IN THE MATTER OF AN ARBITRATION
UNDER THE ARBITRATION RULES OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

OMEGA ENGINEERING LLC
AND
MR. OSCAR RIVERA
CLAIMANTS

v.

THE REPUBLIC OF PANAMA
RESPONDENT

CLAIMANTS' MEMORIAL

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I. INTRODUCTION

1. This dispute pertains to a series of measures targeted against Mr. Oscar Rivera ("**Mr. Rivera**")—a construction entrepreneur—and his company and investments by the Government of Panama ("**Panama**", "**Respondent**", or the "**Government**"). Prior to the events that give rise to this arbitration, Mr. Rivera and his wholly-owned, U.S.-registered company, Omega Engineering LLC ("**Omega U.S.**", together with Mr. Rivera, the "**Claimants**"), had a 34-year track record of completing major complex construction projects in their home State of Puerto Rico, in the broader Caribbean, and in Panama itself. Prior to these events, Omega U.S. had become one of the largest construction companies in Puerto Rico and fastest-growing Puerto Rican construction company in Latin America. As a result of this work, Mr. Rivera and Omega U.S. enjoyed an eminent standing in the construction industry in that region.

2. Claimants invested not only their capital and know-how into the booming Panamanian construction industry, but their hard-earned reputation and goodwill as well. With those valuable assets put to work, they were able to obtain ten lucrative contracts for major public works with Government agencies, valued at over US$ 154 million. These contracts were signed by various Government ministries and agencies on the one hand, and on the other by Omega U.S. and Mr. Rivera's wholly-owned Panama-registered company, Omega Engineering Inc. ("**Omega Panama**") (together with Omega U.S., the "**Omega Consortium**"). These were not just any contracts; they concerned the construction of a higher education facility for Panama's cultural and artistic disciplines, medical clinics, markets, and even a courthouse. For several years the Omega Consortium performed this work; invoices were issued to the Panamanian Government, and they were paid in the ordinary course. While there were often bureaucratic delays, disputes were always resolved amicably and adequately.

3. Everything changed during and following the Panamanian presidential election of

2014, wherein two former allies turned political rivals, former President Ricardo Martinelli and current President Juan Carlos Varela, vied for power. When Mr. Varela assumed the office of the Presidency in July 2014, the new Government promptly targeted Mr. Rivera and the Omega Consortium, whose contracts had each been awarded during the previous Administration, with a number of hostile measures. Outstanding invoices from the Omega Consortium went completely unpaid, Respondent failed to provide required permits and change orders, it declared default on their largest contract, and wrongfully terminated or abandoned the others. In the midst of this pattern of targeted measures, the Government zeroed in on Mr. Rivera and Omega Panama with baseless criminal investigations, and launched a highly-public campaign aimed at sullying their international reputation.

4. Claimants were forced to halt field operations altogether in 2015.[1] Since then, Claimants have incurred, and continue to incur, further expenses in protecting and attempting to recover their investments. In September 2016—over a year after Respondent was required to have terminated its vacuous criminal investigations pursuant to Panamanian law—a Panamanian court finally annulled one of the investigations into Omega Panama and Mr. Rivera. Nevertheless, those investigations and Respondent's other acts have had the inevitable effect of decimating Claimants' business—in Panama, in the United States, and internationally. Deprived of years of income, and with Respondent having declared default in Claimants' longest contract, Omega U.S. remains without sufficient liquidity and bonds to operate.

5. This Memorial follows months of continued good faith negotiations by Claimants and their representatives with the Government to salvage their investment and the relationship. Mr.

[1] This came after many months of continuing to complete work under the contracts without receiving any payment from the Government.

Rivera has been more than willing to resolve this dispute amicably—and he still is. He only asks that Panama fulfill its contractual obligations so the Omega Consortium can get back to work. In the alternative, he respectfully asks this Tribunal to order Panama to compensate him for Panama's illegal destruction of his businesses, his reputation, and his livelihood.

6. As will be demonstrated in this Memorial, Respondent has violated its international and domestic legal commitments by contradicting and otherwise failing to observe the obligations it has made with respect to Claimants and their investment in Panama, and by harassing them through the arbitrary and illegitimate exercise of its sovereign authority. By these series of combined actions, it has expropriated Claimants' contractual rights, and in doing so, has expropriated Claimants' entire investment in Panama in addition to the reputation and goodwill of Omega U.S. The actions and omissions of Respondent with respect to Claimants also constitute, *inter alia*, a violation of the guarantees of fair and equitable treatment, full security and protection, and other treaty guarantees.

7. Claimants bring this arbitration pursuant to: (i) the Treaty between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investment (the "**BIT**"); and (ii) the U.S.-Panama Trade Promotion Agreement (the "**TPA**"). Article VII(3) of the BIT and Article 10.17 of the TPA set forth Panama's consent to arbitrate disputes before the International Centre for Settlement of Investment Disputes ("**ICSID**"). Claimants' Memorial is accompanied by the witness statement of Mr. Oscar I. Rivera Rivera[2] and the expert reports of Mr. Greg A. McKinnon[3] and Messrs. Pablo Lopez Zadicoff and Sebastian Zuccon.[4] This Memorial is also accompanied by 304 new and 3 resubmitted factual exhibits and 117 new and no resubmitted

[2] Witness Statement of Mr. Oscar I. Rivera Rivera dated 25 June 2018 ("**Rivera**").

[3] Expert Witness Statement of Mr. Greg McKinnon dated 25 June 2018 ("**McKinnon Report**").

[4] Expert Report of Messrs. Pablo Lopez Zadicoff and Sebastian Zuccon dated 25 June 2018 ("**Damages Expert Report**").

legal exhibits.

II. RELEVANT POLITICAL BACKGROUND

8. At the time of General Noriega's surrender to U.S. forces in 1989, the two dominant political parties in Panama were the left-wing Partido Revolucionário Democrático and the right-wing Partido Panameñista. For the next 20 years, until 2009, the country's Presidency alternated between these two parties. In 2009, however, Ricardo Martinelli, a self-made supermarket magnate who founded his own political party, the Cambio Democrático, emerged as a popular contender. Martinelli drew his support largely from his right-wing, populist message, which disrupted the traditional order in Panamanian politics.[5] The Panameñista party was the quicker of the older parties to embrace the new political landscape.

9. On 1 July 2009, Ricardo Martinelli was elected President of Panama after winning the country's Presidential election, succeeding Martín Torrijos of the Partido Revolucionário Democrático. Mr. Martinelli came to power after forming a successful alliance with Juan Carlos Varela of the Partido Panameñista. A successful businessman in the liquor industry before turning to politics, Mr. Varela withdrew his candidacy for the Presidency to run as Mr. Martinelli's Vice-President. When Mr. Varela assumed the Vice-Presidency, he also assumed the role of Panama's Minister of Foreign Relations.

10. In December 2009, Mr. Martinelli nominated Alejandro Moncada Luna and another nominee to fill two seats in the Panamanian Supreme Court.[6] Prior to the well-publicized falling out between Messrs. Martinelli and Varela (discussed below), news reports indicated that members of the

[5] *Panamanians elect a conservative, Ricardo Martinelli, as the country's new president*, EL PERIÓDICO EXTREMADURA dated 4 May 2009 (C-0115).

[6] *Martinelli names his two magistrates*, LA ESTRELLA DE PANAMÁ dated 17 Dec. 2009 (C-0118).

Partido Revolucionário Democrático were concerned that President Martinelli was nominating judges to the Supreme Court who were loyal to him in order to subsequently persecute opposition officials.[7]

11. On 30 August 2011, the political upheaval began. The Martinelli Administration issued a statement demanding Mr. Varela's resignation as Minister of Foreign Relations (but not as Vice President).[8] News reports indicated that Mr. Martinelli's party was seeking to sever its ties with Mr. Varela's Panameñista party to become an independent political force, and to push for an electoral reform that would strongly disfavor the Panameñista party.[9]

12. On 3 January 2012, Judge Moncada Luna became President of Panama's Supreme Court.[10] Then, on 9 May 2012, Mr. Martinelli filed a libel suit against Mr. Varela in the Panamanian Courts. Mr. Varela had, a few days prior, accused Mr. Martinelli of engaging in a bribery scandal involving a confidante of former Italian Prime Minister Silvio Berlusconi. Mr. Martinelli countered with a video showing Mr. Varela meeting with Mr. Berlusconi and the same confidante.[11] On the same day the lawsuit was filed, Mr. Martinelli asked Mr. Varela to resign as Vice-President. Mr. Varela refused.[12]

13. On 19 June 2012, Panama's National Assembly erupted into chaos when President

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[7] *See*, *e.g.*, *The U.S. sees the new president of Panama as a danger to democracy*, EL PAÍS dated 14 Mar. 2011 (C-0119).

[8] *The President of Panama asks the Secretary of State for his resignation and unleashes a crisis*, EL UNIVERSAL dated 30 Aug. 2011 (C-0121).

[9] *With friends like these*, THE ECONOMIST dated 14 Sept. 2011 (C-0122).

[10] *Moncada Luna, President*, LA PRENSA dated 4 Jan. 2012 (C-0123).

[11] *The President and Vicepresident of Panama accuse each other of corruption*, EL PAÍS dated 10 May 2012 (C-0124) (describing the media battle between the two leaders, including the video published by Martinelli's camp showing Mr. Varela with Berlusconi and his confidante, Valter LaVitola).

[12] *Panama's pushy president riles his country's politics*, MCCLATCHY dated 24 July 2012 (C-0126).

Martinelli's party, the Cambio Democrático, tried to enact laws appointing three new judges to a proposed Fifth Chamber of the Supreme Court.[13] The proposal envisaged that this new Fifth Chamber would handle all Constitutional matters, provoking widespread concern that the new Chamber would pave the way for President Martinelli and the Cambio Democrático to enact a constitutional amendment that would remove the prohibition on a President from serving for more than one consecutive term, something the Partido Panameñista vehemently opposed.[14] As early as 21 June 2012, only a few months after Mr. Moncada Luna had become President of the Supreme Court, Mr. Varela had called on him to resign.[15]

14. The upheaval continued into 2013. In March of that year, Mr. Martinelli approved a law that raised taxes on liquor, an initiative that was strongly criticized by the opposition and then-Vice President Varela, whose family has substantial investments in the liquor industry.[16] Mr. Varela, who then resigned as Vice-President to run for President as the Panameñista Party's candidate, further criticized President Martinelli, and the two politicians made even more allegations of corruption against each other.[17] In mid-2013, Mr. Martinelli appeared to backtrack, opposing a proposal for a

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[13] *Id.*; *Great opposition to Chamber V*, LA PRENSA dated 21 June 2012 (C-0128); *Clashes between the police and those who opposed the government*, PRIMERA HORA dated 19 June 2012 (C-0130).

[14] *See*, *e.g.*, *Chamber V: the road towards reelection*, LA ESTRELLA DE PANAMÁ dated 25 Feb. 2012 (C-0161) (discussing the possibility that such a Chamber would permit President Martinelli's immediate reelection, and reporting fears that the opposition could resort to a *coup d'etat*); *Polémica gestión de Moncada Luna*, LA PRENSA dated 25 Feb. 2015 (C-0075) (describing Mr. Moncada Luna's active role in trying to create the Fifth Chamber and his request that President Martinelli nominate the three judges that would have filled the new opening).

[15] *Juan Carlos Varela reitera que Moncada Luna debe renunciar por dignidad*, LA PRENSA dated 21 June 2012 (C-0076).

[16] *The controversy continues because of the hike in liquor*, LA PRENSA dated 8 Feb. 2013 (C-0172) (reporting on opposition to the proposed law, including opposition from Mr. Varela's brother, José Luis Varela); *President Martinelli approves law increasing liquor taxes*, LA PRENSA dated 12 Mar. 2013 (C-0183), (reporting on Presidential approval of the law increasing taxes on liquor, and the opposition to that law).

[17] *Business is over*, THE ECONOMIST dated 5 May 2014 (C-0187) (reporting that Mr. Varela had accused Mr. Martinelli's administration of corruption during his campaign); *"This is a fight among Italians stealing from each other",*

Constitutional amendment that would have permitted Presidents to run for two consecutive terms, and instead affirming his support for José Domingo Arias as his successor in the 2014 Presidential election.[18]

15. On 15 April 2014, then-presidential candidate Varela publicly stated that if he were to win the presidency and if Mr. Moncada Luna refused to resign from the Presidency of the Supreme Court before July 1 of that year, he would form a political alliance in Congress "to call for political proceedings and impeach" the judge.[19]

16. In the May 2014 election, Mr. Martinelli's handpicked candidate lost, and Mr. Varela became President of Panama. President Varela quickly sought to change the composition of the Panamanian Supreme Court and launched a campaign of persecution against those seen to be in alliance with the previous administration. As set out below, it was in this campaign of persecution that Claimants unwittingly got mixed up.

III. CLAIMANTS' INVESTMENT IN PANAMA

A. Mr. Rivera Successfully Built One of the Largest Construction Companies in Puerto Rico

17. Mr. Rivera's company, Omega U.S., is an American company registered under the laws of the Commonwealth of Puerto Rico.[20] It is a full-service, general contractor with over 35 years of experience engaged in the construction business, specializing in large-scale, complex, and

Martinelli, TELEMETRO dated 10 Oct. 2013 (C-0190) (reporting that Mr. Martinelli, despite accusing Mr. Varela of paying bribes, had withdrawn a lawsuit against Mr. Varela).

[18] Martinelli rejects presidential reelection proposals in Panama, EL UNIVERSAL dated 20 June 2013 (C-0198).

[19] *Opponent will investigate the misuse of government funds by Martinelli's government if he wins the presidential election*, FOX NEWS LATINO dated 15 Apr. 2014 (C-0204); *Panamanian candidate will investigate the management of funds during Martinelli's government*, LA VANGUARDIA dated 15 Apr. 2014 (C-0225).

[20] Certificate of Incorporation of Omega Engineering Corp. dated 27 Mar. 1980 (C-0002).

commercial projects.[21] Until Respondent's concerted actions against Omega U.S. began, the company had grown to become one of the largest construction companies in Puerto Rico.

18. The company was originally founded and owned by Mr. Rivera's father and his business partner in March 1980. Initially, Omega U.S. was registered as Omega Engineering Corporation, and remained so for nine years until 1989, when it was converted into a Special Partnership ("Sociedad Especial") named Omega Engineering S.E. At that time, Omega U.S. provided electrical and mechanical construction services and worked in both the public and private sectors. It was headquartered in San Juan but participated in projects throughout the territory.[22]

19. Mr. Rivera began working at Omega U.S. in 1991,[23] and, by 2006, he had acquired full ownership of the company.[24] Prior to 2008, Omega U.S.'s core market was Puerto Rico and the U.S. Virgin Islands, where Omega U.S. had successfully completed hundreds of projects for both the U.S. Government and important private clients including Warner Lambert, Walgreens, and Eli Lilly, among others.

20. Some of the largest and most notable projects on Omega U.S.' resume include: the Roberto Clemente Walker Stadium in the City of Carolina (a 300,000 square foot baseball stadium with seating capacity for 12,500 spectators, completed in 2001);[25] the Coliseo de Puerto Rico José

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[21] *See* Omega Engineering LLC ("**Omega U.S.**") Corporate Profile, undated (C-0012).

[22] Rivera ¶ 8.

[23] *Id.* ¶¶ 2-4, 9.

[24] In 2006, Mr. Rivera and Ms. Cristina Soto Benitez (Mr. Rivera's wife at the time) acquired 100% of Omega U.S. *See* Purchase and Sale of Partnership Interest in Omega Engineering S.E. dated 5 Oct. 2006 (C-0013); Stock Purchase Agreement of Omega Engineering S.E. dated 5 Dec. 2006 (C-0014); Agreement to Sell Business Enterprises and Real Estate dated 23 June 2006 (C-0015). On 8 November 2012, following his divorce from Ms. Cristina Soto Benitez, Mr. Rivera became the sole owner of Omega U.S. *See* Divorce Decree (redacted) dated 8 Nov. 2012 (C-0016).

[25] Omega U.S.'s Corporate Profile, undated (C-0012) at 35.

Miguel Agrelot (a 500,000 square foot multi-use entertainment facility with seating capacity for 20,000 spectators, completed in 2004);[26] the Plaza de Diego Condominium (a multi-purpose complex containing 56 apartments, a multi-story parking structure with 328 parking spaces, and approximately 30,000 square feet of commercial space to include restaurants and offices, completed in 2006);[27] the Fine Arts Symphony Hall of Puerto Rico (a 110,000 square foot performing arts center with seating capacity for 1,262, completed in 2009);[28] the Mayagüez Athletic Stadium (an athletic facility with seating capacity for 11,200 spectators, completed in 2010—the centerpiece of the 2010 Central American and Caribbean Games);[29] the U.S. Salvation Army Kroc Center in Guayama (a 75,000 square foot multi-purpose facility which included indoor and outdoor athletic facilities, adjustable classrooms and meeting spaces, completed in 2013);[30] the Complejo Deportivo Tren Urbano metro stations; and several correctional facilities, medical facilities, hotels, condominiums, commercial buildings, and industrial facilities.[31] Omega U.S. also completed the Centro de Distribución *Goya* (a distribution center constructed for the Goya food company in 2007 in Puerto Rico),[32] as well as two Walgreens stores constructed in Saint Thomas, U.S. Virgin Islands (in 2013) and Puerto Rico (in 2014).[33] Reputable companies and organizations such as Esso Standard Oil Company, Chase Manhattan Bank, the U.S. Postal Service, SmithKline Beecham Pharmaceuticals, the University of

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[26] *Id.* at 34.

[27] *Id.* at 31.

[28] *Id.* at 27.

[29] *Id.* at 25.

[30] *Id.* at 21.

[31] Rivera ¶ 10.

[32] Omega U.S.'s Corporate Profile, undated (C-0012) at 30.

[33] Rivera ¶ 10.

Puerto Rico, the Puerto Rico Infrastructure Financing Authority, the Puerto Rico Aqueduct and Sewer Authority, and the U.S. Salvation Army were but a few of the names on Omega U.S.'s client roster.[34]

21. Mr. Rivera has also long been involved in owner/developer teams for residential and mixed-use projects, such as the Torre de Cervantes development (two residential high-rise apartment blocks built in the Rio Piedras area of Puerto Rico), and the Ridgetop Villas development (a low-rise luxury residential complex constructed in the city of Guaynabo, Puerto Rico).[35] He also holds land and/or development rights for several projects in Puerto Rico, which are stalled because of the illegal and arbitrary actions taken by Respondent against him and his companies.[36]

22. As a result of its commitment to growth and quality, by 2013 Omega U.S. had become one of the most important construction companies in Puerto Rico and was reputed to be the fastest-growing Puerto Rican construction company in Latin America.

B. Mr. Rivera Takes Over Omega U.S. and Focuses on Expanding into Panama

23. In 2006, upon assuming control of Omega U.S, Mr. Rivera began to consider the possibility of expanding its operations beyond Puerto Rico. He began by looking to new markets, principally in the hispanophone Caribbean and Latin America. Mr. Rivera spent several years exploring Spanish-speaking jurisdictions in the region including Florida, Colombia, Peru, Chile, Panama and a number of other Central American countries.

24. Ultimately, Mr. Rivera, in consultation with the company's Senior Management, chose to focus Omega U.S.'s plans for expansion on the Panamanian market. The other jurisdictions

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[34] *Id.* ¶ 11.

[35] *Id.* ¶ 12 & n.26.

[36] *Id.* ¶ 12.

he had been considering were discounted for various reasons—some of the markets were not sufficiently business-friendly, some imposed onerous restrictions on foreign investment, and some were logistically impractical.[37] But Panama, Mr. Rivera concluded, was a particularly attractive market at that time because the Panamanian Government was about to embark upon a major public works program, including plans to invest US$ 20 billion in public infrastructure projects (*viz*. roads, hospitals, sewers, schools and a Panama City metro) over the next five years.[38] This highly attractive opportunity for growth, combined with Panama's proximity to Puerto Rico and business-friendly environment, tipped the scale in favor of investing in Panama.

25. In order to understand, as quickly as possible, the fundamental ins-and-outs of that country's construction industry, Mr. Rivera and his team held a number of introductory meetings with local bankers, insurance companies, accountants, and other local business providers with experience in the country.[39] This allowed Mr. Rivera to learn about the bidding process for the public procurement projects in Panama that would best suit Omega's capabilities.

26. Panama has a sophisticated and transparent bidding process for public procurement projects. It takes place through the country's electronic Government procurement portal, "PanamaCompra."[40] Through PanamaCompra, Government agencies issue Requests for Proposals ("**RFPs**") and publish the tender documents for all available projects.[41] These documents are then publicly available to any prospective bidders. Once prospective bidders have expressed an interest,

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[37] *Id.* ¶ 14.

[38] *Id.* ¶ 15.

[39] *Id.* ¶ 16.

[40] *Id.* ¶ 17.

[41] *Id.*; Website of PanamaCompra, undated (C-0232), available at http://www.panamacompra.gob.pa.

the relevant Government Agency will hold a meeting attended by all of them. This is the only time during the process when prospective bidders are afforded the opportunity to ask questions of both a representative of the relevant Government agency or Ministry (generally a mid-level person, such as an engineer) and a member of the project's evaluation commission. As a general rule, the time between publication of the tender documents and award of the project is relatively short.

27. Omega U.S., as part of the Omega Consortium,[42] started bidding on Panamanian public works projects in 2010, selecting those which best suited the company's capabilities and expertise. These were generally projects valued at between [redacted] and in sectors in which Omega U.S. had significant experience and expertise. Mr. Rivera decided to limit his activity in Panama to public projects because, *first*, that was where Omega U.S.'s experience lay and, *second*, Mr. Rivera felt that the Government would be more likely to comply with its contractual undertakings and honor its debts than an unfamiliar private owner.[43] His assessment on the second point was eventually (and quite unfortunately) proven wrong.

28. Over the next few months, due to its competitive pricing and experience completing similar projects in the United States, Omega was able to win bids to complete ten separate construction projects in Panama worth over US$ [redacted].[44] Of the ten projects won, two were successfully completed, but the remaining eight were stalled and eventually terminated, suspended, or allowed to lapse as a result of the Government's campaign of baseless persecution against Claimants.[45] This will be discussed in Sections IV and VI below.

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[42] See infra ¶ 32.

[43] Rivera ¶ 19.

[44] This figure includes the change orders granted in some of the Contracts after the Contracts were awarded to the Omega Consortium.

[45] See infra § VI.

1. Mr. Rivera's Strategy to Penetrate the Panamanian Market While Protecting the Omega Brand.

29. Once Mr. Rivera had decided that Panama was the most attractive market for Omega U.S., he needed to determine the best entry strategy, *i.e.*, how to break into the local construction market gradually while protecting Omega's brand name. Mr. Rivera and the Omega U.S. team decided to employ a strategy that is common among international construction companies that enter a new market: create a company with a different name to complete a small pilot project to test field conditions, including payment, subcontracting, and other logistics. For Claimants, this pilot company was PR Solutions S.A. ("**PR Solutions**"). This strategy would provide Mr. Rivera opportunity and insight into the country and the sector, while still protecting the Omega U.S. brand from unforeseen developments in a new market.[46] Once PR Solutions successfully bid for and won a project, Omega U.S. would invest its own goodwill in Panama and register Omega Engineering Inc.

a. PR Solutions S.A.

30. In June 2010, Mr. Rivera registered PR Solutions S.A., an Omega U.S. affiliate fully-owned and controlled by Mr. Rivera, with the Panamanian Companies Registry.[47] Through PR Solutions, in 2010, Mr. Rivera submitted a bid to complete work on a project for Panama's Tocumen International Airport, which entailed the construction of certain electric, communications, fuel, and water systems.[48] PR Solutions won the bid, and the contract was signed in December 2010.[49] The project was successfully completed on schedule, approved by Respondent's Comptroller-General on

[46] Rivera ¶ 22.

[47] Public Registry of PR Solutions, S.A. dated 11 June 2010 (C-0021); Resolution of the Extraordinary Meeting of Shareholders of PR Solutions, S.A. dated 17 Nov. 2010 (C-0022); Affidavit regarding Shareholders of Companies dated 24 Jan. 2011 (C-0125).

[48] Rivera ¶ 23.

[49] Contract No. 017/10 dated 14 Dec. 2010 (C-0005).

30 December 2011, and paid in full by Aeropuerto Internacional Tocumen, S.A., a Government-owned entity.[50] Such a resounding success in a new market constituted a major milestone for Mr. Rivera and Omega U.S. It also allowed Claimants and their team to familiarize themselves with Panama's public procurement bid market.

31. Encouraged by the early success of the project, PR Solutions, as had always been intended, did not undertake any additional bidding for potential projects.[51] Instead, Claimants decided to bid for any new projects through Omega Panama, so that they could begin building the Omega brand in the Panamanian market. That being said, PR Solutions was not entirely inactive from that point forward; it occasionally acted as a subcontractor on projects and participated in the purchase of land for residential development (discussed further below).[52]

b. Omega Panama

32. Following the early success of PR Solutions' Tocumen Airport project, Mr. Rivera and his team were ready to use the Omega brand to bid for and complete larger public works projects in Panama.[53] While it carried the Omega name, Omega Panama was a newly registered company without its own track record. This created an issue for Omega Panama when bidding, and ultimately, from mid-2010, all bids for large public projects in Panama were made through a consortium consisting of Omega Panama and Omega U.S. (together the "**Omega Consortium**," as noted above).

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[50] *See* Certificate of Final Acceptance of Contract No. 017/10 dated 24 Jan. 2012 (C-0023). Further detail on the involvement of Panama's Comptroller-General in the awarding of public contracts is available below. *See infra* n. 168; Rivera ¶ 24.

[51] Rivera ¶ 24.

[52] *Id.* ¶ 24.

[53] Mr. Rivera registered Omega Engineering Inc. ("**Omega Panama**") with the Panamanian Companies Registry on 26 October 2009. *See* Public Registry of Omega Engineering Inc. dated 26 Oct. 2009 (C-0017). Mr. Rivera was also the new company's 100% shareholder, and he had full control of it (*Id.*; Stock Certificate for Omega Engineering Inc. dated 20 Nov. 2009 (C-0019); Share Register for Omega Engineering Inc., undated (C-0018); Subscriber's Resignation Letters for Omega Engineering Inc. dated 26 Oct. 2009 (C-0020)).

In some instances, where particular expertise that Omega lacked was required, a third company would join the Omega Consortium, generally holding only a nominal 1% share.

33. The Omega Consortium that ended up bidding on public projects in Panama therefore consisted of: (i) Omega U.S., providing vast experience in the construction sector and excellent goodwill built up over decades of successful operations in Puerto Rico and the Caribbean; (ii) Omega Panama, satisfying the local company requirement included in many of the tenders and providing the legal and economic structure to manage the construction projects locally; and (iii) when the tender had a specific technical requirement which Omega U.S. lacked, a third company holding a nominal 1% share in the consortium.

34. Thanks to Omega U.S.'s bonding capacity, solid financials, track record, project portfolio, and other specifications customarily used by project owners to evaluate bid proposals, this arrangement allowed Mr. Rivera to bid for larger Panamanian projects. Mr. Rivera's ultimate objective was to replicate this strategy in other jurisdictions by expanding Omega U.S.'s presence until it became a regional, and ultimately a global, competitor.[54]

35. The first project tendered for, won and completed by the Omega Consortium was another project for the Tocumen Airport, (*viz*. construction of a three-story building to house a new security check-point).[55] The contract for this project was signed on 28 February 2012.[56] Like the first project for the Tocumen Airport, this was also completed successfully, and fully paid by the

[54] Rivera ¶ 13.

[55] Contract No. 035/11 dated 28 Feb. 2012 (C-0006); Addendum No. 1 to Contract No. 035/11 dated 23 Nov. 2012 (C-0134). In this case, only Omega U.S. and Omega Panama bid on this project.

[56] Contract No. 035/11 dated 28 Feb. 2012 (C-0006); Addendum No. 1 to Contract No. 035/11 dated 23 Nov. 2012 (C-0134).

Government-owned Airport Authority.[57]

36. Omega Panama soon became a successful and profitable operation.[58] After it won the tenders for eight more public works contracts, it had dozens of direct employees consisting of engineers, architects, accountants and trade specialists, and close to a thousand subcontracted laborers.[59] Ultimately, however, Omega Panama became a victim of the Varela Administration's concerted harassment and arbitrary and unfair treatment (also detailed below)[60] culminating in the total destruction of the company.[61]

c. Omega U.S.

37. Any company's brand is, of course, a key asset, particularly so in the construction sector. Omega U.S. was and is no different—its reputation had been painstakingly earned over decades of successful operations in Puerto Rico and the wider Caribbean. Mr. Rivera thus understandably wanted to protect the good name and reputation of his family's company. Ultimately, however, Mr. Rivera committed the goodwill of Omega U.S. to his investment in Panama (including its bonding and financial capacity, its solid financials, track record and project portfolio).

38. A key reason for this change was Mr. Rivera's experience on the ground in Panama.

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[57] Certificate of Final Acceptance of Contract No. 035/11 dated 31 July 2013 (C-0007).

[58] *See, e.g.* Audited Financial Statements for Omega Engineering, Inc., as of 31 December 2013 dated 28 Apr. 2018 (C-0135).

[59] *See* Omega U.S.'s Corporate Profile, undated (C-0012).

[60] *See infra* § VI.

[61] Omega Panama is still listed as active on the Panamanian Companies Registry but is, for all intents and purposes, no longer operational. *See e.g.* Omega Engineering, Inc. Financial Statements and Supplementary Information as of 31 December 2013 and 2012 and Independent Auditors' report dated 28 Apr. 2014 (C-0136); Omega Engineering, Inc. Financial Statements and Supplementary Information as of 31 December 2012 and Independent Auditors' report dated 5 June 2013 (C-0137); Omega Engineering, Inc. Interim Balance Sheets for the Year Ended 31 December 2014 dated 31 Dec. 2014 (C-0138).

One of the first bids Mr. Rivera was involved in was for a new home for Panama's National Assembly. This was sure to become a landmark project due to its ultimate user and premier location – and was therefore very attractive to Omega U.S. The project's RFP was published on 29 March 2010[62] and Omega U.S., adhering to Mr. Rivera's cautious approach, submitted its bid in the name of Omega Panama only. When the proposal evaluations were published a few months later Mr. Rivera discovered that Omega Panama had been disqualified on a technicality (*viz*. a bid requirement, previously unclear, that bidding companies needed to have been registered in their country of origin for at least seven years).[63] Given that Omega Panama had only recently been created, it did not satisfy this requirement. Had Omega U.S. been part of the bid, it might have been successful.

39. This experience, combined with similar outcomes in subsequent bids, proved the catalyst for a change in Omega's investment strategy, with Mr. Rivera registering Omega U.S. as a foreign company doing business in Panama in May 2010.[64] Over the next few months Mr. Rivera's experience on the ground confirmed his growing belief that he would have to risk Omega U.S.'s significant assets (particularly its know-how, reputation, and goodwill) in the pursuit of greater commercial success in Panama. And the risks were undeniably high. Including Omega U.S. as part of the Omega Consortium meant that it would be jointly and severally liable to the Panamanian contracting entity for the obligations set out in the various proposals. If the Omega Consortium's bid was successful, this liability would endure for the duration of the contract.[65]

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[62] *See* Bid specification No. 2010-0-01-0-08-LV-004147 for "Design and Approval of Final Drawings, Construction and Provision of Electrical and Mechanical Equipment for the National Assembly's New Office Building" dated 29 Mar. 2010 (C-0345).

[63] *See* Bid Evaluation Report regarding Best Value No. 2010-0-01-0-08-LV-004147 dated 19 May 2010 (C-0112) at 4, ¶¶ 1-3.

[64] *See* Public Writ Number Eight Thousand Eight Hundred Fifteen dated 11 May 2010 (C-0347).

[65] Law No. 22 dated 27 June 2006 (C-0280), art. 4 ("Dos o más personas pueden presentar una misma propuesta en forma conjunta, para la adjudicación, la celebración y la ejecución de un contrato, respondiendo ***solidariamente*** de

40. On 28 February 2011, for the first time in the guise of a consortium including both Omega U.S. and Omega Panama, the Omega Consortium submitted a bid to Panama's Ministry of Health for the construction of a number of local clinics.[66] Shortly thereafter, on 21 March 2011, it appeared that Mr. Rivera's decision to risk the goodwill of Omega U.S. had been vindicated when Panama's Ministry of Health awarded three of the ten contracts up for tender to the Omega Consortium.[67] From that moment on, Omega U.S. participated in all the bids submitted to, and contracts signed with, Panamanian Government entities.[68] While Omega U.S. thus enjoyed significant success from its participation in the Panamanian construction sector, it did so at significant corporate risk.

2. Claimants' Outstanding Projects in Panama

41. Of the 42 public bids for which the Omega Consortium tendered, it was successful in winning a total of ten contracts, one of which (the second Tocumen Airport project) was completed in 2013.[69] The remaining eight contracts (collectively, the "**Contracts**" or the "**Projects**") pertained

todas y cada una de las obligaciones derivadas de la propuesta y del contrato. Por tanto, las actuaciones, los hechos y las omisiones que se presenten en el desarrollo de la propuesta y del contrato afectarán a todos los miembros del consorcio o asociación accidental." (emphasis added) (Two or more people can present a proposal jointly, for the award, celebration, and execution of a contract, being jointly and severally liable for all and each of the obligations derived from the proposal and the contract. Thus, the acts, facts, and omissions that occur in the development of the proposal and the contract shall affect all of the members of the consortium or parties thereby accidentally associated" (translation by Claimants' counsel)).

[66] *See* Omega's proposal for Bid No. 2010-0-12-0-99-AV-003042 (C-0348).

[67] *See* Report from the Evaluation Commission Public Act Nº 2010-0-12-0-99-AV-003042, undated (C-0349).

[68] Specifically, Contract No. 035/11 with Aeropuerto Internacional de Tocumen, S.A. dated 28 Feb. 2010 (C-0006); Contract 150/2012 with the Judiciary (C-0048); Contract 043 (2012) with the Ministry of the Presidency (C-0034); Contract 093-12 with the National Institute of Culture (INAC) dated 6 July 2012 (C-0042); Contract 01-13 with the Municipality of Colón dated 24 Jan. 2013 (C-0051); and Contract 857-2013 with the Municipality of Panama (C-0056).

[69] The Request for Arbitration refers to 58 public works bids, *see* RfA ¶ 16. however, that number mistakenly included non-public works bids. *See* Damages Expert Report ¶ 7. The correct number of public works bids is 42. *See id.*

to a variety of State infrastructure projects.[70] Per the requirements of Panamanian law, the Omega Consortium's bids were fully transparent and subjected to a thorough review by a diverse range of independent commissions in order to ensure that they satisfied different criteria established by statute or the specifications set out in the RFPs.[71]

42. Further detail on each of the Projects is set out below. As will be explained, although the Omega Consortium completed significant work on the Projects, to this day substantial payments from the Government for work performed remain outstanding, and the Government has either improperly terminated, suspended or let lapse all eight Projects.

a. Contracts with the Panamanian Ministry of Health

43. On 7 December 2010, Panama's Ministry of Health issued a RFP for the construction of ten different medical facilities in various different locations across Panama (the "**Minsa Capsi Projects**" or "**Minsa Capsi Contracts**").[72] Seven different companies submitted bids to complete these projects by the Government's deadline of 28 February 2011, including the Omega Consortium.[73] On 28 March 2011, the Ministry of Health issued Resolution No. 345 awarding three

[70] Rivera ¶ 37.

[71] The different criteria for each public contract bid were set out in the respective requests for proposals ("*Pliego de Cargos*") for each project. *See, e.g.*, Request for Proposals No. 2012-0-30-0-08-AV-004833 "*Construcción de un Edificio para la Unidad Judicial Regional de La Chorrera*" dated 2012 (C-0024), at 21-24; Rivera ¶ 37.

[72] See Request for Proposals No. 2010-0-12-0-99-AV-003042 "*Estudio, Desarollo de Planos, Construcción, Equipamiento and Financiamiento de Diez Centros de Atención Primaria de Salud Innovadores (Minsa CAPSi)*" dated 2010 (C-0025); Rivera ¶ 38.

[73] The seven groups submitting the proposals consisted of (1) Consorcio TAS Panamá; (2) Consorcio Panamá Salud 2011; (3) Consorcio BECSA Eduinter; (4) Consorcio HPC-Contratas-P&V; (5) Sociedad Española de Montajes Industriales; (6) Consorcio Galdiano-Berotz-HEYMOCOL PROCOMON; and (7) the Omega Consortium. *See* Minutes to the Opening of Proposal Envelopes dated 17 Jan. 2011 (C-0026), at 2.

of the Minsa Capsi Projects to the Omega Consortium.[74] On 5 April 2011, the Ministry of Health clarified in a letter that it would require the Omega Consortium to either finance the Projects itself or to help arrange financing, because the Government had not allocated it sufficient funds in the annual budget.[75] Claimants agreed to fully finance the three Ministry of Health projects themselves.[76] The day after the Minsa Capsi Contracts were signed, each of the Contracts was amended to extend the completion date and clarify that the contractor (*viz.* the Omega Consortium) would finance the Projects in their entirety.[77] Final Government sign-off was provided a month later when, on 26 October 2011, the Comptroller-General endorsed each Contract.[78] The Ministry of Health issued notices to proceed the following day.[79] Although in general payment on the Contracts was made regularly, as detailed below, once the Varela Administration took power and the new Comptroller-General assumed office, *no payments* were approved for completed and billed work.[80]

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[74] Three of the other contracts were awarded to a consortium led by Spanish construction firm TEYCO, SL, and the four remaining projects to another team led by a different Spanish construction firm, Contratas Iglesias, S.A. *See* Resolution of Adjudication No. 345 dated 28 Mar. 2011 (C-0027); Rivera ¶ 38.

[75] Letter No. 759-DMS/DAPE-2011 from the Ministry of Health to the Omega Consortium dated 5 Apr. 2011 (C-0141); Rivera ¶ 39.

[76] Letter from the Omega Consortium to the Ministry of Health dated 5 May 2011 (C-0350); Rivera ¶ 39.

[77] *See* Contract No. 077 (2011) dated 22 Sept. 2011 (C-0028); Contract No. 083 (2011) dated 22 Sept. 2011 (C-0030); Contract No. 085 (2011) dated 22 Sept. 2011 (C-0031); Addendum No. 1 to Contract No. 077 (2011) dated 23 Sept. 2011 (C-0142); Addendum No. 1 to Contract No. 083 (2011) dated 23 Sept. 2011 (C-0143); Addendum No. 1 to Contract No. 085 (2011) dated 23 Sept. 2011 (C-0144); Rivera ¶ 40.

[78] *See* Addendum No. 1 to Contract No. 077 (2011) dated 23 Sept. 2011 (C-0142); Addendum No. 1 to Contract No. 083 (2011) dated 23 Sept. 2011 (C-0143); Addendum No. 1 to Contract No. 085 (2011) dated 23 Sept. 2011 (C-0144); Rivera ¶ 40.

[79] Notice to Proceed for Contract No. 077 (2011) dated 27 Oct. 2011 (C-0145); Notice to Proceed for Contract No. 083 (2011) dated 27 Oct. 2011 (C-0146); Notice to Proceed for Contract No. 085 (2011) dated 27 Oct. 2011 (C-0147); Rivera ¶ 40.

[80] With exception of three CNOs for MC Kuna Yala that were delivered to Omega between October and November 2014, which, when added up, amounted to a mere [redacted] owed in these Projects.

44. The three Minsa Capsi Projects awarded to the Omega Consortium, via three separate Contracts all signed on 22 September 2011, were as follows:

- *The Rio Sereno Contract*:[81] This Contract between the Omega Consortium[82] and Panama's Ministry of Health (acting on behalf of the State),[83] was a turnkey construction contract contemplating the design and construction of a 27,500 square foot medical facility in the town of Rio Sereno (the "**MC Rio Sereno**"). The medical facility was to have provided emergency medical treatment services, and was to have been equipped with a maternity ward and outpatient facilities. Under the Contract the Omega Consortium was also to equip the medical center with furniture and medical equipment. The last Certificate of Non-Objection ("**CNO**") approved by the Government in connection with this Project covers work performed in November 2013.[84] The Omega Consortium continued on-site operations until October 2014, but the Government under the Varela Administration has failed to approve any further payments to the Omega Consortium for this work.

- *The Kuna Yala Contract*:[85] This Contract was concluded between the Ministry of Health (acting on behalf of the State) and the Omega Consortium (the "**MC**

[81] Contract No. 077 (2011) dated 22 Sept. 2011 (C-0028).

[82] On this occasion Omega U.S. and Omega Panama formed a Consortium with Ciracet Corp., a Puerto Rican corporation, which was brought in due to its expertise in biomedical engineering and technology consulting services and biomedical equipment maintenance. For the Consortium's bid for the Minsa CAPSi Projects, Ciracet Corp. was a 1% partner in the Consortium, with Omega Panama holding a 98% share and Omega U.S. a 1% share. *See* Temporary Consortium Agreement for MINSA CAPSi Projects dated 15 Jan. 2011 (C-0029).

[83] Final Government sign-off was provided when Panama's Comptroller-General endorsed the contract on 26 October 2011. *See* Contract No. 077 (2011) dated 22 Sept. 2011 (C-0028). As detailed, *infra*, the Comptroller-General's approval is required for all Government contracts. *See infra* n.168.

[84] Certificates of No Objection for Contract No. 085 (2011), various dates (C-0267) at 42-43 (CNO No. 015 dated 29 Apr. 2014).

[85] Contract No. 083 (2011) dated 22 Sept. 2011 (C-0030).

Kuna Yala").[86] The MC Kuna Yala Contract was also a turnkey construction contract contemplating the design and construction of a medical facility in the town of Kuna Yala, this time of a larger size of 39,000 square feet. This medical facility was also to have provided emergency medical treatment services, and was to have been equipped with surgery rooms, a maternity ward, hospital facilities and an outpatient clinic. Under the Contract the Omega Consortium was also to have equipped the medical center with furniture and medical equipment. The last CNO approved by the Government in connection with this project covers work performed in June 2014.[87] The Omega Consortium continued on-site operations until October 2014, but the Government under the Varela Administration has failed to approve any further payments to the Omega Consortium for this work.

- *The Puerto Caimito Contract*:[88] This Contract was also concluded between the Ministry of Health (acting on behalf of the State) and the Omega Consortium.[89] Again, this was a turnkey contract contemplating the design and construction of a 32,500 square-foot medical facility in the town of Puerto Caimito (the "**MC Puerto Caimito**"). This medical facility was also to have provided emergency medical treatment services and would have been equipped with an outpatient clinic. Under the Contract the Omega Consortium was also to have equipped the medical center with furniture and medical equipment. The last payment issued by the Government in connection with this project covers

[86] As with the Rio Sereno Contract, for the Kuna Yala Contract Ciracet Corp. was a 1% partner in the Consortium, with Omega Panama holding a 98% share and Omega U.S. a 1% share. *See* Temporary Consortium Agreement for MINSA CAPSi Projects dated 15 Jan. 2011 (C-0029). Final Government sign-off was provided by Panama's Comptroller-General on 26 October 2011. *See* Contract No. 083 (2011) dated 22 Sept. 2011 (C-0030).

[87] Certificates of No Objection for Contract No. 083 (2011), various dates (C-0260) at 88-89.

[88] Contract No. 085 (2011) dated 22 Sept. 2011 (C-0031).

[89] As with the MC Rio Sereno and MC Kuna Yala Contracts, for the Puerto Caimito Contract Ciracet Corp. was a 1% partner in the Consortium, with Omega Panama holding a 98% share and Omega U.S. a 1% share. *See* Temporary Consortium Agreement for MINSA CAPSi Projects dated 15 Jan. 2011 (C-0029). Final Government sign-off was provided by Panama's Comptroller-General on 26 October 2011. *See* Contract No. 085 (2011) dated 22 Sept. 2011 (C-0031).

work performed in November 2013.[90] The Omega Consortium continued on-site operations until October 2014, but the Varela administration has failed to make any further payments to the Omega Consortium for this work.

b. Contract with the Panamanian Ministry of the Presidency

45. Following the Omega Consortium's success in securing the Minsa Capsi Projects, Mr. Rivera and Omega U.S. remained interested in tendering for additional Panamanian Government construction projects.[91] In August 2011, Panama's Ministry of the Presidency issued an RFP for the construction of a public market in the city of Colón.[92] The Omega Consortium[93] submitted a tender for this project, and the Government ultimately received a total of six proposals from different consortia.[94] Having reviewed the tender documents, in October 2011 the Ministry awarded the Contract to the Omega Consortium.[95] The project consists of a traditional market place approximately 38,600 square feet in size, conceived to substitute the old market with a modern, efficient, and up-to-standards new facility for local agricultural producers and vendors to sell their products to the public. The site is located in the urban area of the City of Colón, on the Atlantic coast of Panama. The Contract was signed in August 2012 between the Ministry of the Presidency (acting

[90] Certificates of No Objection for Contract No. 083 (2011), various dates (C-0260) at 80-81.

[91] Rivera ¶ 41.

[92] See Request for Proposals No. 2011-0-03-0-03-AV-006870 "Construcción y Equipamiento del Mercado Público de la Ciudad de Colón, Provincia de Colón" dated 2011 (C-0032).

[93] For this contract, the only members of the consortium were Omega U.S. and Omega Panama, with Omega U.S. only retaining a 1% share of the project. *See* Temporary Consortium Agreement for the Mercado Público de Colón Project dated 14 Sept. 2011 (C-0035).

[94] Rivera ¶ 41.

[95] *See* Resolution of Adjudication No. 124-2011 dated 10 Oct. 2011 (C-0033).

on behalf of the State) and the Omega Consortium (the "**Mercado Público de Colón Contract**").[96] It was a standard lump-sum, owner-financed contract.[97] Final sign-off was provided by the Comptroller-General on the same day as its signature, 17 August 2012.[98] Because the Omega Consortium, for the reasons completely beyond the Omega Consortium's control enumerated below, was never able to commence work on this Project, no work was ever billed on it. As such, the claim under this Contract is limited to lost profits.

c. Contract with the Panamanian National Institute of Culture

46. In January 2012, an RFP was issued by Panama's National Institute of Culture ("**National Institute of Culture**")[99] for the design and construction of a higher education facility in the area of Curundú. The RFP for this turnkey project envisaged that the winning bidder would design and construct a higher education facility for cultural and artistic disciplines of approximately 313,200 square feet in size, conceived to consolidate in one place a series of dilapidated public buildings, scattered around Panama, that housed the public schools for Panama's: (i) national theater company; (ii) national dance and ballet troupe; (iii) national music organization; (iv) national visual arts center;

[96] Contract No. 043 (2012) dated 17 Aug. 2012 (C-0034). Final sign-off was provided by the Comptroller-General on the same day of its signature, 17 August 2012. On this occasion Omega U.S. and Omega Panama bid on the project as a Consortium with Omega Panama holding a 99% share and Omega U.S. a 1% share. *See* Temporary Consortium Agreement for the Mercado Público de Colón Project dated 14 Sept. 2011 (C-0035); Rivera ¶ 41.

[97] Contract No. 043 (2012) dated 17 Aug. 2012 (C-0034), arts. 10, 68.

[98] See generally id.

[99] The National Institute of Culture was created on 6 June 1974 by the Council of National Legislation, through Law No. 63, in order to coordinate and develop cultural and folkloric activities in Panama. *See* the National Institute of Culture Website, last viewed on 23 June 2018 (C-0037 resubmitted). Law No. 63 states that the National Institute of Culture is under the control of the Executive Body of the Ministry of Education. *See* Law No. 63 "Creating the National Institute of Culture," Official Gazette dated 25 June 1974 (C-0038), art. 1.

and (v) National Symphony Orchestra (the "**Ciudad de las Artes Contract**").[100] Proposals from a total of five different groups were received by the Government on 21 April 2012, including from the Omega Consortium.[101] On 11 May 2012, the National Institute of Culture (acting on behalf of the State) issued a resolution awarding the Ciudad de las Artes Contract to the Omega Consortium,[102] with the Contract being signed on 6 July 2012[103] for a total price of over [redacted]. It was approved by the Comptroller-General on 19 September 2012.[104] As it did with the Minsa Capsi Contracts, the Omega Consortium provided the financing for this project.[105] The notice to proceed was eventually issued on 22 April 2013.[106] The Government has failed to approve payments for approved and completed work billed under this Contract from April 2013 through May 2014.[107]

d. Contract with the Panamanian Judiciary

47. Panama's Judicial Branch issued an RFP in September 2012 for the construction of a

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[100] See Request for Proposals No. 2012-1-30-0-08-LV-002784 "Contratación de los Estudios, Diseño, Suministro de Materiales, Mano de Obra, Equipo, Administración y Construcción del Proyecto Ciudad de las Artes" dated 2012 (C-0039); Rivera ¶ 42.

[101] The five groups submitting the proposals were: (i) RIVA, S.A.I.I.C.F.A.; (ii) Elecnor, S.A.; (iii) FCC CONSTRUCCION, S.A.; (iv) Quality Construction Services S.A.; and (v) the Omega Consortium. *See* Minutes of the Opening of Proposal Envelopes of INAC dated 21 Mar. 2012 (C-0040), at 1; Rivera ¶ 42.

[102] *See* Resolution No. 184-12 DG/DAJ from INAC dated 11 May 2012 (C-0041).

[103] Contract No. 093-12 dated 6 July 2012 (C-0042). The Comptroller-General signed off on the Contract on 19 Sept. 2012. *See id*. On this occasion Omega U.S. and Omega Panama bid on the project as a Consortium with Omega Panama holding a 99% share and Omega U.S. a 1% share. *See* Temporary Consortium Agreement for the Ciudad de las Artes Project dated 5 Mar. 2012 (C-0043).

[104] Contract No. 093-12 dated 6 July 2012 (C-0042).

[105] *Id.* Cl 5.

[106] Notice to Proceed for Contract No. 093-12 dated 22 Apr. 2013 (C-0150).

[107] *See* McKinnon Report Annex 1.

building in the country's La Chorrera District.[108] The RFP was for a lump-sum, owner-financed contract for the construction of a 176,500 square-foot court building with additional parking facilities, conceived to host the courtrooms and offices for the judicial district of La Chorrera. Proposals from four different consortia, including the Omega Consortium,[109] were received on 1 October 2012,[110] and on 17 October 2012 the Judicial Branch (acting on behalf of the State) issued a resolution awarding the Contract to the Omega Consortium.[111] On 22 November 2012, the President of the Supreme Court (acting on behalf of the State) entered into a contract with the Omega Consortium on behalf of Panama's Judiciary (the "**La Chorrera Contract**").[112] The Comptroller-General signed off on the Contract on 27 December 2012.[113]

e. Contract with the Panamanian Municipality of Colón

48. The Municipality of Colón issued an RFP in November 2012 for the design, construction and furnishing of a 51,000 square-foot municipal hall and mayoral offices in the district of Colón,[114] conceived to host the municipal hall and offices for the Mayor of the City of Colón and

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[108] See Request for Proposals No. 2012-0-30-0-08-AV-004833 "Construcción de un Edificio para la Unidad Judicial Regional de La Chorrera" dated 2012 (C-0024).

[109] On this occasion the Omega Consortium included Cielo Grande, S.A. as a 1% stakeholder, with Omega Panama holding a 98% share and Omega U.S. a 1% share. *See* Temporary Consortium Agreement for La Chorrera Project dated 17 Sept. 2012 (C-0045). Cielo Grande was brought in to assist with this bid due to its decade of experience building in Panama, a specific requirement under the RFP and something which the Omega Consortium, at that time, lacked; Rivera ¶ 45, n.85.

[110] The four groups which submitted proposals were: (i) Consorcio Construcciones La Chorrera; (ii) Constructora Nova, S.A.; (iii) Constructora Corcione & Asociados, S.A.; and (iv) the Omega Consortium. *See* Minutes of the Opening of Proposal Envelopes for La Chorrera dated 1 Oct. 2012 (C-0046), at 2-3; Rivera ¶ 45.

[111] Resolution No. 092-DALSA dated 17 Oct. 2012 (C-0047); Rivera ¶ 45.

[112] Contract No. 150/2012 dated 22 Nov. 2012 (C-0048).

[113] *Id*.

[114] See Request for Proposals No. 2012-5-16-516-03-AV-000218 "Diseño, Desarrollo de Planos, Demolición del Actual y Construcción con Equipamiento Completo del Nuevo Palacio Municipal Ubicado en la Calle 11 y 12 Santa Isabel en el Distrito de Colón" dated Nov. 2012 (C-0049 resubmitted).

his staff. The Omega Consortium submitted the only proposal in response to this RFP, and on 23 November 2012 the Municipality (acting on behalf of the State) issued a resolution awarding the Contract to the Omega Consortium.[115] On 24 January 2013, the Mayor of the Municipality of Colón signed this turnkey, owner-financed contract on behalf of his Municipality (the "**Municipality of Colón Contract**").[116] The Comptroller-General signed off on the Contract on 2 July 2013.[117] The last payment issued by the Government in connection with this Contract covers work performed between 14 September 2013 and 1 December 2013. The Varela administration has failed to make any further payments to the Omega Consortium for this work.

f. Contract with the Panamanian Municipality of Panama

49. Finally, the Omega Consortium was also interested in an RFP issued by the Municipality of Panama in March 2013 for the design, construction and furnishing of two public markets comprised of small open-air plazas with enclosed stands from which local agricultural producers and vendors could sell their products to the public.[118] Proposals from six different consortia, including the Omega Consortium, were received by the Municipality on 8 April 2013.[119] On 3 May 2013, the Municipality issued a resolution awarding the Contract to the Omega Consortium.[120] On

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[115] Resolution No. 132 from the Municipality of Colón dated 23 Nov. 2012 (C-0050); Rivera ¶ 46.

[116] Contract No. 01-13 dated 24 Jan. 2013 (C-0051). On this occasion, the Consortium consisted only of Omega Panama and Omega-U.S, which held, respectively, a 99% and a 1% share in the Consortium. *See* Temporary Consortium Agreement for the Palacio Municipal de Colón Project dated 15 Nov. 2012 (C-0052); Rivera ¶ 46.

[117] Contract No. 01-13 dated 24 Jan. 2013 (C-0051).

[118] See Request for Proposals No. 2013-5-76-0-08-AV-004644 "Diseños, Planos de Construcción, Estudio de Suelo, Impacto Ambiental, Construcción de Obra y Equipamiento de Mercado Periférico de Pacora y Juan Diaz Acuerdo a las Especificaciones Técnicas Establecidas en el Presente Pliego de Cargos" dated Mar. 2013 (C-0053).

[119] The six groups which submitted proposals were: (i) CIVILTEC; (ii) TENGISER; (iii) TEYCO; (iv) Constructora Pacifico y Atlantico S.A.; (v) Consorcio Mercados; and (vi) the Omega Consortium. *See* Minutes to the Opening of Proposal Envelopes dated 8 Apr. 2013 (C-0054); Rivera ¶ 47.

[120] Resolution No. C-040 dated 3 May 2013 (C-0055).

12 September 2013, the Municipality of Panama (acting on behalf of the State) entered into this turnkey, owner-financed contract with the Omega Consortium (the "**Municipality of Panama Contract**").[121] The Comptroller-General signed off on the Contract the same day it was signed, 12 September 2013.[122] The Municipality of Panama suspended its Contract in September 2014 (and officially terminated it by resolution days after this arbitration was filed).

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50. In sum, the Omega Consortium entered into eight Contracts with six different Panamanian Government entities. But once the Varela Administration took office, *each* of the six different Government entities breached their obligations under *each* Contract at virtually the same time, as further detailed below.[123] These actions are consistent only with a *coordinated* campaign by the Varela Administration against Claimants and their investments.

IV. CLAIMANTS' INVESTMENT IN PANAMA WAS PROGRESSING WELL UNTIL PRESIDENT VARELA ASSUMED OFFICE IN 2014

51. Before the Varela Administration assumed office (*i.e.*, during the Martinelli Administration), the Projects were generally progressing as expected, save for regular course-of-business delays and issues that are typical with construction contracts of this order of magnitude. The Contracts contained mechanisms to deal with delays to a particular project, which the Omega Consortium employed when necessary. For example, all of the Minsa Capsi Contracts were subject to delays not attributable to the Omega Consortium—including rain delays, labor strikes, changes to

[121] Contract No. 857-2013 dated 12 Sept. 2013 (C-0056). On this occasion Omega U.S. and Omega Panama bid on the project as a Consortium with Omega Panama holding a 99% share and Omega U.S. a 1% share. *See* Temporary Consortium Agreement for the Municipality of Colón Project dated 3 Apr. 2013 (C-0057).

[122] Contract No. 857-2013 dated 12 Sept. 2013 (C-0056).

[123] A more detailed summary of the Contracts is exhibited as Annex A of the Request for Arbitration.

the original plans by the owner and problems gaining access to the construction sites.[124] Some of these delays and changes increased the costs of the particular Project.[125]

52. The Government was sometimes slow to address these issues. For example, the MC Rio Sereno, MC Kuna Yala, MC Puerto Caimito, Mercado Público de Colón, and La Chorrera Contracts technically expired before the Omega Consortium was able to renegotiate formal extensions to them.[126] Ultimately, in these cases, this did not prove an insurmountable hurdle because all Parties

[124] *See, e.g.*, Letter from the Omega Consortium to the Ministry of Health dated 27 Nov. 2012 (C-0154) (delays attributed to rain, unclear definitions in contract, and environmental review in construction area); Letter from the Omega Consortium to the Ministry of Health dated 6 Mar. 2013 (C-0155); Email from Frankie Lopez to Oscar Rivera dated 21 Apr. 2013 (C-0156) (requesting assistance from Minsa regarding issues impeding progress on all three projects; Request for additional time and costs submitted by the Omega Consortium to the Ministry of Health and the Republic of Panama dated 19 July 2013 (C-0157) (delay due to rain and the Ministry of Health delays providing approval, etc.); Letter from the Omega Consortium to the Ministry of Health dated 29 July 2013 (C-0351) (delay due to labor strike); Letter from the Omega Consortium to the Ministry of Health dated 28 June 2013 (C-0352); Request for Time extension and additional costs for Contract No. 083 (2011) dated 16 Oct. 2013 (C-0353); Letter from the Omega Consortium to the Ministry of Health dated 16 Feb. 2014 (C-0354); Letter from the Omega Consortium to the Ministry of Health dated 4 Apr. 2014 (C-0355); Time and Costs compensation request to MINSA dated 25 Jan. 2013 (C-0269); Letter from the Omega Consortium to the Ministry of Health dated 1 May 2013 (C-0356); Letter from the Omega Consortium to the Ministry of Health dated 24 June 2013 (C-0357); Letter from the Omega Consortium to the Ministry of Health dated 30 Dec. 2013 (C-0358).

[125] *See, e.g.*, Letter from the Omega Consortium to the Ministry of Health dated 6 July 2012 (C-0158) (Increased costs due to request for additional medical equipment); Letter from the Omega Consortium to the Ministry of Health dated 14 Dec. 2012 (C-0159) (Increased costs due to Omega's provision of full financing for the Project); Letter from the Omega Consortium to the Ministry of Health dated 22 Apr. 2013 (C-0160) (increased costs due to the Ministry of Health's changes to structural plans); Letter from the Omega Consortium to the Ministry of Health dated 24 June 2013 (C-0357) (Increased materials costs due to delays between bid acceptance and signing of the contract); Letter from the Omega Consortium to the Ministry of Health dated 30 Dec. 2013 (C-0358) (detailing "*avance de obra*" and CNO amount required); Letter from the Omega Consortium to the Ministry of Health dated 4 July 2013 (C-0359); Request for Time extension and additional costs for Contract No. 083 (2011) dated 16 Oct. 2013 (C-0353).

[126] The most common reason for these delays was simply the Government's internal bureaucracy; which would generally cause the relevant Government agency to be late in approving the issues that needed approval and in general discharging their obligations under the Contracts. As admitted in the amendments, those delays were not attributable to the Omega Consortium. Addendum No. 2 to Contract No. 077 (2011) dated 21 Feb. 2013 (C-0169); Request for additional time and costs submitted by the Omega Consortium to the Ministry of Health and the Republic of Panama dated 19 July 2013 (C-0157), describing the absence a duly executed contract; Addendum No. 3 to Contract No. 077 (2011) dated 13 Aug. 2013 (C-0170), signed-off 14 January 2014, describing that between 29 January 2010 and 1 July 2013, there was no valid Addendum extending the time of the Contract; Letter from the Omega Consortium to the Ministry of Health dated 9 Apr. 2014 (C-0360), describing that between 6 Aug. 2013 and 14 Jan. 2014, there was no valid Addendum extending the time of the Contract; Minutes of Meeting between Ministry of Health and Omega Engineering, Inc. dated 18 July 2014 (C-0361) (describing that the Contract was directly impacted by the lack of a valid Addendum); Addendum No. 2 to Contract No. 083-2011 dated 18 July 2013 (C-0263); Letter from the Omega Consortium to the Ministry of Health dated 4 Apr. 2014 (C-0355), requesting to execute Addendum No. 3; Addendum No. 2 to Contract No. 085 (2011) dated 22 Feb. 2013 (C-0268); Request for additional time and costs submitted by the Omega Consortium to the Ministry of Health and the Republic of Panama dated 19 July 2013 (C-0157), describing the absence of a duly executed contract;

(acting under the previous Administration) worked together to find a workable solution. In the end, by May 2014, the Omega Consortium had successfully negotiated and signed amendments to all these Contracts extending completion deadlines and allowing recovery for additional costs incurred.[127] However, these amendments required sign-off from Panama's Comptroller-General.

53. One Contract with which the Omega Consortium experienced early difficulties was the Mercado Público de Colón project. This Contract was suspended in December 2012 because the Government was experiencing difficulty removing the existing vendors from the construction site. The Ministry of the Presidency nevertheless requested that the Omega Consortium continue drafting the relevant contractual documents and conducting the necessary pre-construction studies until the situation could be resolved.[128] The Omega Consortium complied with the Ministry of the Presidency's request.

54. One recurring problem with all of the Projects was that approval of payments owed to the Omega Consortium as the Projects progressed was often delayed, and payments were hardly ever made in accordance with the terms of the various Contracts. Each of the Contracts envisaged different mechanisms for collecting the monies owed, but all of these involved layers of bureaucracy which

Addendum No. 3 to Contract No. 085 (2011) dated 2 Aug. 2013 (C-0108), signed-off 14 Jan. 2014; Letter from the Omega Consortium to the Ministry of Health dated 30 Dec. 2013 (C-0358), requesting additional time and costs, due, *inter-alia*, to the lack of a valid contract; Letter from the Omega Consortium to the Ministry of Health dated 9 Apr. 2014 (C-0360), describing the consequences of not having a valid contract; Letter from Ministry of Presidency to Omega dated 24 Mar. 2013 (C-0362), stating that the Contract is expired; Letter No. 2014 05 15 – P007-045 from the Omega Consortium to the Judiciary dated 15 May 2014 (C-0066), requesting an Addendum; Letter from Omega to City Hall of Panama dated 8 Apr. 2015 (C-0184), stating that there is no valid contract.

[127] Addendum No. 4 to Contract No. 077 (2011) dated 7 May 2014 (C-0106), which was never signed-off by the Comptroller-General as described below; Addendum No. 3 to Contract No. 083 (2011) dated 7 May 2014 (C-0107), which was never signed-off by the Comptroller-General as described below; Addendum No. 4 to Contract No. 085-2011 dated 7 May 2014 (C-0171), which was never signed-off by the Comptroller-General as described below; Letter from the Ministry of Presidency to the Omega Consortium dated 24 Mar. 2013 (C-0362), stating that the Contract is expired.

[128] Letter from the Ministry of Presidency to the Omega Consortium dated 31 Dec. 2012 (C-0363).

often slowed things down.

55. For the owner-financed Contracts—the Mercado Público de Colón, La Chorrera, Municipality of Colón, and Municipality of Panama Projects—the Omega Consortium would file a payment application for payment with the respective Government agency, the agency would then perform its own internal review and either query the invoice or grant approval.[129] Upon issuance of Government agency approval, the Comptroller-General would then proceed to review the invoice and, if satisfied, approve the request for payment.[130] Once the Comptroller-General issued his approval, the Omega Consortium would receive payment for 90% of the invoice amount, with 10% being held in reserve to be paid at the end of the Contract.[131] Most of these Contracts required that payment be made within 90 days of receiving the Omega Consortium's request for payment,[132] but payments were often issued after this deadline during the Martinelli Administration.[133] For example, the Omega Consortium experienced several problems obtaining timely payment from Panama's Judiciary for the

[129] *See, e.g.*, Contract No. 043 (2012) dated 17 Aug. 2012 (approved by Comptroller-General on 17 Aug. 2012) (C-0034), Cl. 68.6 ("[P]ayments shall be made upon submission of Work Progress and Reports by THE CONTRACTOR and acceptance by THE GOVERNMENT"); Contract No. 857-2013 dated 12 Sept. 2013 (C-0056), Cl. 8; Contract No. 085 (2011) dated 22 Sept. 2011 (C-0031), Cl. 12; Contract No. 150/2012 dated 22 Nov. 2011 (C-0048), Cl. 5.

[130] *See* Contract No. 01-13 dated 24 Jan. 2013 (C-0051), Cl. 13 ("These Partial Payments shall be effective through the submission of a bill accompanied by a copy of the inspector's report and approved by the Comptroller General of the Republic.").

[131] *See, e.g.*, Contract No. 043 (2012) dated 17 Aug. 2012 (approved by Comptroller-General on 17 Aug. 2012) (C-0034), Cl. 68.4; Contract No. 857 dated 12 Sept. 2013 (C-0056), Cl. 8; Contract No. 085 (2011) dated 22 Sept. 2011 (C-0031), Cl. 14; Contract No. 150/2012 dated 22 Nov. 2012 (C-0048), Cl. 6.

[132] *See, e.g.*, Contract No. 857-2013 dated 12 Sept. 2013 (C-0056), Cl. 8 ("THE MUNICIPALITY agrees to make payments within 90 calendar days upon submission of the payment statement to the Municipal Treasury."); Contract No. 150/2012 dated 22 Nov. 2012 (C-0048), Cl 5 ("This GOVERNMENT agency shall make payments within a maximum of ninety (90) calendar days after the payment statement is submitted.").

[133] Letter No. 2014 04 08 – P004-62 from the Omega Consortium to the Judiciary dated 8 Apr. 2013 (C-0065), stating that invoice No 6 had not been paid; Letter No. S.G.-087-A from the Municipality of Panama to the Omega Consortium dated 2 Sept. 2014 (C-0058), requesting payment of amount due; Letter No. MAP-5-09-14 from the Omega Consortium to Panama's Office of the Mayor dated 5 Sept. 2014 (C-0071); Letter from the Omega Consortium to City Hall of Panama dated 8 Apr. 2015 (C-0184), stating that there are 11 invoices unpaid.

La Chorrera project. Indeed, on one occasion, in April 2014, the Omega Consortium was left with no option but to reduce the number of staff working on the project to the bare minimum until payments were made.[134] Despite this, the following month the Judiciary (again acting under the Martinelli Administration) resolved the issue by paying the majority of the Omega Consortium's outstanding invoices.[135]

56. For the Minsa Capsi Contracts, the mechanism for payment of the Omega Consortium's invoices was different and required several approvals. Each month the Omega Consortium was required to issue a Progress Certificate for each Contract, which certificate would then be certified by the Ministry of Health's project inspectors. This certificate then had to be approved and signed off, first by Ministry of Health officials and then by the Comptroller-General's office. Upon approval of the certificate, the Ministry of Health had to issue a CNO. After the CNO had been issued, it was then sent back to the Comptroller-General's office for sign-off.[136] Once the CNO was ready for payment, the Omega Consortium had to pick it up and take it to the bank providing the project financing for payment. The Ministry of Health was often late in issuing its CNOs,[137] although—during the Martinelli Administration—they were all eventually issued.[138]

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[134] Letter from the Omega Consortium to the Judiciary dated 16 Apr. 2014 (C-0164).

[135] *See* Checks issued to Omega Engineering, Inc. dated 2 May 2015 & 5 May 2015 (C-0364).

[136] *See, e.g.*, Addendum No. 1 to Contract No. 077 (2011) dated 23 Sept. 2011 (C-0142), Amendment 4.

[137] *See, e.g.*, Email from Alex Gonzalez to Arnaldo Martinez dated 26 Oct. 2012 (C-0165) (noting outstanding CNOs for the Rio Serena and Kuna Yala projects); Email from the Omega Consortium to the Ministry of Health dated 6 Dec. 2012 (C-0365) (noting outstanding CNOs on several projects, including a 4 month delay for issuance of the Rio Sereno Contract CNO). Occasionally we also experienced payment delays as a result of administrative problems, but these were relatively minor and generally resulted from inconsistencies in the requests or certain bureaucratic hurdles that needed to be cleared.

[138] Certificates of No Objections for Contract No. 077 (2011), various dates (C-0252); Certificates of No Objections for Contract No. 083 (2011), various dates (C-0260); Certificates of No Objections for Contract No. 085 (2011), various dates (C-0267).

57. For the Ciudad de las Artes Contract, the National Institute of Culture operated a similar payment mechanism to that required under the Minsa Capsi Contracts. The one difference was that instead of issuing a CNO, the National Institute of Culture would issue a Certificate of Partial Payment ("**CPP**").[139] The process for obtaining a CPP was similar to that required to obtain a CNO, with both the National Institute of Culture and the Comptroller-General required to provide an initial sign off on the Omega Consortium's payment requests, and then a subsequent sign-off on the certificates.[140] Although the National Institute of Culture regularly issued CPPs, it issued only one of the corresponding checks for the ITBMS,[141] in May 2014[142] prior to President Varela's inauguration, despite the fact that Omega continued working on the Project until the Project was illegally terminated in December 2014.[143]

58. In sum, *prior* to the Varela Administration's assumption of power the Projects were progressing as expected. While they were subject to several generally (with the exception of the Mercado Público de Colón Project) relatively minor delays, and payment from Panama was not always forthcoming when it should have been, these issues were nothing out of the ordinary in the construction industry in the region and were resolved without major controversy. Consequently, Claimants had every reason, in the summer of 2014, to expect that the Omega Consortium's Projects would be successful, and that Claimants' operations in Panama would continue to progress and grow.

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[139] Addendum No. 1 to Contract No. 093-12 dated 16 Apr. 2013 (C-0167), Cl. 35.

[140] *See, e.g.*, CPP No. 001 Ciudad de las Artes dated 16 May 2013 (C-0168) (signed by the National Institute of Culture and the Comptroller-General's office).

[141] ITBMS, the movable goods and services transfer tax (Impuesto a las Transferencias de Bienes Corporales Muebles y la Prestacion de Servicios) refers to the sales tax or value-added tax (VAT) in Panama applicable to most products sold and services provided.

[142] ITBMS CPP dated 14 May 2014 (C-0239).

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

After President Varela's assumption of power, however, everything changed.

V. IN 2013, THEN-PRESIDENTIAL CANDIDATE CARLOS VARELA MET WITH MR. RIVERA AND REQUESTED A CAMPAIGN CONTRIBUTION FROM HIM

59. Panama held its latest Presidential election in early May 2014. Mr. Juan Carlos Varela of the Panameñista Party was one among seven candidates running for President. Mr. Varela had served as Panama's Vice-President during former President Ricardo Martinelli's term until the two had a falling-out resulting in former President Martinelli dismissing then-Vice President Varela from most of his responsibilities. Although former President Martinelli could not, under Panama's Constitution, run for President for a second term, the disagreement between former President Martinelli and then-Presidential hopeful Mr. Varela resulted in an extremely contentious campaign with both parties accusing each other of corruption.

60. Mr. Rivera has never had any involvement in Panamanian politics. Although Mr. Rivera had been managing and operating his investment in Panama since 2009, he had practically no contact with that country's politicians, including Mr. Varela, prior to mid-2012.[144] The one exception related to a boat incident where the tow rope holding Mr. Rivera's tender (a smaller boat) broke, resulting in the tender drifting loose.[145] After filing the necessary paperwork with the authorities and his insurance company, Mr. Rivera received an anonymous call requesting money in exchange for the return of the tender.[146] Naturally, Mr. Rivera refused to pay and instead decided to hire a helicopter to search the coastline for the tender. He located it at a facility operated by Panama's Servicio Nacional de Fronteras (border patrol). To his surprise, upon contacting the facility holding

[144] Rivera ¶ 58.

[145] *Id.* ¶ 59.

[146] *Id*.

the tender, the border patrol refused to release it, claiming that it now belonged to the two officers that had found it adrift.[147]

61. Mr. Rivera sought the advice and assistance of counsel, specifically that of leading Panamanian law firm Icaza, Gonzalez-Ruiz and Aleman ("**IGRA**"), which advised that the easiest way of recovering the tender would be to have IGRA reach out to a high-level Government official who would call the border patrol and have them release it. IGRA contacted the Government and, almost immediately, a senior border patrol officer called Mr. Rivera to explain that the whole thing had been a misunderstanding and that his tender could be picked up anytime.[148] Unexpectedly, Mr. Rivera also later received a phone call from Mr. Varela—then Vice-President of Panama—asking Mr. Rivera whether the tender had been released.[149]

62. After this incident, Mr. Rivera developed a friendship with Ana Graciela Medina, one of the partners at IGRA. Through her, Mr. Rivera met a number of good friends and associates of Mr. Varela's—including Mr. Varela's private assistants Rafael Flores and Raul Sandoval, as well as Municipal Legislator Ricardo Dominguez—and began attending social gatherings with them.[150] At one of these gatherings Mr. Rivera was introduced to Mr. Varela (in person) for the first time.[151] When they first met, Mr. Varela inquired on the progress of the Minsa Capsi Contracts, and offered his assistance if any was needed.[152]

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[147] *Id*.

[148] Rivera ¶ 61.

[149] *Id*.

[150] Rivera ¶ 62.

[151] *Id*.

[152] *Id*. ¶ 63.

63. Over the following months Mr. Rivera continued to run into Mr. Varela at social gatherings. In July 2012, Mr. Rivera attended Ricardo Dominguez's engagement party, at the Panama City restaurant Jaleo. Mr. Varela approached Mr. Rivera and asked him to join him at a two-seat table at the bar. Mr. Rivera and Mr. Varela were seated together for over an hour during which time Mr. Varela told Mr. Rivera that he (Mr. Varela) did not have to be a politician, but wanted to be one because after experiencing first-hand the excesses and abuses of the Noriega regime, he felt duty-bound to ensure that never again would Panama fall into the hands of someone so ill-equipped to lead. Mr. Varela compared Panama's then-incumbent President, Ricardo Martinelli, to Noriega, and told Mr. Rivera that he feared that President Martinelli would take drastic measures to stay in power past his single five-year, constitutionally-limited, term. Mr. Varela told Mr. Rivera that he needed help to become President precisely to prevent Mr. Martinelli from doing this. At this point Mr. Rivera suspected Mr. Varela was going to ask him for some kind of political contribution, something with which Mr. Rivera was uncomfortable, so Mr. Rivera quickly changed the subject.[153]

64. Mr. Varela asked Mr. Rivera a lot of questions about the Omega Consortium's projects in Panama and, particularly, whether Mr. Rivera had any individuals or contacts within the Government who were assisting him. Mr. Rivera confirmed that he did not have any such contacts, but Mr. Varela refused to believe him. Mr. Varela then excused himself for not being able to assist because he had, by that point, left the Government after a falling out with Mr. Martinelli, but sought to reassure Mr. Rivera that once he became President he would be able to assist. The next morning, when Mr. Rivera arrived at his office, there was a bottle of Mr. Varela's own Centuria rum waiting for him with a note wishing Mr. Rivera well.[154]

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[153] *Id*. ¶ 64.

[154] *Id*. ¶ 65.

65. Not long after this encounter Mr. Rivera received a phone call from Ana Graciela Medina, who informed him that Mr. Varela had asked her to invite him to dinner with Mr. Varela. Mr. Rivera wanted to avoid that meeting because he suspected that Mr. Varela would use it as an excuse to ask him for a political contribution, since Mr. Varela had by-then started his political campaign.

66. In September 2012, Mr. Rivera received a further invitation from Mr. Varela, but Mr. Rivera did not respond—again because he feared that this was an attempt to draw him into making a political contribution. Despite his best efforts to avoid this meeting, towards the end of November 2012, Mr. Rivera was again approached by Ana Graciela Medina to schedule a meeting with Mr. Varela. By this point, Mr. Rivera felt there was no way to escape, so he agreed to meet the then-Presidential candidate for lunch at a restaurant in Panama City named La Trona.[155]

67. Upon arrival at La Trona Mr. Rivera was informed that Ana Graciela Medina and her husband were waiting for him in the restaurant's wine cellar. They informed Mr. Rivera that Mr. Varela intended to request that Mr. Rivera make a significant contribution to his campaign. Mr. Varela arrived shortly thereafter, accompanied by his assistants Rafael Flores and Raul Sandoval, and a bodyguard. After exchanging the usual pleasantries Mr. Varela asked his bodyguard to collect everybody's cell phones. He then proceeded to tell the attendees that they had a lot of friends in common and one common enemy, President Martinelli, and that he was asking for Mr. Rivera's help to compete with Mr. Martinelli in the 2014 elections. Mr. Rivera responded by joking that he would definitely vote for him if he became a Panamanian citizen. Mr. Varela did not take the joke well; instead he asked everyone else there to leave the room, including the bodyguard. Once they were alone, Mr. Varela told Mr. Rivera that he wanted him to make a US$ 600,000 contribution to Varela's

[155] *Id*. ¶ 66.

campaign. Even though Mr. Rivera was expecting a request for money, he was shocked by this request. Mr. Rivera informed Mr. Varela that he would not do it; which immediately angered Mr. Varela. He queried whether Mr. Rivera was supporting Mr. Martinelli. Mr. Rivera reassured him that he was not supporting anyone in the upcoming elections and wished to remain strictly neutral.[156]

68. Feeling threatened at this point, Mr. Rivera told Mr. Varela that the Omega Consortium would gladly buy some raffle tickets or a table at a fund raiser, but that the company could not give him what he was requesting. This did not placate Mr. Varela. He stated, coldly, that he knew very well that some of the Omega Consortium Projects would not be finished by the time the new Government assumed power and that, in Panama, it is often very hard to collect on contracts awarded by the previous Administration. To Mr. Rivera, this was a "direct and unequivocal threat" to him and the Omega Consortium's business interests.[157]

69. True to his word, once Mr. Varela came to power, his administration began a concerted and organized campaign of harassment against Mr. Rivera and his companies, which culminated in the decimation of Claimants' investment in Panama and abroad.

VI. UPON TAKING OFFICE, THE VARELA ADMINISTRATION LAUNCHED AN ORCHESTRATED CAMPAIGN OF HARASSMENT AGAINST CLAIMANTS AND THEIR INVESTMENT

70. When the Varela Administration came to power, the Contracts were each at different stages of completion. Overall, apart from the Mercado Público de Colón Contract, progress to date with all of the Contracts had been relatively smooth.[158] The Government's approval and payment of

[156] *Id*. ¶ 67.

[157] *Id*. ¶ 68.

[158] See supra § IV.

numerous invoices from the Omega Consortium confirms this.[159] Despite this progress, the new Varela Government initiated a campaign of harassment against Claimants and their investment, which included: (1) arbitrarily refusing to issue necessary permits and plans (*see infra* Section VI.A); (2) refusing to pay for work completed and billed for no legitimate reason (*see infra* Section VI.B); (3) terminating, suspending or allowing to lapse all the Contracts for no valid reason (*see infra* Section VI.C); and (4) initiating baseless and bogus criminal investigations against Mr. Rivera and his companies (*see infra* Section VI.D).

A. The Government Obstructed Progress of the Construction Projects by Refusing to Issue Necessary Permits and Plans

71. Beginning in late 2014, the Government began to refuse to issue certain permits and plans contemplated in the tender documents, which the Government was obligated to provide (and which, as the sovereign State, only it could provide). In doing so, the Government deliberately obstructed the progress of several of the Projects, thereby harming Claimants' investment.

72. For example, the La Chorrera Contract required the Government to timely provide approved construction plans as well as an environmental study before the Omega Consortium could commence construction.[160] But the Government, without offering any justification, failed to provide approved construction plans, effectively barring the Omega Consortium from fulfilling its contractual

[159] In Panama, any Government agency that undertakes a construction project will rely on the monthly progress report, or "*Avances de Obra*," prepared by its contractor in order to determine the progress of a particular project. Such progress reports must be approved by each Government agency's in-house inspector as well as, on occasion, a third party inspection company, in order to ensure that payment is applied correctly and reasonably. As an additional fail-safe, an inspector from the Comptroller-General's office must sign-off on the document prior to payment being made under the relevant contract. *See* Law No. 32 "*Por la cual se adopta la Ley Orgánica de la Contraloría General de la República*" dated 8 Nov. 1984 (C-0059), arts. 1, 11(2); Political Constitution of the Republic of Panama, as amended on Nov. 2004 (C-0060 resubmitted), art. 280.

[160] Request for Proposals No. 2012-0-30-0-08-AV-004833 "*Construcción de un Edificio para la Unidad Judicial Regional de La Chorrera*" dated 2012 (C-0024), Chapter III, §§ 1.1-1.3 at 54.

obligations.[161]

73. Similarly, under the Municipality of Panama Contract, the Government was required to provide certain environmental permits. But the Consortium's requests for assistance in obtaining such permits were continuously ignored. In particular, the Omega Consortium needed to obtain a soil use certificate from the Ministry of Housing in order to obtain a required approval from the National Environmental Authority for the Consortium's plans for one of the markets covered by the Contract. In September 2014, the Omega Consortium informed the Municipality that after requesting the soil use certificate, it had not received any response from the Ministry of Housing and therefore was asking the Municipality for its help.[162] The Municipality never even bothered to respond. In April 2015, Omega informed the Municipality that it had still not received the soil use certificate and again asked the Municipality for help, without success.[163] Omega followed-up on five additional occasions, but the Consortium's communications were never answered by the Municipality.[164] The first contact from the Municipality in over two years came in the way of a letter threatening to terminate the Contract by default, and it did so *just a month* after Claimants had notified Respondent of their intention to file this arbitration.[165] To top it off, *a mere 12 days* after this case was registered by

[161] *See* Letter No. 2014 04 08 – P007-037 from the Omega Consortium to the Judiciary dated 8 Apr. 2013 (C-0065); Letter No. 2014 05 15 – P007-045 from the Omega Consortium to the Judiciary dated 15 May 2014 (C-0066).

[162] Letter No. MAP-5-09-14 from the Omega Consortium to Panama's Office of the Mayor dated 5 Sept. 2014 (C-0071), asking for assistance in obtaining soil permits; Rivera ¶ 75.

[163] Letter from the Omega Consortium to City Hall of Panama dated 8 Apr. 2015 (C-0184), following-up on-going issues, Omega followed-up with the Alcaldia on 14 Apr. 2015, 23 Apr. 2015, 30 Apr. 2015, 8 May. 2015, 20 May. 2015, 1 June 2015.

[164] *See id.* (showing the original communication from Mr. Genaro Matias, a senior officer at Omega Panama and the additional four follow up emails from 14 Apr. 2015, 23 Apr. 2015, 30 Apr. 2015 and 8 May 2015).

[165] *See* Letter from Jones Day to the Chief of International Trade Negotiations of the Republic of Panama dated 29 July 2016 (C-0236) *and* Letter from City Hall for the District of Panama to the Omega Consortium dated 19 Aug. 2016 (C-0237).

ICSID, the Municipality issued a resolution to officially terminate the Contract.[166]

B. The Government Refused to Approve Payment of the Omega Consortium's Invoices

74. Shortly after the July 2014 change of administration, the Government also began to cut the flow of funds to the Omega Consortium's Projects. It did so in an arbitrary and baseless manner. For example, the Government refused to make payments that had already been approved by the respective Government agencies, and were therefore before Panama's Comptroller-General for final sign-off on the date the Varela Administration took office.[167] Instead of approving the payments (as it should have), the Comptroller-General instead returned the invoices and/or partial payment certificates to the relevant agencies. This action was undertaken not only without explanation but also without any basis in law.[168]

75. As a result, less than six months into Mr. Varela's Presidency and upon the replacement of President Martinelli's Comptroller-General, the Government had failed to approve payments for *all* of its eight Contracts with the Omega Consortium. From that point on, *only one* of

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[166] Rivera ¶ 122.

[167] Under Panamanian law, the Comptroller-General must provide final sign-off for any payments from public funds. *See* Law No. 32 "*Por la cual se adopta la Ley Orgánica de la Contraloría General de la República*" dated 8 Nov. 1984 (C-0059), arts. 1, 2, 11(2); Political Constitution of the Republic of Panama, as amended on Nov. 2004 (C-0060 resubmitted), art. 280.

[168] In Panama, the Comptroller-General's term in office ends six (6) months after a new President is inaugurated, so the incumbent Comptroller-General remained in office until 31 December 2014, when she was succeeded by President Varela's nominee. *See* Political Constitution of the Republic of Panama, as amended on Nov. 2004 (C-0060 resubmitted), Ch. 3, art. 279. That the Comptroller-General appointed by then-former President Martinelli would follow political trends, and do the bidding of the newly-inaugurated President Varela in refusing to approve the payments owed to Omega until expiry of her term at the end of 2014, *see id*, is unsurprising. Although nominally independent, in practice Comptrollers-General "have virtually never challenged government policy." *See, e.g.*, PANAMA: A COUNTRY STUDY 182 (Sandra W. Meditz and Dennis M. Hanratty, eds, 1987) (C-0061) ("The Constitution also provides for an independent comptroller-general who serves for a term equal to that of the president and who may be removed only by the Supreme Court. The comptroller-general is charged with overseeing government revenues and expenditures and investigating the operations of government bodies. Although independent in theory, in practice holders of this office have virtually never challenged government policy."). Neither the incumbent Comptroller General following Mr. Varela's assumption of power, nor President Varela's chosen Comptroller-General, once appointed, proved any exception to this rule.

the Omega Consortium's invoices was ever approved (though never received by the Omega Consortium).[169] As a result, invoices for many months of work that had already been performed went unpaid, leaving the Omega Consortium with no option but to halt operations and lay off personnel in an effort to mitigate the damages caused by the Government's breaches of its payment obligations.

C. The Government Terminated, Suspended or Allowed to Lapse All of Claimants' Contracts in Panama

76. The Varela Government went further still. In addition to failing to honor its payment approval obligations under the Contracts, the Government also failed to grant the Omega Consortium routine extensions to contract performance periods for delays that were in no way attributable to the Omega Consortium.[170] These extension requests arose out of well-documented Government-induced delays, something which was expressly acknowledged by the Project inspectors.[171] Consequently, and despite the Omega Consortium's numerous and wholly-justified extension requests, as of December 2014—after just 6 months in office—the Varela Government had improperly allowed all but one of the Contracts to lapse, as follows:

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[169] Only one of the Omega Consortium's invoices was ever approved by President Varela's Comptroller-General, Mr. Federico Humbert Arias, after December 2014—an invoice issued in January 2015 for the La Chorrera Contract, approved in October 2015, and paid shortly thereafter. *See* Work Advance No. 13 dated 26 Jan. 2015 (C-0062). Payment on these invoices was never received because the Government used it to offset an alleged debt to the Panamanian Social Security Administration and Internal Revenue Service.

[170] Some of these contract performance extensions were properly approved by the relevant Government agencies under the Martinelli Administration; however, those which were before Panama's Comptroller-General for final sign-off on the date the Varela Administration took office were sent back to those agencies without explanation and unjustifiably denied.

[171] *See, e.g.*, Addendum No. 4 to Contract No. 077 (2011) dated 7 May 2014 (C-0106), which was never signed-off by the Comptroller; Addendum No. 3 to Contract No. 083 (2011) dated 7 May 2014 (C-0107), which was never signed-off by the Comptroller-General; Addendum No. 4 to Contract No. 085 (2011) dated 7 May 2014 (C-0171), which was never signed-off by the Comptroller-General.

Contract	Expiration
Rio Sereno	27-Sept.-2014
Kuna Yala	28-Sept.-2014
Puerto Caimito	04-Aug.-2014
Mercado Público de Colón	01-Mar.-2014
Ciudad de las Artes	08-July-2014
La Chorrera	09-July-2014
Municipality of Panama	15-Sept.-2014
Municipality of Colón[172]	21-July-2015

77. The first Contract allowed to lapse was the Mercado Público de Colón Contract. On 13 December 2012, the Government issued a suspension order as a result of its own failure to enforce orders to vacate the original premises that had previously been issued to merchants who had been occupying the existing market site.[173] Nevertheless, on the same day the suspension order was issued, the Ministry of the Presidency (then controlled by the Martinelli Administration) requested that the Omega Consortium *continue* to draft the relevant contractual documents and conduct the necessary pre-construction studies.[174]

78. The Omega Consortium did so, but the Varela Government has steadfastly refused to

[172] As of December 2014, only the Municipality of Colón Contract had not expired, but the Government was still refusing to allow Omega access to the site. Ultimately the Government did nothing to resolve the issues preventing Omega from gaining access to the construction site and the contract finally expired on 21 July 2015. *See* Letter No. 691-SCF-2012 from the Ministry of the Presidency to the Omega Consortium dated 13 Dec. 2012 (C-0036) (ordering temporary suspension of work on the project); Letter 659-CF-2013 from the Ministry of the Presidency to the Omega Consortium dated 25 Nov. 2013 (C-0063) (instructing Omega to commence work on 15 January 2014, even though the Government had failed to clear the site); Letter 2015 06 19 P004-62 from the Omega Consortium to the Ministry of the Presidency dated 19 June 2015 (C-0064) (summarizing all pending issues, including the fact that the Municipality had failed to relocate the merchants occupying the work site).

[173] *See* Letter No. 691-SCF-2012 from the Ministry of the Presidency to the Omega Consortium dated 13 Dec. 2012 (C-0036), at 1-2 (explaining that the reason for the suspension was the State's failure to clear the existing market of merchants).

[174] Letter No. 691-SCF-2012 from Ministry of Presidency to the Omega Consortium dated 13 Dec. 2012 (C-0036); Rivera ¶ 49.

provide any reasons for its failure to comply with its payment approval obligations.[175] Despite numerous attempts by the Omega Consortium to persuade the Government to move forward with the Mercado Público de Colón Contract, the project remains at a stand-still[176] because, to this date, the suspension has not been lifted. In addition, the Government has not reimbursed the Omega Consortium for the expenses it has incurred as a direct result of being forced to keep the project alive during the suspension. As a result, on February 2015—following the latest refusal by the Varela Administration to lift the suspension without explanation—the Omega Consortium was left with no option but to lay off the Mercado Público de Colón Project's management team, which had been hired specifically for the project in 2011. Other than an initial advance payment that the Government was required to make under the Contract, the Government has neither made any other payments to the Omega Consortium pertaining to this Contract nor taken the necessary steps to release the site so the Omega Consortium can do its work.

79. The next Project to suffer at the hands of the Varela Administration was the Ciudad de las Artes Contract. This Contract was abruptly and improperly terminated by the National Institute of Culture through a resolution issued in December 2014—five months after President Varela assumed office.[177] The National Institute of Culture based its decision to terminate the Contract on groundless allegations of unjustified project delays. But the National Institute of Culture never gave the Omega Consortium proper notice of this purported breach, nor time to comply, as required under

[175] Rivera ¶ 55-56.

[176] Addendum No. 1 to Contract No. 43/2012 dated 2014 (C-0277), signed by the Omega Consortium but not by the Minister or the Comptroller-General; Rivera ¶ 57.

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

Panamanian Law.[178] It likewise failed to follow both the proper termination procedures established under the Contract, and the more general termination procedures established by Panamanian law. Instead, the National Institute of Culture unilaterally and without notice rescinded the Contract on the barest pretext of delays.[179] That these allegations of delay were pretextual is *confirmed* beyond any doubt by the fact that Respondent had decided *months before* that it would not continue with the Project: The 2015 budget of Panama's National Assembly, published in September 2014—*three months* before Respondent's formal termination of the Contract—excluded any reference whatsoever to the Ciudad de las Artes Project.[180] In other words, three months before it notified the Omega Consortium of the termination, the Government had already decided that no money would be spent on the Ciudad de las Artes Project. And the Omega Consortium still has not received payment for the work it performed under the Ciudad de las Artes Contract after the Varela Administration took office and prior to the Government's unilateral termination.[181]

80. The next Project targeted by the Varela Administration was the La Chorrera Contract. Shortly after the Varela administration took office in July 2014, all payments for work performed under this Contract were suddenly refused without explanation. As a result, the Omega Consortium was forced to stop work under this Contract as of January 2015. Approximately two months later, making a bad situation worse, the Varela Government abruptly terminated the Contract, again without

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[178] *Id.* at 3; Rivera ¶ 120.

[179] *See* Resolution No. 391-14 DG/DAJ from INAC dated 23 Dec. 2014 (C-0044), at 1. The Government claimed that it was rescinding the Contract due to purported delays on the part of the Omega Consortium in completing key phases of the project. *Id.* at 3-4. In correspondence pre-dating issuance of the Resolution, however, the Omega Consortium had established that the project had been delayed for reasons not attributable to it. Instead of acting as it should have done under the Contract, extending the Contract performance period, and compensating the Omega Consortium for such delays, the Government arbitrarily chose to misconstrue these delays as breaches by the Omega Consortium. *See id.*

[180] *See generally* 2015 Budget presented by Panama's National Assembly dated 8 Sept. 2014 (C-0067).

[181] McKinnon Report Annex 1 Table 22.

explanation.[182] This was a sharp turn of events; before Mr. Varela assumed the Presidency, by May 2014, the Omega Consortium and the Judiciary had agreed on Addendum No. 2 to the La Chorrera Contract, which granted additional time to the Omega Consortium to complete the Contract due to external factors not imputable to the Omega Consortium. Once the Varela Administration assumed power, however, it proved impossible to obtain sign-off for the addendum from the Comptroller-General. Despite the Omega Consortium's extensive correspondence with the Judiciary, outlining the serious consequences of failing to obtain Comptroller-General sign-off for this addendum,[183] the Judiciary simply ignored all of the Omega Consortium's requests. Illustrating the spuriousness of the delay in approving the addendum, the Omega Consortium finally received that approval on 6 February 2015, but only *after* the Judiciary had notified the Omega Consortium of its intention to unilaterally terminate the Contract for default, about which it subsequently changed its mind upon receiving a comprehensive response from the Omega Consortium.[184]

81. The Municipality of Panama Contract would suffer the same fate. On 2 September 2014, the Government officially suspended construction of one of the two markets due to be built under the Municipality of Panama Contract.[185] While the Government claimed this was because it needed to revise the terms and conditions of the Contract, to date the Omega Consortium has received

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[182] Rivera ¶¶ 125-27.

[183] Letter from the Omega Consortium to the Judiciary dated 27 Nov. 2014 (C-0366), describing to impossibility to submit payments request due the lack of a valid Addendum; Letter from the Omega Consortium to the Judiciary dated 17 Dec. 2014 (C-0367), describing the negative consequences of lack of a valid Addendum; Letter from the Judiciary to the Omega Consortium dated 29 Dec. 2014 (C-0368) (requiring Omega to act even though the Addendum was not signed-off by the Comptroller-General).

[184] Later, the Judiciary "suspended" its decision to terminate the Contract, Letter from the Supreme Court to Omega Engineering, Inc. dated 25 Mar. 2015 (C-0248), allegedly in order to negotiate with the Omega Consortium. But to date no such negotiation has taken place. Despite repeated attempts by Omega to move this Project forward, it remains at a complete standstill.

[185] *See* Letter S.G.-087-A from the Municipality of Panama to the Omega Consortium dated 2 Sept. 2014 (C-0058) at 2.

no such revised terms and conditions, no payment, and no communication from the Government explaining why the Project has remained suspended for nearly four years. Notably, after Claimants notified Respondent, on 29 July 2016, of their intent to initiate the present proceedings, a letter was posted on the PanamaCompra website, on 23 August 2016, confirming Respondent's intention to rescind the Contract and alleging unsubstantiated breaches by Claimants.[186]

82. Despite issuance of this letter, the Government has made no further attempt to resolve the issue and has instead taken steps to aggravate the dispute. On 11 January 2017, twelve days after Claimants filed their Request for Arbitration with the ICSID Secretariat, the Municipality of Panama issued a resolution terminating the Municipality of Panama Contract by default. This resolution also banned Claimants from further contracting with the Government, ordered Claimants to produce a cost report to "initiate the [contract's] liquidation process," and advised that the only remedy against the resolution was filing an appeal within five working days of receiving notification thereof.[187] On 5 May 2018, the Panamanian press reported that construction of one of the two markets had been awarded to another construction company by the Municipality of Panama.[188]

83. Work on the Municipality of Colón Contract never even began because the Municipality, shortly after signature, decided it wanted to change the site for the Project. The Omega Consortium was asked to redesign the Project to accommodate the new site, which it did; however, no approval or comments were ever received for the new plans so the Contract eventually expired.[189]

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[186] *See* Letter No. 5527/DS/2016 from Panama's Office of the Mayor to the Omega Consortium dated 19 Aug. 2016 (C-0068).

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

[188] Panama's Mayor declares the culmination of the work at the public market of Pueblo Nuevo, LA PRENSA dated 5 May 2018 (C-0369).

[189] *See* Letter from the Ministry of the Presidency to the Omega Consortium dated 13 Dec. 2012 (C-0370).

84. Finally, the Ministry of Health Contracts were also allowed to lapse. Around the time Mr. Varela assumed the Presidency, the Omega Consortium was awaiting Comptroller-General approval of amendments to each of the Minsa Capsi Contracts that would provide required extensions and authorize payment to the Omega Consortium for costs incurred.[190] But these approvals were inexplicably never issued.[191] The new Administration's Comptroller-General placed several obstacles in the way of issuance of these approvals. This included requesting a number of documents from the Omega Consortium that he already had, and the rejection of perfectly reasonable requests from the Omega Consortium based on nothing more than pretexts.[192] For example, in April 2015 the Comptroller-General refused to sign the addendum or change order extending the deadline for completion of the MC Puerto Caimito Contract—a document which had been with the Comptroller-General for almost a year—on the baseless contention that a required certificate was missing.[193] But that certificate had been provided during the bidding process and formed an integral part of the MC Puerto Caimito Contract file, something which was already in the Comptroller-General's possession. Two weeks later, the Comptroller-General rejected the change order extending the deadline for the

[190] Addendum No. 4 to Contract No. 077 (2011) dated 7 May 2014 (C-0106), which was never signed-off by the Comptroller as described below; Addendum No. 3 to Contract No. 083 (2011) dated 7 May 2014 (C-0107), which was never signed-off by the Comptroller as described below; Addendum No. 3 to Contract No. 085 dated 7 May 2014 (C-0108), which was never signed-off by the Comptroller as described below; Rivera ¶ 72.

[191] Letter No. MINSA-54 from the Omega Consortium to the Ministry of Health dated 31 Oct. 2014 (C-0173), describing the critical situation of Omega due to the lack of valid Contracts; Letter No. MINSKA-KY-72R from the Omega Consortium to the Ministry of Health dated 22 Sept. 2014 (C-0174), requesting an amendment of the Addendum No3 (MC Kuna Yala) due to the fact that it was not signed-off by the Comptroller before its expiration date; Letter No. MINSKA-KY-83ET from the Omega Consortium to the Ministry of Health dated 28 Nov. 2014 (C-0175), requesting an extension of time (MC Kuna Yala), describing that there is no a valid contract since 30 June 2014; Letter from the Omega Consortium to the Ministry of Health dated 18 Dec. 2014 (C-0371), stating that there has been no valid contract for the last 12 months; Addendum No. 1 to Contract No. 085 (2011) dated 23 Sept. 2011 (C-0144), signed by Omega but not by the Government and not signed-off by the Comptroller; Rivera ¶ 72.

[192] Rivera ¶ 73.

[193] Letter No. 695-15-LEG-F.J.PREV. from the Comptroller-General to the Ministry of Health dated 17 Apr. 2015 (C-0176); Rivera ¶ 73.

Rio Sereno Contract, once again on the most unconvincing of justifications.[194]

85. The Ministry of Health also failed to assist with finalizing the Projects. Instead of assisting the Omega Consortium, the Ministry of Health ignored the Comptroller-General's arbitrary and illegal behavior. The Ministry of Health and the Comptroller-General's Office jointly and deliberately exerted so much pressure on the Omega Consortium that it eventually had to stop work and lay off employees.

86. Despite being subjected to a barrage of hostile governmental actions throughout this period, the Omega Consortium nevertheless remained optimistic that an amicable resolution to this dispute could be reached. The Omega Consortium was thus careful to ensure that its insurance coverage, required permits, surety bonds and guarantees remained up-to-date as required under the Contracts for as long as it could. The Omega Consortium also made numerous attempts to collect payment on its outstanding invoices—both through written communications and personal visits—but its pleas were either ignored or dismissed outright.[195] The Government refused to engage in *any*

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[194] Letter No. 695-15-LEG-F.J.PREV. from the Comptroller-General to the Ministry of Health dated 17 Apr. 2015 (C-0176); Rivera ¶ 73.

[195] *See, e.g.*, Letter MINSA-50 from the Omega Consortium to Panama's Ministry of Health dated 29 July 2014 (C-0069) (requesting that MINSA endorse already-issued change orders so that the Omega Consortium could issue the relevant invoices and receive payment for this work); Letter 2015 06 19 P004-62 from the Omega Consortium to the Ministry of the Presidency (*Secretaría de la Cadena del Frío*) dated 19 June 2015 (C-0064) (acknowledging the Government's desire to resume work on the Contract, but requesting, *inter alia*, that change orders be issued so as to re-balance the Contract with respect to payments owed for 45 months' worth of delay that was not attributable to the Omega Consortium); Letter No. 2015 19 06 P08-013 from the Omega Consortium to the Municipality of Colón dated 19 June 2015 (C-0070) (requesting an explanation as to why, despite numerous inquiries from the Omega Consortium, the Municipality had not paid the Omega Consortium for work completed during the period December 2013 through April 2014, or its invoice of 12 December 2014); Letter No. MAP-5-09-14 from the Omega Consortium to Panama's Office of the Mayor dated 5 Sept. 2014 (C-0071) (requesting assistance from the Municipal Government in coordinating the required inspections by the Comptroller-General's office in order to receive payment for outstanding invoices); Letter No. S.G.-087-A from the Municipality of Panama to the Omega Consortium dated 2 Sept. 2014 (C-0058) (explaining that the motivation for the suspension of work on the Municipality of Panama Contract was to permit the revision of the entire project, but failing to explain the exact terms of such suspension); Letter No. DG/107 from INAC to the Omega Consortium dated 9 Sept. 2014 (C-0073) (refusing, with no excuse, to pay for delays it had caused and most of the changes to the project that it had requested); Letter No. DG/149 from INAC to the Omega Consortium dated 23 Oct. 2014 (C-0074) (stating evasively that INAC had forwarded the Omega Consortium's petition for information with respect to payments to its lawyers). The Omega Consortium's employees, including its financial director, Salvador del Toro, have

meaningful negotiations, and instead went on an even more aggressive attack against Mr. Rivera and his Panamanian companies.

87. It is no coincidence that the Omega Consortium's relationship with *all* the various Government agencies began to sour and issues with *all* the Contracts began to arise so soon after President Varela took office. Mr. Rivera's refusal to comply with President Varela's request for a huge campaign contribution certainly did not help protect Mr. Rivera and his companies from the Government's coordinated campaign against them. As detailed below, these actions—and in particular the declarations of default by Government agencies including the National Institute of Culture and the Municipality of Panama—constituted a debilitating blow to Claimants and their investment. But these actions were just the beginning of the Government's unfair and arbitrary actions against Mr. Rivera. The final blow to Claimants' investment resulted from baseless and illegal criminal investigations subsequently launched against them. Eventually, the Government's concerted actions resulted in the decimation of Claimants' investment in Panama, as well as their business abroad.

D. The Government Opened a Series of Bogus Criminal Investigations into Claimants and their Investments

88. Once the Varela Administration took office in 2014, the Government opened multiple investigations either purportedly involving, or directly implicating, Mr. Rivera, one of his key employees, and his companies. The criminal investigations against Claimants came in three overlapping waves.

made, since July 2014, numerous visits to the relevant Panamanian authorities to discuss progress on the Projects, to no avail.

1. The Prosecution of Judge Moncada Luna and the First Criminal Investigation

89. On 7 May 2014, just a few days after winning the election, President-Elect Varela announced that he would sign a "governability agreement" with the "Partido Revolucionario Democrático" to initiate a criminal trial against Mr. Moncada Luna.[196] It happened just a few months later. In October 2014, the Varela administration opened a criminal investigation into Mr. Moncada Luna, the-then President of Panama's Supreme Court, who had been appointed to that role by Mr. Martinelli. The investigation was triggered by a complaint filed by members of Panama's Bar Association (the "Colegio Nacional de Abogados"),[197] alleging that Mr. Moncada Luna had acquired two luxury condominiums through companies owned and managed by his wife, Ms. Maria del Pilar Fernandez de Moncada Luna. The key allegation in the Complaint was that the Moncada Lunas' income was insufficient for the couple to purchase two luxury apartments for nearly US$ 2 million and to pay for them in only three years.[198] As a result, an investigation for unjust enrichment and other crimes was initiated against Mr. Moncada Luna by Panama's National Assembly (the "**First Criminal Investigation**").

90. The fact that the criminal investigation against Mr. Moncada Luna began a mere three months after President Varela took office is not surprising. As discussed above, in the midst of his political struggle with Mr. Martinelli, Mr. Varela had publicly voiced concerns that Mr. Moncada Luna was supporting an alleged attempt by the outgoing President to change the Panamanian

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[196] I would ask for the heads of public servants, EL SIGLO dated 7 May 2014 (C-0372).

[197] Criminal Complaint against Moncada Luna dated 10 July 2014 (C-0373).

[198] *Id.* at 4-5.

Constitution to allow him to seek re-election.[199] It was no secret that even while President Varela was the country's Vice-President, he had sought Mr. Moncada Luna's resignation and publicly threatened him with impeachment proceedings if he did not resign.[200]

91. Mr. Rivera was generally aware of the criminal investigation into Mr. Moncada Luna from reading the news. But he could have never imagined that he and Omega Panama would be unwittingly drawn into this investigation. Mr. Rivera first learned of his "involvement" in the Moncada Luna investigation on 22 January 2015 when he was "informed that both Omega Panama's and PR Solutions' Panamanian bank accounts, which held only around US$ [redacted] between them, had been frozen by the National Assembly's designated prosecutor (the "**Designated Prosecutor**") as part of this investigation."[201]

92. To be sure, the Designated Prosecutor had *no grounds* for linking the Moncada Luna investigation and Omega Panama. The link, so far as Mr. Rivera and his legal team understand it,[202] appears to have arisen from a legitimate transaction completely unrelated to Mr. Moncada Luna. Specifically, in April 2013, Mr. Rivera had negotiated an unrelated land deal for a private real estate development project. These types of private real estate development projects have always been a key

[199] *See, e.g.*, *Polémica gestión de Moncada Luna*, LA PRENSA dated 25 Feb. 2015 (C-0075) (describing Mr. Moncada Luna's purportedly active role, when the Martinelli administration was in power, in trying to add an extra Chamber to Panama's Supreme Court—a so-called Fifth Chamber—which would have had the power to extend Presidential term limits. The proposal for a Fifth Chamber had already, by that stage, been declared unconstitutional by Panama's Supreme Court).

[200] See Juan Carlos Varela reitera que Moncada Luna debe renunciar por dignidad, LA PRENSA dated 21 June 2012 (C-0076).

[201] Rivera ¶ 85; Email correspondence between Frankie Lopez and others dated 22 Jan. 2015 – 7 Mar. 2015 (C-0188).

[202] Despite the interminable Panamanian investigations into Omega and Mr. Rivera this has never been satisfactorily explained.

part of Mr. Rivera's business model,[203] which, for tax and liability reasons, were always undertaken through a separate corporate vehicle and not one of the Omega companies. In this instance, Mr. Rivera sought to purchase land to develop a vacation resort and residential homes in the region of Los Santos, Tonosí. Mr. Rivera had provisionally named the development the "Verdanza Residences" (the "**Verdanza Project**"). Mr. Rivera had made similar investments in the past in both Puerto Rico and the Dominican Republic.

93. For this land purchase, Mr. Rivera enlisted the help of Tito Chevalier, a friend and colleague of Mr. Rivera's who had good connections in the construction and real estate market in Panama (he had a Coldwell Banker franchise in Panama) and with whom Mr. Rivera had previously worked on private real estate developments. Mr. Chevalier assisted Mr. Rivera to locate suitable tracts of land for the Verdanza Project. He showed Mr. Rivera several tracts in the Tonosi region, which appeared suitable to Mr. Rivera. After seeing several of them, Mr. Chevalier began making inquiries with his contacts about plots of land for sale in the area.

94. Around that time, a Ms. Maria Gabriela Reyna, a Panamanian lawyer with the law firm Reyna y Asociados, whom Mr. Rivera had not met before, sent pictures and drawings to his office of a farm that was for sale in Tonosi. Upon receiving the information, Mr. Rivera set out to see the parcel and decided it was suitable. Once he had made up his mind to buy that land, Mr. Rivera entrusted Mr. Lopez—one of Mr. Rivera's employees and a Director of Omega Panama—to finalize the negotiation with Ms. Reyna, who was acting on behalf of the land owner, a Panamanian company named J.R. Bocas Investment Inc ("**JR Bocas**").[204] Omega Panama set up a Panamanian

[203] Rivera ¶ 92.

[204] Tonosí Land Registration Information date accessed 31 Jan. 2013 (C-0202), at 2; Email from Ricardo Ceballos to Ana Graciela Medina dated 7 July 2015 (C-0203).

special purpose vehicle—Punela Development Corp. ("**Punela**")—to purchase and hold title to the land.[205]

95. Negotiations for the Las Cañas Development took place over the course of a few weeks, and a Sale and Purchase Agreement was ultimately signed by JR Bocas and Punela in April 2013 for an agreed purchase price of US$ [redacted], payable in three installments—the first two of [redacted] balance payable at the end.[206] After the first two installments were paid, a disagreement with JR Bocas arose regarding two key issues concerning the parcel: (i) the outstanding mortgage on the land; and (ii) the lack of public works infrastructure (electricity lines, water pipes, etc.) at the site. JR Bocas attempted to remedy these issues through an amendment extending the time for completion of the purchase from 6 to 12 months and requiring the seller to resolve the outstanding issues, but Mr. Rivera did not sign this proposed amendment as it only benefited the Seller.[207] Although Mr. Rivera paid the first two installments on time, the third and final payment was not made because the parties did not agree on an appropriate amendment. Funds for payment of the first two installments were transferred from the bank account of Omega Panama to the account of PR Solutions, and payment was made from PR Solutions. The payments were made through the bank accounts of these two entities simply because there had been no time to set up a bank account for Punela Development Corp. Ultimately, the last payment was never made because JR Bocas did not address the two outstanding issues, and by that time the baseless criminal investigations had already started, derailing the Verdanza Project and forcing Mr. Rivera to focus

[205] *See generally* Public Registry of Punela Development Corp. dated 2 Jan. 2013 (C-0077).

[206] *See* Sale and Purchase Agreement between JR Bocas Investments, Inc. and Punela Development Corp. dated Apr. 2013 (C-0078).

[207] Extension to the Purchase-Sale Agreement for Tonosí Land dated 3 Sept. 2013 (C-0374) (unsigned by Mr. Rivera).

instead on defending his good name and protecting his larger investment in Panama.

96. Inexplicably, the Designated Prosecutor "drew a link between the [Verdanza Project], on the one hand, and other wholly unrelated projects/transactions—namely the Omega Consortium's La Chorrera Contract, and bank transfers made by people and entities entirely unrelated either to Omega Panama or [Mr. Rivera]—on the other."[208] In particular, the Designated Prosecutor alleged that the two contractual payments made through PR Solutions for the purchase of the land from Reyna y Asociados for the account of the seller,[209] JR Bocas, were then subsequently transferred by Ms. Reyna to another account, then to another, and that these funds eventually found their way into the bank account of Mr. Moncada Luna's wife, and were ultimately used to purchase the two luxury condominiums which led to the investigation into Mr. Moncada Luna.[210]

97. For the Designated Prosecutor's allegation to be anything other than wholly absurd, he needed something else connecting Claimants to Mr. Moncada Luna. This alleged connection came in the form of the La Chorrera Contract. Five months prior to execution of the Verdanza Project documents, Mr. Moncada Luna (on behalf of the Judiciary) had signed the La Chorrera Contract with the Omega Consortium.

98. But this link was both completely coincidental and tenuous, and the Designated Prosecutor was soon forced to admit it. For starters, Mr. Rivera had no control over where, when, and to whom Ms. Reyna transferred the Verdanza Project purchase price funds. Beyond that, the La

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[208] Rivera ¶ 99.

[209] *See* Check from PR Solutions, S.A. to Reyna y Asociados dated 25 Apr. 2013 (C-0079); Check from PR Solutions, S.A. to Reyna y Asociados dated 12 July 2013 (C-0080).

[210] *See* Report of the Preliminary Financial Analysis of Case No. 049-15 by the Public Prosecutor for Organized Crime dated 5 June 2015 (C-0081); Resolution No. 40-15 of the Second Prosecutor dated 15 June 2015 (C-0082); *see also* RfA ¶¶ 38-40.

Chorrera Contract had been awarded to the Omega Consortium following a *transparent public bidding process* that included a review by an *independent, three-person "vetting commission" of architects*.[211] The Omega Consortium competed for the Project with *four other consortia* and won the bid fair-and-square, just as it had won seven others around the same time—with the highest score from the independent commission.[212] Because the Contract was with the Judiciary, it fell upon the President of the Supreme Court to act on behalf of the Judicial Branch in signing the Contract from a functional perspective.[213] But this was just a mere formality; Mr. Moncada Luna had – and could have – *zero* influence over the contractor the Government had chosen for the construction, and would have signed the contract in his designated role as President of the Court no matter whom the Government had selected.

99. It is not surprising that the Designated Prosecutor eventually dismissed the allegations against Mr. Rivera and Omega Panama after Mr. Moncada Luna pled guilty to unjustified enrichment and perjury on public documents.[214] During Mr. Moncada Luna's sentencing hearing on 5 March 2015, the Designated Prosecutor *publicly affirmed* that Omega Panama and Mr. Rivera were *not* linked to Mr. Moncada Luna's assets.[215] In a public video of the proceedings, the Designated

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[211] *See* Request for Proposals No. 2012-0-30-0-08-AV-004833 "*Construcción de un Edificio para la Unidad Judicial Regional de La Chorrera*" dated 2012 (C-0024); Report from the Vetting Commission dated 9 Oct. 2012 (C-0083); *see also* Administrative Resolution No. 082/2012 dated 18 Sept. 2012 (C-0084) (nominating the three architects to the Vetting Commission).

[212] Report from the Vetting Commission dated 9 Oct. 2012 (C-0083).

[213] It is important to emphasize that, in addition to the Omega Consortium, three other companies participated in the public bid for this Contract, none of which were competitive with the Omega Consortium's bid and all of which exceeded the Panamanian Government's reference value (which was then publicly available). *See* Minutes of the Opening of Proposal Envelopes for La Chorrera dated 1 Oct. 2012 (C-0046).

[214] *See* Sentencing Hearing of Mr. Moncada Luna dated 5 Mar. 2015 (C-0085) (Part III), available at https://www.youtube.com/watch?v=JFX_tCVyHo4 (Part I); https://www.youtube.com/watch?v=6bMNm_IDJ6Q (Part II); https://www.youtube.com/watch?v=ySoXEj1kOvY&nohtml5=False (only available electronically).

[215] *See* Rivera ¶ 101.

Prosecutor affirmed categorically that "*PR Solutions [and] Omega Engineering . . . are [among the] companies that are **not** linked to the unjustified enrichment charges against the judge*," further declaring them to be no more than "Affected Third Parties."[216] Moreover, Ms. Reyna's testimony in the investigation confirmed that neither Mr. Rivera nor the Omega Consortium were in any way connected with the Moncada Luna scheme. This is especially important considering that Ms. Reyna provided her testimony despite: (1) incriminating herself and others; and (2) being offered a reduced sentence in exchange for incriminating her accomplices. Yet, Ms. Reyna expressly (and correctly) absolved Omega and Mr. Rivera from any wrongdoing.[217]

100. The Varela Government, however, refused to relent. Despite the statement by the Designated Prosecutor, it refused to unfreeze Omega Panama's and PR Solutions' bank accounts, and proceeded to initiate two additional investigations *based on the very same allegations*. These subsequent investigations—all in breach of Panamanian law—directly (and pretextually) targeted Mr. Rivera, one of his executives, Omega Panama, and PR Solutions.[218]

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[216] Sentencing Hearing of Mr. Moncada Luna dated 5 Mar. 2015 (C-0085) (Part II at 25:40-28:38 minutes) available at https://www.youtube.com/watch?v=6bMNm_IDJ6Q at 25:40-28:38 minutes (only available electronically). Under Panamanian law an Affected Third Party is a person, natural or legal, who is not found to be criminally or civilly liable for the underlying criminal act, but whose assets remain affected by the criminal proceeding or judgment. Criminal Procedure Code of the Republic of Panama dated 28 Aug. 2008 (C-0088), art. 106.

[217] *See* Supplemental Declaration of Maria Gabriela Reyna Lopez dated 14 July 2015 (C-0089) at 8. The only "evidence" provided by the Government has been the Government's confirmation that: (i) the Omega Consortium entered into a contract with the Judicial Branch, which, as required by Panamanian law, was signed by Mr. Moncada Luna on its behalf; and (ii) reports authored by the forensic unit of the prosecutor's office attempting to link the two payments to Reyna y Asociados for the purchase of the Tonosí land with unrelated payments made by unrelated companies to accounts owned by Mr. Moncada Luna's wife. *See* Report of the Preliminary Financial Analysis of Case No. 049-15 by the Public Prosecutor Organized Crime Division dated 5 June 2015 (C-0081); Resolution No. 40-15 of the Second Prosecutor dated 15 June 2015 (C-0082); Summary by the Public Prosecutor First Anti-Corruption Division of the Attorney-General dated 17 Nov. 2015 (C-0086). The tenuous nature of the allegations against Claimants contained in these reports reinforces the designated Prosecutor's dismissal of the allegations against Mr. Rivera. *See* Rivera ¶¶ 98-99.

[218] Under Panamanian law a prosecutor must conclude an investigation within a maximum of four months from the date the investigation commences. *See* Judicial Code of the Republic of Panama dated Jan. 2010 (C-0091), art. 2033.

2. The Second Criminal Investigation

101. A few days after Mr. Moncada Luna's sentencing hearing, a second investigation was opened by the public prosecutor's organized crime division (the "**Second Investigation**").[219] This time, however, the investigation targeted Felipe "Pipo" Virzi (former Vice-President of Panama from 1994 to 1999 and a close friend of Mr. Moncada Luna), Mr. Moncada Luna's wife, and all other companies or individuals allegedly linked to the original allegations—which therefore encompassed, in breach of Panamanian law,[220] Omega Panama and Mr. Rivera. Notably, the Second Investigation was opened at the behest of Panama's Attorney-General a mere *two weeks after the Omega Consortium filed its formal Notice of Dispute under the BIT and the TPA* following Respondent's unilateral rescission of the Ciudad de las Artes Contract.[221]

102. On 25 August 2015, in complete disregard of the Designated Prosecutor's express

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[219] *See generally* Resolution No. 40-15 of the Second Prosecutor dated 15 June 2015 (C-0082); Report of the Preliminary Financial Analysis of Case No. 049-15 by the Public Prosecutor for Organized Crime dated 5 June 2015 (C-0081). Both Resolution No. 40-15 and the Report of Preliminary Financial Analysis state that, in response to the Attorney-General's 20 March 2015 Resolution, the Designated Prosecutor had submitted the case file used in the investigation of Mr. Moncada Luna to the Prosecutor in charge of the Second Investigation ("**Second Prosecutor**") so the Second Prosecutor could investigate Felipe Virzi, María del Pilar Fernández de Moncada, and other allegedly related parties (which include Mr. Rivera, Omega Panama and PR Solutions) to determine whether the evidence in the case file constitutes a crime, and, if so, individualize charges against those responsible. Resolution No. 40-15 of the Second Prosecutor dated 15 June 2015 (C-0082), at 2; *see* also Report of the Preliminary Financial Analysis of Case No. 049-15 by the Public Prosecutor for Organized Crime dated 5 June 2015 (C-0081). Further, Resolution No. 40-15 and the Report of Preliminary Financial Analysis proceed to list (as the basis of the investigation) the same forensic financial evidence (transfers of funds between various companies) as that used by the Designated Prosecutor. *See* Resolution No. 40-15 of the Second Prosecutor dated 15 June 2015 (C-0082); Report of the Preliminary Financial Analysis of Case No. 049-15 by the Public Prosecutor for Organized Crime dated 5 June 2015 (C-0081). These documents confirm, therefore, that the Second Investigation is based on the same factual allegations as the First Investigation. In addition, the crime of money laundering, which is the basis for the Second Investigation, is one of the crimes for which Mr. Moncada Luna was investigated.

[220] Panama's Criminal Procedure Code provides protection from double jeopardy. In particular, Article 7 of the Code provides that "[n]o one can be *criminally investigated* or judged *more than once* for the same crime, even if the crime is given a different name." Criminal Procedure Code of the Republic of Panama (C-0088), art. 7 (emphasis added, translation by Claimants' Counsel). Here, the Prosecutor from Panama's Anti-Corruption Division and the Prosecutor from Panama's Organized Crime Division have launched investigations into Mr. Rivera and Omega Panama based on the same evidence, thereby violating article 7 of the Panamanian Criminal Procedure Code's prohibition against double jeopardy, by giving the alleged crime a different name. *See* Rivera ¶ 113.

[221] Notice of Dispute dated 3 Mar. 2015 (C-0092).

finding that neither Omega Panama nor Mr. Rivera had a case to answer, the Prosecutor directing the Second Investigation issued a detention order[222] and INTERPOL Red Notice[223] against both Mr. Rivera and Mr. Francisco Feliú (one of Omega Panama's senior officers). This meant that both Messrs. Rivera and Feliu were, to all intents and purposes, unable to travel internationally. This act also financially strangled Mr. Rivera and his businesses, wiping out Omega U.S.'s critical bonding capacity, and decimating Mr. Rivera's personal and professional reputation. Mr. Rivera fought these acts and orders to the full extent of the law. Multiple appeals through the appropriate Panamanian legal channels were, however, summarily rejected.[224]

103. Then, on 23 September 2016, Panama's Second Superior Tribunal for the First Judicial District declared "*the nullity of every act in the criminal proceedings . . . for the allegations of money laundering*"[225] against several individuals, *including Messrs. Rivera and Feliú*—thereby annulling the Second Investigation. Particularly noteworthy in this Decision was the Appellate Court's citation, as the justification for its reasoning, of due process violations of the Inter-American Convention of

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[222] *See* Resolution of Detention No. 052-15 dated 25 Aug. 2015 (C-0093). The detention order against Mr. Rivera claimed, without support, that he and other individuals were "unequivocally linked to the unlawful acts under investigation" and that detention was justified because the parties were at risk of neglecting the "proceedings" against them (even though Mr. Rivera and Mr. Feliu have never actually been charged with any crime).

[223] Letter from Secretariat to the Commission for the Control of Interpol's Files dated 24 Mar. 2016 (C-0219); Letter from the Commission for the Control of Interpol's Files dated 13 Dec. 2016 (C-0220); *see also Fiscalía pide a Interpol que emita 'alerta roja' para ubicar a 4 empresarios por caso Moncada Luna*, TVN NOTICIAS dated 2 Sept. 2015 (C-0094). This accused Mr. Rivera, again without any evidence, of holding accounts that "had the purpose of hiding or covering the true source of the funds" presumably funneled to judge Moncada Luna.

[224] *See, e.g.*, Oscar Rivera's Petition of Habeas Corpus to the Supreme Court dated 28 Aug. 2015 (C-0208); Revocation of the Arrest Warrant Request dated 29 Sept. 2015 (C-0223). Despite the Attorney General's constitutional obligation to respond within thirty days to the written complaint filed by Mr. Rivera requesting that that office take note of the violations of his human rights, to this date Mr. Rivera has received no response. *See* Article 41 from the Panamanian Constitution (C-0060 resubmitted) which establishes that: *"[…]El servidor público ante quien se presente una petición, consulta o queja deberá resolver dentro del término de treinta dias[…]*" (The Public Servant before whom a petition, consultation, or complaint is filed shall resolve the matter within thirty days).

[225] Judgment of Panama's Second Superior Tribunal for the First Judicial District dated 23 Sept. 2016 (C-0008), at 15.

Human Rights, the Constitution of Panama, and Panamanian Criminal Procedure, by the Panamanian prosecutors.[226] A few weeks later, on 13 December 2016, INTERPOL confirmed that upon request from Mr. Rivera's counsel it decided to withdraw the Red Notice issued (baselessly) against Mr. Rivera because the data concerning him was not compliant with INTERPOL's rules and "all international police cooperation via INTERPOL's channels in this case would not be in conformity with INTERPOL's Constitution and Rules."[227] Despite this, as of today and in continued violation of Panamanian law, both Omega Panama's and PR Solutions' Panamanian bank accounts remain frozen and the detention orders against Messrs. Rivera and Feliu, incredibly, have not been lifted.

3. The Third Criminal Investigation

104. Unfortunately, the Varela Government's harassment of Omega and Mr. Rivera did not stop there. Incredibly, a *third* investigation was initiated by a Prosecutor from Panama's anticorruption division (the "**Third Investigation**") on the basis of—again—the *very same allegations* used to justify the opening of the first two criminal investigations of Mr. Rivera and Omega Panama.[228]

105. Although Mr. Rivera's name was not included as a person of interest in this investigation, the Prosecutor ordered and executed a search and seizure order against Omega Panama's and PR Solutions' offices in an attempt to obtain documentation related to bank transactions under investigation.[229] This took place simultaneously with another raid by the Prosecutor in the Second Investigation of Mr. Rivera's offices.

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[226] *Id.* at 15-16.

[227] Letter from the Commission for the Control of Interpol's Files (C-0220); *see also* Rivera ¶ 110 & n.174. On 17 February 2017, pursuant to a request by Mr. Feliu, INTERPOL similarly deleted all data concerning him as well.

[228] *See* Search and Seizure Order issued by the Anticorruption Prosecutor dated 17 Nov. 2015 (C-0095) at 2-3.

[229] See id.

106. Despite three separate criminal investigations—two of which blatantly violated Panamanian law—the Varela Government has been unable to find any incriminating evidence against Mr. Rivera and his companies. This is due to the simple fact that none exists.

VII. RESPONDENT'S UNLAWFUL ACTIONS NOT ONLY DECIMATED CLAIMANTS' INVESTMENT IN PANAMA, BUT ALSO OMEGA U.S.'S REPUTATION AND GOODWILL

107. Before Respondent destroyed Claimants' investment in Panama, the country had become Omega U.S.'s main source of revenue and new business. For example, in early 2014, 94.17% of Omega U.S.'s remaining contracted work was in Panama,[230] compared to 5.83% in Puerto Rico.[231] By any measure, Claimants had leveraged nearly all of their goodwill and assets into their Panamanian investment.

108. To make this work, Claimants leased, improved and furnished half of the 16th floor at Plaza Banco General in Calle 50 in Panama City, from which they managed their investment. They had also expatriated to Panama more than a dozen employees from the U.S., spent millions of dollars in materials and services from local businesses, and hired and trained hundreds of Panamanians directly or through their subcontractors. They also invested in more than 20 trucks and motor vehicles, as well as numerous office trailers and construction equipment. Mr. Rivera was personally committed and fully invested in Panama, too. He had leased an apartment in the Punta Pacifica district, where he was living with his teenage son who was attending the Balboa Academy.[232] Mr. Rivera had

[230] *See,* Audited Financial Statements for Omega Engineering, Inc., as of 31 December 2013 (C-0135), at 21, Note 21.

[231] *See* Consolidated Financial Statements with Supplementary Information and Independent Auditors' Report of Omega Engineering, LLC and Its Subsidiary for 28 February 2014 and 2013 dated 10 July 2014 (C-0386), at 24, Note L.

[232] A middle and high school in Panama City, tailored for expats. *See*, *Our Vision*, BALBOA ACADEMY, undated (C-0376), available at http://www.balboaacademy.org/.

decided that Panama would be the cornerstone of Omega U.S.'s future growth in the region.

109. Omega U.S.'s commitment to Panama did not stop there. To further guarantee construction bonds being issued on its behalf in Panama, on 29 October 2012 Omega U.S. executed an agreement whereby it pledged to indemnify ASSA Compañía de Seguros, S.A. in the event of losses related to the bonds.[233] This became a material liability to Claimants when, on 23 December 2014 (and as more fully detailed above),[234] the National Institute of Culture issued a Declaration of Default terminating the Ciudad des la Artes Contract. Claimants were not made aware of this Declaration until 29 December 2014, and even then they were not informed by the method of notification required by Panamanian law.[235] Instead, they were initially notified by an email sent from ASSA[236] in reference to a letter it had received from the National Institute of Culture on 27 December 2014.[237] After a month of negotiations, and despite efforts from Claimants and ASSA to dissuade the National Institute of Culture from wrongfully terminating the Ciudad des la Artes Contract, on 27 January 2015 a notification of the Decision of Default was posted on the front door of Omega Panama's offices.[238]

110. These actions by Respondent quickly crippled Omega U.S.'s financial capacity, reputation and, at bottom, its ability to stay in business. On 9 February 2015, the Smithsonian Institution STBT notified Claimants that Omega U.S. had been eliminated from consideration under

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[233] *See* Compensation Document dated 26 Oct. 2012 (C-0377).

[234] *See supra* ¶ 79; *see also* Rivera ¶ 120.

[235] *See* Law No. 22 dated 27 June 2006 (C-0280), art. 129.

[236] *See* Email from Ian van Hoorde to Frankie Lopez dated 29 Dec. 2014 (C-0378).

[237] *See* Letter No. 364-14/D.A.J. from National Institute of Culture to ASSA dated 26 Dec. 2014 (C-0379).

[238] *See* Decree No. 001 of the National Institute of Culture dated 27 Jan. 2015 (C-0243).

its pre-qualification process for Construction Services at the Smithsonian Tropical Research Institute.[239] The decision was unexpected because Omega U.S.'s experience, financial capacity and reputation far exceeded that of the companies that were selected ahead of it.[240] But even worse news was yet to come. Later that afternoon, Omega was informed that the bid bond for the Superintendencia del Capitolio - Restauración y Rehabilitación del Edificio Medical Arts project in Puerto Rico had been denied. Due to the fact that the tenders were due the following day, on 10 February 2015, Omega's costs and efforts in preparing its proposal were all lost, but even more disheartening was the loss of an important opportunity to generate future revenues.

111. Omega was further informed that due to the Declaration of Default leveled by Respondent against Omega, Omega's surety company, Travelers, would no longer support bids by Omega U.S. (and obviously would not support bids by Omega Panama either).[241] In their explanation, Travelers clearly articulated the far-reaching consequences of Respondent's actions as follows:

> The default on the largest job in Panama has the potential to put at risk both the Panama and P[uerto] R[ican] operations if a resolution is not reached. Both companies could be at risk with this particular situation in Panama if the options to resolve do not involve a full release of Omega's obligations to the surety and the surety's obligations to the government.[242]

Indeed, on 3 March 2015, the surety company demanded that Omega U.S. provide it with a collateral guarantee for US$ 38 million dollars.[243] But at that point it had been almost a year since the Omega

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[239] *See* Email from Smithsonian Tropical Research Institute to Omega Engineering on 9 Feb. 2015 (C-0380).

[240] *See* Letter from the Smithsonian Institution to the Omega Consortium dated 28 Jan. 2015 (C-0381).

[241] *See* Email from Travelers Casualty & Surety Company ("Travelers") to Omega-U.S. dated 9 Feb. 2015 (C-0098).

[242] See id.

[243] *See* Letter No. VPET-007-2015 from ASSA to the Omega Consortium dated 3 Mar. 2015 (C-0382).

Consortium had received any form of payment from Respondent on account of work performed, in some instances it was as far back as 2013. Respondent's delinquent accounts with the Omega Consortium by now exceeded millions of dollars. The outflow of cash to keep Omega Panama alive had drained Omega Panama and Omega U.S.'s reserves, as well as those of Mr. Rivera.

112. In the following months, Omega Panama's cash constraints forced it to terminate almost its entire staff and sell its vehicles, equipment and almost anything else it could liquefy, all while Omega U.S. managed to complete a handful of small projects that it had in Puerto Rico. Omega U.S's remaining larger contracts in Puerto Rico would soon fall away due to the episode in Panama, too. In mid-2015, the Los Altos project,[244] though awarded, had not yet commenced construction, and the Paseo de Puerta de Tierra project[245] had approximately another year of construction ahead. The first one, the Los Altos project, was a real estate development project that had been awarded to one of Mr. Rivera's other companies and, as had been the case for all Mr. Rivera's previous developments, for which Omega U.S. would be the general contractor. On 29 July 2013, Mr. Rivera had secured the anchor tenant for the development[246] and after going through several different alternatives, on 20 February 2015 had obtained funding for the project.[247] As is typically the case, that funding specifically called for the issuance of a performance bond to guarantee the construction of the project.

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[244] *See* Joint Development Agreement for Cupey Station, Parcels A and B between Puerto Rico Highways and Transportation Authority as the Authority and Grupo de Desarrollo los Altos San Juan, Inc. as the Developer dated 30 Dec. 2008 (C-0383).

[245] *See* Contract No. 2015-000209 between Puerto Rico Infrastructure Financing Authority and Omega Engineering, LLC dated 18 Nov. 2014 (C-0384).

[246] *See* Letter of Intent from Grupo de Desarrollo Los Altos San Juan, Inc. to the Puerto Rico Department of Education & the Puerto Rico Department of Transportation and Public Works dated 29 July 2013 (C-0385).

[247] *See* Letter from CPA:18 Global to David Hidalgo and Oscar Rivera dated 20 Feb. 2015 (C-0131).

113. But, as detailed above, just 11 days before, on 9 February 2015, Travelers had decided that due to Panama's Declaration of Default it would not be supporting bonds for Omega U.S. That left Omega U.S. with the impossible task of finding a new surety company willing to immediately issue an US$ 86 million performance bond for a company that: (1) had been declared in default on a US$ 54 million project; (2) had not been paid in almost a year; and (3) was being portrayed in newspapers as part of a criminal enterprise. Not surprisingly, Omega U.S. could not find even one surety company that was willing to talk to it. Given the circumstances, the only available option for Omega U.S. was to buy as much time as possible for itself in the hope that the Declaration of Default would be rescinded, the monies it was owed by Respondent paid off, and that it would be publicly cleared of any wrongdoing. None of this happened and on 3 November 2015 the Government of Puerto Rico ran out of patience and decided to terminate the contract.[248]

114. The Paseo Puerta de Tierra Project would suffer the same fate. On 7 September 2015, the Authority for the Financing of Infrastructure in Puerto Rico ("**AFI**"), a public agency of the Puerto Rican Government that had awarded Omega U.S. a contract for the construction of the project, demanded that Mr. Rivera certify under penalty of perjury whether he, Omega U.S., or any of its affiliates were the subject of a criminal investigation in Panama or elsewhere, among other questions. The purpose of the communication was to determine whether Omega U.S. was in compliance with a Puerto Rican statute that prohibits the award of public contracts to individuals involved in crimes related to public funds or property.[249] On 1 October 2015, Banesco, a financial institution serving

[248] *See*, Letter from Authority of Roads and Transportation of Puerto Rico to Oscar Rivera dated 3 Nov. 2015 (C-0274).

[249] *See*, Letter from the Puerto Rico Infrastructure Financing Authority to Oscar Rivera dated 7 Sept. 2015 (C-0096).

another one of Mr. Rivera's businesses, wrote a letter to Mr. Rivera informing him that the bank had decided to close his account.[250]

115. On 23 October 2015, AFI sent a "cure notice" to Omega U.S. and Travelers, which observed that the Paseo Puerta de Tierra project was delayed and gave Omega U.S. seven days to submit a description of recovery measures and a schedule to cure what the agency claimed were events of default. If Omega U.S. failed to do so, the agency would declare Omega U.S. in default and claim Omega U.S.'s bonds.[251] Travelers orally informed Omega U.S. that it had only two choices: declare itself in default and Travelers would ensure a smooth transition to a new contractor of their choosing, or Travelers would wait for AFI to declare Omega U.S. in default (which at the time seemed inevitable) and face the consequences of a hostile takeover and the ensuing litigation. Overwhelmed by the seemingly endless consequences of Respondent's unscrupulous conduct towards Claimants, on 1 December 2015 Omega U.S. surrendered its last project to the surety.[252] At that point, Respondent had succeeded in destroying Claimants' investment, and indeed their entire business.

VIII. CLAIMANTS MEET ALL JURISDICTIONAL REQUIREMENTS OF THE BIT, THE TPA, AND THE ICSID CONVENTION

116. This case involves two American claimants: (1) Oscar I. Rivera, an American citizen; and (2) Omega U.S., his wholly-owned and Puerto Rican-registered company. Mr. Rivera is the sole shareholder of Omega Panama, a Panamanian incorporated company which participated in all relevant Government tenders in Panama alongside Omega U.S. Against this backdrop, both the BIT and the TPA apply to this case (*see infra* Section VIII(A)), the jurisdictional prerequisites of both are

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[250] *See* Letter from Banesco to Oscar Rivera dated 1 Oct. 2015 (C-0346).

[251] *See* Letter from Authority for the Financing of Infrastructure of Puerto Rico to Omega Engineering, LLC dated 23 Oct. 2015 (C-0331).

[252] *See* Acknowledgement of Default dated 1 Dec. 2015 (C-0312).

met (*see infra* Sections VIII(B)-(C)), as are the jurisdictional prerequisites of the ICSID Convention (*see infra* Section VIII(D)).

A. The BIT and the TPA Apply in this Arbitration

117. The BIT entered into force in 1991, and remains in force to this date.[253] On 31 October 2012, and *after* Mr. Rivera and Omega U.S. had begun investing in Panama, had created Omega Panama and PR Solutions, and had entered into five of their eight Contracts with the Government,[254] the TPA entered into force.[255] The TPA expressly protects investments that were "in existence as of the date of entry into force of [the TPA]," as well as those investments that are "established, acquired, or expanded thereafter."[256] Accordingly, the substantive provisions of both the BIT and the TPA apply to the entirety of this investment, and this arbitration.

118. The dispute resolution provisions also coexist, but only partially. The TPA provides that the BIT's dispute resolution provisions (but ***not*** its substantive provisions) "shall be suspended."[257] However, for a period of ten years from the TPA's entry into force—*i.e.*, until 31 October 2022—this suspension does not apply to, *inter alia*, "investments covered by the

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[253] *See generally* BIT (CL-0001; CL-0002).

[254] Contract No. 077 (2011) dated 22 Sept. 2011 (C-0028) (approved by Comptroller-General on 26 Oct. 2011); Contract No. 083 (2011) dated 22 Sept. 2011 (C-0030) (approved by Comptroller-General on 26 Oct. 2011); Contract No. 085 (2011) 22 Sept. 2011 (C-0031) (approved by Comptroller-General on 26 Oct. 2011); Contract No. 043 (2012) dated 17 Aug. 2012 (C-0034) (approved by Comptroller-General on 17 Aug. 2012); Contract No. 093-12 dated 6 July 2012 (C-0042) (approved by Comptroller-General on 19 Sept. 2012).

[255] *See generally* TPA (CL-0003).

[256] *Id.* art. 2.1.

[257] *Id.* art. 1.3(2) ("Articles VII [investor-State dispute resolution] and VIII [State-to-State dispute resolution] of the [BIT] shall be suspended on the date of entry into force of this Agreement.").

[BIT] as of the date of entry into force of [the TPA]."[258] Therefore, while the substantive provisions of both the BIT and the TPA are applicable to the totality of Claimants' investment, the dispute resolution provisions of the BIT apply only to the five earliest Contracts (concluded prior to the TPA's entry into force), and the dispute resolution provisions of the TPA apply to Claimants' three remaining Contracts.

119. As discussed in the following sections, this is a distinction without a difference, because the jurisdictional requirements of both the BIT (*see infra* Section VIII(B)) and the TPA (*see infra* Section VIII(C)) are satisfied. So are the jurisdictional requirements of the ICSID Convention (*see infra* Section VIII(D)).

B. The BIT's Jurisdictional Requirements Are Satisfied

120. To satisfy the BIT's jurisdictional requirements: (1) the respondent must be a Contracting Party to the BIT; (2) Claimants must be a "national" or a "company" of the United States of America; and (3) Claimants must have a legal dispute with Panama in connection with their "investment" in Panama.[259] As explained below, Claimants' claims satisfy all of these requirements.

121. *First*, the Republic of Panama is an original signatory of the BIT, which was signed on 27 October 1982 and entered into force on 30 May 1991.[260] As such, Panama is a Contracting Party to the BIT and remains so to this date. The initial term of validity of the BIT is 10 years, which period is extended tacitly, unless the BIT is terminated "by giving one year's written notice to the

[258] *Id.* art. 1.3(a)(i).

[259] BIT (CL-0001; CL-0002), art. VII(2) (referring to an "investment dispute between a Party and a national or company of the other Party with respect to an investment of such national or company in the territory of the first Party").

[260] See id.

other Party."[261] As explained above, the entry into force of the TPA merely suspended the *dispute resolution provisions* of the BIT as regards investments made *after* that date. No termination notice for the BIT has been lodged and the substantive provisions of that treaty remain fully in force.

122. *Second*, the BIT defines "national of a Party" as "a natural person who is a national or citizen of that Party."[262] As noted above, Claimant Mr. Rivera is an American citizen and, therefore, a "national of a Party" under the BIT.[263] Further, the BIT defines "company of a Party" as a "company duly incorporated, constituted or otherwise duly organized under the applicable laws and regulations of a Party or a political subdivision thereof."[264] As set out above,[265] Claimant Omega U.S. is a company registered in the United States of America. Accordingly, Omega U.S. is a "company of a Party" as defined under the BIT.

123. *Third*, Claimants have a legal dispute in connection with their "investment" in Panama. "Investment" is defined by Article I(d) of the BIT as "every kind of investment, owned or controlled directly or indirectly including equity, debt, and service and investment contracts, and includes:

> "(i) tangible and intangible property, including rights, such as mortgages, liens and pledges;
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> (ii) a company or shares of stock or other interests in a company or interests in the assets thereof;
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> (iii) a claim to money or a claim to performance having economic value and associated with an investment;

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[261] *Id.* art. XIII(2)-(3).

[262] *Id.* art. I(a).

[263] U.S. Passport of Oscar Iván Rivera Rivera dated 9 Mar. 2007 (C-0001).

[264] BIT (CL-0001; CL-0002), art. I(c).

[265] *See supra* ¶¶ 1-2, 17.

> (iv) intellectual and industrial property rights, including rights with respect to copyrights, patents, trademarks, trade names, industrial designs, trade secrets and know-how; and goodwill;
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> (v) licenses and permits issued pursuant to law, including those issued for manufacture and sale of products;
>
> (vi) any right conferred by law or contract, including rights to search for or utilize natural resources, and rights to manufacture, use and sell products; and
>
> (vii) returns which are reinvested. Any alteration of the form in which assets are invested or reinvested shall not affect their character as investment."[266]

124. Nearly all of these examples are reflected in Claimants' investment in Panama. For instance, the eight construction Contracts constitute a clear and valid "right conferred by law or contract," giving Omega U.S. (and Claimant Mr. Rivera through his ownership of these companies) a definite "claim to money or a claim to performance." Further, Mr. Rivera's direct ownership of Omega Panama itself constitutes an investment in the form of ownership of "a company or shares of stock or other interests in a company" in Panama, and the capitalization of the same, through which he "owned or controlled" "tangible and intangible property" in the country. Omega U.S., too, invested its own significant "know-how" and "goodwill" in Panama when it participated in the tenders, contracts and projects. All of this constitutes a single, unified and holistic investment under the BIT.

125. Claimants have also satisfied the BIT's requirements for negotiations and a cooling-off period. With respect to the negotiations requirement, Article VII(2) of the BIT provides that "[i]n the event of an investment dispute between a Party and a national or company of the other Party with respect to an investment of such national or company in the territory of the first Party, the parties to

[266] BIT (CL-0001; CL-0002), art. I(d).

the dispute shall initially seek to resolve it by consultation and negotiation."[267] In accordance with this requirement, Claimants attempted to negotiate the resolution of the present dispute with Respondent.[268] To date, however, negotiations have proven fruitless. With respect to the cooling off period, the BIT grants investors the right to "choose to consent in writing to the submission of the dispute to [ICSID]" "at any time after six months from the date upon which the dispute arose."[269] As discussed in Section VI above, the actions by the Government giving rise to this dispute began in the latter half of 2014, well over six months before this arbitration was filed.

C. The TPA's Jurisdictional Requirements Are also Satisfied

126. This arbitration also fits squarely within the jurisdiction of the TPA. As with the BIT, to satisfy the TPA's jurisdictional requirements: (1) the respondent must be a Contracting Party to the TPA; (2) Claimants must be an "investor of a Party," which includes a "national" or an "enterprise" of the United States of America; and (3) Claimants must have a legal dispute with Respondent in connection with their "investment" in Panama.[270] Claimants satisfy all of these requirements.

127. *First*, the Republic of Panama is an original signatory to the TPA, which was signed on 28 June 2007 and which entered into force on 31 October 2012.[271] As such, Panama is a Contracting Party to the TPA and remains so to this date. The TPA remains in force unless terminated

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[267] *Id.* art. VII(2).

[268] *See* Letter from Jones Day to the Chief of International Trade Negotiations of Panama dated 29 July 2016 (C-0101). This letter was received by Respondent on 29 July 2016. *See* Email from Ministry of Commerce and Industry to Jones Day dated 1 Aug. 2016 (C-0102).

[269] BIT (CL-0001; CL-0002), art. VII(3).

[270] TPA (CL-0003), arts. 10.1(1) (providing that Chapter 10 of the TPA "applies to measures adopted or maintained by a Party relating to . . . (a) investors of the other Party [and] (b) covered investments"), 10.29.

[271] *See id*. at [32].

"by written notification to the other Party."[272] No such termination notice has been lodged and, thus, the TPA remains in force.

128. *Second*, the TPA has a similar nationality requirement to the BIT. It defines "investor of a Party" as "a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party."[273] As an American citizen, Claimant Mr. Rivera is a "national . . . of a Party" under the TPA.[274] Claimant Omega U.S. is "an enterprise constituted or organized under the law of [the United States of America]," [275] and, accordingly, is an "enterprise of a Party" under the TPA.[276]

129. *Third*, Claimants have "made an investment" in Panama as defined in the TPA, from which this legal dispute arises. "Investment" is defined by Article 10.29 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. Forms that an investment may take include:

> (a) an enterprise;
>
> (b) shares, stock, and other forms of equity participation in an enterprise; . . .
>
> (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; . . . and

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[272] *Id.* art. 22.5(2).

[273] *Id.* art. 10.29.

[274] *See* U.S. Passport of Oscar Iván Rivera Rivera dated 9 Mar. 2006 (C-0001).

[275] TPA (CL-0003), art. 10.29.

[276] *See* Certificate of Incorporation of Omega Engineering Corp. dated 27 Mar. 1980 (C-0003); Certificate of Conversion from Omega Engineering S.E. to Omega Engineering LLC dated 2 Mar. 2009 (C-0004).

> (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges."[277]

130. Claimants' "investment" in Panama plainly satisfied this definition. Mr. Rivera's direct ownership of Omega Panama constitutes ownership of "an enterprise" in Panama as well as ownership of "shares, stock, and other forms of equity participation in an enterprise," through which he "owned or controlled" "tangible or intangible, movable or immovable property, and related property rights." Further, the eight construction Contracts entered into by Omega U.S. are a quintessential investment under the TPA as "turnkey, construction . . . contracts."[278] Finally, Claimant Omega U.S. made an undeniable "commitment of . . . resources" into Panama, in the form of know-how and goodwill. All of this constitutes a single, unified and holistic investment under the TPA.

131. Claimants have also satisfied the TPA's negotiation, notice and cooling-off requirements. Article 10.15 of the TPA provides that "[i]n the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation" before submitting these claims to ICSID.[279] In accordance with this requirement, Claimants attempted to negotiate the resolution of the present dispute with Panama well before this arbitration was filed.[280] With respect to notice of the dispute, the TPA requires that Claimants "deliver to the respondent a written notice of [their] intention" to arbitrate "[a]t least 90 days before

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[277] TPA (CL-0003), art. 10.29.

[278] *Id*.

[279] *Id.* art. 10.15.

[280] *See* Letter from Jones Day to the Chief of International Trade Negotiations of Panama dated 29 July 2016 (C-0101). This letter was received by Respondent on 29 July 2016. *See* Email from Ministry of Commerce and Industry to Jones Day dated 1 Aug. 2016 (C-0102).

submitting any claim to arbitration."[281] Claimants satisfied this requirement by filing a notice of intent to submit their claims to arbitration on 11 March 2016,[282] more than eight months before this arbitration was filed.[283] Lastly, Article 10.16(3) of the TPA stipulates that Claimants may submit their claims to arbitration "[p]rovided that six months have elapsed since the events giving rise to the claim."[284] As discussed in Section VI above, the actions by the Government giving rise to this dispute began in the latter half of 2014, and thus more than six months before this arbitration was registered at ICSID on 30 December 2016.

D. The ICSID Convention's Jurisdictional Requirements Are Satisfied

132. Article 10.16(3)(a) of the TPA and Article VII(3)(a) of the BIT, respectively, permit covered investors to bring disputes against Respondent to ICSID.[285] Under the ICSID Convention, ICSID's jurisdictional requirements must be satisfied as well. Article 25(1) of the ICSID Convention specifies that the "jurisdiction of the Centre shall extend to [(1)] any legal dispute arising directly out of an investment, [(2)] between a Contracting State . . . and a national of another Contracting State, [(3)] which the parties to the dispute consent in writing to submit to the Centre."[286] All of these prerequisites are met in the present case.

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[281] TPA (CL-0003), art. 10.16(2). No notice requirement is found in the BIT.

[282] *See* Notice of Intent to Submit Claims to Arbitration under the United States-Panama Trade Promotion Agreement dated 11 Mar. 2016 (C-0103); Email from Ministry of Commerce and Industry to Mr. Rivera dated 11 Mar. 2016 (C-0104) (confirming receipt of the Notice of Intent).

[283] *See* RfA.

[284] TPA (CL-0003), art. 10.16(3); *see also* BIT (CL-0001; CL-0002), art. VII(3)(a).

[285] *See* BIT (CL-0001; CL-0002), art. VII(3)(a) ("The national or company concerned may choose to consent in writing to the submission of the dispute . . . to [ICSID] at any time after six months from the date upon which the dispute arose."); TPA (CL-0003), art. 10.16(3)(a) ("[A] claimant may submit a claim . . . 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 . . . .").

[286] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, entered into force on 14 Oct. 1966 (CL-0004), art. 25(1).

133. *First*, while the ICSID Convention provides no definition of the term "investment," the term is widely accepted to have a broad meaning that is satisfied here. Claimants have continuously invested in Panama since 2009. Mr. Rivera created a Panamanian company, Omega Panama, to act in consortium with Omega U.S., and established a physical presence in Panama. Claimants then poured millions of dollars into their activities under the Contracts, and had a contractual right to complete and be paid for various construction activities in Panama over a six-year period. The Contracts were profitable for Claimants and beneficial for Respondent. Revenue and profits grew steadily until Respondent began its unlawful campaign against Claimants' investment, and the legal dispute between Claimants and Respondent arises directly out of the unlawful actions taken by Respondent against this investment in breach of Claimants' rights under the BIT and the TPA. This long-term commitment, the expectation of profit and risk, and the avowed benefit to the host State economy, qualify Claimants' activities as a quintessential investment operation in Panama.[287]

134. *Second*, Claimants are nationals of a Contracting State to the ICSID Convention. Mr. Rivera has been and remains a national of the United States as of the date of this Request. Omega U.S. (as a juridical person of the United States) has been and remains a national of the United States as of the date of this Request. The United States signed the ICSID Convention on 27 August 1965; deposited instruments of ratification on 10 June 1966;[288] and the Convention entered into force there

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[287] CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 140, n.19 (2d ed., 2001) (CL-0117); *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001 (CL-0118), ¶ 44. This expressly includes construction contracts. *See, e.g. Bayindir Insaat Turizm Ticaret Ve Sanayi A. (Scedil) v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 Nov. 2005 (CL-0119); CHRISTOPHER F. DUGAN, DON WALLACE JR., NOAH RUBINS & BORZU SABAHI, INVESTOR-STATE ARBITRATION 260 (2008) ("DUGAN ET AL.") (CL-0007).

[288] List of Contracting States and Other Signatories of the Convention dated 12 Apr. 2016 (C-0105).

on 14 October 1966. For its part, Panama signed the ICSID Convention on 22 November 1995 and deposited instruments of ratification on 8 April 1996.[289] The ICSID Convention entered into force in Panama on 8 May 1996.[290]

135. *Third*, Claimants and Respondent have both expressed their consent in writing to submit this dispute to arbitration. By the terms of Article VII of the BIT (as amended), Panama "consent[ed] to the submission of an investment dispute in accordance with the choice of the [U.S.] national or company under paragraph 3(a)(i) [which confirms that "the national or company concerned may choose to consent in writing to the submission of the dispute to [ICSID]]."[291] The BIT further clarifies that "[t]his consent and the submission of the dispute by a national or company under paragraph 3(a) shall satisfy the requirement of . . . Chapter II of the ICSID Convention (Jurisdiction of the Centre)."[292] Similarly, under Article 10.16(3) of the investment chapter of the TPA, U.S. investors are entitled to bring investment disputes against Panama to ICSID.[293] Article 10.17(1) provides that "[e]ach Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement" and that "[t]he consent under paragraph 1 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)."[294] These are Panama's unequivocal statements of consent and offers to arbitrate a potential legal dispute with a qualified investor. In

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[289] *Id*.

[290] *Id*.

[291] BIT (CL-0001; CL-0002), art. VII(3)(b).

[292] *Id.*, art. VII(3)(b)(i).

[293] TPA (CL-0003), art. 10.16(3).

[294] *Id*., art. 10.17(1).

their Request for Arbitration filed with ICSID, Claimants "accept[ed] Panama's offer of arbitration by requesting registration of this Request for Arbitration with ICSID."[295] As such, the requirements of the ICSID Convention are fully satisfied.

IX. RESPONDENT, THROUGH ITS ILLEGAL ACTIONS AGAINST CLAIMANTS AND THEIR INVESTMENTS, HAS BREACHED THE BIT AND THE TPA

136. As described below, Panama breached its obligations under the BIT and the TPA. Specifically, Panama unlawfully expropriated Claimants' investments (*see infra* Section IX(A)), failed to afford Claimants' investments fair and equitable treatment (*see infra* Section IX(B)), failed to provide Claimants' investments full protection and security (*see infra* Section IX(C)), impaired Claimants' investments through unreasonable and arbitrary treatment (*see infra* Section IX(D)) and failed to observe its obligations (*see infra* Section IX(E)). Each of these treaty provisions is reflected in both the BIT and the TPA, either expressly or via incorporation through a most-favored nation clause. Accordingly, the following sections discuss the claims brought by Claimants without distinction unless stated otherwise.

A. Respondent Has Unlawfully Expropriated Claimants' Investments in Violation of the BIT and the TPA

137. Both the TPA and the BIT provide that investments may not be expropriated unless it is done: (1) for a public purpose, (2) in accordance with due process, (3) in a non-discriminatory manner and (4) accompanied by prompt, adequate and effective compensation.[296] This inquiry thus

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[295] RfA ¶ 68.

[296] *See* BIT (CL-0001; CL-0002), art. IV(1), which provides: "Investment of a national or a company of either Party shall not be expropriated, nationalized, or subjected to any other direct or indirect measure having an effect equivalent to expropriation [or] nationalization ('expropriation') in the territory of the other Party, except for a public or social purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process and the general principles of treatment laid down in Article II(2)." Article 10.7 of the TPA (CL-0003) provides: "Neither 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 . . . ; and (d) in accordance

requires, first, an identification of the relevant investments that are protected from expropriation[297] (*see infra* Section IX(A)(1)); second, an analysis of whether an expropriation has occurred (*see infra* Section IX(A)(2)); and third, a determination as to whether the four requirements for lawful expropriation have been fulfilled (*see infra* Section IX(A)(3)). That inquiry here leads to the conclusion that Respondent has unlawfully expropriated Claimants' investments in Panama.

1. Claimants' Investment Was Protected Against Unlawful Expropriation

138. Both the BIT and the TPA include Mr. Rivera's ownership of Omega Panama, and all of its tangible and intangible property, as investments protected from illegal expropriation. The BIT also expressly protects all of Claimants' "knowhow[,] and goodwill" invested into Panama;[298] the TPA does the same by protecting Claimants' commitment of valuable "resources."[299] In addition, and most notably for this case, both the BIT and the TPA protect "any right[s] conferred [on Claimants] by law or contract" and "claims to money" under a contract. Indeed, the TPA makes the protection of Claimants' "construction . . . contracts" express.[300]

139. It is trite law (and common sense) that when a treaty defines an asset as a protected investment, it cannot be expropriated (without, *inter alia*, due process and adequate compensation being paid).[301] The BIT and the TPA are not unique in protecting contracts and contract rights, and

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with due process of law." *See generally* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2d ed., 2012) ("DOLZER & SCHREUER") (CL-0006), at 99-100.

[297] *See, e.g.*, DUGAN ET AL. (CL-0007) at 438 ("A threshold determination as to whether an expropriation has occurred is to identify the foreign investor's investment or property rights in question.").

[298] BIT (CL-0001; CL-0002), art. I(d).

[299] TPA (CL-0003), art. 10.29.

[300] See generally supra ¶¶ 129-130.

[301] *See, e.g.*, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 Feb. 2007 ("*Siemens*—Award") (CL-0008), ¶ 267 ("The Contract falls under the definition of 'investments' under the Treaty and

it is thus widely accepted that "contractual rights are capable of being expropriated."[302] Indeed, "a number of treaty cases have arisen out of contractual disputes."[303] Where, as here, a respondent breaches numerous valuable contracts that constitute investments—and especially when it does so in its exercise of sovereign authority and alongside the decimation of other, interrelated investments like a local enterprise, tangible property, and goodwill—an expropriation claim will most certainly lie.

2. Respondent's Acts Constituted an Expropriation of Claimants' Investment

140. It is widely accepted that "the outright transfer of legal title of an investment" and "the physical seizure of property without compensation by a government" constitute "*direct* expropriation."[304] In the absence of a transfer of title or physical seizure, *indirect* expropriation can result from a government measure that interferes with property rights or diminishes the value of

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Article 4(2) refers to the expropriation or nationalization of investments. Therefore, the State parties recognized that an investment in terms of the Treaty may be expropriated."); *see also* DOLZER & SCHREUER (CL-0006) at 127.

[302] 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 II") (CL-0009), ¶ 7.5.4.

[303] *Id.*; *see also, e.g.*, *id.* ¶¶ 7.5.5-7.5.6; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 Dec. 2000 ("*Wena Hotels*—Award") (CL-0010), ¶ 98 ("It is . . . well established that an expropriation is not limited to tangible property rights."); *Siemens*—Award (CL-0008), ¶ 267 ("There is a long judicial practice that recognizes that expropriation is not limited to tangible property."); *AWG Group Ltd. v. The Argentine Republic*, UNCITRAL, & *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010 ("*AWG-Suez-Vivendi*—Liability") (CL-0011), ¶ 151 ("International law has recognized that contractual rights may be the subject of expropriation at least since the *Norwegian Shipowners' Claims* case. The *Chorzów Factory* case would come to a similar conclusion."); *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 Oct. 2012 (CL-0012), ¶ 506 ("Contractual rights may be expropriated, a position that has been accepted by numerous investment arbitration tribunals."); *see generally* Christoph Schreuer, *The Concept of Expropriation under the ETC and other Investment Protection Treaties*, 20 May 2005 ("Schreuer—*The Concept of Expropriation*") (CL-0013), ¶¶ 50-77 (overview of several cases involving the deprivation of contractual rights).

[304] DUGAN ET AL. (CL-0007) at 450 (emphasis added); *see also* ANDREW NEWCOMBE & LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (2009) ("NEWCOMBE & PARADELL") (CL-0014), § 7.11 ("Direct expropriation arises where there is a forced transfer of property from the investor to the state, or a state-mandated beneficiary.").

property to a significant extent. [305] Like most treaties, the BIT[306] and the TPA[307] prohibit not only "direct" expropriations but also "measure[s]" that work to "indirect[ly]" expropriate the investments of investors of the other Contracting Party or are "equivalent" to such measures.[308] With such language (and sometimes even without it) the protection against unlawful expropriation extends to all measures having similar effect.[309]

141. Tribunals have crafted formulations to designate the point at which government measures rise to the level of an expropriation. For example, the U.S.-Iran Claims Tribunal has stated that a finding of expropriation "is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral,"[310] or when those rights are "rendered so useless that they must be deemed to have been

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[305] *See* DUGAN ET AL. (CL-0007) at 451; *see also* DOLZER & SCHREUER (CL-0006) at 101 ("An indirect expropriation leaves the investor's title untouched but deprives him of the possibility of utilizing the investment in a meaningful way.").

[306] BIT (CL-0001), art. IV(1).

[307] TPA (CL-0003), art. 10.7.

[308] BIT (Cl-0001; CL-0002), art. IV(1); TPA (CL-0003), art. 10.7.

[309] See, e.g., Starrett Housing Corporation, Starrett Systems, Inc. and others v. The Government of the Islamic Republic of Iran, Bank Omaran and others, IUSCT Case No. 24 (ITL 32-24-1), Interlocutory Award No. 32-24-1, 19 Dec. 1983, 10 Y.B. COMM. ARB. 232 (Pieter Sanders ed., 1985) ("Starrett") (CL-0015), ¶ IV(b) ("[T]he Government of Iran did not issue any law or decree according to which the [investment] expressly was nationalized or expropriated. However, it is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner."); Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, et. al, IUSCT Case No. 7, Award No. 141-7-2, 22 June 1984, 6 IRAN-U.S. CL. TRIB. REP. 219, 225 ("Tippetts") (CL-0016), at 225 ("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."); DOLZER & SCHREUER (CL-0006) at 102 ("Today it is generally accepted that certain types of measures affecting foreign property will be considered an expropriation, and require compensation, even though the owner retains the formal title.").

[310] *Tippetts* (CL-0016) at 225; *see also* DUGAN ET AL. (CL-0007) at 468 (discussing "[d]uration of [e]ffect of [a]ct or [m]easure" as a consideration in the expropriation analysis); DOLZER & SCHREUER (CL-0006) at 124 (similar).

expropriated."[311] The tribunal in *Metalclad v. Mexico* elaborated that expropriation includes the "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."[312] Accordingly, expropriation extends not only to the deprivation of rights, but also to the deprivation of business value. For example, in *CME v. Czech Republic*, the Tribunal found that while the claimant still held 99% of the shares in a local Czech company,[313] the government's "actions and omissions"[314] had "caused the destruction" of the local company's operations, leaving it "as a company with assets, but without business."[315] On that basis, the tribunal concluded that an expropriation had occurred.[316] Stated another way, an

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[311] *Starrett* (CL-0015) ¶ IV(b).

[312] *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 Aug. 2000 ("*Metalclad*") (CL-0017), ¶ 103; *see also* NEWCOMBE & PARADELL (CL-0014) §§ 7.12, 7.16; R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS, AND COMMENTARY (2005) (CL-0018), at 14 ("[T]ribunals and commentators state that an expropriation may occur in the absence of a change of title and regardless of any expropriatory intent, if the government takes action that substantially and unreasonably interferes with the control, use or enjoyment of property to an extent that is more than ephemeral.").

[313] *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 13 Sept. 2001 ("*CME*— Partial Award") (CL-0019), ¶ 4.

[314] *Id*. ¶ 605 (as indicated by the "actions and omissions" language, for the tribunal it made "no difference whether the deprivation was caused by actions or by inactions"); *see also Eureko B.V. v. Republic of Poland*, Ad Hoc, Partial Award, 19 Aug. 2005 ("*Eureko*") (CL-0020), ¶ 186 ("[T]he rights of an investor can be violated as much by the failure of a Contracting State to act as by its actions."); NEWCOMBE & PARADELL (CL-0014) § 7.9 ("[I]n principle an omission . . . can be an expropriatory measure.").

[315] *CME*—Partial Award (CL-0019) ¶ 591; *see also id.* ("What was destroyed was the commercial value of the investment in [the local company] . . . ."). The *CME* tribunal later found that approximately 90.5% of the company's asset value had been destroyed. *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Final Award, 14 Mar. 2003 (CL-0021), ¶ 620; *see also Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007 (CL-0022), ¶ 120 ("[O]ne can reasonably infer that a diminution of 5% of the investment's value will not be enough for a finding of expropriation, while a diminution of 95% would likely be sufficient."); DOLZER & SCHREUER (CL-0006) at 118 (noting that continued control by an investor of an investment is not dispositive, particularly "when a host state substantially deprives the investor of the value of the investment leaving the investor with control of an entity that amounts to not much more than a shell of the former investment").

[316] *CME*—Partial Award (CL-0019) ¶ 591.

investor need not "wait until there has occurred something akin to the troops coming in, little by little or all at once, in a nineteenth century sense," before claiming an expropriation.[317]

142. In sum, finding an expropriation requires a substantial deprivation of an investor's ability to control, use or benefit from his investment or of the investment's value.[318] As this definition suggests, the most important consideration to the expropriation inquiry is the *effect* of a government act on an investor's investment, and the *degree* of deprivation suffered.[319] That said, depending on the circumstances of the case, consideration of other factors is appropriate as well.[320]

143. The subjective intent of both the government and the investor can be relevant to whether an expropriation has occurred. The investor's subjectivity is reflected in its legitimate expectations, which is appropriately considered in the expropriation inquiry. Such expectations can be created not only by statements from government officials, but also "by explicit undertakings on the part of the host state in contracts" and by the host state's legal framework.[321] The State's

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[317] *Revere Copper and Brass, Inc. v. OPIC*, AAA Case No. 16 10 0137 76, Award, 17 I.L.M. 1321 (CL-0023), at 1351.

[318] *See* DOLZER & SCHREUER (CL-0006) at 104 ("In recent jurisprudence, the formula most often found is that an expropriation will be assumed in the event of a 'substantial deprivation' of an investment."); *see also* NEWCOMBE & PARADELL (CL-0014) § 7.16 ("The deprivation of property must be severe, fundamental or substantial and not ephemeral.").

[319] *See, e.g.*, DOLZER & SCHREUER (CL-0006) at 112 ("The effect of the measure upon the economic benefit and value as well as upon the control over the investment is the key question when it comes to deciding whether an indirect expropriation has taken place. Whenever this effect is substantial and lasts for a significant period of time, it will be assumed prima facie that a taking of the property has occurred."); Schreuer—*The Concept of Expropriation* (CL-0013) ¶ 12 ("The decisive element in an indirect expropriation is the substantial loss of control or economic value of a foreign investment without a physical taking.").

[320] *See, e.g.*, DOLZER & SCHREUER (CL-0006) at 104 ("Often, the facts of a case simply highlight only one specific factor and neglect of other possible factors does not result from oversight but from irrelevance to the specific circumstances."); DUGAN ET AL. (CL-0007) at 450 (the expropriation inquiry requires a "fact-intensive approach," but "certain broad principles have evolved out of the decisions and the literature in the field").

[321] DOLZER & SCHREUER (CL-0006) at 115 ("Legitimate expectations may be created not only by explicit undertakings on the part of the host state in contracts but also by undertakings of a more general nature. In particular, the legal framework provided by the host state will be an important source of expectations on the part of the investor."); *see also* NEWCOMBE & PARADELL (CL-0014) § 7.18.

subjective intent becomes relevant if there is proof of governmental intent to expropriate, which is not required for an expropriation to be found, but which is material to the calculus when it does exist. As stated by the tribunal in *Vivendi v. Argentina*, "the *effect* of [a] measure on the investor" is "the critical factor," but "intent will weigh[s] in favour of showing a measure to be expropriatory."[322] Similarly, where "the effects of [the Government's] actions [toward a specific investor] are consistent with a policy to nationalize a whole industry,"[323] those actions are most likely "not merely the incidental consequences of an action or policy designed for an unrelated purpose," but evidence of "the conclusion that a taking has occurred."[324]

144. In cases of expropriation of contractual rights caused by a State's breach or termination of a contract, there is an additional criterion to consider. While it is well settled that the deprivation of contractual rights can amount to expropriation, not all breaches of contract by States will be found to be expropriatory.[325] It is generally accepted that "[t]he most important criterion for distinguishing between the simple breach of a contract and the expropriation of contract rights is whether the State

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[322] *Vivendi II* (CL-0009) ¶ 7.5.20 ("While intent will weigh in favour of showing a measure to be expropriatory, it is not a requirement, because the *effect* of the measure on the investor, not the state's intent, is the critical factor."); *see also* NEWCOMBE & PARADELL (CL-0014) § 7.4 ("No matter how the expropriation is described, international law looks to the effect of the government measures on the investor's property." (internal citations omitted)); *id* § 7.14 ("Intent to expropriate is not a necessary element of expropriation. . . . Intent, however, is not wholly irrelevant . . . . A tribunal is more likely to find an expropriation where there is clear evidence of intent to expropriate."); Schreuer—*The Concept of Expropriation* (CL-0013) ¶ 108 ("International judicial practice is almost unanimous in holding that an intention of the host State to expropriate is not essential."); DUGAN ET AL. (CL-0007) at 463 ("If a tribunal is not convinced that a government act is an 'ordinary measure of the State,' then it is more likely to find that the act is expropriatory. Likewise, if the tribunal finds that the reasons behind a governmental measure were unrelated to public policy concerns or that the measure was otherwise unjustified, the tribunal is more likely to find that an expropriation has occurred." (internal citations omitted)).

[323] *Phillips Petroleum Co. Iran v. The Islamic Republic of Iran & The National Iranian Oil Co.*, IUSCT Case No. 39, Award No. 425-39-2, 29 June 1989, 21 IRAN-U.S. CL. TRIB. REP. 79 (CL-0024), ¶ 97.

[324] *Id*.

[325] *See, e.g.*, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006 ("*Azurix*") (CL-0025), ¶ 315 ("[A] State or its instrumentalities may perform a contract badly, but this will not result in a breach of treaty provisions, unless it be proved that the state or its emanation has gone beyond its role as a mere party to the contract, and has exercised the specific functions of a sovereign." (internal quotation marks omitted)).

acts in its commercial role as a party to the contract or in its sovereign capacity."[326] The tribunal in *Siemens v. Argentina* elaborated on this distinction,[327] concluding that "for the State to incur international responsibility it must act as such, it *must use its public authority*. The actions of the State have to be based on its 'superior governmental power.' It is not a matter of being disappointed in the performance of the State in the execution of a contract but rather of interference in the contract execution through governmental action."[328]

145. Finally, it is worth noting that expropriation may "take[] place through a series of actions, none of which might qualify as an expropriation by itself, but the aggregate effect of which is to destroy the value of the investment."[329] This form of expropriation has been called a "creeping expropriation," and it involves "an incremental but cumulative encroachment on one or more of the range of recognized ownership rights until the measures involved lead to the effective negation of the owner's interest in the property."[330] In the end, the expropriation inquiry is fact-dependent.[331] A

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[326] Schreuer—*The Concept of Expropriation* (CL-0013) ¶ 66; DOLZER & SCHREUER (CL-0006) at 128 ("Tribunals have found that the determining factor is whether the state acted in an official, governmental capacity.").

[327] *Siemens*—Award (CL-0008) ¶¶ 247-53.

[328] *Id.* ¶ 253 (emphasis added).

[329] Schreuer—*The Concept of Expropriation* (CL-0013) ¶ 36; *see also Vivendi II* (CL-0009) ¶ 7.5.17 (citing a 2000 UNCTAD study for the proposition that "creeping expropriation may be defined as the slow and incremental encroachment on one or more of the ownership rights of a foreign investor that diminishes the value of its investment. This is so even though the legal title to the property remains vested in the foreign investors but the investors' rights of use of the property are diminished as a result of the interference by the state"); W. Michael Reisman & Robert D. Sloane, *Indirect Expropriation and its Valuation in the BIT Generation*, 74 BRITISH Y.B. INT'L L. 115, 128 (2003) ("REISMAN & SLOANE") (CL-0026), at 128 ("A creeping expropriation therefore denotes, in the paradigmatic case, an expropriation accomplished by a cumulative series of regulatory acts or omissions over a prolonged period of time, no one of which can necessarily be identified as the decisive event that deprived the foreign national of the value of its investment. Moreover, they may be interspersed with entirely lawful state regulatory actions.").

[330] Schreuer—*The Concept of Expropriation* (CL-0013) ¶ 36 (quoting United Nations Conference on Trade and Development, World Investment Report, FDI Policies for Development: National and International Perspectives (2003) at 110).

[331] NEWCOMBE & PARADELL (CL-0014) § 7.16 ("The deprivation of property must be severe, fundamental or substantial and not ephemeral. This will necessarily be a case-by-case analysis."); *see also id.* § 7.12 ("[T]he indirect expropriation analysis is context and fact specific."); RUDOLF DOLZER & MARGARETE STEVENS, BILATERAL INVESTMENT

tribunal must consider the totality of the relevant circumstances in order to conclude whether an expropriation has taken place, and no two cases will be exactly alike.

146. In this case, Respondent took a number of actions that substantially deprived Claimants of their ability to benefit from their investments, of the value of those investments, and ultimately—in the case of some of the Contracts and the rights flowing therefrom—of the investments themselves. Respondent's cessation of payments on the Contracts, its termination or suspension of those Contracts, its illegal declaration of default in the *Ciudad de las Artes* Contract, and its refusal to issue necessary licenses and approvals on the others constituted an expropriation of Claimants' contractual rights (*see infra* Section IX(2)(a)). Some of these same acts, coupled with the aggressive criminal prosecution of Mr. Rivera in Panama, constituted an expropriation of his corporate holdings there and Claimants overall business goodwill, as well (*see infra* Section IX(2)(b)). Even if these acts individually do not constitute expropriation, their cumulative effect most certainly does (*see infra* Section IX(2)(c)).

a. Respondent's Acts Constituted an Expropriation of Claimants' Contractual Rights

147. As detailed above, Claimants (through the Omega Consortium) entered into eight Contracts for Projects with six different Panamanian Government entities. Before President Varela took office in the summer of 2014, each of those Projects was progressing as expected; save for a few generally minor delays in progress and payment (all of which were amicably resolved), the Contracts

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TREATIES (1995) ("DOLZER & STEVENS") (CL-0027), at 100 ("[I]t is generally accepted that a wide variety of measures are susceptible to lead to indirect expropriation and each case is therefore likely to be decided on the basis of its attending circumstances."); DUGAN ET AL. (CL-0007) at 450 ("[A]ny determination of whether there has been an indirect or regulatory expropriation is highly dependent on the particular facts of the dispute. Indeed, although there have been innumerable decisions and writings on this issue, the factual setting of a dispute is almost always more important than any particular doctrinal approach or formulation of the controlling legal principles. Leading commentators have long recognized that a case-by-case approach is imperative."); REISMAN & SLOANE (CL-0026) at 122 ("[I]ndirect expropriations . . . require fact-sensitive inquiries into the practical effect of an event or events on a foreign investor's rights.").

were being performed in accordance with their terms.[332] But once the Varela Administration took charge, each of the Government entities with which the Omega Consortium had contracted breached their respective obligations almost simultaneously.[333] The coordinated sweep of these actions by the Government eviscerated the Contracts, and in three steps fully deprived Claimants of any rights they had therein.

148. *First*, the Government ceased its performance. Within a month of the change in Administration in Panama, the Government halted and even reversed the approval of payments and other requests related to the Omega Consortium's Contracts for work already performed.[334] This was not due to any commercial dispute between the parties—such payments were duly approved by the various contracting Government agencies and pending final sign-off by the Comptroller-General when President Varela assumed office.[335] From that point forward, however, what was usually a ministerial task became embroiled in a bureaucratic quagmire. Nothing was paid to the Omega Consortium from that point forward, and by the end of 2014, the Government was behind on its payments under all eight of the Contracts.[336]

149. *Second*, the Government obstructed Claimants' own continued performance of the Contracts. Contrary to the law and the terms of those Contracts, the Government began to refuse issuing certain permits and plans contemplated in the tender documents; act which only a sovereign

[332] See supra § IV.

[333] See supra § VI.

[334] *See supra* ¶¶ 74-75.

[335] See supra ¶ 74.

[336] See supra ¶ 75.

could do.[337] For example, the lack of approved construction plans and environmental studies for the La Chorrera Contract and Municipality of Panama Contract ground any progress to a halt, effectively barring Claimants from performing them.[338]

150. *Third*, the Government effectively terminated the Contracts as they started to languish. Omega Panama had sought routine extensions on the Contracts, which had been duly approved by the various contracting Government entities, but approvals of those extensions once again either sat unanswered with the Comptroller-General or were baselessly sent back to the Government agencies for re-approval.[339] With invoices for completed work unpaid, the Municipality of Panama suspended its Contract in September 2014 (and officially terminated it by resolution days after this arbitration was filed);[340] the National Institute of Culture terminated the Ciudad de las Artes Contract in December 2014 (without any notice, any invocation of the proper termination procedures, and any payment for prior work)[341]; the Judicial Branch's La Chorrera Contract[342] and the Ministry of Health's Minsa Capsi Contracts were simply allowed to lapse as the Comptroller-General refused to authorize amendments because of delays and/or payments to Omega Panama.[343] So between July 2014 and December 2014, the Government terminated or allowed to lapse all but one of the Contracts

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[337] See supra ¶ 71.

[338] *See supra* ¶¶ 72-73.

[339] See supra ¶ 76.

[340] See supra ¶ 81.

[341] *See supra* ¶ 79. As noted above, while the Government based this termination on asserted delays, in reality the project had been removed from the budget months before the termination order was issued, demonstrating that the assertion of "delay" was merely a convenient pretext. *Id*.

[342] *See supra* ¶ 80.

[343] *See supra* ¶ 84-85.

(the remaining one, Municipality of Colón, was nevertheless in limbo until it finally also lapsed as the Government refused to allow Omega Panama to access the site).[344]

151. In the span of six months, the Government had inexplicably and permanently deprived Claimants of the benefit of the Contracts—not only their expected future revenue and profits, but even worse, payment for the work already performed. These were not just a series of unconnected contractual disputes—from the time that President Varela took office, approved invoices went unpaid or were baselessly returned to the Government agencies by the Comptroller-General, permits and licenses went unfulfilled by various Ministries, Contracts were removed from the State budget and/or were otherwise terminated, suspended or allowed to lapse. This was not just a "substantial" deprivation of Claimants' investments; it was a *complete* deprivation taken in a holistic and coordinated pattern that certainly qualifies as an expropriation.

b. Respondent's Acts Constituted an Expropriation of Claimants' other Investments in Panama

152. As discussed and fully described above, the various Contracts were not the only investment Claimants made in Panama. Omega Panama was itself a valuable asset owned and controlled by Mr. Rivera, and Claimants invested nearly all of their business know-how and goodwill into their Panamanian operations. Respondent's acts expropriated those assets, too.

153. Omega Panama was the first casualty. Already financially crippled as a result of both the Government's concerted refusal to make any payments for work completed and its unilateral termination of the Omega Consortium's largest Contract, the 2015 criminal investigations and seizure of Omega Panama's bank accounts in the country were the final straw.[345] Without invoices being

[344] See supra ¶ 78.

[345] *See supra* § VI(D).

paid or approvals being granted, work was decreased and then stopped, personnel were laid-off and significant expenses were incurred just to keep the Projects from falling into disrepair.[346] With money going out but nothing coming in, Omega Panama quickly became insolvent. [347]

154. Respondent's acts then had broader reverberations for Claimants outside of Panama, and this killed off the entirety of the investment. The Government's unlawful declaration of default in the Ciudad de las Artes Contract shattered Omega U.S.'s bonding capacity and therefore its ability to bid for and obtain new contracts.[348] From there, three separate criminal investigations into Omega Panama and Mr. Rivera were filed in Panama, and Mr. Rivera became the subject of a detention order and Interpol Red Notice.[349] In the end, the culmination of these actions destroyed not only Omega Panama, but both Claimants as well.[350] A construction company's goodwill, brand, and bonding ability is essential to its success. Omega U.S. and Mr. Rivera had invested their business goodwill into Panama, only to see it ruined by Respondent's unwarranted, unjustified, and unlawful acts.[351]

c. The Cumulative Effect of Respondent's Acts Constitutes an Expropriation under the BIT and the TPA

155. Even if the Government's actions described above do not constitute individual acts of expropriation (which they do), put together they undoubtedly constitute a creeping expropriation of Claimants' investment by Panama. The Government's actions cumulatively strangled Claimants' business to the point where it could no longer operate. By the end of 2014, they were drowning in

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[346] *See supra* ¶¶ 4, 78, 86.

[347] *See supra* ¶¶ 87, 110.

[348] *See supra* ¶¶ 109-112.

[349] *See supra* § VI(D), ¶ 102.

[350] *See supra* ¶ 115.

[351] *See supra* § VII, ¶ 37.

unpaid invoices (creating severe economic hardship on the Omega Corsortium's liquidity)[352] and had their work on several ongoing projects frustrated with non-approvals and licensing issues (creating necessary layoffs and slowly diminishing future invoices).[353] When, on 23 December 2014, the Government unfairly declared the Omega Consortium in default of the Ciudad de las Artes Contract (destroying Omega U.S.'s bonding capacity and its ability to bid for and obtain new contracts),[354] the destruction of Claimants' investment was complete and virtually irreversible. Within months, Omega Panama and PR Solutions had their bank accounts frozen in an illegitimate and unwarranted criminal prosecution.[355] By the end, nothing was left of Claimants' investment in Panama.

3. Respondent's Expropriation of Claimants' Investment Was Unlawful Under the Treaty and as a Matter of International Law

156. Having identified Claimants' investments and established that they were expropriated, the final step of the expropriation inquiry is to ask whether such expropriation satisfied the four treaty requirements of public purpose, due process, non-discrimination and compensation.[356] The answer is plainly no.

157. It is undisputed that Respondent has not compensated Claimants for any takings that may have occurred. As the four requirements for an expropriation to avoid triggering a breach of

[352] *See supra* § VI(B).

[353] *See supra* § VI(A), ¶ 113.

[354] *See supra* ¶¶ 109-112.

[355] *See supra* § VI(D)(1).

[356] BIT (CL-0001; CL-0002), art. IV(1); TPA (CL-0003), art. 10.7.

international law must be satisfied *cumulatively*,[357] this fact alone establishes that Respondent has breached the BIT and the TPA.[358]

158. It nevertheless merits mention that Respondent's expropriatory acts also lacked a public purpose, discriminated against Claimants and violated due process. Various tribunals have shed light on these three additional requirements, writing that a public purpose "requires some genuine interest of the public,"[359] that due process requires non-arbitrariness and "the application of [duly adopted] laws,"[360] and that non-discrimination requires similar treatment for similarly-situated parties.[361]

159. Here, it is difficult to see how Respondent's unjustified and illegal decisions to terminate, suspend and cease payment on the Contracts, its withdrawal of and delays in issuing necessary approvals, its illegal declaration of default and its suspension of necessary licenses were taken in pursuit of any legitimate public policy objectives. To the contrary, it is evident that these coordinated attacks were part of an illegal sovereign campaign of harassment against Mr. Rivera and the Omega Consortium brought about by a personal vendetta pursued by Panama's President. Accordingly, Claimants are entitled not merely to the compensation that might flow from an otherwise lawful expropriation, but they are entitled to damages for an *unlawful* expropriation under

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[357] *See, e.g.*, DOLZER & SCHREUER (CL-0006) at 99.

[358] *See, e.g.*, *Vivendi II* (CL-0009) ¶ 7.5.21 ("If we conclude that the challenged measures are expropriatory, there will be [a] violation of [the treaty's expropriation provision], even if the measures might be for a public purpose and non-discriminatory, because no compensation has been paid.").

[359] *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 Oct. 2006 ("*ADC*") (CL-0028), ¶ 432.

[360] Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award, 4 Apr. 2016 ("Crystallex") (CL-0029), ¶ 552.

[361] *ADC* (CL-0028) ¶ 442.

international law that fully takes into account the manner in which Respondent effected such a sweeping and conscious deprivation of all of their rights and assets in Panama.[362]

B. Respondent Has Treated Claimants Unfairly and Inequitably in Violation of the BIT and the TPA

160. Respondent also violated Article II.2 of the BIT, which provides that "[i]nvestment of nationals and companies of either Party shall at all times be accorded fair and equitable treatment."[363] As with all investment treaty protections, consideration of this provision's text and context, and the treaty's object and purpose, aids in the interpretation of the fair and equitable treatment ("**FET**") standard.[364] "In their ordinary meaning, the terms 'fair' and 'equitable' . . . mean 'just', 'even-handed', 'unbiased', [and] 'legitimate.'"[365] As for context, the BIT's Preamble recognizes that the "encouragement and reciprocal protection" contained in the Treaty through international law protections such as the right to FET "will be conducive to the stimulation of individual business initiative and will increase prosperity in both States."[366] The preamble reflects additional elements of the treaty's object and purpose as well, including "promot[ing]" the Contracting Parties' "economic cooperation" and "creating favorable conditions for investment by nationals and companies of one Party in the territory of the other Party."[367] In short, FET requires State conduct that is legitimate,

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[362] *See* Schreuer—*The Concept of Expropriation* (CL-0013) ¶ 119 ("Absence of legitimate purpose would inject an element of illegality that should lead to an award of damages which would be conceptually different from and possibly higher than compensation.").

[363] BIT (CL-0001; CL-0002), art. II(2). The TPA contains a narrower definition of FET, but the MFN clause of that Treaty, *see* TPA (CL-0003), art. 10.4, incorporates the broader formulation.

[364] Vienna Convention on the Law of Treaties, opened for signature 23 May 1969 (CL-0030), art. 31(1).

[365] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 ("*MTD*—Award") (CL-0031), ¶ 113.

[366] BIT (CL-0001; CL-0002) Preamble.

[367] *Id*.

unbiased and just in order to stimulate economic development and increase the flow of capital and technology.[368]

161. The FET obligation is thus a "broad"[369] and "flexible"[370] requirement, protecting foreign investors against a wide variety of State conduct that is unjust under international law. As such, a "judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case."[371] Two decades of arbitral case law have applied these concepts to concrete circumstances, thus providing important guidance.[372] First and foremost, a violation of FET will be clear when a State has frustrated an investor's legitimate expectations, especially when they are reflected in a contract (*see infra* Section IX(B)(1)); where it has harassed or coerced an investor (*see infra* Section IX(B)(2)); or where it has acted arbitrarily, unreasonably, inconsistently, in a discriminatory manner or not in good faith (*see infra* Section IX(B)(3)). And even if a State's individual actions do not amount to an FET violation standing alone, the cumulative effect of those actions may constitute an FET violation all the same; this is known as a "creeping" violation of the

[368] *See, e.g.*, *MTD*—Award (CL-0031) ¶ 113 ("[F]air and equitable treatment should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment.").

[369] Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award, 1 June 2009 (CL-0032), ¶ 450.

[370] *See Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 Apr. 2004 ("*Waste Management*") (CL-0033), ¶ 99 (describing the standard as "a flexible one which must be adapted to the circumstances of each case"); Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. WORLD INV. & TRADE 357, 365 (2005) ("Schreuer—*Fair and Equitable Treatment*") (CL-0034) ("In actual practice, it is impossible to anticipate in the abstract the range of possible types of infringements upon the investor's legal position. The principle of fair and equitable treatment allows for independent and objective third-party determination of this type of behavior on the basis of a flexible standard.").

[371] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 Oct. 2002 ("*Mondev*") (CL-0035), ¶ 118.

[372] *See, e.g.*, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 Jan. 2003 (CL-0036), ¶ 184 (application of the standard to "be disciplined by being based upon State practice and judicial or arbitral case law or other sources of customary or general international law").

FET standard (*see infra* Section IX(B)(4)). As the sections that follow will explain, by any measure, Respondent has repeatedly breached its FET obligation to Claimants.

1. *Respondent Frustrated Claimants' Legitimate Expectations and Contractual Rights*

162. This is the "essential,"[373] "dominant,"[374] and "most significant"[375] element of the FET obligation: the requirement that a State honor an investor's "legitimate expectations."[376] This term refers to "expectations arising from the foreign investor's reliance on specific host state conduct, usually oral or written representations or commitments made by the host state relating to an investment."[377] It is well established that a "reversal of assurances by the host State which have led to legitimate expectations will violate the principle of fair and equitable treatment."[378]

163. An important and legitimate expectation for any foreign investor is that a State will comply with its contractual commitments.[379] As summarized by the tribunal in *Mondev v. United*

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[373] *Duke Energy Electroquil Partners & Electroquil S.A. ("Duke") v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 Aug. 2008 ("*Duke Energy*") (CL-0037), ¶¶ 339-40 (explaining that a "stable and predictable legal and business environment," considered an "essential element" of the FET standard, is directly linked to the investor's "justified expectations," which must be "legitimate and reasonable" at the time of investment).

[374] *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 Mar. 2006 ("*Saluka*") (CL-0038), ¶ 302 (describing legitimate expectations as the "dominant element").

[375] *PSEG Global Inc. et al. v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 Jan. 2007 ("*PSEG*—Award") (CL-0039), ¶ 240 (describing the need to secure a predictable and stable legal environment as including "most significantly" the issue of legitimate expectations).

[376] *See* Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, 12 SANTA CLARA J. INT'L L. 7, 17 (2013) ("Dolzer—*Fair and Equitable Treatment*") (CL-0040) ("The protection of legitimate expectations by the FET standard will today properly be considered as the central pillar in the understanding and application of the FET standard.").

[377] NEWCOMBE & PARADELL (CL-0014) § 6.26; *see also Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 Sept. 2007 (CL-0041), ¶ 331 ("The expectation is legitimate 'if the investor received an explicit promise or guaranty from the host-State . . . .'").

[378] Schreuer—Fair and Equitable Treatment (CL-0034) at 374; DOLZER & SCHREUER (CL-0006) at 145.

[379] *See, e.g.*, Michele Potestà, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*, 28 ICSID REV. 88, 103 (2013) (CL-0042) ("[C]ontracts engender expectations which have to be placed at the highest level of protection—contracts usually reflect the carefully negotiated balance achieved by the opposing parties and could be said to crystallize the parties' expectations. Thus, it will be natural to look

States, "a governmental prerogative to violate investment contracts would appear to be inconsistent with the principles embodied in [NAFTA's FET provision] and with contemporary standards of national and international law concerning governmental liability for contractual performance."[380] Although tribunals have stated that not all breaches of contract by a State give rise to breaches of the FET obligation, many have concluded that a breach of contract "which the State commits in the exercise of its sovereign power" indeed constitutes a treaty violation.[381] In *Vivendi v. Argentina*, the tribunal found that the State's disregard of a contractual tariff regime frustrated the claimants' legitimate expectations and amounted to an FET violation.[382] In that case, a concession agreement between the State and a local company[383] (in which the claimants were shareholders[384]) set forth initial tariffs to be charged and the procedures to be followed in order to change those tariffs when necessary in light of certain contemporaneous circumstances.[385] When an economic crisis struck Argentina, however, the State began to refuse to revise the tariffs in accordance with the concession's legal framework,[386] instead enacting measures directing regulatory authorities to disregard that framework.[387] The tribunal ultimately concluded that "Argentina's actions in refusing to revise the tariff according to the legal framework of the Concession and in purs[u]ing the forced renegotiation

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at the carefully negotiated contractual terms first to infer what the parties could legitimately expect from the transaction . . . .").

[380] *Mondev* (CL-0035) ¶ 134.

[381] *Duke Energy* (CL-0037) ¶ 345.

[382] *AWG-Suez-Vivendi*—Liability (CL-0011) ¶¶ 247-48.

[383] *Id.* ¶ 98.

[384] *Id.* ¶ 1.

[385] *Id.* ¶¶ 106-11.

[386] *Id.* ¶ 232.

[387] *Id.* ¶ 237.

of the Concession Contract contrary to that legal framework violated its obligations under the applicable BITs to accord the investments of the Claimants fair and equitable treatment,"[388] specifically "by frustrating the Claimants' legitimate and reasonable expectations."[389]

164. As detailed above, Claimants (through the Omega Consortium) entered into eight Contracts for Projects with six different Panamanian Government entities. Claimants had every expectation that these *pacta* would be *servanda*. Indeed, before President Varela took office in the summer of 2014, each of those Projects was progressing as expected, in accordance with their terms; invoices were paid and any minor issues were amicably resolved.[390] But once President Varela took office, each of the eight Contracts was almost simultaneously breached by the Comptroller-General and *all* of the various Government Ministries and agencies.[391] It bears repeating how this happened, in three sequential steps.

165. *First*, the Government, acting through the Comptroller-General, ceased its performance. Within a month of the change in Administration in Panama, the Government halted and even reversed the approval of payments and other requests related to the Omega Constortium's

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[388] *Id.* ¶ 247.

[389] *Id.* ¶ 248; *see also Eureko* (CL-0020) ¶ 232 (finding an FET violation based on the State's breach of contract in failing to conduct an IPO); *Rumeli Telekom A.S. & Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 ("*Rumeli*") (CL-0043), ¶ 615 (finding an FET violation because the State attempted to terminate a contract without first suspending it, in breach of the contract's terms); *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Excerpts of Award, 1 Mar. 2012 (CL-0044), ¶ 273 (while a State may "question a contractual arrangement and seek to modify its terms, it must do so within the confines of the law and through proper channels. It is not permissible for [a State] simply to take matters into its own hands and unilaterally prevent performance of a contract, particularly through the exercise of government authority . . . ."). This point was confirmed, most recently, by the tribunal in *Flemingo DutyFree Shop Private Limited v. The Republic of Poland*, UNCITRAL, Award, 12 Aug. 2016 (CL-0045), ¶¶ 552-53 (where the tribunal determined whether the claimants' legitimate expectations had been breached based on the parties' relationship prior to the disagreement as a basis from which to judge their conduct.).

[390] See supra § IV.

[391] See supra § VI.

Contracts for work already performed. This was not due to any commercial dispute between the parties—such payments were duly approved by the relevant contracting Government agencies and pending final sign-off by the Comptroller-General when President Varela assumed office. But from that point forward, and through December 2014, payments on each of the Contracts were progressively withheld.[392] Within six months of Mr. Varela taking office, the Government was behind on its payments for seven out of the eight Contracts (work on one of the Contracts had never commenced through no fault of the Omega Consortium[393]). It cannot seriously be questioned that Claimants had a legitimate expectation of payment under the Contracts for work already performed.

166. *Second*, the Government obstructed the Omega Consortium's continued performance of the Contracts by inexplicably refusing certain permits and plans contemplated in the tender documents.[394] These were documents that the Government had promised to provide, so Claimants had a legitimate expectation that they would be provided.[395] The fact that these permits and approvals never came stopped the Omega Consortium's progress on the projects, and compounded the harm to Claimants.[396]

167. *Third*, within months of President Varela's inauguration, the Government effectively terminated or allowed to lapse all but one of the Contracts.[397] The Omega Consortium had sought routine extensions to their performance, which were agreed by the relevant contracting Government

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[392] *See supra* § VI(B).

[393] See supra ¶ 45.

[394] *See supra* § VI(A).

[395] *Id*.

[396] *See supra* ¶¶ 71-73.

[397] *See supra* § VI(C); *see also* RfA ¶ 30.

entities, but approvals of those amendments were withheld by the Comptroller-General.[398] The Municipality of Panama suspended its contract in September 2014 (and officially terminated it by resolution days after this arbitration was filed);[399] the National Institute of Culture terminated the Ciudad de las Artes Contract in December 2014 (without any notice, any invocation of the proper termination procedures, and any payment for prior work); [400] the Judiciary's La Chorrera Contract[401] and the Ministry of Health's Minsa Capsi Contracts were simply allowed to lapse as the Comptroller-General refused to authorize amendments and/or payments to Omega Panama.[402] This concerted action was a blatant frustration of Claimants' legitimate expectations and Respondent's contractual commitments. Such acts destroyed the bonding capacity of Omega U.S., and effectively marked the death of a previously thriving, well-regarded construction company internationally.[403]

168. In the span of six months, the Government had inexplicably and permanently deprived Claimants of the benefit of the Contracts. This was, by any measure, the total and complete "reversal of [contractual] assurances by the host State which ha[d] led to legitimate expectations," a situation which most certainly "violate[s] the principle of fair and equitable treatment."[404]

2. *Respondent Harassed and Coerced Claimants and Their Investment*

169. "[H]ostile treatment, harassment and coercion" by the State also stand "in violation

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[398] See supra ¶ 84.

[399] See supra ¶ 49.

[400] *See supra* ¶ 57. As noted above, while the Government based this termination on asserted delays, in reality the project had been removed from the budget months before the termination order was issued. *See supra* ¶ 79.

[401] *See supra* ¶ 80.

[402] *See supra* ¶ 84.

[403] *See supra* § VII.

[404] Schreuer—Fair and Equitable Treatment (CL-0034) at 374; DOLZER & SCHREUER (CL-0006) at 145.

of the fair and equitable treatment standard."[405] "Harassment and coercion are forms of conduct not to be expected in the ordinary relationship between the host state and the investor," but "States have come up with various ways of particular maltreatment, often disguised in the cloak of lawful investigations, unacceptable options, and forced conduct."[406]

170. For example, in *Pope & Talbot v. Canada*, a governmental entity had commenced a "verification review" against the investor, which the tribunal found to be "more like combat than cooperative regulation."[407] The investment was "subjected to threats, denied its reasonable requests for pertinent information, required to incur unnecessary expense and disruption in meeting [the government's] requests for information, forced to expend legal fees and probably suffer a loss of reputation in government circles."[408] The tribunal concluded that the government's treatment of the investment went "beyond the glitches and innocent mistakes that may typify the [administrative] process" and that such treatment was "nothing less than a denial of the fair treatment required by NAFTA."[409]

171. This case draws a stark parallel to the situation described above. The Comptroller-

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[405] Schreuer—Fair and Equitable Treatment (CL-0034) at 381; *see also, e.g.*, *Saluka* (CL-0038) ¶ 308 ("[A]ccording to the 'fair and equitable treatment' standard, the host State . . . must grant the investor freedom from coercion or harassment by its own regulatory authorities.").

[406] Dolzer—Fair and Equitable Treatment (CL-0040) at 31.

[407] *Pope & Talbot, Inc. v. The Government of Canada*, NAFTA, Award on the Merits of Phase 2, 10 Apr. 2001 (CL-0046), ¶ 181.

[408] *Id*.

[409] *Id.*; *see also, e.g.*, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 ("*Tecmed*") (CL-0047), ¶¶ 163, 166 (tribunal found coercion inconsistent with FET based on the government's conversion of a license of unlimited duration into a license of limited duration in an effort to force the investor to relocate to a different site); *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 Dec. 2010 (CL-0048), ¶ 338 (FET violation found when investor was forced to accept much less favorable conditions than those originally agreed to, such as forfeiting receivables in exchange for shares).

General's concerted refusals to approve *all* of the various Contract payments were anything but mere "glitches and innocent mistakes that may typify the [administrative] process"—they coincided with a change in the country's politics and a new Presidential Administration that viewed Claimants with animosity.[410] Thereafter, for the next few years, Claimants faced "threats" from criminal investigations,[411] were "denied . . . reasonable requests for pertinent information" relating to payments, permits and licenses,[412] and were forced to "incur unnecessary expense and disruption" and "to expend legal fees" along the way.[413] Not only this but, even after the First Investigation had concluded without criminal charges and with Mr. Rivera and Omega Panama's name being cleared, Panama issued two additional criminal investigations *on the exact same facts* and refused to withdraw its detention order and Interpol Red Notice, depriving Mr. Rivera of his right to travel to and from Panama to manage his investment. This was nothing less than an intentional campaign of sovereign harassment emanating from the highest levels of the Panamanian Government.

172. In the end, Claimants undeniably "suffer[ed] a loss of reputation" not only "in government circles," but more broadly as well.[414] From criminal investigations to detention orders, Interpol Red Notices to declared contractual defaults, Respondent decimated Claimants' bonding ability and general business goodwill, and thereby destroyed Omega U.S. itself.[415]

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[410] See supra § V.

[411] *See supra* § VI.D.

[412] *See supra* §§ VI.A-VI.B.

[413] *See supra* § VI.D.

[414] *See supra* § VII.

[415] *See supra* § VII.

3. *Respondent's Actions Were Arbitrary, Unreasonable, Inconsistent, Non-Transparent and Not Taken in Good Faith*

173. In addition to FET's protection of legitimate expectations and prohibition of harassment and coercion, FET "fill[s] gaps which may be left" by other treaty standards "in order to obtain the level of investor protection intended by the treaties."[416] Thus, FET has been found to protect against arbitrariness, unreasonableness, inconsistency and a lack of either transparency or good faith.[417]

174. These terms, by their very nature, capture a wide array of conduct, which arbitral tribunals have sought to define in ways that clarify their application to investment protection. "Arbitrary" conduct includes that which 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."[418] "Unreasonable" measures are similar, having been understood to mean measures which are "lacking in justification or not grounded in reason . . . , or not enacted in pursuit of legitimate objectives."[419] As for "inconsistent" State action, tribunals have held that "[o]ne arm of

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[416] Rudolf Dolzer, Fair & Equitable Treatment: A Key Standard in Investment Treaties, 39 THE INT'L L. 87, 90 (2005) (CL-0049).

[417] *See generally* Kenneth J. Vandevelde, *A Unified Theory of Fair and Equitable Treatment*, 43 N.Y.U. J. INT'L L. & POL. 43 (2010) ("Vandevelde—*A Unified Theory of Fair and Equitable Treatment*") (CL-0050); DOLZER & SCHREUER (CL-0006).

[418] *Crystallex* (CL-0029) ¶¶ 577-78; *see also, e.g.*, *Siemens*—Award (CL-0008) ¶ 318 (turning to the Oxford English Dictionary for definitions such as "derived from mere opinion," "capricious," "unrestrained" and "despotic," and to Black's Law Dictionary for definitions such as "fixed or done capriciously or at pleasure; without adequate determining principle," "depending on the will alone," "without cause based upon the law"); *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 Oct. 2009 ("*EDF*") (CL-0051), ¶ 303 (accepting the following definitions: "a measure that inflicts damage on the investor without serving any apparent legitimate purpose"; "a measure that is not based on legal standards but on discretion, prejudice or personal preference"; "a measure taken for reasons that are different from those put forward by the decision maker;" and "a measure taken in willful disregard of due process and proper procedure").

[419] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 Dec. 2013 ("*Micula*") (CL-0052), ¶ 525; *see also id.* ("[F]or a state's conduct to be reasonable, it is not sufficient that it be related to a rational policy; it is also necessary that, in the implementation of that policy, the state's acts have been appropriately tailored to the pursuit of that rational policy with due regard for the consequences imposed on investors."); Vandevelde—*A Unified Theory of Fair and Equitable*

the State cannot finally affirm what another arm denies to the detriment of a foreign investor."[420] Transparency in general requires that "the legal framework for the investor's operations is readily apparent and that any decisions affecting the investor can be traced to that legal framework."[421] The transparency obligation has also been interpreted "to require a state to avoid a prolonged state of legal uncertainty and ambiguity."[422] Finally, the FET obligation "includes the general principle recognized in international law that the contracting parties must act in good faith, although bad faith on the part of the State is not required for its violation."[423]

Treatment (CL-0050) at 54 ("A typical violation occurs where the host state's conduct is politically motivated, such as where the state retaliates against the foreign investor for lawful but unpopular behavior.").

[420] *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award, 3 Feb. 2006 (CL-0053), ¶ 158; *see also MTD*—Award (CL-0031) ¶ 163 (finding an FET violation based on "the inconsistency of action between two arms of the same Government *vis-à-vis* the same investor"); *id.* ¶ 166 (more specifically, the investor was not treated fairly or equitably when one governmental entity approved an investment that was against the urban policy of the government in general); *Tecmed* (CL-0047) ¶ 154 ("The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.").

[421] DOLZER & SCHREUER (CL-0006) at 149; *see also Tecmed* (CL-0047), ¶ 154 ("The foreign investor expects the host State to act . . . 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."); *Metalclad* (CL-0017) ¶ 76 ("The Tribunal understands this to include 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 . . . 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 investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws.").

[422] Dolzer—*Fair and Equitable Treatment: Today's Contours* (CL-0040) at 31 (citing *Tecmed* (CL-0047) ¶ 164; *PSEG*—Award (CL-0039) ¶ 246 ("The Tribunal is persuaded nonetheless that the fair and equitable treatment standard has been breached, and that this breach is serious enough as to attract liability. Short 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.")).

[423] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 ("*Biwater Gauff*") (CL-0054), ¶ 602; *see also, e.g.*, *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Final Award, 12 Nov. 2010 (CL-0055), ¶¶ 300-301 ("Bad faith action by the host state includes the use of legal instruments for purposes other than those for which they were created. It also includes a conspiracy by state organs

175. Much of Panama's conduct vis-à-vis Claimants and their investment was both arbitrary and unreasonable.[424] For instance, Respondent's refusal to pay Omega Panama's approved invoices was not "based on legal standards" but rather on the "discretion, prejudice or personal preference" of the then-new Presidential Administration.[425] The same goes for Respondent's decision to declare a default in the Ciudad de las Artes Contract without following the negotiation and resolution procedures established in the Ley de Contrataciones Públicas; no objective legal justification for these State acts was ever provided (nor could it be). The fact that the Government failed to secure funds for this project three months before the contract was officially terminated—a fact that was never communicated to the Omega Consortium—vividly demonstrates the pretext and

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to inflict damage upon or to defeat the investment, the termination of the investment for reasons other than the one put forth by the government, and expulsion of an investment based on local favouritism. Reliance by a government on its internal structures to excuse non-compliance with contractual obligations would also be contrary to good faith. It follows from these authorities that action by the host state that is not in good faith is at variance with the fair and equitable treatment promise. However, not every violation of the standard of fair and equitable treatment requires bad faith. The fair and equitable treatment standard may be violated, even if no *mala fides* is involved."); *Tecmed* (CL-0047) ¶ 153 ("[B]ad faith from the State is not required for [an FET's] violation."). In any event, Respondent failed to act in good faith by, *inter alia*, breaching its "duty to maintain the status quo in juridical relations." CHARLES T. KOTUBY & LUKE A. SOBOTA, GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS 89-101 (2017) ("KOTUBY & SOBOTA") (CL-0081), at 100 (emphasis omitted). As discussed above, the Municipality of Panama threatened to terminate its Contract with the Omega Consortium just a month after Claimants had notified Respondent of their intention to file this arbitration and indeed issued a resolution to officially terminate the Contract a mere 12 days after this case was registered by ICSID. *See supra* ¶ 73. In doing so, after two years of complete inaction despite Claimants' repeated efforts to resolve the outstanding issues with the Municipality, Respondent has taken actions that "would aggravate a dispute and prejudice the effectiveness of an eventual judicial decision or arbitral award." KOTUBY & SOBOTA (CL-0081), at 100 (citation omitted). And, that is not the only example of Respondent's lack of good faith with respect to preserving the status quo. Only a week before the time provided by Claimants in its Notification of Intent to Arbitrate to reach an amicable solution before filing their Request for Arbitration, *see* Letter from Jones Day to the Republic of Panama dated 29 July 2016 (C-0101), Respondent also (1) attempted to cure the notification of the declaration of default of the Ciudad de las Artes project by publishing it on the "PanamaCompra" website (which it had never done prior to this time, even though it was required by law to do so); (2) initiated the declaration of default process for the Municipality of Panama Project; and (3) published a letter on the "PanamaCompra" website noting that Omega was in default under the La Chorrera Contract and that it was preparing the legal documents to proceed accordingly. *See* Webpages from Panama Compra website, undated (C-0162) (showing that the documents were published on "PanamaCompra" on 26 August 2016 at 2:56 PM); Letter No. 5527/DS/2016 from Panama's Office of the Mayor to the Omega Consortium dated 19 Aug. 2016 (C-0068); Letter from the President of Panama's Supreme Court to the Ministry of Commerce and Industry dated 24 Aug. 2016 (C-0163). These, too, are a blatant violation of Respondent's duty to preserve the status quo in juridical relations and, therefore, in contravention of the principle of good faith.

[424] *See supra* § IX.B.3.

[425] *See supra* ¶¶ 74-75.

the "lack[] [of] justification . . . reason . . . , or . . . legitimate objectives" behind its decision.[426]

176. Arbitrariness is apparent not only when gauging the way Claimants were treated vis-à-vis the law, but also the way they were treated vis-à-vis other investors. To wit, other government contractors who were alleged to have been involved in corrupt schemes (and even admitted to some criminal conduct), were treated much differently from Claimants (who were exonerated). Instead of being cut-off from payments, approvals and permits, and subject to seizure and detention orders—like Claimants were—other contractors were awarded new contracts from the new Administration. For instance, on or around November 2016, the Government announced that approximately US$ 34.1 million originally allocated to the Ministry of Health's Minsa Capsi clinics was being re-allocated to pay Odebrecht for a completely unrelated project in the city of Colón.[427]

177. Respondent's acts—indeed some of the same acts—were also manifestly inconsistent. In a word, Respondent granted allowances with one hand, while simultaneously (or least sequentially) denying them with the other. For example, the Designated Prosecutor in the First Investigation *expressly confirmed* that neither Mr. Rivera nor Omega Panama had anything to do with the crimes allegedly committed by Mr. Moncada Luna,[428] but the authorities nonetheless refused to release the frozen bank accounts. And within weeks they started a *second* and *then a third* investigation into Omega Panama and Mr. Rivera *based on the same core facts*.[429] Inconsistency affected Respondent's

[426] Underlying all of this was a lack of forthrightness and transparency. The legal framework for these acts and omissions by the Government, among others, was not apparent and left Mr. Rivera and Omega U.S. in a state of uncertainty, thereby constituting a breach by the Government of its FET obligations.

[427] The construction company Odebrecht is awarded a payment worth millions, LA PRENSA dated 24 Nov. 2016 (C-0329).

[428] See supra ¶ 99.

[429] *See supra* §§ VI.D.2, VI.D.3.

performance of its Contracts, too. Up until 2014 Panama's Comptroller-General would authorize payment of the outstanding amounts owed under the Contracts without material delay.[430] But after President Varela's ascension to power no such payments were authorized by the Comptroller-General, and they remain outstanding to this day.[431] Similarly, prior to President Varela's rise to power necessary amendments to the Contracts would be authorized by the Comptroller-General,[432] correspondence would be responded to, phone calls answered and permits granted.[433] Not so following the inauguration of the Varela Administration.[434] By any measure, these are all inconsistent acts that helped "destroy or frustrate the investment by improper means"[435]—a clear violation of the State's FET obligation.

4. *Respondent's Actions Amount to a Creeping Violation of the FET Standard*

178. The FET obligation not only affords the specific protections explored above, it also requires that governments not engage in actions, the cumulative effect of which is unfair and inequitable treatment. As the *El Paso* tribunal explained, "in the same way as one can speak of *creeping expropriation*, there can also be creeping violations of the FET standard."[436] That tribunal defined a creeping FET violation as "a process extending over time and comprising a succession or an accumulation of measures which, taken separately, would not breach that standard but, when taken

[430] See supra § IV.

[431] See supra ¶ 75.

[432] See supra § IV.

[433] See supra § IV.

[434] *See supra* §§ VI.A-VI.C.

[435] *Waste Management* (CL-0033) ¶ 138.

[436] *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 Oct. 2011 ("*El Paso*") (CL-0056), ¶ 518 (emphasis omitted).

together, do lead to such a result."[437] The tribunal ultimately took "an all-encompassing view of [the] consequences of the measures complained of," and concluded that "by their cumulative effect, they amount[ed] to a breach of the fair and equitable treatment standard."[438]

179. That conclusion is also warranted here. Taken together, Respondent's acts from mid-2014 to the present constitute a creeping violation of the FET standard that crystallized on 23 December 2014 when the Ciudad de las Artes Contract was declared in default. Even if, *arguendo*, the FET obligation is not offended by each of the Comptroller-General's repeated refusal to approve the invoice payments,[439] the State's repeated refusal to grant routine permits, licenses, approvals and amendments,[440] and the baseless criminal investigations on a stand-alone basis,[441] these coordinated and interrelated acts constitute a campaign of unfairness and inequity that violates the BIT and the TPA.

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[437] *Id*.

[438] *Id.* ¶ 519; *see also Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 Sept. 2014 ("*Gold Reserve*") (CL-0057), ¶ 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. In the Tribunal's view, this is the more so when the measures are part of a State policy aimed at gaining control of the object of the investment."); *Walter Bau AG (In Liquidation) v. The Kingdom of Thailand*, UNCITRAL, Award, 1 July 2009 ("*Walter Bau*") (CL-0058), ¶ 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."); *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. The Republic of Kazakhstan*, SCC Case No. V (116/2010), Award, 19 Dec. 2013 ("*Stati*") (CL-0059), ¶ 1095 ("Respondent's measures, seen cumulatively in context to each other . . . , constituted a string of measures of coordinated harassment by various institutions of Respondent. These measures must be considered as a breach of the obligation to treat investors fairly and equitably . . . ."); *Vivendi II* (CL-0009) ¶ 7.4.19 (finding an FET violation on the basis that the government "improperly and without justification, mounted an illegitimate 'campaign' against the concession, the Concession Agreement, and the 'foreign' concessionaire . . . aimed either at reversing the privatisation or forcing the concessionaire to renegotiate (and lower) . . . tariffs").

[439] *See supra* § VI.B.

[440] *See supra* §§ VI.A-VI.B.

[441] *See supra* § VI.D.

C. Respondent Deprived Claimants and their Investment of Full Protection and Security

180. Article II(2) of the BIT and Article 10.5 of the TPA require Respondent to provide "full protection and security" to Claimants' investments.[442] Case law and commentators generally agree that this standard imposes an obligation on States to ensure that foreign investments are protected from adverse acts of administrative bodies and third parties that might undermine legal or physical security.[443] The standard is one of "due diligence," which means that States must ensure "reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances."[444] The obligation is an affirmative one, too: a State must provide, and demonstrate that it has provided, "all measure[s] of precaution to protect the investments of [foreign investors] on its territory."[445]

181. While the standard plainly covers threats to physical security such as Panama's issuance of the detention order and INTERPOL Red Notice against Mr. Rivera,[446] tribunals have recognized that the full protection and security standard is not so limited.[447] It has been held to extend to the *legal* protection of investments as well.[448] This is a product of treaty interpretation, in particular

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[442] BIT (CL-0001; CL-0002), art. II(2); TPA (CL-0003), art. 10.5(1).

[443] Dolzer & Stevens (CL-0027).

[444] *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka,* ICSID Case No. ARB/87/3, Final Award, 27 June 1990, 30 I.L.M. 526 (1991) ("*AAPL*") (CL-0060), ¶ 77 (quoting Professor Alwyn Freeman).

[445] *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 Feb. 1997, 36 I.L.M. 1524 (1997) ("*American Manufacturing*") (CL-0061), ¶ 6.05.

[446] *See supra* ¶¶ 102-03.

[447] *Azurix* (CL-0025), ¶¶ 406-408.

[448] *CME*—Partial Award (CL-0019) ¶ 613; *Siemens*—Award (CL-0008) ¶ 303; *see also* DOLZER & SCHREUER (CL-0006) at 268-70; *Vivendi II* (CL-0009) § 7.4.17; *Eureko* (CL-0020) ¶¶ 236–37; *Ceskoslovenska Obchodni Banka A.S. v. The Slovak Republic,* ICSID Case No. ARB/97/4, Award, 29 Dec. 2004 ("*CSOB*—Award") (CL-0062), ¶ 170.

the canon of *ut res magis valeat* (let every term have full effect). Article 1 of the BIT protects *both* tangible and intangible property,[449] and Article 2 provides "full protection and security" to all such "investment."[450] Similarly, Article 10.29 of the TPA protects both "tangible or intangible" investment,[451] and Article 10.5 likewise provides "full protection and security" to all such "investments."[452] Because *intangible* investments are not subject to *physical* threats, it makes no sense to limit the protection to physical security, lest intangible investments lose the protection of this term altogether.[453] The fact that the promise is to "*full*" protection makes the "ordinary meaning" even clearer that "the content of this standard [extends] beyond physical security."[454]

182. Recent jurisprudence is also instructive. Where, for example, a State coerces a foreign investor to amend its contracts and legal entitlements, full protection and security is sufficiently "devalued" to give rise to State liability.[455] Where a State denies a contractual right, such as to seek indemnity from the government for losses on defaulted loans, the investment represented by the loan is deprived of "meaningful protection" and the State's acts therefore breach the full protection and security standard.[456] And, where an investor, for example, holds a monetary judgment against a state-

[449] BIT (CL-0001; CL-0002), art I(1)(d)(i).

[450] *Id.* art. II(2).

[451] TPA (CL-0003), art. 10.29.

[452] *Id.* art. 10.5.

[453] *See Siemens*—Award (CL-0008) ¶ 303 ("It is difficult to understand how the physical security of an intangible asset would be achieved.").

[454] *Azurix* (CL-0025) ¶ 408; *see also Biwater Gauff* (CL-0054) ¶ 729 ("when the terms 'protection' and 'security' are qualified by 'full,' the content of the standard may extend to matters other than physical security," such as "commercial and legal" security).

[455] *CME*—Partial Award (CL-0019) ¶ 613.

[456] *CSOB*—Award (CL-0062) ¶ 170.

owned entity, but needs to secure the imprimatur of the local courts to enforce that right, State officials cannot interfere with the courts or liquidate the debtor entities without limiting the "security" of the investor's investment. Such acts, too, will run afoul of the full protection and security standard.[457]

183. When viewed in light of these earlier cases, Respondent has committed clear violations of the full protection and security standard with respect to Claimants' investments. The contractual right to payment for the work performed under the Contracts was one of the cornerstones of financial security that Claimants enjoyed in Panama. This is not a novel proposition, and is not unique to these particular Claimants. Respondent's contracting Government entities had a clear obligation to facilitate the issue and approval of payments owed to Omega Panama under the Contracts, and the Comptroller-General was obliged to authorize the making of such payments.[458] Respondent, however, withheld payment through the Comptroller-General and unjustifiably terminated a number of the Contracts through its Government agencies. In other words, while Respondent had initially endorsed the legal and commercial security of Claimants' investment, it later decided not to protect it. Instead, it sought to abrogate and undermine that security through a coordinated sovereign refusal to comply with its contractual obligations by refusing to pay the amounts due and by abruptly declaring Omega Panama in default for no valid reason.

184. From there, however, Respondent's breach went even further. With Claimants' investments reeling from the denigration of the Contract rights and the concomitant loss of operational stability and profitability, Respondent began to violate the core of the full security and protection standard: *physical* protection. As the Contracts were terminated or suspended so was Mr. Rivera's

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[457] *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. 126/2003, Award, 29 Mar. 2005 (CL-0063), at 26.

[458] *See supra* § VI.B.

freedom to travel to and from Panama.[459] Three separate criminal investigations into Omega Panama and Mr. Rivera were filed; documents were seized, bank accounts were frozen and employees were interrogated.[460] Even after Panama's own Designated Prosecutor in the first of these criminal investigations had confirmed that there were *no grounds* to indict either Mr. Rivera or Omega Panama, the threat of imprisonment continued to hang over Mr. Rivera with the initiation of a second and, extraordinarily, a third set of criminal proceedings *based on the same set of facts as had been deemed insufficient to proceed with the First Investigation*.[461] Not only this but, even after the First Investigation had concluded without charge, Panama refused to unfreeze the bank accounts or to withdraw its detention order and Interpol Red Notice, and Mr. Rivera had to request through his counsel that INTERPOL delete it. Physical security and protection include, among others, the right of an investment's managers to travel to and from Panama to manage an investment. They also include the right of such managers to be free from charges for money laundering when there is no proof of any such malfeasance and the country's own courts and prosecutors have dismissed criminal proceedings or allegations. This sort of security and protection was denied to Claimants' investments, in violation of Articles II(2) of the BIT and 10.5 of the TPA.

D. Respondent Has Subjected Claimants' Investments to Unreasonable, Arbitrary and Discriminatory Measures

185. Panama's actions also breached the BIT's and the TPA's[462] obligation to not impair

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[459] *See supra* §§ VI.C, VI.D.2.

[460] *See supra* § VI.D.

[461] *See supra* §§ VI.D.2, VI.D.3.

[462] BIT (CL-0001; CL-0002), art. II(2) provides that "[n]either Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investment made by nationals or companies of the other Party." Via the Treaties' MFN provisions, *see id.* art. II(1) & TPA (CL-0003), art. 10.4, Claimants may also import the protection against unreasonable and discriminatory measures from other treaties to which Panama is a party. One such treaty is the *Agreement on encouragement and reciprocal protection of investments between the Republic of Panama and the Kingdom of the Netherlands*, which provides that

Mr. Rivera and Omega U.S.'s investments through measures that are discriminatory, unreasonable, or arbitrary. Determining the contours of this standard is a textual exercise. As the *Saluka* tribunal explained, the term "measures" covers governmental acts as well as omissions, and "impairment" means any negative impact or effect.[463]

186. This is not a strict liability standard, so there are additional qualifiers on the type of "impairment" that will breach the Treaty. As discussed above, "arbitrary" conduct includes that which 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."[464] "Unreasonable" conduct can be found where the justification for a State act is linked to domestic politics rather than a legitimate public policy objective.[465] "Discriminatory" measures are found where similarly-situated persons are treated in a different manner without reasonable or justifiable grounds.[466]

187. A full description of Respondent's arbitrary and discriminatory conduct does not bear

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"[e]ach 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 on encouragement and reciprocal protection of investments between the Republic of Panama and the Kingdom of the Netherlands, signed on 28 Aug. 2000, entered into force on 1 Sept. 2001 ("**Netherlands-Panama BIT**") (C-0300), art. 3(1).

[463] *Saluka* (CL-0038) ¶¶ 458-59.

[464] *Crystallex* (CL-0029) ¶¶ 578; *see also, e.g.*, *Siemens*—Award (CL-0008) ¶ 318 (turning to the Oxford English Dictionary for definitions such as "derived from mere opinion," "capricious," "unrestrained," and "despotic," and to Black's Law Dictionary for definitions such as "fixed or done capriciously or at pleasure; without adequate determining principle," "depending on the will alone," "without cause based upon the law"); *EDF* (CL-0051) ¶ 303 (accepting the following definitions: "a measure that inflicts damage on the investor without serving any apparent legitimate purpose;" "a measure that is not based on legal standards but on discretion, prejudice or personal preference;" "a measure taken for reasons that are different from those put forward by the decision maker;" and "a measure taken in willful disregard of due process and proper procedure"); *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 21 Jan. 2010 (CL-0064) ¶ 263.

[465] *See, e.g.*, *Eureko* (CL-0020) ¶ 233.

[466] *See, e.g.*, *Saluka* (CL-0038).

repeating. The same conduct that breaches the FET obligation also breaches these Treaty provisions.[467]

E. Respondent Has Breached The Treaties' Umbrella Clauses

188. Respondent's breaches of its obligations under the Contracts also amount to a breach of the "umbrella clauses" found in the BIT and the TPA.[468] This clause obligates Panama to "observe any obligations" it has with respect to investments by foreign investors.[469] The "prevailing interpretation" of such clauses is that they mandate "that the state comply with its undertakings towards investments, including contractual commitments, based on the ordinary meaning of its terms."[470] This clause's placement alongside other substantive guarantees like fair and equitable treatment and full security and protection demonstrates that breach of the provision is not merely hortatory. A breach of the umbrella clause, predicated on a State's breach of contract, is actionable before an arbitral tribunal.

189. This sort of requirement is foundational. Put simply, a contract would not be a contract if not binding. The principle of *pacta sunt servanda* is, in H.L.A. Hart's phrase, "the minimum content of Natural Law,"[471] and it has become a fixture in the international legal order precisely because "[n]o international jurisdiction whatsoever has ever had the least doubt as to [its] existence."[472] Indeed, it

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[467] *See supra* § IX.B.3.

[468] *See* BIT (CL-0001; CL-0002), art. II.2. Claimants may import, via the TPA's MFN clause, TPA (CL-0003), art. 10.4, the umbrella clause from other treaties between Panama and other States. *See, e.g.*, Netherlands-Panama BIT (C-0300), art. 3(4) (stating that "[e]ach Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party").

[469] *See* BIT (CL-0001; CL-0002), art. II(2).

[470] NEWCOMBE & PARADELL (CL-0014) § 9.23.

[471] *See* H.L.A. HART, THE CONCEPT OF LAW 193 (2d ed., 1994) (CL-0065).

[472] *Texaco Overseas Petroleum Co. and California Asiatic Oil Company v. The Government of the Libyan Arab Republic*, Ad Hoc, Award on the Merits, 19 Jan. 1977, 17 I.L.M. 1, 19 (1978) (CL-0066); *see also id*. ("A contract must

would also run contrary to simple logic if every *pactum* were not *servanda*.[473] Whether an agreement between private parties[474] or a contract undertaken by a State in its proprietary or sovereign capacity,[475] *pacta sunt servanda* means that agreements must be "fully respected as definitely binding on both [p]arties" by virtue of the "basic rules . . . shared by all . . . systems of law."[476] Agreements like the Contracts here are exceptionally important for foreign investors as they guarantee stability and security throughout the duration of the investment. Because they are aimed at "avoid[ing] the arbitrary actions of the contracting government," they "must be respected" lest one of the parties be permitted to "avoid its contractual obligations" by a unilateral act.[477]

190. The parties to these Treaties made their intention to protect contractual commitments abundantly clear. In the Agreed Minutes following the Annex to the BIT, Panama specifically stated that, "[w]ith respect to the treatment of investment as set forth in Article II [which contains the BIT's

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be performed in accordance with its contents and in compliance with the requirements of good faith."); *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 Aug. 2006 (CL-0067), ¶ 233 ("[T]he maxim Pacta Sunt Servanda [is] unanimously accepted in legal systems.").

[473] See Sir Gerald Fitzmaurice, Some Problems Regarding the Formal Sources of International Law, in SYMBOLAE VERZIJL 153, 176 (1958) (CL-0068); see also General Dynamics Corp. and General Dynamics Int'l Corp. v. The Islamic Republic of Iran et al., IUSCT Case No. 283, Award No. 123-283-3, 16 Apr. 1984, 5 IRAN-U.S. CL. TRIB. REP. 385, 398 (1984) (CL-0069) (obligation under "general principles of law" to perform contractual duties with due diligence); Sapphire Int'l Petroleums Ltd. v. Nat'l Iranian Oil Co., Award, 15 Mar. 1963, 35 INT'L. L. REP. 136, 181 (1967) ("Sapphire") (CL-0070) ("[I]t is a fundamental principle of law, which is constantly being proclaimed by international courts, that contractual undertakings must be respected. The rule pacta sunt servanda is the basis of every contractual relationship.").

[474] *See*, *e.g.*, *Bermudian Company v. Spanish Company*, ICC Case No. 5485, Final Award, 18 Aug. 1987, 14 Y.B. COMM. ARB. 156 (Albert Jan van den Berg ed., 1989) (CL-0071); *French Enterprise v. Yugoslav Subcontractor*, ICC Case No. 3540, Award, 3 Oct. 1980, 7 Y.B. COMM. ARB. 124 (Pieter Sanders ed., 1982) (CL-0072).

[475] *AMCO v. Republic of Indonesia*, ICSID Case No. ARB/81/l, Resubmitted Case Decision on Jurisdiction, 25 Sept. 1983, ICSID REV.-F.I.L.J. 166 (1998) (CL-0073), ¶ 2; *Libyan American Oil Co.* (*LIAMCO) v. The Government of the Libyan Arab Republic*, Ad Hoc, Award, 12 Apr. 1977, 20 I.L.M. 1, 29 (1981) (CL-0074).

[476] *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 Feb. 2008 ("*Desert Line*") (CL-0075), ¶¶ 205-206 (emphasis omitted).

[477] *Liberian Eastern Timber Corp. v. Government of the Republic of Liberia*, ICSID Case No. ARB/83/2, Award, 31 Mar. 1986, 2 ICSID REP. 343, 368 (1994) (CL-0076).

umbrella clause], [it] has incentive laws granting benefits to duly constituted companies which sign contracts with the government in which they agree to meet the requirements established therein."[478] Omega Panama is, no doubt, one of those "duly constituted companies which sign[ed] contracts with the government." Further, as indicated in his Letter of Transmittal to the White House, Secretary of State George P. Schultz indicated that "[the BIT] obliges Parties to observe their contractual obligations with investors" and, with regard to the "General scope of [the BIT]," Secretary Schultz indicated that "the making, performance and enforcement of contracts . . . are activities 'associated' with an investment and therefore entitled to treaty protection."[479]

191. While umbrella clauses do not elaborate on the governing law by which performance of a respondent State's obligations is to be judged, tribunals and commentators largely agree that the existence and content of such obligations is defined by host State law.[480] International law may still, however, affect certain undertakings in order to comport with general principles of law.[481] So, "even if under domestic law the unilateral conduct of a state does not give rise to a domestic legal obligation, or a commitment given in a contract to the investor is not legally binding under domestic law, in some circumstances the host state's conduct may give rise to an independent obligation under international

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[478] BIT (CL-0001; CL-0002) Agreed Minutes, ¶ 2.

[479] *Id,* BIT (CL-0001; CL-0002) at 39, 42-43.

[480] *See, e.g.*, *Micula* (CL-0052) ¶ 418 ("[W]hether an obligation has arisen depends on the law governing that obligation, and so the interpretation of the term 'obligation' for purposes of the umbrella clause would rely primarily on that law rather than on international law. In other words, to be afforded the protection of the BIT, the obligation must qualify as such under its governing law."); NEWCOMBE & PARADELL (CL-0014) § 9.9 ("What constitutes an undertaking or an obligation covered by the clause is normally a matter for the law of the host State . . . .").

[481] *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992, 8 ICSID REV.-F.I.L.J. 328, 352 (1993) (CL-0077) ("When . . . international law is violated by the exclusive application of municipal law, the Tribunal is bound . . . to apply directly the relevant principles and rules of international law . . . . [S]uch a process 'will not involve the confirmation or denial of the validity of the host State's law, but may result in not applying it where that law, or action taken under that law, violates international law.'").

law enforceable under an observance of undertakings clause."[482] As stated by the *Noble Ventures v. Romania* tribunal, "[a]n umbrella clause is usually seen as transforming municipal law obligations into obligations directly cognizable in international law."[483]

192. Finally, it should be obvious that the observation of *pacta sunt servanda* is not just a semantic exercise, but a casuistic one; contracts must be performed in good faith thus forming the principle of "*pacta sunt servanda bona fide*."[484] As a general principle of law[485] this means that "neither party . . . shall do anything which has the effect of destroying or injuring the rights of the other party to receive the fruits of the contract," "evading the spirit of the bargain, or failing to cooperate in the other party's performance."[486] Respondent repeatedly did just this, and thus failed to "observe [the] obligation[s] it enter[ed] into with regard to the [Claimants' investments]" in violation of the BIT[487] and the TPA.[488]

193. Respondent failed to "observe its obligations" by repeatedly refusing to make required payments for approved and invoiced work; failing to clear project premises, failing to issue the necessary permits and licenses; and failing to allow necessary extensions, all in violation of the

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[482] NEWCOMBE & PARADELL (CL-0014) § 9.9; *see also id.* § 9.10 ("Once again, however, international law may be relevant in the case of representations made or given by the host state with regard to the scope of obligations and in the context of inducement and reliance by the investor. This is not to say that legitimate expectations generated by government representations are binding obligations which may be enforced through an umbrella clause; but as stated above, in case of inducement and reliance distinct international obligations could arise, the respect of which could be so enforced.").

[483] *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 Oct. 2005 (CL-0078), ¶ 53.

[484] *ICC Case No. 5953*, Award, *in* RECUEIL DES SENTENCES ARBITRALES DE LA CCI 1986-1990 437, 441 (1994) (CL-0079).

[485] *See*, *e.g.*, *ICC Case No. 2291*, Award, *in* RECUEIL DES SENTENCES ARBITRALES DE LA CCI 1974-1985 274, 275 (1994) (CL-0080); *see also* KOTUBY & SOBOTA (CL-0081).

[486] KOTUBY & SOBOTA (CL-0081), *supra* at 95 (citing cases).

[487] BIT (CL-0001; CL-0002), art. II(2).

[488] *See* TPA (CL-0003), art. 10.4.

Contracts and Panamanian law. As such, the Government repeatedly breached its "umbrella clause" obligations, embodied in the Contracts and in Panama's commitments in its own *Ley de Contrataciones Públicas*.

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194. As the foregoing demonstrates, Respondent committed myriad violations of both the BIT and the TPA in its treatment of Claimants and their investments. As shown below, these violations have caused catastrophic harm to Omega U.S. and Mr. Rivera, for which Panama must be held liable.

X. RESPONDENT'S UNLAWFUL ACTS CAUSED CLAIMANTS SIGNIFICANT MONETARY DAMAGES FOR WHICH CLAIMANTS ARE ENTITLED TO FULL REPARATION

195. Respondent's breaches of the Treaties caused catastrophic damages to Claimants.[489] As a matter of international law, Claimants are therefore entitled to compensation that would "wipe out all the consequences"[490] of Respondent's multiple wrongful acts and place Claimants in the position they would have been "but for" these acts (*see infra* Section X(A)). The evidence presented in these proceedings demonstrates that, but for Respondent's wrongful conduct, Claimants would have completed all the Projects in Panama and would have likely bid for and won additional contracts in Panama. The only remedy that would wipe out the consequences of Respondent's illegal acts and

[489] The standard of proof for establishing the amount of damages suffered must be treated like any other fact in the case—it must be demonstrated as being more probable than not. *Case Concerning the Factory at Chorzów (Germany v. Poland) Claim for Indemnity (Merits)*, 13 Sept. 1928, 17 PCIJ SERIES A 4 (1928) ("*Chorzów Factor*—Merits") (CL-0082), at 47; *see also Gold Reserve* (CL-0057) ¶ 685; *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011 ("*Impregilo*") (CL-0083), ¶ 371; *AWG Group Ltd. v. The Argentine Republic*, UNCITRAL & *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/03/19, Award, 9 Apr. 2015 ("*AWG-Suez-Vivendi*—Award") (CL-0084), ¶¶ 30-31. The burden to prove the existence of damages is on Claimants. However, the burden shifts to Respondent if Claimants submit evidence that *prima facie* supports their allegations, and "any difficulty in determining the compensation does not prevent the assessment of such compensation where the existence of damage is certain." *Tecmed* (CL-0047) ¶ 190.

[490] *Chorzów Factory*—Merits (CL-0082) at 47; *see also Micula* (CL-0052) ¶ 917.

provide Claimants with the full reparation to which they are entitled under customary international law is payment of compensation in the amount of *at least* US$ 83.11 million (*see infra* Section XI).[491]

A. Claimants Are Entitled to Full Reparation as a Matter of International Law

196. Customary international law imposes upon States the obligation to make full reparation for the damage caused by their unlawful acts. The Permanent Court of International Justice ("**PCIJ**") confirmed the nature of this obligation in the seminal *Chorzów Factory* case as follows:

> [R]eparation must, as far as possible, *wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed*. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[492]

Thus, the "full reparation" standard requires reparation that restores the injured party to the situation that would have existed if the wrongful act had not been committed. This basic principle of international law has been affirmed and applied in hundreds of cases since its formulation by the PCIJ.[493] As the *ADC v. Hungary* tribunal observed, "there can be no doubt about the present vitality

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[491] As set out in the Request for Relief, this amount is claimed jointly by Claimants.

[492] *Chorzów Factory*—Merits (CL-0082) at 47 (emphasis added).

[493] See, e.g., Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Award, 16 Sept. 2015 ("Quiborax") (CL-0085), ¶ 328; AWG-Suez-Vivendi—Award (CL-0084) ¶ 27; Gold Reserve (CL-0057) ¶ 681; Sempra Energy International v. Argentina Republic, ICSID Case No. ARB/02/16, Award, 28 Sept. 2007 ("Sempra") (CL-0086), ¶ 400; Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States, ICSID Case No. ARB(AF)/04/05, Award, 21 Nov. 2007 (CL-0087), ¶ 275; OKO Pankki Oyj, VTB Bank (Deutschland) AG and Sampo Bank PLC v. The Republic of Estonia, ICSID Case No. ARB/04/6, Award, 19 Nov. 2007 (CL-0088), ¶ 330; Biwater Gauff (CL-0054) ¶ 776; National Grid P.L.C. v. Argentine Republic, UNCITRAL, Award, 3 Nov. 2008 ("National Grid") (CL-0089), ¶¶ 269-70; Impregilo (CL-0083) ¶ 361; White Industries Australia Limited v. The Republic of India, UNCITRAL, Final Award, 30 Nov. 2012 (CL-0090), ¶ 14.3.3; Stati (CL-0059) ¶ 1527; Achmea B.V. (formerly known as "Eureko B.V.") v. The Slovak Republic, PCA Case No. 2008-13, Final Award, 7 Dec. 2012 (CL-0091), ¶ 322.

of the *Chorzów Factory* principle, its full current vigor having been repeatedly attested to by the International Court of Justice."[494]

197. The same principle is reflected in the International Law Commission's Articles on State Responsibility ("**ILC Articles**"), which provide that the "responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."[495] Restitution in kind is the preferred remedy,[496] but if restitution is not possible or fails to provide full reparation, the State "is under an obligation to compensate for the damage caused" by its internationally wrongful act, to include "any financially assessable damage."[497]

198. Customary international law, the ILC Articles, and arbitral case law thus make clear that restitution in kind, or an equivalent payment, may be insufficient to accord full reparation. In the words of *Chorzów Factory*, determining "the amount of compensation due for an act contrary to

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[494] *ADC* (CL-0028) ¶¶ 493; *see also, e.g.*, *Vivendi II* (CL-0009) ¶ 8.2.5 ("There can be no doubt about the vitality of this [*Chorzów Factory*] statement of the damages standard under customary international law, which has been affirmed and applied by numerous international tribunals as well as the PCIJ's successor, the International Court of Justice.").

[495] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001) ("Draft ILC Articles") (CL-0092), art. 31(1). The commentary to this article notes that there must be a causal link "between the wrongful act and the injury in order for the obligation of reparation to arise," and explains that various formulations have been used to describe the limitations to that link. *Id*. Comment 10. For example, some cases have required a certain "directness," "foreseeability," or "proximity," while others have rejected claims for damages that were too "remote" from the wrongful act alleged. *Id.* The causal link in this case is self-evident. By refusing to approve needed change orders and to make required payments on the Contracts, and by then either allowing to lapse or unilaterally terminating those Contracts, the Government caused grave damage to the company by December 2014—its debts mounted, it was unable to raise funds to cover those mounting debts and ongoing expenses, it was forced to stop operations, and generally it was no more than a mere shadow of its former self. As Government oppression continued in the months that followed, bringing more refusals to approve change orders and to make payments, as well as commencing bogus criminal proceedings against Mr. Rivera and Omega Panama, the Government completed its destruction of Claimants' investment, destruction for which Claimants must be compensated.

[496] *Id.* art. 35; *see also id.* Comment 1 ("Restitution involves the reestablishment as far as possible of the situation which existed prior to the commission of the internationally wrongful act, to the extent that any changes that have occurred in that situation may be traced to that act. In its simplest form, this involves . . . the return of property wrongly seized."), Comment 3 ("The primacy of restitution was confirmed by the PCIJ in the *Factory at Chorzów* case when it said that the responsible State was under 'the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible.'").

[497] *Id.* art. 36.

international law" requires not only "restitution in kind [or] payment of a sum corresponding to the value which a restitution in kind would bear" but also "damages for loss sustained which would not be covered by restitution in kind or payment in place of it."[498]

199. The U.S.-Panama BIT and U.S.-Panama TPA are not to the contrary. The BIT provides that in the event of a lawful expropriation, "compensation shall amount to the full value of the expropriated investment immediately before the expropriatory action became known."[499] Similarly, the TPA provides that "compensation paid [for a lawful expropriation] shall be no less than the fair market value on the date of expropriation."[500] While such formulation may be a useful starting point for determining the amount of compensation due in the event of an unlawful expropriation or other treaty breaches,[501] it by no means limits that determination.[502] Numerous tribunals have held that regardless of treaty provisions defining the standard of compensation for *lawful* expropriation, the standard of compensation for *unlawful* expropriation and other treaty breaches remains the "full reparation" standard laid out in *Chorzów Factory*.[503]

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[498] *Chorzów Factory*—Merits (CL-0082) at 47; *see also* Draft ILC Articles (CL-0092), art. 36, Comment 3 ("Even where restitution is made, it may be insufficient to ensure full reparation. The role of compensation is to fill in any gaps so as to ensure full reparation for damage suffered."); SERGEY RIPINSKY & KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008) ("RIPINSKY & WILLIAMS") (CL-0093), at 87 ("[A] claimant's loss may be greater than the fair market value of the lost investment at the time of expropriation. Under the customary law regime, these additional losses are recoverable. Examples of this can be found in arbitral practice: *ADC v Hungary* is an example of a case where the claimant was compensated for the post-expropriation increase in value of the investment, while in *Siemens v Argentina*, the Tribunal compensated for the post-expropriation (incidental) expenses of the claimant.").

[499] BIT (CL-0001), art. IV(1).

[500] TPA (CL-0003), art. 10.7(3).

[501] *See, e.g.*, RIPINSKY & WILLIAMS (CL-0093) at 85 ("The starting point for the assessment of compensation for an unlawful expropriation is usually the same as for a lawful one: fair market value of the investment taken.").

[502] *See generally id.* at 83-84 ("[T]he treaty expropriation clauses govern compensation that is due for lawful expropriations only. . . . [T]he award of compensation for unlawful taking is governed not by investment treaties, but by customary international law on State responsibility for internationally wrongful acts.").

[503] *See, e.g.*, *ADC* (CL-0028) ¶¶ 481-84 ("[T]he BIT does not stipulate any rules relating to damages payable in the case of an unlawful expropriation. The BIT only stipulates the standard of compensation that is payable in the case

1. Full Reparation Requires Compensation for All Assessable Damage Caused by Respondent's Actions

200. "The principle of full compensation suggests that any financially assessable damage caused to the investor must be compensated. Such damage can take various forms and shapes depending on the circumstances of the case."[504] These "heads of damage" include the loss of the value of an investment (*see infra* Section X(A)(1)(a)) and moral damages (*see infra* Section X(A)(1)(b)).[505]

a. Loss of Value of the Investment

201. It is generally accepted that "[c]ompensation reflecting the capital value of property

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of a lawful expropriation, and these cannot be used to determine the issue of damages payable in the case of an unlawful expropriation since this would be to conflate compensation for a lawful expropriation with damages for an unlawful expropriation. . . . Since the BIT does not contain any *lex specialis* rules that govern the issue of the standard for assessing damages in the case of an unlawful expropriation, the Tribunal is required to apply the default standard contained in customary international law in the present case. . . . The customary international law standard for the assessment of damages resulting from an unlawful act is set out in the decision of the PCIJ in the *Chorzów Factory* case . . . ."); *Siemens*—Award (CL-0008) ¶ 349 ("The law applicable to the determination of compensation for a breach of such Treaty obligations is customary international law. The Treaty itself only provides for compensation for expropriation in accordance with the terms of the Treaty."); *Vivendi II* (CL-0009) ¶ 8.2.3 ("The Treaty thus mandates that compensation for lawful expropriation be based on the actual value of the investment, and that interest shall be paid from the date of dispossession. However, it does not propose to establish a *lex specialis* governing the standards of compensation for wrongful expropriations. As to the appropriate measure of compensation for the breaches other than expropriation, the Treaty is silent." (emphasis omitted)); *Quiborax* (CL-0085) ¶ 326 ("The Tribunal agrees . . . that the BIT does not establish the standard of compensation for internationally wrongful acts. Article VI(2) of the BIT sets out the standard of compensation for lawful expropriations . . . . The treaty standard does not apply to unlawful expropriations, which are governed by the full reparation principle as articulated by the PCIJ in the *Chorzów* case and later expressed in the ILC Articles. Article VI(2) does not purport to establish a *lex specialis* for unlawful expropriations."); *Biwater Gauff* (CL-0054) ¶ 776 (holding that where the BIT does not offer any guidance for evaluating the damages arising from breaches other than expropriation, the common starting point is the broad principle articulated in the *Chorzów Factory* case); *National Grid* (CL-0089) ¶¶ 269-70 (same); *El Paso* (CL-0056) ¶ 700 (same); *Enron Corporation Ponderosa Assets, L.P v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007 ("*Enron*") (CL-0094), ¶ 359 (same); *Stati* (CL-0059) ¶¶ 1463-64 (same); *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case Nos. ARB/08/1 & ARB/09/20, Award, 31 Dec. 2002 ("*Unglaube*") (CL-0095), ¶¶ 305-06 (same); *see generally Vivendi II* (CL-0009) ¶ 8.2.7 ("Based on these principles, and absent limiting terms in the relevant treaty, it is generally accepted today that, regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the affected party fully and to eliminate the consequences of the state's action.").

[504] RIPINSKY & WILLIAMS (CL-0093) at 262; *see also* Draft ILC Articles (CL-0092), art. 36, Comment 21 (explaining that a claimant's loss "is usually assessed by reference to specific heads of damage relating to (i) compensation for capital value; (ii) compensation for loss of profits; and (iii) incidental expenses").

[505] RIPINSKY & WILLIAMS (CL-0093) at 262.

taken or destroyed as the result of an internationally wrongful act" is to be "assessed on the basis of the 'fair market value' of the property lost."[506] Fair market value ("**Fair Market Value**" or "**FMV**") is frequently defined as "the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts."[507]

202. The FMV of the lost investment is a common head of damage in both expropriation cases and in cases involving other treaty breaches,[508] and it is generally favored when both unlawful expropriation and other treaty violations have been found.[509] For example, in *Vivendi v. Argentina*, the tribunal found that "the same state measures" amounted to both an unlawful expropriation and an FET violation, "caus[ing] more or less equivalent harm"[510] and "emasculat[ing] the Concession Agreement" such that it was rendered "valueless."[511] As a result, the tribunal concluded that it was appropriate to accord compensation based on the FMV of the concession.[512] Even where no

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[506] Draft ILC Articles (CL-0092), art. 36, Comment 22; *see also* RIPINSKY & WILLIAMS (CL-0093) at 183.

[507] International Glossary of Business Valuation Terms, American Society of Appraisers, ASA website dated 6 June 2001 (C-0132), at 4; *see also, e.g.*, *Azurix* (CL-0025) ¶ 424 (quoting this definition); *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 ("*CMS*—Award") (CL-0097) ¶ 402 (same); RIPINSKY & WILLIAMS (CL-0093) at 183-85 (similar).

[508] *See, e.g.*, RIPINSKY & WILLIAMS (CL-0093) at 98 ("Importantly, the 'value' approach, even though explicitly named in treaty expropriation clauses, is not reserved for expropriation cases only. Full loss of, or diminution in, the fair market value of investment can be a measure of compensation regardless of the type of conduct that inflicted the loss.").

[509] *Id.* at 99 ("In the event of multiple treaty violations, wherein one of the violations is expropriation, the measure of compensation applied in expropriation cases (ie, the 'value approach) has been preferred by tribunals."); *see also id.* at 99-100 (citing *Tecmed*, *Metalclad*, and *CME*).

[510] *Vivendi II* (CL-0009) ¶ 8.2.8.

[511] Id.

[512] *Id.* ¶ 8.2.9-10; *see also, e.g.*, *Rumeli* (CL-0043) ¶ 793 ("In the present case, the loss which Claimants maintain that they have suffered is in fact the expropriation of their shares in Kar-Tel, whether or not this is characterised as an expropriation calling for compensation under the BIT, or merely as the consequence of some other internationally

expropriation has been found, tribunals have awarded compensation on the basis of FMV for breaches of obligations such as FET, full protection and security, and umbrella clauses.[513] Thus in *Azurix v. Argentina*, there was no finding of expropriation, but the tribunal was "of the view that a compensation based on the fair market value of the Concession [was] appropriate, particularly since the Province ha[d] taken it over."[514]

203. There are three main approaches to the FMV calculus—an income-based approach, a market-based approach, and an asset-based approach.[515] Selecting an approach "requires careful analysis specific to the circumstances of the case" and the "considerations may relate to the specificities of the asset, industry or the economy in question."[516] As explained by Compass Lexecon,

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wrongful act, such as a breach of the obligation of fair and equitable treatment. In either case, the Tribunal considers that the correct approach is to award such compensation as will give back to Claimants the value to them of their shares at the time when the expropriation took place.").

[513] RIPINSKY & WILLIAMS (CL-0093) at 92 ("In a number of cases, a non-expropriatory violation has produced effects similar to those of an expropriation, ie the *total loss of the investment*, for example due to the destruction of property or termination of a concession. In these circumstances, arbitrators have logically chosen to measure the loss, and therefore compensation, by focusing on the market value of the investment lost."); *see also id.* (citing *AAPL* (CL-0060); *American Manufacturing* (CL-0061; and *Azurix* (CL-0025)).

[514] *Azurix* (CL-0025) ¶ 424; *see also, e.g.*, *CMS*—Award (CL-0097) ¶ 410 (the tribunal was "persuaded that the cumulative nature of the breaches discussed [was] best dealt with by resorting to the standard of fair market value," explaining that "[w]hile this standard figures prominently in respect of expropriation," it is also "appropriate for breaches different from expropriation if their effect results in important long-term losses"); *Enron* (CL-0094) ¶ 363 ("On occasions, the line separating indirect expropriation from the breach of fair and equitable treatment can be rather thin and in those circumstances the standard of compensation can also be similar on one or the other side of the line. Given the cumulative nature of the breaches that have resulted in a finding of liability, the Tribunal believes that in this case it is appropriate to apply the fair market value to the determination of compensation.").

[515] *See, e.g.*, RIPINSKY & WILLIAMS (CL-0093) at 193 ("1. *Income-based approach* calculates the present value of a business's anticipated cash flows. 2. *Market-based approach* determines the value of a business by comparing it to similar businesses, business ownership interests, or securities that are sold on the open market. 3. *Asset-based approach* values tangible and intangible assets comprising a business and aggregates these separate values to arrive at the value of the business."); *National Grid* (CL-0089) ¶ 275 ("The first task of the Tribunal in determining the quantum of compensation is to select among the many valuation methodologies available including 'book value,' 'asset value or replacement cost,' 'comparable transaction value,' 'option valuation,' 'discounted cash flow,' and variations on all of the above.").

[516] RIPINSKY & WILLIAMS (CL-0093) at 194; *see also* Draft ILC Articles (CL-0092), art. 36, Comment 22 (method ultimately selected should "depend[] on the nature of the asset concerned.").

the income based approach is the preferred approach in this case because "the valuation ought to reflect the cash flow generating capability of Claimants' business" and "the general construction industry does not necessarily require substantial investment in fixed assets."[517]

204. Under the income-based approach, the most common method is the discounted cash flow ("**DCF**") method, in which "the sum of future cash flows projected for a certain period of time is discounted back to present value by using a discount rate."[518] The DCF method is a common means by which potential purchasers value assets and entities, by calculating the present worth of future cash flows those assets and entities will generate.[519] The DCF method generally takes into account lost profits, though lost profits may also be claimed as a separate head of damage.[520] Dozens of tribunals have relied on the DCF method of valuation;[521] it has "been constantly used by tribunals in

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[517] Damages Expert Report ¶ 65.

[518] RIPINSKY & WILLIAMS (CL-0093) at 195; *see also, e.g.*, *CMS*—Award (CL-0097) ¶ 403 ("[T]he valuation of the assets is arrived at by determining the present value of future predicted cash flows, discounted at a rate which reflects various categories of risk and uncertainty.").

[519] RIPINSKY & WILLIAMS (CL-0093) at 195; Jose Alberro & Paul Zurek, *Market Approach or Comparables*, *in* GLOBAL ARBITRATION REVIEW: THE GUIDE TO DAMAGES IN INTERNATIONAL ARBITRATION 204, 204 (John A. Trenor ed., 2016) ("Alberro & Zurek") (CL-0098) ("Financial economic theory posits that rational, utility-maximising economic agents assign values to assets by discounting expected future cash flows realised from owning them. This idea underlies the discounted cash flow (DCF) valuation model and approach . . . .").

[520] RIPINSKY & WILLIAMS (CL-0093) at 279.

[521] *See, e.g.*, *ADC* (CL-0028) ¶ 502 ("Like many other tribunals in cases such as the present one, the Tribunal prefers to apply the DCF method . . . ."); *CMS*—Award (CL-0097) ¶ 411 ("The Tribunal has concluded that the discounted cash flow method i[s] the one that should be retained in the present instance."), 416 ("DCF techniques have been universally adopted, including by numerous arbitral tribunals, as an appropriate method for valuing business assets . . . ."); *National Grid* (CL-0089) ¶ 275 ("[T]he Tribunal finds that there is a broad consensus that where, as here, the problem presented is not to fix the value of a fixed asset, but instead to determine the loss, if any, of fair market value of an operating business entity, there is considerable merit in using the Discounted Cash Flow (DCF) method."); *Sistem Mühendislik Inşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, 9 Sept. 2009 (CL-0099), ¶ 164; *Stati* (CL-0059) ¶ 1617; *Enron* (CL-0094) ¶ 385 ("Since DCF reflects the companies' capacity to generate positive returns in the future, it appears as the appropriate method to value a 'going concern' as TGS. Moreover, there is convincing evidence that DCF is a sound tool used internationally to value companies, albeit that it is to be used with caution as it can give rise to speculation. It has also been constantly used by tribunals in establishing the fair market value of assets to determine compensation of breaches of international law."); *Quiborax* (CL-0085) ¶ 347; *Sapphire* (CL-0070) at 185-89; *Karaha Bodas Co. LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, UNCITRAL, Final Award, 18 Dec. 2000, 16(3) MEALEY'S INT'L ARB. REP. (2001) (CL-0100), ¶¶ 112, 125-27; *Delagoa Bay and East African*

establishing the fair market value of assets to determine compensation of breaches of international law."[522] As discussed in more detail below, the DCF method is also applicable in the present case for valuation of some of Claimants' losses in Panama.

205. In addition to determining the proper valuation method, ascertaining the date at which an asset must be valued is key. Although many international arbitral decisions have fixed the valuation date at the date of expropriation or the date of the final award,[523] those approaches may fail to "wipe out all the consequences of the illegal act" as required by customary international law.[524] This is particularly the case in situations of a creeping expropriation, a creeping FET violation, or, more generally speaking, a series of measures that negatively affect the investment. As Professors Reisman and Sloane, speaking primarily to indirect expropriation, explain:

> Were the critical moment of expropriation for purposes of valuation set at the date of the *last* of the series of deleterious governmental acts of malfeasance or nonfeasance that "ripened into a more or less irreversible deprivation of the [investment]", then the fair market value of that investment may well be determined to be substantially less than were the critical moment set at the date of one of the earlier acts. The ironic, indeed perverse, result of that theory would be to reward states for accomplishing expropriation *tranche par tranche* rather than *d'un coup* and to encourage states to accomplish expropriation furtively, . . . by a creeping or disguised series of regulatory acts and omissions of nebulous legality . . . .[525]

Railway Co. (US and Great Britain v. Portugal), Award, 30 Mar. 1990, *excerpts reported in* 3 MARJORIE WHITEMAN, DAMAGES IN INTERNATIONAL LAW 1694 (1943) (CL-0101), at 1694, 1699-1700.

[522] *Enron* (CL-0094) ¶ 385.

[523] *See, e.g.*, *ADC* (CL-0028) ¶¶ 496-97 (noting "various arbitration tribunals" that have used "the date of the expropriation as the date for the valuation of damages," while deciding with respect to the case at hand that "the date of valuation should be the date of the Award and not the date of expropriation").

[524] *Chorzów Factory*—Merits (CL-0082) at 47 (emphasis added).

[525] REISMAN & SLOANE (CL-0026) at 146; *see also id.* at 147 ("to calculate fair market value on the date of the last 'measure tantamount to expropriation' that 'ripened' into a manifest expropriation would be . . . to assess an investment's value at the very 'moment' when the accretion of unlawful acts of the host state has so dramatically devalued the investment as to render it de facto expropriated" (emphasis omitted)).

In light of the "calamitous" consequences that would result,[526] Professors Reisman and Sloane conclude that the date of valuation and the date of expropriation need not coincide,[527] and that the former may precede the latter so as to provide full reparation to claimants.[528] Even tribunals that have resisted decoupling valuation and expropriation dates have fixed the relevant date before the final expropriatory act. For example, the tribunal in *Crystallex v. Venezuela* selected a valuation date that coincided with a permit denial, even though the claimant remained in possession of the mine, given that the permit denial constituted an FET violation and the first act of a creeping expropriation, that mining operations thereafter were "at a standstill," and that claimant's contractual rights were at that point "practically useless."[529]

206. A similar analysis of the valuation date is required here. By December 2014, Respondent's refusal to make payments on any of the Contracts, delays with respect to necessary

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[526] *Id.* at 146-47 ("In the first place, they contravene the venerable and general legal principle, common to municipal and international law, that a delictor may not benefit from its own delict. Second, contrary to the objectives of BITs, they would encourage foreign investors promptly to resort to compulsory dispute-resolution at an early stage rather than seek to resolve matters amicably through negotiation with the host state—lest the investor risk losing potential compensation as the fair market value of its investment progressively depreciates with each subsequent measure 'tantamount to expropriation'. It would be implausible to ascribe an intention to produce such results to the drafters of BITs. It would also be wholly inconsistent with the general principles of international law on compensation explained in the preceding section and for which *Chorzów Factory* remains the lodestar. Hence, the Iran-U.S. Claims Tribunal's proposition—that 'where the alleged expropriation is carried out by way of a series of interferences in the enjoyment of the property', the moment of expropriation is 'the day when the interference has ripened into a more or less irreversible deprivation of the property rather than on the beginning date of the events'—may threaten to work a manifest injustice in circumstances of creeping or consequential expropriations . . . .").

[527] *Id.* at 147.

[528] *See id.* at 148 ("In *Amoco International Finance Corp. v Iran*, the Iran-United States Claims Tribunal found the expropriation of Amoco's contract rights to be 'complete' on December 24, 1980, when the Iranian Minister of Petroleum formally notified Amoco's management that it viewed a 1967 joint venture between Amoco and the Iranian National Petrochemical Company as null and void. But the Tribunal nonetheless awarded Amoco compensation based on the value of its interest as of July 31, 1979, the date on which the Tribunal determined the de facto taking to have occurred.").

[529] *Crystallex* (CL-0029) ¶¶ 855-56; *see also, e.g.*, *Stati* (CL-0059) ¶¶ 1493-99 (fixing the valuation date at the point in time when the claimant first began to incur damages); *see generally Santa Elena* (CL-0102) ¶ 78 ("The expropriated property is to be evaluated as of the date on which the governmental 'interference' has deprived the owner of his rights or has made those rights practically useless.").

approvals, and refusal to provide free and clear sites for fulfillment of certain Contracts constituted treaty breaches that had already substantially chipped away at Claimants' investment and their ability to continue their operations. But, on 23 December 2014, when the Government unilaterally terminated Claimants' largest Contract—the Ciudad de las Artes Contract—Respondent brought Claimants' operations to "a standstill" and rendered their rights "practically useless."[530] As such, it is appropriate to value Claimants' investment as of 23 December 2014 (the "**Date of Valuation**"). To perform that valuation later risks failing to "wipe out all the consequences of the illegal act."[531] As the Government's oppressive acts continued, it stripped additional rights from Claimants, including Mr. Rivera's ability to manage and control his investment from Panama and Omega U.S.'s ability to secure further financing and bonding. To allow Respondent to compensate Claimants on the basis of Omega Panama's later value would allow Respondent to benefit from its own wrongful acts, which would itself be contrary to international law.[532]

b. Moral Damages

207. In addition to the value of the investment, moral damages may be awarded under international law.[533] The ILC Articles and the Commentary to the Articles are clear on the availability of moral damages under international law. In particular, Article 31 provides that "[i]njury includes

[530] *Crystallex* (CL-0029) ¶¶ 855-56.

[531] *Chorzów Factory*—Merits (CL-0082) at 47.

[532] *Nemini dolus suus prodesse debet* and *nemo auditor propriam turpitudinem allegans*: these central tenets mean, inter alia, that a party cannot build a case upon a fraud, cannot cause the nonperformance of a condition precedent to its own obligation, and cannot invoke its own malfeasance to diminish its liability. Although expressed in myriad ways, it is basic that "[n]o one can be allowed to take advantage of his own wrong." KOTUBY & SOBOTA (CL-0081) at 130 (citing Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 389).

[533] RIPINSKY & WILLIAMS (CL-0093) at 307.

any damage, *whether material or moral*, caused by an internationally wrongful act of a State."[534] The ILC Commission explains that "non-material damage is financially assessable and may be the subject of a claim of compensation."[535] Moral damages may include "mental suffering, injury to feelings, humiliation, shame, degradation, loss of social position or injury to credit and reputation."[536] These injuries are "very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated."[537]

208. International investment tribunals likewise agree that moral damages are compensable under international law in "exceptional circumstances."[538] As discussed by the *Dessert Line* tribunal, moral damages may be awarded to both natural and legal persons, and may include loss of reputation.[539] Professor Marboe explains that "[d]amages for loss of reputation, goodwill, creditworthiness, or business opportunities have a dual character and can be part of a claim for material and for moral damages."[540] As a result, tribunals have accepted such damages under a lower threshold than the "exceptional circumstances" generally applied to other types of moral damages.[541]

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[534] Draft ILC Articles (CL-0092), art. 37, Comment 3 (emphasis added).

[535] *Id.* art. 36, Comment 16.

[536] *Id.* (quoting the *Lusitania Case*).

[537] *Id.*

[538] *See, e.g.*, *Desert Line* (CL-0075) ¶¶ 289, 290. Exceptional circumstances have been found in situations which, for example, "affected the physical health of the Claimant's executives and the Claimant's credit and reputation." *Id.* ¶ 289.

[539] *Desert Line* (CL-0075) ¶ 289.

[540] Irmgard Marboe, Calculation of Compensation and Damages in International Investment Law (2d ed., 2014) (CL-0104), ¶ 5.364.

[541] *Id*.

For instance, the *Shufeldt* tribunal awarded damages for "loss of time, injury to credit, and grave anxiety of mind on account of the cancellation of the contracts."[542] Other tribunals have compensated claimants when their credit has been negatively affected by the respondent's actions[543] and for reputational damages caused by criminal charges that clouded the prospects of the company.[544]

209. Here, both Mr. Rivera and Omega U.S. have suffered devastating losses to their reputation, goodwill, creditworthiness, and business opportunities as a result of Respondent's actions, which include, *inter alia*, the "cancellation of contracts" and bogus criminal charges. As explained above, Panama's unlawful criminal investigations, illegitimate and baseless detention order, and INTERPOL Red Notice have ruined Mr. Rivera's reputation. In addition, banks have closed his accounts,[545] he has lost business opportunities, and he is no longer able to take part in many board or other executive activities in which he used to participate. Omega U.S.'s reputational loss has led to the company's inability to secure financing and bonding with its surety company and others, which has precluded the company from tendering for and obtaining additional contracts.[546] Mr. Rivera and Omega U.S. have been unable to generate income since 2015[547] and have had to sell assets at a

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[542] *Shufeldt claim (Guatemala, USA)*, Decision of the Arbitrator, 24 July 1930, 2 R.I.A.A. 1079, 1101 (CL-0105).

[543] *The May Case* (*Guatemala, United States*), Award, 16 Nov. 1900, 15 R.I.A.A. 47, 74 (CL-0106) (awarding damages because, "[o]wing to the unremitting attention exacted by the prosecution of his claim, [the claimant] has been entirely debarred from seeking remunerative work, and his credit, which, on the showing of this Government, was so excellent as to cause his pay checks to be received as cash by all his neighbors, is nearly, if not entirely, suspended until the decision of the arbitrator be known").

[544] *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012 (CL-0107), ¶ 350.

[545] See supra ¶ 114.

[546] See supra ¶ 110.

[547] *See supra* ¶ 110-15.

significant loss to support Mr. Rivera's family during this period.[548] Mr. Rivera's health, too, has been affected as a result.

210. Panama's actions demonstrate a bad-faith effort to decimate Mr. Rivera and Omega U.S.'s reputation, which has led not only to the destruction of Claimants' investment in Panama but also to the destruction of Claimants' reputation and goodwill internationally.[549] Full reparation therefore requires that Claimants be compensated for this injury as well.

2. Full Reparation Also Requires Payment of Interest

211. Under the ILC Articles, interest—which "runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled"—is also part of the "full reparation" to which Claimants are entitled.[550] In this case, both Treaties provide that compensation for expropriation "include[s] interest at a commercially reasonable rate."[551] Arbitral tribunals consistently extend the same compensation standard, including the applicable interest rate, to other breaches, such as fair and equitable treatment and full protection and security.[552] For instance, the

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[548] *See* Rivera ¶ 12.

[549] See supra ¶ 110.

[550] Draft ILC Articles (CL-0092), art. 38; *see also, e.g.*, *Quiborax* (CL-0085) ¶ 523; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007 ("*LG&E*—Award") (CL-0108), ¶ 55; *Vivendi II* (CL-0009) ¶ 8.3.20; *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Award, 24 Dec. 2007 ("*BG Group*") (CL-0109), ¶ 454; *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 Sept. 2008 ("*Continental Casualty*") (CL-0110), ¶ 308; *National Grid* (CL-0089) ¶ 293.

[551] BIT (CL-0001; CL-0002), art. IV(1); TPA (CL-0003), art. 10.7(3).

[552] *See, e.g.*, *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, 2 Mar. 2015 ("*Hassan*") (CL-0096), ¶ 518 ("extending the 'commercially reasonable rate' to a violation of fair and equitable treatment because it is "a criterion of general application"); *Sempra* (CL-0086) ¶ 403 (finding that the compensation standard was appropriate for a fair and equitable treatment violation because "[i]n such cases it might be very difficult to distinguish the breach of fair and equitable treatment from indirect expropriation or other forms of taking and it is thus reasonable that the standard of reparation might be the same"); *Enron* (CL-0094) ¶ 363 (finding that a "commercially reasonable rate" should apply after explaining that "the line separating indirect expropriation from the breach of fair and equitable treatment can be rather thin"); *see also, e.g.*, *MTD*—Award

Hassan v. Romania tribunal noted that the "BIT provides for interest on compensation 'at a commercially reasonable rate'" and, explicitly held that "[e]ven if this is not a case of expropriation, the commercially reasonable rate is a criterion of general application which will be retained by the Tribunal."[553]

212. With respect to awarding single or compound interest up to the date of the award (pre-award interest) and up to the date of payment (post-award interest), the Tribunal has wide discretion. Awards of compound interest are now widely accepted in investment treaty arbitration,[554] in part, due to a recognition that "compound interest reflects the reality of financial transactions, and best approximates the value lost by an investor."[555] Thus, compound interest better achieves full reparation,[556] because simple interest fails to restore a claimant to its pre-injury condition by compensating it for the opportunities lost by not being able to earn a return on the sum owed by the respondent.[557] In recognition of this reality, investor-State tribunals have increasingly awarded

(CL-0031) ¶ 238; *El Paso* (CL-0056) ¶ 745. Tribunals have also applied the same standard when both an expropriation and a treatment claim have been successful. *See, e.g.*, *Crystallex* (CL-0029) ¶¶ 934, 961.

[553] *Hassan* (CL-0096) ¶ 518.

[554] *See, e.g.*, *ADC* (CL-0028) ¶ 522 ("As to post-Award interest, contrary to Respondent's submission, the current trend in investor-State arbitration is to award compound interest. . . . [T]ribunals in investor-State arbitrations in recent times have recognized economic reality by awarding compound interest . . . ."); *Gold Reserve* (CL-0057) ¶ 854; *LG&E*—Award (CL-0108) ¶ 103; *Vivendi II* (CL-0009) ¶ 9.2.4 ("To the extent there has been a tendency of international tribunals to award only simple interest, this is changing, and the award of compound interest is no longer the exception to the rule."); *Santa Elena* (CL-0102) ¶ 105; *Wena Hotels*—Award (CL-0010) ¶ 129; *PSEG*—Award (CL-0039) ¶ 348; *MTD—Award* (CL-0031) ¶¶ 251, 253; *Walter Bau* (CL-0058) ¶ 16.1.

[555] *Azurix* (CL-0025) ¶ 440; *see also Gold Reserve* (CL-0057) ¶ 854; *Continental Casualty* (CL-0110) ¶ 309 ("The 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 . . . ."); *MTD—Award* (CL-0031) ¶ 251 ("[C]ompound interest is more in accordance with the reality of financial transactions and a closer approximation to the actual value lost by an investor.").

[556] *See, e.g.*, *Hrvatska Elektroprivreda D.D. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Award, 17 Dec. 2015 (CL-0111), ¶ 539; *Quiborax* (CL-0085) ¶ 524; *El Paso* (CL-0056) ¶ 746; *Vivendi II* (CL-0009) ¶ 9.2.6; *Wena Hotels*—Award (CL-0010) ¶ 129.

[557] *Azurix* (CL-0025) ¶ 440.

compound interest.[558]

213. International tribunals regularly include pre-award interest as an element of damage.[559] The primary purpose of awarding pre-award interest is to compensate the damage resulting from the fact that, during the period of non-payment by the debtor, the Claimants are "deprived of the use and disposition of that sum [they were] supposed to receive."[560] Likewise, the Tribunal also has broad authority to grant post-award, or "moratory," interest up to the date of payment on the basis deemed most appropriate to the case.[561] International arbitral tribunals regularly award post-award interest, often applying the same interest rate for both pre-award and post-award interest.[562]

XI. FULL REPARATION JUSTIFIES AN AWARD OF AT LEAST US$ 81.58 MILLION AS PROVEN BY THE EVIDENCE AND CLAIMANTS' EXPERTS

A. General Approach to Calculating Damages

214. As *Chorzów Factory* instructs, damages for an illegal act must amount to full reparation, to wipe out all the consequences of that illegal act.[563] And full reparation requires that

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[558] Elihu Lauterpacht & Penelope Nevill, *The Different Forms of Reparation: Interest*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 613, 620 (James Crawford et al. eds., 2010) (CL-0112). In fact, a study conducted in 2010 concluded that more than 20 investor-State arbitral tribunals have awarded compound interest. *Id.*

[559] *See, e.g.*, *Stati* (CL-0059) ¶ 1855; *British Caribbean Bank Limited (Turks & Caicos) v. The Government of Belize*, PCA Case No. 2010-18, Award, 19 Dec. 2014 (CL-0113), ¶¶ 299, 328(h); *BG Group* (CL-0109) ¶¶ 454-57; *El Paso* (CL-0056) ¶¶ 743-47; *Enron* (CL-0094) ¶¶ 451-52; *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia,* ICSID Case Nos. ARB/05/18 & ARB/07/15, Award, 3 Mar. 2010 ("*Kardassopoulos*") (CL-0114), ¶¶ 650-68; *Impregilo* (CL-0083) ¶ 382; *Khan Resources Inc., Khan Resources B.V. & CAUC Holding Company Ltd. v. The Government of Mongolia & MonAtom LLC*, PCA Case No. 2011-09, Award on the Merits, 2 Mar. 2015 ("*Khan*—Award") (CL-0115), ¶¶ 422-26; *Quiborax* (CL-0085) ¶¶ 511-26.

[560] *Vivendi II* (CL-0009) ¶ 9.2.3.

[561] *See* Arbitration Act 1996 (United Kingdom), Chapter 23, 17 June 1996 (CL-0116), § 49(3)-(4).

[562] *See, e.g.*, *BG Group* (CL-0109) ¶ 457; *CME*—Partial Award (CL-0019) ¶ 641; *El Paso* (CL-0056) ¶ 747; *Kardassopoulos* (CL-0114) ¶ 677-78; *Impregilo* (CL-0083) ¶¶ 382-86; *Khan*—Award (CL-0115) ¶ 426; *Quiborax* (CL-0085) ¶¶ 516-17; *Unglaube* (CL-0095) ¶ 326; *Vivendi II* (CL-0009) ¶ 9.2 *et seq*.; *Tecmed* (CL-0047) ¶¶ 196-97.

[563] *Chorzów Factory*—Merits (CL-0082) at 47. *Cf.* Damages Expert Report ¶ 53 (stating that "[u]nder a full compensation principle, these losses should be estimated to restore the Claimants to the position they would have been in had the Measures not taken place.").

"losses . . . be estimated to restore the Claimants to the position they would have been in had the Measures not taken place."[564] Damages thus must be assessed by calculating the victim's economic wealth had the illegal acts not occurred, and subtracting any economic wealth that the victim did enjoy. In other words, damages correspond to the difference between Claimants' economic wealth resulting from the counterfactual situation but for the Alleged Breach(es) (the "**Counterfactual Situation**," or the "**But For Situation**") (*see infra* Section XI(A)(1)), less Claimants' economic wealth resulting from the actual situation (the "**Actual Situation**") (*see infra* Section XI(A)(2)).[565]

215. Because Claimants' economic wealth in the Actual Situation is zero,[566] Claimants' damages in this case ultimately correspond to the Counterfactual or But For Situation.[567] Full reparation also requires that compound interest be assessed on those damages, which Compass Lexecon calculates at 11.65% per annum.[568]

1. The Counterfactual or But For Situation

216. "The value of Claimants' interest in the Omega Consortium stems from the value of its eight existing contracts awarded prior to December 2014, and from its ability to continue as a going concern, bidding and winning further public service work contracts from December 2014 onwards."[569] Accordingly, calculating the But For Situation requires a two-part process. *First*,

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[564] Damages Expert Report ¶ 53; *see also supra* § X.A.

[565] *See* Alberro & Zurek (CL-0098) ("The standard approach to determine . . . full compensation is a comparison of the damaged party's actual situation with the situation it would have been in 'but for' the wrongful act . . . .") *Id*. at 176; *see also* Damages Expert Report ¶ 9.

[566] *See* Damages Expert Report ¶¶ 13-14.

[567] *Id*.

[568] *Id.* § V.4.

[569] *Id.* ¶ 54.

Compass Lexecon applies a discrete damages approach to calculate the value of the existing Contracts absent the Government's interference.[570] *Second*, Compass Lexecon applies a Fair Market Value approach to calculating the value of potential new contracts in Panama (and thus of Claimants' investment) but for the Government's unlawful conduct.[571]

a. Approaches to Calculating the Value of the Existing Contracts

217. The underlying premise when applying the discrete damages approach is that absent the Government's unlawful measures, "Claimants would have i) received payments from each of the eight contracts in relation to the construction milestones that had already been reached; and ii) completed the construction planned for each contract in the time envisaged in the last contract amendment, collecting their respective contractual payments."[572] Thus, in order to ascertain the value of the losses, each Contract must be analyzed individually to determine what Government actions affected each Contract and how.

218. Relying on Mr. McKinnon's Report for the underlying information on a contract-by-contract basis,[573] Compass Lexecon then calculates "the actual losses suffered in each of the eight projects" as of the Date of Valuation—*i.e.*, 23 December 2014.[574] Compass Lexecon does this by computing the "present value of the unpaid progress billings that were issued to [Panama] by December 2014 . . . [p]lus, the present value of the cash flows that the Omega Consortium would have earned in each of these eight contracts between December 2014 and their respective completion

[570] *Id.* ¶ 57.

[571] *See id.* §§ IV.1.1, IV.1.2.

[572] *Id.* ¶ 56.

[573] McKinnon Report Annexes 1-3.

[574] Damages Expert Report ¶ 57

dates . . . [l]ess, the present value of the advance payments (net of retentions) that would have been allocated to and credited against Omega Consortium's future invoices until completion of each project."[575] A cost of equity ("**CoE**") for the engineering and construction industry in Panama is then applied to compute the present value, which Compass Lexecon calculates is 11.65% since Claimants are the equity holders.[576]

b. Approaches to Calculating the Value of Potential Contracts in Panama

219. Under the But For Scenario (which assumes that the Government's unlawful actions did not occur), "Claimants and the Omega Consortium would have been able to continue generating new business as a general construction company operating in Panama, with an established track record of ten completed projects in the country."[577] Instead, and as amply demonstrated above,[578] the Government measures "impeded Omega Panama from continuing as a going concern, reducing its value to zero."[579]

220. Claimants' Experts concur, and the evidence confirms, that by the time the Government's measures began to significantly affect it, the Omega Consortium "had already obtained ten contracts and developed a proven track record of experience that would have increased its chances of obtaining further projects compared with its situation when it was first established in Panama for

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[575] *Id.*

[576] *Id.* ¶ 58 ("This rate reflects the cost incurred by Claimants to obtain the necessary funds (equity) to develop the construction works related to the eight contracts until they were terminated. It is also consistent with the return expected on the net benefits that [Panama] precluded Claimants from obtaining after the early termination of the contracts. . . .").

[577] *Id.* ¶ 59.

[578] *See supra* §§ VI – II, IX.

[579] Damages Expert Report ¶ 59.

the first project."[580] In other words, the Omega Consortium was a going concern and, therefore, it is "reasonable to assume that absent the Measures the Omega Consortium would have, at a minimum, maintained its success rate of winning future bids in which it would have participated."[581] Compass Lexecon opines that the Omega Consortium's track record and "burgeoning reputation" are likely to have "increase[d] its 'success rate' in terms of tender success."[582] Despite this, and approaching their damages valuation conservatively, Compass Lexecon has "assume[d] that the future success rate at the same value [is] identical to the historical success rate."[583]

221. In circumstances like this—where there is a successful track record and cashflows—and echoing the international arbitral decisions and commentary previously discussed,[584] Compass Lexecon explains that Fair Market Value is the appropriate valuation method.[585] As set forth above, the FMV represents "the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts,"[586] and it is the standard metric

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[580] *Id.* ¶ 64.

[581] *Id*.

[582] *Id*.

[583] *Id*.

[584] *See supra* § X.A.

[585] *See* Damages Expert Report ¶¶ 60-63. Compass Lexecon considered other valuation methodologies, including historical investment cost or asset valuation approaches, but chose FMV because, *inter alia*, "the valuation ought to reflect the cash flow generating capability of Claimants' business to simulate a fair market value transaction, and none of these methods do so." *See id.* ¶ 65.

[586] International Glossary of Business Valuation Terms, American Society of Appraisers, ASA website dated 6 June 2001 (C-0132) at 4; *see also, e.g.*, *Azurix* (CL-0025) ¶ 424 (quoting this definition); *CMS*—Award (CL-0097) ¶ 402 (same); RIPINSKY & WILLIAMS (CL-0093) at 183-85 (same); Damages Expert Report ¶ 61 (same).

for valuing investments.[587] Because "[t]he value of Claimants' interest in the Omega Consortium stems from the value of its eight existing contracts awarded prior to December 2014, and from its ability to continue as a going concern, bidding and winning further public service work contracts from December 2014 onwards,"[588] the appropriate method for determining FMV is the discounted-cash flow ("**DCF**") approach.[589]

222. With respect to the income approach's DCF method, Compass Lexecon explains that it is the preferred valuation method for income-earning assets,[590] such as Claimants' business.[591] Compass Lexecon also prefers the DCF method because it "determines value on a specific date, on the basis of the net cash flows that the asset is expected to generate over time,"[592] and it does so "by computing the present value of the cash flows expected from the business (and available to be distributed to its lenders and shareholders), discounted at a rate that reflects the weighted average cost of capital."[593] That Compass Lexecon has chosen this approach should come as no surprise, as "the DCF is one of the most common techniques used in valuation analyses for both going concern

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[587] *See, e.g.*, *CMS*—Award (CL-0097) ¶ 402 ("[T]he general concept upon which commercial valuation of assets is based is that of 'fair market value.'"); RIPINSKY & WILLIAMS (CL-0093) at 183 ("According to the ILC Commentaries to the Articles of State Responsibility, 'fair market value' is a general basis for assessment of compensation reflecting the capital value of property taken or destroyed. Indeed, of many standards of 'value,' the term 'fair market value' possesses the most lucid content and reflects the general meaning of 'value' as a price that an object would bring in a market. Given the nearly universal recognition of 'fair market value' as the appropriate standard of value, this chapter proceeds on this basis.").

[588] Damages Expert Report ¶ 54.

[589] *Id.* ¶ 69.

[590] *Id.* ¶ 69 ("The DCF approach captures all the elements that affect the value of the company in a comprehensive yet straightforward manner." (internal quotation omitted)).

[591] *Id.* ¶ 66.

[592] *Id.* ¶ 67.

[593] *Id.* ¶ 68.

business as well as new projects" and it is widely supported by economists and financial industry participants.[594]

c. Valuation of Losses on the Existing Contracts

223. To value the losses under the Omega Consortium's existing Contracts, Compass Lexecon relies on Mr. McKinnon's expert opinion. Mr. McKinnon's Report analyzes documentation on outstanding balance of progress billings, the balance of retention, the balance of advance payments received by the Omega Consortium, and expected cash flows on uncompleted works.[595]

224. Based on these underlying data, Compass Lexecon first "compute[s] the present value of unpaid progress billing that the Omega Consortium should have collected from the eight construction contracts before December 2014."[596] To calculate the present value of unpaid progress billing as of 23 December 2014, Compass Lexecon applies a "prejudgment interest of 11.65%," and applies it from the date each of the unpaid invoices became due (as presented in Mr. McKinnon's Report[597]).[598] The total losses on unpaid progress billing as of the Date of Valuation amount to US$ [redacted].[599]

225. Compass Lexecon then computes the "present value of cash flows that Omega Panama would have earned in each of these eight contracts between December 2014 and their respective

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[594] *Id.* ¶ 70.

[595] McKinnon Report ¶ 18 & Table 1 (computing a nominal value of US$ 10.24 million); Damages Expert Report ¶ 72.

[596] Damages Expert Report ¶ 74.

[597] McKinnon Report Annex 1 at 5, 10, 15, 20, 23, 26, and 28.

[598] Damages Expert Report ¶ 75.

[599] *Id.* ¶ 76, Table X.

completion dates."[600] Compass Lexecon does so by "estimat[ing] the expected cash flows to the remaining work in each contract" until its completion date.[601] Here again Compass Lexecon relies on the nominal data relating to expected profits, retentions, advance balance and general overheads presented in Mr. McKinnon's Report,[602] and applies certain assumptions to estimate the monthly cash flow for each contract.[603] The next step is to calculate the present value of the cash flows as of 23 December 2014, by applying the 11.65% CoE. The total loss suffered by Claimants "in relation to the completion of existing contracts" is US$ [redacted] as of December 2014.[604]

226. The third and final step in the calculation of losses of the existing contracts is to compute the present value of the advance payments (of net retentions), which are then credited against the Omega Consortium's invoices until completion of the project.[605] To do this, Compass Lexecon relies "on the amount of advance balance computed by Mr. McKinnon in his report,"[606] which is expressed on a nominal and aggregate basis. Applying the 11.65% CoE, Compass Lexecon calculates the present value of the advance balances at US$ [redacted].[607] This figure must be deducted from

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[600] *Id.* ¶ 74 (relying on the amount of expected profits, retentions and advance balance presented by Mr. McKinnon in his report).

[601] *Id.* ¶ 77.

[602] *See* McKinnon Report Table 1 at 6. Because the information in the McKinnon Report is presented on a nominal and aggregate basis, Compass Lexecon makes certain assumptions in order to calculate the monthly cashflows. Damages Expert Report ¶ 78.

[603] Damages Expert Report ¶¶ 78-79.

[604] Damages Expert Report ¶ 80.

[605] *Id.* ¶ 81.

[606] *Id.*; McKinnon Report, Table 1, p. 6.

[607] Damages Expert Report ¶ 82; Table XII.

the estimated losses.[608] Having completed all of the foregoing steps, Compass Lexecon finds that the losses to Claimants on the existing Contracts is **US$ 8.7 million.**

d. Valuation of Losses on Potential New Contracts

227. As explained above, the Omega Consortium was a going concern which, but for the unlawful measures taken by the Government against it, would have continued to bid for, win, and complete construction projects in Panama.[609] "The value of Claimants' interest in Omega Panama [therefore,] not only stems from its existing contracts, but also from its ability to continue as a going concern, bidding and winning further construction contracts in Panama after December 2014."[610] To value the Omega Consortium as a going concern as of the Date of Valuation, Compass Lexecon "estimat[es] the future cash flows that the company would have generated after December 2014 from new construction contracts."[611] In doing so, Compass Lexecon first calculates the projected cash flows from potential new contracts[612] and then calculates the present value of the cash flows from 23 December 2014.[613]

228. *First*, to calculate the projected cash flows from potential new contracts, Compass Lexecon "estimate[s] the future revenues that the Omega Consortium would have generated," and it does so by analyzing and forecasting two key variables: the target market for the Omega Consortium's

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[608] *Id*. at ¶ 82.

[609] *See supra* § VII.

[610] Damages Expert Report ¶ 83.

[611] *Id.* ¶ 84.

[612] *See id*. § V.2.2, Table XV.

[613] *Id.* §§ V.2.1, V.2.2.

bids and the expected success rate of those bids.[614] To ascertain the potential relevant target market, Compass Lexecon "look[s] at GDP and central Government investment in infrastructure," and assumes that "the Omega Consortium's target market would have represented a constant share of central Government expected investment in infrastructure."[615] Compass Lexecon "estimate[s] the Government's expected investment in infrastructure"[616] as well as "the share of Government capital expenditure that comprises Omega Consortium's target market."[617] Having conducted these calculations, Compass Lexecon estimates that the Omega Consortium's target market would have represented 5% of all Government capital expenditures in the future.[618]

229. Knowing the future target market is an important variable, but just as important is estimating the success rate of the Omega Consortium's future bids to determine the share of the market that the Omega Consortium could have garnered[619] with its significant portfolio built over several decades. The historical success rate (that for the period of 2010-2013) was 21.4%, while the success rate for the period of 2011-2013 was 29.2%. Compass Lexecon, based on these figures, assumes a success rate of 25% beyond December 2014.[620]

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[614] *Id.* ¶ 84, § V.2.1.a.i.

[615] *Id.* ¶ 88.

[616] *Id.*

[617] *Id.* ¶ 90.

[618] *Id.* ¶ 90.

[619] *Id.* ¶ 91.

[620] *Id.* ¶ 91.

230. With this information, Compass Lexecon then estimates yearly gross revenues for 2015 to 2019, which it then uses to estimate the gross profit margin on the new contracts.[621] Taking into account Omega Panama's audited financial statements for 2011-2013,[622] as well as the job costs reports for the eight ongoing Projects, Compass Lexecon forecasts "the margins on future projects at [redacted]."[623] Finally, Compass Lexecon estimates general expenses at 3.5%[624] and computes income tax at the applicable 25% rate.[625] For contracts obtained after 2019, Compass Lexecon conservatively estimates that the new contracts' value increases at an average 2% nominal rate per year.[626]

231. *Second*, Compass Lexecon computes the present value of the cash flows from the Date of Valuation. As a preliminary step in this calculation, Compass Lexecon takes into account the historical average length of the existing contracts (*viz.* 16.9 months) to account for the timing of the expected cash flows. Compass Lexecon "calculate[s] that an average of 67% of cash flows from each contract would be generated in the year the contract is awarded."[627] Finally, Compass Lexecon

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[621] *Id.* ¶ 92, Table XIII.

[622] Claimants' Experts have been instructed to take a conservative approach and have therefore relied on audited financial statements in order to determine the margin under the Contracts, as many of the underlying documents are currently in Panama and, therefore, largely out of Claimants' reach due to the detention order against Mr. Rivera. Claimants reserve their right to revise their damages calculations should they gain access to these documents at a later date.

[623] *Id.* ¶¶ 98-99.

[624] *Id.* ¶¶ 101-02. Compass Lexecon compares the audited financial statements, which show 3.4% for general expenses, with Mr. McKinnon's implied estimation of 2.9%. *See id.*; *see also* McKinnon Report, Annex 2.

[625] Damages Expert Report ¶ 102.

[626] *Id.* ¶ 104.

[627] *Id.* ¶ 103.

conservatively assumes that Omega Panama will continue operating after 2019 and that the value of its new contracts will increase at a nominal rate of 2% per year.[628]

232. As a final step in the calculation of the present value, Compass Lexecon applies a discount rate equal to the CoE of 11.65% for December 2014, which accounts for country risk.[629] This results in a value for Claimants' interest in Omega Panama as a going concern of **US$ 46.75 million**.[630]

e. Total Losses under the But For Situation as of the Date of Valuation

233. The total losses in the But For Situation are the sum of the losses under the existing Contracts, which amount to **US$ 8.7 million**, and the losses on potential new contracts, which amount to **US$ 46.7 million**.[631] By adding these two figures together, Compass Lexecon arrives at a total of **US$ 55.4 million**.[632]

2. The Actual Situation

234. As stated above, to calculate Claimants' damages, Compass Lexecon has calculated Claimants' economic wealth in the But For Situation, and then subtracted their economic wealth in the Actual Situation.[633] As a direct consequence of the Respondent's unlawful actions, the value of Claimants' investment in the Actual Situation as of the Date of Valuation is **zero (US$ 0)**.

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[628] *Id.* ¶ 104.

[629] *Id.* ¶¶ 106-07.

[630] *Id.* ¶ 107, Table XV.

[631] *Id.* ¶ 108, Table XVI.

[632] *Id*.

[633] *See supra* ¶¶ 214-15.

3. Final Calculations

235. As a penultimate step, Compass Lexecon would have subtracted the value of Claimants' investment in the Actual Situation from the total losses under the But For Situation. As explained above, however, since the value in the Actual Situation is **zero**, the total value of Claimants' losses is **US$ 55.4 million**, which is the same as the value under the But For Situation. To bring that assessment forward to the award date, assumed for present purposes to be 25 June 2018, Compass Lexecon has applied pre-award interest "at a commercially reasonable rate" of **11.65%**,[634] compounded annually, leading to a total damages figure of **US$ 81.58 million**.[635] Claimants also request post-award compound interest calculated at the same rate. Claimants reserve the right to amend these numbers as the case progresses, and Compass Lexecon will provide updated damages calculations as necessary.

XII. RELIEF REQUESTED

236. Claimants request an award granting them the following relief:

a. A declaration that Respondent violated the BIT and the TPA in respect of Claimants' investment;

b. A declaration that the continued criminal investigations by Respondent's prosecutors against Omega and Mr. Rivera are a violation of the BIT and the TPA;

c. Remedies in the form of:

(i) Restitution of Claimants' investments, including an order that Panama comply with its obligations under the Contracts, the BIT, and the TPA; or, in the alternative

[634] Damages Expert Report § V.4. Compass Lexecon explains that "the rate that is commercially reasonable for Claimants' investment is the cost of capital that is available in the marketplace for Claimants' specific type of investment," *id.* ¶ 110, and, in this case, the CoE is the same as Compass Lexecon's proposed discount rate. *Id.* ¶ 113.

[635] *Id.* ¶ 114, Table XVII.

(ii) Compensation to Claimants for all damages and losses they sustained, in the amount of *at least* **US$ 81.58 million**, which includes pre-award interest to 25 June 2018;

d. All costs and expenses of these proceedings, including attorneys' fees and expenses;

e. Pre-award and post-award compound interest for all damages and losses they sustained, at a commercially reasonable rate of *at least* **11.65%** compounded annually until the date of Respondent's full and final satisfaction of the award; and

f. Such other relief as the Arbitral Tribunal may deem appropriate in the circumstances.

237. Claimants expressly reserve the right to amend their request for relief during the course of this proceeding in any manner they deem appropriate, including seeking relief on additional grounds.[636] Moreover, as the damages caused by Respondent's wrongful conduct will likely continue to accrue throughout the course of this proceeding, Claimants expressly reserve the right to update their damages claims and calculations accordingly.

Respectfully submitted,

Jones Day

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[636] Because there are, and may continue to be, third-party claims against Claimants arising out of the Government's unlawful conduct, Claimants expressly reserve the right to amend their damages claims to include any such losses that may arise from third-party claims.