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' POST-HEARING SUBMISSION

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8 JANUARY 2021

TABLE OF REFERENCE TO THE TRIBUNAL'S QUESTIONS

I. INTRODUCTION

1. Claimants submit this Post Hearing Brief pursuant to Section H of the Tribunal's Order dated 6 October 2020, as amended by the Tribunal's letter of 11 December 2020. Before turning to the merits of the dispute, Claimants thank the Tribunal for its time and attention over the last several years. As Mr. Rivera stated during the Hearing, Claimants are grateful to have been given their day in court. (Tr 2/514:10-13). It has been more than six years since Respondent destroyed Claimants' investment in Panama, as well as the reputations of Omega U.S. and Mr. Rivera globally. When Panama's unlawful actions began, Mr. Rivera was in his early forties and his successful construction business—which portfolio and track-record took two generations to build—was expanding regionally. By the time this case was filed, Mr. Rivera had lost everything as a result of Panama's treaty breaches; he struggled even to find a job to support his family. Indeed, to this day, Panama inexplicably continues to maintain the detention order and asset freezes against Mr. Rivera and his companies, and make baseless allegations which only further tarnish his (and Omega's) reputation. By the time this case is resolved, Mr. Rivera will likely be in his fifties and will have lost almost a decade of his career to Panama's wrongful conduct. Claimants thus greatly appreciate the opportunity to present and prove their case to the Tribunal.

2. The evidence from the First and Second Week Hearings, along with the other evidence presented throughout this arbitration, proves that Respondent violated Claimants' rights under the U.S.-Panama BIT and the U.S.-Panama TPA (collectively, the "**Treaties**") in myriad ways. Those violations were committed by numerous Panamanian Government entities and generally took one of two primary forms: (i) repeated, arbitrary assaults on the Omega Consortium's Contracts and Projects in Panama (and which were politically motivated); and (ii) improper criminal investigations that lacked basic competence and due process and have been continued (and wrongfully publicized) despite their rejection by Panama's own courts. Such

conduct is not countenanced by international law, and, try as it might, Respondent cannot spare itself from the ensuing liability under the Treaties by continuing to baselessly malign Claimants with unsupported allegations of criminal conduct and poor business practices.

3. Below, Claimants will first address the nature of Claimants' investment in Panama and the investment dispute here (*see infra* § II), followed by a discussion of the evidence and testimony proving that Respondent's measures against Claimants and their Investment were sovereign, arbitrary, and unlawful, in violation of the applicable Treaties (*see infra* § III). Claimants then show that Panama's Treaty breaches caused catastrophic losses to Claimants and their investment in Panama (*see infra* § IV), which must be fully compensated through an award of damages in the amount of US$ 81.22 million plus interest (net of Panamanian taxes) (*see infra* § V). Finally, Claimants will briefly address the baseless nature of Respondent's jurisdictional objections (*see infra* § VI).

4. With respect to the questions posed by the Tribunal in its letter dated 10 November 2020, Claimants have included their responses where most relevant throughout this Post Hearing Brief. For the Tribunal's ease of reference, Claimants have included a "*Table of Reference to the Tribunal's Questions*" indicating the page numbers where Claimants address each question. Lastly, in accordance with the Tribunal's letter of 11 December 2020, Claimants have included an Annex to their Post Hearing Brief addressing the authenticity of the VarelaLeaks documents and showing how these documents support Claimants' case (*see* Claimants' VarelaLeaks Annex To Their Post-Hearing Submission).

II. CLAIMANTS MADE AN INVESTMENT IN PANAMA, AND RESPONDENT'S WRONGFUL ACTIONS GAVE RISE TO AN INVESTMENT DISPUTE

5. In response to the **Tribunal's Question No. 2**, Claimants summarize the nature and form of Claimants' investment in Panama (*see infra* § II.A), clarify that the Project Contracts are

not Investment Agreements as defined by the TPA (*see infra* § II.B), and reiterate the reasons why the dispute qualifies as an "investment dispute" (*see infra* § II.C). Claimants also explain, in response to the **Tribunal's Question No. 3**, that a distinction between "investor" and "investment" is immaterial with respect to the claims advanced and damages sought by Claimants (*see infra* § II.D).

A. THE COMPOSITION OF CLAIMANTS' INVESTMENT IN PANAMA (TRIBUNAL QUESTION NO. 2)

6. Mr. Rivera entered the Panamanian market to focus on public works contracts through a consortium, which he called the Omega Consortium and which consisted of Omega Panama and Omega U.S.[1] Mr. Rivera registered Omega Panama—as a fully-owned local company—in October 2009.[2] His goal was for Omega Panama to build sufficient experience, know-how, reputation, and financial and bonding capacity to win construction contracts on its own without the help of Omega U.S.[3] As such, Omega Panama would generally represent 98 to 99 percent of the Omega Consortium.[4] Since Omega Panama did not have its own track record,

[1] Claimants' Memorial dated 25 June 2018 ("**Cls' Mem.**"), ¶¶ 23-25; First Witness Statement of Mr. Oscar I. Rivera Rivera dated 25 June 2018 ("**Rivera 1**"), ¶¶ 13-15; First Witness Statement of Mr. Frankie J. Lopez dated 27 May 2019 ("**Lopez 1**"), ¶¶ 17-18. As Claimants have noted, in order to preserve the brand Mr. Rivera first registered PR Solutions and bid and won a project with Omega U.S. and PR Solutions as the consortium. Cls' Mem. ¶ 29; Rivera 1 ¶¶ 21-22; Third Witness Statement of Mr. Oscar I. Rivera Rivera dated 17 Jan. 2020 ("**Rivera 3**"), ¶ 26; First Expert Report of Pablo Lopez Zadicoff and Sebastian Zuccon, Compass Lexecon dated 25 June 2018 ("**Damages Expert Report 1**"), ¶¶ 29-30.

[2] Public Registry of Omega Engineering Inc. dated 26 Oct. 2009 (C-0017 resubmitted); Rivera 1 ¶ 21.

[3] In the construction sector, including public contracts, experience, know-how, reputation, and bonding and financial capacity are essential to winning bids. It is therefore no surprise that bid evaluation criteria consider such intangible assets on the part of each bidder. *See, e.g.*, Report from the Evaluation Commission Public Act Nº 2010-0-12-0-99-AV-003042, undated (C-0349), at 19; Colón Market Evaluation Committee Report dated 3 Oct. 2011 (C-0625), at 4-5; Panama Municipality Evaluation Committee Report No. 2013-5-76-0-08-AV-004644 dated 15 Apr. 2013 (C-0626), at 2-5; Colon Municipal Palace Evaluation Committee Report dated 26 Nov. 2012 (C-0627), at 2.

[4] As noted in Claimants' pleadings, the Omega Consortium generally consisted of Omega Panama, holding 98 to 99 percent of the shares of the Omega Consortium and Omega U.S. holding the remaining 1 to 2 percent, except in instances "where a particular expertise that the Omega companies lacked was required, then a third company would join the Omega Consortium, generally holding only a nominal 1% share." Cls' Mem. ¶ 32. This third company would not participate in any profits, but rather would generally operate as a subcontractor in the respective project.

however, Mr. Rivera also invested Omega U.S.' know-how, track record, financial and bonding capacity, reputation, and goodwill in the Omega Consortium, and thus in Panama,[5] as well as personal guarantees to obtain financing and secure bonding.[6] Mr. Rivera was required to register Omega U.S. in Panama as a foreign company, which he did in May 2010.[7] Doing so posed a risk to Mr. Rivera and Omega U.S. because "[i]ncluding Omega U.S. as part of the Omega Consortium meant that it would be jointly and severally liable to the Panamanian [Government] contracting entity for the obligations set out in the various proposals."[8] Claimants assumed that risk and began bidding on (and winning) contracts with Omega U.S. as part of the Omega Consortium.[9]

7. Claimants' decision to invest Omega U.S.'s know-how, goodwill, etc. in Panama was part of a long-term strategy to establish Omega Panama in the Panamanian market, and eventually replicate this strategy in other countries in the region.[10] Given his 100% ownership in both Omega U.S. and Omega Panama, Mr. Rivera did not need to enter into any type of agreement between his two companies to formalize his intention. (Tr 2/343:17-19; 5/886:16-887:17). Mr. Rivera envisioned the Omega Consortium as the vehicle for bidding and operating in Panama until Omega Panama could fully stand on its own.

8. Claimants' quantum expert, Mr. Lopez Zadicoff, confirmed that he valued the Omega Consortium as a whole because it is "an indivisible investment . . . [made] in Panamá in

[5] Cls' Mem. ¶ 39; Claimants' Reply on the Merits and Counter-Memorial on Preliminary Objections dated 30 May 2019 ("**Cls' Reply**"), ¶ 38; Claimants' Rejoinder on Preliminary Objections dated 20 Jan. 2020 ("**Cls' Rej.**"), ¶¶ 93, 98, 347; Rivera 1 ¶ 26; Rivera 3 ¶ 28.

[6] *See, e.g.*, Compensation Document dated 26 Oct. 2012 (C-0377); General Agreement of Indemnity executed between Travelers Casualty & Surety Company and Omega-U.S. dated 17 May 2010 (C-0100); Travelers Rider to General Agreement of Indemnity dated 25 Aug. 2011 (C-0618).

[7] Rivera 1 n.47.

[8] Cls' Mem. ¶ 39.

[9] *See id*. ¶ 33.

[10] Rivera 1 ¶¶ 25-26; Rivera 3 ¶ 28.

order to profit from [the] capacity to generate new business, and that materialized in the past in nine Contracts and will continue to materialize in the future in more contracts." (Tr 5/935:16-21). As explained *infra*, Mr. Lopez Zadicoff's economic assessment of Claimants' investment is correct both from a factual and legal perspective.

9. Claimants' investment in Panama thus consisted of the following constituent parts:

(i) Omega Panama—a local company, satisfying the requirement included in many of the tenders and providing the legal and economic structure to manage the construction projects locally;[11]

(ii) The goodwill, bonding and financial capacity, know-how, experience and reputation of Omega U.S., which was built up over decades of successful operations in Puerto Rico and the Caribbean and which satisfied other requirements contained in most public works tenders;[12]

(iii) The public works contracts won by the Omega Consortium, valued at nearly US$ 160 million;[13] and

(iv) Mr. Rivera's personal guarantees,[14] which secured and maintained the Omega Consortium's bonding capacity.

10. This single, unitary investment—and each of its constituent parts individually—satisfy all applicable requirements for an investment.

1. *Claimants' Investment Satisfies The BIT's Requirements*

11. The BIT defines "investment" as "every kind of investment, owned or controlled directly or indirectly," including companies, know-how, goodwill, contracts and contract rights.[15]

[11] Cls' Mem ¶ 33; Damages Expert Report 1 ¶¶ 29-30.

[12] *Id*.

[13] Damages Expert Report 1 ¶ 43.

[14] *See* Cls' Rej. ¶ 347; *supra* n.7.

[15] Treaty between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investment, signed on 27 Oct. 1982, entered into force on 30 May 1991 (CL-0001) ("**BIT**"), art. I(d); Cls' Mem. ¶ 123. *See also* Cls' Reply ¶ 356.

Claimants' investment plainly falls within this definition. Omega Panama is a local "company" capitalized and owned by Mr. Rivera.[16] Omega U.S. invested its "know-how" and "goodwill" (among other intangible assets) in the Omega Consortium in Panama, and Mr. Rivera provided his personal guarantees to secure the Consortium's bonding. And the Contracts won by the Omega Consortium are "right[s] conferred by law or contract," "claims to money or . . . performance" and other "rights."[17] Each of these, separately or together, meet the BIT's definition of investment.

2. *Claimants' Investment Satisfies The TPA's Requirements*

12. The TPA defines "Investment" as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment," including: "(a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise; . . . (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; [and] . . . (h) other tangible and intangible . . . property."[18] Claimants' investment plainly falls within this definition. Mr. Rivera and Omega U.S. committed tangible and intangible resources in Panama—*i.e.*, financial resources, human resources, know-how, goodwill, and others—at great risk, and with the expectation of profit.[19] Mr. Rivera's ownership of Omega Panama constitutes ownership of 'an enterprise' in Panama.[20] And the Omega Consortium's Contracts are "turnkey, construction . . . contracts," which are expressly protected by the TPA. Each of these, separately or together, meet the TPA's definition of investment.[21]

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[16] Cls' Mem. ¶ 124.

[17] *Id*.

[18] United States – Panama Trade Promotion Agreement, entered into force on 31 Oct. 2012 ("**TPA**") (CL-0003), art. 10.29; Cls' Mem. ¶ 129. *See also* Cls' Reply ¶ 356; Tr. 1/62:12-14 ("It is undisputed that the entire TPA applies to the entire investment and the entirety of these claims.").

[19] Cls' Mem. ¶ 39; Cls' Reply ¶ 38; Cls' Rej. ¶¶ 93, 98, 347; Rivera 1 ¶¶ 25-26; Rivera 3 ¶ 28.

[20] Cls' Mem. ¶ 130.

[21] *Id*. Claimants' investment likewise satisfies the requirements of the ICSID Convention. *See id*. ¶ 133.

B. THE PROJECT CONTRACTS ARE NOT "INVESTMENT AGREEMENTS" AS DEFINED BY THE TPA (TRIBUNAL QUESTION NO. 2)

13. While the Contracts are part of Claimants' protected "investment," they are *not* "investment agreements." The TPA defines an "Investment Agreement" as a:

> written agreement . . . between a national authority of a Party and a covered investment or an investor of the other Party that grants the covered investment or investor rights: (a) with respect to natural resources or other assets that a national authority controls; *and* (b) upon which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself."[22]

14. Claimants' Contracts do not fall within this definition. *First*, the Contracts do not grant Claimants' rights "with respect to natural resources or other assets that a national authority controls." Investment Agreements are more akin to a mining concession or a port operation agreement, for example, than to construction contracts which are delivered to the contracting authority once completed. *Second*, Claimants did not rely on the Project Contracts "in establishing or acquiring a covered investment other than the written agreement itself."

C. THE CLAIMS ADVANCED BY CLAIMANTS ARE AN INVESTMENT DISPUTE UNDER THE BIT AND THE TPA (TRIBUNAL QUESTION NO. 2)

15. This dispute is a classic investment dispute in which Claimants allege violations of international law protections provided by the Treaties. The BIT defines an investment dispute as "a dispute involving . . . an alleged breach of any right conferred or created by this Treaty with respect to an investment."[23] Claimants "have alleged international law breaches of 'right[s]

[22] TPA (CL-0003), art. 10.29 at 10-24 (emphasis added). *See also* Tr. 1/63:7-10 ("Everyone here agrees that this case does not involve the interpretation or application of an Investment Agreement, an Investment Authorization, a Concession Agreement, or the like."). The BIT does not define an "investment agreement."

[23] BIT (CL-0001), art. VII.1. The TPA does not define an investment dispute, but it uses the term "investment dispute" in a manner consistent with the definition in the BIT. TPA (CL-0003), §§ B-C.

conferred or created by this Treaty with respect to an investment.'"[24] In particular, Claimants have brought claims for violations of the Fair and Equitable Treatment, Full Protection and Security, and umbrella clause protections, as well claims for expropriation.[25] Respondent's wrongful actions giving rise to these international law violations are all sovereign in nature.[26]

16. As such, Claimants' claims constitute an "investment dispute" over which this Tribunal possesses *exclusive* jurisdiction.[27]

D. ANY DISTINCTION BETWEEN "INVESTMENT" AND "INVESTOR" IS IMMATERIAL

17. In the **Tribunal's Question No. 3**, the Tribunal has asked whether "a distinction between 'investor' and 'investment' has relevance in view of the claims advanced and damages sought by Claimants."[28] Such a distinction is immaterial with respect to these claims, which are premised on two courses of conduct by Respondent: its strangulation of the Omega Consortium and its Contracts,[29] and its criminal investigations into Mr. Rivera and Omega Panama.[30]

18. These wrongful acts taken against the Omega Consortium and its Contracts are plainly action against Claimants' "investment."[31] Once liability has been established, compensation is governed by the *Chorzow Factory* standard of "full reparation," irrespective of any distinction between "investor" and "investment" in the substantive treaty protections.[32] That

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[24] Cls' Reply ¶ 343. *See also* Claimants' Opening Presentation ("**Cls' Opening**"), at 69.

[25] Cls' Mem. § IX; Cls' Reply § VIII.

[26] Cls' Reply ¶ 344.

[27] *Id.* ¶¶ 345-47.

[28] Letter from the Tribunal to the Parties dated 10 Nov. 2020 at 2, Question 3.

[29] *See infra* § III.A.

[30] *See infra* § III.B.

[31] *See infra* § III.A; BIT (CL-0001), art. I(d); Cls' Mem. ¶¶ 123-24. *See also* Cls' Reply ¶ 356.

[32] Claimants' Response to the U.S.' Non-Disputing Party Submission dated 30 June 2020 ("**Cls' Response to U.S. Submission**"), ¶ 19. *See also id.* ¶¶ 19-21.

principle is supported by the plain language of the TPA, too, which permits an investor to bring claims both "on its own behalf," and "on behalf of an [investment]" for breach of "an obligation under Section A [setting forth all substantive protections under the TPA]"—irrespective of whether a particular protection is defined with respect to the investment or the investor.[33] Therefore, with respect to Respondent's conduct against the Omega Consortium and its Contracts, Respondent is liable for all harm caused by that conduct.

19. The distinction between "investor" and "investment" is also immaterial with respect to Respondent's criminal investigations of Mr. Rivera and Omega Panama, its freezing of their accounts and issuance of detention orders, and its improper disclosure of those actions.[34] The award in *Rompetrol v. Romania* ("*Rompetrol*")[35] is instructive here. There the applicable treaty, as here, spoke in terms of ensuring fair and equitable treatment and full physical security and protection to the "*investments of investors*."[36] Claimants asserted, *inter alia*, that the respondent state's criminal investigations into officers and shareholders of the investor, which involved procedural irregularities and acts of surveillance, detention, press releases regarding the investigation, and travel bans, violated those treaty obligations.[37] In analyzing those claims, the

[33] TPA (CL-0003), art. 10.16.1.

[34] *See, e.g.*, *More seized bank accounts linked to suspended judge*, NEWSROOM PANAMA dated 30 Jan. 2015 (C-0193); *Prosecutor seizes accounts linked to Alejandro Moncada Luna*, LA PRENSA dated 30 Jan. 2015 (C-0194); *Fiscalia pide a Interpol que emita 'alerta roja' para ubicar a 4 empresarios por caso Moncada Luna*, TVN NOTICIAS dated 2 Sept. 2015 (C-0094 resubmitted); *Accounts related to money laundering are seized*, LA PRENSA dated 21 June 2015 (C-0213); *Freezing of accounts linked to money laundering*, LA PRENSA dated 21 June 2015 (C-0732).

[35] *Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 ("***Rompetrol***") (CL-0126).

[36] *Id*. ¶ 193 (setting forth the text of Article 3(1) of the applicable BIT as "Each Contracting Party shall ensure fair and equitable treatment of the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors. Each Contracting Party shall accord to such investments full physical security and protection").

[37] *Id*. ¶¶ 191-201.

Tribunal noted that there "can be no dispute that actions directed against [the investor, The Rompetrol Group] ***or*** its investments in Romania fall within the zone of protection accorded by [the BIT]," thus drawing no distinction between acts against the investor and those against the investment, notwithstanding the specific reference to "investments" in the relevant provisions of the BIT.[38] It further found that actions against individuals associated with the investor, if such actions were "directed against [such] individuals (even in their personal capacity) for the purpose of harming the investor or its investment through the medium of injury to the individuals,"[39] were relevant to assessment of the alleged treaty breach. On that basis, the tribunal concluded that the criminal investigations against individuals associated with the investor, and related conduct, breached the respondent state's obligation to "ensure fair and equitable treatment of the investments of investors of the other Contracting Party."[40]

20. Those same principles and reasoning apply here with equal force: as detailed in section III.B, *infra*, Respondent conducted criminal investigations, seized and froze assets, and took other related actions against both Mr. Rivera ***and*** Claimants' investment, Omega Panama. Those actions are plainly actions against Mr. Rivera, as investor, and Omega Panama, as investment. But even the actions against Mr. Rivera alone harmed Claimants' investment through, *inter alia*, reputational harm. Such actions are thus a breach of Respondent's treaty obligations and, as discussed, require full compensation for all harm caused.

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[38] *Id*. ¶ 200. *See also* Hemmi, M., *Using International Investment Arbitration for Compensating Victims of Torture*, MCGILL JOURNAL OF INTERNATIONAL LAW AND LEGAL PLURALISM, 30 May 2019 ("Most authors agree that 'full protection and security' must be understood as protecting the investor from bodily injuries, harassments, or threats caused by government acts.") (CL-0279), at 11.

[39] *Rompetrol* (CL-0126), ¶ 200.

[40] *Id*. ¶¶ 193, 279.

III. RESPONDENT'S MEASURES AGAINST CLAIMANTS AND THEIR INVESTMENT WERE SOVEREIGN, ARBITRARY, AND UNLAWFUL

21. The evidence in this arbitration demonstrates that Respondent breached the Treaties when its various agencies and instrumentalities arbitrarily strangled Claimants' contracts (*see infra* § III.A). Respondent also breached the Treaties when it targeted Claimants with unfounded and prolonged criminal persecution (*see infra* § III.B).

A. Panama's Treatment of Claimants' Contracts Was Arbitrary And Pretextual

22. Prior to the Varela Administration, Claimants and Respondent's officials had a collaborative relationship.[41] This pattern changed once President Varela was elected in May 2014. The evidence that emerged during the hearing underscores this abrupt shift, whereby Claimants' contracts were stifled and terminated either as a form of political retribution (*see infra* § III.A.1) or as mere arbitrary and obstructionist behavior (*see infra* § III.A.2), ***all*** *before there were* ***any*** *allegations of criminality* (however frivolous they might have been). The treaties and international law do not countenance such behavior by an investment host state (*see infra* § III.A.3).

23. As a preliminary matter, and in response to the **Tribunal's Question No. 4**, Claimants first seek to clarify the burden (and standard) of proof applicable in this case. It is well-established in international law that "each Party bears the burden of proving the facts which it alleges."[42] Thus, Claimants have the burden of proving the facts that they allege in support of their

[41] Cls' Reply § III.B; Lopez 1 § IV; Second Witness Statement of Mr. Frankie J. Lopez dated 17 Jan. 2020 ("**Lopez 2**"), ¶¶ 6-7, 9.

[42] *Churchill Mining v. Indonesia*, ICSID Case No. ARB/12/14, Award, 6 Dec. 2016 (RL-0010), ¶ 238; *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award, 16 May 2012 (CL-0095), ¶ 33 ("[T]here is a nearly universal practice among international arbitration tribunals to require each party to prove the facts which it advances in support of its own case."); *Waguih Elie George Siag & Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009 ("***Siag***") (CL-0032), ¶ 315; *Vito G. Gallo v. Government of Canada*, PCA Case No. 55798, Award (Redacted), 15 Sept. 2011 ("***Gallo***") (CL-0125), ¶ 277; *Rompetrol* (CL-0126) ¶ 179; *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010 ("***Liman***") (CL-0138), ¶ 194; *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009 (CL-0161), ¶ 113.

claims, and "if the respondent chooses to put forward fresh allegations of its own in order to counter or undermine the claimant's case, then by doing so the respondent takes upon itself the burden of proving what it has alleged."[43] Likewise, "if the [r]espondent raises defences, . . . the defences can only succeed if supported by evidence marshalled by the Respondent."[44]

24. For example, in the context of Respondent's termination of the Ciudad de las Artes ("**CDLA**") and the Municipality of Panama Projects, and the resulting ban on Claimants' ability to bid for future public works projects, Claimants bear the burden of proving that Respondent ceased to engage with Claimants fairly and in accordance with the Projects' Contracts, and that Respondent's arbitrary, capricious, unjustified and/or retributory actions were a cause of the circumstances that led to Respondent's termination of the Contracts and the prohibitions on the Omega Consortium's future public bidding. Respondent, on the other hand, must prove its independent allegations that Claimants, and Claimants alone, breached the Contracts. In other words, Respondent must prove its contentions that the termination of those Contracts and accompanying prohibitions on public bidding were entirely justified and based solely on Claimants' alleged failure to fulfill the Omega Consortium's contractual obligations.

25. With respect to the claims and defenses related to the Omega Consortium's Contracts, both parties must prove their allegations by a balance of probabilities,[45] meaning the allegations are "more likely than not to be true."[46] And thus, while the burden of proof remains

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[43] *Rompetrol* (CL-0126), ¶ 179. *See also Gallo* (CL-0125), ¶ 277; *Liman* (CL-0138), ¶ 194.

[44] *Gallo* (CL-0125), ¶ 277.

[45] *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Award, 3 March 2010 ("***Kardassopoulos***") (CL-0114), ¶¶ 224-27 (explaining that the claimants have the burden of proving their case on a balance of probabilities); *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005 (CL-0078), ¶¶ 100-01 (same); *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007 ("***Tokios***") (CL-0022), ¶ 124.

[46] *Tokios* (CL-0022), ¶ 124 (stating that with regards to the standard of proof, "Claimant must show that its assertion is more likely than not to be true."). Claimants note that the standard of proof for Respondent's corruption

with the party that must establish a particular factual assertion throughout the proceeding, the standard of proof is relative, meaning that "whether a proposition has in fact been proved by the party which bears the burden of proving it depends not just on its own evidence but on the overall assessment of the accumulated evidence put forward by one or both parties, for the proposition or against it."[47] As demonstrated below, and discussed in Claimants' pleadings, Claimants have met their burden and Respondent has not.

1. *Respondent Refused To Pay, Stalled, Or Terminated The Contracts—All Without Any Reasonable Basis*

26. The Omega Consortium had eight contracts with five public authorities in Panama (the "**Contracts**"), all signed between the years 2011 and 2013.[48] These Contracts were with the MINSA (the "**MINSA CAPSI Contracts**"), INAC (the "**CDLA Contract**"), the Judiciary (the "**La Chorrera Contract**"), the Municipality of Panama (the "**Mercados Perifericos Contract**"), the Ministry of the Presidency ("**Mercado Público de Colón Contract**"), and the Municipality of Colon (the "**Municipal Palace Contract**").[49] All of these Contracts were progressing well before President Varela was elected in June 2014; all of them were beset by government obstruction thereafter.

27. **The best example of Respondent's sudden arbitrary change was on the CDLA Contract**. INAC's Director under the prior administration, Ms. Maria Eugenia Herrera, testified that when she left her "position as Director, in the summer of 2014, there were no major problems

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and money laundering defense is clear and convincing evidence. *See infra* ¶¶ 67, 73; Cls' Reply ¶ 281.

[47] *Rompetrol* (CL-0126), ¶ 178.

[48] For a chronology of the Contracts, *see* Cls' Opening at 58.

[49] For a list of the contracts with exhibit numbers, *see* Cls' Opening at 10.

with the Omega Consortium's performance of the work"[50] on this Contract. Ms. Buendia, the Project inspector and Respondent's witness, has likewise confirmed that this was the case "prior to August 2014." (Tr 4/759:17-21). And Ms. Chen, also Respondent's witness, did not suggest any problems with the CDLA Project before the summer of 2014 either.[51]

28. But everything changed when Ms. Nuñez, President Varela's appointee, became the new Director of INAC in July 2014.[52] Respondent and its witness Ms. Buendia admit that "INAC started withholding approval of Omega's payment applications" as soon as Ms. Nuñez took office.[53] And Ms. Buendia confirmed that *INAC was* "*responsible*" for "delays in Contract payments," *which had an impact on "the contractor's cash flow*." (Tr 4/797:6-9). As Ms. Buendia candidly admitted, the CDLA Contract established a 30-day period to approve payments, and "clearly more than 30 days had elapsed"[54] since the Omega Consortium submitted its payment applications. But INAC refused to approve new payment applications and even to send already approved applications to the Comptroller General for endorsement.[55] As a result, none of Claimants' payment applications, requests for extensions of time or plans were approved by INAC

[50] Witness Statement of Ms. Maria Eugenia Herrera dated 13 May 2019 ("**Herrera**"), ¶ 12. *See* Lopez 2 ¶ 33.

[51] *See generally* Witness Statement of Carmen Chen dated 7 Jan. 2019 ("**Chen**"). Claimants did not call Ms. Chen to be cross-examined because nothing Ms. Chen said regarding the progress of the CDLA Project contradicts Claimants' case. *See also* Cls' Opening at 13-14.

[52] The timeline is illustrated on slides 15 through 17 of the Claimants' Opening Presentation. Cls' Opening at 15-17.

[53] The Republic of Panama's Reply in Support of its Objections to the Tribunal's Jurisdiction and Rejoinder on the Merits dated 18 Nov. 2019 ("**Resp.'s Rej.**"), ¶ 312; Witness Statement of Yadisel Buendia dated 18 Nov. 2019 ("**Buendía**"), ¶ 18; Tr. 4/807:22-808:6 ("Q. And you say in your Witness Statement that soon after that review began, INAC started withholding approval of Payment Applications; correct? A. Yes. They began to take more time in extending the approvals of Payment Applications for Omega and for ourselves as well.").

[54] Tr. 4/803:13-16 (testifying that "Clause 6 established a 30-day period, and clearly more than 30 days had elapsed, and we do ask the institution to do this as, once again, this is very usual with the Panamanian State").

[55] Cls' Reply ¶ 193.

or endorsed by the Comptroller General after the election.[56] Mr. Zarak characterized it as "***funny***" that "***there are no endorsed CPPs after the elections.***"[57]

29. Testimony at the hearing also showed that Respondent caused the same problems of which it now complains by refusing to approve blueprints on time. As Ms. Buendia testified, the CDLA Project was "a fast-track project, which means the design and construction are done in tandem."[58] INAC's failure to approve the Omega Consortium's[59] blueprints stalled the Project and prevented the Omega Consortium from complying with its work plan. This is *exactly* what Mr. Lopez said when he was asked about a supposed reduction of the Project's workforce: although the Omega Consortium anticipated having a certain number of employees at the Project, "[i]n order to meet that projection, [the Omega Consortium] needed some approvals. [Without the approvals, the projection was] different from reality."[60] In any event, after repeatedly voicing her "concern" over a "dramatic reduction in the personnel at the Project," Ms. Buendia withdrew that complaint when confronted during cross-examination with the evidence[61] showing that Claimants maintained most of the anticipated workforce.[62]

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[56] Lopez 1 ¶ 119.

[57] Tr. 6/1209:1-2. *See also* Tr. 6/1266:15-20 ("I would say barely half, but, yes, we did not have enough money on the budget to cover the CPPs" that had already "been endorsed and become irrevocably owing").

[58] Tr. 4/807:8-11 ("This particular project was a design-and-build project that means a fast-track project, which means the design and construction are done in tandem.").

[59] Monthly report from Sosa to INAC dated Oct. 2014 (C-0524).

[60] Tr. 2/304:19-306:7 (testifying that the workforce projections were done "on the basis of the fact that we were going to get an approval on side B, we had to build a metal structure. For us to build a metal structure, we needed to get an approval. Although we submitted the proposal, the approval was never signed off on . . . In order to meet that projection, we needed some approvals. This is different from reality.").

[61] Tr. 4/764:21-771:14.

[62] Tr. 766:1-15, 767:6-771:14; Letter from Omega to Sosa dated 5 Sept. 2014 (R-0045); Biweekly payroll of Ciudad de las Artes dated 1-15 Sept. 2014 (C-0796). Panama's refusal to approve payments and work scope changes forced the Omega Consortium to take steps to mitigate the devastating effect these were causing the Omega Consortium's financial wellbeing. That the Omega Consortium took mitigating steps is not only unsurprising, but it is justified. Expert Report of Jose A. Troyano dated 17 Jan. 2020 ("**Troyano**"), ¶ 127 ("[W]hen one of the parties fails to comply with its obligations, the other party has the right to . . . take reasonable and appropriate measures to

30. In addition to the new Director's and the Comptroller General's obstructionist behavior, on 8 September 2014 the Ministry of the Economy and Finance ("**MEF**") inexplicably slashed the budget for the CDLA Project. Mr. Zarak made striking admissions on this point.

31. As vice minister of the MEF from 1 July 2014 until the end of 2017, Mr. Zarak testified that he was "especially familiar with budgets" during this period. (Tr 6/1154:19-21). He explained that it was a "juggling act" (Tr 6/1158:9), and if an entity like INAC needed budgetary allotments, those would sometimes be subject to "cuts" because the President promised the money elsewhere. (Tr 6/1156:15-1159:21). He also confirmed that "no obligation can be paid without a specific budget line item to cover that obligation." (Tr 6/1167:22-1168:3). On the CDLA Project, the budget was always expected to be about US$ 54 million (Tr 6/1170:1-13), and Mr. Zarak confirmed that the MEF always knew that it would come due in 2015. (Tr 6/1172:2-1177:4). *But despite this, in early September 2014, the MEF knowingly allotted only US$ 10 million for the CDLA Project, or less than 20% of the expected amount and "barely half" of what was already endorsed and owed for completed work, in the 2015 budget.* (Tr 6/1177:11-1178:2; 6/1266:8-12). Mr. Zarak conceded that when it cut the budget, the MEF was "*quite aware* that [the budget allotment of US$ 10 million] was not enough to pay the [approved] CPPs" for work that the Omega Consortium had *already* done. (Tr 6/1216:22-1217:13). Yet, within that meager budget, the MEF had allocated *the full Contract amount* for the local project inspector, Sosa, even though Sosa had not yet completed and billed all of that work.[63] The MEF eventually also allocated funds to pay

mitigate damages incurred in the performance of the contract.").

[63] Tr. 6/1181:5-1184:12. As confirmed by Ms. Buendia, Sosa was paid in full. Tr. 4/790:16-18 ("And Sosa got paid for its services for the 13 months of work in Ciudad de las Artes at the end of 2015.").

the endorsed CPPs to Credit Suisse (Tr 6/1235:2-7), to remain in "good standing as a creditor with international banks."[64] ***Only the Omega Consortium went unpaid***.

32. What was the explanation for this? Mr. Zarak said that the Project was deemed "behind schedule" and "high risk." (Tr 6/1176:12-14; 6/1201:3-7; 6/1237:7-10). But the project inspector, Ms. Buendia, said that everything was proceeding well as of July 2014, and the first recorded indication of any problems with the Project was only made in mid-August 2014.[65] How could a project be deemed "high risk" and "behind schedule" over the course of three weeks, especially when during that time *the government* was "responsible" for "delays in Contract payments" which had an impact on "the contractor's cash flow"? (Tr 4/797:6-16). And how could the MEF base an early September budget cut on an alleged delay when it was not even copied on the mid-August assessment of that delay? (Tr 6/1251:10-1253:2; 6/1265:2-16).

33. Mr. Zarak's explanation was that the MEF decided to cut the budget because ***the MEF had received information*** from INAC's new Director (appointed by President Varela) that had made it "clear" and even "obvious" that it would be "physically impossible" for the Omega Consortium to complete the Project on time.[66] Mr. Zarak surmised that "before [14 August 2014, INAC's Director] had her eye on the Project and was doubtful" (Tr 6/1252:19-20, 6/1255:3-7, 6/1256:3-8), despite the prior Director's testimony about Claimants' good standing, which he dismissed as "CYA – excuse the language." (Tr 6/1244:1-2).

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[64] Witness Statement of Ivan Zarak dated 18 Nov. 2019 ("**Zarak**"), ¶ 18.

[65] Tr. 4/758:9-13, 4/759:17-21; Buendia ¶ 6; Tr. 6/1251:10-20, 6/1254:19-1255:1, 6/1265:9-15.

[66] Tr. 6/1263:11-14. *See also id.* 6/1200:21-1201:7 ("[T]he new Director of the INAC basically reviewed how the Project was going and how was its price completion against its timeline, project timeline, and then she presented the results to us, as well as to the cabinet. And stating, basically, the *obvious*, it was that *the Project was significantly behind schedule by that time and that there was no feasible way to finish this Project by its original due date*, according to the Contract.") (emphasis added).

34. To be clear, Mr. Zarak's testimony on these subjects is not supported by ***any documentary evidence***, which he admitted during the hearing.[67] He claimed that changes to budget spreadsheets "are lost in cyberspace or whatever" (Tr 6/1221:13), and clarified that "I'm just going by memory here." (Tr 6/1221:16). When asked for details about when and how he supposedly learned the CDLA Project was allegedly high-risk, Mr. Zarak said, "I have no idea,"[68] and he admitted that taking any firm position would amount to speculation.[69]

35. **But Mr. Zarak *also* suggested that documentary evidence concerning these subjects *does exist.*** He explained that the CDLA budget evolved in incremental steps in the form of spreadsheets which reduced the US$ 54.5 million budget to US$ 18 million, and then to US$ 10 million (Tr 6/1217:16-1218:13, 6/1238:15-1240:11), and that the process involved high-level public institutions—the National Assembly and Cabinet—that ***would likely maintain records***. (Tr 6/1157:6-18, 6/1158:20-1159:7). Mr. Zarak further testified that the budget was subject to "weekly meetings with [the] Cabinet that lasted until 11:00 or 12:00 at night" (Tr 6/1250:11-12), which would be reflected in ***meeting minutes***.[70] And he repeatedly testified to having formed his view of the Project as "high risk" based on a ***"report" or "presentation"*** given by the new INAC Director to the Cabinet. (Tr 6/1200:18-1201:7, 6/1201:17-1204:10, 6/1238:8-16, 6/1247:19-1248:6). He confirmed that he had "see[n]" this, and that ***something was "filed" and "provided"***

[67] *See* Tr. 6/1217:16-19, 6/1219:14-1221:18, 6/1237:7-19, 6/1238:12-19, 6/1239:15-1240:9, 6/1247:3-21.

[68] Tr. 6/1252:8-15. *See also* Tr. 6/1248:7-12.

[69] *See, e.g.*, Tr. 6/1252:20-21 ("I'm speculating here, and you're asking me something that I cannot--I cannot remember exactly . . . ."). In fact, Mr. Zarak used the word "speculate," or some variation thereof, no less than 15 times in his hearing testimony. *See* Tr. 6/1184:5, 6/1223:6, 6/1244:3, 6/1248:11, 6/1252:15, 6/1252:20, 6/1255:16, 6/1266:1, 6/1266:2, 6/1269:19, 6/1270:4, 6/1277:8, 6/1281:5, 6/1284:10, 6/1304:5.

[70] The record shows that Claimants wrote to INAC to request copies of these types of government files pursuant to the freedom of information principles outlined in Panamanian law. *See* Letter No. INAC-020 from Omega to INAC dated 24 Feb. 2015 (C-0629); Letter No. INAC-021 from Omega to INAC dated 6 Mar. 2015 (C-0630).

to the Cabinet. (Tr 6/1202:12-1203:12). And, he was "pretty sure there was some mention of it in the Cabinet minutes." (Tr 6/1203:14-15). He also explained that besides the presentation, INAC kept MEF informed about the status of the CDLA Project with regular updates. (Tr 6/1204:2-8).

36. *None* of these documents are in the record of this arbitration. If they exist, Respondent should have produced them more than a year ago during the document production phase of this case because they fall within Claimants' Requests 30, 31, and 32(i).[71] Had Respondent done so, Claimants would have had the ability to comment on them and cross-examine Respondent's witnesses on their substance. At this stage, the Tribunal should simply infer what the existing documentary record shows: that Respondent did not cut the CDLA budget based on any alleged delays or risk to the Project caused by the Omega Consortium.

37. On the face of INAC's, the Comptroller General's, and the MEF's efforts to obstruct the Project, the subcontractor ARCO withdrew. As Mr. Lopez explained, ARCO foresaw political problems for the Omega Consortium with the new Administration and told Mr. Lopez "*after the result of the elections* . . . that it did not wish to proceed with the Contract any longer

[71] The alleged "report" or "presentation" to the Cabinet by Ms. Nuñez, and any other INAC documents describing the status of the CDLA project after the Varela administration came into office, would fall within Requests 31 and 32(i) and should have been produced. *See* Tribunal's Decision on Claimants' Request for Production of Documents dated 19 Mar. 2019, Request No. 31 (Respondent agreed to "conduct a reasonable good faith search of accessible INAC files to locate and produce documents responsive to Request 31," which called for "[a]*ll Documents evidencing that INAC's senior management was concerned about or discussed purported 'serious problems with Omega's work starting in the first week of August 2014,' as Respondent claims. This request includes, but is not limited to, minutes of meetings and phone calls, internal memoranda, and internal or external correspondence*"); Request No. 32(i) (Respondent agreed to conduct "a reasonable, good faith search of accessible INAC files to locate and produce documents with just respect to any such 'review' with respect to the Ciudad de las Artes Contract" in response to the following request: "[a]*ll Documents: (i) reflecting, referring, or relating to the 'review' purportedly carried out by INAC 'of all ongoing projects,' including the Ciudad de las Artes Contract from 1 July 2014 through [1 July 2015]*"). Records relating to the budgetary details of the CDLA project are covered by Claimants' Request 30, and should have been produced. *See id.*, Request 30 (Respondent agreed to "conduct a reasonable, good faith search of accessible INAC files to locate and produce documents responsive to Request 30," which called for "*[a]ll Documents created by or originating from INAC, the National Assembly, or any other governmental entity establishing that a 2015 budget was assigned for the Ciudad de las Artes Project and demonstrating the details of that alleged budget*.") (emphasis added).

because, in its understanding, *it had information that the Project was going to be persecuted by the new administration*."[72] And it was. INAC issued an administrative termination of the CDLA Contract in December 2014, preventing Claimants from obtaining any further public works contracts for years thereafter.[73] This had a toppling effect for Claimants' entire investment in Panama,[74] and all of this was in violation of the INAC Contract and Panamanian law.[75]

38. In response to the **Tribunal's Question No. 5**, a finding of retaliation (or a coordinated campaign) by President Varela and his Administration against Claimants and their investment in Panama is indeed relevant to the termination of the CDLA Contract and ultimately to the question of Respondent's liability (but it is not necessary, as discussed below, *see infra* § III.A.2). Put simply, bad faith evinces international responsibility, but is not necessary to it.[76]

39. And that bad faith (or other international misconduct) need not be the sole cause of the harm.[77] Under international law a State bears responsibility for "the injury resulting from and ascribable to [its] wrongful act[s]."[78] When tribunals consider multiple factors that may have caused the injury, "only one of which is to be ascribed to the responsible State, international

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[72] Tr. 2/301:12-16 (emphasis added).

[73] Resolution No. 391-14 DG/DAJ from INAC dated 23 Dec. 2014 (C-0044 resubmitted); Cls' Reply ¶ 232.

[74] *See infra* § III.B.

[75] Cls' Reply § V(D)1.

[76] *See, e.g.*, *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Final Award, 8 June 2009 (CL-0272), ¶ 616 ("[It] is generally agreed upon . . . that bad faith is not required to find a violation of the fair and equitable treatment standard, but its presence is conclusive evidence of such."); *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009 [Redacted] (CL-0284), ¶ 19 (stating "that while acts of bad faith violate the fair and equitable treatment standard, bad faith is not required to make out a violation of the standard").

[77] JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (2002) ("**CRAWFORD – ILC'S ARTICLES**") (CL-0217), at 205, art. 31, comment 11.

[78] *Id.* at 203-04, art. 31, comment 9. *See also* SERGEY RIPINSKY & KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008) (CL-0093 resubmitted), at 84, 87; Cls' Mem. ¶ 197 & n.495 (explaining that the causal link is limited to "a certain 'directness,' 'foreseeability,' or 'proximity'").

practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes."[79] Thus, even if the Tribunal were to find that political retaliation (or any other wrongful action by Respondent) was not the *only* cause of the termination of the CDLA Contract, the fact that it was *a* cause would still give rise to a breach of the Treaties.[80] In any event, and as discussed *supra* and in Claimants' pleadings, Respondent did not have any legitimate reasons to terminate the CDLA Contract.

40. **The actions of MINSA with respect to the MINSA CAPSI Contracts is also representative of Respondent's unlawful conduct.** Ms. Mirones, MINSA's Director of Special Projects until August 2014, has given unrebutted testimony that at least until she left her position "the execution of [the Omega Consortium's] three Contracts progressed normally."[81] And she confirmed that "the Omega Engineering Consortium was a good contractor" and she was "satisfied with the work Omega Engineering was doing."[82] Mr. Lopez also explained that during the Martinelli Administration, MINSA worked cooperatively with Claimants.[83] Even though the MINSA CAPSI Contracts technically expired from time to time, Claimants were able to negotiate with MINSA and sign amendments for extensions and additional costs incurred.[84] MINSA and Claimants signed the last change orders for a time extension on all three MINSA CAPSI Contracts on 7 May 2014, which then needed to be endorsed by the Comptroller General.[85] But unlike

[79] CRAWFORD – ILC'S ARTICLES (CL-0217), at 205, art. 31, comment 12.

[80] The same analysis applies to Respondent's wrongful actions against all of the Omega Consortium's other Contracts and Claimants' overall investment.

[81] Witness Statement of Ms. Karina Mirones dated 14 May 2019, ¶ 6.

[82] *Id.* ¶ 7.

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

[84] 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 7 May 2014 (C-0107); Addendum No. 4 to Contract No. 085-2011 dated 7 May 2014 (C-0171).

[85] Addendum No. 4 to Contract No. 077 (2011) dated 7 May 2014 (C-0106 resubmitted 2); Addendum No.

previous change orders, the Comptroller General ***never*** *endorsed* ***any*** *of these changes orders*, even though Claimants "had repeatedly submitted all of the [necessary] documentation."[86]

41. Respondent's failure to put forth testimony from a knowledgeable witness shows that there is no justification for its actions. Respondent could have put forward a high-ranking official from MINSA, but instead it introduced Mr. Nessim Barsallo, whom Respondent described as a mere "functionary at the Health Ministry." (Tr 1/116:14). Mr. Barsallo himself admitted that he "did not have final decision-making power or [even] initial decision-making powers."[87] From there, Respondent tries to rebut any malign intent by emphasizing that President Martinelli's appointed Comptroller General, Ms. Torres de Bianchini, was in office until December 2014 at which point the Omega Consortium's change orders were still not approved. This fact, however, fails to rebut what Mr. Lopez has consistently said: that after the election Ms. Torres de Bianchini *herself* was operating under direct threats from President Varela.[88] After President Varela was elected, the Omega Consortium submitted a total of *eleven*[89] change order requests to the

3 to Contract No. 083 (2011) dated 7 May 2014 (C-0107); Addendum No. 4 to Contract No. 085-2011 dated 7 May 2014 (C-0171).

[86] Tr. 2/293:2-5 (Mr. Lopez testifying about the materials Claimants had submitted to the relevant agencies repeatedly but without receiving any approvals in response).

[87] Tr. 3/704:9-17 (testifying that he "did not even have final decision-making power or initial decision-making powers. I made recommendations to my immediate superior, I provided the work, and I provided recommendations to whether things were good or bad. If anyone asked me, well, a legal opinion or a technical opinion, fine; I provided those opinions. But I did not have final decision-making power or initial decision-making power").

[88] Tr. 1/256:3-19. *See also* Lopez 1 ¶ 78; *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).

[89] Of the eleven change orders submitted by the Omega Consortium, nine related to the MINSA Contracts, *see* 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), one to the La Chorrera Contract, *see* Change Order No. 2 to Contract 150/2012 dated 13 Jan. 2015 (C-0562), and one to the Municipality of Panama Contract, *see* Email chain between the Municipality of Panama and

Comptroller General, but only *three*[90] were ever endorsed (and those three did not address the critical issue of costs, but instead addressed ancillary matters like equipment specifications).[91] By this time, it was clear that MINSA did not want Claimants' change orders to be approved, because most of the "defects" identified by the Comptroller General were created by *MINSA itself*. (Tr 1/254:18-255:14, 1/258:3-259:5).

42. Claimants' open line of communications with MINSA also was shut down after President Varela took office, as the new Administration replaced existing government officials with political supporters. Mr. Lopez explained that before the change in Administration, he "had open and ongoing communications with MINSA through Nessim Barsallo,"[92] which Mr. Barsallo confirmed.[93] But when the Varela Administration came to power, Mr. Barsallo, in his own words, was no longer "a person of trust because [he] didn't belong to the political party of Varela's team," and although "[he] wasn't really fired, [he] was kept 'at bay' . . . when the new team came in,"[94] disappearing from communications in Claimants' MINSA file. (Tr 3/705:14-16). In fact, Mr. Barsallo testified he was "not surprised" his name was missing from *all* the exhibits cited in his witness statements postdating 4 May 2014 (the election date). (Tr 3/699:21-701:3). He was eventually "sent on vacation" in 2019.[95]

Omega dated 27 Nov. 2014 (R-0061).

[90] Cls' Reply ¶ 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); Change Order No. 2 to the La Chorrera Contract (R-0008).

[91] Lopez 2 ¶ 22; Tr. 1/248:16-22.

[92] Lopez 2 ¶ 11.

[93] First Witness Statement of Nessim Barsallo Abrego dated 7 Jan. 2019 ("**Barsallo 1**"), ¶ 38.

[94] Tr. 3/699:4-699:15 (testifying that "when there's a change in the Administration generally . . . the new Administration comes in and it brings in their personnel of trust. . . . Generally, trust positions are replaced. They are replaced with people from the new Government. At that point in time, although it is true that I wasn't really fired, I was kept 'at bay,' quote/unquote, when the new team came in and looked at all the documentation.").

[95] Mr. Barsallo also testified that he told Mr. Lopez of a "conspiracy" against Omega. Tr. 3/710:18-19 ("I

43. **The Judiciary's actions with respect to the La Chorrera Project followed the same course, at roughly the same time.** Again, the documentary evidence speaks for itself. Respondent admitted that before July 2014 the Project was progressing successfully except for some ordinary construction delays.[96] The Judiciary consistently approved and made payments to the Omega Consortium for completed work.[97] After Mr. Varela was elected President, the Judiciary's attitude towards the Omega Consortium and the La Chorrera project shifted, making it impossible for the Omega Consortium to continue working. The Comptroller General refused to endorse a change order that was already approved and signed by the Judiciary,[98] requiring Claimants to send repeated, unanswered letters.[99] The Contract had expired in July 2014,[100] and the change order, even though re-signed by the Judiciary, was not endorsed by the Comptroller General, meaning that critical payment applications could not be processed.[101] The Comptroller finally endorsed the change order in December 2014, but its effect was short lived; the Judiciary informed Claimants in March 2015 of its intention to unilaterally terminate the Contract.[102]

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indicated a conspiracy as part of a conversation I had with a friend."); WhatsApp message between Frankie Lopez and Nessim Barsallo dated 3 Mar. 2016 (C-0681 resubmitted), at 1 (English) at 6 (Spanish). Prosecutors spent three days at MINSA investigating Claimants for illegal bidding practices. Tr. 3/724:3-12. Their investigation was prompted by a newspaper article, and not a suggestion of wrongdoing by MINSA. Tr. 3/726:8-728:4.

[96] *See* The Republic of Panama's Objections to the Tribunal's Jurisdiction and Counter-Memorial on the Merits dated 7 Jan. 2019 ("**Resp.'s Counter-Mem.**"), ¶¶ 25, 28-30; First Witness Statement of Vielsa Rios dated 7 Jan. 2019 ("**Rios 1**"), ¶¶ 22-24.

[97] *See* Resp.'s Counter-Mem. ¶¶ 25, 28-30. *See also* Rios 1 ¶¶ 22-24.

[98] *See* Cls' Reply ¶ 128.

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

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

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

[102] Note No. P.C.S.J./604/2015 from the Judiciary to Oscar I. Rivera dated 11 March 2015 (R-0013). As Mr. Lopez confirmed, the Judiciary initially backtracked the termination and acknowledged that the problems with the La Chorrera Project were not attributable to the Omega Consortium. Lopez 1 ¶ 102; Letter No. 366/DSG/2015 from General Services Dep't to Chief Legal Officer of the Judicial Authority dated 17 Apr. 2015 (R-0016). That acknowledgement came from Respondent's own witness Ms. Vielsa Rios, among others. *Id*. The Omega Consortium tried to negotiate with the Judiciary and sign a new change order to complete the project but, the Judiciary refused.

44. On behalf of the Judiciary Respondent only offered the testimony of Ms. Rios, who was the Administrative Secretary of the Panamanian Supreme Court[103] and supervised the administrative portions of the La Chorrera Project, including the bidding process.[104] Despite Respondent's fervent assertion that this Contract was procured through corruption, and despite this allegation being Respondent's primary defense to this arbitration, Ms. Rios herself *never even suggested* in her witness statements that Claimants illegally obtained that Contract.[105]

45. **The Mercados Periféricos Project was also proceeding well before June 2014, but the Municipality of Panama turned against Claimants soon thereafter**. Before President Varela was elected, the Municipality commended Claimants' excellent work[106] with a willingness to "go an extra mile" for the Omega Consortium because "they're giving it all they have."[107] That good faith approach evaporated when Mr. Varela became President and Mr. Blandon became the new Mayor of the Municipality of Panama.[108] On 2 September 2014, the Municipality suspended the Juan Diaz Market, [109] based on a review by Mayor Blandon that falsely claimed that Claimants' design was flawed.[110] As for the Pacora Market, the Municipality refused to assist Claimants with a change order extending the Contract (due to delays not attributable to the Omega Consortium)[111];

Lopez 1 ¶ 103.

[103] Rios 1 ¶ 6.

[104] *Id.* ¶ 8.

[105] As a result, live testimony from her was unnecessary. *See infra* III.B.2.

[106] Lopez 1 ¶ 133; Cls' Reply ¶ 164.

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

[108] Lopez 1 ¶ 137.

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

[110] Resp.'s Counter-Mem. ¶ 142; Cls' Reply ¶¶ 166-68; Lopez 1 ¶ 135; Contract No. 857-2013 dated 12 Sept. 2013 (C-0056 resubmitted).

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

it also stonewalled the approval of plans, and the issuance of certificates and permits,[112] including the Certificate of Soil Use that had to be issued by the Ministry of Housing.[113]

46. Respondent offered the testimony of Mr. Diaz. But Mr. Diaz only started working at the Municipality of Panama on 1 August 2016[114]—that is, two years *after* the Omega Consortium started experiencing problems with the Municipality of Panama and the Varela Administration. Nothing he says undercuts the contemporaneous documentary and testimonial record, nor could it.

47. **The Municipal Palace of Colón Contract followed the same course as the others.** Mr. Lopez testified at length about the arbitrary treatment that the Omega Consortium received on this Project.[115] *Respondent failed to introduce a single witness* who could address these events.

48. And those events are damning. In July 2014, with a new President and new Mayor, the Municipality of Colón decided to change the construction site for the Municipal Palace and required Claimants to present an alternative build proposal.[116] Claimants did so on 27 August 2014,[117] but were met with silence.[118] The Municipality did not confirm the Project site change

[112] Lopez 1 ¶ 138; Letter from Omega to Alcaldia de Panama No. S.G.-087 from the Municipality of Panama to the Omega Consortium dated 2 Sept. 2014 (C-0058 resubmitted); Letter from the Omega Consortium to City Hall of Panama dated 8 Apr. 2015 (C-0184).

[113] Mr. Lopez explained that the Omega Consortium "submitted all of the documentation for [this Certificate] in a timely fashion" but "[did] not have authority to approve [it]. The one who had the power to secure some involvement of the Ministry of Housing in a more timely fashion was the Municipality." Tr. 2/285:14-286:1, 2/287:6-10.

[114] First Witness Statement of Eric Diaz dated 7 Jan. 2019 ("**Diaz 1**"), ¶ 6.

[115] Lopez 1 ¶¶ 146-50; Lopez 2 ¶¶ 67-73; Tr. 1/262:12-263:19.

[116] 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.

[117] *Id*.

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

until March 2015,[119] and the long delay resulted in the Contract expiring, which, in turn, required a new change order to address the additional costs and time delays.[120] The Mayor's Office failed to approve the needed change order, ignoring Claimants' communications on the subject.[121] *Today, the Municipal Palace is being constructed by a different contractor—Odebrecht, which had contributed over US$ 700,000 to President Varela's campaign*[122]*—on the original site where the Omega Consortium was told* ***not*** *to build*.[123]

49. **Finally, the Mercado Público de Colón Contract fell to the same governmental misconduct.** With respect to this project, Respondent offered the testimony of Mr. Duque, who worked as the Executive Secretary of the Secretary of Cold Chain within the Ministry of the Presidency. But his testimony is of marginal relevance to what happened on that Project because he only held that position until August 2014, just as Respondent's misdeeds began.[124]

50. The evidence shows that early disruptions to the project occurred when the Government failed to remove existing vendors from the site,[125] resulting in a temporary suspension.[126] After President Varela was elected, Claimants contacted the Secretary of Cold Chain and the Ministry of the Presidency to commence construction, but the Ministry of the

[119] 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).

[120] Lopez 1 ¶ 149.

[121] *Id.*

[122] *Varela Admits Receiving Funds from Odebrecht*, PANAMA TODAY dated 10 Nov. 2017 (C-0487). *See also* Expert Report of Orlando J. Perez dated 17 May 2019, ¶ 32.

[123] Construction Poster by the Municipality of Colón (C-0620); Photographs of the Temporary Installations (C-0621).

[124] Witness Statement of Fernando Duque dated 13 Nov. 2019 ("**Duque**"), ¶ 8.

[125] Letter from the Ministry of Presidency to the Omega Consortium dated 13 Dec. 2012 (C-0363).

[126] *Id.*; Lopez 1 ¶ 152.

Presidency simply stopped responding.[127] Despite following up with the new Executive Secretary of Cold Chain[128] (who, as Mr. Lopez testified, was not up to date with the details of the Project[129]), Claimants encountered further obstruction from the Ministry of the Presidency. In particular, it did not send to the Comptroller General's Office the change order the parties formalized to extend the term of the Contract or the documentation the Omega Consortium submitted to the Ministry, including the renewed bonds.[130] The Government eventually abandoned the Project[131] and gave the site (again) to Odebrecht which, as mentioned above, had contributed a large amount to President Varela's campaign.[132]

* * *

51. In sum, Claimants saw the same pattern again and again. Respondent's officials cooperated with Claimants and went so far as to commend Claimants on their work before President Varela was elected. After the election, Claimants encountered obstruction, delay, silence, and ultimately the demise of each Project at the new government's hands.

2. *Even If The Tribunal Finds No Coordinated Campaign Of Political Retribution, Panama's Actions Were Arbitrary And Unreasonable*

52. There is a single common thread running through all of this behavior by different arms of the Panamanian State—a drastic change in attitude and action after the election of

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

[128] Letter 2015 06 19 P004-62 from the Omega Consortium to the Ministry of the Presidency dated 19 June 2015 (C-0064 resubmitted); Lopez 1 ¶ 152.

[129] Tr. 1/269:14-18 ("A. … Subsequently, I had an opportunity to meet with Engineer Andrés Camargo, who was basically not up to date with all the details of our Project, which gave me the impression that there was not a will to reactivate the Project.").

[130] Lopez 2 ¶ 76.

[131] Lopez 1 ¶ 154.

[132] *See supra* n.123.

President Varela in July 2014. But a motive of political retribution is not necessary to Respondent's liability for that behavior. Respondent's treatment of Claimants—even when assessed separately by project, agency, or incident—was still arbitrary, unreasonable, non-transparent, and obstructive, whether or not one also finds proof of subjective bad faith. And these actions and incidents, even if not part of a single malign plan, still compounded to doom Claimants' investment.[133]

53. The best example of an internationally wrongful act attributable to Respondent was its decision to slash the budget for the CDLA Project. This was Claimants' largest Contract, comprising about 30% of the value of their portfolio of contracts in Panama. As discussed *supra*, in September 2014, the MEF made recommendations for the 2015 budget to provide only US$ 10 million for the entire CDLA Project—a mere fraction of the US$ 54 million contractually due to the Omega Consortium for that year.[134] The National Assembly followed that recommendation and removed the funding.[135] INAC used that budgetary action to withhold payments to the Omega Consortium that had been approved during the previous administration.[136] *No matter the underlying motive*, this was quintessentially arbitrary behavior, contradicting prior approvals without a legitimate basis, and wiping out the economic value of Claimants' largest project.[137] And, as demonstrated above, Mr. Zarak's testimony that the decision to slash the budget on

[133] This section analyzes some of the most pertinent examples of Respondent's individual breaches of Claimants' rights, but it is by no means exhaustive.

[134] *See supra* ¶¶ 27-28. *See also* 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 Sept. 2014 (C-0233); Contract No. 093-12 dated 6 July 2012 (C-0042 resubmitted), at 31.

[135] INAC Draft Budget for the Fiscal Year 2015 dated 30 Apr. 2014 (R-0036), at 7.

[136] *See* Cls' Reply ¶¶ 197, 200.

[137] *See infra* § III.A.3. *See also* Cls' Mem. §§ IX.B.3, IX.D; Cls' Reply § VIII.B.4-5.

information provided by the Varela-appointed INAC Director that the Project was "high risk" is not only unsupported by evidence (which Mr. Zarak says exists, but Respondent did not produce despite its obligation to do so), but it is improbable given the evidenced positive track record of the Omega Consortium's progress on the Project, and the short timeline between the Project inspector's alleged complaints and the MEF's decision to slash the Project's budget.[138]

54. That action escalated to cripple Claimants' long-term survival. After defunding the Project, in December 2014 Respondent terminated the underlying Contract through an administrative resolution.[139] That resolution barred Claimants from participating in any other public bids in Panama for a period of up to three years, thus immediately suffocating Claimants' ability to generate further revenue.[140] This all happened without proper notice to Claimants, and thus due process, and failed to comply with the essential principles of good faith and "logical reasonableness" enshrined in both international and Panamanian law.[141] Subsequent action by a separate government instrumentality furthered the illegality and harm. As soon as INAC's prohibition ended in December 2016, the Municipality of Panama administratively terminated its own contract with the Omega Consortium in January 2017, thus prolonging the ban for another three years (into 2020).[142] These terminations were equally devoid of justification and appear to have been undertaken in response to this arbitration (they came just weeks after Claimants filed

[138] *See supra* ¶¶ 27-33.

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

[140] *Id*. *See also* Cls' Reply § V.D.6, ¶ 431; *infra* § IV.B.1. In addition, the resolution triggered indemnity claims from Travelers and Credit Suisse against Omega Panama and Claimants, including Mr. Rivera's personal guarantees, *see* Acknowledgement of Default dated 1 Dec. 2015 (C-0312); Letter from Travelers Casualty & Surety Company to Omega-U.S. dated 16 Sept. 2015 (C-0099); Letter No. VPET-007-2015 from ASSA to the Omega Consortium dated 3 Mar. 2015 (C-0382), and it also crippled Claimants' ability to secure bonds, *see* Email from Travelers Casualty & Surety Company ("Travelers") to Omega-U.S. dated 9 Feb. 2015 (C-0098).

[141] Cls' Reply ¶¶ 204-11.

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

their Request for Arbitration).[143] These three wrongful actions—the defunding of the CDLA Project, the administrative termination of the same, and the Municipality of Panama's own administrative termination—separately or in combination—breached the Treaties.

55. The Comptroller General's actions (on nearly every project) were also sufficient to trigger Respondent's liability. As of May 2014, the Comptroller General's Office stopped endorsing virtually all of Claimants' payment requests—and it did so without regard to legitimate commercial concerns.[144] At least [redacted] payment applications totaling close to US$ [redacted] were pending at the Comptroller General's Office when Mr. Varela won the election, or were submitted thereafter.[145] Notwithstanding that those applications were for *approved and completed work*, only [redacted] were endorsed, totaling less than US$[redacted].[146] Put differently, the Comptroller General's inaction after July 2014 deprived Claimants of approximately 90% of their due receivables.[147]

56. This too was arbitrary, contradictory, and unreasonable behavior.[148] Mr. Barsallo testified that some of the unendorsed CNOs had expired,[149] and Respondent's counsel insisted that

[143] Cls' Reply ¶ 175.

[144] Cls' Rej. ¶ 190.

[145] The Omega Consortium submitted at least 30 payment applications which amounted to close to US$ 19.6 million. First Expert Report of Mr. Greg McKinnon dated 25 June 2018 ("**McKinnon 1**"), Annex 1, at 1.

[146] The Republic of Panama paid 7 applications totaling US$ 1.88 million, 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.

[147] As previously discussed, the Comptroller General also refused to endorse most of Claimants' duly submitted change orders, which caused many of the Contracts to expire and the exclusion of additional costs resulting from the agencies' scope of work changes. *See supra* n.89; Cls' Rej. ¶¶ 204-14. Without valid contracts, the Omega Consortium was further prevented from processing payments on completed work. *See* Cls' Rej. ¶ 205.

[148] *See infra* § III.A.3. *See also* Cls' Mem. §§ IX.B.3, IX.D; Cls' Reply § VIII.B.4-5.

[149] Second Witness Statement of Nessim Barsallo Abrego dated 18 Nov. 2019 ("**Barsallo 2**"), ¶ 25 (giving CNO No. 20 of the Puerto Caimito Contract as an example of a CNO that was not endorsed because it was submitted after its expiration date).

"the Comptroller General was within its right to return a CNO that had expired." (Tr 1/243:2-3). But this was hardly a consistent position by the Comptroller General. As Mr. Lopez explained, the Comptroller General "decided to pay CNOs that had been expired . . . from Kuna Yala." (Tr 1/243:4-13). The documentary evidence proves this. While CNO No. 20 of the Puerto Caimito Contract was not endorsed because it had expired, CNOs Nos. 22, 23, and 24 of the Kuna Yala Contract *were* endorsed after their expiration date.[150] The same occurred with CNO No. 15 of the Rio Sereno Contract.[151] To be sure, these payments did not provide any meaningful relief to the Omega Consortium; CNOs Nos. 22, 23 and 24 of the Kuna Yala Contract, and CNO No. 15 of the Rio Sereno Contract only represented approximately 10% percent of the amount owed to Claimants at the time they were paid.[152] But these exceptions do undercut the factual basis for Respondent's claims.

57. In the end, whether they were acts of coordinated political vengeance or mere arbitrary and capricious behavior toward a foreign investor, these acts violated international law and destroyed Claimants' investment in Panama.

3. *Panama's Actions Against The Omega Consortium's Contracts Violated The Treaties*

58. As set forth below and in Claimants' prior submissions,[153] Respondent's actions and omissions constituted (a) an unlawful expropriation of Claimants' investments; (b) a violation

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

[151] Certificates of No Objections for Contract No. 077 (2011), various dates (C-0252), at 71.

[152] CNO No. 15 of the Rio Sereno Contract was worth US$ [redacted] and CNOs Nos. 22, 23, 24 of the Kuna Yala Contract were worth US$ [redacted]. *Id.* at 15; Certificates of No Objection for Contract No. 083 (2011), various dates (C-0260), at 21-23. But the Omega Consortium lost US$ [redacted] due to the factoring it was forced to enter into with Banco BAC because the Comptroller General's Office let the CNOs expire before endorsing them. Lopez 2 ¶ 23.

[153] *See* Claimants' Request for Arbitration dated 30 Nov. 2016 ("**Cls' RfA**"), § IV; Cls' Mem. § IX; Cls' Reply § VIII; Tr. 1/66:5-17; Cls' Opening at 69.

of Respondent's duty to provide fair and equitable treatment and full protection and security; and (c) an infringement of the BIT's umbrella clause.

59. Regarding **Expropriation**, Respondent's failure to issue required approvals, its stonewalling of progress on each project, its cutting of budgetary funds and administrative termination of contracts, and its bid-bans for all future work, culminated in the unlawful indirect expropriation of Claimants' investment by the end of 2014.[154]

60. The testimony that emerged during the hearing highlights that Respondent deprived Claimants of their ability to use their investment in any meaningful way,[155] thereby destroying its commercial value.[156] Ms. Buendia's testimony revealed how dramatically INAC shifted from cooperation during the Martinelli administration to obstruction upon Ms. Nuñez becoming INAC's Director under President Varela.[157] The MEF's slashing of the Project's budget by 80% crippled Claimants' largest project; the administrative termination issued by INAC eliminated Claimants' ability to obtain any future contracts with the Panamanian government[158]; and that result was reinforced by the administrative termination of the Municipality of Panama Contract, which extended Claimants' bid-ban into early 2020.[159] Those actions strangled Claimants' cash flow and revenue, and constituted an indirect expropriation.[160]

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[154] *See* Cls' Mem. § IX.A; Cls' Reply § VIII.A.

[155] RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2d ed., 2012) ("**DOLZER & SCHREUER**") (CL-0006 resubmitted 3), at 101. *See also* Cls' Mem. § IX.A; Cls' Reply § VIII.A.

[156] *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL Rules Arbitration, Partial Award, 13 Sept. 2001 ("***CME***") (CL-0019), ¶ 591. *See also* Cls' Mem. § X.A; Cls' Reply § IX.

[157] *See supra* § III.A.1. *See also* Cls' Reply § V.B.6; Cls' Rej. § II.B.1.a.

[158] The resolution also triggered indemnity claims from Travelers and Credit Suisse against Omega Panama and Claimants, including Mr. Rivera's personal guarantees, and destroyed Claimants' ability to secure bonds for future projects inside and outside of Panama. *See supra* n.141.

[159] *See supra* § III.A.2. *See also* Cls' Rej. ¶¶ 235-36.

[160] *See* Cls' Mem. § IX.A; Cls' Reply § VIII.A.

61. Respondent does not even engage with these points.[161] In fact, Respondent has yet to fully rebut Claimants' foundational arguments that Respondent's conduct served no public purpose, disregarded due process, was discriminatory, and never resulted in payment of any compensation—let alone prompt, adequate, and effective compensation.[162] Respondent further ignores the distinctively sovereign nature of its conduct by cherry picking "commercial sounding" facts while ignoring the essential and indisputably "sovereign" facts forming the nucleus of the claims.[163] Panama, unlike Claimants, was imbued with "public authority," and its actions were based on its superior governmental power, which it abused.[164] No private commercial counterparty could have cut a national budget, withheld permits, barred participation in public contract bids through the issuance of administrative resolutions, initiated criminal investigations, frozen bank accounts, or issued detention orders and Interpol Red Notices against its contract partner. By doing so, Respondent caused the destruction of Claimants' investment, leaving it without assets and without current or future revenues.[165]

62. Regarding the **Fair and Equitable Treatment ("FET") and Full Protection and**

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[161] Respondent also continues to insist that Claimants should have had to exhaust their local remedies by suing Panama for breach of contract in local court. Resp.'s Rej. ¶¶ 429, 431. As pointed out previously by Claimants, this is in clear defiance of the language of the governing Treaties. *See* BIT (CL-0001) (containing no exhaustion requirement); TPA (same) (CL-0003). *See also* Cls' Reply ¶ 369.

[162] Cls' Reply ¶ 357; Resp.'s Rej. ¶ 425 (mentioning the four-part expropriation test but failing to apply it to the facts of this case and instead insisting that Claimants' assets were not taken). *Cf.* Respondent's Response to the Submission of the United States of America dated 30 June 2020 ("**Resp.'s Response to U.S. Submission**"), ¶ 19 (arguing, in passing, that Respondent's actions were taken in a non-discriminatory manner and for bona fide public purposes).

[163] *See, e.g.*, Cls' Reply ¶ 367 ("Respondent employed tools available only to a sovereign in dismantling Claimants' investment: pretextual budget cuts, permitting problems, criminal investigations, frozen bank accounts, detention orders, and Interpol red notices, among other things.").

[164] *See Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award, 6 Feb. 2007 ("***Siemens***") (CL-0008), ¶ 253 ("It is not a matter of being disappointed in the performance of the State in the execution of a contract but rather of interference in the contract execution through governmental action."). *See also* Cls' Mem. § VI; Cls' Reply § V; Cls' Rej. § II.B.

[165] *CME* (CL-0019), ¶ 591; *Tokios* (CL-0022), ¶ 120. *See also* Cls' Mem. § IX.A; Cls' Reply § VIII.A.

Security ("FPS") standards, the manner in which Respondent's officials effectively abrogated eight binding Contracts renders the State liable. Respondent's actions arbitrarily altered the foundational legal framework governing Claimants' investment, reneging on the assurances that drew Claimants to invest in Panama's public works sector in the first place.[166]

63. Respondent does not engage with the facts underpinning this claim, instead falling back upon its empty invocation of legal standards,[167] which Respondent frames as rendering it virtually impossible for any State conduct to ever be found unlawful.[168] Rather than confronting the facts of its arbitrary conduct, Respondent argues that Claimants needed stabilization clauses for the FET claims to be viable. (Tr 1/121:8-9). Neither the Treaties, nor international law support such an argument.[169] Respondent further contends that Claimants must prove that Panama's actions had no commercial justification (Tr 1/109:19-110:14), or that the State had malicious intent. (Tr 1/110:15-111:4). Not so. Claimants have no obligation to prove Respondent's motivations for breaching Claimants' rights, nor does Respondent cite any authority to the contrary. (Tr 1/109:19-111:4). In any event, Claimants *have* shown both that Respondent's actions lacked commercial justification and that Respondent had malicious intent.[170]

64. Respondent is simply wrong on the law.[171] But, more importantly, this aspect of

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[166] DOLZER & SCHREUER (CL-0006 resubmitted 3), at 145; *Occidental Exploration and Production Company v. Republic of Ecuador (I),* LCIA Case No. UN3467, Award, 1 July 2004 (CL-0280), ¶¶ 184-86. *See also* Cls' Mem. § IX.B; Cls' Reply § VIII.B.

[167] Resp.'s Rej. ¶¶ 442-45, 460-72; Tr. 1/120:5-121:7.

[168] *See, e.g.*, Resp.'s Response to U.S. Submission ¶ 15 ("Panama . . . could not have violated the FET provisions by frustrating the Claimants' legitimate expectations and treating them arbitrarily, unreasonably, inconsistently, discriminatorily, or with a lack of transparency or good faith.").

[169] DOLZER & SCHREUER (CL-0006 resubmitted 3), at 82; BIT (CL-0001), art. II(2); TPA (CL-0003), art. 10.5.

[170] *See, e.g.*, Cls' Mem. ¶¶ 171, 174, 175; Cls' Reply ¶¶ 112, 119, 359, 407, 424.

[171] Tr. 1/66:10-15; Cls' Reply ¶¶ 383-84; Cls' Response to U.S. Submission ¶ 10.

the case does not turn on legal standards; it turns on the manner in which Respondent attracted Claimants into the Panamanian construction market by offering and executing a series of legal commitments and then, upon the election of a new administration, reneged on those promises. Respondent's observation that the Contracts at issue were signed after the incorporation of Omega Panama[172] (and thus the making of the investment and onset of expectations) is immaterial. Respondent's conduct violates even the most basic norms recognized in the corpus of international law, such as that States must perform their contracts with foreign investors in good faith, must provide such investors with due notice of actions that may affect their rights, and cannot arbitrarily act to frustrate the expectations legitimately held by such investors.[173]

65. Regarding the **Umbrella Clause**,[174] as described above, Respondent has failed to "observe [its] obligation[s]"[175] by its repeated failures to make required payments for approved and invoiced work, its repeated failures to endorse change orders for approved additional work, its failure to issue necessary permits and licenses, its failure to allow extensions, and its failure to conduct itself in a good faith contractual manner.

66. Respondent once again fails to address this claim on a factual level, relying instead

[172] Resp.'s Rej. ¶ 449.

[173] CHARLES T. KOTUBY & LUKE A. SOBOTA, GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS ("**KOTUBY & SOBOTA**") (CL-0081 resubmitted), at 89-101, 119-30, 160-63; Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL TRIBUNALS 112-114 (Cambridge 1987) (CL-0170 resubmitted). *See also Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 Aug. 2000 (CL-0017), ¶¶ 91, 100-01; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 Apr. 2002 (CL-0171), ¶ 143; Stephan W. Schill, *General Principles of Law and International Investment Law* 168-170, in Gazzini and Eric De Brabandere, INTERNATIONAL INVESTMENT LAW: THE SOURCES OF RIGHTS AND OBLIGATIONS (Nijhoff International Investment Law Series, Volume 1, 2012) (CL-0172); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 Sept. 2014 (CL-0057) ¶¶ 575-76; *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Separate Opinion of Thomas Wälde, 1 Dec. 2005 (CL-0133), ¶¶ 28-30. *See also* Cls' Mem. § IX.B; Cls' Reply § VIII.B.

[174] *See* Cls' Mem. § IX.E; Cls' Reply § VIII.D.

[175] BIT (CL-0001), art. II(2).

on misplaced legal arguments. Respondent asserts that Claimants need a stabilization clause to pursue their umbrella clause claim.[176] That argument has no foundation.[177] Respondent's observation that the TPA does not contain an umbrella clause[178] is completely beside the point because there *is* an umbrella clause in the BIT and alternatively (but not necessarily[179]) Claimants may import an umbrella clause into the TPA from one of Panama's other treaties.[180]

67. Respondent also tries to use the umbrella clause to reframe this arbitration into a commercial dispute under Panamanian law.[181] This argument is in tension with Respondent's jurisdictional arguments—as pointed out by the Tribunal during the hearing[182] and as recognized by Respondent.[183] Claimants' umbrella clause claim is predicated on violations of international law, not simple breaches of contract (Tr 1/67:8-12), and damages for this claim are not limited by a particular contract's terms because the failure of Respondent to honor its international obligations led to consequences far beyond a mere breach of contract, including the inability of Claimants' investment to continue as a going concern. (Tr 1/67:12-68:1).

[176] *See* Tr. 1/123:6-16. *See also* Resp.'s Counter-Mem. ¶ 223; Resp.'s Rej. ¶¶ 143, 441, 448, 450.

[177] *See* BIT (CL-0001), art. II(2). *See also* Katja Gehne & Romulo Brillo, *Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment*, NCCR Trade Regulation (Jan. 2014) (CL-0281), at 15.

[178] *See* Tr. 1/123:17-21. *See also* Resp.'s Counter-Mem. ¶ 217; Resp.'s Rej. ¶ 138.

[179] Cls' Response to U.S. Submission ¶ 15 n.51.

[180] Cls' Mem. ¶ 188 n.468.

[181] Resp.'s Rej. ¶ 479.

[182] Tr. 1/111:13-20 ("So, on the one hand, you are saying these are commercial disputes and, therefore, they should go to another forum; but, on the other hand, your defense of the Treaty claim depends on us looking at the rights and obligations under the contract and what the Government was within its rights to do under these particular commercial relationships. So, there's a bit of a tension . . . .").

[183] Tr. 1/112:7-9 ("I understand. There is a difficulty in separating the two from the jurisdictional basis from the merits.").

B. The Criminal Investigations Against Mr. Rivera And Omega Panama Were Entirely (And Admittedly) Unsupported

1. *Requested Findings And Burden And Standard Of Proof*

68. The **Tribunal's Question No. 1** asked the Parties to identify "the findings and determination that each . . . seeks from the Tribunal in relation to Respondent's allegations of corruption [and the] burden and standard of proof that apply to th[os]e findings and determination[s]."[184]

69. Respondent's allegations of corruption factor into these proceedings in two ways—as an aspect of Claimant's claim for breach of Respondent's FET and FPS obligations, and as an aspect of Respondent's jurisdictional objections. The applicable standard of proof, and on which party the burden of proof falls, differs across those two issues.

70. As for Respondent's jurisdictional objection, Respondent contends that the alleged corruption by Omega Panama and Mr. Rivera deprives the Tribunal of jurisdiction over Claimants' claims. (Tr 1/86-99:11). On that objection, Respondent bears the burden of proof,[185] and must prove its allegations of corruption by clear and convincing evidence. This heightened standard is appropriate given that Respondent would have the Tribunal deny Claimants' important legal rights under the Treaties.[186]

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[184] Letter from the Tribunal to the Parties dated 10 Nov. 2020, at 2.

[185] *Rompetrol* (CL-0126), ¶ 179 ("[I]f the respondent chooses to put forward fresh allegations of its own in order to counter or undermine the claimant's case, then by doing so the respondent takes upon itself the burden of proving what it has alleged."); *Quiborax S.A. v. Plurinational State of Bolivia*, ICSID No. ARB/06/2, Decision on Jurisdiction, 27 Sept. 2012 (CL-0127), ¶ 259 ("[T]he Tribunal considers that the party alleging a breach of the legality requirement, *i.e.* the host State, bears the burden of proof."); *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 Oct. 2013 ("***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.")

[186] *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 Dec. 2014 (CL-0131), ¶ 479 ("[I]n view of the consequences of corruption on the investor's ability to claim the [treaty] protection, evidence must be clear and convincing so as to reasonably make-believe that the facts, as alleged, have occurred."); *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, 8 Oct. 2009 (CL-0051), ¶ 221 ("The seriousness of the accusation of corruption . . . demands clear and convincing

71. Claimants submit that the Tribunal should find that Respondent has failed to provide sufficient evidence establishing that either Mr. Rivera or Omega Panama engaged in bribery or any other corrupt or illegal acts.[187] This is true under any standard of proof, even the balance of probabilities standard urged by Respondent. (Tr 8/1722:12-1732:4). Claimants specifically request a finding that Respondent has failed to show that (1) the La Chorrera Contract was procured through bribery; and (2) Mr. Rivera or Omega Panama had any knowledge or intent that funds paid through P.R. Solutions to Reyna y Asociados would flow to Justice Moncada Luna. Claimants therefore request that the Tribunal deny Respondent's jurisdictional objection based on corruption.[188]

72. As to Claimants' affirmative claim for Respondent's breach of its treaty obligations, as explained in section III.B.6, *infra*, Claimants submit that Respondent's years-long investigations of Mr. Rivera and Omega Panama, and its public dissemination of information regarding those supposedly confidential investigations, violated Respondent's FET and FPS obligations. On that claim, Claimants bear the burden of proof,[189] which they must meet on a balance of probabilities.[190] In other words, in order to prevail on these affirmative claims,

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evidence."); *Niko Resources (Bangladesh) Ltd. v. People's Republic of Bangladesh*, ICSID Case Nos. ARB/10/11 & ARB 10/18, Decision on Jurisdiction, 19 Aug. 2013 (CL-0282), ¶ 424 (noting that a tribunal must "be aware that findings of corruption are a serious matter which should not be reached lightly," and agreeing with the *Hamester v. Ghana* tribunal's finding that "a tribunal would only decide on substantiated facts, and cannot base itself on inferences.") (internal quotations omitted).

[187] *See infra* § VI.A.

[188] *See infra* § VI.A. As discussed further therein, even if the Tribunal were to find corruption or illegality in the procurement of the La Chorerra Contract (which is denied), that could not have the effect of nullifying jurisdiction over all of Claimants' claims/investment.

[189] *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."); *Siag* (CL-0032), ¶ 315 ("[T]he Claimant bears the burden of proof with respect to the facts it alleges and the Respondent carries the burden of proof with respect to its defences.").

[190] *Kardassopoulos* (CL-0114), ¶ 229 ("[T]he principle articulated by the vast majority of arbitral tribunals in respect of the [standard] of proof in international arbitration proceedings . . . does not impose on the Parties any

Claimants must only show that, on balance, it is probable that Respondent's actions were illegitimate. As explained in further detail in sections III.B.2-7, *infra*, Claimants request that the Tribunal find that (1) Respondent's conduct of its investigation of Claimants, including holding that investigation open for years while keeping Omega Panama's bank accounts frozen and Mr. Rivera and Mr. Feliu (Omega Panama's Pre-Construction Manager) subject to detention orders, was inconsistent with a competent *bona fide* law enforcement action and with due process, and that (2) by publicly disclosing unproven allegations against Mr. Rivera and Omega Panama in violation of applicable confidentiality requirements, Respondent deliberately damaged Claimants' reputations, goodwill, and ability to capture future contracts. On those bases, Claimants request that the Tribunal find that Respondent breached its FET and FPS obligations to Claimants.

2. *Respondent Initiated Multiple Investigations, None Of Which Resulted In Prosecution Or Any Finding Of Liability*

73. Beginning in late 2014—*months after* Respondent had started strangling Claimants' Contracts—Claimants and their investment were targeted in three separate criminal investigations by the Panamanian Government.[191] *First*, Claimants were investigated as part of the National Assembly investigation of former Justice Moncada Luna.[192] *Second*, Respondent's Special Prosecutor of Organized Crime opened a money laundering investigation against Mr. Rivera and Omega Panama.[193] *Third*, the Anti-Corruption Prosecutor opened an investigation

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[standard] of proof beyond a balance of probabilities."); *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability ("***Lemire* Jurisdictional Award**") (CL-0064), ¶ 369 ("After due consideration, and not without some hesitation, the Tribunal comes to the conclusion that there is a preponderance of evidence showing that the National Council's decisions indeed were arbitrary and discriminatory.").

[191] *See* Cls' RfA, § II.C.; Cls' Mem. § VI.D; Cls' Reply § V.E. Despite Respondent's (false) assertions to the contrary, Respondent's own witness made clear that these were separate investigations. *Compare* Tr. 1/117:9-15 *and* Tr. 3/530:17-532:5, 550:6-552:9.

[192] Cls' Mem. § VI.D.1.

[193] *Id*. § VI.D.2.

against Mr. Rivera and Omega Panama on charges of corruption of a public official.[194] Over the past six years, each of these investigations have either been dismissed, nullified, and/or have run their prescriptive time[195] *without ever resulting in formal prosecution, let alone any finding of wrongdoing*.[196] Notwithstanding that fact, Mr. Rivera and Mr. Feliu are *still* subject to detention orders and Omega Panama's and PR Solutions' bank accounts are still frozen, belying any supposed legitimacy to Respondent's actions. (Tr 1/40:8-18; Tr 2/486:21-488:21).

74. It is thus unsurprising that the record in this arbitration is devoid of any evidence that Claimants' Contracts were procured through illegality.[197] While characterizing the allegation as "incontrovertible" (Tr 1/87:12-13), Respondent failed to submit *any* testimony corroborating its accusations,[198] and likewise failed to produce documents evidencing the same (even though the Tribunal ordered it to do so).[199] Indeed, *Respondent's own witnesses* testified at the Hearing that the Omega Contracts were *not* procured through any illegality.[200] Even Respondent's expert, Mr.

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[194] *Id.* § VI.D.3.

[195] Cls' Rej. § II.A.1.e; Tr. 1/49:5-15; Supreme Court Judgement issued by the Criminal Chamber dated 29 May 2020 (C-0948).

[196] Cls' Rej. § II.A.1.e; Tr. 1/42:12-15 ("Third, it is common ground between the Parties that, after more than five years and three separate investigations, Claimants have never been tried or convicted of anything.").

[197] Resp.'s Counter-Mem. ¶¶ 4, 20, 165-67, 176, 184, 190-91, 196-97, 201, 209, 232, 251, 254, 296, 321, 336, 351, 365-66; Resp.'s Rej. ¶¶ 9, 11-12, 59-60, 64, 67, 71, 73-75, 78, 80-81, 83, 475, 570-71.

[198] For instance, Ms. Buendia and Ms. Chen offer no suggestion in their written testimony that the CDLA Contract was obtained illegally. *See generally* Chen; Buendia. Mr. Diaz never made an allegation that the Municipality of Panama Contract was acquired through corruption, *see generally* Diaz 1; Second Witness Statement of Eric Diaz dated 18 Nov. 2019. And Mr. Duque never suggested that Claimants obtained the Public Market of Colon Contract through any illegal means' *See generally* Duque.

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

[200] With respect to the MINSA CAPSI Contracts, Mr. Barsallo, who was involved in the bidding process, Tr. 3/728:5-7, confirmed that there was no corruption in the tender of the MINSA CAPSI Contracts and explicitly stated that the bidding process "happened in keeping with the transparent process." Tr. 3/728:8-11 ("Q. There was no corruption in the Tender of Omega's MINSA CAPSI Projects; right? A. No, everything happened in keeping with the transparent process.") In fact, Mr. Villalba testified that the bidding process and the contract award for the La

Pollitt, confirmed that he had no evidence of corruption in the La Chorrera contracting process, and was simply *inferring* corruption based on his (unsupported) opinions that funds from Omega Panama were paid to Sarelan Corp by Ms. Reyna, and that the Tonosi land deal ("**Tonosi Land Transaction**") did not occur.[201] (Tr 9/1888:2-1891:13, 1948:13-1949:21). Claimants' Public Contracting Experts, however, performed a blind review of the La Chorrera Contract bids, and concluded that the Omega Consortium was rightfully awarded that Contract.[202] Respondent has not challenged or even addressed those Experts' conclusion; it even declined to cross-examine them. Finally, Mr. Rivera has testified that he never paid or offered to pay any bribe to Justice Moncada Luna or anyone related to him, and that he never met the individuals on the vetting commission for the La Chorrera Contract.[203] Mr. Lopez also testified that he never saw Mr. Rivera involved in, or even contemplating, bribery to obtain a contract.[204] *No witness or any other type of evidence in this case has contradicted this testimony*.

75. Against this backdrop, Claimants' exoneration unfortunately has been long-coming. In September 2016, the Second Instance Court had found the money laundering investigation null *ab initio* because it was based on the same insufficient evidence that caused the Designated Prosecutor to drop the money laundering charge against Justice Moncada Luna. Under Panamanian law, this constituted double jeopardy and was a violation of, *inter alia*, Claimants'

Chorrera Contract was lawful. Tr. 3/627:14-629:2, 3/631:9-632:3.

[201] In fact, Mr. Pollitt admitted that he had paid scant attention to evidence relating to the bidding and award process for that contract—he could not even recall what, if any, documents from that process he reviewed. Tr. 8/1824:1-1829:22.

[202] Expert Report of Prof. José María Gimeno Feliú and Prof. José Antonio Moreno dated 17 May 2019, at 3, 6; Report from the Vetting Commission dated 9 Oct. 2012 (C-0083), at 1, 7; Cls' Reply ¶ 52; Cls' Rej. ¶ 41.

[203] Second Witness Statement of Mr. Oscar I. Rivera Rivera dated 27 May 2019 ("**Rivera 2**"), ¶ 10.

[204] Lopez 1 ¶ 59.

due process rights.[205] In June 2020 Respondent's Supreme Court rejected the Organized Crime Prosecutor's cassation appeal of the Second Instance Court's nullification.[206] In doing so, the Supreme Court explained that the Prosecutor committed serious errors,[207] yet the Prosecutor's filing of the frivolous cassation appeal kept the money laundering investigation, detention orders, and bank account seizures in place for over three years after a court had declared it null. Inexplicably, these sanctions ***still*** remain in place today. (Tr 1/40:8-18; Tr 2/486:21-488:21).

76. Respondent has the burden of proving its illegality defense by clear and convincing evidence,[208] yet it has failed to establish, and in some cases it has failed to even *investigate*, the necessary elements of such a claim. It props-up its entire case on a bank transaction analysis that was inherently and demonstrably flawed (*see infra* § III.B.3), *and does not go any further.* Respondent has never sought to link the demonstrable facts to the elements of the alleged crime and has never investigated any other potential co-conspirators (*see infra* § III.B.4), and it has never properly investigated the obvious propriety of the Tonosi Land Transaction, which was the lynchpin of its search for illegality (*see infra* § III.B.5). It is no surprise that Panama's own courts and the U.S. government found evidence of a crime wanting (*see infra* § III.B.6), a reality which amply demonstrates Panama's breach of the Treaties (*see infra* § III.B.7).

[205] Judgment of Panama's Second Superior Tribunal for the First Judicial District dated 23 Sept. 2016 (C-0008 resubmitted 2), at 7.

[206] Supreme Court Judgement issued by the Criminal Chamber dated 29 May 2020 (C-0948).

[207] The Supreme Court explained that Panamanian law does not permit a cassation appeal of a nullity decision and the Prosecutor's cause of action for the appeal was wrong as a matter of law. *Id*.

[208] United States' Non-Disputing Party Submission dated 3 Feb. 2020 ("**U.S. Submission**"), ¶ 45 ("However, when allegations of corruption are raised, either as part of a claim or as part of a defense, the party asserting that corruption occurred must establish the corruption through clear and convincing evidence."); Cls' Reply ¶ 281, n.817; Cls' Rej. ¶¶ 12, 115-16.

3. *Panama's Allegations Rest Solely On Flawed Bank Transaction Analyses*

77. To support its "illegality" defense, Respondent submitted two contemporaneous reports authored by Mr. Julio Aguirre[209] (the "**Aguirre Report**") and Mr. Jorge Villalba[210] (the "**Villalba Report**") and an expert report by Mr. Roy Pollitt.[211] Each lies on an unstable foundation: a defective financial analysis that exposes the methods of Panama's investigators as sloppy at best.

78. ***First*, the financial analyses are built on defective data, including a set of incomplete bank records.** Both the Aguirre and Villalba Reports ignored that Ms. Reyna's bank transaction history was missing half its pages, leaving significant gaps in the accounting of how Claimants' money was used by Ms. Reyna after the payments for the Tonosi Land Transaction were made.[212] This is no minor detail. Mr. Villalba admitted during his testimony that the Reyna bank transaction history was key to his financial analysis.[213] He also acknowledged that it was obvious that the Reyna bank records were missing pages,[214] but he still relied on them and could not explain why he never tried to rectify this fundamental problem with his key evidence.[215]

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[209] Julio Aguirre's Money Laundering Expert Report for the National Assembly dated 2 Mar. 2015 (R-0063) (the "**Aguirre Report**").

[210] Jorge Enrique Villalba, Preliminary Financial Analysis Report in Case No. 049-15 dated 5 June 2015 (R-0062) (the "**Villalba Report**").

[211] Expert Report of Mr. Roy Pollitt dated 15 Nov. 2019 ("**Pollitt**").

[212] Reyna y Asociados and JR Bocas Investments bank transaction history dated 2015 (C-0421); First Expert Report of Ms. Alison Jimenez dated 13 May 2019 ("**Jimenez 1**"), at 15-16 (showing the Reyna bank transaction history fails to account for US$ 278,000 or more than 210 transactions).

[213] Tr. 3/662:9-18 (admitting that "half the pages of this document are missing" from the document he "used for purposes of [his] investigation," which was "a key document" for his financial transaction analysis).

[214] Tr. 3/661:13-18 ("Q. So, it's pretty obvious, from the fact that we jumped from July 14 to August 29 and from the fact that we jumped from 236,000 to 800 odd dollars, that there are pages and transactions missing; right, Mr. Villalba? A. Yes, we can see that."). *See also supra* n.94.

[215] Tr. 3/662:10-19 (admitting the Reyna & Asociados bank statements was a "key document" that had "half [of] the pages [] missing" but not explaining why this was not corrected or noted in Mr. Villalba's report).

Indeed, Respondent had *eight* opportunities to cure this crucial deficiency,[216] yet it never did so.[217] This speaks volumes about the pretextual nature of the investigations and criminal allegations.

79. Respondent describes the missing pages as "*regrettable but irrelevant*,"[218] but the testimony at the hearing proved its clear relevance. Though Mr. Pollitt initially argued that "bank statements in the record contain the 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,"[219] and that he "didn't need [the missing pages] for [his] analysis,"[220] he was later forced to concede that because of the missing pages he had no idea what transactions actually occurred on critical dates. (Tr 9:1957:6). As Ms. Jimenez explained, those missing pages make it impossible to determine the source of the transfers from Reyna y Asociados to Sarelan.[221] That is fatal to Respondent's case.

80. ***Second*, Respondent's various analyses of the bank records are contradictory.** Even though the Villalba and Aguirre Reports and Mr. Villalba's testimony in this arbitration were all based on the ***same*** underlying source documents (which Mr. Villalba confirmed[222]), the reports and testimony say different things and draw different conclusions regarding the flow of funds allegedly transferred from Omega Panama for the ultimate benefit of Justice Moncada Luna. The "thing of value" that Claimants supposedly paid to Justice Moncada Luna is anything but clear.

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[216] Second Expert Report of Ms. Alison Jimenez dated 17 Jan. 2020 ("**Jimenez 2**"), at 33-34.

[217] Cls' Rej. ¶ 36.

[218] Resp.'s Rej. ¶ 56.

[219] Pollitt at 30.

[220] Tr. 9/1955:22-1964:15 ("Q. Okay. So, it is possible that additional transactions took place on May 3; correct? A. It's possible, but we cannot say if they did.").

[221] Tr. 8/1612:11-1617:11, 8/1656:6-1663:21, 8/1675:2-8, 8/1685:18-1686:7; Jimenez 2 at 34-38; Cls' Rej. ¶ 33.

[222] Tr. 3/549:10 (admitting that the Aguirre Report was based on the same evidence and that Mr. Aguirre did not have any other evidence).

Not only does it change depending on the Report or witness, it even changes among the same witness' statements.[223] The Aguirre Report states that Omega Panama allegedly transferred US$ 275,000 to Justice Moncada Luna,[224] while the Villalba Report describes the "bribe" as US$ 200,000.[225] In this arbitration, Mr. Villalba changed the number (without explanation) to US$ 275,000.[226] Mr. Pollitt could not even commit to identifying the alleged "thing of value."[227]

81. Respondent's case is also inconsistent in how it attributes the alleged bribe to Claimants. With respect to the July 2013 transaction, the Villalba Report asserts that the payment of US$ 130,000 that Justice Moncada Luna received via the corporation Desarrollo Coco del Mar[228] *was sourced primarily from Alexandre Tchevonnyi* (in the amount of US$ 125,000).[229] Mr. Villalba acknowledged that Mr. Aguirre *did not mention Mr. Tchervonnyi in his report* (Tr 3/652:9-15), even though both reports were based on the same documents.[230] And Mr. Villalba admitted that he did not reference Mr. Tchervonnyi's transfer in either of his witness statements *in this arbitration*, instead replacing Mr. Tchervonnyi's portion of the transfer by attributing a second US$ 75,000 transfer to PR Solutions.[231] Mr. Villalba had no meaningful explanation for this crucial inconsistency between his witness statement and his contemporaneous report. (Tr 3/646:4-10, 3/648:15-21, 3/655:1-10).

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[223] Jimenez 2 at 10.

[224] Aguirre Report (R-0063) at 14-15, 17-18; Jimenez 1 at 24.

[225] Villalba Report (R-0062) at 25, 40; Jimenez 1 at 24.

[226] Second Witness Statement of Mr. Jorge Enrique Villalba dated 14 Nov. 2019 ("**Villalba 2**"), ¶ 6.

[227] Tr. 9/1972:22-1973:22; Pollitt at 17, n.57; Jimenez 2 at 40.

[228] Villalba Report (R-0062) at 40.

[229] *Id.*, Table A3. This attribution of funds contains a mathematical error; it over-sourced the transfer by US$ 70,000.

[230] Jimenez 1 at 3-4; Jimenez 2 at 3; Tr. 3/652:5-8.

[231] First Witness Statement of Mr. Jorge Enrique Villalba dated 7 Jan. 2019 ("**Villalba 1**"), ¶ 23; Tr. 3/638:9-15, 3/640:16-641:7, 3/646:4-10, 3/650:3-9.

82. ***Third*, Respondent did not properly analyze Claimants' bank statements.** Mr. Villalba admitted that he and Mr. Aguirre did not have *any* evidence showing that Omega Panama intended to use the money from the La Chorrera Contract to pay for the Tonosi Land Transaction. (Tr 3/670:4-13) And Mr. Pollitt was forced to concede that he had no such evidence, and was simply inferring such a connection. (Tr 9/1917:13-1933:21). Perhaps most damning, neither Mr. Villalba nor Mr. Pollitt could offer any cogent explanation for their assumption that the July 2013 payment to Reyna was sourced from the 11 July deposit into Omega Panama's account of US$ [redacted] for the La Chorrera contract, rather than the US$ [redacted] in unrelated funds deposited that same day. (Tr 3/664:8-671:4, 9/1913:2-1915:22, 1919:16-1920:12). In fact, upon questioning, Mr. Pollitt had to concede that he did not know if the La Chorrera funds *were even available* to Omega Panama to use on 12 July to make the transfer to PR Solutions that Respondent ultimately concludes went to Sarelan. (Tr 9/1920:13-1933:15).

83. ***Fourth*, Respondent did not consider that Ms. Reyna was comingling funds from legitimate and illegitimate transactions.** Ms. Reyna testified in the Organized Crime Prosecutor's investigation that she used the Reyna y Asociados bank account not only for law firm business, but also for *all* of JR Bocas' business *and other business*.[232] She also explained that she was taking money from one transaction to pay obligations under another.[233] Mr. Villalba had access to this testimony (Tr 3/564:1-565:12), yet he disregarded the possibility that Ms. Reyna could have been commingling Omega Panama's funds for the Tonosi Land Transaction with illicit funds from other transactions.[234] But on cross-examination, Mr. Villalba *admitted* that it was entirely possible that Ms. Reyna had used Omega Panama's payments to pay off an unrelated debt

[232] Declaration from Maria Gabriela Reyna dated 23 June 2015 (C-0894), at 12-13; Tr. 3/675:21-676:4.

[233] *Id.* at 9.

[234] Tr. 3/674:11-676:4; Jimenez 2 at 38-40.

that she or JR Bocas had with respect to Sarelan. (Tr 3/678:9). When confronted with this, Mr. Pollitt's only response was to suggest that Ms. Reyna's testimony should not be believed—despite the fact that her bank records clearly support her admission of comingling. (Tr 9/1969:12-1971:13). And Respondent has offered *no evidence* that Mr. Rivera or anyone at Omega Panama had knowledge of what Ms. Reyna did with the money deposited with her.[235] This, too, is fatal to Respondent's case.

84. ***Fifth*, Respondent failed to credibly explain what happened with the remainder of the US$ 500,000 that Omega Panama transferred to Reyna y Asociados to purchase the Tonosi Land.** Respondent's case is that, at most, US$ 275,000 went from Ms. Reyna to Sarelan,[236] leaving at least US$ 225,000 unaccounted for. Mr. Villalba testified that he does not "have the certainty to say what happened to the remainder." (Tr 3/656:4-5). Mr. Pollitt, on the other hand, tried to explain away this defect in Respondent's case by stating (*without any basis*) that the US$ 225,000 (or more) remainder was compensation for individuals "helping to launder proceeds of [a] crime."[237] When pressed on that unsupported assumption at the hearing, Mr. Pollitt offered new, entirely unmoored speculation that perhaps the money went to pay cuts to other possible co-conspirators—speculation for which he admitted he had no evidentiary basis. (Tr 9/1974:11-1979:2). Like Panama's other claims, this is simply baseless conjecture.

4. *Panama Never Even Investigated All The Elements Of Corruption*

85. As explained by Claimants and their expert, and confirmed by Mr. Pollitt, there are

[235] Tr. 3/678:21-679:6 (admitting it is "possibl[e]," "based on the mechanics that [Reyna] describes here, in the case of Mr. Alexandre," that "Reyna & Associates received money from Omega for a land transaction and then used that to pay off a debt with respect to Sarelan"); Tr. 9/1971:18-1972:14 ("Mr. Rivera had no control over how she used her account, yeah, I don't have evidence of that.").

[236] *See generally* Villalba Report (R-0062); Aguirre Report (R-0063); Villalba 1; Villalba 2; Pollitt.

[237] Pollitt n.4; Jimenez 2 at 44; Cls' Rej. ¶ 37.

three elements required to prove corruption with respect to a bribery allegation: (1) the involvement of a Politically Exposed Person; (2) a quid pro quo, comprised of a "thing of value" that the giver provides to the taker in the form of an "official act"; and (3) intent by the giver to influence the taker "to act or refrain from acting in the exercise of his or her official functions or duties."[238] Respondent has failed to prove *any* of these elements.

86. **On the first element**, Respondent alleged a link between Claimants and Justice Moncada Luna during the National Assembly Investigation,[239] but it *never presented real evidence of this link*. Indeed, Respondent's witnesses have essentially admitted that they failed to adequately investigate whether Claimants acted corruptly with respect to Justice Moncada Luna.[240] Mr. Villalba testified that he did not investigate the bidding process; in fact, *Mr. Villalba acknowledged that the La Chorrera Contract's bidding and contract award process was lawful*. (Tr 3/620:5-622:3, 627:1-628:11). It is thus hardly surprising that Respondent waited until this arbitration—*years* after the events in question—and *then* left the matter to its expert (as opposed to fact) witnesses, to *even try* to connect the dots between Claimants and Justice Moncada Luna.[241]

87. In fact, Respondent never even sought to collect the sort of evidence a *bona fide* investigation would look for to establish a corrupt scheme with a public official. As Ms. Jimenez explains, the financial analysis is simply "a data point in an investigation, not the end point."[242] A proper investigation, Ms. Jimenez continued, should include "evidence of meetings, discussions,

[238] Tr. 8/1605:17-1607:18, 8/1794:3-1796:2; Jimenez 1 at 6; Pollitt at 10; *Corruption: A Glossary of International Criminal Standards*, Organisation for Economic Co-operation and Development (C-0431).

[239] Rivera 1 ¶ 83.

[240] *See generally* Jimenez 1, Jimenez 2.

[241] Pollitt at 34.

[242] Jimenez 2 at 28.

middlemen, text messages, or any type of coordination between Omega and/or Mr. Rivera and Moncada Luna in regards to the payment of a bribe."[243] But Respondent's lead investigator admitted that he never even tried to obtain any emails, text messages, phone records, calendar entries, or any other evidence to prove this point, instead subpoenaing only accounting records.[244]

88. Not only did Mr. Villalba and the Prosecutor's Office fail to take these simple steps to collect relevant documentary evidence of the alleged link, but Mr. Villalba also admitted that the majority of the members of the vetting commission—the very people who recommended to Justice Moncada Luna that the Contract be awarded to the Omega Consortium—*were not even interviewed* because the members of the vetting commission "*were not part of that inquiry at . . . any point in time*." (Tr 3/629:3-11). Respondent's investigators simply had no intention of seeking the truth.[245]

89. **On the second legal element,** Professor Grigera Naón asked the central question to Respondent's Counsel during the first week of Hearing: "*what is the quid pro [quo] here?*" (Tr 1/97:8-9). Panama waited almost five years after the investigation began to make even an effort to "define" the official act that Claimants supposedly influenced.[246] Neither one of the Panamanian reports produced in the context of the Anti-Corruption and Organized Crime investigations, nor Mr. Villalba's witness statements, identified such alleged official act.[247] By Mr. Pollitt's own admission, prior to his November 2019 expert report in these proceedings, Respondent had never even stated a belief that there was bribery in connection with the La

[243] Jimenez 1 at 9; Jimenez 2 at 24.

[244] Tr. 3/541:4-15; 3/541:21-543:6 (emphasis added).

[245] *See supra* ¶¶ 75-76.

[246] Cls' Rej. ¶ 25; Jimenez 2 at 9.

[247] *Id*.

Chorrera contract.[248] Mr. Pollitt was also forced to admit that his conclusion that there was bribery was only an inference, based on his conclusions that funds from Omega Panama provided to Ms. Reyna were paid by Ms. Reyna to Sarelan, and that the Tonosi Land Transaction did not occur. (Tr 9/1888:2-1891:13, 1948:13-1949:21). That inference is not evidence and, as explained above in section III.B.3, and below in section III.B.5, its foundations are fatally flawed. Conversely, Mr. Rivera and Mr. Lopez have testified that they had no knowledge of (or intent to make) any payments to Justice Moncada Luna, and the evidence shows that the Tonosi Land Transaction was just that—a legitimate attempt to purchase land for later potential development just like Mr. Rivera (and his father before him) had done in the past.[249]

90. **On the third element of bribery**, the legal proposition is again undisputed: the crime requires *intent* on the part of the alleged bribe giver to influence the actions of the bribe receiver.[250] Thus, Respondent *must* show that Claimants *intended* to influence Justice Moncada Luna to award the La Chorrera Contract.[251] Despite its unsupported assertion that "as to the corruption . . . [Respondent] thinks the proof is incontrovertible" (Tr 1/87:12-13), neither Respondent, nor Mr. Villalba, nor Mr. Pollitt has provided *any* evidence on the element of intent. (Tr 9/1888:2-1891:13, 1948:13-1949:21).

91. At the hearing, Mr. Pollitt conceded that he had no direct evidence of intent—he simply *inferred* it from his analysis of bank records and his presumption that the Tonosi Land Transaction was fake. (Tr 9/1917:13-1933:21). That is far from sufficient to show bribery under

[248] Tr. 8/1840:5-1841:9; Cls' Rej. ¶ 25; Jimenez 2 at 9.

[249] Lopez 1 ¶ 59; Rivera 1 ¶ 92; Rivera 2 ¶ 10; Rivera 3 ¶¶ 10-11; Tr. 2/450:2-4.

[250] Jimenez 1 at 9; Pollitt at 10; Tr. 3/536:21-537:2 ("Q. In reviewing the elements for corruption, you would have seen that it requires a showing of intent; correct, sir? A. Correct.").

[251] Cls' Rej. ¶ 42.

any standard. Even if those factors may be considered "red flags,"[252] in and of themselves they cannot prove corruption; they have to be further investigated and supplemented by other evidence corroborating intent to engage in a corrupt act[253]—which Panama's lead investigator admits never happened. (Tr 3/541:4-15; 3/541:21-543:6). The United States explained this in its rejection of Panama's extradition request, stating that the request lacked evidence "show[ing] the movement of money by Rivera Rivera and reflect[ing] 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."[254]

5. *The Tonosi Land Transaction Was Legitimate*

92. As noted above, Respondent's defense rests on the theory that the Tonosi Land Transaction for the purchase of land ("**Finca 35659**") concluded through a Promise of Purchase and Sale Agreement (the "**Promise Agreement**") was illegitimate. The testimony presented at the hearing proves that Respondent's allegations are unfounded.

93. Respondent calls the Tonosi Land Transaction "spurious" and "pretextual rubbish" (Tr 1/93:1-4; 1/95:21-96:2), but it fails to present *any* evidence to support that allegation. Indeed, Respondent *ignores* all evidence contrary to its baseless allegation. Mr. Villalba, for instance, admitted that he repeatedly received evidence showing that the two financial transactions for payment of Finca 35659 to Ms. Reyna were part of a legitimate transaction (Tr 3/577:2-8), and that none of the persons interviewed during the criminal investigations ever testified that the

[252] *Id.* ¶ 26; Jimenez 2 at 42, 45.

[253] Tr. 8/1741:14-1742:12, 8/1750:14-1752:10; Cls' Rej. ¶ 26; Jimenez 2 at 42, 45.

[254] 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 ("**Extradition Denial**") (C-0900), at 4 (emphasis added).

Tonosi Land Transaction was illegitimate.[255] Mr. Villalba further acknowledged that the so-called criminal "investigation" into the Transaction had focused *exclusively* on locating a construction site,[256] a construction permit application,[257] and a real estate broker's license on the part of Ms. Reyna (a lawyer) (Tr 3/612:3-6)—all of which investigators knew (from the outset) did *not* exist.[258] Respondent did *not* investigate whether JR Bocas owned Finca 35659 (Tr 3/610:18-611:7), nor did it attempt to contact the ultimate owner of Finca 35659 to confirm or deny the land purchase,[259] nor did it verify whether there was a mortgage on the Tonosi Land which caused the breakdown of the Transaction. (Tr 3/611:8-15). It should therefore be no surprise that, given this pretextual and half-hearted "investigation," Mr. Villalba admitted that he could ***not*** conclude that the Tonosi Land Transaction was illegitimate. (Tr 3/577:9-18; 3/565:8-12; 3/570:13-16). This alone puts the lie to Respondent's case.

94. Justice Troyano and the Real Estate Experts confirmed that the Tonosi Land

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[255] Tr. 3/577:11-20, 3/566:5-7, 3/571:2-7. Ms. Maria Gabriela Reyna, Mr. Frankie Lopez, Mr. Francisco Feliu, and Mr. Salvador del Toro were interviewed. *See* Tr. 3/563:18-20, 3/569:21-570:2, 3/574:7-11, 3/575:8-11. Respondent flagged in its cross-examination of Mr. Rivera that the intercompany transfers from Omega Engineering to PR Solutions appear in the latter's financial statements, but not the former's. This is a red-herring. Mr. Salvador del Toro was the accountant for both entities, and he testified in November 2015 that with respect to the first US$ 250,000 transfer, he "was *given instructions to codify and record the transaction* and transfer to PR SOLUTION, which is an account receivable in OMEGA ENGINEERING, INC. The transfer was authorized by FRANKIE LOPEZ and it occurred more or less in May 2013; I do not know the reason for the transaction, I just carried out the order and completed the codification between subsidiaries." Declaration from Salvador del Toro dated 17 Nov. 2015 (C-0887), at 3. When asked about the second US$ 250,000 transfer, Mr. del Toro again says "I was *given instructions to codify and record the transaction*" from Mr. Rivera and Mr. Lopez, so "I recorded the transactions and codified them." *Id*. He goes on to affirm that "that record was entered through the Timberline [accounting software] system . . . and they gave me the [promise of purchase and sale] document as support or justification for the transaction." *Id*. at 4. When Mr. Rivera testified that he was surprised not to see these transactions recorded in Omega Panama's financial statements Tr. 2/431:19-20, it was because he clearly ordered the record to be made, and understood that it had been.

[256] Diligence Report by Alexis Rodriguez dated 20 Nov. 2015 (R-0089).

[257] Villalba 1 ¶ 32; Cls' Reply ¶ 247; Diligence Report by Alexis Rodriguez dated 20 Nov. 2015 (R-0088).

[258] Tr. 3/599:11-599:16, 3/607:1-10, 3/609:20-610:17; Supplemental Declaration of Maria Gabriela Reyna Lopez dated 14 July 2015 (C-0089), at 8; Cls' Reply ¶ 248. The use of a real estate lawyer in lieu of a real estate agent is common in Panama. Tr. 6/1323:13-14.

[259] Jimenez 1 at 10. Respondent had Ms. Jo Reynolds' contact information. Cls' Reply ¶ 250; *JR Bocas Investments bank transaction history* dated 2015 (C-0421) at 56.

Transaction was lawful and followed proper procedures.[260] As explained by Justice Troyano[261] and as agreed by Justice Arjona (Tr 7/1523:1-2), the Promise Agreement complies with all the requirements established under Panamanian law. The so-called "defects"[262] and "critical flaws"[263] that Respondent and its experts argued plagued the Promise Agreement are nothing of the sort, and the form of the transaction and the typographical errors were "not uncommon." (Tr 6/1323:13-14; 6/1324:7-11; 6/1370:9-19; 7/1403:6-12).

95. In particular, Justice Arjona has now admitted: (i) that Panamanian law does not require authentication by a Notary Public or registration/recording of a public deed in the Public Registry (Tr 7/1496:3-12); (ii) that Mr. Rivera hired a "good law firm" in Panama to represent him in the Transaction[264]; (iii) that neither a topographical study, nor an appraisal, nor a land survey were required under Panamanian law (Tr 7/1573:13-1578:10; 1580:2-1581:20; 1582:5-22); (iv) that Justice Arjona is not a real estate expert[265]; and (v) that, in any event, Mr. Rivera had contemporaneous information akin to a topographical study, an appraisal, and a land survey.[266]

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[260] Respondent failed to present an opinion from its own Panamanian real estate expert, and its Panamanian law expert, Justice Arjona, is not a real estate market expert. Tr. 7/1519:12-1520:10.

[261] Troyano ¶¶ 14, 29; Cls' Rej. ¶¶ 49-50.

[262] Resp.'s Rej ¶ 36.

[263] *Id.* ¶ 43.

[264] Tr. 7/1437:14-22 (agreeing that IGRA is a "good law firm"); Rivera 3 ¶ 12.

[265] Tr. 7/1476:2-4, 7/1581:12-20. The Real Estate Experts have confirmed that these so-called "best practices" are rarely used in transactions like the Tonosi Land Transaction, *see* Second Expert Report of Messrs. Arturo Chong and Fidel Ponce of ARC Consulting dated 17 Jan. 2020 ("**Real Estate Experts 2**"), at 30, and Justice Troyano concurs, *see* Troyano ¶¶ 112-13.

[266] *See* Tr. 7/1573:16-1582:22. Finca 35659 already had a registered land survey, *see* Tonosí Land Registration Information dated 31 Jan. 2013 (C-0202); Mr. Rivera personally walked the property, Tr. 2/463:6-8, allowing him to assess its topography in a manner often used in Panama, Real Estate Experts 2 at 30; and given that Public Registry prices in Panama are unreliable and market information is sparse, Mr. Rivera relied on the advice of his real estate agent, Mr. Chevalier, to determine the Finca's market price, Real Estate Experts 2 at 5-6, 31; Rivera 3 ¶ 23; Tr. 6/1335:5-21.

96. Claimants' experts have shown that the additional steps suggested by Justice Arjona—*i.e.,* notarization of the signatures or registration/recording of the Promise Agreement as a public deed in the Public Registry—are not common practice in Panama for a Promise Agreement, nor do they make a Promise Agreement "suspect."[267] Justice Troyano also has shown that the lack of a date in the Promise Agreement was not a "crucial" error because said date may be determined by other evidence.[268] Justice Troyano's testimony further demonstrated that the alleged lack of "proof of authority" does not give rise to any type of nullity under Panamanian law[269] because both parties to the Promise Agreement were duly authorized to sign it[270] under their respective Articles of Incorporation.[271] Neither side needed a special authorization from the shareholders to enter into the Promise Agreement. (Tr 7/1405:2-18).

97. Nor can Respondent prove its baseless assertion that Mr. Rivera paid too much for the property. Its sole evidence is the opinion of Justice Arjona, who seemingly only looked at the price in the public registry at which JR Bocas acquired the land and compared it to the higher price in the Promise Agreement.[272] This proves only Justice Arjona's lack of understanding of, and experience in, Panama's real estate market, since the Real Estate Experts have shown that the price

[267] Real Estate Experts 2 at 29; Tr. 6/1371:18-1372:2; Tr. 7/1442:17-1443:14; Cls' Rej. ¶ 56; Tr. 2/457:19-458:3; Tr. 7/1402:12-19; Troyano ¶ 82.

[268] Troyano ¶ 108; Tr. 7/1447:4-22.

[269] Tr. 7/1403:17-1406:12.

[270] Article 1110 of the Panamanian Civil Code authorizes the legal representative of a corporation to enter into this type of contract. Panamanian Civil Code (C-0742 resubmitted), art. 1110. Further, Panamanian Supreme Court jurisprudence allows the legal representative of a corporation to carry out acts that are related to the corporate object in the name of the corporation. Tr. 7/1405:2-16.

[271] Articles of Incorporation of JR Bocas Investments Inc. dated 4 Apr. 2005 (AA-0009); Articles of Incorporation of Punela Development Corp. dated 2 Jan. 2013 (AA-0010).

[272] Expert Report of Mr. Adán Arnulfo Arjona L. dated 13 Nov. 2019 ("**Arjona**"), ¶ 66.

registered in the Public Registry is rarely the market price.[273] Indeed, in the case of Finca 35659, the Public Registry shows that the original buyer acquired the property for US$ 48 in 2007, yet six months later JR Bocas acquired it for US$ 30,000.[274] Justice Arjona declined to mention this (larger and faster) increase in value, and he never even suggests that this dramatic increase renders the transaction between the original buyer and JR Bocas a "sham."[275] That fact alone discredits Justice Arjona's testimony on this point, especially in the face of the Real Estate Experts' confirmation that the price agreed by Mr. Rivera was reasonable and within the market range.[276]

98. Finally, Respondent's assertion that the Promise Agreement contained an "extraordinary and itself suspicious" "50 percent advance payment" (Tr 1/93:20-94:1) is a misrepresentation of the facts. The initial advance payment was US$ 250,000 and constituted *25%—not 50%*—of the purchase price.[277] Moreover, such structured payments are not uncommon in Panama.[278]

6. *Panama's Illegality Allegations Found No Support In Its Own Courts Or From The United States*

99. Respondent's multiple criminal investigations of Claimants have gone nowhere in Panama,[279] and were rejected by the United States too,[280] but they still completely destroyed Claimants' reputation. First came the National Assembly investigation of Justice Moncada

[273] Real Estate Experts 2 at 5; Cls' Rej. ¶ 64.

[274] Real Estate Experts 2 n.27; Tonosí Land Registration Information dated 31 Jan. 2013 (C-0202); Public Deed number 338 of 15 February 2008 (AA-0006); Cls' Rej. ¶ 64.

[275] Cls' Rej. ¶ 64. *See generally* Arjona.

[276] Real Estate Experts 2 at 4; Tr. 6/1313:13-18, 6/1320:7-9, 6/1323:1-12.

[277] 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.

[278] Real Estate Experts 2 at 31.

[279] Cls' Rej. § II.A.1.e.

[280] Extradition Denial (C-0900).

Luna.[281] On the heels of having their Contracts targeted with budget cuts and other obstructive behavior, Claimants, their investment, and their employees were subject to interviews, evidence collections, and sanctions, including (but not limited to) bank account freezes.[282] Since then, Mr. Rivera, through his attorneys, requested both orally and in writing that the bank accounts be released,[283] but his pleas fell on deaf ears. Even when the Designated Prosecutor in the National Assembly Investigation stated that he did not oppose the release of the frozen bank accounts,[284] the National Assembly Judges rejected the release requests.[285] Inexplicably, the bank accounts remain frozen *to this day*,[286] in violation of Panamanian law.[287]

100. The freeze of Claimants' bank accounts and their involvement in the National Assembly Investigation were widely publicized,[288] and marked a critical milestone in Panama's campaign to destroy Claimants' reputation in Panama and worldwide.[289] The sanctions continued in August 2015, when the Organized Crime Prosecutor issued a highly-publicized detention

[281] Cls' Mem. § VI.D.1.

[282] Mr. Rivera first learned of his unjustified involvement in the National Assembly investigation in January 2015. Rivera 1 ¶ 85; Email correspondence between Frankie Lopez and others dated 22 Jan. 2015 to 7 Mar. 2015 (C-0188); Cls' Mem. ¶ 91.

[283] Letter from Manuel Cedeño Miranda to Special Prosecutor of Organized Crime dated 10 June 2015 (C-0209), at 3-7; Motion for Reconsideration dated 15 Mar. 2015 (C-0206).

[284] Transcript of Moncada Luna's Sentencing Hearing dated 5 Mar. 2015 (C-0930), at 26:36, 28:10.

[285] Verdict on Motion for Reconsideration dated 23 Mar. 2015 (C-0207).

[286] Rivera 1 ¶ 114; Rivera 3 ¶ 32; Resp.'s Counter-Mem. ¶ 175; Cls' Rej. ¶ 81; Tr. 1/28:12-19, 1/40:8-17.

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

[288] *Over $500 thousand belonging to Moncada Luna are encumbered*, LA ESTRELLA DE PANAMA dated 31 Jan. 2015 (C-0191); *Accounts allegedly belonging to Moncada Luna are currently seized*, NOTICIAS 24 PANAMA dated 30 Jan. 2015 (C-0192); *More seized bank accounts linked to suspended judge*, NEWSROOM PANAMA dated 30 Jan. 2015 (C-0193); *Prosecutor seizes accounts linked to Alejandro Moncada Luna*, LA PRENSA dated 30 Jan. 2015 (C-0194); *Accounts related to money laundering are seized*, LA PRENSA dated 21 June 2015 (C-0213); Rivera 1 ¶ 86.

[289] Rivera 1 ¶ 86.

order[290] and Interpol Red Notice[291] against Mr. Rivera (and Mr. Feliu) for alleged money laundering.[292] Mr. Rivera tried to clear his name by challenging the Panamanian arrest warrant on two occasions,[293] but the Panamanian authorities summarily rejected both requests.[294] The Interpol Red Notice was only cancelled after Mr. Rivera contested it directly with Interpol.[295]

101. Then, in December 2015, Panama sought the extradition of Mr. Rivera from the United States to stand trial for money laundering.[296] The United States denied Panama's request for extradition of Mr. Rivera because it lacked "sufficient factual support,"[297] thereby demonstrating why Respondent's corruption defense cannot succeed. The extradition treaty

[290] Resolution of Detention No. 052-15 dated 25 Aug. 2015 (C-0093 resubmitted).

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

[292] *Fiscalia pide a Interpol que emita 'alerta roja' para ubicar a 4 empresarios por caso Moncada Luna*, TVN NOTICIAS dated 2 Sept. 2015 (C-0094 resubmitted); Rivera 1 ¶¶ 108, 110; *More seized bank accounts linked to suspended judge*, NEWSROOM PANAMA dated 30 Jan. 2015 (C-0193); *Prosecutor seizes accounts linked to Alejandro Moncada Luna*, LA PRENSA dated 30 Jan. 2015 (C-0194).

[293] Oscar Rivera's Petition of Habeas Corpus to the Supreme Court dated 28 Aug. 2015 (C-0208); Petition of Habeas Corpus dated 23 Oct. 2015 (C-0221); Petition for Revocation of the Arrest Warrant Request dated 29 Sept. 2015 (C-0223).

[294] Decision of Panama's Supreme Court on Oscar Rivera's Habeas Corpus Petition dated 20 Nov. 2015 (C-0222); Rivera 1 ¶ 110.

[295] Tr. 1/39:21-40:1 ("And I should note, as you can see on the screen, that that Red Notice was canceled after Claimants contested it."); Letter from the Commission for the Control of Interpol's Files dated 13 Dec. 2016 (C-0220).

[296] Extradition Denial (C-0900).

[297] *Id.* at 4. During the Hearing in mid-October, President Shore noted to Mr. Pollitt that Exhibit C-0900 shows that "according to the United States, [the denial of Panama's request for the provisional arrest for the purpose of extradition of Mr. Rivera is] a matter of sufficient, linking evidence," which is not merely a matter of "form." Tr. 9/2006:4-2007:13. Mr. Pollitt responded that he was not aware of what evidence was included in Panama's Request because "[he did not] know what Panamá actually sent." *Id*. As the Tribunal will recall, Respondent produced this evidence only after Claimants' renewed request for production of documents based on Mr. Pollitt's reference in his expert report to documents that had not been produced by Respondent in accordance with the Tribunal's production order. *See* Procedural Order No. 2 dated 18 Dec. 2019, at 4-5. Among the documents belatedly produced was Exhibit C-0900. This is how Claimants (and the Tribunal) learned that Panama had made a request to have Mr. Rivera arrested and extradited to Panama, and that the United States had denied that request due to lack of evidence. This was a fact that Respondent had plainly sought to obfuscate. Indeed, Respondent has never produced the extradition request itself or any evidence accompanying the request, even though this evidence must be solely in its possession, custody or control. The logical inference to be drawn from this is that the extradition request and accompanying evidence would be harmful to Respondent's case.

between the United States and Panama ("**US-Panama Extradition Treaty**") sets out the standard of proof that Panama had to meet with its extradition request, namely that the "evidence of Criminality . . . *would justify [Mr. Rivera's] apprehension and commitment for trial* if the crime or offense had been . . . committed [in the U.S.]"[298] In other words, the US-Panama Extradition Treaty required Panama to satisfy ***only*** the standard for an arrest—***not*** the *much higher* standard for a conviction.

102. The U.S. Department of State receives and processes all initial extradition requests[299] and then forwards them to the Office of International Affairs ("**OIA**"),[300] which evaluates whether the request is "*sufficient and appropriate*."[301] If so, the OIA forwards it to the relevant U.S. Attorney's Office, which in turn "seek[s] a warrant for the fugitive's arrest."[302] Following arrest, the fugitive is brought in front of a judge for an extradition hearing "to determine whether the fugitive is extraditable" under the relevant extradition treaty.[303]

103. In this case, the United States asserted that it could not proceed with Mr. Rivera's arrest because Panama's extradition request did not "contain sufficient factual support linking Rivera Rivera to the money laundering charge."[304] The paucity of evidence must have been palpable, as the State Department apparently never even transferred Panama's request to the U.S. Attorney's Office to seek a warrant for Mr. Rivera's arrest. In other words, the U.S. Government

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[298] U.S. – Panama Extradition Treaty (signed on May 25, 1904, which entered into force for the United States of America on May 8, 1905, and for the Republic of Panama on April 8, 1905) (CL-0283), art. 1.

[299] Department of Justice Manual, § 9-15.700 (C-0954).

[300] *Id.*

[301] *Id.* (emphasis added).

[302] *Id.*

[303] *See id.*

[304] Extradition Denial (C-0900), at 4.

must have felt that the evidence in Panama's extradition request was so plainly "*[in]sufficient*" or "*[in]appropriate*" to justify Mr. Rivera's arrest that it never advanced the process beyond the first stage (review by the OIA).[305] That Respondent's evidence could not even justify passing along the request to ascertain Mr. Rivera's arrest—*let alone actually prove his guilt, as Respondent contends*—speaks volumes about the baseless nature of Panama's criminal allegations. Indeed, the United States' letter unequivocally shows that Claimants were targeted and smeared by nothing more than innuendo.

104. Inexplicably, Mr. Villalba admitted in his testimony that "he was not aware" that the Panamanian Government sought to extradite Mr. Rivera in December 2015,[306] even though Mr. Villalba was still working at the Prosecutor's Office and was the lead investigator in the case. (Tr 3/680:14-681:8). According to Mr. Villalba he "did not have access to th[e] document" seeking extradition, nor the United States' response denying the request for lack of evidence. (Tr 3/681:9-682:21). Although this is information that would be crucial to Mr. Villalba's assessment of his investigation at the time, it appears that Respondent never bothered showing it to him.

105. The Panamanian First Court of the Criminal Circuit ultimately dismissed the corruption investigation in November 2018[307] at the Anti-Corruption Prosecutor's request on grounds that there was *insufficient evidence to prove a punishable act*.[308] After years of investigating, the Anti-Corruption Prosecutor was unable to put forth the minimum amount of

[305] Department of Justice Manual, § 9-15.700 (C-0954).

[306] Tr. 3/679:7-14. *See also id.* 3/679:15-681:4.

[307] Provisional Dismissal No. 143 dated 25 Nov. 2018 (C-0908), at 9.

[308] The Anti-Corruption Prosecutor based the Provisional Dismissal request on Article 2208, subsection 1, which allows a dismissal when the "[e]vidence gathered in the process is not sufficient to prove the punishable act." Panamanian Criminal Code (C-0927); Prosecutor's Opinion No. 43 dated 29 Jun. 2018 (C-0942), at 9.

evidence necessary to proceed.[309] And the six year prescription period for a corruption investigation has now run.[310] With respect to the money laundering investigation, Panama's Second Superior Tribunal declared it *null* on 23 September 2016 because it found that the investigation violated the due process requirements of the Inter-American Convention of Human Rights, the Constitution of Panama, and Panamanian Criminal Procedure.[311] The Prosecutor immediately filed a cassation appeal to Panama's Supreme Court, which lay dormant *for more than three years* before the Supreme Court (in June 2020) summarily denied it.[312] The Supreme Court thus ordered that the account seizures and detention orders against Mr. Rivera, his Panamanian companies, and Mr. Feliu be lifted.

106. However, notwithstanding the Supreme Court's order, the bank account freezes and detention orders *still remain in effect*. And in a moment of remarkable candor, Mr. Villalba testified that the money laundering investigation against Mr. Rivera *could be "reactivated" at any time*, notwithstanding that it had already been pending for more than five years (at that time). In Mr. Villalba's view, were that to happen, the investigation would simply "pick up where it was suspended and then go forward. All of the elements brought together would be part of it, but then new investigative steps would have to be taken and then go to trial." (Tr 3/684:9-686:5).

107. This result leaves Claimants in a Kafkaesque limbo, held hostage by a demonstrably

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[309] Provisional Dismissal No. 143 dated 25 Nov. 2018 (C-0908), at 9; Prosecutor's Opinion No. 43 dated 29 June 2018 (C-0942), at 7-9; Cls' Rej. ¶¶ 77-78.

[310] Cls' Rej. ¶ 78 (citing Panamanian Judicial Code (C-0091 resubmitted 2), arts. 1968-A, B). Under Respondent's flawed theory, the alleged corrupt acts occurred in mid-2013, meaning that the prescription period ended over two years ago.

[311] Judgment of Panama's Second Superior Tribunal for the First Judicial District dated 23 Sept. 2016 (C-0008 resubmitted 2), Recitals 2 and 3, at 13-15; Cls' Mem. ¶ 103; Cls' Rej. ¶ 80.

[312] Supreme Court Judgement issued by the Criminal Chamber dated 29 May 2020 (C-0948). Notably, after years of unexplained delay, the Panamanian Supreme Court acted to dismiss the appeal only *after* this Tribunal raised questions about the delay during the February 2020 First Week Hearing session.

meritless criminal inquiry in violation of foundational Panamanian legal principles. To find a money laundering offense, the alleged offender must have committed a predicate crime, such as corruption.[313] The Anti-Corruption Prosecutor already recognized that he did not have sufficient evidence to charge Mr. Rivera with corruption, and the Panamanian First Court of the Criminal Circuit agreed.[314] And even if the provisional dismissal could be lifted, the corruption investigation could not be reopened because the Panamanian statute of limitations for corruption expired in 2019.[315] Thus, to continue the investigation as Mr. Villalba suggested would be in violation of Panama's own law—but that is what Mr. Villalba admitted was the *status quo, at least at it pertains to Mr. Rivera*.

7. *Panama's Pretextual Criminal Measures Violated The Treaties*

108. The criminal process unleashed against Claimants and their investment, including the account seizures and detention orders, infringes Panama's FET and FPS obligations under any standard.[316] They shock the conscience; they are arbitrary, offend due process, violate the general prohibition on abuse of rights and the principle of proportionality, and wrongfully jeopardized and

[313] Jimenez 2 at 23; Cls' Rej. ¶ 79. *See also* Extradition Denial (C-0900); Tr. 3/537:3-9 ("Q. And in reviewing the elements of money laundering, you would have seen that it requires an underlying predicate criminal offense, doesn't it? A. Correct. Q. And corruption can be such a predicate offense; right? A. Correct.").

[314] Provisional Dismissal No. 143 dated 25 Nov. 2018 (C-0908), at 9; Prosecutor's Opinion No. 43 dated 29 June 2018 (C-0942), at 7-9; Cls' Rej. ¶¶ 77-78.

[315] Cls' Rej. ¶ 78.

[316] Given the extensive nature of Claimants' prior submissions and the page limitation of this one, Claimants focus here on the narrowest interpretation of FET and FPS. For the avoidance of doubt, Claimants maintain their position that Panama's criminal measures violate both broader FET and FPS standards as well as Panama's other obligations (and under any interpretation of those standards). *See, e.g.*, Cls' Reply ¶¶ 372 & n.1032, 374, 421-30. Among other things, they violate the State's obligation to provide full protection and security (in that the criminal measures have breached Claimants' due process rights, ability to travel, and right to be free of targeted harassment) as well as its obligation to refrain from unlawful expropriations (in that the measures have substantially deprived Claimants of the use and enjoyment of their investment—especially the administrative termination of two of the Contracts, which barred Claimants from bidding on any new contracts thereby destroying the investment).

infringed upon Mr. Rivera's (and Mr. Feliu's) physical safety and security.[317] Respondent has no real answer here.[318]

109. It is well established that a State cannot engage in coercion, intimidation, or unreasonable pressure targeted at a particular investment[319] without violating the most fundamental principles of international law.[320] In defiance of these commitments, Panama has forged ahead with unlawful criminal investigations and sanctions. Its conduct could only be understood as having been carried out for illicit purposes.

110. As discussed in sections III.B.3-5, *supra*, Respondent did not even attempt to collect critical evidence that would have formed a part of any serious, legitimate investigation. Mr. Villalba openly conceded that he *assumed* a crime had been committed *at the start of the investigation* and that his mandate was to search for evidence to support that predetermined result.[321] To do so, he focused on flawed bank records, which he *himself* admitted were incomplete,[322] and intentionally avoided exculpatory evidence.[323] Charges have been dismissed

[317] *See* Cls' Mem. § IX.B; Cls' Reply § VIII.B.

[318] Cls' Reply ¶ 402. *See, e.g.*, Tr. 1/92:13-14 ("[W]e don't usually get confessions from the bad guy . . . ."); *id.* 1/117:10-12 (insisting the investigations were "a perfectly reasonable and legitimate exercise of Panamá's police powers"); *id.* 1/122:17-123:5 ("[A] State cannot be told it cannot investigate somebody."); *id.* 1/135:8-10 ("We had a criminal investigation that was grounded in reasonable exercise of police powers . . . .").

[319] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 Aug. 2009 (CL-0181), ¶ 178; *Rupert Joseph Binder v. Czech Republic*, UNCITRAL, Final Award, 15 July 2011 (CL-0182), ¶ 447; *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Dissenting Opinion of Steven A. Hammond, 30 Mar. 2015 (CL-0183), ¶ 134; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 Feb. 2017 (CL-0190), ¶ 171. *See also* Cls' Mem. § IX.B; Cls' Reply § VIII.B.

[320] *Lemire* Jurisdictional Award (CL-0064), ¶ 284. *See also Bosh International, Inc. and B&P, LTD Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, 25 Oct. 2012 (CL-0184), ¶ 106; Cls' Mem. § IX.B; Cls' Reply § VIII.B.

[321] *See supra* ¶¶ 78, 90.

[322] *See supra* ¶ 75.

[323] *See supra* ¶¶ 79-81.

or have run their prescriptive time, a court has nullified one of the investigation for violations of due process, and Panama waited almost five years after the first investigation began to even "define" the official act that was supposedly influenced by Claimants' purported bribe.[324] In June 2020, Panama's Supreme Court put a clear end to the money laundering investigation, denying the Prosecutor's appeal.[325] Yet since 2015 and to this very day, Panama maintains sanctions and continues to accuse Claimants of illegality even though both investigations were dismissed by its courts years ago.[326]

111. Whether described as a denial of due process through "malicious misapplication of the law,"[327] as an abuse of rights for "acts taken under the pretense of law but for an illicit purpose,"[328] or as a grossly disproportionate (mis)use of State power,[329] this type of conduct is unlawful under international law. At best, it qualifies as host State conduct that is "more like combat than cooperative regulation";[330] at worst, it reveals naked animus by Panama's law enforcement officers toward Claimants and their investment.[331] In neither case could Respondent's actions be confused with a mere "unfriendly attitude."[332] By any measure, its

[324] *See supra* ¶ 86.

[325] *See* Decision of Panamanian Supreme Court dated 29 May 2020 (C-0948).

[326] *See supra* ¶¶ 70, 82.

[327] KOTUBY & SOBOTA (CL-0081 resubmitted), at 78 (citing *Azinian v. Mexico*, ICSID Case No. ARB (AF)/97/1, Award, ¶¶ 99-103) (referring to "'a pretence of form' to mask a violation of international law"). *See also* Cls' Mem. § IX.B; Cls' Reply § VIII.B.

[328] KOTUBY & SOBOTA (CL-0081 resubmitted), at 109. *See* Cls' Mem. § IX.B; Cls' Reply § VIII.B.

[329] *See Tecmed v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 (CL-0047), ¶ 122; *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006 (CL-0025), ¶¶ 316-20. *See also* Cls' Mem. § IX.B; Cls' Reply § VIII.B.

[330] *Pope & Talbot v. Canada*, NAFTA Award on the Merits of Phase 2, 10 Apr. 2001 (CL-0046), ¶ 181. *See also* Cls' Mem. § IX.B; Cls' Reply § VIII.B.

[331] *Rompetrol* (CL-0126), ¶¶ 245, 277, 279, 299(c).

[332] *M.C.I. Power Group & New Turbine, Inc. v. Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007 (RL-0018), ¶ 371.

behavior violated international law.[333]

IV. PANAMA'S TREATY BREACHES CAUSED CATASTROPHIC LOSSES TO CLAIMANTS AND THEIR PANAMANIAN INVESTMENT

112. The evidentiary hearings confirmed that Respondent's unlawful actions, both individually and collectively, have caused damage to Claimants and their investment. Shortly after President Varela took office, Claimants' Contracts were financially strangled, stonewalled, or administratively terminated, and (contrary to Respondent's claims) the advance payments the Omega Consortium had received did not spare it the catastrophic harm this caused (*see infra* § IV.A). In addition, the Omega Consortium was legally barred from seeking new contracts in Panama, thereby eliminating any possibility of future revenue (*see infra* § IV.B.1); and Respondent's illegitimate, intentionally publicized criminal investigations destroyed the Omega brand and reputation (*see infra* § IV.B.2). Importantly, all of this began ***immediately after*** President Varela took office, and ***months before*** any suggestion of criminality was raised with respect to Moncada Luna and the La Chorrera Contract.

A. CLAIMANTS' EXISTING CONTRACTS WERE FINANCIALLY STRANGLED AND STONEWALLED, NOTWITHSTANDING THE ADVANCE PAYMENTS

113. The above sections explain in detail how each of Claimants' Contracts were starved of approvals, licenses and payments (*see supra* § III.A.1). The largest of these Contracts (and one other) was administratively terminated. Respondent has largely failed to rebut these facts, so it has resorted to distraction.

114. *First*, Respondent makes incorrect and misleading arguments concerning the advance payments made to the Omega Consortium under the Contracts. It has argued that those

[333] *See supra* ¶¶ 55-64. *See also* Cls' Mem. § IX; Cls' Reply § VIII.

payments were somehow irregular,[334] but there is nothing unusual about the existence or the size of these advance payments; they are a common method of payment in public works contracts with Panama.[335] Indeed, *all* of the Omega Consortium Contracts, across *multiple* government agencies,[336] included advance payments. As Ms. Buendia confirmed when discussing the CDLA Contract, "[i]t is normal for the Contractor to be made an advance payment. . . . Generally, [the advance payment is] 10 percent; in this case, it was 20. *But that is not unusual at all*." (Tr 4/814:7-10). Sosa's Contract with INAC for its inspection services, for example, provided for "[a]n advance payment for 25% of the total contract price."[337]

115. *Second*, Respondent tries to blame its failure to approve payments on an internal review of projects inherited from the previous Administration.[338] For the CDLA Project, this review was allegedly undertaken because of INAC's new Director's concern over Omega's advance payment.[339] But this allegation finds *no support in the record*; there is no documentary evidence that this internal review ever occurred,[340] which is unsurprising considering Ms. Buendia's confirmation that the advance payment was totally normal. And the previous INAC

[334] Buendia ¶ 20; Resp.'s Rej. ¶ 329.

[335] Rivera 2 ¶ 38.

[336] The Omega Contracts all included advance payments as follows: (1) 20% advance payment in the Ciudad de las Artes Project; (2) 20% advance payment in the MINSA Capsi Projects; (3) 15% advance payment in the La Chorrera Project; (4) 20% advance payment in the Municipality of Panama Contract; (5) 30% advance payment in the Municipality of Colon Project; and (6) 10% advance payment in the Mercado Publico de Colon Project. *See* Addendum No. 1 to Contract No. 077 (2011) dated 23 Sept. 2011 (C-0142); Addendum No. 1 to Contract No. 083 (2011) dated 23 Sept. 2011 (C-0143); Addendum No. 1 to Contract No. 085 (2011) dated 23 Sept. 2011 (C-0144); Addendum No. 1 to Contract 150/2012 dated 14 Nov. 2013 (C-0305); Addendum No. 1 to Contract No. 857-2013 dated 2013 (C-0309); Contract No. 01-13 dated 24 Jan. 2013 (C-0051 resubmitted); Addendum No. 1 to Contract No. 043-2012 dated 2014 (C-0277).

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

[338] Resp.'s Counter-Mem. ¶ 105. *See* Cls' Rej. ¶ 134; Letter DG/149 from INAC to the Omega Consortium dated 23 Oct. 2014 (C-0074 resubmitted).

[339] Buendia ¶ 19.

[340] Cls' Rej. ¶ 134.

Director had already undertaken an analysis of the legality of the CPP (payment) process, which took seven months to complete and resulted in the issuance of two orders to proceed.[341]

116. *Third*, notwithstanding any internal review, Respondent was still contractually obligated to pay Claimants for work completed and billed through the CPP system.[342] The CDLA Contract states clearly that INAC agreed to review payment applications within 30 days and "to review, approve, accept, and authorize all accounts with due diligence, which are submitted by The Contractor to make payments to the latter."[343] From there, Mr. Zarak confirmed that any CPP that has been approved by INAC and then endorsed by the Comptroller General *"is an irrevocable obligation by the Panamanian State. . . . [T]hose I know that I have to pay*" because they are *"[p]retty much written in stone*." (Tr 6/1191:10-13, 6/1198:11-1199:10, 6/1205:19-1206:1). Respondent admits to deliberately stopping approval of CPPs No. 13 through 20[344] (and thereby halting any approval of payments to Claimants for work performed as of mid-2014).[345] Mr. Zarak characterized this as "***funny***" that **"*[t]here are no endorsed CPPs after the election*"** (Tr 3/1209:1-2), and conceded that the MEF was "quite aware that [the budget allotment of US$ 10 million]

[341] *See* Cls' Reply ¶ 47; Herrera ¶ 12.

[342] Troyano ¶¶ 131-33.

[343] Contract No. 093-12 dated 6 July 2012 (C-0042 resubmitted), at 11. Respondent's contractual obligation to pay formed within a certain stipulated timeline were part of all of the Contracts. The MINSA Capsi Contracts and the Mercado Publico de Colon Contract also established a payment deadline of thirty days. *See* Contract No. 077 (2011) dated 22 Sept. 2011 (C-0028 resubmitted), at 33-34; Contract No. 083 (2011) dated 22 Sept. 2011 (C-0030 resubmitted), at 33-34; Contract No. 085 (2011) dated 22 Sept. 2011 (C-0031 resubmitted), at 33-34; Contract No. 043 (2012) dated 17 Aug. 2012 (C-0034 resubmitted), at 15. In the remaining Contracts—*i.e.*, the La Chorrera, the Municipality of Colon, and the Municipality of Panama Contracts—the deadline was ninety calendar days. *See* 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 Sept. 2013 (C-0056 resubmitted), at 2. By December 2014, Respondent was breaching almost all of the Contracts as it generally owed Claimants for work completed and billed in the previous six months. *See* McKinnon 1, Annex 1, at 4, 8, 12, 16, 19, 22, 24, Tables 3, 5, 7, 9, 11, 13, 15.

[344] Resp.'s Counter-Mem. ¶¶ 103, 105, 116.

[345] The last payment the Omega Consortium received was for CPP No. 12 covering the month of April 2014 and delivered to the Omega Consortium in June of 2014. McKinnon Report 1, Annex 1, at 16. *Cf.* Herrera ¶¶ 11-12.

was not enough to pay [even] the [outstanding and endorsed] CPPs."[346] Ms. Buendia admits that by not approving and paying these CPPs, Respondent was not in compliance with the CDLA Contract.[347]

117. *Fourth*, Respondent argues that the advance payments should have artificially buoyed the Omega Consortium's cash flow, such that Respondent's subsequent breaches would not have affected the liquidity and progress of the Projects.[348] This argument ignores the record, and commercial reality. Sosa's contemporaneous warning to the Government was that the lack of payment was negatively affecting the Omega Consortium's liquidity,[349] and it certainly was.[350] The problem was acute because Respondent was unlawfully withholding payments not on one or two separate projects, but on *virtually all of them at the same time*.[351] As Mr. Lopez explained, the Omega Consortium would have been able to absorb a temporary cash flow interruption on one, possibly two, of the Omega Consortium's Projects, but was unable to survive complete cessation of cash flow on *all of the projects simultaneously* and for a significant period of time.[352] Respondent concedes that, even taking into account the advance payments, it owes millions of dollars to Claimants for completed work.[353] This alone demonstrates that the advance payments

[346] Tr. 6/1216:22-1217:2, 6/1266:15-20 ("I would say barely half, but, yes, we did not have enough money on the budget to cover the CPPs" that had already "been endorsed and become irrevocably owing").

[347] Tr. 4/803:2-22; Letter No. SA-CDA-128-14 from Sosa to INAC dated 5 Dec. 2014 (C-0715). Respondent's obligation to pay arises not only from the Contract, but also from Panama's public contracting law. Justice Troyano explained that 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." Troyano ¶ 133.

[348] Buendia ¶ 20; Resp.'s Rej. ¶ 329.

[349] Monthly report from Sosa to INAC dated Oct. 2014 (C-0524), at 3, #4.

[350] Lopez 1 ¶¶ 104, 130; Lopez 2 ¶¶ 37, 51.

[351] *Id*.

[352] Lopez 1 ¶ 130; Lopez 2 ¶¶ 37, 51.

[353] Resp.'s Counter-Mem. ¶ 338; Second Expert Report of Pablo Lopez Zadicoff and Sebastian Zuccon, Compass Lexecon dated 27 May 2019 ("**Damages Expert Report 2**"), ¶¶ 3, 10; Second Expert Report of Greg A.

could not have covered the work that Claimants completed on the Projects, much less any continued work and additional costs incurred as a result of Respondent's arbitrary delays.

118. An analysis of the CDLA payments, including the advance payment, shows that Respondent's assertion that the Omega Consortium was "overfunded" in the CDLA Project because of the advance payment is baseless and contradicted by the record. The evidence shows that the Omega Consortium's expenses on the Project were significantly *greater* than the CPPs that Respondent endorsed. By December 2014, Claimants had already spent more than US$ 19.8 million to compensate certain front-end subcontractors, to pay Panamanian tax authorities, to cover other pre-construction expenses, and to cover financing costs and fees related to the CDLA Project,[354] while their total estimated cash inflow for the same period was under US$ [redacted].[355] The result is a [redacted] number of over US$ [redacted]. *And this was only one Contract*. When the totality of the Omega Consortium's Contracts are considered, its cash-flow situation caused by Respondent's decisions to withhold payments and change-order approvals is even more dire.[356] The Omega Consortium was forced to cease physical work on the Projects in late 2014, even though it remained in Panama trying to resolve the issues with the different government ministries and agencies well into 2015.[357]

McKinnon, Hemming Morse dated 27 May 2019 ("**McKinnon Report 2**"), ¶ 5 ("Dr. Flores largely appears to agree with my analysis on which Compass Lexecon bases its calculation of damages on Existing Contracts.").

[354] By 31 December 2014, the cost of the completed work was US$ [redacted] McKinnon 1, Annex 2, at 2. In addition, the project had incurred a US$ [redacted] advance payment to its sub-contractor ARCO, *see* Documents Related to Account No. 01820010822682001 for Omega Engineering (C-0909), at 359, 443, and general and administrative expenses ("**G&A Expenses**") on the CDLA Project of US$ [redacted], leading to a total estimated cash outflow of US$ [redacted]. The G&A Expenses calculation is based on the average G&A Expenses of Omega from 2013 and 2014, as calculated in McKinnon 1 ¶ 101(c), multiplied by the duration of 27 months and reduced by the percentage of the CDLA Contract with respect to the entire portfolio of Contracts. *See also* Lopez 2 ¶ 37.

[355] This figure is calculated as the sum of the advance payment of US$ [redacted] plus the US$ [redacted] in CPPs that had been approved and endorsed, totaling US$ [redacted]. McKinnon 1, Annex 1, Table 9.

[356] McKinnon 1, Annex 1. *See also* Lopez 1 ¶¶ 104, 130; Lopez 2 ¶¶ 37, 51.

[357] Rivera 1 ¶ 129.

B. THE OMEGA CONSORTIUM WAS BARRED FROM SEEKING NEW PUBLIC WORKS CONTRACTS IN PANAMA

119. The harm was not only retrospective; it was prospective in 2014 as well. The unlawful administrative terminations destroyed the future viability of Claimants' investment by cutting off its ability to obtain future work (*see infra* § IV.B.1). The criminal process concomitantly exacerbated that harm by destroying the Omega brand and reputation (*see infra* § IV.B.2).

1. *Panama's Administrative Terminations Stripped The Omega Consortium—And Thus Claimants' Panamanian Investment—Of All Cash Flow And Potential*

120. As explained above, the administrative terminations against Claimants in the CDLA and the Municipality of Panama Projects were distinctly sovereign acts with drastic consequences for Claimants—the terminations banned Claimants from bidding on any future public works projects in Panama.[358] Without the ability to bid, the Omega Consortium was unable to obtain future work, thereby stripping Claimants' investment of its value.

121. Respondent has argued that these administrative terminations were a non-sovereign, commercial act,[359] but by its very nature an Administrative Resolution is a mechanism that only a government can employ.[360] Even assuming that an Administrative Resolution is a purely commercial mechanism of a contracting sovereign, under Panamanian law an

[358] *See, e.g.*, Cls' Mem. ¶ 82; Cls' Reply ¶¶ 4, 175, 431; Cls' Rej. ¶¶ 216, 235- 236; Tr. 1/28:6-11, 1/37:21-38:3, 1/60:7-13, 1/68:5-22.

[359] *See* Tr. 1/110:7-14 (stating that, "[a]s a Government entity, . . . that's the way [INAC] terminates a contract: Through resolution").

[360] Respondent's own law provides that a "Resolution" is an "administrative Act," which is defined as a "[d]eclaration issued or an agreement entered into, in compliance with the law, by an authority or public body in the exercise of an administrative function of the State, to create, modify, transmit or terminate a legal relationship that in some aspect is governed by Administrative Law." Law 36 of 31 July 2000 (R-0053 resubmitted), art. 201(1) [translation by counsel]. *See also id.*, art. 201(90) (defining a "Resolution" as an "Administrative Act").

Administrative Resolution does not automatically result in barring the contractor from bidding on future public works contracts. Under Law 22, that power is reserved to the discretion of the Government entity's representative (or another government official to whom that competence is delegated).[361] *This is a purely sovereign power*, which Respondent exercised when it imposed bans on both Omega Panama and Omega U.S. that precluded them from bidding for over 5 years.[362] These acts are shown and cited on Slide 18 of Claimants' Opening Presentation.

2. *Panama's Unlawful Criminal Measures Against Mr. Rivera and Omega Panama Destroyed Claimants' Reputation And Prevented The Omega Consortium From Developing New Business*

123. The administrative contracting bans were imposed alongside unlawful and baseless criminal persecutions.[363] All of this was done in public, which exacerbated the harm. As Mr. Rivera explained during his cross-examination, Respondent's prosecutors leaked information about their investigation of Moncada Luna to the media, which included Mr. Rivera's alleged (and now dismissed) ties to criminality.[364] This was in direct violation of Panamanian laws.[365] These actions prompted the forced closure of Claimants' bank accounts worldwide,[366] reviews by Claimants' clients in the United States,[367] and ultimately the destruction of Claimants and their

[361] Law No. 22 dated 27 June 2006 (C-0280 resubmitted 2), art. 117 ("The competence to bar contractors based on contract defaulting or noncompliance with purchase orders falls on the Agency's representative or on the public servant to whom this competence is delegated.") [translation by counsel].

[362] *See supra* n.361.

[363] *See, e.g.*, Cls' RfA ¶¶ 2-5, 50, 71; Cls' Mem. ¶¶ 3-6, 102, 172, 208-10; Cls' Reply ¶¶ 69, 264-67, 272, 456-57; Cls' Rej. ¶ 264.

[364] Tr. 2/479:17-20 (emphasis added); *Prosecutor seizes accounts linked to Alejandro Moncada Luna*, LA PRENSA dated 30 Jan. 2015 (C-0194).

[365] Criminal Procedure Code of the Republic of Panama (C-0088 resubmitted 3), art. 8. Respondent's destruction of Claimants' reputation was also devastating for Claimants' employees, as recounted by Mr. Lopez, who was left without a job and had to "start from scratch" in the wake of Respondent's unlawful acts. *See* Tr. 1/146:12-147:3.

[366] *See, e.g.*, Cls' Mem. ¶ 114.

[367] *Id.*

investment.[368] Respondent's bogus detention order and Interpol Red Notice caused Claimants' surety companies to drop their bonds, and prevented Mr. Rivera from engaging in meaningful work for years.[369]

124. Respondent's only counter-argument suffers from internal contradiction. Respondent claims that Tony Burke's witness statement in this arbitration proves that Claimants could not have suffered any reputational harm. (Tr 1/136:13-137:16). But at the same time Respondent asserts that Omega-U.S. was a failing company with a poor reputation even before Panama's breaches. (Tr 1/135:20-136:12). Both points are wrong.

125. On the former point, Mr. Burke's witness statement is completely consistent with Claimants' case. At no point does Mr. Burke indicate that Claimants' reputation did not suffer any harm. His statement only attests to Mr. Rivera's deep knowledge, experience, and capabilities in the construction industry. Respondent thus confuses Mr. Rivera's *capabilities* with his *reputation* in the industry. In fact, Mr. Burke effectively refutes Respondent's argument, testifying that it was "*obvious that* ***this struggle had consumed*** *[Mr. Rivera]* and [Mr. Rivera] was searching for a good firm to lend his talent and *attempting to* ***rebuild*** *his life*."[370] Moreover, finding work *with* a construction company is vastly different from running your *own* construction company. Mr. Rivera had the best and most productive years of his professional life stolen from him.

126. On the latter point—that Omega was a failing company before Respondent's misconduct—the allegation is belied by the record and was debunked at the hearing.[371] During the first week, Mr. Lopez refuted Respondent's allegations in his cross-examination, noting that

[368] *See* Tr. 1/39:2-40:7. *See also* Cls' Mem. ¶¶ 5, 36, 155, 210; Cls' Reply ¶¶ 98, 270; Cls' Rej. ¶¶ 91, 185.

[369] Tr. 1/78:11-79:21. *See also* Cls' Mem. ¶¶ 102-03, Cls' Reply ¶¶ 456-57; Email from Travelers Casualty & Surety Company to Omega-U.S. dated 9 Feb. 2015 (C-0098).

[370] Witness Statement of Mr. Tony Burke dated 16 May 2019, ¶ 6 (emphasis added).

[371] *See infra* ¶ 143.

Omega U.S.'s construction business was profitable, and that any losses reported by Omega-U.S. were due to non-construction related investments. (Tr 1/212:7-22).

127. The cross-examinations of Mr. Rivera and Respondent's quantum expert, Dr. Flores, were especially trained on these points. Contrary to Respondent and Dr. Flores' narrative, Omega U.S. did not have an unusual number of lawsuits for a construction company of its size.[372] In fact, Counsel for Respondent acknowledged that "many" of the lawsuits against Omega U.S. were "customary" in the construction industry. (Tr 2/403:6-10). As Mr. Rivera explained, any lawsuits between project owners and Omega U.S. were due to a requirement in Puerto Rican law that subcontractors who have a dispute with the general contractor must sue the project owner first. (Tr 2/402:16-405:8). Omega U.S. successfully settled every one of these disputes. (Tr 2/402:16-405:8). Dr. Flores admitted that he did not analyze or determine on average how frequently a construction company like Omega U.S. gets sued, or whether the number of lawsuits faced by Omega U.S. is high (Tr 5/1103:15-1104:19), nor did he mention that *most of the lawsuits against Omega U.S. were either withdrawn, dismissed, desisted, or revoked*. (Tr 5/1119:12-19).

128. Also debunked was Respondent's assertion that Omega U.S. was "guilty of shoddy work" (Tr 1/83:10) or underperforming on its Coliseum project in Puerto Rico. Most of this smear is based on a single press report that *does not even mention* Omega U.S. (Tr 2/397:19-399:4), and Dr. Flores did not check whether that press report related to activities that fell within Omega U.S.'s scope of work. (Tr 5/1063:19-1064:12). In contrast, Mr. Rivera testified that after the Coliseum project had already been completed, the owner of that project, the Puerto Rican Authority for Infrastructure Finance ("**AFI**"), wrote favorably about Omega-U.S.'s performance. Though one

[372] Expert Report of Dr. Daniel Flores and Ryan McCann dated 15 Nov. 2019 ("**Flores 2**"), ¶ 79.

such letter is in the record (and indicates that the AFI's "opinion of Omega-U.S." is "excellent"), Respondent *never reviewed it*,[373] and Dr. Flores admitted that he did not even know it existed. (Tr 5/1072:6-9). Regarding his citation to a legal dispute between the company and Oriental Bank,[374] Dr. Flores admitted that he did not research the background, or even the outcome of that dispute. (Tr 5/1072:16-1073:4). Dr. Flores also cited to a press report regarding Omega U.S.' financial capacity in the Paseo Puerta de Tierra project,[375] but in his cross-examination he admitted that any reported concerns that the contracting authority had were insignificant because the authority awarded Omega U.S. the contract nevertheless. (Tr 5/1091:1-5).

129. Dr. Flores also had to admit that, despite the lawsuits faced by Omega U.S., the company still went on to win contracts in Puerto Rico and Panama. (Tr 5/1107:2-21). The contracts that Omega U.S. participated in and won from 2010 through 2014 include the Paseo Puerta de Tierra project, the eight Contracts that are part of this arbitration and the contract that the Omega Consortium won for the Expansion of the North Terminal of the Tocumen Airport.[376] Claimants' work both in Puerto Rico and Panama is evidence of a successful, geographically expanding company,[377] not a company fleeing from anything as Respondent falsely asserts. Respondent's desperate attempts to smear the track-record of Omega U.S. were debunked one by one at the hearings.

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[373] Omega's proposal for Bid No. 2010-0-12-0-99-AV-003042 dated 12 Jan. 2011 (C-0348), at 229; Tr. 2/397:19-399:6.

[374] Flores 2 ¶ 76.

[375] *Id.* ¶¶ 77-78.

[376] Omega-U.S. won bids in Panama as early as September 2011, starting with the MINSA Projects. *See, e.g.*, Contract No. 077 (2011) (C-0028 resubmitted). The Omega Consortium signed the contract for Tocumen airport expansion project in 28 Feb. 2012. *See* Contract No. 035/11 dated 28 Feb. 2012 (C-0006 resubmitted).

[377] Rivera 1 ¶ 15; Lopez 1 ¶¶ 17-18.

V. CLAIMANTS MUST BE FULLY COMPENSATED FOR THEIR LOSSES IN THE AMOUNT OF US$ 81.22 MILLION, PLUS INTEREST

130. Having breached its obligations under the BIT and the TPA, Respondent must make Claimants whole for the losses caused by its breaches.[378] What has to be valued—and made whole—is the Omega Consortium (*see infra* § V.A). The value of its existing Contracts tops US$ 8 million (*see infra* § V.B), and the value of its future contracts is conservatively estimated at over US$ 42 million (*see infra* § V.C). Interest and moral damages must be included in any award, as well (*see infra* §§ V.D & E, respectively). The total amount of damages needed to fully compensate Claimants for their losses is US$ 81.22 million, plus pre- and post-award interest and net of Panamanian taxes.[379]

A. WHAT MUST BE VALUED IS THE OMEGA CONSORTIUM

131. As previously discussed, and in response to the **Tribunal's Question No. 6**, Claimants have consistently asserted that the intangible assets of Omega U.S., including its know-how, goodwill, experience, reputation, and financial and bonding capacity were brought to bear in Panama through a consortium consisting of Omega Panama and Omega U.S. (*i.e.*, the Omega Consortium) that was used to bid on public projects in Panama.[380] The investment of Omega U.S.'s assets was critical to the success of the Omega Consortium because they allowed the Omega

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[378] *See, e.g.*, *Case Concerning the Factory at Chorzów (Germany v. Poland) Claim for Indemnity (Merits)*, 13 Sept. 1928, 17 PCIJ SERIES A 4 (1928) ("***Chorzów Factory***") (CL-0082), at 47; Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001) ("**Draft ILC Articles**") (CL-0092), art. 31.

[379] The calculation of losses, as computed by Compass Lexecon, already "deduct[s] the income tax that Omega Panama would have had to pay," and therefore "assumes that the damages award will not be taxable in Panama." Damages Expert Reports 1 n.7. Compass Lexecon explains that "[s]hould the damages award be taxable in Panama, a grossing-up for the income tax should be added to the amount of damages to avoid double-counting." *Id.* Claimants submit that damages awarded to Claimants must be net of any taxes, as other Tribunals have done so in similar circumstances. *See, e.g.*, *Siemens* (CL-0008), ¶ 403 (11) ("[A]ny funds to be paid pursuant to this decision shall be paid in dollars and into an account outside Argentina indicated by the Claimant and net of any taxes and costs.").

[380] *See, e.g.*, Cls' Mem. ¶¶ 32-34; Tr. 1/23:4-26:22, 1/70:2-71:19. *See also supra* ¶¶ 6, 8-9.

Consortium to bid for (and win) larger Panamanian projects.[381] Respondent does not dispute this fact.[382] Claimants have always contended that those Omega U.S. assets are part of Claimants' investment in Panama which was destroyed by Respondent's actions.[383] For that reason, Claimant's expert, Mr. Lopez Zadicoff from Compass Lexecon, explained that "[w]hat [Compass Lexecon] always valued since the beginning is the totality of Omega Consortium." (Tr 5/833:20-835:2).

132. Claimants and their quantum experts have consistently calculated Claimants' losses to include both the existing Contracts obtained by the Omega Consortium, and the future contracts in Panama that the Omega Consortium could have secured absent Respondent's breaches—*i.e.*, contracts that would have been secured using Omega U.S.'s invested reputation, goodwill, bonding and financial capacities, track record and project portfolio, just as the existing Contracts had been.[384] As Compass Lexecon explained, given the Omega Consortium's proven track-record at the time of the Government measures,[385] "it is reasonable to assume that absent the Measures the Omega Consortium would have, at a minimum, maintained its success rate of winning future bids in which it would have participated."[386]

133. Given that consistent theory of loss, Claimants have not submitted evidence of the value of Omega Panama alone, as a standalone entity. In response to questions from the Tribunal, at the hearing Mr. Lopez Zadicoff explained that, without considering the contributions of Omega U.S. such as experience, reputation and goodwill, Omega Panama itself would have some value

[381] *Id*. *See also supra* ¶¶ 3-4.

[382] *See, e.g.*, Tr. 2/361:21-362:6; Resp.'s Rej. ¶¶ 158-59 (quoting Cls' Mem. ¶¶ 32-34, 172, 494).

[383] Cls' Mem. ¶ 154. *See also id*. ¶ 152; Damages Expert Report 1 ¶ 59; *supra* ¶¶ 5-6.

[384] *See, e.g.*, Damages Expert Report 1 ¶¶ 6, 12, 54; Cls' Mem. ¶ 216.

[385] *See* Damages Expert Report 1 ¶ 64.

[386] *Id. See also id*. ¶¶ 84, 86, 88.

but he could not say what that value would be because "[they] haven't done the analysis." (Tr 5/938-939). Therefore, if the Tribunal were to decide to award damages on the basis of the loss of Omega Panama as a standalone entity, Claimants would require an opportunity to submit supplemental evidence, including expert analysis, to establish the value of that entity.

134. Respondent and its expert, however, contend that Claimants had never sought compensation for anything except the loss of Omega Panama as a stand-alone entity, only adding in the value of Omega U.S.'s contributions to their damages claim at the hearing. (Tr 1/124:22-126:15; 5/1018:18-1019:4). This is demonstrably untrue. While Mr. Lopez Zadicoff acknowledged that Compass Lexecon had at times inadvertently referred to Omega Panama where it should have referred to the Omega Consortium, the *methodology* had been consistent across their reports. (Tr 5/834:9-835:2; 5/866:2-13).

135. Respondent and its expert understood that what Claimants and Compass Lexecon were valuing was the Omega Consortium. Respondent's opening argument presented four slides with the subheading "Compass Lexecon Does Not Value Omega Panama," in which they emphasized Omega U.S.'s role in the Omega Consortium.[387] Mr. Flores argued that by considering the assets contributed by Omega U.S. "Compass Lexecon is conflating Omega Panama with [the] Omega Consortium,"[388] showing that he understood that Compass Lexecon included the Omega U.S. assets invested in the Omega Consortium as part of the value of Claimants' investment. And Mr. Flores even dedicated a section in his second report to contending that Omega U.S.'s reputation, experience, goodwill, etc. had no value.[389]

136. Respondent's attempts to recast Claimants' case to eliminate much of the value of

[387] Resp.'s Opening Presentation at 26-29.

[388] Flores 2 ¶ 57.

[389] *Id.* § III.B.2.d.

Claimants' losses is disingenuous. Claimants invested their experience, reputation, financial and bonding capacity, goodwill and personal guarantees into Panama, only to have that investment destroyed by Respondent's breaches. They must be compensated for the totality of that loss.[390]

B. THE OMEGA CONSORTIUM'S EXISTING CONTRACTS' VALUE IS US$ [redacted]

137. The first component of Claimants' damages are the losses sustained through Respondent's unlawful measures against the Omega Consortium's existing Contracts. On this head of damages, the Parties are substantially aligned as to the applicable methodology and factual underpinnings. Indeed, but for two factual issues introduced in Respondent's final written submission, the Parties were fairly aligned on the value of this head of damages, with their respective experts differing on the total by only about US$ [redacted]. (Tr 5/1001:8-15; 5/1008:2-1009:6).

138. Both experts take as their starting point the unrebutted reports of Claimants' accounting expert, Greg McKinnon. (Tr 5/849:13-16). Based on his reports, Compass Lexecon calculates Claimants' losses on existing Contracts to be US$ [redacted]. (Tr 5/993:17-997:13). Dr. Flores critiques Compass Lexecon's economic analyses, offering certain alternative assumptions to calculate the total losses in his first report at around US$ [redacted].[391] None of those adjustments have merit.

139. *First*, and related to the **Tribunal's Question No. 6(a)**, Dr. Flores contends that Compass Lexecon erred by applying a discount factor to the advance payments that the Omega Consortium received under its Contracts to account for the risk of future income. (Tr 5/997:14-

[390] *See Chorzów Factory* (CL-0082), at 47.

[391] First Expert Report of Dr. Daniel Flores dated 7 Jan. 2019 ("**Flores 1**"), ¶ 99. Note that Quadrant Economics offers a range for its revised total of approximately US$ [redacted] to US$ [redacted], as it offers a range for the downward revision resulting from its adjustments to the discount rate applied to future revenues. *See, e.g.*, Tr. 5/999:19-1000:12.

998:6). According to Dr. Flores, the advance payments should not have been discounted because the Omega Consortium had already received those sums and, thus, there was no risk to warrant a discount. (Tr 5/970:5-13). That position is untenable. The Omega Consortium was required to credit those advance payments against future work when it was performed (Tr 5/852:4-853:5), which created risk. If the Omega Consortium failed to perform the future work, it would have to return those amounts.[392] Further, failing to apply a discount factor to those advance payments, while at the same time applying a discount factor to the portion of those advance payments withheld by Respondent as retainage amounts, results in an internally inconsistent, self-serving treatment. (Tr 5/851:15-853:9).

140. *Second*, Dr. Flores disagrees with the 11.65% cost of equity ("**CoE**") Compass Lexecon used as a discount rate, arguing that a much higher rate must be applied to both (1) the amounts owed by Respondent at the time of the measures under outstanding, billed progress payments for work performed,[393] and (2) expected future cash flows from remaining work to be performed under the existing Contracts.[394] This is the same criticism Dr. Flores levies with respect to Compass Lexecon's discounted cash flow analysis of potential future contracts. But as explained *infra* in § V.C., Dr. Flores' discount rate uses an inflated country risk premium, which he further inflates through the use of a redundant "size premium."[395] That inflated discount rate inappropriately reduces the amount of outstanding payments and future earnings under the existing Contracts, thereby understating Claimants' damages.

[392] Put another way, until the work towards which the advance payments would be completed, as Mr. Lopez-Zadicoff explained "it's money that is owed by the Omega Consortium." Tr. 5/852:9-10.

[393] *See, e.g.*, Tr. 5/998:12-999:2.

[394] *See, e.g.*, Tr. 5/998:7-11; Flores 1 ¶ 100.

[395] *See, e.g.*, Tr. 5/846:12-849:13 (explaining the inflation and redundancies).

141. Notwithstanding those technical disagreements, both experts' assessments of Claimants' losses on the existing Contracts initially only differed by approximately US$ 1.5 million. However, in Dr. Flores' second report, and related to the **Tribunal's Question No. 6(b)**, Respondent introduced for the first time two factual assertions that it contends must be taken into account to drastically reduce the amount of Claimants' losses with respect to the existing Contracts.[396] Neither has merit.

142. *First*, Respondent *instructed* Quadrant Economics to exclude any income arising from change orders that, while executed by both the Omega Consortium and MINSA, had not been endorsed by the Comptroller General and were thus allegedly "not valid."[397] But Mr. McKinnon had explained, unchallenged, that the lack of endorsement does not affect his calculations, since the change order documents "*provide strong accounting evidence of reasonably certain future cash flows.*"[398]

143. Moreover, Mr. Lopez testified that most of those change orders had not been endorsed because the Comptroller General had requested information that was MINSA's obligation to provide, *not the Omega Consortium's*. (Tr 1/254:6-255:15). As to the other unendorsed change orders, the Comptroller General was purportedly awaiting information that the Omega Consortium *had already submitted*. (Tr 1/260:13-262:11). As discussed, after mid-2014 the Comptroller General wrongfully refused to endorse virtually all the Omega Consortium's change orders and payment applications on mere pretext.[399] In other words, the failure to endorse

[396] *See, e.g.*, Flores 2 ¶¶ 164-72; Tr. 5/1002:21-1007:14.

[397] *See, e.g.*, Tr. 5/1003:13-22; Flores 2 ¶¶ 164-68.

[398] McKinnon Report 2 ¶ 37.

[399] *See, e.g.*, *supra* § III.A.1. *Contra* Tr. 1/229:6-230:21 (explaining that before President Varela was elected, Respondent often paid for completed work even though change orders had not been endorsed).

the change orders was part and parcel of Respondent's Treaty breaches, from which it cannot now be allowed to profit.[400]

144. Finally, Dr. Flores asserted that US$ [redacted] in income under the Kuna Yala Contract must be excluded because it pertained to construction of a power line that Respondent had not decided to award to the Omega Consortium.[401] But by Dr. Flores's admission,[402] his sole basis for that exclusion is his interpretation of a letter from MINSA in which the Ministry expressly states that the only other entity it had been considering for the power line work, ENSA, had stated that it was not interested.[403] Further, Change Order No. 3 to the Kuna Yala Contract—approved and signed by MINSA—includes the additional costs related to this power line.[404] Like the others, this Change Order also sat indefinitely at the Comptroller General's Office awaiting endorsement. Again, Respondent cannot rely on its own unlawful conduct to evade compensating Claimants.

145. The value of Claimants' existing Contracts damages is thus US$ [redacted].

C. THE OMEGA CONSORTIUM'S FUTURE CONTRACTS' VALUE IS US$ [redacted]

146. The second component of Claimants' damages is the permanent loss of its investment and operations in Panama, from which it would have continued realizing income into the future but for Respondent's actions. On this, the Parties' cases diverge dramatically. While Claimants calculate that the value of the investment that Respondent destroyed is approximately

[400] *See* KOTUBY & SOBOTA (CL-0081 resubmitted), at 130.

[401] Flores 2 ¶¶ 169-72; Tr. 5/1004:12-1007:14.

[402] *Id*.

[403] Communication "560-DI-D15-2014" of MINSA dated 29 Dec. 2014 (QE-0106) ("In response to meetings held with . . . ENSA where they have told us of their lack of interest in the execution of this project, we submit for your consideration the budget and the plans offered by OMEGA ENGINEERING INC. for the referenced work.").

[404] Addendum No. 3 to Contract No. 083 (2011) dated 26 Dec. 2014 (C-0107 resubmitted), at 2.

US$ [redacted],[405] Respondent contends it is [redacted].[406] To start, Respondent does not dispute that the Omega Consortium won 10 bids for public works projects in its first four years bidding.[407] And Respondent agrees that the value of those Contracts exceeded US$ 140 million.[408] Dr. Flores also concedes that by "2012 and 2013 Omega Panama was already profitable."[409] Despite those undisputed facts Respondent says that Claimants lost ***nothing*** when Panama destroyed their investment beyond the amounts lost from the existing Contracts. That facially untenable contention rests on a fundamentally flawed view of the fair market value ("**FMV**") standard, and other contrived assumptions.

1. *Respondent Fails To Properly Apply The Fair Market Value Standard*

147. The Parties and their experts agree that the proper way to value Claimants' lost business is through the use of the FMV standard, understood to be "[t]he price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm[']s length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts."[410] And as Respondent's counsel underscored, that hypothetical, by its nature must consider "***any***" hypothetical willing buyer and seller, a principle intended to "strip away" any external variables or constraints that would influence the resulting value. (Tr 5/882:5-17). But Dr. Flores does the ***opposite***: he limits his consideration of willing

[405] Tr. 5/847:21-22; Compass Lexecon Presentation at 20.

[406] *See* Tr. 5/955:7-9; Flores 1 ¶ 8(i); Flores 2 ¶ 8.

[407] Flores 2 ¶ 47.

[408] *Id.* ¶ 47 n.57.

[409] *Id.* ¶ 47. *See also id.* ¶ 135 (arguing that "10.7% is the most appropriate estimate").

[410] Compass Lexecon Presentation at 5. *See* Flores Presentation at 4; Tr. 5/946:17-947:1.

buyers to a specific, limited class of persons—*i.e.*, hypothetical buyers that would already have their own experience, reputation, financial and bonding capacity, etc.—who, by definition would not be interested in purchasing any such assets invested by Claimants in Panama.[411]

148. At the hearing, Dr. Flores doubled-down on that same misapplication of the FMV standard explaining that, in his analysis, all he "need[ed was] any company that can provide a balance sheet that is not in default for, like, two or three years, whatever the bidding parameters require, plus then you need the bonding capacity." (Tr 5/959:21-960:2). Mr. Flores emphasized his point that "any Willing Buyer would have bonding capacity or would be able to acquire bonding capacity without having to go and rely on Mr. Rivera's bonding capacity in Puerto Rico." (Tr 5/960:3-960:6). And when challenged with a hypothetical that perhaps the willing buyer was a venture capital company with no prior construction experience, unable to supply its own bonding capacity, experience, etc., Dr. Flores narrowed the universe of hypothetical buyers *even further*, underscoring his bias. (Tr 5/1038:9-1041:19).

149. Dr. Flores's hypothetical thus considers *only* buyers who *already have* much of the assets to be valued, ensuring those hypothetical buyers would have no need of those assets and place no value on them. By doing so, Dr. Flores discards the hypothetical Willing Buyer and Seller concept required by an FMV analysis, in favor of a narrowly-defined specific buyer necessarily uninterested in critical parts of the assets to be valued. Under such a skewed model it is obvious that "you will not be able to achieve full compensation in your valuation assessment." (Tr 5/835:12-21).

150. Moreover, Dr. Flores considers only a Willing Buyer's incentive to pay as little as possible for an asset, ignoring that the Willing Seller would only sell a profitable asset for more

[411] Flores 2 ¶ 30.

than it could collect by holding the asset. (Tr 5/835:12-836:9). Without considering the "Willing Seller, it's impossible to have a hypothetical transaction," and the FMV exercise is doomed from the start. (Tr 5/835:12-836:9).

151. From the outset, therefore, Dr. Flores' analysis rests on a flawed foundation that renders its (contrived) conclusions meritless.

152. During the hearing, the Tribunal inquired what would be sold in the hypothetical transaction in question—*i.e.*, what is the FMV standard being applied to—given that the losses include, for example, the goodwill, reputation, experience, and financial and bonding capacity that Omega U.S. invested in Panama. (Tr 5/932:15-933:4). As Mr. Lopez Zadicoff explained, the proper approach is to consider the transaction to be for the sale of Omega Panama *along with a binding commitment from Omega U.S.* that it will continue to bring those assets to Panama in support of Omega Panama and the Omega Consortium. (Tr 5/883:19-885:8). As he further described, what is being valued "is the support provided by Omega U.S. that would continue being provided to Omega Panamá . . . . [I]t is like buying a company that is operating boots on the ground, running the Projects, plus an agreement that is an ironclad agreement that you will continue receiving the support of Omega U.S." (Tr 5/932:15-933:4, 5/883:19-885:10).

153. Once the impermissible constraints imposed by Respondent on the hypothetical Willing Buyer are lifted, and the hypothetical transaction is understood to encompass the totality of the investment lost by Claimants—including Omega U.S.' know-how, goodwill, and other intangible assets—determining the FMV of Claimants' losses becomes straightforward.

2. *Compass Lexecon's Discounted Cash Flow Analysis Is Reasonable*

154. The valuation of "Claimants' business through potential new public works contracts" is accomplished through the "use [of] the Discounted Cash Flow ("**DCF**") method" to

estimate the value of future income the Omega Consortium would receive on future contracts while accounting for future risks.[412]

155. As Mr. Lopez Zadicoff has explained, in undertaking the DCF analysis the valuation must consider the money Claimants would have made in the future through continued exploitation of their investment in Panama, as a hypothetical Willing Seller would not sell an asset for a value that is less than it could reasonably achieve by holding on to that asset.[413] But Dr. Flores artificially truncates his consideration of future cash flows to exclude any cash flows beyond 2019.[414] For Dr. Flores a hypothetical buyer would be able to replicate the Omega Consortium's success within that period, and so all a hypothetical buyer would be willing to pay for is the cash flows from that initial ramp-up period. But his analysis rests on his *same flawed assumption* that the hypothetical buyer would necessarily be someone that would already have all of the financial and bonding capacity, experience and other assets contributed by Omega U.S. (Tr 5/959:14-960:19).

156. As discussed above, injecting such a constraint is at odds with the nature and purpose of an FMV analysis. Dr. Flores' analysis fails for that reason alone. But as Mr. Lopez Zadicoff has explained, it also suffers from additional flaws: (1) it is completely arbitrary, based on no data regarding success rates for start-up companies, and therefore baseless; (2) it ignores the risk of failure inherent in all start-ups; and (3) it ignores the perspective of the hypothetical Willing Seller, as no seller would accept a price so low that it could realize more gain simply by continuing to operate the assets beyond 2019. (Tr 5/838:2-839:20). By prematurely cutting-off the future cash flows under consideration Dr. Flores thus artificially reduces the value of Claimants' losses.

[412] Damages Expert Report 1 ¶¶ 64-70.

[413] *Id*. ¶ 89.

[414] *See, e.g.*, Flores Presentation at 9; Tr. 5/838:2-7.

157. Equally as flawed are Dr. Flores' criticisms of Compass Lexecon's assumed pool of future contracts. This element of the DCF analysis determines the likely nominal value of the contracts the Omega Consortium would have secured in the future by looking (1) at the historic amount of public contracts offered in Panama that meet the characteristics for which the Omega Consortium bid (*i.e.*, the target market), and (2) the Omega Consortium's success rate in obtaining such contracts. (Tr 5/842:3-8). As to the target market, Compass Lexecon used the average historic value of contracts within the Omega Consortium's bidding parameters as a percentage of Panama's GDP (5%) and conservatively assumed that percentage would remain consistent. (Tr 5/840:22-841:12). Dr. Flores disagrees, asserting that this is based on an unusually high period of spending that would not continue into the future. (Tr 5/962:16-964:4). But, the percentage of GDP represented by public spending on contracts meeting the Omega Consortium's bidding parameters did not decrease, as Dr. Flores projected, but it actually *increased*.[415] Compass Lexecon's assumptions are thus reasonable.

158. As to the Omega Consortium's success rate in obtaining new contracts, Compass Lexecon uses the Consortium's *actual* historic success rate to project future success. Quite simply, the "Omega Consortium participated in 42 public tender bids. It won 10. That is a straight success rate of 23.8 percent." Doing the same in terms of value "yields a success rate of 21.4 percent." (Tr 5/842:9-14). Dr. Flores does not dispute that historic bidding data; instead he arbitrarily discards the data for certain bidding years to artificially reduce the Omega Consortium's success rate.[416] That arbitrary discarding of data has no basis and fails to account for the realities of strategic bidding. (Tr 5/842:14-843:16).

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[415] Compass Lexecon Presentation at 10. *See also* Tr. 5/841:13-842:2.

[416] Flores 2 ¶ 126. But even after discarding those data points, Dr. Flores offered ***no*** proposed alternative rate, simply saying he could conclude nothing from 5 years of bidding data. Tr. 5/966:10-12 ("Our position is we

159. Having calculated the projected universe of future contracts the Omega Consortium reasonably could have expected to secure, Compass Lexecon applies the average profit margin per contract as calculated by Mr. McKinnon (whose calculations remain uncontested) with respect to the existing contracts of 13.2%. (Tr 5/844:14-845:3). Dr. Flores however argues that "the profit margin derived from Omega Panama's audited financial statements of [redacted] is the most appropriate estimate."[417] As Mr. Lopez Zadicoff has explained, reliance on those financial statements—which reflect *interim* data on projects *in progress*—is misplaced. (Tr 5/845:19-846:5). Moreover, Compass Lexecon's use of a [redacted] profit margin is conservative when compared with the average profit margins for international construction companies—which is in the range of 16-20% (Tr 5/845:4-8)—and the Omega Consortium's expected profits of [redacted].[418]

160. To conclude the DCF analysis one must apply a discount rate to account for the fact that the projected income, coming as it would in the future, is subject to volatility in the marketplace. (Tr 5/846:11-21). Both experts start from a common point of understanding in this respect, based on the CoE for a large U.S. construction company. (Tr 5/846:21-847:3). Then both experts add an additional risk component to reflect that the Omega Consortium is operating in Panama. Compass Lexecon adds a country risk factor of 1.89 which is based upon observed data regarding the economic risks in Panama. (Tr 5/847:14-19). Dr. Flores, in contrast, adopts an arbitrary and inappropriately high country risk factor of 4.52% that is inconsistent with market data regarding credit risk in Panama,[419] and further inflates its discount rate by applying an

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have no confidence whatsoever that we can give to you without pure speculation about what the future would look like.").

[417] Flores 2 ¶ 135. At the hearing, however, Dr. Flores offered ***no*** proposed alternative rate, simply saying he could conclude nothing from the Omega Consortium's existing data. Tr. 5/966:13-19.

[418] Damages Expert Report 2 ¶¶ 117-18.

[419] *Id.*, Figure II, at 14. At the hearing, Dr. Flores offered no explanation for his proposed discount rate,

additional 5.78% "size premium," ostensibly because the Omega Consortium is smaller than the large U.S. companies on which the starting point was based.[420] This is incorrect as it ignores the fact that application of the country risk premium already factors in a change in the size of the market and, hence the relative size of the Omega Consortium.[421] Quadrant Economics is thus double counting the effect of operating in Panama, thereby artificially inflating the discount rate to reduce Claimants' damages. That artifice must be rejected. Compass Lexecon's 11.65% rate is reasonable and consistent with market data.

161. In sum, each of Dr. Flores' criticisms fails as illogical, and inconsistent with the data. Compass Lexecon's DCF analysis is reasonable and Claimants' losses from future business are accurately assessed as US$ [redacted].

D. CLAIMANTS ARE ENTITLED TO PRE- AND POST-AWARD INTEREST AT A RATE OF 11.65%

162. Having established the quantum of their losses due to Respondent's measures, Claimants are entitled to pre- and post-award interest to compensate them for the years they have been unlawfully deprived of their assets. The appropriate interest rate is the 11.65% CoE which, as discussed above, is based on the applicable CoE of U.S. construction companies adjusted to account for the increased risks in the Panamanian market.[422] This "is the only rate that recognizes the economic harm to Claimants [because]. . . companies cannot finance their operations for free [and] . . . if they are missing cash flows—as Claimants have been doing since the date of Measures until today—they had to replace them, and that is the financing cost that needs to be

simply saying that "a hypothetical buyer would not even care whether the Discount Rate is 18 percent or 23 percent [because] the hypothetical buyer would never get there." Tr. 5/967:3-7.

[420] *See, e.g.*, Flores 1 ¶ 129.

[421] Tr. 5/849:7-13. *See also* Damages Expert Report 2 ¶¶ 142-43.

[422] *See supra* § V.B (explaining Compass Lexecon's derivation of the 11.65% rate).

compensated."[423] This rate therefore appropriately compensates Claimants for the impact of Respondent's destruction of their assets, as mandated by the *Chorzow Factory* standard.

163. In contrast, Respondent and its experts argue that the most Claimants are entitled to is interest at a *risk free rate* tied to either six-month or one-year U.S. Treasury bills.[424] This is unreasonable because "a short term risk free rate ***does not even compensate for the time value of money, because it's lower than inflation***," and thus is not "commercially reasonable."[425] Respondent's proposed interest rate therefore cannot properly compensate Claimants for the time that they have been unlawfully deprived of the value of their investment.

E. CLAIMANTS ARE ENTITLED TO MORAL DAMAGES OF AT LEAST US$ [redacted]

164. As Claimants have explained, this Tribunal is entitled to award moral damages.[426] Respondent, however, insists that Claimants did not properly plead moral damages because they *quantified* it for the first time in their Reply. (Tr 1/133:13-21). Such formalism is misplaced. Respondent had notice of Claimants' moral damages claim from the very start. Claimants indicated that Panama's breaches destroyed Claimants' reputations in their Notice of Intent to arbitrate,[427] and sought moral damages in their Request for Arbitration,[428] which was echoed in their

[423] Tr. 5/853:11-20. Panamanian law further supports the reasonableness of Compass Lexecon's proposed 11.65% interact rate. *See* Troyano ¶ 129; Art. 1072-A of the Tax Code of Panama, modified by Art. 40 of Law 6/2/2005 and Art. 10 Law 25 of 2014 respectively. Panamanian Fiscal Code (excerpts) (C-0770); Commercial Reference Rate – Superintendency of Banks, undated (C-0771).

[424] *See, e.g.*, Flores 2 ¶¶ 191-92; Tr. 5/973:18-20.

[425] Tr. 5/854:17-855:1 (emphasis added); *id.* at 5/854:21-855:1 ("[N]o company in the world, much less a company in Panamá, can finance its operations at a short term risk free rate.").

[426] *See, e.g.*, Cls' Mem. § X.A.1.b; Cls' Reply § IX.B.3.

[427] Notice of Intent to Submit Claims to Arbitration under the United States-Panama Trade Promotion Agreement dated 11 Mar. 2016 (C-0103), at 3.

[428] Cls' RfA ¶ 78.d.

Memorial.[429] Respondent fails to cite any support for the proposition that Claimants were required to *quantify* their moral damages claim at a specific procedural juncture. This is so because no such authority exists, and neither the Treaties nor the ICSID Rules impose such a requirement.[430]

165. Respondent also alleges that the Tribunal does not have jurisdiction to award moral damages because the Treaties only protect investments and not investors. This is incorrect.[431] The Tribunal's authority to award moral damages does not emanate from the Treaties—it stems from the principle of full reparation under international law, as expressed in *Chorzow Factory* and as reflected in Article 31 of the International Law Commission's Draft Articles on State Responsibility, which states that the "injury" for which the responsible state must "make full reparation . . . includes any damage, whether material or moral, caused by the internationally wrongful act of a State."[432] Where, as here, Claimants' intangible assets and their corporate and personal reputation constitute integral parts of the expropriated or otherwise harmed investment, that principle *requires* compensation for moral damages.[433] Indeed, *every* decision that has awarded moral damages under an investment protection treaty has done so even when the applicable treaty purportedly protected *only* investments and not investors.[434] Respondent has

[429] Cls' Mem. ¶¶ 207-10.

[430] Even if Claimants had only made their moral damages claim as an ancillary claim as late as the Reply (which Claimants did not) the ICSID Arbitration Rules permit Claimants to do so. Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules) (CL-0005 resubmitted), Rule 40.

[431] *See supra* § II.D.

[432] Draft ILC Articles (CL-0092), art. 31 (emphasis added).

[433] *See The May Case* (*Guatemala, USA*), Award, 16 Nov. 1900, 15 R.I.A.A. 47, 74 (CL-0106); *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012 ("***Swisslion***") (CL-0107), ¶ 350. *See also* Cls' Response to U.S. Submission ¶¶ 18-21.

[434] *See Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 Feb. 2008, (CL-0075), at 69, ¶ 191 (awarding moral damages where the applicable treaty provided protection only to "***investments*** of investors of the other Contracting Party"). *See also Von Pezold v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015 (CL-0258), ¶¶ 490, 757 (same).

failed to provide a *single decision* where a tribunal has declined to award moral damages based on the notion that the applicable treaty protects only investments and not investors.[435] Even those tribunals that rejected moral damages have never done so on the semantic basis that the applicable treaty protected only investments and not investors.[436] The weight of authority thus supports this Tribunal's jurisdiction to award moral damages for harm suffered by investors as a result of Respondent's breaches of the Treaties.

166. As discussed previously, Respondent's egregious actions in breach of the Treaties, including a targeted, personal and baseless criminal persecution, caused Claimants significant reputational harm, including (1) the destruction of Omega U.S.' *commercial* reputation, which destroyed Omega U.S.' ability to secure work outside of Panama; and (2) the destruction of Mr. Rivera's *personal* reputation, which prevented him from operating his own construction company and fully providing for his family, causing him severe stress and anxiety.[437] These reputational damages are separate and in addition to the economic damages from the destruction of Claimants' investment in Panama. The only head of damage that can, and should, compensate Claimants for this harm is moral damages.

VI. PANAMA'S JURISDICTIONAL OBJECTIONS ARE BASELESS

167. The parties have briefed the various jurisdictional issues at length, and Claimants

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[435] Respondent's only source is a news report about a decision that the author makes clear he has not read. Cosmo Sanderson, *Uzbekistan Liable for Seizure of Shopping Mall*, Global Arbitration Review, 9 Oct. 2019 (RL-0057) ("GAR *understands* the tribunal partially upheld its jurisdiction . . . the tribunal *is understood* to have refused to consider claims . . ." (emphasis added)).

[436] *See, e.g.*, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 Mar. 2011 (CL-0202), ¶ 345 (denying moral damages grounds other than the treaty's substantive protection applying only to *investments*); *Swisslion* (CL-0107), ¶ 350 (same); *Siag* (CL-0032), ¶ 545 (same); *Frank Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 Apr. 2013, (RL-0040), ¶¶ 602-15 (same); *Oxus Gold v. Uzbekistan*, UNCITRAL, Award, 7 Dec. 2015 ("***Oxus Gold***") (CL-0137), ¶¶ 895-905 (same); *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 Mar. 2015 (CL-0164), ¶¶ 904-17 (same).

[437] Cls' Mem. §§ V, VI, VII, X.A.1.b; Cls' Reply §§ IV, V, VI, IX.B.3; Cls' Rej. § II.B.

will not here belabor the point further with additional recitations of the various reasons why each of Respondent's objections are frivolous. Instead, this brief summary will focus *only* on the jurisdictional points that arose during the two weeks of hearings. For a complete discussion of the Claimants' arguments against Respondent's jurisdictional objections, *see* Claimants' Reply at Section VII and Claimants' Rejoinder on Jurisdiction at Section II.

A. Panama's Illegality/Corruption Objection Has Failed

168. For all of the reasons set forth above in Section III.B,[438] Respondent has not come close to carrying its burden of proving illegality at the inception of Claimants' investment by "clear and convincing" evidence.[439] It has simply made a series of scattershot smears of Claimants' activities surrounding *one* of their Panamanian contracts, and even those allegations are belied by the record, riddled with inconsistencies, and beset with factual inaccuracies.[440] Simply put, Respondent has repeatedly asserted that it "*will prove*" bribery or money laundering,[441] but it has never been able to do so. [442]

169. Respondent's opening argument emphasized the hopelessness of its position when counsel correctly noted that only "proof of corruption [in] the *procurement* of the [investment] deprives a Claimant of jurisdiction."[443] Here, the La Chorrera Contract was entered into *years*

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[438] *See supra* § III.B.

[439] U.S. Submission ¶¶ 44-45; Cls' Response to U.S. Submission ¶¶ 16-17. For the avoidance of doubt, Claimants reiterate that the "clear and convincing" standard applies exclusively to Respondent in this arbitration because it is the sole Party that relies on allegations of bribery to sustain a request for relief (namely, jurisdictional dismissal on the basis of illegality). Claimants' allegation that Mr. Varela demanded US$ 600,000 from Mr. Rivera at the La Trona restaurant are put forward as background evidence to clarify Respondent's motivation for engaging in unlawful action, but it is not necessary for Claimants to sustain that allegation to prevail on the merits of their claims. *See* Tr. 1/53:7-54:4; Cls' Response to U.S. Submission ¶ 17 n.57.

[440] *See supra* § III.B.

[441] Resp.'s Counter-Mem. ¶ 20; Cls' Reply ¶ 16; Cls' Rej. ¶ 13.

[442] *See* Cls' Reply § VII.A; Cls' Rej. § II.A.

[443] Tr. 1/86:18-22 (emphasis added).

after the investment was established. And on its allegations about that Contract, Respondent had no real answer to the Tribunal's question on how that timing could possibly lead to a *quid pro quo*.[444] As explained in detail above, Respondent has had years to investigate and pursue Claimants in its domestic courts for the same alleged crimes Respondent complains of here—and it in fact did so. Mr. Villalba admitted that said investigation was an outcome-driven exercise of investigatory malfeasance, at best.[445] And even then, Respondent has never been able to prove any criminality. Respondent's own courts have dismissed the corruption investigation and nullified the money laundering investigation.[446]

170. Respondent also has consistently failed to assert a meaningful counter-argument to several key legal points made by Claimants. It does not address the implications of the fact that neither the BIT nor the TPA includes any provision requiring that investments accord with host State law as a precondition to arbitration.[447] It fails to acknowledge the difference between *its* jurisdictional challenge in this case, which goes to the *operation* of Claimants' investment, and case law on which it relies, which limits itself to illegality in the *establishment* of an investment.[448] It never addresses Claimants' position that Respondent's inability to obtain any domestic law convictions should estop it from raising its illegality defense.[449] And Respondent has never joined issue with Claimants' argument that, even if there were some form of illegality proven here, the Tribunal should handle the consequences of that finding as a matter of proportionality or

[444] Cls' Reply ¶ 294; Tr. 1/41:20-42:11. *See also* Tr. 1/97:5-16.

[445] *See supra* § III.B.3-4.

[446] *See supra* ¶¶ 70, 102, 104, 107.

[447] Cls' Reply ¶ 279; Cls' Rej. ¶ 84.

[448] Cls' Reply ¶ 292; Cls' Rej. ¶¶ 15, 85, 88-89, 94-95, 101, 116-17.

[449] Cls' Reply ¶¶ 313-18; Cls' Rej. ¶¶ 82, 119-22; Tr. 1/42:12-15.

contributory fault, rather than an issue of jurisdiction or admissibility.[450] For all of these reasons, Respondent's corruption/illegality defense must fail on both the facts and the law.

B. All Of Panama's Misdeeds Were Sovereign And Extracontractual

171. As previously discussed,[451] this case involves much more than commercial claims. To reach this conclusion one need look no further than (1) the implicated actors of the Panamanian government, or (2) the implicated government measures. The first: Juan Carlos Varela (both as a presidential candidate and as the President of Panama), the Municipality of Panama, the Municipality of Colón, the Panamanian Judiciary, the Ministry of Economy, the Ministry of the Presidency, the Ministry of Health, the National Cultural Institute, the Comptroller General's Office, and the Prosecutor's Office. The second: government (administrative) resolutions, national budgets cuts, withholding of endorsements by the Comptroller General, criminal investigations, discretionary bidding bans, detention orders, Interpol red notices, and bank account freezes. In short, these issues do not conform to the garden-variety commercial construction dispute. To apply the paradigm that Professor Douglas offered at the hearing, "looking at the rights and obligations under the contract[s]," the various Government actors were definitively not "within [their] rights . . . under these particular commercial relationships" to engage in the above-mentioned acts. (Tr 1/111:6-19).

172. The evidence also demonstrates that various arms of the Panamanian government acted *in unison* to harm Claimants' investment, thereby triggering state liability. The timing and

[450] Cls' Reply ¶¶ 306-12; Cls' Rej. ¶¶ 82, 116-18. As Claimants have repeatedly explained, even if the Tribunal were to find some sort of corruption in the acquisition of the La Chorrera Contract (which is denied), at most that would eliminate the Tribunal's jurisdiction over *that piece* of Claimants' investment, *i.e.*, the losses flowing from Respondent's destruction of the Omega Consortium's rights under the La Chorrera Contract. Cls' Reply ¶¶ 296-99; Cls' Rej. § II.A.2.a.

[451] *See* Cls' Reply § VII.B; Cls' Rej. § II.B.

synchronized nature of the unlawful conduct committed by various agencies, ministries, municipalities, prosecutors, and individual government officials was no mere coincidence. They show a "coordinated campaign" by Respondent.[452] *But*, as Claimants' counsel stated at the hearing, this Tribunal does *not need* to find such a coordinated campaign against Claimants' investment to articulate a breach of the Treaties. (Tr 1/60:14-62:1, 1/76:16-78:6). Neither the BIT nor the TPA condition state liability on a finding of bad faith, and jurisprudence establishes the same thing.[453] This conclusion follows from the manner in which Claimants pleaded their claims for "creeping" expropriation and FET violations based on Respondent's collective acts as an alternative theory to their primary case of political retribution.[454] As discussed above,[455] the factual record shows that various arms of Respondent violated Claimants' international law rights through separate but mutually-reinforcing wrongs, each of them arbitrary and indefensible under international law.[456] The fact that the record strongly suggests collective action on the part of Respondent, and that Claimants have highlighted an underlying motive from the highest levels of

[452] *See* Cls' Mem. ¶¶ 16, 50, 69, 87, 159, 171; Cls' Reply ¶¶ 3, 5, 26, 94, 194, 235, 271, 320-22, 344, 347, 365, 373, 397, 404, 438; Cls' Rej. ¶¶ 7, 127, 133, 137, 182, 184, 214, 236, 273-74, 311, 349.

[453] *See, e.g.*, DOLZER & SCHREUER (CL-0006 resubmitted 3), at 157-58.

[454] *See* Cls' Mem. ¶¶ 145, 155, 161, 178-79; Cls' Reply ¶¶ 373-74, 413-15.

[455] *See supra* § III.

[456] Whether the Tribunal finds a coordinated campaign, it will, of course, need to undertake a separate inquiry into whether Respondent's unlawful actions (individually or collectively) caused damage to Claimants and their investment. The record is full of individual actions that, in and of themselves, did cause such damage to Claimants and their investment and violated international law. For example: The Ministry of Economy and Finance's decision to slash the 2015 budget for the CDLA Project caused damage in that it removed the funding for the Omega Consortium's largest project, *see supra* ¶¶ 27-36, 50-51; INAC's administrative termination of the same project caused damage in that it prevented Claimants from obtaining any further public works contracts in Panama, *see supra* ¶¶ 35-36, 51, 117-18; the administrative termination of the Municipality of Panama Contract extended Claimants' inability to obtain further public works contracts, *see supra* ¶¶ 51, 57; and the Comptroller General's refusal to act upon pending applications concerning Claimants' projects, thereby obstructing the investment from receiving funding and making progress thereon, was a constant bludgeon to the investment, *see supra* ¶¶ 25, 37-38, 40, 47, 52-53.

the State, only serves to *strengthen* Claimants' rights to relief—it does not establish a higher bar that must be reached for its claims to succeed.

173. *Rompetrol v. Romania*[457] is again instructive here. The claimant there had alleged that Romania breached the FET standard by engaging in a campaign of harassment arising out of improper law enforcement.[458] The tribunal noted that while the claimant had "framed its complaints in terms of a 'campaign of harassment,'" FET "also appl[ies] to specific individual acts attributable to the State, if the circumstances were appropriate and of sufficient seriousness as to lead a tribunal to conclude that the standard of 'fair and equitable treatment' had been breached."[459] The *Rompetrol* tribunal rejected claimants' allegations of a coordinated campaign,[460] but it still found that the host State had violated FET.[461] Other cases confirm this point.[462]

174. It is perhaps fitting to end on the following point: the hearings revealed just how far Respondent will go to deny the sovereign nature of this dispute. On questioning from the Tribunal, Respondent insisted that Claimants should have *no* recourse to treaty arbitration and should only be able to resort to project-by-project commercial arbitration (or domestic litigation) to resolve *all* disputes that have *any* connection to a contract, even "[i]f it is proven that there was a coordinated campaign against the Claimants."[463] With respect, this position defies credulity and

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[457] *Rompetrol* (CL-0126).

[458] *Id.* ¶¶ 124, 160, 190, 193 (quoting Article 3(1) of the BIT). *See also id.* ¶¶ 198, 238, 266, 270.

[459] *Id.* ¶ 198.

[460] *Id.* ¶¶ 232, 237, 265, 269, 271, 276-77.

[461] *Id.* ¶¶ 276-77, 279, 299(c).

[462] *See Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Trading Ltd v. The Republic of Kazakhstan*, SCC Case No. V (116/2010), Award, 19 Dec. 2013 (CL-0059), ¶¶ 635-56, 1086 (noting that the claimants had alleged that Kazakhstan used a typical "playbook" harassing foreign investors through multiple means but rejecting the notion that the claimants needed to establish that there was such a "playbook" for the tribunal to find that a treaty violation occurred); *Oxus Gold* (CL-0137), ¶¶ 826-28, 893, 901, 1047(2) (rejecting claimants' allegations of a harassment campaign but still finding the host State to have violated the treaty).

[463] Tr. 1/100:16-101:5 (reiterating that "[e]ven in circumstances where *it could be proven that there was a*

makes a mockery of the Treaties and the institution of investor-state dispute resolution. The proper exercise is the one suggested by Professor Douglas: "the Treaty claim depends on us looking at the rights and obligations under the contract[s] and wh[ether] the Government was within its rights to do [what it did] under these particular commercial relationships." (Tr 1/111:6-112:6).

175. This is also why Article VII of the BIT does not stand as a jurisdictional impediment to these claims: If the Government operated "[outside] its [commercial] rights" under those Contracts, then there is no "applicable" and "agreed" dispute settlement procedures that would govern a dispute aside from the Treaties.[464] The frivolity of this objection is fully pleaded in Claimants' memorials,[465] but the hearings served to summarize the issue in even simpler terms. Respondent admits that this is just a partial objection, proffered to apply only to the five Contracts that predate the TPA, but this objection should fail on the temporal point alone. It is *undisputed* that the entire TPA applies to the *entire* investment and the *entirety* of these claims, and it is *common ground* that the TPA contains *no such restriction*.[466] Accordingly, this case can proceed *completely* under the dispute resolution provision of the TPA, making the limitation in the BIT (substantively as well as textually) irrelevant.

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conspiracy at the highest level of Government to target the Claimants," the "contractual mechanisms are what would dictate" (emphasis added)).

[464] Tr. 1/111:6-112:6. All the BIT says is that "applicable dispute settlement" procedures between the parties should be followed. *And who are the parties?* The provisions before and above that sentence make it clear: It is *the State party* and *the investor*, or in other words, "the parties to the [investment] dispute." *Are there any "applicable" and "agreed" dispute settlement procedures for this investment dispute? No.* Looking at the five contracts that pre-date the TPA, *none* of them say anything about the forum for investment disputes, international law or treaty claims, let alone contain an explicit waiver thereof. They are each textually limited to disputes regarding the "execution, enforcement, development or termination" of the specific contracts in which they are found. In short, nothing in these agreements links these investors and this Respondent to the treaty claims that are presently before this tribunal. Cls' Opening at 65-66.

[465] *See* Cls' Reply § VII.D; Cls' Rej. § II.E.

[466] Cls' Mem. § VIII.A; Cls' Reply § VII.D; Cls' Rej. ¶¶ 323-26. *See also* Cls' Opening at 58-59.

VII. CONCLUSION

176. Claimants have demonstrated that Respondent's unlawful acts, in breach of the Treaties' requirements, caused catastrophic harm to Claimants and their investment in Panama. Therefore, Claimants respectfully request that the Tribunal find Respondent liable for violating the BIT and/or the TPA and order damages in the amount of US$ 81.22 million plus pre- and post-award interest at a rate of 11.65%, which amount should be net of Panamanian taxes. Claimants also request that the Tribunal award them all of their fees and costs, which will be particularized in their Cost Submission on 21 January 2021.

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