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

PANAMA'S SUBMISSION ON COSTS

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21 JANUARY 2021

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ANNEX 1 - PANAMA'S STATEMENT OF COSTS

1. The Republic of Panama ("**Panama**" or "**Respondent**") provides its Submission on Costs. The Tribunal has the authority to allocate the costs of the arbitration as it determines appropriate.[1] In awarding costs, the Tribunal should consider the reasonableness of the costs presented, whether a Party has prevailed on an issue, and the parties' conduct in these proceedings. Based on these considerations, Panama respectfully requests an award of its costs, including the fees of counsel, its expert witnesses, administrative and travel costs, and the fees and expenses advanced by Panama to ICSID and the members of the Tribunal.

I. THE FEES AND COSTS INCURRED BY PANAMA ARE REASONABLE

2. The fees and costs incurred by Panama in this proceeding are set out in the attached Statement of Costs. These fees and costs are reasonable in light of the number and complexity of the issues addressed in this arbitration. Claimants filed claims relating to eight separate, multi-million-dollar construction contracts, as well as the criminal investigation that arose out of illegal payments made by Claimants to Justice Moncada Luna. The commercial disputes relating to each contract could have – and should have – been a separate proceeding, as required by the relevant contracts, addressing the individual project's specific performance issues. Claimants' decision to accumulate these multiple disputes in an ICSID proceeding was highly inefficient, and contrary to the parties' agreements. Claimants' misguided decision to bring their claims here also forced Panama to raise a number of complex jurisdictional objections. Panama, therefore, was required to submit fact witnesses capable of addressing the technical aspects of each project, the workings of the Comptroller General's office, Panama's budgetary process, and the investigations that exposed Claimants' corrupt conduct.

3. Panama's fees and costs are further justified by the literal ton of needless discovery sought by Claimants. Claimants served Panama with a document request containing 68 requests, many with subparts and all of which were excessive.[2] Ultimately, after multiple rounds of challenges and comments (which resulted in a 307-page Redfern Schedule), the Tribunal granted in-part only a small handful of Claimants' requests. By contrast, Panama served three document requests. One was accepted by Claimants and two were granted by the Tribunal over Claimants'

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[1] ICSID Convention, Art. 61(2); ICSID Arbitration Rule 28(1).

[2] *See* Claimants Redfern Schedule, dated January 22, 2019.

objection. Claimants' conduct during the discovery phase of these proceedings caused Panama to incur substantial additional fees and costs.

4. Panama's costs were also increased by Claimants' decision to lard its Reply on the Merits with needless and irrelevant witness statements and "expert" reports. Claimants' Memorial was supported only by Mr. Rivera's witness statement and the expert reports of Compass Lexecon and Gregory McKinnon. Claimants' Reply submission, however, included additional witness statements from Frankie Lopez, Maria Herrera, Karina Mirones, and Tony Burke, plus additional expert reports from Alison Jimenez, Fidel Ponce and Arturo Chong, Jose Gimeno and Jose Moreno, and Orlando Perez. Claimants not only hid-the-ball by waiting until their Reply submission to file these statements and reports, but also substantially increased the costs of the proceedings.

5. Parties should be free to file witness statements and expert reports that are relevant, material, and helpful to resolving issues in dispute. Claimants, however, filed multiple statements and reports that had no direct bearing on any issues, thereby needlessly causing Panama to incur additional legal fees and costs. As the Tribunal will recall, Ms. Herrera's and Ms. Mirones' testimony addressed time periods that were not relevant to the issues in this case. Mr. Burke was presented as a character witness for Mr. Rivera, although his testimony in fact entirely undermined Claimants' moral damages arguments. The majority of "expert" reports submitted by Claimants were likewise irrelevant. For example, Messrs. Gimeno and Moreno are law professors from Spain, and lacked any basis for their useless opinion on Panama's public bidding process. Mr. Perez, who teaches at a college in Pennsylvania, provided a lengthy macro-historical account of corruption in Panama, which was of no relevance to the particular issues in this case. Nevertheless, Panama was forced to incur fees and costs in relation to both.[3] In an effort to minimize costs, Panama ultimately decided not to cross examine the fact witnesses and "experts" who did not directly address issues in dispute.

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[3] Claimants' conduct during the discovery phase and their decision to submit numerous irrelevant witness statements and expert reports also needlessly increased the fees and costs incurred by Claimants. In the event the Tribunal awards costs to Claimants, they should not be entitled to costs incurred in relation to discovery and the preparation of the witness statements and expert reports referenced above.

6. Even those expert reports that purportedly addressed issues in dispute were irrelevant and unhelpful. Compass Lexecon's report, for example, failed to properly address the valuation standard required under the BIT and TPA. Rather than value Claimants' interest in Omega Panama as a going concern, it provided a valuation that purported to blend intangible assets from Omega US and Omega Panama. In doing so, however, Compass Lexecon made no effort to distinguish between the various pieces comprising its valuation, thereby leaving the Tribunal without any meaningful insight into Omega Panama's value as a stand-alone company. As a result, Panama and its experts could not simply respond to Claimants' quantum case. They were forced to incur additional costs dealing the fundamental flaws in Compass Lexecon's reports. Similarly, Justice Troyano failed to grapple with Panama's position, which was that the contract for the Tonosí land deal contained red flags that called into question the legitimacy of the underlying transaction. Instead, he issued an opinion that the contract contained the minimum requirements to be legal as a matter of Panamanian contract law – an issue not in dispute.

II. PANAMA SHOULD BE THE PREVAILING PARTY IN THIS ARBITRATION

7. There were disputed issues in three distinct phases of this arbitration: jurisdiction, merits, and quantum. Panama met its burden in each of these phases and has demonstrated why Claimants' claims should be dismissed for a lack of jurisdiction. Alternatively, if the Tribunal finds that it has jurisdiction over some or all of Claimants' claims, Panama has shown why those claims fail on the merits and why Claimants are not entitled to receive the compensation they have requested. Indeed, through these proceedings, Panama has proven that:

- Claimants procured their investment through corruption and, thus: (a) are not entitled to substantive protections under the BIT or TPA, and (b) Claimants' claims do not fall within the scope of ICSID's jurisdiction.
- Even if the Tribunal finds that Claimants did not procure all their investment through corruption, the La Chorrera contract was obtained by bribing Justice Moncada Luna and Panama was entirely justified in its criminal investigation of Mr. Rivera and Omega Panama. With respect to Claimants' claims more generally, Panama demonstrated that Claimants: (a) presented commercial claims that do not rise to the level of investment disputes; (b) presented disputes that should be resolved through the dispute resolution mechanisms agreed in the individual project contracts; and (c) presented claims that are predicated on wrongful actions allegedly directed towards Claimants in their capacity as investors. The substantive protections in the BIT and TPA, however, apply only to investments. Investors, therefore, have no standing to assert claims for injuries sustained as investors. As such, Claimants' claims fall outside of the Tribunal's jurisdiction.

- Panama did not subject Claimants to a targeted campaign of harassment but acted as a reasonable and responsible commercial counterparty. Panama's actions and decisions with respect to each of the projects at issue in this arbitration were based on – and justified by – legitimate commercial reasoning.
- To the extent that Claimants' projects were affected by Panama's political process – *e.g.*, the need to have addenda and payment requests approved by the Comptroller General's office and the allocation of funds through the budgetary process – Claimants have not proven that they were treated any differently than any other contractor.
- Claimants failed to demonstrate their entitlement to the compensation sought. Claimants' entire quantum case is predicated on the fallacy that they are entitled to: (a) the blended value of Omega US and Omega Panama; (b) moral damages for injuries allegedly sustained – but not proven – by Mr. Rivera and Omega US in their capacity as investors; and (c) overstated amounts allegedly due under the eight contracts at issue.

8. Panama has clearly prevailed in asserting its jurisdictional challenges and defending against Claimants' claims. Even if the Tribunal were to find in Claimants' favor on some small portion of its claims, Panama still should be deemed the prevailing party and awarded its costs.

III. THE PARTIES' CONDUCT IN THESE PROCEEDINGS DEMONSTRATES WHY ONLY PANAMA SHOULD BE ENTITLED TO RECOVER ITS COSTS

9. The Tribunal's decision to award costs should be guided by the parties' conduct in these proceedings. As shown above, Claimants' conduct materially increased the cost of these proceedings. In addition to the needless discovery fights and their decision to waste time and money with the submission of irrelevant and unhelpful witness statements and "expert reports," Claimants also precipitated needless fights over the admission and relevance of the VarelaLeaks Exhibits. Although acknowledging that the VarelaLeaks Exhibits, at best, provide "circumstantial support" for their claims, Claimants fought for the admission of these exhibits and for an opportunity to provide an unlimited submission on what those exhibits purportedly mean and what Claimants would have shown if they had the opportunity to cross-examine President Varela. While the Tribunal ultimately admitted the VarelaLeaks Exhibits, it did so with substantial caveats and questions as to their relevance and materiality. Claimants' efforts to rely on the VarelaLeaks Exhibits were a failed attempt to taint Panama though "similar conduct" theories. he VarelaLeaks Exhibits are not evidence and Claimants' conduct in fighting for their admission needlessly increased the costs of these proceedings.

10. When assessing Claimants' conduct, the Tribunal should recall that Claimants themselves have not borne the costs of these proceedings. During the first week of the hearings, Mr. Rivera testified that he was not paying the legal team representing him in the arbitration.[4] Claimants' willingness to propound needless discovery requests, fight for the VarelaLeaks Exhibits, submit meaningless witness statements, and hire irrelevant experts, therefore, was not tempered by what those decisions might actually cost Mr. Rivera.

11. By contrast, Panama has borne the costs of these proceedings (which should never have been brought in this forum) and has acted throughout in an appropriate, cost-conscious manner. This is reflected in Panama's decisions to minimize its discovery requests, not to engage counter-experts to rebut the reports filed by Mr. Perez or Messrs. Gimeno and Moreno, and not to cross-examine witnesses who could not speak to issues in dispute. Panama also acted reasonably regarding President Varela's testimony. President Varela was unable to testify during the first week of hearings due to the death of a close advisor and the hospitalization of his wife.[5] President Varela was unable to testify during the second week of hearings due to Claimants' insistence that they would cross-examine him on issues unconnected to the Omega projects, such as those contained in the VarelaLeaks Exhibits. As Panama explained, President Varela is cooperating with an ongoing criminal investigation in Panama and, thus, could not give testimony that could affect that investigation. That decision is reasonable and rational. On balance, Panama has conducted itself in a manner consistent with the efficient and cost-effective resolution of this dispute. Panama, therefore, should be awarded its costs.

12. As Panama has shown, Claimants' case should be denied in its entirety. However, even if the Tribunal accepts a small portion of Claimants' case, Panama still should be deemed the prevailing party. Panama, therefore, requests an award of costs in its favor and the denial of costs to Claimants. Alternatively, due to the potential complexity in determining which party has prevailed for purposes of allocating costs, Panama respectfully requests that the parties be given the opportunity to submit a brief statement of no more than five pages after the Tribunal has issued its award in order to set out their specific positions in light of the Tribunal's decision.

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[4] Tr. 410:18:411:3 (Day 2)

[5] Letter from Shearman & Sterling LLP to the Tribunal dated Feb. 19, 2020.

Dated: January 21, 2021

Respectfully submitted,

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ANNEX 1

PANAMA'S STATEMENT OF COSTS

CATEGORY	TOTAL COSTS (US$)
Shearman & Sterling Legal Fees	[redacted]
Shearman & Sterling Costs/Expenses	[redacted]
TOTAL LEGAL FEES & COSTS	[redacted]
Expert and Witness Fees and Costs	[redacted]
ICSID Costs (Panama's share)[1]	[redacted]
TOTAL FEES & COSTS INCURRED	[redacted]

1 The parties have not yet received a final invoice from ICSID, which would include fees charged by FTI for the technical support provided during the second week of the hearings.