UNDER THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES AND THE INSTITUTION RULES AND ARBITRATION RULES OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

AND

THE TRADE PROMOTION AGREEMENT BETWEEN THE REPUBLIC OF PANAMA AND THE UNITED STATES OF AMERICA DATED 31 OCTOBER 2012

ICSID Case No. ARB/20/31

Regarding a dispute between

(1) IBT GROUP, LLC,

(2) IBT, LLC,

Claimants,

-and-

The Republic of Panama

Respondent.

REPLY TO RESPONDENT'S RESPONSE TO CLAIMANTS' REQUEST FOR PROVISIONAL MEASURES

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8 December 2020
Counsel for Claimants

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I. INTRODUCTION

1. Pursuant to the timetable established by ICSID in its correspondence of 6 November 2020, Claimants IBT Group, LLC ("**IBT Group**"), and IBT, LLC ("**IBT LLC**", and collectively the "**Claimants**" or "**IBT**") submit their Reply to the Response on Provisional Measures (the "**Respuesta**") filed by the Republic of Panama ("**Panama**" or the "**Respondent**") on 24 November 2020.[1]

2. Respondent spends most of its Respuesta contending that the Claimants have no right to the provisional measures requested because they are (i) beyond the jurisdiction of the Tribunal and (ii) concerned with matters that constitute a *fait accompli*. This is not so.

3. Respondent's first argument is that the Claimants have asked the Tribunal to take action that is beyond its jurisdiction; that is, that the Claimants have asked the Tribunal to make an order enjoining the application of the measure in breach of the TPA and Investment Agreement, which is prohibited by Article 10.20(8) of the TPA. To the contrary, as explained further below, the Claimants ask only that the Tribunal enjoin the Respondent from taking additional measures after its measures in breach of the TPA and Investment Agreement, which additional measures aggravate the dispute between the Parties.

4. Second, Respondent pretends that any harm alleged by the Claimants is purely speculative, as, in Respondent's submission, the execution of the Bond is a "consummated fact" that has transferred all risk to the insurance company. Nothing could be farther from the truth.

5. To the contrary, Claimants remain liable for payment under the Bond with Cia. Internacional de Seguros ("**Internacional de Seguros**"), as is evidenced by the fact that just this week the Claimants learned Internacional de Seguros intends to claim the complete amount of the Bond from the Claimants. Clearly, execution of the Bond is not a *fait accompli* as Claimants have not yet been

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1 All capitalized terms not defined herein should have the meaning assigned to them in the Claimants' Request for Provisional Measures dated 22 October 2020 (the "**Request**") and the Claimants' Amended Request for Arbitration dated 11 August 2020 (the "**Amended Request for Arbitration**").

made to pay the USD 13 million pursuant to the Bond. Internacional de Seguros is not assuming – and pursuant to the routine indemnification agreements explained further below – will not assume all of the risk under the Bond.

6. To further aggravate matters, following the Request, Panama accelerated the ongoing (and still incomplete) subrogation proceedings under the Bond. The notification by Internacional de Seguros that it intends to request the amount of the bond reflects this acceleration.

7. For the reasons explained below, Claimants respectfully request that the Tribunal:

   a) Order the Respondent to immediately suspend all execution of the Bond, including but not limited to the ongoing subrogation proceedings, by formally notifying Internacional de Seguros of the Tribunal's order and withdrawing the formal execution, amending the posting on PanamaCompra to reflect the Tribunal's order, and ceasing any effort to subrogate the Contract;

   b) Issue an order directing the Respondent to refrain, until a final award is rendered in the present arbitration proceeding, from resuming or continuing efforts to execute any guaranties issued by the CEFERE Consortium; and

   c) Order the Respondent to formally suspend its order disqualifying the Claimants from contracting in Panama for the pendency of this arbitration, and to remove the publication of the same from PanamaCompra, while simultaneously ordering the Claimants to not tender or bid on any public contracts with Panama for the same period.

II. FACTUAL BACKGROUND TO THE REQUEST

A. The Process of Execution on the Bond is Ongoing

8. Much of Respondent's argument that the Claimants have no right to provisional measures hinges on its contention that the execution of the Bond is a *fait*

accompli. This is not so. Indeed, the process of subrogating the Contract remains ongoing, as are the harms to the Claimants.

1. Current Status of Execution

9. Respondent submits that "*the execution of the Bond is a consummated fact*."[2] In support of this, Respondent notes that "*in the month of May 2020 Mingob contacted the Insurer to initiate the process of execution of the Bond*,"[3] a process that culminated in the letter from Internacional de Seguros to Mingob on 14 August 2020, which provided that:

> *Cia. Internacional de Seguros, S.A., has decided to exercise the option to accept the claim presented by Mingob, based on the terms and conditions set forth in the Performance Bond.*[4]

10. For this reason, Panama contends, "*from 14 August 2020, the Insurer executed the Bond, and in doing so, subrogated itself to all the rights and obligations of the Claimants under the Contract.*"[5] Panama then asserts that the finality of this action was confirmed by its publication in PanamaCompra on 20 August.[6]

11. Respondent itself acknowledges, however, that it has not yet selected a replacement Contractor:

> *In the exercise of its right of subrogration, the Insurance company proposed a series of contractors to be evaluated by Mingob as potential substitute contractors under the Contract. Mingob is currently evaluating the technical and economic capabilities of*

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2 Respuesta, § IV(B)(ii) ("*[l]a ejecución de la Fianza es un hecho consumado*").

3 Respuesta, ¶ 13 ("*en el mes de mayo de 2020 el MINGOB contactó a la Aseguradora para iniciar el procedimiento de ejecución de la Fianza*").

4 **Ap. R-1**, Carta de Cía. Internacional de Seguros, S.A. al MINGOB de fecha 14 de agosto de 2020, p. 2 ("*Cía. Internacional de Seguros, S.A., ha decidido ejercer la opción de acoger el reclamo presentado por el MINGOB, en base a los términos y condiciones consignados en la Fianza de Cumplimiento de Contrato*.")

5 Respuesta, ¶ 18 ("*desde el 14 de agosto de 2020 la Aseguradora dio cumplimiento a la Fianza, la ejecutó y, al hacerlo, se subrogó en todos los derechos y obligaciones de las Demandantes al amparo del Contrato*.").

6 *Id*.

> *contractors proposed by the Insurer as the holder of the rights and obligations of the Contract*.[7]

12. As Sr. Daniel Toledano, the Managing Director of IBT Group, explains, the Claimants learned on Monday, 7 December from Aon, the broker for the Bond, that Internacional de Seguros and Mingob are working to select a replacement contractor.[8]

13. He also explains, however, that as part of this effort, Internacional de Seguros intends to collect on the Bond:

> *17. …As part of this effort, Internacional de Seguros and the Ministry of Government have carried out calculations to determine the budget necessary to complete the work.*
>
> *18. In accordance with their calculations and estimates, due to Panama's payment times (very slow) and the needs of the project, Internacional de Seguros understands that they will need 100% of the CEFERE Bond to fund and continue the execution of the project. As a result, Internacional de Seguros has informed [us] that it intends to write to IBT to claim the full amount of the CEFERE Bond.*[9] (emphasis added).

14. Thus, in no way is the execution of the Bond a *fait accompli*. Internacional de Seguros and Mingob have yet to agree on the specific terms of the subrogation, and in the meantime the surety intends to collect the $13 million dollars

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7 *Id*. ¶ 47 ("*Al ejercer su derecho de subrogación, la Aseguradora propuso a una serie de contratistas para que fueran evaluados por el MINGOB como potenciales contratistas sustitutos bajo el Contrato. El MINGOB está actualmente evaluando las capacidades técnicas y económicas de los contratistas propuestos por la Aseguradora como titular de los derechos y obligaciones del Contrato*.") (internal citations omitted).

8 Declaration of Daniel Toledano, ¶ 17 (**Anexo 24**).

9 *Id*. ¶¶ 17-18 (*citing* Email from Mariano Viale to Daniel Toledano, dated 7 December 2020 (**Appendix 3 to the Declaration of Daniel Toledano**), PDF p. 85 ("*17. … Como parte de ese esfuerzo, Internacional de Seguros y el Ministerio de Gobierno realizaron cálculos para determinar el presupuesto necesario para completar el trabajo. 18. De acuerdo a sus cálculos y estimaciones, por los tiempos de pago de Panamá (muy lentos) y necesidades del proyecto, Internacional de Seguros entienden que van necesitar el 100% del monto de la Fianza CEFERE para fondear y continuar la ejecución del proyecto. Como resultado, Internacional de Seguros me informó que tiene la intención de escribir a IBT para reclamar el monto total de la Fianza CEFERE*.") (**Anexo 24**).

guaranteed by the CEFERE Bond as well a select a new contractor for the project. Neither has yet occurred.

15. Indeed, normally subrogation in Panama can take a period of several years. In the case of the Ciudad de las Artes, a project in the Llanos de Curundú, in the district of Ancón, the original project was awarded to the Omega Engineering Consortium in July 2012 and was meant to have concluded construction in 2016.[10] The Ministry of Culture terminated the contract with Omega in December 2014 and notified ASSA Compañía de Seguros, the insurer, of the termination.[11]

16. Like Internacional de Seguros, ASSA opted to subrogate the contract for Ciudad de las Artes.[12] It was not until 6 September 2018, however, following four years of stagnation and more than two years of negotiations,[13] that ASSA was able to sign a new contract with the National Institute of Culture to resume work with Administradora de Proyectos de Construccion SA stepping in as replacement contractor.[14]

17. This timeline is not surprising. As explained further below, subrogation of a Contract in Panama requires a large number of steps, including the evaluation on the part of the State and the Contraloría General de la República (the "**Comptroller General**") of any potential replacement contractors suggested by the insurance company. The State and the insurance company then have to negotiate a new agreement, with the Comptroller General's endorsement.

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10 *See Ciudad de las Artes, una obra prolongada*, La Prensa, 22 de febrero de 2020 (**Anexo 21**).

11 *Id*.

12 *Id*.

13 *See* Janelle Davidson, Tweet, 5 September 2018 ("*Con profunda emoción acabo de anunciar en la Gala del Ballet Nacional que firmamos el acuerdo para continuar el proyecto Ciudad de las Artes luego de casi 4 anos de paralizada la obra y mas de 2 anos de mucho esfuerzo y trabajo en negociaciones*.") (**Anexo 22**).

14 *See INAC y ASSA firman acuerdo para continuar desarrollo del Proyecto Ciudad de las Artes*, Panamá 24 Horas, 2 de setiembre de 2018 (**Anexo 23**).

18. If the CEFERE project follows the same timeline as the Ciudad de las Artes project, it would be 2024 before Internacional de Seguros is authorized to select one of the five replacement contractors it proposed to Mingob and 2022 before negotiations begin in earnest. Furthermore, as the Claimants explained in the Amended Request for Arbitration, although Mingob selected a new site for the Rehabilitation Center, that change was never formalized in an addendum to the Contract.[15]

19. In order for subrogation to be complete, Mingob and Internacional de Seguros, and the substitute contractor would need to: (i) choose a substitute contractor that complies with the requirements; (ii) negotiate the price of the contract; (iii) adapt the scope of the contract to reflect the new terrain – which is critical, as explained in the Claimants' Amended Request for Arbitration; (iv) add to the contract price the cost of construction on the new terrain; (v) formalize an addendum to the contract to reflect those agreements; (vi) document and budget the changes to the contract; (vii) obtain the Comptroller General's approval of all changes; (viii) obtain approval of the assembly for the new budget; (ix) obtain an order to proceed with the new contract; (x) enter an initial invoice, and (xi) obtain the Comptroller General's approval and endorsement of that invoice. Thus, subrogation of the contract is clearly not a *fait accompli*.

2. The Terms of the Bond

20. As Respondent notes, public contracting in Panama is regulated by Law 22 of 2006 ("**Law 22**"), along with the amendments to that law.[16] The version of Law 22 submitted by the Respondent with its Respuesta, however, only included amendments through Law 48 of 2011. Law 22 was further updated by Law 61 of 2017.[17]

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15 *See* Amended Request for Arbitration, ¶ 18. Any replacement contractor would need to finalize that addendum before proceeding, which will necessarily delay execution of the works.

16 Respuesta, ¶ 8, n. 13.

17 The Claimants thus include the Unified Text of Law 22 as it currently stands, including

21. Article 112 of Law 22 provides that the Comptroller General is tasked with consulting on any aspect of the constitution, presentation, execution, and extinction of bonds constituted to ensure compliance with obligations to public entities.[18] Article 118 of Law 22 provides that Bonds should be executed to the benefit of the State Party to the contract (the *entidad contratante*) and the Comptroller General.

22. Thus, the Bond is executed between the Contractor, the CEFERE Consortium, and Cia. Internacional de Seguros, S.A., and was executed to the benefit of Mingob and the Comptroller General.[19]

23. The provisions of the Bond come from model text established pursuant to Decree No. 317-Leg. of 12 December 2006, enacted by the Comptroller General pursuant to its authority under Law 22:[20]

24. Respondent places a lot of emphasis on the Claimants having "agreed" to the terms of the Bond.[21] Decree No. 317-Leg. of 12 December 2006, however, was

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the amendments in 2017. *See* Texto Unico de la Ley 22 de 2006 ordenado por la Ley 61 de 2017 (**Anexo 25**).

18 *Id*. ¶ 112.

19 *See* Fianza de Cumplimiento, Policy No. 070-001-000016556-000000, issued to Consorcio Cefere Panama and confirmed by IBT, LLC and IBT Group, LLC (**Anexo 2 to the Request**).

20 Fianza de Cumplimiento, Policy No. 070-001-000016556-000000, issued to Consorcio Cefere Panama and confirmed by IBT, LLC and IBT Group, LLC (**Anexo 2 to the Request**).

21 *See, e.g.*, Respuesta, ¶ 8 ("*Conforme a los términos acordados por el Contratista en la Fianza, en caso de que el MINGOB reclamara la ejecución de la Fianza debido a un*

intended to establish model text for bonds.[22] In that sense, it explains that "*the bond is a contract contained in a brief and general document.*"[23]

25. Decree No. 317-Leg. also establishes a general procedure for the Execution of Bonds: it provides (as is reflected in the model text) that the insurance company has thirty calendar days following notice of default to either pay the amount of the bond or replace the contractor.[24] It also provides that:

> *In addition, the contracting entity must notify the General Comptroller of the Republic, for the purpose of coordinating the measures that are pertinent to adopt to safeguard the interests of the State.*[25]

26. Decree No. 317-Leg. was abrogated entirely by Decree No. 21-Leg. of 28 March 2018,[26] also enacted by the Comptroller General:[27]

CONTRALORÍA GENERAL DE LA REPÚBLICA
DECRETO Núm.21-LEG
(De 28 de marzo de 2018)

"Por el cual se reglamentan las fianzas que se emitan para garantizar las obligaciones contractuales del Estado, se establecen sus modelos y se deroga el Decreto Núm. 317-Leg. de 12 de diciembre de 2006."

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incumplimiento del Contratista, la Aseguradora tendría el derecho…")

22 Decreto Nro. 317-Leg. de 12 de diciembre de 2006, Articulo Primero (**Anexo 26**) ("*Se aprueba el reglamento de las fianzas que se emitan para garantizar las obligaciones contractuales del Estado y se establecen sus modelos…*") Article 7 of the decree sets out the information that a bond must contain.

23 *Id*. Art. 3 ("*La fianza es un contrato contenido en un documento de texto breve y general*") (emphasis added).

24 *Id*. Art. 30.

25 *Id*. ("*Además, la entidad contratante deberá comunicar el incumplimiento del contratista a la Contraloría General de la República, para los fines de coordinar las medidas que sean pertinentes adoptar para salvaguardar los intereses del Estado*.") Art. 33 of Decree 317-Leg. states the same.

26 As Claimants explained in the Request, the Bond was endorsed (renewed) on 15 February 2019.

27 *See* Decreto Num. 21-Leg. de 28 de marzo de 2018 (**Anexo 27**), preamble.

This effort was part of the reforms carried out in Law 61 of 2017, updating Law 22.[28]

27. Decree No. 21-Leg. of 28 March 2018 contains the same general provisions as Decree No. 317-Leg. of 12 December 2006,[29] but it adds additional requirements for the execution of bonds in the event of subrogation:

> *Article 35. In the event the insurer decides to subrogate, the contracting entity and the insurer must enter into a supplementary agreement for execution of the performance bond, in which the insurer must designate a third-party executor, which will continue the execution of the contract, on behalf of the insurer and at the risk of the same, provided that it has the technical and financial capacity to do so, in the opinion of the contracting entity, and is approved by it…The supplementary agreement for execution of the performance bond must have the endorsement of the Comptroller General of the Republic.*[30]

28. Article 35 of Decree No. 21-Leg. of 28 March 2018 thus specifies the plethora of subsequent conditions which are required for the subrogation of a public contract to be a *fait accompli*. To better illustrate this for the Tribunal, Claimants outline such subsequent conditions and subconditions, which include the following:

    a) the *entidad contratante* and the insurer must enter into a supplementary agreement for execution of the performance bond;

    b) the insurer must designate a third-party executor which:

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28 *Id*.

29 *See id*. Articulo Primero ("*Se aprueba el reglamento de fianzas que se emitan para garantizar las obligaciones contractuales del Estado y se establecen sus modelos…*"); Art. 3 ("*La fianza es un contrato contenido en un documento de texto breve y general…*").

30 *Id*. Art. 35 ("*En el evento de que la fiadora decida subrogarse, la entidad contratante y la fiadora deben suscribir un acuerdo suplementario de ejecución de fianza de cumplimiento, en el cual la fiadora debe designar a un tercero ejecutor, quien continuara la ejecución del contrato, por cuenta de la fiadora y a cuenta y riesgo de esta, siempre que esta tenga la capacidad técnica y financiera para ello, a juicio de la entidad contratante, y sea aprobado por esta…El acuerdo suplementario de ejecución de fianza de cumplimiento debe contar con el refrendo de la Controlaría General de la Republica.*").

i. has the technical and financial capacity to carry out the contract, and

ii. is approved by the *entidad contratante*; and

c) The supplementary agreement for execution of the performance bond must have the endorsement of the Comptroller General.[31]

29. Article 36 of Decree No. 21-Leg. of 28 March 2018 also provides that the supplementary agreement between the insurer and the *entidad contratante* does not constitute a new contractual relationship, but rather formalizes the replacement of the insurer in all rights and obligations of the former contractor.[32] Article 39 seemingly reinforces this, explaining that:

> *If the contractor has been substituted in all of its rights and obligations by the insurer, in accordance with the provisions of these regulations, and it fails to comply with its obligations, the insurer will be responsible for all of the damages that such failure to comply causes the state beneficiary entity, regardless of the limit at which the performance bond was posted.*[33]

30. That the insurer takes on such obligations "at its own risk," however, is a legal fiction. As Sr. Toledano explains,

> *15. In my experience, in the majority of situations involving the execution of a bond when subrogation is an option, the insurance company opts to subrogate the contract. This permits the insurance company to exercise "step-in" rights and have the right to payments in virtue of the contract which would otherwise have been paid to the contractor. This permits the insurance company to compensate for its risks.*
>
> *16. However, the subrogation does not mean that the insurance company has no recourse against the contractor.*[34]

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31 *See id*. Art. 36.

32 *Id*.

33 *Id*. Art. 39 ("*Si sustituido el contratista en todos sus derechos y obligaciones por LA FIADORA, de acuerdo con lo dispuesto en el presente reglamento, esta incumpliere sus obligaciones, LA FIADORA responderá de todos los daños y perjuicios que tal incumplimiento cause a la ENTIDAD ESTATAL BENEFICIARIA, con independencia del límite por el cual se constituyó la fianza de cumplimiento*.").

34 Declaration of Daniel Toledano, ¶¶ 15-16 ("*15. En mi experiencia, en la mayoría de las*

31. Indeed, Sr. Toledano explains that it is typical for local insurance companies to have their bonds reinsured by much larger companies,[35] and that those larger companies sign blanket indemnification agreements with the contractor to ensure that they bear no ultimate risk.[36] As discussed in the next section, the fact is that Internacional de Seguros has informed IBT (through its broker) that it intends to call on the totality of the CEFERE Bond requiring IBT to pay more than USD 13 million to allow Internacional de Seguros to continue with the subrogation.

B. The Claimants Remain Liable under the Bond

32. Panama also contends that, because pursuant to the Bond the Insurer subrogates the contract at its own risk,[37] the Claimants' Request for Provisional Measures lacks merit.[38] As Sr. Toledano explains, however, there are two paths by which the Claimants will have to pay the amount of the Bond, regardless of Internacional de Seguros' decision to subrogate the Contract.

33. First, as Sr. Toledano explains, Internacional de Seguros already informed Claimants that it intends to ask Claimants to pay the amount of the Bond, which is, according to their calculations, required to cover the cost of the

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situaciones que implican la ejecución de una fianza cuando la subrogación es una opción, la compañía de seguros opta por subrogar el contrato. Esto permite a la compañía de seguros ejercer los derechos de "step-in" y tener derecho a pagos en virtud del contrato que de otro modo se habrían pagado al contratista. Esto permite a la compañía de seguros compensar los riesgos. 16. Sin embargo, la subrogación no impide que la compañía de seguros tome algún recurso contra el contratista.") (**Anexo 24**).

35 *Id*. ¶ 12.

36 *Id*. ¶ 13.

37 The Bond provides that, in the event of subrogation, the Insurance Company proceeds "*por cuenta y riesgo*." Fianza de Cumplimiento, Policy No. 070-001-000016556-000000, issued to Consorcio Cefere Panama and confirmed by IBT, LLC and IBT Group, LLC (**Anexo 2 to the Request**).

38 *Respuesta*, ¶ 49 ("*Dado que la Fianza ya ha sido ejecutada conforme a sus términos (los cuales fueron aceptados por las Demandantes al momento de emitir la Fianza en beneficio del MINGOB), la medida provisional solicitada por las Demandantes para que se suspenda el procedimiento de ejecución de la Fianza carece de materia*.")

construction of the project.[39] This is evident from the email sent to Mr. Toledano by Mariano Viale of Aon, IBT's Broker for the CEFERE Bond:

> *On Friday I had a call with Swiss Re (the claims department) where they anticipated that [Internacional de Seguros] and [Swiss Re] are moving forward with Mingob to select a contractor to complete the work, confirm the budget and Mingo[b] funds for advancement, etc. At the same time they also anticipated that they will send a letter to IBT to claim the full amount of the performance bond.*
>
> *According to their calculations and estimates, for the payment times of Panama and the needs of the project, they understand that they will need 100% of the amount of the performance bond to fund and continue the execution of the project*.[40]

34. The only way to prevent Internacional de Seguros from needing to demand payment of the bond is to, as the Claimants request, order that Respondent suspend the ongoing subrogation proceedings.

35. Second, the Claimants are subject to an indemnification agreement with Swiss Re, the reinsurer of the Bond:

> *13. As reinsurer, Swiss Re is the entity that assumes all of the risk of the bonds, including the risk of noncompliance of a contractor and the risk of subrogation. Swiss Re, via Westport Insurance Company, signed a general indemnity agreement with IBT, in virtue of which it has the right to request additional collateral from IBT, to compensate for its risk, or to ask IBT to reimburse it any sums paid as a result of the execution of any bond.*[41]

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39 Declaration of Daniel Toledano, ¶ 17 (**Anexo 24**).

40 Email from Mariano Viale to Daniel Toledano (**Appendix 3 to the Declaration of Daniel Toledano**), PDF p. 85 ("*El Viernes me pidió y tuve una llamada con Swiss Re (departamento de siniestros) donde me anticiparon que IS y SR están avanzando con el Mingob para la selección de contratista que terminara el trabajo, confirmación de presupuesto y fondos del Mingog [sic] para avanzar, etc. Al mismo tiempo también me anticiparon que van a enviar carta a IBT para reclamar el monto completo de la fianza de cumplimiento. De acuerdo a sus cálculos y estimaciones, por los tiempos de pago de Panamá y necesidades del proyecto, entienden que van a necesitar el 100% del monto de la fianza de cumplimiento para fondear y continuar la ejecución del proyecto*.") (**Anexo 24**).

41 Declaration of Daniel Toledano, ¶ 13 (*citing* Westport Insurance Co. Indemnification Agreement) ("*13. Como reaseguradora, Swiss Re es la entidad que asume todos los riesgos de las fianzas, incluyendo el riesgo de incumplimiento del contratista y el riesgo de subrogación. Swiss Re, a través de la Westport Insurance Company, firmó un acuerdo de indemnización general con IBT, en virtud del cual tiene derecho a solicitar*

36. The indemnification agreement, executed by Westport Insurance Corporation on behalf of Swiss Re, covers "*all Bonds that have been and may hereafter be applied for or executed on behalf of any of the undersigned indemnitors…and any successors, any affiliates, any subsidiaries, any joint venture with others….regardless of the jurisdiction of any such Bond or Bonds*."[42] IBT Group, LLC, the 99% owner of IBT LLC,[43] is a signatory to the indemnification agreement with Westport, which thus binds both Claimants.

37. The indemnification agreement provides that the indemnitors "*shall exonerate, hold harmless and indemnify the Surety from and against any and all Loss*."[44] For the purposes of the indemnification agreement, Loss is defined as:

> *any liability, loss, costs, damages, attorneys' fees, consultants' fees, and other expenses, including interest, which the Surety may sustain or incur by reason of, or in consequence of, the execution of the Bonds (or any renewals, continuations or extensions). Loss includes but is not limited to the following: (a) sums paid or liabilities incurred in the settlement of claims; (b) expenses paid or incurred in connection with the investigation of any claims; (c) sums paid in attempting to procure a release from liability; (d) expenses paid or incurred in the prosecution or defense of any suits; (e) any judgments under the Bonds; (f) expenses paid or incurred in enforcing the terms of this Agreement; (g) sums or expenses paid or liabilities incurred in the performance of any Bonded contract or related obligation; and (h) expenses paid in recovering or attempting to recover losses or expenses paid or incurred. Loss expressly includes attorney fees incurred in defending claims, protecting the Surety's interests in any bankruptcy or insolvency proceeding, arranging for the Surety's performance of its obligations, evaluating, settling, and paying claims, seeking recovery under the terms of this Agreement from the Indemnitors, and pursuing the Surety's common law rights to*

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garantías adicionales a IBT, para compensar su riesgo, o pedir a IBT que le reembolse las sumas pagadas como resultado de la ejecución de cualquier fianza.") (**Anexo 24**).

42 Westport Insurance Corporation, General Indemnity Agreement, p. 1 (**Appendix 2 to the Declaration of Daniel Toledano**), PDF p. 76 (**Anexo 24**).

43 *See* Amended Request for Arbitration, ¶ 8.

44 Westport Insurance Corporation, General Indemnity Agreement, p. 1, ¶ 2 (**Appendix 2 to the Declaration of Daniel Toledano**), PDF p. 76 (**Anexo 24**).

> *seek recovery of losses from others, including third parties.*[45] (emphases added).

38. The indemnification agreement entitles Swiss Re to (i) demand collateral security, upon which "*the Indemnitors shall immediately deposit with the Surety a sum of money as collateral security on the Bonds*;"[46] (ii) declare the Indemnitors in default in the event of "*notice of a claim, breach or default under a Bonded contract*;"[47] (iii) the release of "*all liability for actions and omissions relating to the work of the Bonded contract*" in the event of the Surety taking possession to complete the work of the Bonded contract;[48] and (iv) "*immediate reimbursement of any and all Loss under this Agreement*."[49].

39. Swiss Re's right to demand collateral security can be triggered by, among others, both "*any notice of default, claim, or lawsuit asserting liability*" and "*a material change in the financial condition of any of the Indemnitors*,"[50] and should be "*equal to the liquidated amount stated in any claim or demand plus the amount that the Surety deems sufficient to cover the Surety's estimate of the costs and expenses to defend, investigate and adjust the claim or demand.*"[51] In the case of the CEFERE Bond, therefore, Swiss Re had the right to demand more than USD 13 million in collateral security as of the moment the Respondent issued its formal execution notice.

40. The only way to revoke the right of Swiss Re to demand additional collateral or reimbursement under the indemnification agreement is to, as the Claimants request, order that the Respondent withdraw its formal execution of the Bond. That action would remove the triggering event for IBT's obligations under the indemnification agreement.

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45 *Id*.

46 *Id*. ¶ 3.

47 *Id*. ¶ 4.

48 *Id*. ¶ 8, PDF pg. 77.

49 *Id*. ¶ 9.

50 *Id*. ¶ 3, PDF p. 76.

51 *Id*.

41. As Sr. Toledano explains, such indemnification agreements are common practice when a reinsurer covers bonds issued by a local insurance company.[52] It is not, therefore, the case that the Claimants are absolved from any liability under the CEFERE Bond simply because Internacional de Seguros has opted to subrogate the Contract.

C. The Execution of the Bond and the Imposition of the Disqualification have Already Harmed the Claimants' Business

42. The execution of the Bond and the imposition of the disqualification have already harmed the Claimants' business.

43. As Sr. Toledano explains, and as is evident from the provisions of the indemnification agreement, the Claimants were subject to financial liability from the moment Mingob issued a formal execution notice on Internacional de Seguros, whether or not Internacional de Seguros opted to pay the Bond or subrogate the Contract. That Internacional de Seguros has subrogated the Contract does not abrogate that liability.

44. Indeed:

> *20. When a bond is executed, insurance companies automatically view the contractor as a risk. In the case of IBT, another reinsurer, Liberty Mutual, has been in contact with us through Sr. Viale to request additional guaranties and/or collateral for the bonds that it reinsures with IBT as a result of another project in Panama following the State's intention to execute the CEFERE Bond*.[53]

According to Sr. Toledano, such requests are not uncommon.[54]

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52 Declaration of Daniel Toledano, ¶ 13 (**Anexo 24**).

53 *Id*. ¶ 20 ("*Cuando se ejecuta una fianza, las compañías de seguros ven automáticamente al contratista como de riesgo. En el caso de IBT, otra reaseguradora, Liberty Mutual, se ha puesto en contacto con nosotros a través del Sr. Viale para solicitar garantías y/o colateral adicional para las fianzas que reasegura con IBT como resultado de otro proyecto en Panamá a raíz de la intención del estado de ejecutar la fianza CEFERE*.")

54 *Id*. ¶ 21.

45. This harm is amplified by the cross-indemnity clauses contained in many of IBT's indemnification agreements, which establish that one default can be treated as a default in any other bond.[55]

46. Furthermore, the execution of the Bond has already had and will have much more impact in the future on IBT's creditworthiness and interest rates. As Appelrouth, Farah & Co., IBT's auditors, explain:

> *If the Government of Panama were successful in its claim against the bonding company as it relates to the CEFERE project, it would cause significant harm to IBT, LLC's ability to obtain the bonding credit needed to pursue future projects. Further, IBT, LLC's finances could be severely impacted by the payments that would need to be made in connection to the indemnification agreement between IBT, LLC and the surety company. Finally, if the claim against the bonding company were successful, IBT, LLC could be declared "in default" of several debt covenants, some of which involve other affiliates of IBT, LLC. As a result, several affiliates of IBT, LLC could also be severely impacted if the Government of Panama were to successfully claim the performance bond on the project.*[56]

These cascading impacts are impossible to fully quantify, and are amplified by the fact that IBT has never had a bond called against it. Sr. Toledano explains that, in his ten years with IBT Group, "*no bond of any type has ever been executed against IBT for any other project*."[57]

47. In addition, the disqualification of both Claimants from operating in Panama, and especially the publication of that disqualification in PanamaCompra (as well as the publication of the execution of the Bond on PanamaCompra), have had far-reaching impacts on the Claimants' business worldwide. As Sr. Toledano explains, "*[i]n many of the countries in which IBT operates, the reputation of a company plays an important role in whether [it] is able to*

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55 *Id*.

56 Letter from Appelrouth, Farah & Co., P.A. to Daniel Toledano (**Appendix 4 to the Declaration of Daniel Toledano**), PDF p. 87 (**Anexo 24**).

57 Declaration of Daniel Toledano, ¶ 18 ("En los diez años que he trabajado para IBT Group, nunca se ha ejecutado una fianza de cualquier tipo en contra IBT por ningún otro proyecto.") (**Anexo 24**).

secure new projects."[58] In addition, "*it is common that States, when convening a tender, include a requirement that the bidder affirm that it is not subject to disqualification in any other country*."[59]

48. The disqualification of the Claimants thus has severe implications for their ability to obtain new projects outside Panama.

III. THE TRIBUNAL HAS THE POWER TO GRANT THE PROVISIONAL MEASURES REQUESTED

49. Respondent erroneously argues that the provisional measures Claimants request fall within the prohibition in Article 10.20(8) of the TPA.[60] That prohibition reads, "*A tribunal may not . . . enjoin the application of a measure alleged to constitute a breach referred to in Article 10.16*."[61]

50. The text of Article 10.20(8) is clear. The prohibition focuses on the measure alleged to constitute a breach of the state's international obligations. It does not refer to any other, subsequent measures the state may take after the breach. Furthermore, Article 10.20(8) prohibits enjoining "*the application of*" the breaching measure. The ordinary meaning of this phrase is that any injunction by the Tribunal must leave the breaching measure in force.

51. Thus, Article 10.20(8) prohibits a tribunal from ordering the restoration and continuation of the *status quo* that prevailed before the state took the measure in alleged breach of its obligations. For example, where the alleged breach is the direct expropriation of an investment, this provision would prohibit the tribunal from ordering the state to return the investment to the investor, and to permit the investor to resume operating it for the duration of the arbitration. Similarly, where the alleged breach is the improper termination of a contract

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58 *Id*. ¶ 6 ("*En muchos de los países en los que opera IBE, la reputación de una impresa juega un papel importante en si una empresa es capaz de asegurar nuevos proyectos*.")

59 *Id*. ¶ 7 ("*Además, es común que los Estados, al convocar a una licitación, incluyan el requisito de que el licitante afirme que no está sujeto a una descalificación en ningún otro país*.") Sr. Toledano discusses one such example for a tender in Colombia.

60 *See* Respuesta, ¶¶ 21-31.

61 TPA, Art. 10.20(8) (**Exhibit CLA-1 to the Amended Request for Arbitration**).

(as is the case in the instant dispute), this provision would prohibit the tribunal from ordering the restoration and specific performance of the contract. In this way, Article 10.20(8) of the TPA in fact makes explicit the dominant interpretation of Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules.[62]

52. The two cases that Respondent cites that applied the identically-worded NAFTA Article 1134 confirm the scope of the prohibition.[63]

53. In *Feldman v. Mexico*, the claimant alleged that Mexico breached the NAFTA beginning in December 1997 by denying tax rebates for cigarettes that its investment exported.[64] The claimant requested as an interim measure that the tribunal order Mexico "*immediately to cease and desist for the duration of this arbitration from any interference with Claimant or his property or with [the investment's] assets or revenues*."[65] Since this broad request would require Mexico no longer to deny export tax rebates to the claimant's investment, and restore the tax regime that existed before November 1997, the tribunal

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62 *See* C. Schreuer, *The ICSID Convention: A Commentary* (2009), Article 47, p. 778 ¶ 73 (distinguishing between "the *status quo* existing during the normal execution of the contract or at the time when the controversy arose," and stating that the *travaux préparatoires* of the Convention reveal that the Chairmen preferred the latter) (**Anexo 9 (expanded)**); *Tanzania Electric Supply Co. Ltd. v. Independent Power Tanzania Limited*, ICSID Case No. ARB/98/8, Decision on the Respondent's Request for Provisional Measures, 20 December 1999, ¶¶ 15-16 ("*In our view, Mr Hawkins was right in his submission that what IPTL sought, in reality, was specific performance of the Agreement [the termination of which gave rise to the dispute] and/or an interim mandatory injunction requiring such performance. . . . We do not go so far as to conclude that 'provisional measure' under Rule 39 can never include recommending the performance of a contract in whole or in part; it is not necessary for us to go that far. But where what is sought is, in effect, performance of the Agreement, and where the only right said to be preserved thereby is the right to enjoy the benefits of that Agreement, we consider that the application falls outside the scope of Rule 39, and therefore is beyond our jurisdiction to grant*.") (**Anexo 28**).

63 *See* Respuesta, n.36.

64 *See* Notice of Arbitration from Marvin Roy Feldman Karpa, 30 April 1999, pp. 6-7 (**Anexo 29**).

65 **App. RL-3**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Procedural Order No. 2 dated May 3, 2000, ¶ 3.

appropriately found that it fell within the prohibition contained in NAFTA Article 1134.[66]

54. Likewise, in *Pope & Talbot v. Canada*, the claimant alleged that Canada violated the NAFTA beginning in 1996 by subjecting the claimant's lumber exporting business to an export control regime, and decreasing pursuant to this regime the amount of lumber that the claimant's business was permitted to export each year.[67] The claimant requested an interim measure "*to provide that the Investment's annual softwood lumber allocation from Canada not be decreased pending a final award of the Tribunal*."[68] Canada pointed out that such an interim order would effectively "*take the Claimant out of the [export control] regime*," restoring the regulatory situation that prevailed before 1996.[69] The tribunal therefore found that such a request was captured by the prohibition in NAFTA Article 1134.[70]

55. In this case, Claimants argue that Respondent breached the TPA and its Investment Agreement with Claimants' investment, the CEFERE Consortium, by: (1) frustrating the Consortium's performance of the Contract dated 11 May 2017 from the outset; (2) administratively terminating the Contract on 16 January 2020; and (3) denying justice to the Consortium through its courts in proceedings culminating on 7 April 2020.[71] In order to fall within the prohibition in TPA Article 10.28(8), Claimants would have to request that the Tribunal order Respondent to restore the *status quo* that existed before it took these measures. In other words, Claimants would have to request an order that

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66 *Id.* ¶ 5.

67 *See Pope Talbot, Inc. v. Canada*, UNCITRAL, Notice of Arbitration, 25 March 1999, pp. 2-3 (**Anexo 30**).

68 *Id.* p. 3.

69 *Pope & Talbot, Inc. v. Government of Canada*, UNCITRAL, Government of Canada Statement of Defence, 8 October 1999, ¶¶ 121-22 (**Anexo 31**).

70 **Ap. RL-4**, *Pope & Talbot Inc. v. Government of Canada,* Ruling by Tribunal on Claimants' Motion for Interim Measures.

71 *See* Claimants' Amended Request for Arbitration, ¶¶ 50, 52, 56. *Cf.* Claimants' Request for Provisional Measures, ¶ 51 ("Nevertheless, Mingob administratively terminated the Contract illegally.").

Respondent reinstate the Consortium to the Contract and perform it in good faith.

56. However, Claimants are not making such a request. They are not requesting that the Tribunal order reinstatement and specific performance of the Contract.[72] Claimants are instead requesting that the Tribunal enjoin Respondent from taking additional measures after its breaches that will further aggravate the dispute.[73] This request therefore does not fall within the prohibition in TPA Article 10.20(8).

57. Respondent's argument to the contrary fails. Significantly, Respondent does not argue that either of the measures that Claimants are requesting the Tribunal to enjoin – the execution of the bond and the disqualification of Claimants from further public contracting in Panama – itself is a "*measure alleged to constitute a breach referred to in Article 10.16*," as required by the text of Article 10.20(8) for the prohibition to apply.[74] Respondent is correct to refrain from making such an argument, because Claimants have nowhere alleged that either measure is or would be a breach of the TPA or the Investment Agreement. This fact is sufficient to dispose of Respondent's objection.

58. Respondent proposes an interpretive loophole to overcome this fact. It appears to argue that the words "*application of*" in the phrase "*application of a measure alleged to constitute a breach*" broaden the prohibition beyond the breaching measure itself. Respondent suggests that the "*application of*" the breaching measure encompasses any and all other measures taken after the breaching

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72 *Cf. Tanzania Electric Supply Co. v. Independent Power Tanzania Limited*, ICSID Case No. ARB/98/8, Decision on the Respondent's Request for Provisional Measures, 20 December 1999 (**Anexo 28**).

73 *See* Respuesta, ¶¶ 18-19 (execution of the bond allegedly occurred on 14 August 2020, and Claimants' disqualification went into effect on 27 May 2020).

74 *See generally id*. ¶¶ 3, 21-31.

measure that can be characterized as the "*effects generat[ed]*" by the breaching measure under the host state's domestic law.[75]

59. Respondent distorts the ordinary meaning of the text. The phrase "*application of"* a breaching measure simply means that the measure in question is in force. If, as in this case, the breaching measure is the termination of a contract, the 'application of' the breaching measure means that the contract remains terminated. As noted above, the provisional measures requested by Claimants will not result in the reinstatement of the Contract.

60. Furthermore, Respondent's interpretation has no obvious limiting principle. A measure by a state that breaches the TPA will typically 'generate' any number of 'effects' under the state's domestic law. For example, a breaching measure that consists of the levying of a confiscatory tax on the investment may precipitate enforcement proceedings to seize the investment's assets, criminal prosecution against the investment's officers for tax evasion, bankruptcy proceedings with respect to the investment, or any combination or sequence of the above proceedings, each of which themselves will trigger further consequences by operation of law. Respondent's interpretation of the prohibition in TPA Article 10.20(8) contradicts the prohibition's clear text, and improperly shifts the focus away from the breaching measure to subsequent measures by the state.

61. Therefore, TPA Article 10.20(8) does not prohibit the Tribunal from granting the provisional measures sought in Claimants' Request.

IV. CLAIMANTS ARE ENTITLED TO THE PROVISIONAL MEASURES REQUESTED

62. Claimants' request meets the requirements for the granting of provisional measures. Claimants have established that the Tribunal has *prima facie* jurisdiction over the dispute between the Parties, and the provisional measures

75 *See id*. ¶¶ 3, 24.

sought are urgently necessary to protect the Claimants' right to non-aggravation of the dispute. Respondent's arguments to the contrary fail.

A. The Claimants have demonstrated that the Tribunal has *prima facie* Jurisdiction over the dispute

63. Claimants have amply demonstrated that the Tribunal has *prima facie* jurisdiction over the dispute. Claimants' Amended Request for Arbitration showed that the jurisdictional requirements of the TPA and ICSID Convention are satisfied.[76] Claimants' letter to the ICSID Secretariat of the same date (with a copy sent to Respondent) explained that Claimants had complied with their obligation under the TPA to notify Respondent of their intent to begin arbitration as far as was possible under the circumstances at the time.[77] In response to Respondent's letter to the ICSID Secretariat dated 4 September 2020 and accompanying email dated 7 September 2020 alleging that Claimants' service of the notice of intent was deficient, Claimants sent a letter further demonstrating that the steps they took to provide actual notice to Respondent of the dispute were the only possible ones they could have taken at the time, and that they were sufficient to give Respondent notice of the dispute.[78] Indeed, Respondent has not alleged, nor could it plausibly allege, that the steps Claimant took did not give it actual notice of the substance of the dispute or prevented it from negotiating in good faith a settlement with the Claimants.[79] Thus, Claimants have established the *prima facie* jurisdiction of the Tribunal.

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76 *See* Amended Request for Arbitration, ¶¶ 58-77.

77 *See* Claimants' Letter to ICSID dated 11 August 2020. For the avoidance of doubt, Claimants do not concede that the TPA's requirements concerning the notice of intent constitute requirements of jurisdiction rather than of admissibility.

78 *See* Claimants' Letter to ICSID dated 9 October 2020.

79 *See Bayindir Insaat Turizm Ticaret*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶¶ 90-103 (finding that formalistic deficiencies in claimant's notice to the host state did not deprive the tribunal of jurisdiction, because the state was fully aware of the dispute and could have negotiated with the claimant) (**Anexo 32**).

64. In its Respuesta, Respondent simply buries its head in the sand. It argues that the Claimants did not present jurisdictional arguments "*[i]n their Request*",[80] by which it means Claimants' Request for Provisional Measures.[81] Thus, Respondent essentially complains that Claimants have not reproduced their jurisdictional arguments from their Amended Request for Arbitration and multiple letters to ICSID in their Request for Provisional Measures.

65. There is no requirement that a party seeking provisional measures must demonstrate the tribunal's *prima facie* jurisdiction in the request for provisional measures itself, as opposed to in previous pleadings and filings that are already in the record of the proceedings. Indeed, procedural economy would counsel against imposing such a formalistic requirement. Respondent's argument fails.

B. The Legal Standard for Provisional Measures

66. TPA Article 10.20(8), ICSID Convention Article 47, and ICSID Arbitration Rule 39 establish the requirements for the granting of provisional measures. TPA Article 10.20(8) provides:

> *A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 10.16. For purposes of this paragraph, an order includes a recommendation*.

67. ICSID Convention Article 47 meanwhile provides:

> *Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.*

68. Finally, ICSID Arbitration Rule 39(1) provides:

> *At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights*

80 *See* Respuesta, ¶ 76.

81 *See id.* ¶ 1.

> *be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.*

69. These standards reveal three requirements to be met for a Tribunal to issue provisional measures: (1) the measures must concern the "rights" of the requesting party; (2) the measures must be necessary to preserve those rights; and (3) the need for the measures must be urgent.[82] Claimants briefly discuss these requirements below.

70. Rights: A party to a pending dispute has the right to non-aggravation of the dispute by the other party. Although Respondent dismisses this as an "*ambiguous procedural right[]*,"[83] it is well-established among tribunals.[84] Significant for the purpose of Claimants' Request, this right requires that a

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82 *See* Request, ¶¶ 44-48.

83 Respuesta, ¶ 58 ("*las Demandantes formulan su petición a partir de derechos procesales ambiguos*").

84 *See Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, ¶ 133 (**Anexo 16 to the Request**) ("*Claimants' rights to the non-aggravation of the dispute and the preservation of the* status quo *[are] self-standing rights*."); *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures, 29 June 2009, ¶ 62 ("*The existence of the right to the preservation of the* status quo *and the non-aggravation of the dispute is well-established since the [1939] case of the Electricity Company of Sofia and Bulgaria*.") (**Anexo 33**); *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos v. The Argentine Republic*, ICSID Case No. AR/09/1, Decision on Provisional Measures, 8 April 2016, ¶ 177 ("*As a number of tribunals have found, the rights which may be protected include procedural rights, such as the preservation of the integrity of the proceedings and the preservation of the* status quo *and non-aggravation of the dispute.*") (**Anexo 34**); *Churchill Mining PLC and Planet Mining Pty Ltd. v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 9, 8 July 2014, ¶ 90 ("*It is undisputed that the right to the preservation of the* status quo *and the non-aggravation of the dispute may find protection by way of provisional measures*.") (**Anexo 35**); *Amco Asia Corp. and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Request for Provisional Measures, 9 December 1983, ¶ 5 ("*All these remarks do by no means weaken the good and fair practical rule, according to which both parties to a legal dispute should refrain, in their own interest, to do anything that could aggravate or exacerbate the same, thus rendering its solution possibly more difficult.*") (**Anexo 36**).

party refrain from taking measures during the proceeding that "*result in increased or more extensive damage to a counter-party*."[85]

71. Necessity: Respondent offers an overly narrow interpretation of the necessity requirement for provisional measures under the ICSID Convention and ICSID Rules.[86] It argues that provisional measures are necessary only when they will prevent irreparable loss, which is defined as harm that cannot be made good by an eventual award of damages. However, as the tribunal in *Perenco v. Ecuador* stated, "*Article [47 of the ICSID Convention] does not lay down a test of irreparable loss and the authorities do not warrant so narrow a construction*."[87] Respondent agrees that Article 47 of the ICSID Convention was drafted based on the practice of the ICJ.[88] Indeed, the ICJ "*often granted provisional measures to avoid irreparable harm, although damages could be awarded in order to compensate the alleged prejudice*."[89] This is because "*irreparable prejudice in the international context . . . is not restricted to cases where the harm cannot be compensated by a monetary award*."[90]

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85 **Ap. RL-12**, Gary B. Born, INTERNATIONAL COMMERCIAL ARBITRATION (Kluwer Law International, 2nd ed., 2014) p. 2489.

86 *See* Respuesta, ¶¶ 41-44.

87 *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009, ¶ 43 (**Anexo 15 to the Request**).

88 Respuesta, ¶ 34.

89 *CEMEX Caracas Investment BV and CEMEX Caracas II Investments BV v Venezuela*, ICSID Case No ARB/08/15, Decision on the Claimants' Request for Provisional Measures, 3 March 2010, ¶ 47 (**Anexo 38**).

90 M. Kinnear, A. K. Bjorklund, et al., *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (2006), p. 1134-13 (**Anexo 39**); *see also Behring International, Inc. v. Islamic Republic Iranian Air Force*, Award No. ITM/ITL 52-382-3, June 21, 1985, 8 Iran-U.S. C.T.R. 238, 276 ("*the concept of irreparable prejudice in international law arguably is broader than the Anglo-American concept of irreparable injury. While the latter formulation requires a showing that the injury complained of is not remediable by an award of damages (…), the former does not necessarily so require.*") (**Anexo 40**); *Sergei Paushok et al. v. Government of Mongolia*, UNCITRAL, Order on Interim Measures, 2 September 2008, ¶ 68 ("*in international law, the concept of 'irreparable prejudice' does not necessarily require that the injury complained of be not remediable by an award of damages.*") (**Anexo 41**). Even if the standard required Claimants to show harm that cannot be compensable by damages, however, it is clear that the execution of a Bond always meets that standard. As

72. In fact, the necessity test requires only that the provisional measure be necessary to prevent "*serious or grave damage*" to the requesting party, "*not harm that is literally 'irreparable.'*"[91] As Born notes, "*the injury required for provisional measures is not 'irreparable' harm in what is perceived to be the Anglo-American sense, but instead only a showing of grave, substantial, or serious injury.*"[92] Professor Berger affirms:

> *To preserve the legitimate rights of the requesting party, the measures must be 'necessary'. This requirement is satisfied only if the delay in the adjudication of the main claim caused by the arbitral proceedings would lead to a 'substantial' (but not necessarily 'irreparable' as known in common law doctrine) prejudice for the requesting party.*[93] (emphases added).

73. Urgency: The urgency requirement does not, as Respondent contends, require that the harm to be prevented by the provisional measures be "*imminent*".[94] As the *PNG* tribunal stated, "*the requesting party need not prove that 'serious' harm is certain to occur. Rather, it is generally sufficient to show that there is a material risk*" that the harm will occur before the Tribunal issues its final award.[95]

Professor Berger explains, "*the disruption to business relations and the waste resulting from such acts cannot be truly compensated by damages*." K. P. Berger, *International Economic Arbitration* (1993), p. 336 (**Anexo 45**).

91 *Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. v. Romania*, ICSID Case No. ARB/15/31, Decision on Claimants' Second Request for Provisional Measures, 22 November 2016, ¶ 72 (**Anexo 42**); *Rizzani de Eccher S.p.A., Obrascón Huarte Lain S.A., and Trevi S.p.A. v. State of Kuwait*, ICSID Case No. ARB/17/8, Decision on Provisional Measures, 23 November 2017, ¶ 103 (**Anexo 43**); *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/33/13, Decision on the Claimant's Request for Provisional Measures, 21 January 2015, ¶ 109 ("*In the Tribunal's view, the term 'irreparable' harm is properly understood as requiring a showing of a material risk of serious or grave damage to the requesting party, and not harm that is literally 'irreparable' in what is sometimes regarded as the narrow common law sense of the term.*") (**Anexo 44**).

92 **RL-12** Born, *supra* note 85, p. 2470 (emphasis added); *see id.* p. 2471.

93 K.P. Berger, *International Economic Arbitration* (1993), p. 336 (**Anexo 45**).

94 *See* Respuesta, ¶¶ 4, 41, 56-57.

95 *PNG Sustainable v. Papua New Guinea*, *supra* note 91, ¶ 111 (emphasis added). *See also* Schreuer, *supra* note 62, p. 775, ¶ 63 (urgency means that the question cannot await the outcome of the award on the merits).

74. As demonstrated below, Claimants' request meets these three requirements under the TPA, ICSID Convention and ICSID Rules.[96]

C. The Tribunal should enjoin Respondent from executing the Bond

75. As noted above, a provisional measure may preserve a party's right to non-aggravation of the dispute by "*forbidding . . . actions that result in increased or more extensive damage to a counter-party*."[97] Respondent's efforts to execute on the Bond aggravate the dispute by creating a material risk of substantial financial harm to Claimants, and by substantially undermining Claimants' ability to maintain its businesses and relationships with insurers outside of Panama.

1. Respondent's execution of the bond would aggravate the dispute by causing serious financial injury to the Claimants

76. International commercial arbitration tribunals adjudicating disputes regarding the termination of construction contracts typically grant a contractor's request for a provisional measure enjoining the respondent from collecting or executing

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96 Respondent suggests in a footnote that Claimants must also prove "*a reasonable likelihood of success on the merits of the dispute and that the requested measures will not result in harm to the other party.*" *See* Respuesta, n.64. This is incorrect. These two factors are explicitly required under the UNCITRAL Rules (Article 26(3)(a)), but do not appear in the ICSID Rules. Respondent's cited authority, Mouwad and Silbert, admits that these are "*two additional criteria*" that have been considered exceptionally in "*some cases*". **Ap. RL-13**, C. Mouawad and E. Silbert, A Guide to Interim Measures in Investor-State Arbitration, p. 386. ICSID tribunals rarely consider these factors, and particularly avoid the 'reasonable likelihood of success on the merits' factor, because it invites them to prejudge the merits of the dispute. *See* D. Goldberg, Y. Kryvoi, and I. Philippov, *2019 Empirical study: Provisional measures in investor-state arbitration* (British Institute of International and Comparative Law 2019), pp. 22-23 (**Anexo 46**). In any event, Claimants have satisfied these factors. The Amended Request for Arbitration establishes Claimants' strong *prima facie* case on the merits. The provisional measures sought would impose a minimal burden on Respondent. *Cf. infra*, ¶ 48. Indeed, Respondent has not alleged any harm it would suffer as a result of the measures, and in any event, this would pale in comparison to the reputational and financial harm that Claimants' businesses throughout Latin America would suffer if the measures are not granted.

97 *See* Born, *supra* note 85, p. 2488-89.

on any advance payment or performance bond provided by the contractor.[98] Such tribunals find that allowing the respondent to collect on the bond while the legality of the contract termination is still being adjudicated would only aggravate the dispute by causing grave financial damage to the contractor.[99]

77. The tribunal in *Saipem v. Bangladesh*, a rare example of an investor-state tribunal ruling on such a request, took the same approach.[100] Notably, in that case, as here, the claimant filed the request for provisional measures after the respondent's state-owned company had already sent a letter that began the process of calling the bond under domestic law.[101] The tribunal found that if the state-owned company succeeded in cashing the bond from the bank, the bank would invariably seek indemnification from the claimant.[102] There was "*a risk of irreparable harm if Saipem has to pay the amount of the Warranty Bond*," and therefore the tribunal ordered Bangladesh to "*take the necessary steps to ensure that [the state-owned company] does not proceed to encash the Warranty Bond*."[103] The tribunal concluded that these provisional measures

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98 *See* ICC Case No. 21909/ASM (EA), Order (unpublished), ¶¶ 11.41-11.59 (**Anexo 47**); ICC Case No. 24643/JPA (AE), Order (unpublished) (**Anexo 48**); E. Schwartz, "The Practices and Experience of the ICC Court," ICC Bulletin (1993), pp. 26-27 (**Anexo 49**).

99 *See, e.g.* ICC Case No. 21909/ASM (EA), *supra* note 98, ¶¶ 11.48 ("*In the meantime, were the Respondent to successfully collect under the bonds, this would exacerbate the parties' dispute and lead to related litigation between ASERTA and Applicant 1 with all the attendant costs. I consider that this would constitute serious harm.*"), 11.59 ("*Under international principles, irreparable harm in the American sense – i.e., truly irreparable harm that cannot be compensated by damages – is not required. . . . Under international principles, an applicant rather needs to show a 'material risk of serious damage' . . . and, as noted above (¶ 11.48), I consider the Applicants have done this.*").

100 *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, ¶¶ 181-82 (**Anexo 18 to the Request**).

101 *See id.* ¶¶ 15-16, 180.

102 *Id.* ¶¶ 177, 181.

103 *Id.* ¶¶ 182-83.

"*prevent[ed] an increase of the harm allegedly suffered by one of the parties*."[104]

78. As explained above, the Claimants face liability for payment under the Bond, regardless of Internacional de Seguros' decision to subrogate the Contract, through (i) Internacional de Seguros' decision this week that it will call on the Bond to cover the costs of the substitute contractor and (ii) via the Claimants' indemnification agreements with the reinsurer of the Bond. Either payment would be sufficient to significantly harm the Claimants' financial interests. These payments can be prevented only if the execution of the Bond, including the remainder of the subrogation process, is suspended.

79. Furthermore, as explained by Claimants' auditor:

> *Without the ability to obtain a performance and payment bond from their Surety company, Contractors throughout the Americas are severely hampered in their ability to pursue public construction contracts. In addition, many larger private projects are requiring the contractor to obtain surety credit as a condition of financing on the project. As a company primarily focused on public sector construction projects, IBT, LLC would be particularly affected by the inability to obtain future bonds for the public sector jobs they specialize in.*[105]

2. Respondent's existing efforts to execute the bond aggravate the dispute by substantially threatening Claimants' business outside of Panama and relationships with insurers

80. Beyond the specific case of bond execution, tribunals have more broadly enjoined measures that were a consequence of the alleged breach but, unlike the breach itself, would threaten the claimant's ability to continue its operations in the host state and abroad, including by damaging claimant's relationships with critical third-party stakeholders.

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104 *Id.* ¶ 185.

105 *See* Letter from Appelrouth, Farah & Co., P.A. to Daniel Toledano (**Appendix 4 to the Declaration of Daniel Toledano**), PDF p. 87 (**Anexo 24**).

81. For example, in *Merck Sharpe & Dohme (I.A.) LLC v. Ecuador*, the state's alleged breach consisted of a denial of justice in litigation against the claimant's investment by a private party.[106] The claimant requested provisional measures enjoining the enforcement of the anticipated judgment resulting from the litigation.[107] It explained that the potential seizure of its Ecuadorian branch's assets would "*'swiftly' destroy its investment in Ecuador*" by causing the branch to "*lose key customers, employees, suppliers, distributors and leaseholders who would immediately seek new reliable suppliers*"; furthermore, the enforcement of the judgment against its assets "*in other countries [would] caus[e] substantial and irreparable harm to the Claimant's business.*"[108] The tribunal found that it could not ignore Claimants' "*worst case scenario*," and granted claimant's request.[109]

82. Similarly, in *Chevron v. Ecuador* (PCA Case No. 2009-23), where the alleged breach consisted of a denial of justice in litigation by private parties against the claimant, the tribunal issued provisional measures that required Ecuador to suspend or cause to be suspended the recognition or enforcement of the judgment resulting from the litigation. The tribunal "*was seeking expressly to preclude [the enforcement against claimant's assets] not only within but also outside Ecuador, currently in the state courts of Canada, Brazil and Argentina and possibly in the near future also in the state courts of other countries*."[110]

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106 *See Merck Sharpe & Dohme (I.A.) LLC v. Ecuador*, Notice of Arbitration, 29 November 2011, ¶¶ 147-59 (**Anexo 50**).

107 *See Merck Sharpe & Dohme (I.A.) LLC v. Ecuador*, PCA Case No. 2012-10, Decision on Interim Measures, 7 March 2016, ¶ 29 (**Anexo 51**).

108 *Id.* ¶ 43.

109 *Id.* ¶ 71 & p. 26.

110 *See Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, Fourth Interim Award on Interim Measures, 7 February 2013, ¶ 80 (**Anexo 52**). In other cases, tribunals enjoined the coercive enforcement of tax debts (where the imposition of the tax was the alleged breach) because, while the tax itself did not threaten the survival of the claimants' investments, the seizure of the investments' assets would likely cause them to go out of business. *See Perenco v. Ecuador*, *supra* note 87, ¶¶ 53, 62-63; *Burlington v. Ecuador*, *supra* note 84, ¶¶ 65, 83-84.

83. As Sr. Toledano explains, the threats to the Claimants' business worldwide are numerous: IBT's reputation is harmed by the execution of the Bond, and its creditworthiness is affected by the execution and the cascading effects on IBT's interest rates and cross-indemnifications. These harms, while they exist already, will only be amplified if the requested measures are not granted.

3. The execution of the Bond is not a *fait accompli* but a continuing act

84. Respondent's main defense is that "*the execution of the Bond is a fait accompli*," and that Claimants' requested provisional measures therefore "*seek to reverse a fact that has already been consummated*."[111] Respondent is incorrect both as a matter of fact (as explained above) and international law.

85. As explained above, Respondent remains in the process of executing the Bond. Thus, Claimants seek an order enjoining Respondent from completing that process. Tribunals often enjoin states from completing a process that has already begun, if the completion of the process will further aggravate the dispute.[112]

86. With respect to the publication on the PanamaCompra portal since 20 August 2020 of the fact of the execution of the Bond, Respondent's argument ignores the distinction between continuing and completed acts of a State under international law.[113] As the International Law Commission explains, a

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111 *See* Respuesta, ¶¶ 46-51.

112 As mentioned, the *Saipem* tribunal ordered Bangladesh to take steps to ensure that its state-owned company did not encash a performance bond, after the company had already begun the process of calling the bond. *See supra* ¶ 77; *see also Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC EA 2020/130, Emergency Award on Interim Measures, 2 August 2020, ¶¶ 93, 97, 109, 130.4 (ordering "*a stay and suspension of any steps already taken by the Republic to Moldova to . . . terminate the Concession Agreement*" after Moldova "*started the process of termination*") (**Anexo 53**).

113 *See* International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts, U.N.G.A. Res. 56/83, A/56/9(Vol. I)/Corr.4 (2001), Art. 14 (referring to "*an act of a State not having a continuing character*" and "*an act of a State having a continuing character*") (**Anexo 54**). For the avoidance of doubt, Claimants reiterate that they do not maintain that Respondent's actions taken to execute the Bond constitute an internationally wrongful act or its measure in breach of

continuing act consists of state conduct that persists over time, such as when a state maintains in force a legislative provision, or keeps an individual in detention; a completed act consists of one-time conduct, such as when a state takes title to property, even if the (economic) effects of the conduct continue afterwards.[114]

87. Requiring the prospective modification or cessation of a continuing act is not the same as reversing a completed act, as Respondent erroneously suggests. For example, in *Munshi v. Mongolia*, the tribunal ordered the state to suspend the application of certain strict prison rules to the state's detention of the claimant going forward, because these rules had been preventing the claimant from having meaningful access to counsel.[115] The tribunal also stated as a general matter that "*significant human hardship and serious risk to life and health is capable of constituting irreparable harm for as long as such conditions of confinement continue*," thus warranting provisional measures.[116] The fact that the detention of the claimant had begun in the past did not prevent the tribunal from issuing provisional measures with respect to the state's continuing detention going forward.[117]

88. Likewise, Respondent's maintenance of the publication regarding the execution of the bond on PanamaCompra is a continuing act, which began on 20 August 2020 and continues today. As long as the publication remains live and as written, it is causing substantial and irreparable harm to Claimants by impeding their ability to obtain bonds for other public contracts outside of Panama, thereby damaging their overall business. The Tribunal is free to issue

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the TPA in this case.

114 *See* Commentaries to ILC Articles on the Responsibility of States for Internationally Wrongful Acts, U.N.G.A. Res. A/56/10 (2001), p. 60 ¶¶ 3-6 (**Anexo 55**).

115 *See Mohammed Munshi v. The State of Mongolia*, SCC EA 2018/007, Award on Emergency Measures (5 February 2018), ¶¶ 21-22, 46, 63.1 (**Anexo 56**).

116 *Id.* ¶ 44.

117 *See also Igor Boyko v. Ukraine*, PCA Case No. 2017-23, Procedural Order No. 3 on Claimant's Application for Emergency Relief, 3 December 2017 (ordering changes to the condition of claimant's detention going forward) (**Anexo 57**).

provisional measures that modify the way in which Respondent will perform this continuing act going forward, in order to reduce this ongoing harm and prevent further aggravation of the dispute. Thus, the Claimants ask that the Tribunal order that the Respondent amend the posting on PanamaCompra to reflect the Tribunal's order that the execution of the Bond has been suspended.

89. Furthermore, as previously outlined, the fact that Internacional de Seguros opted to subrogate rather than initially paying the Bond, does not mean that the subrogation has been completed and that payment of the Bond is foreclosed. To the contrary, as is obvious from Internacional de Seguros' recent communications with the broker, it intends to require payment despite the ongoing subrogation process.

D. The Tribunal should order Respondent to formally suspend its disqualification order

90. The analysis is largely the same for the disqualification order. The disqualification order aggravates the dispute by causing substantial harm to Claimants' ability to do business outside of Panama. Like the publication on PanamaCompra of the fact of execution of the Bond, the publication of the disqualification order is a continuing act.

91. As Sr. Toledano explains, IBT operates worldwide. In America, IBT Group maintains operations in the United States, Dominican Republic, Ecuador, El Salvador, Panama, and Peru, and has executed projects in other countries including Argentina, Haiti, and Brazil.[118] The reputational harms to IBT caused by the disqualification implicate all of these operations. As Sr. Toledano explains, IBT's ability to obtain new public contracts outside of Panama is directly hindered by its disqualification.[119]

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118 Declaration of Daniel Toledano, ¶ 4 (**Anexo 24**).

119 *Id*. ¶¶ 6-10.

E. The Provisional Measures requested do not require the Tribunal to prejudge the merits of the dispute

92. Respondent argues that by granting Claimants' requested provisional measures, the Tribunal would be prejudging the merits of the dispute.[120] Respondent is incorrect. In fact, Respondent is asking the Tribunal to prejudge the merits of the dispute in its favor by denying Claimants' Request.

93. By granting Claimants' request, the Tribunal would be taking a neutral position regarding the merits of the dispute. Granting the request would not prejudge the merits of the dispute in Claimants' favor, because as explained above, Claimants are not requesting an injunction of Respondent's measures that constitute its breach of the TPA and Investment Agreement, namely the termination of the Contract.[121] By contrast, denying Claimants' request would amount to prejudging the merits of the dispute in Respondent's favor, because it would allow Respondent to take (and continue taking) actions based on the presumption that the measure that is the subject of the dispute – the termination of the Contract – was lawful.

94. Other tribunals have found that enjoining the respondent state from taking additional measures that assume the legality of the measure alleged to be the breach does not amount to prejudging the merits of the dispute in the investor's favor. For example, the tribunal in *Fouad v. Jordan* enjoined Jordan from enforcing the collection of taxes through coercive proceedings and asset freezes, where the imposition of the tax was the alleged breach of the applicable investment treaty.[122] The tribunal explained that it was not prejudging the merits of the dispute:

> *The Tribunal is not required for the purpose of this Application to determine the merits of the parties' respective positions on the legality of the tax measure underlying the dispute. . . . Nor does*

120 *See* Respuesta, ¶¶ 67-70.

121 *See supra*, Section III.

122 *See Fouad Alghanim & Sons Co. et al. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/13/38, Order on Application for the Grant of Provisional Measures, 24 November 2014, ¶¶ 18-19, 24-27, 103-05 (**Anexo 58**).

> *the relief sought in this Application have the potential to prejudge the merits of the substantive dispute. The Claimants do not seek, by way of provisional measures, a determination as to whether the alleged tax debt was properly imposed. Rather, they request that the enforcement of that debt be stayed until the question of whether it was properly imposed can be determined.*[123]

95. The tribunal in *Perenco v. Ecuador* likewise enjoined the enforced collection of a tax, the imposition of which was the subject of the parties' dispute.[124] It found that doing so was consistent with its task "*[a]t this provisional stage*" to avoid "*approach[ing] the issue [of the legality of the tax] on the assumption that either party's contention is correct*."[125]

96. In *PNG Sustainable Development v. Papua New Guinea*, where the parties' dispute arose out of the state's nationalization of claimant's investment, the tribunal enjoined the state from transferring the shares of the nationalized investment to third parties.[126] The tribunal affirmed that there was

> *no risk that the Tribunal's order would pre-judge any of the issues in this case. An order directing the Respondent to refrain from altering the* status quo *with regard to the ownership of OTML shares would not in any way pre-judge any of the Claimant's claims; rather, it would allow the Tribunal to preserve its authority to decide on the merits of the case (should it determine it has jurisdiction), including to order restitutionary relief, if the Tribunal decides that such relief is appropriate in this arbitration.*[127]

97. Thus, where a tribunal does not enjoin the measure constituting the alleged breach, but instead only enjoins the state from taking further measures that assume that the alleged breach was lawful, the tribunal is taking a neutral position rather than prejudging the merits of the dispute in favor of either party.

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123 *Id.* ¶ 52.

124 *See Perenco v. Ecuador*, *supra* note 87, ¶¶ 43, 62-63.

125 *Id.* ¶ 50 (emphasis added); *see also Burlington v. Ecuador*, *supra* note 84, ¶¶ 6, 11-12, 15, 17, 86-88 (enjoining attempt to seize claimant's assets in order to enforce disputed tax debt).

126 *PNG Sustainable v. Papua New Guinea*, *supra* note 91, ¶¶ 33-34, 171.

127 *Id.* ¶ 163.

98. In this case, as explained, a lawful termination of the Contract was a prerequisite for Respondent to execute on the Bond and disqualify Claimants from public contracting. By enjoining Respondent from taking these acts, the Tribunal will avoid leaving in place a situation that assumes that Respondent's termination of the Contract was lawful. At the same time, the Tribunal will not be ordering reinstatement and specific performance of the Contract, which would assume that the termination of the Contract was unlawful. Thus, by granting Claimants' requested provisional measures, the Tribunal would not be prejudging the merits of the dispute in favor of either Party.

99. Finally, Respondent's assertion that by granting the provisional measures sought the Tribunal would "*also be granting a substantial part of the protection requested by the Claimants on the merits of this Arbitration*" is incorrect.[128] The only protection sought by Claimants in this Arbitration is an award of damages.[129] They would not receive any award of damages as a result of their Request for Provisional Measures being granted.

F. The Provisional Measures sought by Claimants would not impermissibly affect the rights of third parties or infringe on Respondent's sovereignty

100. Respondent argues that the provisional measures requested by Claimants will interfere with the rights and obligations of the Insurer, and that this militates against granting the measures.[130]

101. Respondent misconstrues the relationship between third-party rights and provisional measures. Tribunals have been reluctant to order interim measures that restrict the rights of third parties, where the third parties did not obtain their rights as a direct or indirect consequence of the alleged breach. This was

128 Respuesta, ¶ 69 ("*también estaría otorgando parte sustancial de la protección solicitada por las Demandantes en el fondo de este Arbitraje*").

129 *See* Amended Request for Arbitration, ¶¶ 83-84. Indeed, Respondent itself emphasizes this fact in its argument that the Claimants do not face irreparable harm. *See* Respuesta, ¶¶ 43-45.

130 *See* Respuesta, ¶¶ 4, 71-72.

the case in *Plama v. Bulgaria*, cited by Respondent.[131] There, the third parties were creditors in bankruptcy proceedings against the claimant's investment. There was no allegation that the investment's debt to these creditors arose in any way as a result of alleged breaches by the state.[132]

102. By contrast, where the state's alleged breach was the direct or indirect cause of the creation of the third party rights, tribunals have readily granted provisional measures notwithstanding the effect of such measures on the third-party rights. For example, in *Chevron v. Ecuador* (PCA Case No. 2009-23), as mentioned, the alleged breach arose out of Ecuador's conduct in supporting abusive litigation by private parties, as well as the denial of justice during the litigation.[133] The tribunal had no hesitation issuing and re-issuing provisional measures that required Ecuador to suspend or cause to be suspended the recognition or enforcement of the ensuing judgment from the litigation, notwithstanding the obvious effect that such measures would have on the rights of third parties, namely the plaintiffs/judgment creditors.[134] Likewise, as mentioned above, the tribunal in *Merck Sharpe & Dohme (I.A.) LLC v. Ecuador* issued a provisional measure ordering Ecuador to take all steps to prevent enforcement of a judgment procured by private third parties against the claimant, where the judgment was allegedly issued as a result of undue political interference and a denial of justice.[135]

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131 *Id.* ¶ 72.

132 *See* **Ap. RL-19**, *Plama Consortium Limited v. Republic of Bulgaria,* ICSID Case No. ARB/03/24, Order, 6 September 2005. In fact, the award in *Plama* indicates that most of Bulgaria's alleged breaches occurred by 2001, while the bankruptcy proceedings at issue began in 2005. *See Plama Consortium Limited v. Republic of Bulgaria,* ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶¶ 218, 229, 265, 279, 287, 304 (**Anexo 59**).

133 *See Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador*, UNCITRAL, Claimants' Notice of Arbitration, 23 September 2009, ¶¶ 30-34 (**Anexo 60**).

134 *See Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, Order for Interim Measures, 9 February 2011, pp. 3-4 (**Anexo 61**); *see also* First Interim Award on Interim Measures, 25 January 2012, pp. 12-13 (**Anexo 62**); Second Interim Award on Interim Measures, 16 February 2012, pp. 3-4 (**Anexo 63**); Fourth Interim Award on Interim Measures, 7 February 2013, ¶ 80 (**Anexo 52**).

135 *See supra* ¶ 80.

103. Here, the Insurer would not have acquired any rights with respect to the project but-for Respondent's termination of the Contract, which Claimants maintain was a breach of Respondent's international obligations. Therefore, this case is more akin to *Chevron* and *Merck* than to *Plama*, and the effect of the provisional measures sought on the Insurer's rights is not an appropriate reason against granting the measures.

104. Respondent also argues that the provisional measures sought by Claimants "*would seriously infringe upon the Republic's right to exercise its legitimate sovereign powers.*"[136] Respondent is incorrect.

105. First, as a matter of law, "*it is pertinent to recall that in any ICSID arbitration one of the parties will be a sovereign State, and where provisional measures are granted against it the effect is necessarily to restrict the freedom of the State to act as it would wish.*"[137] This truism "*cannot be conclusive or preclude the [t]ribunal from exercise of its power to grant provisional measures.*"[138]

106. Second, as a matter of fact, Claimants' requested measures would minimally restrict Respondent's freedom to act. Claimants are not asking the Tribunal to require Respondent to restore CEFERE to the Contract or to allow Claimants and CEFERE to bid on new public contracts in Panama. Nor are they asking the Tribunal to prohibit Respondent from completing the project with another entity as a result of a new tender and conclusion of a new contract. Claimants are simply asking the Tribunal to enjoin Respondent from causing Claimants to lose more than USD 13 million and damaging their creditworthiness with current and future insurers, and from maintaining public postings that further damage Claimants' business, while the Tribunal determines whether Respondent lawfully took the step that was the prerequisite for these additional harmful measures.

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136 Respuesta, ¶ 74 ("*infringirían gravemente el derecho de la República de ejercer sus poderes soberanos legítimos*").

137 *Perenco v. Ecuador*, *supra* note 87, ¶ 50.

138 *Id.* (collecting other cases).

V. COSTS

107. Respondent requests that, due to the "*complete lack of merit of the Request*," the Tribunal "*order the Claimants to assume all costs associated with this phase on provisional measures*."[139] As the Claimants have already demonstrated, the Request is meritorious and urgent. Claimants also submit that awarding any costs at this phase of the proceedings would be premature, and submit that any decision on costs should be deferred until the conclusion of the arbitration.

VI. PROVISIONAL MEASURES REQUESTED

108. For these reasons, Claimants respectfully ask that the Tribunal:

a) Order the Respondent to immediately suspend all execution of the Bond, including but not limited to the ongoing subrogation proceedings, by formally notifying Internacional de Seguros of the Tribunal's order and withdrawing the formal execution, amending the posting on PanamaCompra to reflect the Tribunal's order, and ceasing any effort to subrogate the Contract;

b) Issue an order directing the Respondent to refrain, until a final award is rendered in the present arbitration proceeding, from resuming or continuing efforts to execute any guaranties issued by the CEFERE Consortium; and

c) Order the Respondent to formally suspend its order disqualifying the Claimants from contracting in Panama for the pendency of this arbitration, and to remove the publication of the same from PanamaCompra, in exchange for an agreement from the Claimants to not tender or bid on any public contracts with Panama for the same period.

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139 Respuesta, ¶ 81 ("*En atención a la completa falta de mérito en la Solicitud, la Demandada solicita respetuosamente que este Tribunal ordene a las Demandantes que asuman todas las costas asociadas con esta fase de medidas provisionales*.")

Respectfully submitted,

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Appendix 1: List of Fact Exhibits

Exhibit No.	Date	Document Description
Anexo 21	22 February 2020	*Ciudad de las Artes, una obra prolongada*, La Prensa, 22 February 2020
Anexo 22	5 September 2018	Janelle Davidson, Tweet, 5 September 2018
Anexo 23	2 September 2018	INAC y ASSA firman acuerdo para continuar desarrollo del Proyecto Ciudad de las Artes, Panama 24 Horas, 2 September 2018

Appendix 2: List of New and Expanded Legal Exhibits

Exhibit No.	Date	Document Description
Anexo 9 to the Request (Expanded Version)	2009	C. Schreuer, *The ICSID Convention: A Commentary* (2009), Article 47
Anexo 24	8 December 2020	Declaration of Daniel Toledano
Anexo 25	2017	Texto Único de la Ley 22 de 2006 ordenado por la Ley 61 de 2017
Anexo 26	12 December 2006	Decreto Nro. 317-Leg. de 12 de diciembre de 2006
Anexo 27	28 March 2018	Decreto Num. 21-Leg. de 28 de marzo de 2018
Anexo 28	20 December 1999	*Tanzania Electric Supply Co. Ltd. v. Independent Power Tanzania Limited*, ICSID Case No. ARB/98/8, Decision on Provisional Measures, 20 December 1999
Anexo 29	30 April 1999	Notice of Arbitration from Marvin Roy Feldman Karpa, 30 April 1999
Anexo 30	25 March 1999	*Pope Talbot, Inc. v. Canada*, UNCITRAL, Notice of Arbitration, 25 March 1999
Anexo 31	8 October 1999	*Pope & Talbot, Inc. v. Government of Canada*, UNCITRAL, Government of Canada Statement of Defence, 8 October 1999
Anexo 32	14 November 2005	*Bayindir Insaat Turizm Ticaret*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005
Anexo 33	29 June 2009	*Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures, 29 June 2009
Anexo 34	8 April 2016	*Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos v. The Argentine Republic*, ICSID Case No. AR/09/1, Decision on Provisional Measures, 8 April 2016

Anexo 35	8 July 2014	*Churchill Mining PLC and Planet Mining Pty Ltd. v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 9, 8 July 2014
Anexo 36	9 December 1983	*Amco Asia Corp. and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Request for Provisional Measures, 9 December 1983
Anexo 37		Deliberately omitted
Anexo 38	3 March 2010	*CEMEX Caracas Investment BV and CEMEX Caracas II Investments BV v. Venezuela*, ICSID Case No ARB/08/15, Decision on the Claimants' Request for Provisional Measures, 3 March 2010
Anexo 39	2006	M. Kinnear, A. K. Bjorklund et al., *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (2006)
Anexo 40	21 June 1985	*Behring International, Inc. v. Islamic Republic Iranian Air Force*, Award No. ITM/ITL 52-382-3, June 21, 1985, 8 Iran-U.S. C.T.R. 238
Anexo 41	2 September 2008	*Sergei Paushok et al. v. Government of Mongolia*, UNCITRAL, Order on Interim Measures, 2 September 2008
Anexo 42	22 November 2016	*Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. v. Romania*, ICSID Case No. ARB/15/31, Decision on Claimants' Second Request for Provisional Measures, 22 November 2016
Anexo 43	23 November 2017	*Rizzani de Eccher S.p.A., Obrascón Huarte Lain S.A., and Trevi S.p.A. v. State of Kuwait*, ICSID Case No. ARB/17/8, Decision on Provisional Measures, 23 November 2017
Anexo 44	21 January 2015	*PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/33/13, Decision on the Claimant's Request for Provisional Measures, 21 January 2015
Anexo 45	1993	K. P. Berger, *International Economic Arbitration* (1993)
Anexo 46	2019	D. Goldberg, Y. Kryvoi, and I. Philippov, *2019 Empirical study: Provisional measures in investor-state arbitration* (British Institute of International and Comparative Law 2019)
Anexo 47	18 May 2016	ICC Case No. 21909/ASM (EA), Order (unpublished)

Anexo 48	12 August 2019	ICC Case No. 24643/JPA (AE), Order (unpublished)
Anexo 49	1993	E. Schwartz, "The Practices and Experience of the ICC Court," ICC Bulletin (1993)
Anexo 50	29 November 2011	*Merck Sharpe & Dohme (I.A.) LLC v. Ecuador*, Notice of Arbitration, 29 November 2011
Anexo 51	7 March 2016	*Merck Sharpe & Dohme (I.A.) LLC v. Ecuador*, PCA Case No. 2012-10, Decision on Interim Measures, 7 March 2016
Anexo 52	7 February 2013	*Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, Fourth Interim Award on Interim Measures, 7 February 2013
Anexo 53	2 August 2020	*Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC EA 2020/130, Emergency Award on Interim Measures, 2 August 2020
Anexo 54	2001	International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts, U.N.G.A. Res. 56/83, A/56/9(Vol. I)/Corr.4 (2001)
Anexo 55	2001	Commentaries to ILC Articles on the Responsibility of States for Internationally Wrongful Acts, U.N.G.A. Res. A/56/10 (2001)
Anexo 56	5 February 2018	*Mohammed Munshi v. The State of Mongolia*, SCC EA 2018/007, Award on Emergency Measures (5 February 2018)
Anexo 57	3 December 2017	*Igor Boyko v. Ukraine*, PCA Case No. 2017-23, Procedural Order No. 3 on Claimant's Application for Emergency Relief, 3 December 2017
Anexo 58	24 November 2014	*Fouad Alghanim & Sons Co. et al. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/13/38, Order on Application for the Grant of Provisional Measures, 24 November 2014
Anexo 59	27 August 2008	*Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008
Anexo 60	23 September 2009	*Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador*, UNCITRAL, Claimants' Notice of Arbitration, 23 September 2009
Anexo 61	9 February 2011	*Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, Order for Interim Measures, 9 February 2011

Anexo 62	25 January 2012	*Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, First Interim Award on Interim Measures, 25 January 2012
Anexo 63	16 February 2012	*Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, Second Interim Award on Interim Measures, 16 February 2012