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

OMEGA ENGINEERING LLC
AND
MR. OSCAR RIVERA
CLAIMANTS

v.

THE REPUBLIC OF PANAMA
RESPONDENT

CLAIMANTS' REJOINDER ON PRELIMINARY OBJECTIONS

Counsel for Claimants

JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
United States

SHOOK, HARDY & BACON LLP
Citigroup Center
201 S. Biscayne Blvd., Suite 3200
Miami, FL 33131
United States of America

JONES DAY
21 Tudor Street
London EC4Y 0DJ
England

20 JANUARY 2020

TABLE OF CONTENTS

I. INTRODUCTION

1. Respondent's Reply on Preliminary Objections [1] consists of a scattershot compilation of internally inconsistent legal theories, unsupported factual claims, and mischaracterizations of international law. It is a failed search for a silver bullet to avoid international responsibility—an effort to trip up these claims on a made-up theory of Claimants' alleged corruption (which has been disavowed by every arm of the Panamanian State to look at the issue since 2014); a naïve expression of President Varela's incorruptibility (despite the recent publication of evidence that proves his unlawful political reprisal campaign against opponents); a singular effort to smear the Claimants' operational success; and arguments to effectively neuter the substantive protections of the treaties. Nonsense.

2. This dispute is now fully plead on the merits (because Respondent apparently did not believe its preliminary objections worthy of bifurcation), and the timeline of events is clear. When Juan Carlos Varela assumed the Presidency in 2014, he set out to extinguish any remnants of former President Ricardo Martinelli's Administration, especially what he called the "children of Martinelli" who signed public works contracts with the previous Administration. Before that time, Claimants spent years building a successful investment in Panama, but within months of President Varela winning the Presidential elections, Respondent began to systematically destroy it. Every ministry and agency with which Claimants had a contract, every Government official upon whom Claimants depended for invoicing, change orders, and payments, simultaneously began to impede and interfere with Claimants' projects. The Municipality of Panama, the

[1] For purposes of this submission, the Parties' prior written submissions shall be referred to in the following manner: (1) Claimants' Memorial dated 25 June 2018 ("**Cls' Mem**."); (2) Respondent's Objections to the Tribunal's Jurisdictional and Counter-Memorial on the Merits dated 7 Jan. 2019 ("**Resp.'s Objections**"); (3) Claimants' Reply on the Merits and Counter-Memorial on Preliminary Objections dated 30 May 2019 ("**Cls' Counter-Mem**."); and (4) Respondent's Reply in Support of Panama's Objections to the Tribunal's Jurisdiction and Rejoinder on the Merits dated 18 Nov. 2019 ("**Resp.'s Reply**").

Municipality of Colón, the Judiciary, the Ministry of the Economy, the Ministry of the Presidency, the Ministry of Health, the National Culture Institute, the Comptroller General's Office and the Prosecutor's Office all acted in concert to dismantle Claimants' investment. This systematic and across-the-board effort, driven by the Presidency and effected through official state acts, sapped Claimants of their cash flow and eventually brought all eight projects, and Claimants' ability to bid for more projects, to a grinding halt—destroying Claimants' investment.

3. Against this backdrop, Respondent's Preliminary Objections start with the proposition that these claims are an "abuse of [the] international investment law system" because Claimants allegedly "procured investments through the payment of bribes."[2] This soaring rhetoric masks a more mundane reality: the *only allegation* of bribery concerned only *one contract*, and even that alleged act occurred well after Claimants "procured" that contract within its larger and preexisting Panamanian investment. And more importantly, Respondent presses this lone, slanderous allegation against a factual record of its own failure. After *over five years* and *three separate investigations* occupying the *entire mechanism* of investigatory and police powers available to the State, Claimants have never been indicted for (let alone convicted of) *anything*. The corruption investigation into Claimants was temporarily dismissed by a court for lack of sufficient evidence, and the statute of limitations for that alleged episode has now run. The money laundering investigation has also been nullified by a second instance court (and without the predicate crime of corruption, no crime of money laundering can be found). So in effect, Respondent would have this Tribunal be the first arbiter of criminal guilt under Panamanian law (or stand as a criminal appellate court, if you will), with the dismissal of international claims as the requested punishment. Make no mistake, Respondent is thus asking

[2] Resp.'s Reply ¶ 3.

this Tribunal to do something that no other investor-State tribunal has ever done (and for good reason).

4. As a separate Preliminary Objection, Respondent seeks immunity for the (mis)conduct of its criminal investigation into Claimants, and would have this Tribunal disavow its jurisdiction because none of those investigations "ar[o]se directly out of an investment."[3] Never mind that international law has long held States liable for the use (and abuse) of such powers, especially where they serve to fig-leaf the destruction of a foreign investment. By simply making this argument (without citation to *any* authority) Respondent betrays the core of its so-called "corruption defense." How can it be argued that corruption was "*endemic*" to Claimants' investment,[4] but at the same time argued that no domestic criminal investigation or prosecution of Claimants "ar[o]se . . . out" of that same investment? The answer is the simplest one, which the record fully supports: years of overzealous investigation of Claimants determined that there was no crime to prosecute, but the State used that process to exact a political price against Claimants anyway. This is the apex of sovereign power being used against a foreign investor, and the most basic *raison d'etre* of the investment protection regime.

5. Respondent's other Preliminary Objections belie even more tension within its arguments. In nearly the same breath as slandering Claimants as endemically corrupt actors, Respondent also argues that this case is just a consolidation of a few garden-variety contract cases, based on modest commercial disagreements, brought by an aggrieved contractor who simply chose not to do the agreed work. That Respondent has posited this theory as a jurisdictional or admissibility defense means that Claimants must present a thorough factual rebuttal to the charge (which they have done below). And when the record of Claimants'

[3] Resp.'s Reply § II.D.

[4] Resp.'s Reply ¶ 63.

performance is set straight, Respondent's misdeeds take center stage. President Varela's inauguration brought the Comptroller General—and thus the purse-strings of the State and the lifeline of all Government contractors—as well as the heads of each Government Ministry and Agency within his capture and hold. From there forward, the State's performance of its contractual obligations was at the whim and pleasure of the Presidency, and that record of performance is largely undisputed: contracts were administratively terminated, communications and payments stopped, and the inevitable end of Claimant's investment came quickly.

6. None of this was a pure coincidence; new evidence has come to light, which brings this pattern of behavior into sharp focus. Publicized electronic communications between President Varela and high-level Government ministers, including the Comptroller General, demonstrate that this sort of targeting of Government contractors, far from being an "outrageous,"[5] was simply business-as-usual in the Varela Administration.[6] Indeed, a new law currently being debated in Panama's National Assembly acknowledges *precisely* what these publicized messages show: that the Varela Administration was "characterized by a[] . . . scandalous . . . stoppage of projects" that caused the State "more than five billion dollars" in losses, a situation that must be prevented by imposing criminal liability on public servants who willfully or negligently allow projects to stop.[7] This is a candid admission of precisely the sort of State conduct that Claimants and their investment faced since 2014.

7. This Rejoinder will proceed in five parts. *First*, in section II.A., *infra*, Claimants will demonstrate (yet again) that Respondent's theories of corruption and illegality on the part of Claimants is based on pure fantasy, and is fully rebutted by the record and by Respondent's own

[5] Resp.'s Reply ¶ 196.

[6] *See infra* Section II.B.8.

[7] Bill No. 028 that Adds Provisions to the Penal Code Concerning the Stoppage and Deterioration of Public Works dated 22 July 2019 (C-0939).

official acts and admissions. *Second*, in section II.B., *infra*, Claimants will demonstrate that their treaty claims are not just an amalgamation of coincidentally timed commercial disputes; the cudgel used to destroy Claimants' investment in Panama was the office of the Presidency, trained on extracting a political price from disfavored contractors who worked with the previous Administration, and using every apparatus of the State to accomplish it. *Third*, the Claimants' umbrella clause claims fall squarely within this Tribunal's jurisdiction (*see infra* section II.C.), and *fourth*, this Tribunal has jurisdiction to adjudicate Respondent's international responsibility for the conduct of its investigatory and prosecutorial apparatus (*see infra* section II.D.). *Fifth and finally*, nothing in the BIT would require this treaty case to be adjudicated across a multitude of domestic and other arbitral fora, just because some of the commercial contracts that constitute part of Claimants' investment included commercial dispute resolution clauses. (*See infra* section II.E.).

8. In addition to the statements, reports and evidence already on the record, this Rejoinder on Preliminary Objections is supported by the following additional witness statements and expert reports:

- The Third Witness Statement of Mr. Oscar I. Rivera Rivera ("**Rivera 3**");[8]
- The Second Witness Statement of Mr. Frankie Lopez ("**Lopez 2**");[9]
- The Second Expert Report of Ms. Alison Jimenez, of the Bates Group, who is an expert in Anti-Money Laundering and Corruption ("**Jimenez 2**");[10]

[8] Third Witness Statement of Mr. Oscar I. Rivera Rivera dated 17 Jan. 2020 ("**Rivera 3**").

[9] Second Witness Statement of Mr. Frankie Lopez dated 17 Jan. 2020 ("**Lopez 2**").

[10] Second Expert Report of Ms. Alison Jimenez dated 17 Jan. 2020 ("**Jimenez 2**").

- The Second Expert Report of Messrs. Arturo Chong and Fidel Ponce, of ARC Consulting, who are experts in real estate transactions in Panama ("**Real Estate Experts 2**");[11] and

- The Expert Report of Justice Jose A. Troyano L., who is a former President of the Panamanian Supreme Court and an expert in Panamanian civil, commercial, and commercial law ("**Troyano**").[12]

9. In addition, Claimants are hereby submitting 191 new and 11 resubmitted factual exhibits as well as 47 new and 4 resubmitted legal exhibits.

II. THE ARBITRAL TRIBUNAL HAS JURISDICTION OVER ALL CLAIMS

10. As set forth in greater detail below, each of Respondent's jurisdictional and admissibility objections fails. Claimants address each in turn.

A. Respondent's Illegality Objection Does Not Impugn This Tribunal's Jurisdiction (and, in any Event, Fails on the Facts)

11. Respondent's illegality defense has been—and still is—based on nothing more than surmise, speculation, and *ipse dixit* accusation. It fails because Respondent has not met its burden of proof, and because it finds no support from investment law jurisprudence. It also fails because Respondent is simply incorrect in asserting that Claimants engaged in any wrongful conduct. For the avoidance of doubt, neither Mr. Rivera nor any of his affiliates ever bribed Mr. Moncada Luna or committed any instance of money laundering.

12. Respondent bears the burden of proving any illegality (something Respondent admits),[13] and the few tribunals to have upheld such allegations in the form of a jurisdictional

[11] Expert Report of Messrs. Arturo Chong and Fidel Ponce of ARC Consulting dated 17 Jan. 2020 ("**Real Estate Experts 2**").

[12] Expert Report of Justice Jose A. Troyano L. dated 17 Jan. 2020 ("**Troyano**").

[13] Cls' Counter-Mem. ¶ 281 & n.814 (noting that "Respondent does not dispute the well-established rule in international law that 'each Party bears the burden of proving the facts which it alleges.'")

defense have done so on uncontestable (or even uncontested) facts.[14] That is most definitely not the case here.[15] Respondent comes nowhere near establishing illegality by any standard of proof,[16] let alone the clear and convincing evidence required. Up until its last written submission, Respondent had never presented *any* evidence suggesting that Claimants procured *any* of their Contracts through corruption of any kind, and Respondent had never even articulated a coherent theory by which any allegedly corrupt payments could have influenced the award of the La Chorrera Contract.[17] As Claimants rightly noted in their Counter-Memorial, Respondent's illegality defense sought to compel this Tribunal to "take the extreme step of dismissing all claims before it and issue a publicly available award declaring Claimants to have committed criminal law violations—all without paying *any* attention to evidentiary standards."[18]

13. Not much has changed with the filing of Respondent's Reply. Respondent again ducks the ultimate issue and instead seeks to rely on repetition in lieu of proof. Lacking evidence,[19] Respondent simply reiterates—at least *nine* times—that it has "proven" with "incontrovertible" and "overwhelming" evidence that Claimants engaged in bribery and money laundering.[20] But merely repeating a false charge *ad nauseum* does not make it true, and

[14] Cls' Counter-Mem. ¶¶ 281, 289 (confirming that, "[i]n *Inceysa v. el Salvador* the tribunal found that the alleged illegality was 'clear,' 'fully demonstrated,' 'fully proven,' and 'obvious.' Similarly, in *World Duty Free v. The Republic of Kenya* the illegality was *admitted*. And the tribunal in *Phoenix Action v. Czech Republic* emphasized that a tribunal can deny access to arbitration only 'if it is *manifest*' that the illegality is proven.").

[15] Cls' Counter-Mem. ¶¶ 281, 289

[16] Cls' Counter-Mem. ¶ 281.

[17] Cls' Counter-Mem. ¶ 283 (citing to First Expert Report of Ms. Alison Jimenez dated 13 May 2019 ("**Jimenez 1**"), at 6, 7).

[18] Cls' Counter-Mem. ¶ 280.

[19] Cls' Counter-Mem. § VII.A.1.

[20] *See* Resp.'s Reply ¶¶ 12 ("The overwhelming evidence clearly shows money flowing from the Judicial Authority to the Claimants, through a cut-out (Reyna, a professional money launderer) and into a bank account unquestionably controlled by Justice Moncada Luna"); 31 ("In the face of the Claimants' proven participation in the bribery of Justice Moncada Luna, the Claimants nevertheless argue they have nothing to do with it, and are blameless."); 31 ("In view of the incontrovertible bank records and Justice Moncada Luna's guilty plea, the Omega-to-Moncada Luna payments cannot be denied."); 34 ("The Claimants' primary reply to this overwhelming proof of

Respondent's so-called "incontrovertible evidence" amounts to nothing more than an empty mantra.

14. Contrasted against this failure, Claimants have refuted Respondent's allegations through a solid foundation of contemporaneous and testimonial evidence, thorough expert reports and legal opinions, as well as common sense, all as set forth in further detail below. Tellingly, *Respondent's own conduct* before *its own courts supports these conclusions as well*. Panama's Corruption Prosecutor requested a court to temporarily dismiss the corruption investigation into Claimants, and the court issued the order for lack of sufficient evidence to formulate formal charges.[21] The statute of limitations for that alleged crime (which is six

---

their bribery of Justice Moncada Luna is that they were buying some land"); 38 ("The Claimants also attempt to support their alternative land acquisition story, in the face of the incontrovertible evidence of bribery, through 'testimony' supposedly coming from Maria Gabriela Reyna."); 55 ("[The Jimenez opinion] seeks to distract the Tribunal by focusing on various irrelevancies, while disregarding the incontrovertible proof of the flow of bribe money from Mr. Rivera to Justice Moncada Luna."); 56 ("While there is no recording of their communications, there is incontrovertible proof of the movement, twice, of money directly from the Judicial Authority through the Rivera-controlled accounts of Omega Panama and PR Solutions to Reyna y Asociados then to Justice Moncada Luna's company Sarelan."); 57 ("In sum, the Ms. Jimenez opinion proceeds by expressing grave concern that irrelevant points are not clarified, while disregarding incontrovertible proof of the payment and receipt of bribes."); 61 ("In tandem with the overwhelming proof of the bank transfers that moved money from Omega to Justice Moncada Luna, and the fatal imperfections in the fake real estate documentation relied upon by the Claimants, the opinion of Mr. Pollitt further confirms the Claimants' misconduct in connection with the La Chorrera Project."); *see also* Resp.'s Reply ¶¶ 11 ("It is now established that the Claimants made corrupt payments to obtain their work in Panama."); 12 ("Panama demonstrated in its Counter-Memorial that two corrupt payments were made by the Claimants to Justice Moncada Luna."); 25 ("In short, US$ 125,000 went from accounts controlled by Mr. Rivera to Justice Moncada Luna, through the otherwise empty Reyna y Asociados account."); 31 ("There can be no doubt: Omega Panama paid bribes to Justice Moncada Luna, for which he went to prison."); 35 ("That pretext can be dismissed in view of the clearly documented flow of funds set forth above, all of which occurred in immediate proximity to the dates on which Omega Panama was paid by the Judicial Authority."); 47 ("When contrasted to the abundant proof that Omega was paying bribes to Justice Moncada Luna, it is clear that the Finca 35659 'transaction' was a fake bit of paperwork thought to be sufficient to mask the bribes."); 56 ("Ms. Jimenez disregards the inconvenient fact that the recipient of Mr. Rivera's bribes, Justice Moncada Luna, pled guilty to unjust enrichment and false statements, was incarcerated and was forced to give up the two apartments paid for, in part, with the bribe money received from Mr. Rivera."); 62 ("As established above, the Claimants engaged in corruption when they bribed Justice Moncada Luna for the purpose of obtaining the La Chorrera Contract."); 71 ("[T]he evidence clearly establishes that the corrupt payment was made in conjunction with award of the contract."); *but see* Expert Report of Mr. Roy Pollitt dated 15 Nov. 2019 ("**Pollitt**"), at 4 ("[I]t is clear that the transactional behavior by Omega Panama exhibits *indicia* of illicit payments and money laundering relating to the unjust enrichment of Justice Moncada Luna.") (emphasis added).

[21] Judgment of Panama's Second Superior Tribunal for the First Judicial District dated 23 Sept. 2016 (C-0008 resubmitted 2), at 16.

years[22]) has now run, demonstrating the finality of Respondent's failure to prove its case.[23] The money laundering investigation, too, has been nullified by a second instance court.[24] And more foundationally, without the predicate crime of corruption, the allegations of money laundering cannot be found—it is a legal impossibility.[25] In the end, and despite conducting three separate investigations and using the entire mechanism of investigatory and police powers available to the State, Respondent's efforts have produced *nothing*.[26] The factual baselessness of Respondent's so-called corruption defense will be addressed in Section II.A.1, *infra*.

15. Unsurprisingly, Respondent's legal support for an illegality or corruption defense is untenably thin as well. Even if Panama could meet its burden of proving something here that could not be proven after over five years of investigations and proceedings in its own courts, there is still no basis for Respondent's extreme sanction of dismissal because its illegality argument is linked to *only one of the eight* construction Contracts at issue in this arbitration (which themselves cumulatively constitute only *part* of Claimants' broader, unitary investment in Panama).[27] Most of the arbitral jurisprudence cited by Respondent to support its position does not even deal with admissibility (which would address alleged illegality in the *operation* of an investment), but rather relates only to wrongful conduct by the investor in *establishing* an investment (*i.e.,* jurisdiction).[28] Here, not a single one of Respondent's allegations of illegality

[22] Panamanian Criminal Code (C-0927), arts. 119-120, 347; Panamanian Judicial Code (C-0091 resubmitted 2), art. 1968(A-E).

[23] *See infra* ¶ 14, 119.

[24] Judgment of Panama's Second Superior Tribunal for the First Judicial District dated 23 Sep. 2016 (C-0008 resubmitted 2).

[25] Panamanian Criminal Code (C-0927), arts. 254-55.

[26] Cls' Counter-Mem. ¶ 284. *See generally* Jimenez 1 at 6-25.

[27] Cls' Counter-Mem. ¶¶ 296-99.

[28] Cls' Counter-Mem. ¶ 302. The only case Respondent cited where illegality was assessed as a matter of admissibility is completely distinguishable. Cls' Counter-Mem. ¶ 303 (noting that: (i) "[o]nly *Churchill Mining v. Indonesia* assessed illegality as a matter of admissibility, but it did so in circumstances completely distinguishable

relates to the establishment of Claimants' investment; rather, all such allegations *post-dated* the establishment of Claimants' investment and only address the operation of the investment.[29] The legal shortcomings of Respondent's so-called corruption defense will be addressed in Section II.A.2, *infra*.

16. In all events, there is a basic inequity in giving Respondent States a 'second bite at the apple' in proving criminal law violations at the international level, when those allegations could not be proven domestically. In short, when a State has tried and failed to do so, despite having ample time and full opportunity, it cannot thereafter seek to limit its own liability internationally, based on something it could not prove domestically. Panama has repeatedly tried and failed to prove that Claimants were involved in illegal conduct, and thus it should be estopped from raising these allegations again in this arbitral forum.[30] This is addressed in Section II.A.2.d, *infra*.

1. Respondent's Illegality Allegations Are Baseless as a Matter of Fact

17. No matter how it tries to slice-and-dice the factual record of this case, Respondent fails to meet its burden of proof. In particular, Respondent has not proven the key elements of corruption or money laundering. As discussed in Claimants' Counter-Memorial and below, Respondent never identifies the alleged *quid pro quo* between Omega Panama or Mr. Rivera, on the one hand, and former Justice Moncada Luna, on the other; it cannot point to *any* evidence of

---

from this dispute. That tribunal found that 34 documents—which included 10 mining licenses and four decrees creating the rights for Claimants' entire investment—had been forged. The tribunal did not perform a detailed temporal analysis, but it made clear that the illegality 'permeated the Claimants' investments' and constituted a 'large scale fraudulent scheme implemented to *obtain* four coal mining concession areas.'" *See Churchill Mining PLC and Planet Mining Pty. Ltd. v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 6 Dec. 2016 ("***Churchill Mining***") (RL-0010), ¶¶ 507, 528, 557(3)); and (ii) the facts of Churchill Mining could not be more distinguishable from the facts of this case, as even the (falsely) alleged illegality here pertains only to one Contract obtained years after the Claimants initiated and grew their successful investment in Omega Panama.)

[29] Cls' Counter-Mem. ¶ 301.

[30] *See infra* § II.A.2.d.

coordination between Omega Panama or Mr. Rivera and Justice Moncada Luna; and it comes up just as empty-handed on evidence purporting to show that the La Chorrera bidding process was corruptly influenced—all of which are *necessary* to prove Respondent's theory of corruption and money laundering.[31] In fact, the evidence put forward by Respondent is wholly insufficient to even support a *prima facie* case of corruption—which, as Ms. Jimenez explains, is the predicate crime for establishing money laundering.[32]

18. Respondent does not address these fundamental inadequacies head-on. Instead, it seeks to rely on unsupported allegations, innuendo and diversion.[33] These tactics are, again, entirely inadequate to support the grave charge that Claimants committed criminal law violations.

19. At its core, Respondent's corruption defense boils down to two (baseless) arguments: (1) "the overwhelming proof of the bank transfers that moved money from Omega to Justice Moncada Luna, and [(2)] the fatal imperfections in the fake real estate documentation relied upon by the Claimants."[34] Both are incorrect, as made clear in the detailed analysis set forth below.

20. In particular, Respondent fails to establish key elements of corruption (see *infra* Section II.A.1.a); Respondent's own criminal investigations do not prove corruption or money laundering (*see infra* Section II.A.1.b); Respondent's illegality theory requires one to ignore key exculpatory evidence (*see infra* Section II.A.1.c); and Respondent's attempts to discredit Mr.

[31] Jimenez 2 at 4.

[32] Jimenez 2 at 27-28.

[33] *See*, *e.g.*, Resp.'s Reply ¶ 31 (arguing, for example, that the alleged quid pro quo was "*at least* US$ 275,000" and that the manner in which the alleged illegal agreement was reached is "[c]urrently a mystery, but one of little relevance") (emphasis added). These answers are wholly insufficient to support Respondent's grave charge that Claimants engaged in corruption.

[34] Resp.'s Reply ¶ 61.

Rivera's legitimate real estate transaction fail (*see infra* Section II.A.1.d). In the end, Respondent's purported evidence of illegality amounts to nothing, which unsurprisingly is reflected by the actions of Respondent's own prosecutors and domestic courts (*see infra* Section II.A.1.e). Indeed, over *five years* after Respondent began investigating Mr. Rivera and Omega Panama, and with all the police powers of the State at its disposal, Respondent has still not been able to come up with *any* evidence that proves its allegations of wrongdoing by Claimants. This underscores how Respondent's purported investigations were nothing but a sham to harm Claimants and their investment in Panama—all part of a multi-faceted attack by Respondent and its Ministries and Agencies that continues in this arbitration.

a. Respondent Fails to Prove the Key Elements of Bribery and Corruption

21. Claimants' expert, Ms. Alison Jimenez, identifies the various ways in which Respondent's illegality and corruption allegations fall far short of the mark. As a preliminary matter, Ms. Jimenez notes that the two financial analysis reports originally relied upon by Respondent—*i.e.*, Mr. Villalba's Preliminary Financial Analysis and Mr. Aguirre's Money Laundering Expert Report for the National Assembly[35]—were confined to the crime of money laundering. This is important because these reports necessarily *presume* (by the fact that corruption is a predicate crime for money laundering) that Mr. Rivera engaged in corruption through bribery.[36] These reports, however, "failed to provide evidence (aside from [a] flawed transactions analysis) that Omega and/or Mr. Rivera engaged in corruption."[37] Among the key pieces of evidence missing from these reports are:

[35] Jorge Enrique Villalba, Preliminary Financial Analysis Report in Case No. 049-15 dated 5 Jun. 2015 (R-0062) ("**Villalba Report**"); Julio Aguirre's Money Laundering Expert Report for the National Assembly dated 23 Feb. 2015 (R-0063) ("**Aguirre Report**").

[36] Jimenez 2 at 7.

[37] Jimenez 2 at 7; Jimenez 1 § III.A.

- "What the alleged agreement was between Omega and/or Mr. Rivera and Mr. Moncada Luna . . .
- What the alleged specific dollar amount was that Omega and/or Mr. Rivera agreed to provide . . .
- When and how the agreement was reached . . .
- How Mr. Moncada Luna was able to purportedly influence the contract decision making process . . . ."[38]

22. As Claimants have already explained, these are essential elements required to prove corruption.[39] In response, Respondent simply dismisses their importance and repeats *ipse dixit* that it has proven that Claimants acquired the La Chorrera Contract through corruption.[40] This is plainly insufficient for the gravity of what is being alleged, yet it is consistent with Respondent's general approach of leveling serious allegations while glossing over the details.

23. This is not just a technicality; the insufficiency of Respondent's case continues much further. At its core, Respondent maintains that Claimants bribed Mr. Moncada Luna to secure their role in the La Chorrera Project, over which Justice Moncada Luna had control.[41] But *Respondent provides no evidence of either a bribe or such control by Mr. Moncada Luna*. This Tribunal will be unable to find any evidence of an investigation into or charges against other individuals who would have been *necessary co-conspirators* in a corrupt awarding of the La Chorrera Contract, including, *inter alia*, the bid's vetting commission, Ms. Rios, Ms. Ana Bouche, and the Comptroller General.[42] This Tribunal will be unable to find any evidence of communications, meetings, phone calls, witness testimony, alleged co-conspirator testimony, or

[38] Jimenez 2 at 7; Jimenez 1 § III.A.1; *see also* Cls' Counter-Mem. ¶ 255.

[39] Cls' Counter-Mem. ¶ 255.

[40] Resp.'s Objections ¶¶ 20, 24, 190; Resp.'s Reply § II.A.1.

[41] Resp.'s Reply ¶ 31.

[42] Jimenez 2 at 13-14.

other documents evidencing either the bid scheme or an alleged *quid pro quo*.[43] And neither Mr. Moncada Luna, nor Ms. Vielsa Rios, nor Ms. Ana Bouche, nor Mr. Espino, nor Ms. Reyna[44] have *ever* insinuated that corruption or bribery influenced the payment of invoices (including advances) for the La Chorrera project, or that the La Chorrera Contract was obtained through corruption.[45] This failure of proof is insurmountable.

24. Even the U.S. State Department found that the evidence presented by Panama, when seeking to extradite Mr. Rivera, was insufficient. On 21 December 2015, the Embassy of Panama requested that the United States arrest Mr. Rivera for the purpose of extradition so that

[43] Jimenez 2 at 5-6.

[44] In its Reply, Respondent incorrectly states that "[n]owhere does [Ms. Reyna] 'testify' that there was an actual and effective real estate transaction between Mr. Rivera or any of his companies and JR Bocas." Resp.'s Reply ¶ 40. This is simply false. In her sworn declaration to the Prosecutor, Ms. Reyna specifically states:

> "I just want to clarify that **the real estate operations carried out with PUNELA INVESTMENT (OMEGA)** and with ALPHA BUSINESS CORP **are perfectly legal and legitimate acquisitions**. I don't believe that there are any links of any other kind of relationship between OMEGA and the people related to Mr. Ricardo Calvo and other people . . . ." Supplemental Declaration of Maria Gabriela Reyna Lopez dated 14 July 2015 (C-0089 resubmitted), at 8 (emphasis added).

Respondent seems to be taking issue with the word "testify," presumably because it does not consider the sworn declaration to the Designated Prosecutor testimony. This is purely semantics and irrelevant. Respondent further argues that "Ms. Reyna is not a witness, is sketchy and unreliable" and her declaration should be "stricken and . . . disregarded" because she "is not subject to cross-examination." Resp.'s Reply ¶ 38. This argument is illogical and duplicitous. *First*, the Designated Prosecutor, and later the Money Laundering and Corruption Prosecutors, have relied on Ms. Reyna's declarations to attempt to make their case. *See generally* Villalba Report (R-0062). To now say that her testimony should be disregarded because it is unreliable and sketchy (seemingly because it does not fit Respondent's theory of the case) buttresses Claimants' argument that the investigations were bogus and unsupported by evidence. In any event, Respondent's argument is duplicitous as Respondent, and its expert Mr. Pollitt, rely on similar declarations from multiple individuals who are not witnesses in this arbitration, such as Ms. Reyna herself, Ms. Bouche, Mr. Espino, Ms. Kattyana Ines Esquivel Vasquez, Mr. Cesar Iván Morales Ibarra, and Mr. Humberto Elías Juarez Barahona. Supplemental Declaration of Maria Gabriela Reyna Lopez dated 14 July 2015 (C-0089 resubmitted); National Assembly Interview with Maria Gabriela Reyna López dated 27 Jan. 2015 (R-0139 / RP-0022); National Assembly Testimony of Ana Bouche dated 28 Nov. 2014 (RP-0002); Interview with A. Bouche, Public Prosecutor's Office dated 28 July 2015 (RP-0010); Interview with Kattyana Ines Esquivel Vasquez, National Assembly dated 5 Feb. 2015 (RP-0015); Interview with Cesar Iván Morales Ibarra, National Assembly dated 5 Feb. 2015 (RP-0017); Interview with Humberto Elías Juarez Barahona, National Assembly dated 19 June 2015 (RP-0019).

[45] Supplemental Declaration of Maria Gabriela Reyna Lopez dated 14 July 2015 (C-0089 resubmitted); Witness Confrontation Procedure between Maria Gabriela Reyna Lopez and Jorge Enrique Espino Mendez dated 22 July 2015 (C-0090 resubmitted); National Assembly Interview of Vielsa Rios dated 2 Dec. 2014 (R-0127); National Assembly Testimony of Ana Bouche dated 28 Nov. 2014 (R-0128); National Assembly Interview with Maria Gabriela Reyna López dated 27 Jan. 2015 (R-0139 / RP-0022); Interview with A. Bouche, Public Prosecutor's Office dated 28 July 2015 (RP-0010); Addendum to Inquiry Statement of Jorge Enrique Espino Mendez dated 3 July 2015 (RP-0025); Addendum to Inquiry Statement of Jorge Enrique Espino Mendez dated 16 July 2015 (RP-0026).

Mr. Rivera could "stand trial in Panama for the crime of money laundering."[46] Curiously, Panama failed to make any mention of corruption charges against Mr. Rivera in the request.[47] The United States denied Panama's request because it did "not contain sufficient factual support linking Rivera Rivera to the money laundering charge."[48] In particular, the U.S. State Department listed some of the types of evidence it found lacking, including "bank records which show the movement of money by Rivera Rivera and reflect that he knew the money was obtained through illegal means, a summary of testimony given by a co-conspirator, or any other evidence which clearly indicates that Rivera Rivera knowingly participated in the money laundering operation."[49] As Ms. Jimenez explains, "[t]he United States' response highlights the deficiencies in Panama's case against Omega and Mr. Rivera in that Panama relied on flawed analysis of bank records alone to support their allegations against Omega and Mr. Rivera."[50]

25. Further, Respondent's corruption allegations contain gross inconsistencies with respect to both the dollar amount of the bribe allegedly paid to Justice Moncada Luna by the Omega Consortium and/or Mr. Rivera and what this bribe was supposedly meant to influence (that is, according to Respondent's own faulty logic).[51] As shown by Ms. Jimenez, the key elements of corruption—namely (i) the "thing of value" given and received and (ii) the "official

[46] Letter from Panama's Foreign Affairs Ministry to Panama's Office of the Attorney General attaching the U.S. State Department's Denial of Panama's Request of a Provisional Arrest for the Purpose of Extraditing Mr. Rivera, 29 Feb. 2016 (C-0900), at 2.

[47] Letter from Panama's Foreign Affairs Ministry to Panama's Office of the Attorney General attaching the U.S. State Department's Denial of Panama's Request of a Provisional Arrest for the Purpose of Extraditing Mr. Rivera, 29 Feb. 2016 (C-0900), at 2.

[48] Letter from Panama's Foreign Affairs Ministry to Panama's Office of the Attorney General attaching the U.S. State Department's Denial of Panama's Request of a Provisional Arrest for the Purpose of Extraditing Mr. Rivera, 29 Feb. 2016 (C-0900), at 2.

[49] Letter from Panama's Foreign Affairs Ministry to Panama's Office of the Attorney General attaching the U.S. State Department's Denial of Panama's Request of a Provisional Arrest for the Purpose of Extraditing Mr. Rivera, 29 Feb. 2016 (C-0900), at 2.

[50] Jimenez 2 at 23.

[51] Jimenez 2 at 8-9.

act" by the recipient that the giver intends to influence—are never clearly defined in Respondent's expert reports or witness statements.[52] The "thing of value" varies from report-to-report and witness-to-witness, even changing among different statements from the *same* witness.[53] Respondent's investigators even arrived at *different dollar amounts* allegedly paid as the "bribes" to Mr. Moncada Luna.[54] Additionally, *none* of Respondent's witnesses or experts ever clearly defines the "official act" that was supposedly influenced by these bribes.[55] Indeed, it was not until nearly *five years after* the transactions in question happened that Respondent provided a coherent theory of its case—namely that the Omega Consortium bribed Mr. Moncada Luna in order to win the La Chorrera Contract[56]—and that theory is contained in the Pollitt Report, not anything prepared by the criminal authorities in Panama. Notably, and as mentioned above, *none* of the multiple domestic investigations conducted by Respondent's officials ever produced *any* sort of written allegation or opinion that Claimants or their affiliates bribed Mr. Moncada Luna in order to influence him to award Claimants the La Chorrera Contract, nor did they produce *any* evidence to support such a claim.[57]

26. Respondent seeks to brush-away this paucity of proof by saying that the way in which the alleged agreement between Mr. Moncada Luna and Omega Panama and/or Mr. Rivera was reached is a "mystery, but one of little relevance,"[58] because bank records and Justice

[52] Jimenez 2 at 9; *see also* Jimenez 1 § III.A.

[53] Jimenez 2 at 9.

[54] Jimenez 1 at 24 (noting that Mr. Villalba reportedly linked Omega Panama to a total of US$ 200,000, while Mr. Aguirre attributed US$ 275,000 to Omega Panama); Jimenez 2 at 28-31.

[55] Jimenez 2 at 9.

[56] Jimenez 2 at 9.

[57] Jimenez 2 at 9.

[58] Resp.'s Reply ¶ 31.

Moncada Luna's guilty plea allegedly evidence the illicit payments.[59] This is wrong as a matter of law *and* a matter of fact. The alleged agreement reached between Mr. Moncada Luna and Claimants is absolutely fundamental. As explained by Ms. Jimenez, both corruption and money laundering *require the intent* of the giver to influence the actions of the receiver.[60] For Respondent's charges of corruption to stick, Respondent must *prove*—with evidence, and not mere blanket assertions and innuendo—that Mr. Rivera acted with the intent of bribing Mr. Moncada Luna, and actually did so. As Ms. Jimenez explains, financial transactions constitute just one piece of evidence that may be necessary but is certainly not sufficient to lead to criminal charges.[61] Such financial transactions may qualify as indicia or "red flags," but those then need to be investigated and corroborated by *evidence*, such as emails, phone logs, text messages, eye witness accounts, and so forth to establish the *intent* to pay a bribe and/or launder money.[62] As such, even assuming Respondent could point to "red flags" (which is denied), they would merely serve as a *starting point* in a criminal investigation and are *not* in and of themselves *proof* of any criminality.[63]

27. In any event, the supposed "red flags" identified by Mr. Pollitt do not withstand scrutiny. *First*, the "large, round dollar fund transfers" from Omega Panama to the Reyna y Asociados account were documented and testified to as a partial payment for the Finca 35659 land deal.[64] In fact, those are the payments specified in the Promise of Purchase and Sale

[59] Resp.'s Reply ¶ 31.

[60] Jimenez 1 at 9; Jimenez 2 at 23-24.

[61] Jimenez 2 at 45.

[62] Jimenez 2 at 45.

[63] Jimenez 2 at 42.

[64] Pollitt at 11; Jimenez 2 at 43.

Agreement for the land.[65] *Second*, the "pattern of rapid and deliberate transfers" identified by Mr. Pollitt was undertaken by unrelated third parties, *not* by Omega Panama and/or Mr. Rivera.[66] Omega Panama and Mr. Rivera only wrote *two* checks *over a month apart* to Reyna y Asociados, *more than five months after* the Omega Consortium had been awarded the La Chorrera Contract—hardly a "rapid" "pattern" by any stretch of the imagination.[67] *Third*, there were no shell companies involved in the Omega transaction for the purchase of the land.[68] While Mr. Pollitt characterizes PR Solutions as a "non-operating" business and includes it on a list of supposed "shell companies," he ignores the fact that PR Solutions *bid on, won, and completed* the Tocumen Airport Contract, and that the bank accounts for the company show significant movement of money, both plainly indicators of an operating company.[69] In these circumstances, the possibility that Mr. Rivera was caught in Ms. Reyna's alleged scheme after engaging in a legitimate real estate transaction is in no way sufficient to demonstrate that Mr. Rivera engaged in corruption or money laundering.

28. Instead of proving the key elements of bribery/corruption described above, Respondent and Mr. Pollitt simply double down on the financial analysis reports linking the two payments made by Omega Panama/PR Solutions to Reyna y Asociados for the purchase of the Finca 35659 land. This, too, is futile to Respondent's case. As Ms. Jimenez explains, and as Claimants discuss below, the criminal investigations and the related financial analysis reports, as

[65] Sale and Purchase Agreement between JR Bocas Investments, Inc. and Punela Development Corp. dated Apr. 2013 (C-0078 resubmitted 2).

[66] Pollitt at 11; Jimenez 2 at 43.

[67] Jimenez 2 at 43.

[68] Jimenez 2 at 43.

[69] Pollitt at 18; Jimenez 2 at 43. Indeed, Mr. Rivera always had close control over PR Solutions, and in 2010 soon after Mr. Rivera acquired the company, PR Solutions filed a public company resolution to replace the company's board of directors with himself and his colleagues. Rivera 3 ¶ 27; Public Act Changing PR Solutions Board of Directors dated 25 Nov. 2010 (C-0851).

well as Mr. Pollitt's opinion, are wrought with inconsistencies and flaws that render them useless.

b. The Criminal Investigations Were Fatally Flawed and Do Not Prove that the La Chorrera Contract Was Acquired Through Corruption

29. In support of its corruption allegations, Respondent relies on Mr. Villalba's "Preliminary Financial Analysis Report"[70] (the "**Villalba Report**") and his testimony in this arbitration,[71] Mr. Aguirre's 2 March 2015 report to the Designated Prosecutor (the "**Aguirre Report**"), documents collected during the three investigations conducted by Panama,[72] as well as the expert testimony of Mr. Roy Pollitt, who contends that "the nature, timing, and flow of these funds demonstrates behavior *typically associated* with kick back, corruption and money laundering schemes."[73] Respondent and Mr. Pollitt focus on two transfers from Omega Panama/PR Solutions to a Reyna y Asociados bank account, pointing to several alleged indicia of criminal behavior as evidence of Claimants' purported misconduct in connection with the La

[70] Villalba Report (R-0062).

[71] *See* First Witness Statement of Mr. Jorge Enrique Villalba dated 7 Jan. 2019 ("**Villalba 1**"); Second Witness Statement of Mr. Jorge Enrique Villalba dated 14 Nov. 2019 ("**Villalba 2**").

[72] Notably, Respondent initially misrepresented that these files were confidential as to Claimants, the Tribunal, and anyone else not a direct participant in the investigations. *See* The Republic of Panama's Responses and Objections to Claimants' Request for Production dated 8 Feb. 2019, Request 42. But it then produced some unknown percentage of the files to its expert, Mr. Pollitt, who *indisputably* was not a direct participant in any of the investigations in Panama. Letter from Jones Day to the Members of the Tribunal dated 9 Dec. 2019; Letter from Shearman & Sterling to the Members of the Tribunal dated 12 Dec. 2019; Letter from Jones Day to the Members of the Tribunal dated 13 Dec. 2019. Through Mr. Pollitt's Report, Respondent then submitted into the record a handful of cherry-picked documents from the investigations. Letter from Jones Day to the Members of the Tribunal dated 9 Dec. 2019; Letter from Jones Day to the Members of the Tribunal dated 13 Dec. 2019. As Mr. Pollitt's Report made clear that he had relied upon more than just the handful of documents submitted, the Tribunal then ordered Respondent to produce *everything* that Mr. Pollitt had reviewed, Procedural Order No. 2 dated 18 Dec. 2019. Claimants have had only a limited amount of time in which to review these materials, but it is clear that the evidence Respondent attempted to withhold from this arbitration supports Claimants' case and harms Respondent's case. As such, the Tribunal should draw the adverse inference that the investigation materials withheld from Mr. Pollitt (and likewise from Claimants) were even more damaging to Respondent's case. *See Vale S.A. v. BSG Resources Limited*, LCIA Case No. 142683, Award, 4 Apr. 2019 (CL-0247), ¶ 361 ("As a general starting point, it cannot be doubted that the Tribunal has the power to draw adverse inferences wherever appropriate . . . .").

[73] Resp.'s Reply ¶ 59; Pollitt at 4.

Chorrera Project.[74] However, as Claimants' expert Ms. Jimenez explains (and Claimants will summarize below), this theory necessarily relies on a *Preliminary* Financial Analysis based on *incomplete* bank records and *faulty* comparisons to a single inapposite corruption scheme. From there, Respondent's investigations failed to seek (or at least Respondent has failed to submit on the record) key evidence necessary to support the questions raised by the Preliminary Financial Analysis. One would think that such a definitive and important report would include, *inter alia*, emails, text messages, and telephone logs between the investigated parties, but it does not. Ultimately, Respondent chooses to ignore the much more plausible scenario that Omega Panama and Mr. Rivera had *absolutely no knowledge or involvement* in Ms. Reyna's alleged money laundering scheme. And the only logical inference is that it did so based on then-President Varela's vendetta against Claimants.[75]

30. The paucity of real evidence is endemic to Respondent's case—which is likely why Claimants were never convicted of or, in relation to the corruption investigation, even charged with a crime in Panama. The Villalba and Aguirre Reports each failed to show that Claimants engaged in corrupt acts in relation to Mr. Moncada Luna.[76] Instead, they incorrectly conclude that a *coincidental* overlap of Ms. Reyna's presence created a *causal* connection justifying corruption allegations against Claimants, and refused to determine (or even consider) a *legitimate* reason for Claimants' transactions with Reyna y Asociados (*viz*., the purchase of the Finca 35659 land).[77] The Aguirre Report specifically failed to address basic elements of bribery or establish a "direct relationship" between State money (*i.e.*, payments on the La Chorrera

[74] Resp.'s Reply ¶¶ 22-28.

[75] *See infra* Section II.B.

[76] Jimenez 1 at 6-10.

[77] Jimenez 1 at 9.

Contract) and the apartment paid for on behalf of Mr. Moncada Luna's family.[78] The Villalba Report similarly disregarded many of the required elements of bribery/corruption.[79] Further, while Mr. Villalba's witness statement explains that his Report purported to look at all judgments issued by then-Justice Moncada Luna to determine if any judgments were changed or decided contrary to law so as to benefit a particular party, the Villalba Report does not provide *any* detail about how the review was undertaken and fails to even consider the possibility that an entity paid a bribe in advance of winning a contract, or that Mr. Moncada Luna in fact embezzled the funds in question.[80] Instead, Mr. Villalba merely cites to cherry-picked transactions in Omega Panama's and PR Solutions' bank accounts.[81] Critically, at no point in his report did Mr. Villalba state that Omega Panama and/or Mr. Rivera paid a bribe to win the La Chorrera Contract.[82] This singular failure disproves Respondent's entire case.

31. Ms. Jimenez likewise confirms that Panama failed to show that Claimants engaged in money laundering.[83] As discussed *supra*, while corruption—and bribery specifically—are predicate offenses to money laundering, both the Aguirre and Villalba Reports *simply assumed* corruption as a starting point and engaged in a patently flawed analysis of the transactions in question. For example, the Aguirre Report failed to account for the fact that Omega Panama's bank account had more than enough funds to pay off the mortgage debts for both apartments in question prior to receiving the La Chorrera advance payment.[84] In its bank transfer analysis, the Aguirre Report also relied on the partial Reyna y Asociados bank records

[78] Jimenez 1 at 7-8; Jimenez 2 at 7-8.

[79] Jimenez 1 at 8-9; Jimenez 2 at 8-9.

[80] Jimenez 1 at 8.

[81] Jimenez 1 at 8-9.

[82] Jimenez 1 at 9.

[83] Jimenez 1 at 3, 10-23.

[84] Jimenez 1 at 12.

(containing only odd numbered pages), which Ms. Jimenez estimates are missing *more than 210 transactions and US$ 278,000 worth of withdrawals,* including during the crucial time periods.[85] With respect to the first allegedly illicit payment, the Aguirre Report failed to account for half the funds deposited by Omega/PR Solutions into the Reyna y Asociados account.[86] With respect to the second payment, the Aguirre Report similarly failed to account for funds deposited into the Reyna y Asociados account and also disregarded potential alternative sources for the alleged bribe.[87] For example, the Aguirre Report did not attribute the US$ 200,000 deposit by Alexandre Tchervonny into the Reyna y Asociados account as a potential source of funds later allegedly moved to benefit Mr. Moncada Luna, despite the fact that at the time of his Report, Mr. Aguirre had access to Reyna's interview with the National Assembly investigators, during which she repeatedly refused to provide information about Mr. Tchervonny on the basis of attorney-client privilege but suspiciously offered only that he's "Russian" and "Mr. Alexandre Tchervonny by chance hires someone, I don't know you're the one with the list of contractors."[88] This bizarre testimony (combined with the appearance of US$ 200,000 at the right time) should have been a red flag to *any* reasonable investigator, but instead the Aguirre Report chose to draw nonsensical conclusions against Omega Panama and Mr. Rivera in its strained attempt to fabricate criminal findings against them (again, likely due to President Varela's vendetta).

32. The Villalba Report was similarly problematic, contradicting the Aguirre Report in numerous key respects (including, as discussed *supra*, how much money was allegedly

[85] Jimenez 1 at 15-16.

[86] Jimenez 1 at 15.

[87] Jimenez 1 at 17-19; Jimenez 2 at 7-8.

[88] National Assembly Interview with Maria Gabriela Reyna López dated 27 Jan. 2015 (R-0139), at 8, 10; Jimenez 2 at 8.

transferred from Claimants to Mr. Moncada Luna).[89] Like the Aguirre Report, the Villalba Report similarly relied on incomplete Reyna y Asociados bank statements, disregarded the fact that Omega Panama's account had more than enough in funds to pay off the mortgage debts for both apartments prior to receiving the La Chorrera advance, and failed to account for all of the money deposited by Omega Panama/PR Solutions in the Reyna y Asociados account.[90] Ultimately, both reports simply *assumed* the underlying real estate transaction was unlawful without fully evaluating it or the legitimate business purposes involved.[91]

33. Like the Villalba and Aguirre Reports, Mr. Pollitt's analysis of the allegedly fraudulent transactions is similarly flawed. For example, Mr. Pollitt characterizes Ms. Reyna as a professional money launderer, alleging that she "provided her services to help transfer and launder the payments relating to the unjust and illicit enrichment of Justice Moncada Luna."[92] However, as Ms. Jimenez explains, Mr. Pollitt's analysis of the allegedly fraudulent transfers is inherently flawed. In particular, Mr. Pollitt (and thus Respondent) attempts to dismiss the importance of the missing Reyna y Asociados bank transactions, stating that Ms. Jimenez focuses on "irrelevancies" such as the fact that Reyna y Asociados' bank statements are missing key pages.[93] Mr. Pollitt concedes (as he must) that "multiple pages from the Reyna y Asociados bank accounts are missing," but he *incorrectly* asserts that the "bank statements in the record contain a full account of the key time periods in question, including transactions from April 4 to May 3, 2013 and July 16 to July 18, 2013, the relevant periods for both of the US$ 250,000

[89] Jimenez 1 at 24.

[90] Jimenez 1 at 19-22.

[91] Jimenez 1 at 11-12; Jimenez 2 at 7-8.

[92] Resp.'s Reply ¶ 60; Pollitt at 5.

[93] Resp.'s Reply ¶ 56; Pollitt at 30; Jimenez 2 at 38.

payments from Omega Panama/PR Solutions to Reyna y Asociados and then Sarelan."[94] But in reality, the Reyna y Asociados bank statements are at least potentially missing the complete set of pages for *both* 3 May 2013 and 18 July 2013.[95]

34. More specifically with respect to the first allegedly fraudulent transfer, Mr. Pollitt critically discounts the fact that one of the missing pages from the bank records may have contained multiple transfers for 3 May 2013, the date that the Reyna y Asociados account was debited to fund the purchase of a cashier's check for US$ 125,000, made payable to Sarelan.[96] While Mr. Pollitt concluded "the original account balance of $1,852.54 plus the small volume of intermediate transactions was wholly insufficient to fund the outbound Sarelan transfer [on 3 May 2013]"[97] until Omega Panama and PR Solutions made a deposit of US$ 250,000 into the Reyna y Asociados account, he reached his conclusion without considering whether there had been *additional transactions* on 3 May 2013 that would have been listed on the missing page of the account statement and which consequently could have been the source of the first transfer of US$ 125,000 from Reyna y Asociados to Sarelan.[98] Another alternate, and more likely, scenario is that Ms. Reyna simply did as she pleased with the money that was in *her* bank account, commingling funds obtained for both lawful and unlawful purposes.[99] Indeed—and importantly—Ms. Reyna *admitted* to commingling funds in her account during her National Assembly testimony.[100] All of Respondent's various investigators and experts ignore this point.

[94] Pollitt at 30.

[95] Jimenez 2 at 34-38.

[96] Jimenez 2 at 36.

[97] Pollitt at 13 (emphasis omitted).

[98] Jimenez 2 at 36.

[99] Jimenez 2 at 39-40.

[100] Jimenez 2 at 39-40.

35. With regard to the second allegedly fraudulent transfer, which consisted of two cashier's checks for US$ 75,000 debited from the Reyna y Asociados account on 17 and 18 July 2013 and payable to Sarelan, Mr. Pollitt makes no attempt to determine the source of the remaining US$ 37,420.72 that was in the Reyna y Asociados account before the first US$ 75,000 money order was posted on 17 July, inexplicably attributing the full US$ 75,000 to Omega Panama/PR Solutions with no explanation or justification.[101] Further, the second cashier's check for US$ 75,000 from Reyna y Asociados to Sarelan on 18 July 2013 appears on the Reyna y Asociados bank transaction list on "Page 45 of 59," which page contains at least seven transactions from that date.[102] However, it is unclear if there were further transactions on 18 July 2013 that continued onto "Page 46 of 59" because Page 46 is missing.[103] Again, it is pure speculation on the part of Respondent to attribute the second payment of US$ 75,000 to Omega, since it is unknown if there were other deposits into the Reyna y Asociados account on 18 July 2013, or even days later, since Ms. Reyna may have been using Omega Panama's legitimate real estate money to pay off other unrelated debts of her own.[104] Again, she *admitted* during her National Assembly testimony that she engaged in this type of commingling of funds, but Respondent persists in ignoring that admission.[105]

---

[101] Pollitt at 16.

[102] Jimenez 2 at 38.

[103] Jimenez 2 at 38.

[104] Jimenez 2 at 38-39.

[105] In addition to ignoring this admission, and as explained *supra*, Respondent also misrepresents Ms. Reyna's testimony before the Designated Prosecutor by saying that she did not exculpate anyone in her testimony. Ms. Reyna explicitly stated in her declaration on 14 July 2015 that "I just want to clarify that the real estate operations carried out with PUNELA INVESTMENT (OMEGA) and with ALPHA BUSINESS CORP *are perfectly legal and legitimate acquisitions*. I don't believe that there are any links of any other kind of relationship between OMEGA and the people related to Mr. Ricardo Calvo and other people . . . ." Supplemental Declaration of Maria Gabriela Reyna Lopez dated 14 July 2015 (C-0089 resubmitted), at 8 (emphasis added); *see also supra* n.44. What Ms. Reyna describes in her testimony is what she did with the money she received from the legitimate transaction with Punela—namely, that she commingled legitimate and illegitimate funds in her account. Supplemental Declaration of Maria Gabriela Reyna Lopez dated 14 July 2015 (C-0089 resubmitted) at 4 (explaining that "I then

36. Ultimately, the missing Reyna y Asociados bank transactions are not irrelevant or tangential, as Mr. Pollitt claims,[106] but rather a fatal flaw in his, Mr. Villalba's, Mr. Aguirre's, and Respondent's financial transaction analysis. The incomplete bank transactions form the faulty foundation upon which the entirety of Respondent's allegations against Omega Panama and Mr. Rivera are built and thus are insufficient to prove money laundering (or any other possible crime). And, as Ms. Jimenez explains, Respondent had *eight* opportunities to cure this fatal defect,[107] yet it never did so because doing so would not have helped its intended result: to connect Mr. Rivera with unrelated payments made by Ms. Reyna. In sum, the fact that none of Respondent's investigators and expert noticed or cared that their key piece of evidence was missing half of its pages demonstrates that *all of them* were either very careless with their analyses (which seems unlikely) or performed their analyses with a foregone conclusion in mind—namely, that Mr. Rivera and Omega Panama would be labelled "corrupt." In the end, neither scenario supports Respondent's "illegality" defense.

37. Further, as Ms. Jimenez explains, the Pollitt Report also made several clear "guesses" at what happened to the entire US$ 500,000 transferred from Omega Panama to PR Solutions to Reyna y Asociados.[108] While Mr. Pollitt nonchalantly states that "of the $500,000 in transfers that Omega Panama made to middlemen, a material portion of these illicit funds was

---

received the payments [from Omega] in the account of Reyna y Asociados and everything seemed normal. With this money, I made some deposits into an account that Mr. Ricardo Calvo supplied me, for a company named SARELAN [*sic*] and other payments were made to third parties that were owed money by JR and even a loan was made of some money from there"); Jimenez 2 at 39-40. As explained *supra* neither Mr. Rivera, nor Omega Panama, nor Punela had any knowledge that Ms. Reyna might use the money she received from the sale of the Tonosi land for any other purpose. *See supra* ¶ 20. Ms. Jimenez has confirmed that the alleged "evidence" that the payments for the Tonosi land were funneled to Mr. Moncada Luna is flawed and insufficient. *See infra* ¶ 37. Thus, not only did Claimants have no knowledge, but there may well have been nothing to know.

[106] Pollitt at 30.

[107] Jimenez 2 at 33-34.

[108] Jimenez 2 at 43-44.

funneled to Justice Moncada Luna,"[109] he attributes only US$ 275,000 of Omega Panama's funds as going to Mr. Moncada Luna, leaving a whopping US$ 225,000 unaccounted for.[110] The only explanation Mr. Pollitt offers for the missing money is that it was compensation for individuals "helping to launder proceeds of [a] crime."[111] Who this might have been remains unsaid (and obviously went uninvestigated in Panama). However, since under Respondent's theory the only intermediary between Rivera-controlled PR Solutions and Moncada-Luna-controlled Sarelan was Ms. Reyna, this would amount to her being paid US$ 225,000 for her alleged intermediary services, amounting to her receiving an *81% "cut"* for her services as a middleman.[112] This is, frankly, illogical at best. As Ms. Jimenez explains, generally commission rates "average between four and eight percent with a *high of 12 percent* of the principal involved."[113] Again, the simpler (and much more likely) explanation is that Ms. Reyna was simply commingling legitimate and illicit funds—*which she admitted to doing* in her testimony before Respondent's National Assembly.[114]

38. Mr. Pollitt also contends that "[t]he Omega Panama-to-Moncada Luna bribery scheme was identical in its structure to other bribery schemes undertaken by corrupt bidders on other Judiciary projects and in which Justice Moncada Luna also collected bribes."[115] Although Mr. Pollitt oddly fails to name the companies involved or cite any documentation to support this theory, Ms. Jimenez deduces from the declarations cited by Mr. Pollitt that the allegedly similar

[109] Pollitt at 4.

[110] Jimenez 2 at 44.

[111] Pollitt n.4; Jimenez 2 at 44.

[112] Jimenez 2 at 44; Pollitt n.4.

[113] *National Money Laundering Strategy*, US Treasury, 2002, *available at* https://www.treasury.gov/press-center/press-releases/Documents/monlaund.pdf (C-0906), at 24.

[114] National Assembly Interview with Maria Gabriela Reyna López dated 27 Jan. 2015 (RP-0022), at 12; Declaration from Maria Gabriela Reyna dated 23 June 2015 (C-0894), at 8, 12.

[115] Resp.'s Reply ¶ 60; Pollitt at 23-25.

scheme Mr. Pollitt is suggesting most likely relates to the Maritime Judicial Building contract won by Conceptos y Espacios.[116] However, as Ms. Jimenez explains, this comparison is completely inapposite for many reasons. *First*, the Maritime Judicial Building Project only had *one* bidding firm—Conceptos y Espacios—making it easy to rig. In contrast, the La Chorrera Project had *four* bidding firms, with Omega providing the lowest bid by over one million dollars and receiving the highest ranking from an *independent* evaluating committee.[117] *Second*, while Mr. Corcione, a middleman, reached out to Mr. Jorge Espino, president of Conceptos y Espacios, to suggest that a payment could secure the contract for his company, and Mr. Corcione subsequently met with Mr. Moncada Luna, Respondent has offered *zero* evidence or testimony that Mr. Corcione played any role in the alleged Omega bribery scheme, nor that Mr. Moncada Luna engaged in "introductory" (or any other kinds of) meetings on behalf of Omega.[118] *Third*, while Mr. Espino testified that he met with Ms. Reyna three or four times in the fall of 2014 *after* the news broke of the Moncada Luna allegations, Omega Panama (through PR Solutions) interacted with Maria Reyna in early 2013 (as evidenced by the Purchase and Sale Promise Agreement and the checks written to Reyna y Asociados in April and July 2013), *before* there was even a hint of the Moncada Luna allegations. Moreover, Ms. Reyna, Mr. Lopez and Mr. Rivera have all consistently testified that Mr. Rivera and Ms. Reyna have never met.[119] *Fourth*, the financial pattern in the Conceptos y Espacios case is markedly different from the scenario that Messrs. Aguirre, Villalba, and Pollitt suggest happened with Omega Panama and

[116] Jimenez 2 at 18. As Ms. Jimenez notes, however, some of the details provided by Mr. Pollitt do not appear to match the known facts regarding Conceptos y Espacios. Jimenez 2 at 18-22. Nonetheless, as neither Mr. Pollitt nor Respondent have seen fit to identify the alleged "other" scheme to which they are referring, Claimants can only assume it relates to Conceptos y Espacios.

[117] Jimenez 2 at 18; *Compare* Report from the Vetting Commission No. 2013-0-30-0-08-AV-005500 dated 9 Apr. 2013 (C-0890) *with* Report from the Vetting Commission dated 9 Oct. 2012 (C-0083 resubmitted).

[118] Jimenez 2 at 18-19.

[119] Jimenez 2 at 19.

the La Chorrera Contract.[120] In particular, and as Ms. Jimenez explains, there were marked differences in the contract dollar value, the alleged bribe amount, the alleged commission to middlemen, the percentage of the alleged bribe in relation to the contract, and the alleged middlemen commission as a percentage of the alleged bribe, as follows[121]:

		Alleged Scheme	
		Conceptos y Espacios	**Omega**
A	Contract Dollar Value	$8,995,505.11	$16,495,000.00
B	Alleged Bribe Amount	$600,000.00	$275,000.00
C	Alleged Commission to Middleman	$20,000.00	$225,000.00
D	Alleged Bribe plus Commission= B+C	$620,000.00	$500,000.00
E	Alleged Bribe as % of Contract = B/A	**6.7%**	**1.7%**
F	Alleged Middleman Commission as % of Bribe= C/B	**3.3%**	**81.8%**

39. *Fifth*, Mr. Pollitt mischaracterizes Ms. Bouche's testimony with the Organized Crime Public Prosecutor on 28 July 2015.[122] Contrary to Mr. Pollitt's Report, Ms. Bouche did *not* testify that the two alleged schemes "mirrored" each other, but rather discussed the fact that an engineering consultant, Roberto Samaniego, worked on multiple contracts for Judicial Buildings, which was confusing.[123] *Sixth*, unlike the case of Conceptos y Espacios, *none* of the involved parties *ever* implicated the Omega Consortium in their testimony.[124] Thus, far from providing evidence of multiple bribery schemes that parallel the Omega Consortium's bid for the La Chorrera Contract (as Respondent suggests), Respondent is only able to point to a *single*

[120] Jimenez 2 at 19.

[121] Jimenez 2 at 20.

[122] Jimenez 2 at 21-22.

[123] Jimenez 2 at 21-22. Moreover, even in this respect, Ms. Bouche's testimony was wrong. As Mr. Rivera has stated, to the best of his knowledge, Roberto Samaniego had no role on the La Chorrera Project. Rivera 3 ¶ 25.

[124] Jimenez 2 at 22.

scheme that is, in fact, completely inapposite. Again, Respondent is twisting the facts to create a pattern it wants to find, rather than allowing the facts to remain where they lie.

c. Respondent Ignores Key Evidence that Shows that Claimants Did Not Secure the La Chorrera Contract Through Corruption and Instead Focuses on Irrelevancies

40. Respondent goes to great lengths to try to show that Mr. Moncada Luna controlled the bidding and contract award process for the La Chorrera Project.[125] In an attempt to support its theory, it relies heavily on Ms. Rios' testimony. According to that testimony, Mr. Moncada Luna selected and appointed the three members of the Judiciary's Vetting Commission, including Arelys de Caballini (a close friend of Mr. Moncada Luna),[126] and during the La Chorrera bidding process, the Vetting Commission provided recommendations, but Mr. Moncada Luna actually selected the Omega Consortium as the winning bidder.[127] Notably missing from Ms. Vielsa Rios' testimony, however, are any allegations that there was anything untoward or illicit in the La Chorrera Project's bidding. At no point does Ms. Rios testify that Mr. Moncada Luna controlled the bidding and contract award process *because* he wanted the Omega Consortium to win the project due to corruption (or otherwise). Nor does Ms. Rios ever state that she saw or had any knowledge that the Omega Consortium (or anyone else, for that matter) bribed Mr. Moncada Luna so that the Omega Consortium would obtain the La Chorrera Project. Ms. Rios has now had *three sworn opportunities* to accuse Mr. Rivera and/or the Omega Consortium of illegally obtaining the La Chorrera Contract—yet she has *never once* made any such accusation.[128] Her silence in this regard speaks volumes, attesting to the fact that

[125] Resp.'s Reply ¶¶ 13-16.

[126] Resp.'s Reply ¶ 15.

[127] Resp.'s Reply ¶ 16.

[128] National Assembly Interview of Vielsa Rios dated 2 Dec. 2014 (R-0127); First Witness Statement of Vielsa Rios dated 7 Jan. 2019 ("**Rios 1**"); Second Witness Statement of Vielsa Rios dated 18 Nov. 2019 ("**Rios 2**").

there was no corruption. The evidence demonstrates that Mr. Moncada Luna simply followed the recommendations of the vetting commission which (correctly) positioned the Omega Consortium—the lowest bidder—as the winner of the contract with 100 points.[129]

41. Further, Respondent and Mr. Pollitt ignore the fact that Respondent (and its inspectors) have never even *interviewed* the three members of the vetting commission who (if one is to believe Respondent's tale) would have needed to select the Omega Consortium as the winning bidder *at Justice Moncada Luna's request* (and not on the basis of the merits of the bids).[130] This is telling given that Mr. Rivera *specifically requested* through the Panamanian courts that the Prosecutor interview these three individuals, which never happened.[131] Unable to interview the members of the vetting commission—whom Claimants understand are all still working for the Government, including the Judiciary[132]—Claimants commissioned two public works experts to conduct a blind review of the four bids for the La Chorrera Contract and rank them as the vetting commission would have done.[133] The Public Contracts Experts conclude that the Omega Consortium won the La Chorrera Project fair and square.[134] Against this showing Respondent has produced nothing—*zero*—despite having the clear ability to do so. This singular failure again dooms its fantastical theory of illegality and corruption.

42. To distract from this point, Respondent continues to try to prove that Mr. Moncada Luna was corrupt by recapping the formation history of Sarelan Corporation, S.A.

---

[129] *Compare* Report from the Vetting Commission dated 9 Oct. 2012 (C-0083 resubmitted) *with* Expert Report of Prof. José María Gimeno Feliú and Prof. José Antonio Moreno dated 17 May 2019 ("**Public Contracts Experts Report**"), at 6.

[130] *See* Jimenez 2 at 15.

[131] *See* Oscar Rivera's Petition of Habeas Corpus to the Supreme Court dated 28 Aug. 2015 (C-0208 resubmitted) at 25.

[132] Panamanian Judiciary Website, Spreadsheet of Public Officials, undated (C-0928); Raul de Obaldia's LinkedIn Profile, undated (C-0929).

[133] Public Contracts Experts Report at 3, 52.

[134] Public Contracts Experts Report at 53.

("**Sarelan**").[135] But neither Mr. Moncada Luna, nor Sarelan, are at issue in this arbitration.[136] It is completely beside the point in this proceeding whether Mr. Moncada Luna had corrupt bank accounts since this is not a trial against him. The point that Respondent must prove is whether Mr. Rivera acted with the intent to bribe Mr. Moncada Luna when he (through Omega Panama and PR Solutions) made the two payments to Reyna y Asociados for the purchase of the parcel of land in Tonosi. On this point, Respondent has failed. It cannot prove that intent since the story it has created about Omega Panama paying Moncada Luna to win the la Chorrera Contract is completely false.

43. Similarly inapposite are Respondent's and Mr. Pollitt's criticisms that Ms. Jimenez allegedly ignores, or was unaware of, the fact that Mr. Moncada Luna controlled Sarelan and that funds from Omega Panama were moved by Ms. Reyna to Sarelan's account.[137] In particular, Mr. Pollitt inexplicably focuses on the fact that "Justice Moncada Luna directed the incorporation of Sarelan, the opening of Sarelan bank accounts, directing the flow of funds and directly benefitting from a portion of the payments [allegedly] made from Omega Panama to Sarelan," namely in the "paydown of a mortgage and the outstanding balance on two apartment units owned by companies held by Justice Moncada Luna's wife."[138] Further, as Ms. Jimenez explains, only Mr. Rivera and the companies Mr. Rivera owns (Omega Panama and PR Solutions) are relevant in this matter.[139] Any companies owned or controlled by Mr. Moncada Luna (including Sarelan) are not at issue in this proceeding, yet the Pollitt Report goes to great

[135] Resp.'s Reply ¶¶ 17-21.

[136] Jimenez 2 at 12-13.

[137] Resp.'s Reply ¶ 56.

[138] Pollitt at 5.

[139] Jimenez 2 at 13.

lengths to outline Mr. Moncada Luna's involvement with these companies.[140] In doing so, Mr. Pollitt's Report misses the mark and focuses on irrelevancies.[141] He simply sets up a straw man so he has something to knock down.

44. Respondent further asserts that "Justice Moncada Luna lost his position, pled guilty to unjust enrichment and perjury, and gave up his two apartments."[142] This much may be true, but from there Respondent makes an illogical and unfounded leap, claiming that these consequences "all deriv[ed] from [his] receipt of Omega Panama's bribes."[143] Here is where Respondent's house of cards crashes in on itself. *First*, Omega Panama has not paid any bribes to Mr. Moncada Luna, and Respondent has not proven (and cannot prove) otherwise. As explained *supra* the mere existence of bank transactions from Ms. Reyna to a company that was ultimately owned by Mr. Moncada Luna (something which was completely unknown to Mr. Rivera) does not prove any bribery on Claimants' end.[144] *Second*, neither Mr. Moncada Luna, nor Ms. Rios, nor Ms. Bouche, nor Mr. Espino, nor Ms. Reyna have *ever* suggested that either Mr. Rivera or the Omega Consortium had any suspicious dealings with Mr. Moncada Luna, let alone involvement in a scheme to bribe him.[145] *Third*, Mr. Moncada Luna did not go to prison because of any alleged Omega Panama bribes, but because he reached a plea agreement that involved serving time related to the crimes of unjust enrichment,and perjury in public

[140] Jimenez 2 at 12-13.

[141] Jimenez 2 at 13.

[142] Resp.'s Reply ¶ 31.

[143] Resp.'s Reply ¶ 31.

[144] *See supra* ¶ 21.

[145] Supplemental Declaration of Maria Gabriela Reyna Lopez dated 14 July 2015 (C-0089 resubmitted); Witness Confrontation Procedure between Maria Gabriela Reyna Lopez and Jorge Enrique Espino Mendez dated 22 July 2015 (C-0090 resubmitted); National Assembly Interview of Vielsa Rios dated 2 Dec. 2014 (R-0127); National Assembly Testimony of Ana Bouche dated 28 Nov. 2014 (R-0128); National Assembly Interview with Maria Gabriela Reyna López dated 27 Jan. 2015 (R-0139 / RP-0022); Interview with A. Bouche, Public Prosecutor's Office dated 28 July 2015 (RP-0010); Addendum to Inquiry Statement of Jorge Enrique Espino Mendez dated 3 July 2015 (RP-0025); Addendum to Inquiry Statement of Jorge Enrique Espino Mendez dated 16 July 2015 (RP-0026).

documents.[146] As Ms. Jimenez has stated, it is noteworthy that Mr. Moncada Luna did not plead guilty (and thus was not convicted) of the corruption and money laundering charges levied against him.[147] *Fourth*, the corruption investigation against Mr. Rivera in Panama has been dismissed for lack of evidence, which completely undercuts Respondent's theory that Mr. Rivera/Omega Panama bribed Mr. Moncada Luna and its blanket assertions that it has proven as much in this arbitration.[148]

45. Finally, Respondent maintains that the Designated Prosecutor said in the context of convicting Justice Moncada Luna that "he, as the prosecutor for the National Assembly, no longer had a basis to maintain a freeze on the bank accounts of Omega and PR Solutions,"[149] implying that the Designated Prosecutor was addressing merely his jurisdictional limitations. Again, this is incorrect. What the Designated Prosecutor actually established is that Omega Panama and PR Solutions were "in the range of companies *not linked to the unjustified assets* of the separate magistrate according to the theory of the case of the prosecution."[150] Thus, the Prosecutor not only stated that he did not oppose the release of Omega Panama and PR Solutions' frozen bank accounts, but also that there was ***no link*** between these companies and Mr. Moncada Luna's unjustified assets. Notwithstanding the Designated Prosecutor's conclusion and recommendation, the National Assembly Judges nonetheless failed to decide whether to release the frozen bank accounts before the conclusion of the National Assembly

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

[147] Jimenez 2 at 26.

[148] Provisional Dismissal No. 143 dated 26 Nov. 2018 (C-0908).

[149] Resp.'s Reply ¶ 33.

[150] Transcript of Moncada Luna's Sentencing Hearing, dated 5 Mar. 2015 (C-0930), at 26:36 (emphasis added).

proceeding in violation of Panamanian law and Claimants' due process rights.[151] The National Assembly judges had competence—and in fact were the only ones with competence—to determine whether to release those accounts.[152] In failing to decide whether to release the accounts, they left these accounts in judicial limbo because, when their mandate ended, there was no other court in Panama with the competence to lift the freeze order they had issued.[153] These accounts remain frozen to this day, and (again) this is likely not due to incompetence, but rather because the Varela Government was waging war on Mr. Rivera and his companies.

d. Respondent's Accusation that the Real Estate Transaction is a Sham is Meritless as a Matter of Panamanian Law and Real Estate Practice

46. In an effort to support its corruption allegation, Respondent attempts to cast doubt on the legitimacy of the real estate transaction for the purchase of the parcel of land in Cañas ("**Finca 35659**"), which generated the two payments to Reyna y Asociados. In doing so, Respondent relies almost exclusively on the expert opinion of Justice Adán Arnulfo Arjona L. ("**Justice Arjona**" or the "**Arjona Opinion**"). But as Claimants' experts demonstrate, that land deal was a legitimate and lawful transaction, entered into with the advice of a reputable law firm,

[151] Criminal Procedure Code of the Republic of Panama (C-0088 resubmitted 3), art. 262 ("Article 262. Seizure of assets with encumbrances. In the case of other assets that are not money or securities on which a lien falls, the bank or the creditor may declare the overdue debt or request the judicial auction of the assets. The surpluses, if any, will be maintained at the order of the Office of the Prosecutor. The domain actions and requests for lifting provisional apprehension and criminal seizure of the instruments or goods that were provisionally apprehended or seized *will be resolved by the Guarantees Judge or by trial, according to the phase in which the process is found*, by oral hearing. The Judge may grant, before the parties, the possession or provisional administration of the assets.") (emphasis added).

[152] Criminal Procedure Code of the Republic of Panama (C-0088 resubmitted 3), art. 262. Since the National Assembly Judges were the judges who froze Claimants' bank accounts, they were the ones with the competence to decide their release at the end of the National Assembly proceeding. At the moment the National Assembly proceeding ended, no other criminal investigation or procedure had been initiated against Claimants and, thus, no other judge had competence over the release of those accounts. In not releasing the bank accounts, or at the very least engaging in an analysis of whether to release them, the National Assembly Judges violated Claimants' rights protected by Panamanian local law and International treaties.

[153] Criminal Procedure Code of the Republic of Panama (C-0088 resubmitted 3), art. 262.

for a parcel of land priced at market prices, and following the proper procedures under Panamanian law.

47. Respondent's reliance on Justice Arjona's opinion is misguided, given that he is neither an expert in civil law, nor an expert on the Panamanian real estate market.[154] Indeed, the majority of Justice Arjona's tenure in the Panamanian Supreme Court of Justice was spent in "the Third Chamber . . . which reviews *administrative matters* (2000-2009)."[155] In other words, Justice Arjona's time on the Court mostly focused on matters involving a private party and the Government (*viz.* administrative matters), *not* matters involving two private parties (*viz.* civil matters) like the Promise of Purchase and Sale Agreement here. Further, Justice Arjona does not have any apparent experience in the real estate market, either as a realtor, broker, or developer.[156]

48. Unlike Justice Arjona, Claimants' experts have experience in the types of issues that Respondent has raised in this arbitration. Claimants' real estate experts from ARC Consulting have worked extensively in the Panamanian real estate market, and Mr. Fidel Ponce in particular lived and worked in the Azuero Peninsula region (where Cañas is located) during the time the Promise Agreement was negotiated and signed.[157] Further, Justice José A. Troyano P. has focused for over 30 years on civil and commercial law.[158] His ten-year tenure in Panama's Supreme Court of Justice was primarily in the First Chamber, focusing on civil matters, including two years as that Court's President.[159]

---

[154] *See generally Curriculum Vitae*, Adán Arnulfo Arjona L. (AA-0001).

[155] *Curriculum Vitae*, Adán Arnulfo Arjona L. (AA-0001), at 2 (emphasis added).

[156] *See generally Curriculum Vitae*, Adán Arnulfo Arjona L. (AA-0001).

[157] Real Estate Experts 2 at 3; First Expert Report of Messrs. Arturo Chong and Fidel Ponce of ARC Consulting dated 16 May 2019 ("**Real Estate Experts 1**"), at 69.

[158] Troyano at 43-44.

[159] Troyano at 43-44.

49. A prime example of Justice Arjona's lack of expertise in private real estate agreements is evinced from his seeming confusion between two different types of real estate agreements in Panama. As such, the Arjona Opinion serves only to confuse the issue by focusing on an irrelevant type of agreement—and one that materially differs from the agreement that was, in fact, signed between JR Bocas Investment Inc. ("**JR Bocas**") and Punela Development Corp ("**Punela**"). In particular, the Arjona Opinion confuses what is known as a Purchase and Sale Contract with a *Promise* of Purchase and Sale Agreement.[160] JR Bocas and Punela[161] only signed the latter ("**the Promise Agreement**"), not the former (and Justice Arjona at times acknowledges that the contract he is analyzing is a *promise* of sale and purchase agreement.[162]) Based on this sleight-of-hand, Respondent proceeds to enumerate a series of alleged "defects"[163] and "critical flaws"[164] that supposedly affected the Promise Agreement to "cast doubt on the legitimacy of the contract and the legitimacy of the transaction as a whole."[165] This entire exercise is distracting and immaterial to this dispute because it is premised on an analysis of legal requirements for a *different* type of agreement and with *different* legal and real estate practice requirements.

50. To put this in context, as Justice Troyano explains, there are (at least) two distinctive types of agreement for the purchase and sale of land in Panama: (1) a Purchase and Sale Contract, and (2) a *Promise* of Purchase and Sale Agreement. While the former is a contract in which "one of the parties to the contract is obligated to deliver a specific thing to the

---

[160] Troyano ¶¶ 55, 61.

[161] Sale and Purchase Agreement between JR Bocas Investments, Inc. and Punela Development Corp. dated Apr. 2013 (C-0078 resubmitted 2).

[162] Expert Report of Mr. Adán Arnulfo Arjona L. dated 13 Nov. 2019 ("**Arjona**"), ¶¶ 11-13.

[163] Resp.'s Reply ¶ 43.

[164] Resp.'s Reply ¶ 43.

[165] Resp.'s Reply ¶ 42.

other party, and the other party is obligated to pay a specific price or consideration in exchange for the thing,"[166] the latter is "an agreement whereby one or both of the participating parties promise to sign a specific future agreement which they are presently unable or unwilling to sign, after a certain period of time has passed or when the stipulated conditions and other legal requirements have been fulfilled."[167] In other words, the Purchase and Sale Contract is the final contract whereby the property ownership passes to the buyer, while the *Promise* of Purchase and Sale Agreement is a preliminary agreement creating future obligations for both parties to enter into a final sale contract in the future. The following chart summarizes the key characteristics of each type of contract, and highlights the differences between them:[168]

Promise of Purchase and Sale Agreement	Purchase and Sale Contract
This is a preliminary agreement that creates the obligation to enter into a future contract.	This is a definitive future contract or the primary contract.
Creates the obligation to perform a duty.	Creates an obligation to deliver a specific thing.
Fulfills the function of guaranteeing the signature of a future contract.	It is an instrument that transfers ownership.
It necessarily requires the stipulation of a term or deadline for signature of the definitive contract.	Does not require the stipulation of a term or deadline in order to be valid.
In the case of real property, the required formality is that the document must be in writing (private document) in order to be valid.	Requires a Public Deed (public document) and recording in the Public Registry in order to be valid.
Recording the document in the Public Registry (optional) limits ownership rights but does not constitute transfer or conveyance of the property.	Recording of the deed transfers ownership or proprietorship of the real property in question.
Bilateral agreements are innominate or atypical. The provisions of Article 1221 of the Civil Code apply by analogy and the general rules related to obligations and contracts also apply.	These are nominate or typical contracts regulated by their own specific standards in the Civil Code.

[166] Troyano ¶ 36; Panamanian Civil Code (C-0742 resubmitted), art. 1215.

[167] Troyano ¶ 23; Arroyo Camacho Dulio, Civil Contracts, T.I Panama. Mizrachi & Pujol, S.A. (C-0752), at 8.

[168] Troyano ¶ 40.

51. As Justice Troyano confirms, the title and the content of the Promise Agreement unequivocally show that Punela and JR Bocas only signed a *Promise* of Purchase and Sale Agreement, and not a Purchase and Sale Contract.[169] The Arjona Report essentially ignores this critical distinction, and thus ignores the important differences between the two types of agreement.[170] And this distinction has major consequences for the alleged "defects"[171] and "critical flaws"[172] that Justice Arjona purports to identify in the Promise Agreement.

52. Basing its arguments on an incorrect premise, and further relying on the faulty Arjona Opinion, Respondent attempts to prove that Claimants' purchase of Finca 35659 was "fake" by arguing that the Promise Agreement governing the transaction is "replete with defects and uneconomic features"[173] and is "inconsistent with the minimum and reasonable standard of diligence and dedication that is usually observed in Panama in high value transactions."[174] This is misguided and misleading for a number of reasons.

53. *First*, Respondent maintains that the signatures on the Promise Agreement were not authenticated before a notary, and that this results in a relative nullity that gives rise to an action to rescind the acts or contracts in question.[175] Here, Respondent misstates Justice Arjona's opinion. With respect to notarization of the signatures, all Justice Arjona says is that doing so would have given authenticity automatically to the private document, not that lack of notarization would result in relative nullity of the Promise Agreement.[176] While it is true that the

[169] Troyano ¶ 41.

[170] Arjona ¶ 9(c).

[171] Resp.'s Reply ¶ 43.

[172] Resp.'s Reply ¶ 43.

[173] Resp.'s Reply ¶ 36.

[174] Arjona ¶ 15; *see also* Resp.'s Reply ¶ 42.

[175] Resp.'s Reply ¶ 43 (citing Arjona ¶¶ 14, 18, 37-38, 55-60).

[176] *See* Arjona ¶¶ 14, 37-38.

signatures in the Promise Agreement were not authenticated by a Notary Public, Justice Troyano explains that in order for the Promise Agreement to be formalized all that was needed under the law was for the document to be *in writing*.[177] The lack of authenticated signatures does not make the Agreement invalid, nor does it constitute a relative nullity as stated by Respondent.[178] The grounds for nullity or invalidity of contracts are contained in articles 1141 and 1142 of the Civil Code, and lack of authentication of the signatures on the contract by a Notary Public is *not* among them.[179] In this regard, Justice Troyano states that it would fall well outside of common practice for a Panamanian attorney to file a petition before a judge and claim that a Promise of Purchase and Sale Agreement should be declared null and void for a lack of signatures authenticated by a Notary Public.[180] Moreover, as Claimants' real estate experts ("**Real Estate Experts**") explain, in practice parties do not always authenticate the signature through a Public Notary.[181] In sum, Respondent's picayune complaint makes much ado about nothing.

54. *Second*, Justice Arjona suggests that the fact that the signing of the agreement was not authorized by the shareholders of the corporate seller or the corporate buyer could similarly result in a declaration of relative nullity and give rise to an action to rescind the acts or contracts in question.[182] As Justice Troyano clarifies, however, it is important to note that "relative nullity, as opposed to absolute nullity, *cannot be declared ex officio by the judge*," but rather it must be petitioned by the affected party.[183] In other words, even assuming *arguendo* that the parties' representatives (*i.e.*, Mr. Montaño and Ms. Reyna) did not have the authority to enter into the

[177] Troyano ¶ 12.

[178] Arjona ¶ 18.

[179] Troyano ¶ 82.

[180] Troyano ¶ 82.

[181] Real Estate Experts 2 at 29.

[182] Arjona ¶ 55.

[183] Troyano ¶¶ 103-05 (emphasis added).

Promise Agreement, at most the promise Agreement would be "voidable" because the "relative nullity [could have been] corrected by ratification or by a lapse of four years."[184] The four-year statute of limitations expired in April 2017, since the Promise Agreement was signed in April 2013, without either party petitioning a court for relative nullity. Importantly, the subsequent actions of the parties, such as Mr. Rivera's payments and JR Bocas' acceptance of those payments as well as JR Bocas' payment of the mortgage, indicate the parties' tacit ratification. Justice Arjona ignores these facts, just as he ignores that Ms. Reyna committed in the Promise Agreement to provide Minutes of the Extraordinary Shareholders Meeting by which the sale of the property is authorized, in no more than 45 days.[185] In any event, the Promise Agreement unquestionably is legally valid as neither party ever sought to declare that it was not. This is unsurprising because Mr. Rivera sought legal advice from, and was represented by, one of Panama's most reputable law firms, IGRA, not only in drafting the Promise Agreement,[186] but also in setting up the corporate vehicle which bought the property—*viz.* Punela—and its directors.[187] Mr. Rivera was perfectly entitled to assume that his reputable local counsel would secure binding and enforceable documents.

55. *Third*, Respondent claims that the Promise Agreement recites a month and a year of execution, but not the date of signature, and that in Justice Arjona's opinion this is a "critical flaw"[188] that casts doubts on the legitimacy of the Promise Agreement because "it does not conform to the diligent and careful practice which, in [his] experience, is observed in Panama in

[184] Troyano ¶ 101.

[185] Troyano ¶ 100.

[186] Invoice from IGRA for Preparation of the Purchase of Finca, Contract No. 35659 dated 1 May 2013 (C-0558).

[187] Invoice from IGRA in relation to Punela Development Corp. dated 13 May 2013 (C-0559).

[188] Resp.'s Reply ¶ 43; *see also* Arjona ¶¶ 19-20, 61-63.

this type of transaction."[189] But once again, Justice Arjona is wrong. Panamanian law does not include a requirement that contracts express the date on which they are signed.[190] To be sure, the fact that the date is not specified is not fatal to the validity of the Promise Agreement because that date can be determined by other evidence—including the date on which the check for the first payment was sent.[191] As a result, the lack of date in the Promise Agreement does not affect the validity of the contract, nor does it represent an impediment to determining the day on which the parties have to comply with their obligations. Moreover, as Justice Troyano explains, this type of mistake "cannot be construed as being done in bad faith, lack of diligence or malice, but [rather] a simple omission resulting from an oversight."[192]

56. *Fourth*, Respondent argues that the Parties agreed in the Promise Agreement to enter into a Deed of Sale within 180 days of the execution of the Agreement, but that the parties failed to do so and to file it with the Public Registry, affecting the rights and interests of Punela.[193] But again, this cannot be considered a "defect" or a "critical flaw." As stated *supra*, for a Promise of Purchase and Sale agreement to be valid it only has to be in writing. Not only is there no legal requirement for the Promise Agreement to be done through a Public Deed, or to be filed into the public registry, but also, as Justice Troyano explains, it is ***not*** common practice in Panama that Promise of Purchase and Sale Agreements are created as public deeds and registered

[189] Arjona ¶ 63; *see also id*. ¶¶ 19-20, 61; Resp.'s Reply ¶ 43.

[190] Troyano ¶ 109.

[191] Troyano ¶ 108.

[192] Troyano ¶ 107; *see also* Real Estate Experts 2 at 31-32 (explaining that "the fact that the Promise of Purchase and Sale Agreement under consideration has defects is not surprising. It is not uncommon to see defects in 'standard agreements' or even public deeds provided by lawyers to the Public Registry for registration . . . . In most cases, standard agreements are supplied and then evolve throughout the negotiation process. During this evolution, changes are made and sometimes mistakes are made in the internal references and/or other data. If anyone was to visit the Public Registry offices, they would find that there is a good percentage of final deed information being corrected on a daily basis. This is a common problem for brokers, as in some cases these errors create doubts and roadblocks during the closing of a real estate transaction").

[193] Resp.'s Reply ¶ 43; *see also* Arjona ¶¶ 9, 12, 14.

in the Public Registry.[194] Again, this is because Public Registry requirements attach only to a Purchase and Sale Contract—and not to a *Promise* of Purchase and Sale Agreement. Further, there is no reason to believe that the rights and interests of Punela would have been affected due to the lack of registration, since Punela could have initiated (and still can initiate)[195] a lawsuit to exercise its rights toward JR Bocas if the latter did not fulfill the obligations imposed by the Promise Agreement.[196] As a practical matter, the Real Estate Experts explain that entering into a deed of sale usually requires the final phase of the closing stage to take place, once the property is released from mortgages and past owners.[197] However, Finca 35659 was not released from its mortgage as per the Promise Agreement timeline, and without the release of the mortgage, it would have been impossible to register a new Deed of Sale.[198] Additionally, in the Experts' experience, unless there is a reason to distrust the seller, or to suspect that a third party could have an action against the property, registration of a promise of purchase and sale agreement is typically not done.[199]

57. *Fifth*, Respondent contends that the Promise Agreement expired because the parties did not enter into a Deed of Sale within 180 days of the execution of the Agreement or transfer the land, and because Punela did not sign the April 2013 Addendum (tough JR Bocas did).[200] But all of this is irrelevant, since upon expiration of the term of 180 days to sign the public deed, Punela could have requested rescission or termination of the Promise Agreement with compensation of damages and payment of interest; alternatively, Punela could have

[194] Troyano ¶ 78.

[195] *See infra* ¶¶ 64, 65, 73.

[196] Troyano ¶ 79.

[197] Real Estate Experts 2 at 29.

[198] Real Estate Experts 2 at 29.

[199] Real Estate Experts 2 at 29.

[200] Resp.'s Reply ¶ 43.

demanded performance of the obligation. In other words, it could hold its counter-party to its *promise*, and require that JR Bocas sign the Purchase and Sale Contract (with restitution and interest payable for the initial failure to do so). That Punela has thus far not done so is again beside the point; as Justice Troyano explains, the statute of limitations will not run until 29 September 2020.[201]

58. Justice Arjona, however, attempts to cast suspicion on the fact that Mr. Rivera has not brought any claim against JR Bocas for its breach, finding it "completely unusual" that Claimants have not sent a written communication to JR Bocas demanding the termination of the agreement and the return of the US$ 500,000 advance deposit, or formalized a legal claim, for which he (wrongly) claims the prescriptive period lapsed on 29 September 2018.[202] As Justice Troyano explains, however, Justice Arjona is *again* incorrect on the law. The Promise Agreement is *not a commercial* obligation (which carries a five year-statue to limitations), as Justice Arjona claims, but rather *a civil* obligation (which carries a seven-year statute of limitations).[203] Taking the date set by Justice Arjona as the date the statute started running (*arguendo*), the limitation for claims does not expire until 29 September 2020.[204] Thus, Mr. Rivera's decision to reserve his rights until "the present case is finished and [he is hopefully] permitted freely to return to Panama," whereafter he "intend[s] to pursue all legal remedies in Panama to have these funds returned,"[205] is a perfectly reasonable one. Further, as Justice Troyano notes, being immersed in domestic and international legal actions is a reasonable

[201] Troyano ¶¶ 18, 121. As Justice Troyano explains, Justice Arjona has applied the wrong statute of limitations in claiming that any such action is already time-barred. Troyano ¶¶ 116-117; Arjona ¶ 70. *See infra* ¶ 58.

[202] Arjona ¶¶ 70-77.

[203] Troyano ¶ 18, 119.

[204] Troyano ¶ 18.

[205] First Witness Statement of Mr. Oscar Rivera dated 25 June 2018 ("**Rivera 1**"), ¶ 98.

justification for not having pursued remedies relating to the Promise Agreement—especially when the prescription period is still running.[206]

59. *Sixth*, Respondent states that the Promise Agreement contains an exorbitant and unprecedented advance deposit of 50%.[207] Again, this is not only incorrect, but it is a legally inconsequential point. As the Real Estate Experts note, the initial deposit was US$ 250,000 (*i.e.*, the first payment) and thus constituted 25% of the purchase price, *not* 50% as Justice Arjona suggests.[208] The second payment of US$ 250,000 was not part of the deposit, but rather it was required to be paid *sixty days after* the first payment, during which time the seller was to have provided several items, including proof that the mortgage was paid and the minutes stating that Ms. Reyna had the authority to sell the land.[209] This 25% deposit is in line with the 20% to 30% range that Mr. Ponce has observed in the field.[210] In any event, whether the deposit was 25% or 50% is of no consequence legally as the only requirement stated by law is that the price to be paid is determined in the contract.[211] As explained by Justice Troyano, the amount of the payments is always determined by the party paying them, as agreed with the seller.[212] Accordingly, there is nothing in Panamanian law that prohibits initial payments of 50%.[213] Justice Troyano has observed a variety of different percentages in staged payments, and knows

[206] Troyano ¶ 122.

[207] Resp.'s Reply ¶ 43.

[208] Real Estate Experts 2 at 31; Sale and Purchase Agreement between JR Bocas Investments, Inc. and Punela Development Corp. dated Apr. 2013 (C-0078 resubmitted 2), at 1.

[209] Sale and Purchase Agreement between JR Bocas Investments, Inc. and Punela Development Corp. dated Apr. 2013 (C-0078 resubmitted 2), at 1.

[210] Real Estate Experts 2 at 31.

[211] Troyano ¶ 88.

[212] Troyano ¶ 89.

[213] Troyano ¶ 89.

of no commonplace formulas limited to between 10% and 15%.[214] Once again, Justice Arjona and Respondent try to make a mountain out of a molehill.

60. *Seventh*, Respondent and Justice Arjona fault Punela for not supplying an irrevocable promise of payment letter.[215] But Respondent disregards the fact that, according to clause seven of the Promise Agreement, JR Bocas was obligated to deliver the minute of the mortgage cancellation on the property that was the subject of the promised sale within 45 days after the signature of the Promise Agreement, with the express statement that this was to occur "against delivery of the Irrevocable Letter of Credit."[216] Thus, as explained by Justice Troyano, if JR Bocas (the seller) failed to deliver the minute of the mortgage cancellation, Punela was not obligated to supply the Irrevocable Letter of Credit, since the Promise Agreement contained reciprocal obligations.[217] Indeed, it is logical that Punela refrained from delivering the Irrevocable Letter of Credit in the face of JR Bocas' failure to deliver the minute of the mortgage cancellation—even more so when Punela had already complied with its obligation to make the initial payments.[218]

61. *Eighth*, Respondent contends that Claimants' Real Estate Experts refer to the "meeting of the minds" agreement as finalizing the purchase of the land transaction and extending the term of the Promise Agreement, but that the meeting of the minds agreement (the Addendum) was never signed.[219] Because of this, Respondent argues that the Real Estate Experts were "misled" as to whether a "Meeting of the Minds Agreement" ever occurred, or

[214] Troyano ¶¶ 89, 91.

[215] Resp.'s Reply ¶ 44; Arjona ¶¶ 9(h), 13, 53-54.

[216] Troyano ¶ 66.

[217] Troyano ¶ 66.

[218] Troyano ¶ 68.

[219] Resp.'s Reply ¶ 44; *see also* Arjona ¶ 9(d).

simply ignored the absence of this "critical element[]" that was purportedly "needed to support their opinion."[220] But as explained by the Real Estate Experts in their second report (and discussed above), this is irrelevant from the stand point of the real estate transaction.[221] In any event, there were numerous indicia of a meeting of the minds between the buyer and the seller of the land.[222] For example, the parties continued to evaluate electricity and water connectivity, indicating that the purchaser intended to make the most out of what it was paying.[223] Further, as Justice Troyano explains, although the Meeting of the Minds Agreement did not amend the initial Promise Agreement, the fact that the seller (JR Bocas) signed it definitively created obligations for JR Bocas to the commitments it made therein.[224] In short, the Real Estate Experts were neither misled nor ignored that the Meeting of the Minds Agreement was not signed by the buyer precisely because the buyer's signature was irrelevant to the fact that the seller had committed to paying the Mortgage and ensuring that water and electricity was supplied to Finca 35659.

[220] Resp.'s Reply ¶ 49.

[221] Real Estate Experts 2 at 32-33.

[222] Real Estate Experts 2 at 32-33.

[223] Real Estate Experts 2 at 32-33.

[224] Troyano ¶ 48. Further, Ms. Reyna's email to Mr. Lopez in January 2015 confirms that the seller (JR Bocas) was committed to the conditions discussed in the Meeting of the Minds Agreement (the Addendum). *See* Email from Maria Gabriela Reyna to Frankie Lopez dated 28 Jan. 2015 (C-0210). Oddly, Respondent questions whether the email "is . . . even from her," basing its argument merely on the fact that the email address is minigap@gmail.com. Resp.'s Reply ¶ 39. It is unclear, and baffling, why Respondent believes that the email exhibited by Claimants is "not even from [Maria Gabriela Reyna]" when it is clearly signed by "MG Reyna," and the content of the email itself confirms its authenticity. Email from Maria Gabriela Reyna to Frankie Lopez dated 28 Jan. 2015 (C-0210). In her email, Ms. Reyna (accurately) details the content of her testimony before the National Assembly on 27 January 2015—the day before the email was sent. When compared to the transcript of her declaration, it is evident that what Ms. Reyna tells Mr. Lopez in the email matches her testimony to the Designated Prosecutor. *Compare* Email from Maria Gabriela Reyna to Frankie Lopez dated 28 Jan. 2015 (C-0210), *with* National Assembly Interview with Maria Gabriela Reyna López dated 27 Jan. 2015 (R-0139), at 5-6. In any event, it is odd that Respondent would be raising this argument given the fact that many individuals use pseudonyms or abbreviations for their email addresses. As such, there are no legitimate bases for Respondent to question the authenticity of this email.

62. Thus far, none of these alleged "defects"[225] and "critical flaws"[226] have demonstrated any lack of care or diligence on the part of Mr. Rivera or his companies. On the contrary, they only highlight the flaws in Justice Arjona's opinion. He has inexplicably focused his analysis on the wrong type of contract and has based his opinion (on which Respondent has relied) on this incorrect premise in an attempt to raise suspicions with respect to the Promise Agreement and the way in which the parties contracted. But in reality there is nothing odd about the transaction, either under Panamanian law or under common Panamanian real estate practice. Interestingly, Justice Arjona does not stop at the law; he also alleges that certain important documents, methods of pre-purchase diligence, and Panamanian best practices that were allegedly "central to an effective conveyancing under the Agreement" did not exist in the Promise Agreement.[227] In particular, Justice Arjona expresses concern that Punela did not commission a land survey, a topographical study, or an appraisal, which are allegedly generally commissioned in Panama by purchasers of real estate to confirm the metes, bounds, elevations of the land and that the price of the transaction is fair.[228] This is nonsense. As explained by Justice Troyano, not only are these studies not a requirement for the validity of the Promise Agreement as a matter of Panamanian law, they are also mostly associated with final Purchase and Sale Contracts, which is not the type of agreement entered into between Punela and JR Bocas.[229] Further, the Real Estate Experts confirm that these alleged "best practices" are rarely used in Panamanian real estate transactions like the one at issue in this case.

[225] Resp.'s Reply ¶ 43.

[226] Resp.'s Reply ¶ 43.

[227] Arjona § IV.B.v; Resp.'s Reply ¶ 44.

[228] Arjona ¶¶ 64, 67; Resp.'s Reply ¶ 44.

[229] Troyano ¶¶ 112-13.

63. To start, neither an additional land survey, nor a topographical study were needed here. The Real Estate Experts explain that there was no need to incur the cost of a professional surveyor[230] because Finca 35659 already has a registered survey that matches the on-field shape of the property.[231] This is confirmed by Mr. Rivera, who notes that the Promise Agreement identified the specific parcel number (Finca 35659) and the related inscription document (Documento 1162972),[232] as well as a survey certificate for the property, including a map and a specific indication of the parcel's geographic coordinates.[233] Indeed, in practice, the Real Estate Experts explain, land is often purchased without hiring a surveyor, as technology allows one to measure a piece of land with a variety of readily available tools such as cellphone measuring apps, drone and satellite technology, and even counting steps using the approximation of one meter per natural step.[234] Further, Mr. Rivera confirms that he personally saw and walked the property (along with leading Coldwell Banker broker Tito Chevalier), giving him a very good idea of the topographical terrain and its suitability for development.[235] Anyone with real estate experience in Panama would have known that there was no need to incur the cost of a professional surveyor.[236] Justice Arjona's claim merely shows a lack of knowledge of the Panamanian real estate market and Panamanian real estate transactions in general.

64. With respect to whether an appraisal should have been commissioned, the Real Estate Experts explain that an appraisal is neither necessary nor even always common in

[230] Real Estate Experts 2 at 30.

[231] Real Estate Experts 2 at 30.

[232] Rivera 3 ¶ 23.

[233] Rivera 3 ¶ 23; Real Estate Experts 2 at 30; Tonosi Land Registration Information dated 31 Jan. 2013 (C-0202), at 4-5.

[234] Real Estate Experts 2 at 30.

[235] Rivera 3 ¶ 23.

[236] Real Estate Experts 2 at 30.

Panamanian real estate transactions.[237] Indeed, the lack of a formal appraisal is particularly unsurprising here, since Mr. Rivera relied on the expert real estate advice of Mr. Chevalier,[238] who would have been familiar with both the market and the market prices. Respondent then misconstrues what Justice Arjona says regarding the need for an appraisal. Respondent takes Justice Arjona's comment that "[he] would expect a diligent and experienced buyer to commission an appraisal . . . [because] many times the references in the Public Registry can be outdated,"[239] and argues that the absence of an appraisal is especially odd because it is "not credible" that, just five years after JR Bocas bought the property for 30,000, "Mr. Rivera purported to purchase that same piece of land for US$ 1 million, a 3,300% increase in price."[240] This logic is not only wrong, but it is not even in line with what Respondent's own expert says. As the Real Estate Experts explain (and even Justice Arjona seems to agree[241]), the Public Registry prices are wholly unreliable when determining *market value*, providing the *cadastral value* only.[242] For example, according to the Public Registry, the first buyer of Finca 35659 (the original farmer / squatter) acquired the property for US$ 48 in July 2007.[243] Yet, a mere six months later JR Bocas purchased the property from the first buyer for US$ 30,000.[244] Following Respondent's logic, this would represent an exorbitant increase in "value" of approximately 62,400% in merely six months and would most certainly cast doubt on the credibility of the transaction. Yet, no one questions that that transaction was legitimate. Similarly here,

[237] Real Estate Experts 2 at 31.

[238] Rivera 3 ¶ 23; Real Estate Experts 2 at 31.

[239] Arjona ¶ 66.

[240] Resp.'s Reply ¶ 37. *See also* Arjona ¶ 66.

[241] Arjona ¶ 66.

[242] Real Estate Experts 2 at 5.

[243] Real Estate Experts 2 at n. 27; Tonosí Land Registration Information dated 31 Jan. 2013 (C-0202).

[244] Real Estate Experts 2 at n. 27; Public Deed number 338 of 15 February 2008 (AA-0006).

Respondent's alleged 3,333% increase in "value" in five years is a wholly irrelevant figure, exposing nothing more than the fact that the Public Registry is not a proxy for market value, as anyone with familiarity of the real estate market in Panama would know.

65. *Lastly*, Respondent's expert Mr. Pollitt also contends that on 6 October 2015, the Office of Organized Crime sent requests to several governmental ministries requesting documentation on the Verdanza Residences and that investigators separately conducted an additional investigation into the land deal and allegedly found that "no process had been carried out for the approval of a project titled Verdanza Residences."[245] Mr. Pollitt continues that the investigators were allegedly unable to find any registered documentation for the development.[246] However, as the Real Estate Experts explain, this allegation is illogical because permits cannot be granted without land title.[247] In order to process permits for construction on a piece of land, you must be formally authorized to do so.[248] Since the land was never transferred to Mr. Rivera (through Punela), it would have been impossible for him to apply for any permits regarding Finca 35659.[249] Further, in Mr. Ponce's experience working with projects similar to Mr. Rivera's near Cañas, it is normal to have only informal plans, renderings, and informal calculations before even owning the land, and the plans provided by Mr. Rivera are in line with the types of development that were present in the area.[250]

[245] Pollitt at 9-10.

[246] Pollitt at 10.

[247] Real Estate Experts 2 at 29.

[248] Real Estate Experts 2 at 29-30.

[249] Real Estate Experts 2 at 30.

[250] Real Estate Experts 2 at 30.

66. Having failed to show that any of the alleged "important documents and methods of pre-purchase diligence . . . [and] Panamanian best practices"[251] are required, or even commonly used in real estate transactions in Panama, Respondent then shifts to criticize the Real Estate Experts' valuation of Finca 35659. Respondent argues that the Real Estate Experts' Report "is of no value to the Tribunal," alleging that "its authors were misled by the Claimants about the actual state of the transaction documentation and provide no meaningful valuation."[252] This is wrong.

67. As Claimants' Real Estate Experts explain, the price Mr. Rivera agreed to pay for Finca 35659 was reasonable and within the market prices for comparable properties at the time, Mr. Rivera's initial plans for the Finca 35659 project were consistent with the general norms for real estate investors in the area, and the way in which the transaction was structured is consistent with business practices in Panama.[253] Claimants will unpack Respondent's assertions in the paragraphs that follow.

68. For starters, Claimants never "misled" their Real Estate Experts by asking them to assume that the Promise Agreement was accompanied by a bank letter of payment.[254] Rather, and as explained *supra*¸ Punela (Mr. Rivera's corporate vehicle for the real estate transaction)[255] was not obliged to submit the irrevocable promise of payment letter since JR Bocas had not complied with its obligation of cancelling the mortgage.[256] As such, whether a bank letter of payment was drawn in no way affects the Real Estate Experts' *valuation* of Finca 35659.

---

[251] Resp.'s Reply ¶ 44.

[252] Resp.'s Reply ¶ 47.

[253] *See generally* Real Estate Experts 2; Real Estate Experts 1 at 61.

[254] Resp.'s Reply ¶ 48.

[255] *See* Cls' Mem. ¶¶ 94-95; Cls' Counter-Mem. ¶ 235.

[256] *See supra* ¶ 51.

69. Respondent then launches into a series of (unsubstantiated) criticisms of the Real Estate Experts Report. To be sure, Respondent has not adduced a real estate expert of its own, despite the fact that *it* bears the burden of proving its unsupported allegation that the land deal was a fake.[257] In any event, none of its criticisms deserve weight. *First,* it argues that even under ideal circumstances, it is difficult to value land six years after a transaction took place.[258] This criticism reveals Respondent's lack of expertise. Calculating the past value of a parcel of land or any other property is not difficult when the experts doing the valuation are familiar with the area and have data from the relevant time period.[259] And here, Claimants' Real Estate Experts relied on offer prices and actual sales prices from the period of 2009-2014,[260] property appraisals and actual sales contracts from nearby properties in Cañas from the same time period,[261] and proprietary sales information from the same time.[262] The evidence is clear: the market was assigning relatively the same value to similar land as Finca 35659 during the relevant period. In other words, as the Real Estate Experts confirm, Mr. Rivera agreed to pay market price for the land.[263]

70. *Second*, Respondent alleges that Finca 35659 was "hardly ideal, as the land is located in an undeveloped area, seemingly without electricity, and is accessible only by 'deteriorated' roads."[264] Again, this charge demonstrates Respondent's lack of familiarity with

[257] *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award ("***Metal-Tech***") (RL-0011), ¶ 237 ("The principle that each party has the burden of proving the facts on which it relies is widely recognised and applied by international courts and tribunals."); Cls' Counter-Mem. VII.A.1.

[258] Resp.'s Reply ¶ 51.

[259] Real Estate Experts 2 at 3.

[260] Real Estate Experts 2 at 25.

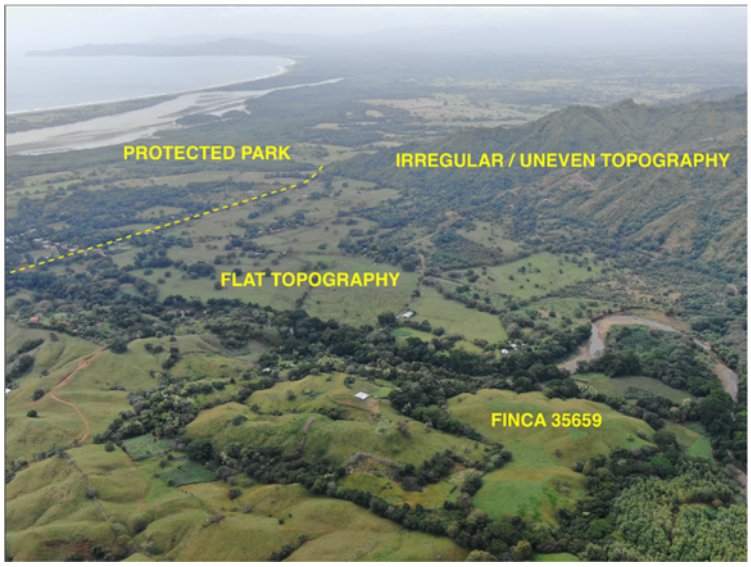
[261] Real Estate Experts 2 at 13; Real Estate Experts 1 at 19, 25-29.

[262] Real Estate Experts 2 at 13.

[263] Real Estate Experts 2 at 16; Real Estate Experts 1 at 2.

[264] Resp.'s Reply ¶ 51.

this area of Panama in general, and Finca 35659 in particular.[265] Far from being "hardly ideal," this region showed great development potential at the time and included many features that were attractive to potential investors. For example, while the topography in the area is a combination of both rolling and steep hills, Finca 35659 consists of rolling hills with enough elevation to provide the property with beautiful, unobstructed ocean views.[266] Finca 35659 also has multiple natural water resources and is minutes away from an asphalted road.[267] Further, as the Real Estate Experts explain, the area has seen several waves of development and, during the previous Administration (*i.e.*, 2009-2014), there was a strong push to develop it, which sparked additional interest from developers.[268] The aerial pictures below depict the topography and location of Finca 35659 in relation to the ocean, water sources, and access to asphalted roads:



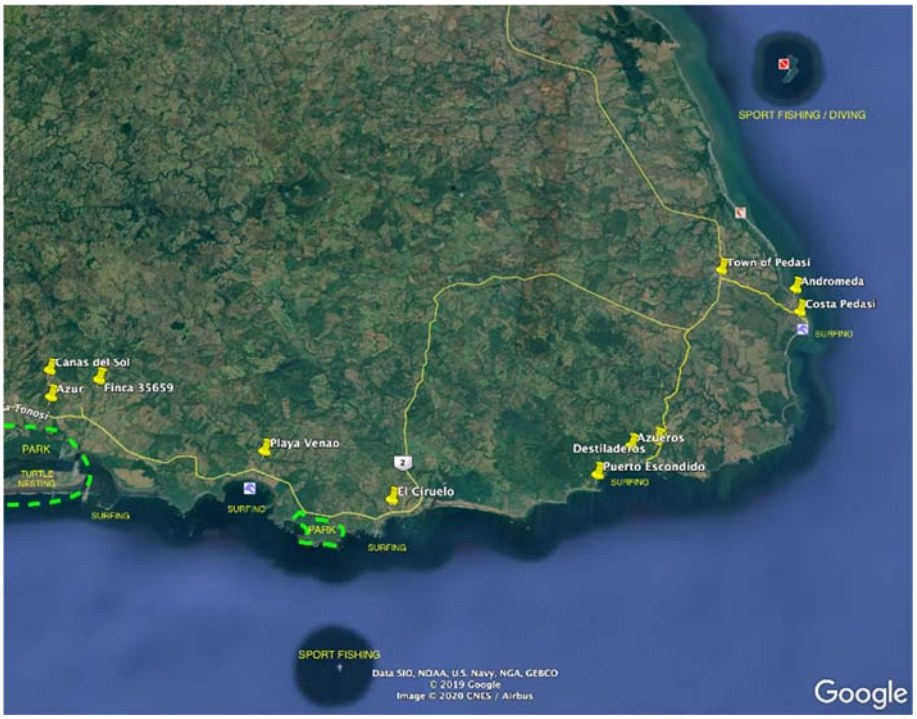
Real Estate Experts Report 2, Picture 5.1

[265] Real Estate Experts 2 at 8.

[266] Real Estate Experts 2 at 9; Real Estate Experts 1 at 24.

[267] Real Estate Experts 1 at 24; Real Estate Experts 2 at 9.

[268] Real Estate Experts 2 at 10.



Real Estate Experts Report 2, Picture 6.11

71. *Third*, Respondent argues that the Real Estate Experts relied on other post-valuation events in setting their value, namely the electrification of the property, which should not have been considered when valuing the land as of 2013, and that land prices have allegedly decreased since Mr. Rivera purchased Finca 35659.[269] However, as Claimants' Real Estate Experts explain, a buyer of expensive real estate in the Azuero Peninsula Region, which includes Cañas, typically would expect to get basic services such as water and electricity with the purchase.[270] Likewise, in the Finca 35659 transaction, it is apparent based on the Addendum to the Promise Agreement (the Meeting of the Minds Agreement) that JR Bocas had committed to providing water and electricity services[271]—a commitment to which it was bound under

[269] Resp.'s Reply ¶ 52.

[270] Real Estate Experts 2 at 27. A buyer can normally assume that 500 meters of electric grid installation could take six months to install because such processes in the region take longer than expected due to bureaucracy and other factors. Real Estate Experts 2 at 27.

[271] Real Estate Experts 2 at 32-33.

Panamanian law.[272] Thus, the Real Estate Experts' valuation did not in any way rely on any post-valuation events.

72. *Fourth*, Respondent contends that the Real Estate Experts focused on a very small number of properties and on non-comparable tracts in conducting their comparable transaction analysis.[273] Not so. In their first report, the Real Estate Experts properly considered comparable properties in the same region as Finca 35659, with sufficient proximity to the same natural resources, a similar target market, and similar marketing strategy.[274] These include parcels that initially started as cattle farms, are near the ocean, and have close access to an asphalted road, as with Finca 35659.[275] Those comparable properties are appropriate because they are the type of information a buyer like Mr. Rivera (*i.e.*, a developer) at the time would have had in order to make his/her assessment of the value.[276]

73. *Fifth*, Respondent maintains that in three of four instances, the prices cited by the Real Estate Experts on these comparable properties are *asking* prices and not *actual sales* prices, allegedly rendering them "entirely irrelevant" for the valuation.[277] However, as the Real Estate Experts explain, in Panama, actual real estate transaction history is generally kept private.[278] Further, the Public Registry (or Registro Público) records often contain inaccurate data, including misspelled owner records, multiple parcel (or Finca) numbers for one piece of land, unregistered land, and generally outdated information.[279] As a result, the information found in

[272] Troyano ¶ 53.

[273] Resp.'s Reply ¶ 53.

[274] Real Estate Experts 1 § 8.

[275] Real Estate Experts 2 at 14.

[276] Real Estate Experts 2 at 25-26.

[277] Resp.'s Reply ¶ 54.

[278] Real Estate Experts 2 at 5.

[279] Real Estate Experts 2 at 5.

the Public Registry does not necessarily match or reflect the actual price paid, let alone the market price, for a property—or even accurately reflect whether a particular parcel is actually available for sale.[280] To complicate matters further, *unlike* the U.S. real estate market, the real estate market in Panama lacks a centralized and regulated Multiple Listing Service giving real estate brokers access to an official electronic database where they can review and compare real estate properties listed on the market.[281] Instead, in Panama there are two or three websites that contain limited real estate information.[282] This makes it more complicated for an investor to find actual sales prices for properties in a particular area and, as a result, buyers in Panama generally rely on offer prices, word-of-mouth, and relationships with either real estate agents/brokers, other developers, or locals in the particular area of interest, rather than comparable data for *sold* properties (as buyers in developed markets like the United States would often do).[283] Again, it is somewhat surprising that the Republic of Panama is unaware of the state of its own real estate market. In any event, the Real Estate Experts have now demonstrated (as discussed *infra*)[284] that the *offer* prices were in the same range as the *actual* prices for properties in Cañas.[285]

74. Respondent and Justice Arjona's arguments are thus baseless, demonstrating their patent lack of knowledge of the Panamanian real estate market. This is in contrast to the Real Estate Experts, who have indeed provided a valuation of Finca 35659 showing that the US$ 12.65 per square meter price agreed in the Promise Agreement was well within the market

[280] Real Estate Experts 2 at 5.

[281] Real Estate Experts 2 at 6.

[282] Real Estate Experts 2 at 6.

[283] Real Estate Experts 2 at 6.

[284] *See infra* ¶ 74.

[285] Real Estate Experts 2 at 16.

prices for comparable properties in the area at the time.[286] To reach this conclusion, the Real Estate Experts explain that they employed a two-fold methodology in their valuation of Finca 35659. *First*, the Real Estate Experts valued Finca 35659 by comparing the price per square meter agreed upon in the Promise Agreement with the offer and actual sales prices in Cañas during the relevant time period. *Second*, they compared the price per square meter agreed in the Promise Agreement with that of comparable properties in areas adjacent to Cañas that are similar in key respects, but that were at a further stage of development. This two-fold valuation is important because a developer would take into account not only the current market price of a particular property, but would also consider the potential future profitability of the area as a whole, allowing him/her to forecast with reasonable certainty whether property values in the Cañas region would increase and what the price per square meter would likely be once the land is developed. In this way, the Real Estate Experts provide the most accurate representation of how an investor at the time would value Finca 35659, reaffirming their previous valuation that market prices at the time for comparable properties in Cañas were in the range of US$ 10 and US$ 15 per square meter. As such, the US$ 12.65 per square meter price for Finca 35659 is well within the market price range.

* * *

75. In sum, none of Respondent's arguments attacking the legitimacy of the Finca 35659 land transaction, either through Respondent's criticisms of the Real Estate Experts' valuation or criticisms of the Promise Agreement's legitimacy, withstand scrutiny. The fact remains that Respondent has not presented *any evidence* showing that the land purchase transaction was a "fake," and in making such allegation it ignores plenty of evidence that the

[286] Real Estate Experts 2 at 4.

transaction was both real and lawful. Indeed, Respondent also ignores the findings of its own Corruption Prosecutor and its own courts, as described below.

e. Respondent's own Prosecutor and Courts Have Found that the Evidence Is Insufficient to Support a Charge of Corruption

76. In the five years since Respondent's baseless persecution of Mr. Rivera began, Panama's own courts have had no choice but to close the investigations. Despite this, Respondent *continues* to disingenuously assert that it has "proven" that Mr. Rivera and Omega Panama bribed Justice Moncada Luna to acquire the La Chorrera Contract through use of the Tonosí land transaction.[287] Put simply, this Tribunal is faced with the decision by Respondent's *own* courts that Claimants violated *no* Panamanian laws, and the contrary invitation by Respondent in this arbitration (with international liability at stake) to ignore those decisions and find that Claimants committed a crime anyway. Frankly, this is a remarkable assertion that defies commonsense and any semblance of criminal justice.

77. With respect to the corruption (bribery) investigation, Panamanian Courts have not been able to find sufficient evidence to support a charge of corruption against Mr. Rivera. On 29 June 2018, the Anti-Corruption Prosecutor in Hearing No. 43 before the First Court of the Criminal Circuit of the First Judicial Circuit of Panama ("**First Court of the Criminal Circuit**,") requested the Provisional Dismissal ("*Sobreseimiento Provisional*") of the investigation because the evidence is *insufficient* to formulate charges against any of the persons being investigated (including Mr. Rivera and his affiliates).[288] This request was based on Article 2208, subsection 1, which allows a dismissal when the "[e]*vidence gathered in the*

[287] *See supra* n.20.

[288] Prosecutor's Opinion No. 43 dated 29 June 2018 (C-0942), at 7-9 (requesting the court to provisionally dismiss the corruption investigation because of insufficient evidence to prove the punishable act and explaining that a first and second instance court already denied the Prosecutor's request for a second extension of time to continue the investigation).

process is not sufficient to prove the punishable act."[289] The Provisional Dismissal request was thereafter confirmed by the First Court of the Criminal Circuit, which issued Dismissal Resolution No. 143 ("**Resolution No. 143**") on 26 November 2018, evidencing that in the *18 volumes and thousands of pages* of the corruption investigation, the Prosecutor was not able to gather sufficient evidence to bring corruption charges against Mr. Rivera. Resolution No. 143 was duly notified through an Edict posted by the First Court of the Criminal Circuit on 20 December 2018.[290]

78. At this point, the statute of limitations or prescription period for any corruption crime has run; as such, the First Court of the Criminal Circuit should turn the Provisional Dismissal into a Definitive or Final Dismissal. Article 1968-A of Panama's Judicial Code explains that a criminal action is extinguished by prescription,[291] and Article 1968-B determines the different prescription periods depending on the type of crime.[292] In the case of the crime of corruption, the prescription period is 6 years,[293] counted from the date on which the alleged

[289] Panamanian Criminal Code (C-0927), Art. 2208.1.

[290] Provisional Dismissal No. 143 dated 25 Nov. 2018 (C-0908), at 9 (ordering the provisional dismissal of the corruption investigation).

[291] Panamanian Judicial Code (C-0091 resubmitted 2), Art. 1968-A ("The criminal action terminates due to . . . 3. Bar by limitations."); *see also* Panamanian Criminal Code (C-0927), Art. 115 ("The penalty is extinguished: . . . 6. By prescription . . . .").

[292] Panamanian Judicial Code (C-0091 resubmitted 2), Art. 1968-B ("The criminal action is barred by limitations: 1. In a period equal to six years, for crimes punished by a prison sentence not exceeding six years . . . ."); *see also* Panamanian Criminal Code (C-0927), Art. 119 ("The penalty of imprisonment imposed by final sentencing has a statute of limitations that is equal to that of the penalty indicated in the sentence.").

[293] Panamanian Judicial Code (C-0091 resubmitted 2), Art. 1968-B; Panamanian Criminal Code (C-0927), Art. 347 ("Whoever, by any method, offers, promises or delivers to a public official any gift, promise, money or other benefit or advantage in order for him to commit, delay or omit any act inherent in his position or job or in violation of his obligations shall be punished by imprisonment for three to six years.").

crime occurred.[294] Under Respondent's fanciful theory the alleged corrupt acts occurred in 2013,[295] meaning that the prescription period for any corruption crime expired last year.

79. The dismissal of the corruption investigation is important because without the predicate crime—*i.e.*, corruption—no money laundering investigation can be supported either.[296] Article 255 of the Panamanian Criminal Code regulates the crime of money laundering and explains that in order to find this offense, the accused's conduct must constitute one of the listed predicate crimes, which include Corruption of Public Servants.[297] Put another way, corruption is an indispensable requirement for the commission of the crime of money laundering in this case. Since there is insufficient evidence to charge corruption, it follows that there is insufficient evidence to charge money laundering. As a result, it would be contrary to Panamanian law (and factually impossible) to find that Mr. Rivera committed the crime of money laundering in Panama.

80. In any event, a Panamanian Court has already declared the nullity of the money laundering investigation. On 23 September 2016, Panama's Second Superior Tribunal for the First Judicial District declared "the nullity of every act in the criminal proceedings . . . for the allegations of money laundering" [298] against several individuals, including Mr. Rivera. Particularly noteworthy in this Decision was: (1) that the Appellate Court considered there was

[294] Panamanian Judicial Code (C-0091 resubmitted 2), Art. 1968-E ("The limitations period for a criminal action shall run, for consummated crimes, from the day of consummation; for continuous and ongoing crimes, from the day on which they cease, and for attempts, from the day on which the last act of execution was committed.").

[295] According to Respondent's theory, the two payments made from PR Solutions to Reyna y Asociados in April and July 2013 for the purchase of Finca 35659 were intended to go to Mr. Moncada Luna as a bribe. Thus, the last alleged "corrupt act[]" occurred in July 2013. The statute of limitations should thus run from that date.

[296] Jimenez at 23; Letter from Panama's Foreign Affairs Ministry to Panama's Office of the Attorney General attaching the U.S. State Department's Denial of Panama's Request of a Provisional Arrest for the Purpose of Extraditing Mr. Rivera dated 29 Feb. 2016 (C-0900).

[297] Panamanian Criminal Code (C-0927), Art. 255.

[298] Judgment of Panama's Second Superior Tribunal for the First Judicial District dated 23 Sept. 2016 (C-0008 resubmitted 2), at 15; Cls' Mem. ¶ 103.

double jeopardy since the Moncada Luna proceeding and plea agreement covered not only the former Justice but also entities that were investigated during the Moncada Luna trial[299] (as evidenced, for example, by the National Assembly's seizure of Claimants' accounts), and (2) that the Appellate Court considered that Panamanian Prosecutors had committed due process violations contrary to the Inter-American Convention of Human Rights, the Constitution of Panama, and Panamanian Criminal Procedure.[300] Further, the Court explained that the investigation conducted by the Organized Crime Prosecutor was based on the same evidence collected by the National Assembly, which was insufficient to sustain the charge of money laundering against Justice Moncada Luna.

81. In other words, just as Ms. Jimenez has concluded,[301] Panama's Courts concluded that none of the three investigations carried out by Respondent ever had sufficient evidence to justify the crimes of bribery and/or money laundering. Thus, the investigations have been baseless from the start, yet Respondent still maintains a freeze on Mr. Rivera's companies' bank accounts, maintains a preventive detention order against Mr. Rivera, refuses to close the investigations, and continues to argue in this Arbitration that there is "incontrovertible evidence" showing that Mr. Rivera and Omega Panama procured the La Chorrera Contract by bribing former Justice Moncada Luna.[302] In other words, Respondent's corruption defense is nothing more than a continuation of Respondent's abusive and arbitrary treatment of Mr. Rivera and his investment in Panama (which is now destroyed). Mr. Rivera has been (and continues to be) a victim of bogus multiple criminal investigations that are unsupported by the facts, and which

[299] Judgment of Panama's Second Superior Tribunal for the First Judicial District dated 23 Sept. 2016 (C-0008 resubmitted 2), at 10, 14-16.

[300] Judgment of Panama's Second Superior Tribunal for the First Judicial District dated 23 Sept. 2016 (C-0008 resubmitted 2), at 15-16.

[301] Jimenez 2 at 48-49.

[302] Resp.'s Reply ¶¶ 31, 38, 55-57; Resp.'s Objections ¶ 196

have violated (and continue to violate) his due process rights and his Treaty rights at the hands of Respondent.

2. Respondent's Illegality Arguments Fail as a Matter of Law

82. While Claimants have shown at length above that Respondent's corruption/illegality defense fails as a matter of fact, it is important to note that it likewise fails as a matter of law. Respondent's Reply tellingly declines to engage with the vast majority of the key legal points made by Claimants. In particular, Respondent *completely* declines to address Claimants' proportionality[303] and estoppel[304] arguments.

83. Instead, Respondent asserts only three rebuttal arguments on arbitral jurisprudence in purported support of its corruption and illegality defense. *First*, it says that "Tribunals have consistently found that corruption and illegal acts by an investor deprive the investor of treaty protection, and thus the tribunal's competence to hear that investor's case."[305] *Second*, it says that "[e]ven if the Tribunal finds that it has jurisdiction," in situations of proven corruption or illegality, "the Tribunal must find that the claims are admissible before the Claimants may proceed on the merits."[306] *Third*, it says that "[w]hether the Tribunal assesses the Claimants' illegal conduct as a matter of jurisdiction or admissibility, the result is the same—the Claimants' claims should be dismissed."[307] Respondent's position is mistaken in every respect.

a. The Tribunal Has Jurisdiction Over All of the Claims Before It

84. As a preliminary matter, Claimants reiterate the argument set forth in their Counter-Memorial that Respondent's illegality objection has no foundation in the text of the BIT

[303] Cls' Counter-Mem. ¶¶ 306-12.

[304] Cls' Counter-Mem. ¶¶ 313-18.

[305] Resp.'s Reply ¶ 67

[306] Resp.'s Reply ¶ 75

[307] Resp.'s Reply ¶ 80

or the TPA.[308] While Respondent continues to make the blanket assertion that Claimants are deprived of protections offered under the BIT and the TPA,[309] the fact remains that there is no provision in either treaty requiring that investments accord with host State law as a precondition for treaty protection and/or investor-State arbitration.[310] Respondent offers no serious textual argument to the contrary.

85. Instead, Respondent asserts that "the BIT and the TPA in the present case contain no language imposing temporal restriction on the range of illegal conduct a tribunal can consider for jurisdictional purposes," therefore, Respondent surmises that this Tribunal should have "no reason to read in a temporal restriction."[311] This argument is fundamentally mistaken. Respondent—as the Party moving to dismiss Claimants' case—bears the burden of proving that its argument finds support in the relevant treaties.[312] It obviously fails to meet that burden by pointing to *the absence* of any relevant language in the treaties. To the extent that Respondent is suggesting that the Tribunal may infer that the treaties contain a legality requirement (albeit unwritten), Respondent again incorrectly assumes that any such implicit legality requirement would apply equally to both the inception and the operation of an investment. Investment arbitral tribunals are unanimous in holding that an implicit "legality" requirement applies (if at all) only with respect to the *making* of an investment.[313] There simply is no peremptory bar on

[308] *See* Cls' Counter-Mem. ¶ 279.

[309] Resp.'s Reply ¶ 67.

[310] *See* Cls' Counter-Mem. ¶ 279.

[311] Resp.'s Reply ¶ 72.

[312] *See* Cls' Counter-Mem. ¶ 70, 280-90.

[313] *See, e.g.*, *David Aven v. The Republic of Costa Rica*, UNCITRAL, Final Award, 18 Sept. 2018 (CL-0257), ¶ 342; *Yukos Universal Ltd. v. Russian Federation*, UNCITRAL, Final Award, 18 July 2014 ("***Yukos***") (CL-0135), ¶ 1354; *Metal-Tech* (RL-0011) ¶ 185; *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 Feb. 2008 ("***Desert Line***") (CL-0075), ¶ 104; *Khan Resources Inc. v. The Government of Mongolia*, UNCITRAL, PCA Case No. 2011-09, Decision on Jurisdiction, 2 Mar. 2015 ("***Khan Resources* – Jurisdiction**") (CL-0139), ¶ 384; *Gustav F. W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case

this Tribunal's ability to hear this case on the basis of charges of illegality in the operation of Claimants' investment. Every arbitral award that has addressed this question agrees.[314]

86. Respondent's other arguments fail as well. Here, there is, as a factual matter, no act of corruption, but even if there were, none of Respondent's allegations taints the making of Claimants' entire investment. Respondent's allegations pertain to only *one* of Claimants' *eight* Contracts, which themselves constitute but one part of Claimants' Unitary Investment in Panama. (*See infra* Section II.A.2.a.i). With that basic point uncontroverted (and incontrovertible) Respondent's cited cases are inapposite.[315] (*See infra* Section II.A.2.a.ii). In a final effort, Respondent tries to argue that the alleged illegality stands at the core of the investment's establishment, but that is simply untrue. (*See infra* Section II.A.2.a.iii). None of Respondent's assertions of illegality and corruption, even if they could be proven, divest this Tribunal of jurisdiction.

i. Respondent's Twisting of the Unitary Investment Principle Gets it Nowhere

87. Respondent argues that, because of the existence of Claimants' Unitary Investment, it "need not make separate allegations [of illegality] as to each contract."[316] This sort of argument betrays its foundation—that Respondent must acknowledge that it has no

---

No. ARB/07/24, Award, 18 June 2010 ("***Hamester***") (RL-0006), ¶ 127; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 Aug. 2007 ("***Fraport***") (CL-0124), ¶ 345; *Oxus Gold v. Republic of Uzbekistan*, UNCITRAL, Final Award, 17 Dec. 2015 ("***Oxus Gold***") (CL-0137), ¶ 707; *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 Sept. 2015 (CL-0085), ¶ 129; *Von Pezold v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015 (CL-0258), ¶ 420; *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 Aug. 2015 (CL-0259), ¶ 598.

[314] *See, e.g.*, *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 Mar. 2017 (CL-0145), ¶ 377; *Desert Line* (CL-0075) ¶ 104; *Khan Resources* – Jurisdiction (CL-0139) ¶ 384; *Hamester* (RL-0006) ¶ 127; *Fraport* (CL-0124) ¶ 345; *Oxus Gold* (CL-0137) ¶ 707.

[315] Resp.'s Reply ¶¶ 67-70. Respondent also makes a passing reference to *Metal-Tech (Id.* ¶ 72). As Claimants confirm, this case is also wholly inapposite. *See infra* ¶¶ 108-09.

[316] Resp.'s Reply ¶ 63.

grounds to even *assert* corruption as to seven out of Claimants' eight Contracts. Be that as it may, this argument is completely at odds with what Respondent argues elsewhere (and Respondent admits so much).[317] On the one hand, Respondent is arguing that "Panama need not make separate allegations as to each contract," purportedly because "non-compliance with Panamanian law was endemic to the Claimants' investments—such that corruption in procuring one investment clearly violates the others." And yet, in the same pleading, Respondent contends that "Claimants' reliance on the Unity of Investment doctrine here is completely unfounded."[318] Both cannot be true. Either Claimants' contracts are "stand-alone agreements that have no bearing on any other project"[319] *or* "they share a common core."[320] To simultaneously maintain, as Respondent does, that both contentions are correct, is untenable and betrays the weakness of Respondent's defenses.

88. Taking Respondent's allegations with respect to the La Chorrera Contract head-on, Respondent's legal theory fails from a temporal perspective. Tribunals uniformly distinguish between illegality in the *formation* of an investment and illegality in the subsequent *operation* of the investment.[321] While the former may deprive an arbitral tribunal of jurisdiction, the latter does not.[322] Yet Respondent has still singularly failed to articulate a factual narrative that

[317] Resp.'s Reply ¶ 63 n.134.

[318] Resp.'s Reply ¶ 181.

[319] Resp.'s Reply ¶ 182.

[320] Resp.'s Reply ¶ 63.

[321] *See, e.g.*, *David Aven v. The Republic of Costa Rica*, UNCITRAL, Final Award, 18 Sept. 2018 (CL-0257), ¶ 342; *Yukos* (CL-0135) ¶ 1354; *Metal-Tech* (RL-0011) ¶ 185; *Desert Line* (CL-0075) ¶ 104; *Khan Resources* – Jurisdiction (CL-0139), ¶ 384; *Hamester* (RL-0006) ¶ 127; *Fraport* (CL-0124) ¶ 345; *Oxus Gold* (CL-0137) ¶ 707; *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 Sept. 2015 (CL-0085), ¶ 129; *Von Pezold v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015 (CL-0258), ¶ 420; *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 Aug. 2017 (CL-0259), ¶ 598.

[322] Cls' Counter-Mem. ¶ 292 (*citing* to *Fraport* (CL-0124) ¶¶ 344-45 ("If, at the time of the initiation of the investment, there has been compliance with the law of the host state, allegations by the host state of violations of its law in the course of the investment, as a justification for state action with respect to the investment . . . could not

Claimants' supposed illegality with respect to the La Chorrera contract in 2012 had *anything* to do with the *formation* of its Unitary Investment *three years earlier*. To put a finer point on the timing, the La Chorrera Contract was entered into on 22 November 2012,[323] *more than three years after* Claimants incorporated Omega Panama—a local corporation that plainly anchors their investment—on 26 October 2009. Given that the totality of Respondent's corruption allegations pertain to only the La Chorrera Contract, it remains the case that Respondent has raised allegations about Claimants' conduct only during the *operation* of the investment (and unfounded ones at that), which by law does *not* raise a jurisdictional issue. And no Tribunal has ever utilized the Unitary Investment principle as a shield to international liability by a State, such that corruption in the operation of one aspect of an investment tainted the making of the entire investment at its inception.

89. Respondent's "contagion" argument (*viz*. that because "Omega contractually undertook to abide by Panama's laws . . . in five of the eight contracts," "[t]he effects of the Claimants' [supposed] bribery and corruption are . . . pervasive") makes no sense. Again, it is *completely novel*. *None* of the three paragraphs Respondent dedicates to this argument contains *any* support for this theory—jurisprudential or otherwise. This is unsurprising, because it is completely illogical. Even accepting *arguendo* the veracity of Respondent's corruption claims, what "pervasive effect" could a bribe paid with regard to one contract in 2012 possibly have on

deprive a tribunal acting under the authority of the BIT of its jurisdiction."); *Hamester* (RL-0006) ¶ 127 ("The Tribunal considers that a distinction has to be drawn between (1) legality as at the initiation of the investment . . . and (2) legality during the performance of the investment."); *Metal-Tech* (RL-0011) ¶¶ 185-193 (distinguishing between illegality in the establishment of an investment and illegality in the investment's operation); *see also Desert Line* (CL-0075) ¶ 104; *Khan Resources* – Jurisdiction (CL-0139), ¶ 384; *Oxus Gold* (CL-0137) ¶ 707; *Vladislav Kim et al. v. The Republic of Uzbekistan*, Decision on Jurisdiction, dated 8 Mar. 2017 (CL-0145), ¶ 377.

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

earlier and later contracts for entirely different projects with entirely different state entities?[324] If Respondent's legal theory were to be accepted, it would amount to the total evisceration of the inception-versus-operation distinction, because one act of impropriety occurring well after the investment's inception would automatically be deemed to infect the making of the investment for jurisdictional purposes. That plainly cannot be right.[325]

90. Nor could Respondent succeed in its defense if the Tribunal were to credit its alternative—and entirely contradictory—position in this case, which is that each of Claimants' Contracts is a separate investment that must stand alone.[326] In that case, it is plainly obvious that, even if corruption or illegality had occurred in obtaining the La Chorrera Contract (and it has not), at most the Tribunal would be deprived of jurisdiction over the La Chorrera Contract "investment," leaving all of Claimants' other claims intact. In the end, neither of Respondent's contradictory theories allow it to escape liability to Claimants.

ii. Respondent's Jurisprudence Supports Claimants' Case

91. In its Reply on Jurisdiction, Respondent cites four investor-State awards[327] to support its misplaced contention that this case falls into the category of cases where "[t]ribunals have consistently found that corruption and illegal acts by an investor deprives the investor of

[324] Completely unrelated except, of course, for the fact that they all constitute part of the same Unitary Investment grounded in the Omega Consortium's interests in Panama.

[325] Claimants explain why below. As tribunals have recognized, inadmissibility is an *extraordinary* remedy, as it should be. A tribunal that dismisses a case on admissibility has divested itself of its admitted jurisdiction by exercising its discretion, and tribunals have rightly been exceedingly cautious in doing so. *See further infra* ¶ 102.

[326] Resp.'s Reply ¶ 182.

[327] *World Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/007, Award, 4 Oct. 2006 ("***World Duty Free***") (RL-0003), ¶¶ 57, 179; *Hamester* (RL-0006) ¶ 123; *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/05, Award, 15 Apr. 2009 ("***Phoenix Action***") (RL-0005), ¶¶ 100-04; *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 Aug. 2006 (CL-0067), ¶ 244. As Claimants confirmed in their Counter-Memorial, the tribunal in *Inceysa v. El Salvador* addressed fraud by the investor as a jurisdictional issue (not an admissibility issue), and the fraud occurred in the *making* of the investment. It is thus completely inapposite here, where Claimants' investment was made through the formation of Omega Panama *years* before the La Chorrera contract was signed. Cls' Counter-Mem. ¶ 302.

treaty protection . . . ."[328] It seeks to infer from this jurisprudential analysis that if corruption is found in regard to the La Chorrera Contract, Claimants should be "prevent[ed] . . . from pursuing their claims in this arbitral tribunal" *writ large*.[329] But this is not *at all* what these cases show. For starters, while in *World Duty Free* the Tribunal expressly held that "Claimant [was] not legally entitled to maintain any of its pleaded claims in [the] proceedings," this was because the claimant's claims "*all* sound[ed] or depend[ed] upon the [single] Agreement" concluded between the relevant Parties that was secured through *admitted* corruption, "and *no other claim* [wa]s pleaded, including any non-contractual proprietary or restitutionary claim."[330] In other words, as a factual matter, all facets of the investment and all claims flowed directly from admitted corruption. Here, of course, Respondent's corruption claims (unfounded as they are) pertain to but one out of eight of Claimants' Contracts, and those Contracts themselves collectively constitute but one facet of Claimants' Unitary Investment. Crucially *none* of Claimants' claims here are purely contractual, but rather are distinct treaty claims pertaining to Respondent's destruction of Claimants' Unitary Investment.

92. *Hamester* is similarly unhelpful for Respondent. That award clearly confirms that it, along with the *Phoenix Action* award it references[331] and the ICSID Convention, address only corruption in the *formation* of the investment, not its *operation*:

> The Tribunal considers, as was stated for example in *Phoenix v. Czech Republic*, that: "States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments not made in good faith."
>
> An investment will not be protected if it has been *created* in violation of national or international principles of good faith; by

[328] Resp.'s Reply ¶ 67.

[329] Resp.'s Reply ¶ 67.

[330] *World Duty Free* (RL-0003) ¶ 179 (emphasis added).

[331] *Phoenix Action* (RL-0005) ¶ 106.

> way of corruption, fraud, or deceitful conduct; or if its *creation* itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is *made* in violation of the host State's law (as elaborated, e.g. by the tribunal in Phoenix).[332]

93. Claimants' investment was, as noted, *made* years before the La Chorrera contract was signed, when Omega Panama was incorporated and Claimants first committed assets, including the goodwill, track-record, and financial and bonding capacity of Omega U.S. in Panama to bid for and carry out construction projects. Accordingly, this holding and those it cites provide no guidance in the present case.[333] Quite how Respondent interprets these cases to mean that "[t]his Tribunal . . . may consider—and deny jurisdiction based upon—any and all of the Claimants' corrupt acts"[334] is a mystery which should cast aspersion on all of Respondent's faulty arguments.

94. As set forth below,[335] illegality in the *operation* of the investment should only be dealt with by an arbitral tribunal, if at all, as a matter of merits and damages analysis. Complementing this line of cases is a recent ICSID case featuring a very experienced tribunal—

---

[332] *Hamester* (RL-0006) ¶¶ 123-24 (emphasis added); *see also* Cls' Counter-Mem. ¶ 292 (*citing* to *Fraport* (CL-0124) ¶¶ 344-45 ("If, at the time of the initiation of the investment, there has been compliance with the law of the host state, allegations by the host state of violations of its law in the course of the investment, as a justification for state action with respect to the investment . . . could not deprive a tribunal acting under the authority of the BIT of its jurisdiction."); *Hamester* (RL-0006) ¶ 127 ("The Tribunal considers that a distinction has to be drawn between (1) legality as at the initiation of the investment . . . and (2) legality during the performance of the investment."); *Metal-Tech* (RL-0011) ¶¶ 185-193 (distinguishing between illegality in the establishment of an investment and illegality in the investment's operation). *See further Desert Line* (CL-0075) ¶ 104; *Khan Resources* – Jurisdiction (CL-0139), ¶ 384; *Oxus Gold* (CL-0137) ¶ 707; *Vladislav Kim et al. v. The Republic of Uzbekistan*, Decision on Jurisdiction, dated 8 Mar. 2017 (CL-0145), ¶ 377.

[333] *See supra* ¶ 83. *Phoenix Action* (RL-0005) ¶¶ 100 (confirming, in the introductory paragraph to the entire section, that "[t]he purpose of the international mechanism of protection of investment through ICSID arbitration cannot be to protect investments *made* in violation of the laws of the host State or investments not *made* in good faith, *obtained* for example through misrepresentations, concealments or corruption, or amounting to an abuse of the international ICSID arbitration system" (emphasis added); 102 ("The core lesson is that the purpose of the international protection through ICSID arbitration cannot be granted to investments that are *made* contrary to law" (emphasis added)).

[334] Resp.'s Reply ¶ 73.

[335] *See infra* Section II.A.2.c.

which was previously cited by Claimants[336] but tellingly ignored by Respondent. In particular, the tribunal in *Álvarez y Marín Corporación S.A., et al. v. Panama* held that breaches of domestic law after the investment is made are irrelevant at the international level and should be dealt with internally by the host State's authorities.[337] That Panama's authorities have investigated Mr. Rivera and his companies for more than five years and still have produced no evidence sufficient to prove criminal conduct[338] speaks volumes about what Respondent is trying to accomplish here.

95. In sum, there is a *complete absence* of jurisprudential support for Respondent's misplaced argument that alleged corruption in the *operation*, not the creation, of *one part* of Claimants' Unitary Investment must be deemed to somehow "pervade" the rest of it, eliminating the Tribunal's jurisdiction in its entirety.

iii. Corruption was not at the "core" of Claimants' Unitary Investment

96. Likely recognizing the weakness of its argument, Respondent argues that the fact that compliance with Panama's law, including its anticorruption laws, is "explicitly required in five of the eight [Omega] contracts"[339] means that such contractual provisions "manifestly 'stand at the core' of the Claimants' investment and deprives their claims of [the] protection [of] the Tribunal's jurisdiction."[340] This argument is nothing more than a disingenuous attempt to twist Claimants' words.

---

[336] Cls' Counter-Mem. ¶ 309 & nn.887-90.

[337] *Álvarez y Marín Corporación S.A., Bartus Van Noordenne, Cornelis Willem Van Noordenne, Estudios Tributarios Ap S.A., Stichting Administratiekantoor Anbadi v. Panama*, ICSID Case No. ARB/15/14, Award, 12 Oct. 2018 (CL-0146), ¶ 299.

[338] *See supra* § II.A.1.e.

[339] Resp.'s Reply ¶ 74.

[340] Resp.'s Reply ¶ 74.

97. When Claimants noted that "[i]n the rare instance in which an investment arbitral tribunal dismisses an entire case on the basis of illegality, the illegality must *stand at the core* of the investment's establishment," they were referring to the plethora of arbitral jurisprudence that has declined to reject jurisdiction unless the illegality at issue stands at the core—*i.e.*, infects the *entirety* of—the investment's establishment.[341] As Claimants noted in their Counter-Memorial, tribunals generally have dismissed cases for lack of jurisdiction on illegality grounds *only* when the investment could not have been acquired *without* the illegality.[342] This was the case in *World Duty Free*, where the entire investment (and thus all claims) flowed directly from the admitted bribe; without the bribe, there could be no investment, so illegality lay at the investment's core.[343] Likewise, in *Phoenix Action*, the entire investment had been a sham; at the core of the investment's making was a fraud.[344]

98. The same certainly cannot be said of Claimants' Unitary Investment in Panama. As detailed in the Request for Arbitration,[345] this investment consists of, *inter alia*: (i) a local Panamanian corporation, Omega Panama; (ii) Claimants' eight contracts with various Panamanian State authorities; (iii) Mr. Rivera's capital investment in Omega Panama; and (iv) Omega U.S.' investment of its goodwill and know-how in Panama and the Omega Consortium.[346] Thus, even if Respondent could prove that the La Chorrera Contract was acquired by corruption, and that illegality therefore lay at the core of that *one small piece* of the

[341] Cls' Counter-Mem. ¶ 298 & n.863 (citing ALOYSIUS P. LLAMZON, CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION §§ 7.03 (2014) (CL-0134) (surveying 30 cases); *see generally World Duty Free* (RL-0003); *Phoenix Action* (RL-0005).

[342] Cls' Counter-Mem. ¶ 298, n.863.

[343] *See, e.g.*, *World Duty Free* (RL-0003) ¶ 179.

[344] *Phoenix Action* (RL-0005) ¶¶ 129, 136, 138-42.

[345] Claimants' Request for Arbitration dated 30 Nov. 2016 ("**Cls' RFA**"), ¶ 63; *see also* Cls' Mem. ¶¶ 124, 130

[346] *See* Rivera 1 ¶ 129; Second Witness Statement of Mr. Oscar Rivera dated 27 May 2019 ("**Rivera 2**") ¶¶ 18-23; Rivera 3 ¶¶ 28-30.

investment (which it cannot), the vast majority of the investment is not even *alleged* to be tainted by illegality. Once again, Respondent can make no credible claim that its illegality objection can eliminate the Tribunal's jurisdiction outright.

99. Respondent's focus on language found in five of the eight Contracts does not change this fact. That slightly more than half of the Contracts obligated the Omega Consortium to comply with Panamanian law is both unremarkable and irrelevant, because (once again), Claimants are only (falsely) alleged to have violated that undertaking with respect to one lone contract. There is simply no illegality at the core of the investment, and no basis upon which to deny this Tribunal jurisdiction over Claimants' claims.

b. Claimants' Claims Are Not Inadmissible

100. While previously only alluding to it,[347] Respondent now openly advances the contention that "[t]he Tribunal should find that the Claimants' corruption renders their claims inadmissible and thus the claims should be dismissed."[348] In advancing this claim, Respondent (wrongly) asserts that "[w]hile the Claimants argue that the timing of illegal conduct is relevant to the admissibility of a claim, they fail to cite any cases holding an investor's claims admissible on the basis that . . . the illegal conduct occurred during, instead of at the inception of, the performance of an investment."[349] But this is simply false. Claimants discussed in their Counter-Memorial[350] the tribunal's holding in *Yukos v. Russian Federation*, which rejected an admissibility defense in the investor-State context where illegality was alleged in the *operation*

[347] Resp.'s Reply ¶¶ 209-13.

[348] Resp.'s Reply ¶ 75.

[349] Resp.'s Reply ¶ 79.

[350] Cls' Counter-Mem. ¶ 310.

of the investment.[351] Below Claimants explain why Respondent's admissibility defense continues to hold no water.

101. First and foremost, and as Claimants have already shown above,[352] Claimants never committed any illegality in the operation of their investment. As such this puts an end to Respondent's "admissibility" objections as a matter of fact. There is, further and in any event, no established "admissibility" defense under international law for illegality in the *operation* of an investment. The vast majority of cases cited by Respondent address the legality of an investment at the moment it was *made*, as already noted.[353] Indeed, the *Yukos* tribunal held, after surveying the field of general international law authorities supplied by distinguished scholars, that it had not found "a single majority decision where an international court or arbitral tribunal has applied the principle of [inadmissibility] in an inter-State or investor-State dispute and concluded that, as a principle of international law, it operated as a bar to a claim."[354] More recent jurisprudence confirms this. In *Aven v. Costa Rica* the tribunal "side[d] with the temporal scope of the legality requirement premised in the *Quiborax, Yukos Universal* and *Copper Mesa Mining* cases" and held that a peremptory bar "should not extend to the subsequent actions during the *performance* of the investment."[355]

---

[351] *Yukos* (CL-0135), ¶ 1362, signatures. The judgment of the District Court of The Hague, The Netherlands of 20 April 2016 (Cases C/09/477160 / HA ZA 15-1, C/09/477162 / HA ZA 15-2, C/09/481619 / HA ZA 15-112) (CL-0268) setting aside the *Yukos* Award was based on grounds unrelated to the discussion herein.

[352] *See supra* § II.A.1.

[353] *See supra* § II.A.2.a.ii.

[354] *Yukos* (CL-0135) ¶ 1362, signatures.

[355] *David Aven v. The Republic of Costa Rica*, UNCITRAL, Final Award, 18 Sept. 2018 (CL-0257), ¶ 342. Emphasis added. Notably, the *Aven* tribunal came to this holding while responding to Costa Rica's plea to have the investor's claim dismissed on the basis of misleading statements and violations of Costa Rican law in the *operation* of the investment. In particular, Costa Rica had argued that "illegalities committed by Claimants during the performance of the investment should constitute a barrier to the admissibility of Claimants' claims." *Id*. ¶ 330. The *Aven* tribunal considered this submission and *rejected* it. *See also Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 Nov. 2017 (CL-0141), ¶ 335 ("[A]n alleged illegality of the

102. This is unsurprising. As tribunals have recognized, inadmissibility is an *extraordinary* remedy, as it should be.[356] A tribunal that dismisses a case on admissibility has divested itself of its admitted jurisdiction by exercising its discretion, and tribunals have rightly been exceedingly cautious in doing so.[357] As another investor-State tribunal has held, such a bar "would effectively deprive an investor from exercising any arbitral remedy under the Treaty if the investor (or its agents or employees) ever committed a breach of the host State's laws during the life of its investment."[358]

103. Thus the only (and narrow) cases in which tribunals have ever considered an illegality defense as a bar to admissibility for conduct occurring during the *operation* of the investment are those cases where *the basis of the claim was itself a fraud on the tribunal or serious illegality*. For example, in *SIREXM v. Burkina Faso* the fraud itself was the basis upon which the claim was brought.[359] Similarly, the French Courts annulled the award rendered in *Belokon v. Kyrgyzstan* because there had been illegality both in the *making* of the investment, and as *the basis for the claim* in front of the tribunal.[360]

---

investment is not sufficient to deny admissibility, though it will have to be considered and may become relevant in the examination of the merits.").

[356] *See Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 Aug. 2002 (CL-0252), ¶ 123 (holding that, where the treaty includes no "express power" to dismiss a claim on admissibility grounds, it is not possible to infer any implied power").

[357] *See Ioan Micula v. Romania [I]*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 Sept. 2008 (CL-0246), ¶¶ 63-65.

[358] *Copper Mesa Mining Corporation v. The Republic of Ecuador*, PCA No. 2012-2, Award, 15 Mar. 2016 (CL-0140), ¶ 5.55. *See also Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 Nov. 2017 (CL-0141), ¶ 320 ("The Tribunal agrees with Claimant that under international law, the Tribunal may not import a requirement that limits its jurisdiction when such a limit is not specified by the parties.").

[359] *Société d'Investigation de Recherche et d'Exploitation Minière (SIREXM) v. Burkina Faso*, ICSID Case No. ARB/97/1, Award, 19 Jan. 2000 (CL-0254), ¶ 6.33.

[360] *Belokon v. Kyrgyzstan*, Cour D'Appel de Paris, No. 15/01650, Judgment, 21 Feb. 2017 (CL-0255), at 10. *See also Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA*, 6 IRAN-U.S. CL. TRIB. REP. 219, 228, Award No. 141-7- 2, 1984 (CL-0016) (addressing whether unpaid taxes should be set off against an award so that the claimant was not unjustly enriched).

104. Even Respondent's central authority—*Churchill Mining*—does not support Respondent's position.[361] In this case the tribunal found that 34 documents—which included 10 mining licenses and four decrees creating the rights for claimants' *entire investment*[362]—had been forged,[363] and expressly noted that these forgeries "permeated"[364] claimants' entire investment because they were "essential to the making and conduct of the [investment] *from which all of the [c]laimants' claims arise*."[365] Stated another way, "*all*"[366] of those claims were "based on documents forged to implement a fraud aimed at *obtaining* mining rights."[367] In other words, the illegality both occurred in the making of the investment and was at its core, such that without the illegality, there could be no investment and no claim.

105. The present case simply could not, of course, be more different. Here, far from "permeating" Claimants' investment, (unfounded) allegations of corruption are leveled at only one of Claimants' eight construction Contracts, which Contracts themselves constituted only *part* of Claimants' Unitary Investment in Panama. That one Contract was, further, obtained years after Claimants initiated and grew their successful investment in Panama through the operations of the Omega Consortium.[368] As discussed, Respondent's unsupported attempts to argue to the

[361] Resp.'s Reply ¶ 76 (*citing Churchill Mining* (RL-0010) ¶¶ 507-08, 528).

[362] *Churchill Mining* (RL-0010) ¶¶ 510, 512, 528-29.

[363] *Churchill Mining* (RL-0010) ¶¶ 254, 478.

[364] *Churchill Mining* (RL-0010) ¶ 507.

[365] *Churchill Mining* (RL-0010) ¶ 507 (emphasis added). It is notable that Respondent omits the crucial second, italicized, part of this holding from its description of the *Churchill Mining* tribunal's holding. Resp.'s Reply ¶ 76.

[366] *Churchill Mining* (RL-0010) ¶ 528.

[367] *Churchill Mining* (RL-0010) (emphasis added).

[368] *See* Cls' Counter-Mem. ¶ 303.

contrary, without engaging in the details of any of the relevant holdings, do not assist this Tribunal.[369]

106. Respondent's reference to *Plama* as purportedly supporting its contention that "where the Claimants' corruption violated both Panamanian law and international public policy their claims are outside of the protections of the BIT and the TPA, even if the Tribunal has jurisdiction"[370] gets it no further. This case is every bit as distinguishable as *Churchill Mining*. In *Plama* the claimant purchased shares in a Bulgarian oil refinery via a share purchase agreement "which was subject to the consent of the Bulgarian Privatization Agency . . . ."[371] Approval was subsequently granted and the transfer of shares was completed.[372] While additional agreements pertaining to the oil refinery purchase were concluded, these were all closely linked with and necessarily derivative of the key investment agreement (*viz*. the SPA for the purchase of the oil refinery shares).[373] As such, when the *Plama* tribunal held that the Privatization Authority's authorization for the share purchase agreement had been *obtained* "in flagrant violation of . . . provisions of Bulgarian law,"[374] and that "this misrepresentation made by [c]laimant renders [the agreement whereby the Privatization Authority granted its approval for the share transfer] unlawful,"[375] as with *Churchill Mining*, the tribunal was necessarily

[369] *See generally supra* § II.A.2.a.iii.

[370] Resp. Reply ¶ 78 (*citing Plama Consortium v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 Aug. 2008 (RL-0008)).

[371] *Plama Consortium v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 Aug. 2008 (RL-0008), ¶ 57.

[372] *Plama* (RL-0008) ¶ 64.

[373] Namely: (i) a Memorandum of Understanding with the Privatization Agency whereby the Privatization Agency gave consent for the sale and transfer of the oil refinery shares to the claimant provided the satisfaction of a number of conditions stated therein was assured (*id*. ¶ 60); (ii) agreements with the trade unions and creditors of the oil refinery (*id*. ¶¶ 61-62); and (iii) a further agreement with the Bulgarian Privatization Agency (*id*. ¶ 63).

[374] *Plama Consortium v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 Aug. 2008 (RL-0008), ¶ 137.

[375] *Plama* (RL-0008) ¶ 137.

holding that this misrepresentation *permeated* the making of claimant's *entire* investment. Stated another way, because the authorization of the Privatization Authority for the oil refinery purchase (*viz*. claimant's entire investment) was *obtained* fraudulently, the *Plama* tribunal held that "the investment [*writ large*] was obtained by deceitful conduct" and that an investment "*obtained* by wrongful means (fraudulent misrepresentation) should not be enforced by a tribunal."[376] Here again, as with *Churchill Mining*, *Plama* is completely distinguishable.

107. As for Respondent's contention that *Churchill Mining* and *Plama* are somehow notable for the fact that "neither . . . held that the question of admissibility was subject to a temporal restriction on the illegal conduct,"[377] the above analysis shows that this misses the point. The reason neither tribunal performed a detailed temporal analysis was because the *entirety* of the investments in *both* cases[378] was *obtained* in such a way that the fraudulent activity identified tainted the investment *writ large*, thereby rendering inadmissible *all* of the respective claimants' derivative claims. As such, any temporal analysis was rendered otiose by the *nature* of the investments and fraudulent activity in question. The opposite is true here, where (again) Respondent's corruption allegations are limited to a single one of Claimants' eight public works construction Contracts, where these Contracts cumulatively form but one constituent part of Claimants' Unitary Investment, and where the relevant Contract was obtained years after the making of Claimants' investment.

[376] *Plama* (RL-0008) ¶ 143.

[377] Resp.'s Reply ¶ 79.

[378] *Viz*., in *Churchill Mining* a coal mining project whereby forged documents were essential to its making and conduct, and in *Plama* the purchase of shares in an oil refinery for which authorization was obtained fraudulently.

108. Next, Respondent's references to *World Duty Free* and *Metal-Tech* are similarly inapposite. As detailed *supra*,[379] while in *World Duty Free* the Tribunal expressly held that "Claimant [was] not legally entitled to maintain any of its pleaded claims in [the] proceedings," this was because the claims "*all* sound[ed] or depend[ed] upon the [single] Agreement" concluded between the relevant parties as a result of admitted bribery, "and *no other claim* [wa]s pleaded, including any non-contractual proprietary or restitutionary claim."[380]

109. Respondent's acontextual reference to the *Metal-Tech* tribunal's confirmation that it was arriving at its holding "to ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act"[381] likewise does not assist it. As Claimants previously confirmed,[382] the context of that award, and hence the quote referenced by Respondent, was a treaty which "require[d] that the investment must be legal when it is initially *established*" and which "simply [did] not address whether or not the investment must be *operated* lawfully after it is in place."[383] For this reason, the *Metal Tech* tribunal addressed only the question of jurisdiction (*i.e.*, illegality in the making of the investments). It did *not* address the question of illegality in the *operation* of the investment.[384] This case has nothing to do with admissibility and is completely inapposite.

110. Once again, these cases provide no grounds for "dismissing *all* of the Claimants' claims"[385] based on (falsely) alleged corruption in the operation of the investment. Respondent's

[379] *See supra* ¶¶ 82, 88.

[380] *World Duty Free* (RL-0003) ¶ 179 (emphasis added).

[381] Resp.'s Reply ¶ 80 (*citing Metal-Tech* (RL-0011) ¶ 389.)

[382] Cls' Counter-Mem. ¶ 292 n.854.

[383] *Metal-Tech* (RL-0011) ¶ 193 (emphasis added).

[384] *Metal-Tech* (RL-0011) ¶¶ 117, 185-93, 389.

[385] Resp.'s Reply ¶ 80 (emphasis in original).

attempts to bolster its argument by asserting that Claimants' alleged corruption "pervades" the rest of their investment (debunked above[386]) do not assist it.

111. Reflective of Respondent's attempt to hide from the correct legal position is its treatment of the *Yukos v. Russia* case, which it ignores. This is unsurprising since the *Yukos* tribunal ruled, as noted above, that it had not found a "single majority decision where an international court or arbitral tribunal has applied the principle of 'unclean hands' [*i.e.*, inadmissibility] in an inter-State or investor-State dispute and concluded that, as a principle of international law, it operated as a bar to a claim."[387] Thus, the tribunal held that where illegality was alleged in the *operation* of an investment, the principles of proportionality and contributory fault (addressed *infra*)[388] should be applied in considering the merits and quantum *instead of* a bar to admissibility of the claims.[389]

112. The same is true for *Copper Mesa v. Ecuador* where the tribunal held that contributory fault "strikes the [t]ribunal as more legally appropriate to this case than an outright dismissal of the Claimant's claims . . . on the ground of inadmissibility."[390] In other words, the *Copper Mesa* tribunal too held that contributory fault (and proportionality) was the correct alternative to inadmissibility when dealing with claims of illegality in the operation of the investment.

113. This jurisprudence puts an end not only to Respondent's baseless contention that Claimants "fail to cite any cases holding an investor's claims admissible on the basis that [] the

[386] *See supra* § II.A.2.a.iii.

[387] *Yukos* (CL-0135) ¶ 1362, signatures.

[388] *See also infra* Section II.A.2.c.

[389] *Yukos* (CL-0135) ¶ 1363, 1594.

[390] *Copper Mesa Mining Corporation v. The Republic of Ecuador*, PCA No. 2012-2, Award, 15 Mar. 2016 (CL-0140), ¶ 5.65.

illegal conduct occurred during, instead of at the inception of, the performance of an investment,"[391] but also to Respondent's admissibility arguments *writ large*.

114. *Finally*, recognizing the inherent weakness of its legal arguments, Respondent concludes its analysis by submitting that the Tribunal should, "alternatively . . . at least dismiss claims related to the La Chorrera Contract, to all subsequent contracts and to all future damages."[392] This, too, has no basis in the law. All the "consistent"[393] jurisprudence on this topic would support is the excision of claims related to the La Chorrera Contract if *it* was *obtained* by corruption. But as shown above, that allegation is false. And as the tribunal confirmed in *Álvarez y Marín*, breaches of domestic law once the investment is made are *irrelevant* at the international level and should be dealt with internally by the host State's authorities.[394]

115. Respondent's attempt to justify its contention that the tribunal should dismiss "all subsequent contracts" and "all future damages"[395] fails for the same reasons as its contention that all of Claimants' claims should be dismissed. The above jurisprudence confirms that tribunals will dismiss claims for corruption only when those claims are "founded" upon the illegal act.[396] Respondent has advanced no evidence whatsoever, for the simple reason that none exists, for its contention that "[b]y engaging in bribery to obtain a Government contract, the Claimants

---

[391] Resp.'s Reply ¶ 79.

[392] Resp.'s Reply ¶ 81.

[393] Resp.'s Reply ¶¶ 67.

[394] *Álvarez y Marín Corporación S.A., Bartus Van Noordenne, Cornelis Willem Van Noordenne, Estudios Tributarios Ap S.A., Stichting Administratiekantoor Anbadi v. Panama*, ICSID Case No. ARB/15/14, Award, 12 Oct. 2018 (CL-0146), ¶ 299 (emphasis added). As already discussed, other Tribunals have adopted a similar position to the *Álvarez y Marín* tribunal. *See, e.g.*, *Yukos* (CL-0135) and *Copper Mesa v. Ecuador* (CL-0140) where, as discussed *supra*, the tribunal applied the principles of proportionality and contributory fault to the issue of illegality in the *operation* of the investment. *See supra* ¶¶ 102-03.

[395] Resp.'s Reply ¶ 81.

[396] *World Duty Free* (RL-0003) ¶ 118.

prejudiced the fairness of subsequent bidding proceedings by establishing an expectation of continued bribery—upon which contractual counterparties may have relied."[397] *First*, this contention assumes that, accepting Respondent's corruption allegations are accurate (and they are not), either the recipient of Claimants' alleged bribe (Mr. Moncada Luna—who was subsequently imprisoned for unjust enrichment) or Claimants themselves (who were subsequently subject to unjustified and illegal criminal investigations[398]), *communicated* to the other Ministries for whose projects they were bidding that they were in the habit of bribing public officials in order to obtain contracts, and prepared to do so again. This is absurd (and one would assume that, if it were true, Respondent could have proffered some documentary or testimonial proof thereof). *Second*, this is but the latest example of Respondent resorting to unsupported and, frankly, irresponsible *ipse dixit* to try and justify unjustified claims. Of course, such *ipse dixit* does not even *begin* to satisfy Respondent's heavy evidential burden of proving its corruption claims by clear and convincing evidence.[399]

c. Principles of Proportionality and Contributory Fault Guide Any Evaluation of Alleged Illegality in the Operation of an Investment

116. Even if Respondent proved by clear and convincing evidence that Claimants had committed a serious illegality (which it has not) in the operation of the investment, the correct method for the Tribunal to evaluate that illegality would be by applying the doctrines of proportionality and contributory fault. Claimants discussed this matter in their prior written submission,[400] but Respondent failed to offer any competing analysis or even address the issue.

[397] Resp.'s Reply ¶ 81.

[398] *See supra* § II.A.1.b.

[399] Cls' Counter-Mem. ¶¶ 306-12.

[400] Cls' Counter-Mem. ¶¶ 306-12.

117. The principles still stand. As noted above, a growing body of case law—including *Yukos v. Russia*,[401] *Copper Mesa v. Ecuador*,[402] *Kim v. Uzbekistan*,[403] and *Alvarez v. Panama*[404]—supports the proposition that where illegality is committed by investors in the operation of the investment, a tribunal should not dismiss those investors' claims outright, but rather should resolve the matter by issuing a ruling proportionate to the wrong, taking into account the investors' contributory fault *when assessing the merits and quantum of those investors' claims*.[405] In fact, the tribunal may just address the matter as one of damages alone. The new award issued in *Perenco v. Ecuador*, for example, shows how one tribunal assessed alleged negligence and other wrongdoing by the investor (whether involving domestic law violations or not) ultimately as a matter of quantum.[406] Recent work from scholars and commentators reflects the same trend,[407] as do domestic court decisions.[408]

---

[401] *Yukos* (CL-0135) ¶¶ 1362, 1614, 1635, 1637.

[402] *Copper Mesa Mining Corporation v. The Republic of Ecuador*, PCA No. 2012-2, Award, 15 Mar. 2016 (CL-0140), ¶¶ 5.65, 6.93-6.102.

[403] *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/03/5, Decision on Jurisdiction dated 27 Apr. 2016 (CL-0145), ¶¶ 377, 396, 413.

[404] *Álvarez y Marín Corporación S.A., Bartus Van Noordenne, Cornelis Willem Van Noordenne, Estudios Tributarios Ap S.A., Stichting Administratiekantoor Anbadi v. Panama*, ICSID Case No. ARB/15/14, Award, 12 Oct. 2018 (CL-0146), ¶ 151.

[405] Cls' Counter-Mem. ¶¶ 306-12.

[406] *See Perenco v. Ecuador*, ICSID Case No. ARB/08/6, Award, 27 Sept. 2019 (CL-0263), ¶¶ 344, 347, 363 (assessing the manner in which the investor may have contributed to the harm it ultimately suffered at the hands of the host State, including allegations that it refused to comply with host State law, as part of the tribunal's damages analysis).

[407] *See* David Attanasio & Ana Duran, *What To Do About Corruption Allegations? A Conference Report*, Kluwer Arbitration Blog (22 Apr. 2019) (CL-0265), at 3 (reflecting conference discussion about the following: "The corruption could be taken into account (if relevant) in determining the compensation due to the investor for the state action at issue in the investment arbitration. In this case, the compensation could be reduced based on the investor's contribution to its own loss through its participation in the corruption.").

[408] *See, e.g.*, *Patel v. Mirza* [2016] UKSC 42 (CL-0267), ¶ 107 (remarking that "[i]n considering whether it would be disproportionate to refuse relief to which the claimant would otherwise be entitled, as a matter of public policy, various factors may be relevant," including "the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability.").

118. In sum, in the unlikely event that the Tribunal were to agree with Respondent that Claimants committed any wrongdoing (which they did not), the Tribunal should take that issue into account in its merits and damages assessment of the claims before it.[409] Dismissal of Claimants' claims would have no basis in the law.

d. Respondent Should Be Estopped from Asserting its Illegality Objection

119. As set forth above,[410] Respondent's own law enforcement officials and judiciary have found the evidence insufficient to support criminal charges against Mr. Rivera and Omega Panama. In particular, Panamanian courts provisionally dismissed the corruption investigation in November 2018, at the request of the Corruption Prosecutor, based on insufficient evidence, and a second instance court has nullified the money laundering investigation. Further, the statute of limitations for the crime of corruption has lapsed, meaning that for all intents and purposes the dismissal of the corruption investigation and nullity of the money laundering investigation are final. And the State's inability to reinitiate corruption charges necessarily extinguishes its right to do the same for money laundering charges, because the latter depends on the former as a predicate offense. In other words, even though Panama has had since 2013 (when it alleges Mr. Rivera committed illegal acts) to marshal its evidence and move forward with criminal charges, it has continuously failed to do so, and it now lacks even the legal right to do so. Given its domestic track record, Respondent should be estopped from raising its illegality jurisdictional defense in this arbitration.

[409] In particular, given the fact that the La Chorrera Contract is but one of Claimants' eight Contracts, which themselves constitute but one part of Claimants' Unitary Investment in Panama (including Omega Panama and Omega U.S.' goodwill, track-record, and financial and bonding capacity transferred to Claimants' operations in Panama in order to bid for and carry out construction projects), should the Tribunal find that the Claimants obtained the La Chorrera Contract through unlawful conduct (which is denied), all remaining claims related to Claimants' Unitary Investment and attendant damages would persist.

[410] *See supra* Section II.A.1.e.

120. The principle of estoppel is well established under international law,[411] and should apply in this instance. As Bin Cheng explains, estoppel "is a principle of good faith that 'a man shall not be allowed to blow hot and cold—to affirm at one time and deny at another."[412] Put another way, "[i]f state organs tolerate a certain conduct over a certain time, this can be regarded as waiver."[413] This principle should come as no surprise to Respondent.[414]

121. Claimants' request finds ample support in investor-State case law as well. For example, in *Wena Hotels v. Egypt*, the tribunal estopped Egypt from raising corruption as an affirmative defense.[415] The tribunal went so far as to recognize that the allegations of corruption, if true, were "disturbing and ground for dismissal" of the claim, yet it declined to dismiss the claims, in part because Egypt had failed to pursue the criminal charges domestically.[416] Similarly, the tribunal in *Swembalt AB v. Latvia* rejected the host State's objections to jurisdiction because Latvia had not shown any concern or taken action in response to the alleged illegality.[417] Other tribunals, including *Karkey v. Pakistan*,[418] have taken similar approaches.[419]

---

[411] *Case Concerning the Temple of Vihear*, 1962 I.C.J. REP. 6, 39 (15 June 1962) (separate opinion of Vice President Alfaro) (CL-0262); *see also* CHARLES T. KOTUBY & LUKE A. SOBOTA, GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS (CL-0081 resubmitted) at 122-24.

[412] BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 140-41 (1987) (CL-0170 resubmitted).

[413] Ursula Kriegbaum, *Illegal Investments*, *in* CHRISTIAN KLAUSEGGER, PETER KLEIN, ET AL., AUSTRIAN ARBITRATION YEARBOOK 307-35 (2010) (CL-0264).

[414] Claimants devoted a section of their Counter-Memorial submission to this subject, Cls' Counter-Mem. ¶¶ 313-18, but Respondent failed to address it in its Reply—even though Respondent did invoke the estoppel doctrine in articulating other, unrelated arguments. *See* Resp.'s Reply ¶¶ 161, 168 (asserting that Claimants should be bound to certain contracts even though they did not sign them on the basis of equitable principles of estoppel).

[415] *Wena Hotels v. Egypt*, ICSID Case No. ARB/98/4, Award, 8 Dec. 2000 (CL-0010).

[416] *Wena Hotels* (CL-0010) ¶ 111.

[417] *Swembalt AB v. Latvia*, Decision by the Court of Arbitration, 23 Oct. 2000 (CL-0260), ¶¶ 29, 34 ("Finally, it is surprising that the authorities waited for more than four months before taking any measures in that regard, if really the whole enterprise was illegal.").

[418] *Karkey Karadeniz Elektrik Uretim v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 Aug. 2017 (CL-0259), ¶ 628 ("In view of the foregoing, the Tribunal finds that Pakistan has consistently maintained that Karkey's investment was established in accordance with Pakistani laws, and it is now estopped from arguing that the investment must be deemed invalid on the basis of a breach of those laws.").

It is only logical that "'principles of fairness' should prevent the Government from raising 'violations of its own law as a jurisdictional defense when . . . [it] knowingly overlooked them and [effectively] endorsed an investment which [allegedly] was not in compliance with its law.'"[420] The same should be true when Respondent has tried and failed for more than five years to bring domestic criminal charges grounded in the political vendetta of its then-President.

122. For these reasons, the Tribunal should estop Respondent from continuing to rely on its corruption / illegality defense.

B. The Claims Levied Against Respondent Concern Quintessential Sovereign Acts and Not Mere "Commercial Claims"

123. Since the start of this arbitration Respondent has mischaracterized the levied claims as non-sovereign and commercial in nature.[421] Claimants have said before and repeat once again: this is incorrect. While various contracts form, in part, the basis of Claimants' investment in Panama, Respondent's wrongful acts span well beyond the four corners of those contracts, constitute distinctively sovereign activities and omissions, and establish breaches of international law.[422] Put simply, Respondent used all the levers of the State—its agencies, ministries, elected officials, appointed officials, prosecutors, courts, contractors—to

---

[419] *E.g.*, *Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007 (CL-0266), ¶¶ 183, 191-92 ("Georgia never protested nor claimed that these agreements were illegal under Georgian law."); *Getma Int'l v. Republic of Guinea*, ICSID Case No. ARB/11/29, Award, 16 Aug. 2016 (CL-0256), ¶¶ 221, 226 ("The Respondent gave priority to the grounds of defense which corruption constitutes, rather than to the prosecution of the corrupted parties. . . . Not only did the Respondent have the necessary powers for gathering evidence of the alleged corruption, it also had the obligation to do so because it is responsible for the proof of the corruption it is invoking. . . . [T]he Arbitral Tribunal sees no possible conclusion to draw from this omission other than that the State itself did not believe that the proof existed.").

[420] *RDC v. Guatemala*, ICSID Case No. ARB/07/23, Second Jurisdictional Decision, 18 May 2010, (CL-0261), ¶ 146.

[421] Cls' Counter-Mem. ¶ 319; *see also* Resp.'s Objections § III.B ; Resp.'s Reply § II.B.

[422] *See* Cls' Counter-Mem. ¶ 321.

systematically destroy Claimants' investment.[423] And it did so upon receiving direction from the highest levels of the Panamanian Government—the Presidency itself. By any measure, this is not a simple breach-of-contract claim. As Respondent *admitted* in its Memorial, the "harassing and retaliatory acts taken by President Varela and his administration" are the "foundational element of [Claimants'] entire case."[424]

124. In its Reply, Respondent ignores all of this and merely doubles-down on the theory that breaches of contract within an investment dispute fall outside the Tribunal's jurisdiction. It (again) mischaracterizes Claimants' claims as principally limited to: (a) unpaid invoices; (b) refusals to amend or extend contracts; and (c) the allegedly improper termination or abandonment of contracts. Having reached this baseless conclusion, Respondent then advances the trite assertion that "[t]here is nothing inherently sovereign in the failure to timely pay invoices, deny requests for contract extensions or amendments, or terminate contracts,"[425] before embarking upon a Contract-by-Contract analysis purporting to detail the "commercial nature of the problems" experienced by Claimants.[426]

---

[423] Cls' Counter-Mem. ¶ 321. As bears repeating, this included: the Government failing to issue municipal permits and licenses, terminating Contracts by sovereign (administrative) resolution, and abusing its law enforcement apparatus. Through the Comptroller General's Office and each of the Agencies, the Government systematically stopped approvals for payments for work already completed and change orders for extensions of time in all Contracts. Claimants were subjected to criminal investigations, detention orders, and Interpol notices; their freedom to travel was restricted, their documents were seized and bank accounts were frozen, and their employees were interrogated. A candidate for President expressly coerced Claimants through a campaign contribution request tied to a threat to destroy Claimants and their investment if the contribution was not made. Once he was elected into office, he took advantage of Panama's lack of checks and balances and his new Administration initiated a top-down campaign of harassment from the highest levels of Government. Respondent terminated Claimants' largest Contract, and then a second Contract, by way of a sovereign administrative resolution, which precluded the Omega Consortium from bidding on any future projects. Political actors of all levels from mayors to agency officials, including the Comptroller General's Office, targeted Claimants. Even allegedly independent actors such as Mr. Saltarín carried out the Administration's orders, creating a "parallel Attorney General's Office" to go after Claimants' investment and relying upon support from the Government's intelligence arm to do so. Cls' Counter-Mem. ¶ 322.

[424] Resp.'s Objections ¶ 246.

[425] Resp.'s Reply ¶ 84.

[426] Resp.'s Reply ¶ 85.

125. This overall defense is wrong as a matter of fact and as a matter of law.

126. As a factual matter, the record shows that Respondent leveraged its distinct nature as a sovereign State to dismantle Claimants' investment in a way that a private party could not do, and that process began—unmistakably so—with the transition from the previous Administration to the Varela Administration.[427] Prior to Mr. Varela's Presidency, the Omega Consortium was becoming a successful player in Panama's public works market, developing a proven track record that set up Claimants for continued success in Panama.[428] Indeed, the Omega Consortium's experienced team, partnerships with knowledgeable subcontractors, financial standing, and understanding of the bidding process all made it a serious contender in Panama's construction market with significant advantages over its competitors.[429] And while the Omega Consortium faced regular course-of-business delays and other challenges that are typical of construction projects of this scale, during the previous Administration, different governmental agencies always displayed a willingness to work with the Omega Consortium to resolve those issues and move forward with the Projects.[430]

127. This all changed almost immediately after former-President Varela won the elections in mid-2014 due to Mr. Varela's decision to use many of the sovereign instruments at his disposal against Claimants. Mr. Lopez, who oversaw all of the Projects in Panama on behalf of the Omega Consortium, explains that he began to notice a marked shift in the nature and

[427] For the avoidance of doubt, the Administration of former President Ricardo Martinelli (2009-2014) is referred to herein as the "previous Administration."

[428] *See* Cls' Counter-Mem. § III.A; *see also* Rivera 3 (referring to the Omega brand name's 30-year track record).

[429] *See* Cls' Counter-Mem. ¶ 41.

[430] *See* Cls' Counter-Mem. at § III.B; First Witness Statement of Mr. Frankie Lopez dated 27 May 2019 ("**Lopez 1**"), § IV; Lopez 2 ¶¶ 6-7, 9.

intensity of the issues the Projects began facing from their State counterparts.[431] It became clear to Mr. Lopez that the Government Agencies' attitude toward the Omega Consortium deteriorated sharply and unexpectedly when the Varela appointees took their positions as head or high-ranking officials of the Agencies (*see infra* Section II.B.1). The attitude at the Comptroller General's Office also changed and endorsement of payments and change orders in virtually all the Contracts abruptly stopped (*see infra* Section II.B.2). The Government focused its attack on, and unreasonably terminated by administrative resolution (a uniquely sovereign act), the Omega Consortium's largest Project in Panama—the Ciudad de las Artes Project—which constituted almost 25% of the value of Claimants' portfolio of Contracts in Panama (*see infra* Section II.B.3). After that, the Government caused the remaining Contracts to lapse while demanding that the Omega Consortium continue working on the Projects, knowing that the Omega Consortium could not bill for work performed under lapsed contracts (*see infra* Section II.B.4). Notwithstanding Claimants' continuing commitment to their investment (*see infra* Section II.B.5), the Government, through the Attorney General's Office, opened baseless criminal investigations against Mr. Rivera and his companies, which remain open and unresolved after almost five years (*see infra* Section II.B.6). As has now become clear through contemporaneous evidence and WhatsApp messages (*see infra* Sections II.B.7, II.B.8), this was all part of a coordinated campaign of governmental harassment orchestrated by then-President Varela and his Administration against Claimants.

128. As a legal matter, Respondent's Reply advances very little new ground and fails as well (*see infra* Section II.B.9). The claims at stake target international law breaches committed by a sovereign entity and thus fall squarely within the jurisdiction of the Tribunal as

[431] Lopez 2 § II.A; *see also* Rivera 3 ¶ 37.

established under the BIT and the TPA. International investment case law supports the Claimants in this regard, and none of the cases cited by Respondent suggest otherwise.

1. The Government Agencies' Attitude Toward the Omega Consortium Deteriorated Unexpectedly When the Varela Appointees Took Office

129. Respondent's jurisdictional argument that the claims before this Tribunal are "commercial" largely rests on a faulty factual premise. In particular, Respondent insists that *nothing changed after President Varela's election*. Throughout its jurisdictional objection it repeats this notion [432] that "the work—and problems—remained the same between administrations,"[433] therefore, the reasoning goes, Claimants' complaints must be rooted in commercial misconduct rather than sovereign misconduct. Respondent's theory is fundamentally incorrect.

130. Prior to the change in Administration, the various Government Agencies with which the Omega Consortium interacted on a daily basis had a cooperative attitude toward the Consortium and its Projects. As discussed before, when issues arose with any of the Projects (as they normally do with any large construction project) the Ministries and Agencies, as the owners of the Projects, worked together with the Omega Consortium to resolve the issues.[434] However, as soon as President Varela took office and began to replace the head of each Government Agency with party loyalists, it became clear that the Government had changed its attitude toward the Omega Consortium. As Messrs. Rivera and Lopez have repeatedly testified,[435] after July 2014, Respondent's Ministries and Agencies began to renege on their contractual commitments, raising never-before mentioned "issues" with the Projects and demanding bogus changes to the

[432] Resp.'s Reply ¶¶ 85, 88, 118, 119, 121.

[433] Resp.'s Reply ¶ 88.

[434] Lopez 2 ¶ 7.

[435] Lopez 1 §§ VI, VII; Lopez 2 § II.A; Rivera 1 § V; Rivera 2 § V; Rivera 3 § VI.

original contract terms. Contrary to Respondent's argument that Claimants labelled problems faced during the previous Administration as "commercial in nature" while designating such issues during the Varela Administration as "sovereign,"[436] this change in attitude was indicative of a pattern of behavior that soon permeated *all* of Claimants' Contracts. As demonstrated below, Respondent's claim that this is merely a series of "commercial" contract disputes—and thus outside the jurisdiction of this Tribunal—is belied when one considers the totality of Respondent's conduct and the evidence that it emanated from the head of State himself.

a. The INAC

131. The INAC's attitude towards the Omega Consortium and the Ciudad de las Artes Project made an about-face once Mr. Varela took office and Ms. Mariana Nuñez was appointed by the Varela Administration as its new Director, thus discrediting Respondent's assertions that Respondent rightfully terminated the project "based on commercial considerations" (*i.e.*, supposed "legitimate concerns" raised by Sosa Arquitectos ("Sosa") (INAC's external inspector for the Project)).[437] As previously discussed, during the previous Administration, the INAC Project was progressing well, and neither the INAC nor Sosa had any complaints regarding the work performed by the Omega Consortium in the Ciudad de las Artes Project.[438] This has been

[436] Resp.'s Reply ¶ 236.

[437] Resp.'s Reply ¶¶ 93-94.

[438] *See* Witness Statement of Ms. Maria Eugenia Herrera dated 13 May 2019 ("**Herrera**"), ¶ 12 ("Until I left my position as Director, in the summer of 2014, there were no major problems with the Omega Consortium's performance of the work"); Lopez 2 ¶ 33 ("[B]efore the change of administration, neither Ms. Herrera nor the team at Sosa Arquitectos . . . had said that the Omega Consortium was not properly performing the project or that there was any kind of serious problem"); Letter SA-CDA-029-14 from Sosa to Omega dated 28 Mar. 2014 (C-0638) (Ms. Buendia indicating that the task had been completed and not mentioning any issues). *See generally* Witness Statement of Ms. Yadisel Buendia dated 18 Nov. 2019 ("**Buendia**") (who does not mention any issues with the project until August 2014, after the Varela Administration had taken power); Witness Statement of Carmen Chen dated 7 Jan. 2019 ("**Chen**") (who does not mention any complaints with the way the Omega Consortium was executing the contract during the previous Administration).

confirmed by INAC's Director at the time, Maria Eugenia Herrera.[439] But everything changed without explanation once Ms. Nuñez became President Varela's new director of the INAC.

132. The clearest evidence of the INAC's change in attitude comes from Respondent itself. Respondent *acknowledges* that the "INAC started withholding approval of Omega's payment applications [or CPPs]" as soon as Ms. Nuñez became the Director.[440] As Mr. Lopez himself explains, these payment applications were CPP Nos. 13 to 20, of which CPP Nos. 13 and 14 were for work completed before 1 July 2014.[441] Ms. Nuñez made this extraordinary decision despite the fact that one of the basic obligations of the INAC (as the owner of the Project) under the Ciudad de las Artes Contract, as well as under Panama's Law 22, was to pay the contractor for completed work.[442] Yet from July 2014 until Ms. Nuñez wrongly terminated the Contract through a (sovereign) Administrative Resolution in December 2014, the Omega Consortium did not receive *any payment* for its work (and has not received any payment to date).

133. Respondent attempts to justify Ms. Nuñez' hostile attitude towards the Omega Consortium by arguing that when Ms. Nuñez became the Director she began withholding the payment approvals pending an "internal review" of the Project, supported by the "coincidental" warnings Sosa began to make starting in August 2014,[443] followed in December 2014 by a "formal" audit requested by the INAC to the Comptroller General's Office.[444] These excuses are factually baseless. They also evidence a concerted governmental campaign to ultimately terminate the Ciudad de las Artes Contract, which was Claimants' largest, representing close to

[439] Herrera ¶ 12.

[440] Resp.'s Reply ¶ 312; Buendía ¶ 18.

[441] Lopez 2 ¶ 34.

[442] Troyano ¶¶ 129-133; Law No. 22 (C-0280 resubmitted 2), arts. 13.10, 14, 86.

[443] Resp.'s Reply ¶ 312.

[444] Resp.'s Reply ¶¶ 307-312.

25% of the value of its investment.[445] And importantly, none of the Government's actions are commercial in nature.

134. *First*, other than a cursory and unsupported reference in the testimony of Ms. Buendía (Sosa's Project Supervisor for the Ciudad de las Artes Project), Respondent has not provided *one* internal document evidencing this alleged internal review or the results of such review. But even assuming, *arguendo*, that the INAC in fact conducted an alleged internal review, the Omega Consortium was never notified of it.[446] It is curious that Sosa would have been aware of the alleged internal review, as Ms. Buendía asserts, and not the Omega Consortium.[447] This suggests that either there was no such internal review, or that Panama was intent on denying the Omega Consortium due process in the context of this review.

135. *Second*, Respondent attempts to excuse the INAC's decision to withhold approval of the CPPs by saying that the INAC informed the Omega Consortium that it was assessing the legality of the CPP payment mechanism.[448] And Ms. Buendía states that "among INAC's concerns stemming from that review was Omega's advance payment, which had been granted through an addendum to the INAC-Omega contract in a very large sum."[449] These arguments are meritless. To start, the advance payment in the Ciudad de las Artes Project was duly approved by the INAC and the Comptroller General's Office,[450] and was in line with the advance payments provided in all of the other Contracts.[451] Further, as Justice Troyano has explained,

[445] Lopez 2 § II.A.2.

[446] Lopez 2 ¶ 42.

[447] Lopez 2 ¶ 42.

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

[449] Buendia ¶ 19.

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

[451] The advance payment in the Ciudad de las Artes Contract was 20% of the value of the Contract. This is in line with: (1) the 20% advance payment in the MINSA Capsi Projects (Addendum No. 1 to Contract No. 077

under Law 22, "an advance payment contractually established in a public works contract *does not excuse* the public entity from making the subsequent partial payments also established contractually."[452] Therefore, whether or not an assessment was underway, or whether Ms. Nuñez thought that the advance payment was too large, the INAC was *obligated* to make subsequent partial progress payments. Any decision to the contrary was a clear act of state in its role as regulator, not an act of INAC in its role as a commercial contracting party.

136. Respondent's argument that the legal assessment was needed because the new Administration was unacquainted with the CPP payment mechanism is likewise without merit.[453] The CPP payment mechanism is essentially the same as the CNO payment mechanism used in the MINSA Capsi Contracts; it is a commonly used payment mechanism in Panama for public work contracts.[454] Since the INAC had not used that type of payment mechanism before the Ciudad de las Artes Contract, it instituted and created a regulation for the CPP payment mechanism as far back as November 2012.[455] At that time, the INAC engaged in a thorough analysis of the CPP payment mechanism, which resulted in the issuance of two different orders to proceed (one in September 2012,[456] and the second one in April 2013).[457] The eight months

(2011) dated 23 Sep. 2011 (C-0142); Addendum No. 1 to Contract No. 083 (2011) dated 23 Sep. 2011 (C-0143); Addendum No. 1 to Contract No. 085 (2011) dated 23 Sep. 2011 (C-0144)); (2) the 15% advance payment in the La Chorrera Project (Addendum No. 1 to Contract 150/2012 dated 14 Nov. 2013 (C-0305)); (3) the 20% advance payment in the Municipality of Panama Contract (Addendum No. 1 to Contract No. 857-2013 dated 2013 (C-0309)); (4) the 30% advance payment in the Municipality of Colon Project (Contract No. 01-13 dated 24 Jan. 2013 (C-0051 resubmitted); and (5) the 10% advance payment in the Mercado Publico de Colon Project (Addendum No. 1 to Contract No. 043-2012 dated 2014 (C-0277)). Thus, there was nothing unusually large about the advance payment in the Ciudad de las Artes Contract. Advance payments are a common method of payment in public works contracts with Panama. Rivera 2 ¶ 38.

[452] Troyano ¶ 133.

[453] Resp.'s Reply ¶ 385.

[454] Rivera 1 ¶ 53.

[455] Resolution No. 0 16-12 J.D. dated 22 Nov. 2012 (R-0035); *see also* Lopez 1 ¶ 54.

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

[457] Notice to Proceed for Contract No. 093-12 dated 22 Apr. 2013 (C-0150).

between the first and the second order to proceed were used by the INAC and the Omega Consortium to negotiate and formalize Change Order No. 1 to the Ciudad de las Artes Contract, which provided the Omega Consortium with an advance payment and re-set the date of commencement and completion of the Ciudad de las Artes Contract.[458] Yet Respondent would now have the Tribunal believe that two years after this *thorough* process, Ms. Nuñez was right to arbitrarily decide to (again) do a "legality assessment" of the CPP payment mechanism simply because the new Administration was unacquainted with it.[459] This sort of excuse strains credulity.[460]

137. *Third*, the timing of Sosa's warning letters is more than curious against the backdrop of that party's course of conduct. Soon after Mr. Varela took office and Mr. Saltarin began to "investigate" the Ciudad de las Artes Project in August 2014,[461] Sosa began to detect purportedly "serious problems" with the Project, which had gone unmentioned over the previous 16 months.[462] That no serious problems were found before the change in Administration is not surprising because, as the previous INAC Director Ms. Herrera confirmed, "the Omega Engineering Consortium was at all times in compliance with its contractual obligations" and "[she] was satisfied with their work."[463] Prior to the change in Administration, Sosa's letters merely commented on mundane aspects of the ongoing construction, which were always addressed by the Omega Consortium.[464] Indeed, as Ms. Buendia *acknowledges*, it was not until

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

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

[460] Resolution No. 0 16-12 J.D. dated 22 Nov. 2012 (R-0035); *see also* Lopez 2 ¶ 34.

[461] Activity Report from Saltarín, Arias y Asociados to Ministry of the Presidency dated 25 Jun. 2016 (C-0617), at 18-19.

[462] Letter from Sosa to INAC dated 4 Aug. 2014 (R-0042); Lopez 2 ¶ 35.

[463] Herrera ¶ 14; *see also* Lopez 2 ¶ 29.

[464] *See* Lopez 2 ¶ 33.

August 2014 that "Sosa began reporting on serious problems regarding Omega's performance."[465] It is no coincidence that a mere month after President Varela assumed office and Ms. Nuñez decided to stop payment on the Project, Sosa began sending correspondence to the INAC and the Omega Consortium raising alleged "serious" issues with the Project and opining on legal issues related to the termination of the Contract.[466] This was a marked departure from Sosa's practice in the preceding 16 months during the previous Administration,[467] and another clear demarcation of the sovereign-rather-than-commercial intent behind INAC's acts to frustrate the project.

138. A few additional points buttress this conclusion. That the letters from Sosa began to include legal issues and substantial legal analysis was particularly odd, as Sosa had been hired as a *technical* inspector (not legal counsel), and the Ciudad de las Artes Contract limited Sosa's role to "the execution of the work in accordance with the tender documents."[468] Further, Sosa's contract confined its role to "inspection and oversight services," nowhere mentioning a duty to provide legal analysis of the Contract.[469] While Respondent is correct that Sosa's contract required it to "[e]nsure that the Contractor's performance complies with the contractual requirements with INAC" and "[v]erify and document the Contractor's performance,"[470] and that as part of these obligations Sosa had a duty to alert INAC if the Omega Consortium was in

[465] Buendía ¶ 6.

[466] *See* Cls' Counter-Mem. ¶ 192; Letter from Sosa to Omega dated 2 Sep. 2014 (R-0044); Letter from Sosa to INAC dated 10 Dec. 2014 (R-0051).

[467] Lopez 1 ¶ 129; Lopez 2 ¶ 35. *See also* Expert Report of Mr. Orlando Pérez dated 17 May 2019 (**Pérez**"), ¶ 53 at 25 ("While the president himself might not have direct contact with project inspectors, it is very plausible that ministry and agency officials transmitted and acted upon Mr. Varela's direction to increase scrutiny of specific projects.").

[468] Contract No. 093-12 dated 6 July 2012 (C-0042 resubmitted), cl. 4.

[469] Contract No. 049-13 between INAC and Sosa dated 7 Feb. 2013 (R-0041), cl. 1, 3.

[470] Resp.'s Reply ¶ 322; Request for Proposals No. 2012-1-30-0-08-AV-003776 dated 2012 (R-0138) at pp. 46-47; Contract No. 049-13 between INAC and Sosa dated 7 Feb. 2013 (R-0041) at cl. 1, 3.

breach of the Ciudad de las Artes Contract,[471] ensuring compliance with contractual requirements is plainly not equivalent to legal analysis of a termination clause. And in any event, Sosa's conduct during the Varela Administration was markedly inconsistent with its approach to the same role under the previous Administration. Something had obviously changed, and as Claimants have established and reiterate here that was the assumption of power by President Varela and his team.

139. Respondent's and Ms. Buendía's justification for why Sosa began reporting serious problems with the Omega Consortium's performance in August 2014 is incorrect and nothing more than a *post hoc* rationalization. According to Ms. Buendía, the Omega Consortium's issues in the Ciudad de las Artes project were "largely due to a falling-out between Omega and its main construction subcontractor, Arco y Asociados S.A., which led to Omega dismissing Arco in late July 2014."[472] This is demonstrably false. The Omega Consortium *did not* dismiss Arco in July 2014.[473] To be clear, the issues the Omega Consortium had with the Ciudad de las Artes Project were caused by the lack of payment of CPPs Nos. 13-20[474] and the overall hostile attitude of the INAC's new Director, and not by an alleged "falling-out" with Arco. The truth is that in mid-2014, Arco informed the Omega Consortium that it wanted to stop working on the Project because it had some information that the Project was going to be targeted by the new Government.[475] In light of this, the Omega Consortium worked with Arco to ensure that the Project would maintain the necessary personnel. At that point, the Omega Consortium started increasing *its own* construction workers on the Project, at the same time that Arco

[471] Resp.'s Reply ¶ 322; Buendia ¶¶ 12-13.

[472] Resp.'s Reply ¶ 316.

[473] Buendia ¶ 7; Lopez 2 ¶ 36.

[474] Lopez 2 ¶ 37.

[475] Lopez 2 ¶ 36.

reduced its workers.[476] Thus, by November 2014, the Omega Consortium had 50 workers on the Project.[477] So Arco's decision to leave the Project was *not* a cause of its failure, and its reasons for doing so only serve as further evidence of the Varela Administration's campaign against Mr. Rivera and his companies.

140. In a failed effort to demonstrate that the Omega Consortium had serious performance problems on the Project, Ms. Buendía alleges that the Omega Consortium recognized Sosa's criticisms and agreed to implement a so-called "recovery plan" to get the Project on track.[478] This is also incorrect. In the construction industry, a "recovery plan" is a work plan that *does not assign fault for the delays in the project*, but only devises a work plan to complete the project within a certain amount of time.[479] So, when the Omega Consortium agreed to implement the so-called "recovery plan," it was not because it deemed the criticisms made by Sosa legitimate, but simply because it wanted to work with INAC to make sure the Project was completed as expected.[480] The INAC never responded to this recovery plan created by the Omega Consortium (a fact that Respondent and Ms. Buendia curiously fail to mention), and Respondent limits itself to arguing that the Omega Consortium "did not meet its commitments under [the] plan."[481] But the fact remains that the plan was *never approved* by the INAC and, accordingly, the Omega Consortium was never in a position to meet any such commitments, and all by the Government's own doing. Once again, it is clear that the INAC's actions, under the

[476] Lopez 2 ¶ 36.

[477] Biweekly spreadsheet of workers in the Ciudad de las Artes Project dated 1-15 Sep. 2014 (C-0796); Biweekly spreadsheet of workers in the Ciudad de las Artes Project dated 27 Oct. 2014 – 9 Nov. 2014 (C-0797).

[478] Buendía ¶ 8.

[479] Lopez 2 ¶ 40; López 1 ¶ 55, 129.

[480] Lopez 2 ¶ 40 (stating that the "recovery plan" consisted of two cost impact analysis).

[481] Resp.'s Reply ¶ 317.

direction of a Varela-appointed Director, were part of a sovereign prerogative to target a foreign investor, and not mere commercial acts.

b. The Municipality of Panama

141. The about-face that occurred in the Ciudad de las Artes Contract with Ms. Nuñez also happened in the Municipality of Panama contract when Mayor Blandon—who belongs to the same political Party as President Varela[482]—took office in July 2014. Respondent incorrectly disputes that the Municipality of Panama Project was progressing well during the previous Administration.[483] To the contrary, the Omega Consortium had made significant progress on both the Juan Diaz and Pacora Markets by May 2014.[484] As previously explained, Johnathan Rodriguez, the Municipality of Panama official in charge of the execution of the Project prior to the Varela Administration, indicated a desire to "go an extra mile" for the Omega Consortium because "they're giving it all they have for the boss to inaugurate the project."[485] This exchange refutes Respondent's baseless charges that "Omega's performance was deficient from the very beginning."[486] Rather, the evidence shows that the Municipality of Panama was pleased with the Omega Consortium's performance and had a positive and cooperative attitude towards the Omega Consortium prior to the Varela Administration.[487]

[482] Cls' Counter-Mem. ¶ 126; Lopez 2 ¶ 58.

[483] Resp.'s Reply ¶ 119.

[484] Emails between Omega and the City of Panamá dated 14 May 2014 (C-0552); Project Report DEYD-1220-79-14, undated (C-0695).

[485] Lopez 1 ¶ 64; Emails between Omega and the City of Panamá dated 14 May 2014 (C-0552); Cls' Counter-Mem. ¶ 60.

[486] Resp.'s Reply ¶ 119.

[487] Lopez 1 ¶ 64.

142. This all changed when the Administration changed.[488] And this change in the Municipality's attitude became evident once José Isabel Blandón became the Mayor of Panama. As Claimants previously stated, following Mr. Blandon's appointment, Mr. Lopez had two conversations with a Municipality official, in which he was told that the Municipality no longer had any intention of following through with its commitments under the Mercados Perifericos Contract.[489] Respondent's only counter is to argue that Mr. Lopez's statements are "unsubstantiated hearsay that does not even conform with the evidentiary record."[490] In support of its argument, Respondent relies heavily on the testimony of Mr. Diaz, who testifies that he was never asked to take any adverse measures against the Omega Consortium and is not aware of anyone at the Municipality being asked to do so.[491] Mr. Diaz's evidence is hardly sufficient to overcome the evidence given by Mr. Lopez, however: Mr. Diaz *acknowledges* that he only began working for the Municipality of Panama on 1 August 2016, well over *two years after* the events at issue in this arbitration began, and over a year after Respondent had already destroyed Claimants' investment.[492] In any event, Mr. Lopez has now further clarified that it was Mayor Blandon himself who told Mr. Lopez that he did not want to continue with the Omega Consortium Projects.[493] Mr. Lopez has also clarified that Guillermo Bermudez (General Secretary of Panama's Mayor's Office) told him personally that *he had instructions* to wait until the Moncada Luna investigation was resolved before approving any payments for the Project.[494]

---

[488] *See* Cls' Counter-Mem. ¶ 164.

[489] *See infra* Section II.B.1.f.

[490] Resp.'s Reply ¶ 224.

[491] Resp.'s Reply ¶ 224; First Witness Statement of Mr. Eric Diaz dated 7 Jan. 2019 ("**Diaz 1**"), ¶ 29; Second Witness Statement of Mr. Eric Diaz dated 18 Nov. 2019 ("**Diaz 2**"), ¶ 16.

[492] Diaz 1 ¶ 6.

[493] Lopez 2 ¶¶ 65, 84.

[494] Lopez 2 ¶¶ 65, 84.

And another Municipality employee told Mr. Lopez that President Varela himself had disparaged Mr. Rivera and Omega at a Municipality event.[495] Simply put, what Mr. Diaz may or may not have been told years later does not address the issue in dispute, and "instructions" given to a Mayor with respect to a municipal contract are a sovereign act that implicates international responsibility, and not a private disagreement about a commercial payment.

143. Respondent disputes Claimants' account of this change in the Municipality's attitude by arguing that the Omega Consortium's design work was defective from the outset.[496] Respondent, however, fails to cite to any contemporaneous documentation proving this sentiment. It merely cites to an April 2014 memorandum from Jonathan Rodriguez, arguing that it identifies serious defects like the unauthorized suspension of works, demobilization of personnel, and construction delays.[497] But none of the issues presented by Mr. Rodriguez specified any problems with *the designs*; his memorandum instead commented that the plans were still not approved *by the Municipality* (a failure that lies at Respondent's feet, not Claimants').[498] In any case, the following month, Mr. Rodriguez sent an email to Omega's Mr. Feliu and others involved with the Project, stating that he had "visited the work site," "saw the progress" on the Project, and commenting that "*we have to back up the company; they're giving it all they have for the boss to inaugurate the project. Let us all go an extra mile.*"[499] So whatever the issues may have been in April 2014, they had been successfully resolved the following month.

---

[495] Lopez 2 ¶ 84.

[496] Resp.'s Reply ¶¶ 119, 218.

[497] Memorandum No. 26-2014 from Jonathan Rodriguez to Juan Manuel Vazquez dated 16 Apr. 2014 (C-0561); Lopez 2 ¶ 58; Resp.'s Reply ¶ 220.

[498] Memorandum No. 26-2014 from Jonathan Rodriguez to Juan Manuel Vazquez dated 16 Apr. 2014 (C-0561) at 3.

[499] Emails between Omega and the City of Panamá dated 14 May 2014 (C-0552).

144. Respondent's other excuses for the failure of the Municipality of Panama Contract are similarly mistaken, and besides framing the issues as "commercial,"[500] none of them point to mere commercial disputes. *First*, Respondent maintains that *following* a review of all public works contracts signed by the Municipality during the previous Administration, Panama *subsequently* suspended the Juan Diaz Market on 2 September 2014, marking the first of the Municipality's actions against the Project.[501] This response is belied by the timing. The Municipality contemporaneously stated that the goal of the suspension was "to *perform* a complete analysis of the project for the compliance of terms and conditions stated in [the] contract,"[502] meaning that the alleged review mentioned by Respondent in its Counter-Memorial did not happen (assuming it happened at all) until *after* the Municipality notified Claimants of the suspension. In other words, this was more of the same pretextual campaign of governmental harassment.

145. *Second*, Respondent (incorrectly) argues that the designs were flawed because the Omega Consortium failed to include an easement or right of way to reach the site.[503] But this so-called flaw was never mentioned contemporaneously; had this been a true justification for the

[500] Resp.'s Reply ¶¶ 117, 124.

[501] Resp.'s Objections ¶¶ 141-142 ("In July 2014, the Mayor of Panama City instructed the Municipality to review all public works contracts signed by the Municipality during the prior administration to ensure that they were being properly executed. '[T]his is routine practice in State institutions throughout Panama during transition periods between administrations' and is intended to give the incoming administration insight into the state of public works projects. Based on this review, it was determined that the Juan Díaz Market was not commercially viable due to Omega's flawed design and its failure to provide solutions for access to the market once it had been completed. As such, on September 2, 2014, the Municipality wrote to Omega requesting that it suspend work on the Juan Díaz Market so that the Municipality could perform a further review of that project"). Note No. S.G.-087-A from the Office of the Mayor of Panama to the Omega Consortium dated 2 Sept. 2014 (C-0058 resubmitted); López 1 ¶ 136. The Omega Consortium complied with the Municipality of Panama's request and stopped work on 5 September 2014. Note No. MAP-5-09-14 from Omega to the Municipality of Panama dated 5 Sept. 2014 (C-0071 resubmitted); López 1 ¶ 136.

[502] Note No. S.G.-087-A from the Office of the Mayor of Panama to the Omega Consortium dated 2 September 2014 (C-0058 resubmitted) (emphasis added); Lopez 1 ¶ 136.

[503] Resp.'s Reply ¶ 216; *see also* Lopez 2 ¶ 60.

Municipality's action against the Contract, would it not have been mentioned in the letter ordering suspension of the works?[504] In any event, the Request for Proposals for the Project only provided that the contractor must provide complete designs and construction blueprints,[505] and Agreement No. 116 does *not* require a contractor to *obtain* an easement, only to *identify* the "[e]asement and construction line of the access route" and "the existence of easements within the site."[506] The Omega Consortium complied with these obligations and submitted all the blueprints, which were approved by the Municipality.[507] From there, it was the Municipality of Panama that had the right (as a governmental Agency) to negotiate an easement, not the Omega Consortium (as a private party).[508]

146. Respondent relies on a similar (non-"commercial") theory with respect to the Pacora Market, claiming that it was the Omega Consortium, not the Municipality, that was solely responsible for obtaining a missing Certificate of Soil Use.[509] It is this failure, Respondent (falsely) claims, that was the downfall of the Project. This Certificate of Soil Use was the most pressing issue the Omega Consortium faced with the Pacora Market because, without it, the Panamanian Environmental Protection Agency could not approve the plans for the Market and the Comptroller General's Office subsequently could not endorse payment applications.[510] But like the easement for the Juan Diaz Market, the Certificate of Soil Use was not something the Omega Consortium could obtain without the cooperation of the Municipality. While the Omega

[504] Lopez 1 ¶ 135; Lopez 2 ¶ 60.

[505] Request for Proposals No. 2013-5-76-0-08-AV-004644 dated Mar. 2013 (R-0099 resubmitted), at 32.

[506] *See* Agreement No. 116 of 1996 of the Municipal Council of Panama City dated 9 July 1996 (R-0119), arts. 4(3.06.01) & 4(3.15).

[507] Lopez 2 ¶ 61.

[508] Cls' Counter-Mem. ¶ 167; Lopez 1 ¶ 135.

[509] Resp.'s Reply ¶ 207; Lopez 2 ¶ 62.

[510] Lopez 1 ¶ 142.

Consortium was contractually responsible for ensuring that an *application* for the Certificate of Soil Use was properly *submitted*—an obligation with which it had complied in June 2014[511]—the Consortium was *not* responsible for ensuring that it *obtained* the Certificate as Respondent suggests. That was a responsibility of the Municipality. This fact is plainly established when one considers that it was *the Municipality of Panama* that actually obtained the Certificate of Soil Use for the Omega Consortium in the Juan Diaz Project.[512] To foist the failure to do the same on the Omega Consortium with respect to the Pacora Market is disingenuous at best.

147. Nonetheless, Respondent raises two points in support of its argument that the Omega Consortium was contractually obligated to *obtain* the Certificate itself. *First*, Respondent points to the language of the Request for Proposals ("**RFP**") for the proposition that all permits and licenses necessary for the execution of the works will be obtained and covered by the contractor.[513] While the text of the RFP is not disputed, the reason why the Omega Consortium could not obtain the certificate was not because the Consortium had not submitted an application or provided the necessary documentation as required by the RFP, but rather because there was a problem with the zoning of the construction site,[514] which was beyond what the RFP envisioned as the obligation of the contractor. *Second*, Respondent asserts that Claimants' argument that the Consortium only had to submit the application for the Certificate "makes no sense" because the Municipality had no authority over the Ministry of Housing.[515] This is illogical for several reasons, the most obvious being that the Omega Consortium certainly had

[511] Letter from the Municipality of Panama to the Ministry of Housing dated 19 Jan. 2014 (R-0100).

[512] Lopez 2 ¶ 62. To obtain the Soil Use Certificate for the Juan Diaz Market it was the Municipality that had direct contact with the Ministry of Housing. *See* Summary for approval of plans, various dates (C-0805).

[513] Resp.'s Reply ¶ 208.

[514] Lopez 2 ¶ 62.

[515] Resp.'s Reply ¶¶ 207, 210; Request for Proposals No. 2013-5-76-0-08-AV-004644 dated Mar. 2013 (R-0099 resubmitted) at 32, 38.

less authority over the Ministry of Housing than the Municipality did. Moreover, when the Ministry of Housing wanted to change the procedure for processing the Certificate, it was the *Municipality* that received the letter from the Ministry, replied to it, and recommended that the procedure not be modified—and all of this was done between the two governmental entities without even notifying Omega.[516] Once the Omega Consortium submitted the application to the Ministry, it was left in the dark as to what the Municipality and the Ministry had discussed or the information they had shared. Thus, following the Omega Consortium's submission of the application, the process of reviewing and granting the Certificate was, as a matter of fact, handled by *the Government—i.e.*, the Municipality and the Ministry—not the Omega Consortium. This, again, dispels the Respondent's notion that this case is purely "commercial" and has no jurisdiction under the Treaties as a result.

148. In addition, it is incorrect to state, as Respondent does, that the Municipality assisted the Omega Consortium in resolving the issues related to the Certificate[517] by going above and beyond the level of support contractually required.[518] *First*, Respondent states that the Municipality followed up with the Ministry of Housing on a weekly basis regarding the status of the Certificate.[519] Respondent makes this assertion without citing to *any document* evidencing these alleged follow-ups. Instead, Respondent relies on Mr. Diaz's testimony which, as mentioned above, is unreliable since Mr. Díaz *was not even working in the Municipality of Panama during that time* and, therefore, lacked any direct knowledge of these follow-ups. And since Mr. Diaz also fails to provide any documentation of the alleged follow-ups, it is unclear on

[516] Letter from the Ministry of Housing to the Municipality of Panama dated 28 July 2014 (R-0101); Letter from the Municipality of Panama to the Ministry of Housing dated 28 Aug. 2014 (R-0102).

[517] Cls' Counter-Mem. ¶ 169; Lopez 1 ¶ 143.

[518] Resp.'s Objections ¶ 145.

[519] Resp.'s Reply ¶ 212.

what evidence his testimony is based (if any). *Second*, Respondent states that the Municipality responded to the Ministry of Housing's letter dated 28 July 2014, which informed the Municipality that it needed to use a different internal procedure to process the request for the Certificate of Soil Use,[520] and that the Municipality's response a month later insisted that the certificate be processed using the original procedure.[521] As previously explained, this was merely part of the Municipality's duties and not additional cooperation or support. In any event, the Omega Consortium was not even notified of the Ministry's letter, so it could not have responded. *Third*, Respondent states that Mayor Blandon himself intervened in the Certificate discussions and that he helped convene a meeting in October 2014, which eventually led to the issuance of the Certificate in July 2015.[522] What Respondent ignores is that nine months went by between the alleged meeting and the issuance of the Certificate. In any event, what this shows is that it was the Municipality's responsibility to *obtain* the Certificate of Soil Use, not the Omega Consortium's.

149. Finally, while it is true that Mayor Blandon signed a Change Order to provide Omega a 239-day extension for the Mercados Perifericos Project in late 2014, 200 days of that extension were due to the time it was taking Respondent's own Ministry of Housing to process the Certificate of Soil Use for the Pacora Market.[523] In approving the extension of time, the Municipality of Panama implicitly recognized that it was not the Omega Consortium's fault that the Certificate of Soil use had not been issued, since as explained by Respondent, the test to grant an extension of time is "whether the contractor has demonstrated that delays to the critical

[520] Resp.'s Reply ¶ 212; Letter from the Ministry of Housing to the Municipality of Panama dated 28 July 2014 (R-0101).

[521] Letter from the Municipality of Panama to the Ministry of Housing dated 28 Aug. 2014 (R-0102); Resp.'s Reply ¶ 212.

[522] Resp.'s Reply ¶ 212.

[523] Resp.'s Reply ¶ 225.

path were caused by the owner or third parties for which *the contractor is not responsible*."[524] Thus, Respondent contemporaneously admitted that the delays in obtaining the Certificate of Soil Use were either the Municipality of Panama's or the Ministry of Housing's fault, *but not the Omega Consortium's*. Its contrary arguments to this Tribunal, made in the context of seeking to turn this Treaty dispute unto a commercial one, are disingenuous.

150. In sum, Respondent's arguments attempting to excuse the Municipality's change of attitude towards the Omega Consortium and the Project as mere commercial disagreements are unavailing. The better explanation is the one given by Mr. Lopez: that the Municipality simply did not want to continue with the Omega Consortium Projects,[525] and had indeed received instructions from the Varela Administration to stymie them.[526]

c. The MINSA

151. Respondent is also mistaken in alleging that the evidence shows no change in the Government's attitude toward the MINSA Capsi Projects between Administrations.[527] In fact, the evidence shows that the Government made an abrupt *volte face*, precisely as alleged by Claimants.

152. The MINSA was cooperative with the Omega Consortium during the previous Administration and generally responsive to its communications.[528] In particular, before the change in Administration, Mr. Lopez "had open and ongoing communications with MINSA through Nessim Barsallo, who was responsible for the MINSA CAPSIS with the Omega

[524] Resp.'s Reply ¶ 285 (emphasis added).

[525] Lopez 2 ¶ 84.

[526] Lopez 2 ¶ 84.

[527] Resp.'s Reply ¶ 85.

[528] Email from Frankie Lopez to Oscar Rivera dated 21 Apr. 2013 (C-0156); Lopez 2 ¶ 10; Lopez 1 ¶ 108.

Consortium as the Deputy Director of Special Projects Management."[529] This all changed when President Varela assumed office and appointed party loyalists such as Minister Terrientes, Gabriel Cedeño (Advisor Minister), and Temístocles Díaz (Advisor Minister) to MINSA, with Messrs. Díaz and Cedeño essentially displacing Mr. Barsallo[530] and becoming the persons in charge of the Projects.[531] After this change, MINSA's communication became much slower and ultimately non-existent.[532]

153. Respondent attempts to minimize this change in attitude by improperly reducing Claimants' allegation to something much more benign. It mischaracterizes Claimants' complaint as focused on MINSA's non-responsiveness to two letters,[533] notwithstanding that MINSA allegedly was in regular contact with the Omega Consortium during the period from October to December 2014 by email, phone, and in-person meetings, and finalized several change orders and Certificates of No Objection ("**CNO**").[534] This over-simplification misses the broader point. MINSA's change in attitude towards the Omega Consortium can be seen not only from the sharply diminished (almost non-existent) communication, but also from the *nature* of its silence (*viz*. in formalizing change orders and CNOs). In short, these were not just missed connections, but silence that struck at the heart of the Project's viability.

---

[529] Lopez 2 ¶ 11.

[530] Although Mr. Barsallo remained in the MINSA, and Mr. López maintained communication with him, it became apparent to Mr. López that Mr. Barsallo no longer had any decision making authority or influence in the MINSA. Lopez 2 ¶ 11.

[531] Lopez 2 ¶ 11.

[532] *See* Letter No. MINSA-KY-82 from Omega to MINSA dated 28 Oct. 2014 *(*C-0575); Letter No. MINSA-RS-62ET from Omega to MINSA dated 28 Nov. 2014 (C-0584); Note No. 007-DI-DIS-2015 from Ministry of Health to Omega dated 2 Jan. 2015 (R-0095); Letter MINSA-RS-63 dated 16 Jan. 2015 (R-0096).

[533] Resp.'s Reply ¶ 256; Second Witness Statement of Mr. Nessim Barsallo dated 18 Nov. 2019 ("**Barsallo 2**"), ¶ 28; Letter No. MINSA-KY-82 from Omega to MINSA dated 28 Oct. 2014 (C-0575); Letter No. MINSA-RS-62ET from Omega to MINSA dated 28 Nov. 2014 (C-0584).

[534] Barsallo 2 ¶¶ 28-29; Resp.'s Reply ¶ 256.

154. The disconnect started at the very top of MINSA. Once Mr. Varela took office, the people in MINSA who had decision-making power regarding the Omega Consortium's Projects became Messrs. Cedeño and Diaz.[535] As explained by Mr. Lopez, despite his continued efforts, he was never able to meet with Mr. Diaz. Mr. Lopez did have the chance to meet with Mr. Cedeño on a few occasions, but the meetings were inconsequential. Similarly, his meetings and communications with Mr. Barsallo became merely social in nature because, as previously explained, Mr. Barsallo lost his decision-making power with the change of Administration.[536]

155. Although Respondent maintains that MINSA finalized several change orders and CNOs during this period,[537] *none of them* assisted the Omega Consortium in moving forward with the Project. MINSA finalized (1) change orders related to medical equipment, which did not address or resolve any pressing issues related to the Project, and (2) change orders related to time extensions and costs. But as to the latter, MINSA (under the Varela Administration) did so in a way that only caused more problems. The processing of these change orders started in May 2014[538] and continued until around December 2014; *more importantly, none of them garnered the endorsement of the Comptroller General's Office*.[539]

156. MINSA and the Comptroller General's Office worked together to prevent the change orders from being endorsed. As will be fully explained below,[540] many of the "objections" that the Comptroller General's Office made to reject such endorsement were

[535] Lopez 2 ¶ 12.

[536] Lopez 2 ¶ 12; *see also* Lopez 1 ¶ 108.

[537] Addendum No. 4 to Contract No. 077 (2011) dated 17 Nov. 2015 (C-0249); Addendum No. 5 to Contract No. 085 (2011) dated 2015 (C-0257); Change Order No. 3 to Contract No. 083 (2011) dated 17 Nov. 2014 (C-0522).

[538] Addendum No. 3 to Contract No. 083 (2011) dated 26 Dec. 2014 (C-0107 resubmitted); Addendum No. 4 to Contract No. 077 (2011) dated 7 May 2014 (C-0106 resubmitted 2); Addendum No. 4 to Contract No. 085 (2011) dated 7 May 2014 (C-0171).

[539] Lopez 2 ¶ 19.

[540] *See infra* § II.B.2.

actually deficiencies *caused by MINSA*. Some of these included: (1) the lack of indication of the methodology used by MINSA to determine financing costs, (2) the lack of indication of the events that MINSA took into consideration to accept the different time extensions requested by the Omega Consortium, (3) the lack of signatures on various documents that the MINSA had to submit to the Comptroller General's Office, and (4) the lack of indication of the different budget lines that were going to be used for that particular change order.[541] Unbeknownst to the Omega Consortium (given that the communications between the Comptroller General's Office and MINSA are not made available to the contractor), MINSA had not only caused these deficiencies, but had also failed to ever correct them and, in doing so, had improperly aided the Comptroller General's Office in refusing to endorse the change orders. This sort of coordinated failure (between MINSA and the Comptroller General's Office) was not a simple commercial dispute, but the machinations of the State among-and-between its various sovereign entities. This signaled to the Omega Consortium, and to Mr. Lopez in particular, that Panama was not truly serious about allowing the Omega Consortium to make progress with the MINSA Capsi Projects or to receive payment for previously completed work.[542]

157. By the end of October 2014, the Omega Consortium had no choice other than to temporarily reduce its personnel, since it no longer had valid contracts (due to the lack of endorsement of the change orders) and had *eleven pending payment applications* amounting to [redacted].[543] Before the Varela Administration, reducing personnel while awaiting endorsement of change orders had never been a problem, as Mr. Barsallo acknowledges.[544] Yet,

[541] Lopez 2 ¶¶ 15-19.

[542] Lopez 2 ¶ 19.

[543] Cls' Counter-Mem. ¶ 153; Letter No. MINSA-54 from the Omega Consortium to the Ministry of Health dated 31 Oct. 2014 (C-0173); Lopez 1 ¶¶ 109, 144; Lopez 2 ¶ 32.

[544] First Witness Statement of Mr. Nessim Barsallo dated 7 Jan. 2019 ("**Barsallo 1**"), ¶ 27.

this time, when the Omega Consortium notified MINSA in October 2014 that it needed to temporarily reduce personnel while awaiting formalization and endorsement of the costs and time extension change orders, this was deemed by MINSA to constitute an abandonment of the projects.[545] This demonstrated not only a change of attitude, but also a change in practice, to the Omega Consortium's detriment.

158. From there, and contrary to Respondent's unfounded assertion,[546] the Omega Consortium did not abandon the Projects. In fact, evidence in the record shows that the Omega Consortium wanted to continue working on and finish the Projects almost a year after it had stopped receiving payments for the work it had performed.[547] That is why the Omega Consortium requested that Ana Graciela Medina attend a meeting with MINSA representatives in July 2015. [redacted][548] Respondent misconstrues Ms. Medina's recount of this meeting by stating that MINSA wanted to resolve the issues with the MINSA Capsi Puerto Caimito and Rio Sereno Projects but that "Claimants had to address certain commercial issues."[549] This

[545] Resp.'s Objections ¶ 77 & n.174.

[546] Resp.'s Reply § III.B.2.e.

[547] Letter No. MINSA-54 from the Omega Consortium to the Ministry of Health dated 31 Oct. 2014 (C-0173); Letter No. MINSA-56 from Omega to MINSA dated 20 Jan. 2015 (C-0583); Letter No. MINSA-KY-82 from Omega to MINSA dated 28 Oct. 2014 (C-0575); Letter No. MINSA-KY-83ET from the Omega Consortium to the Ministry of Health dated 28 Nov. 2014 (C-0175); Letter No. MINSA-PC-58ET from Omega to MINSA dated 28 Nov. 2014 (C-0635); Letter MINSA-55PC from Omega to the Ministry of Health dated 18 Dec. 2014 (R-0092); Letter No. MINSA-RS-62ET from Omega to MINSA dated 28 Nov. 2014 (C-0584); Letter from the Omega Consortium to Ministry of Health dated 18 Dec. 2014 (C-0371).

[548] Email from Ana Graciela Medina to Oscar Rivera and Frankie López dated 30 July 2015 (C-0701 resubmitted).

[549] Resp.'s Reply ¶ 88.

(mis)characterization of the meeting ignores the evidently non-commercial reasons for MINSA not wanting to complete the MINSA Capsi Kuna Yala Project.[550]

159. *First*, referring to the MINSA Capsi Kuna Yala Project, Minister Terrientes explained to Ms. Medina that [redacted] The reasons given by Minister Terrientes [redacted].[552] None of these four excuses are in any way commercial (they are political), or can in any way be laid at the feet of Claimants. Rather, they are all pretextual governmental issues—*viz*. the real-time assessment and shift of sovereign prerogatives which necessarily affected the desirability of the Project.

160. *Second*, [redacted].[553] [redacted].[554] As explained by Mr. Lopez, this [redacted] was absurd, because each of the Omega

[550] Resp.'s Reply ¶¶ 88-90.

[551] Email from Ana Graciela Medina to Oscar Rivera and Frankie Lopez dated 30 Jul. 2015 (C-0701 resubmitted).

[552] Email from Ana Graciela Medina to Oscar Rivera and Frankie López dated 30 July 2015 (C-0701 resubmitted).

[553] *See* Resp.'s Reply ¶ 88; Lopez 2 ¶ 30.

[554] Email from Ana Graciela Medina to Oscar Rivera and Frankie López dated 30 July 2015 (C-0701 resubmitted).

Consortium's MINSA Capsi Projects had different characteristics, including that they were located in different geographical locations, had different sizes, and needed different equipment.[555] All of this necessarily affected the individual project's cost structure, making any standardized cost per square meter impossible. [redacted] This makes no "commercial" sense at all. Rather, such conduct on the part of the State makes sense only if this mandated change was simply a pretext to terminate the Contracts by making them economically unfeasible for the Omega Consortium to complete.[556] Moreover, this demonstrated MINSA's change in attitude towards the Omega Consortium once Mr. Varela won the election.

d. The Municipality of Colón

161. The Government's attitude with respect to the Municipality of Colón project similarly made an about-face once Federico Policani became the new Mayor of Colón. The Mayor's unwillingness to work with the Omega Consortium again belies Respondent's assertion that the project was simply plagued by commercial disagreements.[557]

162. Following the change in Administration (and *only* following the change in Administration), the Municipality of Colón began to identify bogus "issues" with the warehouse that the Omega Consortium had retrofitted into temporary office facilities for the Municipality's employees while the Consortium built the new Municipal Palace. As Respondent acknowledges, the facilities were completed in April 2014 during the previous Administration.[558] The Omega

[555] Lopez 2 ¶ 30.

[556] Lopez 2 ¶ 30.

[557] Resp.'s Reply ¶¶ 109, 115, 116; Lopez 2 ¶ 67.

[558] Letter No. 2015 19 06 P08-013 from the Omega Consortium to the Mayor of the Municipality of Colón dated 19 Jun. 2015 (C-0180 resubmitted), at 1; Resp.'s Reply ¶ 407.

Consortium *never* received *any* complaints about the facilities until September 2015 (seventeen months later), when the Municipality informed the Omega Consortium for the first time that the facilities were deficient and unsafe.[559] That these complaints were mere pretext is not only demonstrated by the curious timing, but is also highlighted by the fact that the purportedly "unsafe and deficient" temporary facilities that the Omega Consortium constructed *are still in use today*.[560] Respondent's counterargument, *viz*. that the facilities are not being used to house the Municipality's employees, and instead are employed as a storage facility and workshop for the Municipality's maintenance personnel, hardly changes the narrative.[561]

163. In the end, the Municipality whipsawed the Omega Consortium until the Contract simply died. In July 2014, the Municipality began demanding changes to the original terms of the Contract, informing the Omega Consortium that it wanted to change the construction site for the Municipal Palace and asking the Omega Consortium to present an alternative proposal to build the Palace on a new site.[562] Despite the fact that the plans for the construction of the Municipal Palace on the original site had been ready since the beginning of 2014, the Consortium complied with this request and submitted a new proposal on 27 August 2014.[563] By early October 2014, the Omega Consortium had not received any response to its new proposal and consequently sent a letter to the Mayor asking him to confirm whether or not the

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

[560] Photographs of the Temporary Installations dated May 2019 (C-0621).

[561] Resp.'s Reply ¶ 420; Lopez 2 ¶ 72. Further, the Municipality criticized the design of the temporary facilities saying, among other things, that it lacked windows. Resp.'s Reply ¶ 109; Letter No. AL-55/15 from the Municipality of Colon to Omega dated 2 Sept. 2015 (C-0703). However, as explained by Mr. Lopez, it was the Municipality of Colon that provided the blueprints and design for the temporary facilities to the Omega Consortium, which Claimants subsequently followed. Lopez 2 ¶ 72. Those blueprints did not include any windows. The Omega Consortium merely complied with what the Municipality of Colon had asked it to do.

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

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

construction site would be changed, a fact Respondent neglects to mention.[564] Having received no response, the Omega Consortium then sent the Municipality a new proposal the following month, including preliminary designs and costs for the relocation of the Project.[565] It was not until March 2015 that the Municipality finally confirmed that the Project site was indeed going to be changed and that it was necessary to formalize a change order to the Contract, by which point the Contract had already expired.[566] By this time, the Omega Consortium needed a change order extending the validity of the Contract, otherwise it could not get paid for its work.

164. Respondent argues that it was the Municipal Council, and not the Municipality, that requested the change in site.[567] But the Omega Consortium's letter to the Mayor of the Municipality states clearly that the *Municipality* instructed the Omega Consortium "to present an alternative to build the Project on a different plot of land."[568] This is further confirmed by Respondent in its latest brief, where it notes that "On March 2, 2015, the *Municipality* sent a letter to Omega officially confirming its decision to change the site and its willingness to negotiate an addendum to the contract."[569] Additionally, each time Omega had to inquire about the relocation of the Project, it communicated with the Office of the Mayor, not the Municipal

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

[565] Lopez 1 ¶ 147. When the Municipality finally met with Claimants later that month, it informed them that there was a possibility that the construction site was not going to change after all. Letter No. 2015 19 06 P08-013 from the Omega Consortium to the Mayor of the Municipality of Colón dated 19 June 2015 (C-0180 resubmitted), #4.

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

[567] Resp.'s Reply ¶¶ 408-12.

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

[569] Resp.'s Reply ¶ 414 (emphasis added).

Council.[570] In any event, this distinction is ultimately irrelevant, as the actions of both entities are attributable to Respondent.

165. Throughout these disagreements that arose after President Varela took office, the Municipality was completely unresponsive to any communication from the Omega Consortium. The Omega Consortium did not receive answers regarding the lack of payments by the Municipality, the new proposal to construct the Municipal Palace on the new construction site, or the change order addressing key budgetary, technical and physical issues.[571] Although Respondent denies that the Municipality took this attitude after Mr. Varela took office, all it can muster is proof of two meetings and two letters in a ten-month period.[572] Constant cooperation is needed to successfully complete a public works project, and such dialogue had existed with the Municipality prior to the change of Administration.[573] The only credible explanation for the change in the Municipality's behavior is the change of Administration.

166. That all of these disputes and discrepancies were functions of a political vendetta and not a commercial disagreement is proven by the events that unfolded after the Omega Consortium's Contract lapsed. On 10 October 2017,[574] with the Omega Consortium out of the picture, the Contract was awarded to a new contractor who is building the Municipal Palace *on the original construction site* where the Omega Consortium was told not to build. The

[570] Letter from the Omega Consortium to the Mayor of the Municipality of Colón dated 2 Oct. 2014 (C-0178); Letter from the Omega Consortium to the Mayor of the Municipality of Colón dated 5 Feb. 2015 (C-0179); Email chain between Frankie Lopez and Federico Herrera dated 15 Nov. 2014 (C-0614); Letter from Omega to the Mayor of the Municipality of Colón dated 16 Dec. 2014 (C-0616).

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

[572] Resp.'s Reply ¶¶ 413-417.

[573] Cls' Counter-Mem. ¶ 59; Lopez 1 ¶ 62.

[574] Resolution of Adjudication No. 093-2014-IBI dated 10 Oct. 2017 (C-0926).

Government simply did not want the Omega Consortium to work on the Project, just as Mayor Policani had informed Mr. Lopez soon after the change of Administration.[575]

e. The Judiciary

167. The Judiciary's attitude towards the Omega Consortium likewise changed after the Varela Administration took over. Before the change in Administration, the La Chorrera Project was progressing well,[576] and the Omega Consortium was receiving payment for work completed and approved by the Judiciary.[577] Respondent claims that the Judiciary's attitude with the Omega Consortium was the same during the previous Administration and the Varela Administration,[578] and it paints a simple picture of "contractual negotiation deadlock" between two commercial parties at odds over an addendum.[579] The factual record shows otherwise.

168. The first indication of the Government's change of approach toward Claimants became evident with the endorsement of Change Order No. 2. This Change Order had been approved and signed by the Judiciary in May 2014, but it was not endorsed until December 2014.[580] Although seven months passed between the original signing and endorsement of the Change Order, Respondent inexplicably states that the "processing time for this Addendum No. 2 *was relatively fast*."[581] This is meaningless *ipse dixit* that ignores reality and context. The Government's making the Omega Consortium wait seven months for the endorsement of the Change Order because of bureaucracy meant that the Omega Consortium had to work without a

[575] López 2 ¶ 83; SCAFID Status of the Contract No. C5-045-17 undated (C-0619); Construction Poster of the Municipality of Colón dated May 2019 (C-0620); Photographs of the Temporary Installations dated May 2019 (C-0621); *see infra* Section II.B.7.

[576] Cls' Counter-Mem. ¶ 156.

[577] Cls' Counter-Mem. ¶ 156.

[578] Resp.'s Reply ¶ 295.

[579] Resp.'s Reply ¶¶ 103, 106.

[580] Lopez 2 ¶ 48.

[581] Resp.'s Reply ¶ 288 (emphasis added).

valid contract, and thus, could not get paid for the work performed and accepted by the Judiciary. In this circumstance, a seven-month delay is not only unacceptable, but also unreasonable.

169. Respondent further tries to justify the delay by stating that there is no "'standard time' in Panama for the processing and endorsement of a contract addendum"[582] and that "the processing time depends on the number of addenda pending at the Comptroller General's Office, the sufficiency of the paperwork, the length and complexity of the changes requested, and the commercial need for the addendum."[583] It is curious that Respondent makes this uncited allegation, and that Dr. Bernard, Respondent's witness from the Comptroller General's Office, does not even mention, let alone explain, whether any of these reasons were the cause of the instant delay. Was there a glut of change orders (addenda) pending? Were these changes particularly complex? We are left to guess, now as well as contemporaneously, as there was no explanation at the time of when (or whether) the process may be completed. Panamanian law requires that the Government act reasonably and in good faith,[584] and seven months of bureaucratic silence, combined with the concomitant delays in endorsing virtually ***all*** of the Omega Consortium change orders and payment applications for ***all*** of its Projects, falls well short of that standard.

---

[582] Resp.'s Reply ¶ 288.

[583] Resp.'s Reply ¶ 288.

[584] Troyano § V. In particular, Article 13 of Law 22 on Public Contracts provides on the "Obligations of the Contracting Agencies" that the Agency must "[p]roceed in a timely manner to ensure that the actions attributable to the public agencies do not cause an onerous burden for the contractor in complying with his obligations; said agencies shall correct, in the shortest possible time, any disruptions that may occur, and agree on the relevant mechanisms and procedures to quickly and efficiently prevent or solve any differences or disputes that may arise, in accordance with the contract and the Request for Proposal." Law No. 22 dated 27 June 2006 (C-0280 resubmitted 2), Art. 13(7). The Law further requires the Contracting Agency to "[m]ake the corresponding payments within the term provided for in the request for proposal and the respective contract. If such payments are made by the contracting entity after the agreed date, for reasons not attributable to the contractor, the contractor shall be entitled to the payment of the default interest, on the basis of the provisions of Article 1072-A of the Tax Code," including when "a contractor is unable to execute the work in the agreed term, due to non-compliance with the responsibilities of the entity stipulated in the respective contract." *See id.*, Art. 13(10). The Omega Consortium was unable to execute the work in the agreed term as a direct result of not one, but all of the Agencies' and Ministries' failures to comply with their responsibilities.

170. Likewise, and contrary to Respondent's argument,[585] the Judiciary was not "generous" and did not try to "accommodate" the Omega Consortium by granting requests for extensions of time.[586] As recognized by Respondent itself, the test for whether an extension of time should be granted is "whether the contractor has demonstrated that delays to the critical path were caused by *the owner or third parties for which the contractor is not responsible*."[587] Thus, if the Judiciary started negotiating a change order with the Omega Consortium, and granted more days than those requested by the Omega Consortium,[588] it was not because it was being gratuitous, gracious and generous, but because it was admittedly responsible for the delays caused to the La Chorrera Project (which, as mentioned in the previous paragraph, the Judiciary itself acknowledged).

171. To put a finer point on these events, two months after Change Order No. 2 had been endorsed, the Judiciary made clear that its attitude had completely changed and that it did not want to work with the Omega Consortium. On 11 March 2015, the Judiciary informed Claimants of its intention to unilaterally terminate the Contract.[589] Respondent argues it was forced to send the termination letter because the Omega Consortium had not made any progress on the project over the prior three months and the bonds were about to expire.[590] This excuse is both misleading and factually incorrect.

---

[585] Resp.'s Reply ¶ 285, arguing that "the Judicial Authority was willing to grant the Claimants additional time even when a rigorous review of the merits would have shown that the Claimants bore the risk of certain delay events included in their requests. " However, in the end, whether the Judiciary gave the Omega Consortium more days than those requested is irrelevant and inconsequential because, since Change Order No. 2 was endorsed seven months later, the Omega Consortium lost 165 additional days of the 260-day extension that was granted.

[586] Lopez 1 ¶ 97.

[587] Resp.'s Reply ¶ 285 (emphasis added).

[588] Resp.'s Reply ¶ 285.

[589] Letter N. P.C.S.J./604/2015 from the Judicial Authority to Omega dated 11 Mar. 2015 (R-0013); Cls' Counter-Mem. ¶ 159.

[590] Resp.'s Reply ¶¶ 104, 299.

172. *First*, Respondent ignores the fact that it was the *Judiciary* that prevented the Omega Consortium from moving on with the Contract, not any so-called "commercial" issues. On 18 March 2015, the Omega Consortium sent a letter to the Judiciary explaining the reasons for the issues affecting the execution of the Contract, including (1) that the delays were attributable to the Judiciary; and (2) that the Omega Consortium's intention was to complete the project upon issuance of pending plans, payments, and contract extensions.[591] In response to this letter, the Judiciary's Office of the Director of General Services (the office where Ms. Rios is the Administrative Secretary) sent a letter to the Judiciary's Director of Legal Counsel providing its analysis of the Contract and the issues.[592] This letter makes pellucid that the issues with the La Chorrera Project were caused by (1) the Judiciary's failure to provide the Omega Consortium with a copy of duly approved plans; (2) the Judiciary's failure to make the payments owed to Claimants; and, (3) the Judiciary's responsibility for the mistakes made in the process of approving plans. [593] Accordingly, the Judiciary's Director of General Services contemporaneously concluded that the termination resolution was wrongful and unfounded.[594] The Judiciary thus decided to temporarily suspend its decision to terminate the Contract, and the parties started negotiating Change Order No. 3.

[591] Cls' Counter-Mem. ¶ 159; Letter Responding to N. P.C.S.J./604/2015 from the Judicial Authority to Omega dated 18 Mar. 2015 (R-0015 resubmitted).

[592] Letter No. 366/DSG/2015 from General Services Dep't to Chief Legal Officer of the Judicial Authority dated 17 Apr. 2015 (R-0016).

[593] Letter No. 366/DSG/2015 from General Services Dep't to Chief Legal Officer of the Judicial Authority dated 17 Apr. 2015 (R-0016).

[594] Letter No. 366/DSG/2015 from General Services Dep't to Chief Legal Officer of the Judicial Authority dated 17 Apr. 2015 (R-0016). Although Ms. Ríos was copied on this letter, she ignores the findings and recommendations of her own office in her witness statement. *See generally* Rios 1; Rios 2. Claimants submit that this is telling.

173. What then transpired was no salve on the prior wrongs, as Respondent suggests,[595] but rather demonstrated the change in attitude toward the Omega Consortium. Change Order No. 3 only extended the Project's time; it did not address key budgetary, technical and physical issues that needed to be resolved in order to move forward with the Project.[596] The Omega Consortium was left with no choice but to reject Change Order No. 3 as insufficient,[597] and the Judiciary inevitably belied any genuine intention of moving forward with the Project or seriously addressing its various problems.[598] All that was generated in the process were additional and unforeseen costs to the Omega Consortium.[599] And, contrary to Ms. Rios' contention,[600] the Omega Consortium had been put in such a strained financial position as a result of Respondent's actions against ***all the Contracts simultaneously,*** such that it could no longer cover the costs for completing the Project unless it was paid for completed work.[601] Indeed, by March 2015, the Omega Consortium was owed close to [redacted] for completed work—which dramatically affected the Omega Consortium's *entire* operation in Panama[602]—

[595] Resp.'s Reply ¶ 300.

[596] Letter No. P007-062 from the Omega Consortium to the Judiciary dated 1 Apr. 2015 (C-0244); Letter from the Omega Consortium to the Judiciary dated 6 Apr. 2015 (C-0245); Letter No. P007-064 from the Omega Consortium to the Judiciary dated 10 Aug. 2015 (C-0246); Letter No. P007-066 from the Omega Consortium to the Judiciary dated 28 Sept. 2015 (C-0247); Email from Ana Graciela Medina, Attorney for Omega, to Elena Jaen of the Judicial Authority dated 27 Aug. 2015 (R-0080); Letter from Omega to Judicial Authority in response to Nota: 2015 10 29 - P007-067 Proposal of Addendum No. 3 dated 29 Oct. 2015 (R-0081); Letter No. P007-064 from Omega to the Judicial Authority dated 10 Aug. 2015 (R-0069).

[597] This was not, as Ms. Rios suggests, a "nonsensical" decision, but a perfectly reasonable one. Rios 2 ¶ 20.

[598] Letter No. 366/DSG/2015 from General Services Dep't to Chief Legal Officer of the Judicial Authority dated 17 Apr. 2015 (R-0016); Lopez 2 ¶ 51.

[599] Lopez 2 ¶ 50.

[600] Rios 2 ¶ 20 (stating that "by signing [Change Order No. 3] Omega would have been able to collect on the outstanding payments" because "there was nearly [redacted] left for the Project").

[601] Lopez 2 ¶ 53 (stating that the [redacted] dollar figure was not enough for the Omega Consortium, because we had already incurred significant costs to maintain the project's progress, and these costs already exceeded Ms. Ríos' [redacted] dollar figure.").

[602] Lopez 2 ¶ 53.

and had incurred additional costs related to the Government-caused delays. Ultimately, the negotiation of the Change Order was not terminated by the Omega Consortium. As explained by Mr. Lopez, by the end of 2015, the Judiciary's inaction on the real issues made it impossible for the Omega Consortium to sign the Change Order, and for the bonding company to renew the bonds.[603] While on 28 January 2016 the Judiciary's Chief Legal Officer was dispatched to the Omega Consortium's offices in an attempt to obtain the Omega Consortium's signature on Change Order No 3,[604] when she arrived the offices were (understandably and predictably) empty. The Judiciary then uploaded to the PanamaCompra website a Report from Ms. Jaen to Ms. Grimaldo (both employees of the Judiciary) stating that Ms. Jaen had visited the Omega Consortium's offices to deliver a letter related to Change Order No. 3, but that the offices were empty.[605] This notification, however, was inconsequential as the same issues with the Project still remained unaddressed by the Judiciary. Once again, Claimants were given the run-around by the coordinated efforts of the Panamanian Government until they simply could no longer operate. This was not mere commercial conduct by the State.

f. The Ministry of the Presidency

174. As might be expected considering the new incumbent, the attitude of the Ministry of the Presidency towards the Omega Consortium similarly changed dramatically once Mr. Varela assumed power. Respondent insists that problems plaguing the Colón Public Market Project (site moves, tenant problems, contract suspensions) were, once again, strictly

[603] Lopez 2 ¶¶ 53, 56.

[604] Report from Elena Jaen to Maria Elena Grimaldo of the Judicial Authority regarding N. 150/P.C.S.J/2016 of January 26, 2016 to Oscar Ivan Rivera, Legal Representative of the Omega Consortium dated 28 Jan. 2016 (R-0021).

[605] Resp.'s Objections ¶¶ 43-44; Report from Elena Jaen to Maria Elena Grimaldo of the Judicial Authority regarding N. 150/P.C.S.J/2016 of January 26, 2016 to Oscar Ivan Rivera, Legal Representative of the Omega Consortium dated 28 Jan. 2016 (R-0021).

"commercial."[606] In truth, it was a project supported by one governmental Administration but rejected by another.

175. During the previous Administration, the Ministry always displayed willingness to work with the Omega Consortium and move forward with the Mercado Publico de Colon Project.[607] Although the Ministry had to temporarily suspend the physical construction of the Project in 2012 because it was having problems clearing the site,[608] the Ministry nevertheless requested that the Omega Consortium continue to draft the relevant contractual documents and conduct the necessary pre-construction studies,[609] which Claimants did.[610] At that point, the Omega Consortium had no reason to think that the suspension was a measure aimed at harming them because it was temporary, only affected the physical work on the Project, and the parties continued to collaborate in good faith to move the Project forward. Indeed, during the first months of 2014, the Ministry of the Presidency and the Omega Consortium started discussing a change order to extend the time of the Contract and cover the additional costs caused by the delays resulting from the suspension.[611] By April 2014, the Ministry of the Presidency confirmed that it had received instructions to process the change order for an extension of time,[612] and by May 2014, the Omega Consortium had successfully negotiated and signed a change order for this Project. Thus, from the beginning of the Project until May 2014, the

[606] Resp.'s Reply ¶¶ 95-102.

[607] Cls' Counter-Mem. ¶ 56.

[608] Letter No. 691-SCF-2012 from the Ministry of the Presidency to the Omega Consortium dated 13 Dec. 2012 (C-0036 resubmitted).

[609] Letter No. 691-SCF-2012 from the Ministry of the Presidency to the Omega Consortium dated 13 Dec. 2012 (C-0036 resubmitted).

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

[611] Lopez 2 ¶ 76.

[612] Email chain between Jose Mandakaras, Maruquel Madrid and Frankie Lopez dated 13 May 2014 (C-0544).

Ministry and the Omega Consortium worked towards successfully completing the Project. As with the other Panamanian Agencies and Ministries, this cooperative attitude changed with the change of Administration.

176. Once Mr. Varela took office, the change order was stonewalled. Respondent's only response is that the change order was never signed.[613] This allegation is factually incorrect.

177. *First*, the email chain Claimants submitted to prove that the change order was signed does not show that "in May 2014 the Ministry of the Presidency and the Omega Consortium were still discussing how to compute the new completion date in order for the Omega Consortium to request an updated bond."[614] Viewed holistically, the email chain clearly shows that the parties had reached agreement.[615] In the email, Ms. Madrid (from the Ministry of the Presidency) sent the final data used to calculate the extension of time to the Omega Consortium, and the Consortium's representative, Mr. Mandarakas, replied agreeing to that data.[616]

178. *Second*, Respondent argues that "[a] condition of signing the addendum was that the Claimants renew the security bond for the project"[617] and because Claimants allegedly did not comply with that condition, the "negotiations stalled."[618] Not so. On 4 May 2014, the Omega Consortium renewed the security bond for this project as requested by Ms. Madrid,[619]

---

[613] Resp.'s Reply ¶¶ 396, 398.

[614] Resp.'s Reply ¶ 396.

[615] Email chain between Jose Mandakaras, Maruquel Madrid and Frankie Lopez dated 13 May 2014 (C-0544).

[616] Email chain between Jose Mandakaras, Maruquel Madrid and Frankie Lopez dated 13 May 2014 (C-0544).

[617] Resp.'s Reply ¶ 395.

[618] Resp.'s Reply ¶ 395.

[619] Email chain between Jose Mandakaras, Maruquel Madrid and Frankie Lopez dated 13 May 2014 (C-0544). Respondent continues to argue that the Omega Consortium could not execute the change order because the security bond had not been renewed. *See* Resp.'s Reply ¶ 402. As explained, this is incorrect. The Omega

and submitted it together with the rest of the documentation so that the change order could be endorsed by the Comptroller General's Office.[620] That is why Mr. Lopez then sent an email to Ms. Madrid on *2 July 2014* asking for the SCAFID number that would allow him to supervise the endorsing process at the Comptroller General's Office.[621] The SCAFID number is provided once the change order has been submitted for endorsement, which can only be done once the contractor and the owner of the project (here the Ministry of the Presidency) sign the change order. Had the change order not been signed (as Respondent incorrectly argues), Mr. Lopez would not have had a reason to request the SCAFID number. As Mr. Lopez explains, the Ministry *never* responded to this email—not to query the execution of the change order or for any other reason. Mr. Lopez later learned the reason why. It was not due to any formality like a missing signature (as Respondent would have us believe now), but because the new Administration of the Ministry of the Presidency never sent the change order to the Comptroller General's Office for endorsement.[622]

Consortium had duly renewed the bond with Assa. Endorsement Extension Validity Bond Compliance – Policy 86B63650-87B50311 dated 5 May 2014 (C-0545). Thus, Respondent's assertion that "[i]f the Omega Consortium was intending to execute an addendum and start work on the project, it would have gone ahead and renewed its bonds" (Resp.'s Reply ¶ 402), is false. But it is irrelevant as the bond was renewed. In its Reply, Claimants inadvertently cited to Note No. 12031-15-ING-UFOGOE from the Comptroller General's Office to ASSA dated 27 Jul. 2015 (C-0623) as corresponding to the Mercado Publico de Colon Project. *See* Cls' Counter-Mem. ¶¶ 93, 185. Claimants want to clarify that Note No. 12031-15-ING-UFOGOE from the Comptroller General's Office to ASSA dated 27 Jul. 2015 (C-0623) relates to the Municipality of Colon Project, and not to the Mercado de Colon. *See also* Lopez 2 n.209.

[620] Lopez 2 ¶ 76.

[621] Email Chain between Jose Mandarakas and Frankie Lopez (Omega) to Maruquel Madrid (MoP) dated 2 July 2014 (C-0694); Lopez 2 ¶ 76.

[622] Lopez 2 ¶ 76. Mr. Lopez concluded this because he wrote an email to Eng. Maruquel Madrid, from the Ministry of the Presidency, asking for the SCAFID number corresponding to the change order, which should have been assigned as soon as the change order had been submitted to the Comptroller General's Office. However, since he never received a response to that email, he checked the SCAFID system and found out that no number had been assigned to the change order. As such, he concluded that the Ministry of the Presidency never sent the change order to the Comptroller General's Office for endorsement in the first place.

179. Respondent's attempts to downplay the marked lack of communication from the Ministry of the Presidency once President Varela assumed power[623] are wholly unavailing. The Omega Consortium tried to contact the Secretary of Cold Chain at the Ministry of the Presidency as early as July 2014, but it was only at the end of 2014 that Mr. Andrés Camargo (the new Director of the Secretary of Cold Chain) agreed to meet with Claimants.[624] During that meeting, Mr. Lopez realized that no one in the Government was addressing the Omega Consortium's problems with the Project.[625] Respondent tries to excuse the unwillingness of the Ministry to work with the Omega Consortium by stating that it "take[s] time for new employees to become acquainted with the ongoing projects"[626] and that "[t]here [was] nothing abnormal or sinister" about it.[627] While this may be enough to excuse intermittent delays counting in the days (or maybe weeks), it cannot in good faith excuse the *volte face* of utter silence that the Omega Consortium faced—from all of Respondent's relevant Ministries and Agencies—in the latter half of 2014.[628] And the communication problems continued in 2015, as did the Project's problems. The Omega Consortium was still committed to resume work, so it met again with the Ministry of the Presidency in June 2015 (six months after the original meeting) to discuss the Project and the

[623] Resp.'s Reply ¶¶ 399-400.

[624] Lopez 1 ¶ 151.

[625] Lopez 1 ¶ 151.

[626] Resp.'s Reply ¶ 400.

[627] Resp.'s Reply ¶ 400.

[628] *See* Lopez 1 ¶ 151; Lopez 2 ¶ 77.

issues affecting it.[629] All the issues discussed were written down in an email and sent to Ministry personnel.[630] Regretfully, these issues were never addressed.

180. Again, as with the other Projects once held by the Omega Consortium, the epilogue is instructive as to the Respondent's true motives. As confirmed by Respondent, Odebrecht is now building a project in the same place where the Omega Consortium was contracted to build the Mercado Publico de Colon Project.[631] That Odebrecht is not building the exact same market, which Respondent attempts to use as a justification,[632] is pure semantics and does not negate the fact that the Omega Consortium was pushed out of the Project by the Varela Administration and it was given to a company with well-known connections to Mr. Varela.[633] This sort of complete evisceration of an investor's business in the host state is not a simple commercial breach, but is necessarily a political and sovereign one.

* * *

181. In sum, once Mr. Varela was elected and began replacing the head of each Government Ministry and Agency with party loyalists, these Ministries and Agencies drastically changed their attitude toward the Omega Consortium. The frequency and nature of the communication changed, the Panamanian Ministries and Agencies became uncooperative and

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

[630] Letter 2015 06 19 P004-62 from the Omega Consortium to the Ministry of the Presidency dated 19 Jun. 2015 (C-0064 resubmitted); *See also* Email Chain between Onelia Delis, Andres Camargo and Francisco Feliu dated 27 May 2015 (C-0622).

[631] Resp.'s Reply ¶ 403; *see also* Lopez 2 ¶ 79.

[632] Resp.'s Reply ¶ 403.

[633] Lopez 2 ¶ 79; Pérez ¶¶ 32, 45; *Varela Admits Receiving Funds from Odebrecht*, PANAMA TODAY dated 10 Nov. 2017 (C-0487); *Panama Raids Mossack Fonseca over Odebrecht Bribery Scandal*, REUTERS dated 9 Feb. 2017 (C-0488); *Panama's President Accused of Accepting Odebrecht Money*, TELESUR dated 10 Feb. 2017 (C-0489); *see also supra* § II.B.8.c (discussing Mr. Varela's interference with the Attorney General during plea negotiations with Odebrecht to benefit the company and in response to blackmail by an Odebrecht representative).

unwilling to work with the Omega Consortium to resolve issues, and, indeed, tried to hinder the Omega Consortium's progress. That some (or even many) of the actions in complete isolation could be taken as commercial, does not in any way make the combination of these actions against the Omega Consortium a commercial dispute. Rather, this change in attitude was indicative of a pattern of behavior that permeated *all* of Claimants' Contracts at the same time. As Mr. Lopez explains, when looking at all the Contracts together, the concerted nature of the change in the Ministries' and Agencies' attitude left no doubt that the Omega Consortium had become the target of a multi-faceted attack by the Government.

2. Upon President Varela Being Elected, and Threatening the Incumbent Comptroller General, the Comptroller General's Office Abruptly Stopped Endorsement of Payments and Change Orders on Virtually All the Contracts

182. As the above discussion shows, while the various ministries and agencies of the Government may have been the actors in the sovereign campaign to destroy Claimants' investment, the Comptroller General's Office was the actual cudgel on behalf of the State. Respondent appears to concede the pivotal role that the Comptroller General's office plays within the Panamanian Government[634] but depicts it as a passive participant to an otherwise "commercial" dispute between business parties.[635] Respondent cannot gloss over the critical role that the Comptroller General's Office played as an instrument of the Panamanian Government that helped dismantle Claimants' investment.

183. As discussed at length in Claimants' prior pleadings, the Comptroller General's Office is supposed to be independent of the Executive, but this was not the case during the

[634] *E.g.*, Resp.'s Reply ¶ 122 ("The Comptroller General is the final check to ensure that contractors have met their commercial and legal obligations before they are paid.").

[635] *E.g.*, Resp.'s Reply ¶ 124 ("The Municipality and Omega clearly acted as commercial actors in negotiating this addendum, which the Comptroller General ultimately did not have a chance to endorse . . . .").

Varela Administration.[636] On 6 May 2014, just two days after winning the election, then-President Varela publicly called for the resignation of the then-Comptroller General Ms. Gioconda Torres de Bianchini and the immediate appointment of Mr. Humbert Arias, a party loyalist, in her place.[637] Never mind that this was done in clear violation of Panamanian law.[638] Even when Ms. Bianchini seemed to ignore the call and stayed in office until the end of her term (31 December 2014), it was clear that President Varela had already started to strong-arm her through threats of investigations, a strategy that would become evident through the actions (and inactions) of the Comptroller General's Office towards Claimants' Contracts.[639]

184. Respondent disputes this characterization, providing spurious justifications for the slowdown in the Comptroller General's Office during the Varela Administration, but these excuses are belied by the record (*see infra* Section II.B.2.a). The Comptroller General's Office engaged in a concerted campaign with Respondent's Ministries and Agencies to stonewall the Omega Consortium's payment applications (*see infra* Section II.B.2.b) and change order requests (*see infra* Section II.B.2.c). These actions by the Government to influence the Comptroller General's Office are not commercial in nature, but rather are the type of actions that only the Government (at the highest levels) could have achieved.

[636] Cls' Counter-Mem. ¶¶ 96-97; *see also* Rivera 3 ¶ 32; Lopez 2 ¶¶ 6, 13.

[637] Cls' Counter-Mem. ¶¶ 97, 109; *Juan C. Varela Will Request the Resignation of Four Officials*, LA PRENSA dated 6 May 2014 (C-0573); *Varela Calls for Resignation of Senior Officials*, LA PRENSA dated 7 May 2014 (C-0574); *Federico Humbert Arias, Juan Carlos Varela's Chosen One*, LA ESTRELLA DE PANAMA dated 31 Aug. 2014 (C-0509).

[638] *See infra* ¶¶ 287, 296.

[639] Cls' Counter-Mem. ¶ 97.

a. Respondent Provides Spurious Justifications for the Slowdown with the Comptroller General's Office During the Varela Administration

185. Even Respondent acknowledges that there were "slowdowns in the Comptroller General's review and approval of [change orders] and payments in the third and fourth quarters of 2014 and the start of 2015."[640] Respondent tries to excuse these excessive (and oftentimes indefinite) delays by referring to an undisclosed audit occasioned by the transition between Administrations, the illness of Ms. Bianchini, and budgetary issues that pushed the funds expected by the Ministry in 2014 to 2015.[641] These justifications are belied by the record. As discussed in Claimants' Reply, the delays with respect to the Omega Consortium's payment applications and change orders were simply inexcusable, particularly when juxtaposed against the facts that: (i) Ms. Bianchini was endorsing change orders and payment applications for other contractors despite her illness; (ii) an audit never took place (or at least Respondent has never provided any evidence of it); and (iii) any purported budgetary issues are just unsupported *ipse dixit*.[642] Even if Respondent's excuses are true (which they are not), they are *all* related to governmental action or inaction that led to the destruction of Claimants' investment, and should thus be viewed as an admission of Respondent's liability. At bottom, these were not garden-variety commercial issues.

186. *First*, Respondent's allegations of an audit are mere farce.[643] Dr. Bernard, Respondent's witness on behalf of the Comptroller General's Office, *never* mentions any "audit," nor does he attempt to excuse the Comptroller General's delays based on it.[644] Respondent has

[640] Resp.'s Objections ¶ 70.

[641] Resp.'s Objections ¶ 70; Cls' Counter-Mem. ¶¶ 99, 108, 111.

[642] Cls' Counter-Mem. §§ V.A.1, V.A.2, V.A.3.

[643] *See* Cls' Counter-Mem. § V.A.1.

[644] *See* Cls' Counter-Mem. § V.A.1; *see also* Bernard.

also failed to produce *any* documentation demonstrating that this "audit" took place, despite being ordered to do so by this Tribunal.[645] Further, as discussed by Claimants in their Reply, there is no legal mandate that the Comptroller General's Office *must* conduct an audit when there is a change in Presidential Administration, and if the Comptroller General decides to conduct such an audit at its discretion, Panama's Public Contracting Law requires the Government to act reasonably and in good faith, something which patently did not happen here.[646] The better explanation of the delays is the contemporaneous evidence on record: as confirmed by Mr. Barsallo in a text message exchange with Mr. Lopez on 3 March 2016,[647] [redacted][648] the Comptroller General's Office had direct orders from the Presidency to stonewall Claimants' progress on the Omega Consortium Projects.

187. *Second*, Ms. Bianchini's illness does not explain or excuse the conduct of the Comptroller General's Office.[649] During this period, Ms. Bianchini was still signing documentation and endorsing change orders and payment applications for President Varela's

[645] The ICSID Arbitration Rules provide that this "Tribunal may . . . call upon the parties to produce documents, witnesses and experts." ICSID Arbitration Rules (CL-0005 resubmitted), Rule 34(2)(a). Where a Party fails to carry out the Tribunal's orders, the "Tribunal shall take formal note" of this failure. *Id.*, Rule 34(3). In such cases tribunals "may draw appropriate inferences from a party's non-production of evidence ordered." *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award dated 4 Oct. 2013 (RL-0011), ¶ 245. Similarly, Article 9(5) of the IBA Rules of Evidence states clearly that where a party refuses to comply with a document production order, "the Arbitral Tribunal may infer that such document[s] would be adverse to the interests of that Party." IBA Rules on the Taking of Evidence in Int'l Arbitration (CL-0147), art. 9(5). When asking for adverse inferences, a party must provide sufficient prima facie evidence to support its proposition that the opposing party has failed to produce ordered documents; when the opposing party can easily produce countervailing evidence to rebut that proposition, but fails to do so, a tribunal can make an adverse inference against it. See Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL TRIBUNALS 323-25 (1987) (CL-0170 resubmitted). Notably in this case, the Tribunal directed Respondent "to produce documents evidencing that the Comptroller General Office's conducted an audit in the July 2014-July 2015 time frame regarding public works contracts." *See* Tribunal's Decision on Claimants' Request for Production of Documents dated 19 Mar. 2019, Req. 11. Respondent has produced no such documents. As a result, the Tribunal should draw the adverse inference that such "audit" never took place.

[646] Cls' Counter-Mem. ¶ 101.

[647] WhatsApp message between Frankie Lopez and Nessim Barsallo dated 3 Mar. 2016 (C-0681 resubmitted).

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

[649] *See* Cls' Counter-Mem. § V.A.2.

supporters.[650] She was simply not endorsing *the Omega Consortium's* pending payments and change orders,[651] presumably as a result of President Varela's threats to Ms. Bianchini immediately upon getting elected.[652] That Respondent wholly ignores this point in its final brief serves to confirm the baselessness of the proffered excuse.

188. *Third*, the so-called "budgetary" issues are belied by the evidence. For starters, as Claimants established in their Reply, the Comptroller General's Office issued dozens of approvals for tens of millions of dollars for companies that had links to Mr. Varela. These approvals happened during the second half of 2014 and directly refute this pretext, which Respondent does not (and cannot) rebut.[653] Further, only four of the eight Contracts are alleged to have faced these "budgetary" issues—namely the three MINSA Capsi Contracts and the Ciudad de las Artes Contract[654]—so even if this justified Respondent's conduct (which it does not), Respondent still cannot use this excuse for endorsement delays suffered by the Omega Consortium in relation to the other four Contracts.[655] With respect to the MINSA Capsi

---

[650] Letter No. 5053-2014-DFG-UCEF from Comptroller General to Ministry of Healthcare dated 16 Sep. 2014 (C-0682); Letter No. 5275-2014-DFG-UCEF from Comptroller General to Ministry of Health dated 14 Nov. 2014 (C-0683); Letter No. 2277-LEG.F.J.PREV. from Comptroller General to MINSA dated 12 Dec. 2014 (C-0684); Public Records on the Comptroller General's Website for Odebrecht, Constructora MECO, Bagatrac, and Rodsa for Jan. 2014-Mar. 2015 (C-0746); Cls' Counter-Mem. ¶¶ 106-107.

[651] With the exception of Change Order No. 2 to the La Chorrera contract, the Comptroller General's Office did not approve or endorse anything related to the Omega Consortium while Ms. Bianchini was still in office. López 1 ¶ 77.

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

[653] Cl's Counter-Mem. ¶¶ 105-106; see also *Public Prosecutor violates Ricardo Martinelli's specialty principle*, PANAMÁ AMÉRICA, https://www.panamaamerica.com.pa/tema-del-dia/ministerio-publico-viola-principio-de-especialidad-ricardo-martinelli-1127064 dated 2 Jan. 2019 (C-0923); *Tapia: Varela accepted donations from companies linked to 'Blue Apple'*, NOTICIAS 7 DIAS PANAMÁ, http://www noticias7dias.com/varela-acepto-donaciones-de-empresas-vinculadas-a-blue-apple/ dated 19 Jan. 2018 (C-0924); Video Interview with President Juan Carlos Varela (exhibited electronically) https://www.youtube.com/watch?&v=NSXDcs2D1-Y dated 22 Mar. 2017 (C-0925).

[654] Resp.'s Objections ¶¶ 73, 92.

[655] *See* Cls' Counter-Mem. ¶ 112.

Contracts, on 20 November 2014, the three Projects all had budget allocations for their respective change orders,[656] a fact Respondent neglects to mention in its Rejoinder. Further, on 5 December 2014, the Comptroller General explicitly stated that Change Order No. 4 to the Kuna Yala Contract had been cleared from a *budgetary* perspective,[657] meaning the Comptroller General's Office must have been in possession of the budget line items for each Contract by 5 December 2014, another point which Respondent fails to address in its latest brief. And, while Respondent maintains that many of the change orders were returned to MINSA because Claimants failed to include relevant and required budgetary information,[658] this "missing" budgetary information needed to be completed by *MINSA or the Comptroller General's Office*, not by Claimants.[659]

189. As to the purported "budgetary" issues that affected the Ciudad de las Artes Contract, Respondent admits that CPP Nos. 13 to 20 (corresponding to payment application Nos. 12 to 19 submitted by the Omega Consortium between June and December 2014), were not approved.[660] Respondent also admits that Ms. Nuñez withheld approval of these CPPs immediately after becoming the INAC's Director.[661] Notably, these CPPs were for work *already*

[656] Letter No. DIPRENA/DP/SEYS/GC/9087 from the Ministry of Economy and Finance to MINSA dated 20 Nov. 2014 (C-0578).

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

[658] Evaluation Report of Change Order No. 4 issued by the Comptroller's office dated 10 Jun. 2014 (C-0687); Memorandum No. 4243-LEG-F.J.PREV from the Legal Division of the Comptroller General's Office to the Director of General Auditing of the Comptroller General's Office dated 26 Jun. 2014 (C-0737); Memorandum No. 3702-2014-DMySC-R.P. from the Accounting Director of the Comptroller General's Office to the Legal Director dated 17 Jun. 2014 (C-0739); Memorandum No. 1480-2014-DAEF from the Economic Director of the Comptroller General's Office to the Legal Director of the Comptroller General's Office dated 5 Jun. 2014 (C-0750); Memorandum No. 3247/2014-DMySC-R.P. from the Accounting Director of the Comptroller General's Office to the Economic Director dated 5 Jun. 2014 (C-0751).

[659] Lopez 2 ¶¶ 16-18.

[660] Resp.'s Objections ¶ 105.

[661] *See supra* ¶¶ 132-33.

completed by the Omega Consortium and (eventually) *already approved* by INAC and external inspector Sosa.[662] Respondent has not claimed there were "budgetary" issues precluding the approval of these CPPs, yet they were never endorsed by the Comptroller General in 2014, which meant that they would then have to be carried over to the 2015 Budget. From there, the Ministry of Economy and Finance ("**MEF**") specifically and arbitrarily slashed the 2015 budget for the Ciudad de las Artes Project.[663] In sum, the sums allotted for this Project were duly submitted, but the payment of those sums was delayed, held-over to the next budget, singled-out and then purposefully slashed from the budget through the coordination of three separate Panamanian Government entities (the INAC, the MEF, and the Comptroller General's Office). This is the sort of "budgetary constraint" that only a sovereign can raise; it is also the sort of constraint that provides no legal defense for its refusal to honor a contractual obligation.

b. The Comptroller General's Office Stonewalls the Omega Consortium's Payment Requests

190. The Comptroller General's Office stopped endorsing virtually all of the Omega Consortium's payment requests as soon as Mr. Varela was elected, and it did so in an arbitrary and unreasonable manner unrelated to any legitimate commercial issues. Notwithstanding Respondent's protestations to the contrary, the evidence is clear. By way of example, of the *at least 30* payment applications on all of the Contracts that were either at the Comptroller General's Office at the time Mr. Varela won the election or submitted thereafter, which amounted to close to [redacted], *only 7* payment applications were endorsed for a total of

[662] Payment Application for Contract No. 093-12, various dates (C-0284); Account Payment Details for Contract No. 093-12, various dates (C-0338).

[663] Cls' Counter-Mem. ¶¶ 116-17.

only close to [redacted][664] In other words, under Mr. Varela, the Omega Consortium received *around 10%* of the amount owed for *approved completed work*.

191. With respect to the MINSA Capsi Contracts, Respondent defends the Comptroller General's conduct by arguing that some of the CNOs were endorsed during the Varela Administration and that, in any event, payment applications were delayed or denied throughout the tenure of the Projects for a variety of benign reasons.[665]

192. *First*, Respondent excuses its stonewalling of Claimants' payment requests by arguing that the payment applications on the MINSA Capsi Projects typically ranged from between [redacted] to [redacted], and that the payment applications cited by Claimants as evidence of harassment fell well outside this range, taking longer to approve.[666] This is nonsensical. That some of the payment applications required greater scrutiny because they were for high amounts does not justify that, over the course of an *entire year*, the Comptroller General's Office was only able to endorse *one payment* application exceeding [redacted],[667] of the *fourteen* applications totaling [redacted] that were at the Comptroller General's Office for endorsement. As Mr. Lopez explains, following Respondent's logic, the Omega Consortium would have had to wait *nine years for its nine payment applications* that exceeded [redacted].[668] Whether waiting one year or nine, this is an unreasonable amount of time for a contractor to get paid for work *already completed and approved* by the

[664] The Republic of Panama paid 7 applications totaling [redacted], including: CNO No. 15 in the Rio Sereno Contract, CNOs Nos. 22-24 in the Kuna Yala Contract, Payment Applications Nos. 10-12 in the La Chorrera Contract (McKinnon 1, Annex 1, at 4, 8, and 19). But the Omega Consortium submitted at least 30 payment applications which amounted to close to [redacted] (McKinnon 1, Annex 1, at 1).

[665] Resp.'s Reply ¶ 249.

[666] Resp.'s Reply ¶ 249.

[667] Lopez 2 ¶ 24.

[668] Lopez 2 ¶ 24.

owner of the Project, especially when a similar situation was taking place with ***all*** the other Contracts, too.[669]

193. *Second*, Respondent complains that almost all of the payment applications were submitted on the same day, totaling [redacted], and that on the same day the Omega Consortium sent a letter to MINSA stating that it would be reducing personnel on the Projects.[670] According to Respondent, "[w]ith many large requests on the same day, simultaneous with announcement of staff reductions, . . . the requests were necessarily going to be reviewed with additional scrutiny."[671] To set the record straight, not all the payment applications were submitted on the same day—some of them were payment applications that the Government asked the Omega Consortium to modify and which the Omega Consortium therefore *re-submitted*.[672] But even if they were submitted together, Respondent does not explain how this created a problem for the Comptroller General's Office. It could have endorsed them one at a time, within a reasonable time, all the while properly scrutinizing the related Projects.[673] However (save for CNO Nos. 15 of Rio Sereno, and 22, 23, and 24 of Kuna Yala, which will be addressed below), the Comptroller General's Office did not endorse *any* payment applications

[669] Lopez 2 ¶ 24. The Omega Consortium Contracts established certain deadlines for the payments. For example in the MINSA Capsi Contracts, as well as in the Mercado Publico de Colon Contract and the Ciudad de las Artes Contract the deadline was thirty working days. Contract No. 077 (2011) dated 22 Sep. 2011 (C-0028 resubmitted) at 34-35; Contract No. 083 (2011) dated 22 Sep. 2011 (C-0030 resubmitted) at 33-34; Contract No. 085 (2011) dated 22 Sep. 2011 (C-0031 resubmitted) at 33-3; Contract No. 093-12 dated 6 Jul. 2012 (C-0042 resubmitted) at 11. In the case of the La Chorrera Contract, the Municipality of Colon, and the Municipality of Panama the deadline was ninety calendar days. Contract No. 150/2012 dated 22 Nov. 2012 (C-0048 resubmitted) at 3; Contract No. 01-13 dated 24 Jan. 2013 (C-0051 resubmitted) at 5; Contract No. 857-2013 dated 12 Sep. 2013 (C-0056 resubmitted) at 2.

[670] Resp.'s Reply ¶¶ 251-52; McKinnon 1, Annex 1 pp. 4, 8, 12; Letter No. MINSA-54 from the Omega Consortium to the Ministry of Health dated 31 Oct. 2014 (C-0173).

[671] Resp.'s Reply ¶ 251.

[672] Lopez 2 ¶ 24.

[673] Lopez 2 ¶ 24.

submitted by the Omega Consortium after July 2014.[674] This cannot be explained by the additional fact that Omega started reducing personnel on the Projects—quite the opposite is true. If anything, a contractor's apparent financial strangulation resulting from its nonpayment for work already approved and completed should, if anything, nudge the Comptroller General to work faster, not slower.

194. *Third*, Respondent maintains that many of the unapproved payment applications were for work allegedly done under pending change orders for additional costs on projects, and since these change orders had not been endorsed by the Comptroller General's Office, "they were not binding contracts."[675] Consequently, Respondent suggests, the Omega Consortium was not entitled to these payments and only would have been if the change orders had been approved.[676] Respondent's warped logic undermines its own argument. While arguing that Claimants were not entitled to payments under change orders that had not been endorsed, Respondent fails to explain its own failure in endorsing these change orders in the first place, putting the Omega Consortium in a vicious cycle.[677]

195. *Fourth*, Respondent points out that the Comptroller General's Office returned several CNOs with requests for corrections.[678] However, Respondent can only cite to CNO No. 20 on the Puerto Caimito Project[679] and Payment Application No. 20 on the Kuna Yala Project[680] as evidence of such action. The former was apparently returned to MINSA because it was submitted for endorsement after its expiration date. This was just another picayune and baseless

[674] Lopez 2 ¶ 24.

[675] Resp.'s Reply ¶ 253.

[676] Resp.'s Reply ¶ 253.

[677] *See infra* § II.B.2.c.

[678] Resp.'s Reply ¶ 254.

[679] Resp.'s Reply ¶ 254.

[680] Resp.'s Reply ¶ 255.

excuse that the Comptroller General's Office used to reject the endorsement of Omega's payment applications. As explained by Mr. Lopez, the Ministry of Economy and Finance ("**MEF**") had previously told the Comptroller General's Office that it should always endorse expired CNOs since the expiration was not attributable to contractors and the MEF was going to pay the expired CNOs,[681] but the Comptroller General's Office *ignored* the MEF's instruction and rejected CNO No. 20.[682] With respect to Payment Application No. 20, it was returned despite the fact that the Comptroller General's financial division had already given the Payment Application the green light,[683] a fact which Respondent completely ignores.[684]

196. *Fifth*, Respondent notes that the Comptroller General endorsed CNO No. 15 on the Rio Sereno Project in March 2015, and CNO Nos. 22, 23, and 24 on the Kuna Yala Project in October and November 2014,[685] but neither of these endorsements disprove the overall trend and prevailing sentiment of the Government against the Omega Consortium's Projects once President Varela took office. For each, Claimants had to wait nearly *one year* between the time they presented MINSA with this payment application (on 8 April 2014) and when they received final payment (on 26 March 2015).[686] Further, Respondent neglects to explain why Payment Application Nos. 15, 16, and 17 (corresponding to CNO Nos. 16, 17, and 18), which were also submitted by Claimants for the Rio Sereno Contract, were never endorsed.[687]

---

[681] Lopez 2 ¶ 25.

[682] Note No. 1809-15-DFG from the Comptroller General to the Minister of Health dated 23 Jan. 2015 (C-0601); Letter No. 2667-2014-DFG-UCEF from the Comptroller General's Office to the Minister of Health dated 26 May 2014 (C-0698).

[683] Memorandum No. 1056-2015 from the Comptroller General Office dated 26 Feb. 2015 (C-0696).

[684] Resp.'s Reply ¶ 255.

[685] Resp.'s Reply ¶ 248.

[686] Resp.'s Reply ¶ 250.

[687] First Expert Report Mr. Greg McKinnon dated 25 June 2018 ("**McKinnon 1**"), Annex 1, p. 4-5; Invoice - Payment Application Rio Sereno, various dates (C-0255).

197. With respect to the Kuna Yala Contract, Payment Application Nos. 20, 24, and 25 (corresponding to CNO Nos. 21, 25, and 26) were likewise *never* endorsed by the Comptroller General's Office.[688] While Respondent is correct that the Comptroller General approved CNO Nos. 22, 23, and 24, totaling [redacted] in October and November 2014,[689] they still could not be cashed by the Omega Consortium because the Comptroller General's Office took an unreasonably long time to endorse them. The expiration date of the three CNOs was a month earlier in September 2014,[690] and the Omega Consortium had an Assignment Contract with Banco BAC according to which the Bank reserved its right to decline CNOs submitted less than 90 days prior to the expiration date.[691] Since by that time the CNOs had expired, the Omega Consortium had to enter into a Factoring Contract[692] with Banco BAC,[693] the consequence of which was that the Omega Consortium ended up paying an extra of [redacted] in factoring fees, the factoring interest, and the interest on late payment caused by the State's delay in paying the CNO to Banco BAC.

198. Lastly (and similarly), with respect to the Puerto Caimito Contract, Payment Application Nos. 19, 20, 21, and 22 (corresponding to CNO Nos. 20, 21, 22, and 23) were never paid.[694] Respondent has nothing at all to say with respect to the unreasonableness of the Comptroller General's Office with respect to these applications.

---

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

[689] Resp.'s Reply ¶ 248; Certificates of No Objection for Contract No. 083 (2011) various dates (C-0260).

[690] Certificates of No Objection for Contract No. 083 (2011) various dates (C-0260), at 109, 111, 113.

[691] Lopez 2 ¶ 23.

[692] A Factoring Contract is a financing agreement between a business owner and a bank or factoring agency by which the bank provides the business owner some money that they can use to fund and finance the business in the short term. Lopez 2 ¶ 23 n.64.

[693] Lopez 2 ¶ 23.

[694] McKinnon 1, Annex 1, p. 12-13.

199. In defense of its actions, Respondent also notes that the Judiciary paid all of the payment applications submitted by the Omega Consortium for the La Chorrera Contract during the Varela Administration,[695] including payment applications from July to December 2014. This is not accurate. While it is true that disbursements against these payment applications were eventually made, these payments did not go to the Omega Consortium. Out of those payment applications, [redacted] went to the Social Security Administration ("**SSA**"), [696] [redacted] went to the National Treasury[697] and [redacted] was retained by the MEF in connection to a precautionary measure on a civil case.[698] So the Respondent merely moved money from one pocket to another, at Claimants' expense. Stubbornly, the Directorate General of Income ("**DGI**"), did not allow the Omega Consortium to use a credit of at least [redacted], shown on Claimants' account statement with the agency,[699] to offset the [redacted] in estimated tax payments for the current year, that the DGI claimed the Omega Consortium owed it. And contrary to what Respondent maintains,[700] these sums did not go to Respondent's agencies at the request of the Omega Consortium, but as a consequence of another vicious cycle in which Claimants were trapped.[701] In order to be able to get paid for their work in Panama, contractors have to submit a "Certificate of Good Standing" (*Paz y Salvo Certificate*) alongside their payment applications. This certificate is only issued when the contractor does not have any debt with the Panamanian Government. Since the Omega Consortium was not getting

[695] Payment Table for Contract No. 150/2012 from the Accounting and Finance Department in the Judicial Authority, undated (R-0007).

[696] *See* Check No. 14952 from the MEF to SSA dated 30 Oct. 2015 (C-0855).

[697] *See* Check No. 14972 from the MEF to the National Treasury dated 30 Oct. 2015 (C-0856).

[698] *See* Letter No. 900-01-520-DT-DGP from the MEF dated 12 June 2015 (C-0852).

[699] *See* E-Tax Panama Account Statement for Omega Engineering, Inc. dated 30 Oct. 2015 (C-0854).

[700] Resp.'s Reply ¶ 297.

[701] Lopez 2 ¶ 54.

paid for the work it had performed in its contracts, it began accruing a debt with the SSA and the DGI.[702] Mr. Lopez attempted to work out a payment plans with the both agencies, but he received the same non-cooperative attitude that the Omega Consortium was experiencing from all Government entities, from the moment Mr. Varela took office, leaving the Omega Consortium with no option but to have those payments sent to the Panamanian treasury.[703] The end result is the same—the Omega Consortium did not receive payment for its approved completed work, nor did it receive the credit from the DGI or the [redacted] retained by the MEF.

200. The Comptroller General's Office also stopped endorsing the Omega Consortium's payment applications for work completed and approved for the Mercados Perifericos Contract with the Municipality of Panama. In particular, the Municipality did not pay the Omega Consortium Payment Application Nos. 1 to 8.[704] While Respondent argues that the Comptroller General could not endorse the Payment Applications because the Omega Consortium's designs were not capable of being fully approved,[705] it fails to mention the fact that the invoices had *already* been approved by the Municipality's inspectors.[706] Respondent also argues that the Omega Consortium did not secure required certificates like the Soil Use Certificate,[707] but as discussed *supra*, the Certificate could only be issued by the Ministry of Housing and thus, by extension, Respondent. All of the excuses made by Respondent were mere pretext created by the Municipality of Panama and the Comptroller General's Office to leave the

[702] Lopez 2 ¶ 54.

[703] Lopez 2 ¶ 54.

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

[705] Resp.'s Objections ¶ 140.

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

[707] Resp.'s Objections ¶ 140.

Omega Consortium without payment for the work performed in the Municipality of Panama Contract.

201. During the Varela Administration, the Comptroller General's Office also stopped endorsing the Omega Consortium's payment applications for the Municipality of Colon Contract. Initially, the Omega Consortium received an advance payment of 30 percent of the Project's cost and was also paid for Payment Application Nos. 1 and 2 during the previous Administration.[708] However, once President Varela assumed office, the Comptroller General began to stonewall Claimants' payment requests. In particular, Payment Application Nos. 3 and 4 were submitted but never paid.[709] Payment Application No. 3, which was for work performed between 2 December 2013 and 30 April 2014, was originally signed by the Municipality and the local Comptroller General, but never received the final endorsement of the Comptroller General. Payment Application No. 4, which was for work performed between 1 May 2014 and 30 November 2014, was never addressed by the Municipality.[710] Respondent has given no reasons for this whatsoever.

202. Instead Respondent counters that Claimants received a significant amount of money on this Project while performing a limited amount of work, receiving a profit of over [redacted].[711] In particular, Respondent notes that Claimants' expert, Mr. McKinnon, "acknowledged a financial debt to the Municipality."[712] This seeks only to distract from the

[708] Resp.'s Objections ¶ 129.

[709] Resp.'s Reply ¶ 422; McKinnon 1, Annex 1, p. 22; Letter No. 2015 19 06 P08-013 from the Omega Consortium to the Mayor of the Municipality of Colón dated 19 June 2015 (C-0180 resubmitted); Payment Application for Contract No. 01-13 dated 3 June 2014 (C-0279 resubmitted); Payment Applications for Contract No. 01-13, various dates (C-0298).

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

[711] Resp.'s Reply ¶ 423.

[712] Resp.'s Reply ¶ 423.

relevant point. Mr. McKinnon's assessment of the accounting of the Projects at a particular point in time has nothing to do with the legal obligations that the Government had towards the Omega Consortium. As Justice Troyano explains, one of the most important legal obligations of the Government in a public works contract is to pay the contractor for completed work, irrespective of whether an advance payment has been made.[713] Respondent's creative effort to excuse the Comptroller General's refusal to pay the Omega Consortium for its completed work according to the contract's terms is therefore unavailing.

203. As explained *supra*, Respondent also admits that CPP Nos. 13 to 20 corresponding to the Ciudad de las Artes Contract were not approved by the Comptroller General's Office. These were for work completed by the Omega Consortium and *eventually* approved by the INAC and external inspector Sosa, but which were never endorsed by the Comptroller General.[714] Respondent does not provide any reason, let alone a valid one, why the Comptroller General did not endorse these payment applications.[715] This silence speaks volumes.

[713] Troyano ¶ 131-33.

[714] *See supra* ¶¶ 132, 189.

[715] While Ms. Buendia maintains that the Omega Consortium was overfunded because it received an advance payment at the beginning of the project, this is a very narrow vision of how public works projects function. See Buendia ¶ 20; Resp.'s Reply ¶ 329. To start with, the Ciudad de las Artes Project was particular in the sense that it had two orders to proceed that obliged Claimants to disburse payments without financing. This meant that many costs which the Omega Consortium incurred between the first and second orders to proceed were never recovered. Lopez 2 ¶ 37. In addition, as explained by Mr. Lopez, the prices established at the beginning of the projects are not static. Lopez 2 ¶ 37. Each project has its own activities that many times are altered at the request of the owner of the project, which logically causes cost increases. Lopez 2 ¶ 37. Thus, comparing the advance payment received by a contractor with the work progress in the construction to determine whether a contractor is over-funded will only show an unrealistic result. Lopez 2 ¶ 37. In any case, as explained by Justice Troyano, the INAC was contractually obliged to make all the payments established under the Contract no matter whether the Omega Consortium received an advance payment, so the discussion about the advance payment is futile. Troyano ¶ 131-33. Unluckily for Claimants, the Republic of Panama ended up destroying all the possibilities of payment when it slashed the Ciudad de las Artes budget for 2015. *See infra* Section II.B.3.b.

c. The Comptroller General's Office Stonewalls the Omega Consortium's Change Order Requests

204. Respondent also began to stonewall the Omega's Consortium's change order requests. From the time Mr. Varela won the elections, the Omega Consortium submitted a total of *eleven*[716] change order requests for endorsement by the Comptroller General's Office, but the Comptroller General only endorsed *three*.[717] These three were minor and inconsequential, giving the Omega Consortium oppressively short extensions or no extra time at all, and the reasons given by the Comptroller General's Office for not endorsing the eight remaining change order requests lie squarely at the feet of Respondent's various Ministries and Agencies, not the Omega Consortium.

205. One of the few change orders that *was* endorsed by the Comptroller General was Change Order No. 2 for the La Chorrera Contract with the Judiciary.[718] But the time that it took to endorse it was unreasonable and, combined with the issues caused by the Government with all the Contracts, put the Omega Consortium in severe financial distress. Change Order No. 2 was

[716] Addendum No. 4 to Contract No. 077 (2011) dated 7 May 2014 (C-0106 resubmitted 2); Addendum No. 3 to Contract No. 083 (2011) dated 26 Dec. 2014 (C-0107); Addendum No. 4 to Contract No. 085 (2011) dated 7 May 2014 (C-0171); Change Order No. 3 to Contract No. 083 (2011) dated 17 Nov. 2014 (C-0522); Addendum No. 4 to Contract No. 077 (2011) dated 17 Nov. 2014 (C-0249); Addendum No. 5 to Contract No. 085 (2011) dated 2014 (C-0257); Draft of Change Order No. 3 of MINSA Capsi Kuna Yala, undated (C-0780); Draft of Change Order No. 4 of MINSA Capsi Puerto Caimito, undated (C-0781); Draft of Change Order No. 4 of MINSA Capsi Rio Sereno, undated (C-0782); Change Order No. 2 to Contract 150/2012 dated 13 Jan. 2015 (C-0562); Email chain between the Municipality of Panama and Omega dated 27 Nov. 2014 (R-0061).

[717] Cls' Counter-Mem. ¶ 106; Change Order No. 3 to Contract No. 083 (2011) dated 17 Nov. 2014 (C-0522); Addendum No. 4 to Contract No. 077 (2011) dated 17 Nov. 2014 (C-0249).

[718] Change Order No. 2 was approved and signed by the Judiciary in May 2014, and sent to the Comptroller General's Office on 21 August 2014. Letter from the Omega Consortium to the Judiciary dated 27 Nov. 2014 (C-0366); Letter No. 1211/S.A./2014 from the Judicial Authority to the Comptroller General dated 21 Aug. 2014 (R-0073); Lopez 2 ¶ 48; Rios 1 ¶ 25. The Change Order was re-signed in October 2014, after the Omega Consortium sent letters requesting endorsement by the Comptroller General's Office. Addendum No. 2 to Contract 150/2012 dated 24 Oct. 2014 (R-0008); Cls' Counter-Mem. ¶ 157; Letter from the Omega Consortium to the Judiciary dated 27 Nov. 2014 (C-0366). While Respondent disputes the fact that the addendum was signed in May 2014, it agrees with the rest of this chronology, in particular acknowledging that Change Order No. 2 was sent to the Comptroller General in August 2014. Resp.'s Reply ¶ 287.

finally endorsed by the Comptroller General's Office on 23 December 2014,[719] *seven months* after it was first signed, and the Omega Consortium was only officially notified of this endorsement several weeks later, on 13 January 2015.[720] Due to the delay in endorsement, the Omega Consortium was prevented from processing payments starting in July 2014, the month President Varela took office, and was consequently forced to reduce its workforce on 17 December 2014.[721]

206. Respondent's only defense to Claimants' argument is, once again, that there is no "standard time" in Panama for the processing and endorsement of change orders, and that this is done on a case-by-case basis depending on the number of change orders pending at the Comptroller General's Office, the sufficiency of the paperwork, the length and complexity of the changes requested, and the commercial need for the addendum.[722] In short: '*tough luck*.' As Justice Troyano has explained, however, the Government is obligated to make payments for completed work in accordance with the principles of reasonableness and good faith.[723] It is patently unreasonable that the Comptroller General's Office would delay a necessary endorsement of a change order for *seven months* without at least notifying the contractor of the reasons for the delay. The pretextual nature of this justification becomes even more apparent when one considers the time it took the Comptroller General to approve the Omega Consortium's change order requests during the previous Administration. Change Order No. 1, which was signed between the Omega Consortium and the Judiciary on 14 November 2013, was

[719] Letter No. 1093/DALSA/2014 from Judicial Authority to Omega dated 23 Dec. 2014 (R-0079).

[720] Letter No. 1093/DALSA/2014 from Judicial Authority to Omega dated 23 Dec. 2014 (R-0079).

[721] Letter from the Omega Consortium to the Judiciary dated 17 Dec. 2014 (C-0367).

[722] Resp.'s Reply ¶ 288.

[723] Troyano § V.

endorsed *one month* later on 19 December 2013.[724] Why should Change Order No. 2, under the Varela Administration, take *seven times as long* to process? And, at the same time, the Comptroller General was expeditiously endorsing requests made by other contractors, such as Odebrecht, Constructora Meco, Bagatrac, and Constructora Rodsa, each of which made illicit payments to Panamanian Government officials.[725] As admitted by President Varela himself in a video interview, and as reported by the Panamanian press, at least some of those companies made "contributions" to an education foundation managed by his sister-in-law.[726] Also, as discussed *infra*, Odebrecht blackmailed Mr. Varela through the Attorney General by claiming that the company knew of "serious" wrongdoing by Mr. Varela.[727] In fact, while the Omega Consortium only received three approvals for its eight Projects in the second half of 2014, and none in 2015, several companies that admitted to paying bribes received significantly more approvals during the same time period. For example, during the second half of 2014, Odebrecht received 73 approvals for approximately five projects.[728] It is quite telling that Dr. Bernard

[724] Addendum No. 1 to Contract 150/2012 dated 14 Nov. 2013 (C-0305).

[725] *See* Public Records on the Comptroller General's Website for Odebrecht, Constructora MECO, Bagatrac, and Rodsa for Jan. 2014-Mar. 2015 (C-0746); Plea Agreement Between the United States Department of Justice and Odebrecht S.A. dated 21 Dec. 2016 (C-0748), at 52, ¶¶ 63-64 (admitting to bribe payments in Panama for several million dollars "in or about and between" 2010 and 2014); Public Ministry Certification, dated 16 Mar. 2018 (C-0749) (showing that Meco's President stuck a plea deal with Panamanian prosecutors on 1 Dec. 2017); Businessmen confess their bribes to Blue Apple, LA PRENSA, dated 10 Mar. 2018 (C-0690) (reporting that President of Meco Carlos Cerdas, Juan Rodriguez of Constructora Rodsa, and Alberto Jurado of Bagatrac, admitted to Panamanian prosecutors to paying several million in bribes to Panamanian officials) available at https://impresa.prensa.com/panorama/Empresarios-confiesan-coimasBlue-Apple_0_4981001922 html; Public Ministry Statement, dated 15 Jan. 2018 (C-0526) (indicating that an "investigation" officially started on 11 Sep. 2017 on Bagatrac, Meco, Rodsa, and other companies), available at http://ministeriopublico.gob.pa/comunicado-caso-odebrecht-2/.

[726] *Public Prosecutor violates Ricardo Martinelli's specialty principle*, PANAMÁ AMÉRICA, https://www.panamaamerica.com.pa/tema-del-dia/ministerio-publico-viola-principio-de-especialidad-ricardo-martinelli-1127064 dated 2 Jan. 2019 (C-0923); *Tapia: Varela accepted donations from companies linked to 'Blue Apple'*, NOTICIAS 7 DIAS PANAMÁ, http://www noticias7dias.com/varela-acepto-donaciones-de-empresas-vinculadas-a-blue-apple/ dated 19 Jan. 2018 (C-0924); Video Interview with President Juan Carlos Varela (exhibited electronically) https://www.youtube.com/watch?time_continue=25&v=NSXDcs2D1-Y&feature=emb_logo dated 22 Mar. 2017 (C-0925).

[727] *See infra* Section II.B.8.

[728] Cls' Counter-Mem. ¶¶ 105-106.

never mentions this fact in his witness statement, despite the fact that the endorsements are such a critical issue in this case.[729]

207. The change in the Comptroller General's attitude is also evidenced by the fact that it stopped altogether endorsing change orders for the Mercados Perifericos Contract with the Municipality of Panama. Mayor Blandon signed Change Order No. 2 to this Contract in November 2014,[730] but *four months later*, the Comptroller General's Office was still studying the Change Order and objecting to the endorsement.[731] To wit, it was requesting additional documentation that it already had (and that Claimants gave to the Municipality),[732] and otherwise complaining about things that were not attributable to the Omega Consortium (*i.e.*, deficiencies in information that the Municipality of Panama had to provide to the Comptroller General's Office).[733] In the end, this Change Order was never endorsed by the Comptroller General's Office, a fact which Respondent does not deny. Respondent does, however, make the baffling admission that Mayor Blandon had no choice but to retender the Pacora Market in *2018*.[734] How

[729] The revisions requested by the Comptroller General's Office to Change Order No. 2 were mere pretext. Cls' Counter-Mem. ¶¶ 128-31. Respondent rejects this characterization, maintaining that the contractual payment schedules needed to align with the funds allocated to the Project, and that in this case the funds changed from 2014 to 2015. Form 128325-129440 from Comptroller General to the Judicial Authority dated 2 Oct. 2014 (R-0074); Letter DIPRENA-DPSG-GC-8184 from MEF to Judicial Authority dated 20 Oct. 2014 (R-0075); Letter re Remedy Action Regarding Addendum No. 2 to Contract No. 150/2012 from Judicial Authority's Prosecutor's Office to the Legal Department at the Judicial Authority dated 2 Oct. 2014 (R-0076); Letter No. 1549/S.A./2014 from Administrative Secretary of the Supreme Court to Director of the National Budget at MEF (R-0077). However, the only reason why the funds changed from one year to the next was because the Comptroller General's Office failed to promptly endorse the change order. This is yet another delay attributable solely to the Comptroller General, and by extension, Respondent. Indeed, delaying until December allowed Respondent to add another hurdle for the Omega Consortium to overcome.

[730] Email chain between the Municipality of Panama and Omega dated 27 Nov. 2014 (R-0061).

[731] Resp.'s Reply ¶ 225; C-0741.

[732] Memorandum No. 1360-15-LEG-F.J.PREV. from Jaime Perez to Arnulfo Him dated 4 Mar. 2015 (C-0741), #3, #4, #5, #6, #12.

[733] Memorandum No. 1360-15-LEG-F.J.PREV. from Jaime Perez to Arnulfo Him dated 4 Mar. 2015 (C-0741), #1, #2, #7, #8, #9, #10, #11, #13, #14, #15, #16.

[734] Requisition No. 544 "For the Refurbishing Project of the Pacora Peripheral Market" dated 27 Mar. 2018 (R-0120); Municipality of Panama, Resolution No. C-070 dated 23 Apr, 2018 (R-0121).

could this happen when the contractor initially and legitimately chosen for the work could not get its necessary change orders approved? The only reasonable explanation is that Respondent, including the Comptroller General's Office, wanted Claimants removed from the Project.

208. Similarly, while the Omega Consortium followed up on the MINSA Capsi Projects and their Change Orders during the second half of 2014, the Change Orders extending the duration of the Contracts and recognizing the attendant costs were never endorsed. These Change Orders, which were signed in May 2014, were No. 4 to the Rio Sereno Contract, No. 3 to the Kuna Yala Contract and No. 5 to the Puerto Caimito Contract. The Comptroller General's Office rejected the endorsement of them all based on deficiencies caused by MINSA, and sent them back to MINSA in July 2014.[735]

209. Respondent argues that the majority of the letters and memoranda that Claimants cite as evidence of Change Orders being returned for pretextual reasons during the Varela Administration were actually drafted and sent to MINSA during the final days of the previous Administration in May and June 2014, and that only three of seven letters were sent during the Varela Administration.[736] It is undisputed, however, that the four letters are dated June 2014, at which point President Varela had already been elected and had publicly threatened then-Comptroller General Ms. Bianchini's position.[737]

[735] Lopez 2 ¶ 15.

[736] Resp.'s Reply ¶ 243; Letter No. 695-15-LEG-F.J.PREV. from the Comptroller-General to the Ministry of Health dated 17 Apr. 2015 (C-0176); Letter No. 3340-2014-DFG-UCEF from Comptroller General Office to the Minister of Health dated 31 July 2014 (C-0685); Letter No. 3081-2014-DFG-UCEF from Comptroller General to Ministry of Health dated 10 July 2014 (C-0686).

[737] Memorandum No. 4243-LEG-F.J.PREV from Legal Division to Director of General Auditing dated 26 June 2014 (C-0737); Memorandum No. 3247/2014-DMySC-R.P. from Accounting Director to Economic Director dated 5 June 2014 (C-0751); Memorandum No. 3702-2014-DMySC-R.P. from the Accounting Director to the Legal Director dated 17 June 2014 (C-0739); Memorandum No. 1480-2014- DAEF from Economic Director to Legal Director dated 5 June 2014 (C-0750).

210. Respondent also maintains that during the previous Administration, the Comptroller General's Office returned the Omega Consortium's Change Orders for reasons similar to those given during the Varela Administration, namely for spelling errors, to change the name of a legal representative, to provide a copy of a missing passport, to correct discrepancies between the number of days written in letters versus in numbers, and to address the validity of the bonds.[738] These, of course, are picayune issues that can be (and were) easily addressed. The reasons that the change orders were returned during the Varela Administration were less routine, and often intractable.

211. For example, Change Order No. 4 of the Rio Sereno Contract was signed in May 2014, but was rejected by the Comptroller General's Office because the Omega Consortium needed to explain why it wanted to modify the contract's period and amount, invoking the Contract's equilibrium clause.[739] But the Omega Consortium had already done so, and it was *MINSA* that failed to provide a required signature for the change order, not the Omega Consortium.[740] Respondent offers nothing in response.[741] The reasons for the rejection were issues caused by MINSA, and that could only be addressed by MINSA.[742] But, of course, as

[738] Memorandum No. 3096-LEG.F.J.-PREV from Director of the Legal Dep't of the Comptroller General's Office to General Services Dep't of the Comptroller General's Office dated 1 May 2013 (R-0131); Note No. 2516-2013-DFG-UCEF from the Comptroller General's Office to MINSA dated 10 May 2013 (R-0132); Letter DVMS-N. 1364-2013 from MINSA to the Comptroller General dated 4 June 2013 (R-0133); Letter DVMS N. 613-2013 from MINSA to the Comptroller General dated 21 June 2013 (R-0134); Memorandum No. 2583-2013-DAEF from the Economy and Finance Dep't to Legal Dep't of Comptroller General's Office dated 7 Oct. 2013 (R-0135); Letter No. 4420-2013-DFG-UCEF from the Comptroller General to MINSA dated 28 Oct. 2013 (R-0136).

[739] Letter No. 3081-2014-DFG-UCEF from Comptroller General to Ministry of Health dated 10 July 2014 (C-0686).

[740] Evaluation Report of Change Order No. 4 issued by the Comptroller's office dated 10 June 2014 (C-0687).

[741] Evaluation Report of Change Order No. 4 issued by the Comptroller's office dated 10 June 2014 (C-0687).

[742] Lopez 2 ¶ 17.

noted above,[743] by that time MINSA was working against the Omega Consortium, along with the rest of Respondent's Government.

212. Similarly, with Change Order No. 3 to the Kuna Yala Contract, the Comptroller General sent a letter to MINSA requesting that the new MINSA administration assess the continuation of its endorsement.[744] It also pointed to similar issues, including missing signatures from MINSA in some documents,[745] the lack of indication of the budget line assigned to the Change Order,[746] and documents related to issues with the indigenous population from Kuna Yala.[747] Again, all of these issues lie squarely at Respondent's feet, and not Claimants'. As with the Rio Sereno Contract, the Omega Consortium subsequently tried to resign the change order,[748] but never received a response—another stubborn fact that Respondent fails to address in its Rejoinder.

213. Change Order No. 4 to the Puerto Caimito Contract was similarly rejected by the Comptroller General's Office because it requested a series of documents that the Omega Consortium had already provided during the bidding process.[749] Respondent provides other excuses, too, but these are again solely attributable to MINSA or other arms of the Panamanian Government,[750] And again, the Omega Consortium tried to speed up the endorsement to no

[743] *See supra* Section II.B.1.c.

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

[745] Memorandum No. 4243-LEG-F.J.PREV from the Legal Division of the Comptroller General's Office to the Director of General Auditing of the Comptroller General's Office dated 26 June 2014 (C-0737).

[746] Lopez 2 ¶ 16.

[747] Lopez 2 ¶ 16.

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

[749] Letter No. 695-15-LEG-F.J.PREV. from the Comptroller-General to the Ministry of Health dated 17 Apr. 2015 (C-0176).

[750] Memorandum No. 3702-2014-DMySC-R.P. from the Accounting Director of the Comptroller General's Office to the Legal Director dated 17 June 2014 (C-0739); Memorandum No. 1480-2014-DAEF from the Economic

avail,[751] another fact Respondent neglects to mention in its Rejoinder. All it does is parrot the thin veil of justification in the underlying documentation [752] without addressing the (un)reasonableness of the decision.

214. Finally, the three Change Orders for costs and time extensions that the Omega Consortium and MINSA had initially signed for the MINSA Capsi Projects in May 2014 were returned by the Comptroller General's Office in July 2014.[753] The Omega Consortium tried to work with MINSA, including its Health Infrastructure Directorate ("**DIS**"), to amend and re-sign the three Change Orders,[754] but at this point the communication with MINSA had deteriorated under President Varela's regime. It was not until October 2014 that MINSA signed the Change Orders again, which it did not submit to the Comptroller General's Office until December 2014.[755] The Comptroller General never endorsed these Change Orders. It was evident from the fact that the Comptroller General's Office endorsed in *just a month* the Change Orders for equipment signed in November 2014 that MINSA's and the Comptroller General's Office's intention was to impede the endorsement of the Change Orders containing the two most pressing issues for the Omega Consortium: costs and an extension of time.[756] This can be explained only by a sovereign campaign of harassment joined by the Comptroller General's Office—this was no mere commercial dispute.

Director of the Comptroller General's Office to the Legal Director of the Comptroller General's Office dated 5 June 2014 (C-0750); Lopez 2 ¶ 18.

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

[752] Memorandum No. 1480-2014-DAEF from the Economic Director of the Comptroller General's Office to the Legal Director of the Comptroller General's Office dated 5 June 2014 (C-0750).

[753] Lopez 2 ¶ 19.

[754] Lopez 2 ¶ 19.

[755] Lopez 2 ¶ 19.

[756] Lopez 2 ¶ 19.

3. The Government's Attack Focused on the Omega Consortium's Largest Project in Panama—the Ciudad de las Artes Project

215. Respondent's sovereign-vs.-commercial jurisdictional objection gives short shrift to the Ciudad de las Artes project.[757] This is unsurprising given the weaknesses in its argument on this point. Not only was the INAC project Claimants' largest one (that is, Claimants' most valuable investment into the Panamanian economy), but it was also extinguished by way of administrative resolution (a distinctively *sovereign* act). Given the size of the project, it is critical that the Tribunal consider in detail the full extent of Respondent's sovereign abuse vis-à-vis the project.

216. Immediately after President Varela appointed the INAC's new Director, Ms. Mariana Nuñez, the Government began attacking the Ciudad de las Artes Project from different angles. To start, and as noted above, the new Director displayed a hostile attitude towards the Project and the Omega Consortium, which was echoed by the Project's Inspectors—Sosa Architects (*see infra* Section II.B.3.a). Then, the Ministry of Economy and Finance unexpectedly slashed the budget for the Project (*see infra* Section II.B.3.b). The deathblow for the Project came a few months later when the INAC unlawfully terminated the Contract by administrative Resolution, leaving the Omega Consortium unable to bid in any other projects for at least three years (*see infra* Section II.B.3.c).

a. The Varela-Appointed Director, Ms. Nuñez, Began to Stonewall the Project Immediately and the Project Inspectors Began to Find (Alleged) Serious Problems Not Previously Encountered

217. As soon as President Varela appointed Mariana Nuñez as the new Director of INAC in July 2014, progress on the Ciudad de las Artes began to deteriorate.[758] As discussed in

[757] Resp.'s Reply ¶¶ 93-94.

[758] Lopez 1 ¶ 119.

Claimants' Reply[759] and again above,[760] Ms. Nuñez stonewalled the Project as soon as she assumed office, and no plans, payments applications, or requests for extensions of time presented by the Omega Consortium were approved by the INAC after July 2014.[761] Indeed, in the coming months, INAC's lack of commitment and nonresponsive posture indicated a stark change in its attitude toward the Omega Consortium and the Ciudad de las Artes Project.

218. This about-face was perhaps most evident in INAC's hostility toward the Omega Consortium's requests for extensions of time and additional costs. The Omega Consortium requested a meeting with Ms. Nuñez upon her appointment, during which the Omega Consortium presented the Ciudad de las Artes Project and communicated pending issues like necessary time extensions and the determination of additional costs.[762] Critically, the Omega Consortium needed to agree with INAC on a change order to extend the Contract before it expired on 27 January 2015, presenting INAC with a request for an extension of time and additional costs on 15 July 2014.[763] The July request had to be followed up with a subsequent letter on 5 September 2014[764] since, by then, the INAC had not yet replied. The INAC finally responded to the Omega Consortium's time extension request on 9 September 2014 (two months after the original request) rejecting [redacted] in costs and 180 days of extended time, and asking the Omega Consortium to provide a calculation of daily operational costs so that INAC could analyze the extension.[765] The Omega Consortium subsequently sent a letter to INAC on 17 September 2014, requesting that the INAC address various issues related to the Project,

[759] *See* Cls' Counter-Mem. § V.B.6.

[760] *See supra* Section II.B.1.a.

[761] Lopez 1 ¶ 119.

[762] Letter No. INAC-11 from Omega to INAC dated 31 July 2014 (C-0594); Lopez 1 ¶¶ 111, 121.

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

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

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

including plan approvals, payments, additional costs and the extension of time, but received no response.[766] Respondent describes the 17 September letter as a "follow-up"[767] and not as a "new request."[768] This characterization is irrelevant, since either way it demonstrates INAC's non-responsiveness and the Omega Consortium's willingness to move forward with the Project.

219. The Omega Consortium sent a *further* request in October 2014 that the extension of time be approved for the Ciudad de las Artes Project, suggesting that the daily operational costs be part of a subsequent change order.[769] Submitting the daily operational costs would have required the MEF's authorization[770] and it was critical to first extend the validity of the Contract.[771] Respondent ignores this fact, and instead maintains that it was the Omega Consortium that was delaying the progress on the extension of time request.[772] As explained, the Omega Consortium was *not* delaying progress on the Contract, but rather actively working toward a solution to the impasse needlessly created by Respondent.[773] While INAC finally responded at the end of October stating it would legally assess the change order request, it made no commitment to work toward a solution on any of the issues raised by Claimants.[774]

220. But the change in attitude and communication was not just felt with respect to change order or payment requests, even routine interactions became contentious. For example, in November 2014, the Omega Consortium sent INAC notes that it had taken during a meeting

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

[767] Resp.'s Reply ¶ 338.

[768] Resp.'s Reply ¶ 338.

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

[770] Lopez 2 ¶ 43.

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

[772] Resp.'s Reply ¶ 338.

[773] Resp.'s Reply ¶ 338.

[774] Lopez 1 ¶ 121, Letter DG/149 from INAC to the Omega Consortium dated 23 Oct. 2014 (C-0074 resubmitted).

with INAC on 23 October 2014.[775] The INAC took offense to the Omega Consortium's taking notes and hostilely questioned "who authorized you to take notes[?]," as if the act of taking notes was somehow inappropriate.[776] It became exceedingly clear that the once cooperative relationship between the Omega Consortium and INAC had come to an end under this new Administration.

221. Simultaneous with INAC's stonewalling of the Omega Consortium's Change Order requests, Claimants stopped receiving payments for work performed on the Ciudad de las Artes Project.[777] Respondent contends that one of the reasons why payments were not approved was that INAC undertook an internal review of all ongoing projects started under the previous Administration.[778] However, as explained *supra*,[779] Respondent has not provided *one document* evidencing that the review occurred or showing the results of the review. Simply saying it does not make it so, especially when the proof should lie at Respondent's disposal.

222. Respondent acknowledges that CPP Nos. 13 to 20 were not approved, but contends that this should not have affected the Omega Consortium because it was allegedly overfunded due to the advance payment and the CPPs it had already received.[780] Further, Ms. Buendía maintains that disruptions in cash flow are apparently a common occurrence on large-scale construction projects.[781] Both arguments are meritless. *First*, comparing the advance payment received by a contractor with the progress on the construction to determine whether a

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

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

[777] *See supra* ¶¶ 135-36.

[778] Resp.'s Objections ¶ 105.

[779] *See supra* ¶¶ 133-34.

[780] Resp.'s Objections ¶¶ 103, 116.

[781] Buendía ¶ 20.

contractor is over-funded is incorrect.[782] As explained by Mr. Lopez, the prices established at the beginning of the projects are not static.[783] Each project has its own activities that many times are altered at the request of the owner of the project, which logically causes cost increases.[784] Thus, comparing the advance payment received by a contractor with the progress of the construction to determine whether a contractor is over-funded will only show an unrealistic result.[785] *Second*, the advance payment was approved as a contractual obligation of INAC, which does not excuse making the subsequent interim payments that were also contractually agreed.[786] *Third*, although Ms. Buendía is now claiming that disruptions in cash flow are "normal,"[787] she knew the disruption that the Omega Consortium was suffering—across ***all*** of its Projects—was far from "normal." Indeed, Sosa reported in October 2014 that the lack of approval of CPPs was "affecting the Contractor's cash flow and provoking a reduction in productivity and delay in the Project."[788]

223. Further, as explained in Claimants' Reply, the INAC began to refuse to disburse payment for CPP Nos. 1 to 12, which had *already* been endorsed by the INAC and the Comptroller General during the previous Administration.[789] These CPPs had been assigned to Credit Suisse (as permitted by the Contract), meaning that Credit Suisse had already advanced the funds to the Omega Consortium.[790] The INAC's refusal to pay Credit Suisse was a serious

[782] *See Supra* ¶ 203 n.715.

[783] Lopez 2 ¶ 37.

[784] Lopez 2 ¶ 37.

[785] Lopez 2 ¶ 37.

[786] *See Supra* ¶ 203 n.715.

[787] Buendia ¶ 20.

[788] Monthly report from Sosa to INAC dated October 2014, p. 3 #4 (C-0524).

[789] Cls' Counter-Mem. ¶ 193.

[790] Cls' Counter-Mem. ¶ 193.

threat to the Omega Consortium's ability to maintain its financing for the Project.[791] It was not until the Omega Consortium organized a meeting with the INAC and Katyuska Correa, the Director of Public Credit at the MEF, that the INAC realized that failure to pay Credit Suisse could put the Government in default with one of the largest international banks.[792] This realization, and the possibility of putting the country in default, led the INAC to pay the same CPPs it had previously refused to pay when the Omega Consortium had made the requests.[793] Importantly, the only difference here was that the INAC and the MEF realized that the CPPs were *a debt to Credit Suisse and not to the now-disfavored Omega Consortium*.

224. That the INAC began to target the Omega Consortium after President Varela was elected is also evidenced by the timing and nature of Sosa Arquitectos' complaints on the Project.[794] As discussed *supra*, in August 2014, Sosa began to send daily correspondence to the INAC and the Omega Consortium focusing on alleged "serious issues" with the Project[795] and opining on legal aspects of the Project, especially as they related to the termination of the Contract. Respondent continues to cling to its belief that the alleged "problems" noticed by Sosa meant Omega had failed to meet its contractual obligations, ergo this dispute must be "commercial."[796] But the evidence shows otherwise. Sosa's sudden discovery of issues in August 2014 was particularly odd since (1) in the previous *sixteen months*, Sosa had *never* sent

[791] Cls' Counter-Mem. ¶ 193.

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

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

[794] Lopez 1 ¶ 128.

[795] *See supra* Section II.B.1.a.

[796] Resp.'s Reply ¶ 93.

daily letters and *rarely* mentioned legal issues,[797] in part because (2) Sosa had been hired as a *technical* inspector and not as a legal counsel.[798] In addition, Sosa also stopped attending the Ciudad de las Artes Project meetings with the INAC and the Omega Consortium.[799] The meetings in which the INAC participated were not numerous,[800] since the INAC had become unresponsive, so it was of the utmost importance that all of the parties involved in the Project, including Sosa, participate in those meetings. This sudden change in attitude paralleled INAC's own obstructionist posture, and it appeared as if Sosa had similarly received a directive to find *any* excuse to terminate the Ciudad de las Artes Contract.[801]

225. Ultimately, all the time extension and payment requests made by the Omega Consortium for the Ciudad de las Artes Project after July 2014, when President Varela took office, were rejected outright. This was part of the Government's multi-flanked attack against Claimants' largest Project, and not merely a commercial issue.

b. The Ministry of Economy and Finance Slashed the Budget for the Project

226. Not content with attacking the Project by unreasonably delaying approval of, and eventually rejecting, all change orders and payment applications on completed work, Respondent used its sovereign authority (through yet another Ministry, the MEF) to slash the budget for the Ciudad de las Artes Project. Again, this legislative and executive authority is one that *only* a sovereign actor can wield.

---

[797] *See supra* Section II.B.1.a; Lopez 1 ¶ 129.

[798] *See supra* ¶ 138.

[799] Lopez 2 ¶ 39.

[800] Lopez 2 ¶ 39.

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

227. This notwithstanding, Respondent contends that its Agencies did not act in "anything but a commercial manner when dealing with Claimants' projects,"[802] and its termination of the Ciudad de las Artes contract was based on "commercial considerations."[803] According to Respondent, Claimants "principally" allege unpaid invoices, refusals to amend or extend contracts, and the improper termination of contracts, problems that are "fundamentally commercial."[804]

228. However, Respondent neglects to explain how the quintessentially sovereign acts highlighted in Claimants' Reply are commercial in nature. For example, Respondent dismisses the fact that as early as September 2014 the Ministry of Economy and Finance recommended only US$ 14 million for INAC's investment projects, of which only US$ 10 million was allocated for the Ciudad de las Artes Contract for 2015—a mere *fraction* of the US$ 54 million which was due to the Omega Consortium in 2015.[805] In turn, the National Assembly followed the Ministry's recommended budget, removing the funding for the Omega Consortium's largest Contract.[806] Ultimately, the INAC used the revised budget in an attempt to avoid making payments that had already been fully approved during the previous Administration.[807] As Professor Perez confirms, "[t]he Minister of Economy and Finance serves at the pleasure of the president" and "[t]he [M]inistry controls the distribution of budget items and could alter, delay or

[802] Resp.'s Reply ¶ 83.

[803] Resp.'s Reply ¶ 93.

[804] Resp.'s Reply ¶ 84, Witness Statement of Mr. Ivan Zarak dated 18 Nov. 2019 ("**Zarak**"), ¶ 14.

[805] *See* Ministry of Economy and Finance, National Budget Direction, Monthly Assignment of Expenditure Budget, 2015 (R-0037), at 3; *The Minister of Economy presents a Budget before the National Assembly's Commission*, LA PRENSA dated 10 Sep. 2014 (C-0233); Contract No. 093-12 dated 6 Jul. 2012 (C-0042 resubmitted), at 31; INAC Draft Budget for the Fiscal Year 2015 dated Apr. 30, 2014 (R-0036), at 7.

[806] *See* 2015 Budget presented by Panama's National Assembly dated 8 Sept. 2014 (C-0067 resubmitted), at 42,47,49.

[807] *See* Cls' Counter-Mem. ¶¶ 197, 200.

stop disbursement of payments at its discretion or at the behest of the executive."[808] Far from the types of actions that any commercial party could take, the combined measures of Respondent's legislative and executive branches were *quintessentially* sovereign.

229. The explanation given by Respondent and its witness former Vice Minister Zarak for the decision to slash the Project's budget is not only unavailing, but it is *littered* with references to executive and legislative actions that only a sovereign could take. Respondent and Mr. Zarak admit that *it was the MEF* that slashed the Ciudad de las Artes budget (despite the fact that under the previous Administration the INAC had requested funds for the Project's full price).[809] Respondent and Mr. Zarak admit that the proposed budget was submitted to *the National Assembly and the President's Cabinet* for final approval.[810] Respondent and Mr. Zarak admit that even after approval of the budget, the budget is subject to "continuing adjustment *by the State* as the year goes by" through budget line transfers or credits from the general budget.[811] Respondent and Mr. Zarak also admit that less than two months after the new Administration took office *it was the MEF* who abruptly decided to declare the Project "high-risk" because somehow the MEF very quickly concluded that the Project "was significantly behind schedule."[812] And Respondent itself admits that *it was the MEF* who made the decision to initiate an emergency budget line transfer to pay Credit Suisse for CPPs that the Omega Consortium had already assigned, which Mr. Zarak himself acknowledges would "require the

[808] Pérez ¶ 53 at 25.

[809] Resp.'s Reply ¶ 369; Zarak ¶ 14.

[810] Resp.'s Reply ¶ 375, Zarak ¶ 8.

[811] Zarak ¶¶ 10, 18 (emphasis added); Resp.'s Reply ¶¶ 376-77.

[812] Resp.'s Reply ¶ 381; Zarak ¶ 15. It is noteworthy that Respondent, on the one hand, argues that delays of up to a year are to be expected when it comes to the endorsement of change orders by a new Comptroller General, but on the other hand sees nothing odd in a new Minister of Finance being able to assess a project for *another* Agency as "high-risk" in just a fraction of that time.

consent of *the National Assembly's Budget Committee*."[813] This was not simply a case of the INAC acting as a mere private commercial actor—by Respondent's and Mr. Zarak's own admissions, this is executive and legislative conduct that went up to the highest levels of Government.

230. In the face of this overwhelming evidence, Respondent attempts to distract from the uniquely sovereign nature of its actions by pointing to alleged deficiencies in the Ciudad de las Artes Project, none of which were ever brought to the Omega Consortium's attention before the Project's budget was unlawfully slashed.

231. *First*, former MEF Vice-Minister Mr. Zarak states that by *September 2014*, when the MEF presented its budget recommendations to the National Assembly, the MEF was apparently aware that the Project was allegedly "significantly behind schedule" and that the Project was considered "high-risk" by the MEF.[814] However, it is unclear how (or why) Mr. Zarak could have believed that there were "serious problems" with the Project in September 2014 when Ms. Herrera, the INAC's former director, has made clear that at the time she left the INAC on 6 July 2014 (just two months prior) the Project was advancing with "no major problems with the Omega Consortium's performance" and the Omega Consortium "was *at all times* in compliance with its contractual obligations."[815] Further, and as explained above, even Sosa, the external Project inspectors, had never before August 2014, made mention of any serious problems with the Omega Consortium's performance in the Project.[816] Respondent also neglects to explain if INAC was reporting to the MEF, and if so, why it was doing so. And if not,

[813] Resp.'s Reply ¶ 377; Zarak ¶ 11 (emphasis added).

[814] Resp.'s Reply ¶ 381.

[815] Herrera ¶¶ 12, 14.

[816] *See supra* ¶¶ 131, 133, 137, 139.

how did the MEF allegedly learn such "information" so quickly? [817] Respondent's defense raises more questions than it answers. Respondent similarly fails to explain why the budget was slashed in September 2014 *immediately* after the MEF purportedly discovered these alleged deficiencies, without any further consideration.[818] While Respondent suggests that the Project was behind schedule in September 2014, this still does not explain why the MEF's response to this was to promptly slash the Project's budget by *over 80 percent*. Once again, this justification is pure pretext.

232. *Second*, Respondent contends that the MEF "cannot precisely assess how much money a Government entity will need for CPPs on a given project" and that taking into account the alleged delays, the MEF "did not have complete visibility as to the amount of money that INAC would need for the Ciudad de las Artes Project in 2015 based on the CPPs that would be due that year."[819] This excuse is similarly nonsensical. To start, Respondent has admitted that it had not allocated sufficient funds in the 2015 budget to pay the *already endorsed* CPPs that had been assigned to Credit Suisse and, thus, the MEF had to transfer money from somewhere to pay Credit Suisse.[820] Indeed "the MEF estimated US$ 10 million as projected budget for the Ciudad de las Artes Project in 2015" even though there were already approximately [redacted] in

[817] Curiously, Mr. Saltarín (the criminal law attorney hired by the office of the Presidency) met with the INAC in August 2014. *See* Activity Report from Saltarín, Arias y Asociados to Ministry of the Presidency dated 25 Jun. 2018 (C-0617). This meeting between Saltarín and the INAC occurred shortly before the MEF submitted the general budget to the National Assembly. Zarak ¶ 8 (explaining that "[o]nce that agreement between the National Assembly and the MEF has been reached, the general budget is again submitted to the cabinet, and later to the National Assembly, for final approval, which generally occurs by July 31, *except on the first year of a presidential term, during which the MEF typically submits the general budget to the National Assembly for final approval by mid-August*") (emphasis added).

[818] The MEF sent the proposed budget (which slashed the Project's funding) to the National Assembly on 8 September 2014. 2015 Budget presented by Panama's National Assembly dated 8 Sep. 2014 (C-0067 resubmitted).

[819] Resp.'s Reply ¶¶ 382-83.

[820] *See* Resp.'s Reply ¶ 387.

endorsed CPPs[821] which, under Panamanian law, represent an *irrevocable obligation* on Respondent to pay.[822] Further, the INAC (and presumably the MEF since the INAC had to request the budget) knew that CPPs 13-20 for work already completed totaled approximately [redacted] and would have to be paid.[823] And, as mentioned above, even under Respondent's theory (which Claimants deny) it is incongruous that by 8 September 2014, when the budget went to the National Assembly, the MEF would have had any reason to doubt that the Project would be completed in 2015 or to classify it as "high risk."[824] *Lastly*, and as previously discussed, the INAC had *already* requested a budget of over US$ 88 million on 30 April 2014, which included US$ 54 million for payment in full on the Ciudad de las Artes Project in 2015.[825] As such, the MEF knew *precisely* how much money the INAC would need to allocate for the completion of the Project, but it simply chose to slash its budget.

233. *Third*, Respondent contends that Claimants misinterpret Panamanian law when they alleged the MEF violated Article 19(6) of Law 22 of 2011 regarding budgetary availability

---

[821] *See* McKinnon 1, Annex 1 at 16; *see also supra* ¶ 229.

[822] As Respondent acknowledges, Resolution No. 016-12 J.D. of 22 November 2012 regulates the issuance of credits with respect to INAC projects. Resp.'s Objections ¶ 87. Article 5 of that Resolution makes clear the irrevocability of CPPs that have already been issued:

> Once issued, each Partial Payment Account shall constitute an autonomous, unconditional and irrevocable obligation of the INAC, subject only to the law and this Regulation. The issuance of each Partial Payment Account creates a payment obligation by the INAC for the amount indicated in the corresponding Partial Payment Account, payable by the INAC to the contractor or Assignees, as applicable, with no deduction, withholding or allocation whatsoever, on the date stipulated in each Partial Payment Account, even in the event of early termination, suspension or administrative cancellation of the respective contract for any reason and regardless of whether or not there is a dispute between the INAC and/or any other government entity and the contractor and/or any guarantor thereof with respect to any issue, whether or not related to the project, including, but not limited to, the fact that the project has not been completed and/or delivered or that the delivered goods covered by the contract have not met the anticipated specifications.

Resolution No. 016-12 J.D. dated 22 November 2012, (R-0035) art. 5.

[823] *See* McKinnon 1, Annex 1 at 16; *see also* Cls' Counter-Mem. ¶ 135.

[824] *See supra* ¶ 131, 133, 137, 139, 229, 231 n.817; *see also infra* ¶ 273.

[825] *See* INAC Draft Budget for the Fiscal Year 2015 dated Apr. 30, 2014 (R-0036), at 7; Contract No. 093-12 dated 28 Dec. 2014 (C-0042 resubmitted).

when selecting a contractor, noting that INAC had budgetary availability when it selected the Omega Consortium as contractor in 2012 and "[t]he fact that, three years later, budgetary allocations for the project may have changed, does not violate that article."[826] But this ignores the reality of the situation. As revealed publicly in November 2019, decisions over the amounts that were budgeted to particular projects came directly from the President, as Mr. Varela personally would give instructions to Economy and Finance Minister de la Guardia and Vice Minister Zarak over which allocations were to be budgeted to specific projects.[827] In other words, President Varela was bestowing and removing funding at will, without regard to legitimate "budgetary allocations."

234. Ultimately, the MEF's decision to slash the budget for the Ciudad de las Artes Project was a concerted effort by both Respondent's executive and legislative branches, one which an ordinary commercial actor could not undertake.

c. The INAC Unlawfully Terminated the Contract by Administrative Resolution, Leaving the Omega Consortium Unable to Bid on Public Work Projects

235. As Claimants have previously explained, the INAC's termination of the Ciudad de las Artes Contract through an administrative resolution was not merely a commercial act, but rather something only a Government can issue. Through this sovereign action the INAC not only terminated Claimants' largest Contract (representing approximately 25% of Claimants' investment in Panama), but it immediately precluded Claimants, by law, from participating in *any* other bids for at least a period of three years.[828] Respondent ignores this point, and instead

[826] Resp.'s Reply ¶ 388.

[827] See *infra* Section II.B.8.

[828] Cls' Counter-Mem. § V.D.6, ¶ 431.

simply claims that "[t]here is nothing inherently sovereign" in the termination of a contract.[829] This is wrong, and merely repeating it does not make it correct.

236. In one swift (illegal) action, Respondent ensured that the Claimants would lose almost a quarter of the value of their contracts and would not be able to bid on more projects in an effort to continue growing their investments through the Omega Consortium. And, although this ban would be in effect through December 2017, on 11 January 2017 Respondent followed with another termination through administrative resolution, terminating the Municipality of Panama Contract[830] and ensuring that the Omega Consortium would remain precluded from participating in any public works bids in Panama until February 2020.[831] This was not a coincidence, nor was it a consequence that a private actor could bring upon a counterparty by simply terminating a contract—only a sovereign authority could bring about such an effect.[832]

237. Thus, the INAC's administrative resolution terminating the Contract, more than simply ending a private commercial relationship, was a sovereign act that destroyed Claimants'

[829] Resp.'s Reply ¶ 84.

[830] Resolution No. C-010-2017 dated 11 Jan. 2017 (C-0234).

[831] List of Debarred Companies, PANAMACOMPRA (C-0443)

[832] The INAC's administrative resolution terminating the Ciudad de las Artes Contract was not simply based on commercial reasons, as Respondent argues. As Claimants established in their Counter-Memorial, and again in the previous sections, the resolution was unfounded, pretextual, unlawful, and illegitimate. Cls' Counter-Mem., § V.D. That Respondent did not act in good faith when it issued the administrative resolution terminating the Ciudad de las Artes Contract is evidenced by the fact that, while Claimants were doing everything they could to find solutions that could help the Project move forward, the INAC met with Mr. Saltarín repeatedly between August 2014 and March 2015—that is, before and after issuing the termination resolution. As previously discussed, Mr. Saltarín was directly hired by the Office of the Presidency to gather evidence to build criminal cases and illegitimately influence the prosecutorial work of the Attorney General's office. Respondent tries to minimize Mr. Saltarín's role by claiming that he was hired only to investigate Government officials. Resp.'s Reply ¶ 341. But Respondent provides no support for this assertion except for a quote from a news article submitted by Claimants that says that Mr. Saltarín was to be responsible for "corruption cases in connection to members of the Martinelli Administration." Resp.'s Reply ¶ 341 n.718. Not even this quote supports Respondent's false assertion. "In connection to" does not mean "exclusively." The reality is that Mr. Saltarín's contract contains no such limitation. *See* Saltarín 2014 Contract No. 063-14 with the Ministry of the Presidency dated 14 Nov. 2014 (C-0529). He was hired specifically to gather evidence to build criminal cases for the Office of the President—there is no language indicating that such cases were to be brought exclusively against public officials. When it issued the termination resolution, the INAC did not simply terminate a Contract—rather, it was acting in concert with the executive branch through repeated meetings with Mr. Saltarín, serving as a tool for the Varela Administration to destroy Claimants and their investments.

ability to bid on any public projects—which was the intention of the Varela Administration from the beginning.

4. While Causing the Remaining Contracts to Lapse, the Government also Demanded that the Omega Consortium Continue Working on the Projects Knowing that the Omega Consortium Could Not Bill for Work Performed under Lapsed Contracts

238. Respondent's "commercial" objection to Claimants' case is also a thinly veiled attempt to deny the treaty claims at stake here of their collective nature.[833] As discussed further below, Respondent cannot be successful in splitting up this arbitration into eight, separate disputes simply by labelling certain construction contracts underlying Claimants' investment as "commercial," because that would mean *no tribunal* would remain to judge Respondent's combined, sovereign action across those eight contracts.[834] This becomes readily apparent when one considers the manner in which various branches of the Panamanian Government acted—*in unison*—in causing Claimants' contracts to lapse, while simultaneously demanding that Claimants continue to perform.

239. Through the actions (and intentional inactions) of the Comptroller General's Office, aided by the different Ministries and Agencies, Respondent caused all the remaining Contracts to lapse. Despite this, Respondent demanded that the Omega Consortium continue working on the Projects, knowing full well that the Omega Consortium could not bill for work performed under lapsed Contracts and that the Panamanian Government never intended to extend the Contracts any further. The Omega Consortium was thus locked in a vicious cycle of obligatory-work-for-no-pay that would ultimately result in the financial strangulation of Claimants' investment.

---

[833] *See generally* Resp.'s Reply § II.B.2.

[834] *See infra* ¶ 349.

240. The first aspect of the vicious cycle was a consequence of Respondent's unreasonable and arbitrary failure to grant the Omega Consortium routine extensions to Contracts for delays caused by its Agencies.[835] As explained *supra*, Respondent did so primarily through the Comptroller General's Office, by rejecting the endorsement of necessary change orders,[836] but also through the contracting Ministries and Agencies, which either did not respond to the Omega Consortium's requests for time extensions or sent to the Comptroller General's Office deficient documentation so that the Comptroller General could pretextually reject the endorsement, or failed to assist in obtaining required permits.[837] The lack of endorsement meant that the Omega Consortium would have expired (not valid) contracts, and thus, could not receive payment for the work performed and completed under those contracts.[838] And this was happening to all the Contracts at the same time, quickening the financial strangulation.[839]

241. Despite the Omega Consortium's efforts, by March 2015, Respondent had forced six of the eight Contracts to lapse.[840] Respondent's proffered defense is that the three MINSA Capsi Projects had actually expired during the previous Administration. While this is true, Respondent neglects to mention that Claimants formalized the time extensions during the previous Administration, which were at the Comptroller General's Office awaiting endorsement when Mr. Varela won the election.[841] These time extensions (in the form of change orders) were

[835] *See supra* ¶¶ 149, 155-56, 170, 172, 204, 214, 217-19, 225.

[836] *See supra* Section II.B.2.

[837] *See supra* Section II.B.2.

[838] Lopez 2 ¶ 26.

[839] Lopez 2 ¶ 26.

[840] Cls' Counter-Mem. ¶ 268.

[841] Addendum No. 4 to Contract No. 077 (2011) dated 7 May 2014 (C-0106 resubmitted 2), Addendum No. 3 to Contract No. 085 dated 7 May 2014 (C-0108 resubmitted), Addendum No. 4 to Contract No. 085 (2011) dated 7 May 2014 (C-0171). During the previous Administration, even when the Contracts lapsed, the agencies continued working with the Omega Consortium and showed a proactive attitude towards the projects and the completion of them. *See Supra* ¶¶ 126, 141, 152, 175. The proactive attitude disappeared once Mr. Varela assumed power.

wrongly rejected by the Comptroller General's Office *after* Varela took office, which was the precipitating act (or failure to act) that caused the contracts to truly lapse.[842]

242. In addition to the six lapsed Contracts, the INAC terminated the Ciudad de las Artes Contract by administrative resolution, as addressed above, and Panama then forced the remaining Contract, the Municipality of Colon Contract, to lapse a few months later in July 2015.[843] Thus, *within a year* of President Varela's inauguration, *all eight of the Omega Consortium's Contracts had been terminated or forced to lapse*, and the Omega Consortium had been precluded from bidding on further public works contracts, dooming Claimants' investment. Against this backdrop, Respondent continues to argue that the Omega Consortium was contractually obligated to continue work even though it had not been paid on any of the Contracts for *over a year,* and would not be able to get paid in the future for work completed under a lapsed contract.[844] Even though Respondent acknowledges that "[it] can be difficult for contractors if they have a requested extension of time and the completion date in the original contract passes while the extension request is under review," according to Respondent, "[p]ending the endorsement of the addendum, the contractor is still obligated to work on the project, even though this can mean they will not receive payment until after the addendum is endorsed."[845] This may be true in ordinary circumstances, but this logic does not hold up when the Government has withheld endorsement of virtually ***all*** change orders and payment applications in ***all*** of a contractor's projects for an unreasonable amount time (sometimes indefinitely) and based on reasons that are nothing more than pretexts.

---

[842] *See supra* Section II.B.2.

[843] *See supra* ¶ 242.

[844] Cls' Counter-Mem. ¶ 144; Lopez 1 ¶ 83.

[845] Resp.'s Objections ¶ 58.

243. Claimants' Gordian Knot of competing obligations is demonstrated by the MINSA Capsi Contracts, where Respondent expected the Omega Consortium to continue working despite the lack of valid Contracts, and thus lack of payment, ultimately forcing the Omega Consortium to reduce its personnel on the Projects in October 2014.[846] Respondent contends that MINSA worked with the Omega Consortium with the goal of completing the MINSA Capsi Projects. While Respondent cites to a technical justification report from July 2014 in support of its position, it fails to mention that MINSA acknowledged in the report that "the work schedule is *affected directly by the lack of validity of the contract*, which makes it impossible to give continuity and approval to the presentation of the work progress, and therefore the Certificates of No Objection (CNO) cannot be delivered to the Transferee, [thereby] *reducing the cash flow*."[847] Respondent's own evidence thus proves that it knew as early as *July 2014* that the lack of a valid contract and subsequent cash flow was negatively impacting the Omega Consortium's progress on the Project. But instead of endorsing the already formalized change orders, the Government used that opportunity to reject them and then stall them (in most cases indefinitely).[848] Respondent also cites to a September 2014 letter where MINSA requested that the Omega Consortium submit a new adjusted schedule for the completion of the Rio Sereno, Kuna Yala, and Puerto Caimito Projects,[849] which the Omega Consortium did upon receiving the letter.[850] Once again, however, the Comptroller General's Office refused to endorse the change orders that would make the Contracts valid.

---

[846] Letter from Omega to SUNTRACS dated 1 Nov. 2015 (C-0589).

[847] Minutes of Meeting between the Ministry of Health and Omega Engineering, Inc. dated 18 July 2014 (C-0361) (emphasis added).

[848] *See supra* ¶ 185, 242; *see generally supra* Section II.B.2.

[849] Note No. 024 DI-DIS 2014 from the Ministry of Health to Omega dated 3 Sept. 2014 (R-0032).

[850] Letter No. MINSA-PC-56 from Omega to MINSA dated 11 Sept. 2014 (C-0581); Lopez 1 ¶ 109.

244. Similarly, with the Ciudad de las Artes Project, Respondent's external inspector, Sosa, was well aware that the Omega Consortium was not getting paid for its work, and that *this* was seriously affecting Omega's cash flow, productivity, and progress on the Project.[851] Respondent ignored Sosa's contemporaneous advice, yet now seeks to fault Claimants alone for the lack of progress on the Project.[852] This belies reality and common-sense; any company strangled of cash flow will display a concomitant decrease in productivity and progress. Respondent's position is especially spurious when one considers that Respondent has expressly acknowledged that payments, and thus the much needed cash flow, was intentionally withheld from the Omega Consortium by INAC's Varela-appointed Director.[853]

245. The second aspect of the vicious cycle created by Respondent revolved around the issuance of "Certificates of Good Standing" (*Certificados de Paz y Salvo*). As explained *supra*, in order to be able to get paid for their work in Panama, contractors have to submit a Certificate of Good Standing with their payment applications. This Certificate can only be obtained when companies do not have any debts with the Social Security Administration or other tax authorities. The Comptroller General's refusal to pay the Omega Consortium for over a year on virtually all of its Contracts naturally injured Claimants' cash flow to the point that they were illiquid, and the Omega Consortium thus owed the Social Security Administration just under [redacted][854] causing it to lose its ability to obtain a Certificate of Good Standing and renew the various projects' bonds. This was a final blow to the Omega Consortium's ability to ever collect payment on work it had already performed, and which already had been approved by the relevant

[851] Monthly report from Sosa to INAC dated Oct. 2014 (C-0524), at 3.

[852] Letter No. SA-CDA-078-14 from Sosa to INAC dated 22 Aug. 2014 (C-0592); Letter No. SA-CDA-128-14 from Sosa to INAC dated 5 Dec. 2014 (C-0715); Monthly report from Sosa to INAC dated Oct. 2014 (C-0524).

[853] Resp.'s Reply ¶ 312; Buendia ¶¶ 17-19.

[854] Cls' Counter-Mem. ¶ 144.

Government agency, because what little payment was approved by the Comptroller General's Office went straight back into the State's coffers, as discussed above.[855] It was also a way to ensure that the Omega Consortium could never recover from the financial strangulation created by Panama.

5. Notwithstanding Respondent's Attacks Against the Omega Consortium's Projects, Claimants Remained Committed to Completing the Projects

246. In yet another attempt to characterize its own illegality as merely "commercial" in nature, Respondent repeatedly asserts that Claimants "abandoned" their work in Panama.[856] There is "nothing inherently sovereign," according to Respondent, in terminating a contract when your contractual counterpart abandons the project.[857] Respondent claims that Omega "had no intention of carrying out its works,"[858] so Respondent acted as any rational commercial party would and terminated the contracts. This argument fails on all fronts.

247. That Claimants remained committed to completing the Projects and did *not* abandon them despite continued and relentless attacks by the Government is evident from the record.[859] As Claimants have demonstrated and Mr. Lopez has confirmed, while there was a slow-down in the physical works of the projects by the end of 2014,[860] in no way did the Omega Consortium abandon the Projects.[861] Rather, the Omega Consortium maintained its key

[855] *See supra* ¶¶ 199, 245.

[856] *See, e.g.*, Resp.'s Reply ¶¶ 84, 93, 104, 117, 119, 124, 125.

[857] Resp.'s Reply ¶ 84.

[858] Resp.'s Reply ¶ 104.

[859] *See supra* Section II.B.5; Cls' Counter-Mem. § II.B; López 1 § VIII; López 2 ¶¶ 9, 32, 44, 50, 66; Barsallo 1 ¶ 14.

[860] Cls' Counter-Mem. ¶ 153; Lopez 1 ¶ 81; Lopez 2 ¶¶ 9, 32.

[861] Lopez 2 ¶ 9.

personnel until mid-2015, and even kept security agents on the ground to safeguard the physical integrity of the Projects.[862]

248. Nonetheless, and despite the evidence to the contrary, Respondent still makes the baseless allegation that the Omega Consortium abandoned the Projects in October/November 2014.[863] To make this point it relies (out of context) on Mr. Rivera's testimony that, "[a]s a result of the financial difficulties inflicted on me by Panama, we were left with no option but to abandon some projects in the country in October and the rest in late November 2014."[864] In his latest Witness Statement, Mr. Rivera clarifies the meaning of his prior testimony, which is that the Omega Consortium effectively had to stop *physical* work on the Projects around that time because Panama left the Omega Consortium with no other choice, and that temporarily halting physical work on the Projects is far from saying that Omega "abandoned and fled Panama."[865]

249. This semantic discussion aside, the record evidence and *Respondent's own witnesses* confirm that the Omega Consortium did not abandon the Projects in October/November 2014.

250. With respect to the MINSA Capsi Projects, Mr. Barsallo confirms that Claimants continued work on the Projects until at least 2015.[866] Respondent alleges that the payment applications for the Projects shows that work on the Kuna Yala Project had only advanced by 0.01 percent, and that the work on the Puerto Caimito and Rio Sereno Projects allegedly stopped in October 2014 because the Omega Consortium did not submit any payment applications for

[862] Lopez 2 ¶ 44.

[863] Resp.'s Reply ¶ 261.

[864] Rivera 1 ¶ 129.

[865] Rivera 3 ¶ 40.

[866] Barsallo 1 ¶ 14.

work after that point.[867] By introducing these arguments, however, Respondent is again highlighting (and seeking to benefit from) the vicious cycle in which it trapped the Omega Consortium. The reason why the Omega Consortium could not submit payment applications for its MINSA Capsi Projects was that it did not have valid contracts; the reason why it did not have valid contracts was because the Comptroller General's Office had refused to endorse the necessary change orders.[868]

251. Respondent also asserts that the Omega Consortium admitted in contemporaneous documents to having reduced personnel in October 2014,[869] and subsequently suspended some work, halted the purchase of products, and reduced personnel in December 2014.[870] This allegation is inaccurate and thus misleading. *First*, in the December letters, the Omega Consortium merely communicated that it was going on winter break.[871] *Second*, since the Omega Consortium was not getting paid for the work performed in the different Projects, it is hardly surprising that it had to slow down the physical construction, something the Omega Consortium had done in the past without any negative feedback from MINSA.[872] *Third*, a mere slowdown (or even cessation) of physical construction does not mean that the Projects were entirely abandoned. In fact, the permanent employees of the Omega Consortium, some construction workers, and security personnel all remained on the project through March 2015.[873]

---

[867] Payment Applications for Contract No. 083 (2011), various dates (C-0336); Certificates of No Objection for Contract No. 083 (2011) (C-0260); Resp.'s Reply ¶¶ 262-63.

[868] Lopez 2 ¶ 28.

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

[870] Letter MINSA-55PC from Omega to the Ministry of Health dated 18 Dec. 2014 (R-0092); Letter MINSA-55KY from Omega to the Ministry of Health dated 18 Dec. 2014 (R-0093).

[871] Letter MINSA-55PC from Omega to the Ministry of Health dated 18 Dec. 2014 (R-0092).

[872] Lopez 2 ¶ 28.

[873] Lopez 2 ¶ 9.

While Mr. Barsallo (unconvincingly) attempts to backtrack on his statement that the projects were ongoing in late 2015, he nevertheless acknowledges that "Omega and MINSA were still attempting to agree on a solution to the Projects via correspondence"[874] well into 2015.

252. Similarly, the Omega Consortium remained committed to completing the La Chorrera Project despite the fact that the Judiciary was uncooperative.[875] While Respondent maintains that the La Chorrera Project was abandoned no later than December 2014,[876] this allegation is belied by the record.

253. *First*, in December 2014, the Omega Consortium informed the Judiciary that it was going on winter break until 12 January 2015, *but that it would later resume work*.[877] It did not say that it was abandoning the project permanently. This is confirmed by Mr. Lopez, who declares that subcontractors and security personnel were still working on the Project during the first months of 2015.[878]

254. *Second*, if the Omega Consortium had indeed abandoned the La Chorrera Project it would not have even bothered to reply to Respondent's attempt to terminate the Contract.[879] But in response to that termination notice, which was sent on 11 March 2015, the Omega Consortium replied with its own communication, explaining that the termination was not valid because the delays involved were attributable to the Judiciary and that the Omega Consortium's intention was to continue to work in order to complete the Project upon the Judiciary's issuance

[874] Barsallo 2 ¶ 31.

[875] *See Supra* §§ II.B.1.e, II.B.5.

[876] Resp.'s Reply ¶¶ 104, 290.

[877] Letter from the Omega Consortium to the Judiciary dated 17 Dec. 2014 (C-0367).

[878] Lopez 2 ¶ 50.

[879] Lopez 2 ¶ 49.

of pending plans, payments, and Contract extensions.[880] Thereafter, the Judiciary's own Director of General Services acknowledged that the termination resolution had been wrongful.[881]

255. The Omega Consortium also remained committed to completing the Ciudad de las Artes Project, but INAC's inexplicable decision to withhold CPP payments for work already performed by the Omega Consortium on the Project, discussed *supra*, seriously impacted the Omega Consortium's cash flow and its progress.[882] Respondent's argument that the Omega Consortium abandoned the Ciudad de las Artes Project by 21 November 2014[883] because it had allegedly removed all of its personnel and suspended the works in their entirety[884] is patently false. As with the other Contracts, the Omega Consortium had to slow down the physical construction of the Project, but the Project's key and administrative personnel, as well as the security team remained onsite at least until mid-2015.[885] In addition, the Omega Consortium engaged in meetings and wrote at least six letters to INAC and Sosa between August and December 2014 in an effort to continue working on the Project.[886]

256. With respect to the Municipality of Panama Project, while Respondent argues that by April 2015 the Omega Consortium had disappeared and abandoned the Project,[887] it does not cite to a single document in support of this proposition. Instead Respondent solely relies upon

---

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

[881] *See Supra* ¶ 172.

[882] Monthly report from Sosa to INAC dated Oct. 2014 (C-0524), at 3.

[883] Resp.'s Reply ¶ 93.

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

[885] López 2 ¶ 44.

[886] Letter from Omega to Sosa dated 5 Sept. 2014 (R-0045); Letter No. INAC-N14-2014 from Omega to INAC dated 2 Oct. 2014 (C-0586); Letter No. INAC-N16-2014 from Omega to INAC dated 16 Oct. 2014 (C-0597); Letter No. SOSA-04-A-2014 from Omega to Sosa dated 31 Oct. 2014 (C-0714); Letter No. INAC-N18-2014 from Omega to INAC dated 21 Nov. 2014 (C-0599); Letter No. SOSA-07-D-2014 from Omega to Sosa dated 22 Dec. 2014 (C-0600); Email from Frankie Lopez to Mariana Nunez dated 13 Oct. 2014 (C-0699).

[887] Resp.'s Reply ¶ 125; Diaz 1 ¶ 27.

the testimony of Mr. Diaz, who only began working for the Municipality of Panama in *August 2016*, well after the events in question, and thus has no firsthand knowledge of the Omega Consortium's alleged abandonment of the Project.[888] Respondent continues that Claimants' evidence that they did not abandon the Project, namely a letter dated April 2015 and follow-up correspondence,[889] is irrelevant because Mr. Diaz never saw the follow-up to the letter and "the follow-ups are simply identical copies of the letter with dubious hand-written and computer-generated notes that purport to signal that a follow-up was sent, and they do not even have a stamp from the Municipality confirming receipt."[890] However, as discussed, Mr. Diaz was not employed by the Municipality at this time, and Claimants have now submitted the follow-up emails to confirm their authenticity.[891]

257. Respondent further cites to the witness statements of Messrs. Rivera and Lopez to allegedly prove the Omega Consortium's abandonment of the Projects,[892] asserting that in April 2015, the Omega Consortium dismissed almost all of its personnel and that only five employees in administrative or executive roles remained thereafter. But, as explained *supra*, what Mr. Rivera meant when he said that the projects were abandoned in 2014 was that the Omega Consortium had to temporarily stop physical work on the Projects, which is completely different from saying that Omega "abandoned and fled Panama."[893] In addition, Mr. Lopez's testimony does not evidence that the project was abandoned, but only that after April 2015 the key

[888] Diaz 1 ¶ 27, Diaz 1 ¶ 6.

[889] Letter from the Omega Consortium to City Hall of Panama dated 8 Apr. 2015 (C-0184); Follow-up to Letter No. P010 – 2015 4 08 – 010 dated 1 June 2015 (C-0612).

[890] Resp.'s Reply ¶¶ 230-31.

[891] Follow-ups of Letter No. P010-2015-4-08-010, various dates (C-0807)

[892] Resp.'s Reply ¶ 232.

[893] Rivera 3 ¶ 40.

personnel *still remained in Panama*.[894] And the reason that the Omega Consortium was forced to dismiss the rest of the employees was the lack of cash flow and financial strangulation it had suffered at the hands of Panama. Indeed, by then Panama owed the Omega Consortium close to [redacted] in completed work on all of the Projects.[895]

258. The Omega Consortium similarly remained committed to completing the Mercado Público de Colón Project, despite Respondent's obstructionist efforts. Following an initial meeting with Andres Camargo, the Director of the Secretariat of Cold Chain in late 2014, the Omega Consortium realized that no one in the new Administration was addressing its problems with the Contract.[896] Consistent with that, the Omega Consortium was unable to meet with representatives of the Ministry of the Presidency again until June 2015, over *six months* later.[897] While the Omega Consortium was committed to resuming work, some Contract terms had to be modified to recover the economic equilibrium of the Contract, in addition to several other issues that needed to be resolved, all of which the Omega Consortium explained to the Ministry of the Presidency.[898] But the Omega Consortium ultimately learned that the new Administration had never sent the Comptroller General the change order signed by the Ministry of the Presidency and the Omega Construction in May 2014, during the previous Administration, for endorsement.[899] This prevented the Contract from moving forward. Thus, if someone "abandoned" the Mercado Público de Colón Project, it was the Ministry of the Presidency, and

[894] Lopez 1 ¶ 79

[895] Lopez 1 ¶ 106.

[896] Lopez 1 ¶ 151.

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

[898] Email Chain between Onelia Delis, Andres Camargo and Francisco Feliu dated 27 May 2015 (C-0622).

[899] Lopez 1 ¶ 153; Cls' Counter-Mem. ¶ 57.

not the Omega Consortium, which had repeatedly demonstrated its willingness to uphold its end of the Contract in spite of Respondent's failure to do so.

259. Finally, the Omega Consortium also was committed to completing the Municipality of Colon Contract. Respondent maintains that Mayor Policani wrote to the Omega Consortium, in September 2015, informing it that the Municipality wanted to begin construction works and requesting that the Omega Consortium renew its completion bonds,[900] but that the Omega Consortium allegedly replied one month later not having renewed the bonds, which is why the Municipality declined to engage in further discussions with the Omega Consortium.[901] This is incorrect. Respondent neglects to mention that the Omega Consortium's response is full of complaints regarding: (1) the lack of payments by the Municipality; (2) the fact that the Municipality had to date (28 September 2015) not made any comments regarding the Omega Consortium's new proposal for the construction of the Municipal Palace on the new site; (3) the Omega Consortium's expressed willingness to sign a new addendum but only if it addressed the necessary budgetary, technical, and physical issues; (4) the request for a meeting with the Municipality's technical team to discuss these issues; and (5) the need to discuss the change order *before* renewing the bonds.[902] Thus, it is clear now—and it was clear to the Municipality then—that with no formal negotiations in place to address the change order issue, it was an impossibility for the Omega Consortium to renew the bonds. Once again, it was Respondent's obstructionist posture that led to the Project's downfall.

260. In the end, the issue boils down to the fact that the Omega Consortium was forced to reduce its personnel and, with that, the physical progress on the Projects, towards the end of

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

[901] Letter No. P08-014 from Omega to the Municipality of Colón dated 28 Sept. 2015 (C-0610); Resp.'s Reply ¶ 416.

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

2014 as a result of Respondent's refusal to pay the Omega Consortium for completed work and to endorse change orders to extend the validity of the Contracts. Despite the precarious financial position that Respondent created for the Omega Consortium, through most of 2015 the Consortium bore the cost of: (i) maintaining its key employees in Panama in an effort to negotiate solutions with the Government to complete the Projects; and (ii) maintaining security personnel at all of the Project sites to ensure their safety. Far from abandoning the Projects (as Respondent wrongly maintains), the Omega Consortium's actions show its willingness to find solutions to what quickly became an untenable situation created by the Government, and which ultimately destroyed Claimants' entire investment.

6. Through the Attorney General's Office, the Government Opened Baseless Criminal Investigations Into Mr. Rivera and His Companies, Which Remain Open and Unresolved After Almost Five Years

261. In a tortured bit of reasoning, Respondent appears to embrace its own unlawful police conduct toward Claimants while maintaining its jurisdictional position that the claims before this Tribunal only encompass "commercial" allegations.[903] It goes without saying that business parties have no police powers—only sovereign states do. Respondent abused those powers in a manner that clearly transcended "commercial" conduct. It must be held accountable.

262. As Claimants established in their Reply, Respondent's attacks on Claimants and their investment included improperly using its criminal law apparatus in multiple ways.[904] For instance, Respondent's criminal authorities issued a detention order and INTERPOL Red Notice request against one of the Claimants and one of their employees, seized Claimants' bank

[903] Resp.'s Reply ¶ 83 ("[T]he Claimants attempt to disguise their claims through assertions of sovereign action and nefarious intent. However, there is no evidence that the various ministries and municipalities acted in anything but a commercial manner when dealing with the Claimants' projects. And, as discussed above, the government was fully justified in exercising its police powers to investigate Mr. Rivera's and Omega Panama's corrupt activities.").

[904] Cls' Counter-Mem. ¶¶ 321-22.

accounts, prevented Claimants from overseeing their investments, and ultimately helped destroy those investments.[905] Respondent does not deny that these are actions that only a State could carry out, and Respondent does not deny that the (illegitimate) exercise of such police powers negatively affected Claimants' investments.

263. Respondent instead attempts to excuse its behavior in two ways. *First*, Respondent states simply that it is entitled to use its police powers to investigate Claimants.[906] And *second*, Respondent argues that the investigations into Claimants did not arise out of Claimants' investment because Panama initially investigated Justice Moncada Luna based on complaints filed by Panamanian bar associations, and that the investigation into Claimants was a mere byproduct of that investigation.[907] Neither of these arguments withstands scrutiny.

264. *First*, it is trite law that a State cannot use its authority (through police powers or otherwise) to harass or otherwise illegitimately persecute a foreign investor.[908] But this is exactly what happened here.[909] Mr. Rivera suffered the consequences of three investigations: the Moncada Luna investigation (in which the Omega Panama accounts were seized), the corruption investigation, and the money-laundering investigation. The latter resulted in a detention order[910] against Mr. Rivera, and an Interpol Red Notice.[911] And just recently—based on the Tribunal-ordered disclosure of the files Respondent provided to Mr. Pollitt—Claimants have learned that

[905] Cls' Counter-Mem. ¶ 322; § V.E.

[906] Resp.'s Reply ¶¶ 83, 129

[907] Resp.'s Reply ¶ 188.

[908] *See Yukos* (CL-0135) ¶¶ 759, 765, 820, 1579-85 (finding that it is within the scope of an investor-State tribunal's jurisdiction to consider allegations of harassment and intimidation and ultimately concluding that a "campaign of harassment carried out by the [host State] under the cloak of 'investigative activities'" that "not only disrupted the operations of [the investor] but also contributed to its demise" breached the host State's obligations under international law).

[909] *See supra* Sections II.B.6-8.

[910] Resolution of Detention No. 052-15 dated 25 Aug. 2015 (C-0093 resubmitted).

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

Respondent also sought the extradition of Mr. Rivera from the United States, which was denied by the U.S. Department of Justice on the grounds that the evidence of criminal conduct was insufficient.[912] In doing all of this, Respondent unquestionably affected Claimants' investment in Panama, both by precluding Claimant Mr. Rivera from overseeing and managing the investment, but also by causing catastrophic harm to the reputations of Mr. Rivera and the Omega brand.[913] Accordingly, whether Respondent's use of its police powers was abusive is a merits question that properly belongs to the Tribunal.

265. At this point Respondent confuses a jurisdictional point with a substantive one. In Respondent's world "[g]overnments [. . .] are not subject to international liability when the exercise of those powers implicates a foreign investor or foreign investment, causing financial harm [. . .] International investment law was never intended to hold governments liable for such actions."[914] As Claimants demonstrated previously, Respondent's position mischaracterizes the jurisprudence, and it is contrary to one of the most basic purposes of international investment protection law, which is to bring claims of abuse of state power that hurts foreign investment before an international tribunal for evaluation.[915] The "rule" Respondent seeks to apply is blanket immunity for all State acts couched as an exercise of police powers; in other words, if Respondent had its way, no Tribunal could ever evaluate whether a State abused its investigative

[912] Jimenez 2 at 23; Letter from Panama's Foreign Affairs Ministry to Panama's Office of the Attorney General attaching the U.S. State Department's Denial of Panama's Request of a Provisional Arrest for the Purpose of Extraditing Mr. Rivera, 29 Feb. 2016 (C-0900).

[913] Cls' Counter-Mem., ¶¶ 321-22, 365.

[914] Resp.'s Reply ¶ 129

[915] *See* Cls' Counter-Mem. ¶¶ 371 & n.1026, 384, 403-04 & n.1112, 410, 424, 429 n.1206.

powers to harass foreign investors. That cannot be right, and, indeed, myriad investor-State decisions prove it is wrong.[916]

266. *Second*, Respondent is incorrect to state that its investigation into Claimants was simply a "byproduct of the criminal investigation and prosecution of Justice Moncada Luna."[917] The record demonstrates that the investigation was squarely trained on Claimants' investment, in particular the Omega Consortium's La Chorrera Project. This much is admitted by Respondent and its expert Mr. Pollitt. Indeed, as discussed *supra*, in its pleadings in *this arbitration*, Respondent ties the criminal investigations of Claimants to the La Chorrera Contract no less than *eighteen* times.[918] Claimants' expert, Ms. Jimenez has identified that, during the Moncada Luna investigation, Respondent's authorities curiously failed to conduct a thorough investigation and overlooked numerous *other* potential sources of the funds paid to Mr. Moncada Luna, by instead focusing myopically (and illogically) on Mr. Rivera and Omega Panama. And Mr. Pollit, Respondent's own expert, also acknowledges that the criminal investigations were related to the La Chorrera Contract.[919] To now argue that the criminal investigations were entirely unrelated to Claimants' investment is disingenuous.

---

[916] *See*, *e.g.*, *Unglaube v. Costa Rica*, ICSID Case No. ARB/08/1, Award dated 16 May 2012 (CL-0095), ¶¶ 246-47 (stating that even though police powers of states are owed a measure of deference, "[e]ven if such measures are taken for an important public purpose, governments are required to use due diligence in the protection of foreigners and will not be excused from liability if their action has been [unlawful]"); *Yukos* (CL-0135) ¶¶ 759, 765, 820, 1579-85; *Asian Agricultural Products Lts v. Sri Lanka*, ICSID Case No. ARB/87/3 Award dated 27 June 1990 (CL-0060), ¶¶ 67, 72-78; *Wena Hotels v. Egypt*, Award dated 8 Dec. 2000 (CL-0010), ¶ 84.

[917] Resp.'s Reply ¶ 188.

[918] *See supra* n.20.

[919] Pollitt, p. 7 (indicating that "[t]he investigation determined that the unjust enrichment, corruption and money laundering allegations were, in part, rooted in suspicious payments from Omega Panama, a general contractor (whose contract for a $16 million courthouse in La Chorerra, Panama was authorized and executed by Justice Moncada Luna) to Justice Moncada Luna via a company to which he possessed direct transactional access, Sarelan)."

7. Contemporaneous Communications with Government Officials and Individuals Close to the Government Confirm this Multi-Faceted Attack was Directed by President Varela

267. Should the Tribunal have any remaining doubt that the unlawful conduct committed by Respondent was not undertaken by commercial business people but rather by *sovereign actors* fulfilling *sovereign roles*, the Tribunal need not look any further than the contemporaneous documents in this record. As discussed below, and as previously discussed by Claimants, the record contains a myriad of evidence indicating that the decision to attack Claimants' investments stemmed from then-President Varela himself. This includes communications between Government officials and representatives and lawyers of the Omega Consortium, Mr. Varela's decision to hire a private law firm that investigated Claimants and their investments, and Mr. Varela's habitual abuse of authority, as now confirmed by contemporaneous WhatsApp conversations Mr. Varela engaged in, made public in November 2019.[920]

268. Respondent falsely alleges that Claimants "have presented no evidence to substantiate these allegations" and that Claimants only "rely on uninformed speculation, unnamed sources, and statements from individuals not called as witnesses in this proceeding."[921] This *ipse dixit* is belied by the record. The attacks against Claimants' investment came from the highest levels of the Panamanian Government, and these actions constitute much more than mere commercial activity—they constitute gross abuses of sovereign power.

269. *First*, contemporaneous communications between Omega Consortium employees and Government officials confirm that it was Mr. Varela and his Administration that ordered the

[920] *See infra* Section II.B.8.

[921] Resp.'s Reply ¶ 133. As the Tribunal can certainly appreciate, potential witnesses living and working in Panama have been reluctant to appear in these proceedings for fear of retribution by the State. Claimants' Counsel have spoken with several such potential witnesses who have refused to appear in this arbitration for this reason.

attacks against Claimants and their investments. Respondent falsely claims that the statements made to Mr. Lopez are unreliable because they are anonymous and they amount to hearsay.[922] Not so. Many of these statements are contemporaneous admissions by Respondent's officials and Mr. Lopez has identified the individuals who made such statements. For instance:

- On 26 November 2015, Victor Almengor, an in-house attorney at the Colón Municipality, told Mr. Lopez that Mr. Varela wanted to rescind the Omega Consortium's contract with that entity. [923]

- On 3 December 2015, Mr. Mandarakas, an engineer working for the Judiciary in the La Chorrera Project, told Mr. Lopez that the decision to terminate the La Chorrera Contract had come from above.[924]

- Mr. Barsallo from MINSA, told Mr. Lopez that he had concluded that there were orders coming from the Presidency to the Comptroller General's Office to interfere with the Omega Consortium's Contracts.[925]

- Mr. Policani, the Mayor of Colon, also confirmed to Mr. Lopez that he had received instructions to cancel the Municipality of Colon Project, and that the pressure he was receiving from the Presidency was severe.[926]

- Guillermo Bermudez from the Municipality of Panama personally told Mr. Lopez he had instructions to halt the Omega Consortium's project until the Moncada Luna investigation had been finalized.[927]

- Mr. Blandon, the Mayor of Panama and an ally and appointee of President Varela, informed Mr. Lopez that he did not want the Mercados Perifericos projects, and that he wanted to build a warehouse in the place where the Juan Diaz Market was being built.[928]

[922] Resp.'s Reply ¶ 135.

[923] Lopez 2 ¶ 69.

[924] Lopez 2 ¶ 85.

[925] WhatsApp message between Frankie Lopez and Nessim Barsallo dated 3 March 2016 (C-0681 resubmitted).

[926] Lopez 2 ¶ 69.

[927] Lopez 2 ¶¶ 65-66, 84.

[928] Lopez 2 ¶ 84.

270. *Second*, contemporaneous communications between Government representatives and Claimants' Panamanian lawyers also confirm that the instructions to attack Claimants' investment came from the highest levels of the Varela Administration. As Mr. Lopez indicates:

- On 14 July 2014 Ms. Medina [redacted][929]
- On 14 May 2015, Ms. Medina [redacted][930]
- On 20 May 2015 Ms. Medina, one of Claimants' Panamanian public procurement lawyers, [redacted]"[931]
- On 30 July 2015, Ms. Medina [redacted][932]

271. Respondent does not address many of these clear and contemporaneous communications; it only focuses on Mr. Barsallo's WhatsApp messages to Mr. Lopez, and argues they are taken out of context. But this argument is belied by the message exchanges themselves. As the Tribunal will see when it reviews the relevant document, Mr. Barsallo specifically indicated that the order to stall Claimants' Projects came directly from the Presidency—*viz.* Mr. Varela and his Administration.[933]

---

[929] Lopez 2 ¶ 82; Email chain between Ana Graciela Medina and Frankie Lopez dated 14 Jul. 2014 (C-0590).

[930] Lopez 2 ¶ 82; Chat between Frankie Lopez and Ana Graciela Medina dated 14 May 2015 (C-0799).

[931] Lopez 2 ¶ 19; Chat between Lopez and Medina (C-0555). This phrase, the "children of R[icardo] M[artinelli]," is used on various occasions in Mr. Varela's cellphone messages, published in November 2019. *See* Section II.B.8, *infra*.

[932] Email from Ana Graciela Medina to Oscar Rivera and Frankie Lopez dated 30 July 2015 (C-0701 resubmitted), at 5.

[933] Chat between Frankie López and Nessim Barsallo dated 3 Mar. 2016 (C-0681 resubmitted).

272. *Third*, the evidence that Mr. Saltarín investigated Claimants and their investments demonstrates clearly that the attacks on Claimants came from Mr. Varela's office, making clear that these attacks were much more than ordinary commercial activity. As Claimants have established, Mr. Saltarín was a private attorney hired directly by the Office of the Presidency and given access to the State's surveillance and investigatory apparatus to influence prosecutions in Panama.[934] Mr. Saltarin held meetings with dozens of Panamanian Government Agencies, some of which had contracts with the Omega Consortium—*i.e.*, the INAC, the MINSA, and the Secretary of Cold Chain (Ministry of the Presidency).[935] The timing of these meetings is telling when compared to what was happening to ***all*** of the Omega Consortium's Projects during that time.

273. For instance, Mr. Saltarin met with the Director of the INAC, Ms. Nuñez, during August 2014, September 2014, November 2014, and March 2015 to "evaluate" the Ciudad de las Artes Project.[936] Shortly after the first such meeting took place in August 2014,[937] Sosa (the INAC's external inspector) suddenly began sending multiple letters alleging "serious concerns" with the progress of the Omega Consortium's Project,[938] and the Omega Consortium stopped receiving any payments for the Ciudad de las Artes Project.[939] Further, the Ciudad de las Artes

[934] *See supra* ¶¶ 137, 123 n.423, 231 n.817, 236 n.832; Cls' Counter-Mem § IV.D.

[935] Cls' Counter-Mem. ¶ 88.

[936] Cls' Counter-Mem. ¶ 90.

[937] Activity Report from Saltarín, Arias y Asociados to Ministry of the Presidency dated 25 June 2018 (C-0617), at 5.

[938] *See supra* ¶¶ 131, 133, 137, 139.

[939] *See supra* ¶¶ 131-32. It is also interesting that Mr. Zarak states that "by September 2014 . . . . the MEF was aware that the Ciudad de las Artes Project was significantly behind schedule and that there were issues with the contractor's performance." Zarak 1 ¶ 15. Mr. Zarak provides no explanation for *how* the MEF would know this. *Id.* That the new Varela appointees at the MEF would have become aware of these allegations so quickly upon taking office makes sense, however, if Mr. Saltarin – at the behest of President Varela – had informed them.

Project was inexplicably classified as "High Risk" and the MEF slashed the Project's budget.[940] Mr. Saltarin further met with Ms. Nuñez in November 2014,[941] around the time the Omega Consortium was trying to formalize a change order for a time extension, which as explained *supra* never occurred because the INAC was allegedly assessing the legality of the request.[942] Mr. Saltarin's meetings with the INAC during the time it began taking serious, improper actions against the Omega Consortium cannot be mere coincidence.

274. There is also undisputable evidence that Mr. Saltarín met with the Minister of Health and representatives of the MINSA in July 2014, August 2014, and March 2015 to discuss and "evaluate" the MINSA Capsi Projects.[943] It is surely no coincidence that Mr. Saltarin's investigation of the MINSA Capsi Contracts started at the same time the three May 2014 Change Orders addressing costs and time extensions were returned to the MINSA.[944] These Change Orders were thereafter stalled by MINSA for months and were *never* ultimately endorsed by the Comptroller General. Once again, Mr. Saltarin (the Presidency's counsel) appears on the scene just as Claimants' Projects are put under attack.

275. Similarly, in July 2015 Mr. Saltarín met with the Manager of the Secretary of Cold Chain to discuss the contracts for the construction of the markets for this Agency, which included Claimants' Contract to build the Mercado Publico de Colón.[945] Just a month before, in June 2015, the Omega Consortium had met with the Executive Secretary of Cold Chain to discuss the possibility of reinitiating works. The Omega Consortium was optimistic that this was

---

[940] *See supra* ¶ 232.

[941] Activity Report from Saltarín, Arias y Asociados to Ministry of the Presidency dated 25 June 2018 (C-0617), at 29-30.

[942] *See supra* ¶¶ 135-36.

[943] Cls' Counter-Mem. ¶ 90.

[944] *See supra* ¶¶ 231 n.817, 236 n.832, 272.

[945] Cls' Counter-Mem. ¶ 93.

going to happen and sent a letter after the meeting stating what needed to be addressed by the Ministry so that Omega could get back to work.[946] But, after Mr. Saltarin met with the Manager of the Secretary of Cold Chain, the letter was never answered and the Project was never recommenced. Again, this is no mere coincidence, nor is it ordinary commercial conduct.

276. With all of these Projects, shortly after Mr. Saltarin met with the respective Agency, it began to stall (in some cases indefinitely) any change orders or payments that would allow the Omega Consortium to continue working on the Projects. This interference by the Presidency's attorney in the business of the various Agencies and Ministries was unquestionably not the act of an ordinary, private commercial party.

277. *Finally*, and as Claimants discuss in detail *infra*, messages from then-President Varela's cell phone published in November 2019 show that abusing State power to destroy enemies and benefit friends was Mr. Varela's *modus operandi*. Mr. Varela did so personally by:

- abusing the authority of his office to intimidate foreign investors and punish his perceived political enemies;
- obtaining financial favors and public contracts for his friends and allies;
- shielding his friends and allies from prosecution;
- illegally interceding on behalf of his friends and allies with the Comptroller General in violation of the Comptroller General's independence; and
- illegally manipulating the Attorney General and blackmailing Supreme Court Justices.[947]

278. Thus, not only is there evidence that Mr. Varela orchestrated the attacks against Claimants, but there is also significant evidence that Mr. Varela had a habit of abusing his

[946] Lopez 1 ¶¶ 152-153.

[947] *See supra* Section II.B.8.

authority to enrich and protect his friends and to persecute his enemies. Such conduct by the Head of State cannot possibly be construed as "commercial."

8. Recently Published WhatsApp Messages Confirm that Corruption and Abuse of Power Were Endemic to the Varela Administration

279. The sovereign nature of the campaign of harassment against Claimants has been brought into sharp focus by recent revelations in Panama. On 31 October 2019 a website was published, making available for download a large depositary of WhatsApp messages sent during the course of 2017-2018, purportedly downloaded from a mobile telephone belonging to President Varela. In Panama this has become known as the "Varelaleaks" scandal. These WhatsApp messages have been the subject of much public discussion both in the Panamanian Press[948] and within Panamanian society *writ large*. Indeed, within days of Attorney-General Porcell's resignation announcement, none other than Respondent's own Panamanian legal expert, Justice Arjona, confirmed the importance of the Varela Leaks revelations, which he has characterized as "relevant facts, very serious, very compromising for the protagonists of those conversations."[949] In the words of Justice Arjona, the Varela Leaks documents confirm "the

[948] *See, e.g.*, Elizabeth Gonzalez, *En medio de los "Varela Leaks", expresidente pierde el control del Partido Panameñista [In the midst of the "Varela Leaks", former president loses control of the Panameñista Party]*, CNN EN ESPAÑOL (Nov. 25, 2019), https://cnnespanol.cnn.com/2019/11/25/alerta-panama-en-medio-de-los-varela-leaks-expresidente-pierde-el-control-del-partido-panamenista/ (C-0910); Paola Nagovitch, *Panama's Constititutional Reform Conundrum*, AMERICAS SOCIETY/COUNCIL OF THE AMERICAS (Nov. 19, 2019), https://www.as-coa.org/articles/panamas-constitutional-reform-conundrum (C-0911); Gustavo A. Aparicio O., *Piden investigar origen y contenido de 'VarelaLeaks' [People call to investigate the origin and content of 'Varelaleaks']*, LA ESTRELLA DE PANAMÁ (Nov. 15, 2019), https://www.laestrella.com.pa/nacional/191113/191115-191114-piden-investigar-origen-contenido-varelaleaks (C-0912); *Panama Attorney General Kenia Porcell says she is resigning*, ASSOCIATED PRESS NEWS (Nov. 12, 2019), https://apnews.com/e5c6ffb58b0147aca97d38acfc64052d (C-0913); Clarissa Castillo, *Rechazo por reformas constitucionales y 'Varelaleaks' podrían afectar el crecimiento de Panamá para el 2020 [Rejection because of constitutional reforms and the 'Varelaleaks' could affect Panama's growth in 2020]*, PANAMÁ AMÉRICA (Nov. 11, 2019), https://www.panamaamerica.com.pa/economia/rechazo-por-reformas-constitucionales-y-varelaleaks-podrian-afectar-el-crecimiento-de (C-0914); Eliana Morales Gil, *'Varelaleaks', política y poder a través del chat ['Varelaleaks', politics and power through chats]*, LA PRENSA (Nov. 7, 2019), https://www.prensa.com/impresa/panorama/Varelaleaks-politica-poder-traves-chat_0_5436206373.html (C-0915).

[949] Interview by Flor Mizrachi with Adán Arnulfo Arjona, in Panama, (17 Nov. 2019) https://www.telemetro.com/flor-mizrachi-pregunta/2019/11/17/flor-mizrachi-pregunta-adan-arnulfo-arjona-exmagistrado-de-la-csj/2274407.html (C-0916).

undoubted undue interference of the Executive in the processing and handling of judicial matters, the conclusion of the agreements with Odebrecht, . . . conversations with campaign donors, [and] with businessmen close to the former president," etc.[950] Reinforcing Judge Arjona's words, Ms. Porcell's successor as Attorney-General, Eduardo Ulloa, tasked with restoring credibility to the Office and dealing with the "ghosts com[ing] out of the past administration,"[951] has undertaken to determine whether a number of judicial cases were properly actioned under the Varela Administration.[952] Respondent's experts and its own officials are obviously taking this information very seriously.

280. The Varela Leaks website claims to be owned by "a group of Latin American citizens committed to democracy and tired of the corruption and abuse of our authorities."[953] These individuals, it is claimed, received a cell phone which, upon inspection, they confirmed contained conversations between Panama's former President Varela and members of his cabinet, the Attorney General, ambassadors and political representatives between 2017 and 2018.[954] It is

[950] *See* Interview by Flor Mizrachi with Adán Arnulfo Arjona, in Panama, (17 Nov. 2019) https://www.telemetro.com/flor-mizrachi-pregunta/2019/11/17/flor-mizrachi-pregunta-adan-arnulfo-arjona-exmagistrado-de-la-csj/2274407.html (C-0916) from 3:02–4:10. Justice Arjona further confirmed in this interview that such was the importance of the Varela Leaks information that the way in which it was obtained was outweighed by the importance to the State of its being published. *See id*. from 4:10–4:32, 5:02–5:39 (confirming that "I believe that once [something like] this is revealed, the question arises as to whether we are really facing private communication[s]. That is, I believe that there is content there that directly affects state matters, and that information's treatment and assessment has to be consistent with that fact" and further that "[a] first reaction is that access to this information has been perhaps irregular . . . [b]ut I believe that there is material there at least for the Public Ministry to clarify a series of situations. As I say, they are relevant facts, very serious, very compromising for the protagonists of those conversations.")

[951] Adelita Coriat, 'Lo malo es que haya sumisión del Ministerio Público hacia la Presidencia' *[It is bad when there is submission by the Public Ministry to the Presidency],* LA ESTRELLA DE PANAMÁ (Jan. 12, 2020), https://www.laestrella.com.pa/nacional/poligrafo/200112/malo-haya-sumision-ministerio (C-0917).

[952] *See* Adelita Coriat, 'Lo malo es que haya sumisión del Ministerio Público hacia la Presidencia' *[It is bad when there is submission by the Public Ministry to the Presidency],* LA ESTRELLA DE PANAMÁ (Jan. 12, 2020), https://www.laestrella.com.pa/nacional/poligrafo/200112/malo-haya-sumision-ministerio (C-0917).

[953] Cache of Varelaleaks.com as of 13 January 2020, https://varelaleaks.com/ (C-0907).

[954] *See* Adelita Coriat, 'Lo malo es que haya sumisión del Ministerio Público hacia la Presidencia' *[It is bad when there is submission by the Public Ministry to the Presidency],* LA ESTRELLA DE PANAMÁ (Jan. 12, 2020), https://www.laestrella.com.pa/nacional/poligrafo/200112/malo-haya-sumision-ministerio (C-0917).

these WhatsApp conversations that were published on the Varela Leaks website. While Mr. Varela has denied that he lost his cell phone and claimed that the messages exhibited on the Varela Leaks website have been "distorted, altered and manipulated,"[955] he has tellingly otherwise declined to dispute their authenticity.

281. Investor-State jurisprudence is uniform in holding that where, as here, information may have been obtained originally via potentially questionable means but then has become *publicly* available, such publicly available information is admissible as evidence.[956] Only where one of the *parties to the arbitration* has acted improperly in obtaining the information at issue, and *that party* then proposes to use it as evidence in the proceedings, will such information be inadmissible.[957] This makes perfect sense and follows the long-held principle of international

[955] Catherine E. Perea, *Varela responde a filtración de conversaciones y señala que fue pinchado con "Pegasus" de Martinelli*, TELEMETRO (Nov. 7, 2019), https://www.telemetro.com/nacionales/2019/11/07/varela-responde-a-filtracion-de-conversaciones-y-senala-que-fue-pinchado-con-pegasus-de-martinelli/2243317.html (enclosing Press Release issued by President Varela in the wake of the Varela Leaks scandal) (C-0938).

[956] *See Caratube International Oil Company and Mr. Devincci Saleh Hourani v. Kazakhstan*, ICSID Case No. ARB/13/13, Award, dated 27 Sept. 2017 (CL-0212) ¶ 156 (holding that documents obtained by hacking a computer network, but which were then made publicly available, were admissible); *Yukos* (CL-0135) ¶ 1253 (relying on a number of WikiLeaks cables in finding that Yukos was the object of a series of politically-motivated attacks by the Russian authorities); *Veteran Petroleum Limited v. The Russian Federation*, PCA Case No. 2005-05/AA228, Final Award, dated 18 July 2014 (CL-0248), ¶ 1189 (the tribunal relied on contemporaneous U.S. State Department cables, which emerged via WikiLeaks, to draw its conclusion); *Hulley Enterprises Ltd. v. Russian Federation*, PCA Case No. 2005-03/AA226, Final Award, dated 18 July 2014 (CL-0207), ¶ 1189 (same). In several other cases parties relied on WikiLeaks cables but the tribunals did not address the issue of their admissibility, holding instead that the documents were not relevant to the arbitration. *See, e.g., OPIC Karimum Corporation v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14, Award, dated 28 May 2013 (CL-0249); *Kiliç Ĭnşaat Ĭthalat Ĭhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award, dated 2 July 2013 (CL-0250). Outside of the investor-State arena, international jurisprudence is even more inclined to admit such evidence, even it was plainly illegally obtained. *See, e.g., Corfu Channel case* (United Kingdom v. Albania), I.C.J. Reports 1949 (CL-0251), p. 244 (the ICJ permitted illegally obtained evidence, gathered via illegal British minesweeping in sovereign Albanian waters, to be admitted at trial).

[957] *See, e.g., Methanex Corporation v. United States of America*, UNCITRAL, Final Award, dated 3 Aug. 2005 (CL-0252), ¶ 55 (holding that personal notes and private correspondence and material that was subjected to legal privilege could not be introduced as evidence, as the claimant, who was seeking to introduce this material as evidence in the arbitration, had obtained it unlawfully by trespassing into the office of a lobbying organization and searching through internal trashcans and dumpsters); *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, dated 23 June 2008 (CL-0253), 82(1.1.3)) (ordering Turkey to destroy all emails and communications it had intercepted under the guise of monitoring money laundering activities that were purportedly related to the arbitration, barring respondent from submitting them as evidence or relying on them in the arbitration).

law that no one may benefit from his own wrong.[958] Claimants, of course, had nothing to do with obtaining the Varela Leaks information or publishing it on the internet. They simply accessed the information via www.varelaleaks.com, as anyone else in the world can do. Moreover, Mr. Varela has appeared in this case as a witness; should he wish to challenge the authenticity of any of the Varela Leaks information, he is certainly free to do so when he appears before the Tribunal.

282. Turning back to the substance of the Varela Leaks WhatsApp messages, they evidence two years of communications between then-President Varela and high-level Government Ministers including, *inter alia*, Panama's-then Attorney-General, Comptroller General, Members of the Judiciary, and the Minister of Economy and Finance. They implicate ex-President Varela in a number of very serious corruption schemes aimed at favoring select companies with State contracts. They thus clearly demonstrate that Claimants' claims against ex-President Varela are anything but "outrageous,"[959] as Respondent would have this Tribunal believe. Rather, the revelations constitute compelling (albeit circumstantial) support for Claimants' claims concerning the inappropriate behavior of Panama's former President, and show that his launching a politically-motivated campaign of harassment against Claimants is *entirely* in keeping with his pattern of wrongful conduct in office.[960] They show that the President would *routinely* impermissibly interfere in the State's affairs in favor of friends and

[958] *See* Kotuby, GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS (CL-0081 resubmitted), at 130 (*citing* Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (Cambridge Univ. Press 1953 at 147).

[959] Resp.'s Reply ¶ 196.

[960] It is correct that the WhatsApp messages revealed in November 2019 do not include the time period most relevant to this case—2014-2015. While it is thus also correct that they do not constitute direct evidence that this pattern of wrongful conduct was deployed against Claimants, they nevertheless provide powerful circumstantial evidence of the types of behavior in which Mr. Varela was regularly engaged, and of the likelihood of this pattern of behavior being deployed against Claimants.

allies or with the aim of blackmailing, driving away, or destroying his enemies. This, of course, is *precisely* the treatment President Varela meted out to Claimants.[961]

283. As Claimants further detail below, President Varela's pattern of inappropriate behavior included: (i) corruption and manipulation as concerns the favoring of certain public contractors and the persecution of others (*see infra* II.B.8.a); (ii) corruption and manipulation of the country's supposedly independent Comptroller General (*see infra* II.B.8.b); (iii) corruption and manipulation with respect to the Attorney-General's office and the use of its associated investigatory powers (*see infra* II.B.8.c); (iv) corruption and manipulation of the country's national budget process (*see infra* II.B.8.d); and (v) corruption and manipulation of the Judiciary and National Security Council (*see infra* II.B.8.e).

a. Corruption and Manipulation Favoring Certain Public Contractors and Persecuting Others

284. The Varela Leaks disclosures confirm that ex-President Varela regularly engaged in behavior designed to favor certain contractors with large public contracts, and to punish other public contractors who had displeased him.

[961] As a preliminary matter it is correct that, although they do not cover the time period of the events in dispute, the Varela Leaks discussions cover the time period in which this arbitration was pending and thus contain a few references to the present dispute in which President Varela—apparently in the process of preparing to become a witness in this case—denies targeting Claimants. *See* Chat with Eyda Varela de Chinchilla, then-Panama's Minister of Economy & Finance dated 5 October 2018 (C-0819) (informing President Varela that she has been on the phone all day with Respondent's attorneys in connection with this case); Chat with Ana Graciela Medina, Former Panamanian Counsel to Mr. Rivera dated 5 October 2018 (C-0820) (President Varela calling Mr. Rivera an "imbecile" and threatening that Mr. Rivera will end up in jail); Chat with Kenia Porcell, then-Attorney General dated 5 October 2018 (C-0821) (President Varela informing Attorney-General Kenia Porcell that he needs all the information relating to Mr. Rivera's indictment in Panama to respond to questions submitted by attorneys in connection with this arbitration); Chat with Raul Sandoval, President Varela's Private Secretary dated 6 October 2018 (C-0822) (alerting President Varela to a questionnaire he had received in connection with this dispute). As these summaries indicate, among the Varela Leaks documents was a privileged document from Respondent's Counsel. Upon discovery of that document, Claimants promptly notified Respondent's Counsel of the existence of the privileged document on the internet and destroyed all copies (electronic and otherwise) of the document in their possession. These denials are, however, of limited probatory value. The relevant WhatsApp messages were sent when President Varela was already well aware that claims were being made against Panama with respect to his conduct in this arbitration, and the tone and content of his WhatsApp messages would thus have been calibrated accordingly. Nonetheless, the Varela Leaks documents make unmistakably clear the type of man that Mr. Varela is, and the type of President that he was when Claimants were investing in Panama.

285. For example, President Varela interceded with Panama's National Bank to ensure the granting of financing to Odebrecht, which had previously admitted to bribery.[962] Mr. Varela similarly intervened with the National Bank on behalf of Odebrecht[963] in the months leading up to the finalization of Odebrecht's plea bargain agreement with the State, which Mr. Varela pressured the Attorney-General into signing.[964] During that time period, Odebrecht had been blackmailing Mr. Varela with threats to reveal what it claimed was serious wrongdoing by the President;[965] therefore, these exchanges followed Odebrecht's admission of involvement in a major corruption scheme aimed at obtaining public contracts.[966] Beyond Mr. Varela's involvement with Odebrecht's projects, Mr. Varela threatened members of Panama's Congress with the freezing of public projects in their electoral districts in retaliation for delaying the passage of a favored Bill.[967] Mr. Varela also confirmed to the General Manager of Panama's public services authority that he had personally sabotaged the execution of a public project due

[962] *See* Chat with Rolando de León, then-General Manager of Panama's National Bank dated 3 October 2017 (C-0824). In a conversation with the General Manager of the Banco Nacional de Panama President Varela expressed his irritation with the bank for withholding, as a result of the corruption scandal, some of Odebrecht's funds. This apparently had the effect of slowing the pace of some of Odebrecht's other projects in Panama.

[963] *See* Chat with Diego Vallarino, then-Board Member of Panama's National Bank dated 22 June 2017 (C-0823).

[964] Chat with Popi Varela, President Varela's brother dated 9 May 2017 (C-0863) (President Varela stating "I had a meeting with *la señora* [the Attorney General] yesterday. I feel they will close [the deal].")

[965] *See* Adelita Coriat, *Triangulación entre Varela, Popi y Porcell, hizo posible acuerdo con Odebrecht [Triangulation between Varela, Popi and Porcell made the agreement with Odebrecht possible]*, LA ESTRELLA DE PANAMÁ (Nov. 12, 2019), https://www.laestrella.com.pa/nacional/191110/191112-191111-triangulacion-varela-popi-porcell-hizo-posible-acuerdo-odebrecht (C-0932); *see also* Chat with Popi Varela, President Varela's brother dated 4 May 2017 (C-0863) (Popi telling President Varela that Mr. Rabello, an Odebrecht executive, "spoke of serious things that you and I committed.").

[966] *See Brazil's Odebrecht 'to give Panama $59m' it paid in bribes*, YAHOO! NEWS (Jan. 12, 2017), https://www.yahoo.com/news/brazils-odebrecht-panama-59m-paid-bribes-022147580 html (C-0931).

[967] *See* Chat with Diputado Varela, then-Congressman dated 4 October 2018 (C-0825) (President Varela confirming that his political party members' lack of support in the National Assembly made him want to "stop [their] projects" and further noting that "[he would] stop all his projects from his groups / I'm tired / Of this blackmail / We gave them everything.").

to the involvement of a businessman with whom President Varela was feuding.[968] Along similar lines, Mr. Varela confirmed to the French Ambassador that he would support French company SUEZ in "squeezing" a disfavored contractor out of Panama's Ciudad David project.[969] He was also happy to intervene with governmental agencies, including both the Comptroller-General and Panama's Minister of Finance, on behalf of favored contractors.[970] And perhaps most relevant to this case, Mr. Varela engaged in detailed, near daily, discussions with Stanley Motta, an influential local magnate who is the Chairman of ASSA, Claimants' surety company; notably, after Claimants were forced out of Panama, ASSA received a significant payment under the

[968] *See* Chat with Roberto Meana, then-General Manager of Autoridad Nacional de los Servicios Públicos dated 31 July 2018 (C-0826) (President Varela stating, after being informed of the Supreme Court's order to proceed with a contract run by NG Power, that "[he didn't] think he'll be able to do that closing / The Chinese won't go for that / I stopped the [port project because they were] playing around."); *id.* dated 21 September 2018 (President Varela informing Mr. Meana that he would ask Chinese investors that formed part of the NG Power contract "to put in writing" that they "desist" from the project so that no closing would occur as a result); *id.* dated 4 October 2018 (President Varela telling Mr. Meana that he had spoken with the Chinese investors and assuring him that they would exit the project).

[969] *See* Chat with the phone number +507 6430-0110 dated 14 October 2018 (C-0828) (evidencing President Varela and the French Ambassador to Panama scheduling discussions to remove Pentech from a consortium led by SUEZ, presumably for a wastewater treatment project in the city of David, Panama); *see also* Press Release, SUEZ, *SUEZ supports the city of David in Panama in improving its wastewater network* (Dec. 2, 2016), https://www.suez.com/en/news/press-releases/suez-supports-the-city-of-david-in-panama-in-improving-its-wastewater-network (C-0829).

[970] *See, e.g.*, Chat with Carlos Duboy, then-Director of Tocumen Airport dated 3 April 2017 (C-0830); Chat with Guillermo, Mexican Businessman dated 24 July 2017 (C-0831); Chat with Jorge Alberto Rosas, former Congressman dated 5 March 2018 (C-0832); Chat with Rogelio Donaldo, Panamanian Businessman dated 11 October 2017 (C-0833); Chat with Dulcidio de la Guardia, then-Minister of Finance & Economy dated 9 July 2017 (C-0834); Chat with Gian Castillero, Panamanian Businessman dated 5 September 2017 (C-0835); Chat with Dulcidio de la Guardia, then-Minister of Finance & Economy dated 5 October 2018 (C-0834); Chat with +507 6672-5015 dated 7 April 2017 (C-0836); Chat with Yassir, Panamanian Businessman dated 12 January 2018 (C-0837); Chat with Moises, Representative of BH Corp. dated 23 December 2016 (C-0838); Chat with the phone number +507 6676-1873 dated 1 April 2017 (C-0839); Chat with Costa, Panamanian Businessman dated 15 August 2018 (C-0840); Chat with Pepo dated 30 April 2018 (C-0841); Chat with Maria del Rosario, Representative of Jan de Nul dated 5 June 2017 (C-0842); Chat with Marco dated 10 October 2017 (C-0843); Chat with Diego Vallarino, then-Board Member of Panama's National Bank dated 14 February 2018 (C-0823); Chat with Guillermo, Mexican Businessman dated 1 September 2017 (C-0831); Chat with Rogelio Aleman, Representative of CUSA dated 6 June 2017 (C-0845).

INAC-ASSA Contract *for work that Claimants had performed* (but had not been paid for) on the Omega Consortium's INAC Project.[971]

b. Corruption and Manipulation of the Comptroller General

286. The Varela Leaks disclosures also confirm that Panama's Comptroller General was anything but "independent" from the Executive as Respondent would have this Tribunal believe.[972] For example, they contain a conversation between President Varela and the Comptroller General in which the then-President instructs the Comptroller to fast-track approval of the contract addendum of a public project.[973] Another example finds President Varela assuring the President of the National Assembly that he will discuss with the Comptroller General a (problematic) ongoing Comptroller General audit of the National Assembly.[974] Still another WhatsApp discussion evidenced Mr. Varela agreeing to intervene with the Comptroller General on behalf of a contractor, and then shows that he evidently did so.[975] That President Varela was exerting influence and control over the Comptroller General,[976] Mr. Federico Humbert, is of course particularly relevant to this case, as that is exactly what Claimants have shown with respect to their Projects.[977]

---

[971] *See, e.g.*, Chats with Stanley Motta, Owner of TVN dated 26 September 2017, 27 September 2017, 4 October 2017, 19 October 2017 (C-0827) (Mr. Motta mentioning a business issue which had arisen as a result of being blocked by the Security Council, discussing ASSA's involvement in a major public works project known as the Fourth Bridge project, and arranging support for a law favored by Mr. Motta's cousin).

[972] Resp.'s Objections ¶ 13.

[973] *See, e.g.*, Chat with Fred, Panamanian Businessman dated 9 June 2018 (C-0849).

[974] *See* Chat with Yanibel Rodriguez, then-President of Panama's National Assembly dated 7 August 2018 (C-0850) (President Varela assuring Mrs. Rodriguez that he would call the Comptroller General and stating "I just wrote to him about something else.").

[975] *See* Chat with +507 6678-9609 dated 10 April 2018 (C-0848) (after promising to speak with the Comptroller General on 5 April 2018, President Varela writes back "Comptroller General ready").

[976] *See* Chat with Federico Humbert, then-Comptroller General dated 4 Sept. 2018 (C-0846) (President Varela directing Mr. Humbert to prioritize an audit into Panama's Agricultural Marketing Institute (IMA) because certain people "want[ed] to attack").

[977] *See supra* § II.B.2.

287. Juxtapose these admissions alongside the testimony of Respondent's own witness, Dr. Bernard, who has confirmed that it was "*illegal* for anyone in President Varela's Administration—*including President Varela himself*—to ask or direct [the Comptroller General] to act against any project."[978] This is because the Panamanian constitution establishes the Comptroller General as an "independent agency within the national government of Panama," whose head is subject to appointment and removal by the National Assembly.[979] To safeguard the agency's independence, Panamanian law presupposes that the Comptroller General "does not report directly to the President of Panama and is not subject to instruction or direction from the Executive Branch." [980] In fact, "Law 355 of the Criminal Code makes it a *felony* for any Government official to interfere in the execution of an independent agency's responsibilities. Similarly, Law 356 makes it illegal for anyone working at an independent agency to fail to carry out their duties."[981] The Varela Leaks messages thus clearly evidence, again in the words of Respondent's own witness Dr. Bernard, that President Varela is guilty of committing a "felony" under Panamanian law by improperly interfering with the work of the Comptroller General.[982] Having done so with frequency in 2017-2018, it should be evident that he did so with respect to Omega's Projects in 2014-2015.

c. Corruption and Manipulation with Respect to the Attorney General's Office

288. The Varela Leaks disclosures similarly evidence that the then-President had a highly inappropriate influence over the country's then-Attorney General, Ms. Kenia Porcell, and

[978] Witness Statement of Dr. James Edward Bernard Véliz dated 7 Jan. 2019 ("**Bernard**"), ¶ 18 (emphasis added).

[979] Bernard ¶ 8.

[980] Bernard ¶ 8.

[981] Bernard ¶ 18 (emphasis added).

[982] *See* Bernard ¶ 18

by extension over Panama's prosecutors. Mr. Varela's surveillance chief Rolando Lopez was frequently included in the WhatsApp conversations between Mr. Varela and the Attorney General, including when it was revealed that Mr. Varela had been using Mr. Saltarín as a "parallel Attorney General."[983] Such was the level of impropriety (indeed, illegality) that one evening a panicked Attorney General Porcell messaged Mr. Varela worried that she was going to go to jail the following year and expressing concern about what would happen to her children.[984] Upon a review of the WhatsApp messages between Ms. Porcell and Mr. Varela, one can understand her concerns.

289. The Varela Leaks disclosures related to the Attorney General include a conversation between President Varela and his friend Jaime Lasso, formerly Panama's Consul-General in South Korea, in which President Varela advises Lasso how he should handle allegations against him that he had embezzled public funds.[985] President Varela then undertakes to personally intervene on his friend's behalf with the Attorney General in relation to a potential criminal prosecution.[986] Mr. Varela later confirms that he had "worked hard for 2 years" to lessen the impact of the criminal prosecution on Mr. Lasso,[987] and advises his friend that the criminal prosecution would soon be closed.[988] Mr. Varela also promised to find out who had

[983] *See* Chat with Fernando Berguido, Panamanian Businessman associated with La Prensa newspaper dated 11 September 2018 (C-0861). *See also supra* ¶ 236 n.832.

[984] *See* Chat with Kenia Porcell, then-Attorney General dated 24 May 2018 (C-0821). The WhatsApps show the then-President reassuring Attorney General Porcell that her corruption (and his) would not lead to her imprisonment. *Id.* They also show Ms. Porcell asking Mr. Varela for personal favors. *Id.*

[985] *See* Chat with Jaime Lasso, former Panamanian Consul General in South Korea dated 31 October 2017 (C-0862).

[986] *See* Chat with Jaime Lasso, former Panamanian Consul General in South Korea dated 31 August 2017 (C-0862).

[987] *See* Chat with Jaime Lasso, former Panamanian Consul General in South Korea dated 10 September 2017 (C-0862).

[988] *See* Chat with Jaime Lasso, former Panamanian Consul General in South Korea dated 13 September 2017 (C-0862).

leaked Mr. Lasso's statement to Panama's Prosecutors (presumably hoping to secure retribution), after having discussed the issue with each of the Attorney General and the chief of the National Security Council.[989] The then-President goes on to reconfirm to Lasso that the criminal charges would be dismissed,[990] and coaches his friend in answering press queries concerning his alleged embezzlement.[991] Finally, the Varela Leaks disclosures show Mr. Varela confirming that he would "speak to the woman" (meaning the Attorney-General) about a court summons issued to Mr. Lasso by a Panamanian criminal court.[992] This episode leaves no doubt that Mr. Varela was perfectly content to meddle in Panamanian criminal matters when it suited his interest.

290. The disclosed WhatsApp messages also evidence the President coordinating closely with the Attorney General regarding plea agreements in the criminal prosecution of contractors friendly to Mr. Varela.[993] Similarly, after Odebrecht threatened to disclose "serious" information about Mr. Varela,[994] the then-President is seen pressuring the Attorney-General to quickly sign a plea agreement with the company.[995]

291. Conversely, and perhaps most importantly, there is also substantial evidence of the President closely coordinating with Attorney General Porcell to prosecute, as he calls them,

---

[989] *See* Chat with Jaime Lasso, former Panamanian Consul General in South Korea dated 26 October 2017 (C-0862).

[990] *See* Chat with Jaime Lasso, former Panamanian Consul General in South Korea dated 27 October 2017 (C-0862).

[991] *See* Chat with Jaime Lasso, former Panamanian Consul General in South Korea dated 31 October 2017 (C-0862).

[992] *See* Chat with Jaime Lasso, former Panamanian Consul General in South Korea dated 18 September 2018 (C-0862).

[993] *See* Chat with Kenia Porcell, then-Attorney General dated 16 April 2018 (C-0821). The disclosed messages show Ms. Porcell keeping Mr. Varela abreast of developments involving contractors who had admitted to the payment of bribes and were reaching plea agreements with the authorities. *See* Chat with Kenia Porcell, then-Attorney General dated 18 May 2018 (C-0821).

[994] *See* Chat with Popi Varela, President Varela's brother dated 4 May 2017 (C-0863).

[995] *See* Chat with Popi Varela, President Varela's brother dated 4 May 2017 (C-0863).

"the R[icardo] M[artinelli] kids."[996] The Tribunal will, of course, recall that Ms. Ana Graciela Medina, Mr. Rivera's attorney at IGRA, [redacted] [997] The Varela Leaks documents also evidence the President retaliating against defeated enemies or perceived allies of Ricardo Martinelli in many other ways, including forcing them to donate to his sister-in-law's charity.[998] There can be no lingering doubt, in the wake of the Varela Leaks disclosures, that Mr. Varela used all of the powers of the Panamanian State—including bogus criminal prosecutions—to target and harm his perceived enemies.

d. Corruption and Manipulation of the Country's National Budget Process

292. In keeping with the control he exercised over the Comptroller General and the Attorney General, the WhatsApp messages pertaining to Panama's national budget process confirm that President Varela maintained close control over budgetary decisions, which he made capriciously. According to nothing more than the President's whim, certain projects would be moved along and others (like the Ciudad de las Artes Project) delayed or scuttled. In this vein the WhatsApp discussions evidence a vast array of instances where the President would have funds transferred from one Ministry to another, or from one public project to another, simply to meet his personal priorities and those of his cronies, in a decision-making process *involving*

[996] *See* Chat with Kenia Porcell, then-Attorney General dated 30 April 2018 (C-0821).

[997] The term [redacted] *See* Lopez 1 n.62; WhatsApp Messages between Ana Graciela Medina and Frankie Lopez dated 20 May 2015 (C-0555).

[998] *See* Eldia Moreno, *Panama detains Mossack Fonseca founders on corruption charges*, REUTERS (Feb. 11, 2017), https://www reuters.com/article/us-panama-corruption-odebrecht/panama-detains-mossack-fonseca-founders-on-corruption-charges-idUSKBN15Q0TK (C-0864); Adelia Coriat, *MEF no recibió dinero en efectivo de China [MEF did not receive money in cash from China]*, LA ESTRELLA (Jan. 3, 2020), https://www.laestrella.com.pa/economia/200102/mef-recibio-dinero-efectivo-china (C-0865). *See further* Chat with Kenia Porcell, then-Attorney General dated 13 August 2017 (C-0821); Chats with Rolando Lopez then-Head of Panama's National Security Council dated 6 September 2018, 27 September 2018 (C-0866); Chat with Julio Gonzalez, then-Director of Panama's Transport Authority dated 28 July 2018 (C-0867).

important matters of State that involved no more formality than the sending of a one sentence text message by the President.[999] These conversations leave no doubt as to the strict personal control President Varela improperly exerted over the administration of Panama's public purse.

293. For example, the Varela Leaks documents include evidence of President Varela expressly instructing the-then Minister of the Economy & Finance to reduce the Ministry of Public Work's budget to fund payments to be made to a contractor, IBT.[1000] They likewise evidence President Varela personally instructing the-then Minister of the Economy & Finance to approve payments being requested by an unknown individual ("Barria").[1001] Even more relevant is the evidence of then-President Varela instructing the then-Minister of the Economy & Finance to delay paying certain invoices after noting that an individual involved in the project "ha[d] been very disrespectful" to him,[1002] proving that Mr. Varela did, indeed, order delays in payments in order to punish disfavored contractors. Perhaps most relevant of all, however, is the

[999] *See, e.g.*, Chat with Dulcidio de la Guardia, then-Minister of Finance & Economy dated 15 August 2017 (C-0834); Chat with Dulcidio de la Guardia, then-Minister of Finance & Economy dated 28 June 2017 (C-0834); Chat with Dulcidio de la Guardia, then-Minister of Finance & Economy dated 24 April 2017 (C-0834); Chat with Kenia Porcell, then-Attorney General dated 16 November 2017 (C-0821); Chat with Dulcidio de la Guardia, then-Minister of Finance & Economy dated 21 October 2017 (C-0834); Chat with Dulcidio de la Guardia, then-Minister of Finance & Economy dated 14 November 2017 (C-0834); Chat with Dulcidio de la Guardia, then-Minister of Finance & Economy dated 16 November 2017 (C-0834); Chat with Dulcidio de la Guardia, then-Minister of Finance & Economy dated 21 March 2018 (C-0834); Chat with Dulcidio de la Guardia, then-Minister of Finance & Economy dated 19 April 2018 (C-0834); Chat with Dulcidio de la Guardia, then-Minister of Finance & Economy dated 1 June 2018 (C-0834); Chat with Roman Torres dated 11 April 2018 (C-0868); Chat with Irene Perurena, Red Cross Representative dated 22 July 2017 (C-0869); Chat with Carlos, Representative of MiBus dated 14 September 2018 (C-0870); Chat with Yolanda Eleta de Varela, President Varela's Sister-in-Law dated 13 August 2017 (C-0871); Chat with Federico Policani, Mayor of Colon dated 21 August 2018 (C-0872); Chat with Gili Ovadia dated 5 August 2017 (C-0873); Chat with Eyda Varela de Chinchilla, then-Panama's Minister of Economy & Finance dated 14 September 2018 (C-0819); Chat with Eyda Varela de Chinchilla, then-Panama's Minister of Economy & Finance dated 17 September 2018 (C-0819); Chat with Eyda Varela de Chinchilla, then-Panama's Minister of Economy & Finance dated 25 September 2018 (C-0819); Chat with Tatiana de Janon, then-Coordinator of Panama's Sanitation Program dated 18 July 2017 (C-0857); Chat with Manuel dated 24 April 2018 (C-0874); Chat with Delia Arosemena, former Director of Panama's Student Scholarship and Loan Agency dated 10 October 2018 (C-0875).

[1000] *See* Chat with Dulcidio de la Guardia, then-Minister of Finance & Economy dated 15 August 2017 (C-0834).

[1001] *See* Chat with Dulcidio de la Guardia, then-Minister of Finance & Economy dated 11 April 2018 (C-0834).

[1002] *See* Chat with Eyda Varela de Chinchilla, then-Panama's Minister of Economy & Finance dated 16 September 2018 (C-0819).

WhatsApp message that shows President Varela *personally* deciding what to do with funds apportioned to the Ciudad de las Artes.[1003]

e. Corruption and Manipulation of the Judiciary

294. The Varela Leaks disclosures also show that President Varela used a network of alliances to inappropriately influence Panama's Supreme Court, even going so far as to communicate with justices *during* the Court's deliberations over key cases. In particular the disclosures evidence President Varela: (i) nominating justices to the Supreme Court he knew his allies could control, and actively demanding (through intermediaries) that those Justices issue favorable decisions;[1004] (ii) threatening to have corruption cases re-opened in order to harass political opponents;[1005] and (iii) using his family ties to influence a judicial appointment concerning a criminal case against a political ally.[1006]

295. With respect to this arbitration—where the evidence shows that Panama's campaign of harassment against Claimants is rooted, at least in part, in the belief that Claimants were "[redacted]"[1007]—it is noteworthy that the Varela Leaks documents show President Varela actively considering firing *all nine Supreme Court Justices* following their issuance of judgments that displeased him regarding ex-President Martinelli.[1008] Moreover,

[1003] *See* Chat with Dulcidio de la Guardia, then-Minister of Finance & Economy dated 22 June 2018 (C-0834).

[1004] Mr. Varela nominated Justices to the Supreme Court that he knew his allies could control, and in exchange he offered large clients to those allies. In 2017 and 2018, President Varela demanded, through Eduardo Valle, a partner at a Panamanian law firm, that the Supreme Court make decisions that favored President Varela. If a particular justice made a decision that displeased President Varela, he would issue threats to them through intermediaries. *See, e.g.*, Chats with Eduardo Valle, then-Partner at Mendoza, Arias, Valle & Castillo dated 29 August 2017, 30 August 2017, 23 November 2017, 16 December 2017, 16 August 2018, 11 September 2018, 12 September 2018, 14 September 2018, 16 September 2018 (C-0877).

[1005] *See* Chat with Jose Alberto Rosas, former Congressman dated 12 May 2018 (C-0832).

[1006] *See* Chat with Jose Alberto Rosas, former Congressman dated 1 February 2018 (C-0832).

[1007] WhatsApp messages between Ana Graciela Medina and Frankie Lopez dated 20 May 2015 (C-0555).

[1008] *See* Chat with Luis Ernesto Carles, then-Panama's Labor Minister dated 2 September 2017 (C-0876).

the disclosed documents show Mr. Varela using his surveillance chief (the Secretary General of Panama's National Security Council) to communicate with a sympathetic Supreme Court Justices *during* deliberations concerning politically sensitive cases about ex-President Martinelli.[1009] As such, there can be no doubt that Mr. Varela was bent on destroying former President Martinelli and, unfortunately for Omega, anyone perceived to be connected to him.[1010]

* * *

296. In sum, the newly disclosed Varela Leaks documents prove Mr. Varela impermissibly influenced practically *every* aspect of the Panamanian Government to unfairly reward his friends and destroy his enemies. The Panamanian Constitution clearly stipulates that the Comptroller General, the Attorney General, and the Judiciary are to be *independent from the President*.[1011] Despite this, Mr. Varela personally interfered with and manipulated these

[1009] *See* Chat with Rolando Lopez, then-Head of Panama's National Security Council dated 15 October 2018 (C-0866).

[1010] The Varela Leaks disclosures also evidence President Varela inappropriately influencing Panama's press. Relevant WhatsApp messages include evidence of: (i) President Varela releasing damaging information about his political opponents to divert the press and public's attention from negative press coverage of him or his allies. *See* Chat with Alvaro Aleman, Panamanian Journalist dated 14 November 2017 (C-0878). (ii) President Varela granting ambassadorships and other favors to the leaders of Panama's influential La Prensa newspaper in return for that publication's close support of his agenda. *See* Chats with Fernando Berguido, Panamanian Businessman associated with La Prensa newspaper dated 3-4 October 2018 (President Varela helping Mr. Berguido with issues related to the Panamanian tax authority), 18 September 2018 (President Varela asking Mr. Berguido to fire one of his journalists), 11 September 2018 (Mr. Berguido coordinating with President Varela to shield him from public scrutiny regarding his contract with Rogelio Saltarin) (C-0861); Chat with Chelle Corró, then-Sub-Director of La Prensa newspaper dated 30 November 2017 (C-0844) (President Varela contacting Ms. Corró to ensure that La Prensa's editorial line favored him, attacked those he perceived as enemies, and avoided scrutiny of his own scandals, including one involving donations, made by contractors that admitted to paying bribes, to a charity program called Mi Escuela Primero, led by President Varela's wife). (iii) President Varela using his close relationship with Miguel Heras, a director of Panamanian television channel TVN, to inappropriately influence its coverage of him. *See* Chats with Miguel Heras, Director of TVN dated 15 September 2018, 20 September 2018, 11 October 2018, 18 October 2018, 19 October 2018 (C-0859). (iv) President Varela using his close relationship with Panamanian Press magnate Stanley Motta, owner of TVN, to inappropriately influence its coverage of him. *See* Chat with Stanley Motta, Owner of TVN dated 18 April 2018 (C-0827). (v) President Varela using his relationship with a director of Panamanian TV channel Cable Onda to complain about negative coverage. *See* Chat with Yolanda Eleta de Varela, President Varela's Sister-in-Law dated 19 June 2018 (C-0871).

[1011] Panama Constitution (C-0060 resubmitted 3), arts., 210, 212, 223 and 279; *see also* Judicial Code of the Republic of Panama (C-0091 resubmitted 2), art. 2 ("magistrates and judges are independent in the exercise of their functions and are subordinate only to the Constitution and the law."); *id.* at art. 331 ("agents of the Public Ministry [Attorney General's Office] are independent in the exercise of their functions and are subordinate only to the

institutions, going well beyond any permissible cooperation envisioned under Panamanian law.[1012] The Varela Administration abused its sovereign powers to perversely incentivize its allies and punish its opponents. The Omega Consortium was, unfortunately, a clear victim of these abuses.

297. Tellingly, Panama has *itself* now recognized the consequences of the abuses evidenced by the Varela Leaks chats. A recently-proposed bill before Panama's National Assembly confirms that "[t]he past five-year administration was characterized by an absolute and scandalous administrative breakdown which resulted in losses in excess of five billion dollars due to the suspension of projects that were incomplete, delayed, deteriorated and lost.[1013] This situation, which has been a national disgrace, cannot be permitted to recur and therefore, as those of us who are responsible for managing public assets are well aware, such conduct must be pristine, otherwise it must be penalized."[1014]

Constitution and the law, but they are obligated to obey such legitimate dispositions that their superiors may emit in the exercise of their legal attributes.").

[1012] As the Panamanian Supreme Court has indicated, although coordination between the various branches is expected for the effective functioning of the State, the intent behind separation of powers under the Constitution is to prevent the undue concentration of Power in one branch of Government. *See* Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Cont. Admin., 1995 Registro Judicial [R.J.] 344, 347 (Nov. 24, 1995) (Panama) (C-0940) (acknowledging the constitutional aim of "harmonic collaboration" between the branches of Government but ruling that there is to be "usurpation *of any type*" by other State organs in the functions of the judiciary) (emphasis in original). Mr. Varela's threats and interference go well beyond harmonious collaboration – they represent exactly the kind of undue concentration of power that Panama's Constitution seeks to prevent.

[1013] *See generally* Bill No. 028 that Adds Provisions to the Penal Code Concerning the Stoppage and Deterioration of Public Works (C-0939).

[1014] Bill No. 028 that Adds Provisions to the Penal Code Concerning the Stoppage and Deterioration of Public Works, (C-0939), at 2. Panama's new Advisory Minister for Private Investment, José Rojas, also recently admitted, in the same vein, that there had previously (*viz*. under the Varela Administration) been "selective abuses" of the rights of individuals by the Ministry of the Presidency as concerns its handling of cases being investigated by Panama's *Unidad de Análisis Financiero* (UAF) (a specialist Panamanian investigative authority created to investigate claims of money laundering and the financing of terrorism). Mr. Rojas pointed out that the UAF is currently "part of the Office of the Presidency," and highlighted that thus far a very high rate of 75% of new UAF investigations were improperly handed over by the Presidency for further investigation to the National Security Council instead of to the Attorney-General's office. Mr. Rojas urged that the UAF be separated from the Office of the Presidency by law to prevent further abuse. *Government affirms that it will separate UAF from the Presidency following the recommendation of the FATF*, TVN Noticias, https://www.tvn-2.com/nacionales/Gobierno-UAF-Presidencia-recomendacion-GAFI_0_5361213900.html (C-0858); Transcript of video embedded in *Government*

9. Respondent's "Commercial" Argument Not Only Fails as a Matter of Fact, but Also as a Matter of Law

298. As the foregoing sections have demonstrated at length, the evidence overwhelmingly indicates that the Varela Administration abused the sovereign power of the Panamanian State, including its various Ministries and Agencies, in concert, to decimate Claimants' investment. This went well beyond what any commercial actor could do. Given the undeniably sovereign nature of Respondent's attacks against Claimants, as a factual matter this dispute falls squarely within the Tribunal's jurisdiction under the Treaties. To the (minimal) extent that Respondent's jurisdictional objection on this point relies on the law,[1015] however, it fails on that ground as well. Even if Claimants' allegations were limited to the eight Contracts under consideration (which they are not), this Tribunal *still* would have jurisdiction to decide this case due to the manner in which they were breached (*viz*. by sovereign acts that no private party could undertake).[1016]

---

affirms that it will separate UAF from the Presidency following the recommendation of the FATF, TVNNoticias, https://www.tvn-2.com/nacionales/Gobierno-UAF-Presidencia-recomendacion-GAFI_0_5361213900.html (C-0847). In the present case, the UAF was, in fact, *twice* asked to participate in the money laundering investigation. On 24 April 2015 and on 21 May 2015, the Attorney General's office asked Alexis Bethancourt of the UAF whether it had "a report in the Unit under your direction of any suspicious operation [. . .] related to the legal entities and bank accounts listed," including those of Omega Panama and PR Solutions. Letter from Attorney General's Office to Financial Analysis Unit dated 24 April 2015 (C-0860); Letter from Attorney General's Office to Financial Analysis Unit dated 21 May 2015 (C-0853).

[1015] *See* Resp.'s Reply ¶¶ 127-33.

[1016] Cls' Counter-Mem. ¶ 323 (*citing* to the holding in *Bayindir v. Pakistan* that "when the investor has a right under both the contract and the treaty, it has a self-standing right to pursue the remedy accorded by the treaty" if it so chooses." *Id.*; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction 14 Nov. 2005 (CL-0119), ¶ 167.) *See also Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction, 9 Oct. 2012 (RL-0012), ¶¶ 240-41 (confirming that a tribunal will have jurisdiction where the State's breaches amount to more than purely commercial breaches of contract. "It is important to recognize that beyond the refusal to pay there are no other acts that the Claimant really seeks to remedy . . . There is no claim of the taking of a right under the Contract or of the Contract's unlawful discontinuance. There is no claim of harassment or interference with the Claimant's right to be present in Paraguay, through its representatives, or to carry on such commercial activities as it wishes to engage in . . . [No] police powers [have been] used . . .").

299. The jurisprudence is clear on this point, and there are important reasons why this jurisprudence has developed. If treaties are to protect sovereign contracts, encourage investments based on contractual rights, and demand that States honor their contracts—as the BIT and TPA do—why should a Tribunal curtail that investment protection and deprive an aggrieved investor of an arbitral remedy, especially where—as here—the State breached those contracts by (mis)using its sovereign authority and in one fell swoop?[1017]

300. A Respondent State cannot deflect liability where contracts underlie the investment. For starters, the decision in *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay* says no such thing.[1018] As Claimants have already noted, *Bureau Veritas* is entirely distinguishable from this case; it involved the non-payment of invoices under *one contract,* and the Tribunal specifically stated that *had* the claimant advanced the types of allegations being made here, it would have viewed the claims quite differently.[1019] To wit, where there are claims regarding "the taking of a right under [a] Contract or of the Contract's unlawful discontinuance," or regarding "harassment or interference with the Claimant's right to be present in [the host state]" through the exercise of "police powers," the situation turns decidedly sovereign and non-commercial.[1020] All of that is present here, and in many ways caused the incidental breach of the underlying contracts.

301. Respondent's citation of *Impregilo v. Pakistan* fares no better. That decision unremarkably denied jurisdiction in a case that was narrowly limited to the "application of a

[1017] Cls' Counter-Mem. ¶ 325.

[1018] *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction, 9 Oct. 2012 (RL-0012).

[1019] Cls' Counter-Mem. ¶ 324.

[1020] *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction, 9 Oct. 2012 (RL-0012), ¶¶ 240-41.

contract, and the conduct of the contracting parties."[1021] Again this holding simply confirms the obvious—that not all breaches of contract constitute breaches of a treaty. What *Impregilo does not* say is that wherever a contract is involved all treaty rights fall to the wayside. Where, as here, those breaches are incidental to a politically motivated and top-down campaign of harassment against an investor with a bundle of investment rights beyond one particular contract, the breach of a contract in the midst of that treaty claim does not divest a Tribunal of jurisdiction.[1022]

302. Respondent's reference to *Saluka v. Czech Republic* misses the mark too, but in an entirely different way. That tribunal unremarkably said that a State cannot be penalized for "each and every breach by the Government of the rules or regulations to which it is subject."[1023] This is trite law—something more than simple illegality under domestic law is necessary to render an act inconsistent with international law—but that hardly addresses the question at issue here regarding the distinction between sovereign and commercial acts. It certainly does not imply *a burden* on Claimants to prove that each alleged wrongful act "lacks any commercial justification and was taken solely for impermissible governmental purposes"[1024] when the overall campaign of acts clearly demonstrates the latter.

[1021] Resp.'s Reply ¶ 132 (*citing Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction (Apr. 22, 2005) (RL-0030), ¶ 268).

[1022] Cls' Counter-Mem. ¶ 348 (*citing Impregilo SpA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 Apr. 2005 (RL-0030), ¶ 258; *Jan de Nul v. Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006 (CL-0158), ¶ 80). This parallelism between a State's commercial and sovereign conduct can be found throughout international law, and its ability to do the former does not constitute immunity for the latter. For instance, while a State is well within its rights to seek renegotiation of a commercial contract, the "forced renegotiation" of a contract through sovereign compulsion and threats will violate a treaty. *AWG Group Ltd. v. The Argentine Republic*, UNCITRAL, & *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010 (CL-0011), ¶ 247.

[1023] *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 Mar. 2006 (CL-0038), ¶ 442.

[1024] Resp.'s Reply ¶ 131.

303. Thus, for all of the reasons stated in this Section (B), this Tribunal has jurisdiction and Respondent's objection on grounds that this is a purely commercial case must fail.

C. This Tribunal Has Jurisdiction Over Claimants' Umbrella Clause Claims

304. Contrary to Respondent's (mis)characterizations, Claimants are not seeking to use the TPA's MFN provision to import the umbrella clause from the U.S.-Panama BIT. Claimants' case is far simpler than that; they seek to import an umbrella clause from one of Panama's numerous other investment treaties.[1025] Accordingly, there is no "attempt[] to expand a BIT's scope of application"[1026] or to gain any additional jurisdictional rights.[1027] Claimants simply urge the Tribunal to give the text of the TPA's MFN clause effect as a *substantive* right, in line with the holdings of numerous tribunals.[1028] From there, Claimants are not seeking to transform a breach of contract into a treaty breach. As detailed above and summarized below, Respondent's failure to honor its obligations to Claimants cannot be read in isolation and constitutes far broader and far deeper sovereign mistreatment than a garden-variety breach of contract.[1029] It encompasses the simultaneous destruction of Claimants' interest in the Omega Consortium's assets in Panama, including its eight separate multi-million dollar public works projects, combined with Government coercion and prosecutorial abuse directed against Mr. Rivera himself.

[1025] Cls' Counter-Mem. ¶ 327. This would include, for example, the Netherlands-Panama BIT. *See* Agreement on Encouragement and Reciprocal Protection of Investments Between the Republic of Panama and the Kingdom of the Netherlands, entered into force 1 Sept. 2001 (CL-0163), art. 3(4) ("Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party."); *see also* Cls' Mem. ¶ 188 n.468.

[1026] Resp.'s Objections ¶ 222.

[1027] Resp.'s Objections ¶¶ 221-23.

[1028] Cls' Counter-Mem. ¶ 328.

[1029] Cls' Counter-Mem. ¶¶ 329-32.

305. Respondent's Reply on Jurisdiction plows little new jurisprudential ground, but these same basic objections find their way among the scattershot arguments seeking to limit this Tribunal's authority.[1030] Below Claimants briefly reiterate why Respondent is incorrect on all counts.

306. *First*, Respondent is incorrect that the "unique procedural posture"[1031] of this case improperly expands the lifespan of the BIT into that of the TPA. The fact that Panama and the United States "specifically renegotiated the scope of their treaty obligations towards each other in the TPA"[1032] and failed to mention umbrella protection is beside the point. They also "specifically negotiated" an MFN provision in that Agreement, knowing full well that Panama had already agreed to honor its "obligations" toward many third-state investors (including but not limited to the United States).[1033] If Panama and the United States had specifically intended for umbrella clauses to be excluded from the TPA's MFN clause, they could (and would) have so provided. But they did not. Pursuant to the articles on Interpretation of Treaties contained in the

[1030] Cls' Counter-Mem. ¶¶ 138-47.

[1031] Resp.'s Reply ¶ 141.

[1032] Resp.'s Reply ¶ 141.

[1033] Besides the Panama-Netherlands BIT referred to earlier, *see supra* note 1024 & Cls' Mem. ¶ 188 n.68, Panama has various other investment treaties in force offering umbrella clauses. *See*, *e.g.*, Agreement Between the Republic of Panama and the Kingdom of Sweden on the Reciprocal Protection and Promotion of Investments, entered into force on 15 July 2008 (CL-0222), art. 2(4) ("Every Party to the Contract shall be liable for all obligations taken on by the investors from the other Party to the Contract regarding their investment."); Agreement Between the Republic of Panama and Ukraine on the Reciprocal Protection and Promotion of Investments, entered into force on 13 June 2007 (CL-0223), art. 10(3) ("Any Party to the Contract must be liable for any other obligation they may have taken on regarding the investments in their country made by the investors from the other Party to the Contract."); Agreement Between the Government of the Republic of Korea and the Government of the Republic of Panama for the Promotion and Protection of Investments, entered into force on 8 February 2002 (CL-0224), art. 10(3) ("Either Contracting Party shall observe any other obligation it may have entered into with regard to investments in its territory by investors of the other Contracting Party."); Agreement on the Reciprocal Protection and Promotion of Investments Between the Kingdom of Spain and the Republic of Panama, entered into force on 31 July 1998 (CL-0225), art. 4(2) ("Each Party to the Contract must be responsible for any obligation taken on regarding the investments coming from investors from the other Party to the Contract."); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Panama for the Promotion and Protection of Investments, entered into force on 7 November 1985 (C-0072), art. 2(2) ("Each Contracting Party shall observe any obligations it may have entered into with regard to investments of nationals or companies of the other Contracting Party.").

Vienna Convention on the Law of Treaties, the plain meaning of the TPA's MFN provision, in line with generally accepted practice in international arbitration,[1034] thereby permits Claimants to import an umbrella clause from any of Panama's third-state treaties.[1035]

307. *Second*, Respondent's argument that Claimants are using the TPA's MFN clause to gain additional *jurisdictional*, as opposed to *substantive* rights, is also misplaced.[1036] The TPA's dispute resolution clause, again freely negotiated between Panama and the United States, contains *no restrictions* on the kinds of dispute that may be arbitrated by this Tribunal.[1037] That it grants this Tribunal jurisdiction over Claimants' "investment dispute" *writ large* is not in question.[1038] Importing an umbrella clause into the TPA from Panama's third-party treaties is in no way "expanding the . . . jurisdiction"[1039] of the Tribunal. Rather, as Respondent expressly admits, it merely "expand[s] the scope of *protection* agreed to by the parties."[1040] And this point, of course, is fully confirmed by both jurisprudence and scholarship. It is trite law that an umbrella clause constitutes a *substantive* form of protection within that discipline—not a procedural protection.[1041] Importing a substantive treaty protection via a non-restrictive MFN

[1034] *See*, *e.g.*, *EDF International SA, Saur International SA and Leon Participaciones Argentinas SA v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012 (CL-0180), ¶¶ 890, 937; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision on Annulment, 5 Feb. 2016 (CL-0226), ¶¶ 33, 216, 237-38; *Arif v. Moldova*, ICSID Case No. ARB/11/23, Award, 8 Apr. 2013 (RL-0040), ¶¶ 395-96.

[1035] Vienna Convention on the Law of Treaties, opened for signature 23 May 1969 (CL-0030), art. 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

[1036] Resp.'s Objections ¶¶ 221-23; Resp.'s Reply ¶¶ 139-140.

[1037] TPA (CL-0003), arts. 10.16, 10.18.

[1038] TPA (CL-0003), art. 10.16.1.

[1039] Resp.'s Reply ¶ 140.

[1040] Resp.'s Reply ¶ 140 (emphasis added).

[1041] *See EDF International SA, Saur International SA and Leon Participaciones Argentinas SA v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012 (CL-0180), ¶¶ 890, 937; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision on Annulment, 5 Feb. 2016 (CL-0226), ¶¶ 33, 216, 237-38; *Arif v. Moldova*, ICSID Case No.

clause, for adjudication under a similarly non-restrictive dispute resolution clause, in no way expands the Tribunal's jurisdiction, which remains seized of the same "investment dispute." If Respondent were correct, every invocation of the MFN provision would be deemed a procedural expansion of the Tribunal's jurisdiction. The complete absence of jurisprudence to support Respondent's argument on this point is therefore unsurprising.

308. *Third*, Respondent's contention that an "umbrella clause does not *require* the Tribunal to hear commercial claims brought under that treaty"[1042] hardly assists the resolution of this dispute. This is especially so since many tribunals *have* held that an umbrella clause elevates a breach of contract into a treaty breach.[1043] In *Noble Ventures Inc. v. Romania*, for example, the tribunal found that "[a]n umbrella clause is usually seen as transforming municipal law obligations into obligations directly cognizable in international law."[1044] The contrary view (*viz*. that the umbrella clause does not *automatically* transform a breach of contract into a treaty breach[1045]) is a minority one and is generally seen as "depart[ing] fundamentally from the

---

ARB/11/23, Award, 8 Apr. 2013 (RL-0040), ¶¶ 395-96; *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018 (CL-0199), ¶¶ 419-20; *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines,* ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 Jan. 2004 ("***SGS v. Philippines***") (RL-0022), ¶¶ 115, 118, 127-28; *Toto Construzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 Sept. 2009 (CL-0227), ¶¶ 200-01; *Eureko B.V. v. Republic of Poland*, Ad Hoc, Partial Award, 19 Aug. 2005 (CL-0020), ¶¶ 259-60; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B. V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009 (RL-0023), ¶ 141; *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Interim Award, 1 Dec. 2008 (CL-0228), ¶ 210; *see also Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 Apr. 2004 (CL-0033), ¶ 73; *Austrian Airlines v. The Slovak Republic*, UNCITRAL, Separate Opinion of Charles N. Brower, 9 Oct. 2009 (CL-0229), ¶ 10 n.6; *Paushok et al. v. Mongolia,* UNCITRAL, Award on Jurisdiction and Liability, 28 Apr. 2011 (RL-0034), ¶ 570.

[1042] Resp.'s Reply ¶ 142 (emphasis added).

[1043] Cls' Counter-Mem. ¶ 329.

[1044] Cls' Counter-Mem. ¶ 329 (*citing Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 Oct. 2005 (CL-0078), ¶ 53).

[1045] *See, e.g*., *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 Aug. 2003 (RL-0021).

conventional understanding of the [umbrella] clause."[1046] Cases like *SGS v. Philippines,*[1047] *Eureko v. Poland*[1048] and *SGS v. Paraguay*[1049] represent the prevailing view that the umbrella clause in the applicable BIT *does* "make[] it a breach of the [treaty] for the host State to fail to observe binding commitments, *including contractual commitments*, which it has assumed with regard to specific investments."[1050] When Respondent enlisted various of its officials, agencies and instrumentalities to orchestrate a top-down frustration of Claimants' contracts, it necessarily failed to "observe binding commitments" that those agencies and instrumentalities had made. The pervasive effect of Respondent's violations across eight projects, and the distinct (sovereign) manner in which Respondent could issue an administrative termination of one contract (Ciudad de las Artes) and thereby preclude the Omega Consortium from obtaining *any* new public contracts across the country, clearly implicates international responsibility. The imported umbrella clauses provide that the Tribunal "*shall*" adjudicate Panama's non-observation of these contracts,[1051] which is more than enough textual basis to dispense with Respondent's invitation that this Tribunal merely defer its jurisdiction on this question.

309. In its Rejoinder, Respondent raises for the first time the decisions of the annulment committee in *Vivendi v. Argentina*[1052] and the *El Paso* tribunal.[1053] But neither of these holdings materially assist Respondent on the facts of this case.

[1046] RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 169 (2d ed., 2012) (CL-0006 resubmitted 2); *see also id*. at 171-72 ("The Tribunal made no reference to the modes of interpretation laid down in Article 31 of the VCLT … . This decision was widely criticized.").

[1047] *SGS v. Philippines* (RL-0022).

[1048] *Eureko B.V. v. Republic of Poland*, Partial Award, 19 Aug. 2005 (CL-0020), ¶ 257.

[1049] *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 Feb. 2010 ("***SGS v. Paraguay* – Decision on Jurisdiction**") (CL-0152).

[1050] *SGS v. Philippines* (RL-0022) ¶ 128 (emphasis added).

[1051] *See infra* ¶ 306 n.1032.

[1052] Resp.'s Reply ¶ 142; *Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002 ("***Vivendi v. Argentina***") (RL-0019).

310. The key holding in *Vivendi v. Argentina* was on the exercise of claim construction, distinguishing those cases "where the *essential basis* of a claim brought before an international tribunal is a breach of contract,"[1054] from those cases where the "'*fundamental basis* of the claim' is a treaty laying down an independent standard by which the conduct of the parties is to be judged."[1055] While discussing at first the applicability of exclusive choice of forum clauses to the two sets of claims, the annulment committee also concluded that it *could* "take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law."[1056] In other words, the existence of a contract did not place a particular claim inexorably into the first category of cases. Rather, treaties "gave Claimants the right to assert that the [relevant contractual] conduct failed to comply with the treaty standard for the protection of investments."[1057]

311. This logic is instructive. The "fundamental basis" of Claimants' claims is that they were the victims of a concerted campaign of harassment at the hands of President Varela and the Panamanian State. The contractual breaches constituted a key intermediate step between the State's targeting of Claimants and the demise of their investment, such that "whether there has been a breach of the [TPA] and whether there has been a breach of [the] contract" are not, as Respondent uses *Vivendi* to contend, "different questions."[1058] Here, as with *Vivendi*, one begets the other, and the umbrella clause grants Claimants the right to assert that Panama's breaches of

---

[1053] Resp.'s Reply ¶ 143 (*citing El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 Apr. 2006 ("***El Paso***") (RL-0020), ¶ 81.

[1054] *Vivendi v. Argentina* (RL-0019) ¶ 98 (emphasis added).

[1055] *Vivendi v. Argentina* (RL-0019) ¶ 101.

[1056] *Vivendi v. Argentina* (RL-0019) ¶ 105.

[1057] *Vivendi v. Argentina* (RL-0019) ¶ 114.

[1058] Resp.'s Reply ¶ 142 (*citing Vivendi v. Argentina* (RL-0019) ¶ 96).

Claimants' Contracts constitute conduct which failed to comply with the TPA's treaty standards for the protection of investments.[1059]

312. As for *El Paso*,[1060] it is correct that this tribunal adopted the minority position that an umbrella clause "will not extend the Treaty protection to breaches of an ordinary commercial contract entered into by the State or a State-owned entity"[1061] and that it will instead only "cover additional investment protections contractually agreed by the State as a sovereign – such as a stabilization clause – inserted in an investment agreement."[1062] But this fifteen-year-old holding was rooted in a perceived need to "distinguish the State as a merchant . . . from the State as a sovereign,"[1063] a classification common to domestic sovereign immunity laws that has been

[1059] That they certainly did is confirmed by Claimants in their Reply. *See* Cls' Counter-Mem. ¶¶ 326-32, 434; Cls' Mem. ¶¶ 188-93. *See also Eureko B.V. v. Republic of Poland*, Partial Award, 19 Aug. 2005 (CL-0020), ¶¶ 112 (holding that "[i]t is clear to this Tribunal that the decision of the ad hoc Committee in Vivendi … authorizes, and indeed requires, this Tribunal to consider whether the [contractual] acts of which Eureko complains … constitute breaches of the Treaty.") To be sure, however, Claimants need not show a breach of any of the Contracts in question in order to establish that Respondent has breached the provisions of the BIT and the TPA, namely those relating to fair and equitable treatment and expropriation. *See* Cls' Counter-Mem. ¶¶ 365-67, 371-72, 375, 393, 395-98, 401, 403-04, 405-10.

[1060] *El Paso* (RL-0020); *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006 (CL-0230).

[1061] Resp.'s Reply ¶ 143 (*citing El Paso* (RL-0020) ¶ 81.)

[1062] Resp.'s Reply ¶ 143 (*citing El Paso* (RL-0020) ¶ 81.) Respondent attempts to distinguish *Noble Ventures* on a similar basis, arguing that the breaches in the present case "are fundamentally different from the failure of a government to honor specific obligations made in privatization agreements designed to facilitate foreign investment." Resp.'s Reply ¶ 147. This argument misses the point. In *Noble Ventures* the tribunal echoed the *Vivendi* holding that "the host State may incur international responsibility by reason of a breach of its contractual obligations towards the private investor of the other Party, the breach of contract being thus 'internationalized.'" *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 Oct. 2005 (CL-0078), ¶¶ 54-62. This holding was not contingent on the type or nature of the contractual obligation the State has assumed.

[1063] *El Paso* (RL-0020) ¶ 81.

expressly disavowed by the ILC.[1064] This perhaps explains why *El Paso's* reasoning has not been meaningfully followed by any subsequent tribunals.[1065]

313. The only remaining question is how the Tribunal should interpret the relevant umbrella clause. The answer is simple: Given the extremely broad wording of the clauses at issue, the Tribunal can only interpret them as providing a justiciable question. The pertinent text of the U.S.-Panama BIT provides: "Each Party shall observe any obligation it may have entered in with regard to investment of nationals or companies of the other Party."[1066] And the umbrella clauses available for the Tribunal to import into the TPA are equally expansive. To take one example from the available provisions,[1067] the Panama-Netherlands BIT states: "Each Contracting Party shall observe *any obligation* it may have entered into with regard to investments of investors of the other Contracting Party."[1068]

314. The ordinary meaning of these clauses must be respected, as required by the Vienna Convention and recognized by case law,[1069] and nothing in Respondent's jurisdictional arguments dictates otherwise. The clauses use the word "shall" (making clear that they create

---

[1064] Draft Articles on Responsibility of State for Internationally Wrongful Acts, with commentaries, 2001 (CL-0092), Commentary to Art. 4 (Acts of State Organs), at 41, n.113. Respondent's contention that "[t]he Claimants do not dispute these fundamental principles" (Resp.'s Reply ¶ 144) is thus, at least as regards the *El Paso* holding, incorrect. In any event, as demonstrated in Claimants' Reply, the conduct by Respondent at issue in this case was sovereign in nature. *See generally* Cls' Counter-Mem. § V.

[1065] The one arguable exception is *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006 (CL-0230). The reason this is only "arguably" an exception is that the tribunal featured two of the three *El Paso* tribunal members, addressed the same BIT, and was published only three months after the *El Paso* award. As such the *El Paso* and *Pan American* Awards are generally considered in conjunction.

[1066] BIT (CL-0001), art. II.2. For the avoidance of doubt, Panama's jurisdictional defenses concerning Claimants' umbrella clause arguments only relate to the TPA and not to the BIT. *See* Cls' Counter-Mem. ¶ 326.

[1067] *See supra* note 1032 (quoting other Panamanian investment treaties offering virtually identical umbrella clauses).

[1068] Agreement on Encouragement and Reciprocal Protection of Investments Between the Republic of Panama and the Kingdom of the Netherlands (CL-0163), art. 3(4) (emphasis added).

[1069] Vienna Convention on the Law of Treaties, opened for signature 23 May 1969 (CL-0030), art. 31(1); *SGS v. Paraguay* — Decision on Jurisdiction (CL-0152) ¶ 169; *see also* Cls' Counter-Mem. ¶ 332.

unequivocal legal requirements for Panama), and they refer to "any obligation" without qualification (commercial, contractual, or otherwise). They also require the host State to observe its obligations "with regard to investments," thus clarifying that the obligation runs not just to the "investor," but to the "investment" itself. Claimants' umbrella clause claims fall well within the scope of this language.

D. The Tribunal Has Jurisdiction Over Claims Relating to the Baseless Criminal Investigations

315. Respondent's unlawful investigations undoubtedly relate to Claimants' investment in Panama and fall squarely within the purview of the Tribunal's jurisdiction as quintessentially sovereign actions (albeit, abusive ones).[1070] Respondent's Reply advances little new ground with respect to this objection, and therefore merits an equally cursory response.

316. Like many of Respondent's other objections, this one also constitutes only a *partial* jurisdictional defense.[1071] Respondent readily concedes this point.[1072] In other words, even assuming that the Tribunal *were* to uphold Respondent's objection (which it should not), it would continue to exercise jurisdiction over all of Claimants' *other allegations* that Respondent breached their rights outside of the criminal investigation context.

317. Self-serving inconsistency also continues to permeate this partial objection. As addressed in Claimants' Reply[1073] (but ignored in Respondent's Reply),[1074] Respondent's jurisdictional objections stand hopelessly in tension with one another. Respondent's most recent iteration of its illegality defense rests on allegations and evidence (false as they may be) that

[1070] Cls' Counter-Mem. ¶ 337.

[1071] *See* Cls' Counter-Mem. ¶ 335.

[1072] Resp.'s Reply ¶ 187.

[1073] *See* Cls' Counter-Mem. ¶ 336.

[1074] Resp.'s Reply ¶¶ 186-90.

arise from the criminal investigations.[1075] And those allegations and evidence, according to Respondent, supposedly lead to the conclusion that "non-compliance with Panamanian law was *endemic to the Claimants' investments*."[1076] Yet Respondent stands this reasoning on its head when it says the investigation of that purportedly "*endemic*" problem is off limits to this Tribunal because *the investigations have nothing to do with the investment*. Respondent cannot blow hot-and-cold, and embrace allegations of criminality when it suits its ends, but disavow (and thereby immunize) the investigation thereof when it does not.

318. The substantive core of Respondent's partial objection is that the Tribunal must decline jurisdiction over the investigations because "Panama initially investigated Justice Moncada Luna" (rather than Claimants).[1077] The Panamanian law enforcement officials, according to Respondent, had "no idea" that the investigation would lead to Claimants, thus the investigation has no relation to Claimants.[1078] This argument fails on at least three levels.

319. *First*, Claimants reject the assertion that Respondent's law enforcement merely stumbled across the Claimants in the context of an otherwise legitimate criminal inquiry. As already explained, Claimants were purposely swept up into the investigations as a pre-textual and unlawful means to harm their investment.[1079] But the Tribunal need not reach this issue to resolve its jurisdictional inquiry, because there is no dispute that Respondent did, *in its own words*, launch a "*specific investigation into the Claimants*."[1080] In fact, it launched *two* such

[1075] *See* Resp.'s Reply ¶¶ 11-81.

[1076] Resp.'s Reply ¶ 63 (emphasis added).

[1077] Resp.'s Reply ¶ 188 (emphasis added).

[1078] Resp.'s Reply ¶ 188.

[1079] Cls' Counter-Mem. § V(e).

[1080] Resp.'s Reply ¶ 188 (emphasis added).

investigations,[1081] which breached Claimants' rights and continue to do so. Again, Respondent *admits* that, as a result of its investigations, Claimants to this day are not "off the hook" and thus are still suffering from the wrongful consequences inflicted on them.[1082] That the criminal investigations against Claimants temporally came after the Moncada Luna investigation is irrelevant.

320. *Second*, Respondent can point to no principle of international law or investment jurisprudence to suggest that it matters that the investigations against Claimants were a "byproduct" of the earlier investigation.[1083] Respondent cited *not a single case* to support its jurisdictional argument on this topic in its Counter-Memorial; Claimants pointed to that glaring deficiency in their Reply,[1084] but Respondent's Reply fails to fill the gap. Its only legal support comes from the text of Article 25(1) of the ICSID Convention—namely, that the "jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment."[1085] Needless to say, that text provides no justification for Respondent's extraordinary suggestion that this Tribunal must dismiss claims that host State prosecutors intentionally harassed a foreign investor simply because the investigation might have had its roots somewhere else. Professor Christoph Schreuer points out that the "requirement of directness [in Article 25(1)] refers to the relation *of the dispute to the investment*. It does not refer to the investment as such."[1086] There is no doubt

[1081] Cls' Counter-Mem. ¶ 242.

[1082] *See*, *e.g.*, Resp.'s Reply ¶ 33 ("All the Designated Prosecutor was doing was acknowledging that his particular investigative role had ended, not that the Claimants were guilt- free and off the hook.").

[1083] Resp.'s Objections ¶ 188 ("The specific investigation into the Claimants, therefore, was a byproduct of the criminal investigation and prosecution of Justice Moncada Luna, and certainly did not arise directly out of the Claimants' investments.").

[1084] Cls' Counter-Mem. ¶ 338 ("Respondent cites not a single case to support this jurisdictional defense.").

[1085] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 14 Oct. 1966 (CL-0004), art. 25(1); Resp.'s Reply ¶ 186.

[1086] CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY (2d ed., 2001) (CL-0117 resubmitted), at 107 ¶ 88.

that this dispute—*i.e.*, whether Panama breached Claimants' international law rights through its police powers—is directly linked to Claimants' investment, as one of the entities subject to the harassment, along with Mr. Rivera (an Investor).[1087]

321. *Third*, Respondent's jurisdictional objection is premised on the assertion that the Panamanian authorities who initiated the investigations could not possibly have done so as part of an effort to destroy Claimants' investment.[1088] But this puts the proverbial cart before the horse. To accept Respondent's argument, the Tribunal, in effect, would have to reject all claims relating to the criminal investigations *on the merits*. Whether or not the Panamanian Government pursued criminal investigations in order to target Claimants and damage their investment is precisely the question raised in several of the substantive claims before the Tribunal. Requiring the Tribunal to dismiss those allegations as a matter of jurisdiction based on an alleged lack of merit would be improper.[1089]

322. For all of these reasons, the Tribunal should find that it has jurisdiction over all claims relating to the criminal investigations.

E. This Arbitration Is the Proper Venue for the Resolution of this Investment Dispute

323. Respondent's Reply continues to press one phrase in Article VII of the BIT as a jurisdictional defense. In short, Respondent argues that this Tribunal has no authority to decide what it calls the "BIT claims" (that is, the claims regarding the contracts signed before the entry

---

[1087] *See* Letter from Manuel Cedeño Miranda to Special Prosecutor of Organized Crime dated 10 June 2015 (C-0209); Verdict on Motion for Reconsideration dated 23 Mar. 2015 (C-0207); Resolution of Detention No. 052-15 dated 25 Aug. 2015 (C-0093); *see also* Cls' Counter-Mem. ¶ 372 n.1032.

[1088] Resp.'s Reply ¶ 189.

[1089] *Nissan Motor Co., Ltd. v. Republic of India*, PCA Case No. 2017-37, Decision on Jurisdiction, 29 Apr. 2019 ("***Nissan***") (CL-0231), ¶ 261 ("[T]he Tribunal concludes that Nissan has alleged sufficient facts to vest the Tribunal with jurisdiction to *consider* the merits . . . . The Tribunal does not accept that it is obligated to *resolve* that question at the threshold jurisdictional stage . . . .") (emphasis in original); *see Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Separate Opinion of Judge Higgins of 12 December 1996, 1996 I.C.J. REP. 803 (CL-0232), at 856 ¶ 32.

into force of the TPA), because the BIT requires the parties to settle their "investment disputes" "in accordance with the applicable dispute-settlement procedures upon which [the parties] have previously agreed."[1090] Put a different way, because the various contracts underlying this dispute contain various forum-selection clauses, Respondent would insist that any investment disputes between the investor and the State that touch upon those contracts be settled, to wit, in a combination of separate ICC arbitrations and local court proceedings conducted in Panama. [1091]

324. Respondent now confirms[1092] that this defense relates only to the five Contracts concluded prior to the TPA's entry into force—that is, the MINSA (Rio Sereno, Kuna Yala, and Puerto Caimito), INAC, and Ministry of the Presidency Contracts.[1093] It does *not* apply to claims relating to the Palacio Municipal, Mercados Periféricos, and La Chorrera Contracts, all of which were signed *after* the TPA entered into force. These three Contracts thus have a separate jurisdictional basis under a treaty with no similar language or alleged restrictions.[1094]

325. This latter point, too, provides a simple basis to reject the defense *in its entirety*. The TPA does not textually exclude from its temporal application preexisting investments where—as here—the dispute manifests (*years*) after the TPA entered into force. Claimants have advanced this point in their Counter-Memorial on Jurisdiction, but Respondent *completely*

[1090] BIT (CL-0001), art. VII(2).

[1091] Contract No. 077 (2011) dated 22 Sept. 2011 (C-0028 resubmitted) (MINSA Capsi – Rio Sereno), cl. 65; Contract No. 083 (2011) dated 22 Sept. 2011 (C-0030 resubmitted) (MINSA Capsi – Kuna Yala), cl. 65; Contract No. 085 (2011) dated 22 Sept. 2011 (C-0031 resubmitted) (MINSA Capsi – Puerto Caimito), cl. 65; Contract No. 043(2012) dated 17 Aug. 2012 (C-0034 resubmitted) (Ministry of the Presidency, Mercado Publico de Colon), cl. 78; Contract No. 093-12 dated 6 July 2012 (C-0042 resubmitted) (INAC), cl. 42.

[1092] Resp.'s Reply ¶ 149; *see also* Cls' Counter-Mem. ¶ 341.

[1093] Contract No. 077 (2011) dated 22 Sept. 2011 (C-0028 resubmitted) (MINSA Capsi – Rio Sereno); Contract No. 083 (2011) dated 22 Sept. 2011 (C-0030 resubmitted) (MINSA Capsi – Kuna Yala); Contract No. 085 (2011) dated 22 Sept. 2011 (C-0031 resubmitted) (MINSA Capsi – Puerto Caimito); Contract No. 043(2012) dated 17 Aug. 2012 (C-0034 resubmitted) (Ministry of the Presidency, Mercado Publico de Colon); Contract No. 093-12 dated 6 July 2012 (C-0042 resubmitted) (INAC).

[1094] Contract 01-13 dated 24 Jan. 2013 (C-0051) (Municipality of Colon); Contract No. 857-2013 dated 12 Sept. 2013 (C-0056) (Municipality of Panama - Mercados Perifericos); Contract No. 150/2012 dated 22 Nov. 2012 (C-0048) (La Chorrera); *see also* Cls' Counter-Mem. ¶ 341.

ignored it in its Jurisdictional Reply. So even if this Tribunal were to find that the "dispute-settlement procedures upon which [the parties] have previously agreed" prevented it from exercising jurisdiction over the earlier Contracts under the BIT, it would *still* be able to exercise jurisdiction over *all of those claims* under Article 10.16 of the TPA.[1095] For this reason alone, Respondent's defense fails.

326. Nevertheless, for the sake of completion, Claimants will address the "BIT claims" below (without accepting that temporal categorization). As shown previously[1096] and again below, the "previously agreed dispute-settlement procedures" phrase in Article VII does not divest this Tribunal of jurisdiction over any claim being advanced here.

1. This Tribunal's Jurisdiction Is Unfettered by Article VII of the BIT

327. Respondent's jurisdictional defense hinges on the meaning of one sentence in Article VII(2), stating that "[i]f the dispute cannot be resolved through consultation and negotiation, *then the dispute shall be submitted for settlement in accordance with the applicable dispute-settlement procedures upon which they have previously agreed*."[1097] From there, Respondent's argument rests on the faulty premise that Claimants have actually submitted eight separate contract disputes to this Tribunal, and therefore it should defer to the eight separate dispute resolution provisions in those contracts. This faulty premise renders the entire argument faulty as well. What Claimants have submitted is one "investment dispute" dealing with Respondent's multifarious and collective international law violations against Claimants and their investment, including the Omega Consortium's assets committed and held in Panama, not eight separate cases for unpaid invoices.

[1095] Cls' Counter-Mem. ¶¶ 350-51.

[1096] Cls' Counter-Mem. ¶¶ 340-52.

[1097] BIT (CL-0001), art. VII(2) (emphasis added).

328. The text of Article VII makes this distinction clear. The "dispute," as referred to in that sentence, can only mean the "investment dispute," or one involving "an alleged breach of any right conferred or created by this Treaty with respect to an investment."[1098] Respondent recognizes as much, but it still insists that "the plain terms of Article VII(2) . . . allocate investment disputes to 'the applicable dispute-settlement procedures upon which they have previously agreed.'"[1099]

329. The fallacy of this textual argument becomes apparent under examination. Article VII itself does not "allocate" all investment disputes to contractual fora. If Article VII(2) were such a "standing allocation," anytime a contract was subsumed in or related to an investment dispute, as suggested by Respondent,[1100] it would deplete the BIT's guarantee of investor-State arbitration of any real meaning. Importantly, Article VII(2) only "allocates" investment disputes elsewhere if the relevant contractual dispute resolution clauses are actually "*applicable.*" This qualifier is important, as clauses only become "applicable" if the contractual parties "have previously agreed" *to resolve investment disputes arising under the Treaty* outside of the Article VII procedures. Such previous agreement cannot be lightly assumed—it must be *explicit*.

330. The recent jurisdictional award issued in *Nissan v. India* is instructive on this very point. When Nissan raised international law claims against India under a treaty (the Comprehensive Economic Partnership Agreement between Japan and the Republic of India), India asserted a similar jurisdictional defense to the one raised by Panama here, pointing to a contractual dispute resolution clause. The tribunal accepted that the contractual provision

[1098] BIT (CL-0001), art. VII(1); Resp.'s Reply ¶ 151.

[1099] Resp.'s Reply ¶ 153.

[1100] Resp.'s Reply ¶ 153.

constituted "an exclusive forum selection clause in favor of Chennai-based arbitration."[1101] But that was not the end of the story. The tribunal then stated that "this analysis does not resolve *the critical question of the scope of disputes that are covered by [the contractual clause]*, and in particular *whether that scope includes potential investment disputes*" under a particular treaty.[1102] That question required "close scrutiny of the instrument that is said to manifest the agreement to an alternative arbitral forum."[1103]

331. Before getting there, the *Nissan* tribunal went on to explain why waiver of treaty claims should not be lightly assumed:

> [T]he Tribunal is unable to accept . . . that the parties to the [contract] *also* intended to waive international arbitration of any treaty claims. The fact remains that international treaty obligations, and the right to enforce them by procedures specified in such treaties, exist on a different level of the international legal order than domestic law rights. In the investment treaty context, sovereign States agree to create procedural rights for the benefit of their respective investors, allowing them to enforce in particular fora the substantive obligations that these States undertake to one another. These procedural rights are different in kind from procedural rights created by private law contracts or other private law relationships.
>
> In the Tribunal's view, ***an agreement by an investor to submit such international law claims to a forum other than the particular fora offered in the treaty therefore must be clearly manifested, and not simply inferred***. While the Tribunal does not exclude the possibility that parties might by clear contract agree to opt-out of international arbitration of treaty claims, ***there must be persuasive evidence of any such opt-out, including that the parties had in mind the possibility of future treaty claims and knowingly waived the right to arbitrate such claims in a neutral international forum***. The Tribunal thus agrees with prior tribunals that the right to access a particular dispute resolution forum offered in a treaty "should not lightly be assumed to have been waived."

[1101] *Nissan* (CL-0231) ¶ 268; *id.* (reiterating the choice for local arbitration was exclusive and unambiguous).

[1102] *Nissan* (CL-0231) ¶ 269 (emphasis added).

[1103] *Nissan* (CL-0231) ¶ 265.

> Rather, ***there would have to be direct and convincing evidence*** that a party intended to do so, for example through an express waiver rather than one merely by inference or implication.[1104]

332. With this in mind, the *Nissan* tribunal ultimately concluded that it was "unable to accept India's argument that the particular wording of [the contractual dispute resolution clause], however broad it may be for domestic law disputes, reflects an agreement to submit *investment treaty disputes* to Chennai-based arbitration."[1105]

333. This Tribunal should follow the reasoning in *Nissan*. Not only is its reasoning cogent and on point, but it is consistent with other cases.[1106] Respondent has not explained how the five contractual dispute resolution clauses under consideration here could constitute such an explicit waiver of BIT jurisdiction, especially when the "investment dispute" here goes well-beyond the four corners of the contracts (both individually and collectively). An analysis of those five clauses reveals no manifest agreement to opt out of treaty arbitration. Nor does Respondent present any extrinsic evidence or other basis to even suggest that any Omega entity and any Panamanian sovereign entity ever discussed or even contemplated the relationship between treaty disputes and contract disputes, much less explicit mutual agreement to substitute the jurisdiction of one for the other.[1107]

334. Indeed, Respondent's Reply on Jurisdiction does not even present, let alone analyze, the language of the clauses at issue. The reason why should be amply clear. The

---

[1104] *Nissan* (CL-0231) ¶¶ 270-71 (emphasis added).

[1105] *Nissan* (CL-0231) ¶ 272.

[1106] *See SGS v. Philippines* (RL-0022) ¶ 154; *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 Oct. 2005 (CL-0233), ¶¶ 115-19; *SGS v. Paraguay* — Decision on Jurisdiction (CL-0152) ¶ 178-80 & n.108; *AWG Group Ltd. v. The Argentine Republic, UNCITRAL & Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/03/19, Award, 9 Apr. 2015 (CL-0084), ¶ 76.

[1107] *Nissan* (CL-0231) ¶ 272 ("Nor has India presented any extrinsic evidence to suggest that at the time of the 2008 MoU, Nissan and the GoTN ever discussed the possibility of a potential treaty dispute, much less mutually agreed to substitute local arbitration for international arbitration of such a dispute.").

MINSA Capsi Contracts' dispute resolution clauses, all of which employ the same text, say nothing about international law claims or treaty arbitration, let alone contain an explicit waiver thereof.[1108] Nor do they address the wide panoply of "investment disputes," but rather are textually limited to disputes regarding the "execution, enforcement, development or termination" of the three MINSA Contracts. The same is true of the INAC and Ministry of the Presidency clauses.[1109] In other words, all five of the relevant dispute resolution clauses that pre-date the TPA fall well short of the type of "direct and convincing evidence" of waiver required under *Nissan*.[1110]

335. So even if Article VII of the BIT continues to govern part of Claimants' case, given that there are no "applicable" dispute resolution agreements between the parties with respect to an investment dispute, Claimants remain free to invoke investor-State arbitration under

[1108] Contract No. 077 (2011) dated 22 Sept. 2011 (C-0028 resubmitted) (MINSA Capsi – Rio Sereno), cl. 65 ("Any dispute related to the execution, enforcement, development or termination of the Contract that cannot be resolved directly by the parties shall be resolved by legal arbitration, in accordance with the Rules of Arbitration of the International Chamber of Commerce. The arbitration shall be held in Panama City, Panama, in Spanish, applying the pertinent laws current in Panama on the date that this Contract is perfected. The Arbitration Tribunal shall be comprised of three arbiters, each party appointing one arbiter and these in turn shall appoint the third arbiter [who] shall preside over the Arbitration Tribunal. In the event that the two arbiters appointed by the Parties fail to reach an agreement on the selection of the third arbiter within a period of 15 business days as of the date on which the last arbiter is appointed by the parties, the third arbiter shall be selected in accordance with the Rules of Arbitration of the International Chamber of Commerce. The decisions made by the Arbitration Tribunal shall be final and binding, and the parties irrevocably accept for purposes of this arbitration clause and the enforcement of any arbitral award regarding the jurisdiction of any Court for the parties or their property are located."); Contract No. 083 (2011) dated 22 Sept. 2011 (C-0030 resubmitted) (MINSA Capsi – Kuna Yala), cl. 65 (same text); Contract No. 085 (2011) dated 22 Sept. 2011 (C-0031 resubmitted) (MINSA Capsi – Puerto Caimito), cl. 65 (same text).

[1109] Contract No. 043(2012) dated 17 Aug. 2012 (C-0034 resubmitted) (Ministry of the Presidency, Mercado Publico de Colon), cl. 78 ("This Contract shall be governed and interpreted in accordance with the Laws of Panama and for all purposes of this Contract, THE PARTIES have chosen Panama City, Panama as special domicile, and state that they shall submit to the Jurisdiction of Panamanian Courts. Any claim that arises due to the interpretation or enforcement of this Contract shall be resolved by mutual agreement between The Parties, and if it cannot be resolved in this way, the dispute shall be submitted to the Panamanian courts."); Contract No. 093-12 dated 6 July 2012 (C-0042 resubmitted) (INAC), cl. 42 (same text).

[1110] Nor does Respondent refer to Article 78 of Law No. 22 (C-0280 resubmitted 2), which provides: "Contracts with foreigners. Foreign natural or legal persons that contract with the State must record in the contract the waiver of a diplomatic claim, except in the case of a denial of justice." In other words, the only type of waiver contemplated by Panamanian law would be a diplomatic—i.e., State-to-State—waiver and not an investor-State waiver in any event.

the BIT, as Respondent implicitly acknowledges when it states: "Where, however, there are no agreements between the private party and the Government entity, Article VII(3) provides that the investor may choose to submit its dispute directly to international arbitration."[1111]

2. Claimants' Corporate Structure Does Not Affect the Tribunal's Jurisdiction

336. Respondent is also fundamentally mistaken that Claimants' corporate structure has any bearing on the Tribunal's jurisdiction under Article VII of the BIT. At the outset, it is worth noting the disproportionate nature of Respondent's argument on this point; its Rejoinder devotes 19 paragraphs[1112] to an attempt to rebut just one paragraph from Claimants' Reply.[1113] Prompting this deluge from Respondent was the simple observation[1114] from Claimants that the three Parties to this arbitration—Mr. Rivera, Omega U.S. and the Republic of Panama—are different than the various parties to the pertinent contractual dispute resolution provisions—Omega Engineering, Inc. (*i.e.,* Omega Panama), the Omega Consortium, Dr. Franklin Vergara (Health Minister), Demetrio Papadimitriou (Ministry of the Presidency), and Maria Eugenia Herrera de Victoria (INAC).[1115] The observation remains factually true, of course, and Respondent cannot contest that Article VII of the BIT is the only dispute resolution agreement in existence between the Parties to *this* ICSID arbitration.[1116]

[1111] Resp.'s Reply ¶ 175.

[1112] Resp.'s Reply ¶¶ 155-73.

[1113] Cls' Counter-Mem. ¶ 345.

[1114] Cls' Counter-Mem. ¶ 345 & n.982.

[1115] Contract No. 077 (2011) dated 22 Sept. 2011 (C-0028 resubmitted) (signed by Oscar Rivera on behalf of Omega Engineering, Inc. and Dr. Franklin Vergara (Health Minister)); Contract No. 083 (2011) dated 22 Sept. 2011 (C-0030 resubmitted) (signed by Oscar Rivera on behalf of Omega Engineering, Inc. and Dr. Franklin Vergara (Health Minister)); Contract No. 085 (2011) dated 22 Sept. 2011 (C-0031 resubmitted) (signed by Oscar Rivera on behalf of Omega Engineering, Inc. and Dr. Franklin Vergara (Health Minister)); Contract No. 043(2012) dated 17 Aug. 2012 (C-0034 resubmitted) (signed by Oscar Rivera on behalf of the Omega Consortium and Demetrio Papadimitriou (Ministry of the Presidency)); Contract No. 093-12 dated 6 July 2012 (C-0042 resubmitted) (signed by Oscar Rivera on behalf of the Omega Consortium and Maria Eugenia Herrera de Victoria (INAC).

[1116] Cls' Counter-Mem. ¶ 345.

337. Nevertheless, Respondent goes to great lengths to avoid this indisputable fact, insisting that it should be disregarded entirely because "Claimants are attempting to hide behind irrelevant corporate veils,"[1117] which it then seeks to pierce. Other than a general citation to *Barcelona Traction*, Respondent fails to explain how the circumstances here could be "exceptional" and thus justify application of the corporate-veil-piercing doctrine.[1118] On a more basic level, however, Respondent has not shown that said doctrine has any application at all to the present context.

338. Respondent's incoherent argument requires the Tribunal to start with elementary propositions. The alter ego theory is intended to prohibit *defendants from avoiding liability* based on corporate formalities.[1119] Yet Omega U.S. and Mr. Rivera are *the Claimants* in this case. They face no potential liability in this arbitration. Nor has Respondent raised any allegations that Claimants have somehow unjustly enriched themselves by virtue of their corporate structure. In fact, this dispute presents precisely the opposite scenario: Respondent's wrongful conduct has caused Claimants to incur many millions in damages.

339. Additionally, Respondent is pursuing a ruling from the wrong authority. Respondent does not actually seek relief from this Tribunal in the form of piercing a veil

---

[1117] Resp.'s Reply ¶¶ 155-72 (citing *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, Case No. 1970 I.C.J. 3, Judgment, 5 Feb. 1970 (RL-0048), ¶¶ 56, 58).

[1118] *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, Case No. 1970 I.C.J. 3, Judgment, 5 Feb. 1970 (RL-0048), ¶ 58 ("[T]he process of lifting the veil [is] an exceptional one admitted by municipal law . . . ."); *see also ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 Oct. 2006 (CL-0028), ¶ 358 ("The Respondent makes reference to the principle of 'piercing the corporate veil.' Although that principle does exist in domestic legal practice in some jurisdictions, it is rarely and always cautiously applied.").

[1119] *See* BLACK'S LAW DICTIONARY 242-43 (8th ed., 2004) (CL-0234) (defining "alter ego" as a "corporation used by an individual in conducting personal business, *the result being that a court may impose liability on the individual by piercing the corporate veil* when fraud has been perpetrated on someone dealing with the corporation") (emphasis added); *id.* at 1031-32 (defining "corporate veil" as the "legal assumption that the acts of a corporation are not the actions of its shareholders, *so that the shareholders are exempt from liability for the corporation's actions*") (emphasis added).

between an Omega entity and Claimants. What Respondent really wants is for *some other court or tribunal* (*i.e.*, either a Panamanian court or an ICC commercial tribunal) to compel the Claimants *here* (Omega U.S. and Mr. Rivera) to litigate *there* by determining that they were the real parties in interest behind the five Contracts in question. Respondent never explains why this Tribunal would have any jurisdiction or competence to opine on that matter. Its novel theory particularly begs the question why it is that this ICSID Tribunal would have the right to determine whether, for instance, a Panamanian court should have jurisdiction over a non-signatory to a construction contract governed by Panamanian law (and to hear an "investment dispute" related to that contract, no less).

340. It is true that the alter ego doctrine sometimes may apply in the context of investor-State arbitration, but Respondent fails to mention that it is usually applicable *in favor of Claimants*. Investment treaties, like the U.S.-Panama BIT, are intended to protect investors at the top of the corporate chain. As noted by one tribunal, "BITs have the effect of 'lifting the corporate veil' to the benefit of the ultimate shareholder."[1120]

341. In the event that an investor-State tribunal invokes the alter ego doctrine against an investor, that inquiry inevitably takes place in the context of assessing the investor's true nationality.[1121] And here, Claimants' nationality is one subject that has remained completely

[1120] *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Final Award, 14 Mar. 2003 (CL-0021), ¶¶ 206-07; *see also Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 30 Apr. 2010 (CL-0235), ¶ 146 n.26.

[1121] *See* OPPENHEIM'S INTERNATIONAL LAW, Vol. I (9th ed., 1992) (CL-0236), at 861; *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 Oct. 2006 (CL-0028), ¶¶ 332-62; *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 Sept. 2017 (CL-0212), ¶¶ 620, 623; *Charanne and Construction Investments v. Spain*, SCC Case No. V 062/2012, Award, 21 Jan. 2016 (CL-0237), ¶¶ 412-17; *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB 09/15, Decision on Respondent's Objections to Jurisdiction, 5 June 2012 (CL-0238), ¶ 68; *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 Oct. 2013 (CL-0239), ¶ 126; *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 Sept. 2011 (CL-0240), ¶ 105.2; *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 Jan. 2000 (RL-0056), ¶ 65; *Pac Rim Cayman LLC v.*

untouched by Respondent's jurisdictional objections.[1122] Put another way: "This is not a case where the State has dealt with a single company throughout the relevant time, and a claimant shareholder has subsequently emerged from behind a hitherto-intact corporate veil and announced that it is seeking redress for alleged injuries to the company."[1123]

342. Even the more general alter ego principles from *Barcelona Traction* have no bearing here. Respondent states that "according to the ICJ, the corporate veil may be lifted under international law 'to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or obligations.'"[1124] Given that such principles exist "to protect third persons such as a creditor or purchaser," it is worth noting that Respondent has never articulated who those "third persons" would be in this case. And while Respondent raises fanciful (and false) accusations of bribery, none of those allegations hint at any "fraud" effected by Claimants' corporate structure. In any event, none of the principles, even as applied to Claimants by Respondent, suggest that Claimants engaged in wrongdoing *as a means to avoid liability or to wrongfully gain access to ICSID arbitration*. And for the avoidance of doubt,

---

Republic of El Salvador, ICSID Case No. ARB/09/12, Award, 14 Oct. 2016 (CL-0241), ¶ 5.58; *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Jurisdictional Decision, 29 Apr. 2004 (CL-0193), ¶¶ 55-56; *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award, 19 Dec. 2008 (CL-0242), ¶ 116.

[1122] *See Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Jurisdictional Decision, 29 Apr. 2004 (CL-0193), ¶ 56 ("Claimant made no attempt whatever to conceal its national identity from the Respondent. To the contrary, the Claimant's status as a juridical entity of Lithuania is well established under the laws of both Lithuania and Ukraine and well known by the Respondent. The Claimant manifestly did not create Tokios Tokeles for the purpose of gaining access to ICSID arbitration under the BIT against Ukraine, as the enterprise was founded six years before the BIT between Ukraine and Lithuania entered into force."); *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 Dec. 2003 (CL-0243), ¶ 57.

[1123] *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability, 29 Dec. 2014 (CL-0244), ¶ 162.

[1124] *See* Resp.'s Reply ¶ 162 (citing *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, Case No. 1970 I.C.J. 3, Judgment, 5 Feb. 1970 (RL-0048), ¶ 56).

Claimants vigorously deny any allegations of misconduct.[1125] Mr. Rivera's third witness statement specifically refutes Respondent's groundless assertions[1126] that Mr. Rivera had "co-mingled" funds and "disguised" corporate activities.[1127] In fact, the evidence shows that Mr. Rivera has always kept strict records of his companies' accounts, which were audited by third parties.[1128]

343. Neither do the cases cited by Respondent support its position. Respondent refers to the *Dow Chemical* award from 1982 for the proposition that a "non-signatory could be bound to [an] arbitration agreement" when doing so would "conform[] to the mutual intent of the parties."[1129] What Respondent fails to mention is that *Dow Chemical* was a purely commercial ICC dispute between private entities, governed by French law, and that a French court had specifically declined jurisdiction over the same dispute *and referred it to ICC arbitration*.[1130] As if those factors were not sufficient to distinguish that case from this one, *the non-signatories there were the claimants*, meaning that the parties with the weakest connection to the arbitration

[1125] As it relates to PR Solutions, Claimants certainly did not "admit to disguising the Omega entities' activities in Panama" or admit to any improper "co-mingling of funds." Resp.'s Reply ¶¶ 164, 166. As already explained, Claimants established and used PR Solutions in a manner that is "common among international construction companies that enter a new market: create a company with a different name to complete a small pilot project to test field conditions, including payment, subcontracting, and other logistics." Cls' Mem. ¶ 29. Claimants also completely reject the allegation that "Mr. Rivera either diverted government funds for his personal use or to bribe the Chief Justice," Resp.'s Reply ¶ 165, and the Supplemental Expert Report of Alison Jimenez dismantles these empty allegations piece by piece. *See* Jimenez 2 § IV.

[1126] Resp.'s Reply ¶¶ 163-66.

[1127] *See* Rivera 3 ¶¶ 29-30.

[1128] Rivera 3 ¶ 29.

[1129] Resp.'s Reply ¶ 169 (citing *Dow Chemical France v. ISOVER Saint Gobain*, ICC Case No. 4131, Interim ICC Award, 23 Sept. 1982 ("***Dow Chemical***") (RL-0049), at 136-37).

[1130] *Dow Chemical* (RL-0049) at 137.

agreement had the strongest interest in joining the arbitration.[1131] Unsurprisingly, the ICC tribunal accepted jurisdiction.[1132]

344. The first *Klöckner* award is equally unhelpful to Respondent. As an initial matter, the award was annulled in its entirety more than 30 years ago[1133]—an important point that Respondent fails to mention.[1134] In any event, *Klöckner* has nothing in common with this dispute. That tribunal's jurisdiction stemmed from a contractual arrangement rather than a treaty, and the key passage relied upon by Respondent concerned the tribunal's jurisdiction over the host State's counterclaim against the claimant.[1135] Respondent ignores all of that and suggests that the annulled award supports its case because it upheld jurisdiction over the claimant even though the claimant had not signed an underlying contract.[1136] Oddly, Respondent overlooks the fact that the award stands for an *expansive ICSID jurisdiction*, which completely undercuts its own position. Nor does Respondent mention that the first *Klöckner* tribunal rejected an argument—much like the one raised here by Panama—that an ICC arbitration clause contained in one of the underlying contracts removed the dispute from ICSID's purview.[1137]

[1131] *Dow Chemical* (RL-0049) at 137.

[1132] *Dow Chemical* (RL-0049) at 138.

[1133] *See Klöckner v. Cameroon*, ICSID Case No. ARB/81/2, Award, 2 ICSID Reports, 21 Oct. 1983 ("***Klöckner* Award**") (RL-0051) at v (listing the Annulment decision at page 95 in the Table of Contents, which page is omitted from Respondent's Exhibit RL-0051); *see also Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Ad hoc Committee Decision on Annulment, 3 May 1985 (CL-0245), ¶ 180(1) (annulling award).

[1134] Resp.'s Reply ¶ 171.

[1135] *Klöckner* Award (RL-0051) at 12, 17.

[1136] Resp.'s Reply ¶ 171.

[1137] *Klöckner* Award (RL-0051) at 13 ("A submission has been made within the Arbitral Tribunal that the International Chamber of Commerce arbitration clause contained in Article 8 of the Management Contract had the effect of removing disputes relating to the Article 9 undertaking from the jurisdiction of this Tribunal, and to subject them to the jurisdiction of an arbitral tribunal that might be set up by the International Chamber of Commerce, and which would apply Swiss law. The Tribunal cannot share this view . . . ."); *see also id.* at 14, 17.

345. Respondent's reliance on *Getma v. Guinea* is similarly unavailing. There, four claimants invoked ICSID jurisdiction based on an arbitration clause contained in Guinea's Investment Code.[1138] Respondent relies on the case because the ICSID tribunal partially declined jurisdiction over the dispute, instead deferring to a contractual clause calling for OHADA arbitration (even though that contract had not been signed by all four claimants).[1139] Again, though, Respondent leaves out critical details. The *Getma* tribunal emphasized the same foundational points as the *Nissan* tribunal, discussed above. In particular, it stated that the host State bore the burden of proving that the relevant contractual dispute resolution provision expressed a clear intent to specifically waive ICSID jurisdiction.[1140] And unlike the contractual dispute resolution clauses under consideration here, the one at stake in *Getma* directly contradicted the consent to ICSID jurisdiction, thus justifying dismissal.[1141] Even more importantly, one of the claimants in *Getma* had *already commenced* OHADA arbitration before commencing ICSID arbitration[1142]—and had even asserted some international law claims otherwise reserved for the ICSID tribunal before the OHADA tribunal.[1143] Needless to say, none of these extreme facts are present here. Thus, Respondent's own authorities disprove its defense.

[1138] *Getma International v. Republic of Guinea* [II], ICSID Case No. ARB/11/29, Decision Regarding Jurisdiction, 29 Dec. 2012 ("***Getma***") (RL-0050), ¶¶ 1-4, 12, 24-25.

[1139] *Getma* (RL-0050) ¶¶ 99-100; § X(1)-(2). The separate proceeding was before the common court of justice and arbitration (the "CCJA") of the Organisation pour 1'Harmonisation en Afnque du Droit des Affaires (the "OHADA"). *Getma* (RL-0050) ¶ 19.

[1140] *Getma* (RL-0050) ¶¶ 99, 103-06.

[1141] *Getma* (RL-0050) ¶¶ 44-49, 97-99, 104, 117-18, 125 (explaining how the contractual dispute resolution clause was a "contrary agreement" pursuant to which the jurisdiction of the OHADA tribunal replaced that of the ICSID tribunal).

[1142] *Getma* (RL-0050) ¶¶ 19, 22, 137.

[1143] *Getma* (RL-0050) ¶¶ 133-34; *see also id.* ¶¶ 137-38 (noting that the claimants in that case eventually modified their claims).

3. Respondent's Attempts to Attack the Unity of Investment Theory Fail

346. In one final attempt to attack the Tribunal's jurisdiction under Article VII of the BIT, Respondent asserts that the "unity of investment concept does not apply in this case."[1144] As set forth in greater detail above, Respondent is mistaken.[1145] By adding an argument about this subject here, Respondent only pits itself against its own first jurisdictional defense (regarding illegality and corruption). Here, it asserts that Claimants' contracts are "stand-alone agreements that have no bearing on any other project";[1146] there, it states that "they share a common core" such that one must be considered to affect all the others.[1147] The directly contradictory nature of Respondent's arguments betrays their inherent weakness.

347. As it relates to Article VII of the BIT, Respondent insists that the "Claimants' contracts are not interdependent, interrelated, or inseparable" and therefore "disputes arising under these five contracts must be resolved in accordance with their individual express terms, as required by Article VII(2)"; ergo, the unitary investment theory does not apply.[1148] This reflects just another faulty iteration of Respondent's defective, one-off contract theory. While the rights enshrined in Claimants' eight construction Contracts alone would be sufficient to constitute a unified investment,[1149] Claimants have consistently made clear that their Contracts constitute but one part of their Unitary Investment.[1150] That investment also includes a Panamanian company

[1144] Resp.'s Reply § II.C.4.

[1145] *See supra* Section II.A.2.a.

[1146] Resp.'s Reply ¶ 182.

[1147] Resp.'s Reply ¶ 63.

[1148] Resp.'s Reply ¶¶ 181-84.

[1149] *Mytilineos Holdings SA v. Serbia and Montenegro and Serbia*, UNCITRAL Arbitration, Partial Award on Jurisdiction, 8 Sept. 2008 ("***Mytilineos***") (CL-0156), ¶ 120 ("Even if one doubted whether the Agreements looked at in isolation would constitute investments by themselves, is [*sic*] seems clear that the combined effect of these agreements amounts to an investment.").

[1150] *See supra* Section II.A.2.a.

(Omega Panama), Mr. Rivera's capital investments, Omega U.S.'s investment of know-how and goodwill, such as Omega U.S.' reputation, project track-record, and bonding and financial capacity, all legal rights arising out of its successful bids for multiple construction projects, and all of the attendant operations for various public works throughout the country.[1151]

348. Jurisprudence is clear that this Tribunal should adopt a "holistic view of Claimant's business activities" in Panama.[1152] That view must include not only the relevant Contract rights, but also the establishment of a local company and long-term business relations, the commitment of tangible and intangible assets by the Claimants, and other significant contributions to the host State's development.[1153] It must also include Claimants' operations, meaning "the construction itself."[1154] The total "combined effect" of all of these factors is "clearly more than an ordinary commercial transaction" and constitutes a Unitary Investment.[1155]

349. Returning to the immediate question posed by Article VII, Claimants' position on their Unitary Investment must be correct because under Respondent's view, there would be no forum to address the distinct issues at stake in this case. In other words, if Respondent were successful in convincing this Tribunal to salami-slice this dispute into numerous, separate commercial contract arbitrations, none of those proceedings would have jurisdiction to address Respondent's misconduct falling outside of the four corners of each of the various construction Contracts. That misconduct is extensive and includes unlawful criminal investigations, bank freezes, travel prohibitions, as well as a general campaign of targeted harassment against

[1151] *See supra* Section II.A.2.a.

[1152] *Mytilineos* (CL-0156) ¶ 123.

[1153] *Mytilineos* (CL-0156) ¶ 124.

[1154] *Saipem S.P.A. v. People's Republic of Bangaladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 Mar. 2007 (CL-0153), ¶ 110.

[1155] *Mytilineos* (CL-0156) ¶ 125.

Claimants. Respondent's argument that *there is no forum at all* to address such misconduct cannot be correct. It is the BIT (and the TPA) that are designed to address such grievous wrongs.

350. For all of these reasons, the Tribunal should reject Respondent's jurisdiction defense relating to Article VII of the BIT.

III. CONCLUSION

351. In sum, all of Respondent's Preliminary Objections fail. For all of the reasons set forth above, the Tribunal should reject all of Respondent's jurisdiction and admissibility defenses, affirm its jurisdiction over Claimants' claims, adjudicate all of those claims on the merits, and award Claimants their costs incurred in rebutting each of Respondent's Preliminary Objections.

Respectfully submitted,

Jones Day

JONES DAY
Washington, D.C. & London

Shook Hardy & Bacon

SHOOK, HARDY & BACON LLP
Miami, FL

Counsel for Claimants