INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE NO. ARB/16/42

OMEGA ENGINEERING LLC

and

OSCAR RIVERA

Claimants

v.

REPUBLIC OF PANAMA

Respondent

THE REPUBLIC OF PANAMA'S RESPONSE TO THE SUBMISSION OF THE UNITED STATES OF AMERICA

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30 June 2020

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I. INTRODUCTION

1. The Republic of Panama ("**Panama**" or "**Respondent**") hereby submits its response to the Submission of the United States of America filed on February 3, 2020 ("**U.S. Submission**") regarding the interpretation of the TPA and BIT (collectively, "**the Agreements**").[1]

2. The U.S. Submission addresses several treaty provisions that are central to the present dispute, which Panama addresses below. First, Panama will respond to the U.S. position on the standard of proof applicable to its corruption allegations; Panama maintains that the applicable standard is "reasonable certainty," and not "clear and convincing evidence," as argued by the United States. Second, Panama expresses its general agreement with the United States' position on the international law standards applicable to this matter.

II. THE STANDARD OF PROOF FOR CORRUPTION

3. Panama has established by overwhelming evidence that the Claimants were guilty of corruption in connection with the La Chorrera courthouse project and the bribes admittedly received by Justice Moncada Luna. Accordingly, discussion of the standard of proof applicable to corruption may be of academic interest only. Nevertheless, Panama rejects the United States' argument that "when allegations of corruption are raised, either as part of a claim or as part of a defense, the party asserting that corruption occurred must establish the corruption through clear and convincing evidence."[2] As Panama has established, "reasonable certainty" is the more appropriate standard for corruption allegations like those asserted here.[3] Considering the importance of fighting corruption and the inherent difficulty in establishing corruption, many tribunals have rejected the heightened standard of "clear and convincing evidence"[4] and instead,

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1 Terms defined in Panama's Objections to the Tribunal's Jurisdiction and Counter-Memorial on the Merits ("**Panama's Counter-Memorial**") and Panama's Reply in Support of its Objections to the Tribunal's Jurisdiction and Rejoinder on the Merits ("**Panama's Rejoinder**") maintain their defined meaning.

2 U.S. Submission ¶ 45 (citing *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award (8 Oct. 2009) (**CL-0051**), ¶ 221; *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award (22 Aug. 2017) (**RL-0074**), ¶ 492).

3 Panama's Rejoinder ¶ 31, n. 51.

4 *See e.g., Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Respondent's Application to Dismiss the Claims (10 Nov. 2017) (**RL-0075**), ¶¶ 304, 308 ("a finding of corruption must be…established with 'reasonable certainty'"); *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award (4 Oct. 2013) (**RL-0011**), ¶ 243 (rejecting the

have required allegations of corruption be established with "reasonable certainty."[5] Tribunals have further held that because "corruption is by essence difficult to establish…it is [] generally admitted that it can be shown through circumstantial evidence."[6]

4. A heightened standard of "clear and convincing evidence" is inappropriate and is not applied when measuring the sufficiency of proof in other substantive areas in treaty arbitrations. Some tribunals have suggested that a heightened standard is appropriate because many legal systems afford a higher standard of proof to serious allegations such as fraud and corruption.[7] This reasoning, however, is misplaced in the context of a treaty dispute. As the tribunal in *Fraport v. Philippines I* explained, the jurisdictional question before the Tribunal is an "international investment dispute … not the determination of a crime."[8] The Tribunal must assess whether an economic transaction by a U.S. company was made in accordance with Panamanian and international law and thus qualifies for protection under the Agreements – not whether a crime was committed.

5. Moreover, even accepting that allegations of fraud and corruption are "serious allegations," the tribunal in *Libananco v. Turkey* found the mere presence of serious allegations does not *per se* "require[] it to apply a heightened standard of proof."[9] Rather, while the tribunal

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standard of "clear and convincing evidence" and applying "reasonable certainty"); *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award (6 May 2013) (**CL-0126**), ¶ 183 ("applying the normal rule of the 'balance of probabilities'"); *Libananco v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award (2 Sept. 2011) (**RL-0076**), ¶ 125 (finding that no heightened standard applies for allegations of "fraud or other serious wrongdoing"); *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award (16 Aug. 2007) (**CL-0124**), ¶ 399 (rejecting a heightened standard); *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Award (26 July 2007) (**CL-0022**), ¶ 124 (rejecting a heightened standard and finding the standard was "more likely than not to be true"); *see also* Constantine Partasides, *Proving Corruption in International Arbitration: A Balanced Standard for the Real World*, 25(1) ICSID Rev-FILJ 47 (2010) (**RL-0077**), ¶¶ 50-53, 56 ("exercising the flexibility inherent in their mandates to take account of the intrinsically difficult nature of demonstrating a bribe, arbitral tribunals need not relax—but should not enhance"—the standard of proof).

5 *Tethyan v. Pakistan* (**RL-0075**), ¶ 304; *Metal-Tech Ltd. v. Uzbekistan* (**RL-0011**), ¶ 243.

6 *See e.g., Metal-Tech. v. Uzbekistan* (**RL-0011**), ¶ 243; *Tethyan v. Pakistan* (**RL-0075**), ¶ 308.

7 *See e.g., Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (1 June 2009) (**CL-0032**), ¶ 326; *EDF v. Romania* (**CL-0051**), ¶ 221.

8 *Fraport v. Philippines I* (**CL-0124**), ¶ 399.

9 *Libananco v. Turkey* (**RL-0076**), ¶ 125.

recognized that "the graver the charge, the more confidence there must be in the evidence relied on," it held that "this does not necessarily entail a higher standard of proof." [10] Instead, "[i]t may simply require more persuasive evidence, in the case of a fact that is inherently improbable," to satisfy the tribunal "that the burden of proof has been discharged."[11]

6. Tribunals trying to justify a heightened standard of proof also argue that the allegation in their case is particularly serious because it "involves officials at the highest level of the [government]" and thus, mandates "clear and convincing evidence."[12] This is the primary rationale employed by the tribunals in the awards cited by the United States.[13] As the tribunal in *Tokios Tokeles v. Ukraine* emphasized, however, there are "serious logical problems" with requiring "proof of more than the balance of probabilities where an allegation of gross misconduct is made against a highly placed person."[14] The tribunal explained that "evidentiary requirements can[not] be heightened purely on the grounds of deference or comity or otherwise."[15] Accordingly, it held that to establish a criminal conspiracy, the claimant must "show that its assertion is more likely than not to be true."[16]

7. Even if this Tribunal were to find persuasive the argument that corruption cases involving government officials may require a heightened standard, there is no basis for applying that standard here. Unlike the officials involved in the *EDF v. Romania* and *Karkey v. Pakistan* cases cited by the U.S., the Panamanian official incriminated in the allegations here – Justice Moncada

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10 *Libananco v. Turkey* (**RL-0076**), ¶ 125 (internal citations omitted); *Rompetrol v. Romania* (**CL-0126**), ¶ 182 (quoting *Libananco*).

11 *Libananco v. Turkey* (**RL-0076**), ¶ 125 (internal citations omitted); *Rompetrol v. Romania* (**CL-0126**), ¶ 182 (quoting *Libananco*).

12 *EDF v. Romania* (**CL-0051**), ¶ 221; *Karkey v. Pakistan* (**RL-0074**), ¶ 492.

13 *EDF v. Romania* (**CL-0051**), ¶ 221 (the "accusation of corruption in the present case" was particularly serious "considering that it involve[d] officials at the highest level of the Romanian Government at the time"); *Karkey v. Pakistan* (**RL-0074**), ¶ 492 (finding "that the seriousness of the accusation of corruption in the present case, including the fact that it involves officials at the highest level of the Pakistani Government at the time, requires clear and convincing evidence.").

14 *Tokios Tokeles v. Ukraine* (**CL-0022**), ¶ 124.

15 *Tokios Tokeles v. Ukraine* (**CL-0022**), ¶ 124.

16 *Tokios Tokeles v. Ukraine* (**CL-0022**), ¶ 124.

Luna – has already pled guilty to the charges and has served a multi-year prison term, eliminating the concerns leading the *EDF* and *Karkey* tribunals to apply a higher standard.[17]

8. Additionally, in *EDF* and *Karkey*, the evidence of corruption was far from sufficient.[18] The circumstances here are remarkably different. Panama has provided overwhelming evidence that the Claimants bribed and made corrupt payments to Justice Moncada Luna to obtain the La Chorrera Contract in violation of Panamanian law and international public policy.[19] Based on the circumstances of this case and the reasoning of numerous tribunals, Panama requests the Tribunal apply the "reasonable certainty" standard to these allegations.

III. REMAINING POSITIONS IN THE U.S. SUBMISSION

A. MFN PROVISION

9. The Claimants rely on the most-favored-nation-treatment ("**MFN**") provision in Article 10.4 of the TPA in attempting to incorporate a "broader formulation" of the FET[20] and to import "the umbrella clause from other treaties between Panama and other States."[21] As Panama has explained, the Claimants fail to establish that these provisions can be incorporated; even if they could be, they fail to show a violation.[22] The U.S. Submission supports this conclusion.

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17 Panama's Counter-Memorial ¶ 170 (citing Plea Bargain of Justice Moncada Luna Feb. 23, 2015 (**R-0064**)).

18 *Karkey v. Pakistan* (**RL-0074**), ¶ 543 ("Even if the Tribunal were to apply the 'balance of the probabilities' standard…there is insufficient evidence to demonstrate that…[claimant] was involved in the practice of corruption."); *EDF v. Romania* (**CL-0051**), ¶¶ 221, 237, 246 ("The evidence before the Tribunal in the instant case concerning the alleged solicitation of a bribe is far from being clear and convincing.").

19 *See generally* Panama's Counter-Memorial § II.C; Panama's Rejoinder § II.A. For avoidance of doubt, it is Panama's position that the evidence provided would establish Claimants' corruption under either a heightened or lower standard of proof.

20 Claimants' Memorial ¶ 185, n. 462; Claimants' Reply on the Merits ¶ 379.

21 Claimants' Memorial ¶ 188, n. 468 (relying on the umbrella clause in the BIT, art. II.2. and the Netherlands-Panama BIT (**C-0300**, art. 3(4))). In the Request for Arbitration and Claimants' Memorial, they attempt to import the protections against unreasonable, arbitrary, and discriminatory measures from other treaties. Request for Arbitration ¶ 72, n. 145; Claimants' Memorial ¶ 185, n. 462. However, in their Reply on the Merits, the Claimants abandon this argument and instead, assert that these concepts fall within the FET protections. *See* Panama's Rejoinder ¶ 459. As such, we will not address that argument here.

22 See Panama's Counter-Memorial ¶¶ 217-227; Panama's Rejoinder ¶¶ 139-147.

10. The U.S. aptly emphasizes that the burden to establish a breach of the MFN provision "rests squarely with the Claimant" and "never shifts."[23] To establish a breach, a claimant must prove that "it or its investments: (1) were accorded 'treatment'; (2) were in 'like circumstances' with investors or investments ('comparators') of a third State (*i.e.*, of a State which is not a Party to the U.S.-Panama TPA); and (3) received treatment 'less favorable' than that accorded to such investors or investments."[24] The Claimants have failed to identify third-State investors or investments in like circumstances or "to demonstrate that investors of another Party or a non-Party 'in like circumstances' were afforded more favorable treatment."[25]

11. With regard to the Claimants' argument that the MFN provision imports greater protections into the TPA's FET provision, Panama agrees with the U.S. that the MFN provision cannot "be used to alter the substantive content of the fair and equitable treatment or full protection and security obligations under Article 10.5 [the minimum standard of treatment provisions]."[26] As such, the U.S. supports Panama's position that the Claimants' cannot broaden the FET provision. Moreover, the U.S. notes that Article 10.5.2 and 10.5.3 clarify that these concepts "do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment" and "that a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of" Article 10.5.[27] As explained in more detail below, the concepts that the Claimants attempt to import into the FET provision do not rise to the level of standards of customary international law and therefore cannot be incorporated into the FET.[28]

12. Although the U.S. Submission on the MFN provision does not directly discuss the incorporation of an umbrella clause into the TPA, it does note that if "the claimant does not

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[23] U.S. Submission ¶ 3.

[24] U.S. Submission ¶ 3.

[25] U.S. Submission ¶ 9 ("[t]he MFN clause of the U.S.-Panama TPA expressly requires a claimant to demonstrate that investors of another Party or a non-Party 'in like circumstances' were afforded more favorable treatment.").

[26] U.S. Submission ¶ 10.

[27] U.S. Submission ¶ 10.

[28] *See infra* § III.B.

identify any third-State investor or investment as allegedly being in like circumstances, no violation of [the MFN provision] can be established" and that third-State investor or investment must be from "a State which is not a Party to the U.S.-Panama TPA."[29] The Claimants have not identified a third-State investor or investment in like circumstances here, as Panama and the U.S. are Parties to the BIT from which the Claimants attempt to import the umbrella clause. The Claimants' umbrella clause arguments fail as a matter of law and fact.[30]

B. MINIMUM STANDARD OF TREATMENT PROVISIONS

13. Panama agrees with the U.S. that the minimum standard of treatment is "a minimum 'floor below which treatment of foreign investors must not fall'" and that the provision is connected to customary international law.[31] In particular, Panama agrees that the determination of a breach of the standard "must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their borders"[32] and that "a departure from domestic law does not in-and-of-itself sustain a violation of" the standard.[33]

14. Panama additionally confirms that minimum standard of treatment protections are limited to FET and full protection and security ("**FPS**") and largely agrees with the description of these obligations in the U.S. Submission.[34] With regard to FPS, Panama agrees that the obligation "requires that each Party provide the level of police protection required under customary law" and that in the "vast majority of cases" where FPS was breached "a State failed to provide reasonable police protection against acts of a criminal nature that physically invaded the person or property of an alien."[35] This obligation does not "require States to prevent economic injury

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29 U.S. Submission ¶ 3.

30 Panama's Counter-Memorial ¶¶ 216-227.

31 U.S. Submission ¶¶ 14-15; Panama's Counter-Memorial ¶¶ 265-270.

32 U.S. Submission ¶ 19 (internal quotations omitted).

33 U.S. Submission ¶ 19.

34 U.S. Submission ¶¶ 20-23.

35 U.S. Submission ¶ 22.

inflicted by third parties; provide for legal protection; or require States to guarantee that aliens or their investments are not harmed under any circumstances."[36] Notably, the Claimants have not alleged that Panama failed to provide police protection or that Panama failed to reasonably protect them against physical injury caused by third parties. Consequently, the FPS provision is not implicated in the current dispute.[37]

15. Panama further agrees with the U.S. that the concepts of legitimate expectations, non-discrimination, transparency, and good faith have not "crystallized into the minimum standard" under customary international law and are therefore not State obligations under the FET provision.[38] Contrary to the Claimants' assertions, neither the concept of legitimate expectations nor transparency are components of fair and equitable treatment,[39] and good faith and non-discrimination are not "free-standing, substantive obligation[s]" that can result in State liability under the Agreements.[40] The U.S. agrees with Panama that it could not have violated the FET provisions by frustrating the Claimants' legitimate expectations and treating them arbitrarily, unreasonably, inconsistently, discriminatorily, or with a lack of transparency or good faith.

16. Panama also agrees that the "only treaty obligations that may be arbitrated are those found in Section A of Chapter Ten" of the TPA and Article VII(1)(c) of the BIT,[41] as the Parties have not consented "to arbitrate disputes based on alleged breaches of obligations found" in other provisions of the Agreements or in "other treaties or other international obligations."[42] The Tribunal lacks jurisdiction over any other claims.

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36 U.S. Submission ¶ 23.

37 *See e.g.*, Panama's Counter-Memorial ¶ 325; Panama's Rejoinder ¶¶ 470-475.

38 U.S. Submission ¶¶ 22-30; Panama's Counter-Memorial ¶ 271 (customary international law obligation of FET is not predicated on an investor's legitimate expectations), ¶ 299 (The FET obligations do not include arbitrary, unreasonable, inconsistent treatment or lack of transparency or good faith).

39 *Compare* Claimants' Memorial ¶¶ 162, 173-174 *with* U.S. Submission ¶¶ 24, 26 and Panama's Counter-Memorial ¶¶ 271, 299.

40 *Compare* Claimants' Memorial ¶¶ 156-59 *with* U.S. Submission ¶¶ 25, 27-30 and Panama's Counter-Memorial ¶¶ 271, 299.

41 U.S. Submission ¶¶ 27-29.

42 U.S. Submission ¶ 27.

C. EXPROPRIATION PROVISIONS

17. There is no dispute that the Agreements protect against direct and indirect expropriation without just compensation and that this obligation is governed by international law.[43] However, as the U.S. notes, "certain actions, by their nature, do not engage State responsibility under the expropriation obligation."[44] Here, the acts that the Claimants allege resulted in the indirect or creeping expropriation of their investment were a series of alleged breaches of commercial contracts together with legitimate government actions that by their nature are not expropriatory.[45]

18. Additionally, the U.S. explains that determining whether an indirect expropriation has occurred is a "fact-based inquiry that considers …'(i) the economic impact of the government action; (ii) the extent to which that action interferes with distinct, reasonable investment-based expectations; and (iii) the character of the government action.'"[46] Particularly relevant here is that economic impact "alone, does not establish that an indirect expropriation occurred" but rather "for an expropriation claim to succeed a claimant must demonstrate that the government measure at issue destroyed all, or virtually all, of the economic value of its investment…."[47] Panama agrees.[48] Here, the economic value of Claimants' investments were not destroyed. As Panama has demonstrated, Claimants' investments have virtually no intrinsic value, as "Omega Panama – the core of the Claimants' investment – had 'zero value to a potential willing buyer'" and any damages from alleged breaches of the Claimants' contracts would be extremely limited.[49]

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43 U.S. Submission ¶¶ 31-36; *see e.g.*, Panama's Counter-Memorial ¶ 276; Claimants' Memorial ¶¶ 139-140.

44 U.S. Submission ¶ 37; *see* Panama's Counter-Memorial ¶¶ 252-256.

45 Panama's Counter-Memorial ¶¶ 252-256.

46 U.S. Submission ¶ 38.

47 U.S. Submission ¶ 39.

48 Panama's Rejoinder ¶ 433.

49 Panama's Counter-Memorial ¶¶ 261-263; Panama's Rejoinder ¶¶ 433-434.

19. Panama also agrees that the nature and character of the government action is an important factor and highlights that Panama's actions with regard to the Claimants' projects as well as its investigation into the Claimants' corruption were taken in a non-discriminatory manner for bona fide public purposes.[50] Ultimately, Panama generally confirms the U.S. interpretation of the expropriation provisions under the TPA and BIT.

D. GOVERNING LAW AND THE GENERALLY APPLICABLE BURDEN OF PROOF

20. It is not in dispute that "[g]eneral principles of international law" govern the Agreements, that the Claimants have "the burden of proving [their] claims," and the Respondent has the burden of establishing the affirmative defenses that it raises.[51] Panama also affirms that the general standard of proof is "preponderance of the evidence;" however, as discussed above, it disagrees with the U.S. assertion on the standard applicable to allegations of corruption.[52] It is also Panama's position, in accordance with the general consensus among international tribunals, that the Claimants' have a higher burden in establishing their right to moral damages.[53]

E. THE VARYING REQUIREMENTS TO ACCORD TREATMENT TO INVESTMENTS OR INVESTORS

21. Panama and the U.S. agree that some obligations "require a Party to accord treatment to both investors and investments" while others "only require a Party to accord treatment to an investment."[54] As Panama has explained, all of the treaty provisions under which the Claimants have made claims – FET, FPS, the umbrella clause, expropriation, and unreasonable and arbitrary measures – "extend only to investments not to investors."[55] Therefore, to establish a

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50 *See* U.S. Submission ¶ 43; *see e.g.* Panama's Counter-Memorial ¶¶ 277-282; 291-300; Panama's Rejoinder ¶¶ 459-469.

51 U.S. Submission ¶¶ 44-45; Claimants' Memorial ¶¶ 156-57, 160, 195, n. 489; Panama's Counter-Memorial ¶¶ 185, 260.

52 *See supra* § II.

53 Panama's Rejoinder ¶ 538 (citing cases). This issue was not addressed in the U.S. Submission.

54 U.S. Submission ¶ 46; Panama's Rejoinder ¶¶ 525-262.

55 Panama's Rejoinder ¶ 526 ("The BIT and TPA make clear, however, that protections accorded in respect of the obligations [under the expropriation, FET, FPS, unreasonable and arbitrary measures, and the umbrella clause provisions] extend only to investments not to investors.").

breach of any of these provisions the Claimants "must establish that [Panama's] treatment was accorded to an investment and violated the relevant obligation."[56] The Claimants fail to establish both elements for any of their clams.[57]

F. THE TRIBUNAL'S AUTHORITY TO AWARD DAMAGES

22. Panama confirms the U.S. position that where obligations in the BIT and TPA only extend to investments, "a tribunal may only award damages for violations where the investment incurred damages" – it has "no authority to award damages that a claimant allegedly incurred in their capacity as an investor" in those circumstances.[58] As such, the Tribunal lacks authority to award the Claimants moral damages for harms purportedly sustained by Mr. Rivera and Omega Engineering LLC because of Panama's alleged breaches of the Agreements.[59]

IV. CONCLUSION

23. As demonstrated above, the U.S. Submission largely supports Panama's legal arguments on the appropriate interpretation of the BIT and TPA. Panama reiterates that the Claimants have failed to establish as a matter of fact or law that Panama has breached any of its obligations under the Agreements.

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[56] U.S. Submission ¶ 46 (discussing TPA, art. 10.5(1) and BIT, art. II.2).

[57] Panama's Rejoinder ¶ 525 ("Panama has not engaged in any unlawful conduct and, thus, the Claimants are not entitled to damages or compensation in any form.").

[58] U.S. Submission ¶ 47; Panama's Rejoinder ¶ 525 ("[E]ven if the Tribunal were to conclude that Panama had breached its treaty obligations, the Claimants still would not be entitled to recover moral damages because the BIT and TPA protect investments not investors.").

[59] Panama's Rejoinder ¶¶ 525-530.

Dated: June 30, 2020

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