

MARTINEZ LOPEZ EXHIBIT 8

IN THE MATTER OF AN ARBITRATION UNDER THE 1976
ARBITRATION RULES OF THE UNITED NATIONS
COMMISSION ON INTERNATIONAL
TRADE LAW

BETWEEN

SACYR S.A.

Claimant

AND

REPUBLIC OF PANAMA

Respondent

NOTICE OF ARBITRATION

3 August 2018

THREE CROWNS

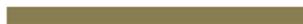


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I INTRODUCTION

- 1 The present dispute arises out of Panama's decision to expand the Panama Canal by increasing its width and depth and, most relevantly, adding a third set of locks (the *Third Set of Locks Project* or *TLP*). The expansion doubled the capacity of the Panama Canal by allowing larger ships and a larger number of ships to use the canal. The expanded Panama Canal was inaugurated in June 2016 and will contribute billions in additional revenue to the Panamanian National Treasury.
- 2 This engineering marvel and boon to Panama's treasury was made possible by Claimant, in consortium with other world-leading construction contractors, who successfully completed the project to construct the third set of locks for the Panama Canal (the *Project*), which was the key component of the broader expansion.
- 3 While the expansion will go down in history as a resounding success for Panama, it was a financial disaster for Claimant and its consortium partners, who suffered massive losses as a result of the misconduct of Panama, through its organs and instrumentalities, in plain breach of the Agreement on the Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and Panama (the *Treaty*).¹ Panama's Treaty breaches are manifold, and span the 9-year period from the beginning of the tender phase to the completion of the Project and beyond. In briefest summary:
 - a Contrary to the premises on which Claimant was induced to invest, the information and studies supplied to Claimant during the tender phase were inaccurate or incomplete in material respects. In many instances, Panama was pointedly aware of these inadequacies. However, rather than complying with its disclosure obligations, Panama failed to alert Claimant and actively withheld crucial pieces of information.
 - b In parallel, Panama moved to try and insulate itself from the implications of this misconduct. Without ever divulging its objectives or indicating that information it had provided could not be relied upon, Panama attempted to dilute its contractual responsibilities, and use its regulatory

¹ Agreement on the Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the Republic of Panama, entry into force on 31 July 1998 (*Treaty*), Exhibit C-1.

powers to exclude the operation of the higher-order legal norms that it had breached.

- c Once Claimant had been induced to invest, the lengthy tender process completed, and the relevant contracts signed, Panama then engaged in a sustained pattern of conduct that was inimical to the requirements of Panamanian law, good faith, and Claimant's legitimate expectations. Notably, as Claimant and its consortium partners discovered that the information upon which they had relied in making their investment was incomplete, misleading, or false, Panama sought to rely on abuses of its sovereign authority in order to immunize itself from the obligation to comply with Panamanian laws and regulations and otherwise to evade the consequences of its misconduct. As part of this overall strategy, Panama's organ/instrumentality – the Autoridad del Canal de Panamá (*ACP*) – openly imposed abusive pre-conditions on its acceptance of legitimate variations, continued to withhold information vital to the execution of the Project, systematically refused to certify full payment for works performed and refused to engage in good faith with the agreed process for the resolution of contractual claims; instead systematically obstructing that process. In parallel with these measures, Panama also conducted a defamatory media campaign in which it falsely alleged that Claimant and its partners were responsible for all Project delays and risked bankruptcy.
 - d In further breach of its own representations during the tender phase that Claimant and its partners would not be required to provide project financing but would instead enjoy positive cash-flows from the Project, Panama has required Claimant and its consortium partners to shoulder billions of project financing costs.
 - e Panama also acted to impair Claimant's investment yet further by enacting legislation which applied only to the TLP and substantially increased the cost of labour, and by failing to use its statutory authority to protect the Project during periods of civil unrest and industrial action.
- 4 Panama's misconduct had profound and costly implications for Claimant and its consortium partners, who have been left to shoulder billions in additional costs, thereby completely eviscerating the value of the Claimant's investment and causing it to suffer substantial additional losses.

- 5 Sacyr S.A (***Claimant***) submits this Notice of Arbitration (the ***Notice***) against Respondent, Republic of Panama (***Panama***), in accordance with:
- a the Treaty²; and
 - b the 1976 Arbitration Rules of the United Nations Commission on International Trade Law (the ***UNCITRAL Rules***).
- 6 This Notice is structured as follows:
- a **Section II** sets out the particulars of the Parties.
 - b **Section III** briefly describes the factual background, including the acts and omissions of Panama that have given rise to this arbitration.
 - c **Section IV** identifies the jurisdictional basis under the Treaty upon which Claimant brings this claim.
 - d **Section V** identifies the provisions of the Treaty that have been breached by the acts and omissions of Panama.
 - e **Section VI** contains Claimant’s procedural proposals in relation to the constitution of the Tribunal and the language of the arbitration.
 - f **Section VII** sets out the relief sought by Claimant.

II THE PARTIES

A SACYR

- 7 Claimant is a company incorporated under the laws of the Kingdom of Spain. Claimant’s registered office is:

Paseo de la Castellana 83-85
28046 Madrid
Spain

- 8 Claimant has instructed Three Crowns LLP to institute and pursue these arbitration proceedings on its behalf. All communication to Claimant, relating to this arbitration, should be addressed to:

² Treaty, Exhibit C-1.

| | |
|----------------------------|--|
| Dr. Gaëtan Verhoosel | gaetan.verhoosel@threecrownsllp.com |
| Mrs. Carmen Martínez López | carmen.martinezlopez@threecrownsllp.com |
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B PANAMA

- 9 Respondent is a sovereign State and a Contracting Party to the Treaty.
- 10 Claimant is serving copies of this Notice on:

By Courier

His Excellency Juan Carlos Varela Rodríguez
President of the Republic of Panama
Palacio de las Garzas, Corregimiento de San Felipe
Presidency of the Republic
Panama 1
Republic of Panama

Her Excellency Isabel de Saint Malo de Alvarado
Vice-President of the Republic of Panama
Palacio de las Garzas, Corregimiento de San Felipe
Presidency of the Republic
Panama 1
Republic of Panama

Her Excellency Isabel de Saint Malo de Alvarado
Minister of Foreign Relations of the Republic of Panama
San Felipe, Calle 3

Palacio Bolívar
City of Panama
Republic of Panama

His Excellency Milton Cohen-Henríquez Sasso
Ambassador of Panamá before the Kingdom of Spain
Calle Juan Bravo, 2, 5º Dcha
28006, Madrid
Spain

His Excellency Carlos Rubio
Minister of Government and Justice
San Felipe, Ave. Central, entre Calle 2nda y 3ra
Apdo. Postal 1628, Zona 1, Panama
Republic of Panama

Mr. Roberto Roy
Minister of Canal Affairs and Chairman of the Board of Directors of
the Panama Canal Authority
Panama Canal Authority (ACP)
Edificio de la Administración
Balboa, Ancón
Republic of Panama

III FACTUAL BACKGROUND

A THE PANAMA CANAL AND ACP

- 11 The Panama Canal is a manmade waterway (approximately 80 kilometres long) that links the Atlantic and Pacific oceans across the Isthmus of Panama.³ The Canal is a major maritime trade route with some 13,000 to 14,000 vessels traversing its waters every year prior to the expansion.⁴
- 12 After its declaration of independence from Colombia, Panama granted the United States the right to construct and administer the Canal and its defences for an indefinite period of time, under the 1903 Hay-Bunau-Varilla Treaty.

³ Panama Canal website, “This is the Canal”, 22 February 2013, **Exhibit C-32**. The Canal serves more than 140 shipping routes and connects 1,700 ports in 160 countries: *see* “Panama Canal Authority: Waterway’s Expansion Boosts Revenues and Sparks Growth in New Business Segments, Underpinning High Credit Quality”, *Moody’s Investors Service*, 22 January 2018, **Exhibit C-61**, p. 2.

⁴ Panama Canal website, “This is the Canal”, 22 February 2013, **Exhibit C-32**.

Pursuant to this arrangement, the Canal was constructed and opened to traffic in 1914 and operated thereafter by the United States for decades. However, following civil unrest and disputes over sovereignty of the Panama Canal Zone, the United States and Panama signed the Torrijos-Carter Treaties in 1977 under which control of the Canal was to be transferred to Panama as of 31 December 1999. After the transfer of control to Panama, the Canal became the “inalienable patrimony of the Panamanian Nation” under Panama’s Constitution.⁵

- 13 In anticipation of its assumption of control over the Canal, Panama created the position of Minister of State for Canal Affairs⁶ and established ACP as the state entity responsible for operating, administering, managing, preserving, maintaining, and modernizing the Panama Canal.⁷ ACP, which was created under Title XIV of the Constitution as an autonomous legal entity of public law [*persona jurídica autónoma de derecho público*],⁸ forms part of the Panamanian State.⁹ The Minister of Canal Affairs serves as the Chairman of ACP’s Board of Directors.¹⁰

⁵ Constitution of the Republic of Panama, 1972, **Exhibit C-2**, Article 315. The original in Spanish reads as follows: “*El Canal de Panamá constituye un patrimonio inalienable de la Nación panameña*”.

⁶ See Panama Canal website, “Historic Milestones of the Transition Period, 1990-1999”, **Exhibit C-62** (recording that Jorge Ritter was appointed as the first Minister of Canal Affairs on 7 July 1997).

⁷ Constitution of the Republic of Panama, 1972, **Exhibit C-2**, Article 316; see also Panama Canal website, “ACP Overview”, 25 July 2015, **Exhibit C-49**.

⁸ Constitution of the Republic of Panama, 1972, **Exhibit C-2**, Article 316.

⁹ See Judicial Code of Panama, 1 April 1987, **Exhibit C-3**, Article 1940. “State should be understood to mean the Nation, the municipality or any autonomous or decentralized public entity”. (Free translation of the Spanish language original). The original in the Spanish reads as follows: “*Por Estado ha de entenderse la Nación, el municipio o cualquier entidad pública autónoma o descentralizada*”. See also Law No. 131 of 2013 “*Que regula el arbitraje comercial nacional e internacional en Panamá*”, 31 December 2013, **Exhibit C-35**, Article 5, paragraph 3. “Panamanian State. Is comprised by the National Government and its respective dependencies, as well as the legal entities of Public Law, autonomous and semi-autonomous entities, the state enterprises of Public Law, Private Law or mixed enterprises and the legal entities of Private Law that exercise state functions by Law, delegation, concession or authority of the State”. (Free translation of the Spanish language original). The original in Spanish reads as follows: “*Estado panameño. Comprende el Gobierno Nacional y sus respectivas dependencias, así como las personas jurídicas de Derecho Público, entidades autónoma y semiautónomas, las empresas estatales de Derecho Público, de Derecho Privado o de economía mixta y las personas jurídicas de Derecho Privado que ejerzan funciones estatal por Ley, delegación, concesión o autorización del Estado.*”

¹⁰ See Panama Canal website, “Board of Directors”, 28 September 2017, **Exhibit C-59**, p. 2.

- 14 Overall, the expanded Canal has been a resounding success. In its first year of operations, average traffic through the expanded Canal reached 5.9 vessels per day, exceeding ACP's original forecast of 2-3 daily transits.¹¹ As a result, the total tonnage crossing the Canal in 2017 set a historic record,¹² increasing 22% from 2016.¹³ By comparison, world merchandise trade volume growth over the same period was 3.6%.¹⁴ ACP anticipates that annual tonnage will continue to grow through 2021, reaching 510 million tons per year – a 54.55% increase from 2016.¹⁵ Revenues are also on the rise. In 2017, ACP's revenues grew by 15% from 2016, and ACP expects to surpass \$3 billion by 2018 (i.e. an additional 4% in revenue growth since 2017).¹⁶ All of this will translate into steadily increasing contributions from ACP to the National Treasury in the next four years alone.
- 15 This is because ACP is required to pay, annually, into the Panamanian National Treasury (i) “the fees per net tonnage of the Panama Canal or its equivalent, collected from vessels subject to the payment of tolls transiting through the Panama Canal”¹⁷ and (ii) any surplus revenue [*excedentes*] that remains after

¹¹ “Panama Canal Authority: Waterway’s Expansion Boosts Revenues and Sparks Growth in New Business Segments, Underpinning High Credit Quality”, *Moody’s Investors Service*, 22 January 2018, **Exhibit C-61**, p. 3.

¹² In 2017, the Canal transited a record 402.8 million PC/UMS (Panama Canal/Universal Measurement System) of cargo, the largest annual tonnage in the Canal’s 103-year history: *see* “Panama Canal Authority: Waterway’s Expansion Boosts Revenues and Sparks Growth in New Business Segments, Underpinning High Credit Quality”, *Moody’s Investors Service*, 22 January 2018, **Exhibit C-61**, pp. 2-3.

¹³ Notably, ACP’s tonnage remained relatively flat in the ten years preceding the expansion with a 1% compound annual growth rate. ACP’s current four-year forecast projects a 6.1% compound annual growth rate from 2018-2021: *see* “Panama Canal Authority: Waterway’s Expansion Boosts Revenues and Sparks Growth in New Business Segments, Underpinning High Credit Quality”, *Moody’s Investors Service*, 22 January 2018, **Exhibit C-61**, p. 2.

¹⁴ “Panama Canal Authority: Waterway’s Expansion Boosts Revenues and Sparks Growth in New Business Segments, Underpinning High Credit Quality”, *Moody’s Investors Service*, 22 January 2018, **Exhibit C-61**, p. 2.

¹⁵ *See* “Panama Canal Authority: Waterway’s Expansion Boosts Revenues and Sparks Growth in New Business Segments, Underpinning High Credit Quality”, *Moody’s Investors Service*, 22 January 2018, **Exhibit C-61**, p. 2.

¹⁶ *See* “Panama Canal Authority: Waterway’s Expansion Boosts Revenues and Sparks Growth in New Business Segments, Underpinning High Credit Quality”, *Moody’s Investors Service*, 22 January 2018, **Exhibit C-61**, p. 4.

¹⁷ Constitution of the Republic of Panama, 1972, **Exhibit C-2**, Article 321. The original in Spanish reads as follows: “*La Autoridad del Canal de Panamá pagará anualmente al Tesoro Nacional derechos por tonelada neta del Canal de Panamá, o su equivalente, cobrados a las naves sujetas al pago de peajes que transiten por el Canal de Panamá.*” The “Panama Canal net ton” is a

ACP has covered operational costs, investments and other costs associated with the improvement and maintenance of the Canal.¹⁸

- 16 In the first six years during which ACP operated the Canal on behalf of Panama (i.e. from January 2000 to September 2005), ACP's annual contributions to the National Treasury amounted to more than twice what Panama received annually in income tax contributions.¹⁹ Since then, ACP's annual contributions to the National Treasury have more than tripled. In 2016, ACP contributed over USD 1 billion in revenue to the Republic of Panama,²⁰ comprising 2.5% of Panama's GDP.²¹ In 2017 – the first full year that the third set of locks was fully operational – contributions to the National Treasury derived from revenue surpluses [*excedentes*] increased by 89.2% from 2016.²² ACP's total contributions to the National Treasury in 2017 exceeded USD 1.65 billion.²³ All told, ACP has contributed more than USD 13 billion to Panama's treasury since it took over the administration of the Canal from the United States in 1999.²⁴

B THE THIRD SET OF LOCKS PROJECT

- 17 As early as 1939, the United States considered, but ultimately abandoned, an expansion of the Canal through the construction of a third set of locks to

measure of the ship's volume and is calculated by reference to a mathematical formula, and the application of a rate that differs depending on whether the ship is laden or empty.

¹⁸ Law No. 19 of 1997 “*Por la que se Organiza la Autoridad del Canal de Panamá*”, 11 June 1997, **Exhibit C-4**, Article 41.

¹⁹ Master Plan of the Panama Canal, 7 June 2006, **Exhibit C-9**, pp. 9-10. Between 2000 and 2008, the Canal contributed, on average, 4.8% annually to Panama's GDP. ACP, Annual Report, 2009, **Exhibit C-21**, p. 180.

²⁰ ACP's total contributions amounted to USD 1,013,100,000. Mirta Rodríguez P., “Aportes del Canal de Panamá cayeron en el 2016”, *La Estrella de Panamá*, 3 April 2017, **Exhibit C-58**.

²¹ Ministry of Economy and Finance, General Accounts of the Treasury, Fiscal Year 2016, March 2017, **Exhibit C-57**, p. 21.

²² On 14 December 2017, ACP's Board approved to transfer USD 1.194 billion in revenue surpluses [*excedentes*] to the National Treasury. ACP Press Release, “Junta Directiva del Canal de Panamá aprueba aporte histórico de B/. 1,650 millones al Tesoro Nacional”, 14 December 2017, **Exhibit C-60**.

²³ In addition to the USD 1.194 billion in revenue surpluses [*excedentes*], ACP transferred to the National Treasury USD 454 million in fees per Panama Canal net ton and USD 2 million as payment for services rendered to ACP by other state entities. ACP Press Release, “Junta Directiva del Canal de Panamá aprueba aporte histórico de B/. 1,650 millones al Tesoro Nacional”, 14 December 2017, **Exhibit C-60**.

²⁴ ACP Press Release, “Junta Directiva del Canal de Panamá aprueba aporte histórico de B/. 1,650 millones al Tesoro Nacional”, 14 December 2017, **Exhibit C-60**.

accommodate the passage of larger vessels.²⁵ The study of a third set of locks resumed in 1982 with the establishment of a Tripartite Commission formed by the Governments of Panama, the United States, and Japan pursuant to the Torrijos-Carter Treaty.²⁶ The Tripartite Commission delivered its final report in 1993 recommending two alternatives for the canal expansion, one of which was a third set of locks.²⁷ However, the Commission’s report was not acted upon at that time.

- 18 The expansion issue was revisited in 1998 and over 120 studies into the Canal’s long-term viability were commissioned.²⁸ Panama touted these studies as an “extensive and complete research program, without precedent in Canal history.”²⁹ These studies concluded that the growing size and volume of cargo vessels as well as the demand for maritime routes through the Canal, would require Panama to construct a third set of locks and the navigational channels required to accommodate larger “Post-Panamax” vessels.³⁰
- 19 President Martin Torrijos Espino launched the approval process for the Third Set of Locks Project on 24 April 2006, describing it as a “national project” and “an affair of State”.³¹ The Constitution expressly provided that the proposal for the construction of a third set of locks had to be approved by the Cabinet Council, the Legislative Assembly, and a national referendum.³² To that end, Panama

²⁵ Proposal for the Expansion of the Panama Canal Third Set of Locks Project, 24 April 2006 (*TLP Proposal*), **Exhibit C-7**, p 5, fn. 12. Based on the dimensions of the original lock chambers, the largest vessels that could traverse the Canal were approximately 294 metres long by 32 metres wide (i.e. Panamax container vessels).

²⁶ The Tripartite Commission also studied the possibility of expanding the Canal by way of a sea-level canal.

²⁷ See TLP Proposal, **Exhibit C-7**, p. 14.

²⁸ TLP Proposal, **Exhibit C-7**, pp. 15, 70.

²⁹ TLP Proposal, **Exhibit C-7**, p. 15.

³⁰ TLP Proposal, **Exhibit C-7**, pp. 15-16.

³¹ See Transcript of speech by President Martín Torrijos Espino, 24 April 2006, **Exhibit C-8**, p. 4. (Free translation of Spanish language original). The original in Spanish reads as follows: “*Es un proyecto nacional. Debemos concordar en que no debe ser politizado y que al país le conviene tratarlo como lo que es: un tema de Estado.*” The significance of the Canal expansion for Panama was repeatedly affirmed by President Torrijos. Just a year after he launched the TLP approval process, for example, he remarked that “the Canal expansion represents the most significant project for this government and the country”: see ACP Press Release, “President Martín Torrijos Appoints New Panama Canal Board Chair”, 13 April 2007, **Exhibit C-14**.

³² “This provision shall apply also to any proposal for the construction of third set of locks or of a canal at sea level on the existing route which the Canal Authority may propose to realize, either by administrative means or by contracts concluded with any private firm or firms or with firms

made available to the public through information centres in Panama the Proposal for the Expansion of the Panama Canal Third Set of Locks Project (the **TLP Proposal**), together with more than 55,000 pages of documents and 120 studies related to the expansion.³³

- 20 The TLP Proposal set out three integrated components of the TLP: (1) the design and construction of two lock facilities (one on the Atlantic side, the other on the Pacific side) built almost parallel to, and operated in conjunction with, the existing locks (i.e. the Project); (2) the excavation of new access channels for the new locks and the widening of existing channels; and (3) deepening the navigation channels and the elevation of the Gatun Lake's maximum operating level.³⁴ Based on the information provided, the Cabinet Council approved the TLP Proposal on 6 June 2006,³⁵ the Legislative Assembly ratified it on 17 July 2006;³⁶ and the Panamanian people approved the TLP Proposal by national referendum on 22 October 2006 with 76.8% of the vote.³⁷
- 21 This multi-tiered process reflects the national significance of the TLP and the Canal itself, which is “the main economic resource of the Republic of Panama.”³⁸ Although the investment was considerable (approximately USD

owned by one or several other States. In these cases the construction proposal, which has to be approved previously by the Executive Branch and be submitted to the Legislative Branch for approval or rejection, shall be submitted to referendum. Any project concerning the construction of a new canal shall also be submitted to referendum.” Constitution of the Republic of Panama, 1972, **Exhibit C-2**, Article 325, paragraph 3. The original in Spanish reads as follows: “*Esta disposición se aplicará también a cualquier propuesta de construcción de un tercer juego de esclusas o de un canal a nivel del mar por la ruta existente, que proponga realizar la Autoridad del Canal de Panamá, ya sea por administración o mediante contratos celebrados con alguna empresa o empresas privadas o pertenecientes a otro Estado u otros Estados. En estos casos, se someterá a referéndum la propuesta de construcción, la cual deberá ser aprobada previamente por el Órgano Ejecutivo y sometida al Órgano Legislativo para su aprobación o rechazo. También será sometido a referéndum cualquier proyecto sobre la construcción de un nuevo Canal.*”

³³ Transcript of speech by President Martín Torrijos Espino, 24 April 2006, **Exhibit C-8**, p. 2.

³⁴ TLP Proposal, **Exhibit C-7**, p. 1.

³⁵ Cabinet Resolution No. 58 “*Que aprueba la propuesta de construcción del tercer juego de esclusas en el Canal de Panamá, presentada por la Autoridad del Canal de Panamá*”, 26 June 2006, **Exhibit C-10**, pp. 3-4.

³⁶ Law No. 28 of 2006 “*Que aprueba la propuesta de construcción del tercer juego de esclusas en el Canal de Panamá, sometida por el Órgano Ejecutivo, y dicta otras disposiciones*”, 17 July 2006, **Exhibit C-11**.

³⁷ Quintín Moreno, “Así se aprobó la ampliación del Canal”, *La Estrella de Panamá*, 4 April 2016, **Exhibit C-51**.

³⁸ TLP Proposal, **Exhibit C-7**, p. 15.

5.25 billion) and the project technically complex, the Panamanian authorities strongly urged the public to support the TLP Proposal on the basis that the expanded Panama Canal would “drive the national economy and improve the quality of life for all Panamanians.”³⁹

C THE TENDER PROCESS

- 22 The tender process for the construction of the new lock facilities – one of the three components of the TLP – took place in two phases. First, between August and December 2007, Panama pre-qualified four consortia, including Grupos Unidos por el Canal (the *GUPC Consortium*) to bid for the contract. At the time, the GUPC Consortium was composed of a group of unincorporated joint-venturers, including Claimant and two other construction and dredging contractors, Salini Impregilo and Jan De Nul.⁴⁰ The second phase commenced on 21 December 2007 when Panama issued its initial Request for Proposals (*RFP*).
- 23 Throughout the tender process, Panama made representations to the GUPC Consortium that informed its members’ decision to invest. These representations concerned, *inter alia*:
- a the exhaustive nature of Panama’s studies and the resulting accuracy of the project cost estimate of USD 3.35 billion;⁴¹

³⁹ TLP Proposal, **Exhibit C-7**, p. 2.

⁴⁰ The GUPC Consortium also included Constructora Urbana S.A. (*CUSA*), a Panamanian construction company.

⁴¹ For the \$3.35 billion figure, *see* TLP Proposal, **Exhibit C-7**, p. 11. Panama represented, for example, that the TLP proposal was “based on complete engineering designs and on six years of rigorous investigations.” ACP, Annual Report, 2006, **Exhibit C-6**, p. 17. Ilya Espino de Marotta – who headed up the group within ACP coordinating the feasibility study process – claimed that between 2002 and 2005, ACP had “perfected the expansion proposal based on the 120 studies”, which cost USD 40 million, and that ACP’s Master Plan had included conceptual designs that had been completed between 1999 and 2001. Jessica Tasón, “Los cien estudios que respaldan la ampliación”, *La Estrella de Panamá*, 8 June 2016, **Exhibit C-52**, p. 2, (Free translation of the Spanish language original). The original in Spanish reads as follows: “*Del 2002 al 2005 se perfeccionó la propuesta de ampliación basada en los 120 estudios, con un costo de \$40 millones, a la que fueron incorporados los primeros estudios realizados, que reforzaron el modelo financiero*”, *indicó Espino de Marotta, encargada de las obras de ampliación por parte de la ACP. Espino de Marotta destaca que el plan maestro incluía diseños conceptuales, tanto del Atlántico como del Pacífico, hechos entre 1999 y el 2001.*” In terms of the accuracy of the cost estimate, Panama represented that the “degree of detail achieved in estimating costs and contingencies makes it possible to ascertain that the [budget] estimate is

- b the accuracy and completeness of the information provided in the RFP;⁴²
- c Panama’s commitment that it would shoulder the financing and that the contractor would not have to provide any project financing;⁴³ and
- d Panama’s commitment to engage with the contractor “in a spirit of mutual trust and cooperation without litigation and adversarial attitudes”.⁴⁴

24 In light of these representations and its own analyses, and its legitimate expectation that Panama (including its organs and instrumentalities) would conduct itself in accordance with its own laws, the GUPC Consortium submitted a bid in early March 2009, offering to execute the Project for just under USD 3.12 billion.⁴⁵

D PANAMA AWARDED THE PROJECT TO GUPC

25 Panama used two criteria to score the bids: price and technical merit of the design. GUPC Consortium’s bid scored the highest on both counts, and Panama

sound and that the variations that have occurred in some other mega projects will not occur.” Panama went on to state that the “cost analysis offers a high level of reliability due to the level of thoroughness and detail with which it has been performed” and therefore “the probability that the construction will be performed within the estimate, or less, is high.” TLP Proposal, **Exhibit C-7**, pp.11-12; *see also supra* fn. 29.

⁴² For example, the minutes of the 4 July 2008 meeting between ACP and the tenderers reflects this understanding. “ACP stated that the GIR is effectively the GBR. However, Consortia do not have to accept the interpretation by ACP. If we deviate, then we take the risk. ACP stated that the GIR is only intended to have a baseline of minimum geological conditions for contractual issues. If the conditions met on site are worse then the Contractor can make a claim for extension of time and/or costs.” Memorandum of ACP – GUCP Meeting in Panama on 4 July 2008 prepared by Consultores Internacionales del Canal de Panamá, 8 July 2008, **Exhibit C-19**, p. 2; *see also supra* fn. 41.

⁴³ For example, Panama represented that the TLP would be “funded from a combination of ACP generated funds and external financing, consequently the Contractor of the Project will not be required to provide financing for the Project. Financing for the Project will be in place before award of the Locks Contract.” Request For Qualifications for the Design-Build of the Third Set of Locks Project, Fifth Revision, 8 November 2007, **Exhibit C-15**, p. 12. Moreover, Panama represented that, due to the Contract structure, the Project was intended to be “cash flow positive.” 2010 Workshop Questions between Hill International and ACP, 12 August 2010, **Exhibit C-24**, p. 8.

⁴⁴ Request For Qualifications for the Design-Build of the Third Set of Locks Project, Fifth Revision, 8 November 2007, **Exhibit C-15**, p. 11.

⁴⁵ Letter from ACP (Mr. Espino) to GUPC, 15 July 2009, **Exhibit C-22**, p.1.

awarded it the Project on 15 July 2009.⁴⁶ On 11 August 2009, Panama – acting through its organ/instrumentality, ACP – and the GUPC Consortium signed the contract for the design and construction of the Project (*Contract*).⁴⁷

- 26 On 23 November 2009, members of the GUPC Consortium incorporated a local Panamanian entity, GUPC S.A., (*GUPC*) to execute the Project (in order to comply with local labour and other legal requirements). As a result, the GUPC Consortium assigned the Contract to GUPC, in which the consortium members each acquired shares⁴⁸ through the “Assignment and Acceptance Agreement”. Panama required the shareholders to become primary obligors under the Joint and Several Guarantee (*JSG*) as a condition precedent to the assignment.⁴⁹ On 31 May 2010, the shareholders signed the JSG, which made them liable for ensuring GUPC’s performance under the Contract.

E PANAMA, ACTING THROUGH ACP AND OTHER STATE ORGANS AND INSTRUMENTALITIES, DESTROYED THE VALUE OF CLAIMANT’S INVESTMENT AND CAUSED SUBSTANTIAL ADDITIONAL LOSSES

- 27 Panama, through ACP and other State organs and instrumentalities, acted in myriad ways to destroy the value of Claimant’s investment and cause it substantial additional losses. The facts of Panama’s misfeasance are complex and span the 9-year period from the beginning of the tender phase to the completion of the Project, and beyond. The summary provided below is therefore necessarily high-level and focuses only on some of the most important elements of Panama’s misconduct.
- 28 *First*, Panama induced Claimant to invest in the Project on false premises. During the course of the Project, it became apparent that Panama’s representations, and the central assumptions on which Claimant and other participants in GUPC had invested, were false. GUPC learned that tender information provided by Panama had been prepared negligently and in certain

⁴⁶ Letter from ACP (Mr. Espino) to GUPC, 15 July 2009, **Exhibit C-22**, p.1.

⁴⁷ The Contract comprises the Contract Agreement and a collection of other documents that are deemed to form part of the Contract Agreement.

⁴⁸ Certificate of Incorporation of GUPC S.A., 23 November 2009, **Exhibit C-23**.

⁴⁹ On 23 December 2008, ACP appended the Joint and Several Guarantee (*JSG*) as Annex E of the Contract as part of RFP Amendment 20. As a condition of approving the assignment of the Contract, the consortium that ends up winning the bid will have to sign the JSG.

key respects was inaccurate and/or incomplete, in breach of Panama's statutory obligations. By way of example only:

- a Panama's interpretation of conditions at the foundation level in the basalt reach of the Pacific Locks Excavation (*PLE*) differed significantly from the conditions actually encountered. Thus, for example, GUPC encountered two significant fault zones in the Locks Upper Chamber that had not been identified in the geotechnical information provided by Panama.⁵⁰ As GUPC later learned, the inaccuracies in the geotechnical information arose because Panama's organ/instrumentality, ACP, had (a) failed to comply with the clear recommendations of several leading consultants (including Consorcio Post-Panamax (*CPP*),⁵¹ Technos Inc.⁵², and Earth Consultants International (*ECI*)⁵³) to investigate faulting; (b) failed to properly analyse the data it had received, preferring instead to dump unsorted data on tenderers; and (c) failed to put in place proper quality check systems.
- b Similarly, Panama represented that basalt excavated from the PLE should be used as the primary source of aggregates for concrete production.⁵⁴ Indeed, this was the *sole* technical assumption amongst the five "most important assumptions" in the cost estimates relied upon in the TLP Proposal.⁵⁵ This representation was repeated many times in the RFP documents. Unsurprisingly in such circumstances, like other tenderers,

⁵⁰ These were located (i) in the Pacific Locks Upper Chamber close to LH1 (*LH1 Fault*), and (ii) at the Western Inlet Wing Wall (*IWW Fault*).

⁵¹ Consorcio Post-Panamax, Geotechnical Analysis and Alternative Construction Methodologies for Third Set of Locks, TO2-TaskA-COB-R002-RevC, 28 August 2006, **Exhibit C-12**, Section 8, p. 46.

⁵² Technos Inc., Final Report, Geophysical Investigation for the Third Set of Locks Project, 22 September 2006, **Exhibit C-13**, p.46.

⁵³ Earth Consultants International, Final Report (ECI Project No. 2708.05), Appendix E on "Assessment of Activity of the Aguadulce Fault", 4 April 2008, **Exhibit C-17**, p. 21.

⁵⁴ Although such a representation was made directly and indirectly in several documents shared by ACP during the tender phase, a clear example of ACP's position is found in its answer to RFP Amendment No.10. When asked about "natural sand source for concrete", ACP replied that "[d]ue to *large volume of material available from the excavation and the suitability of the material for use as aggregate*, only manufactured sand was considered..." (emphasis added). Questions and Answers to RFP 76161 Amendment No. 10, July 2008, **Exhibit C-18**, p. 57.

⁵⁵ See Cost Schedule and Constructability Analysis for the Proposed Post-Panamax Locks, Concept Level Design Estimates Report, April 2004, **Exhibit C-5**, pp. 2-3. See also TLP Proposal, **Exhibit C-7**, p. 89.

GUPC based its tender design on this crucial assumption. As it turned out, Panama had failed to verify properly the information it had provided. Thus, after the award of the Contract, it emerged that the PLE basalt was in fact entirely unsuitable for use as aggregate. This discovery had profound, and costly, implications for the works.

- 29 Panama also knowingly withheld crucial pieces of information and otherwise failed to correct information provided to GUPC that Panama knew to be erroneous. For example:
- a GUPC only later discovered that ground conditions in the Pacific Entrance Access Channel (*PEAC*) were very different to those indicated by the geotechnical information that Panama had provided during the tender phase. Based on that information, GUPC expected to find naturally occurring materials, competent to serve as a foundation for the Pacific Cofferdam, at -6m “PLD”.⁵⁶ However, it transpired that – to Panama’s knowledge – the PEAC had in fact been extensively dredged in 1939, almost down to rock level, and had then been re-covered by a thick layer of sediment. During the tender phase and after contract signature, Panama withheld key documents that recorded details of the prior dredging and omitted to tell GUPC that the geotechnical assumptions for its proposed Cofferdam design were invalid. As a result, GUPC had to redesign the Cofferdam and carry out dredging works to remove the sediment where it was to be located.
 - b In respect of the PLE basalt discussed above, Panama’s own geotechnical consultants – ECI – had reported to Panama’s organ/instrumentality, ACP, that the basalt was “spalling”.⁵⁷ While such spalling would have indicated that the material was not suitable for use as aggregate, Panama failed to address the concern, or bring it to the attention of the tenderers.
 - c Panama’s behaviour was no different in respect of the faulting conditions. ECI had prepared studies that contained descriptions and photos of the trenches in the Aguadulce Fault Zone,⁵⁸ and also reported

⁵⁶ “Precise Level Datum”, which was a reference measure used to designate levels on the TLP.

⁵⁷ Spalling describes the process by which pieces of rock break up into smaller fragments.

⁵⁸ Earth Consultants International, Final Report (ECI Project No. 2708.05), “Quantitative Characterization of the Pedro Miguel Fault, Determination of Recency of Activity on the

the “unanticipated” presence of La Boca formation as opposed to the “basalt that was expected from the prior geological mapping”.⁵⁹ Despite their obvious relevance, during the RFP phase, Panama withheld these reports from tenderers.

- d In respect of the Lock Gates also, Panama withheld crucial information to which it was privy during the tender phase. The seismic information contained in the Reference Design was inappropriate, and this inadequacy was identified by another tenderer – BTM.⁶⁰ As a result, BTM counselled Panama’s organ/instrumentality, ACP, that seismic problems could be addressed only by dramatic increases in the weight and size of the Lock Gates, which would be significantly more costly to construct as a result.⁶¹ Panama failed however to share BTM’s concerns with other tenderers prior to the award of the contract.

30 **Second**, having induced Claimant’s investment on false premises and engaged in a campaign of non-disclosure, Panama then attempted to use its sovereign authority to shield itself from the consequences of its violations. As the evidence of problems with the information it had provided to tenderers mounted, Panama, without telling tenderers, used its regulation-making power to amend the regulations that apply to ACP (the **Regulations**). The intended effect of these amendments was to confine the remedies available to tenderers to those expressly provided in the Contract and, thereby, to exclude the operation of the higher-order legal norms that it had breached.

31 In parallel, through a series of seemingly innocuous amendments to the terms of the Contract, Panama attempted to gradually dilute its responsibility for the accuracy and completeness of the tender information it had provided.

32 Importantly, as it took these steps, Panama never divulged its objectives and never indicated to Claimant that the information it had previously provided was inaccurate or incomplete, nor did it correct any of the premises on which it had

Miraflores Fault, and Detailed Mapping of the Active Faults Through the Proposed Borinquén Dam Location”, 31 January 2008, **Exhibit C-16**, p. 83.

⁵⁹ Earth Consultants International, Final Report (ECI Project No. 2708.05), Appendix E on “Assessment of Activity of the Aguadulce Fault”, 4 April 2008, **Exhibit C-17**, p. 5.

⁶⁰ Letter from BTM (Mr. Adams) to ACP (Mr. Aleman Zubieta), 24 December 2008, **Exhibit C-20**, pp. 24-25.

⁶¹ Letter from BTM (Mr. Adams) to ACP (Mr. Aleman Zubieta), 24 December 2008, **Exhibit C-20**, pp. 1, 25.

induced Claimant to participate in the tender (and on which Claimant ultimately decided to invest).

- 33 While it remained concealed during the tender phase, the design behind Panama's strategy became clear following GUPC's discovery that information it had received from Panama and relied upon was (in some instances to Panama's knowledge) incorrect and materially incomplete. Faced with the contractual claims GUPC notified during the Project, Panama deployed in its defence the opportunistic amendments it had made to the Regulations and to the Contract. In numerous instances, Panama relied upon the amendments it had made to argue that the terms of the Contract prevailed over the Regulations and Panamanian law in order to exclude liability for breach of its obligations, and to deny GUPC's entitlement to remedies that the Regulations and Panamanian law would ordinarily confer.⁶²
- 34 The efficacy of Panama's efforts to displace the operation of certain provisions of the Regulations and Panamanian law, along with other matters, is under dispute in existing ICC proceedings. However, irrespective of the outcome of those proceedings, it is clear that Panama cannot evade liability under the Treaty by abusing its regulatory powers or by introducing amendments into the Contract on false pretences in an effort to shift responsibility for the consequences of Panama's own misrepresentations and omissions onto Claimant and its consortium partners.
- 35 **Third**, Panama engaged in a pattern of conduct during the implementation of the project that was in breach of Panamanian law, good faith, and Claimant's legitimate expectations as protected by the Treaty. By way of illustration only:
- a In multiple instances, Panama improperly conditioned its acceptance of legitimate variations upon GUPC agreeing to an anticipatory waiver of future claims. For example, as a precondition for agreeing to change GUPC's nominated fabricator for the Lock Gates, Panama opportunistically demanded that GUPC sign a waiver releasing all of its claims "in relation to and arising out [of] or in any way in connection

⁶² See, e.g., Employer's Response to the Contractor's Statement of Case for Reference No. 13D to the DAB with respect to Contractor's Claim 96, 31 July 2015, **Exhibit C-50**, p. 14, paragraph 4.28 (b); see also Employer's Response to the Contractor's Statement of Case for Reference No. 8 to the DAB with respect to Contractor's Claim No. 6.1, 28 December 2012, **Exhibit C-31**, p. 48, paragraph 14.3.

with the design, fabrication, transportation, installation or storage of the lock gates both up to date of this Variation Agreement and in the future”.⁶³ Similarly abusive preconditions were sought in other cases, such as variations relating to concrete mix designs.⁶⁴

- b Panama also continued to withhold essential information concerning the Project. Despite repeated requests from June 2013 for an update on the interrelated PAC-4 project⁶⁵ so GUPC could properly plan its works,⁶⁶ Panama failed to divulge that the PAC-4 project had suffered serious delays until 16 May 2014. These delays had a knock-on effect on the Project.
- c Throughout the Project, Panama systematically refused to certify full payment for works GUPC had performed when GUPC submitted its monthly interim payment applications. The total of the under-payments steadily mounted, rising from USD 18 million in October 2010 to USD 60 million by the end of 2015.
- d Panama also repeatedly failed to consider GUPC’s claims in good faith, and instead adopted a broad policy of refusing to acknowledge any entitlement to additional payment unless and until there had been a Dispute Adjudication Board (*DAB*) decision in GUPC’s favour (and even then, frequently refused to give effect to such decisions).⁶⁷ As a result of

⁶³ Variation Agreement No. 14 relating to Contract CMC-221427 for the Design and Construction of the Third Set of Locks, 18 March 2011, **Exhibit C-25**, Clause 6.

⁶⁴ Letter from ACP (Mr. de la Guardia) to GUPC (Mr. Zaffaroni), 24 March 2011, **Exhibit C-26**, p. 5.

⁶⁵ The PAC-4 Contract relates to the Pacific Access Channel construction from the Gatun Lake to the new set of locks on the Pacific side, and was being performed under a separate contract by different contractors.

⁶⁶ The completion of the PAC-4 project was necessary for access to water for testing and commissioning of the new locks.

⁶⁷ By way of example, in relation to GUPC’s claims 43 and 52 (relating to concrete aggregates), GUPC issued a fully detailed claim to ACP on 20 July 2012, which ACP rejected in its entirety on 24 December 2012. Furthermore, by his determination of 24 May 2013, based on an assessment contained in two short paragraphs, the Employer’s Representative denied GUPC’s concrete aggregate claim. See Contractor’s Fully Detailed Claim (First Interim), Delay and Disruption to Concrete Aggregate Production and Concrete Mix Designs, 20 July 2012, **Exhibit C-29**; Employer’s Disapproval and Detailed Comments pursuant to Sub-Clause 20.1 with respect to Contractor’s Claims 43 and 52, 24 December 2012, **Exhibit C-30**; and Determination of Employer’s Representative pursuant to Sub-Clause 3.5 with respect to Contractor’s Claims 43 and 52, 24 May 2013, **Exhibit C-34**, p. 8.

this policy, Panama has accepted less than 1% of GUPC's claims. In the context of a consortium comprising three world-leading, sophisticated construction contractors, this statistic is remarkable.

- e Having forced GUPC to take all claims to the DAB, Panama then compounded the effect of its misconduct by unreasonably protracting the DAB process. One example, of many, is Panama's conduct in relation to GUPC's claim for additional payment following its instruction that a third party run the site laboratories. The resolution of this well-founded claim took nearly five years and three different DAB referrals.⁶⁸ After Panama initially denied liability, the DAB unanimously held in favour of GUPC, and advised the parties to agree on quantum. Although the claim was for USD 19 million, Panama made an offer only slightly in excess of USD 1 million. This occasioned a second DAB referral, where the DAB awarded GUPC USD 15 million, in addition to financing costs to be agreed upon by the parties. Yet again, Panama's conduct was obstinate and dilatory, denying GUPC's financing and additional costs, and claiming that these additional costs ought to be submitted as a new claim. When GUPC obliged, Panama issued a determination that GUPC's claim was time barred. The cat and mouse game ended when GUPC returned to the DAB for a third time in respect of the same claim, where the DAB determined the issue in GUPC's favour and awarded it a further USD 6 million.⁶⁹
- f In parallel with these illegal measures, Panama also conducted a defamatory media campaign in which it *inter alia* incorrectly sought to malign GUPC as the sole cause of delay to the Project, falsely alleged

⁶⁸ DAB Decision on Referral No. 1, 23 August 2011, **Exhibit C-27**; DAB Decision on Referral No. 10, 29 April 2013, **Exhibit C-33**; and DAB Decision on Referral No. 14B, 20 July 2016, **Exhibit C-54**.

⁶⁹ Panama's obdurate approach to GUPC's claims stands in stark contrast to that which it appears to have adopted in relation to claims of contractors working on other aspects of the TLP. Claimant is aware, for example, that Panama accepted claims by the contractor on the PAC-4 project based *inter alia* on the fact that conditions encountered differed from those indicated in the contract documents. Similarly Panama appears to have taken a more conciliatory and constructive approach to delays and cost overruns on the project to construct a third bridge over the Canal.

that GUPC was nearing bankruptcy and suggested that it would be expelled from the Project.⁷⁰

- 36 **Finally**, Panama also impaired Claimant’s investment by the enactment of arbitrary and discriminatory legislation, and failing to use its statutory authority to protect the Project during periods of civil unrest and industrial action. For example:
- a By Executive Decree in January 2012, Panama increased the minimum wage that would apply to the TLP until the completion of construction, which had the effect of significantly increasing the costs of completing the Project.⁷¹ This Executive Decree was discriminatory in that it specifically targeted the TLP – and *only* the TLP – and had the effect of increasing the wages agreed upon in GUPC’s existing labour contracts and collective bargaining agreement rates.
 - b Severe disruption was caused to GUPC’s work in October 2012 when, as a result of Panama passing Bill 529 (later Law 72), which sought to restructure the Tax Free Zone of Colón, riots, commotion and disorder broke out in and around Colón. The circumstances on the ground remained tense, and even as the Mayor of the city declared curfews, strikes and picketing continued. Throughout this period, absenteeism of workers on the Project remained high and progress was seriously affected.
 - c Following the collapse of negotiations of a collective bargaining agreement between the Panamanian Chamber of Construction (**CAPAC**)

⁷⁰ See, e.g., José Meléndez, “Expansion will be completed even if I have to go out with a pick and shovel”, *El País*, 9 January 2014, **Exhibit C-37**, p. 1; see also “Quijano teme que GUPC se declare en bancarrota”, *Crítica*, 31 July 2014, **Exhibit C-47**; “Panamá.- Quijano acudirá el 12 de febrero a la Asamblea Nacional para explicar la situación de las obras del canal”, *El Economista*, 7 February 2014, **Exhibit C-44**; “Martinelli: Lluvia, trueno o relampaguee se hará la ampliación del canal de Panamá”, *CNN en Español*, 22 January 2014, **Exhibit C-40**; Lomi Kriel & Sonya Dowsett, “Insight: Lowball bid comes back to haunt Panama Canal expansion”, *Reuters*, 20 January 2014, **Exhibit C-39**, p. 4; “Minister insists that Panama Canal expansion will be completed in 2015”, *The Tico Times*, 22 January 2014, **Exhibit C-41**, p. 2; and “Se rompen las negociaciones para encontrar una solución a la ampliación del Canal de Panamá”, *RTVE*, 5 February 2014, **Exhibit C-43**.

⁷¹ Executive Decree No. 6 “*Que modifica el Decreto Ejecutivo No. 3 del 4 de marzo de 1980, Por el cual se fija el salario mínimo en las actividades canalearas relacionadas con el uso, manejo, funcionamiento, mantenimiento, protección o defensa del Canal de Panamá*”, 23 January 2012, **Exhibit C-28**.

and the National Union of Workers of Construction and Similar Industries (*SUNTRACS*), a nationwide labour strike was called in the Panamanian construction industry, which lasted from 23 April to 7 May 2014. GUPC was forced to shut down work for the duration of the strike, incurring significant delays and corresponding costs. Despite these adverse circumstances, no support from Panama was forthcoming. On 24 April 2014, GUPC requested the Regional Director for Labour and Workforce Development for authorization to have security and maintenance workers on Site (for mitigation purposes). However, no immediate reply was received. It was only on 5 and 6 May 2014 that the Ministry of Labour and Workforce Development granted the requested authorization for a total of 270 workers.

- 37 As a result of the facts described above, and further facts that will be particularised in the proceedings, the cash-flow profile of the Project was substantially negative, and GUPC was forced to provide significant funding to keep the Project going – contrary to Panama’s representations during the tender phase that the TLP would be “funded from a combination of ACP-generated funds and external financing, consequently the Contractor of the Project will not be required to provide financing for the Project”.⁷² This additional funding was financed, in part, by substantial cash injections by Claimant and GUPC’s other shareholders. In the period from February to June 2012 alone, GUPC’s shareholders provided USD 172 million of additional funding.
- 38 By the middle of 2012, cash-flow issues on the Project had become so severe that GUPC was compelled to seek assistance from Panama, requesting additional funding in the form of advance payments and a moratorium on the repayment of existing advances. Over the course of the following 12 months, Panama (acting through ACP) and GUPC concluded two agreements by which Panama would provide additional advance payments totalling USD 169 million (i.e., less than the amounts committed by GUPC’s shareholders over a four month period in early 2012) in exchange for guarantees from GUPC’s shareholders and Jan de Nul’s parent company, Sofidra.
- 39 By the end of 2013, the situation had reached a crisis point, and GUPC was forced to suspend works on the Project. In the months that ensued, officials at

⁷² Request For Qualifications for the Design-Build of the Third Set of Locks Project, Fifth Revision, 8 November 2007, **Exhibit C-15**, p. 12.

the highest levels of the Panamanian government intervened in the negotiations. President Martinelli, for example, publicly stated that “Panama would only negotiate on the basis of what’s in the contract.”⁷³ The National Assembly also maintained active oversight. In February 2014, Representative Mr. Elias Castillo (who has also been a member of ACP’s Board of Directors since 2015) required ACP’s Administrator, Mr. Quijano, to attend and explain the ongoing negotiations. The President of the National Assembly also stated that ACP should “establish ‘certain limits’” on GUPC and its Shareholders, including Claimant,⁷⁴ and asserted that GUPC’s and Claimant’s requests were “not a blackmail against ACP’s Board, *but against the Nation*”.⁷⁵

- 40 On 13 March 2014, following the negotiations in January and February 2014, Panama (through its organ/instrumentality, ACP) and GUPC concluded a memorandum of understanding (the *MOU*)⁷⁶ and a variation agreement (the *VO 90*)⁷⁷ by which they agreed to provide immediate additional financing in the amount of USD 100 million each.⁷⁸ This additional funding was made available on 24 March 2014 and a substantial proportion of it had been utilized within three weeks.
- 41 In Annex A of the MOU, the parties also agreed that (i) GUPC’s shareholders would deposit an additional USD 400 million of financing in a project completion account⁷⁹ and (ii) there would be a moratorium on the repayment of

⁷³ “Panama leader: Canal authority, contractors still talking”, *San Diego Union-Tribune*, 10 January 2014, **Exhibit C-38**, p. 1.

⁷⁴ “Panamá.- Quijano acudirá el 12 de febrero a la Asamblea Nacional para explicar la situación de las obras del canal”, *El Economista*, 7 February 2014, **Exhibit C-44**. (Free translation of the Spanish language original). The original in Spanish reads as follows: “*debe poner ‘cierto límite’ e, incluso, ‘dejar de negociar’ con el consorcio*”. See also “Asamblea cita al administrador de la Autoridad del Canal”, *La Prensa*, 5 February 2014, **Exhibit C-42**.

⁷⁵ Getzalette Reyes, “Comisión de Infraestructura de la Asamblea citará a la ACP”, *La Prensa*, 2 January 2014, **Exhibit C-36**, p. 2 (emphasis added). (Free translation of the Spanish language original). The original in Spanish reads as follows: “*Precisó además que no es un chantaje contra la directiva de la ACP, sino contra la Patria.*”

⁷⁶ Memorandum of Understanding between ACP, GUPC and Zurich American Insurance Company, 13 March 2014, **Exhibit C-46**.

⁷⁷ Variation Agreement No. 90 relating to Contract CMC-221427 for the Design and Construction of the Third Set of Locks, 13 March 2014, **Exhibit C-45**.

⁷⁸ Panama’s USD 100 million was again to be secured by guarantees provided by GUPC’s shareholders and Sofidra.

⁷⁹ This additional financing was to be obtained by way of a facility provided by Zurich, the Surety for the Project.

the advance payments Panama had made. The parties agreed to use “good faith best efforts” to agree on a formal variation to the contract to implement the terms of Annex A of the MOU by 25 April 2014.

- 42 However, Panama acted contrary to the requirements of good faith to obstruct and delay the negotiation of the variation required to implement Annex A of the MOU (*VO 108*),⁸⁰ including by conducting a media campaign in July 2014 in the course of which (as noted above) Panama issued a series of false statements suggesting, *inter alia*, that GUPC was on the verge of bankruptcy.⁸¹ As a result of Panama’s delays, the USD 400 million in additional financing contemplated in Annex A was not available until 8 September 2014 (nearly five months later than planned). In the interim, Claimant and the other GUPC shareholders were required to contribute a further USD 145 million in additional financing in order to maintain progress.
- 43 Despite the significant adversity GUPC suffered as a result of Panama’s conduct, the Project was successfully completed and the new locks inaugurated in June 2016.⁸² By that time, GUPC had completed works valued at approximately USD 8 billion, of which some USD 4.3 billion remained outstanding and disputed by Panama.⁸³
- 44 However, even after the successful completion of the Project, Panama continued to act in bad faith and breach of its obligations under the Treaty. In early 2017, Panama made demands for repayment from Claimant and its consortium partners and called upon certain advance payment guarantees. These demands and calls were made despite the fact that the advances are not presently

⁸⁰ Variation Agreement No. 108 relating to Contract CMC-221427 for the Design and Construction of the Third Set of Locks, 1 August 2014, **Exhibit C-48**.

⁸¹ This had the effect of further delaying the implementation of Annex A of the MOU: as a result of the Panama’s comments, the process of establishing the Project Completion Account and installing Citibank as Trustee was a much more complicated and protracted process than would otherwise have been the case. Among other things, Citibank in and around July 2014 (i) elevated the profile and risk to regional level (ii) engaged external New York counsel to conduct a separate review of the Trust Agreement (iii) demanded a joint and several indemnification and hold-harmless agreement by GUPC and ACP (which demand Panama rejected) and (iv) demanded an additional English law joint and several guarantee from Claimant and the other GUPC shareholders, which was procured at a substantial additional cost.

⁸² ACP Press Release, “Inauguration of expanded Panama Canal ushers in new era of global trade”, 26 June 2016, **Exhibit C-53**.

⁸³ See Letter from GUPC (Mr. Desiati) to ACP (Mr. de la Guardia) enclosing the Statement at Completion, 15 September 2016, **Exhibit C-55**, p. 12.

determinable or due under the Contract, including because of the substantial increases in the Contract Price to which GUPC is entitled but for which it has not yet been paid.

- 45 As a result of Panama’s conduct, Claimant has suffered enormous losses and reputational harm and has been deprived of the return that it would have earned on its investment.

IV JURISDICTION

- 46 Panama has consented in Article XII of the Treaty to arbitrate all disputes “with respect to issues regulated by [the Treaty]” between Panama and an investor. Claimant hereby accepts that standing offer.

- 47 Article XII provides:

1. Any investment-related dispute which may arise between a Contracting Party and an investor of the other Contracting Party with respect to the issues regulated by this Agreement shall be notified in writing by the investor, together with a detailed report, to the Contracting Party receiving the investment. The parties to the dispute shall, as far as possible, endeavour to settle such differences amicably.

2. If the dispute cannot be thus settled within six months from the date of the written notification mentioned in paragraph 1, the investor may submit the dispute to:

[...]

An ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law [...]

- 48 The term “investor” is defined in Article I(1) of the Treaty to mean:

(b) Enterprises, meaning legal persons, including companies, corporations, firms and any association of the above or other organizations, whether or not for profit, provided that they are constituted or, in any event, duly organized under the law of that Contracting Party.

49 Claimant is a company constituted under the laws of the Kingdom of Spain, a “Contracting Party” to the Treaty. Hence, Claimant is an “investor” under the Treaty.

50 The term investment is defined in Article I(2) of the Treaty to mean:

[A]ny kind of property or asset such as goods and rights of any kind, invested in accordance with the legislation of the State receiving that investment and in particular, but not exclusively, the following:

(a) Shares, bonds, debentures and any other form of participation in companies;

(b) Rights involving money or any other contractual benefit having economic value expressly including any loans made for that purpose;

(c) Movable and immovable property, as well as other real rights such as mortgages, pledges, usufructs and similar rights;

(d) Intellectual and industrial property rights, including patents for inventions, trade names, trademarks, manufacturing licences, technical processes, know-how and goodwill;

(e) Rights to engage in economic and commercial activities conferred by law, administrative act or contract, including concessions to search for, cultivate, extract or exploit natural resources.

No modification in the form in which property or assets have been invested or re-invested shall affect their status as investments [...]

51 Upon Panama’s award of the Project to the GUPC Consortium, Claimant acquired valuable contractual rights to execute the project and to enjoy its share of the revenues and profits it would derive from doing so. Upon the incorporation of GUPC and the assignment of the contract, Claimant’s contractual rights were exchanged for shares in GUPC. Claimant also provided bank and corporate guarantees and letters of credit, made direct cash

contributions and contributed manpower and technical expertise. Hence, Claimant holds an “investment” under the Treaty.

52 As required by Article XII of the Treaty, before exercising its right to pursue international arbitration, Claimant has made attempts at negotiations with Panama, but to no avail. By letter dated 2 December 2016 Claimant formally notified Panama of the dispute, and sought amicable settlement.⁸⁴ To date, no response to that letter has been received.

53 Accordingly, Claimant has no alternative but to refer this dispute to international arbitration.

V PANAMA HAS BREACHED ITS OBLIGATIONS UNDER THE TREATY

54 The acts and omissions described above constitute breaches of Panama’s international obligations to Claimant under the Treaty, including the following:

- a **Fair and equitable treatment.** Panama has breached Article IV(1) of the Treaty, by failing to accord at all times to Claimant’s investment “fair and equitable treatment”, *inter alia* by (i) violating Claimant’s reasonable and legitimate expectations upon which it relied at the time of making its investments; (ii) failing to provide a stable, equitable, transparent and predictable regulatory framework for Claimant’s investments; and (iii) otherwise conducting itself arbitrarily and unreasonably to the detriment of Claimant’s investment.
- b **Full protection and security.** Panama has breached Article IV(1) of the Treaty by failing to accord at all times to Claimant’s investment “full protection and security”.
- c **Obstruction by unreasonable or discriminatory measures.** Panama has breached its obligation under Article IV(2) of the Treaty not to “obstruct in any way, by unreasonable or discriminatory measures, the functioning, management, maintenance, use, enjoyment, expansion, sale or, where appropriate, liquidation” of Claimant’s investments.
- d **Breach of obligations undertaken with respect to investment.** Panama has breached its obligation in Article IV(2) of the Treaty to

⁸⁴ Letter from Sacyr S.A. (Mr. Manrique) to the President of Panama (President Varela), 2 December 2016, **Exhibit C-56**.

“fulfil any obligation entered into with respect to [Claimant’s] investments”.

- e **Treatment no less favourable than accorded to investors from Panama or other States.** Panama has breached its obligation under Article V(1) of the Treaty to accord Claimant’s investments treatment no less favourable than that accorded to Panamanian investors or investors from other States (whichever is more favourable to Claimant).
- f **De facto expropriation without compensation.** Panama has breached Article VI of the Treaty by completely eviscerating the value of Claimant’s investments, without following due legal processes and without paying, or even offering, prompt, adequate and effective fair market compensation.

VI PROCEDURAL MATTERS

A CONSTITUTION OF THE TRIBUNAL

55 Pursuant to Article XII(2) of the Treaty, Claimant has elected to proceed under the UNCITRAL Rules.

56 In accordance with Articles 3(g), 5 and 7(1) of the UNCITRAL Rules, Claimant proposes that the Arbitral Tribunal be comprised of three arbitrators; one arbitrator to be appointed by each party and the President to be appointed by agreement of the two party-nominated arbitrators within a period of 30 days after the nomination of the second arbitrator.

57 Claimant hereby appoints:

Mr. Horacio Grigera Naon

58 To the best of Claimant’s knowledge, Mr. Grigera Naon is both independent of Claimant, and impartial to the case.

59 In accordance with Article 7(2) of the UNCITRAL Rules, Panama must appoint its arbitrator within 30 days of this Notice.

B LANGUAGE OF THE ARBITRATION

60 In accordance with Article 17 of the UNCITRAL Rules, Claimant proposes that the language of the arbitration be English.

VII REQUEST FOR RELIEF

61 Under the Treaty and applicable rules of international law, Claimant is entitled to damages sufficient to wipe out all the consequences of Panama's internationally wrongful acts. Claimant's damages will be quantified in the course of the arbitration.

62 Accordingly, without limitation and fully reserving its right to supplement or otherwise amend the present prayers for relief at appropriate stages of the proceedings, Claimant will respectfully request that the Tribunal issue an Award:

- a DECLARING that Panama has breached Articles IV, V and VI of the Treaty; and
- b ORDERING Panama to:
 - i compensate Claimant in full for all losses suffered as a result of Panama's breaches of the Treaty, in an amount and currency to be determined at the appropriate stage in these proceedings;
 - ii pay, on a full indemnity basis, all of the costs and expenses of these arbitration proceedings, including, without limitation, the fees and expenses: (i) of the members of the Tribunal; (ii) relating to Claimant's legal representation (including attorney fees and disbursements); and (iii) of any experts or consultants appointed by Claimant or the Tribunal;
 - iii pay interest on all damages, costs and expenses claimed herein (including on the costs of the arbitration referred to in the subparagraph above), as may be subsequently amended or supplemented, at rates and dates to be determined by the Tribunal, as well as post-award interest, compounded monthly at a rate to be determined by the Tribunal, on the amounts awarded until full payment thereof; and
- c GRANTING any such other and further relief that the Tribunal may deem appropriate in the circumstances.

- 63 Claimant reserves its rights to amend, supplement or expand upon the facts, legal claims, arguments and evidence submitted in this Notice in the course of the arbitral proceedings.



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3 August 2018