

16 July 2015

Mr. Juan Carlos Varela  
President of the Republic  
Palacio Presidencial  
Panamá 1, República de Panamá

**Subject: Investment in the Republic of Panama**

Your Excellency:

The Republic of Panama is hereby notified that a dispute has arisen under the Convention in force between the Republic of Panama (the "State") and the Republic of Italy on the Promotion and Protection of Investments dated April 30, 2009 (the "Panama-Italy BIT") by and among, on the one hand, the State, and, on the other hand, Salini Impregilo S.p.A. (formerly Impregilo S.p.A.), which is a legal person constituted and duly organized under the laws of the Republic of Italy who invested in Panama. This dispute gives rise to a number of claims discussed herein, which under this letter are being brought exclusively on behalf of Salini Impregilo S.p.A (the "Investor").

The Investor made investments in Panama for the design and construction of the Third Set of Locks of the Panama Canal (the "Project"). On August 11, 2009, the Investor entered into Contract No. CMC-221427 (the "Contract") with Autoridad del Canal de Panamá ("ACP" or the "Employer"), the State entity responsible for administering and financing the Project, and which is established pursuant to Title XIV of the Panamanian Constitution and the Organic Law of June 11, 1997. As you are aware, the Project is the main component of the Panama Canal Expansion Program that was approved by public referendum on October 22, 2006, and is intended to more than double the capacity of the Panama Canal, generating significantly increased revenues for the State.

The Investor – both in its individual capacity and through its share ownership and participation in Grupo Unidos por el Canal S.A. ("GUPC S.A."), the Panamanian Project Company – has diligently performed under the Contract, and the Project is more than 90% complete. In this regard, it must be emphasized that the claims asserted by the Investor below are not duplicative of and without prejudice to any other claims being pursued by GUPC S.A. with respect to the Project. Indeed, the Investor in its own name has contributed hundreds of millions in cash equity, loans, guarantees, technical expertise, and managerial experience to finance and perform the Contract to ensure completion of the Project.

The Investor congratulates your Excellency and the Republic of Panama on hosting of the Summit of the Americas in April, gathering national leaders in Panama City. The Investor noted that one of the highlights of the national leaders' visit to the State was the opportunity to visit the Panama Canal and observe the highly advanced state of the works that the Investor, along with GUPC S.A. and its other shareholders, have achieved despite significant difficulties encountered during the course of the Project.



Indeed, from the inception of the Project, the State has committed numerous actions and omissions which, including those set forth below, have seriously affected the Investor's rights under the Panama-Italy BIT, and which have adversely impacted and destroyed the value of its investments in Panama. Further, despite the Investor's good faith negotiations in 2014 to try and partially address the financial consequences the State's breaches, the State has continued to violate its treaty and contractual obligations to the detriment of the Investor. Among other things, the State, either directly or through ACP:

- Induced the Investor's investment based on representations during its tender process and throughout the execution of the Project – in particular, the State's failure to disclose accurate geotechnical data on existing ground conditions at the site, including prior history of dredging, geological faults and quality of construction materials – on which the Investor relied, and which were later shown to be misrepresentations and grossly negligent behavior, as determined by the independent adjudication board appointed under the Contract;
- Breached its duty to act with transparency during the tender process in breach of the State's duty to safeguard the interests of the contractors under public contracting law, and breached statutory obligations by failing to act in a timely manner to correct overburdens imposed on the Contract, due to actions and omissions attributable to the State;
- Arbitrarily and unreasonably failed to apply Panamanian law to restore equilibrium in the Project after the unforeseen ground conditions caused disproportionate financial burdens on the Investor, resulting in a complete loss of profits and, indeed, resulting in major losses and financial burdens for the Investor;
- Violated Article 133(6) of ACP's regulations – requiring that ACP act in a timely manner to avoid more onerous work on a contractor as a result of actions/omissions by ACP – with respect to the Investor as compared to the investors on the Pacific Approach Channel – 4 ("PAC-4") contract, which were granted approximately three additional years, and an additional increase of nearly a quarter of their contract price, due to similar unforeseen and/or undisclosed ground conditions that were acknowledged by ACP;
- Continually frustrated the Project through arbitrary and unreasonable behavior, including by failing to perform, abusing its powers, and refusing to meet its obligations for the determination of entitlements under the process established in the Contract and under Panama Law, forcing the Investor to fund the Project during protracted and multiple disputes procedures, demonstrating a complete lack of good faith;
- Mismanaged the Contract from the outset of the Project, resulting in unwarranted added requirements on the Investor with attendant expenses;
- Conditioned variations of the Contract on waivers of the Investor's rights, in violation of good faith and the State's own mandatory laws and regulations;
- Unlawfully pressured the Investor, along with the other shareholders in GUPC S.A., to undertake liability for some of GUPC S.A.'s subcontractor delays caused by ACP and not by the Contractor;
- Breached its obligations under the Contract, and failed to disclose critical information with regard to delays in the completion of the adjacent PAC-4 project works, resulting in additional damage to the Contractor and the Investor;





- Improperly deducted, delayed and impaired payments, forcing the Investor to provide further financing to the Project;
- Was responsible for the stoppage of works on the Project in late 2013 and early 2014, resulting in Project delays, and the need for emergency negotiations;
- Failed to negotiate in good faith with the Investor leading to, and resulting from, the Memorandum of Understanding signed on March 13, 2014 ("MOU");
- Imposed extra-contractual obligations on the Investor during the delay in obtaining financing, in contravention of the intent and letter of the MOU;
- Delayed the signing of the MOU Variation Order, leading to more than a five month delay in obtaining critical financing for the Project, and resulting in a harmful financial impact on the Investor;
- Executed a media campaign with discriminatory public statements by various State officials that were injurious to Investor's reputation;
- Enacted discriminatory and project specific legislation regarding labor on wages and conditions on the Project, increasing the cost burden suffered by the Investor; and
- Failed to act under its statutory authority during the nationwide construction labor strike in 2014 which further impacted the labor costs for the Project.

Moreover, during the course of the Investor's participation in the Project, the Investor was targeted in statements of various representatives of the Panamanian Government directly, and through the State's conduct and influence over ACP. For example, very high level government representatives publicly referred to the State's intention to take over the Project from GUPC S.A. and its shareholders to "culminate the expansion and construction works."<sup>1</sup> Likewise, the President of the National Assembly – referring to the Investor – exhorted ACP to stop negotiating with the "the Italians" and noted that the Investor had to bear a "criminal or civil" cost.<sup>2</sup> Additionally, the Chief Executive Officer of ACP publicly implied that GUPC S.A. was nearing bankruptcy, when this was, in fact, not true.<sup>3</sup> These are only a few examples of the negative actions and negative publicity campaigns that the State has carried out against the Investor and its holding in GUPC S.A.

Such discriminatory, arbitrary, unreasonable, and capricious treatment by the State constitute breaches of the Panama-Italy BIT, including of the following obligations:

- **Fair and Equitable Treatment:** the State has breached Article II(3) of the treaty by failing to accord the Investor fair and equitable treatment, including through the State's misrepresentations of the geotechnical conditions of the soil at the Project site during the tender process, and throughout the execution of the Project, as well as through subsequent failures to negotiate in good faith regarding unforeseen Project costs, the unfair requirement for the Investor to waive its rights in violation of local laws and regulations, and failure to comply with local laws and regulations.<sup>4</sup>

<sup>1</sup> See Marinelli, *Lluvia, trueno o relampaguee se hará la ampliación del canal de Panamá*, CNN ESPAÑOL (Jan. 22, 2014).

<sup>2</sup> See Quijano *acudirá el 12 de Febrero a la Asamblea Nacional para explicar la situación de las obras del Canal*, EL ECONOMISTA PANAMA (Feb. 07, 2014).

<sup>3</sup> *Quijano teme que GUPC se declare en bancarrota*, CRITICA (July 31, 2014).

<sup>4</sup> Convention between the Republic of Panama and the Republic of Italy on the Promotion and Protection of Investments dated April 30, 2009 ("Panama-Italy BIT"), Art. II(3).





- **Protection from Arbitrary, Unjustified or Discriminatory Treatment:** the State has further violated Article II(3) of the treaty, including through the State's failure to disclose critical information with regard to delays in the completion of the adjacent PAC-4 project works, as well as the disparate treatment by with the Investor was given as compared to the additional compensation and time extensions accorded to the foreign national contractors on the PAC-4 project, to the detriment of the Investor.<sup>5</sup>
- **Observe in Good Faith the Obligations Entered With the Investor:** the State has violated Article II(4) of the BIT including through the State's failure to adequately perform the Contract through its control of ACP,<sup>6</sup> and its failure to restore the contractual balance – as demanded by Panamanian administrative law, pursuant to which the State, through ACP, has a statutory mandate to both act in good faith and equitably towards the Investor, and to safeguard its rights and interests.<sup>7</sup>

These breaches of the Panama-Italy BIT give rise to claims that are being pursued exclusively by the Investor, separate and apart from any claims being asserted by GUPC with respect to breaches of contractual obligations by ACP.

As a consequence of the State's violations of its obligations under the Panama-Italy BIT, the Investor has suffered and continues to incur significant financial damage, for which the State should be held accountable. The Investor has preliminarily estimated the amount of damage to be in excess of US\$ 2.2 billion – which includes additional equity and debt contributions by the Investor, as well as the provision of joint guarantees for further funding – and the Investor should be compensated for:

- **Compensatory Damages:** the State should compensate the Investor for damages that will be sufficient to erase the State's treaty and contractual breaches, and restore the situation that the Investor would have been in, had the State not breached its obligations.
- **Lost Return on Investment, Interest and/or Financing Value:** the State should compensate the Investor for its lost return on investment, and any interest and financing charges, including, but not limited to those associated with the cost overruns caused by the State's misrepresentations and/or gross negligence in failing to disclose the geotechnical conditions of the Project site during the tender stage.
- **Lost Business Opportunities and Opportunity Costs of Managerial and Employee Time:** the State is responsible for the losses incurred by the Investor by not having the opportunity to undertake other projects due to the required financial and managerial commitments to the Project.
- **Underutilization of Resources:** the State is responsible for the Investor's losses incurred in relation to resources committed to the Project which have been underutilized, or not utilized at all, due to the State's treaty and contractual breaches.
- **Incidental Damages:** the State is responsible for all incidental expenses that the Investor incurred to attempt to repair the damage, and mitigate the loss, caused by the State's treaty and contractual breaches.

<sup>5</sup> Panama-Italy BIT, Art. II(3).

<sup>6</sup> Panama-Italy BIT, Art. II(4).

<sup>7</sup> Organic Law on ACP, art. 53; ACP Procurement Regulations arts. 2, 90, 130, 133(5)(6),(8); General Public Contracting Law, Law No.22 of 2006, Arts. 21-22.





- **Moral Damages:** the State is responsible for moral damages incurred as a result of the State's wrongful acts, including the State's disparaging statements and baseless criticism of the Investor, which have resulted in detrimental effects on the worldwide and industry reputation and image of the Investor, which is listed in the stock-exchange, and whose share value has been detrimentally affected by the injurious attacks abusively released by the State and ACP's officials during the Project's performance.

Despite the circumstances, the Investor – itself and through its shareholding in GUPC S.A. – continues to be committed to the successful and expeditious completion of the Project, and to reaching a mutually beneficial solution with Panama. Thus, pursuant to Article IX of the Panama-Italy BIT, the Investor hereby invites the State to engage in consultations and negotiations in an attempt to resolve the disputes amicably within six months from the date of this letter. The Investor prefers to resolve this dispute amicably, if possible.

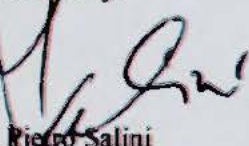
In an effort to find a mutually satisfactory solution, the Investor stands ready to take part in discussions designed to lead to a prompt resolution of these pressing issues. Indeed, we are fully available to meet with Your Excellency at your earliest convenience, and suggest any date between 27 July 2015 and 31 July 2015.

The Investor reserves all rights as to any dispute that is not resolved through consultation and negotiation, including the right to pursue international arbitration under the Panama-Italy BIT, as well as any other rights under the law, the Contract, or any other applicable agreements or instruments. We hereby reserve our right to amend, modify and/or expand upon this notice of dispute. Further, nothing herein is intended to prejudice or waive any rights or entitlements that the Investor, GUPC S.A., or any other parties may have under the law, the Contract, or any other applicable agreements or instruments. The Investor hopes that recourse to these rights will not be necessary and very much welcomes the opportunity to resolve the dispute amicably.

\* \* \*

We renew to your Excellency our assurances of our highest consideration and esteem.

Sincerely,



Pietro Salini

Chief Executive Officer

Salini-Impregilo S.p.A.



Copy to:

Ministry of Foreign Affairs  
Isabel de Saint Malo de Alvarado  
San Felipe. Calle 3  
Palacio Bolívar  
Panamá 4, República de Panamá

Ministry of Economy and Finance  
Dulcidio De La Guardia  
Vía España y Calle 52 Este  
Edificio OGAWA  
Panamá 4, República de Panamá

Ministry for Canal Affairs  
Roberto Roy  
Edificio de la Administración del Canal  
Altos de Balboa  
Balboa, Ancón, República de Panamá

Procuraduría de la Administración  
Kenia Porcell  
Calle 34, Ave. Cuba  
La Exposición - Antiguo Palacio de Arte  
Panamá, República de Panamá

PRESIDENCIA DE LA REPUBLICA	
ADMINISTRACION DE DOCUMENTOS	
RECIBIDO HOY	21-7-15
CONTROL N°	
HORA	1.11
FIRMA	<i>Lucila Esther Semenza</i>

*Lucila Esther Semenza*  
ced 8-509-569

