avoided shifting the burden to the shareholders), and other bad acts, continued to compound, and left GUPC S.A. with no choice but to notify Respondent that it was suspending the works in December 2013.<sup>108</sup>
  - During the ensuing months, the parties engaged in extensive negotiations, in which the National Assembly of Panama directly was involved.<sup>109</sup> In February 2014, for instance, the National

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<sup>106</sup> ACP's Program Management Plan dated Mar. 2010, p. 1-15 (Exh. C-32).

<sup>107</sup> Letter from Respondent to Constructora Urbana dated 13 May 2011 (Exh. C-35); Letter IAE-UPC-1303 from Respondent to GUPC dated 7 Nov. 2012, at 2 (Exh. C-36); Letter IAE-UPC-1313 from Respondent to GUPC dated 20 Nov. 2012, at 2 (Exh. C-37); Letter IAE-UPC-1359 from Respondent to GUPC dated 24 Dec. 2012, at 1 (Exh. C-38).

<sup>108</sup> Letter GUPC-IAE-2331 from GUPC to Respondent dated 30 Dec. 2013, at 1 (Exh. C-39); *see also* Letter from GUPC to Respondent regarding the Contractor's Proposal dated 25 Nov. 2013 (Exh. C-40).

<sup>109</sup> Pursuant to Law 28, ACP is legally mandated to provide quarterly reports to the National Assembly that detail the status of the Project and the procurement process generally, in order for the National Assembly to conduct its oversight of ACP. Law No. 28, "Approving the proposal for the construction of a third set of locks

Assembly asked Mr. Quijano to debrief the Assembly regarding the ongoing negotiations.<sup>110</sup> During that same meeting, the President of the National Assembly, Mr. Sergio Galvez, instructed that ACP “must put a certain limit” on GUPC S.A. and its Shareholders, including Claimant,<sup>111</sup> and asserted that GUPC’s and Claimant’s requests were “not a blackmail against ACP’s Board, *but against the Nation.*”<sup>112</sup>

- On 13 March 2014, the parties executed a Memorandum of Understanding (“MoU”), providing for further financial contributions from Claimant and its partners, as well as certain financial contributions from Respondent, sufficient to enable completion of the Project. The intent of the parties to the MoU was to co-finance the remaining works in order to facilitate GUPC S.A.’s performance of the Project.<sup>113</sup> However, Respondent did not follow the agreed MoU terms and instead continued placing additional procedural and financial burdens on the Claimant.

61. In the end, despite Respondent’s repeated representations to the contrary, Claimant and the other GUPC S.A. shareholders have faced the forced immobilization of over USD 4 billion in cash and financial guarantees to ensure the Project’s completion. Respondent thereby leveraged its power and position to require Claimant to provide significant additional funding to cover costs and delays caused by Respondent’s bad faith acts, inappropriately shifting the financial burden for completion of the Project onto the Claimant and its partners, and thus substantially depriving Claimant of its investment.
62. Respondent’s bad acts, however, did not stop after the completion of the Project. For example, after the taking over of the Project, Respondent unilaterally withheld monthly payments for the maintenance of the works being performed by GUPC S.A. Respondent continues to act in the same manner to further harm Claimant.

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in the Panama Canal – which proposal was submitted by the Executive Branch – and establishing other provisions” dated 17 July 2006, Arts. 4, 6 (Exh. C-19).

<sup>110</sup> *Asamblea cita al administrador de la Autoridad del Canal*, LA PRENSA dated 5 Feb. 2014 (Exh. C-41).

<sup>111</sup> *El administrador del Canal Informara el 12 de febrero a la Asamblea Nacional*, EL ECONOMISTA dated 6 Feb. 2014 (Exh. C-45); *see also Asamblea cita al administrador de la Autoridad del Canal*, LA PRENSA dated 5 Feb. 2014 (Exh. C-41); *see also Comisión de Infraestructura de la Asamblea citara a la ACP*, LA PRENSA dated 2 Jan. 2014 (Exh. C-42).

<sup>112</sup> *Comisión de Infraestructura de la Asamblea citará a la ACP*, LA PRENSA dated 2 Jan. 2014, at 1 (Exh. C-42) (emphasis added).

<sup>113</sup> Memorandum of Understanding for Completion of the Works dated 13 Mar. 2014, Annex A, para. 9 (Exh. C-69).

#### D. The Legal Dispute Under The Treaty And Its Lack Of Resolution

63. Respondent's acts and omissions, summarized above, singly and in combination, constitute breaches of various provisions of Panamanian law, the BIT, and international law.
64. As explained above, Claimant invested in Panama on the basis of its legal framework, which *inter alia*, included Respondent's duties that it would act respecting the principles of good faith; compliance with the law; *venire contra factum proprium non valet*; impartiality and equity; planning and informing; transparency; economy; restoration of the economic balance of the contract; refrain from creating burdens; protection of the right of a contractor; collaboration; and non-discrimination. Claimant also relied upon Respondent's duties under international law and the express representations it made with respect to the conditions, scope, and design of the Project site, as well as its commitment to resolve any disputes in a fair and collaborative manner. All of these formed the basis for Claimant's legitimate expectations.
65. Respondent, however, substantially deprived Claimant of its investment by engaging in oppressive actions, failed to plan and act with transparency and good faith, rejecting financial responsibility for the Project, and refusing to negotiate in good faith. In particular, Respondent failed to compensate Claimant for, among other things, the forced immobilization of its capital to provide funding to complete the Project, as well as its managerial and technical expertise. Respondent took advantage of Claimant's work and funds and now benefits from billions of US dollars in annual revenues from the Canal.
66. By undertaking the foregoing acts and omissions, among others, which Claimant will demonstrate further in this arbitration, Respondent breached its obligations under Panamanian law, *inter alia*:
  - Article 1109 of the Panamanian Civil Code to act in accordance with the duty of good faith;
  - Article 17 of the Panamanian Constitution to act in accordance with the law;
  - Article 53 of Law No. 19 to act with impartiality and equity;
  - Article 19(8) of Law No. 22 to plan and inform the contractor;
  - Article 130 of ACP's Regulation to act in accordance with the principles of economy, responsibility, and transparency;
  - Article 133(5) of ACP's Regulation to restore the economic balance with the contractor;

- Article 133(6) of ACP’s Regulation to act timely and not to additionally burden the contractor, to prevent disruptions, and to immediately and accurately resolve any disputes.

67. At the same time, Respondent also breached its obligations under the BIT, *inter alia*:

- Article II(3) of the BIT to accord Claimant fair and equitable treatment;
- Article II(3) of the BIT not to impair Claimant’s investment by unjustified or discriminatory measures;
- Article III(1) of the BIT to accord Claimant’s investment full legal protection and treatment no less favorable than that granted to investments by its own investors or investors of a third State;
- Article V of the BIT not to adopt expropriatory measures or other measures indirectly depriving Claimant of its investment without a public purpose or reason relating to the social interest, on a discriminatory basis, without due process, and without prompt, adequate and effective compensation;
- Article II(4) of the BIT to fulfill in good faith any obligations undertaken with regard to Claimant.

68. On these facts, Respondent thereby also breached its obligation of fair and equitable treatment under international law, which ensures, *inter alia*, investors’ legitimate expectations and full protection and security.<sup>114</sup> In particular, fair and equitable treatment requires host states to “act consistently,” “use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments,” and “not to deprive the investor of its investment without the required compensation.”<sup>115</sup> It also requires host states to “act in a transparent

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<sup>114</sup> Rudolf Dolzer, *Fair and Equitable Treatment: Today’s Contours*, 12 Santa Clara J. Int’l L. 7 (2014) at 15 (Exh. CL-2) (recognizing that, under international law, FET includes “good faith in the conduct of a party, consistency of conduct, transparency of rules, recognition of the scope and purpose of laws, due process, prohibition of harassment, a reasonable degree of stability and predictability of the legal system, . . . recognition of the legitimate expectation on the part of the investor . . . [and lack of] arbitrariness and discrimination”); see e.g., *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award dated 31 Oct. 2011 ¶ 348 (Exh. CL-3) (“There is an overwhelming trend to 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.”); *Waste Management, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award dated 30 Apr. 2004 ¶ 98 (Exh. CL-10) (“In applying [the FET] standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.”)

<sup>115</sup> *Tecnicas Medioambientales TECMED S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award dated 29 May 2003 ¶¶ 152-174 (Exh. CL-11).

manner” and in accordance with good faith, and to respect due process.<sup>116</sup> In other words, the principle of fair and equitable treatment protects investors against any type of conduct that is “arbitrary, grossly unfair, unjust or idiosyncratic, [] discriminatory . . . or involves a lack of due process.”<sup>117</sup> Respondent’s actions with regard to Claimant’s investment fell far below these thresholds.

69. Claimant notes that GUPC S.A. and its shareholders also have brought contractual claims against ACP in arbitrations before the International Chamber of Commerce (“ICC”), three of which are pending. These contractual claims are separate from the above-listed breaches of the BIT, as they solely derive from the Contract and/or the JSG, under Panamanian law.

## V. PROCEDURAL MATTERS

### A. Constitution Of The Tribunal

70. The BIT is silent with respect to the procedure for the constitution of the Tribunal. In accordance with ICSID Arbitration Rule 2(1)(a), Claimant proposes that the Tribunal be composed of three arbitrators, one arbitrator appointed by each party and the third appointed by agreement of the Parties to serve as president of the Tribunal. Claimant will name its party appointed arbitrator within 30 days of registration of this Request for Arbitration, and Respondent shall name its party appointed arbitrator within 30 days of Claimant’s appointment. Within 60 days of Respondent’s appointment, the Parties shall agree on the President of the Tribunal. Claimant takes note of ICSID Arbitration Rule 2(3) regarding the timing of the constitution of the Tribunal.

### B. Place Of The Proceedings

71. The BIT is silent as to the place of the proceedings. In accordance with Article 62 of the ICSID Convention, the place of the arbitration proceedings shall be the seat of the Centre, Washington, D.C.

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<sup>116</sup> *Rumeli Telekom A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award dated 29 July 2008 ¶¶ 581-619 (Exh. CL-12).

<sup>117</sup> *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/, Award dated 30 Apr. 2004 ¶¶ 89-99 (Exh. CL-10).

**C. Language**

72. The BIT is silent on the issue of the language of the arbitration. In accordance with ICSID Arbitration Rule 22(1), Claimant selects English as the procedural language for this arbitration.

**D. Required Copies And Lodging Fee**

73. In accordance with Rule 4 of the ICSID Institution Rules, Regulation 16 of the ICSID Administrative and Financial Regulations, and the ICSID Schedule of Fees effective 1 January 2019, this Request for Arbitration is accompanied by five additional signed copies, and by a non-refundable fee of twenty-five thousand US dollars (USD 25,000.00).<sup>118</sup>

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<sup>118</sup> See Wire Transfer Confirmation for USD 25,000 ICSID Lodging Fee (Exh. C-5).

## VI. REQUEST FOR RELIEF

74. Claimant requests an award granting it the following relief:

- a declaration that Respondent is in breach of the BIT and is liable to Claimant;
- an award of damages to Claimant in an amount to be elaborated and quantified in the course of this proceeding;
- an award of pre-award and post-award interest at a rate to be fixed until the date of Respondent's full and final satisfaction of the award;
- an award of all costs associated with this proceeding, including all professional fees and disbursements incurred in connection with this arbitration; and
- an award of such further or other relief as the Tribunal may deem appropriate.

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75. Claimant reserves its rights to set forth its claims with greater specificity, to amend or supplement this Request for Arbitration, and to assert additional claims, as permitted by the ICSID Convention and the ICSID Arbitration rules.

Dated: 11 March 2020.

Respectfully submitted,



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