

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

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**ICSID CASE NO. ARB/16/42**

**OMEGA ENGINEERING LLC**

and

**OSCAR RIVERA**

*Claimants*

v.

**REPUBLIC OF PANAMA**

*Respondent*

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**VARELALAKS ANNEX TO PANAMA'S POST-HEARING SUBMISSION**

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**8 JANUARY 2021**

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1. The Republic of Panama (“**Panama**” or “**Respondent**”) submits this Annex in support of its Post-Hearing Brief.<sup>1</sup> On February 14, 2020, the Tribunal issued a decision admitting the 49 VarelaLeaks Exhibits submitted in Claimants’ Rejoinder upon “three significant accompanying qualifications,” including that “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).”<sup>2</sup> The Tribunal further “caution[ed] that in the course of the proceedings the Tribunal may rule, in its procedural discretion, that . . . a certain submission on these exhibits is unhelpful to the Tribunal in deciding the matters in dispute or the credibility of a witness.”<sup>3</sup>

2. Claimants are forced to rely on the VarelaLeaks Exhibits because there is no direct evidence that a campaign contribution was solicited from the Claimants, that threats of retaliation were made, or that President Varela (or his administration) took any politically motivated actions against Claimants. Claimants admit that these exhibits “do not cover the time period of the events in dispute” and provide at best “circumstantial” support for Claimants’ positions.<sup>4</sup> Only four of the VarelaLeaks Exhibits reference Claimants or their projects and all four of those messages refute Claimants’ allegations. The remainder of the VarelaLeaks Exhibits, which deal with unrelated matters, are offered to show “similar conduct.” Indeed, Claimants ask the Tribunal to draw inferences from the snippets of conversation captured in the VarelaLeaks Exhibits and to treat those inferences as evidence that Panama engaged in a targeted campaign of harassment against Claimants that injured Claimants and their investments.

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<sup>1</sup> 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.

<sup>2</sup> Tribunal’s Ruling on Admissibility of the “VarelaLeaks exhibits” dated Feb. 14, 2020, p. 4.

<sup>3</sup> Tribunal’s Ruling on Admissibility of the “VarelaLeaks exhibits” dated Feb. 14, 2020, p. 4. 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.

<sup>4</sup> Claimants’ Rejoinder ¶¶ 282 and n. 961.

**I. THE VARELALEAKS EXHIBITS CONFIRM THAT PRESIDENT VARELA DID NOT REQUEST A CAMPAIGN CONTRIBUTION OR THREATEN CLAIMANTS**

3. Four of the 49 VarelaLeaks Exhibits pertain to Claimants or their investment.<sup>5</sup> These communications – all of which occurred on October 5, 2018 (the date that President Varela learned of Claimants’ allegations against him) – support President Varela’s testimony that he neither requested a campaign contribution of US\$ 600,000 nor threatened Claimants’ projected.

4. The first communication is with Minister Eyda Varela de Chinchilla, who informed President Varela that attorneys from Shearman & Sterling would be in Panama to collect documents, interview potential witnesses regarding the case, and would like to meet with the President to discuss Claimants’ allegations.<sup>6</sup> President Varela stated that it would be a “pleasure” to meet with Panama’s lawyers and that the allegations made by Mr. Rivera are “false.”<sup>7</sup>

5. Later that day, President Varela wrote to Ana Graciela Medina, stating that, “[y]our friend, Oscar. He’s being an imbecile. Saying that we asked for 600k . . . I’ve never in my life asked that idiot for money.”<sup>8</sup> Ms. Medina confirmed that Mr. Rivera “left thousands in debts” in Panama and owes taxes to the social security fund.<sup>9</sup> She further expressed her view that Mr. Rivera’s claims were “not going anywhere” and that his attorneys were merely “taking money from him” to prosecute the case.<sup>10</sup> According to Claimants, Ms. Medina was a good friend and arranged the meeting between Mr. Rivera and President Varela.<sup>11</sup> Notably, however, Claimants did not produce Ms. Medina as a witness. President Varela’s denials of Mr. Rivera’s allegations

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<sup>5</sup> Chat with Eyda Varela de Chinchilla dated Oct. 5, 2018 (C-0819); Chat with Ana Graciela Medina 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).

<sup>6</sup> Chat with Eyda Varela de Chinchilla dated Oct. 5, 2018 (C-0819).

<sup>7</sup> Chat with Eyda Varela de Chinchilla dated Oct. 5, 2018 (C-0819).

<sup>8</sup> Chat with Ana Graciela Medina dated Oct. 5, 2018 (C-0820).

<sup>9</sup> Chat with Ana Graciela Medina dated Oct. 5, 2018 (C-0820).

<sup>10</sup> Chat with Ana Graciela Medina dated Oct. 5, 2018 (C-0820).

<sup>11</sup> See First Witness Statement of Oscar I. Rivera dated June 25, 2018 (“Rivera 1”) ¶ 67.

and Ms. Medina’s affirmatory response provide significant support for President Varela’s testimony in this proceeding.

6. President Varela next communicated with his personal assistant, Raul Sandoval. After discussing the timing of the meeting with Shearman & Sterling, President Varela stated that Mr. Rivera’s allegations are “completely false” and that he “never asked anyone for that amount . . . much less threatened” someone for not making a campaign contribution.<sup>12</sup>

7. President Varela lastly communicated with Kenia Porcell, the Attorney-General of Panama, regarding Mr. Rivera’s allegations.<sup>13</sup> He again stated that Mr. Rivera’s suggestion that a campaign contribution was solicited and that a threat was made is “completely fake” and that he “never asked” for a contribution.<sup>14</sup> Rather, in President Varela’s view, Mr. Rivera has created “a fiction” for purposes of “su[ing] the state.”<sup>15</sup>

8. In four separate conversations, President Varela discussed Mr. Rivera’s allegations of the contribution solicitation and subsequent retaliation by the Varela Administration. And in each conversation, President Varela flatly denied their validity, stating: “That’s false;”<sup>16</sup> “I’ve never in my life asked that idiot for money;”<sup>17</sup> “But I never asked;”<sup>18</sup> and “This is completely false . . . We never asked anyone for that amount . . . Much less threatened.”<sup>19</sup> These denials are consistent with his testimony in these proceedings and, given the nature of the communications, President Varela had no reason to expect them to become public or in the record of these proceedings.<sup>20</sup> As such, he had no reason to lie or temper his statements in any way. Claimants conveniently ignore this fact when they insist on the authenticity of the messages.<sup>21</sup> Instead, Claimants downplay Mr.

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<sup>12</sup> Chat with Raul Sandoval dated Oct. 6, 2018 (C-0822).

<sup>13</sup> Chat with Kenia Porcell dated Oct. 5, 2018 (C-0821).

<sup>14</sup> Chat with Kenia Porcell dated Oct. 5, 2018 (C-0821).

<sup>15</sup> Chat with Kenia Porcell dated Oct. 5, 2018 (C-0821).

<sup>16</sup> Chat with Eyda Varela de Chinchilla dated Oct. 5, 2018 (C-0819).

<sup>17</sup> Chat with Ana Graciela Medina dated Oct. 5, 2018 (C-0820).

<sup>18</sup> Chat with Kenia Porcell dated Oct. 5, 2018 (C-0821).

<sup>19</sup> Chat with Raul Sandoval dated Oct. 6, 2018 (C-0822).

<sup>20</sup> *See generally* Witness Statement of Juan Carlos Varela dated Oct. 7, 2019.

<sup>21</sup> Claimants’ Letter to the Tribunal dated Feb. 12, 2020, p. 4.

Varela’s denials, in part, because they are “not a contemporaneous account of the event in question.”<sup>22</sup> That argument, however, is illogical. President Varela did not solicit a contribution or make threats. As such, it is absurd for Claimants to expect him to have documented the non-occurrence of these events after the La Trona meeting. Moreover, these denials are a contemporaneous account of President Varela’s reaction at the time he learned of Claimants’ allegations. Claimants’ attempt to moot the significance of these denials, therefore, fails.

## **II. THERE IS NO CREDIBLE EVIDENCE SUPPORTING CLAIMANTS’ ALLEGATIONS THAT A CAMPAIGN CONTRIBUTION WAS SOLICITED OR THAT THREATS WERE MADE**

9. As shown above, the VarelaLeaks Exhibits directly undermine Claimants’ allegations regarding the alleged request for a campaign contribution and threat. Claimants have not presented any other contemporaneous documentary evidence or credible testimony to support their allegation that President Varela solicited a US\$ 600,000 contribution at the La Trona restaurant or that any threat was made in relation to that contribution.

### **A. MR. RIVERA’S TESTIMONY IS UNCORROBORATED AND UNRELIABLE**

10. 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.”<sup>23</sup> At the Hearing, Mr. Rivera testified that his girlfriend, Tiese, accompanied him to La Trona.<sup>24</sup> At that meeting, Mr. Varela purportedly cleared the room to request a contribution of US\$ 600,000.<sup>25</sup> 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.<sup>26</sup>

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<sup>22</sup> Claimants’ Letter to the Tribunal dated Feb. 12, 2020.

<sup>23</sup> Rivera I ¶ 68.

<sup>24</sup> Tr 2 (Rivera)/471:15-472:2.

<sup>25</sup> Rivera I ¶¶ 66-67.

<sup>26</sup> Rivera I ¶ 68.

11. Tellingly, Mr. Rivera did not produce either of the witnesses who supposedly had direct knowledge of the existence or substance of the La Trona meeting – Ms. Medina or Ms. Tiese.<sup>27</sup> 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, at a minimum, confirmed that she was cleared out of the room before President Varela made his alleged request and threat. However, neither of these witnesses was proffered and none of these facts have been corroborated.

12. On cross-examination, Mr. Rivera admitted that he had no “notes or mementos or any other hard-copy evidence with respect to that meeting.”<sup>28</sup> 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.”<sup>29</sup> This meeting serves as the foundation upon which Claimants’ allegations regarding a “targeted campaign of harassment” is laid. Mr. Rivera, however, cannot provide the most basic of details regarding the meeting and has not provided any witnesses who were present at the time the meeting allegedly took place.

13. Moreover, Mr. Rivera did not produce a single document supporting his claim 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 which he describes the threat that 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. Panama noted

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<sup>27</sup> 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 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 exiting Panama. Chat with Ana Graciela Medina dated Oct. 5, 2018 (C-0820).

<sup>28</sup> Tr 2 (Weisburg)/470:4-14.

<sup>29</sup> Tr 2 (Rivera)/471:2-3; *see also* Rivera I ¶ 66 (narrowing the date of the meeting to “towards the end of November 2012”).

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.

14. Mr. Rivera's testimony (and the allegations predicated on that testimony) are further undermined by Ms. Medina herself in the VarelaLeaks Exhibits. As noted above, Ms. Medina stated to President Varela that this "lawsuit is not going anywhere" and that "[t]hose Yankee attorneys are only taking money from [Mr. Rivera]."<sup>30</sup> Ms. Medina's incredulousness seems appropriate given the utter lack of evidence for Mr. Rivera's assertions, and may help explain why Claimants did not proffer her as a witness.

15. Mr. Rivera's allegations were also rebutted by President Varela. In his witness statement, President Varela expressly denied requesting a contribution from or threatening Mr. Rivera.<sup>31</sup> This is consistent with President Varela's multiple denials in the VarelaLeaks Exhibits themselves,<sup>32</sup> and with the statement of Raul Sandoval, President Varela's private assistant who Mr. Rivera notes was at the meeting,<sup>33</sup> who stated "that's false" with respect to Mr. Rivera's claims.<sup>34</sup> Remarkably, Claimants would have the Tribunal believe everything contained in the VarelaLeaks Exhibits, except these denials.<sup>35</sup>

**B. MR. LÓPEZ'S TESTIMONY IS VAGUE, UNSUPPORTED AND SHOULD BE DISREGARDED**

16. The only other "evidence" regarding the La Trona meeting is the testimony of Mr. López. Mr. López, however, was not at the restaurant at the time the alleged meeting occurred and did not speak with Mr. Rivera about the meeting until a few days later.<sup>36</sup> Even then, it appears that Mr.

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<sup>30</sup> Chat with Ana Graciela Medina, Former Panamanian Counsel to Mr. Rivera dated Oct. 5, 2018 (C-0820).

<sup>31</sup> Witness Statement of Juan Carlos Varela dated Oct. 7, 2019 ¶ 4.

<sup>32</sup> Chat with Eyda Varela de Chinchilla dated Oct. 5, 2018 (C-0819); Chat with Ana Graciela Medina dated Oct. 5, 2018 (C-0820); Chat with Kenia Porcell dated Oct. 5, 2018 (C-0821); Chat with Raul Sandoval dated Oct. 6, 2018 (C-0822).

<sup>33</sup> Rivera I ¶ 67.

<sup>34</sup> Chat with Raul Sandoval dated Oct. 6, 2018 (C-0822).

<sup>35</sup> See Claimants' Letter to the Tribunal dated Feb. 10, 2020; Claimants' Letter to the Tribunal dated Feb. 12, 2020, p. 4.

<sup>36</sup> Tr 2 (Rivera)/474:1.



Rivera did not provide Mr. López with details about the meeting, including the amount of the alleged request.<sup>37</sup> As such, the most Mr. López could say was that he had been told that “[President] Varela had requested financially significant support, in an intimidating manner [.]”<sup>38</sup> Again, given the significance that Claimants attach to this meeting, it strains credulity that Mr. Rivera would not have given a detailed account of the request and threat to Mr. López, a long-time employee, trusted confidant, and the man in charge of the day-to-day operations in Panama.

17. Mr. López not only had no knowledge of the details of the alleged request, he also could not state when the meeting occurred. Rather, he testified that the meeting took place in late 2012 or early 2013 – a period that covers months.<sup>39</sup> And, despite testifying that he paid for the meeting, Mr. López did not provide any receipts, credit card statements, or other records that would have confirmed both the fact and date of the meeting.<sup>40</sup>

18. Mr. López’s vague testimony provides no support for Mr. Rivera’s allegations. The Tribunal should accord Mr. López’s testimony on this topic no weight due to his lack of specific knowledge about a critical piece of Claimants’ case.

### **III. PRESIDENT VARELA’S TESTIMONY IS SUPPORTED BY THE TESTIMONY OF PANAMA’S OTHER WITNESSES**

19. President Varela’s inability to testify in this arbitration does not lend credence to the VarelaLeaks Exhibits or justify drawing adverse inferences as to whether Panama targeted or harassed Claimants’ investments. As Panama explained, President Varela has been named in a criminal investigation of activities involving Odebrecht.<sup>41</sup> President Varela is cooperating in that investigation. Claimants made clear their intention to cross examine President Varela on Odebrecht-related matters.<sup>42</sup> Such examination would necessarily affect President Varela in the ongoing criminal investigation, thus preventing him from testifying before the Tribunal. While

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<sup>37</sup> Tr 2 (Rivera)/474:1.

<sup>38</sup> López I ¶ 69.

<sup>39</sup> Tr 2 (Rivera)/474:1.

<sup>40</sup> López I ¶ 69.

<sup>41</sup> Panama’s Letter to the Tribunal dated Oct. 1, 2020, p. 1.

<sup>42</sup> See Claimants’ Letter to the Tribunal dated Oct. 7, 2020, p. 2.

unfortunate, President Varela’s decision not to testify or take an action that could affect the ongoing investigation in Panama should be respected.

20. The Tribunal has said that it will assess the weight of President Varela’s witness statement in light of his unavailability for cross examination. Panama submits that veracity of President Varela’s testimony is confirmed by the record evidence in this matter. Each of Panama’s witnesses testified that neither they nor, to their knowledge, anyone in their respective ministries or municipalities was asked by President Varela or a representative of the Varela administration to take adverse actions against Claimants or their investment. Indeed, their statements could not be clearer:

- **Nessim Barsallo (Ministry of Health):** “The Health Ministry was not asked or instructed to terminate or hinder Omega’s projects, which would be a completely illegal act and outside the scope of the Ministry’s function.”<sup>43</sup>
- **Vielsa Rios (Judiciary):** “We in the Judicial Authority were never asked by anyone in President Varela’s administration to take any adverse action against the Claimants or to harm the Project in any way. In fact ... the Judicial Authority worked very hard to have the Project completed even after President Varela took office...”<sup>44</sup> “I reiterate what I said in my first witness statement: we in the Judicial Authority were never asked by anyone in President Varela’s Administration to take any adverse action against the Claimants or to harm the Project in any way.”<sup>45</sup>
- **Carmen Chen (INAC):** “I never received any instructions to harm Omega in any way, and I am not aware of anyone at INAC having received instructions of that kind.”<sup>46</sup>
- **Yadisel Buendia (Sosa Architects – Ciudad de las Artes Project):** “In my view, INAC did not act with the intent to harm Omega or the Project[.]”<sup>47</sup>
- **Ivan Zarak (Ministry of Economy):** “I never saw any evidence of hostility by the government, including by President Varela himself, towards Omega, Mr. Rivera, or any of Omega’s projects in Panama[.]”<sup>48</sup>

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<sup>43</sup> First Witness Statement of Nessim Barsallo ¶ 41.

<sup>44</sup> First Witness Statement of Vielsa Rios ¶ 38.

<sup>45</sup> Second Witness Statement of Vielsa Rios ¶ 25.

<sup>46</sup> Witness Statement of Carmen Chen ¶ 14.

<sup>47</sup> Witness Statement of Yadisel Buendia ¶ 17.

<sup>48</sup> Witness Statement of Ivan Zarak ¶ 13.

- **Fernando Duque (Ministry of the Presidency):** “The problems with the Colón Cold Chain Market began well before President Varela was elected . . . . To my knowledge, this had nothing to do with the Claimants or President Varela.”<sup>49</sup>
- **Dr. James Bernard (Comptroller General’s Office):** “I am not aware of anyone in the Comptroller General's office who was asked or directed to take any negative actions towards Mr. Rivera, Omega, or their projects.”<sup>50</sup>
- **Eric Diaz (Municipality of Panama):** “I never heard or saw anything that suggested that Mayor Blandon or anyone else intended to adversely affect Omega. . . . Mayor Blandon always intended to complete the Pacora Market, which is why the Municipality went to great lengths to assist Omega. . . .”<sup>51</sup>

21. Claimants chose not to cross examine several of Panama’s witnesses. However, those they did examine affirmed the testimony in their written witness statements. Mr. Barsallo, for example, made clear that he had “no knowledge beyond the information . . . from Omega staff . . . to show that there was some sort of illegal manipulation.”<sup>52</sup> 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.<sup>53</sup> And 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.<sup>54</sup> Accordingly, President Varela’s testimony that he did not make threats against Claimants and did not take any hostile measures towards Claimants is supported by testimony of Panama’s other fact witnesses.

22. President Varela’s testimony is also supported by the absence of any evidence directly refuting it. Panama is in the difficult position of proving a negative – *i.e.*, that a campaign contribution was not solicited and a threat was not made. The absence of any direct evidence confirming that these events took place is a significant indicator that they did not. As discussed above, Claimants have not presented any contemporaneous documentation supporting their claim

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<sup>49</sup> Witness Statement of Fernando Duque ¶ 20.

<sup>50</sup> Witness Statement of Dr. James Bernard ¶ 18.

<sup>51</sup> Witness Statement of Eric Diaz ¶¶ 16-20.

<sup>52</sup> Tr 3 (Barsallo)/713:5-9.

<sup>53</sup> Tr 4 (Buendia)/808:17-809:4.

<sup>54</sup> Tr 6 (Zarak)/1236:15-1237:10.

that President Varela requested US\$ 600,000 or threatened Mr. Rivera when he refused that contribution. Despite the purported significance of the event, Mr. Rivera's and Mr. López's testimony is extremely vague. Mr. López was not at La Trona when the meeting between President Varela and Mr. Rivera took place, and Claimants produced no other witnesses (e.g., Ms. Medina or Ms. Tiese) with direct knowledge of the events at La Trona.

23. Claimants further failed to provide any evidence showing that politically motivated retaliatory actions were taken against their investment. Claimants' only real effort to engage with this issue is in the witness statement of Mr. López, where, based on conversations with unidentified "people in Ministries and Government Agencies," he concludes that "there was an intention on the part of the Government to act against Oscar and his companies,"<sup>55</sup> Mr. López's inability to name the people who purportedly made these statements undermines the value and credibility of his testimony. Further, on cross examination, Mr. Barsallo clarified the context in which his statements were made and affirmed that, as a relatively low-level employee within the Ministry of Health, he had no direct knowledge of any actions taken by the Varela administration with respect to Claimants' projects.<sup>56</sup> Claimants failed to produce witness statements from Ms. Medina or the other individuals who supposedly confided in Mr. López (*i.e.*, Mayor Federico Policani and General Secretary Guillermo Bermudez), and Ms. Medina is on record in the VarelaLeaks Exhibits refuting Claimants' allegations.<sup>57</sup>

24. Under the circumstances, the sum total of Claimants' so-called "evidence" that they were targeted by the Varela administration consists of 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[.]"<sup>58</sup> These statements are nothing but unsourced hearsay and

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<sup>55</sup> López I ¶¶ 73, 74.

<sup>56</sup> Tr 3 (Barsallo)/713:2-713:10 ("I have no knowledge beyond the information or the comments that I received from Omega staff [.]").

<sup>57</sup> 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").

<sup>58</sup> López ¶¶ 73-74.

uncorroborated statements of unidentified people, neither heard nor examined before the Tribunal.

#### **IV. THE VARELALEAKS EXHIBITS DO NOT SUPPORT A CONCLUSION THAT PRESIDENT VARELA REQUESTED A CAMPAIGN CONTRIBUTION, THREATENED CLAIMANTS, OR SUBJECTED CLAIMANTS, OR SUBJECTED CLAIMANTS TO A TARGETED CAMPAIGN OF HARASSMENT**

25. Claimants have placed far greater weight on the VarelaLeaks Exhibits than they warrant. As noted, these exhibits contain snippets of communications between President Varela and third parties. While the identity of some of these parties is known (*e.g.*, “Ana Graciela Medina,” whose full name appears in the chat),<sup>59</sup> others lack identification sufficient for the Tribunal to even consider their content. Some parties are only identified by a common first name (*e.g.*, “Fred”)<sup>60</sup> or only with a phone number.<sup>61</sup> In these cases, Claimants simply surmised who these parties might be and what tenuous connection they might have to President Varela – often assigning the general title “Panamanian Businessman.”<sup>62</sup> Predictably, Claimants did not always guess correctly. For example, a Google search reveals that Alvaro Aleman, who Claimants identify as a “Panamanian Journalist,” was actually President Varela’s Minister of the Presidency.<sup>63</sup> Claimants’ failure to adequately identify the cited individuals further diminishes what little relevance can be derived from these conversations, and consequently the degree of their helpfulness to the Tribunal.

26. Claimants’ characterization of the substance of these communications also is flawed. On the whole, the VarelaLeaks exhibits show private discussions of national affairs with government officials as well as a number of vague assurances to constituents on unrelated projects. This does not establish the kind of targeted, retributive behavior alleged by Claimants, but rather the type of conduct that is commonplace in the political process.

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<sup>59</sup> *See, e.g.*, Chat with Ana Graciela Medina dated Oct. 5, 2018 (C-0820).

<sup>60</sup> *See, e.g.*, Chat with Fred Panamanian Businessman dated June 9, 2018 (C-0849).

<sup>61</sup> *See, e.g.*, Chat with +507 6678-9609 dated Apr. 10, 2018 (C-0848).

<sup>62</sup> *See, e.g.*, Chat with Yassir dated Jan. 12, 2018 (C-0837); Chat with Costa dated Aug. 15, 2018 (C-0840); Chat with Fred dated June 9, 2018 (C-0849).

<sup>63</sup> Chat with Eyda Varela de Chinchilla dated Oct. 5, 2018 (C-0819).

27. For example, in their February 12, 2020 letter, Claimants submit that these exhibits show that President Varela “regularly corresponded with the Comptroller General” and that the Comptroller General lacked independence from the Executive.<sup>64</sup> However, the “chats” underlying Claimants’ submission do not support this conclusion. In one of the “chats,” President Varela communicates with an unidentified individual regarding the status of payments on a project.<sup>65</sup> According to this individual, information requested by the Comptroller General’s office had been provided. President Varela requests the “Scafidi” number – *i.e.*, the identification number assigned by the Comptroller General’s Office – for the project.<sup>66</sup> President Varela ultimately confirms that, while the Comptroller General’s office is “ready” to process payments, it still requires certain information from the Ministry of Economy and Finance to do so.<sup>67</sup>

28. In a chat with another unidentified person, President Varela simply responds “sure” and “you can count on that” in response to a request to speak with the Comptroller General’s office regarding the endorsement of a change order.<sup>68</sup> There is no indication, however, that President Varela ever took action with respect to this request, as the person who made the request wrote back 11 days later to “remind[.]” the president about the need to speak with the Comptroller General.<sup>69</sup>

29. Claimants suggest that communications between President Varela and the Comptroller General somehow show a lack of independence by the Comptroller General or constitute undue influence, but no such conclusions can be drawn from the VarelaLeaks Exhibits. There is nothing inherently wrong with a president communicating with his cabinet. Nothing in these exhibits shows the Comptroller General violating the law or its procedures in response to a presidential request. Claimants’ efforts to read such misconduct into these exhibits fails.

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<sup>64</sup> Claimants’ Letter to Tribunal dated February 12, 2020, pp. 2, 3.

<sup>65</sup> Chat with +507 6678-9609 dated Apr. 10, 2018 (C-0848).

<sup>66</sup> Chat with +507 6678-9609 dated Apr. 10, 2018 (C-0848).

<sup>67</sup> Chat with +507 6678-9609 dated Apr. 10, 2018 (C-0848).

<sup>68</sup> Chat with Fred, Panamanian Businessman dated June 9, 2018 (C-0849).

<sup>69</sup> Chat with Fred, Panamanian Businessman dated June 9, 2018 (C-0849).

30. Claimants also cite to communications between President Varela and the Minister of Economy and Finance regarding the allocation of funds in the budget.<sup>70</sup> For example, Claimants cite to a “chat” a representative from the Red Cross for the proposition that President Varela “would have funds transferred from one Ministry to another, or from one project to another, simply to meet his personal priorities.”<sup>71</sup> President Varela responded “I’ll talk to [D]ulcidio [De La Guardia, Minister of Economy and Finance], [I]rene.” This snippet of communications does not show anything in appropriate and, in fact, reflects how the budget process in Panama works.

31. Mr. Zarak provided significant context regarding the budgetary process. As he described, the budget process occurs within the constraints of Panama’s Social and Fiscal Responsibility Law, which “establishes a deficit ceiling,” and limits “how much money” the government can spend.”<sup>72</sup> Once a draft budget that complies with this law is prepared, it is presented to the cabinet for review. The cabinet then “usually asks for more money in certain areas,” including, for example, “project[s] promised by the President.”<sup>73</sup> Once those requests are received, the MEF would “go back and somehow fix those or fit [the requests] within the budget, given the constraints” – a process that required additional cuts and transfers of funds between entities.<sup>74</sup> Mr. Zarak described the budgetary process as a “juggling act,” in which the MEF was trying to balance different requests, recommendations, and priorities from different government offices, including the President.<sup>75</sup>

32. Mr. Zarak also explained that the President received “a lot of different requests from different entities” for additional funds or the prioritization of projects.<sup>76</sup> As such, “you always have additional requests made by the President, for budgetary reasons.”<sup>77</sup> For example, the President would say “Hey, you know, we want to build this road. We need, you know, \$2

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<sup>70</sup> Claimants Rejoinder on Preliminary Objections ¶¶ 292-293; Chat with Dulcidio de la Guardia dated Apr. 24, 2017 (C-0834); Chat with Kenia Porcell dated Nov. 16, 2017 (C-0821).

<sup>71</sup> Claimants’ Rejoinder ¶ 292 (citing Chat with Irene Perurena dated July 22, 2017 (C-0869)).

<sup>72</sup> Tr 6 (Zarak)/1156:7-11.

<sup>73</sup> Tr 6 (Zarak)/1156:12-17.

<sup>74</sup> Tr 6 (Zarak)/1156:19 – 1157:5.

<sup>75</sup> Tr 6 (Zarak)/1157:6 – 1160-1.

<sup>76</sup> Tr 6 (Zarak)/1291:14-17.

<sup>77</sup> Tr 6 (Zarak)/1288:8-11.

million for an initial payment. Please look for the resources.”<sup>78</sup> The process for communicating these requests was “rather informal,” with the President usually conveying requests in a Cabinet meeting “or via text message, or a call or whatever.”<sup>79</sup> These requests, however, were not mandates and could not violate the constraints of the Social and Fiscal Responsibility Law. As Mr. Zarak explained, requests would be accommodated only if they were “within reason.”<sup>80</sup> However, if the President “asked . . . for a billion dollars more in budget,” Mr. Zarak would have informed him that this could not be accommodated.<sup>81</sup> Moreover, the President could not unilaterally direct the flow of funds. If the MEF identified resources, the request would go to the National Assembly and the MEF would seek approval to transfer the money from one line-item to another.<sup>82</sup> Without such approval, the funds could not be transferred.

33. Claimants have tried to distort the communications with the MEF and have suggested that it was somehow improper for President Varela to maintain close control over budgetary decisions.<sup>83</sup> These efforts fail, however, in the face of Mr. Zarak’s testimony. It was entirely appropriate for President Varela to take part in the budgetary process – and, in fact, would have been a dereliction of his responsibilities as President if he had not. That process, however, was neither dictated by President Varela nor manipulated to meet the President’s demands.

34. Claimants similarly twist and misconstrue other VarelaLeaks Exhibits. In their Rejoinder on Preliminary Objections, Claimants argue that the VarelaLeaks exhibits show President Varela making requests on behalf of or in an effort to punish contractors.<sup>84</sup> For example, certain communications show the President’s efforts to speed up payments so that a contractor would not be forced to “let go 500 workers at the airport” and in order to complete works at the airport and the Metro prior to Pope Francis’ visit to Panama.<sup>85</sup> In another communication, President

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<sup>78</sup> Tr 6 (Zarak)/1288:8-11.

<sup>79</sup> Tr 6 (Zarak)/1289:4-17,

<sup>80</sup> Tr 6 (Zarak)/1288:16,

<sup>81</sup> Tr 6 (Zarak)/1288:17-18.

<sup>82</sup> Tr 6 (Zarak)/1288:12-16.

<sup>83</sup> Claimants’ Letter to Tribunal dated February 12, 2020, pp. 2, 3.

<sup>84</sup> Claimants’ Rejoinder on Preliminary Objections ¶¶ 284-285.

<sup>85</sup> Chat with Rolando de Leon dated Oct. 3, 2018 (C-0824).



Varela indicated that he would speak with the Superintendent of Banks regarding the financing for a contractor because “[i]f we don’t get in there and check this out . . . We’ll lose 15 thousand jobs within 60 to 90 days.”<sup>86</sup> In both cases, Mr. Varela clearly stated that his concern was the potential loss of jobs – which is a matter of public policy, and not evidence of alleged cronyism.

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35. According to Claimants, the VarelaLeaks Exhibits “*demonstrate[e] that [President Varela] engaged in precisely the same conduct that Claimants allege he engaged in with respect to them.*”<sup>87</sup> That conclusion is false. Claimants have no direct evidence of corruption or improper acts by President Varela against Claimants or their projects, and the VarelaLeaks Exhibits do not fill this fatal gap in Claimants’ case. Cognizant of this, Claimants suggest that the VarelaLeaks Exhibits provide “circumstantial” support for their position.<sup>88</sup> As shown above, however, that suggestion does not withstand scrutiny.

36. The VarelaLeaks Exhibits do not show wrongdoing by President Varela. Claimants, therefore, ask the Tribunal to hold Panama liable on the basis of innuendo and supposition drawn from the VarelaLeaks Exhibits. Innuendo and supposition, however, are not enough to hold Panama liable for breaching treaty obligations owed to Claimants’ investments. International investment law requires more. A claimant must show that the actions of the government proximately caused their injury and that the compensation they seek flows directly from the harm they sustained. The VarelaLeaks Exhibits do neither. Under the circumstances, the Tribunal should not accord any weight to the VarelaLeaks exhibits. However, if the Tribunal does elect to accord weight to these exhibits, it cannot ignore the four communications that directly refer to Claimants and their projects. Each of those communications affirms President Varela’s testimony that he did not request a campaign contribution of US\$ 600,000 from Mr. Rivera, did not threaten him for refusing such a request, and did not subject Claimants or Claimants’ projects to a campaign of harassment.

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<sup>86</sup> Chat with Diego Vallarino dated June 22, 2017 (C-0823).

<sup>87</sup> Claimants’ Letter to Tribunal dated February 12, 2020, p. 3 (emphasis in original).

<sup>88</sup> Claimants’ Rejoinder ¶ 282 & n. 961.