

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

**OMEGA ENGINEERING LLC  
AND  
MR. OSCAR RIVERA  
*CLAIMANTS***

**v.**

**THE REPUBLIC OF PANAMA  
*RESPONDENT***

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**CLAIMANTS' RESPONSE TO THE U.S.' NON-DISPUTING PARTY SUBMISSION**

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**30 June 2020**

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## I. INTRODUCTION

1. Below Claimants will provide comments to the United States' ("U.S.") Non-Disputing Party Submission dated 3 February 2020 ("*U.S. Submission*").<sup>1</sup> This response is limited to those portions of the U.S. Submission that are material to the resolution of this case (and by implication will identify those that are not). In short, the positions taken by the U.S. on the interpretation of the U.S.-Panama BIT<sup>2</sup> and the U.S.-Panama TPA<sup>3</sup> (together, the "*Treaties*")<sup>4</sup> underscore Respondent's breaches thereof (*see infra* § II), dispense with Respondent's primary defense on alleged corruption (*see infra* § III), and provide this Tribunal with a construct to quantify damages (*see infra* § IV).

## II. UNDER ANY STANDARD, RESPONDENT HAS BREACHED ITS OBLIGATIONS

2. Claimants have pled, *inter alia*,<sup>5</sup> claims for expropriation under Article 10.7 of the TPA and Article IV of the BIT,<sup>6</sup> and claims for denial of fair and equitable treatment ("*FET*") under Article 10.5 of the TPA and Article II(2) of the BIT.<sup>7</sup> Broadly speaking, the same set of facts breached each provision. In sum, Claimants' investment in Panama was decimated starting in mid-2014—after Mr. Varela was elected President—by a series of State actions that terminated or allowed to lapse all of Claimants' public works contracts, banned them from bidding for further contracts, and subjected them to unjustified criminal investigations and sanctions. At worst, these acts were a campaign of retribution against an investor perceived as a political enemy; at best, they were a series of arbitrary and unreasonable acts that destroyed an investment.

3. The U.S.' views on the interpretation of the relevant Treaties do not change the conclusion that Panama's acts amount to an expropriation and an FET violation. Claimants and the U.S. are in nearly full accord on the material points of the expropriation standard, and whether Article

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<sup>1</sup> Claimants' response is by no means exhaustive, and they reserve their right to expand upon their positions in their post-hearing submission.

<sup>2</sup> Treaty Between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investment, signed 27 Oct. 1982, entered into force 30 May 1991 (CL-0001) (the "**BIT**").

<sup>3</sup> The U.S.-Panama Trade Promotion Agreement, signed 28 June 2007, entered into force 31 Oct. 2012 (CL-0003) (the "**TPA**").

<sup>4</sup> Note that the U.S. chose not to comment upon some of the disputed issues of legal interpretation relating to the BIT and the TPA, including, for example, the overlap between the two Treaties, and the intended meaning of the dispute resolution clause in Article VII of the BIT.

<sup>5</sup> Claimants focus in this limited submission on their expropriation and FET claims, but for the avoidance of doubt, Claimants maintain all other claims they have asserted in this arbitration as well.

<sup>6</sup> *See* Cls.' Mem. § IX(A); Cls.' Reply § VIII(A).

<sup>7</sup> *See* Cls.' Mem. § IX(B); Cls.' Reply § VIII(B).

10.5 of the TPA and Article II(2) of the BIT represent an autonomous FET standard or one limited by customary international law is, in this case, a distinction without a difference. Respondent has violated its FET obligations under any standard.

4. **On Expropriation**, Claimants interpret the Treaties to mean that a substantial deprivation of property forming all or a material part of an investment will constitute an expropriation, even when title has not passed to the State or third parties.<sup>8</sup> Respondent echoed that characterization<sup>9</sup> and now the U.S. confirms unanimity that an expropriation occurs if the State’s conduct “destroy[s] . . . *virtually all*[ ] of the *economic value* of the investment, or *interfered* with it to such a similar extent.”<sup>10</sup> Thus, the Treaties demand compensation when a State substantially interferes with the economic value and property rights inherent in a covered investment.

5. One point of contention remains, and it concerns the “nature and character of the governmental action” constituting the alleged expropriation.<sup>11</sup> Yet this dissonance has more to do with factual characterizations than legal principles. Respondent (mis)characterizes the expropriation claim as founded upon a mere breach of contract<sup>12</sup>—more specifically, eight of them, all near-simultaneously, just after a change in government. But these were targeted breaches by sovereign fiat (*e.g.* refusals to endorse payment applications and change orders, termination of contracts by administrative resolutions, and slashing the national budget) *accompanied by purely sovereign measures* that ensured Claimants’ investment could not move forward (*e.g.* seizures of assets, detention orders, and the imposition of future bidding bans).<sup>13</sup>

6. **On the FET standard**, Claimants interpret the BIT to provide an autonomous standard, in line with (or “in accordance with”) the “principles of international law,” but not necessarily limited

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<sup>8</sup> See Cls.’ Mem. ¶¶ 141, 146; Cls.’ Reply ¶¶ 365, 372.

<sup>9</sup> See Resp.’s Rej. ¶¶ 433-35.

<sup>10</sup> U.S. Submission ¶ 39.

<sup>11</sup> *Id.* ¶ 42; compare Cls.’ Reply ¶¶ 364-74, with Resp.’s Rej. ¶¶ 428-32.

<sup>12</sup> Resp.’s Counter-Mem ¶¶ 253-56; Resp.’s Rej. ¶¶ 427-28.

<sup>13</sup> Cls.’ Mem. ¶¶ 147-51; Cls.’ Reply ¶¶ 367, 372, 373-74. The U.S.’ citation to its submission in *Glamis Gold* is thus inapposite. This case does not center on a “regulatory” measure or “some public program adjusting the benefits and burdens of economic life to promote the common good.” U.S. Submission ¶ 42. Rather, Panama’s targeted campaign against Claimants is much more akin to a “physical invasion by the government.” *Id.*

by them.<sup>14</sup> The U.S.’ view is different—just as it has said to other tribunals,<sup>15</sup> it interprets Article 10.5 of the TPA *and* Article II(2) of the BIT as providing an FET standard tethered to and limited by customary international law.<sup>16</sup> Claimants disagree. Setting aside the more specific provisions of the TPA (which does textually reflect the international minimum standard (“**IMS**”)), the U.S.’ position on the BIT is belied by the text of Article II(2) (*see infra* ¶ 7). In any event, under modern international law generally (*see infra* ¶¶ 8-13), and especially in a case like this one, this interpretative disagreement is a distinction without a difference (*see infra* ¶ 14).

7. Article II(2) of the BIT promises “treatment in accordance with *principles of international law*.”<sup>17</sup> It would constitute a wholesale revision of this phrase to say that the Contracting States actually meant that the floor rested more specifically on the customary international minimum standard of treatment and not the broader corpus of international law.<sup>18</sup> The latter is much broader than the former—principles of international law extend well beyond custom (which is defined solely by state *opinio juris*), and incorporates general principles of law (as a primary source), and judicial decisions and scholarly writings (as subsidiary sources).<sup>19</sup> This autonomous interpretation has been endorsed by tribunals interpreting similar treaty provisions.<sup>20</sup>

8. In any event, Respondent has, vis-à-vis Claimants’ investment, violated even the IMS, making this discussion academic. It is well-accepted that the IMS “is not ‘frozen in time’ and that [it]

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<sup>14</sup> See Cls.’ Reply ¶¶ 379, 381.

<sup>15</sup> See, e.g., *Pope & Talbot, Inc. v. Canada*, UNCITRAL Rules Arbitration, Fourth Submission of the U.S., 1 Nov. 2000 (CL-0269), ¶¶ 1-8.

<sup>16</sup> U.S. Submission, ¶ 14.

<sup>17</sup> It should be noted that the substantive provisions of the BIT (as well as its procedural provisions) apply fully to Claimants’ unitary investment and the claims being made in this case. See Cls.’ Mem. ¶ 118; Cls.’ Reply ¶¶ 274, 343-49; Tr. at 58:14-16 (Cls.’ Opening Stmt.). It also should be noted that, given the opportunity to comment upon Claimants’ “interpretation” of the Treaties, neither Respondent nor the U.S. challenged this point.

<sup>18</sup> U.S. Submission ¶ 41; Villiger, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (Nijhoff 2009), at 428 (CL-0270) (“Interpretation in light of a treaty’s object and purpose finds its limits in the treaty text itself. One of the . . . ordinary meanings will eventually prevail. . . . Article 31 avoids an extreme functional interpretation which may . . . lead to ‘legislation’ or the revision of the treaty.”).

<sup>19</sup> See Borchard, *The Minimum Standard of the Treatment of Aliens*, 38 MICH. L. REV. 445, 458 (1939) (CL-0197).

<sup>20</sup> See, e.g., *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 Aug. 2007 (CL-0009) (“**Vivendi**”), ¶¶ 7.4.5-11 (rejecting the view that the words “fair and equitable treatment according to the principles of international law” are limited to the minimum standard of treatment); *Gold Reserve Inc. v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 Sept. 2014 (“**Gold Reserve**”) (CL-0057), ¶¶ 575-76; *Azurix Corp. v. Argentina*, ICSID Case Co. 01/12, Award, 14 July 2006 (“**Azurix**”) (CL-0025), ¶¶ 358-78.

does evolve.”<sup>21</sup> Arbitral tribunals have acknowledged that the evolution of customary international law as it pertains to the treatment of foreign investors has largely “converged” with the “autonomous” FET standard,<sup>22</sup> such that the “whole discussion . . . has become dogmatic [because] there is no substantive difference in the level of protection afforded by both standards.”<sup>23</sup> Especially where (as here) the State’s treatment of an investor violates its “solemn legal and contractual commitments,” the “[t]reaty standard of [FET] . . . is not different from the [IMS] and its evolution under customary international law.”<sup>24</sup> Thus, under a textual interpretation of *both* Treaties, the contemporary and autonomous FET standard should guide the resolution of this case.

9. Even if this Tribunal declines to follow the textual interpretation of the BIT and the “convergence theory” of FET under the TPA, Respondent still breached the IMS as described by the U.S. This standard is not rudderless; the practice of international tribunals has “decidedly moved . . . in the direction of systematized and increasingly specific principles and rules” wherein arbitral awards are the “storehouses from which the content of the binding obligations [of the FET standard] get extracted.”<sup>25</sup> These “widely endorsed,” “generally adopted”<sup>26</sup> obligations include:

10. *The obligation to treat foreign investors in a non-arbitrary manner.* This is a core tenet

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<sup>21</sup> *ADF Group Inc. v. U.S. of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 Jan 2003 (CL-0036), ¶ 179; *see also OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015 (“*OI European*”) (CL-0164), ¶ 489; CI’s Reply ¶¶ 381-82; *Gold Reserve* (CL-0057) ¶ 567 (“public international law principles have evolved since the *Neer* case and . . . the standard today is broader”); *Bernhard von Pezold & Others v. Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015 (CL-0258), ¶ 546 (“To the extent FET incorporates the [IMS], it is clear that this standard has moved on since the *Neer* case.”).

<sup>22</sup> *OI European* (CL-0164) ¶ 489; *see also Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 Aug. 2016 (“*Rusoro*”) (CL-0165), ¶ 468.

<sup>23</sup> *Rusoro* (CL-0165) ¶ 520; *see also Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (CL-0054), ¶ 592 (“[The] actual content of the treaty standard of fair and equitable treatment is not materially different from the content of the [IMS].”); *Rumeli Telekom A.S. et al. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 (CL-0079), ¶ 611 (“[T]he treaty standard of [FET] is not materially different from the [IMS].”); *Azurix* (CL-0025) ¶ 361 (“[T]he minimum requirement to satisfy this standard has evolved and . . . its content is substantially similar whether the terms are interpreted [as an autonomous standard] or in accordance with [the IMS]”); *Murphy Exploration & Production Co. v. Republic of Ecuador*, UNCITRAL, Partial Final Award, 6 May 2016 (CL-0166), ¶¶ 206-08 (“no material difference between the [IMS] and the FET standard under the present BIT”); *Saluka v. Czech Republic*, Partial Award, 17 March 2006 (CL-0038) (“*Saluka*”), ¶ 291.

<sup>24</sup> *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 Aug. 2008 (CL-0037), ¶¶ 333, 337 (quoting *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 (CL-0097), ¶ 284)).

<sup>25</sup> Martins Paparinskis, *THE INTERNATIONAL MINIMUM STANDARD OF FAIR AND EQUITABLE TREATMENT* 117, 124-25 (Oxford 2013) (“*Paparinskis*”) (CL-0271); *see also* U.S. Submission n.11 (citing *Glamis Gold Ltd. v. United States*, NAFTA/UNCITRAL Award, 8 June 2009 (CL-0272) (“*Glamis Gold*”), ¶ 605).

<sup>26</sup> U.S. Submission ¶ 16.

of the IMS,<sup>27</sup> and one that focuses on the *content* of State action, rather than its form. A State’s acts will fall below the IMS when they are done not “according to reason or judgment, . . . [but] depending on the will alone.”<sup>28</sup> A “will” to exact political retribution under the guise of legitimate legal maneuvers will certainly violate the standard,<sup>29</sup> but so too will a lesser showing. Even where there is no subjective bad faith, State action which “exhibits a manifest lack of reasoning”<sup>30</sup> has “no reasonable basis”<sup>31</sup> or “where the means employed do not fit the expressed goal” will be deemed arbitrary.<sup>32</sup>

11. The decision in the *RDC* case is instructive on this point, because it applied the IMS under a treaty substantially similar to the TPA and took into account the views of the U.S. There, the State declared a contract between an investor and a state-owned company to be void as not in the interests of the country. The tribunal deemed that declaration arbitrary and in violation of the IMS because it was issued “under a cloak of formal correctness allegedly in defense of the rule of law, [but] in fact for exacting concessions unrelated” to the stated reasons for the decision.<sup>33</sup> Among the salient factors in the tribunal’s decision were the fact that the Government (i) received benefits from the partial

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<sup>27</sup> *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 Apr. 2004 (CL-0033) (“*Waste Management II*”), ¶ 98. The description of the IMS in this Award has been accepted as reflecting customary international law by dozens of tribunals. See Paparinskis (CL-0271) at 238 n.188; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (RL-0045).

<sup>28</sup> *Azurix* (CL-0025) ¶ 392.

<sup>29</sup> *Glamis Gold* (CL-0272) ¶ 616 (“[O]ne aspect of evolution from *Neer* that is generally agreed upon is that bad faith is not required to find a violation of the [FET] standard, *but its presence is conclusive evidence of such.*”) (emphasis added); *Glamis Gold v. United States*, Rejoinder Submission of the United States, 15 Mar. 2007 (CL-0273), p. 190 n. 739; see also *Ivcher-Bronstein v. Peru*, IACHR Judgment, 6 Feb. 2001 (CL-0274), ¶ 129 (finding a violation where “there is no evidence or argument to confirm that the [measure] was based on reasons of public utility or social interest; to the contrary, the proven facts . . . coincide to show the State’s determination to deprive Mr. Ivcher of the control of [his investment]”); *Aven v. Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 Sept. 2018, ¶ 224 (CL-0257) (“The principle of good faith has been recognized by the [ICJ] as ‘one of the basic principles governing the creation and performance of legal obligations.’ This principle addresses the conduct of the Parties, requiring them to deal fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage. Indeed, it is a well-established general principle of law that good faith is a keystone of the Law of Treaties.”); *Bear Creek Mining Corporation v. Peru*, ICSID Case No. ARB/14/21, Award, 30 Nov. 2017, ¶ 524 (CL-0141) (“The principle of good faith is recognized as a general principle of law under Article 38 of the Statute of the [ICJ]. Numerous tribunals have confirmed that it is a fundamental aspect of the [FET] standard. Bad faith, however, is not required for a finding of a breach of the FET standard.”).

<sup>30</sup> *Glamis Gold* (CL-0272) ¶ 617; *Azurix* (CL-0025) ¶¶ 391-93.

<sup>31</sup> *Glamis Gold v. United States*, Rejoinder Submission of the United States, 15 Mar. 2007 (CL-0273), p. 192; *Enron Corp. v. Argentina*, ICSID Case No. ARB/01/3, Award, 22 May 2007 (CL-0094), ¶ 281.

<sup>32</sup> *Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, ICJ Pleadings, 385 (Reply of the U.S.), 18 Mar. 1988 (CL-0275).

<sup>33</sup> *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012 (CL-0276), ¶ 234.

performance of the contract; (ii) certified that the investor’s performance was satisfactory; (iii) knew and never complained about the stated reasons for the voidance, some of which were due to the Government’s own failures; and (iv) conditioned avoiding the declaration on concessions that were entirely unrelated to the stated problems.<sup>34</sup> *RDC* is a more relevant guidepost than the other IMS cases cited by the U.S. because, like this case, it did not concern Government measures of “general applicability”<sup>35</sup> or ask the tribunal to “second-guess decisions made by government legislators.”<sup>36</sup> It involved *targeted* state measures aimed at undoing *specific* contracts and a *specific* investment.

12. *The obligation to not undermine valid contracts.* Where decisions of State officials exercising sovereign power (*puissance publique*) result in the “outright and unjustified repudiation”<sup>37</sup> of a foreign investor’s contractual rights, that decision will result in State liability. The “criterion of wrongfulness” in this situation will be “the character of the extra-contractual public power by which the breach has been committed” in conjunction with its unjustified use.<sup>38</sup> As with non-arbitrariness, the touchstone of this obligation is the reasoning as well as the form of the repudiation. A State’s mere “failure to pay” due to a “financial crisis” will not alone violate the IMS,<sup>39</sup> but “an illegitimate campaign” against a contract by a newly elected administration “aimed either at reversing [or] renegotiat[ing]” it will.<sup>40</sup> Even absent a coordinated campaign, the same could be said concerning the forced renegotiation of contracts, blatant misuse of the State’s regulatory powers for illegitimate purposes, and the State’s improper use of its agencies as “instrument[s] of political re-engineering.”<sup>41</sup>

13. *The obligation to provide due process in both judicial and non-judicial contexts.* This is part of what the U.S. accepts as “the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings.”<sup>42</sup> While at times constituting a freestanding obligation, it also “supplements” the protection against arbitrariness, contractual repudiations and discrimination by

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<sup>34</sup> *Id.* ¶ 235.

<sup>35</sup> *Glamis Gold* (CL-0272) ¶ 765.

<sup>36</sup> *Glamis Gold v. United States*, Rejoinder Submission of the United States, 15 Mar. 2007 (CL-0273), p. 188 *et seq.*

<sup>37</sup> *Waste Management II* (CL-0033), ¶ 115.

<sup>38</sup> *Paparinskis* (CL-0271) at 242; *see also id.* at 254-55 (citing Jennings regarding the “incursion of international law” into the protection of state contracts).

<sup>39</sup> *Id.*

<sup>40</sup> *Vivendi* (CL-0009) ¶¶ 7.4.19-46.

<sup>41</sup> *Id.* ¶¶ 7.4.19, 7.4.24, 7.4.26, 7.4.28, 7.4.31, 7.4.36, 7.4.46.

<sup>42</sup> U.S. Submission ¶ 21.

ensuring that the State provides adequate procedural safeguards against the breach of these substantive obligations.<sup>43</sup> Respondent denied Claimants and their investment due process in myriad ways, including baseless criminal investigations, seizures, detention orders, and improper administrative terminations of contracts.<sup>44</sup>

14. In sum, Respondent's conduct breached *any* articulation of the FET standard that appears in the BIT and TPA—even a non-evolving IMS. Through the exercise of sovereign power Claimants' liberty was restrained, assets seized, reputations destroyed, invoices denied, project budgets slashed, contracts terminated, and future bids banned—this is precisely the sort of conduct “based on political considerations”<sup>45</sup> and “unjustifiable distinctions”<sup>46</sup> that would breach *any* FET standard.<sup>47</sup> Even without a coordinated campaign of malfeasance, these acts doomed Claimants' investment and were (individually and cumulatively) manifestly arbitrary and unjustified acts that fall below the IMS.

15. One final point deserves cursory mention. The U.S. Submission on MFN Treatment<sup>48</sup> is irrelevant to resolution of this case. *None* of Claimants' procedural entitlements or substantive claims *depend upon* the incorporation of provisions from Panama's treaties with third states. The Tribunal can adjudicate *all* of these claims under *either* the BIT or the TPA.<sup>49</sup> And *every* substantive claim pled by Claimants can be found in *either* the BIT or the TPA as well,<sup>50</sup> both of which are fully applicable to the Claimants' unitary investment.<sup>51</sup>

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<sup>43</sup> Paparinskis, at 250-51.

<sup>44</sup> See, e.g., Cls.' Mem. ¶¶ 103, 139, 156-58, 169-72, 174 n.418, 177, 179, 184, 186 n.464; Cls.' Reply ¶¶ 101, 175, 203-11, 359, 372 & n.1032, 374, 384, 397, 401-04, 421, 424; see also Tr. at 539:5-11, 684:7-685-11 (Villalba admitting he presumed Claimants' guilt); Villalba 1 ¶ 17. Where police powers are at issue, the obligation to act in a non-arbitrary manner implies the need for *fumus boni iuris*—once the need for an action dissipates, so does its justification. See *Chaparro Alvarez & Lapo Iniguez v. Ecuador*, IACHR Judgment, 21 Nov. 2007 (CL-0277), ¶¶ 196-99.

<sup>45</sup> *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Annulment Decision, 1 Sept. 2009 (CL-0278), ¶ 171.

<sup>46</sup> *Saluka* (CL-0038) ¶ 309.

<sup>47</sup> See *supra* ¶ 3.

<sup>48</sup> U.S. Submission ¶¶ 2-10.

<sup>49</sup> See Cls.' Reply ¶¶ 274, 349-50; Tr. at 57:21-59:5 (Cls.' Opening Stmt.).

<sup>50</sup> For expropriation, see Article 10.7 of the TPA and Article IV of the BIT; for FET, see Article 10.5 of the TPA and Article II(2) of the BIT; for the umbrella clause, see Article II(2) of the BIT.

<sup>51</sup> See Cls.' Mem. ¶¶ 118-19; Cls.' Reply ¶¶ 274, 349-50; Tr. at 57:21-59:5 (Cls.' Opening Stmt.). The discussion of the MFN provision as a means to import autonomous FET and FPS provisions, see Cls.' Reply ¶¶ 388, 420, as well as an umbrella clause, see *id.* ¶ 434, is simply an *alternative argument* to support these claims. *Only if* the Tribunal disagrees that the BIT's autonomous provisions and umbrella clause should apply to these claims, *and* determines that the customary international law standards in the TPA are frozen in time and not violated by

### III. CORRUPTION REQUIRES “CLEAR AND CONVINCING EVIDENCE”

16. Respondent’s primary defense is that Claimants’ investment was purportedly infected with corruption.<sup>52</sup> Setting aside the fact that *no* facts have been established (or even alleged) against the propriety of Claimants’ *making* of their investment in Panama (which is required to sustain the defense as a jurisdictional one),<sup>53</sup> Respondent still insists that the claims should be dismissed in their entirety due to allegations surrounding the Tonosi land deal and its supposed (yet unproven) connection to the La Chorrera Contract with the Judiciary. Claimants have already fully addressed the fatal flaws of this affirmative defense, but the U.S. has clarified one important point relating to this issue: In order to succeed, Respondent’s allegation of corruption must be supported by “clear and convincing evidence.”<sup>54</sup> This has been Claimants’ position from the start,<sup>55</sup> and it makes eminently good sense in a case like this one. In this proceeding, Respondent asks this Tribunal to be the *first* adjudicatory body to find *any* criminality attributable to Claimants or tainting their investment; it would be inappropriate to base that finding on anything less than “clear and convincing evidence.”

17. This burden of proof extends to more than just Respondent’s jurisdictional defense. As briefly discussed above,<sup>56</sup> Claimants have plead a *prima facie* case that they were wrongfully targeted by an illegitimate campaign of political retribution and the victim of a series of arbitrary and unreasonable sovereign acts which undermined their investment. To the extent that Respondent’s defense on the merits of that case is to allege that Claimants were “corrupt” and that this justifies every ignored payment application and change order, every budget cut, every bidding ban and every asset seizure, such allegations by Respondent would also require proof by “clear and convincing evidence.”<sup>57</sup> This burden is particularly salient here, where the same allegation has been repeatedly made but *never*

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Respondent’s acts (*see supra* ¶ 8), would Claimants advance the alternative argument that the MFN clause should incorporate more textually lenient provisions from Panama’s other treaties.

<sup>52</sup> See Resp.’s Counter-Mem § III(A); Resp.’s Rej. § II(A).

<sup>53</sup> See Cls.’ Reply ¶¶ 292-95; Cls.’ Rej. On Jurisdiction ¶¶ 12, 115; Tr. at 41:20-42:11 (Cls.’ Opening Stmt.).

<sup>54</sup> U.S. Submission ¶¶ 44-45.

<sup>55</sup> See Cls.’ Reply ¶¶ 280-81; Cls.’ Rej. On Jurisdiction ¶¶ 12, 115; Tr. at 41:12-19.

<sup>56</sup> See also Cls.’ Mem. § VI; Cls.’ Reply § V.

<sup>57</sup> The U.S. asserts that “when allegations of corruption are raised, *either as part of a claim or as part of a defense*, the party asserting that corruption occurred must establish the corruption through clear and convincing evidence.” U.S. Submission ¶ 45 (emphasis added). Claimants’ allegation that Mr. Varela demanded a large campaign contribution from Mr. Rivera does not require “clear and convincing” evidence as it is not an element of any “claim.” Rather, it is background information to partially explain Respondent’s motivation for harming Claimants’ investment. See Tr. at 53:14-53:21. Claimants “are not alleging that incident as a breach of the Treaty,” *id.* at 53:13-14, and thus bear no heightened burden to establish that it occurred.

proven in Panama’s own courts,<sup>58</sup> underscoring Respondent’s breach.

#### IV. THE HARM TO CLAIMANTS’ INVESTMENT DEMANDS COMPENSATION

18. The U.S. (wrongly) asserts that “[a] tribunal has no authority to award damages that a claimant allegedly incurred in their capacity as an investor for violations of obligations that only extend to investments.”<sup>59</sup> In doing so, the U.S. conflates the Treaties’ provisions on liability and quantum to deviate from the *Chorzow Factory* standard.

19. Both Treaties extend certain protections to “investments” without explicit reference to “investors.”<sup>60</sup> Thus, a claimant seeking to establish the host State’s liability for a breach of those provisions may need to demonstrate harm to the “investment” specifically. Once that Treaty breach is established, however, compensation is to be calculated according to the *Chorzow Factory* full reparation standard—that is, without regard to any demarcation between “investments” and “investors.” This is the default rule, and neither the BIT nor the TPA say otherwise. Both Treaties address compensation for *lawful* expropriation,<sup>61</sup> and the TPA provides some general guidance on an arbitral tribunal’s right to award damages, interest, restitution, costs and fees, including a prohibition on punitive damages.<sup>62</sup> The Treaties *do not* address compensation in the case of an *unlawful* expropriation or any other Treaty breach, so compensation is governed by *Chorzow Factory*’s demand for “full reparation.”<sup>63</sup> This is consistent with the Treaties’ incorporation of international law standards, the current position of the U.S., and established precedent.<sup>64</sup>

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<sup>58</sup> See Cls.’ Rej. on Jurisdiction ¶¶ 76-81.

<sup>59</sup> U.S. Submission ¶ 47; *see also id.* ¶ 46.

<sup>60</sup> *See, e.g.*, BIT (CL-0001), art. II(2); TPA (CL-0003), art. 10.5.1.

<sup>61</sup> BIT (CL-0001), art. IV(1); TPA (CL-0003), art. 10.7.2-4; Cls.’ Mem. ¶ 199; Cls.’ Reply ¶ 441.

<sup>62</sup> TPA (CL-0003), art. 10.26.1-3.

<sup>63</sup> *See* Cls.’ Mem. ¶ 199 & n.503 (listing supporting cases); Cls’ Reply ¶¶ 240, 441, 448-65.

<sup>64</sup> TPA (CL-0003), art. 10.22.1 (“[T]he tribunal shall decide the issues in dispute in accordance with this Agreement and applicable *rules of international law.*”) (emphasis added); BIT (CL-0001), art. VI; Letter of Transmittal of U.S.-Panama BIT dated 25 Mar. 1986 (CL-0001) (“[T]he parties also agree to international law standards for expropriation and compensation.”); U.S. Submission n.46 (citing International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries (CL-0217), art. 31, cmt. 9 (2001)); *see, e.g., ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 Oct. 2006 (CL-0028), ¶¶ 481-84; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 Feb. 2007 (CL-0008), ¶ 349; *Vivendi (CL-0009) ¶ 8.2.3*; *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 Sept. 2015 (CL-0085), ¶ 326; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (CL-0054), ¶ 776.

20. Indeed, the U.S.’ position is contrary to the language of the TPA, which allows separate arbitral claims (i) by an investor “on its own behalf”<sup>65</sup> and (ii) by an investor “on behalf of an enterprise” (i.e., an “investment”).<sup>66</sup> The TPA specifically provides that an investor may, “*on its own behalf,*” submit a claim to arbitration for violations of “an *obligation* under Section A [which sets forth *all of* the substantive protections]” where “the *claimant* [investor] has incurred loss or damage by reason of, or arising out of, that breach.”<sup>67</sup> Thus, the TPA expressly permits an investor to obtain losses or damages *it suffered* from violations of any substantive provision in Section A, irrespective of whether the specific provision refers only to “investments.”

21. Moreover, where the State parties have sought to exclude categories of damages, they have done so explicitly. As noted above, Article 10.26(3) of the TPA excludes punitive damages.<sup>68</sup> If the State parties wanted to restrict an investor’s right to receive full reparation for a State’s unlawful conduct, as otherwise protected under international law, they would (and should) have done so. But they did not.<sup>69</sup> As such, the U.S. position on this point is untenable.

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<sup>65</sup> TPA (CL-0003), art. 10.16.1(a).

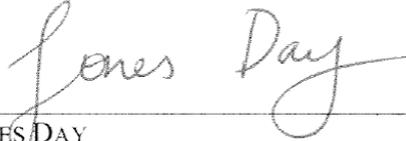
<sup>66</sup> *Id.*, art. 10.16.1(b); *see also id.*, art. 10.26.2(b) (specifying to whom damages are awarded for such claims); *id.*, art. 10.1 (stating that Chapter 10 applies to measures relating to investors and investments). The BIT does not provide for separate claims in the same manner as the TPA.

<sup>67</sup> *Id.*, art. 10.16.1(a) (emphasis added).

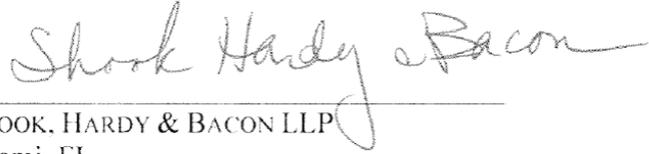
<sup>68</sup> *Id.*, art. 10.26(3) (“A tribunal is not authorized to award punitive damages.”).

<sup>69</sup> Nor do the BIT or TPA place a limit on compensation for moral damages. Under the *Chorzow Factory* standard, as reflected in the ILC Articles relied upon by the U.S., a State must compensate injured parties for “any damage, whether material *or moral*, caused by an internationally wrongful act of a State.” Cls’ Reply ¶ 453 (quoting ILC Articles (CL-0092), art. 37, cmt. 3 (emphasis added)). Thus, tribunals faced with similar treaty language specifically protecting only “investments” have awarded moral damages for harm to the “investor.” *See, e.g., Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 Feb. 2008 (CL-0075), ¶¶ 1, 191, 290-91 (referring to treaty provisions protecting only “investments” of investors and awarding claimant, an investor from Oman with an investment in Yemen, moral damages because Yemen’s conduct had “affected the physical health of the Claimant’s executives and the Claimant’s credit and reputation”); *Pezold v. Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015 (CL-0258), ¶¶ 9-10, 489-90, 543-44, 576-77, 911-16, 920, 923 (referring to treaty provisions protecting only “investments” and awarding claimants, German and Swiss nationals with investments in Zimbabwe, moral damages); *see also* Tr. at 71:20-73:7. Moreover, tribunals that have ultimately rejected claims for moral damages have *not* done so on the basis that the applicable treaty protected investments and not investors. *See, e.g., Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 Mar. 2011 (CL-0202), ¶ 345.

Respectfully submitted,

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JONES DAY  
Washington, D.C. & London

A handwritten signature in cursive script that reads "Shook Hardy & Bacon". The signature is written in black ink and is positioned above a horizontal line.

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