INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE NO. ARB/16/42

OMEGA ENGINEERING LLC

and

OSCAR RIVERA

Claimants

v.

REPUBLIC OF PANAMA

Respondent

POST-HEARING SUBMISSION OF THE REPUBLIC OF PANAMA

---

8 JANUARY 2021

SHEARMAN & STERLING LLP

599 Lexington Avenue
New York, New York 10022-6069

401 9th Street, NW
Washington, DC 20004-2128

Counsel for the Republic of Panama

TABLE OF CONTENTS

1. The Republic of Panama ("**Panama**" or "**Respondent**") submits this Post-Hearing Brief.[1] This submission is filed in in accordance with the schedule set by the Tribunal via Procedural Order No. 4 on October 6, 2020, as adjusted by the Tribunal's Order of December 11, 2020, which allows for the Claimants Omega Engineering LLC and Oscar Rivera ("**Mr. Rivera**" and, collectively, the "**Claimants**") to simultaneously file Post-Hearing Briefs on January 8, 2021. This submission is also accompanied by three new legal authorities submitted pursuant to the Parties' agreement of December 2, 2020.

I. PANAMA'S RESPONSES TO THE TRIBUNAL'S QUESTIONS

2. On November 10, 2020, the Tribunal requested that the Parties address six questions in their post-hearing submissions. Panama's responses are set out below.

A. WHAT ARE THE FINDINGS AND DETERMINATION THAT EACH SIDE SEEKS FROM THE TRIBUNAL IN RELATION TO RESPONDENT'S ALLEGATIONS OF CORRUPTION? IN DOING SO, PLEASE ADDRESS THE QUESTIONS OF BURDEN AND STANDARD OF PROOF THAT APPLY TO THE FINDINGS AND DETERMINATION THAT YOU SEEK.

3. International law does not provide – and international arbitral tribunals have not adopted – a uniform standard against which claims of corruption are measured. However, as Panama has shown, the "reasonable certainty" or "balance of probabilities" standard is the most appropriate standard to be applied.[2] The "reasonable certainty" or "balance of probabilities" standard is the same standard that applies to other substantive allegations before a tribunal. The party asserting the claim must show that, on a balance of probabilities, the alleged acts are more likely than not to have occurred. In 2019, the *Vale S.A. v. BSG Resources Ltd* tribunal expressly affirmed the

---

[1] Terms defined in (1) Panama's Objections to the Tribunal's Jurisdiction and Counter-Memorial on the Merits submitted on January 7, 2019, and (2) Panama's Reply in Support of its Objections to the Tribunal's Jurisdiction and Rejoinder on the Merits submitted on November 18, 2019, maintain their defined meaning.

[2] *See, e.g., Tethyan Copper Company Ptd Ltd. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Respondent's Application to Dismiss the Claims (10 Nov. 2017) (**RL-0075**) ¶¶ 304, 308 ("a finding of corruption must be . . . established with 'reasonable certainty.'"); *Metal-Tech Ltd v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award (4 Oct. 2013) (**RL-0011**) ¶ 243 (rejecting the "clear and convincing evidence" standard and applying "reasonably certainty"); *Libananco v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award (2 Sept. 2011) **(RL-0076)** ¶ 125 (finding that "no heightened standard applies for allegations of fraud or other serious wrongdoing"); *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award (16 Aug 2007) **(CL-0124)** ¶ 399 (rejecting a heightened standard); *Tokios Tokeles v. Ukraine*, ICSID Case No., ARB/02-18, Award (26 July 2007) (**CL-0022**) ¶ 124 (rejecting a heightened standard and finding the standard was "more likely than not to be true").

"balance of probabilities" standard as the foundation of its corruption analysis.[3] While the tribunal acknowledged a need to have a high degree of confidence in the evidence, it made clear that this did not rise to the level of proof required under the "clear and convincing" standard.[4]

4. Despite these holdings, Claimants argue that the "clear and convincing" standard is required due to the serious nature of a corruption allegation.[5] The standard of proof, however, is not directly tied to the alleged "seriousness" of the allegations. As the *Libananco* tribunal held, the mere presence of serious allegations does not *per se* require "a heightened standard of proof."[6] Rather, as noted, "the graver the charge, the more confidence there must be in the evidence relied on."[7] But, this requirement "may simply require more persuasive evidence" and "does not necessarily entail a higher standard of proof."[8]

5. The "clear and convincing" standard is also problematic due to the inherent difficulties in proving corruption. Indeed, as the *Metal-Tech* tribunal noted, "corruption is by essence difficult to establish" and can be shown through "circumstantial evidence."[9] This statement was confirmed by Ms. Jimenez on cross-examination, when she admitted that it is not uncommon for those engaged in corrupt activities to lie, destroy evidence, refuse to testify, or otherwise hide their unlawful behavior.[10]

---

3 *Vale S.A. v. BSG Resources Ltd.*, LCIA Case No. 142683, Award (Apr. 9, 2019) (**CL-0247**), ¶ 358 (finding "balance of probabilities" was the appropriate standard under English or international law).

4 *Vale. v. BSG Resources Ltd.* (**CL-0247**), ¶¶ 354-355 ("[W]here the allegation is a serious one, the standard remains *at all times* the civil standard . . . . However, given the gravity of the allegations raised . . . the Tribunal requires to be satisfied in accordance with the available evidence that it is cogent and commensurate with the gravity of the allegations.") (emphasis added).

5 Claimants' Reply ¶¶ 280-281; Claimants' Rejoinder ¶ 12; Claimants' Response to U.S. Submission ¶¶ 16-17.

6 *Libananco v. Republic of Turkey* (**RL-0076**) ¶ 125.

7 *Libananco v. Republic of Turkey* (**RL-0076**) ¶ 125.

8 *Libananco v. Republic of Turkey* (**RL-0076**) ¶ 125.

9 *Metal-Tech v. Uzbekistan* (**RL-0011**) ¶ 243.

10 Tr 8 (Jimenez)/1687:19-1688:7.

6. Panama has met its burden and proven its corruption claims against Claimants. The evidence establishes that Mr. Rivera used money received from the Judiciary in connection with the La Chorrera Courthouse project to bribe Justice Moncada Luna. As a result, Panama requests that the Tribunal make the following findings:

- Mr. Rivera transferred money, through an intermediary, received from the Judiciary into accounts owned or controlled by Justice Moncada Luna and his wife.
- The procedure used to transfer this money mirrors other bribery schemes involving Justice Moncada Luna and involved multiple individuals who admitted to transferring money for Justice Moncada Luna.
- Justice Moncada Luna pled guilty to unjust enrichment as a result of receiving, in part, funds transferred from Mr. Rivera to purchase two luxury apartments.
- Claimants' corrupt conduct raised red flags about all aspects of their operations and investments in Panama, including as to all eight Project Contracts and Claimants' interests in Omega Panama.
- Panama was justified in its criminal investigation of Mr. Rivera and Omega Panama, including the freezing of Omega's bank accounts and efforts to secure Mr. Rivera's presence in Panama.

7. On the basis of these findings, Panama requests that the Tribunal determine that, as a result of Claimants' corrupt actions:

- Claimants are not entitled to substantive protections arising out of the BIT and TPA, the Tribunal lacks jurisdiction over Claimants' claims, and Claimants' claims are dismissed in their entirety;
- Alternatively, Claimants are not entitled to substantive protections arising out of the BIT and TPA with respect to the La Chorrera Project and all subsequent projects awarded to Claimants (including the Municipality of Colon Palace Project and Municipality of Panama Projects), the Tribunal lacks jurisdiction over all claims relating to the La Chorrera Project, the Municipality of Colon Project, and the Municipality of Panama Project, all claims involving the La Chorrera Project, Municipality of Colon Project, and the Municipality of Panama Project are dismissed, and all substantive claims and claims for compensation involving or relating to Panama's criminal investigation into Mr. Rivera and Omega Panama are denied; or
- Alternatively, Claimants are not entitled to substantive protections arising out of the BIT and TPA with respect to the La Chorrera Project, the Tribunal lacks jurisdiction over all claims relating to the La Chorrera Project, all claims involving the La Chorrera Project are dismissed, and all substantive claims and claims for

compensation involving or relating to Panama's criminal investigation into Mr. Rivera and Omega Panama are denied.

8. Claimants should not be permitted to profit from their corruption. Claimants cannot procure investments in violation of Panamanian and international law and then seek the protections of that very same law. The findings and determinations set forth above ensure that Claimants are held to account for their misconduct and that Panama is not subjected to international liability in conjunction with the criminality of Mr. Rivera and Omega.

B. EACH SIDE SHOULD PROVIDE ITS ANALYSIS OF THE ALLEGED INVESTMENT(S), INVESTMENT AGREEMENT(S), AND INVESTMENT DISPUTE(S), UNDER THE TREATIES INVOKED BY THE CLAIMANTS.

1. Claimants' Alleged Investments

9. Claimants define their investment as having two components, the eight contracts at issue in this arbitration (the "Project Contracts"), and Mr. Rivera's ownership of and investment in Omega Panama. In their Request for Arbitration, Claimants state:

> Nearly all of these examples make up a part of Claimants' investment in Panama. For instance, the eight construction Contracts entered into by Claimant Omega-US constitute a clear and valid 'right conferred by law or contract' giving Omega-US (and Claimants Mr. Rivera through his ownership of Omega-Panama) a 'claim to money or a claim to performance.' Further, Mr. Rivera's ownership of Omega-Panama constitutes ownership of 'a company of shares of stock or interests in a company' in Panama. Finally, Claimant Mr. Rivera's capital investment through Omega-Panama also constitutes an investment under the BIT, specifically in 'tangible' property. It therefore follows that Claimants unquestionably have made a qualified investment under the BIT in Panama.[11]

10. Claimants also assert that the definition of investment in the TPA is met because:

> Claimant Mr. Rivera's ownership of Omega-Panama constitutes ownership of 'an enterprise' in Panama as well as ownership of 'shares, stock, and other forms of equity participation in an enterprise.' Further, the eight construction Contracts entered into by Claimant Omega-US are a quintessential investment under the TPA as 'turnkey, construction . . . contracts.' Finally, Claimant Mr. Rivera's capital investment in Panama

[11] Request for Arbitration ¶¶ 56-57.

> through Omega-Panama constitutes an investment under the TPA as, *inter alia*, an investment in 'tangible . . . movable or immovable property."[12]

11. The scope of Claimants' investment is confirmed by the nature of the compensation they have sought. As explained by Compass Lexicon, "to assess" Claimants losses, they examined the "counterfactual scenario," which reflects Claimants' interest in Omega Panama as of December 23, 2014, and the "actual scenario," which reflects "the actual value of claimants interest in Omega Panama as of" that date.[13] In the counterfactual scenario:

> [T]he value of Claimants' interest in Omega Panama stems from two sources. First, Claimants' value derives from the completion (and full collection of payments) of the eight outstanding contracts awarded prior to December 2014. Second, Claimants' value derives from Omega Panama's ability to continue as a going concern, bidding and winning further construction contracts in Panama from December 2014 onwards in a manner that reasonably reflects its historical track record.[14]

12. Compass Lexecon ultimately "assessed the losses suffered by Claimants" at US$ 55.4 million, which consists of: (a) "Losses on existing contracts estimated at US$ [redacted]" and (b) "Losses on new contracts estimated at US$ [redacted]."[15]

13. Over the course of the proceedings, Claimants made vague references to goodwill and other intangible assets they believe may have been invested in Panama. However, other than in the context of moral damages, at no point did Claimants assert a specific head of claim related to these additional purported investments. Likewise, Compass Lexecon made no effort to quantify the value of Claimants' intangible assets. As Dr. Flores explained on cross-examination:

> … the numerical exercise that [Compass Lexecon] have done is to look at Omega Panama as a going concern, and that's what their calculations attempt to measure. There is no identification, and I think honestly, Mr. Lopez Zadicoff seemed to be struggling this morning to answer questions in that regard. He has no way to identify this much is the value of the intangibles contributed by Omega US and this is how much Omega Panama is worth.

---

12 Request for Arbitration ¶ 63.

13 First Compass Lexecon Report ¶ 9(a)-(b).

14 First Compass Lexecon Report ¶ 10.

15 Second Compass Lexecon Report ¶ 2.

> So, there has been no attempt by the Claimants' Experts to identify and to assign value to that. So, the only thing we have is a valuation of Omega Panama.[16]

14. In an effort to overcome their failure to assert specific claims or seek specific damages relating to the alleged loss of goodwill, Claimants have attempted to shoehorn the issue into the losses on future potential contracts. As Panama has shown (and is discussed below), however, that is inappropriate. The fair-market value standard required by the BIT and TPA to value those losses requires the Tribunal to determine the value that a hypothetical buyer would pay for Omega Panama as a stand-alone entity as of December 23, 2014. That value does not include any intangible assets contributed by Omega US that would not be part of Omega Panama following the sale. Claimants, therefore, are limited to the valuation that they actually presented, even though it may differ from the one they hoped would be presented.

2. The Investment Agreements

15. The only agreements at issue in this arbitration are the eight Project Contracts. These agreements set forth the parties' respective rights and obligations, are subject to Panamanian law, and, importantly, each contain agreed dispute resolution mechanisms.[17] As Panama demonstrated in its submissions, Article VII(2) of the BIT expressly requires that "investment disputes" arising out of "investment agreements" be resolved through previously agreed dispute resolution mechanisms, including commercial arbitration.[18] As discussed in Section B.3 below, Claimants have not properly pled an "investment dispute" in this arbitration. However, should the Tribunal find that there is an investment dispute, it must consider that dispute in light of the BIT's requirements, including the mandatory application of contractual dispute resolution clauses. Panama addresses the requirements of BIT Article VII(2) in Section III.C below.

3. The Investment Disputes

16. Panama submits that there is no investment dispute properly asserted in this proceeding, as Claimants have asserted a series of commercial disputes that fall outside the scope of the BIT

---

16 Tr 5 (Flores)/1029:4-17.

17 BIT (**CL-0001**), Art. VII(2); TPA (**CL-0003**), Art. 10.15

18 *See* Panama's Counter-Memorial ¶¶ 234-243; Panama's Reply in Support of its Preliminary Objections ¶¶ 148-153.

and TPA. The commercial nature of Claimants' disputes is evident from their submissions. In their Request for Arbitration, Claimants state that, after President Varela was elected, "the new Government promptly targeted the US investors [i.e., Mr. Rivera and Omega US] . . . . In particular, Respondent refused to pay the investors' invoices, wrongfully terminated their largest contract, failed to provide required permits and change orders, targeted the investors and a related company with several baseless criminal investigations, and launched a mudslinging campaign aimed solely at sullying the investors' international reputation."[19]

17. In their Memorial, Claimants again predicate their claims on allegations that "[o]utstanding invoices from the Omega Consortium went completely unpaid," Panama failed to provide change orders or approve plans, and because Panama "declared default on their largest contract, and wrongfully terminated or abandoned the others."[20] And, while these alleged contractual breaches were occurring, Claimants again argue that Panama subjected Mr. Rivera and Omega Panama to "baseless criminal investigations" and a campaign to "sully[ ] their international reputations."[21] These specific allegations form the foundation for each of the treaty breaches alleged by Claimants.[22]

18. In their Reply on the Merits, Claimants specifically attempt to address the nature of the alleged "investment dispute" in this proceeding. While acknowledging that their dispute focused heavily on Panama's actions under the Project Contracts, Claimants assert that "much of Respondent's unlawful behavior fell completely outside of the contractual framework governing those projects, such as Respondent's unlawful criminal investigation of Mr. Rivera and Omega Panama, bank freeze orders directed at Omega Panama and another of Mr. Rivera's companies, and detention notices against Mr. Rivera and one of his employees."[23]

19. The manner in which Claimants have framed their claims makes clear that no true investment dispute exists. Complaints over unpaid invoices, denied change orders, and

---

[19] Request for Arbitration ¶ 2.

[20] Claimants' Memorial ¶ 3.

[21] Claimants' Memorial ¶ 3.

[22] Claimants' Memorial, Sect. IX.A – IX.E.

[23] Claimants' Reply on the Merits ¶ 144.

unapproved plans are fundamentally commercial in nature. Unsupported allegations that these actions were taken for sovereign purposes are insufficient to transform them into "investment disputes." Likewise, claims that Mr. Rivera and Omega US were targeted in their capacity as "investors" do not give rise to an investment dispute. As discussed in Section I.C below, the substantive protections in the BIT and TPA are directed towards "investments," and not "investors." Panama, therefore, owed no duty to Mr. Rivera and Omega US in their capacity as investors. As such, they are not protected by the substantive provisions of the BIT or TPA, and have no standing to assert claims for injuries purportedly suffered as investors. In any event, Claimants' own corruption expert testified that Panama was entirely justified in exercising its police powers to investigate payments made from Mr. Rivera to Justice Moncada Luna.[24] The appropriate exercise of police powers against an individual (i.e., investor) does not – and cannot – give rise to an investment dispute under the BIT or TPA.

C. DOES A DISTINCTION BETWEEN "INVESTOR" AND "INVESTMENT" HAVE RELEVANCE IN VIEW OF THE CLAIMS ADVANCED AND DAMAGES SOUGHT BY CLAIMANTS?

20. The distinction between an "investor" and an "investment" is extremely relevant to the claims advanced and damages sought by Claimants.[25] As Panama explained in its Rejoinder on the Merits, the treaty protections underlying each of the substantive claims asserted by Claimants apply solely to "investments" but not to investors.[26] However, many of the allegations recently pressed by Claimants are personal to them as investors, and are therefore outside of the reach of the treaty. For example, in their expropriation claim, Claimants allege that "Respondent's acts . . . had broader reverberations for Claimants outside of Panama . . . three separate criminal investigations into Omega Panama and Mr. Rivera were filed in Panama and Mr. Rivera became

---

24 *See* Tr 8 (Jimenez)/1676:19-1677:1 ("It seems like a reasonable thing to do to determine why that money was transferred from Omega to PR, and that would be investigative steps that are necessary").

25 In their Request for Arbitration, the Claimants describe their "investment" as "Claimants' Contractual Investments" and then proceed to give a short summary of each of the eight Project Contracts. Request for Arbitration ¶¶ 18-26. Likewise, in their Memorial, the Claimants equate their "investment" with the eight Project Contracts. For example, in Section IV of their Memorial, entitled "Claimants' Investment in Panama was Progressing Well Until President Varela Assumed Office in 2014," the Claimants state that "[b]efore the Varela Administration assumed office (*i.e.*, during the Martinelli Administration), the Projects were generally progressing as expected . . . ." Claimants' Memorial ¶ 51. The term "Projects" is defined as the eight Project Contracts. Claimants' Memorial ¶ 41. Further, the Claimants consistently refer to the alleged treatment of their contracts when describing Panama's purportedly unlawful conduct. Claimants' Memorial, Sect. I.

26 Panama's Rejoinder on the Merits ¶ 526.

the subject of a detention order and Interpol Red Notice. In the end, the culmination of these actions destroyed not only Omega Panama, but both Claimants as well."[27]

21. Similarly, Claimants' Fair and Equitable Treatment claim is grounded on allegations of alleged misconduct directed towards the Claimants in their personal capacities. In asserting this claim, Claimants state that "[m]uch of Panama's conduct vis-à-vis Claimants and their investments was both arbitrary and unreasonable."[28] Claimants argue that they "faced 'threats' from criminal investigations" and that "[f]rom criminal investigations to detention orders, Interpol Red Notices to declared contractual defaults, Respondent decimated Claimants' bonding ability and general business goodwill, and thereby destroyed Omega US itself."[29]

22. Claimants' Full Protection and Security claim is equally rooted in allegations of misconduct towards Mr. Rivera and Omega US. For example, Claimants state that the full protection and security standard "covers threats to physical security such as Panama's issuance of the detention order and INTERPOL Red Notice against Mr. Rivera."[30]

23. Even if the Tribunal ignored that Claimants' own corruption expert conceded that it was entirely reasonable to investigate the corrupt payments between Omega Panama and Justice Moncada Luna, Claimants are not protected under the BIT and TPA in their capacity as investors.[31] Moreover, Claimants cannot use allegations of misconduct directed toward them to bootstrap claims that their investments were harmed. The Tribunal must assess Claimants' claims on the basis of conduct allegedly directed towards Omega Panama and the eight Project Contracts, which by Claimants' own admission constitute the full scope of their investment.

24. The distinction between "investor" and "investment" also has a direct bearing on the damages sought by Claimants. As explained in Panama's Rejoinder on the Merits, Claimants'

---

27 Claimants' Memorial ¶ 154 (internal citations omitted).

28 Claimants' Memorial ¶ 175.

29 Claimants' Memorial ¶ 172.

30 Claimants' Memorial ¶ 181.

31 Tr 8 (Jimenez)/1676:19-1677:1 ("I would say that it would need to be investigated. It seems like a reasonable thing to do to determine why that money was transferred from Omega to PR, and that would be investigative steps that are necessary.")

demand for at least US$ [redacted] in moral damages for injuries to Mr. Rivera and Omega US is precluded by the fact that investors are not protected under the treaty. Claimants lack standing to assert any claims in their capacity as investors. As such, there is no foundation under the BIT or TPA for Claimants' request for moral damages. Thus, even if Claimants could establish that their factual circumstances are sufficiently "exceptional" to justify moral damages in principle (which they cannot), the Tribunal would still lack the legal authority to award such damages. Further discussion of the moral damages issue is provided in Section V.C below.

D. IF THE TRIBUNAL WERE TO FIND THAT REASONS OTHER THAN ALLEGED POLITICAL RETALIATION WOULD BE SUFFICIENT TO JUSTIFY TERMINATION OF THE CIUDAD DE LAS ARTES PROJECT CONTRACT UNDER PANAMANIAN LAW, WOULD THE EXISTENCE OF SUCH ALLEGED RETALIATION NONETHELESS CARRY ANY RELEVANCE IN RELATION TO TERMINATION?

25. International investment law does not impose liability on states when they act in a commercial capacity or their actions are contractually justified.[32] If the Tribunal were to find that reasons other than alleged political retaliation were sufficient to justify termination of the Ciudad de las Artes Project Contract, it must hold that Panama has not breached its treaty obligations and deny all Claims relating to that project, even if there was also evidence of alleged political retaliation. Claimants can prevail only if they can prove that political retaliation was the sole and proximate cause for termination of the Ciudad de las Artes Project.

26. Tribunals have clarified that, even in the presence of alleged political motivation, "[w]hat is decisive is whether the reasons given for the termination constituted a legally valid ground for termination according to the provisions of the . . . Contract."[33] That is, where a contract is terminated according to its terms by a sovereign party acting in its commercial capacity (*i.e.*, as a counter-party to a construction contract), international liability for such termination may not attach. For example, in *Biwater Gauff*, the tribunal examined whether the termination of a

---

32 *See, e.g.*, Claimants' Memorial ¶ 144; Panama's Rejoinder ¶ 428.

33 *See, e.g.*, *Impregilo v. Argentina*, ICSID Case No. ARB/07/17, Award (June 21, 2011) (**CL-0083**), ¶ 283; *Convial Callao S.A. y CCI – Compañía de concesiones de Infraestructura S.A. c. República del Perú*, ICSID Case No. ARB/10/2, Laudo Final (Final Award) (May 21, 2013), §501 (noting that international liability will not attach when a contract is terminated on its terms, notwithstanding public motives); *see also Almas v. The Republic of Poland*, PCA Case No. 2015-13, Award (June 27, 2016) (**RL-0078**), ¶ 283 ("[W]here a justified ground for termination of a contract exists such termination cannot be regarded as expropriatory[.]").

contract by a State agency constituted an expropriation.[34] In finding that the state had not expropriated the contract at issue, the tribunal stressed that only "acts which exceed the normal course of conduct of a State" could be characterized as acts of "*puissance publique*."[35] The termination of the contract in that case, however, was done in the "ordinary behavior of a contractual counterparty."[36] In support of its findings, the tribunal cited to various commercial issues and failures that occurred over the course of the project and concluded that, at the moment of contractual termination, "the normal contractual termination process was underway."[37]

27. In *Impregilo v. Argentina*, an Argentine province terminated the claimant's concession contract for water and sewage services because, *inter alia*, the claimant "failed significantly to carry its undertakings in regard to" the contract.[38] The claimant argued that they were targeted because the government had adopted a policy that public utilities (such as water and sewage) should be given to State-owned entities, rather than private companies – and that, consequently, the act of termination constituted an expropriation of the claimant's investment.[39] The tribunal rejected the claimant's argument, finding that Argentina:

> [M]ay have set up as a political goal to transfer water and sewerage services to public entities. However, this does not necessarily lead to the conclusion that the termination of the Concession Contract with AGBA was an act of expropriation . . . . What is decisive is whether the reasons given for the termination constituted a legally valid ground for termination according to the provisions of the Concession Contract.[40]

28. The tribunal ultimately held that if "the Province, with some justification, considered that [the contractor] had grossly failed in fulfilling its contractual obligations and terminated the

---

34 *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (July 24, 2008) (**CL-0054**). *See also Malicorp Ltd v. Republic of Egypt*, ICSID Case No. ARB/08/18, Award (Feb. 7, 2011) (**RL-0080**) (holding that the termination of a contract was not expropriatory because "the reasons on which the Respondent relied in order to bring the Contract to an end appear serious and adequate.")

35 *Biwater Gauff*, (**CL-0054**), ¶ 460.

36 *Biwater Gauff*, (**CL-0054**), ¶ 492.

37 *Biwater Gauff*, (**CL-0054**), ¶ 492.

38 *Impregilo v. Argentina* (**CL-0083**), ¶ 279.

39 *Impregilo v. Argentina* (**CL-0083**), ¶ 275.

40 *Impregilo v. Argentina* (**CL-0083**), ¶¶ 277-278.

Concession Contract on this basis [,] [t]his is sufficient . . . to exclude that the termination could be regarded as an act of – direct or indirect – expropriation or other appropriation of . . . [the claimant's] investment."[41]

29. Here, any allegations of political treatment toward Claimants should be analyzed in the same way. INAC had the contractual right to terminate the Ciudad de las Artes Contract. The Termination Resolution not only "considered," but extensively listed Claimants' failures in carrying out their contractual obligations, including: non-compliance with the Project's schedule; abandonment and suspension of the works; refusal to comply with instructions from INAC and the inspector; and having insufficient personnel to perform the works on time and in a satisfactory manner.[42] Thus, as in *Biwater Gauff*, at the moment of contractual termination, the normal contractual termination process was underway.

30. The inquiry as to whether the termination amounts to a treaty breach ends here. INAC clearly acted in its commercial capacity – and within the scope of the relevant contractual provisions – when terminating the Ciudad de las Artes Contract. Accordingly, Claimants' failure to fulfill their obligations and INAC's resultant termination of the Contract "[are] sufficient . . . to *exclude* that the termination could be regarded as act of . . . expropriation" or of any other conduct attaching international liability to Panama – notwithstanding any political impetus.[43]

E. WHICH PARTY BEARS THE BURDEN OF PROOF FOR ESTABLISHING THE REASONS FOR THE TERMINATION OF OMEGA PANAMA'S PROJECT CONTRACTS AND THE PROHIBITION (UNTIL 15 FEBRUARY 2020) ON ITS PUBLIC BIDDING?

31. The Tribunal's question appears to assume that all eight Project Contracts were "terminated." Respectfully, that is not correct. Only two of the eight contracts were terminated: (a) the Ciudad de las Artes Contract; and (b) the Municipality of Panama Contract.[44] The remaining projects were abandoned by Claimants. As a matter of Panamanian law, a contractor

---

41 *Impregilo v. Argentina* (**CL-0083**), ¶ 283.

42 *See* Resolution No. 391-14 DG-DAJ dated Dec. 23, 2014 (**C-0044**). *See* Contract No. 093-12 dated July 6, 2012 (**C-0042**), Cl. 45 (enumerating grounds for termination).

43 *Impregilo v. Argentina* (**CL-0083**), ¶ 283 (emphasis added).

44 Resolution No. 391-14 DG-DAJ dated Dec. 23, 2014 (**C-0044**); Resolution No. C-10-2017 dated Jan. 11, 2017 (**C-0234**).

whose contract was cancelled as the result of the contractor's default may not bid on public works projects for a period of up to five years.[45] Claimants, therefore, were automatically prohibited from any public works bids once the Municipality of Panama issued a decree terminating Claimants' contract.

32. It is well settled that a party asserting claims under international investment law bears the burden of proving each element of its claims.[46] Claimants have argued that the Ciudad de las Artes and Municipality of Panama Contracts terminated *solely* as the result of targeted harassment by the Varela administration.[47] As discussed above, international liability will not attach where a government has terminated a contract on legitimate grounds, even if public or political considerations were also factors. Claimants bear the burden of proving that "targeted harassment" was the only reason that both of these contracts were cancelled.

33. Claimants failed to meet that burden, and their position is grounded on little more than supposition and speculation. The Claimants' only real effort to engage with this issue is in the witness statement of Mr. Lopez, in which he refers to statements supposedly made by third parties and then conveyed to him regarding the reasons why Claimants' projects were failing.[48] He also refers to statements supposedly made by "public officials," an anonymous "engineer working in the La Chorrera Judiciary," "one of the Municipal Council of Colon's legal counsel," and "all the people in the Ministries and Government agencies who told me that there was an intention on the part of the government to act against Oscar [Rivera] and his companies[.]"[49] These statements are not evidence, but just unsourced hearsay and uncorroborated statements by unidentified people that neither Panama nor the Tribunal had the ability to hear or examine.

34. Claimants also attempted to rely on snippets of WhatsApp communications between Nessim Barsallo and Mr. Lopez. At the hearing, however, Mr. Barsallo clarified the context in which those statements were made and affirmed that, as a relatively low-level employee within

---

45 Law 22 of June 27, 2006, ordered by Law 61 of 2017 dated Mar. 14, 2018 (**RL-0079**), Arts. 132, 134.

46 *See* Panama's Rejoinder ¶ 260.

47 *See, e.g.*, Claimants' Memorial ¶¶ 79, 81-82; Claimants' Reply ¶¶ 222-227; .406.

48 First Witness Statement of Frankie J**.** López (**López I**) ¶ 73

49 López I ¶¶ 73-74.

the Ministry of Health, he had no direct knowledge of any actions taken by the Varela administration with respect to Claimants' projects.[50] Claimants' efforts to prove sovereign action through the crass informal communications between a functionary at the Ministry of Health and Mr. Lopez fail.

35. Claimants' failed efforts to prove that the Ciudad de las Artes and Municipality of Panama Contracts were terminated as a result of targeted harassment stand in stark contrast to the overwhelming evidence Panama produced showing that each of the projects suffered from significant commercial problems.[51] Further, each of Panama's witnesses testified that neither they nor anyone at their ministries or municipalities had been directed or asked by the Varela administration to take adverse actions against Omega.[52]

36. Based on this evidence, Panama has met any burden it carried to establish its defenses.

F. REGARDING DAMAGES IN THE EVENT THAT TREATY LIABILITY IS FOUND, IS IT RELEVANT WHETHER OMEGA PANAMA HAD VALUE, AS OF THE PARTIES' AGREED VALUATION DATE, AS A SEPARATE, STAND-ALONE COMPANY, AND IF SO, WHAT WAS THAT VALUE? IN TERMS OF THE VALUE OF OMEGA PANAMA'S EXISTING CONTRACTS, APART FROM ANY CONSIDERATION OF POSSIBLE FUTURE CONTRACTS OR THE FAIR MARKET VALUE OF OMEGA PANAMA (OR MORAL DAMAGES CLAIMED BY MR. RIVERA), (A) IF ADVANCE PAYMENTS HAD BEEN RECEIVED AS OF THE VALUATION DATE, SHOULD SUCH PAYMENTS BE DISCOUNTED AS THOUGH THEY WERE TO BE RECEIVED IN THE FUTURE, AND (B) WHAT IS THE BASIS FOR INCLUDING OR EXCLUDING THE ADDENDA RELATING TO RIO SERENO, KUNA YALA, AND PUERTO CAIMITO, VALUED BY RESPONDENT AS $3.2 MILLION

37. Panama addresses the Tribunal's questions in two subsections below.

---

50 Tr 3 (Barsallo)/713:2-713:10 ("I have no knowledge beyond the information or the comments that I received from Omega staff [.]").

51 *See* Panama's Counter-Memorial ¶¶ 19-155; Panama's Rejoinder ¶¶ 84-126, 203-424. *See also* Diaz I ¶¶ 11-14, 18-28; Diaz II ¶¶ 6-13, 20; Barsallo I ¶¶ 26-62; Barsallo II ¶¶ 6-26, 31-34 ; Rios I ¶ 21-36; Rios II ¶ 7-24; Duque ¶¶ 20-; Buendía ¶¶ 9-16.

52 *See* Chen ¶ 14; Bernard ¶¶ 18-19; Diaz I ¶ 29; Diaz II ¶ 15; Barsallo I ¶ 41; Rios I ¶38; Rios II ¶ 25; Duque ¶ 20; Zarak ¶¶ 12-14; Varela ¶ 6; Buendía ¶ 17.

1. Regarding damages in the event that Treaty liability is found, is it relevant whether Omega Panama had value, as of the Parties' agreed Valuation Date, as a separate, stand-alone company, and if so, what was that value?

38. If the Tribunal finds that Panama is liable under the BIT or TPA, it must apply the valuation standards set forth in the treaties. The Parties agree that both the BIT and TPA require that compensation for lost future contracts be measured using a fair market analysis.[53] That analysis, in turn, requires the Tribunal to determine the price that an informed hypothetical willing buyer would pay a hypothetical willing seller of the investment as of the valuation date. The investment at issue is Omega Panama.[54] Thus, the question is what price a hypothetical buyer would pay for Omega Panama as of December 23, 2014, as that is the only asset that would transfer to the buyer.

39. In light of that standard, Claimants can be awarded compensation for the loss of future contracts only if Omega Panama had value. As discussed below, Claimants argue that so-called intangible assets attributable to Omega US (e.g., its experience, financing, and bonding capacity) would also be available to a hypothetical buyer.[55] That argument, however, is unfounded and purely speculative. There is no evidence that either Mr. Rivera or Omega US would continue to support Omega Panama following its sale. Indeed, despite being aware that Compass Lexecon was taking this position, Claimants provided no supporting documents or testimony. Moreover, there is no evidence that a hypothetical buyer would want Omega US' continued involvement. The value provided by the Omega Consortium was hardly unique and limited in scope. As Dr. Flores testified, if Claimants' [redacted] valuation is correct, a hypothetical buyer must be someone who has access to those funds.[56] Such a buyer necessarily would have its own

---

53 Claimants' Reply ¶ 440; Panama's Counter-Memorial ¶ 340.

54 Panama's Counter-Memorial ¶ 340; Claimants' Reply ¶ 365.

55 Claimants' Reply ¶¶ 485-487.

56 Tr 5 (Flores)/1038:1-2. Dr. Flores testified that, even when considering a hypothetical buyer, there must be parameters around that buyer's qualifications. As Dr. Flores testified, his mother would not be able to bid on a US$ 40 million asset. Thus, the analysis has to consider what assets a buyer who could afford that valuation (assuming it is correct) would bring to the table. Any company that could afford US$ [redacted] for a small Panama-based contractor with US$ [redacted] in physical assets and one completed project under its belt, necessarily would have its own access to financing and bonding.

experience, financing. and bonding capacity.[57] And, "any hypothetical buyer would be able to assemble a team of people with the necessary technical, financial, and experience/knowledge to be able to bid for contracts in the PanamaCompra website."[58]

40. In addition, Compass Lexecon's theory is predicated on the false assumption that Omega US and Omega Panama had a parent-subsidiary relationship.[59] According to Compass Lexecon, its theory of continued support worked because of this relationship.[60] As the Tribunal is aware, however, Omega US has no interest in Omega Panama; they are directly owned by Mr. Rivera.

41. Under these circumstances, it is clear that compensation could only be awarded if Omega Panama had value as a stand-alone entity as of December 23, 2014. Notably, Claimants have not proffered a value for Omega Panama as a stand-alone entity. Rather, the US$ [redacted] valuation is the "sum of all the assets" of Omega US and Omega Panama.[61] While Compass Lexecon admits that the value of these assets could be "divide[d]" "through certain analytical steps," it made no effort to do so. Indeed, Compass Lexecon conceded that it has no idea what Omega Panama's value as a stand-alone entity would be: "I would say that there is a value of the boots-on-the-ground organization and the setup, but it's no[t] going to be the full $40 million . . . Certainly, it would not be the majority of that value."[62]

42. Claimants' failure to offer proof of a value for Omega Panama as a stand-alone entity is fatal to their quantum claim. They alone bore the burden of proving the value of compensation to which they are entitled, which they failed to do, having offered no evidence of a stand-alone value for Omega Panama, and now it is too late.

---

57 *See generally* Tr 5 (Flores)/945:20-1120:11.

58 Tr 5 (Flores)/1034:19-22.

59 *See* First Compass Lexecon Report ¶ 30.

60 Tr 5 (Zadicoff)/927:8-22.

61 Tr 5 (Zadicoff)/925:15-16.

62 Tr 5 (Zadicoff)/952:15-19.

43. Although Claimants were silent on the issue of Omega Panama's stand-alone value, Dr. Flores did address the issue.[63] His analysis showed that Omega Panama "had a [redacted] of workers," "salary expenses of about [redacted]," roughly "[redacted] in vehicles and just a [redacted] in computers."[64] Despite Claimants efforts to portray Omega Panama as much more, "this is the reality of what Omega Panama was."[65]

44. Dr. Flores also looked at what Omega Panama did and what value it brought to the bidding or execution phases of the projects. What he found was that Omega Panama did not win a single bid on its own.[66] As of the Valuation Date, Omega Panama had completed only one project, the Tocumen Airport.[67] Omega Panama did not hold an exclusive license or right to public works contracts in Panama.[68] It could not, therefore, offer potential buyers guaranteed access to work. Rather, Omega Panama was simply one of hundreds of contractors registered to do business in Panama, each of whom had an equal right to bid on public works projects. As Dr. Flores testified, this fact "is very determinative" in terms of assessing value.[69]

45. In contrast, "[i]f you have a concession to provide mobile telephone services in a country . . . [t]hat gives inherent value to the company because you are the only one that is going to be able to provide mobile telephone services" for a defined period of time.[70] That, however, "is not the case with public works projects in Panama. The only thing you need to provide public works bids in Panama is to register at the site that is called PanamaCompra. It's an online website that's publicly available."[71] There is nothing in Panamanian law that restricts bidding to only a few select bidders. Rather, any contractor registered to do business in Panama can bid for any

---

63 Tr 5 (Flores)/947:5-10 ("So, then the relevant question that we have sought to answer in this arbitration is: what is a Fair Market Value of Omega Panama, as of the 23 December 2014, but for the Measures?").

64 Tr 5 (Flores)/947:13 – 948:6.

65 Tr 5 (Flores)/948:6-7.

66 Tr 5 (Flores)/948:15-18. ("And it had – those nine contracts that it won had always been done when bidding in a Consortium with other companies, all the times with Omega U.S. and also sometimes third parties.")

67 Tr 5 (Flores)/950:4-8.

68 Tr 5 (Flores)/951:15-18.

69 Tr 5 (Flores)/951:19.

70 Tr 5 (Flores)/950:19 – 951:1.

71 Tr 5 (Flores)/951:8-11.

project. Thus, "having prior experience, having bid on nine projects, having won nine projects in the past three years is not a guarantee of anything because at the next bid that you provide, the authority that's going to be awarded in the contract will be who is the best out of the three that have applied for this contract or the seven that have applied for this project."[72] As Dr. Flores explained, it is not the case "that I won three contracts with some Ministries or some Municipalities over the last three years guarantees a stream of income for the future. There is no guarantee whatsoever."[73] Rather, "every project is like a new enterprise."[74]

46. For these reasons, Dr. Flores concluded that "no willing buyer looking to start an operation in the public works sector in Panama would have found any compelling reason to pay anything for Omega Panama,"[75] as the only "asset" it could offer was the ability to bid on projects.[76] Indeed, Dr. Flores rightly questioned why any willing buyer would "pay to buy Omega Panama" when it could accomplish the same goals by "just registering in the PanamaCompra website" – something that is easily accomplished and open to anyone.[77] As Dr. Flores stated, "if I wanted to get into the sector, I wouldn't buy Omega Panama. I would just make a job offer to Mr. Lopez" and rely on his knowledge of the local market.[78]

47. In considering Omega Panama's value as a stand-alone entity, Dr. Flores relied on statements by Claimants that significantly downplay Omega Panama's value. In their Memorial, Claimants stated that Omega Panama merely satisfied "the local company requirement included in many of the tenders and provid[ed] the legal and economic structure to manage the

---

72 Tr 5 (Flores)/953:4-11

73 Tr 5 (Flores)/953:12-16.

74 Tr 5 (Flores)/953:16-19.

75 Tr 5 (Flores)/953-20 – 954:4.

76 Tr 5 (Flores)/955:10-14.

77 Tr 5 (Flores)/954:3-5

78 Tr 5 (Flores)/958:17-21. *See also* Second Quadrant Report ¶ 39 ("Omega Panama did not possess any special competitive advantage, right to projects, or valuable capital assets – it did not stand out amongst its competitor and its reputation was not the valuable asset that Compass Lexecon argues it was. A hypothetical buyer wanting to bid for new public works contracts in Panama in perpetuity would not have needed to acquire Omega Panama, because it could have done so by itself, gaining any necessary knowledge or local standing during an initial ramp-up period.").

construction projects locally."[79] Claimants also made clear that they viewed Omega Panama as a hinderance to their ability to win projects because it did not possess any experience or maintain any assets as a stand-alone entity.[80]

48. In addition, Dr. Flores examined the curve from when Omega Panama entered the country to when it won its projects. Omega Panama was incorporated in 2010. Of the 42 bids that Omega Panama participated in (either independently or as part of a consortium), 14 were submitted in 2010, and 21 were submitted in 2011.[81] Only three bids were submitted in 2012, four in 2013, and none in the six-month period in 2014 prior to President Varela's election.[82] Over 80% of the bids in which Omega Panama participated were submitted before it was two years old, despite the fact that Omega Panama had only roughly US$ [redacted] in income generating assets.[83] These facts show that a new entrant to the Panamanian public works construction market could begin bidding and winning projects relatively quickly. They also show that – consistent with Claimants' views – Omega Panama's critical asset was that it was a locally-incorporated company, had a local bank account, and had registered with PanamaCompra. Mr. Lopez, however, testified that registering a new company with the Panamanian government "was easy," and that Omega Panama was able to easily acquire the licenses necessary to "operate as a construction company," "open bank accounts" in Panama, and "build relationships with local subcontractors and suppliers."[84] As such, the cost of entry into the Panamanian construction market would be relatively low for a hypothetical buyer. No buyer would pay millions of dollars to acquire an asset that could be easily and inexpensively replicated in a short period of time.

49. As Dr. Flores opined, the most a hypothetical buyer would be willing to spend is the marginal difference between cash flows a new entrant could expect to generate during a

---

79 Claimants' Memorial ¶ 22.

80 *See* Claimants' Memorial ¶ 32 ("While it carried the Omega name, Omega Panama was a newly registered company without its own track record. This created an issue for Omega Panama when bidding[.]").

81 Panama's Rejoinder on the Merits ¶ 499.

82 Panama's Rejoinder on the Merits ¶ 499.

83 Panama's Rejoinder on the Merits ¶ 499.

84 Tr 1 (López)/186:13 – 187:5.

reasonable ramp-up period versus the cash flows that could be generated by purchasing Omega Panama.[85] Claimants, however, have presented no evidence of what this marginal difference might be. Under the circumstances, if the Tribunal finds that there is treaty liability, the Tribunal should also find that: (a) the value of any losses on future contracts is limited to the value of Omega Panama as a stand-alone entity as of December 23, 2014; (b) Claimants have not met their burden of establishing Omega Panama's stand-alone value as of that date; and (c) Panama has shown that no reasonable buyer would have paid anything of value for Omega Panama.

2. In terms of the value of Omega Panama's existing contracts, apart from any consideration of possible future contracts or the fair market value of Omega Panama (or moral damages claimed by Mr. Rivera), (a) if advance payments had been received as of the Valuation Date, should such payments be discounted as though they were to be received in the future, and (b) what is the basis for including or excluding the addenda relating to Rio Sereno, Kuna Yala, and Puerto Caimito, valued by Respondent as [redacted]

a. The Appropriate Treatment of Advance Payments

50. The Parties disagree on the treatment of advance payments received prior to the valuation date. Claimants submit that these payments must be discounted back to the valuation date because they were going to be credited against future billings.[86] Claimants do not differentiate between payments received – *i.e.*, cash in hand – and future payments that are subject to the risk of non-payment. Instead, Claimants submit that the fact that advance payments will be credited against future billings subjects them to the same risks as future payments.[87]

51. By contrast, Panama has treated advance payments received prior to the valuation date as if they were actually received. In doing so, Panama recognizes that there is a fundamental difference between cash in hand and money owed in the future. Cash in hand is not subject to the same non-payment risks as are future payments. Cash in hand may be invested or used for

85 Second Quadrant Report, pp. 24-25, Figure 3.

86 Tr 5 (Flores)/969:12-18.

87 Second Compass Lexecon Report ¶ 33.

other purposes. Indeed, Mr. Rivera testified – falsely, it appears – that he used advance payments received in Panama to fund non-Omega projects.[88]

52. Claimants' position is incorrect. The fact that the advance payments would be credited against future billings has no bearing on their treatment: "[r]egardless of the intention to use the advances to offset future billings, it is a fact that the advances having occurred at time X, were more valuable than had they been received at time Y. This is the well understood concept of the time-value of money – a dollar today is worth more than a dollar tomorrow."[89] Under Claimants' theory, "the intended artificial accounting that was to be done at some point in the future somehow renders the concept of the time-value of money moot."[90]

53. The value of the advance payments to Claimants was tangible. Claimants were not required to place those funds into an escrow account that could be accessed solely for use on the specific project for which the advance was received. Rather, Claimants could use that money for any purpose, as Mr. Rivera confirmed.[91]

54. Under these circumstances, the only reasonable alternative is to recognize the advance payments at their face value and to make no adjustments to them as of the valuation date. This approach recognizes the time-value of money for payments received prior to the valuation date, the specific value that these payments had for Claimants, and does not artificially subject the advance payments to the same types of risks associated with future payments.

b. The Addenda for the Rio Sereno, Kuna Yala, and Puerto Caimito Projects Should be Excluded

55. Claimants seek to add approximately US$ [redacted] to the amounts owed under existing contracts based on addenda to the Rio Sereno, Kuna Yala, and Puerto Caimito Projects. Those

---

88 *See* Tr 2 (Rivera)/431:20-432:2 (noting the transfer of funds to PR Solutions after receiving the La Chorrera advance payment to fund the Tonosí Promise Purchase Agreement).

89 Second Quadrant Report ¶ 157.

90 Second Quadrant Report ¶ 157.

91 *See* Tr 2 (Rivera)/431:20-432:2 (noting the transfer of funds to PR Solutions after receiving the La Chorrera advance payment to fund the Tonosí Promise Purchase Agreement).

addenda, however, were not endorsed by the Panama's Comptroller General and, as such, did not become a binding obligation of the State.[92]

56. During his testimony, Mr. Zarak discussed the importance of distinguishing between binding obligations of the state and obligations that have not yet crystalized.[93] This distinction is not only important to the budgeting process, but reflects the established administrative structure that governs Panama's public works contracting. Each public works contract, and any addenda or changes thereto, must be endorsed by the Comptroller General's office. As Panama showed, the Comptroller General serves as the final check on contracts, ensuring that they are commercially, technically, financially, and legally sound.[94] An addendum is not valid and does not have the force of law without the Comptroller General's signature.[95]

57. Claimants argue that the Comptroller General's refusal to sign the addenda was the product of targeted harassment and, as such, the Tribunal should declare the addenda to be binding on Panama and include their value in the Tribunal's compensation calculation. That argument is without merit. Claimants have not shown that any such campaign of harassment existed. Dr. Bernard testified that neither he nor anyone else in the Comptroller General's office was asked to take any adverse actions against Claimants' projects.[96] Similarly, Claimants have not produced any evidence supporting their claim that the Comptroller General's delay in signing these addenda was inappropriate. By contrast, however, Panama has clearly demonstrated that each of the Ministry of Health projects was plagued with commercial concerns.[97]

---

92 Witness Statement of Dr. James Bernard ¶ 14 ("Panamanian law provides that the Comptroller General's office must endorse any contract entered into by a governmental ministry, agency, or municipality in order for it to be valid and binding on the parties.").

93 Tr 6 (Zarak)/1163:18-1164:8.

94 Panama's Counter-Memorial ¶ 13; Witness Statement of Dr. James Bernard ¶ 9.

95 *See* Panama's Counter-Memorial ¶ 18; Witness Statement of Dr. James Bernard ¶ 14.

96 Witness Statement of Dr. James Bernard ¶ 15.

97 *See* Panama's Counter-Memorial ¶¶ 47-78; Panama's Rejoinder ¶¶ 234-281.

II. THE TRIBUNAL LACKS JURISDICTION TO DECIDE THE CLAIMS

A. CLAIMANTS' CORRUPTION PRECLUDES TREATY RELIEF

1. Claimants Bribed Panamanian Justice Moncada Luna

58. Panama has met and exceeded its evidentiary burden in proving that Claimants procured the La Chorrera contract through corruption. Panama has established the following critical facts, which demonstrates Claimants' corruption:

- Justice Moncada Luna personally awarded the La Chorrera contract to Omega.[98]
- Historically, the three-person review committee that evaluated bids for Judiciary projects was appointed by the Judiciary's administrative secretary. Here instead, Justice Moncada Luna appointed the review committee for the La Chorrera project.[99]
- The La Chorrera contract entitled Claimants to an advance payment equal to 15% of the contract price.
- The La Chorrera contract was signed on November 22, 2012.[100] The advance payment was issued to Omega Panama on April 3, 2013.[101] Almost immediately thereafter, on April 25, Omega Panama transferred US$ 250,000 to PR Solutions; PR Solutions subsequently transferred US$ 250,000 to Reyna y Asociados, who in turn transferred US$ 125,000 to Sarelan, a company owned and controlled by Justice Moncada Luna.[102] Neither PR Solutions nor Ms. Reyna had sufficient funds in their

---

98 Administrative Resolution No. 092/2012 for determination of the Abbreviated Bid for Best Value No. 2012-0-30-08-AV-004833 dated Oct. 17, 2012 (**R-0006**); La Chorrera Contract No. 150/2012 (**C-0048**)

99 Second Witness Statement of Vielsa Rios dated Nov. 18, 2019 ("**Rios II**") ¶ 5 (As I explained to the prosecutor appointed by the National Assembly, in the years prior to the administration of Justice Moncada Luna, I as the Administrative Secretary of the Court of Justice had the power to form the evaluation commissions. But on his first day in his office as president of the Supreme Court, Moncada Luna called me into his office and informed me that he operated differently and that from now on he would make all the decisions. And in exercising that authority, it was Justice Moncada Luna who appointed the members of the Evaluation Commission for the tender of the La Chorrera Project….").

100 Contract No. 150/2012 (Nov. 22, 2012) (**C-0048**).

101 Payment Table for Contract No. 150/2012 from the Accounting and Finance Department in the Judicial Authority (**R-0007**); Judicial Authority Check Issued to Omega Engineering Inc. (**R-0114**), p. 2.

102 Transfers from Judicial Authority to Sarelan Corp., S.A. (**R-0114**), p. 1. Mr. Pollitt testified that, in his experience, financial institutions would have noted this transfer to have been a "near-immediate" transfer for purposes of their "alert adjudication process for suspicious transactions." Tr 9 (Pollitt)/1904:17 – 1905:1.

accounts to make these transfers without having received the money from Omega Panama.[103]

- On July 10, 2013, Omega Panama received another payment from the Judiciary in relation to the La Chorrera project. On July 12, 2013, Omega Panama transferred US$ 250,000 to PR Solutions, which immediately transferred US$ 250,000 to Ms. Reyna, who then transferred two payments of US$ 75,000 to Sarelan on July 17, 2013 and July 18, 2013.[104]

- Ms. Reyna– a key individual involved in the scheme to acquire the La Chorrera contract and transfer money to Justice Moncada Luna –admitted having facilitated bribes for Justice Moncada Luna on other projects.[105]

- Justice Moncada Luna was charged with corruption, bribery, unjust enrichment, and perjury, and he pled guilty to the charges of unjust enrichment and perjury as part of a plea bargain.[106]

59. An analysis of these facts confirms that no reasonable conclusion other than bribery by the Claimants can be reached.

a. The Timing of Events Demonstrates the Relationship Between the Award of the La Chorrera Contract and the Claimants' Corrupt Payments

60. The evidence shows that, beginning in October 2012, a series of events occurred that facilitated the payment of bribes by Claimants to Justice Moncada Luna. On October 17, 2012, the La Chorrera contract was awarded to Omega.[107] Three weeks later, on November 9, 2012, Sarelan Corporation was incorporated.[108] There is no doubt that Sarelan was owned and controlled by Justice Moncada Luna: his assistant testified that the company was incorporated at Justice Moncada Luna's direction and for his benefit;[109] Justice Moncada Luna owned Sarelan's

---

103 Compilation of Bank Account Statements and Documentation of Transfers from Oscar Rivera to Justice Moncada Luna ("**Flow of Funds Documents**") (**R-0114**), pp. 7-8.

104 Flow of Funds Documents (**R-0114**), p. 12.

105 Public Prosecutor's Interview with Maria Gabriela Reyna dated July 14, 2015 (**C-0089**), pp. 4-14; Public Prosecutor's Interview with Maria Gabriela Reyna and Jorge Enrique Espino Mendez dated July 22, 2015 (**C-0090**), p. 1.

106 Panama's Counter-Memorial ¶¶ 68-175; Panama's Rejoinder ¶ 30.

107 Award Resolution No. 092-DALSA **(C-047**) at 1; First Witness Statement of Vielsa Rios ("**Rios I**") dated Jan. 7, 2019, p. 1

108 Interview with A. Bouche dated Nov.r 28, 2014, **(RP-0002**), p. 2.

109 Interview with A. Bouche dated Nov. 28, 2014, **(RP-0002**), p. 2.

stock certificate and held a Sarelan debit card;[110] and Justice Moncada Luna was seen on video surveillance withdrawing funds from Sarelan's bank accounts.[111]

61. The La Chorrera contract was signed by Justice Moncada Luna on November 22, 2012 and endorsed by the Comptroller General on December 27, 2012.[112] At this point, the contract is valid under Panamanian law. On January 2, 2013, less than a week after the La Chorrera contract was endorsed by the Comptroller General, Punela Development Corporation was incorporated.[113] That corporation, however, was nothing more than a shell and had no employees, no capital, and no bank accounts;[114] it was just a tool that Claimants used to paper over the bribes paid to Justice Moncada Luna with a "legitimate" business transaction.

62. On January 14, 2013, Justice Moncada Luna purchased the PH Santorini apartment.[115] The next day, January 15, Omega received an order to proceed on the La Chorrera contract. The receipt of the order to proceed is significant because, under the contract, it triggered Omega's entitlement to the 15% advance payment.[116]

63. On February 13, 2013, JR Bocas mortgaged the land in Cañas that Claimants argue was to be part of the Tonosí land deal.[117]

64. On April 3, 2013, the Judiciary made an advance payment of US$ [redacted] to Omega for the La Chorrera project.[118] On April 25, 2013, Omega Panama transferred US$ 250,000 to PR Solutions and PR Solutions immediately transferred that same amount to

---

110 Interview with A. Bouche dated Nov. 28, 2014, **(RP-0002**), p. 7; Second Witness Statement of Jorge Villalba dated Nov. 14, 2019, ¶ 7; Interview with A. Bouche dated July 28, 2015 (**RP-0010**), p. 3.

111 Inquiry Resolution No. 4015 dated June 15, 2014 (**RP-0003**), p. 60.

112 Contract 150/2012 **(C-0048**), pp. 5, 11.

113 Corporate Bylaws of Punela Development Corporation dated Jan. 2, 2013 (**C-0077**), p. 1.

114 *See* Tr. 2 (Rivera)/432-436; López I ¶ 90.

115 First Witness Statement of Jorge Enrique Villalba dated January 7, 2019 ("**Villalba I**") ¶ 18.

116 Contract No. 150/2012 (**C-0048**), Art. 5 ("An advance payment of 15% of the total contract value shall be made at the moment of the receiving the respective Notice to Proceed….").

117 Email from Ricardo Ceballos to Ana Graciela Medina, Search of Property 35659 dated July 7, 2015 (**C-0203**).

118 Flow of Funds Documents (**R-0114**). p. 3.

Reyna & Asociados.[119] On May 3, 2013, Reyna & Asociados transferred US$ 125,000 to Sarelan, and on May 23, Sarelan transferred US$ 148,000 through Fundacion Ricala to pay the mortgage on Justice Moncada Luna's PH Ocean Sky apartment.

65. On July 11, the Judiciary made a further payment, of US$ [redacted], to Omega for the La Chorrera project.[120] The next day, Omega Panama transferred US$ 250,000 to PR Solutions and PR Solutions transferred that same amount to Reyna & Asociados.[121] On July 17 and 18, Reyna & Asociados issued two cashier's checks to Sarelan, each in the amount of US$ 75,000.[122] On July 18, Sarelan transferred US$ 130,000 through Summer Venture to pay the mortgage on Justice Moncada Luna's PH Santorini apartment.[123]

66. During the period between Omega Panama's receipt of the advance payment (April 3) and its transfer of the US$ 250,000 to PR Solutions (April 25), Mr. Rivera was scrambling to create a false paper trail to mask this illicit movement of funds.[124] During this period that Mr. Rivera worked to draft and sign the Promise of Purchase and Sale Agreement for the Tonosí land. As the record shows, however, the drafting process was rushed, devoid of any meaningful diligence, and failed to take even the most basic steps to protect Mr. Rivera's interests.[125] Panama submits that it was the delays surrounding the drafting and signing of the Promise of Purchase and Sale agreement that caused the three-week delay between the receipt by Omega of the first advance payment and the initial transfer of funds to PR Solutions. Had that fake land agreement been in place on April 2 (as seems to have been the intent based on the unexecuted addenda and statements made to Panama's investigators),[126] it is likely that the funds would have been transferred to PR Solutions immediately, as was the case with the July 2013 payment.

---

119 Flow of Funds Documents (**R-0114**), pp. 4, 5.

120 Flow of Funds Documents (**R-0114**), p. 13.

121 Flow of Funds Documents (**R-0114**), p. 15.

122 Flow of Funds Documents (**R-0114**), p. 22

123 Expert Report of Roy Pollitt dated Nov. 15, 2019 ("**Pollitt Report**"), p. 47.

124 A discussion of why the Tonosí land transaction was a sham is provided below at Section II.A.2.b.

125 *See generally* Arjona Report, pp. 1-24.

126 Public Prosecutor Interview with Maria Gabriela Reyna López dated June 22, 2015 (**C-0894**), p. 4 (Ms. Reyna testifies that in mid-2012 she met Mr. López and the promissory sales agreement was signed on April 2, 2013, with Punela Development Corporation). National Assembly Interview with Maria Gabriela

67. The timing of these events shows a clear and linear progression between the award of the La Chorrera contract, the creation of the vehicles through which money would be laundered, the manufacture of the fake land transaction, and the flow of funds from the Judiciary to Omega Panama to Justice Moncada Luna. Of course, Claimants have offered no legitimate reason why Omega Panama would transfer funds to Justice Moncada Luna.

b. The La Chorrera Payment Scheme Was Consistent With Other Bribery Schemes Involving Justice Moncada Luna

68. The La Chorrera project was not the only Judiciary project on which Justice Moncada Luna accepted bribes. [127] Panama's investigation of Justice Moncada Luna and his associates showed that Justice Moncada Luna was paid a bribe by Jorge Espino of Conceptos y Espacios, S.A., the contractor chosen to construct the Maritime Courthouse during the same period as the Omega Panama project.[128] Mr. Espino admitted to Panamanian authorities that he paid at least two bribes to secure the Maritime contract and confirmed that the bribes were paid with money received from the advance payment issued by the Judiciary on that project.[129]

69. Nicolas Corcione had direct involvement in arranging the bribery schemes for both the Maritime and La Chorrera matters and also was the developer of the PH Santorini and PH Ocean Sky apartments purchased and subsequently forfeited as part of Justice Moncada Luna's plea deal.[130] In the Maritime project, Mr. Corcione's company was the other bidder on the project and Mr. Corcione coordinated with Mr. Espino to ensure Mr. Espino won the project.[131]

Reyna López dated Jan. 27, 2015 (**R-0139**), p. 20 ("This Promissory Sales Contract is dated April 2, 2013, signed between María Gabriela Reyna López and…."); National Assembly interview with Frankie López dated Jan. 29, 2015 (**C-0888**), p. 5-6 ("The Promissory Sale agreement, dated April 2, 2013, did not see the need to notarize it, take it before a notary public.").

127 . Direct Presentation of Roy Pollitt, slide 8.

128 Pollitt Report p. 24; Addendum to Inquiry Statement of Jorge Enrique Espino Mendez dated July 16, 2015 (**RP-0026**), pp. 3-4; Public Prosecutor Resolution No. 40-15 dated June 15, 2015 (**RP-0003**), p. 18-19, 30, 60, 63, 73-74.

129 Pollitt Report p. 24; Addendum to Inquiry Statement of Jorge Enrique Espino Mendez dated July 16, 2015 (**RP-0026**), pp. 3-4.

130 Pollitt Report, p. 24; National Assembly Interview with Nicolas Corcione dated Oct. 15, 2014 (**C-0897**), p. 1 (HEBE Corporation was the developer of the Ocean Sky Project – Mr. Corcione was the president and legal representative of the company).

131 Addendum to Inquiry Statement of Jorge Enrique Espino Mendez dated July 16, 2015 (**RP-0026**), at 2; Tr 8 (Pollitt)//1768.

Further, Mr. Espino admitted that Mr. Corcione introduced him to Ms. Reyna to handle transfer of the bribes.[132] He also put Mr. Rivera in touch with Ms. Reyna to handle his bribes and to fabricate the purported Tonosí land deal.[133]

70. In both cases, the contractors used Ms. Reyna – a confessed money launderer – as a conduit to pass the bribe money;[134] the evidence shows that Mr. Corcione was instrumental in connecting both Mr. Espino and Mr. Rivera with Ms. Reyna for that purpose.[135] In both cases, JR Bocas (the purported seller in the Tonosí land deal) was involved to act as a "legitimate" actor.[136] And, in both cases, the bribe-paying contractors funneled money through a series of cut-outs and into shell companies that was set up by and for the benefit of Justice Moncada Luna.[137]

---

132 Pollitt Report p. 24; Addendum to Inquiry Statement of Jorge Enrique Espino Mendez dated July 16, 2015 (**RP-0026**), at 3 (admitting that Mr. Corcione sent him to Ms. Reyna to justify the bribe).

133 Public Prosecutor Interview with Maria Gabriela Reyna López dated July 14, 2015 (**C-0089**), p. 3-4 (stating that in mid-2012, Mr. Corcione referred her to Omega Engineering allegedly for the sale of a piece of property owned by JR Bocas); Tr. 8 (Pollitt)/1766.

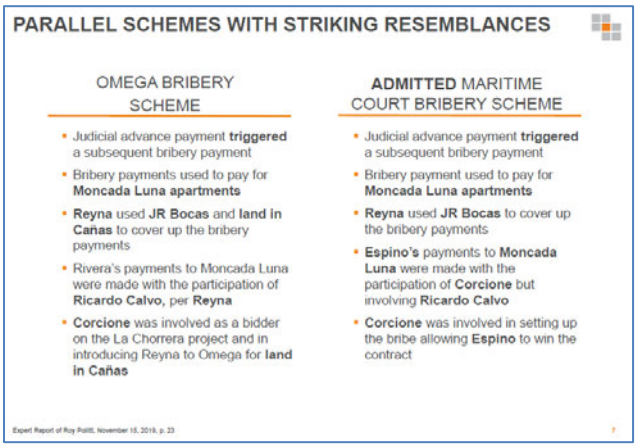
134 Tr 8 (Jimenez)/1651:9-13 ("Q: Okay. And you agree that Ms. Reyna appears to be a money launderer by profession, perhaps among other things? A: Ms. Reyna was involved with transactions that seemed to have had a purpose to launder money. I don't know if that was her sole profession, but she did certainly have some connections to individuals who were involved in admitted bribery schemes.").

135 Pollitt Report p. 24; Addendum to Inquiry Statement of Jorge Enrique Espino Mendez dated July 16, 2015 (**RP-0026**), at 3. Tr 8 (Pollitt)/1827 ("[M]r. Corcione arranged the bribe on the other judicial Contract payment then he was involved in this one, too. Then he was involved in the land deal in Cañas….").

136 Pollitt Report, p. 24; National Assembly Interview of Maria Gabriela Reyna dated July 14, 2015 (**C-0089**), p. 4. Tr. 8 (Pollitt)/1767 ("Reyna used JR Bocas and the land in Cañas to cover up the bribery. Renya used JR Bocas to cover up the bribery of payments on Conceptos for Mr. Espino.").

137 Pollitt Report, p. 24; Public Prosecutor Resolution No. 40-15 dated June 15, 2015 (**RP-0003**), p. 18-19, 30, 60, 63, 73-74.

71. Mr. Pollitt highlighted these similarities in his opening statement at the hearing.[138]



72. As Mr. Pollitt explained in his report, "[t]hese similarities are too remarkable to pass as merely coincidence; in fact, this other case makes the Claimants' claim that the fact that Omega Panama's payments ended up in Justice Moncada Luna's wallet was 'sheer happenstance' simply unbelievable."[139]

2. Claimants Have Not Presented Any Credible Defenses to Panama's Claims of Corruption

73. Claimants have raised three principal defenses against Panama's claim of corruption, none of which are persuasive, or even credible: (a) no direct evidence of intent; (b) the money was to be used for the Tonosí land deal; and (c) Panama cannot prove that the precise dollars paid by the Judiciary were used to pay Justice Moncada Luna.

a. The Totality of the Evidence Shows Claimants' Intent to Bribe Justice Moncada Luna

74. *First*, Claimants argue that there are no emails, documents, or communications among Mr. Rivera, Justice Moncada Luna, or Ms. Reyna documenting their illegal activities and, as such, there is no direct evidence of intent to commit a crime.[140] The absence of such direct communications is neither surprising nor fatal to a charge of corruption. Ms. Jimenez,

---

138 Direct Presentation of Roy Pollitt, slide 8.

139 Pollitt Report p. 23 (quoting Claimants' Reply on the Merits ¶ 8).

140 Claimants' Rejoinder ¶ 26.

Claimants' corruption expert, acknowledged that it is common for evidence of this nature to be missing in money laundering and corruption investigations.[141] It is equally as common for persons accused of committing these acts to refuse to testify and to lie when questioned.[142]

75. Mr. Pollitt, Panama's corruption expert, similarly explained that "direct communication between the two central parties in a bribery scheme is not always present; involved parties, like the ones discussed in this report, frequently use middlemen and intermediaries, who serve to both deliver messages and obfuscate the flow of funds."[143] As such, intent can be inferred from the actions of the parties and the totality of the circumstances.

76. Here, the timeline and sequence of events described above shows the clear link between the award of the La Chorrera contract, payments by the Judiciary, and the illicit transfer of funds to Justice Moncada Luna. Mr. Pollitt further explained that the "middleman in the Omega Panama flow of funds have varied and layered ties to Justice Moncada Luna and the properties in question, as well as to another admitted embezzlement scheme involving many of the same players."[144] Further, "[t]he quid pro quo in question, while not explicitly drawn out in either Report, is implied given that the contract in question was directly authorized by Justice Moncada Luna himself" and "his influence on the process is inherent to that role."[145] In addition, the admissions by Ms. Reyna and others "in the scheme involving the other construction firm–with its uncanny similarities to the Omega Panama scheme–provide additional support for the conclusion that Justice Moncada Luna received payments in exchange for awarding the La Chorrera contract to Omega Panama."[146]

77. Intent also can be inferred from the deceptive and implausible nature of Mr. Rivera's testimony. For example, despite evidence of the connections between Mr. Rivera, Mr. Corcione, and Ms. Reyna, Mr. Rivera denies knowing that Ms. Reyna held money for multiple projects that

---

141 Tr 8 (Jimenez)/1687:12-15.

142 Tr 8 (Jimenez)/1687:17 – 1688:7.

143 Pollitt Report, p. 33.

144 Pollitt Report, p. 33.

145 Pollitt Report, p. 32.

146 Pollitt Report, p. 32.

were involved in bribery schemes with Justice Moncada Luna.[147] Similarly, despite evidence that Roberto Samaniego served as an engineer on both the Maritime courthouse project and the La Chorrera project – both of which involved the payments of bribes to Justice Moncada Luna – Mr. Rivera denied that Mr. Samaniego had any connection to Omega or the La Chorrera project.[148] And, in response to testimony from Ms. Reyna that Mr. Corcione referred Omega to her as a buyer for the Tonosí property and set up a meeting between her and Mr. Lopez regarding the transaction, Mr. Rivera stated, "[y]eah, I saw that . . . and I don't know why she says that."[149] Instead, Mr. Rivera claims that he received unsolicited information about the Tonosí land from Ms. Reyna, visited the property without ever speaking with her, determined the price that he would pay without speaking (or having anyone speak on his behalf) to Ms. Reyna or the seller, forbade Mr. Lopez from negotiating a reduced price, insisted that the transaction be papered quickly without any clear reason given, allowed the transaction to be papered with a woefully inadequate contract, and did nothing to force the deal to close or to recover his down payment for seven-and-a-half years.[150]

78. Claimants' position is that Mr. Rivera was an innocent dupe, and that everyone else is lying. Even though Ms. Reyna and others admitted to wrongdoing in official investigations when making their statements, thus lending significant credibility to those statements, Claimants argue that these connections were mere happenstance or coincidence.[151]

147 Tr. 2 (Rivera)/496:22 – 497:14; Tr. 7 (Douglas)/1729:16 – 1730:7.

148 Tr. 2 (Rivera)/495:21 – 498:20; Tr 7 (Douglas)/1733:4 – 1734:1. *See also* Interview with Ana Bouche dated July 28, 2015 (**RP-0010**), p. 12.

149 Tr. 2 (Rivera)/501:1-7; Tr 7 (Douglas)/1737:15-20.

150 Tr 2 (Rivera)/450:15 – 451:7; 451-13 – 453:19. *See* Tr 9 (Douglas)/1740:15-18.

151 Claimants' Reply ¶ 8; Claimants' Rejoinder ¶ 30.

b. The Tonosí Land Deal was a Sham

79. Claimants argue that US$ 500,000 was transferred from Omega Panama to PR Solutions and onto Ms. Reyna as a deposit on the purported Tonosí land deal. Panama has established in its written submissions why this argument fails and why the Tonosí land deal was a sham.[152]

80. Aside from the uncorroborated – and internally inconsistent – testimony of Mr. Rivera and Mr. Lopez, the only materials presented by Claimants to support the legitimacy of the Tonosí land deal were the Promise of Purchase and Sale Agreement and an unexecuted addendum.[153] Those materials, however, are replete with holes and raise more questions than they answer. Professor Douglas summarized the red flags in these materials during his questioning of Ms. Jimenez:

- "First of all, we know that [the Promise of Purchase and Sale Agreement is] not dated, but we do note that the Addendum refers to the Contract as being dated the 2nd of April, but we know that can't possibly be the date of the actual contract."[154]
- "We know that title never passed under the Contract, so that it was never completed."[155]
- "We know that it was never registered in the land recorder."[156]
- "We know that, until about a month ago, no action had been taken to recover that money, and that was 7.5 years ago, roughly that the Contract was signed."[157]
- "It looks like a 50 percent down payment was made before the Contract was signed."[158]

---

152 Panama does not intend to repeat its arguments in their entirety here. For a full discussion of the problems with the Tonosí land deal, *see* Panama's Counter-Memorial ¶¶ 24, 296; Panama's Rejoinder ¶¶ 35-61; *see generally* Expert Report of Adan Arnulfo Arjona L. dated Nov. 13, 2019.

153 Promise of Purchase and Sale Agreement (**C-0078**); Addendum to the Promise of Purchase and Sale Agreement (**C-0374**); Expert Report of Jose A. Troyano dated Jan. 17, 2020, ¶ 47; Tr 7 (Troyano)/1418:19-21 ("I explained in my Report that [the Addendum] has no legal value because it was not signed by both Parties. So, there was no agreement between the Parties.").

154 Tr 9 (Douglas)/1740:6-9.

155 Tr 9 (Douglas)/1740:11-12.

156 Tr 9 (Douglas)/1740:13-14.

157 Tr 9 (Douglas)/1740:15-18.

158 Tr 9 (Douglas)/1740:19.

- "We know that the property was sold for $30,000 in – five years before this transaction and it increased the – the amount increased to $1 million.[159]

- "We know that it was encumbered and, at least as of 2015, no efforts had been made to remove that mortgage."[160]

- "We know that the Company that signed the Contract of behalf of Mr. Rivera's interests was created in January 2013; and, if I am not mistaken, there was no record of Mr. Rivera being a shareholder on the Public Registry. So, in other words, it was not possible to see who was actually behind the transaction, if he, indeed, was behind the transaction."[161]

81. We also know that there was a material discrepancy in the price of the property in the Promise of Purchase and Sale Agreement, the signatures were not validated, the seller did not provide the board resolutions necessary for a corporation to sell an asset, and no escrow account was set up for the funds to be used in the transaction.[162]

82. Claimants have no answer to these many flaws. Indeed, Claimants' efforts to validate the Tonosí land transaction are problematic in three principal respects.

83. *First*, Claimants have done nothing to address the red flags surrounding the manner in which the Tonosí land deal arose and was handled. While Mr. Rivera insists that this was an ordinary land transaction, the evidence shows that Mr. Rivera received information about the Tonosí land unsolicited from Ms. Reyna and that Ms. Reyna had been directed to Omega by Nicolas Corcione (an admitted criminal and another bidder on the La Chorrera project).[163] Mr. Rivera claims to have then visited the property without telling Ms. Reyna or seeking permission from the owner to enter the property. After deciding that he was interested in the property, he did not communicate with Ms. Reyna and did not negotiate with the seller to arrive at the purported US$ 1 million purchase price.[164] Mr. Lopez testified that Mr. Rivera would not allow him to negotiate a price reduction and that he was eager to pay this price because land values in

---

159 Tr 9 (Douglas)/1741:1-3.

160 Tr 9 (Douglas)/ 1741:4-6.

161 Tr 9 (Douglas)/1741:7-14.

162 Panama's Rejoinder ¶¶ 42-46.

163 *See* Pollitt Report, p. 25.

164 Tr 2 (Rivera)/450:15 – 451:7; 451-13 – 453:19.

the Tonosí area were increasing.[165] Claimants' real estate expert, however, testified that land prices in that area had been stable between 2008, when the property sold for US$ 30,000, and 2013, when Mr. Rivera was willing to pay US$ 1 million for the land.[166]

84. In addition, Claimants have no answer for the fact that key individuals involved in the Tonosí land transaction are admitted criminals with a history of facilitating bribes for Justice Moncada Luna, or that the suspect payments were made immediately after Omega Panama received payments relating to the La Chorrera project. In their Reply on the Merits, Claimants chalk this up to "sheer happenstance."[167] Mr. Lopez testified that he "ended up coinciding at a number of meetings" with Mr. Corcione but had no relationship with him.[168] And, although Ms. Jimenez acknowledges that "real estate has been used to launder[] funds,"[169] she suggests that all of these connections are simply a series of coincidences.[170] The inconsistencies in Claimants' testimony, implausibility of their claims of coincidence, and their inability to explain these red flags undermine any claim that the Tonosí land deal was legitimate.

85. *Second*, Justice Troyano's expert opinion and oral testimony are largely irrelevant. Justice Troyano ignored the red flags in the record and instead either tried to excuse any

---

165 *See* López I ¶ 90; Tr 2 (López)/322:3-16.

166 Tr 6 (Ponce)/1362:1-5 ("It is not a volatile market in that region. So, prices in the region has not changed drastically between 2009 and 2014."). Mr. Ponce testified that there were often jumps in values when land was sold to different types of purchasers. For example, the same piece of land would be valued differently if it was sold to a cattle farmer, an individual for personal use, or a developer for commercial use. Tr. 6 (Ponce) 1315:19-1316:17. There also could be a difference in prices when the properties were sold from a Panamanian to a foreign purchaser. *See* Tr 6 (Ponce)/1374:3-6. Those pricing differentials would not apply here. The land was owned by JR Bocas, a US company and was being sold to a US purchaser for commercial purposes.

167 Claimants' Reply ¶ 8.

168 Tr 2 (López)/331:5-10.

169 Tr 8 (Jimenez)/1741:19 – 1742:1.

170 Jimenez Report p. 10 ("The Reports incorrectly conclude, based on faulty bank transaction analyses, that the coincidence of using the same real estate attorney is the basis for a causal connection."); Tr 8 (Jimenez)/1654:13-17; 1682:3-15 (WEISBURG: It's coincidental that $500,000-and-change came in from the Judiciary and, bang, next minute $250- of that was deposited and then $250,000 went out to PR Solutions; its coincidental . . . . JIMENEZ: My position is, yes, there was $8 million in the account prior to that deposit. So, in my opinion, yes, its coincidental."); Tr 8 (Jimenez)/1732:6-14 ("DOUGLAS: Right. So are we more – are we on safer ground if we say that the fact that this money from PR solutions ended up in Ms. Reyna's bank account, that's – we are more – on safer ground if we say that's a coincidence, rather than the third instance in the same pattern, on the evidence that you're seeing. THE WITNESS: I would say yes, that's correct.").

problems with the Promise of Purchase and Sale Agreement or explain how those problems did not render the contract illegal under Panamanian law.[171] Panama has not asserted, with respect to the Promise of Purchase and Sale Agreement, that the technical requirements of a legal contract under Panamanian law – *i.e.*, it is in writing, sets forth the price, specifies the terms of sale, and identifies the property to be sold – were not met. Thus, Justice Troyano's opinion neither responds to the expert opinion submitted by Justice Arjona nor addresses the core of Panama's allegations, which is that the many red flags associated with the Promise of Purchase and Sale Agreement call into question the legitimacy of the underlying transaction.

86. Moreover, Justice Troyano's efforts to excuse the defects in the Promise of Purchase and Sale Agreement are ineffective. For example, Justice Troyano stated that the price of the property was evidenced by the parties' conduct.[172] In his view, "we must interpret and conclude that the payments and contributions made are a determining factor in establishing the price agreed upon in the contract;"[173] and, "if one takes into account through subsequent actions the intent of the contracting parties merged, and that each of them acted according to what they actually understood, the typographical error becomes irrelevant, since it is corrected by the intent of the parties."[174] That, of course, is entirely incorrect. The Promise of Purchase and Sale Agreement provided for a US$ 500,000 down payment. The discrepancy was whether the balance of payments on the property was US$ 500,000 or US$ 750,000. While the down payment was purportedly made, no effort was made to ever pay the balance. As such, there is no conduct that could resolve the price discrepancy in the Promise of Purchase and Sale Agreement.

87. The same problems exist with Justice Troyano's claim that the date of the Promise of Purchase and Sale Agreement could be determined through the parties' conduct. There is nothing in the record that would definitively show when the Promise of Purchase and Sale Agreement was signed. The Addendum says that it was signed on April 2.[175] Mr. Lopez

---

171 Troyano Report ¶¶ 54-115; Tr 7 (Troyano)/1399:17 – 1400:6.

172 Troyano Report ¶¶ 95-96.

173 Troyano Report ¶ 95.

174 Troyano Report ¶ 96.

175 Addendum to the Promise of Purchase and Sale Agreement (**C-0374**), p. 1.

testified that it was signed a few days after April 25.[176] Other testimony suggests that it was signed on April 25.[177] Despite this ambiguity, Justice Troyano was confident in his opinion that the lack of a clear date on the Promise of Purchase and Sale Agreement was not problematic in any respect. Experts are supposed to provide their independent opinions, not act as apologists for the party that engaged them. Justice Troyano either failed to realize or ignored the significance of these issues when forming his opinion. In either case, his treatment of these issues undermines the credibility of his opinions more broadly.

88. *Third*, Claimants' real estate expert could not justify the US$ 1 million price that Mr. Rivera was supposedly willing to pay for the Tonosí land. Instead, Mr. Ponce presented valuations based almost exclusively on asking prices.[178] When challenged on this point, Mr. Ponce submitted three heavily redacted agreements that purport to show closed transactions.[179] Those agreements, however, were not provided in full, are incomplete, and are missing critical data that Mr. Ponce could not provide during his oral testimony.[180] Consequently, neither Panama nor the Tribunal can assess the relevance of these agreements or the comparability of those transactions to the Tonosí land deal. And his testimony that "prices in the region had not changed drastically between 2009 and 2014" casts further doubt on the legitimacy of the alleged US$ 1 million price for the property in 2013 when it sold in 2008 for US$ 30,000.[181]

89. Under the circumstances, Claimants have not met their burden of proving that the Tonosí land deal was legitimate. Panama, by contrast, has provided evidence showing that this transaction was a sham.

---

176 Tr 1 (López)/311:6-7.

177 *See* Tr 2 (Rivera)/466:1-11.

178 *See* Ponce and Chong Report, pp. 25-27 ("Comparables" B, C and D).

179 *See* Promise of Purchase and Sale Agreement dated Approx. 2009-2014 (**C-0920**); Private Promise of Purchase and Sale Agreement dated approx. 2009-2014 (**C-0921**); Promise of Purchase and Sale Agreement dated 2009 (**C-0922**).

180 Tr 6 (Ponce)/1348-1353, 1357-1361.

181 Tr 6 (Ponce)/1362 ("[T]he market itself, it's slow. It is not a volatile market in the region. So, prices in the region had not changed drastically between 2009 and 2014.").

c. The Source of Money Paid to Justice Moncada Luna is Clear

90. During her testimony, Mr. Jimenez went to great lengths to argue that Panama could not show that an individual dollar transferred from Omega Panama to PR Solutions was the same dollar used by Justice Moncada Luna to pay the mortgage on his apartments. Indeed, during her direct presentation, Ms. Jimenez illustrated her point with a series of slides discussing the movement of pies among neighbors.[182] While possibly amusing, her argument is wrong.

91. With respect to the April 2013 payment described above, Panama showed that, prior to the receipt of the US$ [redacted] advance payment from the Judiciary, Omega Panama had only US$ [redacted] in its account.[183] Panama further showed that, between April 3 (when the advance payment was received) and April 25 (when the US$ 250,000 was transferred to PR Solutions, Omega Panama made only two deposits in the account totaling US$ [redacted].[184] Thus, as Ms. Jimenez acknowledged on cross-examination, Omega Panama lacked the funds to make a US$ 250,000 transfer to PR Solutions without the advance payment from the Judiciary.[185]

92. Panama similarly showed that, prior to the deposit of US$ 250,000 from Omega Panama, PR Solutions had only US$ [redacted] in its account.[186] That money was transferred from PR Solutions to Reyna & Asociados on the same day and without PR Solutions having first received any other material deposits.[187]

93. Panama also showed that, prior to the receipt of the US$ 250,000 from PR Solutions, there was only US$ 1,852 in the Reyna & Asociados account.[188] The record further proves that

---

182 Tr 8 (Jimenez)/1613-1617.

183 Flow of Funds Documents (**R-0114**), p. 3; Omega Bank Transaction History (**C-0422**), p. 19.

184 Tr 8 (Jimenez)/1644-1645.

185 Tr 8 (Jimenez)/1647:20 – 1648:6 ("Q: Looking at this account, but for the deposit received from the Judiciary, there was not enough – there was insufficient funds – and accepting that he never tapped into any overdraft facility that there may have been with respect to this account, [redacted] is not enough to write a check for $250,000, correct? A: Yes. I would agree with your math that [redacted] than $250,000.").

186 Pollitt Report p. 13; Aguirre Report (**R-0063**), p. 14.

187 Pollitt Report; p. 13; Tr 8 (Jimenez)/Tr. 1649:20 – 1650:19.

188 Pollitt Report p. 13; Reyna y Asociados Bank Transaction History **(C-0421-SPA)**; Tr 8 (Jimenez)/1655:9-10.

Reyna did not receive any other material deposits before funds were transferred to Sarelan.[189]

94. With respect to the July payments, Panama similarly showed that money was moved from Omega Panama's account to PR Solutions within a period of 24 hours and without having received any further deposits.[190] At the time that PR Solutions transferred the money to Reyna & Asociados, Ms. Reyna had only US$ 37,420 in her account.[191] Reyna & Asociados received no material deposits between the date it received the US$ 250,000 from PR Solutions and the date that it transferred two cashier's check totaling US$ 150,000 to Sarelan.[192]

95. Despite the clarity of this record, Claimants (through Ms. Jimemez) attempt to cast doubt on these facts by arguing that there are uncertainties as to how the relevant banks post their debits and credits. Panama, however, was able to show that the transactions were not recorded in size order and were not recorded based on a deposit-first or debit-first basis.[193] Rather, the records show that they were recorded chronologically. Ms. Jimenez, however, would not accept this point. Indeed, in response to a question by Mr. Shore, Ms. Jimenez refused to offer an opinion as to how the banks likely worked based either on her experience or on the bank records in evidence.[194] Her refusal to consider the record from an objective perspective is neither helpful to the Tribunal nor consistent with the role of an independent expert.

3. Dismissal of this Case Is Required on Grounds of Corruption

a. The Claimants' Corruption Deprived Them of Protections under the BIT and TPA

96. It is undisputed between the parties that corruption and illegal acts by an investor deprive the investor of treaty protections and the tribunal of its jurisdiction to arbitrate a treaty claim.[195] That is why, for example, the *World Duty Free* tribunal held that "claims based on contracts of

189 Flow of Funds Documents (**R-0114**), p. 10.

190 Pollitt Report p. 14.

191 Pollitt Report p. 14; Reyna y Asociados Bank Transaction History **(C-0421-SPA).**

192 Pollitt Report p. 14; Reyna y Asociados Bank Transaction History **(C-0421-SPA).**

193 Tr. 9 (Pollitt)/1898.

194 Tr 8 (Jimenez)/Tr. 1661:5 – 1663:22.

195 Panama's Reply in Support of Preliminary Objections ¶ 67; Claimants Reply ¶ 292.

corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal."[196] Similarly, the tribunal in *Hamester v. Ghana* held that, "an investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention."[197]

97. Claimants procured the La Chorrera contract through corruption – the facts do not support any other reasonable conclusion. At a minimum, all claims relating to the La Chorrera project and all claims relating to the criminal investigation into Claimants corrupt activities should be dismissed. As a consequence, Claimants' entire claim must be dismissed. As Panama showed in its Reply in Support of Panama's Preliminary Objections, Panama need not make separate allegations of corruption as to each contract at issue in this arbitration.[198] All of the contracts signed by Claimants (with the exception of the Ministry of Colon project) contained an express requirement that Claimants had not violated and were not in violation of any Panamanian law.[199] Claimants had to meet this requirement at the time they procured a contract and ensure they were in compliance with it through the completion of the works. Corruption is illegal in Panama. Claimants, therefore, violated this requirement and unlawfully procured each contract entered into after the La Chorrera contract, and were in material breach of each contract entered into prior to the La Chorrera contract by virtue of having paid bribes to Justice Moncada Luna. As the *Hamester* tribunal held, such illegal conduct strips an investor of its protections under an investment treaty. This is true regardless of whether the corrupt and illegal activities occurred as a means of procuring an investment or after an investment was in operation.

---

196 *World Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. Arb/007, Award (October 4, 2006) (**RL-0003**) ¶ 57.

197 *Gustav F.W. Hamester GmbH & Co. KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award (June 18, 2010) (**RL-0006**) ¶¶ 123. A full discussion of the case law on this point is provided in Panama's Reply in Support of Preliminary Objections ¶¶ 67-74.

198 Panama's Reply in Support of Preliminary Objections ¶¶ 63-74, 80-81.

199 La Chorrera Contract (**C-0048**), Art. 14; Municipality of Panama Contract 857-2013 (**C-0056**), Art. 21; MINSA CAPSI, Rio Sereno Contract No. 077 (**C-0028**), Arts. 18, 80; MINSA CAPSI, Kuna Yala Contract No. 083 (**C-0030**), Arts. 18, 80; MINSA CAPSI, Puerto Caimito Contract No. 085 (**C-0031**), Arts. 18, 80; Ministry of the Presidency, Contract 043 (**C-0034**), Cl. 85.11; *see* Ministry of Colón Contract No. 01-13 (**C-0051**), Art. 8.

98. Neither the BIT nor the TPA contain language imposing temporal restrictions on the range of illegal conduct a tribunal can consider for jurisdictional purposes. As Panama explained in its Reply in Support of Preliminary Objections, a number of treaties include language stating that an investment will be protected only if it is procured in accordance with domestic an international law. Where a treaty is silent, however, (like the BIT and TPA), a tribunal should not impose its own limits onto the parties. The Tribunal, therefore, is free to consider – and deny jurisdiction based upon – any and all of Claimants' corrupt acts. Ultimately, such considerations should lead the Tribunal to dismiss all of Claimants' claims.

99. Alternatively, the Tribunal should find that Claimants' corrupt acts render Claimants' claims inadmissible. As Panama explained in its prior submissions, a number of tribunals have dismissed claims as inadmissible when they found that the claims involved corrupt activities by the claimant, regardless of whether the corrupt activities occurred prior to or after the investment.[200] For example, the tribunal in *Churchill Mining v. Indonesia* held that the claimants' fraud and forgeries committed to obtain four mining contracts were "essential to the making and conduct of the investment" and were, thus, "inadmissible as a matter of international public policy."[201]

B. CLAIMANTS HAVE ASSERTED COMMERCIAL CLAIMS THAT ARE NOT PROTECTED UNDER THE BIT OR THE TPA

1. Panama Has Established the Commercial Nature of the Claims

100. International investment law is not a wholesale substitute for the domestic law of a host country, and ICSID is not a forum to resolve commercial disputes between a state and a foreign investor. Investors, therefore, cannot convert commercial claims into treaty disputes by making unsubstantiated allegations of sovereign intent. Tribunals must be alert to such tactics and examine the essence of the claims presented to determine whether they commercial or sovereign in nature.[202]

---

200 *See* Panama's Reply in Support of Preliminary Objections ¶¶ 75-81.

201 *Churchill Mining PLC and Planet Mining Pty Ltd. v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award (December 6, 2016) (**RL-0010**) ¶ 507-508, 528.

202 *See Parkerings v. Lithuania* (**CL-0041**), ¶ 443.

101. Claimants have presented a series of commercial claims that, by their own admission, arise out of Panama's alleged refusal to pay the investors' invoices, wrongful termination of the Ciudad de las Artes contract, and failure to provide required permits and change orders.[203] There is nothing inherently sovereign about these actions, particularly when a state entity is acting as a counterparty to a commercial contract.

102. In its submissions and through its witnesses, Panama has demonstrated the commercial nature of the problems affecting each of Claimants' projects.[204] For example, Claimants' main complaints regarding the MINSA CAPSI projects are that Panama failed to timely pay invoices and that contract addenda were either denied or returned by the Comptroller General's office so that errors could be corrected or additional information provided.[205] Claimants admit that these issues occurred under both the Martinelli and Varela administrations,[206] and Panama showed that the reasons underlying the Comptroller General's refusal to pay invoices or to approve contract addenda were virtually identical under both administrations.[207] Claimants do not take issue with the Comptroller's actions during the Martinelli administration, as they consider them to be part of the normal administration of a contraction contract.[208] Nevertheless, Claimants argue that the same actions taken during the Varela administration were done for political reasons and, thus, violate the BIT and TPA.[209]

103. Similarly, Panama showed that Claimants' performance on the Ciudad de las Artes project deteriorated significantly in the summer of 2014.[210] As Ms. Buendia testified, Claimants' principal subcontractor quit, which left the project grossly understaffed and resulted in decreased

---

203 Request for Arbitration ¶¶ 2, 4, 20-29, 32-34; 70 Claimants' Memorial ¶¶ 3, 4, 43-44, 46, 70; Rivera ¶¶ 70, 73, 118, 120; Claimants' Reply ¶¶ 5, 145, 175, 204, 206, 208; López ¶¶ 100, 105, 108, 130.

204 Panama's Counter-Memorial ¶¶ 214-227; Panama's Rejoinder ¶¶ 82-147.

205 Claimants' Memorial ¶¶ 74-76, 84-86; Claimants' Reply ¶¶ 119-123. 148-155.

206 Claimants' Memorial ¶¶ 56, 58; Claimants' Reply ¶ 42.

207 *See, e.g.*, Panama's Counter-Memorial ¶¶ 75-76; Panama's Rejoinder ¶¶ 235-255.

208 Claimants' Memorial ¶ 56 ("The Ministry of Health was often late in issuing its CNOs [.]"); Claimants' Memorial ¶ 58 (Delays under the Martinelli Administration "were nothing out of the ordinary in the construction industry[.]"); Claimants' Reply ¶ 42 ("[T]he Omega Consortium faced regular course-of-business delays and other challenges that are typical for big construction projects.").

209 Claimants' Memorial ¶¶ 147-151; Claimants' Reply, Sect. VIII.A-B, D.

210 Panama's Counter-Memorial ¶¶ 95-106; Panama's Rejoinder ¶¶ 307-325.

performance.[211] Claimants refused to increase staffing because of delays in paying their invoices.[212] Ms. Buendia testified that such delays are common on public works projects in Panama.[213] And Mr. Lopez testified on cross-examination that Claimants had no contractual right to refuse to properly staff the project because of payment delays.[214] Claimants' refusal to meet their contractual obligations and failure to progress the works ultimately caused INAC to terminate them for default and to call on Claimants' performance bond in order to have the project completed.[215] This was a reasonable and legitimate response by an owner to a contractor's failures.

104. On the La Chorrera project, Panama showed that Claimants' invoices were routinely paid and that the Judiciary routinely granted Claimants additional time to complete their works.[216] Despite this, Claimants abandoned their works, as is evidenced by the fact that no virtually no progress was made from October 2014 through early 2015.[217]

105. Panama has shown the commercial nature of the problems and the commercial justification for its actions in all of Claimants' projects.[218] In response, Claimants argue that these commercial actions were taken with sovereign intent or, alternatively, constitute sovereign acts in-and-of themselves.[219] The Tribunal challenged Claimants' position during the hearing. During the first week of hearings, Professor Douglas asked: "[i]f it turns out that there's a contractual justification for refusing to sign a change order, is that a complete answer to the Claim, or is there something else that might attract the responsibility of the State, even if it's

---

211 Buendía ¶ 7.

212 *See* Letter from Omega to Sosa dated Sept. 5, 2014 (**R-0045**).

213 *See* Buendía ¶ 18.

214 Tr 2 (López)/299:16-20.

215 *See* Resolution No. 391-14 DG-DAJ dated Dec. 23, 2014 (**C-0044**).

216 Panama's Counter-Memorial ¶¶ 19-45.

217 *See* Panama's Counter-Memorial ¶¶ 34-42; Panama's Rejoinder ¶¶ 290-294.

218 The facts and evidence supporting Panama's position have been laid out in its prior submissions and will not be repeated here. For a full discussion of these facts, *see* Panama's Counter-Memorial ¶¶ 19-155; Panama's Rejoinder ¶¶ 84-126; 203-424. *See also* Sections III.B.2 – III.B.4 below for a discussion of the testimony provided by Panama's witnesses in relation to the Ciudad de las Artes Projects, the Municipality of Panama market projects, and the Ministry of Health projects.

219 Claimants' Reply ¶¶ 127-128.

within its contractual rights?"[220] Claimants' counsel responded that, "it depends on how this is being done . . . . I think it – when it's done through refusing to sign change orders that are within a Government agency, then you have something that is very sovereign happening. It is not just contractual at that point."[221]

106. Under Claimants' theory, an action by the government is considered sovereign simply and solely because the government has taken it. In other words, any refusal by a government agency to sign an addendum, change order, request for payment, or extension of a contract would be a sovereign act just because it was done by a state agency. Claimants' position is clearly wrong, as it fails to recognize the well-settled principle that states can act as commercial actors and, thus, not all state actions are inherently sovereign.[222] For example, a government agency that has a legitimate commercial reason to terminate a contract does not act in a sovereign manner simply because the law requires that agency to effectuate the termination through the issuance of a formal decree. Similarly, a government agency that has a legitimate basis for reducing the budget for a project will not be subject to international liability because the regulatory process requires that the money be removed from the national budget. Form does not outweigh substance; the nature of an act is dictated by the commercial and contractual reasons underlying the agencies' decisions.[223]

107. Claimants bear the burden of showing that each action taken by Panama in relation to the Project Contracts was both sovereign and unjustified. That have not met that burden. Claimants' entire case is predicated on supposition and innuendo. This fact is abundantly clear in how Claimants' characterized their position in the Request for Arbitration:

> In sum, Claimants, in conjunction with Mr. Rivera's Panamanian company, Omega-Panama, entered into eight contracts with six different Panamanian Government entities, only to have each breached at virtually the same time by the six different Government entities at or around the

---

220 Tr 1 (Douglas)/75:16-21.

221 Tr 1 (Kotuby)75:25 – 76:5

222 *See* Panama's Counter-Memorial ¶¶ 214 n, 372; 256-257; Panama's Rejoinder ¶ 428.

223 The Tribunal explored this issue during Panama's Opening Submission. *See* Tr. 105:19 – 111:11.

> time the Varela administration took office. These actions smack of a coordinated campaign.[224]

108. Even if one were to ignore the fundamental and fatal flaws in Claimants' allegations, "smack" is not an evidentiary standard. "Smack" does not mean that something is more likely than not to have occurred. "Smack" is nothing more than speculation. International liability would not attach merely because an action "smacks" of something.

109. Claimants' arguments are intended to distract from their own failings. As Panama has previously submitted, Claimants were in over their heads.[225] Claimants' business outside of Panama had effectively disappeared due to the extended recession in Puerto Rico, problems with its creditors, and concerns regarding the quality of its work.[226] While Claimants boast of Omega US' robust financing and bonding capacity in 2010 and 2011, the record paints a fundamentally different picture of Claimants' assets outside of the United States beginning in 2013.[227] As a result of these problems, Claimants did not have the financial or technical ability to support operations in Panama or run eight large projects simultaneously. Omega Panama was little more than a shell company, with a handful of employees, a couple of trucks, and a few computers.[228] And Mr. Rivera was using money from the La Chorrera project (at least) to bribe government officials. Under the circumstances, Claimants' attempts to prove sovereign action fail.

2. Claimants Have Not Proven Sovereign Intent

110. Claimants' attempt to raise the specter of sovereign intent around purely commercial actions fails for a number of reasons. *First*, Claimants have yet to demonstrate through documentary or testimonial evidence the existence of any campaign of harassment against Claimants. Nor have they proven the predicate act inspiring the alleged harassment – the meeting at the La Trona restaurant where Claimants allege President Varela asked Mr. Rivera for a campaign contribution. President Varela has denied that he asked for any money or that he

---

224 Request for Arbitration ¶ 26.

225 *See* Panama's Counter-Memorial ¶¶ 19-155; Panama's Rejoinder ¶¶ 84-126; 203-424.

226 *See* Claimants' Memorial ¶ 112.

227 *See* First Quadrant Report ¶¶ 42-45; *see also* Omega Engineering, Inc. Financial Statements and Supplementary Information as of 31 December 2013 and 2012 and Independent Auditor's Report, (**C-0136**).

228 *See* First Quadrant Report ¶¶ 42-45.

took – or directed anyone to take – adverse actions against Claimants' investments.[229] Claimants have presented only Mr. Rivera's testimony that either of these things actually occurred. However, despite the apparent significance of the action, Mr. Rivera was unable to produce a single email, letter, WhatsApp transcript, or other document in which he informed anyone of President Varela's request or alleged threat. The absence of any such documents speaks volumes about whether the events Mr. Rivera describes actually occurred.

111. Mr. Lopez's testimony provides no support for Mr. Rivera's claims. He was not at La Trona when the events allegedly occurred and could not remember when the meeting took place. At best, Mr. Lopez could narrow it down to late 2012 or early 2013 – a range of months.[230] And, Mr. Lopez testified that he was not informed of the alleged request and threat until a couple days after the meeting took place.[231] Mr. Lopez's testimony has little to no probative value.

112. As noted above, in the absence of any direct evidence of a campaign of harassment, Claimants rely on hearsay and the alleged statements of unnamed people. Claimants also rely snippets of conversations between Mr. Barsallo and Mr. Lopez.[232] Mr. Barsallo, however, confirmed that these were informal communications with what he thought was a friend. He was effectively parroting back to Mr. Lopez theories and allegations he had heard from Claimants.[233] Mr. Barsallo had no knowledge of how the President or Presidency was acting in relation to Claimants' investments beyond what he was told by Omega's staff.[234] Under the circumstances, Claimants have not met their burden of showing that a targeted campaign of harassment occurred.

113. *Second*, Claimants failed to show that the criminal investigations against them were impermissible, nor have they even alleged that the investigations had any impact on their projects. In fact, Claimants have presented expert testimony that the investigations were not only

---

229 Witness Statement of Juan Carlos Varela dated Oct. 7, 2019 ¶¶ 4-6.

230 López I ¶¶ 67, 69.

231 López I ¶ 70.

232 Claimants' Rejoinder ¶ 186 (citing **C-0681**).

233 Tr 3 (Barsallo)/713:2-9.

234 Tr 3 (Barsallo)/713:2-713:10 ("I have no knowledge beyond the information or the comments that I received from Omega staff [.]").

reasonable, but also encompassed "investigative steps that [were] *necessary*."[235] Legitimate exercises of a state's police power do not constitute harassment and will not give rise to international liability under the BIT or TPA.

3. Claimants' Umbrella Clause Arguments Do Not Justify the Exercise of This Tribunal's Jurisdiction

114. Claimants argue that their investments are protected by the umbrella clause in the BIT and that an umbrella clause should be imported into the TPA pursuant to the TPA's Most Favored Nation provision. As Panama demonstrated in its prior submissions,[236] Claimants' arguments fail for two principal reasons.

115. *First*, Claimants' attempt to import an umbrella clause into the TPA for purposes of this arbitration is inappropriate. Claimants have asserted claims that cross over the period when the BIT expired and the TPA became effective; certain of Claimants' claims, therefore, are based on acts that occurred while the BIT was in force and others on acts that occurred while the TPA was in force. Panama and the United States anticipated this possibility when negotiating the TPA and clarified that the BIT's dispute resolution provision would remain in effect for a period of ten years after the BIT expired. As such, claims brought under the BIT are governed by the BIT's dispute-resolution clause and claims brought under the TPA are governed by the TPA's dispute-resolution clause. The Tribunal, therefore, must have jurisdiction under both treaties.

116. In enacting the TPA, Panama and the United States significantly modified and, of relevance here, removed the umbrella clause from the TPA. This decision makes clear that neither Panama nor the United States consented to protect contractual obligations or to arbitrate disputes involving umbrella clause claims under any circumstances. Claimants' position would negate the treaty parties' intent and moot the evolution of the treaty protection between Panama and the United States reflected in the TPA. That was never the intention of the Most Favored Nation provision.

---

235 Tr 8 (Jimenez)/1676:20-1677:2.

236 Panama's Counter-Memorial ¶¶ 221-222; Panama's Rejoinder ¶¶ 138-147.

117. *Second*, the mere presence of an umbrella clause in the BIT does not *per se* transform an alleged breach of contract into a treaty breach. As explained by the *Vivendi* Annulment Committee, "whether there has been a breach of the BIT and whether there has been a breach of contract are different questions," even in the presence of an umbrella clause.[237] That is why the tribunal in *El Paso v. Argentina* found that umbrella clause like the one in the BIT "will not extend the Treaty protection to breaches of ordinary commercial contracts entered into by the State or a State-owned entity, but will cover additional investment protections contractually agreed by the State as a sovereign – such as a stabilization clause – inserted into an investment agreement."[238] This limitation ensures that investment-related promises and agreements are honored, while preventing an unwarranted and unreasonable expansion of a State's liability.

118. Claimants have not cited any cases that undermine the sound reasoning and principles articulated by the *Vivendi* annulment committee and the *El Paso* tribunal, nor have they presented any facts that show Panama's actions were anything but commercially justified actions taken by the "owner" on various construction projects. As such, even if Panama had breached its contracts under Panamanian law, such breaches would not rise to the level of a treaty violation. Claimants' umbrella clause claims, therefore, must be dismissed.

C. THE BIT CLAIMS MUST BE RESOLVED UNDER THE PREVIOUSLY AGREED DISPUTE RESOLUTION MECHANISMS IN THE PARTIES' CONTRACTS

119. If the Tribunal finds that Claimants' BIT claims are not commercial in nature and are instead investment disputes within the meaning of the BIT and TPA, those claims are governed by the BIT's dispute resolution provisions, which require that the previously agreed contractual mechanism be enforced.

120. As Panama has explained in its prior submissions, Article VII(2) of the BIT establishes a straightforward sequence for investment dispute resolution. *First*, parties must attempt to resolve to resolve such disputes through negotiations. *Second*, failing negotiations, these disputes must

---

237 Panama's Rejoinder on the Merits ¶ 142, *quoting Companie de Aguas del Aconguja S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment (July 3, 2002) (**RL-0019**), ¶ 96.

238 Panama's Rejoinder on the Merits ¶ 143*, quoting El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction (Apr. 27, 2006) (**RL-0020**), ¶ 81.

be resolved in accordance with the "previously agreed" dispute resolution mechanism. Even when the dispute involves expropriation of an investment by a party, the "previously agreed" dispute resolution mechanisms still govern.[239] Claimants' BIT claims, therefore, are not properly before the Tribunal where Claimants' contracts provide for other fora.[240]

121. Claimants cannot and do not dispute that the BIT claims are governed by the BIT dispute resolution provisions, and that these provisions remain in force for investments covered by the BIT until 2022. Indeed, they admitted as much on the first day of the Hearing.[241] Given the Parties' agreement that the BIT's dispute resolution provisions apply, there can be no question that the requirements of that provision must be given force. Claimants, however, ask the Tribunal to ignore the plain text of the BIT that requires investment disputes to be resolved through "previously agreed" dispute resolution mechanisms.

122. To support their argument, Claimants assert that "Claimants' entire investment and all of their claims are covered by both treaties." [242] That is false. As noted above, and as acknowledged by Claimants, the BIT's dispute resolution provision remains in effect for a period of ten years after its expiration. Any claim asserted under the BIT, therefore, must be resolved solely in accordance with the BIT's dispute-resolution provision. While this may create a procedural difference in how BIT and TPA claims are treated, that is what Panama and the United States provided for in the TPA. If the treaty parties had wanted a different outcome, they would have negotiated different provisions. The Tribunal's task is to apply the language as written in order to effectuate the clear and plain intent of the parties.[243]

123. In yet another attempt to avoid the BIT's requirements, Claimants argue that Article VII(2) of the BIT should not apply because the parties to the arbitration are different from the

---

239 *See* Panama's Rejoinder ¶ 151.

240 *See* Panama's Counter-Memorial ¶¶ 39-42 (detailing the Parties' chosen fora under each BIT contract).

241 *See* Tr 1/58:1-58:3 (KOTUBY: "However, until October 2022, the suspension [of the BIT's dispute resolution provisions] does not apply to 'investments covered by the BIT as of the date of the entry into force of the TPA.' Claimants' investment falls *precisely within this category*.") (emphasis added).

242 *See* Tr 1 (Kotuby)/58:11-59:5.

243 *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (Apr. 29, 2004) (**CL-0193**), ¶ 36.

parties to the contracts subject to the BIT. This is disingenuous. Panama has demonstrated that Mr. Rivera is the dominant force in the entire Omega group. He is the sole owner of Omega US and Omega Panama; there are no separate boards or controls in place to maintain the veil of corporate separateness. He dictates what the corporations do, how money moves between accounts, and uses corporate funds and accounts to fund his own personal ventures. Thus, regardless of which entity's signature is on a contract, all responsibility and obligations flow back to Mr. Rivera.[244]

124. Similarly, Claimants' reliance on the unity of investment theory fails to shield them from the requirement to resolve their BIT claims through previously-agreed dispute resolution procedures.[245] Under the unity of investment theory, a tribunal will not carve off a piece of a dispute that may otherwise have been outside the scope of the treaty where that piece is a necessary and indivisible portion of the overall investment. Claimants' investment, however, consists of eight unrelated contracts and Mr. Rivera's ownership interests in Omega Panama. Each contract is separate and distinct from the others, and none of them are inherently necessary for the other contracts and Mr. Rivera's interests in Omega Panama to exist. Consequently, the unity of investment theory does not apply here.[246]

D. THE TRIBUNAL LACKS JURISDICTION OVER CLAIMS RELATING TO PANAMA'S CRIMINAL INVESTIGATION

125. Panama maintains its conclusion that the Tribunal lacks jurisdiction over Claimants' claims relating to Panama's criminal investigation, as they do not arise directly out of an investment. Panama has detailed the reasons for its conclusions at Paragraphs 186 to 190 of its Rejoinder on the Merits. Panama also provides a detailed discussion of the criminal investigation in Section IV.A.3 of this submission.

244 For a full discussion of this issue, *see* Panama's Rejoinder on the Merits, ¶¶ 155-175.

245 Panama's Rejoinder, Sect. II.C.4.

246 For a full discussion of this issue, *see* Panama's Rejoinder on the Merits ¶¶ 176-185.

III. PANAMA'S CONDUCT COMPLIES WITH ITS OBLIGATIONS UNDER THE BIT AND TPA

A. PANAMA DID NOT ENGAGE IN A COORDINATED "CAMPAIGN OF HARASSMENT AGAINST CLAIMANTS AND THEIR INVESTMENT"

126. Throughout the proceedings, Claimants have attempted to tether their commercial claims on the Projects to a purported "campaign of harassment" launched by the Varela administration in response to Mr. Rivera's supposed refusal to provide President Varela with a solicited US$ 600,000 campaign contribution at the La Trona restaurant.[247] Claimants fail to establish the existence and substance of the meeting at La Trona or any evidence of the alleged campaign of harassment, outside of Mr. Rivera's bare assertions. And Panama's witnesses deny the existence of any harassment against Claimants' investment.[248] As Panama will discuss, there was no campaign of harassment and all of the problems on Claimants' Projects were the result of ordinary commercial actions that fall outside the scope of the BIT and TPA.

127. In an attempt to overcome the complete absence of evidence supporting their claims of harassment, Claimants submitted 49 exhibits comprising leaked WhatsApp messages purportedly from President Varela (*i.e.*, the "**VarelaLeaks Exhibits**"). Claimants' apparent objective is to "prove" that President Varela harassed them by referencing his conduct towards unrelated third parties.[249] As Claimants admit, however, these exhibits "do not cover the time period of the events in dispute" and provide at best "circumstantial" support for Claimants' positions.[250] Indeed, only four exhibits refer to Claimants – and those messages refute Mr. Rivera's allegation that then-candidate Varela solicited a US$ 600,000 contribution – a fact that Claimants ignore.[251]

---

247 *See, e.g.*, Claimants' Memorial, Sect. VI; Rivera I ¶¶ 66-70; Claimants' Reply ¶ 3; Claimants' Rejoinder ¶¶ 295-311.

248 *See* Chen ¶ 14; Bernard ¶¶ 18-19; Diaz I ¶ 29; Diaz II ¶ 15; Barsallo I ¶ 41; Rios I ¶38; Rios II ¶ 25; Duque ¶ 20; Zarak ¶¶ 12-14; Varela ¶ 6; Buendía ¶ 17.

249 *See* Claimants' Rejoinder ¶¶ 279-296 (discussing exhibits C-0819 to C-0828; C-0830-C-0846; C-0848-C-0850; C-0857; C-0859; C-0861 to C-0863; C-0866 to C-0878; C-0907).

250 Claimants' Rejoinder ¶ 282 & n. 961.

251 *See* Chat with Eyda Varela de Chinchilla, then-Panama's Minister of Economy & Finance dated Oct. 5, 2018 (**C-0819**); Chat with Ana Graciela Medina, Former Panamanian Counsel to Mr. Rivera dated Oct. 5, 2018 (**C-0820**); Chat with Kenia Porcell, then-Attorney General dated Oct. 5, 2018 (**C-0821**); Chat with Raul Sandoval, President Varela's Private Secretary dated Oct. 6, 2018 (**C-0822**).

1. The Claimants Fail to Show that the Alleged Solicitation or Threat Occurred

128. Claimants present no contemporaneous documentary evidence or any testimony to support their allegation that then-candidate Varela solicited a US$ 600,000 contribution at the La Trona restaurant or that any threat was made in relation to that contribution. The supposed evidence Claimants provide in support is incomplete and inconsistent.

a. Mr. Rivera's Testimony is Unconvincing

129. Mr. Rivera's written and oral testimony tells an unreliable story that is not corroborated – and is in some cases, flatly denied – by other witnesses. In his First Witness Statement, Mr. Rivera alleges that his personal attorney, Ana Graciela Medina, invited him to meet with President Varela and "informed [him] that . . . Mr. Varela intended to request that [Mr. Rivera] make a significant contribution to his campaign."[252] At the hearing, Mr. Rivera testified that his girlfriend, Tiese, accompanied him to La Trona.[253] At that meeting, Mr. Varela purportedly cleared the room to request a contribution of US$ 600,000. [254] Upon Mr. Rivera's alleged refusal, President Varela was said to have threatened that Mr. Rivera would not be able to collect on contracts awarded by the previous administration.[255]

130. Tellingly, Mr. Rivera has not produced either of the witnesses who would have direct knowledge of the existence or substance of the La Trona meeting – Ms. Medina or Ms. Tiese.[256] If Mr. Rivera is to be believed, Ms. Medina could have spoken to her alleged communications with President Varela wherein he requested to meet with Mr. Rivera to solicit a significant contribution. Ms. Tiese could have spoken, at least, to the fact that she was cleared out of the

---

252 Rivera I ¶ 68.

253 Tr 2 (Rivera)/471:15-472:2.

254 Rivera I ¶¶ 66-67.

255 Rivera I ¶ 68.

256 Mr. Rivera asked Ms. Medina to testify, but she refused. Tr 2 (Rivera)/472:16-21; Tr 2 (Rivera)/473:5. Mr. Rivera claims that Ms. Medina "was incredibly intimidated by Mr. Varela" – yet, Claimants' own exhibit shows Ms. Medina engaging in informal, unthreatening conversation with Mr. Varela. *See* Chat with Ana Graciela Medina, Former Panamanian Counsel to Mr. Rivera dated Oct. 5, 2018 (**C-0820**). A more likely reason for Ms. Medina's absence is the "thousands of debts" to her that Mr. Rivera left behind when fleeing Panama. Chat with Ana Graciela Medina, Former Panamanian Counsel to Mr. Rivera dated Oct. 5, 2018 (**C-0820**).

room before President Varela made his alleged request and threat. Over several rounds of briefing, however, Mr. Rivera apparently found this unnecessary. Instead, he produced Mr. Lopez, an individual who was not at the restaurant at the time the alleged meeting occurred, could not recall when it occurred, and did not learn about the alleged meeting until several days later.[257]

131. Moreover, when questioned on the meeting at La Trona, Mr. Rivera admitted that he had no "notes or mementos or any other hard-copy evidence with respect to that meeting."[258] Mr. Rivera also admitted that he does not recall the date of the supposed meeting, noting that "I think I was able to narrow down the period, but I don't have a specific date."[259] Mr. Rivera's allegations are belied by Ms. Medina herself, who stated that Claimants' "lawsuit is not going anywhere" and that "[t]hose Yankee attorneys are only taking money from him," when discussing Mr. Rivera's representations in this case.[260] Ms. Medina's incredulousness seems appropriate given the utter lack of evidence for Mr. Rivera's assertions.

132. These allegations were also denied by President Varela, who, in the VarelaLeaks Exhibits, avowed no fewer than five times that he did not request US$ 600,000 from Mr. Rivera, "[m]uch less threatened."[261] And Mr. Raul Sandoval, President Varela's private assistant who Mr. Rivera notes was at the meeting,[262] has similarly stated "that's false" with respect to Mr.

---

257 Tr 2 (Rivera)/474:1.

258 Tr 2 (Weisburg)/470:4-14.

259 Tr 2 (Rivera)/471:2-3. *See also* Rivera I ¶ 66 (narrowing the date of the meeting to "towards the end of November 2012").

260 Chat with Ana Graciela Medina, Former Panamanian Counsel to Mr. Rivera dated Oct. 5, 2018 (**C-0820**).

261 Witness Statement of Juan Carlos Varela dated Oct. 7, 2019 ¶ 4; Chat with Eyda Varela de Chinchilla, then-Panama's Minister of Economy & Finance dated Oct. 5, 2018 (**C-0819**); Chat with Ana Graciela Medina, Former Panamanian Counsel to Mr. Rivera dated Oct. 5, 2018 (**C-0820**); Chat with Kenia Porcell, then-Attorney General dated Oct. 5, 2018 (**C-0821**); Chat with Raul Sandoval, President Varela's Private Secretary dated Oct. 6, 2018 (**C-0822**).

262 Rivera I ¶ 67.

Rivera's claims.[263] Remarkably, Claimants would have the Tribunal believe everything contained in the VarelaLeaks Exhibits, except these denials.[264]

133. Since Mr. Rivera's side of the story has not been corroborated – and has been denied – by anyone who would have personal knowledge of the event, his testimony with regard to the La Trona meeting should be disregarded.

b. Mr. Lopez's Testimony is Unconvincing

134. As stated above, Mr. Lopez was the only witness Claimants produced to substantiate Mr. Rivera's claims about the La Trona event. However, his testimony is entirely unhelpful. Like Mr. Rivera, Mr. Lopez is unable to recall when exactly the event occurred – pinning down the period "at the end of the year 2012 or beginning of 2013."[265] Mr. Lopez was also unable to state a precise amount of the alleged solicitation, stating only that "[President] Varela had requested financially significant support, in an intimidating manner [.]"[266] His testimony is further undermined by that of Mr. Rivera, who admitted at he is unsure if he even told Mr. Lopez the amount of the solicitation.[267] The Tribunal should thus accord Mr. Lopez's testimony on this topic no weight, in light of his lack of specific knowledge about a critical piece of Claimants' case.

c. The Claimants Present No Documentary Evidence or Additional Testimony of the Alleged Threat

135. Claimants have not produced a single document supporting their claims that then-candidate Varela requested a campaign contribution or made threats against Claimants' projects when that request was denied. Despite the purported significance of these events, Mr. Rivera did not contemporaneously send a single email, letter, WhatsApp message, or other communication to anyone describing the events of the evening in question. Although he communicated with Ms. Graciela frequently, and she purportedly arranged the meeting, there is not a single message in

---

263 Chat with Raul Sandoval, President Varela's Private Secretary dated Oct. 6, 2018 (**C-0822**).

264 See Claimants' Letter to the Tribunal dated Feb. 10, 2020; Claimants' Letter to the Tribunal dated Feb. 12, 2020, p. 4.

265 López I ¶ 69.

266 López I ¶ 69.

267 Tr 2 (Rivera)/474:1.

which he describes the threat supposedly made. Likewise, Claimants have not produced a single document from the period after their projects began experiencing problems in which Mr. Rivera recalls the alleged threat or attempts to link their problems to that threat.

136. Panama noted this failure in its Counter-Memorial and, despite being placed on notice as to this fatal lack of evidence, Claimants still did not produce a single document. Claimants' failure to produce any such documents is telling and should be dispositive of this issue.

3. Claimants Have Presented No Credible Evidence that They Were Targeted for their Affiliation with the Martinelli Administration

137. Claimants' failure to prove the existence of the US$ 600,000 solicitation and resulting threat should obviate the need to examine whether there was a retaliatory campaign of harassment. The Tribunal cannot infer a reaction where no initial action has been established. Nevertheless, the evidence establishes no retributive behavior from the Varela administration or the relevant government parties to Claimants' contracts and that the problems Claimants experienced on their Projects were entirely commercial nature.

a. Mr. Lopez's Testimony Is Unconvincing

138. In support of Mr. Rivera's claim of harassment, Mr. Lopez concludes that "there was an intention on the part of the Government to act against Oscar and his companies,"[268] based on conversations with unidentified individuals in the Judiciary, the Municipality of Colon, and other "people in Ministries and Government Agencies."[269] Mr. Lopez's inability to name many of these individuals who purportedly provided this crucial information shows that the veracity (or existence) of these alleged statements cannot be established. Two of individuals he does name – Nessim Barsallo and Ana Graciela Medina – either clarified their statements to Mr. Lopez (Mr. Barsallo) or otherwise expressed doubts about Mr. Rivera's assertions (Ms. Medina).[270] The remaining individuals he names – Mayor Federico Policani and General Secretary Guillermo Bermudez – have not been produced for cross-examination, nor has any evidence outside of Mr.

---

268 López I ¶ 74.

269 López I ¶ 73.

270 López II ¶¶ 81-82. *See generally* Tr 3 (Barsallo)/708:11- 732:18 (explaining that his statements were based on representations from Omega); Chat with Ana Graciela Medina, Former Panamanian Counsel to Mr. Rivera dated Oct. 5, 2018 (**C-0820**) (opining that "[this] lawsuit is not going anywhere").

Lopez's testimony been presented to enable serious consideration of the claims they allegedly made. In addition, these alleged conversations are belied by the well-documented commercial failures on Claimants' projects which led to their lapse or termination. Mr. Lopez's testimony on the alleged campaign of harassment should thus be disregarded.

b. Panama's Witnesses Have Denied the Existence of Any Harassment Against Claimants and their Investment

139. Consistently and repeatedly throughout these proceedings, Panama's witnesses have rejected Claimants' campaign of harassment theory.[271] Claimants chose not to cross-examine most of Panama's witnesses, and they have not otherwise cast doubt on the credibility of those witnesses. At the hearing, Panama's witnesses maintained that they were not aware of any concerted effort by the Varela Administration to interfere with Claimants' projects. For example, Mr. Barsallo stated that "I have no knowledge beyond the information . . . from Omega staff . . . to show that there was some sort of illegal manipulation."[272] Later, Ms. Buendia confirmed that payment delays are not uncommon "[w]hen there is a change in Government" – noting similar problems, under a *different* President, with the current contractor on the Ciudad de las Artes Project.[273] Finally, Mr. Zarak confirmed that the budget for the Ciudad de las Artes Project was reduced, not as a retaliatory act, but because Claimants' project was high-risk, problematic in performance, and significantly behind schedule.[274]

140. Panama's witnesses, as discussed below in Sections III(B)(2) to III(B)(4), have also detailed the commercial nature of the issues on Claimants' projects and Claimants' commercial failures, which gave rise these issues. Additionally, individuals not testifying on behalf of either party have evidenced the commercial nature of the issues on Claimants' projects. For example, Mr. Rivera's attorney, Ana Graciela Medina – who purportedly set up the La Trona meeting – described issues on the Kuna Yala MINSA CAPSI Project including a lack of access to

---

271 *See* Chen ¶ 14; Bernard ¶¶ 18-19; Diaz I ¶ 29; Diaz II ¶ 15; Barsallo I ¶ 41; Rios I ¶38; Rios II ¶ 25; Duque ¶ 20; Zarak ¶¶ 12-14; Varela ¶ 6; Buendía ¶ 17.

272 Tr 3 (Barsallo)/713:5-9.

273 Tr 4 (Buendía)/808:17-809:4.

274 Tr 6 (Zarak)/1236:15-1237:10.

electricity on the site as well as insufficient administrative and medical personnel to serve at the facility, while also noting MINSA's desire to continue work on the remaining projects.[275]

141. Panama's persistent rejections of Claimants' campaign of harassment theory have been confirmed by Panama's witnesses, corroborated by the record, and have not been disproven by Claimants. Based on this evidence, Claimants have clearly failed to meet their burden to prove the existence of a campaign of harassment and the Tribunal should disregard this theory.

4. The VarelaLeaks Exhibits Fail to Establish the Existence of a Campaign of Harassment Against Claimants

142. As established above, Claimants' assertions fail to show direct evidence of a US$ 600,000 solicitation at La Trona or any subsequent, retaliatory campaign of harassment. These are essential elements to Claimants' claims. And Claimants' attempts to use illegally-obtained personal messages from President Varela similarly fail to establish the alleged solicitation or campaign of harassment – especially where the cited exhibits "do not cover the time period of the events in dispute" and provide at best "circumstantial" support for Claimants' positions.[276]

143. In admitting the 49 VarelaLeaks Exhibits into the record, the Tribunal expressed its reservations about their relevance and materiality, and made clear that their admission was subject to "three significant accompanying qualifications;" namely, "admission of the Varelaleaks exhibits is not intended to indicate that the Tribunal necessarily considers these documents to be relevant and material to the outcome of issues in dispute" and that Claimants may use the exhibits "as potential support for advancing a 'similar conduct' allegation (*to the extent that such an allegation would itself be relevant and material*)."[277] The Tribunal further "caution[ed] that in the course of the proceedings the Tribunal may rule, in its procedural discretion, that . . . a certain submission

---

275 Email from Ana Graciela Medina to Oscar Rivera and Frankie López dated July 30, 2015 (**C-0701**).

276 Claimants' Rejoinder ¶ 282 & n. 961.

277 Tribunal's Ruling on Admissibility of the "Varelaleaks exhibits" dated Feb. 14, 2020, p. 4 (emphasis added).

on these exhibits is unhelpful to the Tribunal in deciding the matters in dispute or the credibility of a witness."[278]

144. The Tribunal's skepticism and concern is appropriate given the manner in which the VarelaLeaks Exhibits came to light, the lack of context surrounding them, and that 45 of the 49 Exhibits do not refer to or deal with Claimants or their projects. Panama has made clear its position that the VarelaLeaks Exhibits, and the allegations of purportedly "similar conduct," are irrelevant and immaterial.[279] However, as permitted by the Tribunal, Panama again demonstrates why they are, at best, unhelpful to the Tribunal and, at worst, unhelpful to the very assertions made by Claimants in the attached VarelaLeaks Annex.

B. THE EVIDENCE MAKES CLEAR THAT CLAIMANTS' CLAIMS LACK MERIT

145. Throughout this proceeding, Panama has shown that Claimants' projects were not targets of a campaign of harassment by the Varela administration but were victims of Claimants' own inadequacies. As noted above, Claimants' business outside of Panama effectively disappeared by 2013 due to the lingering recession in Puerto Rico and systemic problems with Omega US' performance.[280] As a result, lines of credit were cancelled,[281] assets were seized by creditors,[282] and Omega US lost money.[283] Claimants' business in Panama was little more than a shell. PR Solutions became non-operational after the Tocumen airport project,[284] and Omega Panama

---

278 Tribunal's Ruling on Admissibility of the "Varelaleaks exhibits" dated Feb. 14, 2020, p. 4. Later, in Procedural Order No. 5, the Tribunal noted that it "takes note of Claimants' application [to strike Mr. Varela's witness statement], and will consider further with the Parties the matter of Mr. Varela's witness statement and submission that Respondent has made based on Mr. Varela's witness statement." Procedural Order No. 5 dated Oct. 8, 2020, p. 3. To that end, if the Tribunal strikes Mr. Varela's witness statement or accords it no weight, as Claimants request, it would be paradoxical to consider the VarelaLeaks Exhibits at any length. Accordingly, in that event, the VarelaLeaks Exhibits should be similarly stricken or accorded zero weight.

279 *See generally* Panama's Letter to the Tribunal dated Feb. 11, 2020; Panama's Letter to the Tribunal dated Feb. 13, 2020; Panama's Letter to the Tribunal dated Dec. 7, 2020.

280 Tr 2 (Rivera)/359-360; Second Quadrant Report ¶¶ 73-80.

281 Second Quadrant Report ¶ 77.

282 Second Quadrant Report ¶ 76.

283 Second Quadrant Report ¶ 78.

284 *See* Pollitt Report, p. 18; Tr 9 (Pollitt)/1939:8-15; Tr 9 (Pollitt)/1945:18-21.

never had more than a [redacted] of employees, a[redacted] vehicles, and some office equipment totaling less than US$ [redacted].[285]

146. The combination of these factors left Claimants financially troubled and unable to execute eight projects simultaneously in Panama. Indeed, the record shows that Claimants reached a point where their resources were spread so thin that they could not meet their contractual obligations. This resulted in decreased performance, deficient progress, and subcontractor disputes, which ultimately caused Claimants to abandon certain projects and forced INAC and the Municipality of Panama to terminate Claimants for cause.

147. Panama will not repeat the factual narrative and arguments relating to each of Claimants' projects set out in its prior submissions.[286] Rather, Panama will address how these facts and arguments were affected by the witness testimony at the hearing. While Panama only addresses limited topics regarding the specified projects and does not discuss the other projects, it maintains the positions expressed in its prior submissions relating to all projects at issue in this arbitration.[287]

1. Mr. Lopez's Testimony Should Be Accorded Little to No Weight

148. Claimants presented a single fact witness to discuss each of their projects: Frankie Lopez.[288] It is clear, however, that Mr. Lopez's testimony regarding his involvement was exaggerated and that his knowledge of the projects was almost entirely derivative. For example, in an effort to bolster his relevance and knowledge, Mr. Lopez testified in his Second Witness Statement that he was "*always* copied on the emails and letters" relating to the Ciudad de las

---

285 First Quadrant Report ¶¶ 43-44; Omega Engineering, Inc. Financial Statements and Supplementary Information as of 31 December 2013 and 2012 and Independent Auditor's Report (**C-0136**), p. 11.

286 A full discussion of the facts surrounding Claimants' projects can be found in Panama's Counter-Memorial at ¶¶ 19-155; Rejoinder on the Merits at ¶¶ 203-424.

287 **Ciudad de las Artes Project**: Panama's Counter-Memorial ¶¶ 79-117; Panama's Rejoinder ¶¶ 304-389. **Ministry of Health Projects**: Panama's Counter-Memorial ¶¶ 47-78; Panama's Rejoinder ¶¶ 234-281. **Municipality of Panama Market Projects**: Panama's Counter-Memorial ¶¶ 134-155; Panama's Rejoinder ¶¶ 203-233. **Judicial Authority, La Chorrera Courthouse Project**: Panama's Counter-Memorial ¶¶ 19-46; Panama's Rejoinder ¶¶ 282-303. **Ministry of the Presidency, Colón Market Project**: Panama's Counter-Memorial ¶¶ 118-127; Panama's Rejoinder ¶¶ 390-404. **Municipality of Colón, Municipal Palace Project**: Panama's Counter-Memorial ¶¶ 128-133; Panama's Rejoinder ¶¶ 405-424.

288 *See* Panama's Rejoinder ¶ 200.

Artes Project, Claimants' "largest contract."[289] During cross-examination, however, he conceded that his testimony was "inaccurate" and that he was not copied on all communications.[290] Similarly, despite touting in his witness statement that he was personally involved in everything that occurred in Panama,[291] Mr. Lopez admitted that he was not the principal Omega representative on any of Omega's projects; rather, Omega Panama's project managers and engineers were primarily responsible for on-site concerns.[292] These managers and engineers would handle daily communications with the project teams, Ministries, and Municipalities, attend meetings, and address problems as they arose on site.[293] Based on this, it is not surprising that Ms. Buendia, the primary inspector who handled the day-to-day issues on the Ciudad de las Artes project, only met Mr. Lopez once.[294]

149. Additionally, Mr. Lopez's cross-examination on the Municipality of Panama Public Markets Projects made clear that he was only later made aware of key project events and corresponding documentation in preparation of his witness statement, demonstrating his limited contemporaneous knowledge of the projects.[295] It is noteworthy that Claimants failed to provide statements from any of the managers or engineers who worked directly on the projects, and instead rest their case on Mr. Lopez, whose knowledge of the facts derives from documents reviewed in preparation for this arbitration and second-hand conversations with Omega's project representatives.[296] Claimants' approach is contrasted sharply by Panama, which presented witnesses from the key ministries and municipalities with direct knowledge of the projects at

---

289 Second Witness Statement of Frankie López dated May 27, 2019 (López II) ¶ 46; Claimants' Memorial ¶ 206.

290 Tr 1 (López)/167:4-19.

291 López I ¶ 20; López II ¶ 46.

292 Tr 1 (López)/162:11-165:11.

293 Tr 1 (López)/164:11 – 165:16.

294 Tr 4 (Buendía)/820:7-12; *see also* Tr 1 (López)/166:8-167:13 (admitting that he mischaracterized his inclusion in the correspondence for the Ciudad de las Project); *see* López II ¶ 46 (inaccurately claiming he was copied on all emails and letters related to the INAC project).

295 Tr 2 (López)/283-285 (López admits that he does not recall seeing two exhibits which are cited in his witness statement prior to preparation of his witness statement and in fact, only "came to learn" that the Municipality had offered assistance in trying to obtain the Soil Use Certificate in preparation of his witness statement).

296 *See* Panama's Rejoinder ¶¶ 200-202.

issue in this arbitration. Under the circumstances, Mr. Lopez's statements about the projects and allegations of politically motivated actions should carry no weight.[297]

2. The Ciudad de las Artes Project

a. Ms. Buendia's Testimony Confirms the Serious Commercial Issues Plaguing the Project

150. The Ciudad de las Artes project was the largest of Claimants' contracts. INAC was forced to declare Claimants in default, terminate their contract, and draw on their performance bond in order to finish the project. Claimants argue that INAC's actions were unlawful and were politically motivated. The evidence, however, shows that Claimants' performance on the INAC project deteriorated and that, despite multiple warnings by the independent project engineer, Claimants did nothing to improve the quality of their works.

151. In its written submissions, Panama detailed the serious problems affecting Claimants' performance. During the hearing, Ms. Buendia, who served as an independent engineer engaged by INAC to oversee the project, confirmed Panama's position and described in detail Claimants' failings on the project. As Ms. Buendia explained, delays began on the project in August 2014, after Arco, Omega's primary subcontractor, withdrew from the project.[298] Arco's withdrawal led to "a dramatic and clear diminution in the number of workers at the site."[299] By August 21, 2014, the situation was so dire that Sosa advised INAC about the state of the project and recommended that INAC and the Comptroller General notify the guarantor about Omega's noncompliance.[300] Despite this notice, Omega did nothing to correct the staffing shortfalls, and the project remained understaffed through the end of 2014.[301] Omega "devised a recovery plan in early September 2014" to bring Omega's productivity back to adequate levels. Under that plan the number of workers on site was supposed to increase from 70 to 115 between September and the end of October 2014.[302] Omega, however, never took any steps to increase staffing to

297 *See generally* López I & López II.

298 Tr 4 (Buendía)/763:14-764:12, 772:12-774:1.

299 Tr 4 (Buendía)/762-763.

300 Tr 4 (Buendía)/772.

301 Tr 4 (Buendía)/766.

302 Tr 4 (Buendía)/766:16-767:1.

the levels promised.[303] Indeed, on September 2, there were only 38 workers on site.[304] Between October 27 and November 9, 2015, there were never more than 50 workers on site, even though the recovery plan called for 115 workers.[305]

152. Claimants argue that they had to reduce the work force as a result of INAC's delayed payments.[306] Mr. Lopez, however, acknowledged in cross-examination that there is no provision in the contract allowing Omega to reduce its workforce as a result of delayed payments.[307] In fact, as Ms. Buendia explained, payment delays are common in government contracts and therefore, it was important for Omega to use its advance payment in the case of delays.[308] Ms. Buendia testified that Omega was told that it was very common to have delays in approvals, "specifically when there is a change in the administration" and that "it [was] very important for them to continue to work [on] the Project, specifically when they had a financial advance that was larger than the advance in the field because of the advance [payment] that they had gotten."[309] She also warned Omega that it was at risk of breaching the contract, "if construction works are stopped or if the construction pace is slowed down – because at that moment the pace was dramatically slow."[310] Nonetheless, Omega never changed course and ultimately, suspended work and removed all personnel from the site, compelling INAC to terminate the contract.[311]

b. Ms. Buendia's Testimony Proves Sosa's Concerns were Legitimate and Not Politically Motivated

---

303 Tr 4 (Buendía)/766-767; Tr 4 (Buendía)/769-770 ("It was really surprising, the small number of employees that they had. It wasn't even close to what this plan said. That's why we were concerned. They didn't really have the number of staff that was included in this recovery plan.").

304 Tr 4 (Buendía)/766:8-11; Letter SA-CDA-081-14 from Yadisel Buendía to Luis Pacheco dated Sept. 2, 2014 (**R-0044**).

305 Tr 2 (López)/306:17 – 307:1.

306 Claimants' Reply ¶ 220.

307 Tr 2 (López)/299:12-20; *see also* Tr 4 (Buendía)/789-790 (it is not the case here that the Contractor can reduce or suspend work if there is a delay in payment).

308 Tr 4 (Buendía)/787:2-788:1, 798:1-15, 808:15-809:4; Tr 4 (Buendía)/788:20-790:22, 791:16-792:7.

309 Tr 4 (Buendía)/786-787; *see also* Tr 6 (Zarak)/1200-1201.

310 Tr 4 (Buendía)/790.

311 Panama's Rejoinder ¶ 305; Panama's Counter-Memorial ¶¶ 95-115.

153. Ms. Buendia's testimony also disproves Claimants' allegations that INAC acted differently towards the Omega Consortium under the Varela Administration, or that President Varela directed an "organized campaign" against the project.[312] Claimants argue that INAC's failure to approve plans or payment applications after July 2014 is evidence of President Varela's vendetta against the Omega Consortium.[313] However, Ms. Buendia testified that the delays in approvals of blueprints and payment applications were not uncommon and in fact still continue to plague the Ciudad de las Artes project to this day under a different administration.[314] She explained that under both the Martinelli[315] and Varela Administrations, as well as the current administration, the blueprints remained unapproved.[316] Similarly, she described that delays in payment applications were extremely common, particularly when there is a change in government.[317] These delays in approvals and payments offer no support for Claimants' allegations of unfair or different treatment by the Varela administration.

154. Ms. Buendia's testimony further reveals that at no time in her extensive communications with Omega's project representative, Mr. Luis Pacheco, did he ever tell her that Omega felt they were being "treated unfairly" by the new Administration.[318] Although he expressed concern with delays when the new authorities came into office, Ms. Buendia explained to him that this was common and everything takes a little bit longer when there is a new administration.[319] Contrary to what one would expect if Omega was feeling it was being treated unfairly, Omega never expressed to Ms. Buendia that they thought INAC "had it in" for them or their project.[320]

---

312 Claimants' Reply ¶¶ 188-194.

313 Claimants' Reply ¶¶ 188, 190, 194.

314 Tr 4 (Buendía)/808-809.

315 Tr 4 (Buendía)/785 (describing a report from Sosa to INAC dated October 2014 urging INAC to review and comment on the revised plans as requested by Omega at the meeting held on May 28, 2014 – months before the Varela Administration took office).

316 Tr 4 (Buendía)/785-788.

317 Tr 4 (Buendía)/808-809.

318 Tr 4 (Buendía)/821:8-822:17.

319 Tr 4 (Buendía)/821-822.

320 Tr 4 (Buendía)/821-822.

c. Mr. Zarak's Testimony Confirms that the MEF Did Not Target Claimants

155. Mr. Zarak's testimony confirms that, contrary to Claimants' allegations, the MEF did not target Claimants using the Ciudad de las Artes Project's budget.[321] *First*, Claimants' allegation that President Varela directed the MEF to decrease the budget for the Ciudad de las Artes Project in 2015 is directly refuted by Mr. Zarak's testimony that "nobody recommends additional cuts."[322] Representatives from the various ministries always ask for more money. It, ultimately, is the MEF's job to prioritize funds and to move money as needed to ensure an appropriate and legally compliant budget is approved.[323]

156. *Second,* Mr. Zarak showed how Claimants' argument that there is something nefarious about the President's involvement in preparing and adjusting the budget is contrary to the realities of how the budget process works.[324] As Mr. Zarak explained, the Cabinet and National Assembly have roles in preparing and reviewing the budget. This includes considering items that the "President promised . . . or . . . was in the five-year Government plan"[325] and is "a juggling act between many more requirements than resources" with the National Assembly ultimately having the last word in approving the budget.[326]

157. *Third*, Mr. Zarak's testimony explains why the MEF's budget recommendation for the Ciudad de las Artes Project for 2015 was lower than the amount originally requested by INAC, which was based on the budget realities for 2015 and the progress on the Ciudad de las Artes Project.[327] With regard to the 2015 budget for the Ciudad de las Artes Project, INAC requested US$ 54.6 million for the project – the full amount of the Ciudad de las Artes contract.[328] Claimants suggest that because Addendum No. 1 of the Ciudad de las Artes contract provides for

---

321 *See e.g.* Panama's Rejoinder ¶¶ 367-388.

322 Tr 6 (Zarak)/1216. First Witness Statement of Ivan Zarak dated Nov. 18, 2019 ¶ 14.

323 Tr 6 (Zarak)/1157, 1166-1168; 1218-1219.

324 Claimants' Rejoinder on Preliminary Objections ¶¶ 292-293.

325 Tr 6 (Zarak)/1159:14-21.

326 Tr 6 (Zarak)/1159.

327 Tr 6 (Zarak)/1175-1197, 1200-1201; First Witness Statement of Ivan Zarak ¶ 14.

328 Tr 6 (Zarak)/1175:8-1176:14 (discussing **R-0036**).

payment of the full amount on March 31, 2015, the MEF somehow acted badly in recommending US$ 10 million for the project in 2015.[329] As Mr. Zarak explained, however, Claimants' argument ignores that payments were directly related to the progress made on the project.[330] Indeed, Addendum No. 1 to the contract provides that INAC "shall recognize and pay the Contractor, for executing the project…a total amount of" US$ 54,527,345.00 and that payments shall be made to the contractor on a monthly basis according to the "percentage of progress of the project during the respective period, and total value of this progress."[331] Accordingly, the US$ 54.6 million was due to Claimants only upon completion of the project.[332] In September 2014, when the MEF was preparing the budget, the Ciudad de las Artes Project was only 24% complete.[333] It was clear, therefore, that the project would not be completed in the next year and that the full amount owed under the contract would not be due.[334]

158. Additionally, the MEF categorized the Ciudad de las Artes Project as a high-risk project based on, *inter alia*, the information INAC provided the MEF about the project and the fact that "this Project was paid a bunch of money to start [the advance payment], and we have paid more money than where the physical completion is right now. . . and on top of that, it is delayed."[335]

---

329 Tr 6 (Gorsline)/1196; Addendum No. 1 to Ciudad de las Artes Project (**C-0167**) (emphasis added).

330 Tr. 6 (Zarak)/1194, 1196-1197 (Zarak: "But you are leaving the most import part behind, which is: Obviously, if you comply with the rest of the provisions of the contract, the total amount payable is due on 2015. As long as you know the rest of the – there are obviously obligations from each Party. In this case, the Contractor has the obligation to deliver the total Contract in its due date, which was within six months of March 31, 2015.").

331 Addendum No. 1 to Ciudad de las Artes Project (**C-0167**), Cl. 35.

332 Tr 6 (Zarak)/1200-1201 ("[A]s I understand it, the 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."). *See* 2015 Budget presented by Panama's National Assembly dated Sept. 8, 2014 (**C-0067**), p. 1.

333 Tr. 6 (Zarak)/1302. Claimants argue that based on their expert McKinnon's accounting the project was [redacted] two months later in December 2014. Tr 6 (Gorsline)/1306. Even if it is true that the project progressed to [redacted] by December 2014 (which we do not concede is correct), it is still highly improbably that the project would be complete three months later – by March 31, 2015.

334 Tr 6 (Zarak)/1200-1201 ("[T]here was no feasible way to finish this Project by its original due date, according to the Contract"); *see* Tr 6 (Zarak)/1204-1205 ("[i]t doesn't take a civil engineer to look at the Project and say, well, it doesn't look like you're going to need those whole resources for that year because the Project is . . . behind schedule . . . ").

335 Tr 6 (Zarak)/1237, 1247 (explaining that this information mostly came from conversations with the entities including the presentation that the Director of INAC gave to the cabinet); Tr 6 (Zarak)/1253-1254.

Based on the information available to the MEF, and contrary to Claimants' argument that "by September 2014, the MEF would [not] have had any reason to doubt that the Project would be completed in 2015 or to classify it as 'high risk,'"[336] it was highly unlikely if not impossible that the project would be completed by the contractual completion date of March 31, 2015.[337] With this information, it would have been fiscally irresponsible for the MEF to recommend a budget of US$ 54 million for 2015.

159. Further, Claimants attempt to cast doubt on the logic and propriety of the MEF's actions in light of the outstanding CPPs for approximately US$ [redacted] that had been approved by INAC and endorsed by the Comptroller General.[338] Mr. Zarak, however, testified that the first draft of the MEF's budget initially recommended the US$ [redacted] to cover these CPPs, but "along the way with the additional Cabinet requirements and the additional Assembly requirements," the MEF had to make cuts.[339] Eventually, the final budget submitted by the MEF on September 8, 2014 and subsequently approved by the National Assembly, allocated US$ 10 million for the Ciudad de las Artes Project.[340] However, Mr. Zarak testified that the "MEF was quite aware that [the recommended US$ 10 million] was not enough to pay the CPPs . . . [a]nd we knew that come Year 2015 when the budget came in line, we would have to . . . move money around, so that we had enough funds to pay the CPPs."[341] He explained that while unfortunate, this is not out of the ordinary.[342] The MEF has to make sure that its budget recommendations comply with the Social and Fiscal Responsibility Law (meaning the budget for the year has to match the funds the government actually has for that year) which "cannot be amended as opposed to the budget."[343] So it is common practice when "the budget comes in line [to] . . .

---

336 Claimants' Rejoinder on Preliminary Objections ¶ 232.

337 Tr 6 (Zarak)/1263 ("It was clear to us that that was physically impossible, given the Project advancement at that time" that the project would be completed by March 2015).

338 Tr 6 (Zarak)/1206.

339 Tr 6 (Zarak)/1216.

340 Tr 6 (Zarak)/1177:12-22.

341 Tr 6 (Zarak)/1216-1217; Tr. 6/1215 ("You have to make…a budget line transfer, which is – it is quite common. It is not something that is out of the ordinary . . . .It is something that we do every week of every year for around nine months of the year."); Tr 6 (Zarak)/1216.

342 Tr 6 (Zarak)/1214:9-16.

343 Tr 6 (Zarak)/1219; *see* Law 34, Social and Fiscal Responsibility Law dated June 5, 2008 (**C-0953**).

make a bunch of transfers."[344] This is exactly what happened in this case – INAC received a budget line transfer and paid the 12 CPPs to Credit Suisse.[345]

160. Claimants also try to make an issue out of the fact that Sosa Arquitectos was paid in full for its inspection services on the project, but Claimants were not paid the full US$ 54 million.[346] This is of no moment. Sosa had a different role than Claimants – to provide inspection services for the project not to complete the project. Under Sosa's contract, payments were not conditioned on project completion (Claimants' role) but rather on the presentation of monthly reports over the 645-day contractual period.[347] There is nothing unfair about Panama paying Sosa in full for completion of its obligations, while paying Claimants a portion of their full contract amount, as they never completed their contractual obligations. In fact, as previously explained, Claimants were overpaid and continue to hold almost US$ [redacted] for unperformed work.[348]

161. In sum, the witness testimony confirms Panama's positions that (1) there were serious deficiencies with Omega's performance on the Ciudad de las Artes Project which triggered termination of the contract, (2) there is no evidence of the Varela Administration targeting the project, and (3) neither MEF nor Sosa were directed to target Claimants or the Ciudad de las Artes Project, but rather their reports and decisions were based on the realities of the project's progress and the budget available for 2015.

3. The Municipality of Panama Public Market Projects

a. Omega Failed to Meet its Contractual Requirements and Abandoned the Project

162. As Panama has shown throughout this proceeding, Omega performed poorly on its contract with the Municipality of Panama for the design, construction and furnishing of the Pacora and Juan Díaz Markets and ultimately, abandoned the project in April 2015.[349] Indeed, Claimants failure to obtain critical permits, approvals, and easements meant that the designs for

344 Tr 6 (Zarak)/1219.

345 Tr 6 (Zarak)/1225.

346 Tr 6 (Gorsline)/1180-1185.

347 Contract No.049-13 dated Feb. 7, 2013 (**R-0041**), Arts. 4, 6-7.

348 Panama's Rejoinder ¶ 332.

349 Panama's Rejoinder ¶ 203-233.

the projects could not approved. Without approved designs, invoices could not be paid and work could not commence.[350]

163. In their written submissions, Claimants attempt to camouflage their deficient performance by arguing that "delay in the Project was the result of a series of issues that were exclusively under Respondent's control, such as . . . the refusal of the Ministry of Housing to grant the required Soil Use Certificate."[351] That argument fails, however, as Mr. Lopez conceded on cross-examination that Omega was required to obtain all licenses and permits under the contract, which included the Soil Use Certificate.[352]

164. Claimants further argue that although they were obligated to obtain permits and licenses, the Municipality did not cooperate in helping Omega obtain these documents.[353] Again, that argument fails. The Municipality had no contractual or legal obligation to assist Omega to execute work that was solely within its scope. Nevertheless, the Municipality frequently went to great lengths to help Omega. For example, representatives from the Municipality interceded with other ministries regarding the Soil Use Certificate. The evidence shows that various officials, including the Mayor, reached out to check on the status of the approvals.[354]

b. Claimants Have Not Shown that They Were Targeted by the Municipality of Panama or the Varela Administration

165. Claimants failed to provide any evidence of harassment on the Municipality of Panama Public Market Projects, and Mr. Lopez's testimony casts further doubt on the credibility of these allegations.[355]

---

350 Tr 2 (López)/288.

351 Claimants' Reply on the Merits ¶ 126.

352 Tr.2 (López)/283-287 ("Q: So, as a contractual matter, the Contract shifted the risk of obtaining all licenses and permits necessary to carry out the construction work to the Omega Consortium; correct? A: Yes. We did the work, made the presentation to each entity or agency, and it was up to each Government agency to provide the corresponding approvals.").

353 Tr 2 (López)/282-283.

354 Tr 2 (López)/285-286; Letter from the Municipality of Panama to the Ministry of Housing dated Aug. 28, 2014 (**R-0102**); Letter from the Mayor of Panama City to the Ministry of Housing dated Oct. 13, 2014 (**R-0103**); *see* Panama's Rejoinder ¶ 212 (describing the efforts taken by the Municipality of Panama related to the Soil Use Certificate).

355 *See* Panama's Rejoinder ¶¶ 222-229.

166. *First*, Mr. Lopez's testimony highlights the fact that the Municipality under Mayor Blandón, who Claimants indicate was "appointed by the Varela Administration" and was an "outspoken supporter of the President,"[356] made a concerted effort to assist Omega in obtaining the necessary Soil Use Certificate for the Pacora Market.[357] As noted above, Omega was responsible for obtaining the permits and licenses needed for the projects,[358] so the Municipality had no obligation to assist in this matter. Nonetheless, the Municipality and even the Mayor made a personal and concerted effort to obtain the necessary documentation in August and October of 2014, months after President Varela took office.[359] Such a step would never have been taken had the Mayor been directed or intended to stop Omega's project.

167. *Second*, Mr. Lopez's testimony further supports Panama's position that there was no change in the Municipality or Comptroller General's behavior towards Claimants on the project as a result of the change in administration. Claimants had alleged in their Memorial that payments on Omega's projects stopped being approved when President Varela took office,[360] but later acknowledged that payment applications submitted during the Martinelli administration were similarly not approved.[361] Mr. Lopez's testimony confirms that between September 2013 and September 2014 – nine months of which was during the Martinelli administration – the necessary permits were not approved by the relevant agencies and therefore, the payment applications could not be, and in fact were not, approved by the Comptroller General's office.[362] Far from demonstrating political motivation, this shows that the Municipality and Comptroller General's office acted consistently during both administrations.

---

356 Claimants' Reply ¶ 126.

357 Tr 2 (López)/285-286; Letter from the Municipality of Panama to the Ministry of Housing dated Aug. 28, 2014 (**R-0102**); Letter from the Mayor of Panama City to the Ministry of Housing dated Oct. 13, 2014 (**R-0103**); *see also* Panama's Rejoinder ¶ 212 (describing the efforts taken by the Municipality of Panama related to the soil use certificate).

358 Tr 2 (López)/287.

359 Tr 2 (López)/285-286.

360 Claimants' Memorial ¶¶ 58, 70, 74-75; Rivera I ¶¶ 54-55, 76.

361 Claimants' Reply ¶ 170; López I ¶ 138.

362 Tr 2 (López)/292:14-293:8.

4. The MINSA CAPSI Projects

168. The witness testimony at the hearing did not address the commercial issues on the MINSA CAPSI Projects – the Rio Sereno Project, Kuna Yala Project, and Puerto Caimito Project. As such, Panama will only address the MINSA CAPSI Projects in relation to Claimants' allegations of harassment by the Varela Administration. As indicated above, Panama maintains all of the positions articulated in prior submissions related to the MINSA CAPSI Projects.

a. Claimants Fail to Provide Evidence of Differing Treatment Under the Martinelli and Varela Administrations

169. Claimants argue that their MINSA CAPSI projects were treated differently after President Varela took office. Specifically, Claimants argue that they were not paid on any of these projects and that the Comptroller General's office returned CNO's and contract addenda for pretextual reasons.[363] Panama showed why these arguments fail in its written submissions,[364] and Panama's position was confirmed during the hearing by Mr. Lopez's testimony.

170. *First*, while Claimants argue that they did not receive a penny on any of the MINSA CAPSI projects after President Varela took office, the record clearly shows that several payments on these projects were made after June 2014.[365] During cross-examination, Mr. Lopez conformed that payment applications submitted in August 2014 were paid on the Kuna Yala Project.[366] Even without Mr. Lopez's testimony, Claimants' own accounting expert, Mr.

---

363 Claimants' Reply ¶¶ 118-123; López I ¶¶ 112-113. Additionally, Claimants argue in support of their contention that the government's attitude changed that Mr. Barsallo acknowledges that "[b]efore the Varela Administration, reducing personnel while awaiting endorsement of change orders had never been a problem." Claimants' Rejoinder ¶ 157. Mr. Barsallo, however, corrected the corresponding portion of his witness statement in his direct testimony, stating that "based on my knowledge and the documents reviewed, Omega, during the time of President Martinelli, did not formally submit any suspensions or any personnel reductions." Tr. 3 (Barsallo)/689:6-690:1 (referring to Barsallo I ¶ 27). Claimants present no other evidence of the reduction in personnel during the Martinelli administration from which to draw this comparison, and therefore, Claimants' contention about changes in treatment due to personnel reduction should be dismissed as unsupported.

364 Panama's Rejoinder ¶¶ 235-259; Panama's Counter-Memorial ¶¶ 59-65, 70-76.

365 Panama's Rejoinder ¶¶ 272-275 (noting that several payments were received by Claimants after July 2014); Panama's Counter-Memorial ¶ 74 (showing multiple CNOs were issued to Omega after President Varela took office); *see also* McKinnon Report, Annex I, pp. 4-12.

366 Tr. 1 (López)/232:8-11 ("Q: And it is true that the Payment Applications that were submitted in August of 2014 were paid; correct? A: Correct).

McKinnon confirms that payments were made on several applications presented after the change in administration in addition to those Mr. Lopez confirms were paid on the Kuna Yala Project.[367]

171. *Second*, Claimants' argument that contract addenda were returned by the Varela administration for pretextual reasons was shown to be false. Mr. Lopez confirmed that the Comptroller General's office occasionally returned contract addenda that contained various errors or missing information. During cross-examination, Panama explored several contract addenda returned by the Martinelli and Varela administrations for identical reasons. For example, addenda were returned by both administrations, to correct typos in the number of days the contract would be extended for, to correct issues regarding amounts due under the contract, and to add the budget allocation for the project. Claimants concede that they have no "concerns with political motivation with respect to requests" to revise addenda and payment applications "that were made between 2013 and the election of President Varela."[368] When presented with addenda and payment applications which were returned during President Varela's term for similar, if not the same, errors, Mr. Lopez confirmed that the "errors" in the applications also "caused them to be returned by the Comptroller General."[369] This directly undermines Claimants position that these addenda were returned as a form of political harassment.[370] Claimants, therefore, cannot maintain that the Comptroller General's reasons for returning addenda and payment applications during the Varela administration were politically motivated and pre-textual, when Claimants admit the same actions cause no "concern[] [of] political motivation" when taken during the Martinelli administration.[371]

b. There was No Political Influence from the Presidency on the MINSA CAPSI Projects

172. In prior briefing, Claimants relied on excerpts of WhatsApp messages between Nessim Barsallo (former Sub-Director of Projects at MINSA) and Mr. Lopez to support their contentions that the Presidency was acting against Omega's MINSA CAPSI Projects and that the Comptroller General received instructions from the Presidency to "ignore all requests by the

---

367 Expert Witness Statement of Greg. A. McKinnon, Annex I, pp. 4-12.

368 Tr 2 (López)/ 250-251, 256-257.

369 Tr 2 (López)/257-259.

370 Claimants' Reply ¶¶ 118-123; Claimants' Memorial ¶¶ 84-87.

371 Tr 2 (López)/250-251, 256-257; Panama's Rejoinder ¶¶ 243-255; Panama's Counter-Memorial ¶¶ 75-76.

Omega Consortium."[372] However, Mr. Barsallo's personal WhatsApp messages cannot be relied on to support these assertions.

173. As Mr. Barsallo explained in his witness statement and affirmed in his testimony, he had no knowledge of President Varela or the Presidency influencing the Comptroller General or acting against Omega's MINSA CAPSI Projects.[373] Mr. Barsallo testified, "I have no knowledge beyond the information or the comments that I received from Omega staff to – for me to confirm, for me to say, for me to show that there was some sort of illegal manipulation."[374] His comments were based on what Mr. Lopez had told him about what "was going on from [Mr. López's] own point of view [of the] investigation of Omega that was being carried out" by the Public Ministry and that Mr. López's frustration was based on his and Omega's perception that "the administration of President Varela was moving forward with some investigations [i.e., the Moncada Luna investigation] on a personal basis and specifically targeting Mr. Rivera."[375]

174. Mr. Barsallo noted that he had no basis to "assert that what [Omega was] saying" was accurate.[376] At the time of these messages, Mr. Barsallo indicated that his relationship with the administration "was not the best," so he would be "the last person [Mr. Lopez] had to resort to, to know what was going on."[377] Accordingly, the Tribunal should accord no weight to the WhatsApp messages between Mr. Barsallo and Mr. Lopez in determining whether it believes Claimants' allegations that President Varela was acting against Omega's projects or that the Comptroller General received instructions from the Presidency to ignore Omega's requests.

C. PANAMA DID NOT EXPROPRIATE THE CLAIMANTS' INVESTMENTS

175. In order to prevail on a claim of expropriation, Claimants must show that there was a taking of property, for a public purpose, done with due process, in a non-discriminatory manner, and with the payment of compensation.[378] This burden applies regardless of whether a claimant

---

372 Claimants' Reply ¶ 104; Claimants' Rejoinder ¶¶ 186, 269-271.

373 Tr 3 (Barsallo)/708-723, 730. Barsallo II ¶¶ 35-39; *see also* Panama's Rejoinder ¶¶ 266-281

374 Tr 3 (Barsallo)/713:2-9.

375 Tr 3 (Barsallo)/714:1-17.

376 Tr 3 (Barsallo)/714:18-715:1.

377 Tr 3 (Barsallo)/721:1-11, 729:12-731:19.

378 BIT (**CL-0001**), Art. IV(1); TPA (**CL-0003**), Art. 10.7. As Panama has noted, Claimants' definition of their investment has shifted dramatically throughout the proceedings from their Contracts to their interest in

alleges that their property has been directly or indirectly expropriated. Here, Claimants argue that their property has been indirectly expropriated. Annex 10-B(4) of the TPA states that determination of whether an indirect expropriation has occurred requires a "case-by-case, fact-based inquiry" that considers, among other factors, the economic impact of the government actions, the extent to which the action interferes with distinct, reasonably, investment-based expectations, and the character of the government action.[379] When these factors are considered, it is clear that Claimants have not met their burden.[380]

1. There is No Evidence of Substantial Deprivation or Economic Impact from Panama's Actions

176. An adverse economic impact caused by government actions "standing alone, does not establish that an indirect expropriation has occurred."[381] Thus, international liability will not arise merely because an investor suffered economic loss as a result of government action. The investor must show that the government measure destroyed all, or virtually all, of the economic value of its investment.[382] Here, Claimants have argued that their investment was affected in two respects: (a) the loss of money purportedly due under existing contracts; and (b) the decrease in the value of their interest in Omega Panama due to the loss of potential future contracts. As Panama has shown, neither of these losses were material or support a finding of an indirect expropriation.

177. With respect to moneys purportedly owed under existing contracts, legitimate contractual disputes exist as to whether the money Claimants seek is owed under the various contracts. As Panama has demonstrated, Claimants received advance payments in each of their projects that were not fully recovered by Panama. Such funds should be offset against any moneys owed under the contracts. Further, there are legal barriers to paying certain amounts claimed by Claimants because the contracts covering those payments were left to expire.

Omega Panama, an apparent shell company. Panama's Rejoinder ¶ 426. Under either definition, Claimants failed to show that Panama expropriated Claimants' investment.

379 TPA (**CL-0003**), Annex 10-B ¶ 4.

380 Panama's Counter-Memorial ¶ 257 (citing *Parkerings v. Lithuania* (**CL-0041**), ¶ 443).

381 TPA (**CL-0003**), Annex 10-B ¶ 4(a)(i).

382 U.S. Submission ¶ 39.

178. With respect to the alleged decrease in the value of Omega Panama due to lost potential future contracts, Claimants have not clearly shown they suffered any material, adverse economic impact from Panama's actions. As Panama has shown (and as is discussed below), Claimants' valuation does not accurately reflect the value of Omega Panama but reflects a combination of assets from Omega Panama and Omega US. If Claimants had valued Omega Panama as a stand-alone entity – as is required by the fair-market value standard – they would have been forced to admit that, as Dr. Flores found, "the Fair Market Value of Omega Panama is zero[.]"[383] Whatever success Claimants may have had in Panama was not the product of their investments in that country. Rather, they were linked to intangible assets of Omega US, which are not investments. A worthless investment cannot be further devalued. And Claimants' attempts to have Omega Panama ride the coattails of Omega US and various third-party partners further demonstrate that, on its own, Omega Panama has no material value to a hypothetical buyer.[384]

2. Panama's Actions Did Not Interfere with Claimants' Distinct, Reasonable, Investment-based Expectations

179. An assessment of whether a government's action interfered with a claimant's reasonable, investment-based expectations requires an objective inquiry of the reasonableness of the claimant's expectations.[385] This analysis is similar to the analysis required under the Fair and Equitable Treatment standard relied on by Claimants. Claimants did not have legitimate, reasonable, investment-based expectations that were undermined by Panama. A discussion of this factor is provided in detail below at Section III.C.2.

3. Panama's Actions Were Commercial In Nature and Do Not Constitute a Taking

180. As discussed above, it is well settled that a state will not incur international liability when it acts in a commercial capacity.[386] Therefore, an alleged breach of contract will not give rise to a treaty breach unless it can be shown that the breach was the result of the state acting solely in its capacity as a state. Where the state is acting in a commercial capacity, disputes regarding an

383 *See, e.g.*, Tr 5 (Flores)/955:10-11; *see also* First Quadrant Report, Section III.A, ¶ 23.

384 Panama's Rejoinder ¶ 433.

385 U.S. Submission ¶ 41.

386 *See Parkerings v. Lithuania* (**CL-0041**), ¶ 443.

alleged breach should be resolved in accordance with the law and forum specified in the contract.[387]

181. Claimants agree that the sovereign action requirement is "[t]he most important criterion" for distinguishing between a mere breach of contract and an expropriation, yet the basis of their expropriation claim consists of purely commercial actions that *any* contracting party could take: untimely payment of invoices, untimely approval of contract addenda, and termination of contracts.[388] However, the character of an act, and not the identity of a party, dictates whether sovereign authority is implicated. As such, none of the acts complained of, even if proven (which they are not), becomes sovereign simply because a ministry or municipality is involved. On this basis alone, Claimants' expropriation claim must fail.

4. The Evidence Does Not Support a Creeping Expropriation

182. Claimants further claim that Panama's "collective actions were a creeping expropriation of Claimants' *entire* investment in Panama."[389] Again, Claimants allege that Panama's purported breaches of contract, lapses in contractual performance, and termination of the Contracts give rise to international liability.[390] However, Claimants again incorrectly ascribe sovereign character to purely commercial actions.

183. As the submission of the United States correctly notes, "certain actions, by their nature, do not engage State responsibility under the expropriation obligation" and that "the character of the government action" determines whether a creeping expropriation has occurred.[391] Each of the alleged acts was undertaken by various ministries and municipalities in their capacity as commercial actors, has no sovereign character whatsoever, and consequently "does not engage State responsibility." Accordingly, where no component act is sovereign in character, the "collective actions" cannot add up to a use of sovereign authority. Nor can they substantially

---

387 *See* Panama's Rejoinder ¶ 428.

388 Claimants' Memorial ¶ 144 (citation omitted); Panama's Rejoinder ¶ 428.

389 Claimants' Reply ¶ 373 (emphasis in original).

390 *See* Claimants' Reply ¶ 374.

391 U.S. Submission ¶¶ 37-38.

decrease or deprive the value of a valueless investment. Claimants cannot make something out of nothing, and their creeping expropriation claim must thus fail.

D. PANAMA TREATED CLAIMANTS' INVESTMENTS FAIRLY AND EQUITABLY

184. Panama did not treat Claimants unfairly or inequitably, either directly or in a "creeping" manner. Claimants' arguments to the contrary all fail.

1. Claimants' Standard for Fair and Equitable Treatment Is Wrong

185. Claimants argue that the BIT and TPA provide for "a broad and flexible standard of fair and equitable treatment."[392] However, both the United States and Panama – the state parties to both Agreements – have represented to the Tribunal that Claimants' argument is incorrect.[393] Both treaty parties take the position that their FET obligations under the TPA and BIT are expressly linked to (and limited by) the minimum standard required by customary international law. This is made clear in the text of both treaties. Article II(2) of the BIT provides that:

> Investors of nationals and companies of either Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Party. *The treatment, protection and security of investment shall be in accordance with applicable national laws and international law*.[394]

186. Similarly, Article 10.5 of the TPA states:

> 1. Each Party shall accord to covered investments treatment *in accordance with customary international law*, including fair and equitable treatment and full protection and security.
>
> 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.[395]

---

392 Claimants' Reply ¶ 378.

393 U.S. Submission ¶¶ 11-30; Panama's Counter-Memorial ¶¶ 267-270; Panama's Rejoinder ¶¶ 442-444.

394 BIT (**CL-0001**), Art. II(2) (emphasis added).

395 TPA (**CL-0003**), Art. 10.5 (emphasis added).

187. These provisions demonstrate the treaty parties' adoption of the minimum standard of treatment under customary international law to govern their FET obligation.[396] Accordingly, to prove a violation of FET, "[t]he burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*."[397] That is, a claimant "must prove that [a] custom is established in such a manner that it has become binding on the other Party."[398] Subsequently, a claimant must show that "the respondent State has engaged in conduct that violates that rule."[399]

188. Here, Claimants have failed to identify *any* custom established by Panamanian State practice or opinions of the Panamanian courts which has allegedly been violated. Instead, Claimants point to the untimely payment of invoices, the denial of contract addenda, and the termination of contracts or projects as evidence of Panama's supposed FET violation. Panama is not aware of any custom barring contracting parties from exercising contractual rights during the course of commercial transactions. Further, conduct violating the FET standard must "show[] a willful neglect of duty, an insufficiency of action falling far below international standard or even subjective bad faith."[400] Commercial actions contemplated by contract and taken in the context of troubled projects cannot rise to the level of breach nor do they fall below the international minimum standard of treatment.

2. The Evidence Shows Claimants' Legitimate Expectations Have Not Been Undermined

189. Claimants further allege that Panama breached its FET obligation by violating "the requirement that a State honor an investor's 'legitimate expectations.'"[401] This is not the "essential, dominant, and most significant element of the FET obligation" as Claimants allege.[402] Rather, under the standard required by the BIT and TPA, an investor's legitimate expectations

396 U.S. Submission ¶ 14 (citation omitted).

397 U.S. Submission ¶ 18 (citations omitted).

398 U.S. Submission ¶ 19 (citations omitted).

399 U.S. Submission ¶ 19 (citations omitted).

400 Panama' s Rejoinder ¶ 444 (quoting *Genin v. Estonia* (**RL-0029**), ¶ 367).

401 Claimants' Memorial ¶ 162.

402 Claimants' Memorial ¶ 162 (internal quotation marks and citations omitted).

form *no part* of the FET obligation.[403] As the United States aptly explained: "The mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of [the TPA or the BIT], even if there is loss or damage to the covered investment as a result."[404] Accordingly, the concept of legitimate expectations has not "crystallized into the minimum standard under customary international law" and has no bearing on whether a party has breached its FET obligations.[405] Claimants' arguments regarding any frustration of their legitimate expectations are therefore inapposite and cannot support a violation of the FET provisions of the Agreements.

190. Even if Claimants' position were correct, they have provided no evidence of any meetings with Panamanian government officials, any agreement, nor any other promise or inducement showing that Panama provided any assurances to Mr. Rivera regarding the investment environment.[406] In fact, the only "expectation" Claimants cite is the doctrine of *pacta sunt servanda*. As Panama showed, however, tribunals have consistently stated that this doctrine does not create a "legitimate expectation" for purposes of the FET requirement. Indeed, a finding that *pacta sunt servanda* created a legitimate expectation for FET purposes would effectively transform any contract breach by a government into an FET violation, thereby expanding the scope of a state's international liability beyond any reasonable measure.

3. The Evidence Shows that Claimants Were Not Targeted or Harassed

191. Claimants have alleged throughout the proceedings that their investment was targeted as part of a "campaign of harassment" by President Varela – including that "Government officials carried out that threat by depriving Claimants of their contractual rights to payment and other benefits" and that Panama "intimidated Claimants by abusing its police powers and initiating groundless criminal investigations against the Claimants, leading to unwarranted detention notices and an INTERPOL red notice."[407] Claimants have presented no documents nor have they elicited any testimony supporting this notion of targeting or harassment. In fact, each of Panama's

403 U.S. Submission ¶ 24; Panama's Response to the U.S. Submission ¶ 15.

404 U.S. Submission ¶ 24.

405 Panama's Response to the U.S. Submission ¶ 15 (internal quotation marks and citations omitted).

406 Panama's Rejoinder ¶¶ 448-451.

407 Claimants' Reply ¶ 401.

witnesses has explicitly denied that Claimants' projects were targeted or harassed in any way.[408] Further, Panama has proven – and Claimants' expert has confirmed – the reasonableness of its criminal investigations into Mr. Rivera and the Omega entities.[409] Claimants' only support for the alleged campaign of harassment lies on Mr. Rivera's bare assertions which have not been substantiated through any additional documentary or testimonial evidence. Consequently, any claims based on Panama's alleged targeting and harassment of Claimants' investment must fail.

4. The Evidence Shows that Claimants Were Not Treated Arbitrarily, Unreasonably, Inconsistently, Non-Transparently or "Not in Good Faith"

192. Claimants alleged that Panama violated the FET standard by breaching its purported obligations of transparency, non-discrimination, and good faith.[410] These arguments are similarly without merit. Like legitimate expectations, the concept of transparency is not a component of fair and equitable treatment.[411] Further, good faith and non-discrimination are not "free-standing, substantive obligation[s] . . . that . . . can result in State liability under the Agreements."[412] Thus, even if Panama treated Claimants arbitrarily, unreasonably, inconsistently, discriminatorily, or with a lack of transparency or good faith, such conduct could not constitute a violation of the FET provisions.

193. However, Claimants have consistently failed to establish the facts to support a violation even under their constructed legal framework. The evidence demonstrates that Panama acted in good faith at all times when dealing with Claimants.[413] Similarly, Panama exceeded any purported

---

408 Respondent's Rejoinder ¶ 457, n. 930.

409 *See* Respondent's Rejoinder Sect. II.A.1; Tr 8 (Jimenez)/1676:20-1677:2 ("I would say that it would need to be investigated. It seems like a reasonable thing to do to determine why that money was transferred from Omega to PR, and that would be investigative steps that are necessary.")

410 *See* Claimants' Reply ¶¶ 395-398; Panama's Rejoinder ¶¶ 453-454, 459-469. Notably, in Claimants' Memorial, this was framed as a violation of Article II(2) of the BIT. Claimants later abandoned this frivolous argument in their Reply, in favor of "fold[ing] their allegations into their [FET] claim." *See* Panama's Rejoinder ¶ 459.

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

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

413 Panama's Rejoinder ¶ 454 & n. 926.

transparency obligation when INAC provided Claimants with more notice and due process regarding termination of the contract than the standards Claimants argue were required by law.[414]

194. Crucially, as the United States raises, "[i]t is . . . incumbent upon the claimant to identify third-State investors or investments" to support any discrimination claim, failing which, "no violation of Article 10.4 [of the TPA] can be established."[415] Claimants have yet to identify any third-State investor as an appropriate comparator and they fail to apply the necessary rigor in establishing the pre-requisite "like circumstances," which "requires . . . more than just the business or economic sector, but also the regulatory framework and policy objectives, among other relevant characteristics."[416] With no reference point for like circumstances, there is no basis for finding that Panama has acted arbitrarily, inconsistently, or discriminatorily.

E. PANAMA HAS NOT BREACHED ITS OBLIGATION TO PROVIDE FULL PROTECTION AND SECURITY

195. Claimants argue that Panama breached its obligation under the BIT and TPA to provide Claimants and their investment full protection and security.[417] Their arguments must fail because the FPS provisions of the Agreements are not even implicated in the current dispute. The scope of the FPS obligation is limited to "instances where a foreign investment has been affected by civil strife and physical violence."[418] As such, the "vast majority" of FPS violations have involved a State's failure to provide reasonable police protection against criminal acts that endanger the investor or its property.[419] Indeed, both parties and the United States agree that "the core of the full security and protection standard . . . [is] *physical* protection."[420] Yet

414 Panama's Rejoinder ¶ 454 & n. 928.

415 U.S. Submission ¶ 5.

416 U.S. Submission ¶ 6.

417 Claimants' Memorial ¶¶ 180-184. Panama notes that while some treaty obligations cover treatment accorded to investors and investments, the full protection and security obligation extends only to investments. Panama's Response to U.S. Submission ¶ 31. Thus, any FPS claims based on the treatment accorded to Claimants have no legal foundation.

418 Panama's Rejoinder ¶ 470 (internal quotation marks and citations omitted).

419 U.S. Submission ¶ 22.

420 Claimants' Memorial ¶ 184 (emphasis in original); *see also* Panama's Response to U.S. Submission ¶ 14 ("Panama agrees that . . . in the 'vast majority of cases' were FPS was breached 'a State failed to provide reasonable police protection against acts of a criminal nature that physically invaded the person or property of an alien.") (citing U.S. Submission ¶ 22).

Claimants argue that the FPS standard is "not so limited," and argue that Panama breached its obligation through a purported "refusal to comply with its contractual obligations", termination of Claimants' contracts, and an alleged failure to provide "legal security" over Claimants' investment. [421] This is factually incorrect and legally impossible.

196. As the United States aptly stated, the FPS obligation "does not . . . require States to prevent economic injury inflicted by third parties; provide for legal protection; or require States to guarantee that aliens or their investments are not harmed under any circumstances."[422] Any requirement of this nature would "impermissibly extend" the FPS obligation beyond the minimum standard required under customary international law.[423] Consequently, legal protection of an investment is expressly excluded from a State's FPS obligation. Similarly, commercial acts, such as the termination of a contract, must be also be excluded where any resulting injury would be purely economic and thus would not implicate any use or threat of physical force which could give rise to international liability.[424] Claimants cite to no authority or provide any testimony proving otherwise. Accordingly, Claimants' arguments that Panama failed to provide "legal and commercial security of Claimants' investment" necessarily cannot establish a breach of Panama's full protection and security obligation.[425]

197. Claimants further argue that Panama failed to provide physical security to Mr. Rivera by restricting "Mr. Rivera's freedom to travel to and from Panama" through conducting criminal investigations into Claimants as well as the issuing a detention order and INTERPOL Red Notice.[426] Notably, these allegations do not – and could not – involve any failure by Panama to provide reasonable police protection or to protect Claimants against physical injury caused by

---

421 Claimants' Memorial ¶¶ 181 & n. 454, 183.

422 U.S. Submission ¶ 23.

423 U.S. Submission ¶ 23.

424 *See* Panama's Rejoinder ¶¶ 470-475.

425 Claimants' Memorial ¶ 183. Even if international liability could be established, Panama has proven time and again that Claimants are the ones who have breached their contractual obligations through contractual failures and corruption, and that any actions taken by Panama have been in response to such breaches. *See* Panama's Rejoinder ¶ 475.

426 Claimants' Memorial ¶ 184.

third parties.[427] Rather, Claimants state – without any citation – that "[p]hysical security and protection include[s] . . . the right of an investment's managers to travel to and from Panama to manage an investment."[428] Claimants have provided no evidence that such a right exists or that such conduct is protected by the FPS obligation. Similarly, Claimants have produced no evidence or testimony tending to prove that any breach arises when a State, in exercise of its police powers, tries to mitigate a flight risk pending the resolution of investigations into a high-level corruption and money laundering scheme. Instead, Claimants have submitted evidence confirming that Panama's use of its police powers was not only reasonable but encompassed "investigative steps that [were] *necessary*."[429] In light of Claimants' own evidence, even under a higher standard, Panama has not breached the FPS provisions of the Agreements.

F. PANAMA DID NOT BREACH THE UMBRELLA CLAUSE

198. Claimants argue and have failed to prove that Panama has breached the umbrella clause of the BIT and that Panama has not challenged this claim on the merits.[430] As an initial matter, they fail to reconcile a critical contradiction. Claimants simultaneously claim that "Respondent's breaches of its obligations under the Contracts also amount to a breach of the 'umbrella clauses'" and that "Claimants have not alleged a breach of contract under domestic law; they have alleged *international law* breaches of 'right[s] conferred or created by this Treaty with respect to an investment.'"[431] However, if Claimants' position is that the umbrella clause elevates a breach of contract into a treaty breach, they cannot have established an umbrella clause violation where, admittedly, "Claimants have not alleged a breach of contract under domestic law."

---

427 *See* Panama's Response to U.S. Submission ¶ 14.

428 Claimants' Memorial ¶ 184.

429 Tr 8 (Jimenez)/1676:20-1677:2 (emphasis added).

430 Claimants further allege that they "may import via the TPA's MFN clause . . . the umbrella clause from other treaties between Panama and other States [(*i.e.*, the BIT)]" to support a violation of the TPA. Claimants' Memorial ¶ 188, n. 468 (citation omitted). This claim is groundless. *See* Panama's Counter-Memorial ¶¶ 217-227; Panama's Rejoinder ¶¶ 139-147. Even if the MFN provision of the TPA were implicated, the United States correctly notes that the existence third-State investor or investment under like circumstances must be established before a violation of the MFN provision can be found. *See* U.S. Submission ¶ 3. As noted above, Claimants have failed to do so and have thereby abandoned a condition precedent to relief.

431 Claimants' Memorial ¶ 188; Claimants' Reply ¶ 343 (citation omitted).

199. This is especially true where Claimants have offered no discussion of where a breach of contract may lie in the absence of an overarching rule of international contract law. Further, Claimants provide no contractual analysis proving that they were entitled to certain dollar amounts and time extensions nor whether Claimants' requests comported with contractual and Panamanian legal requirements. Instead, Claimants offer conclusory assertions that they are entitled to payments and contract extensions simply because they asked. As a commercial and legal matter, this is false, and Claimants have failed to prove any conduct sufficient to constitute a violation of the umbrella clause, even under Claimants' flawed legal framework. The umbrella clause claim thus fails.

IV. CLAIMANTS FAILED TO ESTABLISH ENTITLEMENT TO ANY COMPENSATION

200. Panama demonstrated in its written submissions that Claimants' request for compensation is grossly overstated, factually indefensible, economically unsupportable, and inconsistent with the law. This fact was confirmed at the hearing, when the extent of Compass Lexecon's methodological and factual flaws was fully revealed. Indeed, Compass Lexecon's testimony made clear that its valuation of Claimants' alleged losses on future contracts improperly valued Omega US' assets, relied on unsupported assumptions. and ignored or distorted critical facts – all of which leads to an overstated and unsubstantiated valuation.

A. THE AMOUNT CLAIMED FOR WORKS ALLEGEDLY PERFORMED ON EXISTING CONTRACTS IS OVERSTATED

201. Claimants seek approximately US$ [redacted] for work allegedly performed on existing contracts. That amount is overstated for three reasons: (a) Claimants used an inappropriate high rate to compound the amount of money owed through the valuation date; (b) Claimants overstated the amount of expected future cash flows; (c) Claimants discounted future cash flows to the valuation date using an incorrect cost of equity; and (d) Claimants failed to account for the offsetting effects of advances paid to Claimants for yet unbilled future work.

202. Panama addressed the advance payment issue in its response to the Tribunal's questions above. The remaining issues were not addressed in detail during the hearing and, as such, the Parties' positions remain the same as set forth in their respective expert reports. For a full

discussion on these issues, Panama refers the Tribunal to Sections IV.A-C; and V of Dr. Flores' First Report and Sections IV.B and V of Dr. Flores' Second Report.

B. THE AMOUNT CLAIMED FOR ALLEGED LOSSES ON POTENTIAL NEW CONTRACTS IS UNSUPPORTABLE

203. Claimants seek US$ [redacted] million in compensation for lost revenue associated with potential new contracts that Omega Panama might have secured but for Panama's actions.[432] According to Claimants' written submissions, this amount reflects the net present value of Omega Panama, as determined through the application of a discounted cash flow ("DCF") analysis.[433] Panama has demonstrated, however, that Claimants' DCF analysis and purported valuation of Omega Panama are fundamentally – and fatally – flawed. Indeed, Claimants do not value Omega Panama as a stand-alone entity, but provide a valuation that combines the value of Omega US and Omega Panama.[434] Claimants valuation also relies on faulty assumptions regarding future capital spending in Panama, incorrectly analyzes competitive bid data, and incorrectly applies the principles underlying the fair-market value analysis.

1. Claimants Did Not Value Omega Panama

204. Claimants assert that their claimed losses on future potential contracts derive from to "Omega Panama's proven capacity to generate new contracts,"[435] and ability to continue as a "going concern, bidding and winning further construction contracts in Panama from December 2014 onward."[436] As such, Compass Lexecon purported to conduct a valuation that reflects the "price at which a willing buyer would have agreed to buy Omega Panama and the price that a willing seller would have voluntarily agreed to sell it for."[437]

---

432 Claimants' Reply ¶ 468.

433 First Compass Lexecon Report ¶ 66.

434 Second Quadrant Report ¶¶ 8, 25-31.

435 Claimants' Reply on the Merits ¶ 481.

436 First Compass Lexecon Report ¶ 10.

437 Second Compass Lexecon Report ¶ 49 (internal quotation marks omitted). It is agreed between the parties that the fair market standard applies to value Claimants interest in Omega Panama. The value prescribed by that standard is the "amount a willing buyer would normally pay to a willing seller after taking into account the nature of the investment, the circumstances in which it would operate in the future and its specific characteristics, including the period in which it has been in existence, the proportion of tangible

205. While Claimants purported to calculate the "value that a willing buyer and a willing seller would have given to Omega Panama in a hypothetical transaction as of December 2014,"[438] their US$ [redacted] million valuation is, in reality, the "sum of all the assets" of Omega US and Omega Panama.[439] Although admitting that it would be possible to calculate the portions of that valuation attributable to Omega US and Omega Panama, respectively, Compass Lexecon did not do so.[440] "There is nowhere in the Compass Lexecon's reports where there's an attempt to quantify [Omega US'] intangible assets . . . there's not even an attempt to say these are the intangible assets and this is how much these assets were worth in a counterfactual world."[441] Compass Lexecon admits that it has no idea what the actual value of Omega Panama would be as a stand-alone entity, but agrees that it would be nowhere near the US$ [redacted] million sought be Claimants.[442] Rather, Claimants simply provide an unsupported, unquantified, and unexamined "sum of all the assets" supposedly held by Omega US and Omega Panama.

206. Claimants' approach disregards the fact that none of Omega US's so-called intangible assets (e.g., operational history, financing capacity, or bonding capacity) transferred to Omega Panama and that none of them would be available to the hypothetical purchaser in the fair-market value analysis. Rather, Compass Lexecon operated under the false assumption that the "subsidiary" type of relationship between Omega Panama and Omega US would have continued after Omega Panama was sold to a third party:[443]

> **Professor Douglas (Q)**: [D]on't we need to make an assessment of the likelihood that the relationship [between Omega Panama and Omega US] will continue? Don't we have to make an evidence-based assessment of whether that's the case

---

assets in the total investment and other relevant factors pertinent to the specific circumstances of each case." Second Compass Lexecon Report ¶ 47; First Quadrant Report ¶ 16; Second Quadrant Report ¶ 19

438 Second Compass Lexecon Report ¶ 54.

439 Tr 5 (Zadicoff)/925:12-16.

440 Tr 5 (Zadicoff)/924:20 - 925:18.

441 Tr 5 (Zadicoff)/1027:2-12.

442 Tr 5 (Zadicoff)/938:9-19 (conceding that the value of Omega Panama is "not going to be the full $40 million. It's going to be – I don't know. Certainly, it would not be the majority of the value.").

443 Tr 5 (Zadicoff)/926:13-20 ("[G]iven that this is a kind of subsidiary from an international company, I will have no reason to believe that this relationship will stop."); Tr 5 (Zadicoff)/939 5, 8-9.

> because that, in turn, will affect the value of that relationship which is a component of the thing that you evaluate?
>
> **Mr. Zadicoff (A):** That is correct. . . [G]iven that this is a direct investment in a subsidiary form to capitalize on the same assets and put them at risk to win new projects, I would – the logical assumption in my valuation view is that you would consider that the relationship would continue into the future because the basis for doing the subsidiary, the investment, is to capitalize on these investments in the Panamanian market.[444]

207. Compass Lexecon further confirmed its erroneous assumption that Omega US would continue to support Omega Panama was because of the parent/subsidiary relationship between Omega US and Omega Panama in response to a question from Mr. Shore:

> **Mr. Shore (Q):** [A]m I right that you said you would see no reason in a hypothetical sale and purchase that Omega US would refuse to provide support. That is, you would assume that it would continue to provide support.[445]
>
> **Mr. Zadicoff (A):** Right. Given that it is a subsidiary and it was – the Panamanian entity as a subsidiary was created with the purpose of capitalizing on the assets. That I would not expect that support to be interrupted . . . [446]
>
> . . . [T]his is like buying – if you want to conceptualize this, it 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 US.[447]

208. Compass Lexecon's assumption is entirely unsupportable. *First*, Compass Lexecon ignores the fact that the Omega Consortium would no longer exist following the sale of Omega Panama. The hypothetical buyer would hold title to Omega Panama and would be forced to rely solely on Omega Panama's assets as the basis for any future bids. Profits from any bids won in Panama would flow to the hypothetical buyer. Absent some contractual agreement between the hypothetical buyer and Omega US, neither Mr. Rivera nor Omega US would derive any financial benefit from their continued assistance following the hypothetical sale. It is illogical, therefore, for Compass Lexecon to suggest that Omega US would continue to assist in the Panamanian

---

444 Tr 5 (Zadicoff)/926:18-9 927:1-9, 15-22.

445 Tr 5 (Zadicoff)/931:19-932:1

446 Tr 5 (Zadicoff)/932:6-10.

447 Tr 5 (Zadicoff)/933:1-4.

bidding process without receiving any future remuneration for its services. And, even if one were to assume the existence of a theoretical consulting arrangement between the hypothetical buyer and Omega US to secure Omega US' future assistance, that arrangement would come with a cost that necessarily would diminish the value of Omega Panama at the valuation date. It would be inappropriate, however, to engage in such speculation as part of a valuation analysis.

209. *Second*, as Dr. Flores testified, a hypothetical buyer of a closely-held asset like Omega Panama would be someone with pre-existing experience in the international construction market and the assets necessary to make this type of an investment.[448] Such a purchaser almost certainly would have its own operational history, financing capacity, and bonding capacity; thereby, rendering any potential future involvement by Omega US unnecessary.[449]

210. *Third*, Compass Lexecon's assumption is grounded on the belief that Omega US and Omega Panama were in a parent-subsidiary relationship. Compass Lexecon's position seems entirely without merit. Indeed, it strains credulity to suggest that, following the voluntary sale of a subsidiary company, a parent would continue to support the new owner in its commercial efforts. The entire point of the sale would be to divest the parent of the subsidiary – something that could not be achieved if the parent continued to provide material support. In any event, Compass Lexecon's assumption is undermined by the fact that there is not parent-subsidiary relationship between Omega US and Omega Panama. Rather, both companies are directly and wholly owned by Mr. Rivera. The factual predicate underlying Compass Lexecon's assumption, therefore, does not exist.

211. *Fourth*, even in the unlikely event that Mr. Rivera and Omega US remained involved with Omega Panama after a hypothetical sale, Compass Lexecon assumes that (a) they would remain actively involved forever (i.e., that Mr. Rivera would never retire, sell Omega US, or simply lose interest in supporting a third party's operations in Panama); and (b) that Omega US

448 Tr 5 (Flores)/1034:14-20, 1036:4-22.

449 Tr 5 (Flores)/955:12-956:8.

would perpetually remain solvent and always have the same financing and bonding capacity. Such assumptions are wholly unreasonable in the context of a DCF analysis.[450]

212. A reasonable and credible DCF analysis would have accounted for an end to – or diminution of – the support provided by Mr. Rivera and Omega US over time.[451] Compass Lexecon, however, models this assistance into perpetuity. As Dr. Flores explained, "the model shows that [Compass Lexecon] assume[s] that the Willing Buyer will say Omega Panama had something so valuable . . . that no one would be able to replicate it, not in three years, not in five years, not in 10 years, not in 1000 years."[452] That position is inconsistent with the facts.

213. Historically, Mr. Rivera's company focused worked almost exclusively in Puerto Rico. He seriously began exploring other markets as a direct result of the downturn in the Puerto Rican economy and the attendant slowing of public works projects. After exploring various countries, Mr. Rivera chose Panama to take advantage of the "boom" in public works spending expected over the 2009-2014 period.[453] Claimants' counsel even affirmed that Claimants "were all set to service the construction boom that was contributing to Panama's development."[454]

214. The "ultimate objective," though, was "to replicate" the opportunistic strategy started in Panama "in other jurisdictions by expanding Omega U.S.'s presence until it became a regional, and ultimately a global, competitor."[455] Panama was never intended to be a permanent (or even long-term) move for Mr. Rivera. Rather, as his testimony and conduct establish, Mr. Rivera viewed Panama's impending construction "boom" as a short-term opportunity and he remained focused on pursuing the next opportunity in the Central American and Caribbean regions. There is nothing to suggest that Claimants intended to stay in the Panamanian market after the boom ended, let alone forever. Remarkably, however, Compass Lexecon was not even aware that this

450 *See* First Quadrant Report, Sect. III.B.2.

451 *See* Second Quadrant Report ¶¶ 144-146.

452 Tr 5 (Flores)/961:2-8.

453 Rivera I ¶ 15;

454 Tr 1 (Concepcion)/78:18-20.

455 Claimants' Memorial ¶ 34, *citing* Rivera I ¶ 13.

anticipated "boom" influenced Claimants' decision to operate in Panama.[456] Compass Lexecon's ignorance – or willful disregard – of this critical fact is unsurprising given the sloppiness and lack of diligent care that pervades its report. It also undermines the credibility of Compass Lexecon's conclusions.

2. Claimants' Valuation is Inherently Unreliable

215. Even if the Tribunal were to ignore the fact that Claimants failed to properly apply the fair-market value analysis and have presented a valuation for an entity (e.g., the Omega Consortium) that is not the "investment" at issue in this arbitration, the Tribunal should still reject Claimants' demand for US$ [redacted] in compensation for losses related to potential new contracts. To support that number, Compass Lexecon has grossly overinflated both the size of the potential public works market in Panama and the portion of that market that Claimants reasonably could have expected to acquire. As such, Compass Lexecon's report is riddled with analytical and methodological errors that undermine its conclusions.

a. Claimants Overestimate Future Public Works Spending

216. Historically, Panama spends no more than six percent of GDP on central government capital expenditures.[457] The one glaring exception to this historical trend occurred during President Martinelli's administration (2009-2014), when Panama spent roughly 11% of GDP on public works projects.[458] In projecting future cash flows for its DCF analysis, Compass Lexecon ignores the historical data and relies instead on the aberrational period between 2009-2014. In doing so, Compass Lexecon has artificially and improperly increased the amount of money projected to be spent by Panama on public works projects into perpetuity.

217. Compass Lexecon's willingness to disregard this information is inexplicable given its acknowledgement that a hypothetical buyer would be aware of key facts regarding the country where the asset to be valued was located.[459] It is even harder to explain, given that the anticipated construction boom in Panama was such a significant influence in Mr. Rivera's

456 Tr 5 (Zadicoff)/875:19-880:10.

457 First Quadrant Report ¶¶ 59-60; Second Quadrant Report ¶ 95

458 First Quadrant Report ¶ 65, Figure 7.

459 Tr 5 (Zadicoff)/4-7.

decision to enter Panama. According to Mr. Lopez, Mr. Rivera travelled to several Central and South American countries, including Panama.[460] Panama became the destination of choice, however, because "[i]t was a very good time for the construction sector in the country, which was experiencing a construction 'boom.'"[461] During the hearing, Mr. Lopez confirmed that, at the time the investment decision was made, Claimants were aware that the projected public works spending in Panama during the five-year "boom" period would be higher than what had been spent on public works projects in the past.[462]

218. Compass Lexecon's failure to account for historical spending rates is even more inexplicable in view of the contemporaneous expectations of future public works spending as of December 2014. President Varela announced during his campaign that his government would install fiscal discipline and prioritize responsible social spending.[463] Similarly, the President of the National Association of Economists in Panama was saying that fiscal discipline would require the government to rein in spending.[464] And, after President Varela was elected, he issued a new strategic plan that restored public works spending to historic levels.[465]

219. Claimants unquestionably were aware that the 2009-2014 period was unprecedented and that they went to Panama to service the resulting construction boom. Nevertheless, as noted above, Compass Lexecon failed to grasp the importance of this boom on Claimants' decision to enter Panama. In doing so, Compass Lexecon also failed to recognize that an informed hypothetical buyer in December 2014 would be similarly influenced by public pronouncements that Panama would be exercising greater fiscal discipline going forward and that public works spending would trend downward to historical norms. In Compass Lexecon's scenario, a hypothetical buyer would ignore those pronouncements and assume that public works spending

---

460 López I ¶ 18.

461 López I ¶ 18; *see also* Tr 1 (López) 188:19 – 189:3 ("Q: Okay. So, the fact that there was going to be an increase in the construction spending in Panama over this period of time was an important factor in the decision to move to Panama? A: I would understand that that's the case, yes.").

462 Tr 1 (López)/188:3-11.

463 Tr 5 (Flores)/962: 25 – 963:10; *see also* First Quadrant Report ¶¶ 66-67 (citing (**QE-0027**)).

464 Tr 5 (Flores)/963:11-20; *see also* First Quadrant Report ¶¶ 66-67 (citing (**QE-0027**)).

465 Tr 5 (Flores)/964:1-9; *see also* First Quadrant Report ¶¶ 66-67 (citing (**QE-0027**)).

would far exceed historic levels forever.[466] That scenario is illogical. As Dr. Flores explained, "[t]he first thing a hypothetical buyer would do is look at the history, and then you realize that [the 2009-2014 period was] much higher than historically. You see that historically it had been under 5 percent. It is true, the last five years were over 8.5 percent, but would that be sustainable? . . . [T]his is the boom that you see. That's what the boom looks like."[467]

b. Claimants' Analysis of Competitive Bid Data Is Flawed

220. In purporting to value Omega Panama, Compass Lexecon looks at "competitive bid data" for the bids in which Omega Panama participated. This analysis is flawed on multiple levels. *First*, as described above, Compass Lexecon does not control for the influence that Omega US and third-party partners had on the bids. As such, Compass Lexecon does not measure Omega Panama's competitiveness in these bids as a stand-alone entity.

221. *Second*, Compass Lexecon takes a simplistic view of the bid data, resulting in misleading conclusions. For example, Compass Lexecon states that "Omega Panama had an overwhelmingly better [financial] performance than" its competitors.[468] Compass Lexecon acknowledged at the hearing, however, that it did not actually measure Omega Panama's performance and made no effort to separate out the value of the so-called intangible assets contributed to the Omega Consortium by Omega US.[469]

222. Compass Lexecon's methodology for examining the bid data was flawed. For example, when examining financial capacity, Compass Lexecon only took into account when a company received a perfect score of 30 points.[470] If a company did not receive 30 points, Compass Lexecon concludes that it was not financially competitive.[471] That is wrong. Semi – one of the

---

466 Tr 5 (Flores)/961:14-22. ("Now, we are in Slide 1, and what we can see here is that to establish the pie of revenue for which Omega Panama could bid, they look at the public spending on capital projects by the Government of Panama – right? – and what you see, what they assume is that, going forward, starting in 2015 and forever more, that would be 8.5 percent of GDP.").

467 Tr 5 (Flores)/962:1-9.

468 Second Compass Lexecon Report ¶ 70.

469 *See* Tr 5 (Zadicoff)/864:7-21.

470 Second Quadrant Report ¶ 63; Second Compass Lexecon Report ¶ 70.

471 Second Quadrant Report ¶ 63; *see* Second Compass Lexecon Report ¶ 70.

companies that competed in bids with the Omega Consortium – received 27 out of 30 points (or, a score of 90%).[472] Under Compass Lexecon's analysis, however, Semi gets a zero in each of these cases and is deemed to be financially deficient.

223. Similarly, Comsa – another competitor – received perfect scores in two out of three bids.[473] It did not receive a perfect score on the last bid because a reference letter was not addressed explicitly to the entity soliciting the bid.[474] This is was clearly a clerical error that had no bearing on Cosma's financial capability. Compass Lexecon, however, concluded that Comsa's financial strength was less than Omega Panama's because it received fewer perfect scores. This type of misleading analysis defines Compass Lexecon's approach.

224. The flaws in Compass Lexecon's approach are highlighted when the Omega Consortium's competitors are examined.[475] Omega was routinely competing against large international contractors with far greater experience, size, and financial capacity. Indeed, its competitors included the IBT Group – a Spanish contractor, with subsidiaries in Miami, Paris, and London that operates in over 30 countries.[476] In 2014, the IBT group had revenues of US$ 204 million (more than ten times the revenues generated by Omega Panama), and offered customers financing from multilateral organizations such as the United Nations and World Bank, and global financial institutions like Deutsche Bank, Bank of America, Merrill Lynch, BBVA, and Banco Sabadell, Caixa Bank, and BNP Paribas.[477]

225. Other competitors included FCC Construccion, S.A. (which has operated for 120 years, with operations in 21 countries, and revenues in 2014 of € 2.08 billion);[478] and Acciona S.A. (a

472 Second Quadrant Report ¶ 65.

473 Second Quadrant Report ¶ 65.

474 Second Quadrant Report ¶ 65.

475 Second Quadrant Report ¶ 56.

476 Second Quadrant Report ¶ 56.

477 Second Quadrant Report ¶ 56.

478 Second Quadrant Report ¶ 56.

multinational construction company that has been in business for over 80 years, with operations in more than 40 countries, and construction revenues in 2014 of € 2.63 billion).[479]

226. These companies stand in stark contrast to Omega Panama, a locally-incorporated entity, with a [redacted] of employees and roughly US$ [redacted] in tangible assets. Despite this contrast, Compass Lexecon absurdly concludes that Omega Panama had a comparative advantage over its competitors.

C. CLAIMANTS' DEMANDS FOR "MORAL DAMAGES" ARE UNJUSTIFIED

227. Claimants demand "moral damages" of "at least" US$ [redacted].[480] As Panama noted in its Reply on the Merits, Claimants failed to specifically request or quantify their moral damages claim until their Reply submission. This failure means that their request was never properly presented to the Tribunal and, thus, should be dismissed out of hand. In the event the Tribunal elects to consider Claimants' moral damages claim, it should still be dismissed. And, importantly, even if the Tribunal had jurisdiction, Claimants have not established their legal or factual entitlement to any moral damages.

1. Moral Damages May Not be Awarded because the TPA and BIT Protects Investments and not Investors

228. Claimants' moral damages claim is predicated on harms they allegedly suffered as a result of Panama's actions. In particular, Mr. Rivera and Omega US assert that they suffered reputational harm and lost business opportunities as a result of the "'cancellation of contracts' and bogus criminal charges."[481] The TPA and BIT, however, protect foreign investments, not investors. As such, Claimants cannot claim substantive protections under the BIT and TPA, and cannot seek damages for harm caused to them, in their capacity as investors.

229. As discussed above, Claimants assert four claims against Panama: (a) expropriation without compensation; (b) failure to provide fair and equitable treatment; (c) breach of a prohibition against unreasonable and arbitrary measures; and (d) breach of the umbrella

---

479 Second Quadrant Report ¶ 56.

480 Claimants' Reply ¶ 455.

481 Claimants' Memorial ¶ 209.

clause.[482] Each of these claims is linked to a specific provision in the BIT and TPA. As Panama demonstrated in its Reply on the Merits, however, each of the relevant treaty provisions protects investments and not investors.[483] Claimants, therefore, have no standing to either assert the substantive protections of the BIT and TPA or seek moral damages for alleged injuries sustained in their personal capacity.

230. In its submission, the United States confirmed that the treaty provisions at issue in this arbitration protect only investments and not investors.[484] As such, the United States shares Panama's position that "for TPA or BIT obligations that only extend to investments, a tribunal may only award damages for violations where the investment incurred damages. A tribunal has not authority to award damages that a claimant allegedly incurred in their capacity as an investor for violations of obligations that only extend to investments."[485]

2. Claimants Were Not Injured Because of "Bogus Criminal Charges"

231. Claimants' argument that they were injured because of "bogus criminal charges" is unfounded. As Panama demonstrated in its prior written submissions and at the hearing, the criminal investigations of Mr. Rivera and Omega Panama evolved out of the National Assembly's investigation into the criminal activities – and subsequent conviction – of Justice Moncada Luna. Evidence uncovered in that investigation showed that, on at least two occasions, Mr. Rivera transferred funds paid to him by the Judiciary under the La Chorrera Project contract to Justice Moncada Luna.[486] Such payments are crimes under Panamanian law and, thus, it was a legitimate exercise of the state's police powers for Panama to investigate and bring charges.

232. Claimants' own money laundering expert confirmed that it was entirely reasonable for Panama to investigate Mr. Rivera and Omega in light of this evidence.[487] Claimants' protestations against Panama's criminal investigation fail in the face of their own expert's

---

482 Panama's Reply on the Merits ¶ 526; Claimants' Request for Arbitration ¶¶ 70-73.

483 Panama's Reply on the Merits ¶ 526.

484 US Submission ¶ 46.

485 US Submission ¶ 47.

486 *See supra* at Sect. III.B.1.

487 Tr 8 (Jimenez)/1676:20-1677:2.

testimony that it would be perfectly reasonable to investigate the reasons why money was transferred from the judiciary to Omega, through a series of cutouts, and into the account of Justice Moncada Luna:

> **Mr. Weisburg (Q):** Correct. Let's call it the hypothetical world of money comes in from the Judiciary into an account that doesn't have enough money to then transfer 250,000 to PR Solutions. PR Solutions doesn't have enough money but for that $250,000 to submit it to Reyna. Reyna doesn't have enough money but for that $250,000 to remit it to the Judge. And there's no--that's the world.
>
> **Ms. Jimenez (A):** Okay.
>
> **Mr. Weisburg (Q):** You wouldn't regard that as perfectly legal money, would you?
>
> **Ms. Jimenez (A):** I would say that it would need to be investigated. It seems like a reasonable thing to do to determine why that money was transferred from Omega to PR, and that would be investigative steps that are necessary. What was the intent of 1 the transfer from PR to Omega? What was the purpose of the transaction? And then, additionally, on the Reyna to Sarelan side of the transaction, you also need to establish an intent, and was there an official act? So, the fact that money was transferred alone, those might be things you would want to investigate to determine the whys, but you can't conclude purely from the transaction alone with no additional evidence or insight of whether the money is legal or illegal. So, to answer your question, I would say it would be a starting point for an investigation.[488]

233. Ms. Jimenez further testified in response to a question from Professor Douglas that it was "concerning" to see that Ms. Reyna – who has a long criminal record – "was involved" and that her involvement was "a very relevant and valid point for the Panamanian investigators to go down that road and to investigate and interview witnesses."[489]

234. In light of the evidence identified during the investigation into Justice Moncada Luna, Panama had both the right and the duty to investigate Mr. Rivera and Omega Panama. States will not be subjected to international liability for the legitimate exercise of their police powers.[490]

---

488 Tr 8 (Jimenez)/Tr. 1676:7 – 1677:14.

489 Tr 8 (Jimenez)/1731:7-14.

490 *See Restatement (Third) of the Foreign Relations Law of the United States*, American Law Institute, Volume 1, 1987, Section 712, Comment g (**RL-0045**) ("A state is not responsible for loss of property or for

Claimants' own expert confirmed the legitimacy of Panama's investigation. Claimants' arguments, therefore, fail.

3. Claimants Have Not Shown the Exceptional Circumstances Warranted to Consider Moral Damages

235. A party claiming moral damages faces a high burden of proof establishing its entitlement to such damages.[491] Indeed, a tribunal rejected claims for moral damages despite allegations that a claimant and his companies were "mistreated and harassed" by court decisions, subjected to "endless attempts of state authorities to intimidate him and his business," including repeated raids conducted "under the pretext of an investigation for tax evasion." [492] Another tribunal rejected claims for moral damages despite finding that the claimant had been subjected to numerous police audits, was subjected to criminal investigation and interrogations, had its assets frozen, and saw numerous employees arrested and detained – all at the direct order of the President of the country.[493] The tribunals in both cases found that the allegations did not constitute exceptional circumstances and that the claimants had not met their high burdens of proof.[494] Here, Claimants have not shown the exceptional circumstances necessary to consider an award of moral damages.

---

other economic disadvantage resulting from . . . [an] action of the kind that is commonly accepted as within the police power of the states"). *Cf. Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award (Nov. 3, 2015) (**CL-0215**), ¶ 444 ("To impose international liability in such a context would significantly undermine States' long-recognised right to reasonably exercise their police powers to enforce existing laws.").

491 Panama's Rejoinder ¶ 538 & n. 1057 ("Claimants, having the burden of proof, must meet a very high threshold to show a liability for moral damages.") (internal quotation marks and citation omitted); *Oxus Gold v. Uzbekistan*, UNCITRAL, Award (Dec. 7, 2015) (CL-0137) ¶ 894) ("Moral damages have been considered admissible under international law . . . but the bar for recovery of such damages has been set high and they have been awarded only in exceptional circumstances.").

492 Panama's Rejoinder ¶ 538 (quoting *Frank Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (Apr. 8, 2013 (**RL-0040**) ¶ 595).

493 *Stati v, Kazakhstan* (**CL-0059**) ¶¶ 950, 952-1000.

494 *Arif v. Moldova* (**RL-0040**) ¶ 595; *Stati v. Kazakhstan* (Cl-0059) ¶ 1786. Tribunals have rejected moral damages in the vast majority of cases either on grounds that the circumstances involved were not "exceptional" or that the claimant failed to meet its evidentiary burden. *See e.g.*, *Bogdanov v. Moldova* (**RL-0059**), § 5.2; *M. Meerapfel Söhne AG v. Central African Republic*, ICSID Case No. ARB/07/10, Award (May 12, 2011) (**RL-0060**), ¶¶ 414, 431-35; *Société Ouest Africaine des BéTonosíndustriels (SOABI) v. Senegal*, ICSID Case No. ARB/82/1, Award (Feb. 25, 1988), 2 ICSID Rep. 190 (1993) (**RL-0061**), ¶¶ 6.22, 10.02; *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003), 10 ICSID Rep. 134 (2006) (**CL-0047**), ¶ 198; *Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award (May 6, 2013) (**CL-0126**), ¶¶ 289-93; *Victor Pey*

a. Claimants Have Not Demonstrated Exceptional Circumstances Supporting Omega US' Claim for Moral Damages

236. Claimants argue that Omega US lost business opportunities and was unable to secure funding because of Panama's actions. Those arguments are entirely without support.

237. *First*, Claimants have not established that Omega US lost "valuable business opportunities worth tens of millions of new dollars (beyond the new contracts in Panama which are explicitly claimed)."[495] Rather, Claimants simply provide examples of two bids that were lost in the 2014-2015 time period and assert that they were lost because of Panama's actions. Claimants, however, provide no evidence to support their assertion. For example, Claimants refer to the fact that Omega US lost a bid to work on a project in Panama for the Smithsonian Institution. As "evidence," they have submitted a letter from "the Smithsonian's Tropical Research Institute, Panama" informing Omega US that it had not been selected for a project.[496] Nothing in the Smithsonian's letter, however, suggests that Omega lost this bid because of any actions taken by Panama, and nothing in the record shows that the Smithsonian was ever aware of the problems Mr. Rivera faced in Panama. Indeed, no Omega entity had won a private construction contract in Panama and the record is clear that Omega (whether it was Omega Panama acting alone or with Omega US) lost far more public works bids than it won.

Casado & Foundation "Presidente Allende" v. Republic of Chile, ICSID Case No. ARB/98/2, Award (May 8, 2008) (**RL-0062)**, ¶¶ 27, 266, 689, 704 (*see also Victor Pey Casado & Foundation "Presidente Allende" v. Republic of Chile*, ICSID Case No. ARB/98/2 (Resubmission Proceeding), Award (Sept. 13, 2016) (**RL-0063**), ¶ 243); *Valeri Belokon v. Kyrgyz Republic*, UNCITRAL, Award (Oct. 24, 2014) (**RL-0064**), ¶¶ 317-18; *AHS Niger et al. v. Republic of Niger*, ICSID Case No. ARB/11/11, Award (July 15, 2013) (**RL-0065**), ¶¶ 148-49; *Oxus Gold v. Uzbekistan*, UNCITRAL Arbitration Proceeding, Award (Dec. 17, 2015) (**CL-0137**), ¶¶ 895, 901; *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award (Mar. 10, 2015) (**CL-0164**), ¶¶ 908-17; *Hassan Awdi et al. v. Romania*, ICSID Case No. ARB/10/13, Award (Mar. 2, 2015) (**CL-0096**), ¶¶ 460-66, 501-03, 516; *Adel A Hamadi Al Tamimi v. Sultanate of Oma*n, ICSID Case No. ARB/11/33, Award (Nov. 3, 2015) (**CL-0215**), ¶¶ 249-56; *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award (Feb. 26, 2014) (**RL-0066**), ¶¶ 277, 506; *Quiborax S.A. & Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award (Sept. 16, 2015) (**CL-0085**), ¶¶ 97-819; *Convial Callao S.A. & CCI—Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2, Final Award (May 21, 2013) (**RL-0067**), ¶¶ 233-36, 357.

495 Claimants' Reply ¶ 457 (citing Claimants' Memorial ¶ 114).

496 Letter from Smithsonian Institution to Omega, dated Jan. 28, 2015 (**C-0381**).

238. Similarly, Claimants allege that Omega US lost an "an important opportunity to generate future revenues" in Puerto Rico when its bid bond was denied.[497] Again, Claimants assume that they had already won the project and that it was taken away from them. In reality, Omega US had not even submitted its bid at the time its bond was denied. It is speculation to suggest that Claimants would have won the bid but for the denial of its bond, as there are too many variables that affect a competitive bidding process.

239. *Second*, Claimants allege that Omega US has been unable to secure financing and bonding as a result of Panama's actions. It is not credible, however, to argue that a large and sophisticated bonding company would terminate its global business with a contractor because the contractor defaulted on a single project.[498] Rather, as Mr. Zadicoff testified, "[t]o obtain bonding capacity, you need a track record with financial institutions in which financial institutions will know that every now and then one project would go sour or you will have a bad debt expense. But they will care about your overall performance, and that's how they will decide to extend letter of credits or not, act as a bonding agent or not."[499]

240. Claimants' argument ignores the fact that Omega US had experienced significant problems for a number of years, including declining revenues, citations by the Office of the Comptroller General of Puerto Rico for structural deficiencies on the Coliseo de Puerto Rico project,[500] and public fights with its banks, which resulted in the cancellation of lines of credit and the issuance of a court order allowing one bank to seize certain of Omega US' assets.[501] The evidence shows that Omega US was a company that struggled both financially and operationally for years prior to entering the Panamanian market. All of these factors affected Omega US' ability to secure financing and bonding.

---

497 Claimants' Memorial ¶ 110.

498 Panama's Rejoinder ¶ 545.

499 Tr 5 (Zadicoff)/930:4-11.

500 Panama's Rejoinder ¶ 546; Government of Puerto Rico, Informe de Auditoria CP-10-26, April 8, 2010 (**QE-0092**).

501 Panama's Rejoinder ¶ 547; Second Quadrant Report ¶¶ 76, 77.

b. Claimants Have Not Shown Exceptional Circumstances Supporting Mr. Rivera's Claim for Moral Damages

241. Mr. Rivera argues that he personally has been injured because his reputation was damaged and he has not been able to generate income since 2015. That argument, however, was completely undermined by the testimony of Mr. Tony Burke. Indeed, Mr. Burke provided glowing testimony about Mr. Rivera's abilities, his contributions to Mr. Burke's firm, his ability to generate business in the Caribbean, and his expectation that Mr. Rivera would replace him as CEO of Mr. Burke's company.[502] Mr. Burke viewed Mr. Rivera as a "partner" and as providing "a competitive and comparative advantage for any company in the construction industry."[503] Mr. Burke's expectations about Mr. Rivera succeeding him, however, were shattered when Mr. Rivera left to work for a "larger construction company."[504]

242. As Panama showed, Mr. Burke's testimony undermines any suggestion that Mr. Rivera's reputation has been destroyed or that Mr. Rivera cannot earn a living. Mr. Rivera is employed (and employable) and has proven to be successful in the region in which he claims his reputation was damaged. As such, there is no basis to award Claimants any moral damages.

D. CLAIMANTS' DEMANDED INTEREST RATE AND REQUEST FOR COMPOUND INTEREST IS UNREASONABLE AND INCORRECT

243. Panama set forth its position on the issue of interest in its written submissions; namely, that interest on any compensation awarded to Claimants should be limited to simple interest. This issue was not addressed at the hearing and nothing has changed since the Parties filed their written submissions. Panama, therefore, refers the Tribunal to Section V.C of its Counter-Memorial and Section IV.C of its Rejoinder on the Merits.

V. CONCLUSION AND REQUEST FOR RELIEF

244. As demonstrated above, as a threshold matter, Claimants' investments were procured through corruption and as a result they have forfeited their right to claim protections under the BIT or TPA. Moreover, Claimants have failed to establish their entitlement on the merits. The

---

502 Panama's Rejoinder ¶¶ 551-554.

503 Witness Statement of Tony Burke ¶ 10.

504 Witness Statement of Tony Burke ¶ 7.

acts complained of are nothing more than a series of commercial disagreements. Claimants' efforts to transform them into treaty violations are without merit. And, lastly, even if Claimants' had proven their case on the merits, their claimed quantum is grossly overstated and unsupported.

245. For these reasons, Panama requests that the Tribunal enter an award:

1. Dismissing Claimants' case for lack of jurisdiction on the grounds that the Claimants procured their investments in Panama through corruption and, as such, are not entitled to substantive protections under the BIT or TPA.

2. Dismissing Claimants' case for lack of jurisdiction on the grounds that the Claimants have asserted commercial claims that do not fall within the scope of the BIT or TPA.

3. Dismissing Claimants' BIT Claims for lack of jurisdiction on the grounds that they must be resolved through previously agreed dispute resolution measures set forth in the relevant BIT Contracts.

4. Denying on the merits the claims presented by Claimants.

5. Denying Claimants the compensation requested.

6. Denying Claimants any other relief sought.

7. Awarding Panama all reasonable costs (including legal and expert fees) incurred in defense of this case.

8. Awarding Panama any additional relief the Tribunal deems appropriate.

Dated: January 8, 2021

Respectfully submitted,

SHEARMAN & STERLING LLP

Henry Weisburg
Christopher Ryan
Anna Stockamore
Carlton Mosley

599 Lexington Avenue
New York, New York 10022-6069

401 9th Street, NW
Washington, DC 20004-2128

Counsel for the Republic of Panama