

INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

JUAN CARLOS ARGÜELLO AND ERNESTO ARGÜELLO

Claimants

v.

THE REPUBLIC OF PANAMA

Respondent

ICSID CASE No. ARB/25/39

CLAIMANTS' MEMORIAL ON THE MERITS

10 June 2026

WHITE & CASE

**MIRANDA
& AMADO**

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1. Messrs. Juan Carlos Argüello and Ernesto Argüello (individually, “**Juan Carlos Arguello**” or “**Juan Carlos**” and “**Ernesto Arguello**” or “**Ernesto**,” respectively, and, jointly, “**Claimants**”), both citizens of the United States of America (“**United States**” or “**U.S.**”), hereby submit their Memorial on the Merits (“**Memorial**”) in support of their claims against the Republic of Panama (“**Panama**,” “**Respondent**,” or “**State**”) under the Trade Promotion Agreement between the United States and Panama (“**Treaty**”).¹

I. INTRODUCTION

2. This case arises out of Panama’s abrupt and unjustified annulment in August 2022 of all the approvals it previously gave over the course of several years for Claimants’ *Luces del Pacífico* project (“**Luces del Pacifico Project**” or “**Project**”), which Claimants were developing in accordance with Panama’s *Fondo Solidario de Vivienda* (“**FSV Program**”).²
3. The facts of this case can be summarized as follows:
 - Panama established the FSV Program to resolve a longstanding housing deficit by incentivizing private investment to develop low-income housing. Pursuant to the FSV Program, Panama undertook to provide financial support enabling qualifying homebuyers to purchase housing units approved for the FSV Program by the State.
 - Claimants are award-winning U.S. real estate developers with experience building low-income housing in the Central America region. Induced to invest by Panama by *inter alia* officials at the highest levels of government, they launched the Project to build high-quality affordable housing for low-income families as part of an innovative, secure, full-service community with educational, recreational, and commercial opportunities.
 - Claimants planned to develop the Project in two main phases: (i) an initial pilot phase consisting of a mix of over 1,000 houses and apartment units; and (ii) a larger expansion phase that would bring the total number of housing units to approximately 10,000. The expansion would be built on the pilot phase’s blueprint, using the sale of the pilot phase homes for necessary financing.

¹ See United States - Panama Trade Promotion Agreement, entered into force on 31 Oct. 2012 (CL-001).

² In accordance with paragraph 11.1 of Procedural Order No. 1, Claimants submit with this Memorial exhibits in English and Spanish without translation and cite to exhibits in both languages. In the body of this Memorial, all Spanish quotes have been translated into English. Relevant portions of exhibits in languages other than English and Spanish have been translated into English, consistent with paragraph 11.4 of Procedural Order No. 1. For documents without page numbers or multiple types of page numbers, pagination has been added to exhibits and is cited in the following format: “W&C p. [x].”

- Claimants had the support of the U.S. government, which provided funding through the Overseas Private Investment Corporation, which was later renamed the U.S. International Development Finance Corporation (both, “**OPIC/DFC**”), as well as Panamanian private and State-owned banks that likewise believed in the Project.
 - Officials at the highest levels of the Panamanian government pledged their support to Claimants. That support materialized over years, during which Panama’s Ministry of Housing and Territorial Planning (“**Housing Ministry**” or “**MIVIOT**”) and other authorities granted approvals and confirmed the Project’s compliance with the FSV Program requirements, and promised financial support and hundreds of mortgages to potential homebuyers through the State-owned National Bank of Panama (*Banco Nacional de Panamá*) (“**National Bank**”) and Savings Bank (*Caja de Ahorros de Panamá*) (“**Savings Bank**”). In addition, Panama publicly touted the Project at housing fairs, and National Bank declared itself a “strategic ally” of the Project. Based on these promises, Claimants successfully secured hundreds of mortgage commitments from banks for the sale of houses to Panamanian low-income families. Despite an unjustified and unexplained temporary financing stoppage by Savings Bank beginning in early 2019, government authorities continued to confirm the Project’s compliance with all applicable requirements and in November 2021 Savings Bank agreed to resume mortgage financing, putting the Project back on track.
 - Before Claimants were able to finalize the sale of a single unit, however, but after they had invested approximately US\$ 41 million and reached an advanced stage of construction on hundreds of housing units, the Housing Ministry suddenly annulled its prior approvals of the Project. To this day, Panama has never provided a satisfactory explanation for its decision to annul the Project’s prior approvals, which was inconsistent with its prior conduct and repeated approvals of the Project over many years as well as with the State’s obligations under Panamanian law. Shortly after the annulment, the Vice Minister of Housing told the Project’s representative that “foreigners imposing innovations” were not wanted.
 - The annulment killed the Project. Claimants were excluded from the FSV Program, which was the financial backbone of their investment. Savings Bank and National Bank withdrew their support for the Project. Claimants were left with hundreds of unsold houses and no way to continue developing the Project or meeting their financial obligations.
4. Panama’s conduct is in breach of multiple obligations to protect the qualifying investments of U.S. investors that it undertook in Chapter Ten, Section A of the Treaty, including, *inter alia*, its obligation to extend fair and equitable treatment (“**FET**”) (Article 10.5), its obligation not to expropriate a covered investment through direct or indirect measures (Article 10.7), and its obligations to accord Claimants and their investment treatment no

less favorable than that it accords, in like circumstances, to its own investors (“NT”) (Article 10.3).

5. The Tribunal has jurisdiction to hear and determine Claimants’ claims pursuant to Chapter Ten, Section B of the Treaty, which entitles U.S. investors to bring claims at ICSID against Panama on their own behalf for breaches of Panama’s obligations under Chapter Ten, Section A of the Treaty. Claimants have met all applicable requirements under the Treaty, as well as under the ICSID Convention.
6. Claimants are entitled to full reparation in the form of compensation for the losses resulting from Panama’s unlawful conduct, which amount to no less than US\$ 204.4 million as of the date of the filing of this Memorial (10 June 2026).

* * *

7. Claimants’ Memorial is accompanied by the following:
 - Witness statement of Mr. Juan Carlos Argüello (“**Juan Carlos Arguello**”);
 - Witness statement of Mr. Ernesto Argüello (“**Ernesto Arguello**”);
 - Witness statement of Mr. César Fernando Núñez Duarte (“**Núñez**”), the Financial Administrator and Project Manager of the Project between 2015 and 2023;
 - Expert report on Panamanian Law by the former President of both the Supreme Court of Panama and the Third Chamber of the Administrative Contentious Court, which is the highest court in Panama with jurisdiction over the legality of administrative acts, Mr. Adán Arnulfo Arjona (“**Arjona**”); and
 - Expert report on quantum by Ms. Isabel Kunsman of AlixPartners (“**AlixPartners**”).
8. Claimants’ Memorial is accompanied by the following supporting documentation: (i) Exhibits C-0052 to C-0302; and (ii) Legal Authorities CL-004 to CL-0147.

II. FACTUAL BACKGROUND

A. FOR YEARS, PANAMA HAS ACTIVELY SOUGHT FOREIGN INVESTMENT, INCLUDING IN ITS LOW-INCOME HOUSING SECTOR

1. Panama has long promoted itself as a stable destination for foreign investment and specifically sought investment from U.S. investors

9. For decades, Panama has presented itself to potential investors as a model of legal and economic stability and investor-friendly policies in Latin America to induce their investment. In particular, Panama has had close relations with the United States for its entire history and has long maintained policies conducive to facilitating trade and investment between both countries. For example, Panama's economy has been dollarized since 1904, with the Panamanian Balboa pegged to the U.S. dollar (1:1), which minimizes currency risk for foreign investors and which Panama uses to promote foreign investment in the country.³
10. In addition, Panama has a long history of promising investors certain fundamental protections. This is confirmed by Mr. Adán Arnulfo Arjona, who has previously served as both the President of the Supreme Court of Justice of Panama and the President of the Third Chamber of the Administrative Contentious Court, which is the highest court in Panama with jurisdiction over the legality of administrative acts, and who is submitting a report in this case as an independent legal expert on Panamanian law on Claimants' behalf:

Panamanian law imposes fundamental obligations on the State toward all private investors, including respect for (i) the guarantee of due process, which requires that every administrative act be within the State's jurisdiction, be sufficiently reasoned, and comply with legal procedures; (ii) the principle of national treatment; (iii) the principle of administrative good faith, which obligates the State to act with consistency, loyalty, and honesty,

³ See Calvin Sims, *Panama Chief Seeks to Prod the Economy*, NEW YORK TIMES dated 3 Nov. 1994 (C-0059) (“[President Ernesto Perez Balladares] cited Panama’s location, the canal, its bilingual labor force and its dollar-denominated economy as major selling points. ‘Countries are competing for investment both nationally and internationally, and I want to make sure that we have laws that make Panama as competitive as anybody else,’ Mr. Perez Balladares said.”). See also Juan Luis Moreno-Villalaz, *Lecciones de la experiencia monetaria panameña: Una Economía dolarizada con integración Financiera*, CATO JOURNAL dated 8 Jun. 1999 (C-0063) (Economic Advisor, Panama Ministry of Economy and Finance, noting that Panama’s use of the dollar has created a “very competitive financial market, and a country with low risk and zero risk of devaluations.”); U.S. Department of State, Bureau of Western Hemisphere Affairs, Background Notes: Panama dated Jan. 2000 (C-0065) (“The Government of Panama actively promotes Panama’s long-standing reputation as an international trading, banking, and services center--and as a site for foreign direct investment. Panama’s economy is characterized by low inflation and zero foreign exchange risk.”).

without betraying the legitimate expectations of those subject to its administration; and (iv) the doctrine of estoppel, which prevents the State from contradicting its prior actions.⁴

11. Moreover, Panama has a long history of providing investment protections to investors from the United States. In October 1982, Panama and the United States signed the Treaty Between the United States and Panama Concerning the Treatment and Protection of Investments (“**1982 BIT**”).⁵ This was the second treaty signed under the U.S. bilateral investment treaty program.⁶
12. Between 1983 and 1989, Panama was ruled by *de facto* military leader Manuel Antonio Noriega. During his administration, Panama experienced political, economic, and social instability, which impacted its global image and its ability to attract foreign investment.⁷ In 1989, the United States ousted the Noriega regime and an elected government was sworn into office.⁸

⁴ Arjona ¶ 5 (“*El ordenamiento jurídico panameño impone al Estado obligaciones fundamentales frente a todo inversionista privado, entre ellas se encuentran el respeto a (i) la garantía del debido proceso, que exige que todo acto administrativo cuente con competencia, motivación suficiente y cumplimiento de los trámites legales; (ii) el principio del trato nacional; (iii) el principio de buena fe administrativa, que obliga al Estado a actuar con coherencia, lealtad y honestidad, sin defraudar la confianza legítima de los administrados; y (iv) la doctrina de los actos propios, que impide al Estado contradecir sus actuaciones precedentes.*”).

⁵ See Treaty Between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investments, entered into force on 30 May 1991 (CL-009).

⁶ See Message to the Senate Transmitting a Protocol Amending the Panama-United States Investment Treaty, THE AMERICAN PRESIDENCY PROJECT dated 12 Sep. 2000 (C-0068).

⁷ See Barry B. Levine, *Panama’s Strongman Must Go*, NEW YORK TIMES dated 6 Jul. 1987 (C-0055) (“From behind the scenes, General Noriega commands a civilian puppet Government that can only be called a kleptocracy: It rules by force and fraud, murder and deceit.”); President George H.W. Bush, *Address to the Nation on Panama*, UPI dated 20 Dec. 1989 (C-0056); see also Country Report: Panama, Policies Toward Foreign Capital, 1990–2015, Project: Transnationalization and Economic Development in Latin America Department of Economics – School of Social Sciences – UdeLaR Funded by CSIC Research Group I+D (C-0211) p. 10 (referring to the dire economic situation and unemployment in Panama during the Noriega dictatorship).

⁸ See Mark P. Sullivan, *Panama: Political and Economic Conditions and U.S. Relations*, CRS Report for Congress dated 22 Apr. 2011 (C-0099) p. 3.

13. On 22 November 1995, Panama signed the ICSID Convention,⁹ which it then ratified on 8 April 1996.¹⁰ In accordance with ICSID Convention Article 68(2), the ICSID Convention entered into force with respect to Panama on 8 May 1996.¹¹ In an official report, Panama's Ministry of Economy and Finance explained that joining ICSID was intended to "provide greater guarantees to foreign investors."¹²
14. During the late 1990s, Panama continued to promote itself to foreign investors as an investment friendly destination. Panama's Ministry of Economy and Finance recognized that one of the main pillars of the economic program between 1994 and 1999 was "promotion of foreign investment."¹³ In this context, Panama implemented reforms designed to attract foreign investment.¹⁴ In particular, among other things, Panama

⁹ See ICSID, Database of ICSID Member States (last accessed 21 Jul. 2025) (C-0048) (indicating that Panama signed the ICSID Convention on 22 November 1995 with the Convention entering into force for Panama on 8 May 1996).

¹⁰ See *Panama Ratifies the ICSID Convention*, 2 International Centre for Settlement of Investment Disputes 13, dated 1996 (C-0003).

¹¹ See ICSID, Database of ICSID Member States (last accessed 21 Jul. 2025) (C-0048).

¹² *Informe Económico 1994-1999*, Ministerio de Economía y Finanzas de Panamá – Dirección de Análisis y Políticas Económicas dated Aug. 1999 (C-0064) p. 36 ("legislation was enacted to incorporate Panama into the World Bank's Multilateral Investment Guarantee Agency (MIGA), and the Convention on the Settlement of Investment Disputes was ratified, thereby providing greater guarantees to foreign investors.") ("se aprobó una legislación para incorporar a Panamá a la Agencia Multilateral de Garantía de Inversiones del Banco Mundial (MIGA) y se ratificó la Convención para resolver las disputas sobre inversión, lo que da mayores garantías a inversionistas extranjeros.").

¹³ *Informe Económico 1994-1999*, Ministerio de Economía y Finanzas de Panamá – Dirección de Análisis y Políticas Económicas dated Aug. 1999 (C-0064) p. 12 (emphasis added) ("The main components of the economic program were: (1) the redefinition of the role of the State and the reduction of government intervention in both productive and regulatory activities; (2) the elimination of import substitution policies; (3) the removal of incentive policies that favor certain sectors and social groups at the expense of others; (4) an outward-oriented economy and the promotion of foreign investment; (5) prudent management of public finances and the modernization of public administration; and (6) the targeting of public spending to support lower-income groups and investment in infrastructure") ("Los principales componentes del programa económico fueron: 1) la redefinición de la función del Estado y la reducción de la intervención del gobierno en lo productivo y en lo regulador; 2) la eliminación de la política de sustitución de importaciones; 3) la eliminación de las políticas de incentivos que privilegian a ciertos sectores y grupos sociales a costa de los demás; 4) la orientación hacia afuera de la economía y la promoción de la inversión extranjera; 5) el manejo prudente de las finanzas públicas y la modernización de la administración pública, y 6) la focalización del gasto público de respaldo a los grupos de menores ingresos y hacia la inversión en la infraestructura.").

¹⁴ See Calvin Sims, *Panama Chief Seeks to Prod the Economy*, NEW YORK TIMES dated 3 Nov. 1994 (C-0059) ("Seeking to stimulate the economy and reduce poverty, Panama's new Government has introduced an ambitious plan to sell stakes in state-run industries, reduce import tariffs and revise labor laws that inhibit foreign investment."); See also *Informe Económico 1994-1999*, Ministerio de Economía y Finanzas de Panamá – Dirección de Análisis y Políticas Económicas dated Aug. 1999 (C-0064) p. 36 (Panama's Ministry of Economy

undertook ambitious steps aimed at privatizing and deregulating its economy, including selling state-run companies.¹⁵ Panama similarly created governmental entities, including commercial offices operating abroad, to “promote foreign investment and foreign trade.”¹⁶

15. Panama’s post-Noriega reforms quickly yielded results. According to the World Bank, Panama’s FDI net inflows rose from US\$ 135 million in 1990 to over US\$ 1.3 billion in 1998, a nearly tenfold rise over less than a decade.¹⁷

2. In the early 2000s, Panama suffered from an acute shortage of affordable housing, which it sought to address by developing a housing program for low-income families

16. Panama has long grappled with the challenges of providing access to affordable housing to low-income segments of its population, which it has sought to address through various policies, such as the *Ley de Interés Preferencial* (“**Preferential Interest Law**”), which guarantees preferential interest rates for mortgages to qualifying homebuyers.¹⁸ As Panama’s economy grew and its population expanded,¹⁹ Panama faced a shortage of affordable housing.²⁰ In August 2002, the Housing Ministry estimated that “approximately 167,000 housing units are still needed.”²¹ In 2004, Panama amended its Political

and Finance setting out the objectives of the government’s economic program, including “attracting private foreign investment”) (“*El objetivo del programa de privatización era poder aumentar la eficiencia y productividad de las empresas, mejorar la competencia en los sectores restringidos al monopolio estatal, liberar y ampliar los recursos del Estado para destinarlos a las inversiones sociales prioritarias, y atraer la inversión privada extranjera.*”).

¹⁵ See Calvin Sims, *Panama Chief Seeks to Prod the Economy*, NEW YORK TIMES dated 3 Nov. 1994 (C-0059).

¹⁶ Law No. 53 dated 21 July 1998 (C-0062) Art. 2-A(13) (“Additional functions of the Ministry of Commerce and Industries include: . . . Opening commercial offices abroad to promote investment and foreign trade.”) (“*Son funciones adicionales del Ministerio de Comercio e Industrias: Abrir oficinas comerciales en el extranjero para promover la inversión y el comercio exterior.*”).

¹⁷ See World Bank, World Development Indicators, Foreign Direct Investment, Net Inflows (BoP, current US\$) — Panama (1990 – 1998) (last accessed 22 May 2026) (C-0057).

¹⁸ See Law No. 3, Preferential Interest Law dated 20 May 1985 (C-0054).

¹⁹ See World Bank, World Development Indicators, GDP growth (annual %)— Panama (1991-2004) (last accessed 22 May 2026) (C-0058) (showing a growth in Panama’s GDP from 1.2% in 1991 to 4.5% in 2004); Shlomo Angel, *Housing Policy And Housing Programs In Panama: Diagnosis And Guidelines For Action*, Prepared for the Inter-American Development Bank New York, November 2000 (C-0069) p. 3 (“*The population of Panama amounted to a total of 2.8 million in the year 2000, and grew at an annual rate of 1.9% between 1990 and 2000.*”).

²⁰ See Alexis Rodríguez Mojica, *Social protection systems in Latin America and the Caribbean: Panama*, United Nations Economic Commission for Latin America and the Caribbean dated Nov. 2013 (C-0108) p. 45.

²¹ *Deficit habitacional se reduce en un 10.8%*, LA PRENSA dated 21 Aug. 2002 (C-0072).

Constitution. The new Constitution expressly imposes an obligation on the State to provide housing for the people, including those with low incomes: “[t]he State shall establish a national housing policy aimed at ensuring that the entire population can enjoy this social right, especially lower-income groups.”²²

17. In December 2005, the Housing Ministry increased this estimate to approximately 200,000 homes.²³ Shortly after, in January 2006, the Housing Ministry again recognized the need to invest in social housing due to the current deficit and announced that the Government would invest US\$ 17 million for the construction of 5,593 homes.²⁴
18. On May 2, 2006, Panama created the *Programa de Vivienda Solidaria* or *Provisol* (“**Provisol Program**”).²⁵ Recognizing that the housing deficit “principally affects the sectors of the population with scarce economic resources,” Panama committed to providing financial support for housing for eligible low-income families, *i.e.*, families with a monthly income of under 300 Balboas.²⁶ Under the initial Provisol Program, qualifying families could receive a grant of up to 2,000 Balboas to be used for the purchase of new housing with a maximum purchase price of 17,500 Balboas.²⁷ As Panama’s Ministry of Economy and Finance explained at the time, this program was “a novel element in social policy . . . to implement a social protection system based on a direct subsidy for families in extreme poverty.”²⁸

²² *Constitución Política de Panamá* dated 2004, Art. 117 (C-0075) (“El Estado establecerá una política nacional de vivienda destinada a proporcionar el goce de este derecho social a toda la población, especialmente, a los sectores de menor ingreso.”); Arjona ¶ 34.

²³ See Maritza Bonilla, *Housing deficit remained in 2005*, EDITORA PANAMÁ AMÉRICA S.A. dated 24 Dec. 2005 (C-0076).

²⁴ See *Mivi Recognizes the Deficit of Houses*, LA PRENSA dated 17 Jan. 2006 (C-0078).

²⁵ See Executive Decree No. 35 creating the Programa de Vivienda Solidaria dated 2 May 2006 (C-0080) Art. 1.

²⁶ See Executive Decree No. 35 creating the Programa de Vivienda Solidaria dated 2 May 2006 (C-0080) Preamble, Art. 1.

²⁷ See Executive Decree No. 35 creating the Programa de Vivienda Solidaria dated 2 May 2006 (C-0080) Art. 1.

²⁸ *Informe Económico Anual 2006*, Ministerio de Economía y Finanzas, Anexo I, *Historia de las Políticas Sociales en Panamá y su Impacto en la Pobreza*, Por Nuvia Zarzavilla de Jarpa dated 2006 (C-0083) W&C p. 92 (“Como elemento novedoso en la política social, a partir del año pasado el gobierno inició un plan piloto para implementar un sistema de protección social basado en un subsidio directo para las familias en pobreza extrema. El propósito es aliviar de manera directa las necesidades inmediatas de estos hogares, lo que refleja la solidaridad social como elemento esencial de una buena política de Estado.”).

3. In the following years, Panama sought to induce foreign investment in particular from U.S. investors by promising them protection under the Treaty

19. Over the following years, Panama continued to seek to promote foreign investment and signed a series of treaties to that aim, such as a Free Trade Agreement with Singapore (1 March 2006), Chile (27 June 2006), United States (28 June 2007), Canada (14 May 2010), and Peru (25 May 2011). Panama also signed Bilateral Investment Treaties with Sweden (15 January 2008) and Italy (6 February 2009).
20. Panama's leaders consistently encouraged foreign investment into the country and publicly spoke of their success in securing it. In an August 2007 speech before the National Assembly, President Torrijos publicly stated: "[w]e have certainly built investor confidence; last year alone, investments totaled 2.4 billion, and we expect similar figures this year."²⁹
21. On 28 June 2007, Panama and the United States signed the United States – Panama Trade Promotion Agreement.³⁰ As Panama's Minister of Commerce and Industries explained at the time, the Treaty was a "guarantee of economic development" for Panama, and a "guarantee [to U.S. investors] that all investments will be welcomed."³¹
22. Meanwhile, Panama continued its efforts to reform its domestic policy to attract foreign investment. In January 2008, the Directorate for the Promotion of Private Investment was created within the Housing Ministry.³² Its objective included, among other things, to "contribute to decreasing the housing deficit, through the creation of public policies and

²⁹ Kathia Martinez, *Torrijos destaca crecimiento económico en Panamá*, MY PLAINVIEW dated 31 Aug. 2007 (C-0087) ("Sin duda generamos confianza en los inversionistas, sólo el año pasado se registraron inversiones por 2.400 millones y para este año esperamos cifras similares").

³⁰ *See Treaty signed by Panama and the United States will accelerate the development of Panama*, SICE OAS dated 28 Jun. 2007 (C-0004); United States and Panama Sign Trade Promotion Agreement, Office of the United States Trade Representative dated 28 Jun. 2007 (C-0005); United States - Panama Trade Promotion Agreement, United States Embassy in Panama dated 30 May 2019 (C-0029).

³¹ *Treaty signed by Panama and the United States will accelerate the development of Panama*, SICE OAS dated 28 Jun. 2007 (C-0004) ("Para los panameños, este TPC supone una garantía de desarrollo económico, basada en el comercio exterior, pero orientada al avance de nuestra sociedad; y para los estadounidenses representa el acceso a un mercado seguro, al que mirar con interés y con todas las garantías de que sus inversiones serán bienvenidas"). *See also* Betty Brannan Jaén, *Histórica firma de TLC con EU*, LA PRENSA dated 29 Jun. 2007 (C-0085).

³² *See* Executive Decree No. 95 dated 2 Jan. 2008 (C-0090) Art. 19.

investment strategies at a national level and the promotion of capital investments from private companies.”³³ Among the specific tasks with which it was charged was “[t]o mediate, facilitate, and promote the development of master plans and land-use planning in new project developments, with the participation of private investment.”³⁴

23. On 17 September 2008, Panama’s Vice President, Samuel Lewis, visited Washington D.C. and, according to a press report, noted that Panama is the fastest growing economy in the Americas and an important ally to the United States who is its major trading, investment, and strategic partner.³⁵ He further stated that “[t]he passing of the [Treaty] would not only send a strong geopolitical message, but also guarantee benefits for everyone by creating a more stable economic and political environment.”³⁶
24. Later, once the Treaty had been approved by a U.S. Congressional Committee, President Ricardo Martinelli, who assumed the Presidency in 2009, reportedly stated that he was “very glad about the approval of the Free Trade Agreement,” describing the United States as Panama’s “biggest ally,” “most important partner,” and “most traditional friend.”³⁷ President Ricardo Martinelli took efforts to promote Panama to U.S. investors, including participating in meetings with potential U.S. investors.³⁸ The Treaty entered into force on 31 October 2012.³⁹

³³ Executive Decree No. 95 dated 2 Jan. 2008 (C-0090) Art. 19 (“*contribuir a la disminución del déficit habitacional, a través de la generación de políticas y estrategias de inversión a nivel nacional y la promoción de inversión de capitales de la empresa privada.*”).

³⁴ Executive Decree No. 95 dated 2 Jan. 2008 (C-0090) Art. 21 (“*Mediar, facilitar y procurar el desarrollo de planes maestros y de ordenamiento territorial en los nuevos desarrollos de proyectos, con la participación de la inversión privada y de las organizaciones no gubernamentales.*”).

³⁵ Brian Wanko, U.S.-Panama Trade: Linking Strategic Partners for Increased Opportunity, THE AMERICAS dated 17 Sept. 2008 (C-0093).

³⁶ Brian Wanko, U.S.-Panama Trade: Linking Strategic Partners for Increased Opportunity, THE AMERICAS dated 17 Sept. 2008 (C-0093).

³⁷ *Martinelli celebra avance de TLC en Congreso de Estados Unidos*, LA ESTRELLA DE PANAMÁ dated 6 Oct. 2011 (C-0101) (“*Estados Unidos ‘es nuestro mayor aliado, nuestro socio más importante, nuestro amigo más tradicional.*”).

³⁸ *See Presidente se reúne con 51 inversionistas americanos*, LA ESTRELLA DE PANAMÁ dated 8 May 2012 (C-0105) (“*la inversión extranjera es la clave para el desarrollo*”); *Presidente Martinelli se reúne con empresarios estadounidenses*, TU POLÍTICA dated 23 Sep. 2009 (C-0094).

³⁹ *See United States, Panama Set Date for Entry into Force of United States-Panama Trade Promotion Agreement*, Office of the United States Trade Representative dated 22 Oct. 2012 (C-0016). The 1982 BIT was not terminated

4. In the late 2000s, Panama sought to attract further investment in its affordable housing sector and created the FSV Program

25. Despite the Government's early efforts to provide financial support to low-income Panamanians through the Provisol Program, Panama's affordable housing shortage continued in the late 2000s.⁴⁰ On 25 August 2009, Panama accordingly issued Executive Decree No. 55, which replaced the Provisol Program with the more expansive FSV Program, whereby the State sought to attract private investors to develop housing to be purchased by low-income individuals and families with State-provided financial support.⁴¹ The Housing Ministry listed the FSV Project as one of the government's "flagship projects."⁴²
26. Panama designed the FSV Program with better conditions for private developers, promising them increased financial support through qualifying homebuyers. Panama promised to make the FSV Program open to all qualifying projects and established that the Housing Ministry would issue a "list" of the housing projects that had been approved as FSV-compliant for prospective homebuyers, thereby promoting those projects to the pool of potential homebuyers, which list it updated over time.⁴³ To meet this requirement, project developers were required to submit a formal application including, among other

by the Treaty. Thus, both instruments are currently in force. Although the substantive protections provided under the 1982 BIT are still in effect, the dispute resolution provisions of the 1982 BIT (Articles VII and VIII) were suspended upon the entry-into-force of the Treaty, with a ten-year exception for covered investments made and disputes existing at the time the Treaty entered into force. It was also provided that this suspension does not apply to claims arising out of investment agreements already in existence. *See* Treaty (CL-001) Arts. 1.3. For the avoidance of doubt, Claimants bring their claims under the Treaty and not the 1982 BIT.

⁴⁰ *See Plan Estratégico 2010-2014, MIVIOT – Dirección de Programación y Presupuesto* dated Jan.2010 (C-0095) p. 16 (showing that Panama's affordable housing shortage continued in the late 2000s and that, as of 2008, Panama's housing deficit still stood at approximately 140,120 homes).

⁴¹ *See* Executive Decree No. 55 creating the FSV Program dated 16 Sep. 2009 (C-0006) (signed on 25 August 2009); *see also* Arjona § IV.A.

⁴² *See Memoria 2009-2010, MIVIOT* (C-0098) p.10 ("*También se hace mención a los proyectos insignias del actual gobierno, que son el Proyecto de Desarrollo Integral de Curundú, el Fondo Solidario de Vivienda y la ley que creó el Viceministerio de Ordenamiento Territorial, los cuales serán tareas a ejecutar en el transcurso del próximo quinquenio.*").

⁴³ *See* Executive Decree No. 55 creating the FSV Program, dated 16 Sep. 2009 (C-0006) Arts. 4(3), 8.

things, a technical report of the project (with the design for the project and the unit), official documents regarding title of the land, and construction permits.⁴⁴

27. In particular, the FSV Program put in place by Executive Decree No. 55 was designed to “ensure the facilitation of access to housing for low-income” individuals,⁴⁵ through “the implementation of measures to increase private investment.”⁴⁶ The FSV Program raised the maximum eligible housing price from 17,500 Balboas (under the Provisol Program) to 30,000 Balboas per unit, making development financially viable and commercially attractive. This price increase enabled developers to construct higher-value housing units, better recover their construction costs, and access more competitive locations, while retaining eligibility for the State financial support.⁴⁷
28. Executive Decree No. 55 also established the minimum requirements for housing projects to qualify for the FSV Program and made the Housing Ministry responsible for evaluating housing projects, approving home designs, and carrying out inspections to verify compliance with approved designs and specifications, among other things.⁴⁸
29. Executive Decree No. 55 further established that the Housing Ministry was responsible for verifying each individual potential homebuyer’s compliance with the FSV Program’s requirements.⁴⁹ To qualify, homebuyers were required to be Panamanian citizens or formal

⁴⁴ See *Trámites y Requisitos - Dirección de Promoción de la Inversión Privada* (last accessed 26 Mar. 2026) (C-0209).

⁴⁵ Executive Decree No. 55 creating the FSV Program dated 16 Sep. 2009 (C-0006) (“*la realidad constructiva e inmobiliaria actual hace necesario que se revalúe el mecanismo y monto de los aportes para viviendas sociales, con la finalidad de poder garantizar la facilitación y acceso a viviendas para los sectores con menos recursos.*”).

⁴⁶ Executive Decree No. 55 creating the FSV Program dated 16 Sep. 2009 (C-0006) (“*existe un déficit habitacional en la República de Panamá que requiere que se tomen las medidas necesarias tendientes a incrementar la inversión privadas en desarrollos de interés social para las clases económicamente necesitadas. . . .*”).

⁴⁷ See Executive Decree No. 55 creating the FSV Program dated 16 Sep. 2009 (C-0006) Arts. 1-2 (“*Artículo 1. Se deja sin efecto el Programa de Vivienda Solidaria (PROVISOL) y en su lugar se crea el FONDOSOLIDARIO DE VIVIENDA, bajo la dirección y coordinación del Ministerio de Vivienda, con el propósito de otorgar un aporte, de carácter intransferible para personas y familias de bajos ingresos de la economía formal de hasta Cinco Mil Balboas con 00/100 (B/.5,000.00) por familia, para la adquisición de viviendas nuevas cuyo precio de venta no excedan la suma de Treinta Mil Balboas con 00/100 (B/.30,000.00), sin incluir el monto correspondiente a los gastos legales y de cierre de la transacción. Artículo 2. El aporte antes descrito será otorgado a las personas cuyos ingresos familiares formales no superen la suma de Ochocientos Balboas con 00/100 (B/.800.00) mensuales.*”).

⁴⁸ See Executive Decree No. 55 creating the FSV Program dated 16 Sep. 2009 (C-0006) Art. 4.

⁴⁹ See Executive Decree No. 55 creating the FSV Program dated 16 Sep. 2009 (C-0006) Arts. 3-4, 7.

residents of legal age and had to file a sworn statement declaring that their income was under the threshold established for the program.⁵⁰ Homebuyers were also required to present a mortgage loan approval letter from a bank or financial institution confirming that the buyer had secured financing for the balance of the purchase price.⁵¹ This mortgage approval letter could be issued by any bank, public or private, including Panamanian State-owned banks Savings Bank and National Bank.

30. Once the homebuyer obtained this letter and fulfilled other requirements, the Housing Ministry would approve the individual homebuyer's application by resolution, and send that resolution to National Bank, the State-owned bank authorized to administer the FSV Program's financial support funds, as well as to the financial institutions that had issued a mortgage loan approval letter and the promoter of the housing project.⁵² National Bank would then issue an irrevocable letter of payment (*carta promesa de pago*) in favor of the project developer, committing the State to disburse the financial support once all FSV conditions were met, including registration of the property in the public registry in the name of the beneficiary.⁵³
31. On 23 October 2009, Panama issued Law No. 61, which empowered the Housing Ministry to "promote the investment of capital from the private sector for the funding of houses" by providing additional incentives to investors in the Panamanian housing market, including tax benefits.⁵⁴ Law No. 61 also authorized the Housing Ministry to "[t]ake the necessary

⁵⁰ See Executive Decree No. 55 creating the FSV Program dated 16 Sep. 2009 (C-0006) Art. 3.

⁵¹ See Executive Decree No. 55 creating the FSV Program dated 16 Sep. 2009 (C-0006) Art. 3.

⁵² See Executive Decree No. 55 creating the FSV Program dated 16 Sep. 2009 (C-0006) Arts. 6-7.

⁵³ See Executive Decree No. 55 creating the FSV Program dated 16 Sep. 2009 (C-0006) Art. 5.

⁵⁴ Law No. 61 reorganizing the Ministry of Ministry of Housing and establishing the Ministry of Housing and Territorial Planning dated 23 Oct. 2009 (C-0007) Art. 2(8). ("*Promover la inversión de capitales del sector privado para el financiamiento de viviendas y ordenamiento territorial, a través de los incentivos que otorgue la ley, como la exoneración del Impuesto de Inmuebles, el descuento obligatorio a favor de los propietarios y de las entidades hipotecarias estatales y privadas, de los alquileres y las amortizaciones sobre hipotecas respectivamente, así como las concesiones que liberalicen la importación o fomenten la producción nacional de materiales de construcción y la garantía de un rendimiento razonable de sus inversiones.*"); see also Arjona § IV.

measures to facilitate the implementation of large-scale social housing projects . . . through the formulation of special credit policies and the creation of incentives of all kinds.”⁵⁵

32. Law No. 61 was intended to advance the Housing Ministry’s institutional “modernization” through which it transitioned “from a builder entity to a facilitator entity” with the objective of addressing the accumulated housing deficit.⁵⁶ As part of this modernization, the Housing Ministry established measures aimed at streamlining procedures and “strengthening relations with private investors.”⁵⁷
33. Through the recently created Directorate for the Promotion of Private Investment, as referenced above, the Housing Ministry continued to seek to induce private investors to invest in the housing market, participating in events and meetings with local and foreign investors at which the FSV Program was a focal point, as reported in its Annual Report to Congress.⁵⁸ In January 2010, the Housing Ministry published a Strategic Plan for the period 2010-2014, in which it confirmed the existence of a housing deficit of over 130,000 houses and that low-income families had the greatest need for additional housing.⁵⁹ The

⁵⁵ Law No. 61 reorganizing the Ministry of Ministry of Housing and establishing the Ministry of Housing and Territorial Planning dated 23 Oct. 2009 (C-0007) Art. 2(3). (“[A]doptar las medidas del caso para facilitar la realización de programas masivos de soluciones habitacionales de interés social por parte de las diferentes dependencias y entidades del sector público y privado, mediante la formulación de políticas crediticias especiales y la creación de incentivos de todo orden.”).

⁵⁶ See *Trabajando por mi barrio*, Ministry of Housing (C-0084) W&C p. 51 (“The modernization of the institution, based on the needs arising from new operational tools, has resulted in the transformation of the Ministry of Housing from a builder entity to a facilitatory entity; all of this with the aim of addressing the accumulated housing shortage.”) (“[L]a modernización de la institución con base a las necesidades generadas por los nuevos instrumentos operativos que dan como resultado la conversión del Ministerio de Vivienda de un Ente constructor a un Ente facilitador; todo esto con el propósito de detener el déficit habitacional acumulado.”).

⁵⁷ See *Trabajando por mi barrio*, Ministry of Housing (C-0084) W&C p. 51 (“Entre los primeros pasos figuran el establecimiento de mecanismos y fórmulas para reducir en tiempo los tramites de Ventanilla Única de aprobación de planos, creando la Dirección Nacional de Ventanilla Única . . . [A]demás para fortalecer la relación con los inversionistas privados se creó la Oficina para la Promoción de la Inversión Privada (OPIP).”).

⁵⁸ See *Memoria 2009-2010*, MIVIOT (C-0098) p. 120 (“OBJETIVO Promocionar la inversión de capitales del sector privado y no gubernamental, para el financiamiento de viviendas de interés social, estimulando la ocupación sostenible del territorio basado en sus potencialidades y las interrelaciones de sus características socioeconómicas, ambientales, culturales y administrativas. INVITACIONES Presencia en ferias de índoles diversas, institucionales y de la empresa privada, en donde se ha promovido conjuntamente con otras direcciones de la institución los programas que tiene en Ministerio de Vivienda, resaltando el programa: FONDO SOLIDARIO DE VIVIENDA. ATENCIÓN DE PROMOTORES E INVERSIONISTAS NACIONALES: 100 EXTRANJEROS: 60”).

⁵⁹ See *Plan Estratégico 2010-2014*, MIVIOT – Dirección de Programación y Presupuesto dated Jan.2010 (C-0095) pp. 15-18; see also Arjona ¶¶ 36-37.

Housing Ministry also confirmed its goal of “creating conditions to incentivize private investment” in the low-income housing sector of Panama and laid out its strategic objectives, which included, among others, “reducing significantly the housing deficit through programs targeted at low-income populations and the informal sector,” “generating housing programs in coordination with the private sector,” and “integrating the participation of local authorities, municipalities, ministries, and private and autonomous entities.”⁶⁰

34. Meanwhile, Panamanian officials publicly promoted the FSV Program to foreign investors. Panamanian President Ricardo Martinelli himself referred to the FSV Program in a September 2010 speech to the UN General Assembly in New York in which he highlighted that Panama had created “a solidary fund for Panamanians of low-income that apply for their first home.”⁶¹ Also in September 2010, President Martinelli, together with Panama’s then-Housing Minister, Carlos Duboy, reportedly publicly confirmed that some 2,500 families had already benefited from the FSV Program’s financial support.⁶² Against this background, Housing Ministry authorities reportedly announced that Panama was expecting to invest 10 million Balboas more in the FSV Program by the next year alone.⁶³

⁶⁰ *Plan Estratégico 2010-2014*, MIVIOT – Dirección de Programación y Presupuesto dated Jan. 2010 (C-0095) pp. 9-20 (“Generar condiciones para el incentivo de la inversión privada en el sector habitacional Prioritario I; II y III . . . Disminuir significativamente el déficit habitacional, a través de programas dirigidos a la población de menor ingreso y del sector informal . . . Generar programas de vivienda en coordinación con la empresa privada focalizando acciones sectoriales en las áreas urbanas y rurales . . . Integrar la participación de las autoridades locales, municipales, ministeriales y entidades autónomas y privadas para resolver, en conjunto, los problemas del desarrollo urbano, habitacionales, sociales y de integración, que confrontan las comunidades, objeto de atención por esta Institución.”).

⁶¹ Speech by His Excellency the President of the Republic of Panama, Ricardo Martinelli, at the Millennium Goals Summit, SISTEMA DE LA INTEGRACIÓN CENTROAMERICANA dated 23 Sep. 2010 (C-0009) p. 4. (“Adicionalmente, constituimos un fondo solidario para panameños y panameñas de bajos recursos que aplican a su 1ra vivienda.”).

⁶² *See Dos mil 500 familias se han beneficiado del programa fondo solidario*, PANAMA AMERICA dated 16 Sep. 2010 (C-0097).

⁶³ *See Dos mil 500 familias se han beneficiado del programa fondo solidario*, PANAMA AMERICA dated 16 Sep. 2010 (C-0097).

B. IN RELIANCE ON PANAMA’S PROMISES, CLAIMANTS INVESTED SUBSTANTIAL FUNDS TO DEVELOP A LARGE-SCALE SOCIAL HOUSING PROJECT IN LA CHORRERA, PANAMA

1. Claimants were experienced investors in the Central American housing sector

35. Claimants come from a proud tradition of successful and socially conscious builders and developers. Born in Texas in 1976 and 1979, respectively, Juan Carlos and Ernesto spent their childhood in Honduras, where their father helped build Conhsa Payhsa, S.A. (“**Conhsa Payhsa**”), a leading Central American construction company.⁶⁴ During this time, Claimants’ family was actively involved in various charities and aid programs designed to assist less fortunate communities, including, for example, seeking to help poor senior citizens, including by starting an “adopt an elder” initiative, and undertaking initiatives to promote education and economic development, such as by establishing a foundation that provided education and childcare to women with young children.⁶⁵
36. As Claimants recall, these were formative experiences. Juan Carlos remembers that “[f]rom an early age, my brothers and I helped our parents and learned from their example the importance and commitment to service and helping others. My involvement in charitable work shaped my values and inspired me to make a positive social impact.”⁶⁶ And as Ernesto recollects, his parents always included him and his brothers in charity work and “encouraged [them] to help those in need.”⁶⁷
37. Juan Carlos earned a degree in Management and Finance from Blinn College in Texas in 1998 and then a Bachelor of Business Administration from Texas A&M University in 1999, after which he joined Conhsa Payhsa, where he worked his way up and built his career in the construction industry.⁶⁸ For his part, Ernesto earned a dual degree in civil engineering and architecture from the University of Miami in 2002, after which he worked

⁶⁴ Juan Carlos Arguello ¶¶ 2-3; Ernesto Arguello ¶¶ 2, 4.

⁶⁵ Juan Carlos Arguello ¶ 4; Ernesto Arguello ¶ 3.

⁶⁶ Juan Carlos Arguello ¶ 4.

⁶⁷ Ernesto Arguello ¶ 3.

⁶⁸ Juan Carlos Arguello ¶¶ 5-6.

in real estate construction and development in Miami.⁶⁹ In these roles, he gained practical experience in large scale construction and engineering projects, including commercial utility site work in South Florida, high-end residential projects in Miami, and social housing projects in Central America.⁷⁰

38. Claimants' interest in building social housing developed naturally from their ingrained sense of social responsibility and experience in construction. Juan Carlos, who spearheaded the Luces del Pacifico Project, remembers being confronted with serious poverty while working at Conhsa Payhsa and wanting to make a change:

Employees working in Conhsa Payhsa and Zip Bufalo [another family enterprise in Honduras] accounted for approximately 15,000 workers in the Sula Valley of Honduras, an industrial area lacking in affordable housing because of high construction costs and limited available financing opportunities. Many of our own workers lived in makeshift homes, without running water, proper roofing, or finished flooring. I saw this and wanted to help them live in dignity and in good houses. Around 2002, I proposed to my father the idea of creating a dedicated housing division within Conhsa Payhsa to improve the quality of life for the employees while also helping address the housing shortage, which we did.⁷¹

39. Similarly, Ernesto wanted to use his real estate and construction background "to create a real estate business . . . with a strong social mission. We wanted to build affordable social housing in safe communities with educational and other social infrastructure and support systems integrated into every aspect of the development."⁷²
40. Claimants' first social housing venture was the *Guacamayas* project in Honduras, which they successfully undertook between 2004 and 2006.⁷³ Acting through Conhsa Payhsa, Claimants built 800 homes⁷⁴ that working families were able to purchase by taking

⁶⁹ Ernesto Arguello ¶¶ 5-7.

⁷⁰ Ernesto Arguello ¶¶ 6-8.

⁷¹ Juan Carlos Arguello ¶ 7.

⁷² Ernesto Arguello ¶ 10.

⁷³ Juan Carlos Arguello ¶ 8.

⁷⁴ Juan Carlos Arguello ¶ 8.

advantage of a State housing program that guaranteed subsidies and Government-backed mortgages to low-income Hondurans.⁷⁵

41. The *Guacamayas* project proved to be an invaluable experience for Claimants, who developed an alternative construction system known as the Block Engineering System (“**BES**”) that made the construction of small, single-family homes cost-effective and scalable. Juan Carlos’s brainchild, BES relies on the production of concrete blocks at plants constructed at or near each housing project and involves concrete batching, mixing, and pressing PVC planks and core pullers that create an inter-locking system of non-structural hollow blocks held together under compression by smooth galvanized steel bars.⁷⁶ Thanks to BES, Claimants are able to mass-produce houses that are structurally reliable and suitable for seismic zones.⁷⁷
42. Claimants’ efforts caught the attention of Clark Realty Capital LLC (“**Clark**”), the real estate affiliate of one of the largest privately held contractors in the United States (Clark Construction).⁷⁸ As Juan Carlos attests, Claimants saw Clark as a “top-notch international partner that could contribute its expertise, experience, and resources” and thought that it would be a strong partner with which Claimants could expand beyond Honduras.⁷⁹
43. Together, Claimants and Clark approached the Overseas Private Investment Corporation (“**OPIC**”), which was renamed the U.S. International Development Finance Corporation (“**DFC**”) in 2019 (both referred to herein as “**OPIC/DFC**”) to discuss financing.⁸⁰ OPIC/DFC is the international development finance institution of the U.S. government, and has for 55 years been a key institution for mobilizing U.S. capital for projects that the U.S. government considers critical to solving development challenges.⁸¹

⁷⁵ See Programa “*Vivienda para la Gente*” inicia en Francisco Morazán, PRESIDENCIA DE LA REPÚBLICA DE HONDURAS dated 20 Nov. 2002 (C-0073); Juan Carlos Arguello ¶ 8.

⁷⁶ See Juan Carlos Arguello ¶ 8.

⁷⁷ Juan Carlos Arguello ¶ 8.

⁷⁸ Juan Carlos Arguello ¶ 9.

⁷⁹ Juan Carlos Arguello ¶ 9.

⁸⁰ See Overseas Private Investment Corporation Website (C-0210).

⁸¹ In Focus: Overseas Private Investment Corporation (OPIC), Congressional Research Service Report dated 24 May 2017 (C-0135) W&C p. 1.

44. In December 2007, OPIC/DFC entered into a \$70 million revolving credit facility agreement with Inter-Mac International Inc., a special-purpose vehicle that Clark incorporated to develop the Honduras projects.⁸² The OPIC/DFC financing expressly designated Hola Holdings, S.A., a Honduran company that Claimants owned and controlled, as a “builder” of these homes and allocated to it an advancement payment,⁸³ which permitted Claimants to invest in additional social housing developments in Honduras and across the region, including in Panama.⁸⁴ The financing was intended to support the construction of up to 10,000 homes for low-wage workers across Central America, which Claimants would finance through long-term mortgage loan contracts.⁸⁵
45. Building on the success of the *Guacamayas* project, starting in 2007, Claimants began developing their second social housing project in Honduras, called *Los Castaños de Choloma*, relying on the OPIC/DFC financing.⁸⁶

2. Claimants developed the Luces del Pacifico Project

(a) Claimants assessed various options in the Central America region and decided to invest in Panama because of the various advantages it promised

46. Building on their experience in Honduras, around 2009, Claimants, together with Clark, began to seriously consider the possibility of developing social housing in other markets drawing on the US\$ 70 million OPIC/DFC credit facility to which they continued to have access.⁸⁷ Seeking to grow and deepen their long-term financing relationship with OPIC/DFC and Clark established through their projects in Honduras, Claimants started

⁸² See Loan Agreement between Inter-Mac International, Inc. and OPIC dated 10 Dec. 2007 (C-0088).

⁸³ See Loan Agreement between Inter-Mac International, Inc. and OPIC dated 10 Dec. 2007 (C-0088) W&C pp. 125, 142-145, Sections 5.12, 7.09; Juan Carlos Arguello ¶ 10.

⁸⁴ See Loan Agreement between Inter-Mac International, Inc. and OPIC dated 10 Dec. 2007 (C-0088) pp. 6-7, 48, 54-55.

⁸⁵ See Loan Agreement between Inter-Mac International, Inc. and OPIC dated 10 Dec. 2007 (C-0088) pp. 6-7, 48, 54-55 (“‘Project’ means the construction by the Company and its Program Subsidiaries of approximately 10,000 low income housing units at sites to be determined in Program Countries and the sale or leasing to Homebuyers (through mortgage or lease purchase financing) of such units.”); Juan Carlos Arguello ¶ 10.

⁸⁶ Juan Carlos Arguello ¶¶ 9-11.

⁸⁷ Juan Carlos Arguello ¶ 12; see Loan Agreement between Inter-Mac International, Inc. and OPIC dated 10 Dec. 2007 (C-0088) p. 46.

having conversations with both Clark and OPIC/DFC about expanding into other markets in Central America.⁸⁸

47. Claimants evaluated several potential markets, including Nicaragua, the Dominican Republic, and Panama, all of which were expressly covered by the OPIC/DFC credit facility.⁸⁹ The Panamanian market offered better advantages, including a promised stable and investor-friendly legal and economic framework, a currency tied to the U.S. dollar (eliminating currency risk), and protections for U.S. investors (under the Treaty).⁹⁰
48. Panama's highly attractive housing sector tipped the scale in favor of investing in Panama. As Juan Carlos describes Claimants' decision to invest, Panama's large affordable housing deficit and the Government's strategic objective of reducing it from 2010-2014 ensured there was a significant market opportunity; the Government was actively promoting investment through the FSV Program; and there was considerable land available in attractive locations where it would be possible to develop a social housing project.⁹¹

(b) Panamanian Government officials induced Claimants to invest in Panama

49. Government officials expressly induced Claimants to invest in Panama. In 2010, Claimants met with then-Vice President of Panama Juan Carlos Varela and Housing Minister Carlos Duboy. As Ernesto recalls, "[d]uring the meeting, we presented our social housing vision and our positive track record in Honduras, as well as our partnerships with U.S. investors Clark and OPIC/DFC," and "[b]oth Vice President Varela and Minister Duboy responded very positively."⁹²
50. Shortly after this meeting, Vice President Varela arranged for his father, Mr. Luis Varela, a prominent landowner in Panama, to show Claimants properties that were good locations

⁸⁸ Juan Carlos Arguello ¶ 12.

⁸⁹ Loan Agreement between Inter-Mac International, Inc. and OPIC dated 10 Dec. 2007 (C-0088) p. 48 ("Eligible Country" means each of Belize, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, and Panama"); Juan Carlos Arguello ¶ 12.

⁹⁰ Juan Carlos Arguello ¶ 13.

⁹¹ Juan Carlos Arguello ¶ 13.

⁹² Ernesto Arguello ¶¶ 17-18.

to develop a social housing Project, including the high-growth region of West Panama, which is part of the Panama City metropolitan area.⁹³

51. In an email sent by Juan Carlos to Mr. Luis Varela thanking him for meeting with them and facilitating their visit, Juan Carlos highlighted that “as a result of the trust we feel from you, as well as from the government, we would like to develop a first-class housing program.”⁹⁴
52. Claimants continued to tour additional sites in the Panama City metropolitan area in the summer and fall of 2010, visiting approximately 25 potential sites over several months.⁹⁵ Claimants took note at the time of Panama’s pro-investment climate and support for social housing projects from senior Government officials and as reflected in State housing policy, and relied upon these factors when making the decision to invest in Panama.⁹⁶

(c) Claimants planned to develop the Project with initial financing from State-owned and private financial institutions that would be paid back through home sales

53. Beginning in 2010, and with OPIC/DFC’s and Panama’s support, Claimants, together with Clark, made the decision to invest in Panama to develop the Project under the FSV Program.⁹⁷
54. Claimants decided to develop the Project through two companies: *Materiales Vista Bahía* (“MVB”), a special-purpose vehicle responsible for Project development, management, and implementation, and Excellence Management Group (“EMG”), which would serve as a financing vehicle for the Project.⁹⁸
55. Claimants designed the Luces del Pacifico Project to be financed with short-term funding from drawdowns on the OPIC/DFC revolving credit facility and additional financing from

⁹³ Ernesto Arguello ¶¶ 18-19.

⁹⁴ See Email from Juan Carlos to Luis Varela dated 8 Sep. 2010 (C-0096) p. 1 (“*A raíz de la confianza que sentimos por parte suya así como del gobierno, nos gustaría desarrollar un programa de viviendas de primer nivel . . .*”).

⁹⁵ Juan Carlos Arguello ¶ 17.

⁹⁶ Juan Carlos Arguello ¶ 13.

⁹⁷ Juan Carlos Arguello ¶¶ 14-15.

⁹⁸ Juan Carlos Arguello ¶ 18.

Panamanian banks, if needed.⁹⁹ The Project would depend on low-income buyers being able to receive State-provided financial support and mortgage financing from State-owned banks issuing mortgages under the FSV Program.¹⁰⁰ Claimants would use the proceeds from home sales to pay off their financing obligations and to acquire more land and undertake further construction to expand the Project.¹⁰¹

56. In this way, Claimants planned to build the Project “Lego-by-Lego,” with each phase of construction leading to home sales generating revenue that would allow Claimants to (1) pay back prior financing; (2) secure additional financing for future phases; and (3) earn a profit.¹⁰² They envisioned two principal phases: an initial and smaller pilot phase, designed to serve as a blueprint and source of funding for an expansion phase.¹⁰³ In total, Claimants planned to build around 10,000 units of affordable housing, including over 8,000 FSV-compliant houses and approximately 2,000 additional apartment units.¹⁰⁴
57. This financing approach, which is consistent with how large-scale construction projects are often financed, including in emerging markets, meant that any interference with Claimants’ ability to develop one aspect of the Project would imperil the remainder of it.¹⁰⁵

⁹⁹ See Juan Carlos Arguello ¶ 34 (“By the end of 2012, with funding from OPIC/DFC . . . we were well positioned to start construction.”), ¶ 39 (“[W]e also were able to obtain additional financing from private lenders who saw the potential in our Project.”); see also Loan Agreement between Inter-Mac International, Inc. and OPIC dated 10 Dec. 2007 (C-0088) pp. 6, 54, 55.

¹⁰⁰ Juan Carlos Arguello ¶ 28.

¹⁰¹ Juan Carlos Arguello ¶ 28.

¹⁰² Juan Carlos Arguello ¶ 28.

¹⁰³ Juan Carlos Arguello ¶ 15.

¹⁰⁴ Ernesto Arguello ¶ 22.

¹⁰⁵ See, e.g., LexisNexis, *5b Real Estate Financing § 15.09: Acquisition and Construction Financing* (C-0301) p. 19 (“It has become standard practice for construction loans to provide for partial releases to be given as individual unit sales are closed. In exchange for this release, a lender will require that a certain amount of principal be paid down on the construction loan.”); Loïc Chiquier, *Construction Finance in Emerging Economies*, in HOUSING FINANCE POLICY IN EMERGING MARKETS, Loïc Chiquier & Michel Lea (eds.), 159 (2009) (C-0302) p. 167 (stating that in a typical construction loan, “[t]he developer acquires the land, and the bank finances the construction and sometimes part of the land infrastructure, typically a short-term (six- to 24-month, depending on the size of the project) progress-payment loan, which is repaid from sales of individual houses or units. The same or different lender may provide mortgages to finance purchase.”); Juan Carlos Arguello ¶ 28.

(d) Claimants designed the Luces del Pacifico Project to help meet Panama's affordable housing shortage, drawing on their extensive experience in the sector and region

58. Having decided to invest in Panama, Claimants began evaluating potential locations to build the Project in Panama. Claimants wanted a Project site location that was “accessible, near employment centers, [and] with access to grocery shopping and healthcare facilities.”¹⁰⁶ Claimants also wanted to acquire land at a price point that would allow them to build and sell homes at a price point at which they would qualify for State support under the FSV Program.¹⁰⁷
59. In November 2010, Claimants ultimately settled on a nearly 29-hectare site in La Chorrera, West Panama as the location of the Project.¹⁰⁸ Claimants selected La Chorrera because it is conveniently located in a high-growth area and land prices were low enough for Claimants to develop and sell social housing units at competitive prices.¹⁰⁹ La Chorrera is only 40 kilometers from Panama City and is situated close to the highway (and therefore commutable to Panama City) and the largest regional hospital, Hospital Nicolás Solano, and offers views of the Pacific Ocean.¹¹⁰ Its location is depicted in the following image:¹¹¹

¹⁰⁶ Juan Carlos Arguello ¶ 16.

¹⁰⁷ See Juan Carlos Arguello ¶¶ 16 (“We wanted a site that was . . . otherwise suitable for a low-income housing development.”), 24 (“We set the housing prices in accordance with the FSV Program’s limit for the FSV compliant units . . .”).

¹⁰⁸ Juan Carlos Arguello ¶ 17; Materiales Vista Bahía, Proyecto: Luces del Pacífico (C-0208) W&C p. 25.

¹⁰⁹ See Luces del Pacifico – Multifamily – Opportunity Summary (C-0207) p. 1; Ernesto Arguello ¶ 19; Juan Carlos Arguello ¶ 17.

¹¹⁰ Ernesto Arguello ¶¶ 19-20; Juan Carlos Arguello ¶ 17.

¹¹¹ See Promotional Materials, *Proyecto Residencial Luces del Pacifico* dated 12 Nov. 2012 (C-0107) W&C p. 2.



Promotional Materials, *Proyecto Residencial Luces del Pacifico* dated 12 Nov. 2012 (C-0107) W&C p. 2, Figure 1

60. Claimants designed the Project based on the model they had developed in Honduras, integrating affordable housing with comprehensive community development solutions across five core areas: education, health and safety, infrastructure, environmental sustainability, and economic stability.¹¹²
61. Claimants particularly prioritized education. As Juan Carlos describes their initiative, “[w]e . . . believed that education was a critical component of sustainable community development, particularly in lower-income communities.”¹¹³ Claimants organized the Project around ten residential clusters they called *quintas*, self-contained neighborhoods with their own neighborhood parks, commercial spaces, and internal paved streets, thereby fostering a cohesive sense of community and enabling residents to access essential services and commercial opportunities within close proximity to their homes.¹¹⁴

¹¹² See *Materiales Vista Bahía, Proyecto: Luces del Pacifico* (C-0208) W&C p. 16.

¹¹³ Juan Carlos Arguello ¶ 27.

¹¹⁴ Juan Carlos Arguello ¶ 26.

62. Each *quinta* would consist of duplex houses totaling between 96 and 122 units.¹¹⁵ Each unit would have three bedrooms, two bathrooms, a combined living and dining area, a kitchen, and a laundry room.¹¹⁶
63. Claimants also designed the Project to include apartment buildings, as well as commercial/retail units, a chapel, nurseries, a community center, a National Police outpost, soccer fields, and playgrounds.¹¹⁷ Neighborhoods in the Project were to be connected with paved streets.¹¹⁸
64. After the pilot of the Project would be completed, Claimants planned a much larger second phase, with thousands more housing units and corresponding amenities and infrastructure.¹¹⁹ As Juan Carlos explains, “[t]he Project was designed to be scalable with the expansion phase being very similar in terms of design to the pilot phase, allowing us to essentially repeat the blueprint of the pilot phase on a larger scale (approximately seven times the pilot phase) to efficiently and cost-effectively construct the expansion phase.”¹²⁰
65. Consistent with their financing plan and industry practice, Claimants planned to fund the expansion phase with revenue generated by home sales built in the first phase.¹²¹ As Ernesto summarizes:

The plan was to finalize and sell the affordable homes in the *quintas* in the pilot phase, and then to use this revenue to build the apartment buildings and expand the Project according to the same blueprint as the pilot phase. The expansion phase would be a scaled-up version of the pilot phase, and would include over 10,000 units, including over 8,000 single family homes that qualified for the FSV program and over 2,000 apartment units.¹²²

¹¹⁵ Promotional Materials, *Proyecto Residencial Luces del Pacífico* dated 12 Nov. 2012 (C-0107) W&C p. 12.

¹¹⁶ Promotional Materials, *Proyecto Residencial Luces del Pacífico* dated 12 Nov. 2012 (C-0107) W&C p. 5.

¹¹⁷ Notice of Public Consultation dated 3 Apr. 2012 (C-0104) W&C p. 1.

¹¹⁸ Juan Carlos Arguello ¶ 26.

¹¹⁹ Juan Carlos Arguello ¶ 28.

¹²⁰ Juan Carlos Arguello ¶ 28.

¹²¹ Juan Carlos Arguello ¶ 28.

¹²² Ernesto Arguello ¶ 22.

(e) From 2010 through 2013, Panama issued repeated approvals and permits that were required for the Project and Claimants began developing the Project

66. Claimants began seeking approvals and permits to begin construction on the Project in 2010, beginning with the BES:

- Claimants, through Hola Holdings, S.A., submitted the BES for technical review to the Technical University of Panama (“UTP”). The purpose of the review was to conduct experimental testing of the system in accordance with the requirements of Panama’s structural design regulations.¹²³ UTP conducted the review and issued a report on BES in November 2010.¹²⁴
- Panama’s Permanent Consultative Committee (“CCP”), which was formed pursuant to the Regulation for Structural Design, reviewed the UTP report. The CCP evaluated the BES structural concept and determined that the system was “satisfactory.”¹²⁵
- Upon considering both the report from the UTP and the approval from the CCP, on 18 July 2011, the *Junta Técnica de Ingeniería y Arquitectura* (Technical Engineering and Architecture Board of the Public Works Ministry) (“JTIA”) approved the BES alternative construction system for small houses and authorized its use in small single-family homes like those at which the FSV Program was targeted.¹²⁶ The JTIA reviewed the report submitted by the CPP, noting that the structural requirements had been met and that the BES system complied with JTIA regulations.¹²⁷

67. From 2012 to 2013, Claimants applied for and obtained approvals and permits relating to various aspects of the Project (e.g., Project viability, construction, environmental assessment, and zoning, among others). Each approval required Claimants to submit detailed documentation. As part of the approval process, the authorities conducted site

¹²³ Technical University of Panama, Report No. CEI-04-2023-2010 dated 15 Nov. 2010 (C-0010) p. 8 (“2.0 OBJETIVO: Someter a prueba experimental al Sistema Alternativo BES BLOCK ENGINEERING SYSTEMS según los requerimientos del Reglamento para el Diseño Estructural en la República de Panamá (REP-2004).”); Juan Carlos Arguello ¶ 20.

¹²⁴ Technical University of Panama, Report No. CEI-04-2023-2010 dated 15 Nov. 2010 (C-0010).

¹²⁵ Technical Engineering and Architecture Board of the Public Works Ministry, Resolution No. J-TIA-912-2011 dated 18 Jul. 2011 (C-0011) p. 1.

¹²⁶ Technical Engineering and Architecture Board of the Public Works Ministry, Resolution No. J-TIA-912-2011 dated 18 Jul. 2011 (C-0011) p. 2; Juan Carlos Arguello ¶ 23.

¹²⁷ Technical Engineering and Architecture Board of the Public Works Ministry, Resolution No. J-TIA-912-2011 dated 18 Jul. 2011 (C-0011) pp. 2-3.

visits, examined technical reports, and verified compliance with applicable regulations before issuing their determinations:

- On 19 March 2012, the *Autoridad Nacional del Ambiente* (National Environmental Authority) (“NEA”), which is in charge of environmental matters at a national level, completed a technical report on the Project as part of an Environmental Impact Assessment that Claimants sought. The NEA examined the Project’s environmental mitigation measures and concluded that the Project complied with all mitigation requirements.¹²⁸
- On 29 March 2012, Panama’s national civil protection agency, the *Sistema Nacional de Protección Civil de Panamá* (National System for the Civil Protection of Panama), which is responsible for disaster prevention, emergency response, and risk management, issued a certificate of viability for the Project.¹²⁹ Prior to its approval, the Directorate of Disaster Prevention and Mitigation conducted an inspection visit to the Project site to analyze the topographic characteristics of the site.¹³⁰
- On 2 May 2012, the Housing Ministry approved Claimants’ proposal related to the use of land and zoning for the Project.¹³¹
- On 20 August 2012, the NEA issued a favorable Environmental Impact Assessment for the Project.¹³²

68. Ultimately, on 7 September 2012, the Housing Ministry informed Claimants that the Project met all requirements to participate in the FSV Program.¹³³ This was a significant moment for Claimants, as it meant that the Project could benefit from financial support from the State provided to homebuyers under the Program as well as mortgages issued by State-owned banks.¹³⁴

¹²⁸ National Environmental Authority, Technical Report No. 111 dated 19 Mar. 2012 (C-0012) p. 2.

¹²⁹ See National System for the Civil Protection of Panama, Feasibility Certificate dated 29 Mar. 2012 (C-0013) pp. 2-3.

¹³⁰ See National System for the Civil Protection of Panama, Feasibility Certificate dated 29 Mar. 2012 (C-0013) p. 2.

¹³¹ MIVIOT, Resolution No. 239-2012 dated 2 May 2012 (C-0014); MIVIOT, Resolution No. 601-2018 dated 15 Oct. 2018 (C-0026) (recognizing Resolution No. 239-2012).

¹³² National Environmental Authority, Resolution DIEORA IAM-048-0012 dated 20 Aug. 2012 (C-0106) p. 3.

¹³³ Letter from MIVIOT to MVB approving the Project’s incorporation into the FSV Program dated 7 Sep. 2012 (C-0015).

¹³⁴ Arjona ¶¶ 42-49.

69. Alongside these approvals, Claimants continued meeting and building relationships with State officials to discuss the Project's development.¹³⁵ These approvals and relationships and funding from OPIC/DFC gave Claimants confidence that the Project was on the right track.¹³⁶
70. Meanwhile, Claimants' work in Latin America started to be recognized as setting the standard for social housing development. Claimants received the MTV Latin America and Interamerican Development Bank (IDB) Agent of Change Award in 2012¹³⁷ and the Pacific Coast Builders Conference Gold Nugget Grand Award, Judges Special Award of Excellence in 2013.¹³⁸ The Gold Nugget Awards are "the oldest and most prestigious residential design awards in the [United States], recognizing those who improve our communities through exceptional concepts in design, planning and development."¹³⁹ These awards validated Claimants' vision and gave them confidence to press forward in Panama.¹⁴⁰

(f) Claimants received all required approvals, began construction on the Project, and continued to secure additional financing in 2013

71. Claimants began construction of the Project in the spring of 2013.¹⁴¹ By this time, Claimants had hired around 100 employees, including workers and technical staff.¹⁴² Supervisors were brought from Honduras to train the local Panamanian workforce in production and installation.¹⁴³
72. As Claimants built the Project, the Panamanian Government continued to grant additional permits. For example, on 21 March 2013, the La Chorrera Municipal Department of

¹³⁵ Juan Carlos Arguello ¶ 36.

¹³⁶ Juan Carlos Arguello ¶ 36.

¹³⁷ Ernesto Arguello ¶ 25.

¹³⁸ Gold Nugget Awards, Winners Book 2013 (C-0110).

¹³⁹ Pacific Coast Builders Conference, Gold Nugget Awards 2025 (C-0201).

¹⁴⁰ Ernesto Arguello ¶ 25.

¹⁴¹ Juan Carlos Arguello ¶ 35.

¹⁴² Juan Carlos Arguello ¶ 35.

¹⁴³ Juan Carlos Arguello ¶ 37.

Engineering approved Claimants' proposal for use of a rear setback line (*retiro posterior*), which refers to the minimum distance required from the back of the house to the property line.¹⁴⁴

73. With construction underway, Claimants continued to receive support from the Government, including at its highest levels. In the fall of 2013, Ernesto met in New York with Panamanian President Ricardo Martinelli, who had heard about the Project and invited Ernesto to a private dinner.¹⁴⁵ At the dinner, Ernesto told him about the Project, of which the president said he was “extremely supportive.”¹⁴⁶
74. As construction progressed, Government officials periodically inspected the Project site and requested adjustments to the Project. As Juan Carlos recalls, “[t]hese requests were typically minor, relatively speaking, and we were able to resolve them. Occasionally, however, they were time consuming and even costly, forcing us to increase the price at which we sold houses, but always within the parameters of the FSV Program.”¹⁴⁷
75. Claimants at this time entered into and concluded negotiations to secure additional financing for the Project:
- On 11 February 2014, Claimants, through EMG, secured additional financing from *Banco Panameño de la Vivienda* (“**Banvivienda**”) (which was purchased by Global Bank in 2019), a private Panamanian bank. Banvivienda entered into a line of credit agreement with EMG to finance the first phase of the Project (“**Private Bank Loan**”).¹⁴⁸ The Private Bank Loan was originally for US\$ 2.02 million (later increased to \$10.5 million) and was secured by the Luces del Pacifico Project’s land and construction in progress.¹⁴⁹ The terms of the loan provided that the funds from the line of credit would be used “exclusively for the financing of ninety percent (90%) of the direct construction costs of the first phase of the Luces del Pacifico Residence project.”¹⁵⁰ Banvivienda worked closely with the architectural

¹⁴⁴ Letter from the Department of Municipal Engineering to Architect Yunus Hasan Asvat approving the Project Setback Line dated 21 Mar. 2013 (C-0018).

¹⁴⁵ Ernesto Arguello ¶ 26.

¹⁴⁶ Ernesto Arguello ¶ 26.

¹⁴⁷ Juan Carlos Arguello ¶ 38.

¹⁴⁸ Public Deed No. 2684 dated 11 Feb. 2014 (C-0113).

¹⁴⁹ Juan Carlos Arguello ¶ 39.

¹⁵⁰ Public Deed No. 2684 dated 11 Feb. 2014 (C-0113) W&C p. 5 (“*SEGUNDA (FINALIDAD): Los fondos de la línea de crédito de este contrato serán utilizados por LA PARTE DEUDORA exclusivamente para el*”).

firm Avinco, which conducted inspections of the Project to ensure it was on track and compliant with the terms of the loan.¹⁵¹

- On 10 March 2014, Claimants, through EMG, entered into a \$3 million revolving credit facility with a Clark affiliate in Panama to finance Project construction and development.¹⁵²
- On 2 May 2014, Claimants, through MVB, entered into an agreement with an entity owned by Dev Equity LLC (“**Dev Equity**”), a company that provides financing for social impact projects, to purchase land for the Project in La Chorrera for \$2 million.¹⁵³
- On 25 June 2014, Claimants, through EMG, received a \$1.6 million loan from Abracci Investments Limited, a company registered in the British Virgin Islands, that they secured through personal guarantees.¹⁵⁴

76. In 2014, Claimants were again recognized for their social development projects in Latin America, receiving the OPIC/DFC Impact Award for Access to Finance for their work creating pathways to homeownership in safe and vibrant communities in Honduras.¹⁵⁵

C. FROM 2014 TO 2018, PANAMA CONTINUED SUPPORTING THE PROJECT AS CLAIMANTS RAISED ADDITIONAL FUNDS AND CONSTRUCTION ADVANCED

1. Panama amended the FSV Program in 2014

77. As Claimants continued work on the Project, Respondent extended the FSV Program and sought to attract further investment in the program, including by reducing regulatory requirements and increasing the price threshold for qualifying housing units. In 2014, the Panamanian Government extended the FSV Program until December 31, 2019 through

financiamiento del noventa por ciento (90%) de los costos directos de construcción de la primera fase del proyecto Residencia Luces del Pacífico . . .”).

¹⁵¹ Juan Carlos Arguello ¶ 39.

¹⁵² Revolving Credit Agreement between EMG and CRC Panama, S. de. R.L. dated 10 Mar. 2014 (C-0114) Recital C.

¹⁵³ Dev Equity Sales Agreement dated 2 May 2014 (C-0116); Juan Carlos Arguello ¶ 39.

¹⁵⁴ Loan Agreement between Abracci Investments Limited and Excellence Management Group dated 25 Jun. 2014 (C-0117).

¹⁵⁵ Ernesto Arguello ¶ 28.

Executive Decree No. 393,¹⁵⁶ which increased the amount of Housing Ministry support available to eligible families to 10,000 Balboas for the purchase of a new home with a sale price not exceeding 50,000 Balboas. Pursuant to this Decree, families with a monthly income below 1,200 Balboas became eligible for support from the Housing Ministry.¹⁵⁷

78. Through Decree No. 393, the Housing Ministry also introduced a new zoning code called *Residencial de Bono Solidario* (“RBS”) that was designed specifically to incentivize the construction of social housing¹⁵⁸ and created a specific department within the FSV Program to promote initiatives with the private sector.¹⁵⁹ With this new regulation, developers were required to have land zoned under the RBS designation to participate in the FSV Program.¹⁶⁰ The Housing Ministry also established minimum characteristics for housing units under the FSV Program.¹⁶¹

2. Construction advanced with Panama’s support in early 2015

79. In January 2015, Claimants appointed Cesar Fernando Núñez Duarte (“**Núñez**”) as Project Manager and Financial Manager of the Project in Panama.¹⁶² Mr. Núñez had a proven track record in social housing development.¹⁶³
80. Shortly after Mr. Núñez’s arrival, on 27 January 2015, the Private Bank Loan was increased by US\$ 6 million. Like the original financing, this expanded financing was designed to finance Project construction costs.¹⁶⁴
81. Construction advanced rapidly, and Claimants monitored Project progress closely.¹⁶⁵

¹⁵⁶ Executive Decree No. 393 modifying the FSV Program dated 16 Dec. 2014 (C-0118) Art. 1, Art. 12; *see* Arjona § IV.B.

¹⁵⁷ Executive Decree No. 393 modifying the FSV Program dated 16 Dec. 2014 (C-0118) Art. 2.

¹⁵⁸ Executive Decree No. 393 modifying the FSV Program dated 16 Dec. 2014 (C-0118) Art. 13.

¹⁵⁹ Executive Decree No. 393 modifying the FSV Program dated 16 Dec. 2014 (C-0118) Art. 14.

¹⁶⁰ Arjona ¶ 45.

¹⁶¹ Executive Decree No. 393 modifying the FSV Program dated 16 Dec. 2014 (C-0118) Art. 10; Arjona ¶ 45.

¹⁶² Núñez ¶ 8.

¹⁶³ Núñez ¶ 5.

¹⁶⁴ Public Deed No. 621 dated 27 Jan. 2015 (C-0120) W&C p. 8.

¹⁶⁵ Juan Carlos Arguello ¶ 37.

82. On 23 March 2015, the Housing Ministry conducted a site inspection and, in a letter signed by its director for the promotion of private investment, again confirmed that the Project met the requirements to participate in the FSV Program.¹⁶⁶

3. In August 2015, Claimants secured additional funding from OPIC/DFC

83. On 31 August 2015, Claimants secured a further US\$ 7.5 million in financing from OPIC/DFC, part of which Claimants used to allow Clark to exit the Project. Clark sought to leave Panama due to privacy and security concerns it had related to the passage and implementation of Panama's Foreign Account Tax Compliance Act.¹⁶⁷
84. To secure this financing, which was an important part of Claimants' development strategy and demonstrated further U.S.-government support for their investment,¹⁶⁸ the Project had to comply with a series of rigorous conditions and undergo the due diligence conducted by OPIC/DFC. Juan Carlos managed this process and, as he describes, "OPIC/DFC conducted extensive due diligence for this financing and reviewed the technical Project, including its technical legal and financial aspects."¹⁶⁹
85. While they were securing additional OPIC/DFC financing, Claimants continued to receive Government support and continued to make progress on the development of the Project.¹⁷⁰
86. Sales had advanced significantly by September 2015. At this point, Claimants had secured mortgage commitments from banks for the sale of 503 housing units totaling US\$ 20 million, representing 87% of the units planned for the first phase of the Project.¹⁷¹ The

¹⁶⁶ Letter from MIVIOT to MVB approving the FSV Program dated 23 Mar. 2015 (C-0020).

¹⁶⁷ Juan Carlos Arguello ¶¶ 43-44.

¹⁶⁸ Nuñez ¶ 13; Juan Carlos Arguello ¶ 44 ("We considered securing the new OPIC/DFC loan as a huge win for us and a significant milestone for the Project because it showed that the U.S. Government had confidence in our investment in Panama and the future of the Project.").

¹⁶⁹ Juan Carlos Arguello ¶ 43; OPIC Form 115, OPIC Form 115, Application for Financing dated 31 May 2015 (C-0123) p. 5.

¹⁷⁰ Progress Report prepared by MVB to OPIC dated Sep. 2015 (C-0126) W&C p. 2 (noting "[t]he positive response we have received from local market and local Government support . . .").

¹⁷¹ Progress Report prepared by MVB to OPIC dated Sep. 2015 (C-0126) W&C p. 2.

following chart summarizes this sales progress (reflected in the totals for the columns mortgages approved, pending confirmation, or under review ($52\% + 8\% + 27\% = 87\%$)): ¹⁷²

Sales Progress						
Summary	Total Casas	Approved Mortgages	Pending Confirmation	Mortgages Being Reviewed	Not sent to Banks	TOTAL
QUINTA "A"	118	81	10	12	15	118
QUINTA "B"	117	67	2	23	25	117
QUINTA "C"	110	51	3	46	10	110
QUINTA "D"	117	54	4	59	0	117
QUINTA "E"	118	48	26	17	27	118
TOTAL	580	301	45	157	77	580
%	100%	52%	8%	27%	13%	100%

Progress Report prepared by MVB to OPIC dated Sep. 2015 (C-0126) W&C p. 2, Figure 2: Housing Sales as of August 2015

87. As Mr. Nuñez observes, “[t]hese numbers confirmed the commercial soundness of the Project and supported the financial projections necessary to obtain additional financing.” ¹⁷³
88. Claimants remained committed to the social aspect of their work throughout the construction of the Project. Dev Equity, which as noted above finances social impact projects, provided financing for the land on which the Project was built, observed in its 2015 Impact Report:

The [Luces del Pacifico Project] construction team receives onsite training in each activity associated with the housing build. Low-skill workers receive hands on training in electricity, masonry, and other trades, improving their ability to secure meaningful future employment. By rotating construction teams and providing training, the company is able to improve efficiencies throughout the build process. . . .

Families that purchase a safe, quality home are able to save money which they can direct to the family’s education, health and well-being. Luces del Pacifico promotes affordable housing as a primary way to help families escape poverty. . . .

Luces del Pacifico is committed to providing a safe, secure and enriching community for low and middle-income residents. Of the 520 presold

¹⁷² Progress Report prepared by MVB to OPIC dated Sep. 2015 (C-0126) W&C p. 2.

¹⁷³ Nuñez ¶ 14 (“*Estas cifras confirmaban la solidez comercial del Proyecto y respaldaban las proyecciones financieras necesarias para que pudiéramos seguir obteniendo financiamiento para el desarrollo del Proyecto.*”).

homes, 490 families have access [to] the government's subsidy for affordable housing for low-income residents. . . .

The company has plans to support community development projects that prioritize resident, and especially youth, involvement. These initial plans include resident associations and access to after-school outreach activities to help young people become contributors to their community.¹⁷⁴

89. With work on the Project rapidly progressing in 2015 and 2016, Claimants were again recognized for their work in promoting social housing: they received the 2015-2016 National Association of Home Builders "Best in American Living" Award and the 2015-2016 Communitas Award for Social Responsibility.¹⁷⁵

4. By late 2015, Savings Bank was issuing mortgage commitment letters to prospective buyers, confirming the Project's viability under the FSV Program

90. By late 2015, Savings Bank, which was among the banks authorized under the FSV Program to issue mortgage approval letters,¹⁷⁶ had issued dozens of commitments to provide mortgage financing for homebuyers interested in buying homes at the Project, subject to the homebuyers' fulfillment of certain conditions.¹⁷⁷ These commitments not only confirmed the strong interest of prospective buyers, but also demonstrated the financial backing of one of Panama's most important State financial institutions.¹⁷⁸ Once a home purchase was finalized, it would then fall to National Bank, another State-owned bank, to disburse the corresponding financial support under the FSV Program through an irrevocable letter of payment (*carta promesa de pago*).¹⁷⁹
91. In 2016, the Project was again included on the Housing Ministry's list of projects approved for the FSV Program.¹⁸⁰ That year, Savings Bank agreed to provide financing for the

¹⁷⁴ Dev Equity LLC, Impact Report 2015 (C-0128) p. 20.

¹⁷⁵ Ernesto Arguello ¶ 31.

¹⁷⁶ See *supra* § II.A.4.

¹⁷⁷ Nuñez ¶ 15.

¹⁷⁸ Nuñez ¶ 15.

¹⁷⁹ Arjona ¶ 42; see *supra* § II.A.4.

¹⁸⁰ See List of Projects Integrated into the FSV 2016 (C-0134) W&C p. 6.

Project construction,¹⁸¹ in addition to the mortgage financing it was to provide to homebuyers under the FSV Program. Ernesto met with Mario Rojas, the CEO of Savings Bank, who promised Ernesto: “Whatever you can build, we can finance.”¹⁸² He also encouraged Ernesto to attend housing fairs to solicit interest from prospective clients, who would be able to get pre-approved for a mortgage from Savings Bank, which sent representatives to the fairs.¹⁸³

92. On 3 May 2016, Savings Bank approved a multi-facility construction financing package that included multiple facilities to support various aspects of the Project, covering construction costs for multifamily buildings, *quintas*, and “Front” buildings, a house completion line, short-term bridge financing to complete aspects of construction if needed, and the refinancing of prior bank debt.¹⁸⁴ The financing agreement was for up to 19.9 million Balboas and was designed to finance the ongoing construction of *quintas* A-D.¹⁸⁵ The credit facility included extensive oversight mechanisms (inspections, conditions precedent, assignment of the irrevocable letters of payment to make FSV Program payments, deposit controls, and first-option mortgage channeling), linking disbursements to certified work progress, regulatory compliance, and unit sales under the FSV framework.¹⁸⁶
93. Pursuant to the Savings Bank credit facility, on 30 August 2016, Savings Bank and EMG executed a 1 million Balboas loan tied to the 3 May 2016 offer to fund up to 80% of the direct costs to finish homes in *quintas* A–D.¹⁸⁷ Claimants served as personal guarantors of this loan, with Project land serving as collateral.¹⁸⁸

¹⁸¹ Letter from Savings Bank to EMG dated 3 May. 2016 (C-0023) pp. 1, 3, 5, 7-8.

¹⁸² Ernesto Arguello ¶ 32.

¹⁸³ Ernesto Arguello ¶ 32.

¹⁸⁴ See Letter from Savings Bank to EMG dated 3 May. 2016 (C-0023) pp. 1, 3, 5, 7-8.

¹⁸⁵ Letter from Saving Bank to EMG dated 3 May 2016 (C-0023) pp. 1, 3, 5, 7.

¹⁸⁶ See Letter from Savings Bank to EMG dated 3 May 2016 (C-0023) pp. 2-3, 9-10; Nuñez ¶ 17.

¹⁸⁷ Public Deed No. 8973 dated 30 Aug. 2016 (C-0132) pp. 3-4, 13-14.

¹⁸⁸ See Public Deed No. 8973 dated 30 Aug. 2016 (C-0132) pp. 3, 13-14; Juan Carlos Arguello ¶ 44.

5. Construction of the Project continued in 2017-2018 with support from Panamanian State-owned banks and other lenders, despite project delays caused by national labor strike and delays in governmental approvals

94. In 2017 and 2018, Claimants' progress was slowed by turnover of personnel at the Housing Ministry that resulted in delays in necessary approvals, as well as lengthy approval times at local government agencies and a national construction workers' strike in the spring of 2018 that cost the Panamanian economy \$30 million every day.¹⁸⁹ Nevertheless, Claimants continued to push the Project forward, and it was again included on the Housing Ministry's list of projects approved for the FSV Program.¹⁹⁰
95. As construction progressed, Claimants made plans to advance with the expansion phase of the Project by looking to acquire hundreds of additional adjacent hectares to expand construction over a 10-year period.¹⁹¹ As Juan Carlos recalls, around this time "we began looking into the purchase of additional lots of land,¹⁹² so that we could start building additional *quintas* as soon as we received the revenue from the pilot phase of the Project. We were confident that we could complete the purchase of this land once we completed sales of the first units."¹⁹³ As part of this expansion phase of the Project, Claimants planned to build an additional 7,184 houses, 120 commercial units, and 1,500 apartments.¹⁹⁴ Claimants' plans for the expansion phase are depicted below:

¹⁸⁹ Juan Carlos Arguello ¶ 45; Email correspondence between Ernesto Arguello, Ben Patton and Matt Patton dated 7 Jun. 2019 (C-0162); *Panamá: finaliza huelga que paralizó un mes la construcción*, DEUTSCHE WELLE dated 19 May 2018 (C-0139) W&C p. 2.

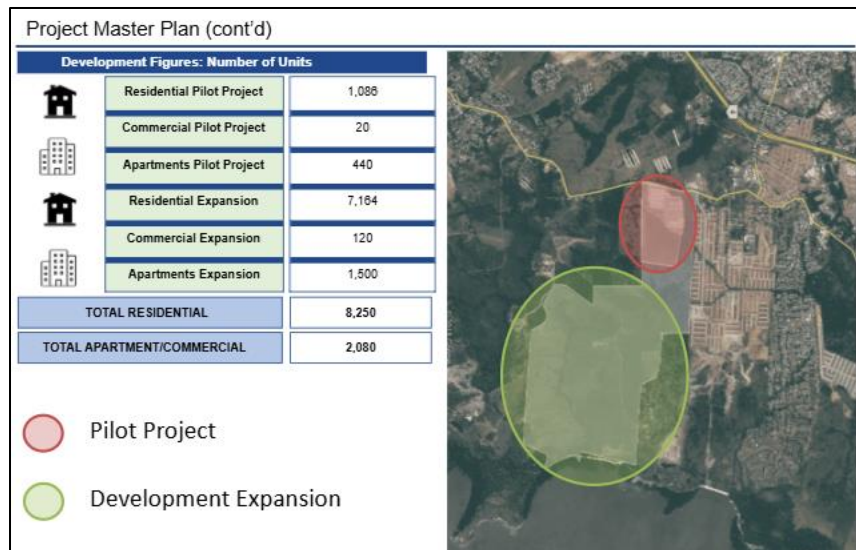
¹⁹⁰ Juan Carlos Arguello ¶ 45; Email correspondence between Ernesto Arguello, Ben Patton and Matt Patton dated 7 Jun. 2019 (C-0162); MIVIOT, List of Projects Integrated into the FSV from 2017 and 2018 (C-0136). *See also* Promissory Note Splendid L.P. dated 15 Feb. 2018 (C-0137).

¹⁹¹ MVB Presentation, Investment Opportunity dated Oct. 2018 (C-0147) W&C pp. 4, 7; Juan Carlos Arguello ¶ 45; *see* Email correspondence between Tom Livelli, Cristobal Comandari and Ernesto Arguello dated 1 Jun. 2018 to 20 Feb. 2019 (C-0140) p. 14 (noting that Claimants are planning developments to include more than 10,000 new homes).

¹⁹² MVB Presentation, Investment Opportunity dated Oct. 2018 (C-0147) W&C p. 7.

¹⁹³ Juan Carlos Arguello ¶ 45.

¹⁹⁴ MVB Presentation, Investment Opportunity dated Oct. 2018 (C-0147) W&C p. 4.



MVB, Investment Opportunity dated Oct. 2018 (C-0147), W&C p. 4, Figure 3

96. During this period, Claimants also applied to the Housing Ministry for a rezoning of certain land at the Project site in a manner that would allow them to fully implement their plans for the Project. On 15 October 2018, the Housing Ministry approved Claimants' proposal to modify the classification of certain Project lots as RBS.¹⁹⁵ This reclassification was important because homes built on RBS-zoned land qualified for financial support under the FSV Program.¹⁹⁶
97. In the second half of 2018, Claimants sought to meet with Savings Bank officials to provide updates on the project's progress and to discuss the terms of the existing credit line.¹⁹⁷ At this time, Savings Bank also issued hundreds of payment commitment letters for mortgages for the Project's homes¹⁹⁸ and began the appraisal process for the value of the houses as a

¹⁹⁵ MIVIOT, Resolution No. 601-2018 dated 15 Oct. 2018 (C-0026); Arjona ¶ 44.

¹⁹⁶ Arjona ¶ 44-45; Executive Decree No. 393 modifying the FSV Program dated 16 Dec. 2014 (C-0118) Art. 13.

¹⁹⁷ Email from Ernesto Arguello to Mario Rojas from Savings Bank dated 14 Jun. 2018 (C-0141); Email from Ernesto Arguello to Savings Bank officials dated 9 Apr. 2019 (C-0158).

¹⁹⁸ See, e.g., Second Letter from Savings Bank to Mundial de Servicios Fiduciarios dated 26 Dec. 2018 (C-0153); Letter from Savings Bank to Mundial de Servicios Fiduciarios dated 12 Jul. 2018 (C-0142); Letters from Savings Bank to Mundial de Servicios Fiduciarios dated Oct. to Nov. 2018 (C-0148); Client approval letters for mortgage loans issued by Savings Bank for the Luces del Pacifico Project dated 2014-2018 (C-0144); Second Letter from Savings Bank to Mundial de Servicios Fiduciarios dated 17 Oct. 2018 (C-0145); and Letter from Savings Bank to Mundial de Servicios Fiduciarios dated 26 Dec. 2018 (C-0152).

mortgage lender.¹⁹⁹ Claimants were in close contact with Savings Bank to facilitate the issuance of mortgage financing and the final sale of homes to prospective buyers during this period.²⁰⁰

98. In late 2018, Savings Bank invited the Claimants to present the Project at a housing fair organized for members of the country's security forces, including the Institutional Protection Service, the National Border Service, the National Police, and the National Aeronaval Service.²⁰¹ Savings Bank and National Bank funded the housing fair.²⁰² Claimants attended the event and received substantial interest from police officers and others in the security forces, and took this as a further sign that the Government stood behind the Project.²⁰³
99. In January 2019, the Panamanian Government unified the FSV Program in a single regulation through Executive Decree No. 10, maintaining the existing term of 31 December 2019.²⁰⁴

D. BETWEEN 2019 AND AUGUST 2022, THE PROJECT ADVANCED DESPITE AN UNJUSTIFIED AND UNEXPLAINED FINANCING STOPPAGE BY THE STATE

1. In 2019, after Savings Bank abruptly and without explanation paused issuing mortgage financing for the Project and indicated it would no longer honor previously issued mortgages, the Housing Ministry, National Bank, and an independent expert each confirmed that the Project was compliant with all applicable rules and regulations

100. In February 2019, during a meeting intended to finalize the details and requirements for completing sales and handing over houses, Savings Bank ambushed Ernesto, telling him that it would stop providing mortgages to borrowers to buy homes in the Luces del Pacifico Project until further notice and would no longer honor the mortgage commitments that it

¹⁹⁹ Email correspondence between Mr. Nuñez and Savings Bank officials dated 11 to 27 Nov. 2018 (C-0149).

²⁰⁰ Email correspondence between Mr. Nuñez and Savings Bank officials dated 11 to 27 Nov. 2018 (C-0149).

²⁰¹ See Email correspondence between Ernesto Arguello and Lorena Ubarte from Savings Bank dated 21 Dec. 2018 (C-0151); Ernesto Arguello ¶ 34.

²⁰² Ernesto Arguello ¶ 34.

²⁰³ See Email correspondence between Ernesto Arguello and Lorena Ubarte from Savings Bank dated 21 Dec. 2018 (C-0151); Juan Carlos Arguello ¶ 45; Ernesto Arguello ¶¶ 34-35.

²⁰⁴ Executive Decree No. 10 dated 15 Jan. 2019 (C-0154) Art. 32; see Arjona § IV.E. The term of the FSV Program was again extended in May 2019 until 31 December 2021, as noted below.

had previously provided.²⁰⁵ No explanation was provided for this abrupt U-turn. When Ernesto asked whether the decision applied to all FSV Program projects or only to the Project, Savings Bank responded that its decision applied exclusively to the Project.²⁰⁶ Ernesto was “in shock” and requested that Savings Bank put its decision in writing and provide it to Claimants, but Savings Bank refused to do so.²⁰⁷

101. Although this was not mentioned at the meeting, Claimants started to hear that Savings Bank’s decision was based on certain “technical issues” with the Project.²⁰⁸ These “technical issues” were not described or even identified in writing, and the allegation that there were problems with the Project was directly at odds with what Savings Bank officials had been telling Claimants for months.²⁰⁹ Moreover, to the extent Savings Bank provided any details at all about the alleged “technical issues,” they were based on fundamental misunderstandings. As Ernesto recalls:

The only example that they mentioned (informally) in my presence during this time related to the thickness of the roofing material. Amazingly, Savings Bank’s apparent complaint was that the roofing material used at the Project was not compliant because we had used material that was *thicker* (meaning, more expensive and of higher quality) than the minimum requirements for the FSV Program. To me, this suggested that the excuse was pretextual and that whoever was making these decisions at Savings Bank was motivated by factors other than concern for Project quality.²¹⁰

102. On 11 March 2019, shortly after Savings Bank stopped issuing mortgage financing, a bank official, sent an email to Ernesto requesting: (1) a master plan for the Project approved by the Housing Ministry, including the type of road surface Claimants planned to use; (2) technical reports on the BES method from UTP; and (3) approved blueprints.²¹¹ This

²⁰⁵ Email from Ernesto Argüello to Savings Bank officials dated 9 Apr. 2019 (C-0158); Letter from EMG to Savings Bank’s Director of Architecture and Engineering dated 28 Aug. 2019 (C-0032); Ernesto Arguello ¶ 37; Juan Carlos Arguello ¶ 46.

²⁰⁶ Ernesto Arguello ¶ 37.

²⁰⁷ Ernesto Arguello ¶ 37.

²⁰⁸ Ernesto Arguello ¶ 37.

²⁰⁹ Ernesto Arguello ¶ 37.

²¹⁰ Ernesto Arguello ¶ 37.

²¹¹ Email correspondence between Ernesto Arguello and Lorena Ubarte from Savings Bank dated 11 to 20 Mar. 2019 (C-0155) p. 1.

request was surprising because Claimants had already submitted all of this documentation to Savings Bank.²¹²

103. Notwithstanding Savings Bank's position on alleged problems with the Project, on 20 March 2019, the Housing Ministry inspected the Project and confirmed that it complied with all applicable legal requirements. The inspection report expressly stated that "these homes comply with Executive Decrees 393 and 225 and offer other advantages that provide greater comfort to the home."²¹³
104. Confident that the Project was fully compliant, Claimants requested a meeting with Savings Bank to answer any questions about the rumored but unsubstantiated "technical issues."²¹⁴ Claimants met with Savings Bank officials on 22 March 2019, and Ernesto promptly followed up asking about what could be done to resume mortgage financing.²¹⁵ Claimants delivered all of the materials that Savings Bank had requested by 5 April 2019.²¹⁶
105. Because Savings Bank officials had refused to register their complaints in writing, on 9 April 2019, Claimants sought written confirmation of Savings Bank's position regarding the Project.²¹⁷ Ernesto emphasized that all requested documentation had already been delivered to Savings Bank's satisfaction and said the situation was a misunderstanding that appeared to have been resolved with Claimants' submission of information showing that it was fully permitted and compliant with all rules and regulations.²¹⁸ Ernesto noted his understanding that the issuance of new mortgage financing could resume, and that the

²¹² Ernesto Arguello ¶ 39.

²¹³ Letter from MIVIOT to Private Investment Director dated 20 Mar. 2019 (C-0028) (technical report containing the results of the inspection). ("[E]stas viviendas cumplen con los Decretos Ejecutivos 393 y 225 y aportan otras ventajas que le proporcionan a la vivienda mayor confort.").

²¹⁴ Ernesto Arguello ¶ 39; see Email correspondence between Ernesto Arguello and Lorena Ubarte from Savings Bank dated 11 to 20 Mar. 2019 (C-0155) p. 1.

²¹⁵ Ernesto Arguello ¶ 39; see Email correspondence between Ernesto Arguello and Savings Bank officials dated 22 Mar. to 5 Apr. 2019 (C-0157) p. 5.

²¹⁶ Ernesto Arguello ¶ 39; see Email correspondence between Ernesto Arguello and Savings Bank dated 22 Mar. to 5 Apr. 2019 (C-0157) p. 1.

²¹⁷ Ernesto Arguello ¶ 39; see Email from Ernesto Arguello to Savings Bank officials dated 9 Apr. 2019 (C-0158).

²¹⁸ Email from Ernesto Arguello to Savings Bank officials dated 9 Apr. 2019 (C-0158).

closing process for existing mortgages was pending only the completion of an occupancy certificate and bank appraisal, with an inspection visit expected by the end of April.²¹⁹

106. Shortly thereafter, on 18 April 2019, in another follow-up letter to Savings Bank, Ernesto noted his understanding that the issues concerning the approval of the construction method and current project plans had been clarified and emphasized the urgency of resuming the issuance of mortgage financing.²²⁰
107. Notwithstanding Savings Bank's confirmation that it had received the requested documentation, the bank did not lift the hold on the issuance of new mortgages and instead sent an inspector to inspect the Project on 8 May 2019 but then did not disclose the results of the inspection.²²¹
108. As Ernesto details, Savings Bank's concerns were not shared by other State entities.²²² Seeking to fill the void left by Savings Bank's decision to suspend its support for the Project's mortgages, Claimants approached National Bank to see whether National Bank would support the Project.²²³ As Ernesto recalls, as part of a rigorous inspection process, a National Bank representative visited the Project for an inspection in May 2019 and said that he "really like[d] the Project" and that it was "very nice" and displayed "good progress."²²⁴ National Bank then followed up with a letter dated 3 June 2019 saying that it was now a "strategic all[y]" of MVB²²⁵ and approved the Project for the issuance of mortgage financing.

²¹⁹ Email from Ernesto Arguello to Savings Bank officials dated 9 Apr. 2019 (C-0158).

²²⁰ Email from Ernesto Arguello to Savings Bank officials dated 18 Apr. 2019 (C-0159).

²²¹ Email correspondence between Ernesto Arguello and Lorena Ubarte from Savings Bank dated 11 to 20 Mar. 2019 (C-0155) p. 1; Letter from EMG to Savings Bank's Director of Architecture and Engineering dated 28 Aug. 2019 (C-0032) W&C p. 1; Email correspondence between Ernesto Arguello and Oscar Van Hoorde from Savings Bank dated 28 Aug. to 6 Sept. 2019 (C-0165) pp. 2-3.

²²² Ernesto Arguello ¶ 41.

²²³ Ernesto Arguello ¶ 42.

²²⁴ Ernesto Arguello ¶ 41.

²²⁵ Letter from National Bank to MVB dated 3 Jun. 2019 (C-0030) ("*Sean nuestras primeras líneas para informarles que su Materiales Vista Bahía S. R. L. y su proyecto Luces del Pacífico ha sido aprobado por Banco Nacional de Panamá. A partir de la fecha nos convertimos en aliados estratégicos.*").

109. At the same time, Claimants learned that the Government was facing challenges supporting its housing policies financially. On 30 May 2019, Raúl Zarak, a representative from the bank La Hipotecaria informed Claimants that the bank’s board of directors had decided the previous day to stop supporting projects that were financed with Government-supported preferential interest rates (*i.e.* projects relying on the Preferential Interest Law), which included projects under the FSV Program.²²⁶ The “primary reason,” Mr. Zarak explained, was that “the government is currently failing to make timely payments on the subsidized interest for these mortgages.”²²⁷ Nevertheless, on 3 June 2019, Panama opted to extend again the term of the FSV Program from 31 December 2019 to 31 December 2021 through Executive Decree No. 50.²²⁸
110. Frustrated with Savings Bank’s failure to provide any explanation for its decision to stop issuing mortgages and honoring those it had already issued, as well as its lack of disclosure of any internal report on the alleged issues at the Project, Claimants were forced to focus on resolving the situation and put the expansion phase on hold. As Juan Carlos explains, “[w]ithout Panama financing the home purchases, the Project would fail, so finding a resolution became our priority, and we focused our efforts on that as well as finishing and selling the FSV-compliant homes in the pilot phase, which we would need to do to be able to advance with the further development of the Project, including the expansion, which in light of the situation we temporarily put on the backburner.”²²⁹

²²⁶ Email correspondence between Ernesto Arguello and Raul Zarak from La Hipotecaria dated 22 to 30 May 2019 (C-0160) p. 1; *see supra* § II.A.2.

²²⁷ Email correspondence between Ernesto Arguello and Raul Zarak from La Hipotecaria dated 22 to 30 May 2019 (C-0160) p. 1 (“*El día de ayer, en nuestra reunión de Junta Directiva, se nos dio la directriz, de no abrir más cupos de financiamiento a nuevos proyectos de intereses preferenciales hasta nuevo aviso. La razón principal de esto es que el gobierno no esta pagando a tiempo, los intereses subsidiados de estas hipotecas, y por otro lado, ya sobrepasamos el cupo máximo de inventario permitido en el 2019.*”).

²²⁸ *See* Executive Decree No. 50 dated 3 June 2019 (C-0161) Art. 3 (extending the term established in Article 32 of Executive Decree No. 10 from 31 December 2019 until 31 December 2021.). The term of the FSV Program was later extended in July 2021 until 30 June 2024, as noted below.

²²⁹ Juan Carlos Arguello ¶ 46; Ernesto Arguello ¶ 38 (“Savings Bank’s suspension impeded our ability to continue Project development. We were forced to put our plans for the expansion phase of the Project on hold while we resolved this issue and could proceed with home sales. While we never abandoned our expansion plans, we could not advance without the revenue from the pilot phase.”)

111. As part of their efforts to get the Project back on track, in June 2019, Claimants hired an independent expert to evaluate the Project: Nicanor Yau Rivera, a well-known construction expert who specialized in structural inspection, calculations, construction, consulting, and budgeting, and who had previously headed the Testing and Materials Laboratory at the UTP's Experimental Engineering Centre.²³⁰ On 17 June 2019, Mr. Yau produced an initial report surveying the status of the construction, in which he did not identify any technical issues.²³¹
112. On 28 August 2019, with Savings Bank continuing to withhold the results of its inspection more than six months after the bank first claimed there were unspecified "technical issues" with the Project, Claimants wrote to the bank offering "to meet to address any concerns" and requesting the bank's inspection results.²³² Claimants also indicated that Mr. Yau was working as a technical expert to inspect the Project and noted that they had "engaged local and international firms to supervise the construction from the project's inception to date" and that "no anomalies have arisen in the construction process."²³³
113. In correspondence with Savings Bank again requesting an explanation, Claimants offered to have Mr. Yau produce a supplemental report to respond to questions raised by Savings Bank orally, as Savings Bank had still not released its technical report.²³⁴ Ernesto wrote to Mr. Oscar Van Hoorde, General Executive of Architecture and Engineering at Savings Bank, to explain his frustration via email on 28 August 2019:

²³⁰ Ernesto Arguello ¶ 40; Email correspondence between Ernesto Arguello and Lorena Ubarte from Savings Bank dated 11 to 20 Mar. 2019 (C-0155) p. 1.

²³¹ Inspection Report on the "Luces del Pacifico" Residential Project dated 2 Sep. 2019 (C-0031) p. 1; Ernesto Arguello ¶ 45.

²³² Letter from EMG to Savings Bank's Director of Architecture and Engineering dated 28 Aug. 2019 (C-0032) W&C p. 1. ("*Por medio de la presente estamos solicitando nos puedan facilitar acceso al informe técnico realizado por Caja de Ahorros, seguido por una reunión para poder atender las inquietudes técnicas de parte del Banco acerca de nuestro proyecto habitacional Luces del Pacifico, y de ser necesario agendar una visita al mismo.*")

²³³ Letter from EMG to Savings Bank's Director of Architecture and Engineering dated 28 Aug. 2019 (C-0032) W&C p. 1 ("*Cabe mencionar que mi representada junto con la institución financiera de desarrollo del gobierno de los Estados Unidos (OPIC) hemos financiado el proyecto Luces del Pacifico, habiendo contratado firmas locales e internacionales para la supervisión de la construcción desde el inicio del proyecto y a la fecha, no se han presentado anomalías en el proceso constructivo.*").

²³⁴ Email correspondence between Ernesto Arguello and Oscar Van Hoorde from Savings Bank dated 28 Aug. to 6 Sep. 2019 (C-0165) pp. 2-3.

As you know, we've been stuck in limbo since February 28 of this year and have been suffering the consequences. Later, during my meeting with you at your offices on April 26, you told me that only one plan was needed to resolve everything, and here we are.

On behalf of Caja, they conducted a site visit on May 8, and the technical report apparently contains certain information that has raised the Bank's suspicions. To date, they have not provided us with any explanation, much less the opportunity to clarify our doubts.²³⁵

114. Mr. Van Hoorde responded curtly the same day that “[i]f you have new information or information that differs from what was initially provided regarding the project, you may formally submit it to us so that the Bank may take it into consideration.”²³⁶ Mr. Van Hoorde then ignored subsequent emails and informed Ernesto when he stopped by Savings Bank for a meeting that he was “in a scheduled meeting and couldn’t attend to [him]” and invited Ernesto to submit Mr. Yau’s supplemental report.²³⁷
115. Mr. Yau addressed each of the issues Savings Bank had raised orally in a supplemental report dated 2 September 2019.²³⁸ Mr. Yau concluded that the Project met the required

²³⁵ Email correspondence between Ernesto Arguello and Oscar Van Hoorde from Savings Bank dated 28 Aug. to 6 Sep. 2019 (C-0165) pp. 2-3. (“Como ya sabes, desde el 28 de febrero de este año nos tienen frenados y sufriendo las consecuencias. Posteriormente, en mi reunión contigo en tus oficinas el 26 de abril me indicaste que solo faltaba un plano para que se resolviera todo y aquí estamos. De parte de Caja realizaron una visita de campo el 8 de mayo y el reporte técnico que aparentemente presenta cierta información ha generado desconfianza por parte del Banco. A la fecha no nos han dado ninguna explicación y menos aún la oportunidad de esclarecer dudas.”). Ernesto further observed that “Even the worst criminals have the right to a defense; in this case, we are doing good for Panamanian families and have all the necessary technical backing. Therefore, we want to address any doubts or concerns with you beforehand so that we can resolve any issues at their root. I invite you to visit the project and see firsthand what we are doing. In addition, we can prepare an additional independent report with engineer Nicanor Yau, thereby providing evidence that everything complies with the relevant regulations. I ask for your cooperation to resolve this with due attention.” (“Hasta los peores criminales tienen derecho a una defensa; en este caso, nosotros estamos haciendo el bien a familias panameñas y tenemos todo el respaldo técnico correspondiente. Por lo cual queremos aclarar dudas o inquietudes contigo antes ya que podríamos resolver de raíz cualquier problema. Te invito [a] que visites el proyecto y veas de primera mano lo que estamos haciendo. Además, podemos hacer un reporte independiente adicional con el ingeniero Nicanor Yat y de esa forma dejar pruebas que todo cumple con los correspondientes reglamentos. Te pido tu colaboración para poder resolver este tan delicado tema.”).

²³⁶ Email correspondence between Ernesto Arguello and Oscar Van Hoorde from Savings Bank dated 28 Aug. to 6 Sep. 2019 (C-0165) p. 2. (“En el caso de ustedes tener información nueva o diferente a la inicialmente provista relacionada al proyecto nos la pueden enviar formalmente para que sea tomada en consideración por el Banco.”).

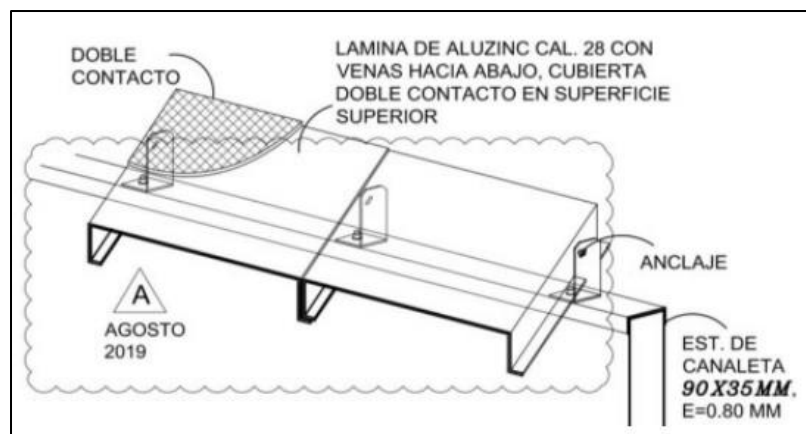
²³⁷ Email correspondence between Ernesto Arguello and Oscar Van Hoorde from Savings Bank dated 28 Aug. to 6 Sep. 2019 (C-0165) p. 1. (“El día que pasaste por CA me encontraba en una reunión programada y no te pude atender. Favor dejar el reporte que indicas y el equipo de CA analizará el mismo.”).

²³⁸ Inspection Report on the “Luces del Pacifico” Residential Project dated 2 Sep. 2019 (C-0031) pp. 13-18.

standards for participation in the FSV Program and made himself available to answer any technical questions from Savings Bank.²³⁹ Mr. Yau highlighted that during the inspection carried out he confirmed “that the construction projects – streets, houses, and the drinking water supply reservoir built by IDAAN [*Instituto de Acueductos y Alcantarillados Nacionales* (the National Aqueducts and Sewerage Institute)] – as well as the sanitary and stormwater systems, comply with the standards required by the codes listed at the beginning of the report.”²⁴⁰

116. Mr. Yau responded to the following “technical issues” that Savings Bank had raised orally but refused to put in writing:

- **The lack of purlins:** Savings Bank claimed that the Project houses lacked purlins to support the roofs. However, as Mr. Yau explained, the roofs have “C” sections that, when mechanically fastened together, act as purlins spaced 45 cm apart, making the roof system self-supporting. As such, purlins were not structurally necessary.²⁴¹ The image below illustrates this mechanism:



Inspection Report on the “Luces del Pacifico” Residential Project dated 2 Sep. 2019 (C-0031) p. 14

²³⁹ Inspection Report on the “Luces del Pacifico” Residential Project dated 2 Sep. 2019 (C-0031) p. 18 (“I suggest that this report be taken into account by Savings Bank in its corresponding departments to present a favorable technical opinion on the structural integrity of the houses of the Luces del Pacifico residential project . . .”).

²⁴⁰ Inspection Report on the “Luces del Pacifico” Residential Project dated 2 Sep. 2019 (C-0031) p. 19. (“*La barriada que revisé e inspeccioné, en mis visitas; considero que sus obras de construcción: Calles, Casas, Tanque de abastecimiento de Agua Potable por el IDAAN; los Sistemas: Sanitario y Pluvial, cumplen con los estándares, requeridos por los códigos, indicados al inicio del informe.*”).

²⁴¹ Inspection Report on the “Luces del Pacifico” Residential Project dated 2 Sep. 2019 (C-0031) p. 14.

- **Use of thinner gauge than specified in the roof designs:** Savings Bank had conveyed that the gauge of the metal roofs installed on the houses was thinner than specified in Project roof designs. Mr. Yau clarified this was an error by the bank’s inspector: the plans specify a gauge and the builder used a gauge that is actually thicker than what was called for (in steel gauging, a higher number means thinner material).²⁴² The plans were updated to state that 28 gauge is the minimum, and thicker gauges (24 or 26) are permitted as an improvement.²⁴³
- **Erosion / concrete slab and easement areas:** Savings Bank claimed that there had been erosion in areas of the Project. Mr. Yau clarified that the erosion Savings Bank had observed related to units in future phases of Project development where the perimeter sidewalk and channel had not yet been built.²⁴⁴ In response, Claimants updated their development plans to include erosion protection details, specifically with respect to perimeter concrete sidewalks and a perimeter beam with concrete lining to prevent moisture and undercutting.²⁴⁵
- **Plan approval dates:** Savings Bank also questioned the timing of the Project pre-approval dates. As discussed above, the original plans were approved by the Housing Ministry in 2012. When Claimants requested a change in the zoning in October 2018, the Housing Ministry required all plans – including the preliminary project plans – to be resubmitted as if it were a new project.²⁴⁶ As Mr. Yau clarified, that is why the construction and preliminary plans showed recent approval dates.²⁴⁷
- **Lintels, structure and upper enclosures:** Savings Bank also called attention to the houses’ upper enclosures. As Mr. Yau noted, there were no problems with the upper enclosures, as the houses have lateral Vierendeel beams and gable walls made of structural-grade galvanized steel, topped on one side with a continuous line of windows (providing lighting and ventilation along the full length of the wall) and on the other with fiber-cement sheets lined internally with decorative PVC.²⁴⁸ The steel beams are mechanically anchored to the block tendons, forming an integrated structural system that also functions as lintels for doors and windows, as Figure 4 shows below:²⁴⁹

²⁴² Inspection Report on the “Luces del Pacifico” Residential Project dated 2 Sep. 2019 (C-0031) pp. 13-14, 15.

²⁴³ Inspection Report on the “Luces del Pacifico” Residential Project dated 2 Sep. 2019 (C-0031) p. 15.

²⁴⁴ Inspection Report on the “Luces del Pacifico” Residential Project dated 2 Sep. 2019 (C-0031) pp. 15-16.

²⁴⁵ Inspection Report on the “Luces del Pacifico” Residential Project dated 2 Sep. 2019 (C-0031) p. 15.

²⁴⁶ Inspection Report on the “Luces del Pacifico” Residential Project dated 2 Sep. 2019 (C-0031) p. 17.

²⁴⁷ Inspection Report on the “Luces del Pacifico” Residential Project dated 2 Sep. 2019 (C-0031) p. 17.

²⁴⁸ Inspection Report on the “Luces del Pacifico” Residential Project dated 2 Sep. 2019 (C-0031) p. 17.

²⁴⁹ Inspection Report on the “Luces del Pacifico” Residential Project dated 2 Sep. 2019 (C-0031) p. 17.



Inspection Report on the “Luces del Pacifico” Residential Project dated 2 Sep. 2019 (C-0031) p. 17, Figure 4

- **Exposed tendons:** Savings Bank also noted the exposed tendons in the designs of some Project houses. As Mr. Yau clarified, the exposed tendons were to be features of house built in phases of the Project where construction has not yet begun.²⁵⁰ Mr. Yau recommended cleaning those tendons and applying a cement grout with a water-cement ratio of 0.45 by weight before work resumed.²⁵¹

117. In fact, none of alleged technical issues was a problem at all, and Savings Bank’s decision to pause support for the Project based on them was clearly pretextual. Indeed, each had been reviewed and approved by the State entities that issued the construction permits in favor of Claimants in the first place.²⁵² Throughout this period, the Housing Ministry’s approvals of the Project remained in force and were never questioned.
118. Claimants delivered Mr. Yau’s report to Savings Bank, and Savings Bank never questioned any of his conclusions. On 6 September 2019, Ernesto wrote an email directly to Savings Bank officials, copying officials from the U.S. government, highlighting his concerns about Savings Bank’s seven-month suspension of the provision of mortgages and indication that it would no longer honor previously issued mortgages without having received a clear response from the bank and noting that the Government seemed to be discriminating against Claimants: “[t]his seems, so far to be direct discrimination against the project.”²⁵³

²⁵⁰ Inspection Report on the “Luces del Pacifico” Residential Project dated 2 Sep. 2019 (C-0031) p. 18.

²⁵¹ Inspection Report on the “Luces del Pacifico” Residential Project dated 2 Sep. 2019 (C-0031) p. 18.

²⁵² *See supra* §§ II.A.2.

²⁵³ Email correspondence between Ernesto Arguello and Oscar Van Hoorde from Savings Bank dated 28 Aug. to 6 Sep. 2019 (C-0165) pp. 1-2 (“*Estoy sumamente preocupado de no tener noticias tuyas. Este tema es sumamente delicado puesto que van 7 meses sin tener ningún tipo de claridad por parte del banco de lo que parece hasta ahora ser una discriminación directa contra el proyecto que junto con el gobierno de USA estamos desarrollando*”).

119. On 24 September 2019, Ernesto sent a letter to Mr. Andrés Farrugia, the General Manager of Savings Bank, explaining: (i) the status of the disbursement of financing from Savings Bank to Claimants' clients;²⁵⁴ (ii) the lack of response from Mr. Van Hoorde; and (iii) the results of Mr. Yau's favorable report.²⁵⁵
120. Shortly thereafter, Juan Carlos met with Mr. Farrugia to discuss the Project and to emphasize that National Bank continued to support the Project even as Savings Bank had suspended its support, in the hopes that this would persuade Savings Bank to resume support.²⁵⁶ Instead, the opposite occurred and National Bank abruptly reversed its own approval without explanation shortly thereafter.²⁵⁷
121. Still, Savings Bank contacted the engineering firm AIR Avaluos to request an independent technical report, and the firm visited the Project site on 10 October 2019.²⁵⁸ Ernesto then wrote to Savings Bank officials noting the AIR Avaluos visit and that Savings Bank's failure to provide Claimants' clients mortgage financing was making it impossible for them to repay their loan from the bank because mortgage payments were Claimants' planned source of loan repayment.²⁵⁹ In light of Savings Bank's failure to issue financing to Claimants' clients, Ernesto asked for an extension of time to make the final payment on the loan.²⁶⁰ The lack of clarity and formal communication regarding decisions of this nature created significant uncertainty for the Project.²⁶¹

en Panamá y donde hemos invertido arriba de \$30 millones de dólares a raíz de la aprobación que recibimos por parte de la junta técnica de ingeniería de la universidad tecnológica la cual posteriormente fue publicada en la gaceta.”).

²⁵⁴ Letter from Ernesto Arguello to Andrés Farrugia from Savings Bank dated 24 Sep. 2019 (C-0166) W&C p. 1.

²⁵⁵ Letter from Ernesto Arguello to Andrés Farrugia from Savings Bank dated 24 Sep. 2019 (C-0166) W&C pp. 1-2.

²⁵⁶ Juan Carlos Arguello ¶ 53.

²⁵⁷ Juan Carlos Arguello ¶ 53; Ernesto Arguello ¶ 45.

²⁵⁸ Emails between Savings Banks and AIR Avaluos dated 2 Mar. 2020 (C-0172); Email from Ernesto Arguello to Savings Bank officials dated 15 to 21 Oct. 2019 (C-0167).

²⁵⁹ Email from Ernesto Arguello to Savings Bank officials dated 15 to 21 Oct. 2019 (C-0167).

²⁶⁰ Email from Ernesto Arguello to Savings Bank officials dated 15 to 21 Oct. 2019 (C-0167).

²⁶¹ Ernesto Arguello ¶¶ 45-46.

122. Due to the threat that Savings Bank's conduct posed to the Project and its investors, OPIC/DFC became involved in negotiations with Savings Bank and attended a meeting with Savings Bank officials, including Andrés Farrugia and Oscar Van Hoorde, on 27 January 2020.²⁶² At that meeting, Savings Bank raised for the first time that the lifespan of the houses might not be sufficiently long to justify offering 30-year mortgages, highlighting eight purported issues with Project houses, including the placement of the laundry sink next to the front door (which Claimants noted at the time related to consumer preferences and had no bearing on a house's longevity) and several issues that Mr. Yau had addressed in his report (and which Savings Bank had never responded to).²⁶³
123. OPIC/DFC Director of Asset Management John S. Carlisle addressed these unfounded claims in a follow-up email to Savings Bank officials after the meeting, inviting Savings Bank to inspect the Project site and observing that the Project had been fully permitted and met all applicable building codes.²⁶⁴ As part of this follow-up, Mr. Carlisle attached a 14-page document explaining why none of the alleged technical issues with the Project that Mr. Van Hoorde raised at the 27 January 2020 meeting was in fact an issue at all.²⁶⁵
124. Savings Bank responded two days later saying that Claimants were in default on their loan (as Claimants had warned they would be, due to Savings Bank's refusal to support mortgages for prospective buyers).²⁶⁶ Savings Bank also raised a new argument regarding the collateral securing Claimants' loan. Even though Savings Bank had previously approved the collateral, it now said that the zoning of the pledged land as green areas, recreation and neighborhood activities meant that the property had no market value to secure Claimants' loan and asked for substitute collateral.²⁶⁷ Savings Bank did not address

²⁶² Email correspondence between John Carlisle (OPIC/DFC) and Savings Bank officials dated 12 to 19 Feb. 2020 (C-0170) p. 2.

²⁶³ Email correspondence between John Carlisle (OPIC/DFC) and Savings Bank officials dated 12 to 19 Feb. 2020 (C-0170) pp. 2-4.

²⁶⁴ Email correspondence between John Carlisle (OPIC/DFC) and Savings Bank officials dated 12 to 19 Feb. 2020 (C-0170) pp. 4-5.

²⁶⁵ Document titled, *Lista de las actividades que atienden las inquietudes expresadas por el departamento técnico de Caja de Ahorros* dated 12 Feb. 2020 (C-0169).

²⁶⁶ Letter from Savings Bank to John Carlisle (OPIC/DFC) dated 14 Feb. 2020 (C-0171) pp. 1-2.

²⁶⁷ Letter from Savings Bank to John Carlisle (OPIC/DFC) dated 14 Feb. 2020 (C-0171) p. 2.

Claimants' explanations about the purported technical issues it had identified with the Project or the invitation to visit the Project.²⁶⁸ Instead, Savings Bank continued to withhold its technical report and stonewall Claimants' efforts to restart mortgage financing for buyers.

2. Progress slowed in 2020 due to the COVID-19 pandemic but resumed in 2021

125. At the start of 2020, Claimants continued to work to advance the pilot phase of the Project, including by seeking additional funding to service existing loans and finalize construction. Moreover, Claimants had an indication that Savings Bank was finally going to lift its pause of its support for the Project's mortgage financing. As Ernesto explains: "[o]n 3 March 2020, the General Manager of Savings Bank, Andrés Farrugia, and the bank's Executive Manager of Architecture and Engineering, Oscar van Hoorde, visited the Project site with Juan Carlos and me. I remember Mr. Farrugia being very dismissive about there being any technical issues and assuring us that the stoppage would soon be lifted."²⁶⁹ It was in this context that the COVID-19 pandemic struck Panama.²⁷⁰
126. On 13 March 2020, by Executive Decree No. 472, Panama declared the implementation of stringent health measures to mitigate the spread of the coronavirus.²⁷¹ Subsequently, on 19 March 2020, by Executive Decree No. 500,²⁷² Panama ordered the temporary closure of commercial establishments and businesses throughout the country due to COVID-19.
127. As Ernesto recalls, "[u]nfortunately, the COVID-19 pandemic hit in mid-March 2020 causing Panama to implement an aggressive lockdown across the country, and the country faced social unrest. This was a particularly challenging time"²⁷³
128. Indeed, as Juan Carlos remembers:

²⁶⁸ Letter from Savings Bank to John Carlisle (OPIC/DFC) dated 14 Feb. 2020 (C-0171).

²⁶⁹ Ernesto Arguello ¶ 46.

²⁷⁰ See Ernesto Arguello ¶¶ 47-48; Juan Carlos Arguello ¶¶ 53-55.

²⁷¹ Executive Decree No. 472 dated 13 Mar. 2020 (C-0173).

²⁷² Executive Decree No. 500 dated 19 Mar. 2020 (C-0174).

²⁷³ Ernesto Arguello ¶ 46.

[w]ith the onset of the COVID-19 pandemic, Panama went into lockdown in mid-March 2020. This was one of the strictest lockdowns in the world, and work on the Project had to stop. The pandemic had a significant impact on the Project’s advancement. . . . Even after the lockdown ended, restarting work took time, and it could not resume until 2021.²⁷⁴

129. Still, the Government continued to tout its support for the FSV Program. In early July 2020, the Panamanian Vice-Minister of Territorial Planning lauded Panama’s “flagship” FSV Program, which he described as being carried out “hand in hand” with the private sector, as “one of the pillars of the country’s economic reactivation, considered as such by both [the] President . . . and the Minister of Economy and Finance[.]”²⁷⁵ A few days later, on 31 July, 2020, the Panamanian Government opted to extend the FSV Program until June 30, 2024 through Executive Decree No. 306.²⁷⁶
130. Ernesto recalls that “[a]lthough the pandemic disrupted and slowed progress on the Project and on resolving the situation with Savings Bank, we continued to receive positive signals and support from the Housing Ministry.”²⁷⁷
131. In further efforts to restore support from Savings Bank, in January of 2021, Claimants contacted Global Bank to ask for assistance because, having lent a substantial sum for the Project as described above, Global Bank had a financial interest in the success of the Project. Global Bank set up a meeting with Savings Bank and helped coordinate an inspection by AIR Avaluos, nearly 18 months after Savings Bank first discussed requesting the firm to do so.²⁷⁸
132. On 11 May 2021, AIR Avaluos issued a technical report analyzing and reviewing the structural system at Luces del Pacifico, with a favorable result.²⁷⁹ Contrary to Savings

²⁷⁴ Juan Carlos Arguello ¶¶ 55-56.

²⁷⁵ See They are drafting an amendment for decree that will expand the Fondo Solidario for housing, CRÍTICA dated 6 Jul. 2020 (C-0037) (“*Igualmente, Batista señaló que este programa insigne del Miviot es uno de los pilares de la reactivación económica del país, considerado así tanto por el presidente Cortizo Cohen como por el ministro de Economía y Finanzas, Héctor Alexander.*”).

²⁷⁶ Executive Decree No. 306 dated 31 July 2020 (C-0176) pp. 32, 38, Arts. 1, 23.; Arjona § IV.H.

²⁷⁷ Ernesto Arguello ¶ 49.

²⁷⁸ Juan Carlos Arguello ¶ 57.

²⁷⁹ AIR Avaluos, Report of the Analysis and Review of the structural system dated 11 May 2021 (C-0178).

Bank's pretextual and unfounded assertions about problems with the Project, the AIR Avaluos report concluded that "[t]he construction elements found on site match those specified in the received plans, which bear the approval seal of the relevant entities. Furthermore, these elements comply with the Panamanian structural code."²⁸⁰ The AIR Avaluos report further confirmed that the Project was properly zoned under the RBS designation, as confirmed in the Project's master plan approved by the Housing Ministry in Resolution No. 601-2018.²⁸¹ It also confirmed that the construction plans had the required approval seals from multiple government entities, including the Housing Ministry, the Ministry of Health, the Fire Department, the Municipality of la Chorrera, National Aqueducts and Sewerage Institute, and others.²⁸²

133. Despite the findings in the independent AIR Avaluos report that the Project complied with Panamanian law, however, Savings Bank and National Bank continued to refuse to issue mortgages to Project clients.

3. Government authorities continued to confirm the Project's compliance and in November 2021 Savings Bank agreed to resume mortgage financing

134. Once public health conditions improved, Claimants restarted construction, and on 3 August 2021, after inspecting the site, the Housing Ministry – in a letter sent by the Directorate for the Promotion of Private Investment – again confirmed that the Project was approved for the FSV Program.²⁸³ In this letter, the Housing Ministry was explicit that the Project complied with Executive Decree No. 306-2020 and the Housing Ministry's implementing regulation, Resolution No.430-20.²⁸⁴

²⁸⁰ AIR Avaluos, Report of the Analysis and Review of the structural system dated 11 May 2021 (C-0178), p. 10 (“*Los elementos constructivos encontrados en obra coinciden con los establecidos en los planos recibidos y que cuentan con los sellos de aprobación de las entidades, a su vez, estos elementos cumplen con el reglamento estructural panameño vigente.*”)

²⁸¹ AIR Avaluos, Report of the Analysis and Review of the structural system dated 11 May 2021 (C-0178) p. 4 (“*El proyecto mantiene codificación de uso de suelo RM-1, C1 y RBS, según se indica en el Master Plan aprobado mediante Resolución No. 601-2018 del Ministerio de Vivienda . . .*”).

²⁸² AIR Avaluos, Report of the Analysis and Review of the structural system dated 11 May 2021 (C-0178) p. 3.

²⁸³ Letter from MIVIOT to MVB approving the Project dated 3 Aug. 2021 (C-0042).

²⁸⁴ Letter from MIVIOT to MVB approving the Project dated 3 Aug. 2021 (C-0042).

135. Finally, on 30 November 2021 – nearly three years after the suspension began and without explaining what made it change its decision – Savings Bank sent a letter confirming that it had completed its review and would reactivate its financial support for the Project.²⁸⁵ Savings Bank reactivation covered both the existing construction financing package and the issuance of mortgage commitments to potential homebuyers.²⁸⁶ This was a pivotal moment for Claimants, who believed the Project could now get back on track and that National Bank would follow Savings Bank’s lead.²⁸⁷
136. Having re-secured financing from Savings Bank, Claimants continued to advance the Project in accordance with the applicable legal framework and Government demands. As explained by Juan Carlos, “[as] we had temporarily put aside the expansion phase in light of the situation with Savings Bank, we now looked forward to the sale of the pilot units and moving forward with the remainder of the Project.”²⁸⁸
137. On 12 May 2022, Carlos Marín of the Housing Ministry’s Directorate for the Promotion of Private Investment sent an email to developers requesting that upon requesting an inspection of their project, they submit specific information to the Housing Ministry, and he further clarified his request the next day.²⁸⁹
138. On 22 July 2022, Claimants, through Mr. Nuñez, wrote to Mr. Marín and other Housing Ministry officials noting that the Project had already been approved and asking whether additional steps were necessary.²⁹⁰ On 27 July 2022, Mr. Marín sent an email indicating

²⁸⁵ Letter from Savings Bank to Mr. César Nuñez dated 30 Nov. 2021 (C-0043) (approving the reactivation of financing by Savings Bank) (“*Tengo a bien dirigirme a usted con el propósito de comunicarle de manera formal, que hemos aprobado la reactivación de financiamientos en el Proyecto de Luces del Pacífico . . .*”).

²⁸⁶ Letter from Savings Bank to Mr. César Nuñez dated 30 Nov. 2021 (C-0043); Juan Carlos Arguello ¶ 59.

²⁸⁷ Juan Carlos Arguello ¶ 59; Ernesto Arguello ¶ 50; Nuñez ¶ 23. The reactivation of the financing was conditioned on the fulfilment of new criteria that were not part of the FSV Program, including that a maximum term of 30 years would be granted for the financing provided; that only 30% of the lots would be financed for each phase of the Project; and that financing would only be renewed for those clients who remained interested in the Project. Additionally, clients seeking financing were required to contribute an additional 2% to the financial support extended by the FSV Program. See Letter from Savings Bank to Mr. César Nuñez dated 30 Nov. 2021 (C-0043).

²⁸⁸ Juan Carlos Arguello ¶ 61; see also Ernesto Arguello ¶ 50.

²⁸⁹ Email correspondence between César Nuñez and Carlos Miranda from MIVIOT dated 12 May to 27 Jul. 2022 (C-0184) pp. 5-6.

²⁹⁰ Email correspondence between César Nuñez and Carlos Miranda from MIVIOT dated 12 May to 27 Jul. 2022 (C-0184) pp. 2-3.

that the Project “only is APPROVED but not ACTIVE” and that Claimants needed to submit additional documentation with a request for inspection.²⁹¹

139. On 6 August 2022, Claimants accordingly requested an inspection and submitted all of the information the Housing Ministry had requested.²⁹² On 10 August 2022, the Housing Ministry conducted an inspection of the Project site.²⁹³

E. ON 17 AUGUST 2022, THE HOUSING MINISTRY SUDDENLY ANNULLED ITS PRIOR APPROVALS OF CLAIMANTS’ PROJECT WITHOUT ANY EXPLANATION, AND SHORTLY THEREAFTER THE PANAMANIAN STATE-OWNED BANKS WITHDREW THEIR SUPPORT FOR THE PROJECT

140. Then, on 17 August 2022, the Housing Ministry suddenly informed Claimants that it was annulling the Project’s approval for the FSV Program (“**Annulment**”).²⁹⁴ The decision was announced in a perfunctory letter signed by Minerva de Miranda, the Housing Ministry’s Director of Private Investment Promotion, that read, in full:

Dear Sirs:

The Luces del Pacífico Residential Project, approved by Note 14.500-1805-2015, dated March 23, 2015, in accordance with Decree 393 of December 16, 2014, and its approval renewed by Note 14.500-4539-2021, dated August 3, 2021, in accordance with Decree 306 of July 31, 2020, which is regulated by Resolution No. 430-2020 of August 25, 2020; after having requested the inspection of the project that allows for the requirement of an approval resolution for the Housing Solidarity Bond; we must inform you that said project does not meet the minimum requirements of Decree 306, Regulatory Resolution No. 430, nor the RBS regulations established by Resolution 366-2020 of August 5, 2020.

For the foregoing reasons, the approvals granted prior to this note are hereby annulled.

We remain at your disposal.

²⁹¹ Email correspondence between César Nuñez and Carlos Miranda from MIVIOT dated 12 May to 27 Jul. 2022 (C-0184) pp. 1-2.

²⁹² Email from César Nuñez to Carlos Miranda from MIVIOT dated 6 Aug. 2022 (C-0185) p. 1.

²⁹³ Nuñez ¶ 24.

²⁹⁴ Letter from MIVIOT to MVB Cancelling FSV Program Approval dated 17 Aug. 2022 (C-0044).

Sincerely,

Arq. Minerva de Miranda, Director of Private Investment Promotion²⁹⁵

141. This communication blindsided Claimants, as it was in direct contrast with the many approvals that Claimants had received from the Housing Ministry over a period of numerous years confirming that the Project did meet the FSV minimum requirements.²⁹⁶ As the Housing Ministry's letter itself acknowledged, the Project had been approved as recently as August 2021.²⁹⁷ In fact, the Housing Ministry had repeatedly and consistently approved the Project, finding in 2012, 2013, 2015, 2016, 2019, and 2021 that the Project complied with all FSV Program requirements as the Government repeatedly expanded the Program.²⁹⁸
142. Moreover, the Housing Ministry's letter offered no explanation for the Annulment.
- While the letter alludes to noncompliance with the minimum requirements of Executive Decree No. 306-2020, Resolution No. 430-2020, and Resolution 366-2020, it does not say which provisions the Project was not compliant with or identify which aspects of the Project were non-compliant. Tellingly, it does not explain what had changed since the Project passed an inspection conducted by the Housing Ministry in 2019 that would justify the new, very different conclusion.

²⁹⁵ Letter from MIVIOT to MVB Cancelling FSV Program Approval dated 17 Aug. 2022 (C-0044) ("*Señores: El Proyecto Residencial Luces del Pacífico, aprobado mediante nota 14.500-1805-2015, de 23 de marzo de 2015 de acuerdo al Decreto 393 de 16 de diciembre de 2014 y renovada su aprobación mediante nota 14.500-4539-2021, de 3 de agosto de 2021, de acuerdo al Decreto 306 de 31 de julio de 2020, el cual es reglamentado por la Resolución No.430-2020 de 25 de agosto de 2020; luego de haber solicitado la inspección del proyecto que permite requerir resolución de aprobación del Bono Solidario de Vivienda; nos precisa Informarle que dicho proyecto, no cumple con los mínimos requisitos del Decreto 306, de la Resolución de Reglamentación No.430, ni con la normativa RBS que establece el Resolución 366-2020 de 5 de agosto de 2020. Por lo anterior, las aprobaciones otorgadas antes de la presente nota quedan anuladas. Sin otro particular, quedo de ustedes. Atentamente*). See also, Email from Carlos Marin to Cesar Fernando Nuñez Duarte dated 17 Aug. 2022 (C-0187).

²⁹⁶ Juan Carlos Arguello ¶ 63; Ernesto Arguello ¶ 51; Nuñez ¶¶ 24-26.

²⁹⁷ Letter from MIVIOT to MVB Cancelling FSV Program Approval dated 17 Aug. 2022 (C-0044).

²⁹⁸ See *supra* § II.B-D; Letter from MIVIOT to MVB approving the Project's incorporation into the FSV Program dated 7 Sep. 2012 (C-0015); MIVIOT, List of Projects Integrated Into the FSV, dated 15 Jan. 2013 (C-0017); National System for the Civil Protection of Panama, Feasibility Certificate dated 29 Mar. 2012 (C-0013); Letter from the Department of Municipal Engineering to Architect Yunus Hasan Asvat approving the Project Setback Line dated 21 Mar. 2013 (C-0018); Letter from MIVIOT to MVB approving the FSV Program dated 23 Mar. 2015 (C-0020); List of Projects Integrated into the FSV from 2016 (C-0134); MIVIOT, List of Projects Integrated into the FSV from 2017 and 2018 (C-0136); Letter from MIVIOT to Private Investment Director dated 20 Mar. 2019 (C-0028); Letter from MIVIOT to MVB approving the Project, dated 3 Aug. 2021 (C-0042).

- While the letter references Claimants’ request for an inspection, it does not mention the 10 August 2022 inspection, nor does it attach any report detailing the results of the inspection or even indicate that one had ever been created. Indeed, the Housing Ministry has never disclosed such a report, to the extent one was ever prepared.²⁹⁹
 - While the letter acts to annul all of the Project’s prior approvals, it does not say why the Annulment was the appropriate action instead of giving Claimants an opportunity to remedy any shortcomings identified during the inspection (if in fact there were any).
143. Compounding the confusion, a separate Housing Ministry directorate issued another approval for the Project *on the very same day*.³⁰⁰ On 17 August 2022, Blanca de Tapia, the Housing Ministry’s National Director of Development Control and Guidance, sent Claimants a notice recertifying the Housing Ministry’s 15 October 2018 decision to rezone Project land as *Residencial Bono Solidario* (RBS), *i.e.*, the zoning for projects under the FSV Program.³⁰¹ This approval made no mention of the Annulment and gave no indication that the Housing Ministry had any concerns with the Project.³⁰²
144. The Annulment and the circumstances surrounding it were patently contrary to Panamanian Law. As Professor Arjona explains:
- The letter conveying the Annulment failed to provide adequate reasoning and justification for the Housing Ministry’s decision, in violation of Article 201, paragraph 1 of Law 38 of 2000 – the law regulating General Administrative Procedure (“**Law 38**”) – as well as fundamental guarantees of due process.³⁰³
 - “The failure to state the grounds for annulment constitutes a serious violation, insofar as administrative acts cannot be annulled for reasons other than those expressly set forth in Law 38, which means that grounds not expressly provided for by the legislature or by analogy are not admissible.”³⁰⁴

²⁹⁹ Email from Cesar Nuñez to Carlos Marin from MIVIOT dated 10 Aug. 2022 (C-0186).

³⁰⁰ Juan Carlos Arguello ¶ 64; MIVIOT, Zoning Certification No. 196-2022 for Residencial Bono Solidario dated 17 Aug. 2022 (C-0045).

³⁰¹ MIVIOT, Zoning Certification No. 196-2022 for Residencial Bono Solidario dated 17 Aug. 2022 (C-0045).

³⁰² MIVIOT, Zoning Certification No. 196-2022 for Residencial Bono Solidario dated 17 Aug. 2022 (C-0045).

³⁰³ Arjona ¶ 75.

³⁰⁴ Arjona ¶ 75 (“*La omisión de indicar el motivo de anulación representa una infracción grave en la medida en que los actos administrativos no pueden anularse por causas distintas a las consagradas taxativamente en la Ley 38,*

- The Annulment did not “comply with the requirement to indicate the remedies available to the party affected by a given measure” under Panamanian Law.³⁰⁵
- The Annulment should have been decided, under Panamanian Law, through a formal resolution, rather than through a cursory letter providing no explanation for the decision.³⁰⁶
- Panama failed to grant Claimants a 10-day period to remedy the alleged issues with the Project, as required under Law 38.³⁰⁷
- Panama violated its obligation to “preserve, wherever possible, the valid parts of administrative acts, thereby preventing the entire proceeding from being invalidated when only a part of it is flawed.”³⁰⁸
- “[T]he administrative act in question was marked by an atmosphere of confusion and contradiction on the part of the Government, which violates the principle of good faith and is inconsistent with its own actions.”³⁰⁹

145. From Claimants’ perspective, the Annulment came out of the blue and the Housing Ministry’s refusal to provide any explanation left them completely in the dark.³¹⁰ Indeed, Claimants had to petition the Housing Ministry just to get a meeting to discuss the Annulment.³¹¹ On August 22, 2022, Mr. Nuñez met with an official from the Housing Ministry, who stated that the Ministry had certain technical concerns with the Project but was unable (or unwilling) to provide any further details or explanation of the Annulment,

con lo cual, no se admiten causales que no se encuentren contempladas por mandato expreso del legislador ni por analogía.”).

³⁰⁵ Arjona ¶ 75 (“*Tampoco cumplió con indicar los recursos de los que podía hacer uso el afectado con dicha medida, como establece el artículo 96 de la Ley 38 de 2000.*”).

³⁰⁶ Arjona ¶¶ 73-74.

³⁰⁷ Arjona ¶ 76.

³⁰⁸ Arjona ¶ 77 (“*Esta disposición es una norma fundamental que obliga a la administración pública a conservar, siempre que sea posible, las partes válidas de los actos administrativos, evitando la nulidad total de actuaciones cuando solo una parte está viciada.*”).

³⁰⁹ Arjona ¶ 81 (“*[E]l acto administrativo comentado estuvo rodeado por una atmosfera de confusión y contradicción por parte del Estado, lo cual vulnera el principio de buena fe y es inconsistente con sus actos propios.*”).

³¹⁰ Ernesto Arguello ¶ 51; Juan Carlos Arguello ¶ 63; Nuñez ¶ 24.

³¹¹ Nuñez ¶ 28.

and it was clear to Mr. Nuñez that the decision had been made by some other, higher-ranking official.³¹²

146. On August 26, 2022, Mr. Nuñez met with Ms. Miranda at the Housing Ministry.³¹³ As had been the case in the 22 August meeting, Ms. Miranda was unable (or unwilling) to explain or justify the Annulment.³¹⁴ During the meeting, Ms. Miranda showed Mr. Nuñez two folded pieces of paper with a chart comparing Decree 393-2014 and Decree 306-2020 and a final column entitled “*Observaciones Comparativas*” purporting to address the Project’s compliance with these requirements.³¹⁵ Ms. Miranda eventually provided Mr. Nuñez with a copy of the chart.³¹⁶
147. The chart obtained by Mr. Nuñez is not an inspection report or analysis of the Project’s compliance with technical requirements of the FSV Program. While the final column appears to identify six instances of non-compliance with requirements for which it states “*no cumple*,”³¹⁷ for none of these does it include details about the alleged non-compliance or evidence thereof.³¹⁸ Notably, the chart identified areas of non-compliance that the Housing Ministry had *itself* previously certified as compliant.³¹⁹
148. On September 1, 2022, Mr. Nuñez met with Vice Minister of Housing José Batista and Ms. Miranda.³²⁰ During this meeting, Mr. Nuñez explained that the Project had been fully

³¹² Nuñez ¶ 28.

³¹³ Nuñez ¶ 29.

³¹⁴ Nuñez ¶ 29.

³¹⁵ Nuñez ¶ 29.

³¹⁶ Nuñez ¶ 29.

³¹⁷ MIVIOT, Chart handed to Mr. Nuñez by Ms. Minerva on 26 Aug. 2022 (C-0188).

³¹⁸ MIVIOT, Chart handed to Mr. Nuñez by Ms. Minerva on 26 Aug. 2022 (C-0188) pp. 1-2.

³¹⁹ MIVIOT, Chart handed to Mr. Nuñez by Ms. Minerva on 26 Aug. 2022 (C-0188) pp. 1-2; Nuñez ¶ 30; Letter from MIVIOT to Private Investment Director dated 20 Mar. 2019 (C-0028). For example, the chart handed to Mr. Nuñez indicates that the Project was non-compliant with the lot size requirements of Executive Decree No. 306-2020. However, the Housing Ministry had previously certified after an inspection of the Project in 2019 that “these homes comply with Executive Decrees 393 and 225 and offer other advantages that provide greater comfort to the home.” And as the chart makes clear, the minimum lot size under Executive Decree No. 343-2014 is *smaller* than the minimum lot size under Executive Decree No. 306-2020. Therefore there could be no basis for the Housing Ministry to claim that the Project’s lot sizes were compliant with Executive Decree No. 343-2014 but not under Executive Decree 306-2020.

³²⁰ Nuñez ¶ 31.

permitted and had all of the necessary approvals under the FSV Program.³²¹ Vice Minister Batista clearly had no interest in having a serious discussion and said he would not support the Project.³²² Shockingly, he explicitly told Mr. Nuñez that “foreigners imposing innovations” were not wanted.³²³

149. The Annulment meant that Claimants were not able to sell FSV-compliant homes through the FSV Program and therefore could not benefit from the State’s support to homebuyers.³²⁴ As Mr. Nuñez recalls:

[a]s a direct consequence, both Savings Bank and National Bank withdrew from the Project, and stopped issuing the documents in which they committed to finance the mortgages of the buyers of the homes, which were essential for them to be able to buy the homes of the Project. Without [the Housing Ministry]’s approval, no other bank could issue these documents either.³²⁵

150. Indeed, the State banks that had previously pledged their support for the Project – Savings Bank and National Bank (which had called itself a “strategic all[y]” of the Project) – informed Claimants shortly after the Annulment that they would no longer provide mortgages to low-income buyers of homes built as part of the Project.³²⁶
151. After the Annulment, Ernesto reached out to OPIC/DFC to seek their assistance to try to convince the Panamanian Government to reinstate the Project’s approvals, but he was told there was nothing that could be done.³²⁷ Despite their efforts, Claimants were unable to

³²¹ Nuñez ¶ 31.

³²² Nuñez ¶ 31.

³²³ Nuñez ¶ 31 (“[M]e dijo explícitamente que no quería ‘extranjeros imponiendo innovaciones.’”); Juan Carlos Arguello ¶ 72; Ernesto Arguello ¶ 54.

³²⁴ Juan Carlos Arguello ¶ 65, 72; Nuñez ¶ 33.

³²⁵ Nuñez ¶ 32 (“Como consecuencia directa, tanto Caja de Ahorros como el Banco Nacional se retiraron del Proyecto, y dejaron de emitir los documentos en que se comprometieron a financiar las hipotecas de los compradores de las viviendas, las cuales eran indispensables para que pudieran comprar las viviendas del Proyecto. Sin la aprobación del MIVIOT, ningún otro banco podía emitir estos documentos tampoco.”).

³²⁶ Juan Carlos Arguello ¶ 65; Nuñez ¶ 32; Ernesto Arguello ¶ 53; Letter from National Bank to MVB, dated 3 Jun. 2019 (C-0030) (“We would like to start by informing you that [your Project] has been approved by National Bank of Panama. From this date on, we become strategic allies.”).

³²⁷ Ernesto Arguello ¶ 52.

persuade Panama to rescind the Annulment.³²⁸ As Juan Carlos recalls, “[t]he Panamanian authorities told us that the annulment was final, that we had no way to get back the Project’s prior approvals, and that the Project could not be brought back to life.”³²⁹

F. PANAMA’S ANNULMENT OF THE PROJECT’S PRIOR APPROVALS CAUSED THE PROJECT’S DEMISE

152. Panama’s Annulment meant that the houses could not be sold to the homebuyers who had committed subject to financial support from the State and prevented Claimants from being able to pay back loans to their lenders that had been predicated on repayment with proceeds from Project home sales.³³⁰ As Juan Carlos explains:

Because we needed the revenues from the sales of the homes included in the first five *quintas* (including the financial support provided through the FSV Program) to continue to finance the Project (including both additional FSV-compliant homes in the next set of *quintas* that we planned to construct, as well as additional non-FSV-compliant housing units in apartment buildings), we could no longer afford to continue to develop the Project.³³¹

153. Indeed, the Annulment prevented Claimants from servicing existing debt obligations, including from Global Bank, which had a cascading effect on their ability to develop the Project.³³² As Mr. Nuñez recalls, “[t]he expulsion of the Project from the FSV Program meant that we could no longer build or sell social housing for low-income people who depended on the state financial support.”³³³
154. In Ernesto’s words, “Panama’s annulment of the Project’s approvals effectively killed its future and left us with no remaining money to keep the Project alive.”³³⁴ Deprived of the ability to complete the pilot phase and receive the revenue from the sale of the homes

³²⁸ Juan Carlos Arguello ¶ 67.

³²⁹ Juan Carlos Arguello ¶ 67.

³³⁰ Juan Carlos Arguello ¶ 6; Nuñez ¶ 33.

³³¹ Juan Carlos Arguello ¶ 66.

³³² Juan Carlos Arguello ¶¶ 66, 70; Nuñez 33.

³³³ Nuñez ¶ 33 (“*La expulsión del Proyecto del Programa FSV significó que ya no podíamos construir ni vender viviendas sociales para las personas de bajos recursos que dependían del aporte financiero estatal.*”); Letter from Global Bank to EMG dated 9 Sep. 2022 (C-0190).

³³⁴ Ernesto Arguello ¶ 55.

included therein, Claimants were also forced to abandon their plans for the expansion phase.³³⁵

155. As it was clear that the Project could not be brought back to life, Juan Carlos led Claimants' efforts to sell the remaining Project assets.³³⁶ As Juan Carlos recalls, Claimants came close to selling *quintas* that had already been built but ultimately were unable to do so:

In early 2024, a potential buyer expressed interest in acquiring four of the *quintas* and told me that he had met with officials in the Housing Ministry and that the process of reviewing the Project's technical issues with them was advancing well. In light thereof, he told us that he intended to move forward with the development of the Project. However, the buyer ultimately walked away before the deal could be finalized.³³⁷

G. PANAMA ALLOWED THE FSV PROGRAM TO EXPIRE ON 30 JUNE 2024

156. In late 2022, the Panamanian press reported that the Housing Ministry had failed to pay some developers under the FSV Program since April 2022.³³⁸ In April 2023, a majority of developers in the FSV Program sent a letter to the Housing Ministry complaining about delays in payment of Program financial support and arguing that the delays were affecting low-income families and the entire construction sector.³³⁹ By October 2023, a regional developers' association estimated that the Housing Ministry owed \$120 million to developers under the FSV Program, and that the debt had been growing since April 2022.³⁴⁰
157. In light of this growing debt burden and its inability to meet the obligations it had undertaken under the FSV Program, Panama allowed the Program to expire on 30 June 2024 rather than continuing to extend the Program as it had repeatedly done since 2009. On 6 August 2024, Jaime Jované, the Housing Minister in the administration of President José Raúl Mulino, who took office on 31 July 2024, explained the decision by stating that there was no budget to extend the FSV, emphasizing that the previous administration had

³³⁵ Juan Carlos Arguello ¶ 72.

³³⁶ Juan Carlos Arguello ¶ 73; *see also* Ernesto Arguello ¶ 55.

³³⁷ Juan Carlos Arguello ¶ 73.

³³⁸ “Unos \$30 millones adeuda el gobierno al Fondo de Vivienda,” PANAMÁ AMÉRICA dated 26 Nov. 2022 (C-0192).

³³⁹ “Carta al MIVIOT,” LA PRENSA dated 14 Jun. 2023 (C-0194)

³⁴⁰ “Gobierno debe el Bono Solidario de Vivienda a promotores en el interior,” TVN dated 18 Oct. 2024 (C-0197).

never secured the necessary funds for the project.³⁴¹ In September 2024, President Mulino confirmed that the Program was being shut down, observing that “construction began under the premise that there would be access to the *bono [solidario]* for apartments and houses, without consulting if the State had capacity to pay” and that “default was high because there had been an excess of construction.”³⁴² When the FSV Program was shuttered in 2024, it was US\$ 90 million in debt, and the Government continues to owe US\$ 290 million due as part of its broader social housing initiatives, including to private banks who offered preferential interest rates to low-income homebuyers.³⁴³

H. LEFT WITH NO ALTERNATIVES, CLAIMANTS INITIATED THIS ARBITRATION

158. The Annulment killed the Project and left Claimants without any money to service debt owed to the Project’s funders or to pay lawyers in Panama to wind down the Project.³⁴⁴ With the Project land pledged as collateral to lenders and held in trust, Savings Bank has begun repossessing and selling land.³⁴⁵ Because Claimants’ creditors hold the rights to the remaining Project assets, Claimants have no control over the assets and are unsure as to their present status.³⁴⁶
159. As Ernesto explains, unable to sell the Project’s assets or to reinstate the Project in the FSV Program, Claimants, “made the difficult decision to leave Panama and start this Arbitration to seek justice.”³⁴⁷ Claimants are relying on third-party financing to pursue this

³⁴¹ “Fondo Solidario de Vivienda, amenazado por falta de presupuesto,” PANAMÁ AMÉRICA dated 6 Aug. 2024 (C-0195).

³⁴² “Eliminación del Fondo Solidario de Vivienda en Panamá: ¿Qué sigue para las familias de bajos ingresos?,” TVN, dated 25 Sep. 2024 (C-0196) (“El mandatario señaló que existe una incongruencia en el programa, explicando que ‘se inician urbanizaciones bajo el pretexto de que contarán con el bono para apartamentos y casas, sin consultar al Estado si tiene capacidad de pago’” and “Agregó que la morosidad es alta porque se ha construido en exceso, motivo por el cual ‘ese bono definitivamente dejará de existir’”).

³⁴³ “El hoyo del subsidio de vivienda: \$290M sin pagar y miles de familias sin su casa,” NEXO dated 31 May 2026 (C-0204).

³⁴⁴ Juan Carlos Arguello ¶ 74.

³⁴⁵ Juan Carlos Arguello ¶ 74; Ernesto Arguello ¶ 55; Savings Bank, Direct Sale of Repossessed Assets dated 21 Sept. 2025 (C-0199) p. 1; Savings Bank, Informative Note dated 11 Jan. 2023 (C-0193).

³⁴⁶ Juan Carlos Arguello ¶ 74; Ernesto Arguello ¶ 55.

³⁴⁷ Ernesto Arguello ¶ 56; Juan Carlos Arguello ¶ 72.

Arbitration, as Panama’s actions have destroyed their investment and left them “without money” and unable to fund the Arbitration themselves.³⁴⁸

160. Meanwhile, the low-income families that the Project was designed to serve remain without adequate housing and Panama’s housing deficit still persists and exceeds 185,000 homes.³⁴⁹

III. THE TRIBUNAL HAS JURISDICTION OVER CLAIMANTS’ CLAIMS

161. There can be no question that the Tribunal has jurisdiction over Claimants’ claims, which satisfy each of the conditions for jurisdiction established in the ICSID Convention and the Treaty, as well as all of the Treaty’s procedural requirements. In particular, as described below, the Parties have consented in writing to the submission of Claimants’ claims to arbitration (Section III.A); Claimants are entitled to submit their claims to arbitration pursuant to the ICSID Convention and the Treaty (Section III.B); and Claimants’ claims satisfy all notice, timing, and waiver requirements set forth in Chapter Ten, Section B of the Treaty (Section III.C). Claimants’ claims are therefore properly within the jurisdiction of this ICSID Tribunal.

A. THE PARTIES HAVE CONSENTED IN WRITING TO THE PRESENT ARBITRATION

162. Article 25(1) of the ICSID Convention requires that parties to a dispute provide their “consent in writing” to the submission of a claim to ICSID arbitration.³⁵⁰ This consent requirement is satisfied here: Panama consented in Article 10.17 of the Treaty to the submission of claims under the Treaty to ICSID arbitration, while Claimants consented to ICSID arbitration by submitting their claims to arbitration under Section B of Chapter Ten of the Treaty in their Request for Arbitration initiating this arbitration pursuant to Article 10.16.1 of the Treaty.

³⁴⁸ Juan Carlos Arguello ¶ 74.

³⁴⁹ “Déficit habitacional en Panamá alcanza las 185 mil viviendas,” TVN dated 2 June 2026 (C-0205) (“[El Ministro de MIVIOT] recordó que Panamá mantiene un déficit habitacional estimado en 185 mil viviendas.”); “Aplicación de tasa de 2% a las viviendas nueva amenaza con aumentar el déficit habitacional en Panamá,” INFOBAE dated 20 Apr. 2026 (C-0202).

³⁵⁰ ICSID Convention Art. 25(1).

163. Specifically, Panama consented in writing to the submission of claims under the Treaty to ICSID arbitration under Article 10.17 of the Treaty, which states that “[e]ach Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement” and that this consent “and the submission of a claim to arbitration under this Section shall satisfy the requirements of Chapter II of the ICSID Convention (Jurisdiction of the Centre) . . . for written consent of the parties to the dispute.”³⁵¹
164. Panama’s consent to arbitration encompasses Claimants’ claims pursuant to Article 10.16.1 of the Treaty, which provides that “(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim: (i) that the respondent has breached: (A) an obligation under Section A; . . . and (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach.”³⁵² Thus, Panama has consented in writing to the present arbitration, in which Claimants have submitted claims that Panama has breached various obligations under Section A of Chapter Ten of the Treaty as a result of which Claimants have incurred loss or damage.
165. Claimants have also consented to ICSID arbitration. Under Article 10.16.4 of the Treaty, “[a] claim shall be deemed submitted to arbitration” under Section B of Chapter Ten “when the claimant’s notice of or request for arbitration . . . is received by the [ICSID] Secretary-General.”³⁵³ Claimants submitted their claims for breaches of Respondent’s obligations under Section A of Chapter Ten of the Treaty to arbitration under Section B of Chapter Ten when they submitted their Request for Arbitration (“**RfA**”) to the ICSID Secretary General on 31 July 2025.³⁵⁴ The ICSID Secretariat received Claimants’ RfA on 31 July 2025, at which point Claimants’ consent was perfected and their claims were properly submitted to ICSID arbitration.³⁵⁵

³⁵¹ Treaty (CL-001) Art. 10.17(1)-(2).

³⁵² Treaty (CL-001) Art. 10.16(1).

³⁵³ Treaty (CL-001) Art. 10.16(4)(a).

³⁵⁴ *See* RfA.

³⁵⁵ *See* Letter from ICSID to Claimants confirming receipt of submission of Claimants’ RfA dated 1 Aug. 2025.

B. CLAIMANTS ARE ENTITLED TO SUBMIT THEIR CLAIMS TO ARBITRATION PURSUANT TO THE ICSID CONVENTION AND THE TREATY

166. Claimants also comply with all other jurisdictional requirements of the ICSID Convention and the Treaty.
167. As to the ICSID Convention, Article 25(1) provides jurisdiction over “any legal dispute arising directly out of an investment between a Contracting State . . . and a national of another Contracting State.”³⁵⁶ Article 25(2) then defines “National of another Contracting State” to include “any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to . . . arbitration as well as on the date on which the request was registered.”³⁵⁷ Panama and the United States are both Contracting States to the ICSID Convention.³⁵⁸
168. Regarding the Treaty, as explained in Section III.A, Article 10.16 of the Treaty authorizes a “claimant” to submit claims to ICSID arbitration that a Party has breached an obligation under Section A of Chapter Ten of the Treaty.³⁵⁹ A “claimant” is defined as “an investor of a Party that is a party to an investment dispute with the other Party,” while “investor of a Party” is defined as “a national . . . of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party.”³⁶⁰ Article 10.29 further defines “national” as including “a natural person who has the nationality of a Party” and “investment” as “every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.”³⁶¹ The following forms of investment are explicitly recognized in the definition of investment in Article 10.29:

³⁵⁶ ICSID Convention Art. 25(1).

³⁵⁷ ICSID Convention Art. 25(2).

³⁵⁸ See ICSID, Database of ICSID Member States (last accessed 21 Jul. 2025) (C-0048) (indicating that (i) Panama signed the ICSID Convention on 22 Nov. 1995 with the Convention entering into force for Panama on 8 May 1996; and (ii) the United States signed the ICSID Convention on 27 Aug. 1965 with the Convention entering into force for the United States on 14 Oct. 1966).

³⁵⁹ Treaty (CL-001) Art. 10.16(1).

³⁶⁰ Treaty (CL-001) Art. 10.29.

³⁶¹ Treaty (CL-001) Art. 10.29.

- (a) an enterprise;
- (b) shares, stock, and other forms of equity participation in an enterprise;
- (c) bonds, debentures, other debt instruments, and loans;
- (d) futures, options, and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- (f) intellectual property rights;
- (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and
- (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.³⁶²

169. Further, in order to qualify for protection under Chapter Ten of the Treaty, an investment must be a “covered investment.”³⁶³ As defined in Article 2.1 of the Treaty, covered investments are those investments by an investor of one Party into the territory of the other Party that are “in existence as of the date of entry into force of [the Treaty] or established, acquired, or expanded thereafter.”³⁶⁴
170. As described below, Claimants (i) are nationals of the United States (ii) who have made covered investments in the territory of Panama, and (iii) are currently in an investment dispute with Panama, and therefore satisfy all jurisdictional requirements of the ICSID Convention and the Treaty.

³⁶² Treaty (CL-001) Art. 10.29.

³⁶³ Treaty (CL-001) Art. 10.1(1)(b).

³⁶⁴ Treaty (CL-001) Arts. 2.1, 10.29.

1. Claimants satisfy the nationality requirements of the ICSID Convention and the Treaty

171. Claimants Juan Carlos Argüello and Ernesto Argüello are citizens of the United States (and no other State).³⁶⁵ Claimants are thus “national[s] of another Contracting State,”³⁶⁶ and the nationality requirement of Article 25 of the ICSID Convention is satisfied. Similarly, as citizens of the United States (a Party to the Treaty), Claimants are “national[s]” under the Treaty.³⁶⁷

2. Claimants’ investments in Panama are “covered investments” under the Treaty and investments under the ICSID Convention

172. Claimants’ investments are protected investments under Chapter Ten of the Treaty and Article 25(1) of the ICSID Convention.³⁶⁸ As described in Sections II.B-D, Claimants made significant investments in the territory of Panama through their development of the Luces del Pacifico Project in La Chorrera before and after the Treaty’s entry into force in October 2012 that involved the commitment of capital and other resources. Claimants made these long-term investments with the expectation of profit and assumed risk in doing so, and their investments contributed to the economic development of Panama. Claimants’ investments specifically included, *inter alia*, contributions of cash, time, know-how, and other resources to the Project, shares in EMG and MVB, loans and guarantees, real estate acquired for the Project and related intellectual property rights, permits and other rights conferred pursuant to domestic law, as well as other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.³⁶⁹ These investments unquestionably qualify as “covered investment[s]” under the Treaty and “investment[s]” under the ICSID Convention.

³⁶⁵ See Passport of Juan Carlos Argüello dated 15 Aug. 2013 (C-0019); Passport of Ernesto Argüello dated 13 Oct. 2016 (C-0025); Birth Certificate of Juan Carlos Argüello dated 9 Aug. 1976 (C-0001); Birth Certificate of Ernesto Argüello, dated 26 Jan. 1979 (C-0002).

³⁶⁶ ICSID Convention Art. 25(1).

³⁶⁷ See Passport of Juan Carlos Argüello, dated 15 Aug. 2013 (C-0019); Passport of Ernesto Argüello, dated 13 Oct. 2016 (C-0025); Birth Certificate of Juan Carlos Argüello dated 9 Aug. 1976 (C-0001); Birth Certificate of Ernesto Argüello, dated 26 Jan. 1979 (C-0002).

³⁶⁸ Treaty (CL-001) Arts. 2.1, 10.29; ICSID Convention Art. 25(1).

³⁶⁹ See *supra* §§ II.B-D.

3. The dispute between the Parties is a legal dispute that arises directly out of Claimants' investment in Panama

173. The present dispute is a “legal dispute arising directly out of an investment” under Article 25 of the ICSID Convention and an “investment dispute” under Article 10.16 of the Treaty. As Claimants have described in their Notice of Intent (“**NOI**”), RfA, and Section II of this Memorial, the present arbitration arises directly out of Claimants’ covered investments and Panama’s failure to comply with its obligations under Section A of Chapter Ten of the Treaty.³⁷⁰ It is therefore unquestionably both a “legal dispute arising directly out of an investment” under the ICSID Convention and an “investment dispute” under the Treaty.

C. CLAIMANTS HAVE COMPLIED WITH ALL PROCEDURAL REQUIREMENTS UNDER THE TREATY

174. Claimants have satisfied each of the notice, timing, and waiver requirements in Chapter Ten, Section B of the Treaty.

175. Articles 10.15, 10.16.2, 10.16.3, 10.18.1, and 10.18.2 of the Treaty provide, respectively:

Article 10.15: Consultation and Negotiation

In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures such as conciliation and mediation.

Article 10.16: Submission of a Claim to Arbitration

2. At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration (“notice of intent”). The notice shall specify:

- (a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;

³⁷⁰ See Request for Consultation and Negotiation and Notice of Intent to Submit Claims to Arbitration Pursuant to Articles 10.15 and 10.16 of the U.S.-Panama TPA dated 29 Apr. 2024 (C-0047).

- (b) for each claim, the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;
 - (c) the legal and factual basis for each claim; and
 - (d) the relief sought and the approximate amount of damages claimed.
3. Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph [10.16.1]:
- (a) under the ICSID Convention and the ICSID Rules of Procedures for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention;
 - (b) under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention; or
 - (c) under the UNCITRAL Arbitration Rules.

Article 10.18: Conditions and Limitations on Consent of Each Party

1. No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.
2. No claim may be submitted to arbitration under this Section unless: . . .
 - (b) the notice of arbitration is accompanied:
 - (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver . . . of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any

proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.

176. On 29 April 2024, Claimants sent Respondent their NOI, which included a request for consultation and negotiation pursuant to Article 10.15 of the Treaty and contained all information that is required to be submitted pursuant to Article 10.16.2 of the Treaty.³⁷¹
177. As Claimants have described in their NOI, RfA, and Section IV of this Memorial, Respondent's conduct culminated in a breach of the Treaty on 17 August 2022, when the Housing Ministry canceled its approval of the Project by complete surprise, causing the Project's demise.³⁷² Claimants submitted their RfA on 31 July 2025, more than six months after Respondent's breach and therefore in compliance with Article 10.16.3 of the Treaty.³⁷³ This was also less than three years after Claimants first acquired knowledge of Respondent's breach on 17 August 2022 and therefore in compliance with Article 10.18.1 of the Treaty.³⁷⁴
178. Claimants attached to their RfA the waiver required by Article 10.18.2 of the Treaty and further confirmed that they have not alleged any breach of an obligation under Section A of Chapter Ten of the Treaty in proceedings before a court or administrative tribunal of Panama.³⁷⁵
179. Accordingly, Claimants have complied with all timing, notice, and waiver requirements of the Treaty and their claims have been properly submitted to arbitration.

IV. PANAMA HAS BREACHED ITS OBLIGATIONS UNDER CHAPTER TEN OF THE TREATY

180. Panama's acts and omissions described in Section II violate its obligations under the Treaty with respect to Claimants and their investments. Panama's violations of the substantive

³⁷¹ See Request for Consultation and Negotiation and Notice of Intent to Submit Claims to Arbitration Pursuant to Articles 10.15 and 10.16 of the U.S.-Panama TPA dated 29 Apr. 2024 (C-0047) pp. 1-6.

³⁷² See Request for Consultation and Negotiation and Notice of Intent to Submit Claims to Arbitration Pursuant to Articles 10.15 and 10.16 of the U.S.-Panama TPA dated 29 Apr. 2024 (C-0047) pp. 1-6; RfA ¶¶ 42-46, 48-56.

³⁷³ See RfA ¶¶ 79-82.

³⁷⁴ See RfA ¶¶ 81-82.

³⁷⁵ See RfA ¶¶ 72-74; Waiver of Juan Carlos Argüello and Waiver of Ernesto Argüello dated 25 Jul. 2025 (C-0050).

protections provided to Claimants and their investments under Chapter Ten , Section A of the Treaty include: (A) failing to accord Claimants’ investments fair and equitable treatment under Article 10.5; (B) unlawfully expropriating Claimants’ investments under Article 10.7; and (C) breaching its obligation to accord Claimants and their investments treatment no less favorable than it accords Panamanian investors and their investments under Article 10.3.

A. PANAMA HAS BREACHED ITS OBLIGATION UNDER THE TREATY TO ACCORD CLAIMANTS’ INVESTMENTS FAIR AND EQUITABLE TREATMENT

181. Article 10.5(1) of the Treaty provides that Panama “shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment.”³⁷⁶ Panama has failed to do so, frustrating Claimants’ legitimate expectations and engaging in measures with respect to Claimants’ investments that were arbitrary and unreasonable, non-transparent and inconsistent, discriminatory, and in violation of fundamental principles of due process.³⁷⁷ Respondent’s wrongful acts, whether assessed individually or cumulatively, violate Article 10.5 of the Treaty.

1. The Treaty requires Respondent to provide covered investments fair and equitable treatment

182. Article 10.5 of the Treaty requires Respondent to accord covered investments the minimum standard of treatment (“MST”) under customary international law, including FET. Article 10.5 provides, in relevant part:

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

³⁷⁶ Treaty (CL-001) Art. 10.5(1).

³⁷⁷ In their Request for Arbitration, Claimants also advanced a claim for breach of the full protection and security obligation (“FPS”) in Article 10.5. Given the close connection between the FPS standard and the FET obligation to, *inter alia*, provide a stable legal framework, “a treatment that is not fair and equitable automatically entails an absence of full protection and security of the investment.” *Occidental Petroleum Corporation v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (5 Oct. 2012) (“*Occidental*”) (CL-084) ¶ 187. However, as a breach of the FPS standard does not provide additional reparation to Claimants for the harm caused by Respondent, in the interest of judicial economy, Claimants have decided to further particularize only their claim for breach of the fair and equitable treatment obligation under Article 10.5.

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. The obligation in paragraph 1 to provide:

(a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world³⁷⁸

183. Annex 10-A confirms that the MST “refers to all customary international law principles that protect the economic rights and interests of aliens.”³⁷⁹

184. The obligation to accord FET is broad and well established. As the tribunal observed in *Waste Management II*:

the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.³⁸⁰

185. Thus, FET protects investors from conduct by the host State that is arbitrary or unreasonable, inconsistent or non-transparent, discriminatory, or lacking in due process.

186. As the *Waste Management II* tribunal further observed, the FET obligation also protects investors’ legitimate expectations: “In applying [the minimum] standard [of treatment] it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.”³⁸¹ In the words of the *International Thunderbird v. Mexico* tribunal, an investor’s legitimate expectations arise in “a situation

³⁷⁸ Treaty (CL-001) Art. 10.5.

³⁷⁹ Treaty (CL-001) Annex 10-A.

³⁸⁰ *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 Apr. 2004) (“*Waste Management II*”) (CL-036) ¶ 98.

³⁸¹ *Waste Management II* (CL-036) ¶ 98.

where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the [State] to honour these expectations could cause the investor (or investment) to suffer damages."³⁸²

187. Tribunals and scholarly commentary have consistently recognized such substantive protections as forming part of States' FET obligations.³⁸³
188. State conduct may breach the FET standard in a variety of ways. As the tribunal noted in *Rusoro Mining v. Venezuela*, a State may violate its FET obligations "by administrative acts, adopted by the government or its agencies, targeting the investor or its investment directly," as well as by judicial or legislative acts.³⁸⁴ A State does not need to act in bad faith for its conduct to give rise to an FET breach.³⁸⁵ Rather, whether a breach has occurred

³⁸² *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award (26 Jan. 2006) ("**Thunderbird**") (CL-043) ¶ 147; see also *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Final Award (22 May 2007) (CL-151) ¶ 262 ("What seems to be essential [] is that these expectations derived from the conditions that were offered by the State to the investor at the time of the investment and that such conditions were relied upon by the investor when deciding to invest."); *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/08, Final Award (11 Sep. 2007) (CL-150) ¶ 331 ("The expectation is legitimate if the investor received an explicit promise or guaranty from the host-State, or if implicitly, the host-State made assurances or representation that the investor took into account in making the investment.").

³⁸³ See, e.g., *Telefónica, S.A. v. Republic of Colombia*, ICSID Case No. ARB/18/3, Award (12 Nov. 2024) ("**Telefónica**") (CL-146) ¶ 409 ("No obstante, como ha sido aceptado por la mayoría de los tribunales arbitrales de inversión, el TJE tiene por función impedir que el Estado asuma conductas o adopte medidas que: (i) frustren las expectativas legítimas del inversor; (ii) acusen falta de transparencia o sean contradictorias; (iii) sean irracionales o arbitrarias; o (iv) impacten la inversión de manera negativa o desproporcionada."), ¶ 407 ("El TJE es considerado por muchos el más importante de todos los estándares de protección y, además, el más amplio."); *LG&E* (CL-051) ¶ 131 ("[T]he fair and equitable standard consists of the host State's consistent and transparent behavior, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfill the justified expectations of the foreign investor."); Stephan Schill, *Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law*, 3(5) TDM 2005 (CL-042) p. 11 ("In view of the existing arbitral jurisprudence on fair and equitable treatment, seven specific normative elements can be discerned that occur in recurring fashion in the reasoning of arbitral tribunals and are presented as elements of fair and equitable treatment. These elements are (1) the requirement of stability, predictability and consistency of the legal framework, (2) the principle of legality, (3) the protection of investor confidence or legitimate expectations, (4) procedural due process and denial of justice, (5) substantive due process or protection against discrimination and arbitrariness, (6) the requirement of transparency and (7) the requirement of reasonableness and proportionality."); *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India*, PCA Case No. 2016-7, Award (21 Dec. 2020) ("**Cairn**") (CL-124) ¶ 1722.

³⁸⁴ *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 Aug. 2016) ("**Rusoro Mining**") (CL-102) ¶ 523.

³⁸⁵ See, e.g., *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12 (14 Jul. 2006) ("**Azurix**") (CL-047) ¶ 372 (citing *CMS Gas Transportation Company v. Argentine Republic*, ICSID Case No. ARB01/8 (12 May 2005) ("**CMS**") (CL-040) ¶ 284).

is an “objective requirement that does not depend on whether the Respondent has proceeded in good faith or not.”³⁸⁶ Thus, whether treatment was fair and equitable “is a matter of appreciation by the Tribunal in light of all relevant circumstances; ... [a] judgment of what is fair and equitable cannot be reached in the abstract: it must depend on the facts of the particular case.”³⁸⁷

189. A breach of the FET standard need not arise out of a single act or omission. Indeed, the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts (“**ILC Articles**”) make clear that a breach may be composite, comprising multiple acts or omissions extending over a period of time:

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.³⁸⁸

190. Accordingly, tribunals have consistently held that a breach may occur as part of “a succession or [an] accumulation of measures which, taken separately, would not [breach the FET standard] but, when viewed as a whole, do lead to that result.”³⁸⁹ It is well

³⁸⁶ *Occidental* (CL-084) ¶ 186.

³⁸⁷ *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (17 Mar. 2006) (“*Saluka*”) ¶ 285 (CL-045).

³⁸⁸ ILC Articles (CL-025) Art. 15.

³⁸⁹ *El Paso* (CL-081) ¶ 518; see also *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (20 Aug. 2007) (“*Vivendi*”) (CL-018) ¶ 7.5.31 (“It is well-established under international law that even if a single act or omission by a government may not constitute a violation of an international obligation, several acts taken together can warrant finding that such obligation has been breached.”); *Walter Bau AG (In Liquidation) v. The Kingdom of Thailand*, UNCITRAL, Award (1 Jul. 2009) (CL-067) ¶ 12.43 (“The Tribunal sees no reason why a breach of a FET obligation cannot be a series of cumulative acts and omissions. One of these may not on its own be enough, but taken together, they can constitute a breach of FET obligations.”); *OAQ Tatneft v. Ukraine*, PCA Case No. 2008-8, Award (29 Jul. 2014) (“*Tatneft*”) (CL-091) ¶ 413 (“The aggregate of the events discussed can only be considered as amounting to arbitrariness and unreasonableness as far as the treatment of the Claimant’s rights are concerned.”); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela (I)*, Award (22 Sep. 2014) (“*Gold Reserve*”) (CL-092) ¶ 566 (“[E]ven if a measure or conduct by the State, taken in isolation, does not rise to the level of a breach of the FET, such a breach may result from a series of circumstances or a combination of measures.”); *Fleming DutyFree Shop Private Limited v.*

established that a composite act “crystallizes”³⁹⁰ or “takes place at a time when the last of [a series of] acts occurs and violates (in aggregate) the applicable rule.”³⁹¹

191. While States sometimes argue that the content of the FET obligation under the MST should be fixed to a standard established a century ago, tribunals have been nearly unanimous in rejecting this approach. Indeed, tribunals have held for decades that the FET obligation under the MST is a dynamic standard that has evolved over time and is now coextensive with “autonomous” FET provisions in treaties.³⁹² As the tribunal held in *Rusoro Mining*:

Republic of Poland, UNCITRAL, Award (12 Aug. 2016) (CL-101) ¶ 536 (“[A] succession of acts – whether or not individually significant – can build up to unfair and inequitable treatment.”); *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award (27 Dec. 2016) (CL-103) ¶ 362 (“A breach of an obligation to . . . ‘to accord at all times . . . fair and equitable treatment’ could be breached by a single transformative act aimed at an investment, or by a program of more minor measures, or by a series of measures taken without plan or coordination but having the prohibited effect.”); *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award (3 Jun. 2021) (CL-125) ¶¶ 228-235; *Tecmed* (CL-034) ¶ 68; *Renée Rose Lévy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award (9 Jan. 2015) ¶ 149 (CL-093); *Agility Public Warehousing Company K.S.C. v. Republic of Iraq*, ICSID Case No. ARB/17/7, Decision on Jurisdiction (9 Jul. 2019) (CL-117) ¶¶ 174-181, 253-257.

³⁹⁰ *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Award (24 Apr. 2019) (“*Hydro*”) (CL-116) ¶ 558.

³⁹¹ *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12 (“*Pac Rim*”) (CL-147) (1 June 2012) ¶ 2.74; see also ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries (“**ILC Commentaries**”) Art. 15 cmt. (8) (CL-026) (“Paragraph 1 of article 15 defines the time at which a composite act ‘occurs’ as the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act, without it necessarily having to be the last in the series.”); *Hydro* (CL-116) ¶ 558.

³⁹² *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 Oct. 2002) (“*Mondev*”) (CL-030) ¶ 123 (“[T]he content of the minimum standard today cannot be limited to the content of customary international law as recognised in arbitral decisions in the 1920s.”); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award (9 Jan. 2003) (“*ADF*”) (CL-032) ¶ 179 (noting that “both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development”); see also *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award in Respect of Damages (31 May 2002) (CL-029) ¶¶ 57-58 (“Canada considers that the principles of customary international law were frozen in amber at the time of the Neer decision. . . . The Tribunal rejects this static conception of customary international law.”); see also *Clayton/Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 Mar. 2015) (“*Clayton/Bilcon*”) (CL-096) ¶ 438 (“At the same time, the international minimum standard exists and has evolved in the direction of increased investor protection precisely because sovereign states—the same ones constrained by the standard—have chosen to accept it.”); *Chemtura Corporation v. Government of Canada*, PCA Case No. 2008-01, Award (2 Aug. 2010) (CL-075) ¶ 121 (noting that “the evolution of customary international law, [j]or the impact of BITs on [such] evolution” cannot be overlooked in determining the scope of MST); *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award (31 Mar. 2010) (“*Merrill*”) (CL-072) ¶ 193 (observing “a shared view that customary international law has not been frozen in time and that it continues to evolve in accordance with the realities of the international community”); *Thunderbird* (CL-043) ¶ 194 (“The content of the minimum standard should not be rigidly interpreted and it should reflect evolving international customary law.”); *Gold Reserve* (CL-092) ¶ 567 (“It is the Tribunal’s view that public international law principles have evolved since the *Neer* case and that the standard today is broader than that defined in the *Neer* case on which Respondent relies.”).

the [customary international law] standard has developed and today is indistinguishable from the FET standard and grants investors an equivalent level of protection as the latter. The whole discussion of whether Art. II.2 of the BIT incorporates or fails to incorporate the CIS Standard when defining FET has become dogmatic: there is no substantive difference in the level of protection afforded by both standards.³⁹³

192. Moreover, even if the content of the FET standard under Article 10.5 were less favorable than the FET protections under other treaties, *quod non*, Panama would nonetheless be obligated to accord Claimants' investment the more favorable standard under those treaties under the most favored nation ("MFN") guarantee in Article 10.4 of the Treaty. Indeed, it is well established that the MFN guarantee allows investors to invoke more favorable substantive protections contained in treaties the host State has signed with third countries.³⁹⁴ As Professors Dolzer and Schreuer explain, "[t]he weight of authority clearly supports the view that an MFN rule grants a claimant the right to benefit from substantive guarantees contained in third treaties."³⁹⁵
193. Many of Panama's investment treaties include FET provisions that are not explicitly tied to customary international law – for example, the Panama-Italy BIT and the Panama-Uruguay BIT.³⁹⁶ As such, Panama is obligated to afford Claimants the standard of

³⁹³ *Rusoro Mining* (CL-102) ¶ 520.

³⁹⁴ See, e.g., *Clorox Spain S.L. v. Bolivarian Republic of Venezuela*, PCA Case No. 2015-30, Final Award (9 Aug. 2023) ("**Clorox**") (CL-139) ¶ 362 (noting that the MFN provision in the Spain–Venezuela BIT entitled the claimant to benefit from the autonomous FET standard contained in Venezuela's treaties with Belarus, Iran, Italy, and Vietnam, even though the basic treaty only provided FET "*in accordance with international law*."); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award (25 May 2004) ("**MTD**") (CL-037) ¶ 104 (permitting the claimant to import FET provisions from two other BITs); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction and Award (27 Aug. 2009) ("**Bayindir**") (CL-068) ¶¶ 153-160, 163-167 (permitting the claimant to rely upon an FET obligation from another BIT).

³⁹⁵ Dolzer & Schreuer (CL-085) p. 211.

³⁹⁶ Agreement Between the Government of the Republic of Italy and the Government of the Republic of Panama on the Promotion and Protection of Investments (entered into force 12 Oct. 2010) ("**Panama-Italy BIT**") (CL-078) Art. II(3) ("*Cada Parte Contratante asegurará en todo momento un tratamiento justo y equitativo a las inversiones de inversionistas de la otra Parte Contratante que hayan sido admitidas en su territorio, y no perjudicará su gestión, mantenimiento, uso, goce, usufructo, ampliación, liquidación o disposición, a través de medidas injustificadas o discriminatorias.*"); Agreement Between the Republic of Panama and the Eastern Republic of Uruguay for the Promotion and Reciprocal Protection of Investments (entered into force 14 Apr. 2002) ("**Panama-Uruguay BIT**") (CL-028) Art. 4(1) ("*Cada parte Contratante garantizará un tratamiento justo y equitativo dentro de su territorio a las inversiones de los inversionistas de la otra parte Contratante y asegurará que el ejercicio de los derechos aquí reconocidos no será obstaculizado en la práctica.*"); *Latin American*

protection offered in those BITs, to the extent the Tribunal finds it differs from that offered in the Treaty (which it should not).³⁹⁷

194. Given the clear protections of Article 10.5 of the Treaty, Claimants focus below on that provision; however, for the avoidance of doubt, all allegations made also apply in the context of FET provisions in treaties of Panama with other States that apply to Claimants and their investments by virtue of Article 10.4 of the Treaty.

2. Panama has failed to protect Claimants' legitimate expectations

195. As noted above, Article 10.5 of the Treaty requires that Panama not frustrate investors' legitimate expectations. Legitimate expectations are the "basic touchstone" of FET,³⁹⁸ prohibiting a State from "affect[ing] the basic expectations that were taken into account by the foreign investor to make the investment."³⁹⁹ By actively courting Claimants' investments and making specific promises about the treatment of Claimants' investments, Panama created legitimate expectations that Claimants relied upon when making their investments.⁴⁰⁰ Respondent then breached these expectations by, *inter alia*, annulling all Project approvals without basis or explanation, in violation of Article 10.5.

Regional Aviation Holding S. de R.L. v. Oriental Republic of Uruguay, ICSID Case No. ARB/19/16, Award (13 Feb. 2024) (CL-144) ¶ 844 (interpreting Article 4(1) of the Panama-Uruguay BIT and concluding that "[e]sta definición de la obligación de TJE no hace referencia al trato mínimo del derecho internacional consuetudinario, y no existe evidencia de que las partes, al pactar dicha norma, hayan entendido referirse al trato mínimo. Por lo tanto, el Tribunal Arbitral concluye que el Tratado se refiere a un estándar autónomo"). See also Agreement on Encouragement and Reciprocal Protection of Investments Between the Republic of Panama and the Kingdom of the Netherlands (entered into force 28 Aug. 2000) ("**Panama-Netherlands BIT**") (CL-003) Art. 3(1) ("Each Contracting Party shall ensure fair and equitable treatment of the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors."); Agreement Between the Republic of Panama and Czech Republic for the Promotion and Reciprocal Protection of Investments (1999) ("**Panama-Czech Republic BIT**") (CL-015) Art. 2(2) ("Investments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.").

³⁹⁷ See *Clorox* (CL-139) ¶ 362; *MTD* (CL-037) ¶ 104; *Bayindir* (CL-068) ¶¶ 153-160, 163-167.

³⁹⁸ *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability (10 Apr. 2013) (CL-086) ¶ 914 ("The Tribunal agrees with the general description given by Claimant in its Memorial in the following citation: 'It has become clear that the basic touchstone of fair and equitable is to be found in the legitimate expectations of the parties.'").

³⁹⁹ *Tecmed* (CL-034) ¶ 154.

⁴⁰⁰ See *supra* §§ II.A-D.

(a) The Treaty protects Claimants' legitimate expectations

196. The protection of an investor's legitimate expectations is a key element of the FET standard under Article 10.5.⁴⁰¹ As the tribunal observed in *International Thunderbird* in applying Article 1105 of the North American Free Trade Agreement ("NAFTA") – the forerunner of Article 10.5 of the Treaty, which, like Article 10.5, incorporates the MST under customary international law,⁴⁰² the FET undertaking requires host States "to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor in making the investment"⁴⁰³
197. Legitimate expectations "arise out of representations, assurances, or commitments made by the State, on which the investor reasonably relies."⁴⁰⁴ The host State may create legitimate expectations in a variety of ways: through legislation or regulation;⁴⁰⁵ formal or

⁴⁰¹ See, e.g., *El Paso* (CL-081) ¶ 348 (finding that "the legitimate expectations of the investors have generally been considered central in the definition of FET"); *Saluka* (CL-045) ¶ 302 (observing that legitimate expectations is the "dominant element" of the FET standard).

⁴⁰² Although Article 1105(1) of the NAFTA states only that "[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security," the NAFTA Free Trade Commission stated in an interpretative note issued years after the treaty's ratification that "treatment in accordance with international law" refers to the minimum standard of treatment under international law. See North American Free Trade Agreement (1992) ("NAFTA") (CL-011) Art. 1105(1); NAFTA Free Trade Commission Notes of Interpretation of Certain Chapter 11 Provisions (31 Jul. 2001) (CL-023) p. 2 ("1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. 2. 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 the customary international law minimum standard of treatment of aliens. 3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).").

⁴⁰³ *Tecmed* (CL-034) ¶ 154; see also *Eureko B.V. v. Republic of Poland*, *Ad Hoc* Arbitration under the Agreement between the United Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investment, Partial Award (19 Aug. 2005) ("*Eureko*") (CL-041) ¶ 235 (quoting *Tecmed* (CL-034) ¶ 154).

⁴⁰⁴ *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia (I)*, ICSID Case No. ARB/04/16, Award (27 Aug. 2019) ("*Glencore*") (CL-119) ¶ 1374; see also *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability (25 Aug. 2006) ("*Total*") (CL-049) ¶¶ 117-118 ("The expectation of the investor is undoubtedly 'legitimate', and hence subject to protection under the fair and equitable treatment clause, if the host State has explicitly assumed a specific legal obligation for the future, such as by contracts, concessions or stabilisation clauses on which the investor is therefore entitled to rely as a matter of law. The situation is similar when public authorities of the host country have made the private investor believe that such an obligation existed through conduct or by a declaration. Authorities may also have announced officially their intent to pursue a certain conduct in the future, on which, in turn, the investor relied in making investments or incurring costs.").

⁴⁰⁵ See, e.g., *Mathias Kruck and others v. Kingdom of Spain*, ICSID Case No. ARB/15/23, Decision on Jurisdiction, Liability and Principles of Quantum (14 Sep. 2022) ("*Mathias Kruck*") (CL-132) ¶ 189 ("[I]n circumstances where the explicitly declared purpose of legislation is to invite investors to commit capital to projects in reliance

informal communications;⁴⁰⁶ implicit or explicit assurances;⁴⁰⁷ specific or general representations;⁴⁰⁸ the general investment framework of the State;⁴⁰⁹ or other State conduct.⁴¹⁰ Whether a State has created legitimate expectations is a factual, objective

upon guarantees of stability in a regulatory regime, specific commitments can be made by provisions in general legislation.”); *Murphy Exploration & Production Company International v. Republic of Ecuador*, PCA Case No. 2012-16, Partial Final Award (6 May 2016) (“**Murphy Exploration**”) (CL-100) ¶ 248 (“An investor’s legitimate expectations are based upon an objective understanding of the legal framework within which the investor has made its investment. The legal framework on which the investor is entitled to rely consists of the host State’s international law obligations, its domestic legislation and regulations, as well as the contractual arrangements concluded between the investor and the State.”); *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Electricite de France S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award (15 Jun. 2018) (“**Antin**”) (CL-113) ¶ 538 (noting that expectations can arise from “representations made by the host State . . . with respect to certain features of a regulation aimed at encouraging investments in a specific sector.”).

⁴⁰⁶ See, e.g., *Metalclad* (CL-017) ¶¶ 88-89 (“Metalclad asserted that federal officials told it that if it submitted an application for a municipal construction permit, the Municipality would have no legal basis for denying the permit and that it would be issued as a matter of course. . . . Metalclad was entitled to rely on the representations of federal officials and to believe that it was entitled to continue its construction of the landfill. In following the advice of these officials, and filing the municipal permit application on November 15, 1994, Metalclad was merely acting prudently and in the full expectation that the permit would be granted.”).

⁴⁰⁷ See, e.g., *Ioan Micula, Viorel Micula and others v. Romania (I)*, ICSID Case No. ARB/05/20, Award (11 Dec. 2013) (“**Micula**”) (CL-087) ¶ 669 (“There must be a promise, assurance or representation attributable to a competent organ or representative of the state, which may be explicit or implicit. The crucial point is whether the state, through statements or conduct, has contributed to the creation of a reasonable expectation, in this case, a representation of regulatory stability.”); *Gold Reserve* (CL-092) ¶ 571 (“The investor’s legitimate expectations are based on undertakings and representations made explicitly or implicitly by the host State.”).

⁴⁰⁸ See, e.g., *Murphy Exploration* (CL-100) ¶ 248 (“Specific representations or undertakings made by the State to an investor also play an important role in creating legitimate expectations on the part of the investor but they are not necessary for legitimate expectations to exist. An investor may hold legitimate expectations based on an objective assessment of the legal framework absent specific representations or promises made by the State to the investor.”); *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19 (25 Nov. 2015) (CL-098) ¶ 7.78 (“While specific assurances given by the host State may reinforce the investor’s expectations, such an assurance is not always indispensable Specific assurances will simply make a difference in the assessment of the investor’s knowledge and of the reasonability and legitimacy of its expectations.”).

⁴⁰⁹ See, e.g., *Watkins Holdings S.à.r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Award (21 Jan. 2020) (“**Watkins Spain**”) (CL-120) ¶ 527 (“The Tribunal finds that the Claimants’ expectations on the continued application of the economic regime to the Project Companies were legitimate and reasonable”); *Micula* (CL-087) ¶ 677 (“After a review of all of the facts and circumstances surrounding the Claimants’ investment and Romania’s enactment of EGO 24 and related legislation . . . the Tribunal finds that, through an interplay of the purpose behind the EGO 24 regime, the legal norms, the PICs, and Romania’s conduct, Romania made a representation that created a legitimate expectation that the EGO 24 incentives would be available substantially in the same form as they were initially offered.”); *Antaris GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award (2 May 2018) (“**Antaris**”) GMBH (CL-111) ¶ 366 (accepting that “promises or representations to investors may be inferred from domestic legislation in the context of its background, including official statements”).

⁴¹⁰ See, e.g., *Novenergia II — Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, Award (15 Feb. 2018) (“**Novenergia II**”) (CL-110) ¶ 651 (“[T]he Tribunal agrees with the Claimant’s statements that an expectation that the regulatory framework will be stable can arise from, or be strengthened by, state conduct or statements.”).

inquiry: as the tribunal in *Micula v. Romania* observed, “[i]t is irrelevant whether the state in fact wished to commit itself; it is sufficient that it acted in a manner that would reasonably be understood to create such an appearance.”⁴¹¹

198. FET also encompasses investors’ legitimate expectation that host States will provide a stable and predictable legal environment,⁴¹² which is closely connected to the FET obligation on States to act transparently, non-arbitrarily, and in good faith.⁴¹³ As the tribunal observed in *Tecmed v. Mexico*:

The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations . . .⁴¹⁴

199. The intention of Panama and the United States to provide investors of the other Party to the Treaty a stable and predictable legal environment is clearly reflected in the preamble to the Treaty, which is relevant to the meaning of fair and equitable treatment under Article 31 of the Vienna Convention on the Law of Treaties (“VCLT”).⁴¹⁵ In the preamble, both parties to the Treaty pledge to “ensure a predictable commercial framework for business

⁴¹¹ *Micula* (CL-087) ¶ 669.

⁴¹² *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 Aug. 2008) (“**Duke Energy**”) (CL-040) ¶ 340 (“The stability of the legal and business environment is directly linked to the investor’s justified expectations.”); *CMS* (CL-040) ¶ 276 (“[T]he significant number of treaties, both bilateral and multilateral, that have dealt with this standard also unequivocally shows that fair and equitable treatment is inseparable from stability and predictability. Many arbitral decisions and scholarly writings point in the same direction.”); *Occidental* (CL-084) ¶ 183 (“The stability of the legal and business framework is thus an essential element of fair and equitable treatment.”); *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award (16 May 2018) (“**Masdar Solar & Wind**”) (CL-112) ¶ 484 (“[T]he FET constitutes a standard the purpose of which is to ensure that an investor may be confident that . . . the legal framework in which the investment has been made will not be subject to unreasonable or unjustified modification . . .”).

⁴¹³ See *Merrill* (CL-072) ¶ 187 (“Good faith and the prohibition of arbitrariness are no doubt an expression of such general principles and no tribunal today could be asked to ignore these basic obligations of international law. The availability of a secure legal environment has a close connection too to such principles and transparency . . .”).

⁴¹⁴ *Tecmed* (CL-034) ¶ 154.

⁴¹⁵ Vienna Convention on the Law of Treaties, entered into force on 27 January 1980 (“VCLT”) (CL-007) Art. 31(1) (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes [additional means of interpretation].”)

planning and investment,” unambiguously declaring their intent to provide investors a stable and predictable legal environment.⁴¹⁶

200. Whether a State has accorded the investor due process is also relevant to an assessment of whether the State has breached the investor’s legitimate expectations, including in the context of permit denials and revocations. As such, tribunals have held that a failure to provide for and follow a clear process when issuing or revoking permits constitutes a breach of an investor’s legitimate expectations.⁴¹⁷
201. In *Metalclad*, for example, the Tribunal found that Mexico created legitimate expectations that the investor’s landfill project would be approved when the federal government issued a permit approving the project and then assured the investor that it had received all permits necessary to construct the project.⁴¹⁸ Mexico then breached the investor’s legitimate expectations when the municipality in which the landfill was being built decided not to issue a construction permit at a town council meeting of which the investor “was given no notice, to which it received no invitation, and at which it was given no opportunity to appear.”⁴¹⁹ This decision was made “well after construction was virtually complete.”⁴²⁰ In failing to “ensure a transparent and predictable framework for Metalclad’s business planning and investment” or to provide an “orderly process and timely disposition with

⁴¹⁶ Treaty (CL-001) Preamble; *see also* *Occidental* (CL-084) ¶ 183 (relying on similar language in the preamble to the U.S.-Ecuador BIT to conclude that “[t]he stability of the legal and business framework is . . . an essential element of fair and equitable treatment.”).

⁴¹⁷ *See, e.g., Tecmed* (CL-034) ¶ 173; *Metalclad* (CL-017) ¶¶ 78-101; *Gold Reserve* (CL-092) ¶¶ 592-600 (the State’s failure finding to provide the investor “an opportunity to be heard” prior to revoking its permits constituted a breach of the FET obligation); *Occidental* (CL-084) ¶ 184 (finding that the State’s revocation of previously issued tax reimbursements and provision of a “wholly unsatisfactory and thoroughly vague answer” violated the investor’s legitimate expectations); Stephan W. Schill, *International Investment Law and Comparative Public Law* (2010) (CL-077) p. 171 (“With respect to administrative procedure, in particular concerning the granting, renunciation, or renewal of operating licences, fair and equitable treatment requires domestic administrations to grant foreign investors a fair hearing, conduct proceedings in a comprehensible way, and give reasons for their decisions.”). As explained in Section IV.A.3.a.iii below, due process is also an independent component of the FET standard.

⁴¹⁸ *Metalclad* (CL-017) ¶¶ 78-85.

⁴¹⁹ *Metalclad* (CL-017) ¶ 91.

⁴²⁰ *Metalclad* (CL-017) ¶¶ 90.

respect to the investor,” the Tribunal found that Mexico had breached the claimant’s legitimate expectations.⁴²¹

202. Similarly, in *Tecmed v. Mexico*, the tribunal found that the State breached the investor’s legitimate expectations where a State agency failed to renew the claimant’s permit because the agency neither informed the investor in advance that renewal was at risk nor afforded it any opportunity to address the concerns raised or remedy the alleged shortcomings.⁴²² The State failed to “enter into any form of dialogue” through which the investor might have learned about the State’s plans, or to establish any process by which the investor could “inform of . . . their position or provide an explanation with respect to such deficiencies, or the way to solve such deficiencies to avoid the denial of renewal and, ultimately, the deprivation of the Claimant’s investment.”⁴²³ These failures constituted a breach of the investor’s “fair expectations upon which [its] actions were based and upon the basis of which [its] investment was made”⁴²⁴
203. In *Gold Reserve v. Venezuela*, meanwhile, the Tribunal found that Venezuela created a legitimate expectation in the investor that its permits and approvals would remain valid and that it would obtain an authorization to explore the concession by “raising no objections” to the investor’s mining activities and repeatedly issuing approvals.⁴²⁵ Moreover, the investor’s “reliance and expectations were reinforced by the absence of any warnings or formal notice from Respondent regarding alleged failures to fulfill its mining obligations, even if of an essential nature.”⁴²⁶ Respondent then breached its FET obligations when it issued a revocation order without providing the investor “an opportunity to be heard.”⁴²⁷
204. Finally, in *Occidental v. Ecuador*, the Tribunal observed that Ecuador’s revocation of previous decisions granting VAT credits and reimbursements to the investor frustrated the

⁴²¹ *Tecmed* (CL-034) ¶ 99.

⁴²² *Tecmed* (CL-034) ¶ 173.

⁴²³ *Tecmed* (CL-034) ¶ 173.

⁴²⁴ *Tecmed* (CL-034) ¶ 173.

⁴²⁵ *Gold Reserve* (CL-092) ¶¶ 578-579.

⁴²⁶ *Gold Reserve* (CL-092) ¶ 579.

⁴²⁷ *Gold Reserve* (CL-092) ¶ 600.

investor's legitimate expectations.⁴²⁸ There, after adopting a new and erroneous interpretation of its tax law leading to the revocation of its previous decisions, Ecuador responded to the investor's entreaties for clarity with a "wholly unsatisfactory and thoroughly vague answer."⁴²⁹ By revoking decisions that Claimant had relied upon without a basis and failing to explain its rationale, the Tribunal observed that it was "quite clear" that Ecuador had breached the investor's legitimate expectations by failing to provide the investor a predictable and transparent legal framework.⁴³⁰

(b) Panama breached Claimants' legitimate expectations

205. Panama created legitimate expectations with respect to Claimants' ability to develop the Project under the FSV Program.⁴³¹ Claimants relied upon these expectations in making and maintaining their investments in Panama, building social housing to sell to Panamanians in response to the Panamanian Government's explicit efforts to induce foreign investors to develop the sector.⁴³² Panama then frustrated these expectations by preventing Claimants from making sales and developing the Project, without basis, explanation, or due process.⁴³³ While the Annulment itself constitutes a violation of the Treaty, Panama's prior wrongful acts also impacted Claimants' development of all or part of the Project and these acts constitute a composite breach that crystallized with the Annulment.

(i) Panama created a legitimate expectation that Claimants would be able to receive the benefits promised to developers under the FSV Program

206. Panama created legitimate expectations about Claimants' ability to develop the Project and receive State benefits established under the FSV Program by: (1) establishing and actively promoting the FSV Program; (2) offering, through senior Government officials, specific assurances to Claimants about Panama's support for the Project; and (3) repeatedly issuing

⁴²⁸ *Occidental* (CL-084) ¶¶ 180-187.

⁴²⁹ *Occidental* (CL-084) ¶ 184.

⁴³⁰ *Occidental* (CL-084) ¶¶ 185-186.

⁴³¹ *See supra* § II.A-D.

⁴³² *See supra* §§ II.B-D.

⁴³³ *See supra* § II.E.

permits and approvals of the Project over the duration of Claimants' investment, confirming the Project's viability and compliance with all laws and requirements. Tribunals have recognized each category of conduct as creating legitimate expectations among investors, and cumulatively there can be no question that Panama deliberately created such expectations in Claimants to induce them to invest in Panama.

207. *First*, Respondent made express promises to private investors in the Panamanian social housing sector by adopting a legal regime aimed to promote investment in Panama, both specifically for its low-income housing projects and more generally for U.S. investors.⁴³⁴ Respondent promised, through the FSV Program, to provide financial support to low-income homebuyers to facilitate private developers' construction and sale of homes as part of its efforts to address Panama's acute housing shortage.⁴³⁵ The FSV Program promised investors that qualifying projects would be approved and would benefit from the Program's financial support, thereby creating a legal framework upon which Claimants were told they could rely.⁴³⁶
208. Similarly, by signing and ratifying the 1982 BIT and later the Treaty, Panama committed to accord U.S. investors, including Claimants, fair and equitable treatment, full protection and security, and protection against expropriation, thereby creating a legitimate expectation that the legal framework governing their investments would not be arbitrarily disregarded.⁴³⁷
209. In addition, Panama promised to provide investors, including from the United States, with certain fundamental protections under Panamanian law. As Dr. Arjona explains, these protections included, among other things, the fundamental right to due process, which encompasses the right to be heard by the relevant authority, be advised of the accusations made against you, present evidence and contradict the accusations of the counter-party, obtain a reasoned decision based on law, and challenge that decision.⁴³⁸ They also include

⁴³⁴ See *supra* § II.A.

⁴³⁵ See *supra* § II.A.

⁴³⁶ See *supra* § II.A.; Arjona §§ III.A-D.

⁴³⁷ See Juan Carlos Arguello ¶ 13.

⁴³⁸ Arjona § III.A.

the guarantee to treat foreign nationals and Panamanian nationals equally under the law, the right to be treated in good faith by the government, and the guarantee that the State will act in a consistent manner, including by acting in accordance with its own law.⁴³⁹

210. The creation of this framework created legitimate expectations as to Panama’s treatment of Claimants’ investments. Panama’s adherence to the promises made to investors under the legal framework of the FSV Program was, in the words of the *Tecmed* tribunal, a “basic expectation[]” that Claimants took into account when making their investment.⁴⁴⁰
211. *Second*, as Claimants considered whether or not to invest in Panama, senior Panamanian officials made specific representations to Claimants about State support for the Project that induced their investment.⁴⁴¹ For example, in 2010, Vice President Varela and Housing Minister Duboy personally met with Claimants, enthusiastically and actively encouraging their investment and promoting the benefits of investing in the country, including the FSV Program.⁴⁴² The Vice President went as far as to personally arrange for a tour of potential Project sites with his father, a prominent Panamanian landowner.⁴⁴³ Similarly, the former President of Panama, Mr. Ricardo Martinelli, reached out to Ernesto and invited him to attend a private dinner because he had heard about Claimants’ project, and expressed support for their plans to develop affordable housing in the country.⁴⁴⁴
212. Panama’s State-owned banks likewise made specific commitments to support the Project. Savings Bank CEO Mario Rojas promised Claimants “whatever you can build, we can finance,” and Savings Bank agreed not only to provide mortgage financing to Project homebuyers but also to extend Claimants a multi-facility construction financing package of approximately US\$ 20 million, in addition to promoting the Project at Panama’s Housing Fair.⁴⁴⁵ Similarly, National Bank declared itself a “strategic all[y]” of the Project

⁴³⁹ Arjona §§ III.B-D.

⁴⁴⁰ *Tecmed* (CL-034) ¶ 154; *see also* *Eureko* (CL-041) ¶ 235 (quoting *Tecmed* (CL-034) ¶ 154); *see supra* § II.A-D.

⁴⁴¹ *See supra* § II.B.2.b; Ernesto Arguello ¶ 26.

⁴⁴² *See supra* § II.B.2.b; Ernesto Arguello ¶¶ 17-18; Juan Carlos Arguello ¶ 14.

⁴⁴³ *See supra* § II.B.2.b; Ernesto Arguello ¶ 18.

⁴⁴⁴ Ernesto Arguello ¶ 26.

⁴⁴⁵ *See supra* §§ II.C-D; Letter from Savings Bank to EMG dated 3 May. 2016 (C-0023) p. 1; Ernesto Arguello ¶ 32; Nuñez ¶ 16.

and agreed to provide financial support under the FSV Program and mortgage financing to Project homebuyers.⁴⁴⁶

213. These representations by Government officials and State-owned financial institutions created and reinforced Claimants' legitimate expectation that the State supported the Project and that the Project would be allowed to proceed in accordance with the FSV Program.⁴⁴⁷ Indeed, Claimants' legitimate expectations "ar[is]e out of representations, assurances, or commitments" made by the State in the form of general statements of support for the Project and specific commitments made by Government officials and through the FSV Program, just as in the investor-State cases surveyed above.⁴⁴⁸
214. *Third*, Claimants were repeatedly invited to participate in State-organized housing fairs, with the State holding out the Project as a model development under the FSV Program.⁴⁴⁹
215. *Fourth*, Panama repeatedly issued approvals confirming the Project's compliance with the FSV Program and other national and municipal laws over the duration of Claimants' investments.⁴⁵⁰ It did so through FSV Program approvals issued by the Housing Ministry

⁴⁴⁶ Letter from National Bank to MVB dated 3 Jun. 2019 (C-0030) ("*Sean nuestras primeras líneas para informarles que su Materiales Vista Bahía S. R. L. y su proyecto Luces del Pacífico ha sido aprobado por Banco Nacional de Panamá. A partir de la fecha nos convertimos en aliados estratégicos.*"); Ernesto Arguello ¶ 41.

⁴⁴⁷ See *supra* § II.B-C; Juan Carlos Arguello ¶ 15.

⁴⁴⁸ *Glencore* (CL-119) ¶ 1374.; see also *Total* (CL-049) ¶¶ 117-118; *Mathias Kruck* (CL-132) ¶ 189; *Murphy Exploration* (CL-100) ¶ 248; *Antin* (CL-113) ¶ 538; *Metalclad* ¶ 89 (CL-017); *Micula* (CL-087) ¶¶ 669, 677; *Gold Reserve* (CL-092) ¶ 571; *Watkins Spain* (CL-120) ¶ 527; *Antaris GMBH* (CL-111) ¶ 366; *Novenergia II* (CL-110) ¶ 651; *Duke Energy* (CL-059) ¶ 340; *CMS* (CL-040) ¶ 276; *Occidental* (CL-084) ¶ 183; *Masdar Solar & Wind* (CL-112) ¶ 484.

⁴⁴⁹ See Juan Carlos Arguello ¶¶ 33, 45; Ernesto Arguello ¶¶ 24, 32, 34; Email correspondence between Ernesto Arguello and Lorena Ubarte from Savings Bank dated 21 Dec. 2018 (C-0151).

⁴⁵⁰ See *supra* §§ II.B-D; see, e.g., Technical University of Panama, Report No. CEI-04-2023-2010 dated 15 Nov. 2010 (C-0010); Technical Engineering and Architecture Board of the Public Works Ministry, Resolution No. J-TIA-912-2011 dated 18 Jul. 2011 (C-0011) pp. 2-3; National Environmental Authority Environment, Technical Report No. 111 dated 19 Mar. 2012 (C-0012) p. 2; National Environmental Authority, Resolution DIEORA IAM-048-0012 dated 20 Aug. 2012 (C-0106); Letter from MIVIOT to MVB approving the Project's incorporation into the FSV Program dated 7 Sep. 2012 (C-0015); MIVIOT, List of Projects Integrated Into the FSV, dated 15 Jan. 2013 (C-0017); National System for the Civil Protection of Panama, Feasibility Certificate dated 29 Mar. 2012 (C-0013); Letter from the Department of Municipal Engineering approving the Project Setback Line dated 21 Mar. 2013 (C-0018); Letter from MIVIOT to MVB approving the FSV Program dated 23 Mar. 2015 (C-0020); List of Projects Integrated into the FSV from 2016 (C-0134); MIVIOT, List of Projects Integrated into the FSV from 2017 and 2018 (C-0136); Letter from MIVIOT to Private Investment Director dated 20 Mar. 2019 (C-0028); National Fire Security Prevention and Investigation Department, Report No. 120-19, dated 6 Nov. 2019 (C-0033); National Fire Security Prevention and Investigation Department, Report No. 128-19, dated 16 Dec. 2019 (C-0034); Letter from MIVIOT to MVB approving the Project dated 3 Aug. 2021 (C-0042); Panama, Province of

in 2012, 2013, 2015, 2016, 2018, 2019 (that time following an inspection of the Project site), and 2021,⁴⁵¹ and through national and municipal permits issued by numerous State organs, including the NEA, National System for the Civil Protection of Panama, National Fire Security Prevention and Investigation Department, and La Chorrera Municipal Department of Engineering.⁴⁵² Indeed, as in *Metalclad*, Panama, through the Housing Ministry and other national and sub-national entities, created legitimate expectations about Claimants' ability to develop the Project by repeatedly and consistently issuing approvals, certifying that it was compliant with all FSV Program requirements until the unexpected and unexplained Annulment.⁴⁵³

216. Thus, Panama's enactment of a regime designed to induce investors to invest in the social housing sector, with specific support and assurances offered by senior Government officials and consistent and repeated approvals of Claimants' Project for years, gave rise to Claimants' legitimate expectations that the Government would treat them and their investment in a consistent manner, and that they would be able to develop their Project in accordance with the FSV Program and the Government would not cancel Project approvals without due process.

Panama, Municipal Mayor's Office of the District of La Chorrera, Resolution No. 38 dated 7 May 2020 (C-0035) pp. 2-3.

⁴⁵¹ Letter from MIVIOT to MVB approving the Project's incorporation into the FSV Program dated 7 Sep. 2012 (C-0015); MIVIOT, List of Projects Integrated Into the FSV, dated 15 Jan. 2013 (C-0017); National System for the Civil Protection of Panama, Feasibility Certificate dated 29 Mar. 2012 (C-0013); Letter from the Department of Municipal Engineering approving the Project Setback Line dated 21 Mar. 2013 (C-0018); Letter from MIVIOT to MVB approving the FSV Program dated 23 Mar. 2015 (C-0020); List of Projects Integrated into the FSV from 2016 (C-0134); MIVIOT, List of Projects Integrated into the FSV from 2017 and 2018 (C-0136); Letter from MIVIOT to Private Investment Director dated 20 Mar. 2019 (C-0028); Letter from MIVIOT to MVB approving the Project, dated 3 Aug. 2021 (C-0042).

⁴⁵² See, e.g., National Environmental Authority Environment, Technical Report No. 111 dated 19 Mar. 2012 (C-0012) p. 2; National Environmental Authority, Resolution DIEORA IAM-048-0012 dated 20 Aug. 2012 (C-0106); National System for the Civil Protection of Panama, Feasibility Certificate dated 29 Mar. 2012 (C-0013); National Fire Security Prevention and Investigation Department, Report No. 120-19, dated 6 Nov. 2019 (C-0033); National Fire Security Prevention and Investigation Department, Report No. 128-19, dated 16 Dec. 2019 (C-0034).

⁴⁵³ See *supra* §§ II.B-D; *Metalclad* (CL-017) ¶¶ 78-85.

(ii) Claimants relied upon the legitimate expectations that Panama created

217. Claimants relied upon their legitimate expectations in making and maintaining their investments in Panama. Claimants chose Panama over other markets, specifically because of Panama's promised stable and investor-friendly legal framework, including the FSV Program, and the support from senior Government officials.⁴⁵⁴
218. At senior Government officials' urging, Claimants designed the Project based on the benefits offered to developers under the FSV Program.⁴⁵⁵ The Project's financing depended on low-income buyers obtaining State-backed financial support and mortgages through the Program, with proceeds from home sales being used to repay existing debt obligations and fund further construction.⁴⁵⁶ Any interference with Claimants' ability to participate in the FSV Program would undermine the entirety of Claimants' investments.⁴⁵⁷ The very structure of Claimants' investments demonstrates a clear reliance on the legitimate expectations that Panama created.
219. Claimants' investments made in reliance upon these legitimate expectations were significant: by 31 December 2022, Claimants had invested approximately US\$ 41 million in construction in progress, land, and other inventories.⁴⁵⁸ Had Panama not made express representations through the adoption and promotion of the FSV Program, statements made by senior Government officials, and the repeated issuance of Project approvals, Claimants would not have invested in Panama.⁴⁵⁹

(iii) Panama failed to protect Claimants' legitimate expectations

220. After inducing Claimants to invest tens of millions of dollars in Panama, Panama pulled the rug out from under Claimants' investment. On 17 August 2022, the Housing Ministry

⁴⁵⁴ See *supra* § II.B; Juan Carlos Arguello ¶¶ 13-14; see also Loan Agreement between Inter-Mac International, Inc. and OPIC dated 10 Dec. 2007 (C-0088) p. 48.

⁴⁵⁵ See *supra* §§ II.B; Juan Carlos Arguello ¶ 14.

⁴⁵⁶ See *supra* § II.B; Juan Carlos Arguello ¶ 28.

⁴⁵⁷ See *supra* §§ II.B, II.F.

⁴⁵⁸ AlixPartners ¶ 114.

⁴⁵⁹ Juan Carlos Arguello ¶¶ 13-15.

suddenly annulled all prior approvals of the Project in a perfunctory letter, without any explanation, failing to identify how and why the Project was purportedly not compliant with FSV Program regulations.⁴⁶⁰ Claimants had no warning that the Project's prior approvals would be annulled, and indeed had consistently received approvals from the Housing Ministry and other government entities over the course of their investments.⁴⁶¹

221. When Claimants attempted to get clarity about Respondent's decisions, it became clear that Respondent's actions had violated Panamanian administrative law, and that Respondent had failed to comply with the administrative requirements in place to protect individuals and entities in their dealings with the State.⁴⁶²
222. As Dr. Arjona explains, Respondent's actions violated Panamanian law, including by: (i) failing to comply with the legal requirement that the Government issue a formal resolution (rather than a mere letter) when annulling the Project's approvals; (ii) failing to reasonably explain the justification for the Annulment, in violation of the legal guarantee of due process, among other violations of Panamanian law; (iii) violating the principle of conserving legally valid acts by annulling all of the Project's approvals and killing the entire Project; (iv) failing to provide Claimants with a period in which to cure the Project's supposed defects, in violation of Panamanian law; (v) failing to provide for or state which remedies were available to Claimants; and (vi) violating the principles of good faith and the consistency of the State's own acts, both of which are enshrined in Panamanian law.⁴⁶³
223. Just as in *Metalclad*, where a Mexican municipality denied the investor a construction permit at a town council meeting of which the investor "was given no notice, to which it received no invitation, and at which it was given no opportunity to appear," Claimants had no notice or opportunity to demonstrate the Project's compliance with the FSV Program regulations, as the Housing Ministry annulled their approvals without prior warning and

⁴⁶⁰ Letter from MIVIOT to MVB cancelling FSV Program approval dated 17 Aug. 2022 (C-0044); *see supra* § II.E; Nuñez ¶¶ 25-26.

⁴⁶¹ *See supra* §§ II.B-E.

⁴⁶² Arjona ¶ 71.

⁴⁶³ Arjona ¶¶ 71-81.

did not allow them an opportunity to remedy the situation.⁴⁶⁴ Indeed, Claimants learned of the annulment of the Project's approvals via a note from the Housing Ministry announcing the annulment, but were excluded from the decision-making process and given no opportunity to have input on or contest the Housing Ministry's decision. Rather, Claimants themselves had to repeatedly request meetings with Housing Ministry officials after a decision was already rendered, and never received any clear explanation of the reason for the Annulment or an opportunity to remedy any supposed defects or reinstate the approvals.⁴⁶⁵

224. The facts before this Tribunal are likewise directly analogous to *Tecmed*, where the State breached the investor's legitimate expectations by failing to renew the claimant's permit because it did not inform the investor in advance that renewal was at risk and did not afford any opportunity to address the concerns raised or remedy the claimed shortcomings.⁴⁶⁶ Here, Claimants were given no notice that the Project's prior approvals would be annulled. Respondent did not "enter into any form of dialogue" through which it might have apprised Claimants of its plans, or inform them of its "position or provide an explanation with respect to such deficiencies, or the way to solve such deficiencies" to avoid destroying Claimants' investments.⁴⁶⁷
225. The lack of clarity and process afforded to Claimants directly frustrated their legitimate expectations. As in *Gold Reserve v. Venezuela*, Respondent violated Claimants' legitimate expectations by giving Claimants no "opportunity to be heard" prior to revoking their approvals.⁴⁶⁸ And like in *Occidental v. Ecuador*, where the investor pressed for an explanation following the State's revocation of previously issued tax decisions but received a "wholly unsatisfactory and thoroughly vague answer," Respondent never provided Claimants any specifics as to what FSV Program requirements they supposedly had been

⁴⁶⁴ *Metalclad* (CL-017) ¶¶ 90-91; see *supra* § II.E.

⁴⁶⁵ See *supra* § II.E; Nuñez ¶¶ 28-31.

⁴⁶⁶ *Tecmed* (CL-034) ¶ 173.

⁴⁶⁷ *Tecmed* (CL-034) ¶ 173.

⁴⁶⁸ *Gold Reserve v. Venezuela* (CL-092) ¶¶ 592-600.

found to violate.⁴⁶⁹ The most Claimants ever got in writing from Respondent in connection with the Annulment came in the form of a folded, stapled together chart suggesting that certain aspects of the Project “*no cumple[n]*” with the FSV Program, but that provided no explanation and was inconsistent with the facts and prior certifications.⁴⁷⁰ Claimants’ efforts to extract additional information in subsequent meetings were unsuccessful, and they were ultimately left with no satisfactory explanation for the Annulment of the Project.⁴⁷¹

226. Moreover, the eleventh-hour timing of Respondent’s revocation contributed to the frustration of Claimants’ legitimate expectations: the decision to annul Claimants’ approvals was made after Claimants had invested approximately US\$ 41 million into the Project, in reliance upon assurances from the Government of Panama as to the legal framework governing the FSV Program.⁴⁷² Indeed, the Housing Ministry’s decision came when the Project was already significantly advanced, with construction on more than 500 homes underway and major parts of the infrastructure of the Project substantially complete.⁴⁷³
227. Thus, whereas Claimants invested expecting Panama to act in a consistent manner and planned their investment in consideration of FSV Program regulations,⁴⁷⁴ these regulations turned out to be paper thin: Respondent undid all of Claimants’ hard work with the stroke of a pen, without bothering to say why and without regard to the regulations it had bound itself to.
228. The Annulment constitutes a self-standing violation of the Treaty with respect to the entire Project. Further, Savings Bank’s unexplained decision in 2019 to suspend mortgage financing (both for previously agreed and future mortgages) delayed Project development and forced Claimants to put the Expansion Phase on the back burner, frustrating

⁴⁶⁹ *Occidental* (CL-084) ¶¶ 184, 180-187.

⁴⁷⁰ MIVIOT, Chart handed to Mr. Nuñez by Ms. Minerva on 26 Aug. 2022 (C-0188); Nuñez ¶¶ 29-30.

⁴⁷¹ *See supra* § II.E; Nuñez ¶¶ 28-31.

⁴⁷² *AlixPartners* § 114; *see supra* §§ II.A-D.

⁴⁷³ *Metalclad* (CL-017) ¶¶ 90; Juan Carlos Arguello ¶ 60.

⁴⁷⁴ *Tecmed* (CL-034) ¶ 154.

Claimants' legitimate expectations, as Claimants were forced to spend years seeking to find a resolution (*e.g.*, meeting with bank officials, obtaining independent technical reviews, and seeking alternative sources of financing) rather than advancing the Project.⁴⁷⁵ While Claimants were able to resolve the situation in November 2021 and would have proceeded with the entire Project but for the Annulment, these prior acts and omissions delayed and negatively impacted the Project at the time of the Annulment. Accordingly, they form part of a composite breach that culminated in the Annulment.⁴⁷⁶

3. Panama's measures were arbitrary and unreasonable, inconsistent and non-transparent, lacking in due process, and discriminatory

229. The Annulment also violated Respondent's obligation to refrain from treating covered investments in an arbitrary, unreasonable, inconsistent, discriminatory, or non-transparent manner or without due process, as reflected in Article 10.5 of the Treaty. Each of these protections arises from the same underlying principle: States must treat investors and their investments fairly and equitably.⁴⁷⁷ Tribunals have widely adopted these protections as forming the core of the FET obligation, and as described below, Respondent's conduct in annulling Claimants' approvals and killing the Project manifestly violated them. The Annulment by itself constitutes a violation of these core components of the FET obligation. Further, Panama's prior wrongful conduct also impacted Claimants' development of the Project, and this conduct gives rise to a composite breach that crystallized with the Annulment.

(a) The Treaty prohibits measures that are arbitrary, unreasonable, inconsistent or non-transparent, lacking in due process, and discriminatory

230. In addition to protecting legitimate expectations, Article 10.5 serves to prohibit conduct by Panama that is inconsistent with the MST under customary international law.⁴⁷⁸ As the

⁴⁷⁵ See *supra* § II.D.

⁴⁷⁶ See *supra* § IV.A.1; see also *Pac Rim* (CL-147) ¶ 2.74; see also ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries Art. 15 cmt. (8) (CL-026); *Hydro* (CL-116) ¶ 558.

⁴⁷⁷ See, *e.g.*, *Saluka* (CL-045) ¶ 297 ("In their ordinary meaning, the terms 'fair' and 'equitable' mean 'just', 'even-handed', 'unbiased', 'legitimate'" and that a breach of this obligation implies "treatment in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective.").

⁴⁷⁸ Treaty (CL-001) Annex 10.5.

Waste Management II tribunal observed, “the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety.”⁴⁷⁹ Numerous tribunals have endorsed this definition when applying FET provisions that are analogous or identical to that of Article 10.5 of the Treaty.⁴⁸⁰

231. Although tribunals use varying terminology, it is clear that FET prohibits conduct that is (i) arbitrary or unreasonable; (ii) inconsistent or non-transparent; (iii) lacking in due process; and (iv) discriminatory, each of which is addressed in turn below. Tribunals have confirmed that a State’s conduct need not be egregious or extreme for it to give rise to an FET violation.⁴⁸¹ Nor does the State’s conduct need to be undertaken intentionally or in bad faith. As the *Siemens v. Argentina* tribunal noted, “[o]f course, such intention and bad faith can aggravate the situation but are not an essential element of the standard.”⁴⁸²

⁴⁷⁹ *Waste Management II* (CL-036) ¶ 98.

⁴⁸⁰ See, e.g., *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award (29 Jun. 2012) (CL-083) ¶ 219 (interpreting the FET provision in Article 10.5 of CAFTA-DR and noting that “*Waste Management II* persuasively integrates the accumulated analysis of prior NAFTA tribunals and reflects a balanced description of the minimum standard of treatment.”); *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/17, Award (19 Dec. 2013) (“*TECO*”) (CL-088) ¶ 454 (interpreting Article 10.5 of CAFTA-DR and observing that the FET obligation is breached “by conduct attributed to the State and harmful to the investor if the conduct is arbitrary, grossly unfair or idiosyncratic [or] is discriminatory”); *Clayton/Bilcon* (CL-096) ¶ 588 (accepting the *Waste Management II* definition of FET in interpreting NAFTA Article 1105); *Odyssey Marine Exploration, Inc. v. The United Mexican States*, ICSID Case No. UNCT/20/1, Award (17 Sep. 2024) (“*Odyssey Marine*”) (CL-145) ¶ 438 (“It should be recalled that the FET standard is understood to be [the *Waste Management II* standard].”).

⁴⁸¹ See, e.g., *Mondev* (CL-030) ¶ 116 (“To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.”); *Crystallex* (CL-099) ¶ 543 (“The Tribunal believes that the state’s conduct need not be outrageous or amount to bad faith to breach the fair and equitable treatment standard.”); *Micula* (CL-087) ¶ 524 (“[I]t is well established that the state’s conduct need not be outrageous to breach the fair and equitable treatment standard.”).

⁴⁸² *Siemens* (CL-053) ¶ 299; see also *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 Jun. 2003) (CL-035) ¶ 132 (“Neither State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice.”); *Total* (CL-049) ¶ 110 (“Awards have found a breach in cases of discrimination against foreigners and ‘improper and discreditable’ or ‘unreasonable’ conduct. This does not mean that bad faith is necessarily required in order to find a breach . . .”); *LG&E* (CL-051) ¶ 129 (“The Tribunal is not convinced that bad faith or something

(i) The FET standard protects investors and their investments against arbitrary or unreasonable conduct

232. Arbitrary or unreasonable acts or omissions violate a State's obligation to afford FET to investors and their investments.⁴⁸³ As the tribunal observed in *Lemire v. Ukraine*, the "underlying notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law."⁴⁸⁴ The fact that a government decision "reflects a U-turn from previous positions (*i.e.* is arguably inconsistent) [or] is highly consequential" are factors to be taken into consideration when assessing whether conduct is arbitrary.⁴⁸⁵ Tribunals have adopted similar definitions of unreasonableness: as the *Plama v. Bulgaria* tribunal held, unreasonable measures are "those which are not founded in reason or fact but on caprice, prejudice or personal preference."⁴⁸⁶
233. The prohibition on arbitrary or unreasonable conduct seeks to ensure that States act in furtherance of a rational policy objective.⁴⁸⁷ That is not enough, however: a State's conduct must *actually* be motivated by the reasons provided by the government decision-maker to the investor. Indeed, decisions by the State that are undertaken in a "black box," without

comparable would ever be necessary to find a violation of fair and equitable treatment."); *Crystallex* (CL-099) ¶ 543.

⁴⁸³ See, e.g., *Crystallex* (CL-099) ¶ 577 (finding that "[i]t is beyond peradventure that a conduct that is arbitrary is contrary to FET"); *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Award (3 Sep. 2001) ("**Lauder**") (CL-024) ¶ 221 (defining arbitrary with reference to Black's Law Dictionary as "depending on individual discretion; . . . founded on prejudice or preference rather than on reason or fact"); *Joseph Charles Lemire v. Ukraine (II)*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 Jan. 2010) ("**Lemire**") (CL-090) ¶ 263 ("Summing up, the underlying notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law."); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 Aug. 2008) ("**Plama**") (CL-060) ¶ 184 (describing "[u]nreasonable" measures as "those which are not founded in reason or fact but on caprice, prejudice or personal preference."); *Pawłowski AG and Thomas Pawłowski v. Czech Republic*, ICSID Case No. ARB/17/11, Award (1 Nov. 2021) ("**Pawłowski**") (CL-129) ¶ 295 ("Any unreasonable . . . measure may, by definition, also be said to be unfair and inequitable."); *Tecmed* (CL-034) ¶ 154; *Saluka* (CL-045) ¶ 307.

⁴⁸⁴ *Lemire* (CL-090) ¶ 263.

⁴⁸⁵ *Sociedad Aeroportuaria Kuntur Wasi S.A. and Corporación América S.A. v. Republic of Peru*, ICSID Case No. ARB/18/27, Decision on Jurisdiction, Liability, and Certain Aspects of Quantum (11 Aug. 2023) ("**Kuntur Wasi**") (CL-140) ¶ 697.

⁴⁸⁶ *Plama* (CL-060) ¶ 184; see also *Pawłowski* (CL-129) ¶ 295.

⁴⁸⁷ See, e.g., *Saluka* (CL-045) ¶¶ 309, 460 ("A foreign investor . . . is entitled to expect that [the State] will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (*i.e.* unrelated to some rational policy) . . . The standard of 'reasonableness' therefore requires, in this context as well, a showing that the State's conduct bears a reasonable relationship to some rational policy.").

“being supported by clear and articulable legal or policy principles or reached in accordance with due process principles,” are inherently arbitrary.⁴⁸⁸ As such, tribunals find that a State’s conduct breaches the FET standard when it takes measures for reasons other than those provided to the investor.⁴⁸⁹

234. In accordance with these principles, the *EDF v. Romania* tribunal and others have adopted Professor Schreuer’s definition of arbitrary conduct as:

- a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;
- b. a measure that is not based on legal standards but on discretion, prejudice or personal preference;
- c. a measure taken for reasons that are different from those put forward by the decision maker;
- d. a measure taken in wilful disregard of due process and proper procedure.⁴⁹⁰

(ii) The FET standard protects investors from inconsistent and non-transparent State conduct

235. FET also requires States to act consistently and transparently.⁴⁹¹ As the *Crystallex* tribunal observed, “[l]inked to the notion of transparency is the concept of consistency which

⁴⁸⁸ *Air Canada v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/17/1, Award (13 Sep. 2021) (“*Air Canada*”) (CL-126) ¶ 411.

⁴⁸⁹ See, e.g., *Tecmed* (CL-034) ¶ 164 (finding that Mexico breached the fair and equitable treatment standard where “[t]he lack of transparency in INE’s behavior and intention throughout the process ... [did] not reflect in full the reasons that led to the non-renewal of the Permit”); *Bayindir* (CL-068) ¶¶ 242-250 (summarizing the claimant’s argument that the State breached the obligation to accord fair and equitable treatment by providing a pretextual justification for the claimant’s expulsion which did not reflect the State’s actual motivations, and finding that “the allegedly unfair motives of expulsion, if proven, are capable of founding a fair and equitable treatment claim under the BIT”); *Crystallex* (CL-099) ¶ 578 (“In the Tribunal’s eyes, a measure is for instance arbitrary if it is not based on legal standards but on excess of discretion, prejudice or personal preference, and taken for reasons that are different from those put forward by the decision maker.”).

⁴⁹⁰ *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award (8 Oct. 2009) (“*EDF v. Romania*”) (CL-070) ¶ 303; see also *Lemire* (CL-090) ¶ 262; *Gramercy Funds Management LLC and Gramercy Peru Opportunities Fund v. Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award (6 Dec. 2022) (“*Gramercy*”) (CL-135) ¶¶ 828, 831.

⁴⁹¹ *Crystallex* (CL-099) ¶ 579 (observing that “[l]inked to the notion of transparency is the concept of consistency”) (internal citations omitted); see also *Saluka* (CL-045) ¶ 307 (“A foreign investor protected by the Treaty may in

requires that ‘[o]ne arm of the State cannot finally affirm what another arm denies to the detriment of the foreign investor.’”⁴⁹²

236. In this respect, a State violates its FET transparency obligation when it says one thing and does another. As the tribunal observed in *Lee-Chin v. Dominican Republic*:

[i]t is noteworthy that, in the instant case, Respondent has engaged in a series of contradictory actions which, on the one hand, sought to reassure Claimant regarding the successful operation of his investment, and, on the other hand – what is more, contemporaneously – actually intended to terminate this operation on the basis that it was anything but successful. . . . What the State cannot do – or rather what it cannot do without violating its duty to provide FET – is to certify that the investment meets all applicable requirements and, at the same time, terminate the concession while arguing otherwise.

237. In the words of the *Tecmed* tribunal, “[t]he foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor.”⁴⁹³ As such, the tribunal held that Mexico breached the FET obligation in denying a permit where the decision was “characterized by [] ambiguity and uncertainty which are prejudicial to the investor in terms of its advance assessment of the legal situation surrounding its investment and the planning of its business activity.”⁴⁹⁴
238. To this end, States have an obligation to engage transparently and consistently in rendering decisions that affect the rights of investors. In *Saluka v. Czech Republic*, for example, the tribunal found that the State had breached the FET standard as a result of its non-transparent and inconsistent conduct in its handling of the investor’s attempts to address the serious financial difficulties facing its investment, one of the largest banks in the Czech

any case properly expect that the Czech Republic implements its policies *bona fide* by conduct that is, as far as it affects the investors’ investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination.”); *Tecmed* (CL-034) ¶ 167 (stating that “the Claimant was entitled to expect that the government’s actions would be free from any ambiguity that might affect the early assessment made by the foreign investor of its real legal situation or the situation affecting its investment.”); *Micula* (CL-087) ¶¶ 532-533 (quoting approvingly ¶ 154 of the award in *Tecmed* setting out the requirement of consistency and transparency), ¶ 534 (“Whether a state acted in an ambiguous or inconsistent manner is also assessed taking into consideration that state’s past conduct which is part of the context.”).

⁴⁹² *Crystallex* (CL-099) ¶ 579 (internal citations omitted).

⁴⁹³ *Tecmed* (CL-034) ¶ 154.

⁴⁹⁴ *Tecmed* (CL-034) ¶ 172.

Republic.⁴⁹⁵ The tribunal concluded that the State breached its FET obligations when it placed the bank into forced administration and later permitted its acquisition by a State-owned bank instead of engaging with the investor's good-faith proposals to find a solution that would have allowed its investment to continue.⁴⁹⁶ Instead, the State rejected all of the investor's proposals by offering "varying reasons,"⁴⁹⁷ including some that the State's own prior representations contradicted,⁴⁹⁸ and others to which "[t]he Government failed to respond in any constructive way."⁴⁹⁹ As the Tribunal explained:

[a] host State's government is not under an obligation to accept whatever proposal an investor makes in order to overcome a critical financial situation like that faced by IPB. Neither is a host State under an obligation to give preference to an investor's proposal over similar proposals from other parties. An investor is, however, entitled to expect that the host State takes seriously a proposal that has sufficient potential to solve the problem and deal with it in an objective, transparent, unbiased and even-handed way.⁵⁰⁰

239. The transparency obligation further requires States to act clearly and unambiguously in its administrative processes.⁵⁰¹ In the words of the *Metalclad* tribunal, transparency is:

the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters. Once the authorities of the central government of any Party (whose international responsibility in such matters has been identified in the preceding section) become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that

⁴⁹⁵ *Saluka* (CL-045) ¶ 407.

⁴⁹⁶ *Saluka* (CL-045) ¶¶ 134, 407.

⁴⁹⁷ *Saluka* (CL-045) ¶ 421.

⁴⁹⁸ *Saluka* (CL-045) ¶ 424.

⁴⁹⁹ *Saluka* (CL-045) ¶ 423.

⁵⁰⁰ *Saluka* (CL-045) ¶ 363.

⁵⁰¹ Christopher Dugan & Don Wallace, et al., *INVESTOR STATE ARBITRATION* (2008) (CL-064) p. 519.

investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws.⁵⁰²

240. Bureaucratic incompetence is no excuse for a lack of consistency or transparency, and indeed the failure to engage in negotiations with an investor in competent manner may give rise to a breach of the FET standard. As the Tribunal observed in *PSEG v. Turkey* in finding an FET breach:

[s]hort of bad faith, there is in the present case first an evident negligence on the part of the administration in the handling of the negotiations with the Claimants. The fact that key points of disagreement went unanswered and were not disclosed in a timely manner, that silence was kept when there was evidence of such persisting and aggravating disagreement, that important communications were never looked at, and that there was a systematic attitude not to address the need to put an end to negotiations that were leading nowhere, are all manifestations of serious administrative negligence and inconsistency. The Claimants were indeed entitled to expect that the negotiations would be handled competently and professionally, as they were on occasion.⁵⁰³

241. To the extent any ambiguity exists in an administrative process, the State has an affirmative obligation to cure it.⁵⁰⁴ While the State has an obligation “not to prevent the exchange of relevant and available information” under the FET standard,⁵⁰⁵ this is not enough: the State is not permitted to leave an investor in the dark as to their rights and obligations under the legal framework governing the investor’s investment and must take steps to ensure the investor is properly informed.⁵⁰⁶

⁵⁰² *Metalclad* (CL-017) ¶ 76; see also *Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V (064/2008), Award (8 Jun. 2010) *Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V (064/2008), Award (8 Jun. 2010) (“*Al-Bahloul*”) (CL-074) ¶ 183.

⁵⁰³ *PSEG Global Inc. and Konya Ilgın Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award (19 Jan. 2007) (“*PSEG*”) (CL-052) ¶ 246.

⁵⁰⁴ *Metalclad* (CL-017) ¶ 76.

⁵⁰⁵ *Michael Anthony Lee-Chin v. Dominican Republic*, ICSID Case No. UNCT/18/3, Award (6 Oct. 2023) (“*Lee-Chin*”) (CL-142) ¶ 445 (concluding “that a requirement of a certain degree of transparency has reached the level of customary international law”).

⁵⁰⁶ *Metalclad* (CL-017) ¶ 76; *Lee-Chin* (CL-142) ¶ 446 (“[T]he State must act in a transparent manner and respect a certain level of transparency in the decision-making process; verifying whether this is or is not the case must be distinguished from the separate issue of the stability of the legal framework.”).

(iii) The FET standard requires States to afford investors due process

242. Failure to afford due process likewise violates FET. It is well established that due process “is a central element of the FET standard” that “applies not only to acts of the judiciary but also to acts of other branches of the government, including administrative decisions.”⁵⁰⁷ As the tribunal observed in *Glencore v. Colombia*, due process requires that a government authority “must give each party a fair opportunity to present its case and to marshal appropriate evidence, and then must assess the submissions and the evidence in a reasoned, even-handed, and unbiased decision.”⁵⁰⁸
243. In adopting this definition, the Tribunal in *Odyssey Marine v. Mexico* held that “a violation of administrative due process may occur not only when there is complete lack of transparency and candour, but also . . . when an investor is denied a permit based on reasons that are unrelated to specific existing requirements for issuing that permit.”⁵⁰⁹
244. Interpreting an FET clause in the Central America-Dominican Republic FTA that is identical to Article 10.5 of the Treaty, the tribunal in *TECO v. Guatemala* observed:

[A] lack of due process in the context of administrative proceedings such as the tariff review process constitutes a breach of the minimum standard. In assessing whether there has been such a breach of due process, it is relevant that the Guatemalan administration entirely failed to provide reasons for its decisions or disregarded its own rules.⁵¹⁰

245. Additionally, a failure to provide grounds for restoration of a revoked permit may contribute to a finding that a State has breached the FET standard. This was the case in *Rumeli v. Kazakhstan*, where the tribunal described the conduct that gave rise to an FET violation:

The Working Group issued a three and a half pages decision, summarily reasoned, and concluded that the Contract was lawfully terminated and that there were no grounds for its restoration. The Working Group founded its decision of validation not only on Kar-Tel’s non-compliance with its

⁵⁰⁷ *Odyssey Marine* (CL-145) ¶ 309.

⁵⁰⁸ *Glencore* (CL-119) ¶ 1318.

⁵⁰⁹ *Odyssey Marine* (CL-145) ¶ 310 (internal quotations and emphases omitted).

⁵¹⁰ *TECO* (CL-088) ¶ 457.

reporting obligations but also on various entirely different grounds than those forming the basis for the initial decision. The decision was made without Claimants having a real possibility to present their position. They were only verbally invited to a meeting just two days before the meeting of the Working Group⁵¹¹

(iv) The FET standard protects investors from discriminatory measures

246. The FET obligation also prohibits States from engaging in discriminatory conduct. Arbitral tribunals have held that discriminatory measures are by their very nature unfair and inequitable.⁵¹² As the *LG&E* tribunal observed, “[i]n the context of investment treaties . . . a measure is considered discriminatory if the intent of the measure is to discriminate or if the measure has a discriminatory effect.”⁵¹³ In assessing whether a measure is discriminatory, “it is sufficient that, objectively, two similar situations are treated differently.”⁵¹⁴ Differential treatment on the basis of nationality involves *per se* discrimination and accordingly tribunals have found that it violates the FET standard.⁵¹⁵

(b) Panama’s measures were arbitrary, unreasonable, discriminatory, nontransparent, and/or inconsistent

247. Panama’s conduct was arbitrary and unreasonable, inconsistent and non-transparent, lacking in due process, and discriminatory, which individually and cumulatively constitutes a breach of Article 10.5 of the Treaty.

(i) Panama’s conduct was arbitrary and unreasonable

248. Panama’s Annulment of the Project’s approvals was arbitrary and unreasonable under any formulation of those standards. Applying Professor Schreuer’s widely adopted definition of arbitrariness, the Annulment (1) did not serve any apparent legitimate purpose; (2) was not based on any articulated legal standards; (3) was taken for reasons other than those put

⁵¹¹ *Rumeli Telekom A.S. and Telsim Mobil Telekomünikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (29 Jul. 2008) (“*Rumeli*”) (CL-058) ¶ 617.

⁵¹² See, e.g., *Pawłowski* (CL-129) ¶ 295.

⁵¹³ *LG&E* (CL-051) ¶ 146.

⁵¹⁴ *Ulysseas* (CL-082) ¶ 293.

⁵¹⁵ See, e.g., *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award (8 May 2008) (CL-056) ¶ 670; *Tatneft* (CL-091) ¶¶ 408-409.

forward by the Housing Ministry; and (4) was taken in willful disregard of fundamental notions of due process.⁵¹⁶

249. *First*, the Annulment served no apparent legitimate purpose. Claimants submitted a request for an inspection on 6 August 2022, and the Housing Ministry conducted an inspection four days later.⁵¹⁷ Then, inexplicably, rather than issuing an inspection report or engaging with Claimants about the results of the inspection in any manner, the Housing Ministry sent a perfunctory letter on 17 August 2022 annulling the Project and all prior approvals issued in relation to it.⁵¹⁸ The Housing Ministry’s letter neither identified any specific provision of the FSV Program law or regulations with which the Project was purportedly non-compliant, nor explained what had changed since the Housing Ministry’s own inspection in 2019 confirmed that the Project complied with all applicable requirements.⁵¹⁹ Indeed, the Housing Ministry had repeatedly and consistently approved the Project for participation in the FSV Program – in 2012, 2013, 2015, 2016, 2019, and 2021 – even as the Government amended the contours of the Program.⁵²⁰ The Annulment thus represented a dramatic and unexplained reversal of the Housing Ministry’s own prior determinations, which is precisely the kind of “U-turn from previous positions” that is recognized as a hallmark of arbitrary conduct.⁵²¹
250. *Second*, Claimants never received a satisfactory explanation for the Annulment. According to the Housing Ministry’s note of 17 August 2022, the Project supposedly did not meet certain unstated requirements. Even had this been true, however, the Housing Ministry never explained why this justified the annulment of all prior approvals. Moreover, the only document the Housing Ministry ever provided in support for its decision was the chart handed to Claimants’ Project Manager at a meeting that Claimants requested after the Annulment and which does not appear to have been either a formal or an official

⁵¹⁶ See *EDF v. Romania* (CL-070) ¶ 303; *Lemire* (CL-090) ¶ 262; see also *Gramercy* (CL-135) ¶¶ 828, 831.

⁵¹⁷ Email from César Nuñez to Carlos Marin from MIVIOT dated 10 Aug. 2022 (C-0186); Nuñez ¶ 24.

⁵¹⁸ See *supra* § II.E; Letter from MIVIOT to MVB cancelling FSV Program approval dated 17 Aug. 2022 (C-0044).

⁵¹⁹ See *supra* § II.E; Letter from MIVIOT to MVB cancelling FSV Program approval dated 17 Aug. 2022 (C-0044); Letter from MIVIOT to Private Investment Director dated 20 Mar. 2019 (C-0028).

⁵²⁰ See *supra* §§ II.B-D.

⁵²¹ *Kuntur Wasi* (CL-140) ¶ 697.

document.⁵²² That chart merely identified six purported instances of non-compliance by stating “*no cumple*” but provided no details, evidence, or explanation, and, notably, identified areas of purported non-compliance that the Housing Ministry had itself previously certified as compliant.⁵²³ The decision to annul the Project thus epitomizes the very kind of “black box” decision-making without “being supported by clear and articulable legal or policy principles or reached in accordance with due process principles” that is contrary to FET.⁵²⁴

251. *Third*, although Panama’s stated basis for the Annulment was never clear to Claimants, behind closed doors the Government did hint at one potential motivation: in a meeting on 1 September 2022, the Vice Minister of Housing explicitly told Claimants’ Project Manager, Mr. Nuñez, that “foreigners imposing innovations” were unwelcome.⁵²⁵ This basis was manifestly different from the vague assertions of non-compliance that the Housing Ministry had offered in the chart handed to Mr. Nuñez previously. Indeed, the letter announcing the Annulment and the chart handed to Mr. Nuñez did “not reflect the full reasons that led to the non-renewal of the permit” and thus the Annulment was made arbitrarily.⁵²⁶
252. *Fourth*, the Annulment was undertaken without *any* due process. As explained above in Section IV.A.3.(b).iii, Claimants were not informed in advance that their approvals might be revoked, were not given an opportunity to appear to argue their case, were not informed of the reasons for the revocation, were not afforded the opportunity to remedy the alleged instances of non-compliance, and had no ability to appeal. In addition, the Annulment failed to comply with the requirement under Panamanian law that the State treat foreign

⁵²² MIVIOT, Chart handed to Mr. Núñez by Ms. Minerva on 26 Aug. 2022 (C-0188).

⁵²³ *See supra* § II.E.

⁵²⁴ *Air Canada* (CL-126) ¶ 411.

⁵²⁵ Nuñez ¶ 31 (“[M]e dijo explícitamente que no quería ‘extranjeros imponiendo innovaciones.’”).

⁵²⁶ *Tecmed* (CL-034) ¶ 164; *see also Bayindir* (CL-068) ¶¶ 242-250 (summarizing the claimant’s argument that the State breached the obligation to accord fair and equitable treatment by providing a pretextual justification for the claimant’s expulsion which did not reflect the State’s actual motivations, and finding that “the allegedly unfair motives of expulsion, if proven, are capable of founding a fair and equitable treatment claim under the BIT”); *Crystalex* (CL-099) ¶ 578 (“In the Tribunal’s eyes, a measure is for instance arbitrary if it is not based on legal standards but on excess of discretion, prejudice or personal preference, and taken for reasons that are different from those put forward by the decision maker.”).

nationals equally, the principle of good faith, and the guarantee that the State act consistently, including in accordance with its own laws and regulations.⁵²⁷

253. Thus, because the Annulment was “not founded in reason or fact” and represented a serious departure from earlier decisions supporting the Project; had no basis in legitimate policy; was undertaken for reasons other than those initially provided by the Housing Ministry; and was conducted without foundational elements of due process, it constitutes a breach of Panama’s obligation to refrain from engaging in arbitrary and unreasonable conduct.⁵²⁸
254. Further, Savings Bank’s decision to suspend mortgage financing in 2019 was likewise arbitrary and unreasonable, having been based on pretextual and unsubstantiated “technical issues” that were contradicted by the Housing Ministry’s own inspections, an independent expert report, and an independent appraisal firm’s assessment. While Claimants were able to resolve the situation in November 2021 and would have proceeded with the entire Project but for the subsequent Annulment, Respondent’s conduct through Savings Bank and National Bank, which also suspended financing, delayed the construction of the Pilot Phase of the Project and forced Claimants to put the Expansion Phase on hold. Accordingly, such conduct forms part of a composite breach that culminated in the Annulment.⁵²⁹

(ii) Panama’s conduct was inconsistent and non-transparent

255. Panama’s conduct was also inconsistent and non-transparent, in further breach of Article 10.5. As the *Tecmed* tribunal held, fair and equitable treatment requires the host State to act “in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor.”⁵³⁰ Panama’s treatment of Claimants’ investment fell far short of this standard.
256. As explained above, the Annulment was fundamentally inconsistent with the Housing Ministry’s own prior conduct. The Housing Ministry repeatedly approved the Project for

⁵²⁷ Arjona §§ III.A-D.

⁵²⁸ See *EDF v. Romania* (CL-070) ¶ 303; see also *Lemire* (CL-090) ¶ 262; *Gramercy* (CL-135) ¶¶ 828, 831.

⁵²⁹ See *supra* § II.D; see also *Pac Rim* (CL-147) ¶ 2.74; see also ILC Commentaries Art. 15 cmt. (8) (CL-026); *Hydro* (CL-116) ¶ 558.

⁵³⁰ *Tecmed* (CL-034) ¶ 154.

participation in the FSV Program, confirming its compliance with all applicable requirements through inspections and formal certifications. Prior to the Annulment, the Housing Ministry did not raise any concerns about the Project's compliance, warn Claimants that their approvals were at risk, or identify any deficiency that Claimants might have remedied.⁵³¹ To the contrary, the Housing Ministry conducted an inspection of the Project in 2019 and concluded that it met all FSV Program requirements.⁵³² The Annulment thus represented an abrupt and unexplained reversal of the Housing Ministry's consistent prior position.

257. As further evidence of Respondent's inconsistent conduct, on the same day that the Housing Ministry annulled all of the Project's prior approvals, a separate directorate within the Housing Ministry confirmed that the Project's land qualified as *Residencial Bono Solidario* (i.e., land qualified for the FSV financial support) without any mention of the Annulment or any indication that the Housing Ministry had concerns with the Project.⁵³³ This is precisely the kind of inconsistency that the *Crystallex* tribunal found to breach the FET standard when it held that "[o]ne arm of the State cannot finally affirm what another arm denies to the detriment of the foreign investor."⁵³⁴
258. Respondent's failure to meaningfully engage with Claimants about alleged problems with the Project before and after the Annulment constitutes a breach of its obligations to engage transparently with Claimants.⁵³⁵ The Annulment and subsequent fallout were "characterized . . . by ambiguity and uncertainty which [were] prejudicial" to Claimants, as they were unable to assess their legal obligations or the allegedly non-conforming aspects of the Project due to the extremely limited information that Respondent shared with them.⁵³⁶

⁵³¹ See *supra* §§ II.B-D.

⁵³² Letter from MIVIOT to Private Investment Director dated 20 Mar. 2019 (C-0028).

⁵³³ MIVIOT, Zoning Certification No. 196-2022 for Residencial Bono Solidario dated 17 Aug. 2022 (C-0045).

⁵³⁴ *Crystallex* (CL-099) ¶ 579 (internal citations omitted).

⁵³⁵ See *supra* § II.E.

⁵³⁶ *Tecmed* (CL-034) ¶ 172; see *supra* § II.E.

259. Panama's non-transparency is also evidenced by the Housing Ministry's failure to disclose any inspection report underlying the Annulment. Although the Housing Ministry's 17 August 2022 letter referenced an inspection of the Project, it did not attach any report or indicate that one had been prepared, and the Housing Ministry has never disclosed such a report.⁵³⁷ The only written document Claimants ever received purporting to explain the Annulment was the chart handed to Mr. Núñez with unexplained "no *cumple*" notations, which was not an inspection report or a reasoned analysis of the Project's compliance.⁵³⁸
260. Panama's lack of transparency is further evidenced by its failure to comply with its own administrative law, including the requirements to (i) issue the Annulment via a formal resolution (rather than a mere note); (ii) to provide a reasonable justification for the Annulment; (iii) to limit the Annulment to only any invalid acts (rather than simply annulling all prior approvals in their entirety), (iv) to accord Claimants a time period to cure the Project's supposed defects; and (v) failing to state which remedies Claimants could pursue, as confirmed by Dr. Arjona.⁵³⁹
261. This "complete lack of transparency and candour in an administrative process" is precisely what the *Waste Management II* tribunal identified as a hallmark of an FET breach.⁵⁴⁰ As the *Metalclad* tribunal held, transparency requires that "all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party" and there should be "no room for doubt or uncertainty on such matters."⁵⁴¹ Panama's refusal to explain the basis for the Annulment left Claimants entirely in the dark about the reasons for the destruction of their investment, a clear violation of Article 10.5 of the Treaty.

⁵³⁷ Letter from MIVIOT to MVB cancelling FSV Program approval dated 17 Aug. 2022 (C-0044).

⁵³⁸ MIVIOT, Chart handed to Mr. Núñez by Ms. Minerva on 26 Aug. 2022 (C-0188).

⁵³⁹ Arjona §§ III.A-D; see *Tecmed* (CL-034) ¶ 154; *Metalclad* (CL-017) ¶ 76; *Al-Bahloul* (CL-074) ¶ 183; *PSEG* (CL-052) ¶ 246; Christopher Dugan & Don Wallace, et al., *INVESTOR STATE ARBITRATION* (2008) (CL-064) p. 519.

⁵⁴⁰ *Waste Management II* (CL-036) ¶ 98.

⁵⁴¹ *Metalclad* (CL-017) ¶ 76.

262. In addition, the suspension of mortgage financing by Panama’s State-owned banks from 2019 until 2021 was also inconsistent and non-transparent, its reasons never having been properly articulated to Claimants and the supposed “technical issues” never substantiated and in fact contradicted by the Housing Ministry itself. Claimants were forced to put the Expansion Phase on the back burner and to focus on restoring mortgage financing, which they thought was back on track when Savings Bank re-committed to supporting the Project in November 2021, only for the Housing Ministry to deliver the ultimate blow by annulling all Project approvals in August 2022.⁵⁴² Accordingly, such conduct forms part of a composite breach that culminated in the Annulment.⁵⁴³

(iii) Panama did not afford Claimants due process

263. Panama’s conduct also violated the due process protections that form a “central element of the FET standard” under Article 10.5.⁵⁴⁴ As the *Glencore* tribunal held, to afford due process, a government authority “must give each party a fair opportunity to present its case and to marshal appropriate evidence, and then must assess the submissions and the evidence in a reasoned, even-handed, and unbiased decision.”⁵⁴⁵

264. Here, Claimants received no advance notice that the Housing Ministry was considering annulling the Project’s approvals, nor were they given any opportunity to present their case, marshal evidence of the Project’s compliance, or address any concerns that the Housing Ministry may have had before the decision was rendered.⁵⁴⁶ The Annulment was therefore rendered without giving Claimants “a real possibility to present their position,” as Claimants were excluded from the decision-making process entirely.⁵⁴⁷

⁵⁴² See *supra* § II.E; see also *Pac Rim* (CL-147) ¶ 2.74; see also ILC Commentaries Art. 15 cmt. (8) (CL-026); *Hydro* (CL-116) ¶ 558.

⁵⁴³ See *supra* § II.E; see also *Pac Rim* (CL-147) ¶ 2.74; see also ILC Commentaries Art. 15 cmt. (8) (CL-026); *Hydro* (CL-116) ¶ 558.

⁵⁴⁴ *Odyssey Marine* (CL-145) ¶ 309.

⁵⁴⁵ *Glencore* (CL-119) ¶ 1318; see also *Tecmed* (CL-034) ¶ 173 (noting that a State breaches the FET standard where it fails to “enter into any form of dialogue” through which the investor might learn about the State’s concerns or “inform of . . . their position or provide an explanation with respect to such deficiencies, or the way to solve such deficiencies”).

⁵⁴⁶ See *supra* § II.E.

⁵⁴⁷ *Rumeli* (CL-058) ¶ 617.

265. Instead, Claimants learned of the Annulment through a mechanical letter that offered no explanation and no avenue for recourse or appeal, in clear violation of Panamanian law, including the guarantee of due process.⁵⁴⁸ The Housing Ministry’s failure to issue a reasoned decision underscores Respondent’s breach of its obligation to afford Claimants due process. As the *TECO* tribunal observed in interpreting an FET clause identical to Article 10.5 of the Treaty, it is relevant that the State “entirely failed to provide reasons for its decisions or disregarded its own rules.”⁵⁴⁹ The Housing Ministry’s letter provided no such information. The chart that Claimants subsequently obtained was, as in *Rumeli*, a “summarily reasoned” document that provided no meaningful basis for the decision.⁵⁵⁰
266. Claimants were also deprived of due process after the Annulment. Claimants themselves had to petition the Housing Ministry just to obtain a meeting to discuss the Annulment, and even then, the officials they met with were unable or unwilling to explain or justify the decision.⁵⁵¹ The Housing Ministry also failed to afford Claimants any opportunity to remedy the Project’s purported shortcomings after the Annulment or appeal the decision.⁵⁵²
267. Indeed, as Dr. Arjona explains, the Annulment clearly violated Panamanian law, depriving Claimants of their due process rights, including by (i) failing to comply with the legal requirement that the Government issue a formal resolution (rather than a mere note) when annulling the Project; (ii) failing to reasonably explain the justification for the Annulment; (iii) violating the principle of conserving legally valid acts by annulling the entire Project; (iv) failing to provide Claimants with a period in which to cure the Project’s supposed defects; (v) failing to provide for or describe any recourse available to Claimants; and (vi) violating the principles of good faith and the consistency of the State’s own acts.⁵⁵³

⁵⁴⁸ Letter from MIVIOT to MVB cancelling FSV Program approval dated 17 Aug. 2022 (C-0044); Arjona § III.A.

⁵⁴⁹ *TECO* (CL-088) ¶ 457.

⁵⁵⁰ *Rumeli* (CL-058) ¶ 617.

⁵⁵¹ *See supra* § II.E; Nuñez ¶¶ 28-31.

⁵⁵² *See supra* § II.E.

⁵⁵³ Arjona ¶¶ 71-81; *see TECO* (CL-088) ¶ 457; *Rumeli* (CL-058) ¶ 617; *Glencore* (CL-119) ¶ 1318; *see also Tecmed* (CL-034) ¶ 173.

268. Thus, Respondent's conduct violated Claimants' due process rights under Article 10.5 of the Treaty.
269. In addition, the unexplained and unjustified suspension of mortgage financing by Panama's State-owned banks from 2019-2021 was also contrary to Panama's due process obligations. Indeed, Savings Bank never provided Claimants a reasoned basis for its decision and withheld the written results of its inspection, never providing Claimants a clear way to restore mortgage financing for Project homebuyers.⁵⁵⁴ While they ultimately were able to resolve the situation in November 2021 and would have proceeded with the Project but for the Annulment, Claimants spent more than a year trying to understand the basis for Savings Bank's decision. Accordingly, such conduct also forms part of a composite breach of Panama's due process obligations under Article 10.5 that crystallized with the Annulment in 2022.⁵⁵⁵

(iv) Panama's conduct was discriminatory

270. Finally, Panama acted discriminatorily in annulling all Project approvals, in breach of Article 10.5. As described in Section II.E, on 1 September 2022, just two weeks after the Annulment, Vice Minister of Housing José Batista explicitly told Claimants' Project Manager, Mr. Nuñez, that "foreigners imposing innovations" were not wanted, revealing a clear discriminatory animus.⁵⁵⁶ The Annulment also resulted in discriminatory treatment, as Claimants understand upon information and belief that Respondent permitted Panamanian developers – including developers of social housing projects in La Chorrera under the FSV Program – to complete those projects.⁵⁵⁷
271. Thus, Respondent objectively treated Claimants differently from Panamanian developers in substantially similar situations in violation of Article 10.5 of the Treaty.

⁵⁵⁴ See *supra* § II.D.

⁵⁵⁵ See *supra* § II.D; see also *Pac Rim* (CL-147) ¶ 2.74; see also ILC Commentaries Art. 15 cmt. (8) (CL-026); *Hydro* (CL-116) ¶ 558.

⁵⁵⁶ Nuñez ¶ 31 ("[M]e dijo explícitamente que no quería 'extranjeros imponiendo innovaciones.'"); *LG&E* (CL-051) ¶ 146.

⁵⁵⁷ See *supra* § IV.A.3.

B. PANAMA HAS UNLAWFULLY EXPROPRIATED CLAIMANTS' INVESTMENTS

272. It is a fundamental principle of international law that a State may not expropriate foreign investments unless certain conditions are met, including the payment of prompt, adequate, and effective compensation. The international law standard for expropriation is set forth in Article 10.7 and Annex 10-B of the Treaty, which expressly prohibit Panama from expropriating U.S. investors' investments, directly or indirectly, absent strict compliance with the conditions set forth therein. Under the Treaty, expropriation may occur either through a direct seizure or indirectly through measures that effectively deprive an investor of the use or reasonably expected economic benefits of the property. In each case, a State's failure to comply with the requirements of international law with respect to expropriation renders its measures unlawful.
273. As explained below, Panama unlawfully expropriated Claimants' investment in the Project by annulling the Project's approvals to participate in the FSV Program without a public purpose, for discriminatory reasons, without any compensation, and in direct contravention of fundamental principles of due process.

1. Article 10.7 of the Treaty regulates indirect expropriation

274. The Treaty expressly prohibits both the direct and indirect expropriation of covered investments except in accordance with specified conditions. Article 10.7.1 of the Treaty provides:

No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ('expropriation'), except:

- (a) for a public purpose;
- (b) in a non-discriminatory manner;
- (c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2 through 4; and
- (d) in accordance with due process of law and Article 10.5 [which, as detailed below, sets out the guarantee of MST, including FET].

275. With respect to the requirement of prompt, adequate, and effective compensation, Article 10.7.2 states:

Compensation shall:

- (a) be paid without delay;
- (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“the date of expropriation”);
- (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and
- (d) be fully realizable and freely transferable.⁵⁵⁸

276. Article 10.7 provides that it must be interpreted in accordance with Annex 10-B of the Treaty,⁵⁵⁹ which confirms certain shared understandings of the treaty parties as to expropriation. Annex 10-B confirms that “Article 10.7.1 is intended to reflect customary international law concerning the obligation of States with respect to expropriation.”⁵⁶⁰

277. In addition, Annex 10-B addresses the nature of expropriatory measures and what can be subject to expropriation: “An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.”⁵⁶¹ The reference to “tangible or intangible property right or property interest in an investment” reflects the well-established rule that a State can expropriate both tangible and intangible assets.⁵⁶² It is consistent with the Treaty’s broad definition of protected investments, which encompasses every asset with the characteristics

⁵⁵⁸ Treaty (CL-001) Art. 10.7.

⁵⁵⁹ Treaty (CL-001) Art. 10.7, n. 2 (“Article 10.7 shall be interpreted in accordance with Annexes 10-A and 10-B.”). As detailed above, Annex 10-A contains the treaty parties’ shared understanding of “customary international law.”

⁵⁶⁰ Treaty (CL-001) Annex 10-B ¶ 1.

⁵⁶¹ Treaty (CL-001) Annex 10-B ¶ 2.

⁵⁶² George C. Christie, *What Constitutes a Taking of Property Under International Law?*, in 38 BRIT. Y.B. INT’L L. 307 (1962) (CL-006) pp. 318-319 (“contract and many other so-called intangible rights can, under certain circumstances, be expropriated, even by indirect interference”).

of an investment (including, among other things, “licenses, authorizations, permits and similar rights conferred pursuant to domestic law,” and tangible or intangible property rights).⁵⁶³

278. Moreover, by confirming that expropriation encompasses the “interference” with such protected rights, the Treaty conforms with the well-established rule of international law that expropriation includes State interference with an investor’s use of its rights. Tribunals have recognized that interference with use is a core component of expropriation. As the Iran-U.S. Claims Tribunal observed, “[a] deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected.”⁵⁶⁴ Likewise, in *Middle East Cement v. Egypt*, the tribunal found that an expropriation occurs “[w]hen measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment.”⁵⁶⁵
279. Annex 10-B expressly confirms that Article 10.7 protects against both direct and indirect expropriation:

Article 10.7.1 addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

⁵⁶³ Treaty (CL-001) Art. 10.29 (definition of “investment”). The existence and scope of rights is generally determined by reference to domestic law, whereas the question of whether there has been a violation of an investment treaty is decided based on the treaty itself and the other applicable rules of international law. *See, e.g., El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 Oct. 2011) (“*El Paso*”) (CL-081) ¶ 135 (“The fact that the BIT and international law govern the issue of Argentina’s responsibility for violation of the treaty does not exclude that the domestic law of Argentina has a role to play too. The Tribunal agrees with the Claimant that this role is to inform the content of those commitments made by Argentina to Claimant that the latter alleges to have been violated. Thus, in order to establish which rights have been recognised by Argentina to the Claimant as a foreign investor, resort will have to be had to Argentina’s law. However, whether a modification or cancellation of such rights, even if legally valid under Argentina’s law, constitutes a violation of a protection guaranteed by the BIT is a matter to be decided solely on the basis of the BIT itself and the other applicable rules of international law.”).

⁵⁶⁴ *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, Iran-U.S. Claims Tribunal, Award (29 Jun. 1984) (“*Tippetts*”) (CL-008) p. 5.

⁵⁶⁵ *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award (12 Apr. 2002) (“*Middle East Cement*”) (CL-027) ¶ 107.

The second situation addressed by Article 10.7.1 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.⁵⁶⁶

280. Irrespective of the type of expropriation, a State's failure to meet any one of the legality requirements in Article 10.7.1 – that any expropriation must be for a public purpose, non-discriminatory, accompanied by the payment of prompt, adequate, and effective compensation, and in accordance with due process of law and Article 10.5 of the Treaty – renders an expropriation unlawful and in breach of the Treaty. The scope of these requirements is well established.

- *For a public purpose* means that there must be a genuine public interest and that the expropriatory measure must be, in fact, “for” the public purpose, *i.e.*, capable of furthering the stated purpose.⁵⁶⁷
- *Non-discrimination* means the same thing in the context of expropriation as under the FET standard,⁵⁶⁸ *i.e.*, that the State may not subject the investor to different treatment to others in similar circumstances.⁵⁶⁹
- *Payment of prompt, adequate, and effective compensation* means that the State is obligated to provide, at the moment of the taking, a sum equal to the fair market value of the investment immediately before the expropriatory measure occurred, and to do so in a freely usable and transferable currency.⁵⁷⁰

⁵⁶⁶ Treaty (CL-001) Annex 10-B ¶¶ 3-4.

⁵⁶⁷ *See, e.g., Nachingwea U.K. Limited (UK), Ntaka Nickel Holdings Limited (UK) and Nachingwea Nickel Limited (Tanzania) v. United Republic of Tanzania*, ICSID Case No. ARB/20/38, Award (14 Jul. 2023) (“*Nachingwea*”) (CL-138) ¶¶ 274-275 (“[A] tribunal must also assess whether the impugned expropriatory measure was ‘for’ the public purpose expressed. In so doing, all the relevant circumstances, including the government’s post-expropriation conduct, will have to be considered. In this regard, ‘the idea is to determine whether the measure had a reasonable nexus with the declared public purpose or in other words, was at least capable of furthering that purpose’. Further, there must also be some genuine public interest at hand in order for the ‘public purpose’ requirement to be satisfied.”). *See also ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2 Oct. 2006) (“*ADC*”) (CL-050) ¶¶ 222, 304, 429-433.

⁵⁶⁸ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (4 Apr. 2016) (“*Crystallex*”) (CL-099) ¶ 715 (“With regard to discrimination, the Tribunal similarly refers to its earlier findings on discrimination under FET which it considers relevant, *mutatis mutandis*, for its examination of the fulfilment of this particular requirement under expropriation.”).

⁵⁶⁹ *Crystallex* (CL-099) ¶ 715 (“The Tribunal recalls that to show discrimination the investor must prove that it was subjected to different treatment in similar circumstances without reasonable justification, typically on the basis of its nationality or similar characteristics.”).

⁵⁷⁰ Treaty (CL-001) Art. 10.7.

- *In accordance with due process of law and Article 10.5* means that the State's measures must follow fair, transparent, and non-arbitrary procedures, and comply with the MST standard, including FET. This involves providing "an actual and substantive legal procedure" through which the investor can "raise its claims against the depriving actions already taken or about to be taken against it"⁵⁷¹ and "basic legal mechanisms, such as reasonable advance notice . . . and an unbiased and impartial adjudicator to assess the actions in dispute."⁵⁷² The investor must also be afforded "a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard."⁵⁷³

281. Article 10.7.1 explicitly protects against indirect expropriation, *i.e.*, "where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure."⁵⁷⁴ As explained above, Annex 10-B confirms that expropriation involves "interference" with the use of protected rights and interests, which is in line with well-established law.⁵⁷⁵ In addition, Annex 10-B provides the following guidance with respect to the existence of an indirect expropriation:

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

⁵⁷¹ ADC (CL-050) ¶ 435.

⁵⁷² ADC (CL-050) ¶ 435.

⁵⁷³ ADC (CL-050) ¶ 435.

⁵⁷⁴ Treaty (CL-001) Annex 10-B ¶ 4.

⁵⁷⁵ Treaty (CL-001) Annex 10-B ¶ 4. *See also* Tippetts (CL-008) p. 5; Louis B. Sohn & R.R. Baxter, *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens*, Draft No. 12, Art. (10)(3)(a), in 55 AM. J. INT'L L. 545 (1961) (CL-005) p. 553 ("A 'taking of property' includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference."); UNCTAD, *Taking of Property* (CL-014) p. 4 ("[M]easures short of physical takings may amount to takings in that they result in the effective loss of management, use or control, or a significant depreciation of the value, of the assets of a foreign investor[]). Some particular types of such takings have been called 'creeping expropriations', while others may be termed 'regulatory takings.'").

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

(iii) the character of the government action.⁵⁷⁶

282. The first guideline in Annex 10-B requires that the Tribunal consider the “economic impact of the government action.”⁵⁷⁷ Tribunals have routinely found that indirect expropriation occurs where State measures substantially deprive the investor of the use, enjoyment, or economic benefit of its investment.⁵⁷⁸ As confirmed by the tribunal in *Metalclad v. Mexico*, expropriation includes:

covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.⁵⁷⁹

283. Similarly, in *Tecmed v. Mexico*, the tribunal observed, in the context of a revocation of an investor’s permit for a landfill, that a measure rises to the level of an indirect expropriation when “the economic value of the use, enjoyment or disposition of the assets or rights

⁵⁷⁶ Treaty (CL-001) Annex 10-B(a).

⁵⁷⁷ See Treaty (CL-001) Annex 10-B ¶ 4(a)(i).

⁵⁷⁸ See, e.g., *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award (17 Feb. 2000) (“*Santa Elena*”) (CL-016) ¶ 77 (finding that “[t]here is ample authority for the proposition that a property has been expropriated when the effect of the measures taken by the state has been to deprive the owner of the title, possession or access to the benefit and economic use of his property[.]”); *Crystallex* (CL-099) ¶ 667 (recognizing that an expropriation can impact the “enjoyment or benefit of [an] investment”); *Middle East Cement* (CL-027) ¶ 107 (“[w]hen measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as ‘creeping’ or ‘indirect’ expropriation.”); *Antoine Goetz and others v. Republic of Burundi*, ICSID Case No. ARB/95/3, Award (10 Feb. 1999) (CL-013) ¶ 124 (finding that the State’s withdrawal of a bank’s free-zone status certificate caused an indirect expropriation as it “deprived [the claimants’] investments . . . of all utility and deprived the claimant investors of the benefit which they could have expected from their investments.”); *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2 (16 Sep. 2015) (CL-097) ¶ 238 (“For an indirect expropriation to exist, it is generally accepted that the State measure must have the effect of substantially depriving the investor of the economic value of its investment.”); *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss (21 Feb. 2017) (“*Ampal-American*”) (CL-105) ¶¶ 179-180, 183.

⁵⁷⁹ *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 Aug. 2000) (“*Metalclad*”) (CL-017) ¶ 103.

affected by the administrative action or decision have been neutralized or destroyed.”⁵⁸⁰ Moreover, the tribunal continued, “[u]nder international law, the owner is also deprived of property where the use or enjoyment of benefits related thereto is exacted or interfered with to a similar extent, even where legal ownership over the assets in question is not affected, and so long as the deprivation is not temporary.”⁵⁸¹ Thus, the tribunal concluded that the measure revoking the investor’s permit constituted an indirect expropriation, as “the economic or commercial value directly or indirectly associated with [the landfill’s] operations and activities and with the assets earmarked for such operations and activities was irremediably destroyed.”⁵⁸²

284. The second guideline in Annex 10-B requires that the Tribunal consider “the extent to which the government action interferes with distinct, reasonable investment-backed expectations,”⁵⁸³ a factor often considered by tribunals when finding expropriation.⁵⁸⁴ In *Metalclad*, the investor relied on State assurances that it had all necessary permits, which were frustrated when the municipality refused to grant a construction permit and denied the investor’s “right to operate [its investment], notwithstanding the fact that the project was fully approved and endorsed by the federal government.”⁵⁸⁵ The “measures, taken together with the representations of the . . . federal government, on which the [investor] relied, and the absence of a timely, orderly or substantive basis for the denial . . . amounted to an indirect expropriation.”⁵⁸⁶

⁵⁸⁰ *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (“*Tecmed*”) (CL-034) ¶ 116.

⁵⁸¹ *Tecmed* (CL-034) ¶ 116.

⁵⁸² *Tecmed* (CL-034) ¶ 117.

⁵⁸³ Treaty (CL-001) Annex 10-B ¶ 4(a)(ii).

⁵⁸⁴ See, e.g., *Tecmed* (CL-034) ¶¶ 122, 150 (finding that the revocation of an operating permit for a landfill amounted to indirect expropriation because the investor could no longer operate the landfill profitably, thereby frustrating its legitimate expectations and substantially depriving it of the investment’s value); *Fireman’s Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award (17 Jul. 2006) (CL-048) ¶ 176(k) (“The investor’s reasonable ‘investment-backed expectations’ may be a relevant factor whether (indirect) expropriation has occurred”).

⁵⁸⁵ *Metalclad* (CL-017) ¶¶ 104, 106-107.

⁵⁸⁶ *Metalclad* (CL-017) ¶ 107.

285. The third guideline in Annex 10-B requires that the Tribunal consider the “character of the government action.”⁵⁸⁷ In assessing this factor, tribunals have considered whether the State “acted in its sovereign rather than commercial capacity,”⁵⁸⁸ and whether the measure at issue is illegal under domestic law.⁵⁸⁹
286. Finally, Annex 10-B twice states that indirect expropriation may be accomplished by “an action or series of actions,” the latter sometimes being called a “creeping expropriation.”⁵⁹⁰ This is consistent with international practice, and commentators have explained that a measure may be an expropriation if it “has the effect, often degree-by-degree, of depriving an owner of fundamental rights of property.”⁵⁹¹ A creeping expropriation, in other words, results from a succession of adverse measures that together give rise to an expropriation, even though they need not constitute an expropriation individually. In the words of the *Siemens v. Argentina* tribunal:

[b]y definition, creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation. If the process stops before it reaches that point, then expropriation would not occur. This does not necessarily mean that no adverse effects would have occurred. Obviously, each step must have an adverse effect but by itself may not be significant or considered an illegal act.⁵⁹²

⁵⁸⁷ Treaty (CL-001) Annex 10-B ¶ 4(a)(iii).

⁵⁸⁸ See *Omega Engineering LLC and Oscar Rivera v. Republic of Panama*, ICSID Case No. ARB/16/42, Award (14 Oct. 2022) (“**Omega**”) (CL-133) ¶ 389 (analyzing the Treaty); *Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru*, ICSID Case No. ARB/19/28, Award (20 Dec. 2023) (“**Latam Hydro**”) (CL-143) ¶¶ 1246-1252.

⁵⁸⁹ *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award (20 Nov. 2017) (CL-108) ¶ 415.

⁵⁹⁰ Treaty (CL-001) Annex 10-B ¶ 4(a)(i); *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 Feb. 2007) (“**Siemens**”) (CL-053) ¶ 263.

⁵⁹¹ L. Yves Fortier and Stephen L. Drymer, *Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor*, in 19(2) ICSID REV. FOREIGN INV. L. J. 293 (2004) (CL-038) p. 294. See also Rudolf Dolzer & Christoph Schreuer, *Admission and Establishment*, in PRINCIPLES OF INTERNATIONAL INVESTMENT LAW, Oxford University Press (2nd ed. 2012) (“**Dolzer & Schreuer**”) (CL-085) p. 125 (explaining that “an expropriation may occur ‘outright or in stages.’ Thus, the term ‘creeping expropriation’ describes a taking through a series of acts”) (internal citations removed).

⁵⁹² *Siemens* (CL-053) ¶ 263.

2. Respondent indirectly expropriated Claimants' investments

287. Panama breached Article 10.7 by indirectly expropriating Claimants' investment with respect to the Project without any public purpose, in a discriminatory manner, without any compensation, and without any due process. The three factors set forth in Annex 10-B of the Treaty confirm that Panama's measures constitute an indirect expropriation of Claimants' investment.⁵⁹³
288. *First*, Claimants' investment held significant economic value. As AlixPartners explains, Claimants had invested approximately US\$ 41 million in Panama as of 31 December 2021 (the date of the latest available audited financial statements before the Annulment), having built dozens of houses and started construction on hundreds more – with thousands more planned – as part of their mission to help provide high-quality housing to low-income Panamanians.⁵⁹⁴ But for Respondent's breach of its Treaty obligations, AlixPartners estimates that the fair market value of Claimants' investment was US\$ 150.4 million as of 17 August 2022, the date that Respondent annulled their prior approvals.⁵⁹⁵ Indeed, had Claimants been allowed to develop the Project in accordance with their plans – including the expansion phase, which was put on the back burner due to Savings Bank's conduct from 2019-2021 – and pursuant to the legal framework that Respondent promised them when they invested, the Project would have become a major development and source of social housing in Panama.⁵⁹⁶
289. The economic impact of Panama's wrongful acts was devastating to Claimants and their investment.⁵⁹⁷ The Annulment deprived Claimants of the ability to sell homes that had been specifically designed for low-income families to purchase as part of the FSV Program.⁵⁹⁸ As a direct consequence of the Annulment, Savings Bank and National Bank (both of which are State entities whose conduct is attributable to Panama as a matter of

⁵⁹³ See Treaty (CL-001) Annex 10-B ¶ 4(a).

⁵⁹⁴ AlixPartners ¶ 67.

⁵⁹⁵ AlixPartners ¶¶ 28, 138.

⁵⁹⁶ See *supra* §§ II.B-D.

⁵⁹⁷ See Treaty (CL-001) Annex 10-B ¶ 4(a)(i).

⁵⁹⁸ See *supra* §§ II.E-F.

international law)⁵⁹⁹ refused to provide mortgage financing for Project homebuyers, despite previously having pledged their support for the Project, with National Bank having called itself a “strategic all[y]” of the Project.⁶⁰⁰

290. Without the ability to sell homes through the FSV Program, Claimants could no longer continue to develop the Project, including completing the pilot phase and constructing the additional housing units that they had planned as part of the expansion phase.⁶⁰¹ Nor could Claimants generate the revenues necessary to service their existing debt obligations, including to Global Bank, which issued a notice of cancellation of outstanding balances just one month after the Annulment.⁶⁰² Unable to pay their lenders as a result of the Annulment, Claimants lost control over all Project assets.⁶⁰³ The Annulment thus deprived Claimants “of the use or reasonably-to-be-expected economic benefit” of their investment.⁶⁰⁴

291. *Second*, Panama’s measures interfered directly with Claimants’ distinct, reasonable investment-backed expectations.⁶⁰⁵ As set forth above, Claimants invested in Panama specifically in reliance on the FSV Program framework and the State’s repeated assurances

⁵⁹⁹ As a matter of international law, it is well established that the State may be liable for the conduct of its organs as well as of a person or entity empowered to exercise governmental authority or that acted on the instructions and under the direction and control of other parts of the State. *See* ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001) (“**ILC Articles**”) (CL-025) Arts. 4 (“1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.”), 5 (“The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”), and 8 (“The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”).

⁶⁰⁰ *See supra* § II.E.

⁶⁰¹ *See supra* §§ II.B-F.

⁶⁰² *See supra* § II.F.

⁶⁰³ *See supra* § II.H.

⁶⁰⁴ *Metalclad* (CL-017) ¶ 103; *see also Santa Elena* (CL-016) ¶ 77 (finding that “[t]here is ample authority for the proposition that a property has been expropriated when the effect of the measures taken by the state has been to deprive the owner of the title, possession or access to the benefit and economic use of his property[.]”); *Crystallex* (CL-099) ¶ 667 (recognizing that an expropriation can impact the “enjoyment or benefit of [an] investment . . .”).

⁶⁰⁵ *See* Treaty (CL-001) Annex 10-B ¶ 4(a)(ii).

of support for the Project, as well as its promises to protect investors under Panamanian law.⁶⁰⁶ The Project's financing was built around and depended on the FSV Program: Claimants planned to sell affordable homes built as part of the FSV Program and to use the proceeds from such sales to repay their existing debt obligations and finance the continuing construction costs.⁶⁰⁷ The Housing Ministry's repeated approvals of the Project – in addition to support from State-owned banks Savings Bank and National Bank – confirmed that the Project met all requirements to participate in the FSV Program and reinforced Claimants' reasonable expectation that they would be permitted to continue developing the Project under the Program.⁶⁰⁸

292. *Third*, the governmental character of the Annulment confirms that it constitutes an indirect expropriation.⁶⁰⁹ Panama acted in its sovereign capacity and in contravention of Panamanian law when it annulled the Project's FSV Program approvals in 2022 through an official letter signed by the Housing Ministry's Director of Private Investment Promotion.⁶¹⁰ The Annulment was a unilateral exercise of State authority that breached Panamanian law without any basis, explanation, or due process – precisely the kind of sovereign act that gives rise to an indirect expropriation under the Treaty.
293. *Finally*, the Annulment constitutes an indirect expropriation with respect to the entire Project, including both its pilot and expansion phases. The expansion phase – which Claimants had always planned as an integral component of their investment and which was designed to be scalable, essentially repeating the blueprint of the pilot phase on a larger scale (thereby benefitting from economies of scale) – was forced onto the back burner after Savings Bank suspended mortgage financing for the Project in 2019.⁶¹¹ Claimants were compelled to redirect their efforts away from advancing the expansion phase and toward

⁶⁰⁶ See *supra* § II.B.

⁶⁰⁷ See *supra* § II.B.

⁶⁰⁸ See *supra* §§ II.A-D.

⁶⁰⁹ See Treaty (CL-001) Annex 10-B ¶ 4(a)(iii); *Omega* (CL-133) ¶ 389; *Latam Hydro* (CL-143) ¶¶ 1246-1252.

⁶¹⁰ See *supra* § II.E; Arjona ¶¶ 71-80; Letter from MIVIOT to MVB cancelling FSV Program approval dated 17 Aug. 2022 (C-0044).

⁶¹¹ See *supra* §§ II.B-D; Juan Carlos Arguello ¶ 46; Ernesto Arguello ¶ 38.

the urgent tasks of restoring mortgage financing and completing the pilot phase.⁶¹² Although Claimants believed that the situation had been resolved when Savings Bank agreed to resume financing in November 2021, the State's interference had already deprived Claimants of years during which they would have been advancing the Project. The Annulment then fully and finally eliminated their ability to complete the Project.⁶¹³ Thus, in addition to itself constituting an indirect expropriation, the Annulment was the moment of crystallization of Panama's creeping expropriation.⁶¹⁴

294. In sum, the Annulment constituted an indirect expropriation of Claimants' investment, depriving them of 100 percent of the value of their investment by interfering with their investment-backed expectations through illegal sovereign acts.

3. Respondent's indirect expropriation of Claimants' investments in the Project is unlawful

295. Respondent's expropriation breached its obligations under Article 10.7 because it failed to meet any of the conditions for a lawful expropriation under Article 10.7.1.
296. *First*, the Annulment did not serve any public purpose. As set forth above, it was conducted without any explanation, and Panama has never identified any legitimate public purpose that it served.⁶¹⁵ To the contrary, the Annulment directly undermined Panama's stated public policies of promoting foreign investment and building low-income housing.⁶¹⁶ Moreover, Vice Minister of Housing Batista's statement that "foreigners imposing innovations" were not wanted strongly suggests that the Annulment was motivated by considerations other than any genuine public interest.⁶¹⁷ As such, the Annulment manifestly did not serve a public purpose.⁶¹⁸

⁶¹² See *supra* § II.D; Juan Carlos Arguello ¶ 46; Ernesto Arguello ¶ 38.

⁶¹³ Juan Carlos Arguello ¶¶ 65-67.

⁶¹⁴ See Treaty (CL-001) Annex 10-B ¶ 4(a)(i); *Siemens* (CL-053) ¶ 263.

⁶¹⁵ See *supra* § II.E.

⁶¹⁶ See *supra* § II.A.

⁶¹⁷ Nuñez ¶ 31 ("*[M]e dijo explícitamente que no quería 'extranjeros imponiendo innovaciones.'*").

⁶¹⁸ Treaty (CL-001) Art. 10.7.1(a); see *Nachingwea* (CL-138) ¶¶ 274-275.

297. *Second*, Panama’s measures were discriminatory.⁶¹⁹ As explained above, the Vice Minister of Housing stated that Claimants’ project was unwanted because they were foreign.⁶²⁰ This statement constitutes direct evidence that the intent of the Annulment was discriminatory.⁶²¹ In addition, Claimants understand – and intend to prove with the benefit of document production – that Respondent discriminated against them by allowing Panamanian developers building social housing projects under the FSV Program to complete those projects, including in La Chorrera. Thus, objectively, Respondent discriminated against Claimants.⁶²²
298. *Third*, Panama has failed to pay Claimants any compensation. Panama has never offered, let alone paid, any compensation to Claimants for the Annulment or for the consequent destruction of their investment. Panama’s failure to compensate Claimants renders the expropriation unlawful.⁶²³
299. *Fourth*, as explained above in Section IV.A, Respondent’s conduct in annulling the Project’s approvals was not “in accordance with due process of law and Article 10.5.”⁶²⁴
300. Thus, Panama’s indirect expropriation of Claimants’ investment in the Project was entirely unlawful, in breach of Article 10.7 of the Treaty.

C. PANAMA HAS FAILED TO ACCORD CLAIMANTS AND THEIR INVESTMENTS TREATMENT NO LESS FAVORABLE THAN IT ACCORDS, IN LIKE CIRCUMSTANCES, TO PANAMANIAN INVESTORS AND THEIR INVESTMENTS

301. Article 10.3 of the Treaty requires that Panama accord U.S. investors and their covered investments treatment no less favorable than it accords its own investors and their investments in like circumstances.⁶²⁵ This protection is fundamental: as the United Nations Conference on Trade and Development has observed, “[t]he national treatment standard is

⁶¹⁹ Treaty (CL-001) Art. 10.7.1(b); *see supra* § II.E.

⁶²⁰ Nuñez ¶ 31.

⁶²¹ *See LG&E Energy LLC, LG&E Capital LLC, and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 Oct. 2006) (“**LG&E**”) (CL-051) ¶ 146.

⁶²² *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL, Award (12 Jun. 2012) (“**Ulysseas**”) (CL-082) ¶ 293.

⁶²³ Treaty (CL-001) Art. 10.7.1(c).

⁶²⁴ Treaty (CL-001) Art. 10.7.1(c); *supra* § IV.A.

⁶²⁵ Treaty (CL-001) Art. 10.3(1)-(2).

perhaps the single most important standard of treatment embodied in international investment agreements.”⁶²⁶ Panama manifestly violated this obligation by targeting Claimants and their investment at least in part because of Claimants’ U.S. nationality, revoking the Project’s approvals while letting Panamanian developers’ projects under the FSV Program proceed to completion.⁶²⁷

1. Article 10.3 of the Treaty requires Panama to accord Claimants and their investments treatment no less favorable than it accords, in like circumstances, to Panamanian investors and their investments

302. Article 10.3 of the Treaty provides:

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.⁶²⁸

303. Thus, any treatment by Panama of U.S. investors and their investments that is less favorable than the treatment Panama provides to Panamanian investors and their investments in like circumstances constitutes a breach of Article 10.3 of the Treaty.

304. To demonstrate that a measure gives rise to a National Treatment violation, it is not necessary to demonstrate that the host State *intended* to discriminate on the basis of the

⁶²⁶ UNCTAD, Series on issues in international investment agreements: National Treatment dated May 1999 (CL-014) p. 1.

⁶²⁷ Claimants bring a claim for breach of Article 10.3 of the Treaty on the basis of Respondent’s discriminatory treatment of Claimant vis-à-vis Panamanian developers. However, as Claimants noted in their Request for Arbitration, Respondent’s conduct may also breach Article 10.4 of the Treaty on the basis of Respondent’s discriminatory treatment of Claimant vis-à-vis investors of other States. RfA ¶ 8. Claimants reserve the right to pursue a claim on the basis of Article 10.4 should information supporting such a claim surface during document production or otherwise.

⁶²⁸ Treaty (CL-001) Art. 10.3(1)-(2).

investor's nationality; it is sufficient to demonstrate the fact of differential treatment.⁶²⁹ Once such a showing has been made, the burden shifts onto the respondent to demonstrate a non-discriminatory, rational policy basis for the measure.⁶³⁰ As such, upon a showing of differential treatment, the arbitral tribunal should draw a negative inference if the respondent can present no evidence demonstrating that it did not discriminate against the investor on the basis of their nationality.⁶³¹

2. Panama has failed to accord Claimants and their investments treatment no less favorable than it accords, in like circumstances, to Panamanian investors and their investments

305. Panama has breached its obligation to accord Claimants and their investments protection under Article 10.3. As Claimants have demonstrated above, Panama's Vice Minister of Housing José Batista admitted in a private meeting with Claimants' Project Manager that Panama had annulled Claimants' approvals on the basis of their U.S. nationality.⁶³² Indeed, the Vice Minister flatly stated that Panama did not want "foreigners imposing innovations" on the country.⁶³³ This admission constitutes *prima facie* evidence of discrimination. Further, Claimants understand and intend to prove through document production that Respondent revoked Claimants' approvals while allowing other FSV Program projects owned by Panamanian developers to be built to completion, including in La Chorrera.⁶³⁴

⁶²⁹ See, e.g., *Bayindir* (CL-068) ¶ 390 (finding that "a showing of discrimination of an investor who happens to be a foreigner is sufficient" to give rise to a breach of the national treatment obligation); *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 Dec. 2002) ("*Feldman*") (CL-031) ¶¶ 181, 183 ("[R]equiring a foreign investor to prove that discrimination is based on his nationality could be an insurmountable burden to the Claimant, as that information may only be available to the government. It would be virtually impossible for any claimant to meet the burden of demonstrating that a government's motivation for discrimination is nationality rather than some other reason.") (citations omitted); *Occidental* (CL-084) ¶ 177 (concluding that the investor received less favorable treatment than treatment accorded to national companies, even if it wasn't done with the intent of discriminating against foreign-owned companies); *Cargill, Incorporated v. Republic of Poland (II)*, ICSID Case No. ARB(AF)/04/2, Award (29 Feb. 2008) (CL-055) ¶¶ 343-344 (noting that the national treatment is an "objective" standard).

⁶³⁰ See *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2 (10 Apr. 2001) (CL-022) ¶ 78.

⁶³¹ See *Feldman* (CL-031) ¶ 178 ("[I]t is entirely reasonable for the majority of this Tribunal to make an inference based on the Respondent's failure to present evidence on the discrimination issue.").

⁶³² See *supra* § II.E; Nuñez ¶ 31.

⁶³³ Nuñez ¶ 31 ("*[M]e dijo explícitamente que no quería 'extranjeros imponiendo innovaciones.'*").

⁶³⁴ See *supra* § IV.A.

306. Therefore, Panama clearly breached its obligations under Article 10.3 of the Treaty.

V. CLAIMANTS ARE ENTITLED TO FULL REPARATION IN THE FORM OF COMPENSATION IN THE AMOUNT NEEDED TO WIPE OUT THE CONSEQUENCES OF PANAMA’S TREATY BREACHES

307. Panama’s breaches of its obligations under the Treaty have caused and continue to cause Claimants serious harm, including the loss of their Project and corresponding economic opportunity. Under well-established principles of international law, Claimants are entitled to full reparation in the form of compensation for the full value of their present and future losses stemming from Panama’s conduct in breach of the Treaty.

308. As a result of Panama’s breaches of the Treaty, Claimants presently estimate their damages, including pre-award interest thereon to date, to be no less than US\$ 204.4 million.

A. PANAMA IS OBLIGATED TO MAKE FULL REPARATION TO CLAIMANTS TO WIPE OUT THE CONSEQUENCES OF ITS TREATY BREACHES

309. Panama is obligated under international law to make full reparation, including through compensation, to Claimants for its violations of the Treaty. Article 31 of the ILC Articles provides that a State that has breached its obligations under international law “is under an obligation to make full reparation for the injury caused by the internationally wrongful act.”⁶³⁵ This principle reflects the Permanent Court of International Justice’s (“**PCIJ**”) decision in the *Chorzów Factory* case that full reparation means to “wipe out all of the consequences of the illegal act, and reestablish the situation which would, in all probability, have existed if that act had not been committed.”⁶³⁶

310. The obligation to make full reparation includes payment of compensation, including for lost profits. ILC Article 34 is clear that full reparation must “take the form of restitution, compensation and satisfaction, either singly or in combination.”⁶³⁷ As the ICJ held in the

⁶³⁵ ILC Articles (CL-025) Art. 31(1).

⁶³⁶ *Chorzów Factory* (Case Concerning the Factory at Chorzów, Merits), PCIJ, Judgment (13 Sept. 1928) (“*Chorzów Factory*”) (CL-004) p. 47; *see also* *ADC* (CL-050) ¶¶ 493, 495-497 (“[T]here can be no doubt about the present vitality of the *Chorzów Factory* principle, its full current vigor having been repeatedly attested to by the International Court of Justice.”); *Gold Reserve* (CL-092) ¶¶ 678-681 (noting that “reparation should wipe-out the consequences of the breach and re-establish the situation as it is likely to have been absent the breach,” which is “well accepted in international investment law” and “represent[s] customary international law”).

⁶³⁷ ILC Articles (CL-025) Art. 34.

Gabčíkovo-Nagymaros Project case, “[i]t is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it.”⁶³⁸ ILC Article 36 states that States that have committed an internationally wrongful act “shall cover any financially assessable damage including loss of profits insofar as it is established.”⁶³⁹ As the ILC Commentaries explain, monetary damages are “intended to offset, as far as may be, the damage suffered by the injured State as a result of the breach.”⁶⁴⁰

311. Tribunals routinely confirm the applicability of these principles in the context of investment arbitration,⁶⁴¹ including in cases involving composite breaches.⁶⁴²
312. Articles 10.7(2) and (3) of the Treaty establish the framework for compensation owed to an investor when the State expropriates the investor’s investment in compliance with Article 10.7(1).⁶⁴³ These provisions do not apply to unlawful expropriations, however, nor do they apply to violations of other provisions of the Treaty, including the FET and National Treatment provisions.⁶⁴⁴ Instead, the customary international law principle of

⁶³⁸ *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ, Judgment (25 Sep. 1997) (CL-012) ¶ 152.

⁶³⁹ ILC Articles (CL-025) Art. 36.

⁶⁴⁰ ILC Commentaries (CL-026) Art. 36, cmt. (4).

⁶⁴¹ See, e.g., *Crystallex* (CL-099) ¶¶ 846-850; *Rusoro Mining* (CL-102) ¶ 640; *Siemens* (CL-053) ¶ 352; *Waguith Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (1 Jun. 2009) (“*Siag*”) (CL-066) ¶ 582; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 Jul. 2008) (CL-057) ¶ 774; *El Paso* (CL-081) ¶¶ 700-701.

⁶⁴² See, e.g., *Clorox* (CL-139) ¶¶ 722-727 (adopting the *Chorzów* standard of full reparation and valuing the claimant’s investment as of the date of the expropriation but finding also “that the principle of full reparation justifies that Claimant is entitled to compensation for damages caused prior to the date on which the expropriation was consummated due to the effect of the measures questioned in this arbitration and which progressively and cumulatively caused the expropriation. Indeed, if established, these damages were not caused by the expropriation because they predate it and would not be compensated by compensation equivalent to the value of the investment”).

⁶⁴³ Treaty (CL-001) Art. 10.7(2)-(3) (“(2) Compensation shall: (a) be paid without delay; (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“the date of expropriation”); (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and (d) be fully realizable and freely transferable. (3) If the fair market value is denominated in a freely usable currency, the compensation paid shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.”).

⁶⁴⁴ See, e.g., *Crystallex* (CL-099) ¶ 846 (“First, as a general matter, the Tribunal considers that the standard of compensation contained in Article VII(1) of the Treaty is not the appropriate standard of compensation in cases of *breaches* of that provision, i.e., when the requirements set out in Article VII(1) are not met. . . . [T]he Tribunal

“full reparation” applies when a State has breached its Treaty obligations.⁶⁴⁵ In any event, compensation for an unlawful expropriation or other violation of the Treaty can be no less than compensation for a lawful expropriation,⁶⁴⁶ as such an approach would reward unlawful conduct.⁶⁴⁷

313. Article 10.26(1) of the Treaty confirms that a tribunal may “separately or in combination” award “monetary damages and any applicable interest” and/or “restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.”⁶⁴⁸
314. The legal standard for an award of damages is that the claimant must provide a “reasonable basis” for the valuation of damages suffered.⁶⁴⁹ Although “[v]aluation is not an exact

is of the view that the Article VII(1) ‘standard’ is only concerned with expropriation, and not breaches of other BIT standards. Because the Tribunal has found breaches of FET (in addition to an expropriation), the Tribunal considers that the ‘full reparation’ principle under customary international law must be applied as a consequence of its decision on liability.”); *Burlington Resources Oil & Gas Company Ratification Trust and Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award (7 Feb. 2017) (CL-104) ¶ 160 (“In the Tribunal’s view, the appropriate standard of compensation in this case is the customary international law standard of full reparation. Article III (1) [of the applicable BIT] only describes the conditions under which an expropriation is considered lawful; it does not set out the standard of compensation for expropriations resulting from breaches of the Treaty.”).

⁶⁴⁵ *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award (22 Apr. 2009) (CL-065) ¶¶ 107, 109 (holding that the expropriation at issue there was unlawful due to Zimbabwe’s failure to pay just compensation to claimants, and noting that “in case of unlawful expropriation, international law provides for *restitutio in integrum* or, if impossible, its monetary equivalent at the time of the judgment.”); *Crystallex* (CL-099) ¶ 846; *Vivendi* (CL-018) ¶¶ 8.2.3-8.2.5; *Siemens* (CL-053) ¶ 349.

⁶⁴⁶ *See Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Trading Ltd. v. Republic of Kazakhstan*, SCC Case No. V 116/2010, Award (19 Dec. 2013) (CL-089) ¶¶ 1460-1461 (ruling where there was a breach of Article 10(1) of the Energy Charter Treaty that “damages to be awarded . . . shall not be lower than what the ECT prescribes for a lawful expropriation.”); *Vivendi* (CL-018) ¶ 8.2.5 (“It is also clear that [the *Chorzów Factory* standard of full reparation] permits, if the facts so require, a higher rate of recovery than that prescribed in Article 5(2) for *lawful* expropriations.”).

⁶⁴⁷ *See, e.g.,* W. Michael Reisman and Robert D. Sloane, *Indirect Expropriation and Its Valuation in the BIT Generation*, 74(1) BYBIL 115 (2004) (CL-039) p. 148 (“BITs and comparable multilateral investment treaties should, as a matter of both the intent of their drafters and the policies that animate them, be construed to deter, not reward, unlawful expropriation of all kinds.”); Irmgard Marboe, *Valuation of Standards and Criteria, in* CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW (2d ed., 2017) (CL-109) ¶ 3.81 (“As a matter of principle, such an effect appears to be necessary because the financial consequences of lawful and unlawful behaviour would otherwise be the same. This would not be in the interest of legal justice and run counter the general preventive function of law.”).

⁶⁴⁸ Treaty (CL-001) Art. 10.26(1)(a)-(b).

⁶⁴⁹ *Hydro* (CL-116) ¶ 845; *see also ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Award (8 Mar. 2019) (“*ConocoPhillips*”) (CL-115) ¶ 273 (“When the occurrence of certain facts is demonstrated with

science” and “the calculation of damages . . . inevitably requires a certain amount of conjecture as to how things would have evolved ‘but for’ the actual behavior of the parties,”⁶⁵⁰ the “difficulty in calculation, cannot . . . deprive an investor, who has suffered injury, from his fundamental right to see his losses redressed.”⁶⁵¹ As such, Claimants need only establish that the quantification “provide[s] a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss.”⁶⁵²

1. Compensation must include the fair market value of the investment

315. When an investor has been deprived entirely of the value of its investments as a result of a State’s wrongful conduct, reparation in the form of compensation must cover the restitution value of that investment on the basis of its fair market value (“**FMV**”). As the ILC Commentaries explain, “[c]ompensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the ‘fair market value’ of the property lost.”⁶⁵³
316. The FMV approach is consistently applied in investment arbitration to ensure full reparation.⁶⁵⁴ As the tribunal held in *Gold Reserve*:

certainty, their quantification may be assessed when the Tribunal has received information sufficient to show their reliability with reasonable certainty.”); *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Award (18 Apr. 2017) (CL-106) ¶ 121 (“Tribunals have traditionally resolved such difficulties applying a rule of reason, rather than a rule requiring absolute certainty in calculating compensation.”); *Sistem Mühendislik İnşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award (9 Sep. 2009) (CL-069) ¶ 155 (“[T]he Tribunal has sought to arrive at a rational and fair estimate, in accordance with the BIT, of the loss sustained by the Claimant rather than to engage in a search for the chimera of a sum that is a uniquely and indisputably correct determination of the value of what that Claimant lost.”).

⁶⁵⁰ *Lemire* (CL-079) ¶¶ 248-249.

⁶⁵¹ *Lemire* (CL-079) ¶ 249; *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award (20 May 1992) (CL-010) ¶ 215 (noting that “it is well-settled that the fact that damages cannot be assessed with certainty is no reason not to award damages when a loss had been incurred”); *Tecmed* (CL-034) ¶ 190 (observing that “any difficulty in determining the compensation does not prevent the assessment of such compensation where the existence of damage is certain.”).

⁶⁵² *Lemire* (CL-079) ¶ 246. See also *Crystallex* (CL-099) ¶ 869 (discussing *Lemire* and noting that “[t]he tribunal is of the view that the emphasis should be put on the phrase ‘with reasonable confidence’ which seems to strike a wholesome and pragmatic approach, prone to satisfy common law and civil law minds”).

⁶⁵³ ILC Commentaries (CL-026) Art. 36, cmt. (22).

⁶⁵⁴ See, e.g., *ADC* (CL-050) ¶ 499 (“the Tribunal concludes that it must assess the compensation to be paid by the Respondent to the Claimants in accordance with the *Chorzów Factory* standard, i.e., the Claimants should be compensated the market value of the expropriated investments”); *CMS* (CL-040) ¶ 402 (“the general concept upon which commercial valuation of assets is based is that of ‘fair market value’”).

[t]he relevant principles of international law applicable in this situation are derived from the judgment of the Permanent Court of International Justice in the *Chorzów Factory* case that reparation should wipe-out the consequences of the breach and re-establish the situation as it is likely to have been absent the breach. As the consequence of the serious breach in the present situation was to deprive the investor totally of its investment, the Tribunal considers it appropriate that the remedy that would wipe-out the consequences of the breach is to assess damages using a fair market value methodology.⁶⁵⁵

317. Similarly, the Tribunal in *Crystallex* held:

in view of its findings on FET that the Respondent's conduct caused all the investments made by Crystallex to become worthless, the Tribunal will apply the full reparation standard according to customary international law. . . . [I]t is well-accepted that reparation should reflect the 'fair market value' of the investment. Appraising the investment in accordance with the fair market value methodology indeed ensures that the consequences of the breach are wiped out and that the situation which would, in all probability, have existed if the wrongful acts had not been committed is reestablished.⁶⁵⁶

318. The FMV of an investment lost due to wrongful conduct should be assessed as of the date that ensures full reparation under customary international law, which may be the date of the breach or the date of the award.⁶⁵⁷

2. Compensation must include interest at a commercially reasonable rate, compounding from the date of breach to the date of payment of the award

319. It is well settled that interest may be necessary to ensure full reparation for a State's wrongful conduct under international law. Article 38 of the ILC Articles provides:

1. Interest on any principal sum due . . . shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

⁶⁵⁵ *Gold Reserve* (CL-092) ¶ 681.

⁶⁵⁶ *Crystallex* (CL-099) ¶¶ 846-850.

⁶⁵⁷ See, e.g., *Yukos Universal Limited (Isle of Man)*, UNCITRAL, Final Award (18 Jul. 2014) (CL-033) ¶ 1763 (“[I]n the case of an unlawful expropriation, as in the present case, Claimants are entitled to select either the date of expropriation or the date of the award as the date of valuation.”).

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.⁶⁵⁸

320. The view that interest is fundamental to full reparation has been widely embraced by investment tribunals and in academic literature,⁶⁵⁹ and is reflected in Article 10.26(1) of the Treaty, which provides that tribunals have authority to award interest.⁶⁶⁰
321. In order to ensure full reparation, interest accrues from the date at which the principal sum due as a result of the State's wrongful acts is quantified. As explained in the ILC Commentaries, "[a]s a general principle, an injured State is entitled to interest on the principal sum representing its loss, if that sum is quantified as at an earlier date than the date of the settlement of, or judgment or award concerning, the claim and to the extent that it is necessary to ensure full reparation."⁶⁶¹ Thus, consistent with ILC Article 38 and Article 10.7(3), in this case, interest must run from the valuation date (*i.e.* the date at which Claimants' loss is quantified), which, as discussed below, in this case is the date of the breach.⁶⁶² Interest continues to accrue until the State has fulfilled its obligation to make full reparation, as investment tribunals have routinely recognized.⁶⁶³

⁶⁵⁸ ILC Articles (CL-025) Art. 38.

⁶⁵⁹ See ILC Commentaries (CL-026) Art. 38, cmt. (2) ("[S]upport for a general rule favouring the award of interest as an aspect of full reparation is found in international jurisprudence."); see also *Crystallex* (CL-099) ¶ 930 ("The substantive international legal obligation to pay interest on monies due is well established. An authoritative statement of the position is to be found in Article 38(1) of the ILC Articles."); *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Award (27 Nov. 2013) (CL-061) ¶ 251 ("[I]t is undisputable that the delay incurred by the creditor . . . in receiving the payment of the amount of money due to it must be compensated through the awarding of interest at an appropriate rate. This is required . . . 'to the extent that is necessary to ensure full reparation.'"); see also Elihu Lauterpacht and Penelope Nevill, *The Different Forms of Reparation: Interest*, in THE LAW OF INTERNATIONAL RESPONSIBILITY (2010) ("**Lauterpacht & Nevill**") (CL-076) p. 614; Treaty (CL-001) Art. 10.7(3).

⁶⁶⁰ Treaty (CL-001) Art. 10.26(1) ("Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.").

⁶⁶¹ ILC Commentaries (CL-026) Art. 38, cmt. (2). This is also reflected in Article 10.7(3) of the Treaty, which states that in the event of a *legal* expropriation, "the compensation paid shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment." Treaty (CL-001) Art. 10.7(3).

⁶⁶² See *infra* § V.B.

⁶⁶³ See, e.g., *ConocoPhillips* (CL-115) ¶ 828 ("In the instant case, post-award interest represents compensation for the loss of the money awarded. Such interest will not serve to increase the amounts of dividends to which the

322. The rate of interest must be sufficient to ensure full reparation. As the ILC Commentaries explain, “[t]he interest rate and mode of calculation are to be set so as to achieve the result of providing full reparation for the injury suffered as a result of the internationally wrongful act.”⁶⁶⁴ Given that Article 10.7(3) of the Treaty provides that interest in the context of a *legal* expropriation must accrue at a “commercially reasonable rate,” it is apparent that interest with respect to damages arising from a *breach* of the Treaty must be *at least* at that level; as discussed above, a contrary approach would reward unlawfulness.⁶⁶⁵
323. Until its discontinuation, investment treaty tribunals recognized the London Interbank Offered Rate (“**LIBOR**”) plus an uplift of 4% as an appropriate interest rate for both pre- and post-award interest.⁶⁶⁶ Since its discontinuation, the Secured Overnight Financing Rate (“**SOFR**”), which represents the “broad measure of the cost of borrowing cash overnight collateralized by U.S. Treasury securities in the repurchase agreement (repo) market,”⁶⁶⁷ plus an uplift, has replaced the LIBOR as the standard interest rate applied in international investment arbitration.⁶⁶⁸

Claimants are entitled in a but-for scenario. Post-award interest serves to compensate the Claimants for the lack of revenue represented by the amounts awarded and the profit that the Claimants would most probably derive from it in the usual course of its business.”); *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Award (3 Mar. 2010) (“*Kardassopoulos*”) (CL-071) ¶ 677 (“[I]nterest is to be awarded at such a rate so as to achieve full reparation and runs from the date when the principal sum should have [been] paid until the obligation to pay is fulfilled.”); *Lemire* (CL-079) ¶ 364 (“Interest shall continue to accrue, until all amounts owed in accordance with this Award have been finally paid.”); *Rusoro Mining* (CL-102) ¶ 879(j); *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award (12 Jul. 2019) (“*Tethyan*”) (CL-118) ¶ 1809.

⁶⁶⁴ ILC Commentaries (CL-026) Art. 38, cmt. (2).

⁶⁶⁵ Treaty (CL-001) Art. 10.7(3); *see supra* § V.A.1.

⁶⁶⁶ *See, e.g., Rusoro Mining* (CL-102) ¶¶ 837-838, 904 (applying LIBOR +4% as the appropriate interest rate for both pre- and post-award interest); *JSC Tashkent Mechanical Plant, JSCB Asaka, JSCB Uzbek Industrial and Construction Bank, and National Bank for Foreign Economic Activity of the Republic of Uzbekistan v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/16/4, Award (17 May 2023) (CL-136) ¶¶ 785-787 (applying LIBOR +4% as the appropriate interest rate for both pre- and post-award interest).

⁶⁶⁷ Federal Reserve Bank of New York, Alternative Rates Committee, Transition from LIBOR (C-0180) p. 2.

⁶⁶⁸ *See, e.g., Niko Resources (Bangladesh) Ltd. v. Bangladesh Oil Gas and Mineral Corporation (Petrobangla), Bangladesh Petroleum Exploration and Production Company Limited (Bapex)*, ICSID Case No. ARB/10/18, Award (24 Sep. 2021) (CL-128) ¶¶ 254-257 (replacing a previously-decided LIBOR interest rate with SOFR because “the LIBOR will end”); *Refinería de Cartagena S.A. v. Chicago Bridge & Iron Company NV, CB&I UK Limited and CB&I Colombiana S.A.*, ICC Case No. 21747/RD/MK/PDP, Final Award (2 Jun. 2023) (CL-137) ¶ 2356 (noting that “SOFR should be accepted as the alternative to LIBOR”).

324. Investment tribunals typically award interest on a compound basis.⁶⁶⁹ Compound interest is appropriate because it reflects what the investor could reasonably have been expected to earn with its money had the State not deprived it of its investment. As the *Santa Elena v. Costa Rica* tribunal observed:

where an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then became due to him, the amount of compensation should reflect, at least in part, the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest. It is not the purpose of compound interest to attribute blame to, or to punish, anybody for the delay in the payment made to the expropriated owner; it is a mechanism to ensure that the compensation awarded the Claimant is appropriate in the circumstances.⁶⁷⁰

325. The tribunal in *Continental Casualty v. Argentina* likewise noted that “[t]he time value of money in free market economies is measured in compound interest; simple interest cannot be relied upon to produce full reparation for a claimant’s loss occasioned by delay in payment; and under many national laws recently enacted, an arbitration tribunal is now

⁶⁶⁹ See Lauterpacht & Nevill (CL-076) p. 620 n. 29 (listing 19 case examples in which compound interest was awarded and observing that “the balance of investment treaty tribunal practice has shifted towards awarding compound interest where requested by the claimant”); *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Award (5 Nov. 2021) (CL-130) ¶ 592 (“The Tribunal . . . considers compound interest to be consistent with economic reality and therefore necessary in the sense of Article 38(1) of the ILC Articles in order to ensure full reparation of an investor for breach of a treaty that aims at protecting his or her investment.”); *Siag* (CL-066) ¶ 595 (“[T]he Tribunal is certain that in recent times compound interest has indeed been awarded more often than not, and is becoming widely accepted as an appropriate and necessary component of compensation for expropriation.”); *Middle East Cement* (CL-027) ¶ 174 (“[I]nternational jurisprudence and literature have recently, after detailed consideration, concluded that interest is an integral part of the compensation due after the award and that compound (as opposed to simple) interest is at present deemed appropriate as the standard of international law in such expropriation cases.”); *Azurix* (CL-047) ¶ 440 (“The Tribunal considers that compound interest reflects the reality of financial transactions, and best approximates the value lost by an investor.”).

⁶⁷⁰ *Santa Elena* (CL-016) ¶ 104; see also *AES Solar and others (PV Investors) v. Kingdom of Spain*, PCA Case No. 2012-14, Award (28 Feb. 2020) (CL-121) ¶ 854 (“In the Tribunal’s view, the interest should be compounded in line with generally accepted financial practice. If the Claimants had not been deprived of the funds to which they were entitled, they could have invested them and would have earned compound interest. Similarly, if as a result of the deprivation, they had to borrow money, they would also have paid compound interest. Case law confirms this choice.”); *MTD* (CL-037) ¶ 251 (“The Tribunal considers that compound interest is more in accordance with the reality of financial transactions and a closer approximation to the actual value lost by an investor.”); *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award (8 Dec. 2000) (“*Wena Hotels*”) (CL-020) ¶ 129 (“[A]n award of compound (as opposed to simple) interest is generally appropriate in most modern, commercial arbitrations.”);

expressly empowered to award compound interest.”⁶⁷¹ Indeed, as the tribunal held in *Wena Hotels*, “it is neither logical nor equitable to award the claimant only simple interest.”⁶⁷²

326. AlixPartners confirms this approach, observing that “the use of compounding interest is economically appropriate and consistent with conventions recommended by the Alternative Reference Rates Committee and published by the Federal Reserve Bank of New York.”⁶⁷³
327. Pre- and post-award interest compounded on a semi-annual basis is necessary to ensure full reparation.⁶⁷⁴ Indeed, “more modern decisions” have adopted semi-annual compound interest as the standard,⁶⁷⁵ finding that it is “frequently applied by international investment tribunals”⁶⁷⁶ and applying it because it reflects the “business and economic reality” investors face and the “actual damages suffered.”⁶⁷⁷

B. CLAIMANTS’ CLAIM FOR COMPENSATION FOR THE HARM TO THEIR INVESTMENTS

328. Claimants are entitled to monetary damages and interest thereon pursuant to Article 10.26(1)(a) of the Treaty and international law for the harm to their investments caused by Panama’s Treaty breaches. As described below, Claimants present reliable evidence of the measure of their losses based on the FMV of their investment as of 17

⁶⁷¹ *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award (5 Sep. 2008) (CL-062) ¶ 309;

⁶⁷² *Wena Hotels* (CL-020) ¶ 129.

⁶⁷³ AlixPartners ¶ 146.

⁶⁷⁴ See, e.g., *Kardassopoulos* (CL-071) ¶¶ 667-668, 677-678 (awarding pre- and post-award interest at a rate of LIBOR + 4%, compounded semi-annually beginning on the date of breach); see also *PSEG* (CL-052) ¶ 348.

⁶⁷⁵ *Lemire* (CL-079) ¶ 360.

⁶⁷⁶ *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan (II)*, ICSID Case No. ARB/13/13, Award (27 Sep. 2017) (CL-107) ¶ 1226 (noting that “today compound interest is readily awarded by international investment tribunals in an effort to provide full compensation to the claimant and place the latter in the position it would have been in had the wrongful act not taken place” and awarding semi-annual compounding interest because “the use of a semiannual compounding period is frequently applied by international investment tribunals and appropriate in the circumstances of the present case to provide full reparation”).

⁶⁷⁷ *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award (2 Mar. 2015) (CL-094) ¶ 519; see also *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award (20 Sep. 2021) (CL-127) ¶ 885 (finding that “unpaid interest shall be capitalized semi-annually, from the *dies a quo*”).

August 2022, the date on which Respondent annulled the Project's approval for the FSV Program ("**Date of Breach**" or "**Valuation Date**").

329. The quantum of Claimants' monetary damages and pre-award interest thereon to date has been calculated by Isabel Kunsman, Partner and Managing Director of AlixPartners, whose International Arbitration practice she co-leads. Ms. Kunsman is an expert in valuation and financial analysis. She earned a Master of Business Administration with the highest distinction from Georgetown University's McDonough School of Business and a Bachelor of Science in Economics and Finance degree from Georgetown University's Walsh School of Foreign Service. She has conducted over 100 substantive valuations and financial analyses involving contentious and non-contentious matters around the world.⁶⁷⁸
330. AlixPartners calculates Claimants' damages based on the FMV of Claimants' investment as of the Date of Breach. As AlixPartners notes, "FMV is perhaps the value standard most frequently referred to in bilateral and multilateral investment treaties."⁶⁷⁹ An FMV valuation seeks to determine the price at which a hypothetical buyer would voluntarily agree to purchase, and a hypothetical willing seller would agree to sell, the assets in question acting at arm's length in an open and unrestricted market.⁶⁸⁰
331. As AlixPartners explains, there are three generally accepted valuation methodologies to assess the FMV of a business or an investment interest therein: the "income approach," according to which a business valuation is modeled based on its free cash flows; the "market approach," according to which a business is valued by reference to observable market prices of comparable businesses; and the "asset approach," according to which the value of a business is assessed based on the value of its assets assuming an orderly liquidation.⁶⁸¹

⁶⁷⁸ AlixPartners ¶ 7.

⁶⁷⁹ AlixPartners ¶ 75.

⁶⁸⁰ AlixPartners ¶ 74.

⁶⁸¹ AlixPartners ¶ 78.

332. Under the income approach, the most widely used valuation method is the discounted cash flow (“**DCF**”) method. As AlixPartners notes, “[t]he income approach is widely accepted by valuation practitioners to value real estate development projects.”⁶⁸²
333. It has also been widely adopted as a measure of damages in investor-State arbitration.⁶⁸³ Indeed, as the tribunal observed in *Rusoro Mining*, “[v]aluations based on the DCF method have become usual in investment arbitrations, whenever the fair market value of an enterprise must be established.”⁶⁸⁴ Notably, the DCF method is the appropriate means of valuing investments where the “project would have gone forward and become operational and profitable in due course” but for the host State’s wrongful conduct.⁶⁸⁵
334. In this case, AlixPartners concludes that the DCF method is “a reliable and appropriate basis for assessing the Project’s FMV.”⁶⁸⁶
- In the context of the valuation of a real estate development such as the Project, the DCF method explicitly models all components of the Project’s value chain and resulting cash flows, including: (i) the timing and magnitude of cash outflows (*e.g.*, land acquisition, titling and design, permits and impact fees, hard costs, soft costs, contingencies, developer fee, and initial leasing/marketing); and (ii) the timing and magnitude of cash inflows (*e.g.*, sales of the residential and commercial units).⁶⁸⁷
335. The DCF method is reliable here because “[a]s of the Valuation Date, sufficient information is available to project the timing and magnitude of the Project’s cash outflows and cash inflows for the Project.”⁶⁸⁸ The market approach to calculating the but-for value of the Project is inapplicable here because AlixPartners “could not identify a publicly traded company or transaction for a company similar to the Project Companies or the

⁶⁸² AlixPartners ¶ 79.

⁶⁸³ *See, e.g., OI European Group B.V. (OIEG) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award (10 Mar. 2015) (CL-095) ¶ 658 (observing that “[t]he most widely accepted formula for calculating the market value of a functioning company is unquestionably the DCF methodology.”); *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14, Award (23 Aug. 2022) (CL-131) ¶ 283; *Hydro* (CL-116) ¶¶ 848-849.

⁶⁸⁴ *Rusoro Mining* (CL-102) ¶ 758.

⁶⁸⁵ *Tethyan* (CL-118) ¶ 331; *see also Crystallex* (CL-099) ¶¶ 875-885.

⁶⁸⁶ AlixPartners ¶ 82.

⁶⁸⁷ AlixPartners ¶ 80.

⁶⁸⁸ AlixPartners ¶ 82.

Project.”⁶⁸⁹ The asset approach is likewise inapplicable because, as AlixPartners notes, it “is used only in situations where ongoing operations are in jeopardy,” whereas in the case of the Project, but for Respondent’s violations of the Treaty, the Project would have continued as a going concern.⁶⁹⁰

336. AlixPartners (1) uses the DCF method to calculate the FMV of Claimants’ investments, that is, the FMV of Claimants’ investment in the Project, as of the Date of Breach, reflecting the FMV of the Project had Respondent not breached its obligations under the Treaty (“**But-for Scenario**”), and (2) deducts the actual value of the Project’s assets as of the Date of Breach (“**Actual Scenario**”), to calculate Claimants’ damages as of the Date of Breach.⁶⁹¹ AlixPartners then calculates pre-award interest at the Secured Overnight Financing Rate (“**SOFR**”) + 4% from the Date of Breach up to the date of AlixPartners’ report, as a proxy for the date of award.⁶⁹²
337. As described in detail below, AlixPartners estimates Claimants’ damages to be no less than US\$ 204.4 million, including pre-award interest thereon to date.

1. The But-for Scenario

338. In calculating the FMV of Claimants’ investments in the But-for Scenario, AlixPartners first estimates the enterprise value (“**EV**”) of the Project as of the Date of Breach, which represents the total value of the operations of MVB and EMG, the Project companies through which Claimants made their investments, including both the pilot and expansion phases of the Project.⁶⁹³
339. AlixPartners uses the DCF methodology to calculate the EV of the Project as of the Date of Breach.⁶⁹⁴ AlixPartners’ DCF analysis is based on projecting the Project’s Free Cash Flows to the Firm (“**FCFF**”), which include five main components: (i) revenues; (ii) operating costs; (iii) taxes; (iv) capital expenditures; and (v) changes in working capital

⁶⁸⁹ AlixPartners ¶ 84.

⁶⁹⁰ AlixPartners ¶ 85.

⁶⁹¹ AlixPartners ¶¶ 23, 79-82, 87-90.

⁶⁹² AlixPartners ¶¶ 140-147.

⁶⁹³ AlixPartners ¶¶ 27, 77.

⁶⁹⁴ AlixPartners ¶ 77.

that the Project would have generated from the Valuation Date (here the Date of Breach) through its expected completion in 2033.⁶⁹⁵

340. AlixPartners' DCF analysis is based on Claimants' business planning and Project documents.⁶⁹⁶ It assumes that the Project would have continued to develop in accordance with the business plans and documented progress through 2033.⁶⁹⁷ It likewise assumes that Claimants would have continued to find buyers for the housing units, which AlixPartners confirms were priced consistently with local comparable benchmarks as of the Date of Breach.⁶⁹⁸ AlixPartners projects revenues based on unit prices tied to expected inflation in Panama as calculated by the International Monetary Fund ("IMF") from the Date of Breach to 2027 and using the U.S. Federal Reserve target rate of inflation from 2028 to 2032, and assumes that the Housing Ministry would have continued to increase the price threshold for inclusion in the FSV Program consistent with inflation, in line with its historical pattern of adjustments.⁶⁹⁹
341. AlixPartners' analysis of projected Project costs is likewise based on business planning and Project documents, including MVB's financial statements and Project progress reports.⁷⁰⁰ AlixPartners projects future costs by assessing: (1) land acquisition costs; (2) direct construction costs; (3) infrastructure costs; and (4) indirect costs.⁷⁰¹
342. To arrive at its total future costs figure, AlixPartners calculates the cost per type of unit incurred through December 2021 and then estimates additional land acquisition costs for the expansion phase and the remaining total direct construction costs, infrastructure construction costs, and indirect costs required to complete both phases of the Project, escalated to account for inflation.⁷⁰² To cross-check its figures, AlixPartners benchmarks

⁶⁹⁵ AlixPartners ¶¶ 88-89.

⁶⁹⁶ AlixPartners ¶ 95.

⁶⁹⁷ AlixPartners ¶¶ 92, 101.

⁶⁹⁸ AlixPartners ¶¶ 26, 128.

⁶⁹⁹ AlixPartners ¶ 99.

⁷⁰⁰ AlixPartners ¶ 104.

⁷⁰¹ AlixPartners ¶¶ 102, 105.

⁷⁰² AlixPartners ¶¶ 105-117.

its per-unit estimates of direct construction and infrastructure costs based on similar projects in Panama for which information is publicly available.⁷⁰³

343. AlixPartners then adjusts its calculations based on (1) applicable taxes, (2) anticipated additional capital expenditures to purchase and replace equipment needed for the Project, and (3) changes in working capital as sales progressed.⁷⁰⁴
344. Next, AlixPartners discounts these cash flows for risk and the time value of money to represent the value of expected cash flows as of the Valuation Date.⁷⁰⁵ AlixPartners discounts cash flows based on the Project's weighted average cost of capital ("WACC"), which is a "measure of a company's overall cost of capital that is based on an average of a company's cost of equity and cost of debt, weighted in proportion to their contribution to total capital."⁷⁰⁶ AlixPartners uses a blended discount rate for both the pilot and expansion Phases of the Project, which tends to "overstate the risks associated with the Pilot."⁷⁰⁷ AlixPartners estimates the Project's WACC as 8.69%.⁷⁰⁸
345. Finally, AlixPartners deducts MVB's and EMG's net third-party debt.⁷⁰⁹
346. Based on its DCF analysis, AlixPartners estimates the FMV of Claimants' investments as of the Valuation Date as US\$ 150.4 million.⁷¹⁰

2. The Actual Scenario

347. AlixPartners calculates the actual value of Claimants' investment to be zero as of the Date of Breach:

Following Respondent's alleged breaches, Claimants could not continue developing the Project or generate cash flows from which to service the Project Companies' net third-party debt of US\$33.05 million as of the Valuation Date. The Project's principal assets — the land on which

⁷⁰³ AlixPartners ¶ 118.

⁷⁰⁴ AlixPartners ¶¶ 120-128.

⁷⁰⁵ AlixPartners ¶ 129.

⁷⁰⁶ AlixPartners ¶ 156.

⁷⁰⁷ AlixPartners ¶ 131.

⁷⁰⁸ AlixPartners ¶ 129.

⁷⁰⁹ AlixPartners ¶¶ 135-137.

⁷¹⁰ AlixPartners ¶ 138.

Claimants had built (and would have completed) the housing units, together with the construction in progress on that land — were pledged to secured creditors. Accordingly, Claimants’ interest in the Project had no value.⁷¹¹

3. Claimants’ total damages, including pre-award interest to date

348. To arrive at Claimants’ total damages as of the Valuation Date, AlixPartners subtracts the value of the Project in the Actual Scenario from the FMV in the But-for Scenario. AlixPartners calculates Claimants’ damages as of the Valuation Date to be no less than US\$ 150.4 million.⁷¹²
349. To bring this figure up to the date of its report (as a proxy for the date of award), AlixPartners calculates pre-award interest on Claimants’ damages at the SOFR + 4% that investment tribunals have found constitutes an appropriate rate, as explained in Section V.A.2.⁷¹³ AlixPartners calculates semi-annual compound interest on Claimants’ damages, which is necessary to ensure full reparation.⁷¹⁴
350. Applying the SOFR + 4% interest rate, compounded semi-annually, AlixPartners calculates that Claimants have suffered total damages in the amount of US\$ 204.4 million as of 10 June 2026, the date of submission of this Memorial.⁷¹⁵
351. Claimants reserve the right to update their calculations and to adjust the Valuation Date in the event new information becomes available that impacts Claimants’ damages under the full reparation standard.⁷¹⁶

⁷¹¹ AlixPartners ¶ 139.

⁷¹² AlixPartners ¶¶ 137-138.

⁷¹³ *Supra* § V.A.2.

⁷¹⁴ AlixPartners ¶¶ 140-147; *see supra* § V.A.2.

⁷¹⁵ AlixPartners ¶ 149.

⁷¹⁶ *Eurus Energy Holdings Corporation v. Kingdom of Spain*, ICSID Case No. ARB/16/4, Award (14 Nov. 2022) (CL-134) ¶ 106 (permitting the claimant to change its valuation date because “it is in principle legitimate for a party to amend its position and legal arguments throughout the proceedings, including after the hearing, as long as no new evidence is being submitted and the other side is given a chance to respond to these new arguments”).

C. PANAMA SHOULD BEAR ALL COSTS OF THIS PROCEEDING

352. Article 10.26(1) of the Treaty and ICSID Arbitration Rule 52 give the Tribunal broad discretion to allocate costs between the Parties.⁷¹⁷ Claimants request that the Tribunal order Panama to bear all the costs incurred in connection with this proceeding, including all Claimants' costs, which include Claimants' costs for legal representation, expert witness fees and costs, any other fees and costs incurred by Claimants in connection with the pursuit of these proceedings, the Tribunal members' fees and expenses, and the costs of the Centre.
353. The principle that the losing party should pay costs has become common practice in investor-State disputes, as reflected in the decisions of many tribunals.⁷¹⁸ This is necessary because, as the Tribunal held in *Cairn Energy v. Republic of India*, "a party should not be forced to bear the costs of proceedings it was obliged to initiate to protect its investment (in the case of a prevailing claimant) or compelled to participate in (in the case of a respondent)."⁷¹⁹ Indeed, as the tribunal concluded in *ADC v. Hungary*:

[i]n the present case, the Tribunal can find no reason to depart from the starting point that the successful party should receive reimbursement from the unsuccessful party. This was a complex, difficult, important and lengthy arbitration which clearly justified experienced and expert legal representation as well as the engagement of top quality experts on quantum. The Tribunal is not surprised at the total of the costs incurred by the Claimants. Members of the Tribunal have considerable experience of substantial ICSID cases as well as commercial cases and the amount expended is certainly within the expected range. Were the Claimants not to be reimbursed their costs in justifying what they alleged to be egregious conduct on the part of Hungary it could not be said that they were being made whole.⁷²⁰

⁷¹⁷ Treaty (CL-001) Art. 26(1)(b) ("A tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules."); ICSID Arbitration Rules, Rule 52 ("In allocating the costs of the proceeding, the Tribunal shall consider all relevant circumstances.").

⁷¹⁸ See, e.g., *Kornikom EOOD v. Republic of Serbia*, ICSID Case No. ARB/19/12, Award (11 Aug. 2023) (CL-141) ¶ 748 (indicating that the tribunal would apply the 'costs follow the event' or 'loser pays' principle "which has also been applied by other investment arbitration tribunals."); *Staur Eiendom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award (28 Feb. 2020) (CL-122) ¶ 526 ("From the above, it is evident that the Respondent has been the successful party. All of the Claimants' claims have been rejected. It therefore follows that the Claimants should bear the costs reasonably incurred by the Respondent for the arbitration.").

⁷¹⁹ See also *Cairn* (CL-124) ¶ 2020.

⁷²⁰ *ADC* (CL-050) ¶ 533.

354. As Claimants have demonstrated in this Memorial and will demonstrate in subsequent submissions, an award of costs to Claimants is fully justified and necessary to make Claimants whole.

D. PANAMA MUST PAY POST-AWARD INTEREST ON ALL AMOUNTS AWARDED

355. As explained in Section V.A.2, the principle of full reparation requires that post-award interest be awarded on all damages.⁷²¹ Additionally, as the Treaty requires compensation to include “interest at a commercially reasonable rate” from the date of a lawful expropriation,⁷²² any award of compensation in this case, in which Panama breached its international law obligations under the Treaty, must be accompanied by interest at least at that level. Interest up to the date of payment is also warranted on any award of costs in Claimants’ favor.⁷²³

356. Accordingly, Claimants request post-award interest on all amounts awarded at a rate of no less than SOFR + 4%, compounded semi-annually, which is necessary to ensure full reparation.⁷²⁴

⁷²¹ *Supra* § V.A.2; *ConocoPhillips* (CL-115) (“In the instant case, post-award interest represents compensation for the loss of the money awarded. Such interest will not serve to increase the amounts of dividends to which the Claimants are entitled in a but-for scenario. Post-award interest serves to compensate the Claimants for the lack of revenue represented by the amounts awarded and the profit that the Claimants would most probably derive from it in the usual course of its business.”); *Rusoro Mining* (CL-102) ¶ 879(j); *Tethyan* (CL-118) ¶ 1809.

⁷²² Treaty (CL-001) Art. 10.7(3).

⁷²³ *Deutsche Telekom AG v. Republic of India*, PCA Case No. 2014-10, Award (27 May 2020) (CL-123) ¶ 356 (“[T]he Tribunal considers that, consistent with the principle of full reparation, India should pay interest on the costs awarded. Such interest should be computed at the same rate as the interest payable on the damages awarded”); *Public Joint Stock Company “State Savings Bank of Ukraine” (Oschadbank) v. Russia*, PCA Case No. 2016-14, Award (26 Nov. 2018) (CL-114) ¶ 392 (“The Tribunal notes that the Claimant claimed interest on the costs that may be awarded by the Tribunal at the same rate of interest awarded on the damages. The Tribunal agrees that it is appropriate to grant post-Award interest on the costs at the same rate of interest as for pre-Award interest on damages and for post-Award interest.”).

⁷²⁴ *See supra* § V.A.2; *Kardassopoulos* (CL-071) ¶¶ 667-668, 677-678 (awarding pre- and post-award interest at a rate of LIBOR + 4%, compounded semi-annually beginning on the date of breach); *see also PSEG* (CL-052) ¶ 348.

VI. REQUEST FOR RELIEF

357. For all the reasons set forth above, Claimants respectfully request that the Tribunal:

- a) DECLARE that Panama has breached Chapter Ten of the Treaty, including by breaching its obligations: (1) to accord Claimants and their investments fair and equitable treatment (Article 10.5); (2) not to expropriate a covered investment indirectly through measures equivalent to expropriation except for a public purpose, in a non-discriminatory manner, on payment of prompt, adequate, and effective compensation, and in accordance with due process of law (Article 10.7); and (3) to accord Claimants and their investment treatment no less favorable than that it accords, in like circumstances, to its own investors and their investments in Panama with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments (Article 10.3);
- b) ORDER Panama to pay, net of tax, monetary damages including pre-award interest at a rate of SOFR + 4% compounded semi-annually as compensation for the damage to their investments in an amount presently estimated at US\$ 204.4 million;
- c) ORDER Panama to pay all Claimants' costs of this arbitration, including, without limitation, Claimants' legal costs, expert fees, and other costs incurred in relation with this arbitration, the fees and expenses of the Tribunal, and ICSID's costs;
- d) ORDER Panama to pay post-award interest on all sums awarded to Claimants in this arbitration at a rate of SOFR + 4% compounded semi-annually; and
- e) AWARD any further or other relief that the Tribunal considers just and appropriate.

358. Claimants reserve all of their rights, including their right to amend their claims and relief requested.

Respectfully submitted,

White & Case LLP

WHITE & CASE LLP

Ank Santens
Felipe Volio
1221 Avenue of the Americas
New York, NY 10020
United States of America
Francisco X. Jijón
John Dalebroux
Isaac D. Webb
701 Thirteenth St. NW
Washington, DC 20005
United States of America

MIRANDA & AMADO

Luis Alonso Navarro
Roberto Perez-Prieto
Av. José Larco 1301
Piso 20, Miraflores
15074, Lima, Perú
Counsel for Claimants

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