INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
1818 H STREET, NW | WASHINGTON, DC 20433 | USA
TELEPHONE +1 (202) 458 1534 | FACSIMILE +1 (202) 522 2615
WWW.WORLDBANK.ORG/ICSID

CERTIFICATE

SACYR S.A.

v.

REPUBLIC OF PANAMA

(ICSID CASE NO. UNCT/18/6)

I hereby certify that the attached document is a true copy of the Tribunal's Award dated 31 October 2025 and the Separate Opinion of Dr. Horacio A. Grigera Naón.

Gonzalo Flores
Acting Secretary-General

Washington, D.C., 31 October 2025

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

IN THE MATTER OF AN ARBITRATION UNDER THE AGREEMENT ON THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS BETWEEN THE KINGDOM OF SPAIN AND THE REPUBLIC OF PANAMA, SIGNED ON 10 NOVEMBER 1997

- and -

THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, AS ADOPTED IN 1976

- between -

SACYR S.A.

Claimant

- and -

REPUBLIC OF PANAMA

Respondent

ICSID Case No. UNCT/18/6

AWARD

Members of the Tribunal
Mr. John Beechey CBE, President
Dr. Horacio A. Grigera Naón
Prof. Zachary Douglas KC

Assistant to the Tribunal
Mr. Niccolò Landi

Secretary of the Tribunal
Ms. Sara Marzal Yetano

Date of dispatch to the Parties: 31 October 2025

Representation of the Parties

Representing Sacyr S.A.:

Ms. Carmen Martínez López
Mr. Agustín García Sanz
Ms. Laura França Pereira
Mr. Borja Pérez-Puente
Mr. Luis Tamborini
Ms. Macarena Bahamonde
Ms. Laura Anaya
Three Crowns LLP
Calle de Miguel Ángel 11
28010 Madrid
Spain

Mr. Simon Elliot
Three Crowns LLP
6 Battery Road 30-01
Singapore 049909
Singapore

Mr. Simon Consedine
Three Crowns LLP
Washington Harbour
3000 K Street NW Suite 101
Washington, DC 20007
United States of America

Mr. Gaëtan Verhoosel KC
Ms. Ridhi Kabra
Three Crowns LLP
JJ Mack Building
33 Charterhouse Street
London EC1M 6HA
United Kingdom

and

Mr. Raymundo Treves
Ms. Daria Pavlyuchok
Three Crowns LLP
104 avenue des Champs-Elysées
75008 Paris
France

Representing the Republic of Panama:

Ms. Ivette Martínez
Dr. Margie-Lys Jaime
Ms. Michelle Mastellari Bonilla
Ministerio de Economía y Finanzas
Vía España y Calle 52E
Edificio OGAWA
Panama
Republic of Panama

and

Ms. Mélida Hodgson
Ms. Claudia Taveras*
Arnold & Porter Kaye Scholer LLP
250 West 55th Street
New York, New York 10019-9710
United States of America

Mr. E. Whitney Debevoise II
Ms. Caroline Kelly*
Mr. Sebastián Canon Urrutia
Mr. Ernesto M. Hernández
Ms. Ana Sofía Pirnia
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave, NW

Mr. Timothy Smyth*
Arnold & Porter Kaye Scholer LLP
Tower 42
25 Old Broad Street
London EC2N 1HQ
United Kingdom Washington, DC 20001
United States of America

and

Mr. Kenneth Figueroa
Ms. Clara Brillembourg
Mr. Ofilio Mayorga
Foley Hoag LLP**
1717 K Street N.W. Suite 1200
Washington, D.C. 20006
United States of America

and

Mr. Manus McMullan KC***
Atkin Chambers
Gray's Inn
1 Atkin Building
London WC1R 5AT
United Kingdom

* Through June 2024
** Through March 2024
*** Since March 2024

Contents

Table of Selected Abbreviations/Defined Terms

ACP	Autoridad del Canal de Panamá
ASTM	American Society for Testing and Materials
BIT or Treaty	Agreement on the Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the Republic of Panama, signed on 10 November 1997 and in force since 31 July 1998
BTM	Bechtel-Taisei-Mitsubishi
C-[#]	Claimant's Exhibit
CLA-[#]	Claimant's Legal Authority
CBA	A collective bargaining agreement between the Panamanian Chamber of Construction and the National Union of Workers of Construction and Similar Industries
Claimant's Counter-Memorial on Jurisdiction	Claimant's Counter-Memorial on Jurisdiction dated 17 April 2020
Claimant's Memorial on the Merits	Claimant's Memorial on the Merits dated 30 September 2022
Claimant's Rejoinder on Jurisdiction	Claimant's Rejoinder on Jurisdiction and Admissibility dated 29 May 2024
Claimant's Reply on the Merits	Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction and Admissibility dated 14 January 2024
Cofferdam Arbitration	*Grupo Unidos por el Canal, S.A. et al. v. Autoridad del Canal de Panama,* ICC Case No. 19962/ASM/JPA
Concrete Arbitration	*Grupo Unidos por el Canal, S.A. et al. v. Autoridad del Canal de Panama,* ICC Case No. 20910/ASM/JPA (C-20911/ASM/JPA)
Contract	Contract for the design and construction of the TSLP signed on 11 August 2009 between ACP and the GUPC Consortium
CPP	Consorcio Post-Panamax

CUSA	Constructora Urbana S.A.
Disruption Arbitration	*Grupo Unidos por el Canal, S.A. et al. v. Autoridad del Canal de Panama,* ICC Case No. 22466/ASM/JPA (C-22967/JPA)
EsIA	Environmental Impact Study
FET	Fair and Equitable Treatment
FIDIC	FIDIC: Fédération Internationale des Ingénieurs-Conseils
FPS	Full Protection and Security
GDR	Geotechnical Data Report dated 16 May 2008
GIR	Geotechnical Interpretive Report dated May 2008
GR	Geotechnical Report dated December 2007
Guarantees Arbitration	*Grupo Unidos por el Canal, S.A. et al. v. Autoridad del Canal de Panama,* ICC Case No. 22588/ASM/JPA
GUPC	GUPC S.A.
GUPC Consortium	Grupos Unidos por el Canal
Hearing on Jurisdiction and the Merits	Hearing on Jurisdiction and the Merits held from 17 to 24 June 2024
ICC Arbitrations	The eight ICC arbitrations proceedings instituted by GUPC against the ACP under the dispute resolution provisions of the TSLP Contract that were latter consolidated into five proceedings, namely (i) the *Cofferdam* Arbitration; (ii) the *Guarantees* Arbitration; (iii) the *Concrete* Arbitration; (iv) the *Lock Gates and Labor* Arbitration; and (v) the *Disruption* Arbitration.
ICSID or the Centre	International Centre for Settlement of Investment Disputes
ILA	International Law Association

ILC Articles	International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted in 2001
JSG	Joint and Several Guarantee dated 31 May 2010
Lock Gates and Labour Arbitration	*Grupo Unidos por el Canal, S.A. et al. v. Autoridad del Canal de Panama,* ICC Case No. 22465/ASM/JPA (C-22966/JPA)
MOU	The Memorandum of Understanding concluded on 13 March 2014 between ACP and GUPC
MST	Minimum Standard of Treatment
NARA	US National Archives and Record Administration
PAC-4	Pacific Access Channels Phase 4 Project
PCA	The Permanent Court of Arbitration
PGA	Peak Ground Accelerations
PO7	Procedural Order No. 7 dated 25 July 2023
PO9	Procedural Order No. 9 dated 6 December 2023
PO10	Procedural Order No. 10 dated 15 December 2023
R-[#]	Respondent's Exhibit
Respondent's Counter-Memorial on the Merits	Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction and Admissibility dated 28 April 2023
Respondent's Rejoinder on the Merits	Respondent's Rejoinder on the Merits and Reply on Jurisdiction and Admissibility dated 1 May 2024
RFP	Request for Proposals dated 21 December 2007
RLA-[#]	Respondent's Legal Authority
ROIC	Return on Investment Capital
SUNTRACS	National Union of Workers of Construction and Similar Industries

TNO	The Netherlands Organization for Applied Scientific Research
TSLP or the Project	The project to construct the third set of locks for the Panama Canal
TSLP Proposal	The Proposal for the Expansion of the Panama Canal Third Set of Locks Project dated 24 April 2006
Transcript, Day [#], [page]	Transcript of the Hearing
Tribunal	Arbitral Tribunal constituted on 9 May 2019
UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law, as adopted in 1976
UTP	Universidad Tecnológica de Panamá
VO14	The variation agreement concluded on 18 March 2011 between ACP and GUPC
VO108	The variation agreement concluded on 1 August 2014 between ACP and GUPC
VCLT	Vienna Convention on the Law of Treaties

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to arbitration pursuant to the Agreement on the Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the Republic of Panama, signed on 10 November 1997 and in force since 31 July 1998 (the "**BIT**" or the "**Treaty**")[1] and the Arbitration Rules of the United Nations Commission on International Trade Law, as adopted in 1976 (the "**UNCITRAL Rules**").

2. The claimant is Sacyr S.A. ("**Sacyr**" or the "**Claimant**"), a company incorporated under the laws of the Kingdom of Spain ("**Spain**").

3. The respondent is the Republic of Panama ("**Panama**" or the "**Respondent**").

4. The Claimant and the Respondent are collectively referred to as the "**Parties**". The Parties' representatives and their addresses are listed above on page (i).

II. PROCEDURAL HISTORY

5. On 3 February 2022, the Tribunal issued a Decision on a Preliminary Issue (the "**Decision**") by which it determined that ACP is an Organ of the Republic of Panama and its acts are attributable to Panama pursuant to Article 4 of the ILC Articles. The Tribunal declared that it would entertain the Parties' submissions on the substance of the Treaty claims that Sacyr might seek to pursue and on the remaining jurisdictional and admissibility objections pursuant to a timetable to be agreed between the Parties and in consultation with the Tribunal. The Tribunal emphasised that its decision did not in any way constitute an indication, much less any prejudgment, of any question relating to the merits of those claims and those other objections. The Tribunal refers to Chapter II of the Decision for the previous procedural history.

6. On 11 May 2022, following an invitation from the Tribunal, the Parties jointly submitted a procedural calendar for the next phase of the proceedings.

[1] Agreement on the Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the Republic of Panama, 31 July 1998 (the "**BIT**") (**C-1**).

7. On 26 May 2022, Respondent shared with the Tribunal a Notice of Document *Subpoena* received from counsel in the case *Webuild S.p.A. v. Republic of Panama* (ICSID Case No. ARB/20/10), an investment arbitration initiated by the consortium partner of Claimant arising out of the same set of facts as this arbitration, compelling the production of documents by WSP, USA, a consultant to the ACP. In Panama's view, the *subpoena* was a circumvention of the Tribunal's discretion to control document production in these proceedings.

8. On 2 June 2022, Claimant submitted its comments on Respondent's communication of 26 May 2022, objecting to the Respondent's characterization of the *subpoena*.

9. On 30 September 2022, Claimant filed its Memorial on the Merits ("**Claimant's Memorial on the Merits**"), together with the witness statements of Mr. Antonio Zaffaroni and Mr. Rafael Pérez, the expert reports of Mr. Tim Hart and Prof. John Coates IV dated 28 September 2022 and the third expert report of Prof. Jaime Franco.

10. On 28 April 2023, Respondent filed its Counter-Memorial on the Merits and Memorial on Jurisdiction and Admissibility ("**Respondent's Counter-Memorial on the Merits**"), together with the witness statements of Mr. Jorge Fernández dated 20 April 2023, Mr. Miguel Lorenzo dated 20 April 2023 and Mr. Francisco Minguez dated 22 April 2023, and the expert reports of Dr. Luis Fábrega dated 27 April 2023 and Dr. Daniel Flores (Quadrant Economics) dated 28 April 2023.

11. On 26 June 2023, following exchanges between the Parties, each Party filed a request for the Tribunal to decide on production of documents.

12. On 25 July 2023, the Tribunal issued Procedural Order No. 7 ("**PO7**") deciding on the Parties' respective document production requests.

13. On 26 July 2023, Respondent sought clarification regarding a ruling made by the Tribunal in PO7 pertaining to Dr. Flores' request for access to data on the PECO system. On 27 July 2023, the Tribunal provided the clarification requested. It ordered Dr. Flores to explain "*the extent to which, and why, he require[d] to look beyond the materials selected by Mr Hart and to interrogate data in particular PECO WBEs.*"

14. By letter dated 4 August 2023, according to the Tribunal's instructions, Dr. Flores set out for Claimant the reasons for, and the scope of, the access to PECO data that he had requested.

15. On 11 August 2023, Claimant sought the dismissal by the Tribunal of Dr. Flores' request to be granted "*comprehensive access to all the PECO data on the Project.*"

16. On 18 August 2023, Respondent filed its response to Claimant's letter of 11 August 2023.

17. On 21 August 2023, the Tribunal issued Procedural Order No. 8, dismissing Claimant's 11 August 2023 application.

18. On 13 November 2023, Claimant filed an application for further directions in respect of PO7 by reason of what was said to be Respondent's non-compliance with the Tribunal's document production orders. On 21 November 2023, Respondent filed its comments on Claimant's application. Claimant replied on 23 November 2023 and Respondent submitted further comments on 1 December 2023.

19. On 6 December 2023, the Tribunal issued Procedural Order No. 9 ("**PO9**"), providing further directions with respect to PO7 and establishing revised dates in the procedural calendar.

20. On 13 December 2023, Claimant filed an application by which it sought the production of certain documents and an adjustment of the procedural calendar. On 14 December 2023, Respondent filed its objections to Claimant's application and sought reconsideration by the Tribunal of PO9 regarding the production of unredacted copies of the settlement agreements between the ACP and the consortium for the Pacific Access Channel Phase 4 project ("**PAC-4**") (the "**PAC-4 Settlement Agreements**"). On 15 December 2023, Claimant filed its reply rejecting Respondent's application for reconsideration.

21. On the same date, the Tribunal issued Procedural Order No. 10 ("**PO10**"), by which, *inter alia*, it denied Respondent's request for reconsideration of PO9. The Tribunal ordered the production of any remaining documents subject to production by

Respondent pursuant to PO9, including unredacted copies of the PAC-4 Settlement Agreements, by no later than 23 December 2023.

22. On 22 December 2023, Respondent transmitted a confidentiality agreement to be entered into by Sacyr with the ACP as a condition for the latter to provide copies of the PAC-4 Settlement Agreements. On the same date, Claimant objected to Respondent's request. Respondent filed its reply on the same date.

23. On 23 December 2023, the Tribunal issued Procedural Order No. 11, by which, *inter alia*, it reconfirmed PO10 which required the Respondent to produce unredacted copies of the PAC-4 Settlement Agreements that day.

24. On 14 January 2024, Claimant filed its Reply on the Merits and Counter-Memorial on Jurisdiction and Admissibility ("**Claimant's Reply on the Merits**"), together with the second witness statements of Mr. Antonio Zaffaroni and Mr. Rafael Pérez, the expert reports of Mr. Martin Hunter and Messrs. Peter Deming, PE and Andrew Klaetsch, PE, PG, the second expert report of Mr. Tim Hart, and the fourth expert report of Prof. Jaime Franco.

25. On 21 February 2024, Respondent filed its application for bifurcation of Claimant's damages claims. On 28 February 2024, Claimant submitted its response to Respondent's application. On 29 February 2024, Respondent filed its reply.

26. On 1 March 2024, the Tribunal issued its decision on Respondent's application for bifurcation of Claimant's damages claims. It noted that Claimant did not oppose the application and the bifurcation of the proceedings.

27. On 15 April 2024, Claimant applied to the Tribunal for an order requiring Respondent to comply with its document production obligations, as established in the Tribunal's procedural orders. On 17 April 2024, Respondent filed its response to Claimant's application. On 18 April 2024, Claimant submitted its reply. On the same date, Respondent requested the Tribunal to reserve its decision on the matter until after the filing of Respondent's Rejoinder on the Merits. On 19 April 2024, Claimant noted its objection to Respondent's request.

28. On 22 April 2024, the Tribunal notified the Parties that it would reserve its decision on Claimant's application of 15 April 2024 until after the filing of Respondent's Rejoinder on the Merits.

29. On 1 May 2024, Respondent filed its Rejoinder on the Merits and Reply on Jurisdiction and Admissibility ("**Respondent's Rejoinder on the Merits**"), together with the second witness statements of Mr. Jorge Fernández dated 26 April 2024, Mr. Miguel Lorenzo dated 25 April 2024 and Mr. Francisco Miguez dated 29 April 2024, the expert reports of Dr. Kevin MacDonald dated 30 April 2024 and Mr. Paul J. Lewis dated 30 April 2024, and the second expert report of Dr. Luis Fábrega dated 24 April 2024.

30. On 8 May 2024, mindful of the Tribunal's correspondence of 22 April 2024, Claimant informed the Tribunal that it maintained its application of 15 April 2024. It said that none of the matters raised in its application had been addressed in Respondent's Rejoinder on the Merits. On 10 May 2024, Respondent filed its response to Claimant's communication, reiterating its request that the application be denied in its entirety. On 11 May 2024, Claimant submitted further comments in reply.

31. On 13 May 2024, the Tribunal issued Procedural Order No. 12, by which it granted Claimant's application of 15 April 2024 in part. It required the Respondent either: (i) to make immediate enquiry of URS Holdings Inc. ("**URS**") in respect of the 2008 Withheld Sulfate Soundness Test and other documents recording URS's analysis of the Test and if such Test and other documents were still in existence, to produce them forthwith and in any event by no later than Friday 17 May 2024; or (ii) if such Test and/or other documents could not be identified, by Friday 17 May 2024 to produce a formal signed statement of a Minister or senior representative of government, setting out in detail the nature of the enquiries made of URS by Panama and by ACP and what it was said had happened to the documentation the subject of the Order. Claimant's application for disclosure of any Other Laboratory Requests and of an unredacted version of the January 2009 Minutes was denied.

32. On 17 May 2024, Respondent filed its response to the Tribunal's directive in Procedural Order No. 12.

33. On 28 May 2024, Claimant filed an application seeking leave to introduce nine new documents into the record.

34. On 29 May 2024, Claimant filed its Rejoinder on Jurisdiction and Admissibility ("**Claimant's Rejoinder on Jurisdiction**").

35. On 31 May 2014, Respondent submitted its observations on Claimant's application of 28 May 2024, objecting to the introduction into the record of six of the nine documents in respect of which Claimant had sought leave.

36. On 2 June 2024, the Tribunal issued Procedural Order No. 13. The Order granted Claimant's request of 28 May 2024 to admit new documents into the record in part.

37. On 3 June 2024, in accordance with the Tribunal's directions in Procedural Order No. 13, Claimant sought to justify the admission into the record of the documents comprising Requests 3 & 4 of its application of 28 May 2024. Additionally, Claimant sought reconsideration of the Tribunal's decision to exclude Request 7.

38. On 5 June 2024, Claimant sought permission to introduce a further new document into the record.

39. On the same date, the Tribunal issued Procedural Order No. 14 concerning the organization of the hearing on jurisdiction and the merits.

40. By its letters of 5 and 7 June 2024, the Respondent objected to the reconsideration of the Tribunal's decision to exclude Request 7, as well as to the admission into the record both the Request 3 and 4 documents and the new document which was the subject of Claimant's application of 5 June 2024.

41. On 9 June 2024, the Tribunal issued Procedural Order No. 15. The Tribunal decided that it would defer a decision on Claimant's applications of 3 and 5 June 2024 until it had heard the Parties' submissions and evidence on the record at the hearing on jurisdiction and the merits.

42. The hearing on jurisdiction and the merits was held in Washington, D.C. from 17 to 24 June 2024 (the "**Hearing**"). The following persons were present at the Hearing:

Tribunal:

Mr. John Beechey CBE	President
Dr. Horacio A. Grigera Naón	Arbitrator
Prof. Zachary Douglas KC	Arbitrator

Assistant to the Tribunal:

Mr. Niccolò Landi	Assistant to the Tribunal

ICSID Secretariat:

Ms. Sara Marzal Yetano	Secretary of the Tribunal

For the Claimant(s):

Dr. Gaëtan Verhoosel KC	Three Crowns
Ms. Carmen Martinez Lopez	Three Crowns
Mr. Simon Elliot	Three Crowns
Mr. Agustin G. Sanz	Three Crowns
Dr. Ridhi Kabra	Three Crowns
Mr. Borja Pérez-Puente	Three Crowns
Ms. Macarena Bahamonde Villafuerte	Three Crowns
Mr. Luis Tamborini	Three Crowns
Ms. Laura Anaya	Three Crowns
Ms. Eleonore Gleitz	Three Crowns
Ms. Shea Adams	Three Crowns
Ms. Laura Abril	Three Crowns
Mr. Luis Javier Cortés	Cortés Abogados
Ms. Ana Sala Andres	Sacyr S.A. / Cortés Abogados
Mr. Carlos Andres Iso Floren	Sacyr, S.A.
Mr. Francisco Javier Barrera Barrena	Sacyr, S.A.

For the Respondent(s):

Ms. Mélida Hodgson	Arnold & Porter
Mr. E. Whitney Debevoise	Arnold & Porter
Ms. Caroline Kelly	Arnold & Porter
Mr. Sebastián Canon Urrutia	Arnold & Porter
Ms. Claudia Taveras	Arnold & Porter
Mr. Tim Smyth	Arnold & Porter
Mr. Ernesto Hernández	Arnold & Porter
Ms. Ana Sofía Pirnia	Arnold & Porter
Mr. Anthony Perez	Arnold & Porter
Ms. Alexia Morán	Arnold & Porter
Mr. Caleb Ruby	Arnold & Porter
Ms. Andrea Sanchez	Arnold & Porter
Ms. Karla Moctezuma	Arnold & Porter
Mr. Manus McMullan KC	Arnold & Porter
Ms. Margie-Lys Jaime	Ministry of Economy and Finance
Mr. Miguel Clare González-Revilla	Ministry of Economy and Finance
Ms. Michelle Mastellari Bonilla	Ministry of Economy and Finance
Ms. Karla Arias	Ministry of Economy and Finance

Mr. Nick Henchie	Vinson & Elkins
Mr. Scott Stiegler	Vinson & Elkins
Mr. Peter Danysh	Vinson & Elkins
Mr. Ben Grunberger-Kirsh	Vinson & Elkins
Ms. Maria Fernandez	Vinson & Elkins
Ms. Heather Tyson	Vinson & Elkins
Mr. Ruben Peña	Vinson & Elkins

Court Reporter(s):

Ms. María Eliana Da Silva	D-R Esteno
Ms. María Agustina Iezzi	D-R Esteno
Ms. Dawn K. Larson	Larson Reporting, Inc.

Interpreters:
Ms. Silvia Colla
Mr. Charles Roberts
Mr. Luis Eduardo Arango

43. During the Hearing, the following persons were examined:

On behalf of the Claimant:

Mr. Rafael Pérez	Witness
Mr. Antonio M. Zaffaroni	Witness
Mr. Jaime Franco	Expert
Mr. Peter Deming	Expert
Mr. Andrew Klaetsch	Expert

On behalf of the Respondent:

Mr. Miguel Lorenzo	Witness
Mr. Jorge Fernández	Witness
Mr. Francisco J. Miguez P.	Witness
Mr. Paul Lewis	Expert
Mr. Kevin MacDonald	Expert
Mr. Mark Lukkarila	Expert
Mr. Luis Ramón Fábrega	Expert

44. On 17 June 2024, Claimant filed an application seeking an order that Respondent provide certain information regarding a purchase order of a sulfate test disclosed by the ACP in the Disruption Arbitration. Alternatively, Claimant requested permission to introduce the document into the record.

45. At the end of the Hearing session on 19 June 2024, the Tribunal heard oral argument by the Parties in the course of which Respondent recorded its objection to Claimant's application of 17 June 2024.

46. During the Hearing session on 20 June 2024, the Tribunal informed the Parties of its decision to allow the introduction of the new document into the record and to reject Claimant's request for further information.

47. On 28 June 2024, Claimant informed the Tribunal that, having considered the Parties' submissions and evidence adduced before the Tribunal at the Hearing, it had decided to abandon its pending applications of 3 June 2024 (arising out of its application of 28 May 2024) and 5 June 2024 to introduce new documents into the record.

48. On 31 July 2024, the Tribunal informed the Parties that it had no additional questions for the Parties. It invited them to confer and to agree upon a date for the submission of their respective statements on costs.

49. In accordance with the agreed deadline, the Parties submitted their respective statements on costs on 20 November 2024. Pursuant to the request of the Tribunal, updated Statements of Costs to 29 September 2025 were submitted by both Parties. A further and final exchange between the Parties on the subject of costs rested with Respondent's email of 11 October 2025.

50. On 24 October 2025, Claimant informed the Tribunal that during the cross examination of a witness in the hearing in ICSID Case No. ARB/20/10 *Webuild S.p.A. (formerly Salini Impregilo S.p.A.) v. Republic of Panama*, new facts had emerged regarding the failed sulfate soundness test from 2005 that it argued are "*material to the Tribunal's determination of Claimants' claim.*" Claimant requested the Tribunal to allow the introduction of this new evidence into the record and to order Panama to produce the witness for cross-examination by Claimant at a short one-day hearing.

51. On 26 October 2025, Respondent objected to Claimant's request, and on 27 October 2025, Claimant filed a reply.

52. On 28 October 2025, the Tribunal issued Procedural Order No. 16 declining to grant Claimant's request.

53. The Tribunal declared the proceedings closed on 29 October 2025.

III. REQUESTS FOR RELIEF

54. Claimant requests the following relief:

> *Without limitation and fully reserving its right to supplement or otherwise amend the present prayers for relief at appropriate stages of the proceedings, Claimant respectfully requests that the Tribunal issue an Award:*
>
> *a. DECLARING that the dispute and the entirety of Claimant's claims are within the jurisdiction and competence of this Tribunal;*
>
> *b. DECLARING that the dispute and the entirety of Claimant's claims are admissible;*
>
> *c. DECLARING that Panama has breached Articles IV and V of the Treaty;*
>
> *d. ORDERING Panama to:*
>
> *(i) compensate Claimant in full for all losses suffered as a result of Panama's breaches of the Treaty, and in particular:*
>
> *(1) to compensate Claimant for (1) loss of its sunk costs of USD 1.05 billion; (2) loss of its lost opportunities of USD 871.49 million; and (3) reputational damages of USD 681.98 million; or*
>
> *(2) in the alternative, to compensate Claimant for Panama's unjust enrichment, amounting to USD 2,243.42 million.*
>
> *(3) in the further alternative, to compensate Claimant for the amounts quantified in Section IV.B.*
>
> *(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;

e. *ORDERING Panama to compensate Claimant for the amount of any additional tax liability in Spain in relation to the compensation awarded in the Tribunal's Award, presently calculated as USD 348.69 million; and*

f. *GRANTING any such other and further relief that the Tribunal may deem appropriate in the circumstances.*[2]

55. Panama requests the following relief:

For the reasons set forth above, the Republic of Panama respectfully requests that the Tribunal grant the following relief:

a. *Dismiss Sacyr's claims for lack of jurisdiction or, alternatively, as inadmissible, in their entirety and with prejudice;*

b. *In the event that the Tribunal exercises jurisdiction over any of Sacyr's claims, declare that Panama did not breach any of its obligations under the Treaty, and deny Claimant's request for relief as enunciated in paragraph 464 of the Reply;*

c. *Order Claimant to pay all costs of the arbitration, including Panama's legal and expert fees and expenses, the fees and expenses of the Tribunal, including the Assistant to the President, as well as the administrative costs charged by ICSID, plus interest on such amounts until the date of payment, calculated at the US Dollar Prime rate plus 2% per annum; and*

d. *Award to Panama any such additional relief as the Tribunal may consider just and appropriate.*

Pursuant to the Tribunal's decision of 1 March 2024 to bifurcate these proceedings, Panama reserves its right to request relief regarding the damages that Claimant seeks in any possible subsequent damages phase.[3]

---

2 Reply on the Merits, [464].
3 Rejoinder on the Merits, [1102]–[1103].

IV. THE DISPUTE

56. The present dispute arises out of a project to expand the Panama Canal by increasing its width and depth and adding a third set of locks (the "**Project"** or "**TSLP**"). On 11 August 2009, Sacyr S.A., one of four contractors in the *Grupos Unidos por el Canal* consortium ("**GUPC Consortium**"), entered a contract with the *Autoridad del Canal de Panamá* (the "**ACP**") for the design and construction of the Project (the "**Contract**"). Sacyr contends that Panama, acting through the ACP, breached the Treaty by (i) failing to grant Claimant's investment fair and equitable treatment ("**FET**") (Article IV(1)); failing to provide Claimant's investment with full protection and security ("**FPS**") (Article IV(1)); obstructing through arbitrary measures Claimant's management, use and enjoyment of its investment (Article IV(2); and discriminating against Claimant and its investment (Articles IV and V).

V. JURISDICTION AND ADMISSIBILITY

(1) The Tribunal Lacks Jurisdiction *Ratione Materiae*

A. Respondent's Position

57. Panama asserts that Sacyr's claims relate exclusively to alleged contractual conduct that falls outside the scope of the dispute resolution provisions of the Treaty. The Tribunal therefore lacks jurisdiction *ratione materiae.*[4]

58. Panama submits that Sacyr seeks to abuse the provisions of the Treaty by bringing purported treaty claims based on the contractual conduct of the ACP. Such conduct was commercial in nature. It did not involve any element of *puissance publique*. It therefore cannot plausibly give rise to a breach of the FET and non-impairment provisions of the Treaty. Accordingly, the Tribunal lacks jurisdiction over such claims.[5]

4 Rejoinder on the Merits, [676].
5 Rejoinder on the Merits, [680].

i. Relevant Legal Principles

59. Panama submits that an investor cannot bring claims for breach of the Treaty if the essential predicate of such claims is contractual or commercial conduct, rather than sovereign conduct. Panama sets out the following four principles:[6]

(i) Claimant, as the investor, has the burden of proof to show that the Tribunal has jurisdiction to hear its claims,[7] including by establishing the facts supporting the Tribunal's jurisdiction;[8]

(ii) where the dispute resolution provisions under a treaty encompass only disputes with respect to issues regulated by the treaty, such provisions do not apply to contractual disputes.[9] In this case, Article XII of the Treaty applies only to "*[a]ny 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*."[10] Claims based on contractual conduct under domestic law are not "*issues regulated by [the Treaty]*". They therefore fall outside the scope of Panama's consent to arbitration under Article XII;[11]

(iii) when assessing whether an investor's claims are genuinely treaty-based, a tribunal cannot rely simply on the investor's characterisation of its own claims. Rather, the tribunal must conduct its own independent analysis;[12] and

(iv) in order to establish liability under a treaty with respect to a State's contractual conduct, an investor must show that the relevant conduct was carried out in the

---

6 Rejoinder on the Merits, [682].
7 Counter-Memorial on the Merits, [17]; Rejoinder on the Merits, [168].
8 Rejoinder on the Merits, [683].
9 *See Iberdrola Energía, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Award, 17 August 2012, [306] (**RLA-223**). *See also* Counter-Memorial on the Merits, [461]–[464].
10 BIT, Article XII (**C-1**).
11 Rejoinder on the Merits, [684].
12 *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, [254] (**RLA-38**); Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, 3 February 2021, ICJ Reports 2021, [75] (**RLA-266**) ("*The Court recalls that, according to its well-established jurisprudence, in order to determine its jurisdiction* ratione materiae *under a compromissory clause concerning disputes relating to the interpretation or application of a treaty, it cannot limit itself to noting that one of the parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the acts of which the applicant complains fall within*.")

exercise of the State's *puissance publique*.[13] The distinction between *puissance publique* and ordinary commercial conduct reflects the classic dichotomy under international law between *acta iure imperii* (sovereign acts) and *acta iure gestionis* (commercial acts). The key question when categorising a State's conduct in relation to a contract is whether the State was acting in the exercise of its sovereign powers or behaving as an ordinary contracting party.[14] A tribunal must consider whether the State's actions went "*beyond that which an ordinary contracting party could adopt and involve State interference with the operation of the contract*,"[15] or whether "*[a]ny private contract partner could have acted in a similar manner*."[16] If the relevant conduct could have been carried out by any private contractual partner, it will not constitute sovereign conduct. In *AWG v. Argentina*, for example, the tribunal held that the termination of a concession contract did not constitute the exercise of *puissance publique*, because it "*seem[ed] not unlike the behavior of a private contracting party faced with the threatened termination of an important long-term supply contract*."[17]

60. Panama submits that, while Sacyr accepts the principle that State actions within the framework of a contract will only breach a treaty if they constitute *puissance publique*, it attempts to "*obfuscate*" matters by arguing that "*investment tribunals have doubted the need for a showing of* puissance publique *where the contract was allegedly breached by an organ of the State*."[18] Panama submits that this argument is misguided for two reasons:

(i) First, it is inconsistent with the well-established principle, as articulated by Judge Crawford, that "*a State is not, generally speaking, internationally responsible*

---

13 Rejoinder on the Merits, [686].

14 *AWG Group v. Argentine Republic*, UNCITRAL, Decision on Liability, 30 July 2010, [154] (**RLA-208**) (finding that Argentina's actions in terminating a concession were taken in accordance with Argentina's rights under the contract and the legal framework and therefore constituted contractual, not sovereign acts).

15 *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007, [248], [260] (**RLA-49**) (finding that Argentina's use of its police powers to interfere with its contractual relationship with the investor constituted sovereign conduct, but that its actions in relation to delays, non-budgetary allocations and other acts were contractual rather than sovereign in nature).

16 *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, [170] (**RLA-53**) (finding that the refusal to grant an extension of time was not a sovereign act).

17 *AWG Group v. Argentine Republic*, UNCITRAL, Decision on Liability, 30 July 2010, [154] (**RLA-208**).

18 Rejoinder on the Merits, [689], citing Reply on the Merits, [337].

for the 'private law' acts of its organs (e.g. the breach of a commercial contract entered into by the State)."[19]

(ii) Secondly, the principle that a State is not liable for the private law acts of its organs has "*nothing to do with attribution*", because "*the distinction between attribution and breach needs always to be borne in mind*."[20] In other words, just because an act is attributable to a State does not mean that it breaches international law. Panama submits that the *Strabag SE v. Libya* award upon which Claimant relies is inapposite. In that case, the tribunal held that it was not possible to read a requirement of *puissance publique* into an umbrella clause. That ruling is irrelevant here, as Sacyr no longer maintains its umbrella clause claim.[21]

ii. Claimant's FET and Non-impairment Claims Relate to Commercial Conduct

61. Panama contends that all of Sacyr's claims under the FET and non-impairment standards of the Treaty relate to mere commercial conduct and are therefore outside the scope of the dispute resolution provisions of the Treaty.[22] The essential grounds upon which Sacyr's FET and non-impairment claims are founded within the framework of the Contract and did not involve sovereign conduct.[23]

62. Panama further notes that in its attempt to distinguish the cases upon which Panama relies with respect to the *puissance publique* requirement, Sacyr asserts that the tribunals in those cases were considering "*whether claims the essential predicate of which were breaches of contract could qualify as treaty claims*."[24] Panama submits that it relies on those cases, because the "*essential predicate*" of Sacyr's claims is contractual, not sovereign, conduct, and Claimant has failed to show otherwise.

---

19 James Crawford, 'First Report on State Responsibility', 2(2) ILC Yearbook (1998) 1, at 37, [174] (**CLA-30**).
20 Rejoinder on the Merits, [691], citing James Crawford, 'First Report on State Responsibility', 2(2) ILC Yearbook (1998) 1, at 37, [174] (**CLA-30**).
21 Rejoinder on the Merits, [691].
22 Rejoinder on the Merits, [692].
23 Rejoinder on the Merits, [692].
24 Reply on the Merits, [335].

iii. FET and Non-Impairment Claims do not give rise to breach of the Treaty

Claimant's Legitimate Expectations Claims cannot sustain a Violation of the Treaty's FET Standard

63. Panama contends that Sacyr's legitimate expectation claims cannot sustain a violation of the Treaty's FET standard.[25] Those claims are based on several alleged representations made by the ACP prior to the entry into the Contract. The relevant representations occurred prior to Claimant's investment and so they cannot form the basis of a breach of the Treaty. In any event, Panama submits that Sacyr has not proven misrepresentation.[26]

64. Panama submits that the alleged representations relied on by Sacyr relate to matters that were addressed or regulated by the provisions of the Contract. They are outside the scope of the dispute resolution provisions of the Treaty for the following reasons:[27]

(i) the representations allegedly made by the ACP regarding the completeness and accuracy of the studies provided to bidders, and the right to be compensated if such studies proved incorrect, were expressly dealt with under the provisions of the Contract;

(ii) the ACP's alleged representation contained in historic costs estimates regarding the feasibility of the Project is dealt with under the provisions of the Contract. Claimant has taken the position in the ICC Arbitrations that the ACP's alleged duty to provide all relevant information and to guarantee the accuracy of that information arose under the Contract;[28]

(iii) Panama's alleged representation that the Project would not require funding from Claimant and its partners is a contractual issue. GUPC and the ACP agreed a fixed price, lump sum contract. The extensive prequalification process to test the

---

25 Rejoinder on the Merits, [695].
26 Rejoinder on the Merits, [695].
27 Rejoinder on the Merits, [696].
28 *See, e.g.*, *Grupo Unidos por el Canal, S.A., et al. v. Autoridad del Canal de Panamá*, ICC Case No. 19962/ASM, Statement of Claim, 2 February 2015, [408]–[410] (**R-159**).

experience and financial strength of the potential bidders indicates that there was no intention that the Contract should be cash-flow positive;[29]

(iv) Panama's alleged representation that it would take a cooperative approach to the Project is based directly on a statement in the Request For Qualifications ("**RFQ**") and on the dispute resolution mechanisms (i.e., the Dispute Adjudication Board process) under the Contract. The ACP, however, did not agree to accept claims that had no merit, such as those that the Contractor presented; and

(v) Panama's alleged representation that GUPC's bid "*complied with all the requirements specified in the contract*" is a purely contractual matter.[30]

65. Panama submits that the alleged frustration of Claimant's expectations with respect to information provided during the tender process revolves around an alleged misrepresentation or *culpa in contrahendo,* rather than a treaty breach. Claimant's allegations, according to Panama, relate exclusively to the ACP's conduct within the framework of the Contract.[31] If such a claim were to succeed it would be necessary to establish the requirements for a finding of misrepresentation, but that would not, without more, give rise to a treaty violation.

66. Panama relies on the decision of the tribunal in *Parkerings v. Lithuania*, which found that Lithuania's failure to disclose a legal opinion to the investor prior to the execution of the contract did not breach international law.[32] Panama contends that Claimant has ignored the central statement of principle in the *Parkerings* case, which is that the non-disclosure of information prior to a transaction "*while objectionable, does not, in itself, amount to a breach of international law. It would take unusual circumstances to decide otherwise.*"[33] According to Panama, Sacyr has failed to show that "*unusual*

---

29 Request for Qualifications for the Design-Build of the Third Set of Locks Project, 27 August 2007, [14.1.1.a], [14.1.2 b, d, e] (**C-163**); Request for Qualifications for the Design-Build of the Third Set of Locks Project, Fifth Revision, 8 November 2007, [17.14], [17.15] (**C-15**).

30 Rejoinder on the Merits, [696], citing Counter-Memorial on the Merits, [493].

31 Rejoinder on the Merits, [697].

32 *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, [307] (**CLA-189**).

33 *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, [307] (**CLA-189**).

circumstances" apply in this case. In particular, it has failed to demonstrate that the ACP's alleged failure to disclose certain information in relation to the Project was carried out in the exercise of *puissance publique*.[34]

67. Sacyr asserts that, due to budgetary concerns for the Project, the ACP failed to reveal key seismic information material on the design and construction of the Lock Gates to the TSLP tenderers (the "**Tenderers**") and it concealed key information regarding the low quality of the Pacific Lock Excavation ("**PLE**") basalt for the production of aggregates.[35] Panama responds that this would not necessarily make the ACP's actions sovereign acts. Any employer which commissions a construction project will be concerned about the price for the project and the need to justify the economic feasibility of the Project to its stakeholders.[36]

68. Panama relies on the decision of the tribunal in *Bureau Veritas v. Paraguay*. In analysing a claim by an investor based on Paraguay's failure to pay amounts due under a contract, the tribunal noted that:

> *[t]here is nothing inherent in the fact that such conduct [i.e., the failure to pay] is undertaken by a State in its capacity as a contracting party that might as such endow them with the quality of sovereign acts such as to catalyse responsibility under an international treaty obligation relating to fair and equitable treatment. There has been no reliance by Paraguay on the powers of a public authority that might not – by analogous means – also be available to a private person or corporation. Attempts to mislead, distort, conceal or otherwise confuse a contractual partner are strategies open to and used by both public and private persons.*[37]

69. Panama submits that the same conclusion applies in this case.[38] The alleged actions of the ACP in withholding information from bidders did not involve the use of any powers that would not have been available to a private contracting party which tendered for a construction project. Panama further submits that the ACP's conduct in relation to the

---

34 Rejoinder on the Merits, [702].
35 Reply on the Merits, [343(b)].
36 Rejoinder on the Merits, [705].
37 Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay, ICSID Case No. ARB/07/9, Award, 9 October 2012, [241] (**RLA-144**).
38 Rejoinder on the Merits, [707].

Dispute Adjudication Board ("**DAB**") process and with respect to the financing of the Project was similarly contractual in nature and taken within the framework of the Contract.[39] Panama says that the *Latam Hydro v. Peru* case is instructive in this regard. In that case, the tribunal found that Peru's denial of an extension request and commencement of arbitration under a construction contract were contractual acts. The tribunal held that:

> *the true nature of the act of denying the Third Extension Request was as a contractual party and not as sovereign. The denial of the Third Extension Request (like the execution of the Addenda to the RER Contract) was carried out within the framework of the RER Contract. The fact that there are procedural and administrative formalities of contracting with a sovereign does not translate those contractual acts into governmental ones.*[40]

Claimant's Bad Faith and Lack of Transparency Allegations cannot sustain a violation of the Treaty

70. Panama submits that Sacyr's allegations of bad faith and lack of transparency are equally incapable of giving rise to a breach of the Treaty. These claims relate to Panama's alleged failure to disclose relevant information during the tender process.[41] However, in order to establish bad faith conduct in violation of the Treaty, Sacyr must demonstrate that there are exceptional circumstances that warrant a finding of bad faith under international law, such as (i) the use by a State of legal instruments for purposes other than those for which they were created; (ii) a conspiracy on part of a State to inflict damage on, or to defeat, an investment; (iii) the termination of an investment for reasons other than those put forward by the government; or (iv) the expulsion of an investment based on local favouritism.[42] In order to establish a lack of transparency in breach of FET, a claimant must show that Panama breached "*the most fundamental notions of transparency and due process*", as would be the case if Panama were to fail to ensure

39 Rejoinder on the Merits, [708].
40 *Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru*, ICSID Case No. ARB/19/28, Award, 20 December 2023, [1216] (**RLA-308**).
41 Rejoinder on the Merits, [710].
42 Counter-Memorial on the Merits, [510], citing *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, PCA Case No. 2008-09, Final Award, 12 November 2010, [300] (**RLA-211**).

that the relevant legal requirements for initiating, completing or operating the investment were made known to a prospective investor.[43]

71. Panama submits that Sacyr has made no attempt to show that any of these exceptional circumstances exist in this case. It has stated only that its claims do not concern Panama's contractual obligations, but rather "*whether the ACP was obligated under the Treaty to provide contractors with all relevant data regarding fundamental aspects of the Project during the tender phase*."[44] Panama submits that this is not enough to meet Sacyr's burden of showing that the relevant conduct was carried out in the exercise of *puissance publique.*[45]

72. Panama submits that all of the alleged conduct that forms the basis of Claimant's bad faith and transparency claims overlaps entirely with Claimant's legitimate expectations claims. Panama therefore reiterates that such conduct was contractual rather than sovereign in nature.[46]

Claimant's Discrimination Allegations cannot sustain violation of the Treaty

73. Sacyr alleges that Panama discriminated against it by failing to reimburse it for certain costs in relation to the quality of the basalt to be used for the Project, while at the same time agreeing to reimburse similar costs to the contractor in the related PAC-4. Panama submits that Sacyr has failed to show on a *prima facie* basis that Claimant and the PAC-4 contractor were similarly situated at the time of the relevant treatment for the purposes of the legal test for discrimination.[47]

74. Panama submits that Sacyr ignores key differences between the TSLP and the PAC-4 that dictate the terms of the ACP's relationship with these contractors: the contractual framework governing each of the two projects was fundamentally different.[48]

---

43 Counter-Memorial on the Merits, [513], citing *RENERGY S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Award, 6 May 2022, [928] (**RLA-276**).
44 Reply on the Merits, [333(b)].
45 Rejoinder on the Merits, [711].
46 Rejoinder on the Merits, [711].
47 Counter-Memorial on the Merits, [758].
48 Counter-Memorial on the Merits, [758].

75. The PAC-4 contract was a "*design-bid-build*" project. The ACP designed the works, and the contractor was responsible for the construction portion of the work.[49] There was no pre-qualification process for the PAC-4 contract, and tenderers were not required to provide detailed information about their financial qualifications.[50] The PAC-4 consortium was to be paid according to the quantity of work that it undertook. Further, the payment structure of the PAC-4 contract was that of an estimated quantities contract, which allowed for adjustments to the contract price based on the quantity of unit-price items required.[51] By contrast, GUPC's Contract was a "*design-build*" project, such that the contractor was responsible for both the design and construction of the works.[52] The Tenderers were thus subject to a rigorous pre-qualification process to ensure that they had both the technical expertise and financial capability to undertake the Project.[53] GUPC's Contract was a lump-sum, fixed-price contract. GUPC was required to carry out all of its obligations under the Contract in return for the agreed contract price.[54] The contract price was subject to adjustment only in the limited circumstances set out in GUPC's Contract.[55] The quantity or amount of work undertaken by GUPC under its Contract was largely irrelevant; it would be paid the Contract Price, no more, no less, regardless of how much it cost GUPC to carry out and complete the Works.[56]

76. Panama therefore submits that the PAC-4 consortium was neither similarly situated to GUPC nor in like circumstances to those of GUPC at the time of the alleged discriminatory treatment. Sacyr's discrimination claim therefore fails at the first hurdle.[57]

77. Panama submits further that Sacyr has failed to establish on a *prima facie* basis that the PAC-4 contractor and Claimant were treated differently. Sacyr argues that the ACP agreed to reimburse the PAC-4 contractor for the quality of the basalt. Panama submits

---

49 **RWS-2** Fernández I, [14].
50 **RWS-2** Fernández I, [14]–[15].
51 **RWS-2** Fernández I, [15].
52 **RWS-2** Fernández I, [14].
53 **RWS-2** Fernández I, [17].
54 **RWS-2** Fernández, [15].
55 RFP, Amendment No. 24, Volume III – Conditions of Contract (Final), February 2009 (**C-222**).
56 Counter-Memorial on the Merits, [759].
57 Counter-Memorial on the Merits, [762].

that this is untrue, and Mr. Fernandez explains in his Second Witness Statement that any such claims were waived.[58]

78. In any event, Panama submits that Sacyr's and PAC-4 contractor's eligibility for reimbursement of any costs was a matter entirely governed by the respective contracts between those companies and the ACP. Sacyr's claims are therefore *a fortiori* contractual matters and they do not involve any exercise of *puissance publique*.[59]

79. Sacyr argues that Executive Decree No. 6 of 23 January 2012 ("**Decree No. 6**") was discriminatory because it increased the minimum wage costs only in relation to the Project. Panama submits that Sacyr has failed on a *prima facie* basis either (i) to identify a comparator that is in like circumstances with GUPC; or (ii) to establish that there was differential treatment between any such comparator and GUPC.[60] The increased labour costs under Decree No. 6 applied to all contractors participating in the TSLP.[61] Moreover, Panama contends, the ability of Claimant and its consortium partners to reclaim increased labour costs arising from Decree No. 6 is a matter covered by the terms of the Contract, not the Treaty.[62]

Claimant's Arbitrary Treatment Allegations cannot sustain a violation of the Treaty

80. Panama submits that any breach of Treaty claim based upon arbitrary treatment must meet a high threshold in order to succeed. The complainant must show either that measures were taken by the State to inflict damage on the investor without serving any apparent legitimate purposes or that they were based on discretion, prejudice or personal preference.[63]

81. Panama argues that Sacyr's claims fall short of meeting this standard; it contends that the basis of Sacyr's claim that Panama "*forc[ed] Claimant to finance the inevitable costs of the Project*"[64] is contractual, not sovereign.[65] For instance, Sacyr alleges that "*the*

58 Rejoinder on the Merits, [713]; **RWS-5** Fernández II, [36].
59 Rejoinder on the Merits, [713].
60 Rejoinder on the Merits, [715].
61 Rejoinder on the Merits, [715].
62 Rejoinder on the Merits, [715].
63 Rejoinder on the Merits, [716].
64 Reply on the Merits, [333(d)].
65 Rejoinder on the Merits, [717].

Contract entitled GUPC to interim payments for works done."[66] Panama submits that Sacyr has provided no evidence that the ACP sought to interfere with the Contract through the improper use of sovereign power.[67]

82. Sacyr appears to allege that the ACP's conduct was motivated by alleged constraints on the Project's budget which arose because ACP was required to pay contributions to the National Treasury in an amount equal to, or more than, its contributions in 2005.[68] As a result, Sacyr says that such actions were carried out in the exercise of *puissance publique*. Panama responds that the ACP promptly paid additional sums to Sacyr when it was ordered by the DAB to do so, including over US$ 200 million pursuant to the DAB Referral 11 decision, which was subsequently overturned.[69] Moreover, Panama submits that Sacyr has provided no evidence that the ACP's liability for contributions to the National Treasury had any impact on its conduct *vis-à-vis* Sacyr.[70] Throughout each year of the Expansion program, the ACP's contributions to the National Treasury exceeded the amount required by Law No. 28,[71] yet the ACP voluntarily advanced significant additional funds totalling more than US$ 1 billion to assist the Contractor during the course of the Works.[72]

83. Sacyr relies on *Desert Line v. Yemen* to argue that "*starving*" an investor of cash can breach the FET standard.[73] Panama submits that the circumstances in *Desert Line v. Yemen* were different from the present case.[74] In *Desert Line v. Yemen*, the tribunal's conclusion that refusing requests for payment breached the FET standard was based on several aggravating factors, including the State's use of duress to force the investor to enter into a settlement agreement. None of those factors is alleged here.[75]

84. Panama relies on *Waste Management v. Mexico* for the proposition that the breach by a State of its contractual obligations will not amount to arbitrariness unless there has been

66 Memorial on the Merits, [148].
67 Rejoinder on the Merits, [717].
68 Reply on the Merits, [344(c)].
69 DAB Decision on Referral No. 11, 30 December 2014 (**C-387**).
70 Rejoinder on the Merits, [718].
71 *Lock Gates and Labor* Arbitration, Miguez Witness Statement, [104] (**C-421**); Spreadsheet with the Total Contributions made by the ACP to the Panama National Treasury (**R-524**).
72 Rejoinder on the Merits, [719].
73 Reply on the Merits, [333(d)].
74 Rejoinder on the Merits, [721].
75 Rejoinder on the Merits, [721].

an "*outright and unjustified repudiation of the transaction*," or the State has failed to provide "*some remedy […] open to the creditor to address the problem*."[76] The ACP did not repudiate the Contract and Claimant had ample access to appropriate remedies, including through the DAB process and ICC arbitration, both of which it utilised.[77]

iv. Claimant's Arguments that the ACP Acted in Exercise of *Puissance Publique* Fail

85. Panama submits that, having failed to show that any of the specific actions on which it bases its claims constitute sovereign conduct, Sacyr advances four arguments regarding the role of the ACP:[78]

(i) *The Panama Canal was a project of national significance and therefore the actions of the ACP in relation to it were sovereign in nature*. Panama responds that the importance of the Panama Canal to Panama's economy does not convert the ACP's actions in relation to the Project into sovereign actions.[79] It is the nature of the relevant conduct that is of primary importance, not the purpose of the conduct. Even if the expansion of the Panama Canal has a sovereign purpose, this does not mean that commercial arrangements used to achieve that purpose are sovereign in nature.[80] Panama points out that many cases that discuss the need for a showing of an exercise of *puissance publique* also involve contracts for major public infrastructure projects, such as *Impregilo v. Pakistan, RFCC v. Morocco, Bayindir v. Pakistan* and *Staur v. Latvia*.[81]

Panama contends that the commercial nature of the arrangements between the ACP and Claimant is evident from the Contract. The Contract was negotiated and agreed by the ACP and the various Tenderers. The first draft of the Contract was based on the internationally recognised FIDIC standard form contract. The

---

76 Counter-Memorial on the Merits, [522], citing *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, [115] (**CLA-207**).
77 Rejoinder on the Merits, [722].
78 Rejoinder on the Merits, [723].
79 Rejoinder on the Merits, [724].
80 Rejoinder on the Merits, [724].
81 Rejoinder on the Merits, [725].

Contract was subsequently amended and agreed following multiple meetings between ACP and the Tenderers and comments from the Tenderers.[82]

The Contract contains many of the standard commercial terms that typically appear in a commercial construction contract, including (i) access to site; (ii) the Contractor's responsibilities; (iii) the design of the Project; (iv) defects; (v) contract price and payment terms; (vi) termination rights; (vii) *force majeure*; and (viii) dispute resolution. None of the terms of the Contract suggests that the ACP is exercising sovereign power when exercising its rights and obligations under the Contract.[83]

Sacyr points out that the ACP board referred to the need to include a sovereign immunity waiver in its financing contracts with lenders.[84] Panama responds that the terms of the financing contracts are completely separate to the design-build contract and irrelevant to the issues in this case. The same Board minutes note that a sovereign immunity waiver will be required in order to obtain "***commercial*** *financing*" [Panama's emphasis]. The Contract itself does not include a sovereign immunity waiver, which Panama says underscores the purely commercial nature of the acts contemplated under that agreement.[85]

(ii) The Project was initially approved by the executive and legislative branches and via a referendum. Panama submits that the mere fact that a project is subject to approval by a country's government and legislature does not mean that all acts carried out in relation to that project are sovereign in nature.[86] Government organs regularly enter into commercial contracts and receive approval to do so, without that process automatically turning the contract into a sovereign act. Panama submits, further, that it is common in many countries, particularly in Latin America, for commercial projects that have social or public significance to be subjected to a referendum.[87]

82 Rejoinder on the Merits, [726].
83 Rejoinder on the Merits, [727].
84 Minutes of the Extraordinary Meeting of the Board of Directors of the ACP, 15 January 2008, p. 11 (**C-104**).
85 Rejoinder on the Merits, [728].
86 Rejoinder on the Merits, [729].
87 Rejoinder on the Merits, [729].

Panama dismisses Sacyr's reliance on alleged examples of government influence on the ACP during the tender process. Sacyr cites a speech by President Torrijos in which he stated that the Panamanian government and the ACP acted as "*one team*". Panama submits that the fact that the ACP coordinated with the government regarding aspects of the tender does not make any and all of the ACP's actions in relation to the tender sovereign.[88] Sacyr also alleges that President Torrijos "*gave directions*" to the ACP regarding assumptions to be contained in the TSLP Proposal. Panama submits that the segment of the speech relied on by Sacyr merely notes that the Project would be financed through gradual increases in tolls.[89] Other documents relied on by Sacyr mention coordination or meetings with Government in relation to the Project, but they do not provide any evidence that the ACP was acting in a sovereign capacity, so far as its conduct relevant to this case is concerned.[90]

(iii) The Contract was entered into pursuant to the ACP's regulatory authority. Sacyr relies on Article 6 of Law No. 28 of 2006. Panama submits that Article 6 does not refer to the ACP's regulatory authority.[91] Article 6 provides that during the contracting and implementation process of the construction of the third set of locks, an *Ad-hoc* Commission will be established, composed of seven members: a representative of the National Council of Organized Workers (CONATO); a representative of the National Council of Private Enterprises (CONEP); a representative of Civic Clubs; a representative of the Council of Rectors; a representative of the Ecumenical Committee; a representative appointed by the National Assembly; and a representative appointed by the Executive Body.[92]

Article 52 of Law No. 19 of 1997, which is the organic law of the ACP, provides that in contracting for goods and services, the ACP is required to "*ensure the best quality, the most favorable prices, efficiency and competitiveness*."[93] Panama submits that the ACP is required to obtain the best possible goods and

88 Rejoinder on the Merits, [730].
89 Rejoinder on the Merits, [730].
90 Rejoinder on the Merits, [730].
91 Rejoinder on the Merits, [731].
92 Rejoinder on the Merits, [731].
93 Law No. 19 of 1997 "Por la que se Organiza la Autoridad del Canal de Panamá," Art. 52 (**C-4**).

services at the best possible price, as would be any commercial company when contracting for goods and services. According to Panama, this underlines the commercial nature of the ACP's contractual relationships with counterparties.[94]

Sacyr alleges that Panama sought to amend its regulations to protect itself from certain risks. Panama responds that the amendments to Panama's regulations to which Sacyr refers are, in fact, a reference to the ACP's modifications to its Acquisition Regulations. Those amendments reinforced the primacy of the terms of the Contract in governing the relationship between the ACP and the GUPC.[95]

(iv) The ACP's performance of its duties under the Contract was subject to a "*system of controls*" from the executive and legislature. Panama submits that what Sacyr characterises as "*controls*" are in fact merely "*reporting obligations*" and "*transparency obligations*" *vis-à-vis* Panama's executive and legislative branches pursuant to Law No. 28.[96] The fact that an entity reports to certain State branches is not sufficient to demonstrate that specific actions are sovereign in nature.

B. Claimant's Position

i. *Puissance Publique*

86. Sacyr dismisses Panama's objection to the Tribunal's jurisdiction *ratione materiae* on the basis that Sacyr's claims are nothing more than contractual claims that do not involve the exercise of *puissance publique* as a mischaracterisation.[97] Sacyr claims that Panama breached the Treaty by withholding and misrepresenting crucial risk information so as to secure Sacyr's investment on certain contractual terms, and then, once the undisclosed risk had materialised, sought to deploy those contractual terms against Sacyr for the purpose of saddling it with the cost consequences of its deception.[98] The fact that this deception relates to the Contract does not somehow transform Claimant's Treaty claims

94 Rejoinder on the Merits, [732].
95 Rejoinder on the Merits, [733].
96 Rejoinder on the Merits, [734].
97 Rejoinder on Jurisdiction, [1]–[2].
98 Rejoinder on Jurisdiction, [3].

into claims for breach of the Contract. Whether or not the ACP breached the Contract has no bearing on the question of whether Panama breached the FET standard.[99]

87. Panama has referred the Tribunal to cases holding that a breach of contract can only give rise to a treaty breach if it involves the exercise of *puissance publique*. Sacyr submits that the authorities relied on by Panama are all directed to a situation where the investor claims that the State has breached the contract and that this contractual breach gives rise to treaty breach.[100]

88. Sacyr acknowledges that, according to the authorities, a breach of contract will not give rise to a treaty breach unless the State exercises its *puissance publique* in breaching the contract. Sacyr says that that question does not arise on the facts of this case.[101] In any event, it is not axiomatic that if the relevant factual matrix includes a contract, the question of a breach of a treaty obligation will not arise. A State cannot be inoculated against international responsibility for breach of its treaty obligations whenever the conduct complained of occurred within the factual context of a contractual relationship.[102] If that were the case, Sacyr submits that a State would be able to render itself immune from international responsibility pursuant to an investment treaty simply by entering into a contract with an investor.[103]

89. The proposition that State conduct in breach of a treaty cannot engage a State's international responsibility whenever it "*relates to*" a contract is untenable.[104] The fact that a State's wrongful conduct involved the exercise of contractual rights does not affect its characterisation as internationally unlawful.

90. Sacyr relies on *Vivendi I (Annulment)* for the following principles:

99 Rejoinder on Jurisdiction, [4].
100 Rejoinder on Jurisdiction, [6].
101 Rejoinder on Jurisdiction, [7].
102 Rejoinder on Jurisdiction [7].
103 Reply on the Merits, [328].
104 Rejoinder on Jurisdiction, [9].

(i) "*whether particular conduct involves a breach of a treaty is not determined by asking whether the conduct purportedly involves an exercise of contractual rights.*"[105]

(ii) "*[I]t is evident that a particular investment dispute may at the same time involve issues of the interpretation and application of the BIT's standards and questions of contract.*"[106]

(iii) "*As to the relation between breach of contract and breach of treaty in the present case, it must be stressed that Articles 3 and 5 of the BIT [imposing an obligation upon the State to provide, respectively, fair and equitable treatment and protections against expropriation] do not relate directly to breach of a municipal contract. Rather they set an independent standard. A state may breach a treaty without breaching a contract, and vice versa, and this is certainly true of these provisions of the BIT.*"[107]

(iv) "*[W]hether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract, in other words, the law of Tucumán.*"[108]

---

105 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic), ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, [110]**(CLA-27**).

106 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic), ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, [60](**CLA-27**).

107 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic), ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, [95] (**CLA-27**).

108 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic), ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, [96] (**CLA-27**).

(v) A treaty tribunal may review contract matters "*at least so far as necessary in order to determine whether there had been a breach of the substantive standards of the BIT.*"[109]

91. Sacyr submits that, following *Vivendi I*, treaty tribunals have consistently held that (i) the factual matrix of a treaty case may include the relevant contract with no impact on the characterisation of an investor's claims as treaty claims;[110] and, similarly, that (ii) investment tribunals may need to consider the relevant contractual background in assessing treaty claims, while still exercising treaty jurisdiction.[111]

92. According to Sacyr, the *Impregilo v. Pakistan* decision, on which Panama relies, endorsed this distinction in the following terms:

> *... contrary to Pakistan's approach in this case, the fact that a breach may give rise to a contract claim does not mean that it cannot also – and separately – give rise to a treaty claim. Even if the two perfectly coincide, they remain analytically distinct, and necessarily require different enquiries.*[112]

93. Sacyr therefore asserts that its claims are predicated on facts which are clearly capable of constituting breaches of the Treaty:[113]

(i) Sacyr's claim that Panama breached its legitimate expectations falls within this Tribunal's jurisdiction. Panama argues that its representations during the tender phase were purely contractual matters, because they concerned "*at their core, the question of whether the ACP incurred in* culpa in-contrahendo *during the tender by withholding information and supplying inaccurate data*".[114] Sacyr submits that while GUPC may also have a *culpa in contrahendo* claim against ACP on the basis of the Contract or Panamanian law, that is not the claim that

---

109 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic), ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, [110] (**CLA-27**).

110 Reply on the Merits, [332], citing *Strabag SE, Raiffeisen Centrobank AG, Syrena Immobilien Holding AG v. Republic of Poland*, ICSID Case No. ADHOC/15/1, Partial Award on Jurisdiction, 4 March 2020, [5.33]–[5.34] (**CLA-242**).

111 Reply on the Merits, [332].

112 *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, [258] (**CLA-47**).

113 Reply on the Merits, [333].

114 Counter-Memorial on the Merits, [482].

Sacyr is bringing to this Tribunal. To the contrary, Sacyr's case is that Panama's misrepresentations during the tender stage regarding the most fundamental aspects of the Project induced Sacyr's investment. The fact that GUPC subsequently entered into the Contract with the ACP does not transform Sacyr's BIT claim arising from Panama's assurances into a "*purely contractual*" or pre-contractual matter.[115]

(ii) Claimant's claim that Panama did not act transparently and in good faith falls within this Tribunal's jurisdiction. Panama argues that Sacyr's claims for breaches of the transparency, good faith, and non-arbitrariness requirements under the Treaty's FET standard concern whether the "*ACP was obliged under the Contract and Panamanian law to provide contractors with all relevant data*".[116] Sacyr submits that Panama has mischaracterised its claims, which concern whether the ACP was obligated under the Treaty to provide contractors with all relevant data regarding fundamental aspects of the Project during the tender phase.[117]

Parkerings v. Lithuania does not support Panama's contention that it is not enough to show that the State failed to disclose certain information in the context of the negotiation of a design and construction contract to breach the Treaty's FET standard. In *Parkerings v. Lithuania,* the tribunal found that the Municipality's failure to disclose a legal opinion, which did "*not provide any information which was not, at the time of its drafting, accessible to the public or at least to any other qualified law firm*", did not amount to a breach of international law.[118] In this case, Sacyr alleges that Panama failed to disclose key information regarding the tests that it had performed or commissioned regarding the quality of the basalt, or regarding the concerns expressed by Bechtel, Taisei, Mitsubishi Corporation ("**BTM**") or Consorcio Post-Panamax

115 Reply on the Merits, [333(a)].
116 Counter-Memorial on the Merits, [509].
117 Reply on the Merits, [333(b)].
118 *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, [304] (**CLA-189**).

("**CPP**") as to the Seismic Reduction Factor included in the Reference Design provided by Panama.[119]

(iii) Claimant's claim that Panama discriminated against Sacyr falls within this Tribunal's jurisdiction. Panama argues that Claimant's discrimination claim does not reach the required jurisdictional threshold as it is a claim grounded in the Contract. Sacyr reiterates that its claim is based on the Treaty's FET standard, which, *inter alia*, protects investors against discriminatory conduct. Sacyr is not seeking recovery in relation to any alleged breach of the Contract or the Joint and Several Guarantee ("**JSG**") and it is not asserting rights fundamentally based on the Contract before this Tribunal. [120]

(iv) Claimant's claims that Panama acted arbitrarily and violated the Treaty's FET and non-impairment standards fall within this Tribunal's jurisdiction. Panama argues that Sacyr's claims that it acted arbitrarily by forcing Sacyr to finance the costs of the Project are plainly contractual and cannot give rise to a breach of Panama's obligations under the Treaty. Sacyr submits that its claims in this arbitration are not that Panama breached the Contract, but rather that Panama breached the Treaty by forcing Sacyr to finance the inevitable costs of the Project, including through the issuance of discriminatory legislation targeted at GUPC.[121]

The creation of a liquidity crunch in a construction project can violate the FET standard. Sacyr relies on the decision in *Desert Line v. Yemen*, in which Yemen's actions, which included *inter alia*, "*denying the Claimant's legitimate requests for due payments*" and "*starving the Claimant for cash*"[122] as part of a course of conduct intended to induce the claimant to accept a settlement agreement was a breach of its obligation to provide fair and equitable treatment.[123] In this case, Sacyr submits that Panama's adopted course of conduct created a liquidity

119 Reply on the Merits, [333(b)].
120 Reply on the Merits, [333(c)].
121 Reply on the Merits, [333(d)].
122 *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, [181] (**CLA-32**).
123 *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, [194] (**CLA-32**).

> crunch and forced Claimant to make additional investments in the Project. Panama's approach was allegedly driven by a political imperative to limit Panama's funding of the Project to the amount that Panama had presented to its population when it sought public approval for the Project in the referendum.[124]

94. In any event, if the Tribunal were to consider that a showing of *puissance publique* was required in assessing Sacyr's claims, then Sacyr submits that this requirement is satisfied.[125]

95. Sacyr relies on the finding of the tribunal in Strabag v. Libya that contracting for "*significant public infrastructural projects*" in the State's interest "*is in fact a typical State function, not a commercial activity carried out* jure privatorum."[126]

96. Sacyr further submits that, in finding that the Lithuanian entity responsible for overseeing privatisations (the SPF) was acting in a sovereign capacity, the tribunal in *Bosca v. Lithuania* considered the fact that the privatisation process in that case was "*highly regulated … culminating in a multi-step State-approval process*" and "*SPF's actions were vetted and … approved by higher authorities that clearly acted in sovereign capacities*", in such a way that the "*Government acted in multiple steps, projecting its sovereign authority*".[127]

97. Sacyr says that these findings are applicable to the present case.[128] It draws attention to this Tribunal's observation in the first phase of this arbitration that: "*the TLP Project, 'the most complex and largest project that [Panama] has ever executed', was an 'affair of State' upon which the 'future of [Panama] for the next one hundred years' depended, and upon which the Panamanian people were called upon to vote in a referendum*".[129] The Tribunal further reasoned that the Canal was a "'*pillar in the human, social and*

---

124 Mr. Quijano (ACP's Administrator) stated that the ACP's strategy was to "*fight until the last penny*", because the ACP "*kn[e]w that any amount that the Panama Canal has to pay to a contractor, beyond what was contracted, ultimately impacts on what the State, being all Panamanians the State, we are going to receive.*" A. Solis, "$400 million remaining contingencies", El Capital Financiero, 27 August 2012, p. 2 (**C-303**); Minutes of the Session of the National Assembly, 19 January 2015, p. 12 (**C-388**).

125 Reply on the Merits, [338].

126 *Strabag SE v. Libya*, ICSID Case No. ARB(AF)/15/1, Award, 29 June 2020, [165] (**CLA-140**).

127 *Luigiterzo Bosca v. Republic of Lithuania*, PCA Case No. 2011-04, Award, 17 May 2013, [127]–[128] (**CLA-20**).

128 Reply on the Merits, [340].

129 Decision on a Preliminary Issue, [200(iv)].

economic development of [Panama]'" and "*the 'main economic resource' of the Republic of Panama*", and, as a result, "*[i]t would be difficult to imagine an entity closer to the single most important national resource in Panama than ACP, nor an entity with greater responsibility for the safe, uninterrupted, efficient and profitable operation of the Canal in furtherance of Panama's Treaty obligations*."[130] The Tribunal recorded that Panama had assumed full responsibility for the management, operation and maintenance of the Canal. Those obligations were fulfilled by the ACP, such that the obligations of the ACP were the obligations of Panama.[131]

98. Sacyr submits that the Panama Canal expansion project was an inherently governmental activity of the utmost importance to Panama and its citizens. It required a multi-tiered process of approval, including approvals from (i) the Cabinet Council; (ii) the National Assembly; and (iii) the Panamanian people in a national referendum.[132] The acts taken by the ACP in planning and executing the Project were governmental acts.[133]

99. Sacyr notes the minutes of a meeting of the ACP Board discussed the securing of financing for the Project and its consideration of the fact that if it were to obtain financing, it would need to waive its sovereign immunity.[134] In the US, an entity does not enjoy sovereign immunity for commercial activities.[135] Sacyr submits therefore that in this context ACP's representations, actions and interactions with the Tenderers during the tender phase amounted to an exercise of sovereign power:[136]

(i) The representations that the ACP made to the bidders during the tender phase were based on studies commissioned for the preparation of the TSLP Proposal, which was approved by the Executive, the Legislative and the Panamanian people in a referendum. President Torrijos later confirmed that the Panamanian government and the ACP acted as "*just one team*" during the preparation of the

130 Decision on a Preliminary Issue, [200(ii)-()–(iii)], [201].
131 Decision on a Preliminary Issue, [210]–[211].
132 Reply on the Merits, [341].
133 Reply on the Merits, [341].
134 See Minutes of the Extraordinary Meeting of the Board of Directors of ACP, 15 January 2008, p. 11 (**C-104**).
135 Foreign Sovereign Immunities Act, 28 U.S.C., Section 1605(a)(2) (**C-91**). Section 1603(d), which defines "*commercial activity*" as "*… either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose*."
136 Reply on the Merits, [343].

TSLP Proposal.[137] Government officials also gave directions regarding the assumptions that were to be included in the TSLP Proposal in order for it to be approved, including with respect to the financing of the Project and engineering and technical matters.[138]

(ii) Sacyr explains that the Project was of the utmost importance to Panama and its people.[139] Global trade patterns were changing, and Panama wanted to maintain its importance as a pathway for global trade. At the same time, Panama had promised its people that the TSLP would be executed on budget. By law, ACP's contributions to the National Treasury had to remain at pre-project levels, and ACP's ability to secure external financing was constrained. Sacyr submits that the political cost of exceeding budget was apparent and if the Project's cost were to increase, Panama would no longer be able to justify the economic feasibility of the Project.[140]

(iii) The TSLP was approved on Panama's confirmation that concerns about its estimated cost were unfounded, and that any increase in the cost of the Project would require further approvals, including by the National Assembly and pursuant to a referendum.[141]

(iv) Sacyr submits that Panama also sought to amend its regulations during the tender phase to protect itself from the risks it had identified and thereby illegitimately to transfer such risk to Sacyr.[142]

100. Sacyr submits that the ACP's conduct in executing and performing the Contract also constituted an activity beyond that of an ordinary contracting party:[143]

(i) the Contract was issued under the ACP's regulatory authority;[144]

---

137 Interview of President Torrijos, 22 June 2016, 16:02-18:04 (**C-115**).
138 Reply on the Merits, [343(a)].
139 Reply on the Merits, [343(b)].
140 Reply on the Merits, [343(b)].
141 Minutes No. 7 of the Session of the Canal Affairs Commission, 27 June 2006, pp. 265–266 (**C-144**).
142 Reply on the Merits, [343(d)].
143 Reply on the Merits, [344].
144 Reply on the Merits, [344(a)].

(ii) the National Assembly explicitly introduced a system of controls that was to apply "*during the contracting and the implementation process of the construction of the third set of locks*",[145] namely: (i) reporting obligations to the National Assembly, the Executive Body and the Comptroller General; (ii) directing the Minister for Canal Affairs and the Administrators to "*appear in person before the Plenary Session*" of the National Assembly, "*once every semester, or whenever required by it*";[146] and (iii) imposing transparency obligations;[147] and

(iii) the ACP was also directed to pay contributions to the National Treasury during the entire Project, in an amount "*not less than [its] contributions ... made ... in the fiscal year 2005*",[148] which constrained the budget for the Project.[149]

101. For the above reasons, Sacyr submits that its claims in this arbitration are fundamentally based on the Treaty and fall within this Tribunal's jurisdiction. Sacyr does not advance any contractual claims under the Contract itself (or the JSG). Panama's *ratione materiae* jurisdictional objection must therefore fail.[150]

(2) Claimant's Claims are Inadmissible

A. Respondent's Position

102. Panama submits that the essential basis of all of Sacyr's claims is the Contract. As a result, such claims are exclusively subject to the dispute resolution provisions in Clause 20 of the Contract. The Tribunal should therefore decline to exercise jurisdiction over Sacyr's claims, because they are inadmissible.[151]

103. Panama relies on the approach set out in *Vivendi I* and *SGS v. Philippines*, namely, that where the "*essential basis*" of a claim is a breach of contract rather than a treaty breach, an investment treaty tribunal constituted to hear the purported treaty breach should defer

145 Law No. 28 of 2006, Articles 4-6 (**C-11**).
146 Law No. 28 of 2006, Article 4 (**C-11**).
147 Reply on the Merits, [344(b)].
148 Law No. 28 of 2006, Article 2 (**C-11**)
149 Reply on the Merits, [344(c)].
150 Reply on the Merits, [346].
151 Rejoinder on the Merits, [677

to the dispute resolution provisions under the contract.[152] The underlying rationale behind this approach is that where parties have agreed on a specific dispute resolution procedure for their contractual disputes, those procedures should apply to such disputes.[153]

104. Sacyr relies on the *Vivendi I* annulment committee's statement that a contractual jurisdiction clause cannot prevent a party from bringing a treaty claim where "*'the fundamental basis of the claim' is a treaty laying down an independent standard by which the conduct of the parties is to be judged*".[154] However, Panama submits that the "*fundamental basis*" of Sacyr's claims is the Contract.[155] For instance, (i) the ACP's alleged representations regarding the completeness and accuracy of the studies presented to bidders and the right to be compensated if such studies proved incorrect were expressly dealt with under the provisions of the Contract, including the Entire Agreement Clause and risk allocation provisions; (ii) the ACP's alleged representations purportedly contained in historic cost estimates concerning the feasibility of the Project are likewise dealt with by express provisions of the Contract; and (iii) Sacyr's claims regarding the ACP's conduct in relation to the DAB process were exclusively governed by the terms of the Contract in relation to that process.[156]

105. Sacyr submits that the facts of *SGS v. Philippines* are distinguishable, because the claimant's claims in that case related to an unpaid debt under a contract and therefore its claims could only tenably be brought under the umbrella clause of the treaty.[157] Panama submits that the facts in *SGS v. Philippines* are analogous to this case. As with the unpaid invoices in *SGS v. Philippines*, Sacyr's claims are firmly rooted in the Contract and so must be resolved pursuant to the dispute resolution provisions therein.[158]

---

152 *Compañía de Aguas del Aconquija, S.A. and Vivendi Universal v. Argentine Republic* (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic), ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, [98] (**CLA-27**).

153 *SGS Société Générale de Surveillance S.A. v. Republic of Phillippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, [141] (**RLA-35**).

154 *Compañía de Aguas del Aconquija, S.A. and Vivendi Universal v. Argentine Republic* (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic), ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, [99]–[101] (**CLA-27**).

155 Rejoinder on the Merits, [737].

156 Rejoinder on the Merits, [739].

157 Reply on the Merits, [370], footnote 996.

158 Rejoinder on the Merits, [738].

106. For all of the above reasons, Panama submits that the Tribunal should decline to exercise jurisdiction over Sacyr's claims.[159]

B. Claimant's Position

107. Sacyr does not dispute that Vivendi I (Annulment) and SGS v. Philippines are authorities for the proposition that a "*treaty tribunal should only exercise jurisdiction over claims involving alleged contract breaches where the 'fundamental' or 'essential' basis of the claim is the breach of the treaty rather than the contract.*"[160]

108. However, Sacyr contends that the "*fundamental basis*" principle was evoked in cases in which the claimant had alleged that a breach of contract gave rise to a breach of a treaty. That, in Sacyr's submission, is not the case here in that Sacyr does not predicate its Treaty claim on an asserted contract breach by the ACP.[161]

109. For instance, the tribunal in SGS v. Philippines observed that it could not "*accept that standard BIT jurisdiction clauses automatically override the binding selection of a forum by the parties to determine their contractual claims.*"[162] As noted above, the claim in SGS v. Philippines was for the payment of an unpaid debt owed under a contract. Sacyr submits that SGS v. Philippines is distinguishable from the present arbitration in that Sacyr's claim is predicated upon Panama's alleged withholding and misrepresentation of crucial risk information in order to secure Sacyr's investment on certain terms, and its subsequent attempt to use those terms against Sacyr.[163] Sacyr submits the fact that the conduct complained of occurred in the factual context of the Contract is not enough to bring Sacyr's claim within the ambit of Clause 20 and render it inadmissible before this Tribunal.[164]

110. Sacyr submits that Panama's reliance on the *Vivendi I* decision is misplaced, because Panama has ignored the following paragraphs of the decision:

---

159 Rejoinder on the Merits, [1102(a)].
160 Rejoinder on the Merits, [739].
161 Rejoinder on Jurisdiction, [11].
162 *SGS Société Générale de Surveillance S.A. v. Republic of Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, [153] (**RLA-35**).
163 Rejoinder on Jurisdiction, [12].
164 Rejoinder on Jurisdiction, [12].

> *… the exclusive jurisdiction clause did not and could not preclude a claim … in the event that the treatment accorded … amounted to a breach of international law;*
>
> *[and]*
>
> *… where 'the fundamental basis of the claim' is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard.*[165]

111. For those reasons, Sacyr requests that the Tribunal dismiss Panama's objections to the jurisdiction of the Tribunal and the admissibility of its claims.[166]

(3) Res Judicata, Issue Estoppel and Lis Pendens

A. Respondent's Position

112. Panama submits that the principles of *res judicata*, issue estoppel and *lis pendens* preclude Sacyr from reopening claims and issues that have been, or are in the process of being, finally determined in the various ICC Arbitrations.[167]

113. The Claimant (and its consortium partners) initiated over 20 DAB Referrals and eight ICC Arbitrations against the ACP under the dispute resolution provisions of the Contract. The latter were consolidated into five arbitrations, namely (i) the *Cofferdam* Arbitration; (ii) the *Guarantees* Arbitration; (iii) the *Concrete* Arbitration; (iv) the *Lock Gates and Labor* Arbitration; and (v) the *Disruption* Arbitration. The first three arbitrations have already been decided. Sacyr's claims in the *Lock Gates and Labor* Arbitration have been almost entirely rejected.[168] In particular, the claim in relation to the seismic coefficient which is repeated in these proceedings was fully considered and

---

165 *Compañía de Aguas del Aconquija, S.A. and Vivendi Universal v. Argentine Republic* (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic), ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, [99], [101] (**CLA-27**).

166 Rejoinder on Jurisdiction, [13].

167 Rejoinder on the Merits, [678].

168 *Lock Gates and Labor* Arbitration, Final Award, [319] (**RLA-283**).

rejected.[169] Panama submits that Sacyr "*has sought to repackage its contractual claims as purported breaches of the Treaty*."[170]

114. Sacyr's claims have the same essential basis as its claims in the ICC Arbitrations and, as a result, they are barred by the principles of *res judicata*, issue estoppel and/or *lis pendens.* Panama submits that Sacyr has mischaracterised the relevant legal principles and failed to engage with its analysis of the basis upon which the relevant principles should be applied to the facts.[171] Moreover, Sacyr has now abandoned its claims with respect to the Cofferdam.[172]

i. The Doctrine of *Res Judicata*

115. Panama submits that the doctrine of *res judicata* precludes the resurrection of claims that have already been decided. Under international law, there are two requirements for the doctrine to apply, namely: (i) identity of the parties in the claim that has been decided and the claim that is being pursued; and (ii) that the "*matter in dispute*" or "*question at issue*" in the two cases is the same. The second requirement is sometimes divided into two elements, namely object (*petitum*) and grounds (*causa petendi*).[173]

116. It is not necessary for the parties or matter in dispute to be identical. Rather, some flexibility is required when applying the elements of the legal test, as otherwise a party would be able to circumvent the *res judicata* effect of a judgment or award by resurrecting the same claim but on a slightly different legal basis, or through a related party.[174] Panama therefore submits that it is unnecessary to adhere strictly to the "*triple identity*" test.[175] A tribunal faced with overlapping or duplicative claims should take a holistic approach.[176]

117. While Panama acknowledges that public international law applies, it submits that the law of the *lex arbitri* is relevant as guidance when applying international law principles

169 Rejoinder on the Merits, [742].
170 Rejoinder on the Merits, [743].
171 Rejoinder on the Merits, [743].
172 Reply on the Merits, [329].
173 Rejoinder on the Merits, [746].
174 *The Use and Limits of* Res Judicata *and* Lis Pendens *as Procedural Tools*, pp. 56–61 (**RLA-33**).
175 Rejoinder on the Merits, [746].
176 The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools, p. 72 (**RLA-33**).

on *res judicata.*[177] As the United States is the place of arbitration both in the ICC Arbitrations and this arbitration, Panama submits that US law in relation to *res judicata* should be considered in the Tribunal's analysis in this case.[178] Under US law, the relevant enquiry for the purposes of "*claim preclusion*" is "*whether the plaintiff's claims arise out of the same 'common nucleus of facts'*" as the earlier litigation.[179]

118. Claimant relies on the "*triple identity test*" and therefore seeks to distinguish the cases upon which Panama relies in support of the proposition that investment tribunals do not rigidly apply the triple identity test, but rather, they examine the identity of the parties and the claims.[180] For instance, Sacyr argues that the *Inceysa v. El Salvador* tribunal "*did not rule […] that the identity of cause of action requirement was not part of the triple identity test, let alone that the triple identity test should not be strictly applied*."[181] Panama submits that this is incorrect. The *Inceysa* tribunal referred only to "*(i) identity of parties and (ii) identity of the claims*" as "*the basic requisites of* res judicata". It did not split the identity of claims into object (*petitum*) and grounds (*causa*).[182]

119. With respect to the *Fabrica v. Venezuela* award, Claimant points out that the tribunal did not rule on Venezuela's *res judicata* objection. Panama submits that the tribunal indicated that it had "*some sympathy with the Respondent's position*" and that Venezuela's objection "*would have been a serious issue for the Tribunal's consideration had it proceeded to adjudicate the merits of the Claimants' claims*."[183]

120. Panama also submits that Claimant mischaracterises the *Fraport v. Philippines* award. It says that it is clear that in *Fraport*, the tribunal applied the tests of identity of the

177 Rejoinder on the Merits, [750]–[751].
178 Rejoinder on the Merits, [747].
179 *Youngin's Auto Body v. District of Columbia*, 711 F. Supp. 2d 72, 79, p. 6 of PDF (D.C. Cir. 2011) (**RLA-214**).
180 Reply on the Merits, footnote 980.
181 Reply on the Merits, footnote 980.
182 Rejoinder on the Merits, [748]; *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (2 Aug. 2006), [214] (**CLA-48**).
183 Rejoinder on the Merits, [749], citing *Fábrica de Vidrios Los Andes, C.A. & Owens-Illinois de Venezuela, C.A v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Award, 13 November 2017, [319] (**RLA-155**).

parties and the claim, rather than the triple identity test when considering the *res judicata* effect of findings of the Philippines prosecutor.[184]

ii. Issue Estoppel

121. Panama submits that a closely related principle to *res judicata* is issue estoppel, which precludes parties from re-opening issues that have already been decided by a prior court or tribunal.[185] The requirements for issue estoppel are as follows: (i) it is apparent that the relevant issue was an issue in a prior proceeding; (ii) that the court or tribunal in that prior proceeding actually decided the issue; and (iii) that the resolution of that issue was necessary to resolving the claims.[186] Where the "*essential predicate*" to the success of a claim is an issue that has already been decided in a prior proceeding involving the same parties, that claim must be dismissed.[187]

122. Sacyr submits that "*[i]ssue estoppel does not exist in civil law systems, including Panamanian law. It is thus not a principle of international law*".[188] Panama submits that whether or not a legal principle is part of civil or Panamanian domestic law is not determinative of the question of whether it forms part of international law.[189]

123. Sacyr argues that *Amco v. Indonesia* and *RSM v. Grenada* involve circumstances that are quite different from the present case and therefore should not be relied on by the Tribunal.[190] Panama submits that both of these cases clearly acknowledge and apply the doctrine of issue estoppel and thus demonstrate that the doctrine forms part of international law.[191]

124. Sacyr submits that "*given that it [i.e., issue estoppel] is a species of res judicata, the triple identity test applies and is plainly not satisfied here.*"[192] Panama submits that

---

184 Rejoinder on the Merits, [749]; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Phillippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, [390] (**RLA-133**).
185 Rejoinder on the Merits, [754].
186 *Rachel S. RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010 [7.1.1] (**RLA-67**); Counter-Memorial on the Merits, [548].
187 Rejoinder on the Merits, [754]; *Rachel S.RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010 [7.2.1] (**RLA-67**).
188 Reply on the Merits, [356(a)].
189 Rejoinder on the Merits, [755].
190 Reply on the Merits, [356(a)], footnote 963.
191 Rejoinder on the Merits, [756].
192 Reply on the Merits, [356(b)].

while issue estoppel is indeed sometimes categorised as a species of res judicata under common law systems, it does not require the triple identity test to be satisfied.[193] As Professor Vaughan Lowe KC explained in his commentary on res judicata and international arbitration:

> "*Identity of cause and object are not, in practice, always required. This is because another doctrine comes to the aid of the party seeking to rely upon the findings of the earlier tribunal*", namely "*the doctrines of collateral estoppel or issue estoppel.*"[194]

125. Panama objects to Sacyr's argument that "*it is widely recognized that decisions of contract tribunals (such as the ICC tribunals in the present case) do not have res judicata effect in treaty proceedings.*"[195] According to Panama, the cases cited by Sacyr in support of that proposition are distinguishable.[196]

126. In *Desert Line v. Yemen,* the tribunal concluded that the relevant contract and treaty claims were fundamentally distinct from each other, unlike in the present case.[197] In *Helnan v. Egypt,* the tribunal applied the triple identity test, which is not a requirement for issue estoppel.[198] In *Lao Holdings v. Lao People's Democratic Republic,* the tribunal reached its conclusions based on its interpretation of a settlement agreement entered into between the investor and the State.[199] Finally, in *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, the tribunal applied the doctrine of *lis pendens*, not issue estoppel.[200]

127. Sacyr relies on the fact that the *Guarantees* and *Concrete* tribunals decided not to apply the doctrine of issue estoppel *vis-à-vis* other awards in the ICC Arbitrations. Panama

---

193 Rejoinder on the Merits, [757].
194 V. Lowe, *Res Judicata and the Rule of Law in International Arbitration*, 8 AFR.J.INT'L & COMP. L. 38 (1996), p. 41 (**RLA-123**).
195 Reply on the Merits, [356(b)].
196 Rejoinder on the Merits, [758].
197 *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008 [137] (**CLA-32**).
198 *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, 3 July 2008 [126] (**CLA-45**).
199 *Lao Holdings v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on the Merits of Claimants' Second Material Breach Application, 15 December 2017, [109] (**CLA-54**).
200 *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction, 6 August 2003, [182] (**CLA-79**)

submits that the tribunals in those cases based their conclusions on Panamanian law, which does not apply here.[201]

iii. The Doctrine of *Lis Pendens*

128. Panama submits that the *lis pendens* doctrine will preclude a claim in which the parties and the matter in dispute are the same as those in a pending proceeding in another forum.[202] A claim will be precluded where the parties and issue in dispute are substantially the same or, drawing from cases involving 'fork-in-the-road' clauses, they share the same "*fundamental basis*" as a claim being pursued in another forum.[203]

129. Sacyr does not accept that *lis pendens* constitutes a principle of international law. For its part, Panama submits that: (i) as noted by the tribunal in *Azurix Corp v. Argentine Republic,* the doctrine of *lis pendens* has been "*consistently followed by arbitral tribunals in cases involving claims under BITs*."[204]; and (ii) *lis pendens* is the logical corollary of the principle of *res judicata*: it would make no sense to preclude a party from relitigating a claim that has already been decided, but nonetheless to allow a party to bring the same claim simultaneously in another forum.[205]

iv. Claimant's Claims are Barred Pursuant to *Res Judicata* and Issue Estoppel

130. Panama submits that the doctrines of *res judicata* and issue estoppel preclude Sacyr's claims in this case.[206]

131. First, Panama contends that the requirement of identity of the parties is met. Sacyr is one of the claimants in all of the ICC Arbitrations and it is also the Claimant in this case. All of the ICC Arbitrations were brought against the ACP. The Tribunal has determined that the ACP is an organ of the Panamanian State for the purposes of attribution in this arbitration.[207]

---

201 Rejoinder on the Merits, [759].
202 Rejoinder on the Merits, [760].
203 Rejoinder on the Merits, [760].
204 *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, [89] (CLA-1).
205 Rejoinder on the Merits, [761].
206 Rejoinder on the Merits, [762].
207 Rejoinder on the Merits, [763].

132. Second, Panama submits that in this arbitration, Sacyr seeks to relitigate issues raised and determined by the ICC tribunals in the *Concrete, Cofferdam*, *Guarantees,* and *Lock Gates and Labor* Arbitrations. Such issues are now precluded from determination in this arbitration pursuant to the doctrines of *res judicata* and issue estoppel.[208] Panama sets out those issues as follows:

(i) The Concrete Arbitration. In the Concrete Arbitration, the claimants (including Sacyr) argued that "*ACP consistently represented that: the PLE basalt was a hard and strong basalt; the PLE basalt was suitable for concrete aggregate production; and the PLE [basalt] [sic] would and should be used as the primary source of concrete aggregates for the Project.*"[209] Sacyr raised the same argument in this arbitration, asserting that: "*Panama represented that the PLE basalt was both suitable for production of concrete aggregates and could be used as the primary source of material for such production.*"[210]

The *Concrete* tribunal "*[did] not accept that the Contract was concluded upon the 'fundamental datum' that the PLE Basalt be used as the primary source of concrete aggregates or that the Tenderers were led to believe that this was a 'fundamental datum' for the Project.*"[211] Sacyr argues in this arbitration that the PLE Basalt turned out to be unsuitable, because it produced excessive wet fines. The Concrete tribunal rejected this argument. The Concrete tribunal found that GUPC was contractually responsible for the basalt and that the vast majority of the basalt that was excavated and processed by GUPC did, in fact, produce suitable concrete aggregates.[212] The Concrete tribunal also found that the claimants should have carried out bulk testing on the PLE Basalt.[213]

Sacyr argues in this arbitration that the ACP sought to starve it of cash flow by refusing to approve its claims for additional payments of costs.[214] The ICC claimants have raised the same issue in their return on investment claims in all

208 Rejoinder on the Merits, [764].
209 *Concrete* Arbitration, Statement of Claim, [288] (**R-182**).
210 Memorial on the Merits, [128].
211 *Concrete* Arbitration, Partial Award, [1061] (**RLA-167**).
212 *Concrete* Arbitration, Partial Award, [895] (**RLA-167**).
213 *Concrete* Arbitration, Partial Award, [939], [984] (**RLA-167**).
214 Memorial on the Merits, [151], [160], [165], [190]; Reply on the Merits, [250], [278], [306].

of the ICC Arbitrations. For example, in the *Concrete* Arbitration, the claimants argued that they had suffered loss due to ACP's "*wrongful requirement that Claimants 2-4 [Sacyr, Salini-Impregilo S.p.A., and Jan De Nul N.V.] finance the cost overruns resulting from ACP's own breaches, gross negligence, and violations of Panamanian law*", meaning that the claimants were forced to provide significant additional funding to GUPC and that "*actual cash flow was negative on the Project*."[215] The *Concrete* tribunal rejected these arguments, holding that "*[e]ven in the event that the Contractor was faced with additional costs that the Claimants believed to be within the responsibility of the ACP ... they would have to continue to guarantee the completion of the Works – including financing the Works – pending final resolution of the Contractor's claims" and that "the Arbitral Tribunal does not consider that the ACP treated the Contractor unfairly or acted in bad faith in rejecting those claims*."[216] The tribunal also rejected the notion that there was a "'*secret policy*"'[217] of the ACP to reject the Contractor's claims. Sacyr makes the same complaint in this arbitration. Given the rejection of these allegations by the *Concrete* tribunal, Panama maintains that the Claimant is precluded from re-opening these issues here.

(ii) The *Lock Gates and Labor* Arbitration. In the *Lock Gates and Labor* Arbitration, the claimants alleged that (i) BTM, as well as CPP, made the ACP aware of a problem with the seismic design of the lock gates, but the ACP failed to disclose that issue to the other tenderers;[218] and (ii) Panama enacted "*discriminatory wage increases targeting the project*," in the form of Decree No. 6 and then refused to reimburse the claimants for labour cost increases resulting from that Decree.[219]

Panama submits that Sacyr has raised claims based on the same fundamental basis in this arbitration,[220] for example asserting that: (i) "*Panama knew during*

215 *Concrete* Arbitration, Statement of Claim, [2228], [2244] (**R-182**).
216 *Concrete* Arbitration, Partial Award, [2191]–[2192] (**RLA-167**).
217 *Concrete* Arbitration, Partial Award, [2193] (**RLA-167**).
218 *Lock Gates and Labor* Arbitration, Final Award, [208] (**RLA-283**).
219 *Lock Gates and Labor* Arbitration, Claimants' Statement of Claim, Ch. III, [4] (**R-208**).
220 Rejoinder on the Merits, [772].

the tender process that the Seismic Reduction Factor applied in its Reference Design was inaccurate through its discussions with BTM; and…BTM's concerns were validated…by…CPP", but it "*did not share BTM's concerns or the fact that those concerns were validated by CPP with tenderers*";[221] and (ii) "*in 2012 Panama enacted Executive Decree No. 6 that increased the minimum wage payable to the employees working on the Project. The Decree was blatantly discriminatory*."[222] Sacyr claims that it is entitled to labour cost increases resulting from that Decree, as well as certain costs arising from a collective bargaining agreement and a subsequent agreement regarding minimum wages concluded with the National Union of Workers of Construction and Similar Industries ("**SUNTRACS**").[223]

Panama contends that these issues were addressed and determined in the *Lock Gates and Labor* Award. The *Lock Gates and Labor* tribunal rejected the claimants' allegation that the ACP had failed to disclose BTM's or CPP's concerns regarding the "*Seismic Reduction Factor*." The tribunal concluded that a canal operator such as the ACP, with no expertise in construction or seismic design, could not be expected to raise a technical point like this.[224] Moreover, the tribunal went on to find that, in point of fact, the matter had not been clearly raised pre tender by either BTM or CPP.[225] Panama submits therefore that Sacyr's claim with respect to any alleged failure on Panama's part to disclose information regarding the "*Seismic Reduction Factor*" is therefore precluded.[226]

Regarding labor costs, the *Lock Gates and Labor* tribunal found that the claimants were entitled to reimbursement of the additional labor costs resulting from Decree No. 6 under Clause 13.7 of the Contract. The tribunal declared that the claimants were entitled to up to US$ 34.963 million with respect to those costs. Sacyr claims the exact same loss in this arbitration. In light of the *Lock Gates and Labor* tribunal's decision and the fact that the same issue is still

221 Memorial on the Merits, [117].
222 Memorial on the Merits, [290].
223 **CER-9** Hunter, [6.1]–[6.28].
224 *Lock Gates and Labor* Arbitration, Final Award, [317] (**RLA-283**).
225 *Lock Gates and Labor* Arbitration, Final Award, [319].
226 Rejoinder on the Merits, [773].

pending in the *Disruption* arbitration, Panama contends that Sacyr should be precluded from claiming further relief from this Tribunal with respect to the same allegation and claimed loss.[227]

Finally, the *Lock Gates and Labor* tribunal also rejected the claimants' claims with respect to SUNTRACS, and therefore Sacyr is similarly precluded from raising those claims in this arbitration.[228]

(iii) The *Cofferdam* Arbitration. Panama submits that the *Cofferdam* tribunal also made several important findings of fact in relation to the Project sufficient to preclude similar allegations being raised by Sacyr in this arbitration.[229] For example, the *Cofferdam* tribunal rejected the claimants' allegation that the ACP "*repeatedly assured [the claimants] that the Project would be fully funded and its payments to GUPC would exceed the costs to be incurred.*"[230] The tribunal also rejected the claimants' argument that the ACP had guaranteed the financial success of the Project by verifying the technical and financial aspects of the bid.[231]

Sacyr has attempted to re-open the same issues in this arbitration, arguing that Panama: (i) represented that the Project would not require funding from the Claimant or its partners;[232] and (ii) confirmed the Claimant's alleged expectations by validating that the GUPC's consortium's bid fully complied with the technical and financial requirements of the tender.[233] Given the *Cofferdam* tribunal's rejection of precisely the same arguments, Sacyr is precluded from resurrecting these same arguments in this arbitration.[234]

(iv) The *Guarantees* Arbitration. In the *Guarantees* Arbitration, the central issues included: (i) whether GUPC was liable to repay the Advance Payments made by the ACP to GUPC; (ii) whether GUPC's shareholders (including the Claimant)

227 Rejoinder on the Merits, [774].
228 *Lock Gates and Labor* Arbitration, Final Award, [1105(f)(g)] (**RLA-283**).
229 Rejoinder on the Merits, [777].
230 *Cofferdam* Arbitration, Final Award, [669] (**RLA-97**).
231 *Cofferdam* Arbitration, Final Award, [670] (**RLA-97**).
232 Memorial on the Merits, [250].
233 Memorial on the Merits, [252].
234 Rejoinder on the Merits, [778].

were liable under certain guarantees regarding GUPC's performance and additional payments to GUPC; and (iii) whether GUPC was entitled to exercise set-off rights with respect to maintenance services provided to the ACP.[235] Panama submits that these issues centred around a single core issue, namely where did responsibility for funding the costs of the Project lie.

The *Guarantees* tribunal rejected the claimants' arguments with respect to the above-listed issues, save that the tribunal held that the ACP was not entitled to withhold amounts with respect to maintenance services.[236] In this arbitration, Sacyr seeks to relitigate substantially similar issues. It argues that Panama repeatedly invoked the guarantees and forced the Claimant to make claims for additional payments, despite previously assuring the Claimant that it "*would 'not be required to provide financing for the Project'*."[237] In light of the ruling of the *Guarantees* tribunal, Panama submits that Sacyr's attempt to relitigate these issues in this arbitration is precluded by the doctrines of *res judicata* and issue estoppel.

The *Guarantees* tribunal further rejected the claimants' argument that the parties to the Contract had agreed that the Project would be "*cash flow positive*" and that the claimants would not have any liability to fund cost overruns. Sacyr argues that Panama represented that the Project would not require funding from the Claimant or its partners.[238] Given the *Guarantees* tribunal's rejection of these arguments, Panama submits that Sacyr is precluded from seeking to reopen those issues in this arbitration.

133. Panama sets out in Annex 3, Part A to its Rejoinder on the Merits and Reply on Jurisdiction and Admissibility, the issues raised in this arbitration that it asserts have already been determined by the tribunals in the ICC Arbitrations.

---

235 *Guarantees* Arbitration, Final Award, [28]–[34], [40] (**RLA-100**).
236 *Guarantees* Arbitration, Final Award, [621] (**RLA-100**).
237 Memorial on the Merits, [190].
238 Memorial on the Merits, [250].

v. Claimant's Claims are Barred under *Lis Pendens*

134. The final ICC Arbitration (and the only one that remains pending) is the *Disruption* Arbitration. Panama submits that this arbitration involves (i) the same parties (i.e., Sacyr, the Claimant in this arbitration, and the ACP, which the Tribunal has determined is an organ of Panama, the Respondent in this arbitration); and (ii) substantially the same causes of action raised in this arbitration, including that the ACP misrepresented the suitability of the PLE Basalt and that the claimants were adversely affected by labour stoppages resulting from legislation issued by Panama.[239]

135. In particular, Panama submits that substantially similar issues to those in this case have been put in issue and are pending in the *Disruption* Arbitration. For example, the *Disruption* claimants alleged that the ACP misrepresented: (i) that "*the materials excavated from the Pacific Site (including, but not limited to weathered basalt and stockpiled basalt) would be suitable for re-use in the Works as fill material*", but that the basalt turned out not to be suitable, not least because it produced excessive wet fines;[240] and (ii) the "*shortage of sand available for concrete production*."[241] Panama submits that these allegations rely on the same arguments and causes of action already determined in relation to the PLE Basalt issues in the *Concrete* Arbitration and this current arbitration.[242]

136. The claimants in the *Disruption* Arbitration further make a claim for delay on the basis that:

> *ACP's misconduct and breaches, taken together, seriously depleted the funds available to GUPC to perform the Works. ACP's wrongful under-certification of Interim Payments and rejection of GUPC's entitlements resulted in the choking-off of the cash flows needed to pay subcontractors, purchase materials, and progress the Project.*[243]

137. Panama submits that, as noted above in relation to the *Concrete* Arbitration, Sacyr has replicated these arguments in this arbitration. The claimants have also argued in the

---

239 Rejoinder on the Merits, [784].
240 *Disruption* Arbitration, Statement of Claim, Ch. I, [17], Ch. III [119] (**R-219**).
241 *Disruption* Arbitration, Statement of Claim, Ch. X, [17] (**R-219**).
242 Rejoinder on the Merits, [786].
243 *Disruption* Arbitration, Statement of Claim, Ch. VII,, [2] (**R-219**).

Disruption Arbitration that they were adversely affected by labour stoppages resulting from legislation issued by Panama and, in addition, that the ACP delayed the signing of the Memorandum of Understanding od 2014 and engaged in a negative press campaign against GUPC and its shareholders in 2014–2015. Panama submits that Sacyr repeats those allegations in this arbitration.[244]

138. Panama submits therefore that these matters are in issue in the ICC Arbitrations and the Claimant is precluded from raising them in this arbitration pursuant to the doctrine of *lis pendens*.[245]

vi. Claimant's Claims Infringe the Principles of Equity, Efficiency and Justice

139. Panama submits that Sacyr's re-litigation of the issues raised in the ICC Arbitrations contravenes the following public policy considerations:[246]

(i) Sacyr's attempt to relitigate its claims from the ICC Arbitrations undermines the principles of finality, equity and justice that underpin the *res judicata*, issue estoppel and *lis pendens* doctrines. The rationale behind those principles are that "*it is in the public interest that there should be an end to litigation" and "no one should be sued twice for the same cause*".[247] Panama submits that it is not in the public interest for Claimant "*endlessly*" to litigate the same issues in different fora, nor is it in the interests of justice or fairness that the ACP should be obliged to defend claims only for them to be relitigated against Panama.[248]

Sacyr submits that Panama should not be entitled to invoke the principles of equity, efficiency and justice, because Sacyr "*was induced to invest under false premises*" and Panama has "*reaped the enormous benefits from that investment*."[249] Panama retorts that this submission requires the Tribunal to

244 Rejoinder on the Merits, [788]; *Disruption* Arbitration, Statement of Claim, Ch. 1, [40] (**R-219**).
245 Rejoinder on the Merits, [789].
246 Rejoinder on the Merits, [790].
247 Rejoinder on the Merits, [791].
248 Rejoinder on the Merits, [791].
249 Reply on the Merits, [367].

accept Sacyr's entire merits case, which it cannot do when considering whether or not to exercise jurisdiction.[250]

(ii) Second, duplicative claims lead to a risk of fragmentation and incoherence within the international legal system. They give rise to the potential for conflicting determinations by the ICC tribunals and this Tribunal on the same issues. Panama submits that the consequences of conflicting judgments in the international sphere are arguably more serious than in a domestic legal system, because there is no mechanism to resolve such conflicts.[251] Moreover, Panama cannot bring counterclaims on ACP's behalf. By repurposing its contractual claims against the ACP as treaty claims against Panama, Sacyr avoids the potential for any counterclaims to be brought against it that were available to, and pursued by, the ACP in the ICC Arbitrations.[252]

(iii) Third, Panama submits that allowing Sacyr to relitigate issues that either have been, or are still to be, determined in the ICC Arbitrations would undermine the objectives of the New York Convention that arbitral awards be final and binding.[253] As Professor Gary Born notes, if awards are to be recognised as binding, they must be given preclusive effect.[254]

(iv) Fourth, Sacyr's pursuit of these claims in this arbitration raise an inherent risk of double recovery. The claims in the ICC Arbitrations and this arbitration seek damages for the same loss. Sacyr asserts that it "*carefully quantified its claims to exclude duplication and has committed to avoid seeking double-recovery.*"[255] Panama submits that there is no evidence that Sacyr has avoided duplication with the ICC Arbitrations in its damages calculations.[256] Panama submits that there is an almost complete overlap between damages sought in this arbitration and those sought in the ICC Arbitrations.[257] Claimant's expert, Mr. Hunter, includes

250 Rejoinder on the Merits, [797].
251 Rejoinder on the Merits, [792].
252 Rejoinder on the Merits, [792] –[793].
253 Rejoinder on the Merits, [794].
254 G. Born, "Chapter 27: Preclusion, Lis Pendens and Stare Decisis in International Arbitration," in INTERNATIONAL COMMERCIAL ARBITRATION (3rd Ed., 2021), pp. 4–5 (**RLA-265**).
255 Reply on the Merits, [369].
256 Rejoinder on the Merits, [800].
257 Rejoinder on the Merits, [800].

in his damages calculation costs relating to increased labour costs as a result of Decree No. 6, despite the fact that in the *Lock Gates and Labor* Arbitration, the tribunal has already declared that the claimants may be entitled to such costs if other facts can be established pursuant to the Contract.[258] Aside from a single reference to having excluded one claim from the *Concrete* Arbitration, there is no evidence that Mr. Hunter has excluded costs already awarded.[259] In addition, Panama submits that it is far from clear that Claimant's other expert, Mr. Hart, has avoided duplication with the ICC Arbitrations.[260] The only reference to deductions for double-counting is a single entry in Appendix I.1(u) to Mr. Hart's Second Report, which notes that he deducted approximately US$ 7 million to reflect the Claimant's share of amounts awarded to GUPC in the *Concrete* Arbitration with respect to maintenance work.

Panama submits that once the Tribunal has issued its award, it will be *functus officio* and Panama will have no reliable means of ensuring that the Claimant's purported "*commitment*" to avoid double recovery is upheld. Panama submits that this is a yet further reason why Sacyr's claims in this case must be dismissed.[261]

Professor Douglas explained in his dissenting opinion in Gardabani v. Georgia, "*the idea that the law or justice requires the simultaneous pursuit of a contract claim and a treaty claim in respect of the same loss and two separate awards of compensatory damages for that loss is indefensible.*"[262] Sacyr's arguments to the contrary do not, in Panama's opinion, change the principled basis for Professor Douglas' opinion.[263]

B. Claimant's Position

140. Sacyr did not address *res judicata*, issue estoppel or *lis pendens* in its Rejoinder on Jurisdiction and Admissibility dated 29 May 2024, choosing to "*rest on its previous*

258 **CER-9** Hunter, [6.1]–[6.14]; *see also Lock Gates and Labor* Arbitration, Final Award, [838] (**RLA-283**).
259 Rejoinder on the Merits, [800]; **CER-9** Hunter, footnote 59.
260 Rejoinder on the Merits, [801].
261 Rejoinder on the Merits, [802].
262 *Gardabani Holdings B.V. and Silk Road Holdings B.V. v. Georgia*, ICSID Case No. ARB/17/29, Dissenting Opinion of Professor Zachary Douglas, 27 October 2022, [20] (**RLA-279**).
263 Rejoinder on the Merits, [799].

submissions in respect of those issues."[264] In its Memorial and Reply on the Merits, Sacyr argues that Panama's *res judicata*, issue estoppel and *lis pendens* admissibility objections are based on inapposite legal principles.[265]

i. Public International Law Governs Panama's Admissibility Objections

141. Sacyr objects to Panama's reliance on US law. Public international law governs the admissibility of Sacyr's claims, unless the *lex arbitri* specifically addresses how these doctrines apply to international arbitration.[266] In this case, neither the Treaty, nor the UNCITRAL Rules, nor the U.S. Federal Arbitration Act contains rules addressing *res judicata*, issue estoppel and *lis pendens* with regard to international arbitration.[267]

ii. Issue Estoppel and Lis Pendens are not Principles of Public International Law

142. Sacyr submits that Panama's assertion that issue estoppel and *lis pendens* are well-established principles of international law is incorrect.[268]

143. Issue estoppel is a species of *res judicata* that emerges from the common law. It extends *res judicata* effects beyond the *dispositif* to include the essential reasoning underpinning it. Issue estoppel does not exist in civil law systems, including Panamanian law. It is thus not a principle of international law. [269]

144. Even if issue estoppel were a principle of international law, then: (i) given that it is a species of *res judicata*, the triple identity test applies and is plainly not satisfied here; and (ii) it is widely recognised that decisions of contract tribunals do not have *res judicata* effect in treaty proceedings.[270] Sacyr submits that for these reasons Panama's jurisdiction objection should be rejected.

---

264 Rejoinder on Jurisdiction, [2].
265 Reply on the Merits, [350].
266 Reply on the Merits, [352].
267 Reply on the Merits, [352].
268 Reply on the Merits, [355].
269 Reply on the Merits, [356(a)].
270 Reply on the Merits, [356(b)], citing *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, [138] (**CLA-32**) ("*[T]he settlement of the Claimant's contractual claims in the Yemeni Arbitration does not bar the Arbitral Tribunal from having jurisdiction in the present case, since the claims formulated by the Claimant here are capable of constituting violations of the BIT if they are upheld*"); *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on the Merits of Claimants' Second Material Breach Application, 15 December 2017, [109]

iii. The Conclusions of the ICC Tribunals do not have *Res Judicata* Effect

145. Even if this Tribunal were to accept that issue estoppel could operate to bar Treaty claims within this Tribunal's jurisdiction, Sacyr submits that Panama has not articulated how such a test would be met in this case.[271] In particular, Sacyr says, Panama's reasoning is limited to an attempt to identify similarities in the factual allegations made in support of the different causes of action in the ICC Arbitrations and the present case.[272] Panama does not demonstrate that the same right, question, or fact before this Tribunal was directly put in issue and determined by the ICC tribunals.[273]

146. Sacyr submits that the requirements for *res judicata* to apply in international law are well-established. *Res judicata* can only arise in respect of awards that have been issued and become final and binding. Under international law, if the conclusions in an award are to have *res judicata* effect, the following cumulative requirements must be met:[274]

(i) There must be identity of the parties, object (*petitum*) and cause of action (*causa petendi*);[275]

(ii) the parallel proceedings must have been conducted before courts or tribunals in the same international legal order;[276]

(**CLA-54**) ("*The Settlement confers two distinct and separate arbitral mandates without creating any preclusive hierarchy in their authority to decide issues within their respective spheres. The Settlement creates no rule of paramountcy between the SIAC Tribunal and this Treaty Tribunal*"); and *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, 3 July 2008, [126]–[131] (**CLA-45**).

271 Reply on the Merits, [359].

272 Reply on the Merits, [359].

273 Reply on the Merits, [359].

274 Reply on the Merits, [148].

275 *Factory at Chorzów (Germany v. Poland)*, Interpretation of Judgments Nos 7. and 8, Dissenting opinion of Judge Dionisio Anzilotti, 1928 P.C.I.J. Series A, No 13, p. 23 (**CLA-37**); K. Hobér, "Res judicata and lis pendens in international arbitration", 366 The Hague Academy collected courses online (2014), p. 295 (**CLA-46**); and K. Yannaca-Small, "Parallel Proceedings", in P. Muchlinski et al. (eds), The Oxford Handbook of International Investment Law (2008), p. 1018 (**CLA-96**).

276 K. Yannaca-Small, "Parallel Proceedings", in P. Muchlinski et al. (eds), The Oxford Handbook of International Investment Law (2008), p. 1017 (**CLA-96**); C. McLachlan, "Part II Ambit of Protection, 4 Parallel Proceedings" in C. McLachlan, L. Shore and M. Weiniger (eds), International Investment Arbitration: Substantive Principles (2nd edn, 2015), [4.14] (**CLA-59**); Y. Shany, "The competing jurisdictions of international courts and tribunals" (2003) p. 26 (**CLA-83**); and *Certain German Interests, Jurisdiction (Germany v. Poland)*, 1925 P.C.I.J. Series A, No. 6, p. 20 (**CLA-24**).

(iii) the prior award must be final and binding at the seat of the first arbitration and recognised in place of the subsequent arbitration;[277] and

(iv) the party opposing the request must not suffer material prejudice.[278]

147. Sacyr argues that the first two of these requirements have not been met. First, the ICC tribunals sit on a "*hierarchically different legal plane than this Tribunal*" and second, "*the 'triple identity' test [has] not [been] satisfied*" as the parties, causes of action and relief sought in these proceedings are different.[279]

148. In particular, Sacyr submits that in the present case, Sacyr's claims are founded on the Treaty, whereas the ICC proceedings were and are based on the Contract, the JSG and Panamanian law. The legal bases for the claims and relief requested in each of the proceedings are fundamentally different.[280] Moreover, Sacyr's claims arise as a result of Panama's breaches of the Treaty. In respect of these breaches, Sacyr seeks not only damages relief, but also declaratory relief that Panama has breached its Treaty obligations.[281]

149. Sacyr submits that Panama's attempt to relax the application of the triple identity test does not withstand scrutiny.[282] Prevailing authorities confirm that the test is strictly applied.[283] Commercial claims made pursuant to a contract and claims under international investment treaties are considered to be distinct, even where there is a substantial overlap in the factual circumstances underpinning the contractual and treaty-based claims. Sacyr relies on the following authorities:[284]

(i) In *Helnan v. Egypt*, the tribunal determined that claims under the contract were not identical to claims under the treaty, because "*although the subject matter*

---

277 *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)* (Assessment of the Amount of Compensation Due from the People's Republic of Albania to the United Kingdom of Great Britain and Northern Ireland), I.C.J. Reports 1949, p. 248 (**CLA-29**); K. Hobér, "Res judicata and lis pendens in international arbitration", 366 The Hague Academy collected courses online (2014), pp. 264–269 (**CLA-46**).

278 *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India*, PCA Case No. 2016-7, Decision on the Respondent Application for a Stay of the Proceedings (Procedural Order No. 3), 31 March 2017, [114] (**CLA-23**).

279 Reply on the Merits, [149(a)–(b)].

280 Reply on the Merits, [142].

281 Reply on the Merits, [143].

282 Reply on the Merits, [361].

283 Reply on the Merits, [141].

284 Reply on the Merits, [141].

may be substantially the same, the causes of action are different" and the relief sought in each proceeding *was not* "*fully identical*".[285] The tribunal held that it was not sufficient that both proceedings arose out of the same factual circumstances.

(ii) In *Gavazzi v. Romania*, the tribunal distinguished the contractual claims as turning on contractual provisions governed by Romanian law, whereas the treaty claims before it turned on treaty provisions.[286] The tribunal therefore determined that the requisite identity in causes of action was missing, because, under international law, there is no identity between contractual claims and treaty claims.[287]

(iii) In *SGS v. Pakistan*, the tribunal upheld its jurisdiction to hear treaty-based claims although another tribunal was already hearing the parties' contract claims.[288] Six of the seven heads of relief sought were identical between both cases.[289] The tribunal held that it could not accept the respondent's allegation that the treaty claims were "*dressed up*" contract claims, as to do so "*would deny the Claimant its right to make out its arguments that they are not and would require the Tribunal to pass [judgment] upon, here and now, the merits of the BIT claims*."[290]

(iv) The tribunal in *Unión Fenosa v. Egypt* distinguished between contractual and treaty claims, refusing to stay the treaty arbitration in favour of a contract-based arbitration that was pending.[291]

---

285 *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, 3 July 2008, [124]–[128] (**CLA-45**).

286 *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction Admissibility and Liability, 21 April 2015, [171] (**CLA-41**).

287 *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction Admissibility and Liability, 21 April 2015, [171]–[172] (**CLA-41**)

288 *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction, 6 August 2003, [182] (**CLA-79**).

289 *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction, 6 August 2003, [181] (**CLA-79**).

290 *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction, 6 August 2003, [181] (**CLA-79**).

291 *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018, [11.3-]–[11.35] (**CLA-91**).

(v) In Impregilo v. Pakistan, the tribunal declined to order a stay, because to do so "*would confuse the essential distinction between the Treaty Claims and the Contract Claims*", which involved inquiries that were "*fundamentally different (albeit with some overlap)*".[292]

(vi) The tribunal in *Bayindir v. Pakistan* accepted that treaty and contractual claims were distinct and declined to stay the treaty arbitration. It noted that a decision to stay would deprive the treaty dispute resolution provision of any meaning, and that there were practical difficulties in deciding "*at this preliminary stage, which contractual issues (if any) will have to be addressed by the Tribunal on the merits*."[293]

150. In addition, Sacyr submits that the requirement for the parties to be identical prescribes a strict distinction by legal personalities.[294] The parties to both sets of proceedings must be identical, and not merely the same or substantially the same. The required identity of parties between the ICC Arbitrations and the present arbitration does not exist: the ICC Arbitrations involve GUPC S.A. and two of its shareholders.[295]

151. Sacyr further submits that Panama's case "*founders*" on the final requirement listed above, namely, to avoid substantial injustice.[296] Panama's argument is tantamount to suggesting that Sacyr waived its right to protection and redress under the Treaty by entering into the Contract and the JSG and subsequently commencing proceedings for breach of those agreements and Panamanian law pursuant to the contractual dispute resolution clause.[297]

iv. The Doctrine of *Lis Pendens* does not Bar Claimant's Claims

152. As noted above, Sacyr submits that *lis pendens* is not a principle of public international law and, therefore, should not be applied to this arbitration.[298]

---

292 *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, [289] (**CLA-47**).
293 *Bayindir Insaat Turizm Ticaret ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, [270]–[271] (**CLA-16**).
294 Reply on the Merits, [134].
295 Reply on the Merits, [138].
296 Reply on the Merits, [152].
297 Reply on the Merits, [152].
298 Reply on the Merits, [363].

153. However, even if this Tribunal were to accept that *lis pendens* was a principle of public international law, Sacyr submits that Panama has failed to demonstrate that its requirements would be met in this case.[299] Under the doctrine of *lis pendens,* one tribunal may decide to stay the exercise of its jurisdiction pending a decision by another tribunal engaged in ongoing parallel proceedings where the following cumulative requirements are met:[300]

(i) the parallel proceedings must have been conducted before courts or tribunals in the same legal order or "*equivalent legal plane*";[301] and

(ii) there must be identity of the parties, object (*petitum*) and cause of action (*causa petendi*), also known as the "*triple identity*" test.

154. Sacyr submits that the first element of the test has not been satisfied. ICC Arbitrations are governed by the Contract and the laws of Panama, whereas the dispute submitted to the Tribunal is governed by the Treaty and public international law.[302] An arbitral tribunal constituted on the basis of an international treaty is considered to be "*hierarchically superior*" to any national court or arbitral tribunal constituted pursuant to a domestic law governed contract.[303] As a result, a "*treaty tribunal should not apply principles of lis pendens in relation to proceedings before a non-treaty forum*."[304] The International Law Association ("**ILA**") notes that the application of *lis pendens* in an international law context "*assumes that the parallel proceedings are before fora of equal status*" and acknowledges that treaty tribunals are hierarchically superior to domestic law contract tribunals.[305]

155. Sacyr further asserts that the second element for the application of *lis pendens* has not been satisfied either, namely the triple identity test. As noted above, Sacyr submits that the triple identity test is strictly applied in respect to both *res judicata* and *lis pendens*.

---

299 Reply on the Merits, [364].
300 Reply on the Merits, [121].
301 Reply on the Merits, [124], referencing K. Yannaca-Small, "Parallel Proceedings", in P. Muchlinski et al. (eds), The Oxford Handbook of International Investment Law (2008), p. 1017 (**CLA-96**).
302 Reply on the Merits, [122].
303 Reply on the Merits, [125].
304 H. Wehland, "The Coordination of Multiple Proceedings in Investment Treaty Arbitration" (2013), [5.81] (**CLA-9**).
305 F. de Ly and A. Sheppard, "ILA Final Report on Lis Pendens and Arbitration" (2009), 25(1) Arbitration International 83, [3.2] (**CLA-31**).

For the reasons given at paragraphs 146 to 150, Sacyr submits that the triple identity test has not been met in this case.

v. Panama's "Equity, Efficiency, and Justice" Argument

156. Sacyr objects to Panama's submissions that its claims infringe the principles of "*equity, efficiency, and justice*".[306]

157. Sacyr submits that it was induced to invest under false premises by Panama and therefore objects to the notion that the Tribunal should apply the concepts of "*equity, efficiency, and justice*" in favour of Panama.[307]

158. Sacyr further submits that Panama's argument relies on the incorrect assumption that the claims litigated in the ICC Arbitrations are the same claims that Sacyr is litigating in the present UNCITRAL proceedings. Sacyr says that its claims in this arbitration are "*firmly rooted*" in the Treaty.[308] Sacyr submits that it is not attempting to advance, in disguise or otherwise, any contractual claims under the Contract, the JSG, or Panamanian law. The Treaty claims that Sacyr has raised before this Tribunal have never been presented to the ICC tribunals.[309]

159. Sacyr submits that Panama's reliance on the dissenting opinion of Professor Douglas in *Gardabani v. Georgia* to argue that this arbitration presents a "*risk of double recovery*" is misplaced. *Gardabani v. Georgia* is readily distinguishable from this case. First, the claimants in that case pursued, in addition to a commercial arbitration for breach of contract, a claim for breach of the umbrella clause on the theory that the same breaches of contract were elevated to a breach of the relevant treaty. In addition, the parties agreed to consolidate the contractual claims and the treaty claims into a single procedure before a single tribunal. Professor Douglas' double recovery concern in *Gardabani v. Georgia* arose where the contract claim and the treaty claim had the same remedial objective, namely compensation for a particular loss suffered. According to Sacyr, this cannot apply to the Treaty claims advanced before this Tribunal, as Sacyr does not advance an

306 Reply on the Merits, [366].
307 Reply on the Merits, [367].
308 Reply on the Merits, [368].
309 Reply on the Merits, [368].

umbrella clause claim and, furthermore, it "*has carefully quantified its claims to exclude duplication and has committed to avoid seeking double-recovery*".[310]

VI. THE MERITS CLAIM

(1) Fair and Equitable Treatment

A. Claimant's Position

160. Article IV of the Treaty provides as follows:

> *Investments made by investors of one Contracting Party in the territory of the other Contracting Party shall receive at all times fair and equitable treatment .... Neither Contracting Party shall at any time grant such investments treatment less favourable than that required by international law.*[311]

161. Sacyr submits that Panama's conduct breached its obligations under Article IV of the Treaty by inducing Claimant's investment on premises that Panama knew to be false. According to Sacyr, Panama took two steps:[312]

(i) first, Panama did not disclose the following relevant information that affected fundamental aspects of the Project during the tender phase: (i) at least 40% of its sulfate soundness tests of the Pacific basalt had failed to meet the standard specifications; and (ii) the seismic assumptions used by Panama's consultants in designing the Lock Gates were potentially incorrect; and

(ii) second, Panama sought to shift responsibility for the risks it had identified and concealed from Claimant by "*devising a Contract and making certain amendments to the ACP Acquisition Regulation that subsequently would prove critical in successfully resisting GUPC's contractual claims.*"[313]

---

310 Reply on the Merits, [369].
311 BIT, Article IV(1) (**C-1**).
312 Reply on the Merits, [26].
313 Reply on the Merits, [26(b)].

i. The FET Standard

162. Sacyr submits that the FET standard protects investors against unfair, arbitrary, unreasonable, or discriminatory conduct and frustration of their legitimate expectations.[314]

163. In order to find a breach of FET, tribunals need not consider whether each individual measure contravened FET. A breach of FET may result from a "*succession or an accumulation of measures which, taken separately, would not breach that standard but, when taken together, do lead to such a result*".[315]

164. Sacyr further submits that tribunals have explained that "*a decision can be inequitable and unreasonable without rising to levels as dramatically wrong as those just mentioned [egregiousness, manifest injustice, lack of due process, offending judicial propriety, arbitrariness, bad faith and clear and malicious application of the law], and still eventually engage liability for the breach of the FET standard*."[316]

165. Panama accepts that the FET standard imposes obligations on a State to "*act consistently with specific representations made to the investor; conduct itself transparently; and refrain from arbitrary or abusive conduct*";[317] and the cumulative effect of a State's measures can result in a breach of FET where the measures are "*sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system*".[318]

166. Panama contends, however, that the FET standard is not autonomous; it is coextensive with the obligation to provide the minimum standard of treatment under international law. Sacyr responds that Panama's position contravenes the text of the Treaty, which provides that: "*[i]nvestments made by investors of one Contracting Party in the territory*

---

314 Reply on the Merits, [28].

315 Reply on the Merits, [28], citing *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, [518] (**CLA-168**); s*ee also Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, [566] (**RLA-89**); *Flemingo Duty Free Shop Private Limited v. The Republic of Poland*, UNCITRAL, Award, 12 August 2016, [536] (**CLA-38**); and *Walter Bau AG v. Kingdom of Thailand*, UNCITRAL, Award, 1 July 2009, [12.43] (**RLA-59**).

316 *OAO Tatneft v. Ukraine*, PCA Case No. 2008-8, Award on the Merits, 29 July 2014, [475] (**CLA-232**).

317 Counter-Memorial on the Merits, [604].

318 Counter-Memorial on the Merits, [608].

of the other Contracting Party shall receive at all times fair and equitable treatment", and that "*[n]either Contracting Party shall at any time grant such investments treatment less favourable than that required by international law*".

167. The FET standard cannot be reduced to the customary international law minimum standard of treatment. It is widely accepted that the customary international law minimum standard has evolved, such that any difference with the autonomous FET standard has become more apparent than real.[319] In any event, Sacyr submits that Panama's conduct has been of a nature that Panama accepts is proscribed by the customary international law minimum standard.[320]

168. Panama further argues that the threshold for violating the FET standard is high and, in determining whether there has been a breach, tribunals should accord the deference which international law generally extends to the right of national authorities to regulate matters within their own borders. Sacyr submits that Panama has not explained what it means by "*deference*". While deference may be owed to regulatory policies of the host State, no arbitral tribunal would suggest that deference might be owed to a State's decision to withhold critical information to a tenderer to induce its investment on false pretences.[321]

The FET Standard Proscribes Unfair, Unreasonable or Arbitrary Conduct

169. Sacyr submits that Panama accepts that the FET standard in the Treaty protects an investor against unreasonable and arbitrary conduct on the part of the State.[322] The protection against arbitrary measures includes measures that: (i) inflict damage on the investor without serving any apparent legitimate purpose; (ii) are not based on legal standards, but on discretion, prejudice or personal preference; (iii) are taken for reasons that are different from those put forward by the decision maker; or (iv) are taken in wilful disregard of due process and proper procedure.[323]

319 Reply on the Merits, [31(a)–(b)].
320 Reply on the Merits, [31(b)].
321 Reply on the Merits, [33(a)].
322 Counter-Memorial on the Merits, [520]; [690]–[691].
323 Counter-Memorial on the Merits, [520].

170. Sacyr objects to Panama's contention, however, that the threshold to establish violation of the FET standard requires a wilful disregard of due process of law and an act which shocks a sense of juridical propriety,[324] arguing that gross unfairness, unreasonableness or arbitrariness are not so confined. Sacyr notes that tribunals have also made clear that "*what is unfair or inequitable need not equate with the outrageous or the egregious*", and that "*a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith*".[325]

171. In any event, Sacyr submits that there is a breach of the Treaty even on the higher standard relied on by Panama.[326]

The FET Standard Protects Legitimate Expectations

172. Sacyr submits that the Treaty's FET standard protects legitimate expectations. It is common ground that legitimate expectations are to be assessed objectively;[327] an investor's due diligence may be considered in assessing the reasonableness of the expectations;[328] and that establishing a breach of legitimate expectations is a fact-specific inquiry.[329]

173. According to Sacyr, it is well established that the FET standard is breached where: (i) an investor had a legitimate expectation at the time of investing; (ii) it invested in reliance on that expectation; and (iii) the State has acted contrary to that expectation.[330] This is confirmed, Sacyr says, by both the authorities relied on by the Claimant,[331] and by the cases on which Panama relies. For instance, Panama relies on the ICJ's decision in the *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, which

---

324 Reply on the Merits, [36].
325 Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, [116] (**CLA-183**).
326 Reply on the Merits, [38].
327 Memorial on the Merits, [231]; Counter-Memorial on the Merits, [617].
328 Memorial on the Merits, [255]–[256]; Counter-Memorial on the Merits, [616].
329 Memorial on the Merits, [223]; Counter-Memorial on the Merits, [619].
330 Reply on the Merits, [40].
331 *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, [602] (**CLA-17**) ("*the purpose of the fair and equitable treatment standard is to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment, as long as these expectations are reasonable and legitimate and have been relied upon by the investor to make the investment*"); and *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, [7.75] **(CLA-169)** ("*[i]t is widely accepted that the most important function of the fair and equitable treatment standard is the protection of the investor's reasonable and legitimate expectations.*")

expressly recognised that "*references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment*".[332] The award in *Cargill v. Mexico* similarly acknowledged that the FET standard in investment treaties can protect the "*reasonable expectations of the investor at the time of the investment*".[333]

174. Sacyr further objects to what it says is Panama's "*attempts to constrain the scope of the protection of legitimate expectations*".[334]

175. Panama suggests that representations must be specific and addressed to the individual investor. Sacyr says that that is not so; representations can be general or specific in nature, relying on the following decisions:[335]

(i) *Electrabel v. Hungary*, which held that "*[w]hile specific assurances given by the host State may reinforce the investor's expectations, such an assurance is not always indispensable*";[336]

(ii) *SunReserve v. Italy*, which held that "*legitimate expectations can be created in the absence of specific promises or commitments by the host State*";[337] and

(iii) *RENERGY v. Spain*, which held that "*there is no* numerus clausus *as to the forms of State actions that can give rise to legitimate expectations" and that "such expectations can be engendered by any (explicit or implicit) statements or conduct*".[338]

---

332 *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Merits, Judgment, ICJ Reports 2018, 1 October 2018, [162] (**RLA-246**).
333 *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, [290], [294] (**RLA-204**).
334 Reply on the Merits, [41].
335 Reply on the Merits, [43].
336 *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, [7.78] (**CLA-169**).
337 *SunReserve Luxco Holdings SRL v. Italy*, SCC Case No. 132/2016, Final Award, 25 March 2020, [699] (**CLA-200)**.
338 *RENERGY S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Award, 6 May 2022, [639] (**RLA-276**).

176. Sacyr submits that legitimate expectations may arise from domestic legislation that is of general application.[339] Professors Dolzer and Schreuer state that:

> *The investor's legitimate expectations are based on the host State's legal framework and on any undertakings and representations made explicitly or implicitly by the host State. The regulatory framework on [] which the investor is entitled to rely consists of legislation and treaties as well as of assurances contained in decrees, licences, and similar executive statements.*[340]

177. Sacyr submits that Panama's assertion that the existence of a contractual relationship does not give rise to legitimate expectations is irrelevant as Claimant's legitimate expectations arose from representations made to induce the contractual relationship.[341] It is likewise irrelevant that the alleged assurances occurred pre-investment: legitimate expectations are engendered by assurances made by the State to induce investment and therefore, by their nature, they arise pre-investment.[342]

The FET Standard Mandates Transparency

178. Sacyr submits that the FET standard mandates transparency and even-handedness in dealings with investors.[343] Sacyr submits that transparency requires the following:

(i) openness in administrative decision-making processes as to the rationale for decisions affecting investments and candour in exchanges regarding negotiation and performance of investments;[344]

(ii) clarity as to the legal requirements applicable to an investment. Sacyr says that the Parties are in agreement that:

> *relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under*

339 Reply on the Merits, [44].
340 R. Dolzer, U. Kriebaum and C. Schreuer, "Principles of International Investment Law" (3rd edn, 2022), pp. 208–209 (**CLA-215**).
341 Reply on the Merits, [48].
342 Reply on the Merits, [50].
343 Memorial on the Merits, [232]; Counter-Memorial on the Merits, [600]–[601].
344 *Nordzucker AG v. The Republic of Poland*, UNCITRAL, Second Partial Award (Merits), 28 January 2009, [84] (**CLA-185**).

an investment treaty should be capable of being readily known to all affected investors[345]

(iii) foreseeability as to changes in legislation or policies;[346] and

(iv) advance notification of any measures targeted at the investor and allowing the investor an opportunity to be heard.[347]

179. Sacyr submits that Panama may be found in breach its transparency obligations if it:[348]

(i) failed to disclose "*relevant facts*", "*misinformed*" or "*positively misled*" and "*actually concealed [information] by affirmatively creating a misleading impression*";[349]

(ii) failed to share relevant information "*in a timely manner*";[350] and

(iii) did not engage in open and frank communication with Claimant.[351]

180. Sacyr objects to Panama's argument that in order to establish breach, Claimant "*must demonstrate that it was not in a position to know beforehand the rules and regulations that would govern its investment*".[352] It takes issue, too, with the proposition that: "*a State is under no duty to correct any potential misunderstandings on the part of the investor*".[353]

181. Sacyr submits that the two cases on which Panama relies, *Champion Trading v. Egypt* and *Global Telecom v. Canada*, are distinguishable from the present case as neither

---

345 Counter-Memorial on the Merits, [668]; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic,* ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, [128] *(***CLA-125**).

346 *I.C.W. Europe Investments Limited v. The Government of the Czech Republic*, PCA Case No. 2014-22, Award, 15 May 2019, [579] (**CLA-174**).

347 *Olin Holdings Limited v. State of Libya*, ICC Case No. 20355/MCP, Final Award, 25 May 2018, [322] (**CLA-188**).

348 Reply on the Merits, [56].

349 *Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10, Interim Award, 13 December 2017, [376], [380], [387], [389], [390] (**CLA-33**).

350 *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, [870] (**CLA-120)**.

351 *Nordzucker AG v. The Republic of Poland*, UNCITRAL, Second Partial Award (Merits), 28 January 2009, [84] (**CLA-185**).

352 Counter-Memorial on the Merits, [669].

353 Counter-Memorial on the Merits, [670].

concerned the withholding of relevant information from the investor to engender that misunderstanding, nor the subsequent introduction of covert regulatory and contractual amendments by a State.[354] Sacyr could not know beforehand the information that Panama was withholding.

The FET Standard Imposes a Duty to Act in Good Faith

182. Sacyr submits that good faith requires *bona fide* conduct, which is consistent, transparent, even-handed and non-discriminatory. Lack of good faith in negotiations is a breach of FET.[355]

183. Panama submits that the standard is high and that it has rarely been found to have been breached, relying on *ConocoPhillips v. Venezuela*. Sacyr submits that the findings in that case do not support Panama's position.[356] *ConocoPhillips v. Venezuela* recommended the purported "*high*" standard in the context of a jurisdictional allegation that the investor had engaged in an abuse of process by resorting to investment treaty arbitration. Sacyr contends that it has no relevance to the merits of a breach of FET.[357]

ii. Panama cannot Rely on the ICC Arbitrations to Excuse its Treaty Breaches

184. In its Counter-Memorial, Panama seeks to rely on the findings of the ICC tribunals and argues that Claimant is attempting to overturn those findings. Sacyr objects to this argument for the following reasons:[358]

(i) The ICC awards did not rule on whether Panama's actions were in breach of the Treaty;

(ii) in any event, the ICC awards do not have *res judicata* effect in these proceedings under the Treaty. See paragraph 146 *et seq*. above;

354 Reply on the Merits, [59].
355 Reply on the Merits, [61].
356 Reply on the Merits, [62].
357 Reply on the Merits, [62(a)].
358 Reply on the Merits, [76].

(iii) the ICC tribunals were not aware of the full extent of Panama's conduct. The reviews undertaken by the ICC tribunals were limited to distinct aspects of the Project;

(iv) Panama deprived the ICC tribunals of the full record that is now emerging. For instance the tribunal in the *Concrete* Arbitration was unaware that: (i) Panama did not provide the 2005 Sulfate Soundness Test and the 2008 Sulfate Soundness Test to the Tenderers; (ii) Panama's own internal assessment was that there was a material likelihood (20–39%) that basalt was "*unsuitable as aggregate*", but it had told the Tenderers that such a situation "*almost certainly won't occur*"; and (iii) Panama chose to address the risk that basalt might be of inferior quality for aggregate production by devising a strategy to shift that risk onto the successful tenderer, without informing the Tenderers.

185. The tribunal in the *Concrete* Arbitration in fact held that Panama would be in breach of contract if it were to "*pick and choose what information it would provide to the tenderers*"[359] and that the ACP's wrongful withholding of relevant information would not be covered by the Contract's exclusions of liability.[360] Sacyr submits that the full extent of Panama's wrongdoing is unlikely to "*ever come to light*" as a result of Panama's consistent failure to produce documents that it was ordered to produce.[361]

iii. The Allocation of Risk under the Contract and the Purported "Design-Build" Model of the Project

186. Sacyr submits that Panama induced it into accepting the purported allocation of risks under the Contract by withholding documents and making false representations. For that reason, Sacyr says, Panama cannot rely on the Contract to defend against its alleged Treaty breaches, even if Claimant bore certain risks under the Contract.[362]

187. Panama's FET obligation required it to disclose "*relevant facts*" to Sacyr and to refrain from concealing information by creating a misleading impression. Sacyr submits that whether or not it bore certain contractual risk is irrelevant.[363] Investment treaty tribunals

359 *Concrete* Arbitration, Partial Award, 21 September 2020, [703] (**C-419** or **RLA-167**).
360 *Concrete* Arbitration, Partial Award, 21 September 2020, [663] (**C-419** or **RLA-167**).
361 Reply on the Merits, [71].
362 Reply on the Merits, [85].
363 Reply on the Merits, [89].

have held that there would have to be direct and convincing evidence that a party intended to waive its rights under the Treaty; clear and unequivocal language is required.[364]

188. Sacyr relies on *Desert Line v. Yemen.*[365] The claimant in that case alleged that Yemen's actions in inducing the claimant to accept a settlement agreement was a breach of its obligation to provide FET. Yemen responded by arguing that the claimant had willingly entered into the settlement agreement. Despite acknowledging that the claimant had "*entered into a contractual relationship that was not favourable to it*" and "*chose to assume certain financial risks*",[366] the tribunal found Yemen's conduct in inducing the claimant to conclude the settlement agreement to be a breach of the FET standard. Yemen was precluded from raising the settlement agreement as a bar to its obligations to the claimant because the claimant had not freely consented to concluding the settlement agreement and therefore could not "*be deemed to have accepted such risks as the ones that were imposed in the Settlement Agreement*".[367]

189. Panama contends that *Desert Line v. Yemen* turned on very different facts. It did not relate to a tender process and concerned a situation of duress, an objection dismissed by Sacyr as irrelevant. The principle on which Sacyr relies is that a State cannot use the terms of a contract procured through a violation of the FET standard.[368]

190. Draft reports on the "*Canal Expansion Program Risk Management Plan*" prepared by Ms. Angie Hanily from ACP's Program Development Office expressly warned Panama that risk transfer was only "*appropriate when both sides fully understand the risks and rewards of the project*" and that "*ACP must explicitly identify all project risks to be allocated to contractors and these risks should be made known to prospective bidders*".[369]

---

364 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Jurisdiction, 9 September 2008, [71] (**CLA-234**).
365 Reply on the Merits, [89(c)].
366 *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, [182] (**CLA-32**).
367 *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, [182] (**CLA-32**).
368 Reply on the Merits, [89(c)].
369 ACP, Draft "Canal Expansion Program Risk Management Plan", 19 June 2006, pp. 20–21 (**C-455**).

191. Panama's consultant, Louis Berger, prepared a report in June 2008 (the "**LBG Report**"), which suggested that it was likely that Tenderers would rely on the information provided by Panama because of the extensive investigations on which that information was based:

> *All data that is [sic] being furnished with the third set of locks contract specifications is labeled for reference, including the concept designs and the numerical and physical models of the hydraulic elements of the design, except for geological information and maps that were generated from site investigations. Since extensive investigations have been conducted over many years, starting with the 1939 third set of locks project (when much data collection was done and actual excavations were performed) until recent data collection campaigns performed by the ACP, this should not be a major reason for increasing cost.*[370]

192. Louis Berger also explained that, as a matter of construction industry practice, the contractor in a design-build contract is typically not responsible for misrepresented information.[371]

193. Further, Panama's witness, Mr. Miguez, testified in the *Concrete* Arbitration that Panama shared information with the Tenderers with the intent that they would rely on the information provided:

> *During the RFP process, we set about making available to the Tenderers information that we thought would be helpful and informative about the TSLP and the Sites. There was a compelling reason to do so from our own perspective – we had invested considerable sums of money in the studies we had done and which had demonstrated the TSLP was technically feasible. We were keen to share this with Tenderers to show the TSLP was feasible. Additionally, many new boreholes had been drilled and logged and other studies had been made to supplement those taken in different areas of the Sites by previous administrations, particularly in the 1940's. Other testing had been commissioned from independent third parties by the ACP, such as geophysical testing. All of this provided potential information about the Site that we felt the*

370 Louis Berger Group, Technical Consulting Services for the Panama Canal Expansion Program, 3rd *Preliminary Report*, 27 June 2008, p. 106 of PDF (**C-484**).

371 Louis Berger Group, Technical Consulting Services for the Panama Canal Expansion Program, 3rd *Preliminary Report*, 27 June 2008, p. 106 of PDF (**C-484**).

> *Tenderers would appreciate to receive and which might help them as they interpreted and investigated the Site, considered the available information and contemplated their designs and construction methodologies.*[372]

194. In any event, Sacyr submits that the Contract was not a typical design-build contract.[373] The ACP issued a comprehensive and detailed Request for Proposals ("**RFP**") that ran to thousands of pages and contained very detailed instructions. The ACP's Reference Design for the Project was significantly advanced and, according to Hill International ("**Hill**") went "*considerably farther than would normally be found on a project of this nature*".[374] In its assessment, Hill explained that: "*although this is a 'design-build' contract, in a number of aspects it seems more like a detailed design and construction drawings preparation and construction contract*".[375]

iv. The Claimant Did Not Underbid for the Contract

Cost of the Lock Gates Fabricator

195. Panama argues that the GUPC Consortium underbid the price of the Lock Gates fabricator, and thus the Lock Gates. The GUPC Consortium priced the fabrication of the Lock Gates at US$ 344.7 million. The price that it eventually contracted to pay the chosen Lock Gates Fabricator, Cimolai, for more complex and heavier gates was US$ 384 million. Sacyr notes that the sum agreed with Cimolai was significantly lower than the US$ 527 million price quoted by Heerema (the fabricator nominated in the GUPC Consortium's tender). Panama's accusation of underbidding is therefore incorrect.[376]

196. The GUPC Consortium's reasons for bidding US$ 345 million for the Lock Gates Fabricator is described by Mr. Zaffaroni. He explains that negotiations with Heerema regarding the price of fabrication were ongoing when the GUPC Consortium submitted its tender, as the initial offers made by Heerema did not match other quotes received by the GUPC Consortium from the market. As a result, the GUPC Consortium included a

---

372 *Concrete* Arbitration, Third Witness Statement of Francisco J. Miguez, 13 December 2017, [82] (**C-617**).
373 Reply on the Merits, [93].
374 Hill International, Panama Canal Expansion Project – GUPC Bid Risk Review Report, April 2010, p. 14 (**C-549**).
375 Hill International, Panama Canal Expansion Project – GUPC Bid Risk Review Report, April 2010, p. 14 (**C-549**).
376 Reply on the Merits, [99].

price in its tender that it considered in line with the market price.[377] That assessment was ultimately vindicated by the price agreed with Cimolai, which was only US$ 40 million higher than the GUPC Consortium's quoted price in the bid, and nearly US$ 150 million lower than the price quoted by Heerema. Sacyr submits, contrary to Panama's allegations, the GUPC Consortium's process for pricing the Lock Gates Fabricator confirms the thoroughness of its due diligence and pricing exercise.[378]

Management's Awareness of the GUPC Consortium's Price Proposal

197. Panama claims that "*the top management of the Shareholders, including Sacyr's management, were not even aware of the final price tendered*".[379] Mr. Zaffaroni explains that this is not true: "*Three of the most experienced construction companies in the world would never submit a bid—much less a USD 3.22 billion bid—without previous discussion and senior level approval*".[380] In its contemporaneous independent review of the GUPC Consortium's tender, Hill found that "*the management of the project was functioning as a seamlessly integrated team*".[381] In any event, Sacyr submits that, even if it had been true, any lack of management awareness would not establish any purported underbidding.[382]

Bids Submitted by the Other Tenderers

198. The GUPC Consortium's bid of US$ 3.2 billion was lower than the bids submitted by BTM (US$ 4.2 billion) and C.A.N.A.L. (US$ 5.9 billion). Sacyr submits that Panama does not explain how this fact of itself is indicative of any purported underbidding on behalf of the GUPC Consortium; it amounts to a mere assumption on Panama's part that the other bidders submitted higher bids to account for risks. Sacyr responds that there is no evidence to support that argument. The proposals for the Design and Construction of the Third Set of Locks each had different designs. In any event, Panama vetted the GUPC Consortium's bid and gave it the highest score.[383] The GUPC Consortium's bid

377 **CWS-1** Zaffaroni I, [90]; **CWS-3** Zaffaroni II, [73]–[]–[76].
378 Reply on the Merits, [100].
379 Counter-Memorial on the Merits, [81].
380 CWS-3 Zaffaroni II, **[**53**]**.
381 Hill International, Panama Canal Expansion Project – GUPC Bid Risk Review Report, April 2010, p. 11 (**C-549**).
382 Reply on the Merits, [103].
383 ACP, "Tender Receipt and Evaluation of Technical Proposals", Technical Evaluation Final Report, Contracting Officer's Report, July 2009, pp. 37, 40 (**C-234**).

of US$ 3.22 billion was the only bid that compared with Panama's estimate of US$ 3.35 billion for the Project and complied with Panama's criteria.[384]

199. Sacyr further submits that BTM was able to conduct extensive seismic investments during the tender phase, because its team had particular experience in conducting seismic analysis of large gates. Through its investigations, BTM had discovered that the seismic information provided by Panama to the Tenderers in the Reference Design was incorrect and it was able to factor that into its design and pricing of the Lock Gates. Panama did not share BTM's concerns with the GUPC Consortium, nor did it provide it with the additional studies it commissioned from its consultant, CPP, that confirmed BTM's concerns.[385]

Opinion of the DAB

200. Panama refers to a note prepared by the DAB in 2013 in which it commented that it was "*probable that GUPC underbid the Contract*".[386] Sacyr points out that the same note concludes that (i) "*the project as being realised by GUPC is better than would have been the case had any other contractor been engaged to execute the project even at a considerably higher price*"; (ii) "*the Contractor's cash-flow shortage is genuine and this is not a case of an unscrupulous contractor trying to put pressure on an employer in order to gain further enrichment*"; (iii) "*[i]f anyone believes that any other bidder would not have sought additional payments and extensions of time this is a mistaken belief*"; and (iv) "*[o]n any opinion, ACP is getting a bargain, a very good final project and a very good deal even if a cash injection of a significant lump sum was now made to GUPC.*"[387]

201. Sacyr submits that the independent risk assessment review conducted contemporaneously by Hill for the bond-issuer, Zürich International, demonstrates that Panama's allegations of underbidding are misplaced. Following a comprehensive document review and interview process, Hill concluded that the GUPC Consortium had

384 Reply on the Merits, [104(b)].
385 Reply on the Merits, [104(c)].
386 Email from DAB to GUPC and the ACP with attachment "Future of the Existing Project", 10 December 2013, pp. 3-4 of PDF (**R-140**).
387 Email from DAB to GUPC and the ACP with attachment "Future of the Existing Project", 10 December 2013, p. 3 of PDF (**R-140**).

prepared "*a very detailed" and "realistic*" cost estimate using "*the best available information and the considerable work histories of the GUPC entities*".[388] Those data were "*reviewed by the teams to validate the accuracy and assumptions used in their preparations*".[389]

v. Panama Failed to Disclose Key Information Relating to the Quality of PLE basalt

202. Sacyr submits that Panama: (i) during the tender, withheld from Claimant sulfate soundness tests with non-acceptable results and other relevant information regarding the risks of using basalt for concrete aggregate production, while seeking to shift that risk to the successful tenderer; and (ii) induced Claimant's investment on the basis of representations regarding the basalt that were later revealed to be incorrect.[390]

Panama Withheld the Failed Sulfate Soundness Tests on Pacific Basalt

203. A sulfate soundness test is a chemical test to determine the relative quality, toughness, and durability of mineral aggregates subjected to weathering, thus offering valuable information about the durability and performance of aggregates in use for concrete mixing.[391]

204. As explained by Sacyr's experts Mueser Rutledge Consulting Engineers ("**MRCE**"), "*[t]he loss of mass provides an indirect indication of the presence of internal defects in the aggregate particles, as well as the interconnectedness of defects, as interconnection allows the sulfate solution to penetrate deeper into the rock matrix, yielding a greater loss of mass in the test*".[392] The Employer's Requirements require aggregates to conform to ASTM C33 (Standard Specification for Concrete Aggregates).

205. ASTM C33 sets criteria for aggregate "*soundness*" determined in accordance with ASTM C88 (Standard Test Method for Soundness of Aggregates by use of Sodium Sulfate or Magnesium Sulfate).[393] The ASTM C88 standard requires testing and

388 Hill International, "Panama Canal Expansion Project – GUPC Bid Risk Review Report", April 2010, p. 45 (**C-549**).
389 Hill International, "Panama Canal Expansion Project – GUPC Bid Risk Review Report", April 2010, p. 39 (**C-549**).
390 Reply on the Merits, [108].
391 Reply on the Merits, [110].
392 **CER-7** MRCE, p. 8.
393 **CER-7** MRCE, p. 7.

reporting coarse aggregate (particle size range 4.75mm to 100mm) separately from fine aggregate (particle size range 0.3mm to 4.75mm).[394] According to the ASTM C88 standard for sulfate soundness testing, a result (weight loss) of 12% or lower is acceptable for coarse aggregate testing and a result of 10% or lower is acceptable for fine aggregate testing.[395] Results higher than these thresholds are not acceptable, and indicate that the basalt may not be suitable for use as aggregate.

206. In January 2008, Panama made available three sulfate soundness tests on Pacific basalt to the Tenderers. All three tests disclosed by Panama showed acceptable results.[396] In particular:

(i) Panama provided the Tenderers with a coarse aggregate test commissioned by the ACP from the *Universidad Tecnológica de Panamá* ("**UTP**"), dated 14 April 2004, on Sample TP1C-16 in Location "*Corte Culebra*", within the contract area for the PAC-4 works (the "**First 2004 Sulfate Soundness Test**").[397] The First 2004 Sulfate Soundness Test showed acceptable results of 0.49%.

(ii) Panama provided the Tenderers with a second coarse aggregate test commissioned by ACP from the UTP, also dated 14 April 2004, on Sample TP1C-7 in Location "*Corte Culebra*" (the "**Second 2004 Sulfate Soundness Test**").[398] That test, too, showed acceptable results of 9.15%.

(iii) Panama also provided the Tenderers with a fine aggregate test conducted by ACP, dated 12 April 2006, on Sample M-1 in Location "*Corozal*" (which corresponds to the location of the ACP's soils and materials laboratory) (the "**2006 Fine Aggregate Sulfate Soundness Test**").[399] The source of basalt for this one fine aggregate soundness test was not identified on the test sheet, although Panama represented in the accompanying report that the test had been

394 **CER-7** MRCE, p. 7.
395 **CER-7** MRCE, p. 7; ASTM, Standard Specification for Concrete Aggregates, C 33/C 33M—11a, 1 January 2011, p. 5, Table 4 (**C-263**).
396 Reply on the Merits, [112].
397 ACP, Technical Report 2006-14, "Laboratory tests on materials from the Third Set of Locks to be used as aggregates", September 2006, p. 10 of PDF (**C-146**).
398 ACP, Technical Report 2006-14, "Laboratory tests on materials from the Third Set of Locks to be used as aggregates", September 2006, p. 11 of PDF (**C-146**).
399 ACP, Technical Report 2006-13, "Tests on Pacific Site Basaltic rock as fine aggregate or manufactured sand to replace the natural sand", July 2006, p. 10 of PDF (**C-145**).

conducted on "*Pacific Site Basaltic rock*" for the purpose of determining whether basalt could be used to produce "*fine aggregate or manufactured sand*".[400] The 2006 Fine Aggregate Sulfate Soundness Test showed acceptable results of 2.8%.[401]

207. In 2008, Panama further represented that "*[a]ll tests [including chemical tests for sulfate wear] met the standard specifications for concrete aggregates*"[402] and that "*[i]n the past, tests such as chemical analysis and abrasion have been made to materials from these sources with acceptable results*".[403] Panama also told the Tenderers in response to a specific question raised by them regarding the source of fine aggregates (sand) that it had itself only considered manufacturing sand from basalt "*[d]ue to large volume of material available from the excavation and the suitability of the material for use as aggregate*".[404]

208. Sacyr submits, however, that while Panama disclosed the three sulfate soundness tests that reported "*acceptable results*" and represented that all tests met the standard specifications, it had conducted tests which reported failed results. Those tests had been withheld from Tenderers.[405]

209. In particular, Panama failed to disclose a coarse aggregate test also commissioned by the ACP from the UTP, dated 29 April 2005, on Sample M-1 in Location "Miraflores" (the "**2005 Sulfate Soundness Test**").[406] This test reported a failed result of 14.8%.

210. Sacyr submits that Panama also failed to disclose a test conducted by or on behalf of its consultant, URS, during the tender phase, which reported a failed result of 23.9% (the "**2008 Sulfate Soundness Test**"). The background to the engagement of URS may be summarised as follows. In 2007, Panama engaged URS to interpret and characterise

---

400 ACP, Technical Report 2006-13, "Tests on Pacific Site Basaltic rock as fine aggregate or manufactured sand to replace the natural sand", July 2006, p. 1 of PDF (**C-145**).

401 ACP, Technical Report 2006-13, "Tests on Pacific Site Basaltic rock as fine aggregate or manufactured sand to replace the natural sand", July 2006, p. 10 of PDF (**C-145**).

402 ACP, Technical Report 2006-13, "Tests on Pacific Site Basaltic rock as fine aggregate or manufactured sand to replace the natural sand", July 2006, p. 6 of PDF (**C-145**).

403 GDR, May 2008, p. 23 (**C-186**).

404 Consolidated version of Questions and Answers from the Tender Stage, April 2008–February 2009, p. 224 of PDF (**C-219**).

405 Reply on the Merits, [114].

406 Technological University of Panama, "Sulfate Soundness Test ASTM C-136-D4791-C131-C88", 29 April 2005, (**C-135)**.

material to be used in the construction of the Borinquen Dams, a set of four dams needed to provide navigation access from the third lock structures to a pre-existing section of the Canal known as the Gaillard Cut.[407] Construction of three of these dams (known as Dams 2E, 1W and 2W) was part of the Project. The fourth Borinquen Dam (Dam 1E) fell within the scope of the PAC-4 contract.

211. In February 2008, URS prepared a Geotechnical Interpretive Report in relation to the three dams within the scope of the Project (the "**February 2008 URS Report**"). The Report explained that URS was conducting a "*full range of laboratory testing*" on certain core samples of sound basalt obtained from outside the Project area, but which were expected to be representative of PLE basalt.[408] In April 2008, Panama provided the Tenderers with the February 2008 URS Report.[409]

212. On 12 May 2008, URS prepared a further Geotechnical Interpretative Report relating to the same three dams within the scope of the Project (the "**May 2008 URS Report**"), again reiterating that it was conducting a "*full range of laboratory testing*" on the same core samples of sound basalt described in the February 2008 URS Report.[410] Panama disclosed this Report to the tenderers on 16 May 2008.[411]

213. Also on 16 May 2008, Panama issued the Geotechnical Data Report (the "**GDR**") in which it stated that it had conducted "*state-of-the-art … laboratory tests … in accordance with ASTM standards*", including 19 sodium sulfate tests on the Pacific site,[412] which had produced "*acceptable results*", showing that "*sand manufactured from the basalt resulted in an acceptable fine aggregate*".[413]

214. In July 2008, the Tenderers asked Panama to share "*the outstanding test results*" mentioned in the February 2008 URS Report and the May 2008 URS Report.[414] Panama

---

407 GDR, May 2008, p. 13 (**C-186**).
408 URS, Draft Technical Memorandum, "Task A.2.3, In-Situ Construction Materials, Dams 2E, 1W, and 2W, Geotechnical Interpretive Report (GIR)", 15 February 2008, p. 29 of PDF (**C-178**).
409 RFP, Amendment No. 7, April 2008, [1.107] (**C-182**); and RFP, Amendment No. 7, Volume VI, Part 2 – Geotechnical Data Report No. 01-2008, April 2008, p. 296 (**C-469**).
410 URS, Technical Memorandum, "Task A.2.3, In-Situ Construction Materials, Dams 2E, 1W, and 2W, Geotechnical Interpretive Report (GIR)", 12 May 2008, p. 30 of PDF (**C-478**).
411 RFP, Amendment No. 8, May 2008, [1.46] (**C-477**); and GDR, May 2008, p. 307 (**C-186**).
412 GDR, May 2008, pp. 10–11, 25–26 (Table 19) (**C-186**).
413 GDR, May 2008, pp. 23, 28 (**C-186**).
414 Consolidated version of Questions and Answers from the Tender Stage, April 2008–February 2009, p. 210 of PDF (**C-219**).

responded by asking the Tenderers to refer to the GDR, which contained the representation that Panama's "*state-of-the-art*" laboratory testing had produced "*acceptable results*".[415]

215. On 15 August 2008, URS presented a "*summary of testing of basalt*" that it had conducted on samples contained in "*core borings URS2-2 and URS2-6*" in its latest report (the "**August 2008 URS Report**").[416] Sacyr explains that while the Report itself concerned the fourth Borinquen dam, which was part of the PAC-4, the test results that it reported were part of the "*full range of laboratory testing*" to which the prior URS Reports relating to the Project referred, and that they had been conducted on the same core samples that URS had confirmed to be representative of PLE basalt. The "*summary of testing of basalt*" compared the tests conducted by URS with the tests that ACP had conducted on Pacific-side basalt to determine whether it could be used to produce fine aggregates for the Project. The summary compared the 2006 Fine Aggregate Sulfate Soundness Test with a 2.8% result with the 2008 Sulfate Soundness Test, which had produced a failed 23.9% result, noting that the latter result (above the 10% limit) was "*higher than expected and [is] currently under review*".[417]

216. MRCE explained that "*[t]he fine aggregate soundness test result of 23.9%, withheld from the tenderers by ACP, is consistent with soundness tests carried out by GUPC on fine aggregate derived from Miraflores basalt from the PLE during construction*".[418] All of GUPC's 14 soundness tests on PLE basalt during construction gave results higher than 2.8%; and 10 of those tests were in the range of 15% to 30% for fine aggregates, five to ten times greater than the 2.8% result on fine aggregate provided by the ACP in the 2006 Fine Aggregate Sulfate Soundness Test.[419]

217. Sacyr submits that Panama disclosed neither the 2008 Sulfate Soundness Test, nor the August 2008 URS Report to the Tenderers. Nor did it correct its representations that

---

415 Consolidated version of Questions and Answers from the Tender Stage, April 2008–February 2009, p. 210 of PDF (**C-219**).

416 URS, Final Technical Memorandum, "Task A.2.3, In-Situ Construction Materials, Dam 1E, Geotechnical Interpretive Report (GIR)", 15 August 2008, p. 35 of PDF (**C-489**).

417 URS, Final Technical Memorandum, "Task A.2.3, In-Situ Construction Materials, Dam 1E, Geotechnical Interpretive Report (GIR)", 15 August 2008, p. 55 of PDF (Table 7-1) (**C-489**).

418 **CER-7** MRCE, p. 12.

419 **CWS-4** Pérez II, [7]; **CER-7** MRCE, p. 24.

Panama's laboratory testing had produced "*acceptable results*" and that "*[a]ll tests met the standard specifications for concrete aggregates*".[420] Panama alleges that Sacyr has possession of that test. At the Hearing, the following exchange occurred:

> *ARBITRATOR DOUGLAS: So where do we stand with the 2008 document? Because, as I understand, the Respondent says you had it all along, and it seems from your Opening that that's denied? Or what's the position now?*
>
> *MR. VERHOOSEL: Yes. We didn't have the test. And indeed, even today we don't have the test itself. There's a laboratory Report. What I think Panama relies upon is the fact that the URS Report, that refer to the results of this test was provided to the PAC-4 Tenderers, the Tenderers for that other Project, but that was provided to those Tenderers after the Letter of Acceptance for our Project had already been issued and, therefore, GUPC was already committed to that Project.*[421]

218. Sacyr sets out in the table below a summary of Panama's alleged representations:[422]

S. No.	Sulfate Soundness Test	Result (Pass rate: Coarse agg. < 12% Fine agg. < 10%)	Provided to Claimant
1.	Coarse aggregate testing dated 14 April 2004 on Sample TP1C-16 in Location "Corte Culebra" (within the PAC-4 contract area, roughly 2.25 km from the PLE)	0.49% (Acceptable result)	Yes
2.	Coarse aggregate testing dated 14 April 2004 on Sample TP1C-7 in Location "Corte Culebra" (within the PLE)	9.15% (Acceptable result)	Yes
3.	Coarse aggregate testing on Sample M-1 in Location "Miraflores"	14.81% (Non-acceptable result)	No
4.	Fine aggregate testing dated 12 April 2006 on Sample M-1 in Location "Corozal"	2.8% (Acceptable result)	Yes

420 Reply on the Merits, [116].
421 Transcript, Day 1, 16–17.
422 Reply on the Merits, [117], p. 64.

5.	Fine aggregate testing by URS around August 2008 on Samples "URS 2-2" and "URS2-6" (within the PAC-4 contract area, roughly 2.5 km from the PLE)	23.9% (Non-acceptable result)	No

219. Two out of five of Panama's sulfate soundness tests on the Pacific basalt had failed, and one of the two tests for fine aggregates had also failed.[423]

220. Sacyr submits that Panama neither exhibited, nor produced any of the 2005 Sulfate Soundness Test, the 2008 Sulfate Soundness Test or URS' review of the results of the 2008 Sulfate Soundness Test in the *Concrete* Arbitration. Sacyr says that Panama also failed to disclose any of the 19 sulfate soundness tests it claimed to have conducted on Pacific-side basalt (including the sulfate soundness test that it specifically claimed to have performed on a specimen taken from borehole TP1C-21 in location "Miraflores").[424]

221. Panama only produced the 2005 Sulfate Soundness Test following an application by Sacyr to the Tribunal. Sacyr submits that Panama has not produced the 2008 Sulfate Soundness Test (Request No. 23); documents relating to the review of the 23.9% results of the 2008 Sulfate Soundness Test (Request No. 23); nor other sulfate soundness tests in its possession in response to Request No. 22.[425]

222. Sacyr submits that Panama's deficient document production also warrants the drawing of an adverse inference that (i) the sulfate soundness tests that Panama continues to fail to provide from its alleged set of 19 tests on Pacific-side basalt (including the sulfate soundness test that it specifically claimed to have performed on a specimen taken from borehole TP1C-21 in location "Miraflores") reported failed results; (ii) the "*review*" of the 2008 Sulfate Soundness Test failure result of 23.9% led to further tests with similar results which were never provided to the Claimant; and that (iii) Panama withheld additional information that could have alerted the Tenderers to the problems eventually encountered with the PLE basalt.[426]

---

423 Reply on the Merits, [118].
424 Reply on the Merits, [119(a)].
425 Reply on the Merits, [119(b)].
426 Reply on the Merits, [120].

Panama Withheld its Internal Assessment of 20–39% Chance of PLE Basalt being "*unsuitable as aggregate*"

223. In September 2005, Panama prepared the September 2005 Risk Assessment (which it later released to the Tenderers) in which it classified the probability of PLE basalt being "*unsuitable as aggregate*" as low, (defined in that document as meaning that it "*almost certainly won't occur*").[427]

224. In an internal "*preliminary*" version of the September 2005 Risk Assessment dated 30 September 2005, Panama proposed to mitigate the risk of basalt being inappropriate for producing aggregate by conducting laboratory tests in advance.[428]

225. In November 2005, ACP prepared the November 2005 Risk Assessment. Panama quantified the probability of "*[r]ock [being] unsuitable for aggregate*" to be as high as *"20-39%*".[429] Sacyr alleges that this document was withheld.

Panama Withheld Other Documents and Information Referring to Issues with Pacific Basalt

226. Sacyr submits that Panama also withheld other relevant information from the Tenderers relating to potential issues with the Pacific basalt.

227. Panama failed to alert the Tenderers to the fact that its consultants had questioned Panama's assumption that fine aggregates could be produced from PLE basalt. They had repeatedly advised it significantly to increase the basalt related contingency. As early as April 2004, Panama explained in its 2004 Cost Report that one of Panama's "*most important*" assumptions in preparing its cost estimate was that "*[t]he aggregate and crushed stone required for both sites would be obtained from the excavation of the Pacific locks and access channel*".[430] Draft versions of this Report were reviewed by the Project Management Team (the "**PMAT**") comprised of a group of independent consultants led by Parsons Brinckerhoff. In August 2004, following revisions made to the Reference Design for the Lock Gates, Panama revised the cost estimates contained in the 2004 Cost Report. In September 2004, the PMAT conducted a peer review of the

427 ACP, "Design Value Management, Constructability Dialogos and Risk Assessment – Third Lane Locks Project – 22nd August to 26th August 2005", Workshop Report, 14 September 2005, pp. 47, 138 (**C-137**).
428 Preliminary Risk Report on the Expansion Programme, 30 September 2005, p. 13, entry 80 (**C-451**).
429 ACP, Project Cost Risk Matrix, 1 November 2005, entry 80 (**C-453**).
430 Cost Schedule and Constructability Analysis for the Proposed Post-Panamax Locks, Concept Level Design Estimates Report, April 2004, pp. 2–3 (**C-5**).

revised cost estimates, in which it questioned Panama's assumption that fine aggregates could be produced from PLE basalt.[431] The PMAT recommended the inclusion of a 50% contingency in the cost estimate for "*[l]ack of fine aggregates for concrete – sand fabrication*".[432]

228. Sacyr maintains that Panama challenged that recommendation. It rejected the PMAT peer review, leading PMAT to revise its recommendation to make it less explicit.[433] A further version of the peer review report prepared in October 2004 noted that: "*this level of contingency [15%] is too small given the level of conceptual design available, and recommends that the overall contingency should actually be increased from the amount used in March*".[434]

229. In November 2004, Parsons Brinckerhoff updated the cost estimates contained in the 2004 Cost Report from approximately US$ 2.9 billion to US$ 3.5 billion, noting that there were "*significant gaps in necessary design data*".[435]

230. Sacyr further submits that Panama failed to disclose Part III of the Final Report on Modified Third Locks Project prepared by the United States, despite requesting the entire report from the US National Archives and Record Administration (the "**NARA**") for the purpose of sharing it with the Tenderers. According to Sacyr's experts, Messrs. Demming and Klaetsch, "*Part III includes discussion of basalt degradation in stockpiles, slippery clay in basalt joints, and crusher plant problems due to mud generated when water was introduced to the basalt crushing process*".[436]

---

431 Parsons Brinckerhoff International, "Peer Review of the Third Lane Locks, Alignment Channels, Water Saving Basins and Other Related Improvements, Part 1: Locks Program", 30 September 2004, p. 8 (**C-445**).

432 Parsons Brinckerhoff International, "Peer Review of the Third Lane Locks, Alignment Channels, Water Saving Basins and Other Related Improvements, Part 1: Locks Program", 30 September 2004, p. 4 (**C-445**).

433 Reply on the Merits, [130(b)].

434 Parsons Brinckerhoff International, "Revised Peer Review Report of the Third Lane Locks, Alignment Channels, Water Saving Basins and Other Related Improvements, Part 1: Locks Program", 11 October 2004, p. 6 (**C-447**).

435 Parsons Brinckerhoff International, "Conceptual Level Cost Estimate and Integrated Schedule, Volume 1", 24 November 2004, p. 19 of PDF (**C-448**).

436 **CER-7** MRCE, p. 20.

231. Mr. Zaffaroni explains in his first and second witness statements that these failed test results would have raised "*red flags*" regarding the durability of the basalt.[437] Mr. Pérez also testified that:

> *It is exactly the kind of key information that a tenderer expects the employer to disclose. This is because this information would have given the tenderers an opportunity to adjust their testing accordingly, to determine whether there was a need to search for alternative sources to replace the PLE basalt (if at all feasible), and, in those circumstances, to decide whether or not to bid—and if so, at what price.*[438]
>
> *…*
>
> *In all my years of experience, I have never encountered an employer withholding such relevant and meaningful information. I firmly believe that we should have been given this information at tender stage.*[439]

232. With respect to the tests conducted by URS, Panama first claimed in its Counter-Memorial that it was not required to pass on the results of the tests, because the Tenderers had not asked any follow-up questions about the status of the tests referred to in URS's February and May 2008 Reports. In its document production correspondence, Panama then suggested that it was not required to disclose the 2008 Sulfate Soundness Test or the August 2008 URS Report to the Tenderers, because: (i) the 2008 Sulfate Soundness Test was "*performed for a different contract (i.e., the PAC-4 Contract) in an area* outside *the area contracted for in the Third Set of Locks Contract*" and *"[it] was not performed to understand the suitability of the PLE basalt as the primary source of concrete aggregate in the Third Set of Locks Contract*"; and (ii) the August 2008 URS Report "*was finalized only after the tender period for the Third Set of Locks Contract had already commenced*".[440]

233. Sacyr does not accept these arguments. First, Sacyr submits that Panama cannot explain why Sacyr should be put to making "*follow-up*" requests when the Tenderers had already requested sight of URS's test results, but they had been told that no more drilling had

---

437 **CWS-1** Zaffaroni I, [101]; **CWS-3** Zaffaroni II, [17].
438 **CWS-4** Pérez II, [6].
439 **CWS-4** Pérez II, [8].
440 Panama's Letter to the Tribunal, 1 December 2023, p. 4. [Emphasis in original]

been performed in the locks area and had been referred to the May 2008 GDR and the statement that testing had produced "*acceptable results*".[441]

234. In addition, Sacyr submits that Panama's assertions that the 2008 Sulfate Soundness Test did not need to be provided, because it had been performed for a different contract and it was not the purpose of the test to understand the suitability of the PLE basalt as the primary source of concrete aggregate in the Third Set of Locks Contract are contradicted by the contemporary evidence of Panama's own consultant, URS.[442] In the February 2008 URS Report (relating to the Project), URS explained that a "*full range of laboratory testing is currently being performed by ACP on core samples of sound basalt from seven borings*", including borings "*URS2-2*" and "*URS2-6*".[443] URS further explained that "*[w]hile these tests are being performed on samples from basalt located just north of the PAC-7 area, they are expected to be representative of … basalt that would available from the Pacific Locks excavation [i.e., PLE basalt]*".[444] Sacyr submits that the contemporary evidence is therefore clear that Panama's consultants understood that the samples on which the 2008 Sulfate Soundness Test was performed would be representative of the quality of the PLE basalt.[445]

235. Panama did disclose the First 2004 Sulfate Soundness Test conducted on Sample TP1C-16, which gave acceptable results. Like the URS2-2 and URS2-6 borings, Sample TP1C-16 is also located in the PAC-4 contract area. Sacyr submits that Panama cannot seriously argue that it disclosed soundness test results conducted on samples located in the PAC-4 contract area when they produced acceptable results but it was entitled to withhold non-acceptable results on the basis that those tests were conducted on samples in that same PAC-4 contract area.[446]

---

441 Reply on the Merits, [144(a)].
442 Reply on the Merits, [144(b)].
443 Sacyr says the 2008 Sulfate Soundness Test appears to have been conducted on basalt samples from core borings "URS2-2" and "URS2-6". *See* URS, Final Technical Memorandum, "Task A.2.3, In-Situ Construction Materials, Dam 1E, Geotechnical Interpretive Report (GIR)", 15 August 2008, p. 7-2 (**C-489**).
444 URS, Draft Technical Memorandum, "Task A.2.3, In-Situ Construction Materials, Dams 2E, 1W, and 2W, Geotechnical Interpretive Report (GIR)", 15 February 2008, p. 29 of PDF (**C-178**).
445 Reply on the Merits, [144(b)(ii)].
446 Reply on the Merits, [144(b)(ii)].

236. Sacyr points out that while Panama now seeks to draw a distinction between the analysis conducted by URS for the PAC-4 contract and the Project, URS itself did not draw any such distinction at the time. URS reviewed and evaluated the same geological, geotechnical, and other relevant data to characterise the materials for use in the construction of the dams, whether they related to the PAC-4 contract or GUPC's Contract.[447] URS sought to compare (i) the 2006 Fine Aggregate Sulfate Soundness Test (which gave an acceptable result of 2.8% and was disclosed to the Tenderers); and (ii) the 2008 Sulfate Soundness Test (which gave a failed result of 23.9% and was not disclosed to the Tenderers):

Table 7-1
Summary of Testing of Basalt and Agglomerate for Filter, Drain and Transition Materials

Excavated Material	Test Standard	Criteria	Basalt	Agglomerate	Combined Samples
Specific Gravity	ASTM C127	> 2.6	2.7 (ACP) 2.7 (URS)	2.4 (ACP) 2.1 (URS)	-
Abrasion Resistance	ASTM C131	Max 10% 100 revolution ---------- Max 40% 500 revolutions	- (ACP) 5% (URS) 19% (ACP) 20% (URS)	- (ACP) 9% (URS) - (ACP) 41% (URS)	- 25% and 26% (ACP)
	ASTM C535	Max 40% 1000 revolutions	- (ACP) 18% (URS)	- (ACP) 39% (URS)	21% (ACP)
Sodium Sulfate Soundness	ASTM C88	<10%	2.8% (ACP) 23.9%* (URS)	- (ACP) 99.1%* (URS)	-
Elongated Particles	ASTM D4791	<15%	0% (URS)	0% (URS)	0.2% and 1.8% (ACP)

* These results are higher than expected and are currently under review.

Panama Represented that the PLE Basalt was of Adequate Quality to Produce Concrete Aggregates

237. Sacyr submits that, while withholding relevant information regarding the possible deficiencies in PLE basalt, Panama also repeatedly represented to Tenderers that its testing had shown "*acceptable results*" and that PLE basalt was of adequate quality to

447 Appendix A of each of three URS reports contains an identical list of information reviewed by URS. *See* URS, Draft Technical Memorandum, "Task A.2.3, In-Situ Construction Materials, Dams 2E, 1W, and 2W, Geotechnical Interpretive Report (GIR)", 15 February 2008, Appendix A, p. 75 of PDF (**C-178**); URS, Technical Memorandum, "Task A.2.3, In-Situ Construction Materials, Dams 2E, 1W, and 2W, Geotechnical Interpretive Report (GIR)", 12 May 2008, Appendix A, p. 78 of PDF (**C-478**); URS, Final Technical Memorandum, "Task A.2.3, In-Situ Construction Materials, Dam 1E, Geotechnical Interpretive Report (GIR)", 15 August 2008, Appendix A, p. 105 of PDF (**C-489**).

produce concrete aggregates.[448] According to Sacyr, Panama's alleged representations were contained in the following documents:

(i) the 2004 and 2006 Cost Reports, which recorded that one of Panama's "*most important*" assumptions was that the "*aggregate and crushed stone required for both sites would be obtained from the excavation of the Pacific locks and access channel*".[449] The PLE basalt was described as "*strong*",[450] which was not the case;

(ii) the risk assessment shared with the Tenderers: in the September 2005 Risk Assessment, Panama indicated that the probability that the PLE basalt would be "*unsuitable as aggregate*" "*almost certainly won't occur*".[451] There was no suggestion on Panama's part that the probability could be as high as 39%;

(iii) the Technical Reports with which the Tenderers were provided: in its July 2006 Technical Report, Panama explained that "*[t]he purpose of this report is to verify the quality of basalt rock in the Pacific Area through mechanical, physical and chemical tests*".[452] It stated that "*[c]hemical tests for sulfate wear, abrasive wear and granulometry were performed in the laboratory of the Technological University of Panama. All tests met the standard specifications for concrete aggregates*".[453] Similarly, in its September 2006 Technical Report, Panama explained that "*[t]he tests that are normally performed on aggregates to determine their quality were conducted, and their properties and characteristics were found to be within acceptable ranges according to ASTM specifications*";[454]

---

448 Reply on the Merits, [148].

449 Cost Schedule and Constructability Analysis for the Proposed Post-Panamax Locks, Concept Level Design Estimates Report, April 2004, pp. 2-3 (**C-5**).

450 Cost Schedule and Constructability Analysis for the Proposed Post-Panamax Locks, Concept Level Design Estimates Report, April 2004, p. 81 (**C-5**).

451 ACP, "Design Value Management, Constructability Dialogos and Risk Assessment – Third Lane Locks Project – 22nd August to 26th August 2005", Workshop Report, 14 September 2005, pp. 47, 138 (**C-137**).

452 Technical Report 2006-13, Tests on Pacific Site Basaltic rock as fine aggregate or manufactured sand to replace the natural sand, July 2006, p. 4 of PDF (**C-145**).

453 Technical Report 2006-13, Tests on Pacific Site Basaltic rock as fine aggregate or manufactured sand to replace the natural sand, July 2006, p. 6 of PDF (**C-145**).

454 Technical Report 2006-14, Laboratory tests on materials from the Third Set of Locks to be used as aggregates, September 2006, p. 4 of PDF (**C-146**).

(iv) the Geotechnical Report ("**GR**") dated December 2007, the GDR and testing conducted by Panama: In the GR, Panama stated that:

- "*In the past, tests such as CBR and abrasion have been made to materials from these sources with acceptable results.*"[455]

- "*There are spoil stocks of basalt near the Miraflores Third Locks excavation areas, this material has proven to be satisfactory to be used as aggregate.*"[456]

- "*The conclusion was that manufactured sand from the basalt resulted in an acceptable fine aggregates.*"[457]

On 16 May 2008, Panama issued the GDR in which it stated that:

- It had conducted "*state-of-the-art ... laboratory tests ... in accordance with ASTM standards*" and that "*[i]n the past, tests such as chemical analysis and abrasion have been made to materials from these sources with acceptable results*"[458]; and

- "*sand manufactured from the [Pacific side] basalt resulted in an acceptable fine aggregate.*"[459]

Those representations were reproduced in the original Geotechnical Interpretative Report ("**GIR**") issued in May 2008.[460] Sacyr submits that these representations were incorrect. At least two out of five of Panama's sulfate soundness testing on the Pacific basalt had failed, and one out of two tests for fine aggregate had failed[461]

455 RFP, Volume VI, Part 2, Geotechnical Report, December 2007, p. 28 (**C-172**).
456 RFP, Volume VI, Part 2, Geotechnical Report, December 2007, p. 28 (**C-172**).
457 RFP, Volume VI, Part 2, Geotechnical Report, December 2007, p. 33 (**C-172**).
458 GDR, May 2008, pp. 10–11, 23, 35–36 (Table 19) (**C-186**).
459 GDR, May 2008, p. 28 (**C-186**).
460 RFP, Amendment No. 8, Volume VI, Part 2 – Geotechnical Interpretative Report No. 01-2008 Rev 0, May 2008, p. 46 of PDF (**C-185**).
461 Reply on the Merits, [148(f)].

(v) Panama's responses to questions raised by the Tenderers: In response to a question from the Tenderers regarding "*Potential Sites of Aggregates*" and whether any natural sand source was available, Panama stated that: "*[d]ue to large volumes of material available from the excavation and the suitability of the material for use as aggregate, only manufactured sand was considered.*"[462] Further, in July 2008, the Tenderers asked Panama to make available to them any remaining "*outstanding test results*" performed by URS. Panama responded by asking the Tenderers to refer to the GDR,[463] in which it was represented that Panama's laboratory testing had produced "*acceptable results*";

(vi) the Employer's Requirements: On 6 August 2008, several months into the tender process, Panama amended the Employer's Requirements to reiterate that the PLE basalt was of sufficient quality to produce concrete aggregates: "*During the planning stage of this project, the Employer assumed that the main source of aggregates for the Atlantic and Pacific sites would be the rock coming from the excavation of the Pacific site*".[464] Panama revised those representations regarding the quality of PLE basalt in September 2008 by amending the Employer's Requirements as follows:

> *A potential source of aggregates for the Atlantic and Pacific Sites may be the rock coming from the excavation at the Pacific site and sand that may be manufactured from that rock. The Employer in no way guarantees that such aggregate is adequate or meets the requirements for the Contractor's proposed design or is suitable for the Works*[465]

(vii) the Environmental Impact Study ("**EsIA**"): In October 2008, Panama issued the full version of the EsIA to the Tenderers. The EsIA, which formed part of the Employer's Requirements, stated that:

---

462 Questions and Answers to RFP 76161 Amendment No. 10, July 2008, p. 57 (**C-18**).

463 Consolidated version of Questions and Answers from the Tender Stage, April 2008–February 2009, p. 210 of PDF (**C-219**).

464 RFP, Amendment No. 13, Volume III, Employer's Requirements, Section 01 50 00, Temporary Facilities, Accesses and Controls, August 2008, p. 8, Article 1.07.D.1 (**C-192**).

465 RFP, Amendment No. 16, Volume II, Part 3, Employer's Requirements, Section 01 50 00 – Temporary Facilities, Accesses and Controls, September 2008, p. 8, Article 1.07.D.1. (**C-196**).

- "*It is improbable that basalt is affected by air, humidity, or other geochemical changes.*"[466]

- "*[B]asalt may be fractured and fused at a variety of degrees; therefore, it can be fragmented in a wide range of sizes. Further, it can also be crushed and used in the production of sandy and gravel materials. Basalt may be broken into angular shaped particles and still maintain its hardness; likewise, its abrasive resistance to sulfate and its alkaline reaction are to be considered in using this rock as aggregate material for concrete.*"[467]

- "*Basalt excavated from the Pacific side will be used to obtain aggregate for the construction of the locks and water saving basins*."[468]

- "*In the areas to be excavated on the Atlantic Side there are no good sources of material, and it has been proposed that materials for use as aggregates, backfill, and foundation layers be taken from the excavation on the Pacific Side access channel.*"[469]

- "*A crushing plant will be installed on the Pacific Side to process the basalt rock material obtained from the excavation of the upper and intermediate chambers of each of the new locks for the production of gravel to be used in the manufacture of the concrete required for the chambers, water saving basins, backfill, and roads.*"[470]

- Basalt in the Pacific locks area is "*strong*" and of "*good*" quality.[471]

466 EsIA Report, July 2007, p. 4-17 (p. 240 of PDF) (**C-159**).
467 EsIA Report, July 2007, pp. 4-17–4-18 (pp. 240–241 of PDF) (**C-159**).
468 EsIA Report, July 2007, p. ES-7 (p. 7 of PDF) (**C-159**).
469 EsIA Report, July 2007, p. 3-80 (p. 149 of PDF) (**C-159**).
470 EsIA Report, July 2007, p. 3-81 (p. 150 of PDF) (**C-159**).
471 EsIA Report, July 2007, p. 4-17 (p. 240 of PDF) (**C-159**).

- "*According to Panama Canal Authority requirements, the Project requirements for aggregates to prepare concrete … will be covered with excavated materials, mainly on the Pacific Side.*"[472]

- "*[M]anufacturing of aggregates will be mainly obtained from the excavations and processed at the plants described previously.*"[473]

238. Sacyr submits that in addition to Panama's representations regarding the quality of the basalt, Panama also represented that:[474]

(i) it had conducted extensive and rigorous studies to plan the TSLP and arrive at a design that was beyond the conceptual level;

(ii) its technical studies were thorough and offered a "*high level of reliability*" for its cost estimate of US$ 3.35 billion for the Project and that "*variations that have occurred in some other mega projects will not occur*";

(iii) the studies that it provided to the Tenderers were accurate;

(iv) the Tenderers would not be required to fund what Sacyr says are the inevitable additional costs of the Project; and

(v) Panama would act transparently and in good faith.

Claimant Relied on the Representations

239. Sacyr submits that Panama's argument that the documents listed at paragraph 237 above did not form part of the Contract is incorrect. The Contract notes that reference documents provided by Panama as Volume VI documents were "*deemed to form and be read and construed as part of [the Contract]*".[475]

240. Sacyr points out that in contemporaneous discussions during the tender phase, Panama expected, and often asked, the Tenderers to refer to the documents it had provided, even if they were provided "*for reference only*". For instance, Panama would often respond

472 EsIA Report, July 2007, p. 7-79 (p. 679 of PDF) (**C-159**).
473 EsIA Report, July 2007, p. 7-164 (p. 764 of PDF) (**C-159**).
474 Reply on the Merits, [149].
475 Reply on the Merits, [154].

to questions raised by the Tenderers during the tender process by referring them to: (a) the Master Plan;[476] (b) the GDR;[477] (c) the GIR;[478] and (d) other documents provided in Volume VI of the RFP.[479] In response to Claimant's request for a "*geotechnical baseline report*" on which the "*Contractor is allowed to rely*", Panama informed the Tenderers that it was preparing a report with geotechnical data based on the experience of geotechnical work within the Canal area, which "*can be used by the tenderers in evaluating site conditions*".[480] Similarly, during a presentation of its geotechnical investigations to the Tenderers, Panama explained that its "*objective*" was to "*[p]rovide information necessary for a general characterization of the areas and for the preparation of preliminary designs for bid submittal.*"[481]

241. In its individual meetings with the members of the GUPC Consortium during the tender stage, Panama suggested that the Consortium could rely on the information provided by it.[482] Mr. Quijano told Mr. Zaffaroni that:

> *[T]here is a question for example, that has been addressed by several of you with regards to the availability of material, which is very important for you, but we also need to take some responsibility of making sure that the amount of those will be close to what we put on paper. Those we expect to have also included Monday with a map showing where these things are and the amounts that may be available within a certain, certainty to us because otherwise we would have a claim coming back that you told me so much and definitely we want to make sure that those numbers are correct.*[483]

---

476 Consolidated version of Questions and Answers from the Tender Stage, April 2008–February 2009, p. 22 of PDF (**C-219**).
477 Consolidated version of Questions and Answers from the Tender Stage, April 2008–February 2009, p. 210 of PDF (**C-219**).
478 Consolidated version of Questions and Answers from the Tender Stage, April 2008–February 2009, p. 209 of PDF (**C-219**).
479 Consolidated version of Questions and Answers from the Tender Stage, April 2008–February 2009, p. 92 of PDF (**C-219**).
480 Consolidated version of Questions and Answers from the Tender Stage, April 2008–February 2009, p. 113 of PDF (**C-219**).
481 ACP Presentation, "Locks Pre-Tender Meeting", 26 March 2008, p. 24 (**C-180**).
482 ACP-GUPC RFP Individual Meeting, Transcript (Extract of ACP Recording), 11 September 2008, p. 1 of PDF (**C-200**).
483 ACP-GUPC RFP Individual Meeting, Transcript (Extract of ACP Recording), 11 September 2008, p. 1 of PDF (**C-200**).

242. Mr. Zaffaroni explained that:

> *ACP in fact directed tenderers to examine the reference documents in response to several questions from tenderers, which indicated to us that reliance could be placed on the reference documents. This understanding was further confirmed by Panama during our meetings. For example, in a meeting that took place on 11 September 2008, Panama stated that it was revisiting the "whole RFP" as it "need[ed] to take some responsibility of making sure that the amount of [available material] [would] be close to what [they had] put on paper". Again, these statements indicated to us that we could rely on the RFP documents when preparing the tender. Panama's position in the arbitration is inconsistent with my experience of how these tender processes are handled generally in the construction industry, and with ACP's conduct during the tender process on the Project.*[484]

243. While Panama argues that it did not represent that these studies were complete, Sacyr points out that the TSLP Proposal, the Master Plan and the RFQ stated that the Panama Canal Capacity Expansion Proposal was "*the result of an exhaustive study and planning process, commenced in 1996*" and that "*ACP has commissioned its own designs, significantly beyond the conceptual level, in order to demonstrate the appropriateness and feasibility of the proposed configuration*".[485] Panama's witness, Mr. Miguez, confirmed that Panama had: "*managed a very comprehensive USD 40 million study plan*" that encompassed a wide range of matters, including seismic, engineering, conceptual designs, pricing and risk.[486]

244. In his first witness statement, Mr. Zaffaroni explained the basis of Claimant's reliance as follows:

> *In sum, we invested in Panama on the basis of the clear representations made by Panama, including as to the reliability, accuracy and completeness of the data provided and the fact that the Project would 'be executed in a spirit of mutual trust and cooperation without litigation and adversarial attitudes.' We would never have submitted a binding proposal had we known about the errors*

---

484 **CWS-3** Zaffaroni II, [11].
485 Memorial on the Merits, [74]; Request for Qualifications for the Design-Build of the Third Set of Locks Project, 27 August 2007, p. 11 (**C-163**).
486 **RWS-3** Miguez I, [22].

> *and inaccuracies in the information and representations made by Panama or the way in which it would eventually conduct itself during the execution of the Project.*[487]

245. Sacyr says that the extent of the GUPC Consortium's reliance upon these representations is evident is in its bid in which it explained that its tender phase design "*ha[d] been based on*" the documents provided by Panama.[488]

Panama cannot rely on asserted deficiencies in Claimant's Due Diligence as a Defence to its Treaty Breach

246. In its Counter-Memorial, Panama submits that the Claimant failed to conduct due diligence.

247. Sacyr submits, first, that Panama should not be allowed to shift the burden onto Claimant to discover Panama's wrongful conduct.[489] This basic principle is illustrated in a decision of the English Court of Appeal:

> *If a man is induced to enter into a contract by a false representation it is not a sufficient answer to him to say, 'If you had used due diligence you would have found out that the statement was untrue. You had the means afforded you of discovering its falsity, and did not choose to avail yourself of them.' I take it to be a settled doctrine of equity, not only as regards specific performance but also as regards rescission, that this is not an answer … the effect of false representation is not got rid of on the ground that the person to whom it was made has been guilty of negligence.*[490]

248. In addition, Sacyr points out that two independent bodies with extensive experience in evaluating this kind of project had confirmed the reasonableness of Claimant's due diligence:[491]

(i) In 2010, Zurich International (the performance bond issuer), engaged Hill, a prominent construction management firm, to conduct an independent risk

---

487 **CWS-1** Zaffaroni I, [60].
488 GUPC Tender, Volume V – General and Administrative, Technical Proposal, March 2009, p. 506 of PDF (**C-228**).
489 Reply on the Merits, [181].
490 *Redgrave v. Hurd* (1881) 20 Ch D 1, pp. 13–14 (**CLA-236**).
491 Reply on the Merits, [182].

assessment of the GUPC Consortium's bid in 2010. Hill concluded that GUPC had prepared a well-researched and carefully planned tender.[492]

(ii) The DAB (by majority) confirmed that the scope of a due diligence exercise did not require "*extensive investigations*" in the circumstances, and that Tenderers could place reliance on the information supplied by Panama:

> *[T]he DAB rejects the suggestion that tenderers were required to undertake extensive investigations of the PLE or other naturally occurring material before submitting the Tenders. In a competitive tendering situation where RFP instructions were regularly changing it would not have been practical or commercially viable for any tenderer to have thoroughly investigated the PLE or to crush (on an industrial scale) the basalt occurring on the Site in order to check the suitability of the PLE basalt or to check that fines produced in crushing Miraflores basalt were not excessive. The only organisation that could have done this (practically) was the Employer ....*[493]

249. In any event, Sacyr submits that the extent of due diligence that a prudent investor is expected to conduct depends on the circumstances of the case.[494] Panama had a significant advantage over Claimant, having conducted a comprehensive US$ 40 million study plan of approximately 55,000 pages on a variety of subjects, such as seismic, engineering and pricing, over a period of many years.[495] The GUPC Consortium, by contrast, had a period of 14 months within which to investigate the feasibility of the Project. Mr. Zaffaroni explained that: "*[w]e could never have replicated the 'exhaustive study and planning process, commenced in 1996' that Panama represented it had undertaken with the help of world-class engineering consultants.*"[496]

---

492 Hill International, "Panama Canal Expansion Project – GUPC Bid Risk Review Report", April 2010, p. 25 (**C-549**).
493 DAB Decision on Referral No. 11, 30 December 2014, [127] (**C-387**).
494 Reply on the Merits, [183].
495 Reply on the Merits, [183(a)].
496 **CWS-3** Zaffaroni II, [38].

vi. Panama Failed to Disclose Key Seismic Information Relating to the Lock Gates

250. Sacyr submits that Panama failed to disclose key seismic information that was material to the design and construction of the Lock Gates. Sacyr summarises its position as follows:[497]

(i) Panama provided the Tenderers with its Reference Design for the Lock Gates so that they could refer to it for information in preparing their tender design of the Lock Gates. The Reference Design was prepared by CPP, a consortium of world-leading designers and engineers;

(ii) the Reference Design applied a "*Seismic Reduction Factor*" to calculate the impact of seismic forces on the Lock Gates during an earthquake. After Panama had awarded the Contract to the GUPC Consortium, it emerged that in discussions with Panama, BTM had identified that it was not appropriate to apply the Seismic Reduction Factor in the seismic design of the Lock Gates and that the Lock Gates would have to be designed to be heavier and wider than contemplated in the Reference Design;

(iii) during the ICC *Lock Gates and Labor* Arbitration, it further emerged that Panama had commissioned CPP to investigate the concerns raised by BTM. In its reports, CPP agreed with BTM's concerns and raised questions about the appropriateness of applying the Seismic Reduction Factor;

(iv) Panama did not disclose BTM's or CPP's concerns to the Tenderers, even though it had the opportunity to do so on multiple occasions, not least when BTM raised a formal question with the specific purpose of creating a level playing field for all Tenderers or when Panama issued Amendment 21 to the Contract; and

(v) had Panama disclosed during the tender phase that questions had been raised regarding the use of the Seismic Reduction Factor, the GUPC Consortium would itself have reassessed whether or not to apply the Seismic Reduction Factor.

---

497 Reply on the Merits, [197].

The ICC *Lock Gates and Labor* Arbitration

251. The tribunal in the *Lock Gates and Labor* Arbitration issued its award on 11 May 2023. Sacyr reiterates that the ICC tribunal's decision is not *res judicata.* The ICC tribunal applied a high burden of proof on the claimant, namely that "*a primary condition for the duty [to inform] to apply, [was] a reasonable certainty as to the matter to be disclosed: in the present case, the technical knowledge at the time of the Tender*."[498] The ICC tribunal found that "*Claimants have not satisfied their burden of proof concerning their assertions that during the Tender period BTM repeatedly drew the ACP's attention to the fact that the PIANC coefficient should not be applied, and requested the ACP to relay such information to the other Tenderers*."[499]

252. Sacyr submits that, whatever standard the majority of the ICC tribunal applied under the Contract and Panamanian law, Panama's FET obligation required it to disclose relevant facts to Claimant, and to refrain from concealing information or from creating a misleading impression. Panama's conduct should therefore be judged on its merits under the relevant Treaty standard.[500]

BTM and CPP Raised Questions about the Applicability of the Seismic Reduction Factor

253. Sacyr submits that CPP questioned the seismic design that CPP had presented in the Reference Design, including the applicability of the Seismic Reduction Factor. CPP provided to the ACP a draft version of its report on the seismic issues highlighted by BTM on 7 January 2009 ("**Draft CPP Report**"). CPP noted in the draft report that "*[d]uring this review, the applicability of this specific [seismic] reduction was questioned*".[501] CPP reiterated its doubts in the final version of the report, presented to the ACP in March 2009 ("**Final CPP Report**").[502]

254. Panama argues that CPP "*did not take any firm position*" on the applicability of the Seismic Reduction Factor,[503] and suggests that CPP's purpose was limited to providing

498 *Lock Gates and Labor* Arbitration, Final Award, [241] (**C-622**).
499 *Lock Gates and Labor* Arbitration, Final Award, [319] (**C-622**).
500 Reply on the Merits, [201].
501 CPP, Draft Report, Task Order No. 1 – Review Lock Gates Requirements, 7 January 2009, p. 3-14 (p. 17 of PDF) (**C-212**).
502 CPP, Final CPP Report, Task Order No. 1: Review Lock Gates Requirements, 20 March 2009, p. 4-22 (p. 26 of PDF) (**C-232**).
503 Counter-Memorial on the Merits, [164].

guidance to the ACP.[504] Sacyr disputes that: it says that Panama's objection is incorrect.[505] Panama commissioned CPP to "*[i]dentify and resolve the differences between the RFP gate requirements and the Conceptual Design of gates developed by CPP (2005)*".[506] As part of that mandate, one of CPP's tasks was to review the seismic action for purposes of the seismic design of the Lock Gates.[507] In commissioning CPP's analysis, the ACP provided BTM's presentation on its seismic design and seismic information to CPP, which expressed concerns regarding the Reference Design of the Lock Gates and the use of the Seismic Reduction Factor.

255. As part of its review of the seismic action, CPP proposed three "*specific model[s] [of the Lock Gates] for seismic events*".[508] While one of those models applied the Seismic Reduction Factor, CPP noted that this model "*was not chosen as the preferred option.*" It was presented in the report only "*so that the reader can compare the results*".[509] Sacyr submits that CPP's questioning of its own methodology was relevant information of which Panama should have made the Tenderers aware.[510]

256. Panama's suggestion that the Seismic Reduction Factor was not raised in meetings between BTM and the ACP is described by Sacyr as "*disingenuous*".[511] Mr. Pérez explained that while BTM did not use the words "*Seismic Reduction Factor*" or "*PIANC coefficient*" during its meetings with the ACP, "*it would have been obvious to anyone with a background in structural engineering that BTM was indicating that the Seismic Reduction Factor could not be applied for the seismic design of the Lock Gates*."[512] BTM presented a comparison of the "*seismic design loads*" in the Reference Design and in BTM's design. It demonstrated that while the Reference Design sought to reduce the seismic forces acting on the Lock Gates by applying an amplification factor of less than

---

504 Counter-Memorial on the Merits, [164].
505 Reply on the Merits, [203].
506 Contract No. CMC-____Engineering Services for Design Review for Third Set of Locks, Task Order No. 1 – Review Lock Gates Requirements, 1 September 2008, (**C-198**).
507 CPP, Final CPP Report, Task Order No. 1: Review Lock Gates Requirements, 20 March 2009, pp. 2-1, 4-19 (pp. 5, 23 of PDF) (**C-232**).
508 CPP, Final CPP Report, Task Order No. 1: Review Lock Gates Requirements, 20 March 2009, p. 4-22 (p. 26 of PDF) (**C-232**).
509 CPP, Final CPP Report, Task Order No. 1: Review Lock Gates Requirements, 20 March 2009, p. 4-22 (p. 26 of PDF) (**C-232**).
510 Reply on the Merits, [204(c)].
511 Reply on the Merits, [205].
512 **CWS-4** Pérez II, [62].

1 (0.614) (in other words, by applying a Seismic Reduction Factor), BTM had applied a factor of 1.73 (i.e., greater than 1). In other words, BTM had not applied a Seismic Reduction Factor.[513] In its communications with the ACP, BTM had also noted that in order to withstand the applicable seismic loads, the Lock Gates would need to be wider and heavier than in the Reference Design.[514]

Panama Withheld BTM and CPP's Concerns from Claimant

257. Panama accepts that it did not inform the other Tenderers of the concerns raised by BTM and CPP regarding the seismic design of the Lock Gates. It says that it was not bound to share that information.

258. Sacyr dismisses Panama's argument that it could not pass on BTM's specific comments to the other Tenderers for competitive reasons.[515] First, BTM had used the formal questions and answers procedure on 19 January 2009 to ask Panama to "*confirm that the reference design for the gates does not meet the current design criteria*".[516]

259. Second, BTM had explained in its meetings with the ACP that its motivation for asking that question was to signal to the other Tenderers that it would be inappropriate to rely on the Reference Design. BTM had decided to raise a formal question precisely to ensure that: "*all the bidders are on a level playing field*".[517] Finally, Sacyr points to Panama's own statement to BTM in a meeting held on 18 December 2008 that: "*if BTM has any remaining doubts, they should put them in writing and ACP will respond to all tenderers*".[518]

260. Sacyr submits that BTM itself created an opportunity for Panama to inform the Tenderers that the Reference Design might contain inaccurate guidance regarding the seismic design of the Lock Gates, and Panama knew that this was the intent behind BTM's question.[519] Panama did not alert the Tenderers to BTM's concerns. Rather, it

513 BTM letters and presentations to ACP, "Rolling gate width and weight justification", 9 December 2008–16 January 2009, p. 45 of PDF (**C-214**); **CWS-4** Pérez II, [62].
514 BTM letters and presentations to ACP, "Rolling gate width and weight justification", 9 December 2008–16 January 2009, p. 27–28 of PDF (**C-214**).
515 Reply on the Merits, [208].
516 Counter-Memorial on the Merits, [159].
517 Transcript of BTM-ACP Meeting, 14 January 2009, p. 22 (**C-213**).
518 Meeting Minutes, Lock Gates Discussion – BTM Consortium, 18 December 2008, p. 4 (**C-209**).
519 Reply on the Merits, [210].

responded only to BTM's question by referring the Tenderers to "*Clause 5.1 of the Conditions of Contract*", which reminded the Tenderers that they could use the Reference Design "*for information purposes*".[520]

261. Sacyr draws attention to internal correspondence within the ACP, notably, to its administrator, Mr. Quijano's, response to BTM's question: "*[t]hey finally sent the question!!!*".[521] Mr. Rigoberto Delgado proposed a "*specific*" answer which confirmed that "*the reference design*" would need to change to comply with the "*current design criteria*".[522] Mr. Quijano instructed his team to "*refer [the tenderers] to a section in the RFP*", because he did not want to be "*that specific*".[523]

262. Mr. Zaffaroni explained his response as follows:

> *I certainly did not read such reference to Clause 5.1 of the Conditions of Contract as an indication that BTM had alerted as to the inapplicability of the Seismic Reduction Factor applied by Panama in its Reference Design.*[524]

263. Sacyr objects to Panama's assertion that it was under no obligation to share the Final CPP Report of March 2009 with Claimant.[525] The record suggests that Panama had planned to disclose the CPP reports to the Tenderers until it saw the contents of those reports. On 31 December 2008, the record of Panama's internal discussions suggests that its intention was to provide the Tenderers with the CPP materials: the ACP noted that if CPP delivered: "*the report even in draft form by the end of next week [i.e., by 9 January 2009], [the ACP could] review it and give [the Tenderers] a presentation of the results at the one-to-one meeting with a formal copy on a CD, which [the ACP*

---

520 Consolidated version of Questions and Answers from the Tender Stage, April 2008–February 2009, p. 320 of PDF (**C-219**).
521 Email exchange between ACP executives regarding BTM's formal question, 19-—20 January 2009, p. 5 of PDF (**C-216**).
522 Email exchange between ACP executives regarding BTM's formal question, 19–20 January 2009, p. 5 of PDF (**C-216**).
523 Email exchange between ACP executives regarding BTM's formal question, 19–20 January 2009, p. 5 of PDF (**C-216**).
524 **CWS-3** Zaffaroni II, [83(a)].
525 Reply on the Merits, [213].

would] then include in amendment no. 21".[526] Panama received the draft CPP Report on 7 January 2009, yet Amendment 21 was issued on 21 January 2009 without it.[527]

264. Sacyr further submits that Panama's argument that it was under no obligation to make this report available to the Tenderers, because it was prepared for its own internal purposes is unconvincing.[528] Mr. Zaffaroni explained that:

> *One would expect that an employer would share a study that flags potential inaccuracies in information already provided to the tenderers, even if the study was, according to Panama, commissioned for other purposes.*[529]

265. The Final CPP Report used "*[m]ore complex design methods ... and different assumptions in order to evaluate the impact of reduction factors*",[530] and, according to CPP, "*[t]he results of this analysis, although not complete, demonstrate that the lock gate weight will increase considerably*".[531] Sacyr submits that this would have been relevant information for a tenderer looking to price the Lock Gates and it should have been disclosed.[532]

266. Sacyr further submits that Panama's attempt to mitigate its non-disclosure of the CPP Report on the basis that it had provided GUPC with BTM's letters is unavailing.[533] The letters to which Panama refers were sent by BTM to the ACP on 28 July 2009.[534] BTM provided its review of the "*deficiencies*" in the GUPC Consortium's bid, noting that the Seismic Reduction Factor should not have been applied.[535] On 6 August 2009, the ACP wrote to the GUPC Consortium and attached BTM's letters.[536] Sacyr notes that the ACP's letter was sent nearly one month after it had awarded the Contract to the GUPC

---

526 Email exchange between ACP and Tractebel regarding BTM's letter, 24–31 December 2008 p. 1 of PDF (**C-211**).
527 Reply on the Merits, [213(a)].
528 Reply on the Merits, [214].
529 **CWS-3** Zaffaroni II, [83(b)].
530 Email exchange between P. Buffel (Tractabel) and C. George (ACP), 7 August–3 September 2009, p. 28 of PDF (**C-547**).
531 Email exchange between P. Buffel (Tractabel) and C. George (ACP), 7 August–3 September 2009, p. 28 of PDF (**C-547**).
532 Reply on the Merits, [214].
533 Reply on the Merits, [216].
534 Letter from BTM to ACP (RFP - 76161 Design and Construction of the Third Set of Locks), 28 July 2009, (**C-237**); Letter from BTM to the ACP, 28 July 2009 (**R-65**).
535 Letter from BTM to ACP (RFP - 76161 Design and Construction of the Third Set of Locks), 28 July 2009, (**C-237**); Letter from BTM to the ACP, 28 July 2009 (**R-65**).
536 Letter from ACP to GUPC (IACC-221427-C003), 6 August 2009, (**C-238**).

Consortium on 15 July 2009 and five days before the Contract was signed on 11 August 2009.[537]

267. Mr. Zaffaroni explained that:

> *at the time we received the letter, we had already presented our bid, we had just been awarded the Contract and were focused on making sure that all the moving pieces were ready to start our work. In addition, we did not at the time know about the CPP report, or about BTM's discussions with ACP during the tender phase. It was once we started to concentrate on the design process of the Lock Gates that we started to fully understand BTM's criticism to our tender design.*[538]

Claimant Relied on Panama's Representations in the Reference Design

268. Sacyr submits that the GUPC Consortium relied on the Reference Design for its bid.[539] Panama provided the Reference Design so that the Tenderers could base their own preliminary designs on it. The GUPC Consortium adopted in its tender design the approach to the seismic design of the Lock Gates used in the Reference Design.[540]

269. Sacyr rejects Panama's argument that the Reference Design was provided for information purposes only. According to Sacyr, this does not provide a State which is aware of potential inaccuracies in such a document with a plausible basis upon which to withhold relevant information identifying such potential inaccuracies.[541] In any event, design-build models do not, by themselves, prevent reliance on reference documents, particularly in circumstances where Panama claimed that the Reference Design was "*very detailed*" and "*analysed very carefully*".[542]

270. Panama claims that it did not instruct the Tenderers to "*base*" their design on the Reference Design. Sacyr points out that Panama provided a Design Plan to the Tenderers in which it instructed the Tenderers that they were to ("*shall*") *"… develop and submit*

---

537 Letter from ACP (Mr. Espino) to GUPC, 15 July 2009 (**C-22**); Contract Agreement between Autoridad de Canal de Panamá and Grupo Unidos por el Canal, 11 August 2009 (**C-81**).
538 **CWS-3** Zaffaroni II, [81].
539 Reply on the Merits, [219].
540 **CWS-1** Zaffaroni I, [38], [74].
541 Reply on the Merits, [221].
542 Minutes No. 7 of the Session of the Canal Affairs Commission, 27 June 2006, p. 17 (**C-144**).

a preliminary design based on the concept drawings, reference drawings, reports, analyses, and specifications that are provided within this Request for Proposal".[543]

271. Panama amended its Design Plan on 28 August 2008 (after the original deadline of 22 August 2008 for submitting bids) to state that "*the tenderer shall develop and submit a tender design that meets or exceeds the Employer's Requirements given the information via the concept drawings, reference drawings, reports, analyses, and specifications that are provided within the RFP*".[544] Sacyr asserts that by this amendment, Panama continued to instruct Tenderers to use the Reference Design in their efforts to meet or exceed the Employer's Requirements.

272. Panama also argues that the GUPC Consortium did not rely on the Reference Design because: (i) Mr. Zaffaroni had accepted in the *Lock Gates and Labor* Arbitration that the Reference Design was not binding; (ii) GUPC hired its own seismic advisor, TNO, which produced an earthquake analysis report, and its design differed in some respects from the Reference Design; and (iii) GUPC's tender made no reference to the conceptual design for the Lock Gates.[545]

273. Sacyr submits, first, that Mr. Zaffaroni and Mr. Pérez have confirmed that the GUPC Consortium relied on the Reference Design for the Seismic Reduction Factor.[546] The GUPC Consortium did not consider itself bound by the Reference Design.[547] However, Mr. Zaffaroni considered that it was clear that the ACP expected the Tenderers to take the Reference Design into account when preparing their own tender designs.[548]

274. In addition, Sacyr submits that the fact that the GUPC Consortium hired external consultants does not negate its reliance on Panama's representations.[549] The GUPC Consortium retained TNO to assist CICP (the GUPC Consortium's design consultants) in the preparation of the seismic design of the Lock Gates. TNO's mandate was not to

543 RFP, Volume V, Technical Part 5, Design Plan, December 2007, p. 1 (**C-171**).
544 Amendment 15 to Volume V, Part 5, Design Plan, August 2008 (**R-75**).
545 Counter-Memorial on the Merits, [634]–[635].
546 **CWS-2** Pérez I, [17]; **CWS-1** Zaffaroni II, [28].
547 Reply on the Merits, [224(b)].
548 *Lock Gates and Labor* Arbitration, Zaffaroni First Witness Statement, [20] (**R-207**).
549 Reply on the Merits, [224(c)].

comment on the feasibility of the Seismic Reduction Factor, nor did TNO raise any concerns regarding the Seismic Reduction Factor applied in the Reference Design.[550]

275. Mr. Pérez explained that as a result of Panama's alleged misrepresentations and withholding of documents regarding the Seismic Reduction Factor:

> *GUPC and our designers had to depart significantly from the Reference Design and our concept, to arrive at gates that were extremely complex to design and fabricate, 25% heavier than originally planned, and cost hundreds of millions more than the cost we had calculated under the flawed seismic assumptions provided by Panama.*[551]

276. In summary, Sacyr submits that both BTM and CPP questioned the seismic design included in the Reference Design while the tender process was ongoing. Panama did not share this important information with the Tenderers. Sacyr submits that this was a breach of the Treaty.[552]

vii. Panama Modified the ACP Acquisition Regulation and the Contract during the Tender Phase

277. Sacyr submits that Panama took covert steps to attempt to shift the burden of any cost overruns on the Project onto Claimant.[553] Between 26 August and 10 September 2008, Panama introduced Articles 1B and 6D into the ACP Acquisition Regulation, intending, Sacyr submits, that these Articles would allow it to assert that the provisions of the Contract would eliminate other rights available to Claimant under Panamanian law. Panama simultaneously amended the Contract to attempt to reduce liability for its representations.[554] Sacyr submits that it did not, and could not have been expected to, appreciate the import of these amendments.[555]

278. Claimant sets out a chronology of the amendments as follows:[556]

---

550 **CWS-4** Pérez II, [45].
551 **CWS-2** Pérez I, [21].
552 Reply on the Merits, [229].
553 Reply on the Merits, [230].
554 Reply on the Merits, [230].
555 Reply on the Merits, [230].
556 Reply on the Merits, [234].

(i) As early as 2005, Panama had received the 2005 Sulfate Soundness Test, from which it assessed that there was a 20-39% chance of basalt being unsuitable for concrete aggregate production, and it had decided to protect itself by transferring that risk to the Tenderers;

(ii) while the tender phase was ongoing, Panama received further information regarding potential errors in its representations regarding the Project design. For instance:

(a) With respect to the Lock Gates: beginning in February 2008, BTM held several meetings with Panama to discuss potential issues with the design requirements of the Lock Gates. On 1 September 2008, BTM's concerns led Panama to commission further reports regarding the design of the Lock Gates from its consultant, CPP.

(b) With respect to PLE basalt: On 15 August 2008, Panama received the August 2008 URS Report (and likely the 2008 Sulfate Soundness Test), i.e., the second failed sulfate soundness test result

(iii) rather than make this information available to the Tenderers, Panama amended the ACP Acquisition Regulation and the Contract;

(iv) in July 2008, Panama amended Clauses 4.10 and 5.1 of the Conditions of Contract. Under the original Clause 4.10, the Contractor was "*deemed to have obtained all necessary information as to risks, contingencies and other circumstances which may influence or affect the Tender or Works*" but only "*[t]o the extent which was practicable (taking account of cost and time)*".[557] In July 2008, Panama sought to remove the limitation of "*[t]o the extent which was practicable*".[558] Panama also introduced Clause 4.10.4 to seek to prevent Claimant from bringing claims regarding the sub-surface conditions above the foundation levels, i.e., the area which would comprise the majority of

[557] RFP, Volume III, Contract Conditions, December 2007, Clause 4.10 (**C-170**).
[558] RFP, Amendment No. 10, Volume III, Conditions of Contract, Part 2 – Particular Conditions, July 2008, Clause 4.10 (**C-190**).

excavation in the PLE.[559] Finally, Panama amended Clause 5.1 to disclaim responsibility for the accuracy and completeness of the information it had provided;[560]

(v) on 26 August 2008, Panama introduced Article 1B to the ACP Acquisition Regulation to the effect that "*[n]othing in this Regulation shall be applied or interpreted in the sense of granting to any contractor rights or benefits that exceed those stipulated in the contract it entered into with the Authority*";[561]

(vi) on 28 August 2008, Panama again amended Clauses 4.10 and 5.1 of the Conditions of Contract. Clause 4.10.1 stated that Panama "*shall have made available to the Contractor*" all "*data in the Employer's possession on sub-surface, hydro-geologic and topographic conditions at the Site*".[562] In August 2008, Panama amended that language to say that it was providing "*certain other data*" on the physical conditions at the Site.[563] Panama further added a new third paragraph to Clause 5.1 to the effect that it was not representing the "*accuracy or completeness*" of Volume VI Reference Documents and that those documents "*may not be relied upon*" and were being provided "*for information purposes only*";[564]

(vii) also on 28 August 2008, Panama attempted to revise its representations in the Reference Design by amending Volume V of the Contract containing the Design Plan. The original Volume V stated that: "*the tenderer shall develop and submit a preliminary design based on the concept drawings, reference drawings, reports, analyses, and specifications that are provided within this Request for Proposal (RFP)*".[565] The amendment stated that "*the Tenderer shall develop and submit a Tender design that meets or exceeds the Employer's requirements given*

559 RFP, Amendment No. 10, Volume III, Conditions of Contract, Part 2 – Particular Conditions, July 2008, Clause 4.10.4 (**C-190**).
560 RFP, Volume III, Contract Conditions, December 2007, Clause 5.1 (**C-170**); RFP, Amendment No. 10, Volume III, Conditions of Contract, Part 2 – Particular Conditions, July 2008, Clause 5.1 (**C-190**).
561 Memorial on the Merits, [99]; ACP Acquisition Regulation, May 2011, Article 1B (**C-275**).
562 RFP, Volume III, Contract Conditions, December 2007, Clause 4.10 (**C-170**).
563 RFP, Amendment No. 15, Volume III, Conditions of Contract, August 2008, Clause 4.10.1 (**C-193**).
564 RFP, Amendment No. 15, Volume III, Conditions of Contract, August 2008, Clause 5.1 (**C-193**).
565 RFP, Volume V, Technical Part 5, Design Plan, December 2007, p. 2 (**C-171**).

the information provided via the concept drawings, reference drawings, reports, analyses, and specifications that are provided within the RFP";[566]

(viii) on 10 September 2008, Panama introduced Article 6B(2) (later renumbered as Article 6D) to the ACP Acquisition Regulation to allow the ACP to include in its contracts "*whose celebration was preceded by the prequalification process*" "*terms and conditions … to protect the Authority's interests more effectively*" and that "*may be, in the Authority's opinion, necessary or convenient to better protect its interests*";[567] and

(ix) on 16 September 2008, Panama amended Article 1.07.D.1 of the Employer's Requirements that PLE basalt would be "*the main source of aggregate*" to the representation that PLE basalt could be "*[a] potential source of aggregates.*"[568] Panama further purported to exclude liability for the PLE basalt by amending Article 1.07.D.1 to remove any guarantees for the "*suitability*" of PLE basalt. Following that amendment, Article 1.07.D.1 stated that "*[t]he Employer in no way guarantees that such aggregate is adequate or meets the requirements for the Contractor's proposed design or is suitable for the Works.*"[569]

279. Panama points out that the amendments were published in the Bulletin of the Registry of the ACP. Sacyr submits that it was unaware that Panama had withheld relevant documents regarding the inaccuracies in its representations and that it was not in a position to understand the true significance of the amendments.[570] In any event, the amendments were introduced late into the tender process, after the intended original deadline for the submission of bids.

280. The Cabinet Council and the Legislative Assembly approved the TSLP Proposal on 26 June 2006 and 17 July 2006 respectively. In its Counter-Memorial, Panama asserts that the approval of the US$ 5.25 billion cost estimate in the TSLP Proposal (of which

---

566 RFP, Amendment No. 15, Volume V, Part 5, Design Plan, August 2008, p. 1 (**R-75**).
567 Memorial on the Merits, [100], footnote 179; ACP, Board of Directors, Agreement No. 166 "Whereby the Panama Canal Acquisition Regulation is amended", 10 September 2009, Article One (**C-199**).
568 RFP, Amendment No. 16, Volume III, Employer's Requirements, Section 01 50 00, Temporary Facilities, Accesses and Controls, September 2008, p. 8, Article 1.07.D.1. (**C-196**).
569 RFP, Amendment No. 16, Volume III, Employer's Requirements, Section 01 50 00, Temporary Facilities, Accesses and Controls, September 2008, p. 8, Article 1.07.D.1. (**C-196**).
570 Reply on the Merits, [235(b)(i)].

US$ 3.35 billion was the estimate for the Project) "*did not operate as a binding constraint on ACP*".[571] Sacyr observes that it was understood that any material increase in the cost of the Project and/or the TSLP would require further approvals, including approvals by the National Assembly and in a referendum.[572]

viii. Panama Arbitrarily Sought to Shift the Financial Burden of the Project to Claimant

Panama Refused to Certify Full Payment of Works Performed by GUPC

281. Sacyr submits that despite interim payments being a crucial source of funding for the Project, Panama routinely under-certified interim payments due to GUPC without justification.[573] For instance, Panama adopted a system of responding to GUPC's payment applications through a spreadsheet entitled "*Payment Validations*". In this spreadsheet, Sacyr submits, Panama would arbitrarily reduce the payment claimed by GUPC without explanation.[574]

282. Panama's under-certifications rose from US$ 15 million in October 2010 to over US$ 50 million by January 2016.[575]

283. Panama argues that from late 2011, the ACP consistently authorised payments to GUPC in a shorter timeframe than the 56-day Contractual timeframe. Sacyr responds that this submission does not engage with its case, which is that Panama routinely under-certified interim payments due to GUPC without justification.

284. According to Sacyr, Panama's assertion that it did not certify certain payments, because GUPC was "*overstating progress on the Project*"[576] is unsupported.[577] GUPC was carefully measuring its progress each month against the program and presenting voluminous documentation in support of its applications.[578]

---

571 Counter-Memorial on the Merits, [36].
572 Reply on the Merits, [238].
573 Reply on the Merits, [246].
574 Memorial on the Merits, [150]; Employer's Overall Deployment and Design October 2010 Payment Validation, October 2010 (**C-255**).
575 Memorial on the Merits, [151]; GUPC Chart of ACP's Under-Certification of Interim Payments, July 2020 (**C-417**).
576 Counter-Memorial on the Merits, [261].
577 Reply on the Merits, [249].
578 **CWS-4** Pérez II, [83]–[85].

Panama Forced GUPC to go to the DAB

285. In the RFQ, Panama represented that it would resolve all claims "*in a spirit of mutual trust and cooperation without litigation and adversarial attitudes*".[579] The Contract required the Employer's Representative (the "**ER**") to "*endeavour to reach agreement with the Contractor*", and in case of failure, to "*make a fair determination*" of the Contractor's claims.[580] The ER was an employee of the ACP.

286. Sacyr submits that GUPC's claims throughout the Project were systematically rejected.[581] The ER declined 99.9% of all of GUPC's claims for additional payment throughout the Project, awarding GUPC only US$ 3.8 million of the approximately US$ 3.5 billion that it claimed.[582]

287. Sacyr submits that the ACP had set itself the objective of rejecting all GUPC's claims. The ACP's "Project Management Plan" identified certain "*critical success factors*" to achieve the commitments that Panama had made to its people, including the commitment that "*[t]he Program Team [would] deliver the Panama Canal Expansion Program … within budget*".[583] One "*measure of success*" was that "*100 percent of claims are decided in favor of the ACP*."[584]

288. Panama argues that the ER denied 99.9% of GUPC's claimed entitlements, because GUPC was raising unfounded claims, a point made good by the outcomes in the ICC proceedings. Sacyr submits that GUPC did not lose 99.9% of its claims in front of the DAB or in the ICC Arbitrations.[585] Claimant prevailed in front of the DAB on a significant number of the claims, which the ER had rejected in their entirety.[586]

---

579 Request for Qualifications for the Design-Build of the Third Set of Locks Project, Fifth Revision, 8 November 2007, p. 11 (**C-15**).
580 Memorial on the Merits, [153]; Conditions of Contract for the Panama Canal Third Set of Locks (as amended through Variation Order No. 188), 29 December 2016, Articles 3.5, 20.1 (**C-404**).
581 Reply on the Merits, [251].
582 See GUPC, Summary of Contractor's Entitlements and ACP's Determinations, March 2018 (**C-411**).
583 ACP, "Program Management Plan", March 2010, p. 1-10 (p. 23 of PDF) (**C-245**).
584 ACP, "Program Management Plan", March 2010, p. 1-15 (p. 28 of PDF) (**C-245**).
585 Reply on the Merits, [253].
586 GUPC, Summary of Contractor's Claimed Entitlements and ACP's Determinations, March 2018 (**C-411**).

Panama Attempted to Delay and Encumber the DAB process

289. Sacyr submits that, contrary to its legitimate expectations, Panama's routine rejection of GUPC's claims at the ER level overburdened the DAB with a large number of proceedings. Panama turned the DAB proceedings into fully adversarial proceedings, and, on several occasions, Panama failed to comply with DAB decisions therefore forcing GUPC to refer further issues to the DAB.[587]

290. Sacyr submits that the primary reason for delay in the DAB proceedings was because of the ER's failure to decide the claims fairly and promptly in conformity with the Contract, forcing GUPC to refer essentially all claims to the DAB.[588]

291. Panama also blames GUPC for making the DAB process adversarial, pointing to GUPC's submission of expert evidence in one DAB referral. Sacyr submits that the ACP refused to agree to additional rules for DAB proceedings which would have ensured a more streamlined process.[589]

Panama Imposed Prospective Waivers on GUPC

292. Sacyr submits that Panama compromised GUPC's ability to raise legitimate claims by requiring general waivers of claims in exchange for Contract variations that were needed to progress the Project.[590] In particular, the ACP illegitimately insisted upon the inclusion of a general waiver on future and unknown claims in relation to the Lock Gates in Variation Order No. 14 ("**VO14**").[591] Claimant, unlike Panama, was unaware of the true breadth of the waiver.

293. Sacyr does not dispute the reasonableness of including waivers of claims relating to the change of the Fabricator, which were indeed included in other clauses of VO14. Rather, Sacyr disputes the reasonableness of including a much broader waiver of future

587 Reply on the Merits, [256].
588 Reply on the Merits, [258].
589 DAB Panama Site Visit Report, 1st Visit, 7 April 2010, pp. 6–7 (**C-248**); DAB Panama Site Visit Report with Appendices, 3rd Visit, 19 February 2011, p. 18 of PDF (**C-560**).
590 Reply on the Merits, [262].
591 Memorial on the Merits, [171]–[174].

unknown claims, which is not valid under Panamanian law, at a time when Panama already knew about its mistakes in relation to the Lock Gates design.[592]

294. Sacyr submits further that its claim is not merely theoretical. The *Lock Gates and Labor* tribunal found that GUPC's claim with respect to the load cycles of the Lock Gates was contractually sound, but that GUPC had waived such claim by entering into VO14.[593] On that basis, the tribunal dismissed GUPC's claim.

Panama Enacted Arbitrary and Discriminatory Legislation Targeted at Claimant

295. Sacyr submits that Panama arbitrarily and discriminatorily increased Claimant's financial burden by: (i) issuing Decree No. 6 which introduced a wage increase applied uniquely to TSLP workers;[594] and (ii) then refusing to pay in full the additional costs arising from Decree No. 6.[595]

296. Before Decree No. 6, the Panama Canal workers' minimum wage was set by (i) Executive Decree No. 3 ("**Decree No. 3**"), which regulated the minimum wages payable to all workers associated with the Canal; and (ii) a 2006 collective bargaining agreement between the Panamanian Chamber of Construction ("**CAPAC**") and SUNTRACS applicable to the construction industry in Panama ("**CBA**"). The 2006 CBA was to remain in force until January 2014 and expressly prohibited SUNTRACS from demanding changes to the CBA. Even before the promulgation of Decree No. 6, the Panama Canal workers were earning more than other SUNTRACS members in the construction industry.[596]

297. In January 2012, Decree No. 6 was promulgated pursuant to which the Ministry of Labour announced a decision to increase minimum wages by 12.5% to 15% "*only for the workers that work in the Project for the Construction of the Third Set of Locks of the Panama Canal Expansion*".[597] It was the first time in Panamanian history that Panama had enacted legislation to increase the minimum wage only for employees working on

592 Reply on the Merits, [265].
593 *Lock Gates and Labor* Arbitration, Final Award, [1089] (**C-622**).
594 Executive Decree No. 6, 23 January 2012, Article 2 (**C-28**).
595 Reply on the Merits, [268].
596 Reply on the Merits, [269(a)].
597 Executive Decree No. 6, 23 January 2012, Article 2 (**C-28**).

a specific project.[598] Sacyr submits that Decree No. 6 was not a legislative measure of general application.[599]

298. Decree No. 6 clearly records the fact that GUPC did not agree to the increase of the minimum wage:

> *That, by virtue of the workers employed in the expansion of the Canal, having requested the companies, contractors and subcontractors an adjustment of the minimum wage and an agreement between the parties was not reached, it is the attribute of the Executive Branch to establish it (minimum wage)*.[600]

299. The Record of Agreement signed by GUPC, SUNTRACS, and the representative of the Minister of Labor did not record an agreement on the minimum wage increase either. GUPC merely acknowledged that: "*the Executive Branch, through the Minister of Labor and Labor Development, has announced that it will issue an Executive Decree establishing the new minimum wage rates for workers engaged in construction activities in the Panama Canal Third Set of Locks Project*".[601]

300. The ICC Lock Gates tribunal recorded that GUPC had been relegated to a "*passive role*" during these negotiations, that there had been a "*lack of participation of the Contractor*", and that "*[t]here is no indication of the Contractor having been called to discuss the alleged motives of the strike (acknowledged by the ACP as futile), let alone the extent of the wage increases per Decree No. 6, notwithstanding that they exclusively impacted the Contractor and its sub-contractors*".[602]

301. Sacyr submits that Panama's reliance on the alleged existence of avenues of recourse for Claimant under local law is irrelevant: Sacyr was not required to exhaust local remedies before pursuing its BIT claim.[603] In any event, GUPC pursued the recourse that the Contract provided by requesting payment for the additional wage costs from the

---

598 **CER-3** Franco III, [64]–[72].
599 Reply on the Merits, [269(b)].
600 Executive Decree No. 6, 23 January 2012, Preamble, [4] (**C-28**).
601 Record of Agreement for the Termination of the Conflict and Resumption of Works, 21 January 2012, p. 3 of PDF (**C-286**).
602 *See Lock Gates and Labor* Arbitration, Final Award, [806] (**C-622**).
603 Reply on the Merits, [275(a)].

ACP (Article 13.7 of the Contract). Panama did not reimburse GUPC for these increased costs.[604]

Panama Forced GUPC to Provide Significant Additional Funding to Sustain the Project

302. Sacyr submits that by forcing the Project into a cash flow crisis by under-certifying the interim payments and compelling GUPC to refer all claims to the DAB, Panama breached Claimant's legitimate expectation that GUPC would not be required to fund the costs of the Project.[605] Sacyr says that Panama forced Claimant and its partners to inject funds into the Project, arguing that it was GUPC's and its shareholders' responsibility to fund the Project until the DAB had resolved the disputes. During discussions to solve the cash-flow crisis, Sacyr submits that Panama was hostile and rejected Claimant's proposals; members of the government and National Assembly intervened to disparage GUPC and to dictate the position that the ACP should adopt during negotiations; and finally, once an agreement had been reached, Panama delayed its implementation, forcing Claimant to provide yet more financing to the Project.[606]

303. Sacyr contends that Panama was responsible for GUPC's cash flow crisis. By December 2012, GUPC had already advanced claims for over US$ 700 million and, by the end of 2013, GUPC's claims amounted to US$ 1.6 billion.[607] Instead of fairly determining the claims, the ER denied 99.9% of the claims, thus forcing GUPC and its shareholders to provide the funds while the claims were submitted to the DAB for resolution.[608]

304. GUPC's contemporaneous references to the global financial crisis are not proof that the crisis was responsible for GUPC's cash-flow crisis: it is not denied that the crisis created additional difficulties for GUPC to obtain financing, but GUPC's cash-flow issues were due to Panama's actions.[609]

---

604 Reply on the Merits, [275(c)].
605 Reply on the Merits, [278].
606 Reply on the Merits, [278].
607 Letter from GUPC to ACP (GUPC-IAE-1617), 21 December 2012, p. 2 (**C-314**); Letter from GUPC to ACP, 11 October 2013, p. 1 (**C-325**); Letter from GUPC to the Employer's Representative (GUPC-IAE-2273), 25 November 2013, p. 2 of PDF (**C-333**).
608 Letter from ACP to GUPC (IAE-UPC-1359), 24 December 2012 (**C-315**).
609 Reply on the Merits, [280(b)].

305. Sacyr submits that towards the end of 2013, when the cash flow issue was reaching crisis point, Panama became increasingly hostile and forced GUPC to suspend the works.[610]

306. Sacyr submits that Panama failed to engage with Claimant and its partners in constructive deliberations. GUPC wrote directly to the ACP Board of Directors in order to seek constructive dialogue with the Employer as the cash-flow crisis reached its breaking point.[611] Panama replied on 30 October 2013 by asserting that Claimant and its partners should fund the Project.[612] The ACP and GUPC engaged in further discussions and, at a meeting held on 21 November 2013, the ACP made a proposal, which it again set out in a letter dated 22 November 2013, that US$ 300 million in financial support be provided by way of an advance payment by the ACP of US$ 100 million and additional funding to be provided by GUPC of US$ 200 million.[613] GUPC rejected this proposal on 25 November 2013.[614]

307. GUPC made proposals in early 2014 before the suspension of the works.[615] After GUPC issued its notice of intention to suspend the works, Sacyr submits that Panama exacerbated the dispute with GUPC by taking steps to call the Performance Bond, the JSG and the Parent Company Guarantee.[616] GUPC was then forced to suspend works in February 2014.[617]

308. Finally, Sacyr submits that the ACP's delay between reaching an agreement in the form of a Memorandum of Understanding and the execution of Variation Order No. 108 ("**VO108**") meant that GUPC did not receive US$ 400 million in additional financing until more than six months later than agreed. This delay compelled Claimant and its

610 Reply on the Merits, [281].
611 Reply on the Merits, [281(a)].
612 Letter from ACP to GUPC (IAE-04233), 30 October 2013, p. 2 (**C-327**).
613 Letter from ACP to GUPC (IAE-UPC-1794), 22 November 2013 (**C-330**).
614 Letter from GUPC (P. Möder) to ACP (R. Roy and J. Quijano), 25 November 2013 (**C-331**).
615 Letter from GUPC to ACP and Zurich (GUP-IAE-2345), 10 January 2014, p. 2 (**C-350**); Letter from GUPC to ACP (GUPC-IAE-2368), 20 January 2014 (**C-353**). *See also* Panama Canal Negotiation Protocol between GUPC and ACP, 22 January 2014 (**C-356**); and Letter from ACP to GUPC (IAE-UPC-1883), 28 January 2014 (**C-359)**; Solution for Completion of Panama Canal Third Set of Locks Project, 2 February 2014, pp. 2–3 (**C-361**); Email from C. Lamm (White & Case) to B. Machlin (Mayer Brown), 24 January 2014, pp. 4–9 of PDF (**C-358**).
616 Memorial on the Merits, [198].
617 Reply on the Merits, [282].

partners to fund the Project to the tune of an additional US$ 145 million.[618] The material facts are set out below.

309. In February 2014, GUPC and Panama reached an agreement which was formalized in a Memorandum of Understanding ("**MOU**") and a Variation Order No. 90 both dated 13 March 2014. GUPC and the ACP each agreed to provide immediate additional financing in the amount of US$ 100 million. Sacyr submits that this additional funding was made available on 24 March 2014 and a substantial proportion of it had been utilized within weeks.[619]

310. In Annex A of the MOU, the Parties also agreed that: (i) Zurich American Insurance Company would make reasonable efforts to facilitate or assist GUPC's efforts to arrange financing in the amount of US$ 400 million, to be deposited into a collateral escrow account to assist in the performance and completion of the Works; and (ii) there would be a moratorium on repayment of the advance payments that Panama had already made until 31 December 2018.[620] The Parties agreed to "*use their respective good faith best efforts to agree to a variation agreement to the Contract and any additional definitive documentation necessary to implement*" the terms of Annex A to the MOU by 25 April 2014.[621]

311. Sacyr submits that Panama obstructed and delayed negotiation of the variation required to implement Annex A of the MOU, namely VO108, including by suggesting that GUPC was on the verge of bankruptcy.[622]

312. Sacyr contends that as a result of Panama's conduct, the execution of VO108 was delayed by four months, such that it was signed only in August 2014. GUPC could not obtain the US$ 400 million in additional financing that was contemplated in the MOU until over six months later on 8 September 2014. Claimant and its partners had to contribute a further US$ 145 million towards the Project.[623]

---

618 Reply on the Merits, [283].
619 Memorial on the Merits, [205].
620 Memorial on the Merits, [206].
621 Memorandum of Understanding between ACP, GUPC, and Zurich American Insurance Company, 13 March 2014, Clause 6 (**C-46**).
622 Memorial on the Merits, [207].
623 Memorial on the Merits, [209].

ix. Panama's Disparaging Statements about Claimant Breached the FET Standard

313. Finally, Sacyr submits that Panama also breached its obligation to treat Claimant fairly and equitably by its campaign of public disparagement of GUPC, Claimant and its partners.[624]

314. Panama repeatedly, falsely and publicly suggested that GUPC could go bankrupt; stated that it had identified a company to replace it and a plan had been made to that effect; depicted GUPC and Claimant as "*pirates*"; claimed that Claimant and its partners were treating Panama like a "*bunch of feather-wearing people*"; and threatened that Claimant and its partners would "*have to pay a cost, whether criminal or civil*".[625] Sacyr submits that these statements had an immediate effect on the works on the Project; they negatively influenced the discussions regarding the MOU; and they impacted Claimant's credibility and standing in the marketplace.[626]

315. Sacyr submits that Panama cannot seriously argue that statements that GUPC and Claimant were "*pirates*" or that they were treating Panama like a "*bunch of feather-wearing people*" were "*measured statements*", much less, that they were true.[627]

316. Sacyr submits that the disparaging statements made about Claimant by Panama were a breach of the FET standard.

B. Respondent's Position

i. Claimant seeks to Downplay the Significance of the Contract

317. As a preliminary matter, Panama submits that Sacyr is asking the Tribunal to disregard both the terms of the Contract and the fact that the Conditions of Contract were negotiated, agreed and communicated to all the Tenderers during the 14-month tender process.[628] Panama submits that the Tribunal should recognize the Contract, not only as the binding agreement between its parties, but also as a tender document that was

624 Reply on the Merits, [285].
625 Memorial on the Merits, [188], [207].
626 Memorial on the Merits, [208].
627 Reply on the Merits, [290].
628 Rejoinder on the Merits, [803].

provided to all the Tenderers along with the documents upon which Claimant now relies.[629]

318. Sacyr seeks to rely on multiple documents that supposedly contained representations from the ACP yet it overlooks the fact that the reference documents were provided by the ACP "*for information purposes only*" and they should not have been relied upon.[630] The Conditions of Contract contained provisions regarding the value of the documents that were provided to all the Tenderers, as well as provisions regarding allocation of risk and responsibility. Panama submits that Sacyr cannot "*cherry-pick*" tender documents that allegedly help its case, but disregard others.[631]

319. The Contract is valid, binding and enforceable between the ACP and Claimant. Panama relies on the evidence of its legal expert, Dr. Luis Fábrega. He maintains that if Sacyr's arguments regarding the ACP's alleged wilful misrepresentations and withholding of information were true, then Sacyr should have requested the ICC tribunals to declare the Contract null and void pursuant to the Panamanian law concept of *dolo*.[632] In the ICC Arbitrations, Panama submits, Claimant did the opposite: it advanced many alleged contractual claims against the ACP on the basis of the Contract. Panama contends that Sacyr cannot have it both ways. The factual basis of Sacyr's Treaty-based claims is identical to that of the claims raised in the contract-based arbitrations.[633]

320. Sacyr asserts that Panama cannot rely on the FIDC design-build nature of the Contract as a defence against the Claimant's allegations of misrepresentation and the withholding of information on its part. In response, Panama submits that the Contract's nature is relevant to understanding Claimant's contemporaneous expectations, as well as the discrimination claim.[634] The nature of the Contract was negotiated and agreed with Tenderers over a 14-month tender process. The Contractor agreed to be fully responsible for the design of the Works, and this included correcting any errors in its design at its own cost.[635] Sacyr now argues that it relied on the conceptual design that was provided

629 Rejoinder on the Merits, [803].
630 Rejoinder on the Merits, [804].
631 Rejoinder on the Merits, [805].
632 **RER-4** Fábrega I,[111]–[117].
633 Rejoinder on the Merits, [806].
634 Rejoinder on the Merits, [807].
635 Rejoinder on the Merits, [807(a)].

by the ACP, which contradicts Clause 5.1 of the Conditions of Contract that "*the Parties agree that the Employer shall not be responsible in any way whatsoever for the Volume VI Documents…*".[636]

ii. The FET Standard

321. Panama asserts that the applicable FET standard under the Treaty is the minimum standard of treatment ("**MST**") under customary international law.[637] MST does not impose on a State an obligation to protect an investor's legitimate expectations. In any event, even if the autonomous FET standard relied on by Sacyr were applicable in this case, it would impose a high burden of proof on Claimant and it accords a high level of deference to the State.[638]

The Treaty Expressly Prescribes the Customary International Law Minimum Standard of Treatment

322. Article IV of the Treaty uses the formulation of FET that indicates that the applicable legal standard is the minimum standard of treatment under customary international law.[639] It provides:

> *Investments made by investors of one Contracting Party in the territory of the other Contracting Party shall receive at all times fair and equitable treatment …. Neither Contracting Party shall at any time grant such investments treatment less favourable than that required by international law.*[640] [Panama's emphasis]

323. Under the VCLT, the Treaty must be interpreted in good faith and in accordance with the ordinary meaning of its terms.[641] Panama submits that the plain language of Article IV indicates that Panama's obligation to accord FET is coextensive with the obligation

---

636 RFP, Amendment No. 24, Volume III – Conditions of Contract (Final), Clause 5.1 (**C-222**).
637 Rejoinder on the Merits, [813].
638 Rejoinder on the Merits, [813].
639 *Alejandro Diego Díaz Gaspar v. Republic of Costa Rica*, ICSID Case No. ARB/19/13, Award, 29 June 2022, [356] (interpreting an identical provision) (**RLA-277**). *See also Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, 30 October 2017, [8.44] (**RLA-294**); *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, [520] (**RLA-237**); *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, [482] (**RLA-295**).
640 BIT, Article IV(1) (**C-1**).
641 Counter-Memorial on the Merits, [598].

to provide fair and equitable treatment required under customary international law, which is MST.[642] Sacyr therefore bears the burden of proving that Panama's alleged conduct was: "*arbitrary, grossly unfair, unjust or idiosyncratic …, discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety*."[643]

324. Panama submits that Sacyr has failed to meet the burden of proving that Panama's conduct constituted a violation of the MST, including the applicable legal standards.[644] Sacyr argues that the applicable legal standard is irrelevant where its essence is uncontroverted. Panama submits, however, that the essence of the standard is controverted, and Claimant has failed to discharge its burden of proof under any standard.[645]

325. As a threshold matter, Panama submits that Sacyr has the burden of proving the existence and content of any rules of customary international law on which it relies, including fair and equitable treatment.[646] The ICJ has confirmed that "*[t]he Party which relies on a custom [of international law] must prove that this custom is established in such a manner that it has become binding on the other Party*."[647] In applying this principle, the ICJ has repeatedly dismissed claims on the basis that a party failed to adduce sufficient evidence to establish that an alleged rule has attained the status of customary international law. The tribunal in *Glamis Gold v. United States* recognized that "*[a]scertaining custom is necessarily a factual inquiry, looking to the actions of States and the motives for and consistency of these actions*".[648]

326. In addition, decisions by investment tribunals cannot alone establish the existence or content of customary international law.[649] The *Glamis Gold* tribunal stated: "*Arbitral*

642 Counter-Memorial on the Merits, [599].
643 *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, [98] (**CLA-207**).
644 Rejoinder on the Merits, [817].
645 Rejoinder on the Merits, [817].
646 Rejoinder on the Merits, [818].
647 *Asylum Case (Colombia v. Peru),* Judgment, ICJ Reports 1950, 20 November 1950, [276] (**RLA-296).**
648 *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009, [607] (**RLA-300**).
649 Rejoinder on the Merits, [818(b)].

awards, Respondent rightly notes, do not constitute State practice and thus cannot create or prove customary international law."[650]

327. Panama submits that Sacyr has incorrectly argued that there is consensus between the Parties as to the legal standard. For instance, Sacyr alleges that Panama accepts that the cumulative effect of a State's measures can result in a breach of FET where the measures are "*sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system*."[651] According to Panama, Sacyr failed to articulate the full applicable legal standard related to composite acts as a breach of FET in its Memorial, and "*fabricated*" a purported agreement between the Parties regarding the applicable legal standard in its Reply.[652]

328. Panama objects to Claimant's submission that the "*weight of the authorities*" has discredited the theory that FET can be reduced to MST under customary international law. [653] Sacyr cites two awards, which Panama submits fail to show why the Tribunal should ignore the Treaty's plain text. First, Sacyr relies on *Azurix v. Argentina* and *Cairn Energy PLC v. India.* Panama submits that the underlying treaties considered in those arbitrations had different FET clauses than that in the Treaty in this case. Secondly, in *Cairn Energy PLC v. India,* the tribunal recognised that a reference to "*international law*" in a treaty would indicate that the governing standard would be MST under customary international law.[654]

329. In summary, Article IV of the Treaty expressly provides for FET in accordance with international law, which State practice equates with the customary international law minimum standard of treatment.[655]

---

650 *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009, [605] (**RLA-300**).
651 Reply on the Merits, [29].
652 Rejoinder on the Merits, [819(b)].
653 Rejoinder on the Merits, [820(a)].
654 *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India*, PCA Case No. 2016-07, Final Award, 21 December 2020, [1701] (**CLA-213**) ("*Unlike certain other investment treaties (e.g., NAFTA), the language of Article 3(2) of the UK-India BIT does not refer to international law or to the minimum standard of treatment. This suggests that the Contracting Parties did not intend to limit the scope of the FET standard to the minimum standard of treatment under customary international law*.")
655 Rejoinder on the Merits, [823].

The Autonomous FET Standard Imposes a High Burden of Proof and Accords a Deference to States

330. In the alternative, if the Tribunal finds that the autonomous FET standard is applicable under Article IV of the Treaty, Panama submits that it imposes a high burden of proof on Claimant and accords a high level of deference to States. Panama says that Sacyr has failed to satisfy its burden of proving the existence of any legitimate expectations or that Panama frustrated those expectations.[656]

331. In order to substantiate an FET violation claim based on legitimate expectations, Panama submits that a claimant must prove that its expectations (i) derive from specific representations or assurances upon which the investor relied in making its investment; (ii) were reasonable in light of all the circumstances of the case; and (iii) foundered in the face of subsequent unilateral conduct of the State that frustrated those expectations.[657]

332. For an expectation to be legitimate, a claimant must prove that the representations on which it relied were (i) specific, "*definitive, unambiguous, and repeated*;" and (ii) addressed to the individual investor, as opposed to the world in general.[658] According to Panama, provisions of general legislation are insufficient to give rise to legitimate expectations.

333. Sacyr must further establish that it relied on the State's representation at the time it made the investment. Panama contends that the tribunal must assess whether a claimant's expectation was reasonable by analysing all circumstances (political, socioeconomic, cultural, and historic conditions) prevailing in the host State, as well as the claimant's own due diligence before the investment.[659]

334. Panama submits that none of the awards on which Sacyr relies support its argument that "*general*" representations can give rise to an investor's legitimate expectations in all circumstances. Rather, Panama argues, Sacyr "*selectively*" quotes from *SunReserve v.*

656 Rejoinder on the Merits, [825].
657 Rejoinder on the Merits, [826].
658 Counter-Memorial on the Merits, [611]–[614].
659 Rejoinder on the Merits, [828].

Italy,[660] *RENERGY v. Spain*,[661] and *Charanne v. Spain*,[662] where the investor's expectations all related to the stability of the host State's laws.[663] Those tribunals held that absent specific commitments from the State, such as stabilisation clauses in agreements, investors cannot hold "*the very particular expectation*" that the regulatory framework in force at the time the investment was made will remain unchanged.[664] General legislation is not sufficiently specific to give rise to legitimate expectations.

335. Panama submits that the commentaries cited by Sacyr do not assist its arguments. Although Sacyr purports to rely on Professors Dolzer and Schreuer for the proposition that "*legitimate expectations may arise from domestic legislation*," Panama says that when read in proper context, Professors Dolzer and Schreuer make clear that legitimate expectations require explicit representations and specific assurances:

> *Explicit representations and specific assurances play a central role in the creation of legitimate expectations. Explicit undertakings and representations made by the host State are the strongest basis for legitimate expectations. In the renewable energy cases against Spain, tribunals have increasingly looked for the existence of explicit assurances on the part of the host State. […] Legitimate expectations are what a prudent investor would have anticipated. Tribunals discussing legitimate expectations do not look for assumptions or wishes of investors but rely on the objective circumstances created by the host*

660 *SunReserve Luxco Holdings S.À.R.L. et al. v. Italian Republic*, SCC Case No. V 2016/32, Final Award, 25 March 2020 (**CLA-200**).

661 *RENERGY S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Award, 6 May 2022 (**RLA-276**).

662 *Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain*, SCC Case No. 062/2012, Final Award, 21 January 2016 (**RLA-235**).

663 Rejoinder on the Merits, [830(b)].

664 Rejoinder on the Merits, [830(b)]; *SunReserve Luxco Holdings S.À.R.L. et al. v. Italian Republic*, SCC Case No. V 2016/32, Final Award, 25 March 2020, [702] (**CLA-200**) ("*Firstly, Respondent contends that the obligation to protect legitimate expectations of investors cannot be treated as an obligation to keep the host State's legal regime frozen in time, unless the host State has specifically committed to a stabilization or freezing clause. The Tribunal agrees with Respondent's submission*."); *RENERGY S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Award, 6 May 2022, [639]–[642] (**RLA-276**) ("*However, in the absence of any clear indication to the contrary, no State can reasonably be taken to have entered into an investment treaty with the intention of generally committing to freezing its laws, or for the investment treaty to serve as a permanent 'insurance policy' to the benefit of foreign investors against any change of the regulatory framework. As a consequence, as seems to be accepted by both Parties, for an investor to legitimately hold the very particular expectation that the regulatory framework in force at the time of investment will remain unchanged, the State needs to have made a specific commitment to that effect*").

> *State, on its legal framework, and on any specific commitments made by it.*[665]
> [Panama's emphasis]

336. Panama further points out that Sacyr relies on representations made before the Contract was executed. The Contract's provisions are necessarily representations made before the execution of the TSLP Contract. Panama asserts that if Sacyr argues that it relied on the content of the tender documents, then it cannot ignore the Conditions of Contract, as those were part of the tender documents given to the tenderers. The Conditions of Contract contradict Claimant's supposed expectations as they addressed the very matters that are the subject of Sacyr's claims.

337. Even if Sacyr could separate the "*pre-contractual/tender representations*" from the contractual context, Panama submits that various tribunals have held that representations made to an investor before the execution of the contract do not supersede the express terms of the contract and, therefore, cannot serve as a basis for legitimate expectations.[666]

338. Sacyr relies on *Noble Ventures v. Romania*. In that case, the claimant had entered into several association agreements (including a Share Purchase Agreement or SPA) with a State agency for the privatization of a State-owned company that operated a Romanian steel mill. The SPA contained a merger clause that provided: "*This Agreement and its Appendixes represent the entirety of the agreements between the Parties hereto and supersedes any prior agreement or covenant related to the subject matter hereof.*" The association agreements formed part of a "*tender book*," which contained additional presentational materials that the State agency distributed to the claimant. The claimant alleged that the State had breached the underlying treaty by making fraudulent misrepresentations in the tender books. The *Noble Ventures* tribunal rejected the claimant's arguments. It held, in relevant part, that the claimant was not entitled to rely on the contents of the tender book, or any representation made before the execution of the SPA, because the SPA's merger clause precluded such reliance.[667]

---

665 R. Dolzer, U. Kriebaum and C. Schreuer, Principles of International Investment Law, (3rd ed., 2022) p. 209 (**CLA-215**).

666 Rejoinder on the Merits, [833].

667 *Noble Ventures Inc. v. Republic of Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, [106], [116] (**RLA-40**).

339. Panama further relies on the *Eurotunnel Arbitration.* The claimants had entered into a concession agreement with the two State governments for the construction of a fixed link between the United Kingdom and France. During the tendering process and before execution of the concession agreement, the two governments published an "*Invitation to Promoters*", which called for tenders to develop, finance, construct and operate the tunnel. In the ensuing arbitration, the claimants argued that (i) based on the Invitation to Promoters, the claimants had a legitimate expectation that the respondents would not give State financial assistance or public guarantees to the claimants' competitors, which were involved in the operation of businesses associated with the fixed link; and (ii) the claimants' legitimate expectations were frustrated when its competitors received certain subsidies from the governments. The *Eurotunnel Arbitration* tribunal rejected the claimants' arguments. It held that the claimants' legitimate expectations could not have been based on representations in the Invitation to Promoters:

> *The promoters must have known that their legal relationship with the Governments would be determined not by the Invitation but by the Concession Agreement to be negotiated. Clause 41.1 of the Concession Agreement expressly so provides. That expectations may have been raised by the terms of the Invitation would have been a reason to insist on their inclusion in the Concession Agreement. But it is not a reason for reading into that Agreement stipulations which are notably absent from it.*[668]

iii. Claimant's Claim For Alleged Breach Of Its Legitimate Expectations Lacks Foundation

No Legitimate Expectations Considering the Terms of the Contract

340. Panama submits that Sacyr seeks to distance itself from the Contract because, under the Contract, it could not have developed the alleged legitimate expectations claimed in this arbitration.[669] For example, with respect to the PLE basalt, the *Concrete* tribunal had already concluded that: "*GUPC could not have had a legitimate expectation that it could rely upon the information that the ACP was specifically disclaiming any responsibility*

---

668 *The Channel Tunnel Group Limited and France-Manche S.A. v. United Kingdom and France (The Eurotunnel Arbitration)*, PCA Case No. 2003-06, Partial Award, 30 January 2007, [384] (**RLA-314**).

669 Rejoinder on the Merits, [845].

for, or that the ACP had verified the accuracy of the same."[670] Panama submits that the same conclusions must be drawn here.[671]

341. Panama submits that the following provisions of the Conditions of Contract, negotiated with and agreed to by Claimant, must be considered against the alleged legitimate expectations arising out of other tender documents.[672] These provisions state that the ACP was not responsible for the suitability of the basalt, that the Contract superseded all prior representations, that the parties to the Contract did not rely on any representations and waived any claim based on them and that the parties understood that Volume VI documents were provided for information purposes only and should not be relied upon.

342. As a result, Panama contends, the ACP bore no responsibility for the sufficiency, suitability or completeness of any data or information provided. According to Clause 4.10.3 of the Contract, the ACP gave: "*no warranty as to and shall have no responsibility for the sufficiency, suitability or completeness of any data or information (including geotechnical boring cores) it has provided or does provide regarding physical conditions […]*."

343. Clause 1.16 further provided that: "*The Contract and the documents incorporated herein by reference constitute the entire agreement between the Employer and the Contractor and supersede all prior negotiations, commitments, representations, communications and agreement relating to the Contract either oral or in writing except to the extent they have been expressly incorporated herein.*" Clause 1.16 also states that: "*The Employer and the Contractor confirm that they have not relied upon any representation inducing them to enter into the Contract.*" Both Parties agreed to waive any right to bring claims related to representations pursuant to Clause 1.16.

344. Clause 4.10.12 provided that the Contractor was deemed to have "*obtained all necessary information as to risks, contingencies, and other circumstances which may influence or affect the Tender or the Works.*"

---

670 *Concrete* Arbitration, Partial Award, [701] (**RLA-167**).
671 Rejoinder on the Merits, [845].
672 Rejoinder on the Merits, [846].

345. According to Clause 4.11, "*the Accepted Contract Amount covers all the Contractor's obligations under the Contract and all things mentioned to be or reasonably inferred to be necessary for the proper design, execution and completion of the Works and the remedying of any defects.*"

346. The Parties further agreed that the Volume VI Documents were provided for information purposes only. The documents provided by the ACP to Tenderers under Volume VI of the RFP documents were incorporated into the Contract "*for information purposes only*" under Clause 5.1. These documents, according to Clause 5.1, were not to be relied upon "*in any way or for any reason*." Panama points out that the majority of the documents allegedly relied upon by Claimant are Volume VI Documents.

347. Panama submits therefore that Sacyr has not established that either Panama or the ACP made any specific representations indicating that the Contract meant anything different than what was clearly stated in the contractual terms.[673]

iv. The ACP Did Not Misrepresent the Quality of the PLE Basalt

Claimant's Alleged Legitimate Expectation with Respect to the PLE Basalt Is Baseless

348. Sacyr claims that the ACP induced its investment on the basis of representations that were incorrect, specifically that: (i) the ACP represented that the PLE basalt was "*of adequate quality*" to produce concrete aggregates and that its testing had shown "*acceptable results*;" and (ii) Claimant relied on such representations and decided to use the PLE basalt as its primary source for producing concrete aggregates.

349. Panama submits that Sacyr's claims are false. There was no contractual requirement to use the PLE basalt, nor did the ACP represent that the PLE basalt was uniformly suitable as concrete aggregate. In any event, Sacyr did not rely on the tender documents.[674]

The Use of PLE Basalt Was Not Mandatory Under the Contract

350. Panama submits, first, that there was no contractual requirement to use the PLE basalt for any particular purpose, and this was made clear to the Tenderers not only in the Contract, but also during the tender process. The Tenderers had freedom to decide how,

673 Rejoinder on the Merits, [847].
674 Rejoinder on the Merits, [849].

and from where, to source concrete aggregates and indeed all three bidders decided to use the PLE basalt differently.[675]

No Misrepresentation in Relation to PLE basalt

351. Panama submits that the ACP did not represent that the PLE basalt was suitable for concrete aggregate. Panama submits that Sacyr relies on documents that were either later modified in the tender process, or not part of the tender process at all or were not provided to the Tenderers. Sacyr further ignores the geotechnical information made available to the Tenderers.[676]

352. The information available to the Tenderers clearly indicated the variable nature of the PLE basalt. During the tender process, Claimant recognised that the geology of the Site was "*complex*"[677] and that there was a deficit of good basalt in the PLE.[678] It was therefore for Sacyr and GUPC to decide how "*suitable*" the basalt would be as an aggregate given the Site's geological complexity.[679]

353. Among the documents that Panama says Claimant "*selectively*" quoted is the 2006–13 Report. This document was included as an annex to the GDR, which was part of the Volume VI Documents. Sacyr argues that this document shows that all tests met the standard specifications for concrete aggregates. Panama submits that this report, read in its entirety, expressly flagged the possibility that crushing the PLE basalt could potentially result in the generation of a high content of fine material, which is the precise issue that Sacyr alleges that GUPC experienced.[680] The 2006–13 Report concluded that the test results demonstrated significant variability in the fines percentages of basalt from the PLE. The report recommended industrial testing to determine the feasibility of using crushed basalt as fine aggregate in concrete mixes:

> *This study demonstrates that the use of manufactured sand or crushed basalt is technically feasible in order to be used as a fine aggregate in concrete mixes.*

675 Rejoinder on the Merits, [850].
676 Rejoinder on the Merits, [852].
677 Letter from GUPC to ACP, 1 March 2016 (**R-304**).
678 GUPC Draft Technical Memorandum, Civil/Geotechnical – Approach Channels, 21 October 2008 (**R-377**).
679 Rejoinder on the Merits, [853].
680 ACP, Technical Report 2006-13, Tests on Pacific Site Basaltic rock as fine aggregate or manufactured sand to replace the natural sand, July 2006, p. 7 of PDF (**C-145)**.

> *Nevertheless, industrial testing and economic analyses are required in order to determine if crushing the material or rock in the quarry—with industrial crushers—would be economically feasible. The drawbacks associated with crushed (manufactured) sand become evident when the fines content is very high, producing a highly cohesive mix that affects workability, thereby requiring more water and, in turn, affecting concrete strength.*[681]

354. Panama submits that, during the tender process, Claimant disregarded the 2006–13 Report. Mr. Buffa, who was responsible for the design of the Contractor's crushing plant, confirmed that he did not read the 2006–13 Report during the RFP period and GUPC did not conduct any of the tests recommended by the Report, even though there was stockpiled basalt available at the Site and Claimant had access to at least one local industrial crushing facility owned by its consortium partner, Constructora Urbana, S.A. ("**CUSA**").[682]

355. In addition, Panama submits, the Employer's Requirements expressly stated that "*[a] potential source of aggregates [...] may be the rock coming from the excavation at the Pacific site [...] The Employer in no way guarantees that such aggregate is adequate or meets the requirements for the Contractor's proposed design or is suitable for the Works.*" Panama submits that it is difficult to understand how a tenderer might legitimately have concluded from that document that the ACP was representing that the PLE basalt was suitable as concrete aggregate.[683]

356. Panama contends that Sacyr ignored other information that the ACP also made available. The ACP drilled 1,799 borings resulting in a collection of 8,600 boxes of cores over about 180 hectares (444 acres) comprising the PLE.[684] These core boxes, which contain crucial information, were made available to all the Tenderers.[685] Sacyr, however, did not inspect any basalt cores from the PLE.[1637] As confirmed by Claimant's

---

681 ACP, Technical Report 2006-13, Tests on Pacific Site Basaltic rock as fine aggregate or manufactured sand to replace the natural sand, July 2006, p. 7 of PDF (**C-145)**. The English translation of the paragraph in question was agreed upon by the Parties through an exchange of correspondence (ie Claimant's letter dated 3 June 2024 and Respondent's email dated 6 June 2024).

682 *Concrete* Arbitration, Hearing Transcript, Day 4, Tr. 127:6–128:10 (**R-202**).

683 Rejoinder on the Merits, [856].

684 *Concrete* Arbitration, Partial Award, [978], [1327] (**RLA-167**).

685 **RER-7** MacDonald, [6.26]; **RER-6** Lewis, [6.47], [6.1117].

own DAB expert, "*Any Contractor bidding for the Project would have studied the available cores and cores logs*."[686]

357. In addition, the evidence indicates that GUPC knew that (i) not all the PLE basalt would be suitable for producing concrete aggregate; and (ii) it intended to use PLE basalt not only as concrete aggregate but also for backfilling operations. In October 2008, Sacyr and GUPC formed the view that there was a "*deficit of aggregate class basalt*."[687] As a consequence, GUPC's proposal stated that: "*[a]ny suitable basalt excavated at the Pacific site will be transported to the crushing plant to be processed for use as aggregates and sand for concrete, and to be used in filters, drains, or specialized fill*."[688] In addition, GUPC stated that it: "*expected that the majority of [PLE basalt] will be suitable basalts which will be crushed by a primary crusher near the excavations before being transported to the aggregate plants for processing into required sizes and size ranges.*"[689] Panama submits therefore that Sacyr knew that not all the PLE basalt was going to be suitable.

358. Accordingly, Panama submits, GUPC's Tender Construction Plan confirmed, under the heading "*Excavated material utilization*," that the Pacific basalt "*would be used for production of concrete aggregates and for backfilling operations*."[690] These are two entirely different uses for the PLE material proposed by GUPC in its bid.

Claimant did not Rely on the Information Provided by the ACP

359. Panama submits that Sacyr has put forth no credible evidence that it relied on any of the alleged representations when making its investment. Instead, Sacyr asserts reliance through (i) a statement made by the DAB in a decision that later was overturned by the *Concrete* tribunal, but which does not indicate that Claimant actually relied on the information provided by the ACP; (ii) Mr. Zaffaroni's contradictory testimony, even

686 Mr. Page Expert Report, DAB Referral No. 11, 24 September 2013, p. 21 of PDF (**R-135**).
687 GUPC Draft Technical Memorandum, *Civil/Geotechnical – Approach Channels*, 21 October 2008, p. 6 of PDF (**R-377**).
688 GUPC Tender: Volume II - Technical Proposal, March 2009, p. 61 of PDF (**R-80**).
689 GUPC Tender: Volume II - Technical Proposal, March 2009, p. 903 of PDF (**R-80**)
690 GUPC Tender: Volume II - Technical Proposal, March 2009, p. 1323 of PDF (**R-80**).

though he neither examined the basalt tests, nor inspected a basalt core and did not design the crushing plant; and (iv) GUPC's Tender Proposal.[691]

360. Panama submits that the DAB statement cited by Sacyr does not indicate that GUPC relied on the information provided by the ACP. The decision states that the Contractor "*should be permitted to place some reliance on the information supplied without the need to verify the same*."[692]

361. Panama submits further that Mr. Zaffaroni's statements in this arbitration are directly contradicted by statements he has made in the ICC Arbitrations.[693] For example, Mr. Zaffaroni conceded in the *Concrete* Arbitration that the tender process afforded sufficient time to prepare the tender. However, in the present arbitration, Mr. Zaffaroni states that GUPC had to rely on studies conducted by the ACP due to the limited time for the tender process.[694]

362. Panama submits that GUPC's Tender Proposal indicates that it intended to obtain aggregates from on-site resources "*to reduce road transport, its related costs and possible environmental impacts*."

363. In summary, Panama submits that there is no contemporaneous evidence that Sacyr relied upon the alleged representations at the time it made its investment.[695]

The PLE Basalt Was Suitable and Used by GUPC

364. Even if the ACP had represented that the PLE basalt was a suitable source of concrete aggregate, and Sacyr relied on that representation, Panama submits that it would have no claim against Panama, because the aggregates produced from the PLE basalt were suitable for the Works. This was admitted by Claimant's expert in DAB Referral No. 11,

691 Rejoinder on the Merits, [861].
692 DAB Decision on Referral No. 5, 10 August 2012, [46] (**C-302**).
693 Rejoinder on the Merits, [864].
694 *Concrete* Arbitration, Hearing Transcript, Day 4, Tr. 109:17–110:10 ([Question from the President of the Tribunal] "*[L]ooking back, do you consider [...] that you had enough time to properly review the documentation? The RFP documentation.*" [Answer by Mr. Zaffaroni] "*Let's say the original time was tough but considered to be enough to carry out a design and build project.*" […] [Question by the President of the Tribunal] "But, in general, you think you had enough time to —" [Mr. Zaffaroni] "*Let's say under pressure but okay.*" [President] "*You were under pressure but you had the —*" [Mr. Zaffaroni] "*It could be done.*") (**R-202**).
695 Rejoinder on the Merits, [866].

who stated that the PLE basalt was "*accepted as ultimately useable for concrete aggregate*."[696] The real problem, according to Claimant's own expert, was not that the PLE basalt was unsuitable, but that it produced "*excessive fines*."[697] The expert conceded that the PLE basalt was used to produce concrete which "*passed all the Employer's stringent specifications for concrete sampling*."[698]The ACP had flagged this precise point when it provided the 2006–13 test report in crushing basalt to make sand.

No Adverse Inferences

365. Panama submits that a tribunal should resort to adverse inferences only in exceptional circumstances where the requesting party has demonstrated beyond mere speculation that the evidence in question is relevant and material to the resolution of key issues in dispute, its contents can reasonably be inferred from corroborating facts on the record and it is supported by *prima facie* evidence that was within the control of the opposing party and withheld without a reasonable excuse or in direct defiance of a tribunal's order to produce the evidence in question.[699]

366. Panama submits that the ACP did not withhold any of the tests alleged by Claimant. The reference in Table 19 of the GDR to 19 sulfate soundness tests is a mistake. Claimant's expert, MRCE, stated that the 2006-13 Report "*suggests a single ASTM C88 soundness test was performed and incorrectly reported as seven individual tests*."[700] While the number of tests listed in summary Table 19 of the GDR is inaccurate, all of the sulfate soundness tests results in the 2006-13 and 2006-14 Reports were nevertheless provided by the ACP during the tender process. Thus, Panama submits that Sacyr's assertion that Panama is withholding additional tests with "*failed results*" is inaccurate and lacks any evidentiary support.[701]

696 Mr. Page Expert Report, DAB Referral No. 11, 24 September 2013, p. 29 of PDF (**R-135**).
697 Mr. Page Expert Report, DAB Referral No. 11, 24 September 2013, p. 59 of PDF (**R-135**).
698 Mr. Page Expert Report, DAB Referral No. 11, 24 September 2013, p. 59 of PDF (**R-135**).
699 Rejoinder on the Merits, [411].
700 **CER-7** MRCE, p. 15.
701 Rejoinder on the Merits, [416].

v. The ACP Did Not Represent the Applicability of the Seismic Reduction Factor for the Design of the Lock Gates

367. In summary, Panama submits that the Contract was a design-build contract. As a result, Sacyr cannot have relied on the conceptual design provided by the ACP. Sacyr, further, relied on its own seismic advisor, TNO. GUPC's design differed significantly from the conceptual design, which shows that it did not rely on the conceptual design. In any event, Panama submits, Sacyr was not entitled to rely on the conceptual design because it was a Volume VI Document.

368. Panama points out that Sacyr's narrative regarding the Seismic Reduction Factor has changed over the years, such that it cannot establish the claimed legitimate expectation:[702]

(i) In the *Lock Gates and Labor* Arbitration, Claimant first argued that the ACP "*instructed*" the Tenderers to base their tender designs on the Reference Design.[703]

(ii) In the Statement of Reply of the *Lock Gates and Labor* Arbitration, Claimant abandoned the instruction theory, and argued that it had relied on the Seismic Reduction Factor applied in the conceptual design to the Lock Gates, even though there was no instruction to that effect on the part of the ACP.[704] In addition, it argued that its case was entirely based on ACP's alleged failure to pass on BTM's pre-tender warnings at tender stage.

(iii) In this arbitration, Claimant argues that it relied on the Seismic Reduction Factor, because Panama represented that it had conducted "*exhaustive stud[ies] and engaged in a rigorous planning process to prepare the TLP Proposal on which the Project was based*"[705] and because the ACP stated in the RFQ that it had commissioned its own designs significantly "*beyond the conceptual level*."[706]

---

702 Rejoinder on the Merits, [872].
703 *Lock Gates and Labor* Arbitration, Claimants' Statement of Claim, 23 March 2020, [145], [159] (**R-208**).
704 *Lock Gates and Labor* Arbitration, Claimants' Statement of Reply, 16 July 2021, p. 78 (**R-439**).
705 Reply on the Merits, [149].
706 Reply on the Merits, [149(a)].

BTM's Alleged "*Warning*"

369. Panama submits that BTM gave no warning to the ACP regarding the "*seismic reduction factor."* Sacyr's case therefore fails.[707]

370. Panama explains that there is a critical distinction between (i) the seismic design criteria for the Lock Gates; and (ii) the use of a "*Seismic Reduction Factor*" or, more accurately, a seismic coefficient, in the design of the Lock Gates.[708] BTM's correspondence prior to the meeting of 14 January 2009 did not concern the "*Seismic Reduction Factor*."

371. The ACP provided its original, but provisional, seismic design criteria in a report that was included in Volume VI, Part 3 of the RFP in December 2007.[709] The criteria included the full peak ground accelerations ("**PGA**"), which should be used for the design, corresponding to different levels of earthquake. The ACP made clear that those criteria were provisional, and that the final values to be used would be released subsequently,[710] as happened in April 2009 with Amendment No. 7 to the RFP. As a result:[711]

(i) higher PGAs were specified;

(ii) the ACP modified the performance design criteria for the two different levels of earthquake which were prescribed (Level I, corresponding to a 475-year return period; and Level II, corresponding to a 1,000-year return period), so that for a Level I earthquake, no damage was allowed that might interfere with operations. The Lock Gates were required to operate immediately after the event without loss of serviceability, and displacement of the Lock Gates and Lock Heads had to be limited so that there was no leakage through any seal, joint or opened crack; while for a Level II earthquake some visible damage may be exhibited which might require a temporary closure for repairs, but the Lock Gates had to retain

707 Rejoinder on the Merits, [501].
708 Rejoinder on the Merits, [473].
709 ACP's Seismic Hazard and Design Criteria for the TSLP, Volume VI, Part 3, December 2007, p. 27 of PDF (**R-40)**.
710 ACP's Seismic Hazard and Design Criteria for the TSLP, Volume VI, Part 3, December 2007, p. 27 of PDF (**R-40)**.
711 Rejoinder on the Merits, [474].

their structural integrity and not collapse as well as retaining the ability to retract fully into their recess for repair; and[712]

(iii) The ACP provided the Tenderers with detailed seismic hazard information, including time histories and response spectra.[713]

372. On 9 December 2009, BTM sent a letter and a position paper to the ACP that pointed to three design factors which BTM considered to be the cause of the increase of size/weight of the lock gates as designed when compared to the conceptual design: the fatigue design requirements in the Employer's Requirements; the higher PGAs in the seismic design criteria after Amendment No. 7 to the RFP; and the floating stability requirements.[714] BTM's focus was on the Amendment No. 7 – the seismic design criteria. No mention was made in that letter to the PIANC seismic coefficient (or any Seismic Reduction Factor).[715]

373. BTM's concerns had been raised by the steel escalation formula in Amendment No. 19 to the RFP.[716] This formula placed the risk of steel price volatility on the ACP, but only up to a maximum stated weight of steel; beyond that weight, the risk would pass to the successful Tenderer.[717] If one of the other Tenderers had not taken its design sufficiently far, that Tenderer might underestimate the amount of steel required for the Lock Gates and fail to add a contingency for the risk of steel price fluctuations above the maximum weight covered by the formula, thereby gaining an advantage in the tender process.[718] Mr. Lorenzo points out that the ACP had no reason to consider that only BTM out of the Tenderers would undertake a thorough design: he believed that all Tenderers would carry out the necessary analysis to establish compliance with the Employer's Requirements and that their gates would be sized, and later priced, appropriately.[719]

---

712 RFP, Volume II, Employer's Requirements, *Section 01 81 16.13 – Seismic Design Criteria*, November 2008, [1.03.A] (**R-278**).
713 RFP, Volume VII, Part 3, Seismic Study (**R-496**).
714 BTM's letters and presentations to ACP, "Rolling gate width and weight justification", 9 December 2008–16 January 2009, p. 7 (**C-214**).
715 Rejoinder on the Merits, [477].
716 BTM's letters and presentations to ACP, "Rolling gate width and weight justification", 9 December 2008–16 January 2009, p. 7 (**C-214**).
717 **RWS-7** Lorenzo II, [24].
718 BTM's letters and presentations to ACP, "Rolling gate width and weight justification", 9 December 2008–16 January 2009, p. 7 (**C-214**).
719 **RWS-4** Lorenzo I, [52].

BTM did not ask the ACP to convey any of the information in their letter or position paper to the Tenderers.[720]

374. Following a meeting between BTM and the ACP on 12 December 2008 and a technical meeting between BTM and the ACP on 17–18 December 2008, BTM sent a further letter dated 24 December 2008, which stated that:

> *The meetings highlighted the reasons behind the differences in weight of steel plate that have been the subject of discussion in several of our meetings: principally that the reference design is based on preliminary design that only includes allowances for fatigue and was also completed before the ACP's latest seismic criteria were issued.*[721]

Panama submits that there was no mention in those meetings of the PIANC seismic coefficient or the "Seismic Reduction Factor."[722]

375. In Attachment 3 to BTM's letter of 24 December 2008, BTM wrote:

> *Seismic events must consider the dynamic mass of the water in, and acting on, the gates rather than just the mass of the steelwork. The acceleration of the dynamic mass, which is 15 times the mass of the steelwork, in a seismic event will cause out-of-plane bending of all the plates and the reference design gate will fail. The ACP seismic design criteria issued after the reference design was completed require thicker steel plate than was determined in the reference design.*[723]

376. Panama submits that, in relation to seismic design, the focus of BTM's comments was on the Amendment No. 7 seismic design criteria.[724]

377. According to Panama, the "*information*" that BTM communicated to the ACP, which Sacyr alleges should have then been communicated to the other Tenderers, was relayed

---

720 Rejoinder on the Merits, [479].

721 BTM's letters and presentations to ACP, "Rolling gate width and weight justification", 9 December 2008–16 January 2009, p. 5 (**C-214**).

722 Rejoinder on the Merits, [480]; Transcript of BTM-ACP Meeting, 12 December 2008, (**R-323)**; Transcript of BTM-ACP Meeting, 17 December 2008), (**R-54**); and Transcript of BTM Meeting, 18 December 2008, (**R-55**).

723 BTM's letters and presentations to ACP, "Rolling gate width and weight justification", 9 December 2008–16 January 2009, p. 27–28 (**C-214**).

724 Rejoinder on the Merits, [482].

in the meeting between BTM and the ACP on 14 January 2009.[725] The relevant part of the discussion arose out of one slide deck during a seismic presentation by BTM.[726] Panama maintains that the audio recording and transcript of the meeting demonstrate that there was no mention of the PIANC seismic coefficient. The *Lock Gates and Labor* tribunal found that:

> *The audio recording of the meeting reveals that limited time was spent on the seismic question and confirms that the PIANC seismic coefficient was not mentioned, nor any 'error' in the Conceptual Design, nor any request that any matter discussed should be imparted to the other Tenderers*.[727]

378. As noted at paragraph 258 *et seq*. above, BTM used the formal questions and answers procedure in January 2009 to ask the ACP to "*confirm that the reference design for the gates does not meet the current design criteria*." Panama submits that the point which BTM was making in its formal question was that the reason why the conceptual design for the Lock Gates would not be adequate was because the seismic and fatigue criteria had been revised since the conceptual design had been prepared.[728] This was the same point that BTM had previously made to the ACP in its correspondence in December 2008. According to Panama, the question itself contained its own answer ("*Since those criteria have been revised since the reference design was prepared, it is clear that the reference design for the gates will not be adequate for the specified design loading*.")

379. Unlike the previous meetings and correspondence, BTM's subsequent letter of 28 July 2009 did contain a warning about the use of the PIANC seismic coefficient adopted by GUPC in its tender. The ACP sent that letter to GUPC on 6 August 2009.[729] GUPC did not do anything of substance in response to that warning. Its Project Designer, CICP, was "*confident that whatever concerns BTM expressed in its letter could be addressed in subsequent design stages*."[730] Panama submits that GUPC's reaction to BTM's letter

---

725 Rejoinder on the Merits, [486].
726 BTM's letters and presentations to ACP, "Rolling gate width and weight justification", 9 December 2008–16 January 2009, p. 45 of PDF (**C-214**).
727 *Lock Gates and Labor* Arbitration, Final Award, [267] (**C-622**).
728 Rejoinder on the Merits, [499(c)].
729 Letter from ACP to GUPC (IACC-221427-C0003), 6 August 2009, (**C-238**).
730 *Lock Gates and Labor* Arbitration, Augustijn Second Witness Statement, 16 July 2021, [119] (**R-32**).

shows that Sacyr would not have done anything differently, even if Panama had communicated the alleged information to GUPC.[731]

The CPP Report

380. Panama further objects to Sacyr's argument that CPP warned Panama about the Seismic Reduction Factor.[732] Mr. Lorenzo explains that: "*the background to the CPP Report was that the ACP wanted CPP to assess the impact of the seismic ship impact and fatigue requirements in the Employer's Requirements on the conceptual design … for the purposes of the ACP's own internal cost estimate and to determine whether any improvements could be made to the performance requirements in the RFP*."[733] This was set out in terms in the relevant Task Order to CPP of September 2008.[734]

381. Sacyr referred to the Draft CPP Report and the final CPP Report. In both versions, CPP undertook a new analysis. The Draft CPP Report explains that "*For the study of seismic events and ship impact in this review, a new finite element model was set up*".[835] The final 2009 CPP Report explains that:

> *In the concept and outline design, seismic actions were taken into account by equivalent static loads. The magnitude of these loads were [sic] based on an acceleration of 0.4g. Within this design review a more elaborated study of the influence of the seismic actions is made. Extensive simulations are made with different calculation methods. The seismic data for these simulations are taken from the specifications available at the start of the current Task Order (amendment no. 17).*[735]

382. CPP was undertaking different analyses from those undertaken for the purposes of the conceptual design. Panama explains that as part of CPP's dynamic analysis, it used three different scaling factors ("**kh**") when calculating the water added masses (which were used as a substitute for water pressures that would apply to the Lock Gates in an

731 Rejoinder on the Merits, [546].
732 Rejoinder on the Merits, [503].
733 **RWS-4** Lorenzo I, [60].
734 Contract No. CMC-_____Engineering Services for Design Review for Third Set of Locks, Task Order No. 1– Review Lock Gates Requirements, 1 September 2008, (**C-198**). *See also Lock Gates and Labor* Arbitration, Final Award, [292] (**C-622**).
735 CPP, Final CPP Report, *Task Order No. 1: Review Lock Gates Requirements*, 20 March 2009, p. 23 of PDF (C-**232**).

earthquake).[736] These were kh=1, and kh=0, and kh=var, according to the PIANC documents.[737]

383. According to Panama, it was within the context of discussing these scaling values used to calculate water pressures as part of CPP's new dynamic analysis that the following comments on the seismic coefficient appear.[738]

384. The Draft CPP Report notes the following:

> *Impulsive water pressures that occur during seismic events are not applied as such but the pressures are substituted by Westergaard-type masses. The magnitude and the spatial distribution of these masses are calculated with the formulae of [sic] elaborated by Housner. Other aspects of sloshing could also be relevant but were not included. Additionally, these masses are scaled with a factor kh. Three scaling values are used throughout this review: kh=0 (no additional masses), kh=1.0 (no reduction) and kh=var according to the PIANC-documents. During this review, the applicability of this specific reduction was questioned.*[739]

385. The final 2009 CPP Report states:

> *Impulsive water pressures that occur during seismic events are not applied as such but the pressures are substituted by Westergaard- type masses. The magnitude and the spatial distribution of these masses are calculated with the formulae elaborated by Housner. Additionally, these masses are scaled with a factor kh. Three scaling values are used throughout this review: kh=0 (no additional masses), kh=1.0 (no reduction) and kh=var according to the PIANC- documents. It is currently not clear to the authors of this report if the value of the reduction factor mentioned in the PIANC-documents is appropriate for this particular gate type structure. Therefore, the case kh=var*

736 Rejoinder on the Merits, [508].
737 CPP, Final CPP Report, *Task Order No. 1: Review Lock Gates Requirements*, 20 March 2009, p. 26 of PDF (**C-232**).
738 Rejoinder on the Merits, [509].
739 CPP, Draft Report, *Task Order No. 1 – Review Lock Gates Requirements*, 7 January 2009, p. 17 of PDF (**C-212**).

> *was not chosen as the preferred option. Results are given for all three options so that the reader can compare the results.*[740]

386. Panama submits that these passages "*speak for themselves.*"[741] CPP clearly did not warn the ACP that adoption of the PIANC seismic coefficient was inapposite for the Lock Gates.[742] CPP questioned the applicability of the PIANC seismic coefficient in the context of the analyses it had undertaken in that Report, which were separate, and different, from the pseudo-static analysis which had been used to develop the conceptual design. CPP proceeded to apply the PIANC seismic coefficient in one of the three calculations which it presented in the Report.[743]

387. Panama relies on the following passages from the *Lock Gates and Labor* Arbitration:[744]

> *Nor does the Tribunal find that the ACP 'received drafts during the tender period confirming that the seismic reduction factor was inapplicable.'. The Report presented calculations for the three options identified. GUPC argues that CPP could not be openly critical of the reduction factor because they were those who produced the reference design using it to begin with. Apart from the fact that the ACP did not commission the CPP to review the accuracy of the conceptual design, the argument ignores that the use of the PIANC seismic coefficient was not an 'error' of CPP that they would have been anxious to downplay, considering the engineering knowledge at the time of the conceptual design. By stating that 'the case kh=var is not the preferred option', the author of the Report did not 'evidently [mean] that the [SRF] was not applicable' or 'quite clear' that a seismic reduction factor is not applicable as argued by [GUPC]…*
>
> *Pr. Brancaleoni [the claimants' expert] is more restrained in his comment of CPP's statement that whether a reduction factor should be applied or not was not clear: 'to say the least, doubts on the applicability of the Seismic Reduction Factor were raised by CPP in this report.' The question, however, is whether 'doubts' expressed regarding a component of the seismic calculations used in*

740 CPP, Final CPP Report, *Task Order No. 1: Review Lock Gates Requirements*, 20 March 2009, p. 26 of PDF (**C-232**).
741 Rejoinder on the Merits, [511].
742 Rejoinder on the Merits, [511].
743 Rejoinder on the Merits, [511].
744 Rejoinder on the Merits, [513].

> *the conceptual design generated an obligation of communication to the Tenderers, considering both the non-conclusive nature of the statement and the fact that the conceptual design was communicated for information only. The opinion that 'the case kh=var is not the preferred option' was expressed in the context of the new and more stringent requirements; it is not an alert that the PIANC factor used in the conceptual design was no longer valid, which was only ascertained later.*
>
> […]
>
> *The conclusion can be drawn from the preceding that the impropriety of applying a seismic reduction factor to a given PGA was not ascertained when the Contract was awarded to GUPC. Even if the conceptual design had been contractual, which it was not, it did not contain an 'error'.*[745]

388. In any event, Panama contends, there was no obligation on Panama to disclose the CPP Report to Sacyr. The conclusion to the Report makes it clear that its purpose was to provide guidance to the ACP in evaluating competing tenders. The ACP was recommended to consider whether contractors had "*propose[d] less costly solutions that do not fully comply—or even do not comply at all—with the spirit of the requirements.*"[746] The ACP was therefore under no obligation to provide the CPP Report to the Tenderers. It had been prepared for the ACP's own internal purposes, and the Contractor bore full responsibility for the design of the Lock Gates.[747]

Panama did not Represent that Claimant could Rely on the Conceptual Design

389. Panama submits that merely providing a conceptual design (at the prequalification stage preceding the RFP) and stating that it went beyond conceptual level cannot be deemed to amount to having induced the Tenderers to rely on it, especially when the Parties had expressly agreed that they may not rely on it in any way or for any reason.[748] This is particularly evident given the RFQ itself made clear: (i) that the conceptual design was commissioned "*to demonstrate the appropriateness and feasibility of the proposed*

---

745 *See Lock Gates and Labor* Arbitration, Final Award,, [304]–[305], [311] (**C-622**); Rejoinder on the Merits, [514].
746 CPP, Final CPP Report, *Task Order No. 1: Review Lock Gates Requirements*, 20 March 2009, p. 63 (**C-232**).
747 Counter-Memorial on the Merits, [164].
748 Rejoinder on the Merits, [873].

configuration;"[749] and (ii) that the locks contractor "*will be required to take full design and performance responsibility for all aspects of the Project*."[750] The Tenderers therefore knew that they were bidding for a design-build contract, with the result that they would bear complete responsibility for ensuring that the design of the Works complied with the Employer's Requirements.[751]

390. The Tenderers' proposal had to comply with the Employer's Requirements. The conceptual design, upon which Sacyr allegedly relied, was produced in 2005. It pre-dated the Employer's Requirements by around two years. Panama submits that there were clear differences between the design assumptions in the conceptual design and the Employer's Requirements.[752] Mr. Lorenzo explains:

> *The differences between the Employer's Requirements and the design parameters used in the conceptual design ultimately meant that the conceptual design, while potentially a useful way of depicting the general concept of the gates (rolling gates, wheelbarrow concept etc.), did not have any further practical value to the RFP as it was obviously not designed to meet the different and, in many cases, more stringent requirements set out in the Employer's Requirements.*[753]

391. The reference drawings themselves contained an explicit warning: "*[t]his is a conceptual drawing for reference purposes only and shall not be construed as a design plan for the Third Set of Locks Project.*"[754]

392. During the tender process, the ACP emphasized that the conceptual design was provided for information purposes only and should not be relied upon by the Tenderers. In the response to the question posed to the ACP by BTM, the ACP referred to Clause 5.1 of the Conditions of Contract, indicating that the Reference Design should not be relied upon.[755] Panama submits that the "*overwhelming evidence*" in this arbitration

---

749 RFP, Amendment No. 24, Volume III – Conditions of Contract (Final), February 2009, Clause 5.1 (**C-222**).
750 Request for Qualifications for the Design-Build of the Third Set of Locks Project, Fifth Revision, 8 November 2007, p. 11 (**C-15**).
751 Rejoinder on the Merits, [471].
752 Rejoinder on the Merits, [875].
753 **RWS-4** Lorenzo I, [23].
754 CPP, Conceptual Design of Lock Gates [*Diseño Conceptual de las Esclusas Pospanamax*] VF-1706-118-22 and VF- 1706-118-23, August 2007, p. 3 (**R-36**).
755 Rejoinder on the Merits, [876].

demonstrates that the ACP made it clear throughout the RFP process that the conceptual design should not be relied on by the Tenderers, including with respect to the design of the Lock Gates.[756]

The Claimant has Failed to Prove that it Relied on the Conceptual Design

393. Panama submits that Mr. Zaffaroni concedes that Sacyr understood that the conceptual design "*was not binding*."[757] As such, it was evident to GUPC that there was no obligation to follow the conceptual design and there is no evidence that it did so. Panama submits that the other Tenderers' markedly different Lock Gates designs discredit Sacyr's assertion that it relied on the conceptual design. The difference in designs indicates that none of the other Tenderers considered that the ACP expected them to rely on the Reference Design.[758]

394. Panama submits further that GUPC's tender does not evidence any detailed reliance on the conceptual design, and indeed shows that there was no such reliance.[759] In the conceptual design, the PIANC seismic coefficient was used for the design of both the Lock Walls and the Lock Gates.[760] However, GUPC did not use the PIANC seismic coefficient for its tender design of the Lock Walls. In its preliminary pseudo-static analysis for the Lock Walls, GUPC used a different seismic coefficient: namely the USACE coefficient.[761] Moreover, it decided to carry out dynamic analyses (including both linear and non-linear analyses), which Panama asserts were more advanced than the pseudo-static analysis in the conceptual design, for the seismic design of the Lock Walls.[762] Panama submits that this shows that GUPC was well aware that it was not bound to follow the conceptual design.[763]

395. In respect of the Lock Gates, the seismic coefficient used by GUPC in the design of the Lock Gates at the tender stage did not originate from the conceptual design, instead it

---

756 Rejoinder on the Merits, [877].
757 *Lock Gates and Labor* Arbitration, Zaffaroni Witness Statement, 16 March 2020, [17] (**R-207**).
758 Rejoinder on the Merits, [878].
759 GUPC Tender: Volume II - Technical Proposal, March 2009, (**R-80**).
760 ACP, "Update of Pacific Locks Conceptual Design and Harmonization of Atlantic Locks Conceptual design", 20 May 2005, p. 72 of PDF (for the *Lock Walls*) and p. 191 of PDF (for the *Lock Gates*) (**C-136)**.
761 GUPC Tender: Volume II - Technical Proposal, March 2009, pp. 749, 807, 819–821, 825–826 of PDF (**R-80**).
762 Rejoinder on the Merits, [519].
763 Rejoinder on the Merits, [519].

originated from the PIANC Seismic Design Guidelines for Port Structures. Panama submits that there has been a "*telling lack of disclosure*" by Sacyr in respect of the investigation by GUPC and its consultants into the PIANC seismic coefficient at the time of its tender design.[764]

396. Furthermore, GUPC did not rely on the Reference Design. GUPC's tender design of the Lock Gates was carried out by Iv-Groep, which was part of the CICP design consortium.[765] Iv-Groep sought specialist advice on the design of the Lock Gates from TNO, which produced a report on seismic issues including the applicability of the seismic reduction factor (the "**TNO Report**").[766] TNO advised using the "*step-wise approach*", which is more detailed and comprehensive than the basic pseudo-static method that was used in the conceptual design.[767] TNO therefore did not follow the conceptual design, nor did it refer to the conceptual design. The TNO Report did make express reference to the PIANC seismic coefficient[768] but in the calculations contained in the report, TNO specified that the PGA should be used and did not apply the PIANC seismic coefficient.[769]

397. Panama submits that it is unclear why GUPC did not follow the advice of TNO about the applicability of the seismic reduction factor. Panama contends that GUPC's decision not to use the seismic reduction factor in the design of the Lock Walls called into question its alleged reliance on this factor.[770]

vi. Panama did not Represent that the Cost of the Project would be US$ 3.35 Billion

398. Sacyr asserts that Panama represented that "*its technical studies were so thorough as to offer a 'high level of reliability' for its cost estimate of USD 3.35 billion for the Project and that 'variations that have occurred in some other mega projects will not occur.*"'[771]

---

764 Rejoinder on the Merits, [465(c)].
765 **CWS-4** Perez II, [44].
766 **RWS-4** Lorenzo I, [71]–[72].
767 Rejoinder on the Merits, [520].
768 TNO Report, *The earthquake conditions in the Panama "third set of locks"* project, 7 October 2008), p. 6 of PDF (**C-204**).
769 TNO Report, *The earthquake conditions in the Panama "third set of locks"* project, 7 October 2008), p. 18 of PDF (**C-204**).
770 GUPC Tender: Volume II - Technical Proposal, March 2009, pp. 749, 807, 819–821, 825–826 of PDF (**R-80**).
771 Reply on the Merits, [149(b)].

In the Counter Memorial, Panama explained that the cost estimate was neither prepared for, nor presented to, the Tenderers. Rather, it had been prepared in the context of the Proposal for the Expansion Program and the referendum process, prior to the initiation of the tender process.[772] The cost estimate was prepared on the premise that the ACP would be responsible for the design of the Project, and this assumption had changed after the costs estimate.[773] Neither the ACP, nor Panama instructed the Tenderers to rely on the cost estimate: it was incumbent upon bidding Tenderers to make their own cost estimates. Sacyr and its partners represented that US$ 3.22 billion was sufficient for completion of the Project.[774]

399. According to Sacyr, Panama's cost estimates reinforced Panama's representations regarding the strength of its technical studies. Panama responds that none of the other Tenderers relied on the costs estimates and Sacyr has failed to explain how a cost estimate could reinforce the strength of technical studies.[775]

400. In any event, even if GUPC did rely on the purported representation, such reliance would have been unreasonable. Panama points out that the cost estimate was prepared five years before the tender process and was based on a different type of contract and conceptual designs.[776] In addition, it was neither prepared for, nor presented to, the Tenderers.

vii. Panama did not Represent that Claimant would not Fund the Costs of the Project

401. Sacyr further alleges that Panama represented that GUPC would not need to fund the costs of the Project. Panama contends that Sacyr has made no attempt to show an actual representation by Panama to this effect or any evidence of its alleged reliance on such representation.[777]

772 Counter-Memorial on the Merits, [628].
773 Counter-Memorial on the Merits, [628].
774 Counter-Memorial on the Merits, [628].
775 Rejoinder on the Merits, [885].
776 Rejoinder on the Merits, [885].
777 Rejoinder on the Merits, [886].

402. Panama notes, first, that Claimant argued in the ICC Arbitrations that it expected the Project to be cash-flow positive[778] and that it would not have to provide financing,[779] pointing to the fact that the Contract provided for initial advance payments.[780] Three ICC tribunals have rejected those arguments.[781]

403. Second, the Contract's terms make it clear that GUPC had committed to executing the Works for the tendered sum which it was itself responsible for determining, namely US$ 3,118,880,001.[782] GUPC was entitled to receive the Contract Price in return for carrying out the Works. GUPC did not have the right to seek additional "*financing*" from the ACP. GUPC had agreed to carry out the Works for a specific price and was contractually obliged to do so. Panama submits that this does not amount to forced funding. By confirming that the tendered sum was sufficient and that GUPC had the financial resources to perform the Works, GUPC acknowledged that it assumed the risk as to the sufficiency of the Contract Price.[783] Panama emphasizes that the Contract was a lump sum agreement, which allocated certain risk to the Contractor.[784]

404. Panama submits that it did not shift the financial burden of the Project to Sacyr. Rather, GUPC underbid for the Contract. GUPC was obliged to use Heerema for the fabrication of the main lock gates, and Heerema's quoted price was approximately US$ 200 million higher than the sum included in GUPC's tender bid (US$ 325 million versus US$ 527 million).[785] Sacyr relies on a report prepared by Hill. The Hill report, however, shows that the final price tendered by GUPC was prepared on "*best case*" expectations and there was little room for contingencies. Panama notes the following findings from the Report:[786]

778 *Concrete* Arbitration, Statement of Claim, [2165], [2170], [2171] (**R-182**).
779 *Concrete* Arbitration, Statement of Claim, [2165] (**R-182**).
780 *Concrete* Arbitration, Statement of Claim, [2170] (**R-182**).
781 *Guarantees* Arbitration, Final Award, [469], [471] (**RLA-100**).
782 Rejoinder on the Merits, [888].
783 Rejoinder on the Merits, [888].
784 Rejoinder on the Merits, [889].
785 Rejoinder on the Merits, [629].
786 Rejoinder on the Merits, [633].

(i) "*due to the size and quantities involved in the project, even small changes in unit prices, productivity, or duration assumptions can have a significant impact on the final project cost;*"[787]

(ii) "*GUPC's Tender … appears to rely on 'best case' expectations. Though achievable, there is little room in the budget for execution errors or significant inefficiencies;*"[788]

(iii) "*GUPC's bid has $62 million in contingency, about 2% of total bid price. This would normally be considered low for a design-build project of this size and complexity and we believe this level of contingency is low as well;*"[789]

(iv) "*Hill has performed an independent risk analysis using the experience of the Hill team. This analysis was performed on a summary basis and consisted of an evaluation of the % risk associated with different type of construction. The analysis is shown on Table 4 below. The table shows a potential of $183 million as compared to the $62 million in the estimate;*"[790]

(v) "*GUPC already has $15 – 20 million in potential change orders. About $15 million of the change order requests are related to the cofferdam subsurface conditions. A first look at the contract brings into question whether this may be compensable; however GUPC plans to demonstrate to ACP how the alleged changed conditions have affected the cost of the work.*"[791]

405. Hill observed that the GUPC tender price for Gates and Recess closures (US$ 547 million) was 59% less than the next lowest bidder (US$ 872 million), or a total of US$ 324 million, and stated:

---

787 Hill International, *Panama Canal Expansion Project – GUPC Bid Risk Review Report*, April 2010, p. 6 of PDF (**C-549**).
788 Hill International, *Panama Canal Expansion Project – GUPC Bid Risk Review Report*, April 2010, p. 6 of PDF (**C-549**).
789 Hill International, *Panama Canal Expansion Project – GUPC Bid Risk Review Report*, April 2010, p. 6 of PDF (**C-549**).
790 Hill International, *Panama Canal Expansion Project – GUPC Bid Risk Review Report*, April 2010, p. 50 of PDF (**C-549**).
791 Hill International, *Panama Canal Expansion Project – GUPC Bid Risk Review Report*, April 2010, p. 6 of PDF (**C-549**).

> *Given the limited number of suppliers of these large specialized items the difference is surprising assuming consistent pricing strategies. This difference would be an indicator of a risk item in the tender and should be monitored closely in the design and final procurement process.*[792]

406. Panama submits that Hill was not aware that GUPC's real position was that in fact it had only included an allowance of US$ 345 million, another US$ 200 million lower than Hill believed.[793]

407. In respect of concrete, Hill also observed that it "*remains however a point of concern for the project as a comparison of the tender pricing between GUPC and the next lowest bidder reveals that the GUPC tender price for Structure Concrete ($653 million) is 71% less than the next lowest bidder ($1,120 million), or a total of $467 million.*"[794] The Contractor subsequently, and unsuccessfully, claimed more than US$ 500 million in relation to the Concrete Mix Design and the basalt aggregate claims.[795]

408. While the ACP gave GUPC the highest overall technical and financial score, Panama submits that this means only that the GUPC Consortium bid was the highest when an evaluation was made in accordance with the methods and procedures described in Volume IV – Employer's Evaluation Criteria - and in accordance with the process established in Article 89 C of the Employer's Acquisition Regulation. It does not mean that GUPC had allowed sufficient money in its price to carry out the Works.[796]

409. Panama notes the following comment from the DAB:

> *The DAB understands that the GUPC bid was similar to the project estimate of ACP (the DAB understands that GUPC was about a quarter of a billion less). This does not guarantee that both ACP and GUPC estimated correctly or fully appreciated the unique allocation of risks placed on the Contractor by reason of the ACP modifications to the standard FIDIC contract. Pricing*

---

792 Hill International, *Panama Canal Expansion Project – GUPC Bid Risk Review Report*, April 2010, p. 47 of PDF (**C-549**).
793 Rejoinder on the Merits, [637].
794 Hill International, *Panama Canal Expansion Project – GUPC Bid Risk Review Report*, April 2010, p. 45–46 of PDF (**C-549**).
795 Rejoinder on the Merits, [638].
796 Rejoinder on the Merits, [641(b)].

quantities is only part of an estimate. It is probable that GUPC underbid the Contract.[797]

410. Panama concludes that GUPC's bid was aggressive and "*full of risk*," and it likely underbid on the Contract.[798]

viii. The ACP did not Represent to GUPC that it would Accept All Claims

411. Sacyr relies on the ACP's statement in the RFQ that one of the ACP's objectives for the TSLP was to execute the Project: "*in a spirit of mutual trust and cooperation without litigation and adversarial attitudes.*"

412. Panama submits, first, that Sacyr's allegation that ACP under-certified payments is incorrect.[799] The ACP provided GUPC with capital injections to assist its cash flow to a total of more than US$ 1 billion, which Panama asserts outweighs the complaints about under certification.[800] There was no requirement under the Contract to provide financial assistance; it was provided voluntarily and in good faith by the ACP to help the Contractor's cash flow shortage and in light of the Contractor's threats to stop work. Panama contends that limited examples of purported under-certification do not demonstrate that the ACP "*routinely*" denied interim payments due to GUPC.[801]

413. In many cases, the reason for not certifying certain payments was attributable to GUPC's overstatement of progress on the Project. Panama points out that GUPC never referred a claim based upon under-certification of payments to the DAB for resolution.[802]

414. In its Reply, Sacyr states that it "*prevailed in front of the DAB on a significant number of the claims which Panama's ER wholly rejected—to the tune of some USD 330 million more.*"[803] Panama observes that Sacyr omits to mention that the ICC tribunals overturned the vast majority of this amount.[804] The ICC tribunals ordered GUPC and its shareholders, including Sacyr, to pay and reimburse the ACP more than US$ 1 billion

---

797 Email from DAB to GUPC and ACP with attachment "Future of the Existing Project", 10 December 2013, p. 3 of PDF (**R-140**).
798 Rejoinder on the Merits, [645].
799 Rejoinder on the Merits, [894].
800 Rejoinder on the Merits, [894].
801 Rejoinder on the Merits, [894].
802 Rejoinder on the Merits, [895].
803 Reply on the Merits, [253].
804 *Concrete* Arbitration, Partial Award (**RLA-167**).

for monies wrongly awarded by the DAB and Advance Payments that Claimant refused to repay.[805]

415. Moreover, the ACP did not have a "*secret policy*" to reject all of GUPC's claims, because ACP's Project Management Plan stated that a "*Critical Success Factor*" was to have "*100 percent of claims […] decided in favor of the ACP*."[806] Panama notes that two ICC tribunals have rejected this allegation. The tribunal in the *Concrete* Arbitration found as follows:

> *[T]he Arbitral Tribunal does not consider that the evidence presented by the Claimants shows a 'secret policy' of the ACP to reject all of the [GUPC]'s claims. The Program Management Plan referred to by the Claimants, which was prepared by the ACP in March 2010, states that one of the 'Critical Success Factors' for the Project was 'Clearly defined contract documents that result in a minimum number of claims and change orders/good working relations with construction contractors,' and one of the measures of success associated with this goal was noted as '100 percent of claims are decided in ACP's favor.' In the Arbitral Tribunal's view, this cannot be interpreted as stating that the ACP would be successful if it issued Determinations only in its own favor, as such an interpretation would clearly undermine the stated goal of 'good working relations with construction contractors.' Instead, the only logical interpretation of the ACP's statement is that they would aim to reduce the number of claims through clear contract terms, and that any bad claims would ultimately be decided in the ACP's favor.*[807]

416. The tribunal in the *Lock Gates and Labor* Arbitration found:

> *Before reviewing this record, the general argument that the Employer was implementing a 'secret policy' of never acknowledging a Contractor's entitlement may easily be disposed of. There simply was nothing secret about the Project Management Plan and it would indeed be ill-advised to display in writing a 'secret' and devious scheme for everyone to be aware of …. Moreover, this is in a contractual setting where, beyond the ER's determinations, differences with the Contractor were to be solved by external*

---

805 *Concrete* Arbitration, Final Award, § XI (**R-23**); Counter-Memorial on the Merits, [268].
806 Reply on the Merits, [254].
807 *Concrete* Arbitration, Partial Award, [2193] (**RLA-167**).

> *bodies: first the DAB, then, an arbitral tribunal. The reproached statement, therefore, must be seen as a call and an incentive to the whole ACP workforce involved in the performance of the Project not to place the Employer in a position where it would be found liable by an independent body; such a target can hardly be criticized.*[808]

417. Sacyr further argues that the ACP attempted to delay and encumber the DAB process. Panama submits that GUPC began introducing expert evidence in DAB proceedings, thereby transforming the DAB process into arbitration-like proceedings.[809] GUPC overwhelmed the DAB with claims and later bypassed the DAB process.[810] Sacyr raises a new argument in its Reply that the ACP: "*refused to agree to additional rules for DAB proceedings which would have ensured a more streamlined process*."[811] Panama submits that this is not true and, in any event, it is an "*absurd*" basis upon which to seek to establish expectations.[812]

418. Sacyr argues that the ACP "*abusively*" imposed waivers on GUPC in exchange for approving legitimate variations. Panama submits that this complaint is misleading.[813] VO14 was to GUPC's benefit, despite the fact that it had breached the Contract. The ACP helped GUPC to avoid a multi-million-dollar claim. The only waiver identified by Sacyr was, in Panama's submission, a reasonable response to Sacyr's breach of the Contract.[814]

419. The ACP was not obliged to accept all of Sacyr's or GUPC's cost overrun claims, irrespective of whether they were supported by the Contract's terms and evidence. Panama submits that if Sacyr had any such expectation, it had also failed to demonstrate that such an expectation would have been reasonable.[815]

---

808 *Lock Gates and Labor* Arbitration, Final Award, [1056] (**RLA-283**).
809 Rejoinder on the Merits, [898].
810 Rejoinder on the Merits, [898].
811 Reply on the Merits, [259].
812 Rejoinder on the Merits, [898].
813 Rejoinder on the Merits, [899].
814 Rejoinder on the Merits, [899].
815 Rejoinder on the Merits, [900].

ix. Panama and the ACP Acted Transparently

The Minimum Standard of Treatment does not Contain an Obligation of Transparency

420. Panama submits that there is no obligation of transparency under the minimum standard of treatment.[816] Even if the autonomous FET standard applied, tribunals must safeguard only the most fundamental notions of transparency and States are accorded a significant margin of deference. Panama submits that States are not under a duty to correct any potential misunderstandings on the part of an investor.[817] In addition to according due deference to States, the application of a transparency obligation under an autonomous FET standard also requires consideration of the legal framework as a whole. The tribunal in *Orazul v. Argentina* stated that:

> *The obligation upon a State to be transparent involves an obligation of publicity, whereby the State must make available in an accessible form the legal and administrative requirements applicable to the investor, as well as an obligation to act with candour. Under such standard, the tribunal is to ascertain in light of all factual circumstances whether the State has failed to be transparent with respect to its laws and regulations and whether such failure was fundamental.*[818]

421. Professor Schreuer explains:

> *Transparency means that the legal framework for the investor's operations is readily apparent and that any decisions affecting the investor can be traced to that legal framework.*[819]

816 Rejoinder on the Merits, [915].
817 Rejoinder on the Merits, [916].
818 *Orazul International Espana Holdings S.L. v. Argentine Republic*, ICSID Case No. ARB/19/25, Award, 14 December 2023, [725]–[731] (holding that the State did not breach its obligation of transparency where (i) the State "*made accessible the legal and administrative requirements applicable to the Claimant's investment and that all acts could be traced to the applicable legal framework*;" (ii) "*[i]t was apparent for the Claimant that the Respondent would be adopting a number of the measures it enacted*;" (iii) the claimant knew about the potential regulatory changes; (iv) "*the regulatory framework was continuously adapted to the existing circumstances*;" and (v) the State "*consistently recalled the objective of adapting the applicable rules to the current circumstances*" and to its overall objectives) (**RLA-313**).
819 C. Schreuer, "Fair and Equitable Treatment in Arbitral Practice", (2005) 6(3) The Journal of World Investment & Trade 357, p. 374 (**CLA-239**).

422. Sacyr relies on *Nordzucker v. Poland* as authority for the proposition that there is a requirement for transparency. However, Panama submits, the relevant finding is apparent when the case is read in proper context:

> *This Arbitral Tribunal finds that the lack of information regarding the actual reasons of its possible refusal of consent, in combination with the lack of open and frank communication by the Ministry in the period October 2000 – March 2001 about what was upholding the sales constitutes a lack of transparency which Poland was under the BIT obliged to show in its dealings with a prospective investor who had completed the entire sales procedure and who was waiting for the other party to agree or at least tell him clearly what he had to do when a "hint" proved insufficient to push him into action.*[820] [Panama's emphasis]

423. Panama asserts that even if transparency were part of the applicable FET standard, the threshold for breach is high, requiring "*complete silence*" and "*total inaction*" from the State for several months.[821] Transparency would not therefore require, as Sacyr alleges, advance notification of measures targeted at the investor in order to allow the investor an opportunity to be heard.[822] Sacyr has not shown that such an obligation exists, whetherunder Panamanian law or according to the ACP Regulations. Sacyr's asserted standard further lacks any foundation in the Treaty.[823]

Panama did not Fail to Disclose "*Key Information*" Material Regarding the Quality of the PLE Basalt

424. Sacyr contends that the following documents were withheld by the ACP:

(i) two sulfate soundness tests that allegedly "*reported failed results*" (the August 2008 URS Report and the 2005 UTP Report);

[820] *Nordzucker AG v. Republic of Poland*, UNCITRAL, Second Partial Award, 28 January 2009, [84] (**CLA-185**).
[821] Rejoinder on the Merits, [922(e)].
[822] Rejoinder on the Merits, [922(f)].
[823] Rejoinder on the Merits, [922(f)].

(ii) ACP's internal assessment of November 2005, which had assessed the probability of "*rock [being] unsuitable as aggregate*" as between 20% and 39% (the November 2005 Risk Assessment);

(iii) two reports titled "Peer Review of the Third Lane Locks, Alignment Channels, Water Saving Basins and Other Related Improvements, Part 1: Locks Program" dated 30 September 2004 and 11 October 2004 (the Parsons Brinckerhoff documents); and

(iv) Part III of the publicly available Final Report on Modified Third Locks Project prepared by the United States (the Historical Documents).

425. According to Sacyr, these documents would have raised "*red flags*" regarding the durability of the basalt and about using basalt for concrete aggregate production without having to engage in unreasonable industrial crushing tests. Panama submits that Sacyr's allegations are false.[824]

426. Panama submits that some of these documents do not relate to the TSLP area and are thus irrelevant. Moreover, the August 2008 URS Report has been in Sacyr's possession since 2009.[825]

427. Panama reiterates that Sacyr's complaint is not that the PLE basalt was unsuitable or non-durable, but rather that the basalt produced an excessive amount of fines when crushed. The documents on which Sacyr relies would not have raised "*red flags*" regarding the amount of fines that the basalt would produce when crushed. Rather, crushing tests were recommended by the documents that were provided to the Tenderers and would have shown that information.[826]

428. The ACP provided the Tenderers with thousands of pages of information and gave them ample opportunity to test the materials, visit the Site and inspect core boxes. Panama submits that it is hard to reconcile the claim that the ACP wanted to induce the Tenderers to make mistakes and bid a low price when the ACP gave the Tenderers, all of which

824 Rejoinder on the Merits, [924].
825 Rejoinder on the Merits, [925].
826 ACP, Technical Report 2006-13, *Tests on Pacific Site Basaltic rock as fine aggregate or manufactured sand to replace the natural sand*, July 2006, p. 7 of PDF (**C-145**).

were world class experts in their fields, ample opportunity to conduct their own due diligence.[827]

429. Panama addresses the specific documents on which Sacyr relies as follows:[828]

(i) **the Sulfate Soundness Tests (the August 2008 URS Report and the 2005 UTP Report)**: a sulfate soundness test is intended to assess the soundness or durability of aggregates when subject to freeze-thaw conditions in concrete. The test has little application in Panama, which is considered a "*Negligible Weathering Region*" under the ASTM C33 specifications, because it does not experience the freeze-thaw conditions that the sulfate soundness test is intended to simulate.[829] Panama submits that the test and its results are thus irrelevant to assessing the amount of fines that the basalt will produced when crushed.[830] Moreover, as explained by Dr. MacDonald, the sodium sulfate test is imprecise, highly variable, and unreliable.[831]

(ii) **the 2008 Sulfate Soundness Test (the August 2008 URS Report)**: Panama submits that this test does not pertain to the PLE and, in any event, the test has been available to Sacyr since the summer of 2009, even before Sacyr entered into the Contract and began crushing basalt.[832] The tested sample was a combination of basalt and agglomerate (a weaker material than basalt) and thus was in no way representative of sound basalt from the PLE.[833]

(iii) **the 2005 Sulfate Soundness test (the 2005 UTP Report)**: The UTP Report is a laboratory report containing the results of certain ASTM tests on samples described as "*Miraflores basalt*." This term refers to basalt collected from within an area larger than the PLE and which has highly variable characteristics. The exact location of the sample analyzed is unclear. The Miraflores basalt is not

827 Rejoinder on the Merits, [927].
828 Rejoinder on the Merits, [928].
829 Standard Specification for Concrete Aggregates–ASTM C33–23, Table 4 (**R-540**).
830 **RER-7** MacDonald, [4.5], [4.21].
831 **RER-7** MacDonald, [4.25]–[4.35].
832 **RWS-5** Fernández II, [13]–[14].
833 URS, Final Technical Memorandum, "Task A.2.3, In-Situ Construction Materials, Dam 1E, Geotechnical Interpretive Report (GIR)", 15 August 2008, p. ES-1 (**C-489**).

homogenous basalt.[834] In addition, the test result itself indicated certain anomalies. For instance, Dr. MacDonald explains that the test results showed a higher loss with a smaller fraction of material, which was an unexpected result calling into question the manner in which the test had been carried out.[835] Dr. MacDonald concludes that crushing tests would be far more informative to test excessive amounts of fine materials when basalt is crushed.[836]

(iv) **the November 2005 Risk Assessment**: this document shows that the risk that "*rock*" (not basalt from the PLE) might be "*unsuitable as aggregate*" was ranked as "*moderate*" – a combination of a low 'probability' and high 'impact' qualitative assessment. The risk that was being assessed had not changed with respect to the other assessments that were provided to the tenderers.

(v) **Parsons Brinckerhoff Documents:** These documents were prepared by Parsons Brinckerhoff and Montgomery Watson Harza ("**MWH**"). Contrary to Sacyr's assertions, Panama submits that these documents did not address Panama's assumption that fine aggregates could be produced from PLE basalt, because there is no reference to the PLE basalt.

(vi) **Historical Documents**: a full copy of the index to the Final Report on Modified Third Locks Project prepared by the United States was included in the Volume VI Documents. In the *Cofferdam* Arbitration, GUPC admitted it had reviewed the index and that it knew at the tender stage that a Part III existed and decided not to request it.[837] The document is publicly available in the U.S. National Archives, and Sacyr could have requested it from the Archives. In any event, this document does not contain any warnings regarding potential aggregate production problems.[838]

---

834 **RER-7** MacDonald, [5.11].
835 **RER-7** MacDonald, [5.11]–[5.13].
836 **RER-7** MacDonald, [2.4].
837 *Cofferdam* Arbitration, Sembenelli Witness Statement, [50] ("*We also studied the GDR that ACP had provided … The GDR among other things included the table of contents and select chapters of a report prepared by the Isthmian Canal Company*") (**R-339**).
838 Rejoinder on the Merits, [928(d)].

430. Panama concludes that, considering the vast amount of information that the ACP provided to the Tenderers, the claim that the results of a single additional test (the 2005 UTP Report) of a small sample would have made a difference to Sacyr's decision to bid "*is simply a litigation strategy*".[839] As the *Concrete* tribunal has already determined, the RFP documents "*would have put the Contractor on notice concerning the variability of the material that could be expected to be found in the PLE.*"[840] A single test showing a result of 2.8% above the acceptable threshold does not mean that the basalt was unsuitable and, in any event, a sulfate soundness test is irrelevant for purposes of knowing the amount of fines that the basalt will produce when crushed.[841]

The ACP did not Fail to Disclose Key Seismic Information Relevant to the Lock Gates

431. On 11 May 2023, the *Lock Gates and Labor* tribunal issued its award. It rejected all of Claimant's accusations of lack of transparency and good faith in relation to the Lock Gates. Panama accordingly reiterates:[842]

(i) there never was a specific warning from BTM regarding the seismic reduction factor contained in the Reference Design;

(ii) the Reference Design was provided for information purposes only. It was clear to all competent parties involved that the Lock Gates would be differently designed from the design shown in the Reference Design;

(iii) after the Contract was awarded, BTM communicated its concerns regarding GUPC's design to the ACP. The ACP sent BTM's letter to GUPC. GUPC did nothing of substance in response to BTM's letter dated 28 July 2009 because it "*thought that BTM's criticisms may be the reaction of a disgruntled bidder*;"[843]

(iv) the CPP Report did not give any warning regarding the Seismic Reduction Factor. In addition, the ACP was under no obligation to provide the CPP Report to the Tenderers, as the report had been prepared for the ACP's own internal

839 Rejoinder on the Merits, [929].
840 *Concrete* Arbitration, Partial Award, [980] (**RLA-167**).
841 Rejoinder on the Merits, [930].
842 Rejoinder on the Merits, [932].
843 **CWS-1** Zaffaroni I, [86].

purposes and the Contractor bore full responsibility for the design of the Lock Gates; and

(v) finally, it is clear that GUPC undertook its own design of the Lock Gates and did not follow or rely on the Reference Design.

The ACP Transparently Modified Its Regulation

432. In August and September 2008, the ACP published the amendments to its Regulation in the Bulletin of the Registry of the ACP, which is publicly available on the ACP's website.[844] The ACP published the amendments at least five months before the deadline for Tenderers to submit bids. Panama submits that Claimant either was, or should have been, aware of these amendments when it placed its bid. Panama submits that, despite being ordered to produce documents regarding its due diligence, Sacyr has failed to demonstrate that it acted diligently to review these amendments.[845]

433. In addition, the amendments introduced by the ACP were not specific to the TSLP or Sacyr, but they applied to all contractors and contracts entered into by the ACP.[846] The amendments reinforce the sanctity of contracts, and as such reinforced the TSLP Contract.

434. Panama submits that Claimant's argument that during the tender process it was not in a position to appreciate the true significance of Panama's amendments when they were introduced is an admission of a lack of due diligence.[847]

435. Panama objects to Sacyr's claim that the ACP's amendments caused the transfer of risk to the potential contractor. The risk allocation clearly arises from the Contract to which the Parties had mutually agreed after a 14-month long negotiation process.[848]

844 Rejoinder on the Merits, [934].
845 Rejoinder on the Merits, [934].
846 Rejoinder on the Merits, [935].
847 Rejoinder on the Merits, [936].
848 Rejoinder on the Merits, [937].

436. In addition, the ACP is not a construction or engineering company. The expertise of the ACP is to operate the Canal. The Contractor was in a better position fully to appreciate the risks related to the Project.[849]

x. Panama and the ACP Acted in Good Faith

States Enjoy a Presumption that Statements by Public Officials are Made in Good Faith

437. Panama submits that the standard for proving a breach of good faith conduct is high. States enjoy a presumption that statements by public officials are made in good faith and a claimant must provide "*clear*" and "*convincing*" evidence to the contrary.[850]

438. Panama relies on *ConocoPhillips v. Venezuela*, in which the tribunal recognised that because the standard for breach of good faith is high, courts and tribunals seldom hold that respondent States have breached a good faith or other related standard on the basis of statements by public officials.[851]

439. Sacyr relies on *Desert Line v. Yemen* as an example of a treaty tribunal finding that a State's conduct was in breach of good faith and therefore the FET standard. Panama asserts that the underlying facts of that case are extreme and they bear no similarity to the present case.[852] Sacyr also relies on *Azurix v. Argentina*, in which the tribunal found a breach of FET by reason of Argentina's conduct, which included a governor and a mayor making repeated calls for citizens not to pay their bills to the concessionaire; a prohibition on the concessionaire billing; and threats to a regulating agency for allowing the concessionaire to resume billing. Those statements were considered together to amount to a violation of the relevant treaty. Panama submits that the circumstances are distinguishable from the present case.[853]

No Disparaging Statements about the Claimant

440. Panama submits that its statements made in the face of GUPC's threatened and actual breach of the Contract, notably the stopping of the Works, were justified and not made

849 Rejoinder on the Merits, [938].
850 Rejoinder on the Merits, [942].
851 Counter-Memorial on the Merits, [671].
852 Rejoinder on the Merits, [945].
853 Rejoinder on the Merits, [945].

in bad faith.[854] Sacyr does not address the context surrounding the statements of Panama's public officials about which it complains. Between 2012 and 2014, the ACP provided voluntary financial aid to GUPC to help it address its cash flow "*mismanagement*," which GUPC initially stated was caused by the global financial and liquidity crisis.[855] Despite the ACP's voluntary financial assistance, Panama says, GUPC made numerous demands for more money, while threatening to stop work. In addition, one of GUPC's Shareholders issued a public statement indicating that if GUPC's demands were not accepted, "*Panama [would] not have its new Canal*."[856] In early 2014, despite having received more than US$ 700 million in financial aid from the ACP, GUPC stopped all work on the Canal. Panama submits that, understood in that context, ACP leaders and Panamanian officials publicly commented on GUPC's unilateral decision to stop work and its illegitimate demands for more financial assistance.[857]

441. Panama explains that the statements cited by Claimant were "*measured and made in good faith*", particularly considering the circumstances.[858]In particular, those of:

(i) Honorable Deputy Juan Carlos Arosemena: "*I am extremely concerned about what is happening with the Panama Canal, and this Parliament has not expressed its opinion on it. We are seeing, without wishing to judge, an attitude on the part of the Spanish and Italian companies, an attitude that suggests a certain degree of blackmail. It is not possible that they have tendered three thousand two hundred million dollars and now they are putting in addendums for almost fifty per cent of the cost: that is dangerous.*"[859]

(ii) Honorable Deputy Julio Luque: "*I also listened to Director Quijano's statements this morning at a press conference, and my fears are growing every day, every*

854 Rejoinder on the Merits, [948].
855 Letter from the Contractor to the ACP (GUPC-IAE-1284), 19 June 2012, (**C-295**).
856 Webuild, Press Release, 8 January 2014, ("*The alternative to the completion of the works by the current consortium would result in a delay of at least three years … If these proposals were not accepted … Panama will not have its new Canal or the revenues deriving from the operation of the new canal*.)" (**R-333**); GUPC Press Release, "GUPC Continues to seek Panama Canal Solution Despite Break in Negotiations by Canal Authority", 5 February 2014, (**C-362**).
857 Rejoinder on the Merits, [950].
858 Rejoinder on the Merits, [951].
859 Minutes of the Session of the National Assembly, 21 January 2014, (translation completed by Panama), p. 7 of PDF (**C-354**).

> *moment, that precisely because we have to finish the work and we are going to finish it, we will end up, in some way, acceding to this blackmail by [GUPC]. The Administrator was emphatic when he said: 'We are going to finish it, but we are not going to submit to blackmail. Someone must pay for it. Legal actions have to be taken, here or anywhere in the world, because we are right.'*"[860]

442. Even if Sacyr could establish that any statements by Panamanian officials were made in bad faith or intended to cause harm to its investment, Panama submits that this alone is not sufficient to establish a breach of the Treaty.[861]

443. Panama points to *Omega v. Panama*, in which the tribunal explained that, even recognizing there may be "*evidence that comments manifesting a desire to do harm to the Claimants were made by certain State actors*", the claimants' treaty claims failed. The evidence "*point[ed] to legitimate commercial reasons as the relevant cause of the Project contract failures*" and there was an "*absence of evidence of concerted action by State organs and actors to destroy the Claimants' investment*."[862] In the present case, the conduct that forms the basis of Sacyr's claims was entirely commercial in nature, and Sacyr has failed to establish any attempt by the State to cause harm to its investment.[863]

The ACP did not Delay the MOU or Variation Order No. 108

444. GUPC stopped all work under the Contract on 5 February 2014.[1827] From February until early March 2014, Panama submits that the ACP was being pressured to agree to provide GUPC with extraordinary additional financial support.[864] GUPC was holding the bespoke lock gates in Italy and, as a result, Panama asserts that the ACP agreed to provide additional financial assistance. On 13 March 2014, the ACP entered into the MOU by which it agreed to an immediate injection of US$ 200 million (US$ 100 million each from the ACP and GUPC), resumption of the works, and a framework and outline

860 Minutes of the Session of the National Assembly, 5 February 2014, p. 4 of PDF (**C-364**).
861 Rejoinder on the Merits, [954].
862 *Omega Engineering LLC and Oscar Rivera v. Republic of Panama*, ICSID Case No. ARB/16/42, Award, 14 October 2022, [319] (**RLA-293**).
863 Rejoinder on the Merits, [954].
864 GUPC Press Release, "GUPC Continues to seek Panama Canal Solution Despite Break in Negotiations by Canal Authority", 5 February 2014, (**C-362**); Email from C. Lamm (White & Case) to B. Machlin (Mayer Brown), 6 February 2014, (**R-528**); and Email from C. Lamm (White & Case) to B. Machlin (Mayer Brown), 6 February 2014, (**R-529**).

terms for a subsequent Variation Order to the Contract (Variation No. 108), which would provide even more financial assistance to GUPC.[865]

445. Sacyr contends that the ACP delayed Variation No. 108's effective date, namely 25 April 2014. Panama submits that this was a target. Moreover, Panama asserts, any delay was due to GUPC's inability to secure its own financing. In addition, the effective date was not going to be the date of the signature of Variation No. 108, but rather the date upon which all the key conditions precedent had been met, including a key condition precedent that GUPC secure US$ 400 million in financing.[866] Panama submits that obtaining financing was under the control of GUPC and its other Shareholders. Any delay was thus a result of GUPC's actions.[867]

446. Variation No. 108 was signed on 1 August 2014, but GUPC did not satisfy the conditions for achieving the effective date until 8 September 2014. The delays related to the execution of Variation No. 108 or the MOU are not attributable to the ACP or Panama but to GUPC's own delay in obtaining financing.[868]

xi. Panama and the ACP did not Act Arbitrarily

447. Panama submits that Sacyr has failed to substantiate its claim of "*arbitrary*" treatment in violation of the obligation to provide FET. Panama submits that the threshold for a finding of arbitrariness is high and more demanding than the threshold for a finding of unreasonableness.[869] As noted above, tribunals characterise the standard for arbitrariness as "*a willful disregard of due process of law, an act which shocks, or at least surprises a sense of juridical propriety*."[870]

448. Panama submits that Decree No. 6 was the result of negotiations between GUPC and its workers (through SUNTRACS).[871] The Ministry of Labor successfully mediated the

---

865 Variation Agreement No. 108 relating to Contract CMC-221427 for the Design and Construction of the Third Set of Locks, 1 August 2014, (**C-48**).
866 Variation Agreement No. 108 relating to Contract CMC-221427 for the Design and Construction of the Third Set of Locks, 1 August 2014, [9] (**C-48**).
867 Rejoinder on the Merits, [958].
868 Rejoinder on the Merits, [959].
869 Rejoinder on the Merits, [962].
870 Counter-Memorial on the Merits, [691]; citing *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment, ICJ Reports 1989, 20 July 1989, [128] (**RLA-172**).
871 Counter-Memorial on the Merits, [217].

negotiations and assisted the parties in reaching a mutually acceptable agreement.[872] In the agreement reached by GUPC and SUNTRACS on 21 January 2012, GUPC affirmed "*that it will abide by and apply the new wage rates decreed by the Executive Branch through the modification of Executive Decree No. 3 of March 4, 1980*".[873] Panama submits that Decree No. 6 codified this agreement between GUPC and SUNTRACS, and was beneficial to GUPC because it ended the labour stoppage and it allowed GUPC to recover from the ACP more of its increased costs than it would have been able to do, had it reached a private settlement.[874]

449. When Decree No. 6 was issued, GUPC put out a press release expressly thanking the Ministry of Labor for its participation as a mediator in the settlement of the labour dispute.[875] Panama submits that this action is inconsistent with Sacyr's claim that Panama acted arbitrarily. In any case, a 15% increase in the minimum wage after 32 years for all the workers involved in the Canal expansion, not only GUPC's workers, was well within the sovereign prerogatives of Panama.[876]

450. GUPC received a financial benefit because of Decree No. 6. It was able to recoup 70% compensation of its additional salary and overtime costs, plus compensation in respect of broader labour costs. Panama submits that, as a consequence of Decree No. 6, GUPC has been paid nearly US$ 22 million by the ACP which it would not have received had the settlement not been codified.[877] In addition, the Contractor claimed further monies in the *Lock Gates and Labor* Arbitration and was successful in principle, subject to proving other points to show its entitlement.[878] The Contractor has also applied to add those issues to the matters before the *Disruption* tribunal.[879] Panama submits that the

---

872 Settlement Agreement for the Termination of the Conflict and Resumption of Works, 21 January 2012, p. 1 (**C-286**).
873 Settlement Agreement for the Termination of the Conflict and Resumption of Works, 21 January 2012, p. 3 (**C-286**).
874 Rejoinder on the Merits, [966].
875 GUPC Press Release, Stoppage by Expansion Workers Ends [*Finaliza Paro de Trabajadores de la Ampliación*] (**R-229**).
876 Rejoinder on the Merits, [967].
877 Rejoinder on the Merits, [968].
878 *See Lock Gates and Labor* Arbitration, Final Award, [1105(e)] (**C-622**); *Lock Gates and Labor* Arbitration, Award Addendum, [7(c)] (**R-380**).
879 *Disruption* Arbitration, Claimants' Application to Introduce New Claims, (**R-531**).

Contractor has therefore claimed all the monies in issue in other *fora* and there is nothing left to claim in this Arbitration.[880]

451. With respect to GUPC's increased costs, Panama emphasises that the ACP was under no contractual obligation to fund Claimant or GUPC, or to accept Claimant's request for funding. There is nothing arbitrary in applying contractual provisions that require proper presentation and justification of claims.[881]

(2) Full Protection and Security

A. Claimant's Position

452. Sacyr submits that Panama breached its obligation under Article IV of the Treaty to provide full protection and security ("**FPS**") to Claimant's investment by: (i) failing to provide a physically safe environment for Claimant's investment; and (ii) failing to provide legal security and protection for Claimant's investment.[882]

i. The FPS Standard

453. The FPS obligation requires Panama to take all reasonable, precautionary and remedial measures to ensure a secure investment environment. It also obliges Panama to ensure that neither it, nor third parties, devalue or withdraw the security and protection of the foreign investor and its investment.

454. Sacyr submits that the FPS obligation covers the physical, legal and commercial security of the protected investment.[883] Sacyr relies on the summary of the scope of FPS in *Biwater Gauff v. United Republic of Tanzania*:

> *[W]hen the terms "protection" and "security" are qualified by "full", the content of the standard may extend to matters other than physical security. It implies a State's guarantee of stability in a secure environment, both physical, commercial and legal. It would in the Arbitral Tribunal's view be unduly artificial to confine the notion of "full security" only to one aspect of security,*

880 Rejoinder on the Merits, [968].
881 Rejoinder on the Merits, [969].
882 Reply on the Merits, [292].
883 Memorial on the Merits, [297].

> *particularly in light of the use of this term in a BIT, directed at the protection of commercial and financial investments.*[884]

455. Panama argues that Claimant's FPS claim fails, because the standard of protection does not encompass legal and commercial security. Sacyr submits that interpreting the FPS standard to exclude legal and commercial security would be inconsistent with the ordinary meaning of the provision, which includes the word "*full*."[885] There is no language in the Treaty limiting the FPS standard to physical security. Several tribunals have endorsed an appropriately broad reading of the FPS standard in cases where the FPS provision did not explicitly exclude legal and commercial protection.[886]

456. Sacyr submits that the FPS obligation also requires the host State to protect investments against the actions of third parties and the host State itself.[887] As the tribunal held in *CME v. Czech Republic*:

> *The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued.*[888]

457. Panama contends that Claimant's FPS claim should fail, because the FPS standard is meant to protect only from actions of third parties. Sacyr submits that Panama's position is too narrow;[889] it says that the FPS Standard protects the investment both from actions of third parties and from actions of the State and its organs.[890] Sacyr relies further on the following passage in *Parkerings-Compagniet v. Lithuania:*

> *A violation of the standard of full protection and security could arise in case of failure of the State to prevent the damage, to restore the previous situation*

---

884 *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, [729] (**CLA-17**).
885 Reply on the Merits, [302(a)].
886 Reply on the Merits, [302(b)].
887 Memorial on the Merits, [298].
888 *CME Czech Republic B.V v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, [613] (**CLA-160**).
889 Reply on the Merits, [301].
890 *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, [613] (**CLA-160**); *(DS)2 S.A., Peter de Sutter and Kristof De Sutter v. Madagascar II*, ICSID Case No. ARB/17/18, Award, 17 April 2020, [303] (**CLA-216**) ("*The obligation of constant security and protection comprises harmful actions of third parties, as well as those perpetrated by organs and representatives of the State*.").

> *or to punish the author of the injury. The injury could be committed either by the host State, or by its agencies or by an individual.*[891]

ii. Panama Failed to Provide a Physically Safe Environment

458. Sacyr's FPS claim is that Panama devalued the physical security of the investment by enacting Law 30, which Panama knew, or should have known, would cause severe disruption to the Project.[892]

459. The adoption of Law 30 was expected to be met with opposition and protests. During debates at the Commission on Labor, Health and Social Development, opponents warned that deaths can "*happen if the Law is not withdrawn, because we warned and said that this was a very sensitive issue*,"[893] that the law would cause "*angst, blood, grief and pain*," or that "*it will reverberate into big and grave problems for all the different component of the Panamanian social structure*."[894]

460. Violent protests and strikes against Law 30 resulted in the detention, injury and death of several protestors.[895] This had an immediate effect on the Project. The Law eliminated the requirement for employers to deduct union dues from workers' salaries. Given that GUPC employed thousands of Panamanian workers whose union dues were previously automatically withheld by GUPC and transferred to SUNTRACS: "*[t]hese dues from GUPC's workers made up [a]considerable proportion of SUNTRACS' fund, and thus their reduction would greatly impair SUNTRACS' finances*."[896] SUNTRACS immediately retaliated with protests and strikes, forcing GUPC's employees to stop working on both the Atlantic and Pacific sites.[897]

461. Panama argues that Sacyr's FPS claim should fail, because the FPS Standard requires actual physical harm to the investment, which Claimant has not proven. Sacyr reiterates

---

891 *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, [355] (**CLA-189**).
892 Reply on the Merits, [295].
893 *See* Minutes of the Session of the Commission on Labor, Health and Social Development, 20, 21, 22, 26 and 27 July 2010, p. 53 (**C-553**).
894 See Minutes of the Session of the Commission of Labor, Health and Social Development, 13 October 2010, p. 21 (**C-554**).
895 Minutes of the Session of the Commission on Labor, Health and Social Development, 20, 21, 22, 26 and 27 July 2010, [16], [47] (**C-553**).
896 *Disruption* Arbitration, Witness Statement of Monica Fossati Franceschi, 13 October 2021, [27] (**R-216**).
897 Memorial on the Merits, [183(a)].

that none of the cases cited by Panama supports the proposition that the investor must suffer physical harm to make out a breach of FPS. Sacyr asserts that it suffered significant damages as a result of Panama's failure to provide FPS.[898]

462. Panama further argues that the FPS obligation does not protect investments against the State's right to legislate or regulate in a manner that negatively affects them. Yet, Sacyr submits, even the case law cited by Panama is clear that the FPS "*does not protect against a state's right […] to legislate or regulate in a manner which may negatively affect a claimant's investment, provided that the state acts reasonably in the circumstances and with a view to achieving objectively rational public policy goals*".[899] However, Sacyr submits that, in promulgating Law 30, Panama did not act reasonably in the circumstances and with a view to achieving objectively rational public policy goals.[900] In this connection, Sacyr submits that the ultimate proof that Panama was not acting reasonably in such a way was the speed with which Panama repealed Law 30.[901]

463. Panama argues that the riots and strikes as a result of Law 30 did not amount to a breach of Panama's FPS obligation, because Panama did not encourage or support them. Sacyr submits that Panama does not need to have encouraged or supported the strikes and protests in order to breach its FPS obligation. The FPS standard obliges Panama to ensure that third parties do not devalue or withdraw the security and protection of the foreign investor and its investment. Enacting Law 30, despite knowing that it would result in violent protests and strikes, was enough.[902]

iii. Panama Failed to Provide Legal Protection and Security to Claimant's Investment

464. In its Memorial, Sacyr contended that Panama's responsibility under the FPS Standard included protection against the illegitimate actions of State organs and, as a result, Panama was obliged to protect Claimant from ACP's alleged wrongful acts, which included:[903]

---

898 Reply on the Merits, [296].
899 *AES Summit Generation Limited et al v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, [13.3.2] (**RLA-210**). [Claimant's emphasis]
900 Reply on the Merits, [297].
901 Reply on the Merits, [298(d)].
902 Reply on the Merits, [299].
903 Memorial on the Merits, [301(a)–(c)].

(i) the ACP's attempts to disavow its obligations to Claimant under Panamanian law pursuant to Articles 1B and 6D of the ACP Acquisition Regulation in order to try to limit Claimant's remedies to those that were strictly available under the Contract;

(ii) the ACP's systematic rejection of Claimant's claims, its obstructive approach towards resolution of the claims by the DAB and its refusal to comply with the DAB's decisions on liability; and

(iii) the ACP's refusal to resolve in good faith the cash crisis faced by GUPC in 2013–14 due to the ACP's conduct.

465. In its Reply, Claimant submits that Panama failed to provide legal protection and security to Claimant's investment by:

(i) failing to protect Sacyr from the illegitimate actions of ACP; and,

(ii) accepting the militant tactics of the labour union, SUNTRACS, in 2012 and increasing the minimum wages payable only to employees working on the Project by enacting Decree No. 6.[904]

466. Sacyr's submissions in respect of these two arguments are set out in more detail above.

B. Respondent's Position

i. The FPS Standard

467. Panama submits that paragraph 1 of Article IV of the Treaty limits the FPS obligation to MST under customary international law. Panama relies on *Glamis Gold v. United States* for the following proposition:

> *The question thus becomes: what does this customary international law minimum standard of treatment require of a State Party vis-à- vis investors of another State Party? Is it the same as that established in 1926 in* Neer v. Mexico*? Or has Claimant proven that the standard has "evolved"? If it has evolved, what evidence of custom has Claimant provided to the Tribunal to*

[904] Reply on the Merits, [300].

determine its current scope? As a threshold issue, the Tribunal notes that it is Claimant's burden to sufficiently answer each of these questions.[905]

468. Panama submits that customary international law imposes two obligations on a State:[906]

(i) the State must provide protection to a foreign national's investments from physical harm by third parties; and

(ii) the level of protection to be accorded is not absolute; rather, the State: (i) must exercise "*vigilance*" and "*due diligence*" with respect to harm that may befall the investment; and (ii) must "*take steps*" to prevent the harm from coming to the investor or continuing.[907]

469. In other words, Panama submits, the FPS obligation does not guarantee that an investor will not suffer losses.[908] FPS clauses require nothing more than the general duty to provide protection and security of foreign nationals under MST.[909] The tribunal in *Tulip Real Estate v. Turkey*, for example, underscored that "*the FPS standard does not impose a 'strict liability obligation*'" and "*[t]he question of whether the State has failed to ensure FPS is one of fact and degree, responsive to the circumstances of the particular case*."[910]

470. Consistent with principles of customary international law, if a claimant is advocating for a reading of MST that goes beyond the obligation to provide physical security, it must prove: (i) that such rule or principle has crystallized into widespread and consistent State practice; and (ii) that such State practice flows from a sense of legal obligation (i.e., *opinio juris*).[911]

---

905 *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009, [600]–[601] (**RLA-300**).

906 Rejoinder on the Merits, [979].

907 Rejoinder on the Merits, [979], citing *Asian Agricultural Products (AAPL) Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, [53] (**RLA-121**).

908 Rejoinder on the Merits, [980].

909 *See Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, [164] (**RLA-40**).

910 *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014, [430] (**RLA-84**).

911 *See, e.g.*, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, ICJ Reports 2012, 3 February 2012, [55] ("*[T]he existence of a rule of customary international law requires that there be 'a settled practice' together with* opinio juris") (**RLA-336**); *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Judgment, ICJ

471. Sacyr relies on the decision in *Roussalis v. Romania* for the proposition that there is authority for an interpretation of FPS that goes beyond requiring physical harm or destruction, such that it extends to legal protection for the investor.[912] Panama submits that this is incorrect. The *Roussalis v. Romania* tribunal recognised that the prevailing approach for FPS is that a State must:

> *[P]rotect more specifically the physical integrity of an investment against interference by use of force.*

The tribunal acknowledged that: *"[t]here is also authority indicating that the principle of [FPS] reaches beyond safeguard from physical violence and requires legal protection for the investor".* The principle of FPS "*implies a State's guarantee of stability in a secure environment, both physical, commercial and legal*." To this extent, the tribunal stated that "*the standard is also covered by Fair and Equitable treatment.*"[913]

472. Sacyr also submits that the Gold Reserve v. Venezuela tribunal: "*did not state that actual physical harm must exist in order to find a breach of the FPS standard.*"[914] Panama submits that in the paragraphs cited by Sacyr, the *Gold Reserve v. Venezuela* tribunal actually held that:

> *[T]he more traditional, and commonly accepted view [of FPS], as confirmed in the numerous cases cited by Respondent is that this standard of treatment refers to protection against physical harm to persons and property.* […] *Accordingly, the Tribunal finds that the obligation to accord full protection and security under the BIT refers to the protection from physical harm.*[915]

Reports 1969, 20 February 1969, [77]–[78] (**RLA-299**); *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009, [602] (**RLA-300**).

912 Reply on the Merits, [296], footnote 775.

913 *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011, [319]–[321], (**RLA-218**).

914 Reply on the Merits, [296], footnote 775.

915 *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, [622]–[623] (**RLA-89**).

473. Panama submits therefore that Sacyr has failed to establish that the FPS obligation extends to protection against devaluing physical security or to legal and commercial security.[916]

ii. Law 72

474. Panama notes that Sacyr has seemingly abandoned its claim that Panama allegedly breached its FPS obligation by enacting Law 72 in October 2012, which, it asserted, resulted in work stoppages.[917]

475. Panama submits that Sacyr's allegations regarding Law 72 lacked merit. Law 72 was neither labour-related, nor had any nexus to the Third Set of Locks Project or GUPC's sites. Sacyr's own evidence established that the ACP and Panamanian officials offered protection to both GUPC and its workers to reduce the disruptions caused by the related work stoppages. In any event, GUPC's investment did not suffer any physical harm from the protests. The ACP contemporaneously compensated GUPC for any delay and costs on the Project caused by the Law 72 work stoppages.[918]

iii. The 2014 Work Stoppages

476. Panama suggests that Sacyr has also seemingly abandoned its claim that Panama allegedly breached its FPS obligation by purportedly ignoring GUPC's requests for support during a two-week SUNTRACS-initiated nationwide labour stoppage in April 2014.

477. Panama submits that Sacyr's claim regarding the 2014 two-week labour stoppage lacks merit, because Panama, through the Ministry of Labor, and the ACP, supported GUPC. Before the work stoppage began, the Ministry of Labor mediated the SUNTRAC-CAPAC negotiations.[919] During the work stoppage, within seven business days of receiving GUPC's requests, the Ministry of Labor's Regional Director promptly authorized GUPC's workers to have access to the Project sites for "*security and*

916 Rejoinder on the Merits, [988].
917 Rejoinder on the Merits, [989].
918 Rejoinder on the Merits, [990].
919 Counter-Memorial on the Merits, [239]; *Suntracs and Capac, Close to an Agreement* [*Suntracs y Capac, cerca de acuerdo*], La Estrella de Panamá, 18 April 2014, p. 1 of PDF (**R-147**).

maintenance works."[920] After the work stoppage ended, the ACP contemporaneously compensated GUPC for any delay and costs that this work stoppage had caused the Project.[921]

iv. Panama's Alleged Lack of "*Legal*" Protection

478. Panama suggests further that Sacyr has also seemingly abandoned most of its claims against Panama for alleged lack of "*legal*" protection by failing to protect Sacyr from the illegitimate actions of the ACP. In its Reply, Sacyr provides no further details or evidence to support its allegation regarding the supposed failure to provide protection. Panama submits therefore that Sacyr has failed to discharge its burden of proof.[922]

479. Panama submits that Sacyr's claim boils down to an allegation that Panama should have instructed the ACP not to enforce its contractual rights. In addition to the fact that the Treaty's FPS Standard does not extend to "*legal and commercial*" protections, Panama submits that the claim fails, because Sacyr has not shown that its claim pertains to the physical, much less "*legal and commercial*," security of its investment.[923] These claims are addressed in more detail in the proceeding paragraphs.

<u>The ACP Acquisition Regulation Provided Tenderers with Predictability</u>

480. In its Memorial, Sacyr alleged that the ACP had limited its remedies to those that were strictly available under the Contract in a violation of the Treaty's FPS standard.[924] Panama submits that this claim has no merit and, in addition, it does not fall within the Treaty's FPS protections.

481. Panama submits that the amendments to the Acquisition Regulation, which applied to all ACP contracts, simply reaffirmed the principle of *pacta sunt servanda*, and provided

---

920 Counter-Memorial on the Merits, [241]–[242]; Letter from the Regional Director of Labor and Labor Development to GUPC, 5 May 2014, (**C-377**); Letter from the Regional Director of Labor and Labor Development to GUPC, 6 May 2014, (**C-378**); Letter from GUPC to ACP (GUPC-IAE-2854), 25 April 2014, (**R-148**); Letter from the ACP to GUPC (IAE-UPC-2192), 6 August 2014, (**R-154**); Letter from GUPC to the Regional Director of Labor and Labor Development, 2 May 2014, (**C-376**).

921 Rejoinder on the Merits, [994].

922 Rejoinder on the Merits, [995].

923 Rejoinder on the Merits, [997].

924 Memorial on the Merits, [301].

the Tenderers with predictability in knowing that they could rely on the terms of the Contract, thereby reinforcing the primacy of the Contract.[925]

The DAB Proceedings

482. Panama submits that GUPC deliberately and strategically delayed the DAB proceedings in the hopes of forcing the ACP into a settlement.[926] As noted above, Panama asserts that GUPC were the first to complicate the DAB proceedings by being the first party to introduce expert evidence.

GUPC Mismanaged Funds Created its "*Cash Crisis*"

483. Panama submits that Sacyr also appears to have abandoned its argument that the Treaty's FPS obligation required Panama to protect it from the ACP's alleged "*refusal to resolve in good faith*" GUPC's 2013–2014 cash crisis.[927] In any event, Panama submits that GUPC's purported "*cash crisis*" stemmed from GUPC's own mismanagement of the funds it received under the fixed-price Contract. The ACP was not obligated to provide additional funds to GUPC beyond the terms agreed in the Contract.[928]

Law 30

484. Sacyr submits that Panama devalued the physical security of GUPC by enacting Law 30. Sacyr specifically alleges that the enactment of Law 30 had the "*predictable*" and "*immediate*" effect of causing SUNTRACS to mobilize Project workers and stop working in protest.[929]

485. Panama explains that Law 30 was enacted in June 2010. It established, in relevant part, that an employer was no longer obligated to collect mandatory union dues from its employees,[930] that payment of union dues was voluntary for unionized employees,[931] that employers could temporarily suspend employment contracts of striking

925 Rejoinder on the Merits, [1000].
926 Counter-Memorial on the Merits, [252]–[254].
927 Rejoinder on the Merits, [1004].
928 Rejoinder on the Merits, [1005].
929 Reply on the Merits, [298(c)].
930 National Assembly, *Law No. 30 of 2010*, 16 June 2010, Article 12 (**R-88**).
931 National Assembly, *Law No. 30 of 2010*, 16 June 2010, Article 12 (**R-88**).

employees[932] and that employers could hire temporary workers to replace the striking workers.[933]

486. Panama submits that Sacyr has put forward no proper legal basis to support its claim.[934] Sacyr's reliance on *CME v. Czech Republic* is misguided. In *CME v. Czech Republic*, the claimant and a partner company formed a joint venture to operate a national television broadcasting company. The Czech Republic's media regulatory agency (the Media Council) had awarded to the claimant's partner a license for television broadcasting services but effectively required that the claimant enter into a joint venture as its investment. Both companies entered into a memorandum of association, which was incorporated as a license condition, and under which the claimant's partner would be the license-holder and the claimant would be the operator and services provider. The Media Council approved the memorandum of association.[1940] After a change in law aimed at re-establishing the Media Council's control of broadcasting operations, the Media Council began pressuring both companies to restructure the joint venture and to enter into a new service agreement. As part of its campaign, the media council, *inter alia*, initiated administrative proceedings against the claimant's investment and threatened to withdraw the broadcasting license.

487. The *CME* tribunal found that the Media Council had violated the Treaty when it dismantled the legal basis of the foreign investor's investments by forcing the foreign investor's joint venture company, ČNTS, to give up substantial accrued legal rights. The clear alternative available for the Media Council in this situation was to abstain from any pressure on CME/ČNTS and to allow the foreign investor to maintain its investment on the basis of the legal structure which had been developed jointly with the Media Council and which was the basis for the foreign investor's investment decision.[935]

488. Panama submits therefore that the *CME v. Czech Republic* tribunal did not hold that a State's FPS obligation included protection against the "*devaluing*" of an investment's physical security.[936] Rather, read in proper context, *CME* related to an extreme set of

---

932 National Assembly, *Law No. 30 of 2010*, 16 June 2010, Article 14 (**R-88**).
933 National Assembly, *Law No. 30 of 2010*, 16 June 2010, Article 14 (**R-88**).
934 Rejoinder on the Merits, [1009].
935 *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, [520] (**CLA-160**).
936 Rejoinder on the Merits, [1013].

facts relating to the "*dismantling [of] the legal basis of the foreign investor's investments*."[937] Panama submits that the facts of *CME v. Czech Republic* bear no similarity to the facts of this case. Law 30 was not aimed at dismantling the legal basis of Sacyr's investment, but instead it constituted a legitimate government action to address labour issues.[938]

489. Sacyr alleges that Panama breached its FPS obligation because it "*knew or should have known*" that enacting Law 30 would have the "*predictable*" effect of causing SUNTRACS to mobilise Project workers to stop work in protest, and to disrupt the TSLP.

490. Panama submits that Sacyr's description of the events surrounding Law 30 is inaccurate. The Ministry of Labor successfully mediated the conflict between GUPC and its workers. In any event, the work stoppages at the Project lasted only 3–4 days. Panama submits that Sacyr presents an exaggerated and misleading narrative of session minutes from the Panama National Assembly's Commission on Labor, Health, and Social Development wherein opponents of Law 30 debated the law's passage.[939]

491. The quote upon which Sacyr relies from those minutes to the effect that "*deaths can 'happen if the Law is not withdrawn*" refers to protests that happened in Panama in 1995 in Bocas del Toro, approximately 615 km from the TSLP.[940] Sacyr asserts that after the passage of Law 30, violent protests and strikes against the Law erupted which resulted in the detention, injury and death of several protesters. Panama submits that these incidents occurred in Changuinola, Panama, approximately 621 km from the TSLP.[941]

492. Sacyr has also put forward no evidence that the protests or other disruptions in response to Law 30 caused any physical harm to GUPC or the TSLP sites. Sacyr does not explain how protests on the other side of Panama would have had the "*predictable*" effect of causing SUNTRACS to mobilize the TSLP workers in a work stoppage.[942]

---

937 *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, [520] (**CLA-160**).
938 Rejoinder on the Merits, [1013].
939 Rejoinder on the Merits, [1016].
940 Rejoinder on the Merits, [1017].
941 Rejoinder on the Merits, [1017].
942 Rejoinder on the Merits, [1017].

493. Panama submits that Sacyr's argument that the effects were "*immediate*" is also erroneous and undermined by Sacyr's own evidence in the ICC Arbitrations. For instance, Claimant's witness in the *Disruption* Arbitration, Ms. Monica Fossatti, testified that the full work stoppages at both TSLP Sites began on 5 July 2010,[943] namely, several weeks after Law 30 was enacted on 16 June 2010 and several days before the incidents in Changuinola occurred on 8–10 July 2010. Panama submits that "*it is clear that neither the terms of Law 30 nor the actions of any Panamanian officials caused the work stoppages or any disruption*."[944]

494. On 8 and 9 July 2010, within three days of the full work stoppages, the Ministry of Labor visited both the Pacific and Atlantic sites of the TSLP and convinced GUPC's workers to resume work, which they did almost immediately.[945] Law 30 was suspended temporarily on 11 July 2010, one day after the incidents in Changuinola occurred and two days after the Ministry of Labor had resolved GUPC's labour stoppage.[946] Once a situation arose that could have threatened the physical security of Claimant's investment, Panama reacted and resolved the situation.[947]

495. In any event, threats from unions and protests are not uncommon in Panama. A threat that a law will cause discontent cannot interfere with the sovereign State's obligation to legislate. GUPC had the right under the Contract to receive compensation from the ACP for certain disruptions, and it acknowledges that it did receive such compensation.[948]

496. Panama submits that it does not have an obligation to refrain from issuing laws that might affect in any way the Claimant's investment. Law 30 was not targeted at GUPC but it applied to all employers in Panama.[949]

---

943 *Disruption* Arbitration, Fossatti Witness Statement,Oct [36] **(R-216)**.
944 Counter-Memorial on the Merits, [212].
945 Counter-Memorial on the Merits, [212].
946 National Assembly, *Law No. 68 of 2010*, 26 October 2010, Articles 1–6, 10 (**R-95**).
947 Rejoinder on the Merits, [1018].
948 Reply on the Merits, [294], footnote 773.
949 Rejoinder on the Merits, [1020].

Sacyr's Claim Related to Decree No. 6

497. Sacyr also alleges that Panama failed to provide FPS to its investment by enacting Decree No. 6. Panama reiterates that Sacyr cannot expand the scope of the FPS obligation under customary international law to include legal protection.[950]

498. In addition, even if the Treaty provided "*legal protection*" there would be no violation. Panama asserts that Sacyr's allegation around Decree No. 6 misrepresents the facts.[951]

499. In enacting Decree No. 6, the Ministry of Labor acted reasonably under the circumstances and helped ensure the stability and continued progress of the Project by assisting GUPC and its workers in resolving the GUPC-induced labour dispute.[952] Panama asserts that GUPC caused the discontent among its workforce by failing to calculate and pay overtime due to its construction workers, paying its foreign workers more than its Panamanian workers for the same type of work and allowing its foreign senior personnel to mistreat the Panamanian workers.[953] Given the inability of the two sides to resolve the dispute, and at the request of GUPC's workers, the Ministry of Labor promptly mediated the negotiations between GUPC and SUNTRACS.

500. Panama submits that the settlement agreement, which GUPC negotiated and to which it agreed, ultimately benefitted GUPC under the reimbursement provisions of the Contract. In any event, it was reasonable for Panama to grant the workers the requested pay raise when there had not been an increase in the minimum wage for more than 30 years.[954]

(3) Obstruction through Arbitrary Measures

A. Claimant's Position

501. Sacyr submits that Panama's arbitrary conduct, which has been described at paragraph 281 above, constitutes a breach of the non-impairment clause in the Treaty.[955] Article IV(2) provides that:

950 Rejoinder on the Merits, [1024].
951 Rejoinder on the Merits, [1025].
952 Rejoinder on the Merits, [1027].
953 Rejoinder on the Merits, [1027].
954 Rejoinder on the Merits, [1029].
955 Reply on the Merits, [304].

> *Neither Contracting Party shall obstruct in any way, by arbitrary or discriminatory measures, the functioning, management, maintenance, use, enjoyment, expansion, sale or, where appropriate, liquidation of such investments.*

502. Sacyr points out that the tribunal in *Saluka Investments v. Czech Republic*, relied on by Panama, found that:

> *Insofar as the standard of conduct is concerned, a violation of the non-impairment requirement does not therefore differ substantially from a violation of the "fair and equitable treatment" standard. The non-impairment requirement merely identifies more specific effects of any such violation, namely with regard to the operation, management, maintenance, use, enjoyment or disposal of the investment by the investor.*[956]

503. Panama further argues that a finding of breach of the non-impairment standard requires the fulfilment of two steps: (i) a determination that the measures were unreasonable or discriminatory; and (ii) if the measures were unreasonable and discriminatory, that they caused a significant impairment.

504. Sacyr submits that Panama's conduct was indeed arbitrary, and it significantly impaired Claimant's investment. Sacyr submits that the impact of Panama's arbitrary conduct reached its height when it led to GUPC's cash flow crisis forcing GUPC to suspend the works.[957]

B. Respondent's Position

505. Sacyr alleges that Panama breached Article IV(2) of the Treaty purportedly by "*adopt[ing] a course of conduct—including by insisting on adversarial dispute-resolution of claimant's claims for payments during the execution of the Project, and imposition of anticipatory waivers of those claims—which forced Claimant to make additional investments in the Project.*"[958]

---

956 *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, [461] (**CLA-196**).
957 Reply on the Merits, [306].
958 Memorial on the Merits, [307].

506. Panama denies that it obstructed the functioning, management and enjoyment of GUPC.[959] It submits that: [960]

(i) Sacyr has conflated the FET and non-impairment standards, thereby rendering the non-impairment standard meaningless. Sacyr's interpretation of Article IV(2) of the Treaty violates the principle of *effet utile* and basic principles of treaty interpretation;

(ii) in order to meet its burden of proof, Sacyr must prove both (i) that Panama's measures were either unreasonable or discriminatory, and (ii) that they gave rise to significant impairment of the investment;

(iii) the non-impairment standard is a more exacting standard than FET. It requires a claimant to identify "*more specific effects of any such violation*" to the operation, management, maintenance, use, enjoyment, or disposal of the investment;

(iv) as discussed above, Panama submits that: (i) GUPC weaponised the DAB process; (ii) the ACP provided extraordinary financial assistance that surpassed the requirements of the TSLP Contract, ultimately entering into Variations to help alleviate GUPC's alleged cash flow issues and to provide GUPC with immediate funds; and (ii) the ACP recognized legitimate GUPC claims, "*overpaying in excess of USD 175 million to GUPC*;"[961]

(v) Panama further submits that Sacyr has attempted to repackage its FET claims as impairment claims. They fail for the same reasons Sacyr's FET claims fail: (i) the ACP represented the Contract's terms clearly to Sacyr, including a provision under which the Tenderers agreed not to rely on Volume VI Documents "*in any way or for any reason*;" (ii) the ACP acted transparently and in good faith in providing documents and information to the Tenderers; (iii) the ACP amended its internal regulations transparently; (iv) Panama and the ACP responded in good faith to GUPC, notwithstanding GUPC's threats and breach of the Contract;;(v) Panama and the ACP acted at all times reasonably and fairly

959 Rejoinder on the Merits, [1032].
960 Rejoinder on the Merits, [1033].
961 Rejoinder on the Merits, [1033(d)].

towards GUPC, so far as the resolution of multiple labour strikes and adherence to the Contract's terms were concerned;[1987] and

(vi) in addition to failing to establish any arbitrary or discriminatory treatment, Panama submits that Sacyr has also failed to identify any significant impairment to its investment caused by the alleged impairing conduct.[962]

507. In its Reply, Sacyr argues that the non-impairment standard is not more exacting than the FET standard, relying on *Saluka v. Czech Republic* for the proposition that "*the non-impairment requirement does not therefore differ substantially from a violation of the 'fair and equitable treatment' standard*."[963] Panama submits that Sacyr's argument is flawed.[964] While two standards may not differ substantially, they are still different. Panama submits that the requirement for a claimant to identify "*more specific effects*" of a violation is logically more exacting.[965] Treating the FET and non-impairment standards as entirely co-extensive would violate the principle of *effet utile*, rendering the non-impairment provision of the Treaty meaningless, contrary to basic principles of treaty interpretation under international law.[966]

508. Sacyr asserts that Panama's conduct was arbitrary for the same reasons that underpin its FET arguments regarding the ACP's purported shifting of the financial burden to GUPC.[967] Panama reiterates that the ACP did not have an obligation to fund GUPC, nor was it required to ensure that the Project was "*cash-flow positive*." In this connection, Panama submits that the ACP provided financial assistance to the tune of more than US$ 1 billion to GUPC.[968] The ACP did not have a "*secret policy*" to reject all of GUPC's claims, nor did it impose waivers of those claims. On the contrary, the ACP allowed the Claimant to replace the Lock Gates Fabricator and to cure its contractual breaches in that respect.

962 Rejoinder on the Merits, [1033(f)].
963 Reply on the Merits, [305].
964 Rejoinder on the Merits, [1034].
965 Rejoinder on the Merits, [1034].
966 Counter-Memorial on the Merits, [742].
967 Reply on the Merits, [306].
968 Rejoinder on the Merits, [1034].

509. Panama submits that Sacyr's claims under Article IV (2) of the Treaty must therefore be dismissed.[969]

(4) Discrimination against Claimant and its Investment

A. Claimant's Position

510. Sacyr submits that Panama discriminated against its investment in breach of the FET standard, the non-impairment clause and Article V of the Treaty. Article IV provides:

> *Investments made by investors of one Contracting Party in the territory of the other Contracting Party shall receive at all times fair and equitable treatment […]. Neither Contracting Party shall at any time grant such investments treatment less favourable than that required by international law.*

511. Article V provides:

> *Each Contracting Party shall grant to investments of investors of the other Contracting Party in its territory treatment no less favourable than that accorded to investments of its own investors or to investments of investors of any third State, whichever is more favourable to the investor.*

512. It is not in dispute[970] that a measure will be discriminatory if two similar situations are treated differently without reasonable justification.[971]

513. Sacyr submits that Panama discriminated against the Claimant by: (i) providing the PAC-4 contractor with the August 2008 Report and acknowledging the "*low quality of the basalt*" in that case, while not doing the same for GUPC; and (ii) by enacting the discriminatory Decree No. 6 that only increased the wages paid to the employees of the Project.[972]

969 Rejoinder on the Merits, [1036].
970 Counter-Memorial on the Merits, [784].
971 Reply on the Merits, [307].
972 Reply on the Merits, [308].

i. Panama Discriminated against Claimant and its Investment with Respect to the PAC-4 Contractor

514. Sacyr submits that Panama discriminated against Claimant and its investment with respect to the PAC- 4 contractor.[973] Panama provided the August 2008 Report (which referred to the 23.9% 2008 Sulfate Soundness Test) to the PAC-4 contractor during the tender phase, yet it withheld that document from the Claimant.[974] The Claimant and the PAC-4 contractor were similarly situated: they were both working on the TSLP; their relationship with Panama was governed by the same ACP Acquisition Regulation and other Panamanian domestic laws; and they presented their bids based on Panama's representations.[975] URS reviewed and evaluated the same "*geologic, geotechnical, and other relevant data*," including the same "*geologic and topographic maps, geologic profiles, boring logs, and field and laboratory test data provided by ACP*" to characterise the materials for use in the construction of the dams.[976]

515. Panama argues that the 2008 Sulfate Soundness Test and the August 2008 Report (which referred to the 23.9% 2008 Sulfate Soundness Test) did not need to be provided to the GUPC Consortium, because the 2008 Sulfate Soundness Test was "*performed*" for the PAC-4 contract in the PAC-4 area. Sacyr maintains that this does not explain the discriminatory conduct of which it complains:

(i) during the tender phase, Panama (i) shared test results with the GUPC Consortium conducted on these very samples from the PAC-4 contract area; and (ii) shared with the GUPC Consortium other sulfate soundness tests on samples also located in the PAC-4 contract area. Sacyr asserts that Panama cannot argue that it had objective reasons for disclosing non-compliant test results to the PAC-4 contractor, while withholding them from the GUPC Consortium on the basis that they were conducted on basalt from the PAC-4 area, when Panama had

973 Reply on the Merits, [309].
974 Reply on the Merits, [310].
975 Reply on the Merits, [310].
976 Appendix A of each of three URS reports contains an identical list of information reviewed by URS. See URS, Draft Technical Memorandum, "Task A.2.3, In-Situ Construction Materials, Dams 2E, 1W, and 2W, Geotechnical Interpretive Report (GIR)", 15 February 2008, Appendix A, pp. 75–77 of PDF (**C-178**); URS, Technical Memorandum, "Task A.2.3, In-Situ Construction Materials, Dams 2E, 1W, and 2W, Geotechnical Interpretive Report (GIR)", 12 May 2008, Appendix A, pp. 77–78 of PDF (**C-478**); URS, Final Technical Memorandum, "Task A.2.3, In-Situ Construction Materials, Dam 1E, Geotechnical Interpretive Report (GIR)", 15 August 2008, Appendix A, pp. 105–106 of PDF (**C-489**).

shared compliant test results from the same area with the GUPC Consortium;[977] and,

(ii) the contemporary evidence of Panama's consultant, URS, shows that Panama's consultants understood that the samples from the PAC-4 contract area on which the 2008 Sulfate Soundness Test was performed would be representative of quality of the PLE basalt.[978]

516. The PAC-4 consortium encountered similar issues to those encountered by GUPC in relation to the use of basalt in producing aggregates. The PAC-4 Settlement Agreements confirm that Panama agreed to compensate the PAC-4 consortium for its claims, which included claims arising from the "*low quality of the basalt*"[979] or the "*lack of healthy basalt [which] was not the one required for the production of aggregates for filters*",[980] in exchange for the PAC-4 consortium's agreement to waive such claims.[981]

517. Sacyr submits that whatever differences may exist between the PAC-4 contract and the GUPC Contract, they could not legitimately explain why Panama provided the August 2008 Report to the PAC-4 contractor but withheld it from the GUPC Consortium.[982] Panama required both GUPC and the PAC-4 contractor to produce aggregates in accordance with the ASTM C33 standard.

518. The PAC-4 contractor presented claims on the basis of the low quality of the basalt, which forced it to look for alternative sources of basalt and therefore caused delays in the processing (crushing) of the necessary aggregates. The PAC-4 consortium sought compensation for the price paid for such external supplies and for the resulting delays. Sacyr submits that it is unclear why Panama argues in this case that there was no problem with the PLE basalt with respect to GUPC, yet it had agreed to compensate the PAC-4 contractor for its claims relating to the low quality of the basalt.[983] Sacyr notes

977 Reply on the Merits, [311(a)].
978 Reply on the Merits, [311(b)].
979 Claim 4 Letter (PAC-4), 21 December 2012, p. 6 (**C-313**); Claim 19 Letter (PAC-4), 17 November 2015, p. 1 (**C-394**).
980 Claim 19 Letter (PAC-4), 17 November 2015, p. 1 (**C-394**).
981 Settlement Agreement between Consorcio ICA-FCC-MECO and ACP, 8 May 2014, p. 2 (**C-606**); Settlement Agreement between Consorcio ICA-FCC-MECO and ACP, 26 September 2016, p. 2 (**C-612**).
982 Reply on the Merits, [314].
983 Reply on the Merits, [317].

in this connection that the PAC-4 contractor required little basalt and therefore only claimed damages in the range of tens of millions of US dollars. In contrast, GUPC required large amounts of basalt and, Sacyr submits, it suffered hundreds of millions of US dollars of losses as a result. Had Panama settled its basalt claims with GUPC, it would have broken the promise made to the people of Panama not to increase the costs of the Project.[984]

ii. Panama Discriminated against Claimant and its Investment by enacting Decree No. 6

519. Sacyr submits that Panama subjected Claimant and its investment to a discriminatory measure by enacting Decree No. 6, which increased the minimum wage payable only to workers on the Third Set of Locks Project without a reasonable justification.[985]

520. Panama argues that Decree No. 6 was not discriminatory, because Claimant failed to identify a valid comparator. Sacyr submits that the relevant comparator comprises all the workers of the Canal as defined in Decree No. 3, which Decree No. 6 modified. Its complaint is that Decree No. 6 applied only to workers on the Project; it did not raise the minimum wage of all workers at the Canal, it raised the wages only of workers on the Project.[986] Sacyr's submissions relating to Decree No. 6 are set out in more detail at 292 above.

B. Respondent's Position

521. Panama rejects all these claims.

i. Sacyr Has Conceded the Legal Standard

522. In answer to Sacyr's allegations of breach of Articles IV and V of the Treaty, Panama submits that if it is to establish that Panama's conduct was discriminatory, Sacyr must: (i) identify a comparator investment and establish that its investment was in "*like circumstances*" with the comparator; (ii) establish that the investments were treated

984 Reply on the Merits, [318].
985 Reply on the Merits, [320].
986 Reply on the Merits, [321].

differently; and (iii) establish that such differing treatment was not justified. If Sacyr fails to establish any one of these criteria, its claims fail and must be dismissed.[987]

523. In its Reply, Sacyr states that "*a measure is discriminatory if two similar situations are treated differently without reasonable justification*."[988] Panama submits that Sacyr does not contest the legal authorities cited in Panama's Counter-Memorial. The Parties thus appear to agree with respect to the relevant legal standard set out by Panama, namely that:[989]

(i) assessing "*like circumstances*" is a fact- and context-sensitive inquiry;

(ii) as the *Bayindir v. Pakistan* tribunal held, where "*two contractual relationships are too different*" to be deemed to amount to "*similar situations*," a claimant's claims for discrimination must fail;[990]

(iii) Sacyr must also prove that it was treated differently and that such treatment had adverse effects on its investment;

(iv) if there was any reasonable basis for the different treatment of the investments, the act cannot be considered discriminatory; and,

(v) the threshold to establish that a State's conduct was justified is low.

524. Panama submits that Sacyr has failed to prove any discriminatory treatment against its investment.

ii. Sacyr's Allegations regarding the PAC-4 Consortium Lack Merit

525. Sacyr alleges that Panama (through the ACP) engaged in a pattern of discrimination against GUPC by: (i) providing the PAC-4 consortium with the August 2008 URS Report; and (ii) settling claims with the PAC-4 consortium for changed circumstances as to the quality of the basalt on its project site.

---

987 Rejoinder on the Merits, [1043].
988 Reply on the Merits, [307].
989 Rejoinder on the Merits, [1044].
990 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, [411] (**RLA-60**).

The PAC-4 Consortium is not a "Similarly-Situated" Comparator to GUPC

526. Panama submits that GUPC and the PAC-4 consortium were not in like circumstances at the time of the alleged treatment.[991] According to Panama, Sacyr's comparisons ignore the fundamentally different contractual frameworks governing the TSLP Contract and the PAC-4 contract.[992]

527. Each consortium worked on a separate component of the Canal Expansion Project. They entered into an entirely distinct type of contract with the ACP.[993] The contracts differed in at least four material respects:[994]

(i) First, each Contract was a different type of agreement with a different allocation of risk and responsibility. Whereas GUPC's "*design-build*" contract made GUPC responsible for both the design and construction of its project, the PAC-4 consortium's "*design-bid-build*" contract left the PAC-4 consortium with responsibility only for the construction of its project based on the ACP's designs. As such, there was less risk involved for the PAC-4 consortium than for GUPC;

(ii) Second, each consortium participated in a different type of tender process. Given the size and complexity of the TSLP, GUPC's tender process required a pre-qualification phase to establish both the experience and financial capacity of the pre-qualified bidders. In contrast, the PAC- 4 Consortium's tender process did not require a pre-qualification phase, because the ACP was to provide the project design;

(iii) Third, the two contracts had different payment structures. Whereas GUPC's Contract stipulated a fixed lump-sum payment for the whole of the Works, the PAC-4 contract was an estimated quantities contract, which allowed adjustments to the originally estimated quantities, and hence the sum paid, for the work actually completed. A re-measure of the work performed was always required in the PAC-4 contract[2014]; and

991 Rejoinder on the Merits, [1049].
992 Rejoinder on the Merits, [1049].
993 Rejoinder on the Merits, [1050].
994 Rejoinder on the Merits, [1050].

(iv) Fourth, the dispute resolution provisions of the two contracts were different. GUPC's Contract, unlike the PAC-4 contract, required submission of any dispute to a DAB.

528. Panama relies on the finding of the *Bayindir* tribunal that if "*two contractual relationships are too different*," they cannot be in "*similar situations*," and a claimant's claims for discrimination fail.[995]

529. Panama submits that, even if Sacyr could establish that GUPC and the PAC-4 consortium were similarly situated with respect to their work on the Canal Expansion Project, GUPC and PAC-4 did not encounter the same alleged "*issues*" with the basalt.[996]

530. Mr. Fernández explained that the issues that the PAC-4 consortium faced had nothing to do with the quality of the basalt. They were instead the result of the PAC-4 consortium's poor project planning and management.[997] While the ACP settled certain claims with the PAC-4 consortium, the ACP did not agree to compensate the PAC-4 Contractor with respect to any alleged low quality basalt.[998] The PAC-4 consortium waived its claims related to allegations regarding the basalt quality.[999] Panama submits that the PAC-4 Settlement Agreements were consistent with the design-bid-build nature of the PAC-4 contract, under which the risk allocation differed significantly from GUPC's design-build TSLP Contract.[1000]

531. Moreover, the basalt formation in the PAC-4 site was limited to a small area within the PAC-4 site, amounting only to approximately 15% of the site.[1001] The remaining area comprised of other material which was not suitable for filter production.[1002]

---

995 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, [411] (**RLA-60**).
996 Rejoinder on the Merits, [1053].
997 **RWS-5** Fernández II, [28]–[31].
998 **RWS-5** Fernández II, [36].
999 **RWS-5** Fernández II, [36]; Agreement between Consorcio ICA- FCC-MECO and ACP, 8 May 2014, pp. 1–2 (**C-606**).
1000 Rejoinder on the Merits, [1054].
1001 **RWS-5** Fernández II, [27].
1002 **RWS-5** Fernández II, [27].

532. Accordingly, because GUPC and the PAC-4 consortium were not in like circumstances, Panama submits that Sacyr's allegation of discrimination fails and must be dismissed.[1003]

The ACP did not Treat the PAC-4 Consortium More Favorably

533. In addition to failing to prove that GUPC and the PAC-4 consortium were in "*like circumstances*" contractually, Panama further submits that Sacyr has failed to demonstrate that the PAC-4 consortium was treated more favourably than GUPC by: (i) providing the PAC-4 consortium, but not GUPC, with the August 2008 URS Report; and (ii) agreeing to compensate the PAC-4 consortium for its claims against the ACP for alleged "*low quality basalt*." Panama submits that the August 2008 URS Report was never withheld and, as noted above, the ACP did not compensate the PAC-4 consortium to settle its claims for alleged "*low quality basalt*."

534. Sacyr received the August 2008 URS Report in July 2009, when the ACP released the bid solicitation for the PAC-4.[1004] The August 2008 URS Report was never "*withheld*." As part of the PAC-4 public solicitation, the ACP produced to potential bidders numerous project drawings and reference documents, including the August 2008 URS Report.[1005] As part of the bid documents, it was publicly available.[1006] Sacyr bid for the PAC-4 contract, and thus received these documents as a tenderer. Panama submits that Claimant concedes as much in a footnote in the Memorial.[1007] Sacyr was part of the Consorcio ISC consortium. When Consorcio ISC submitted its bid in December 2009, it acknowledged that it had received all documents related to the PAC-4 provided by the ACP.[1008] Panama submits therefore that Sacyr has had the test results in its possession for approximately fifteen years, both before GUPC executed the TSLP Contract and before it began its work on the TSLP.

1003 Rejoinder on the Merits, [1056].
1004 Solicitation for the Pacific Access Channel, Project No. PAC-4 (**R-251**); **RWS-5** Fernández II, [7].
1005 Solicitation for the Pacific Access Channel, Project No. PAC-4, pp. 2, 60–74, Annex A (**R-251**); **RWS-5** Fernández II, [7]–[8].
1006 **RWS-5** Fernández II, [7].
1007 Memorial on the Merits, [134], footnote 254 ("*GUPC received the URS Report as it was part of the information made available in relation to the PAC-4 contract*.")
1008 Consorcio ISC Panama PAC-4 Bid Submission, 22 December 2009, p. 1 of PDF (**R-244**); **RWS-5** Fernández II, [13].

535. In any event, Panama submits that Sacyr's claim also fails, because the August 2008 URS Report was not prepared for the TSLP, and certainly not for the purpose of addressing the quality of the basalt to be used in the TSLP. The August 2008 URS Report concerned Dam 1E and was prepared specifically for the PAC-4, a different sub-component and area of the Canal Expansion Program. The testing it referenced was for the separate purpose of assessing "*filter, drain and transition materials*" for the Borinquen dam 1E.[1009] URS prepared separate reports for the TSLP, and those reports were produced to the TSLP Tenderers.[1010]

536. Although the ACP may have disclosed some documents related to the PAC-4 to the tenderers of the TSLP Contract, Sacyr has not established that it was entitled to receive all documents from both Projects. Accordingly, because the August 2008 URS Report was not relevant to the TSLP, there is no basis for Sacyr's allegation that the ACP treated the PAC-4 consortium favourably by providing it with this document.[1011]

537. Panama further submits that ACP assessed and resolved each consortium's claims in accordance with the terms of the relevant governing contract(s) and the underlying merits of the specific claim(s).[1012] Panama submits that Sacyr ignores the fact that the PAC-4 contract was an estimated quantities contract that allowed adjustments to the price, whereas GUPC's Contract did not.[1013] Panama submits, too, that nowhere in the PAC-4 Settlement Agreements is it stated that the ACP agreed to compensate the PAC-4 consortium for "*low quality basalt*" or "*lack of healthy basalt*."[1014] The sums that the ACP paid were set out in the subsequent "*modifications*" to the PAC-4 contract. They demonstrate that the sums were paid for foundation preparations ("*grout curtains*") as

1009 URS, Final Technical Memorandum, "Task A.2.3, In-Situ Construction Materials, Dams 1E, Geotechnical Interpretive Report (GIR)", 15 August 2008, pp. 34–36 of PDF (**C-489**); **RWS-2** Fernández Statement, [12].
1010 Agreement between ACP and GUPC, 11 August 2009, Volume VI, Index, pp. 2–3 (listing URS laboratory reports provided to GUPC) (**R-322**).
1011 Rejoinder on the Merits, [1064].
1012 Rejoinder on the Merits, [1066].
1013 Rejoinder on the Merits, [1066].
1014 Rejoinder on the Merits, [1069].

well as for "work and expense."[1015] The PAC-4 Settlement Agreements show that the PAC-4 consortium initially advanced claims related to basalt but then waived them.[1016]

The ACP's Actions were Justified

538. Panama submits, in the alternative, that Sacyr's claims for discrimination still fail, because any differential treatment was reasonably justified under the respective Contracts.[1017] Any difference in treatment resulted from the consortia having different contracts with distinct structures and different terms related to risk allocation, payment and dispute resolution.[1018]

539. For these reasons, Panama submits that Sacyr's allegation of discrimination must be dismissed.[1019]

Decree No. 6 is not Discriminatory

540. Panama submits that Sacyr's contention that Decree No.3 is the relevant comparator to assess whether Decree No. 6 was discriminatory was not raised in its Memorial. It is therefore untimely and inadmissible.[1020]

541. In any event, even applying the broad comparator advanced by Sacyr, Panama submits that Sacyr has failed to explain how "*all the workers of the Canal as defined in Decree No. 3*" were in any way similarly situated to all labourers working on the GUPC Contract.[1021] Decree No. 6 codified a settlement agreement between GUPC and the TSLP workers to resolve a labour strike that had disrupted work on the Project. Panama argues that Sacyr has failed to show that any other workers of the Canal as defined in Decree No. 3 had initiated similar strikes by reason of a wrongful withholding of Wages by their employers.[1022]

1015 Agreement between Consorcio ICA-FCC-MECO and ACP, Contract No. CMC-227623, Modification No. 33, 27 June 2014, p. 3 (Item 12) (**R-248**); Agreement between Consorcio ICA-FCC-MECO and ACP, Contract No. CMC-227623, Modification No. 39, 3 October 2016, p. 8 (Item 12) (**R-250**).
1016 Settlement Agreement between Consorcio ICA-FCC-MECO and ACP, 8 May 2014, pp. 2–3 (**C-606**).
1017 Rejoinder on the Merits, [1071].
1018 Rejoinder on the Merits, [1072].
1019 Rejoinder on the Merits, [1073].
1020 Rejoinder on the Merits, [1075].
1021 Rejoinder on the Merits, [1076].
1022 Rejoinder on the Merits, [1077].

542. Panama submits that, even if the Tribunal were to find that the relevant comparator to assess whether Decree No. 6 was discriminatory is all the workers of the Canal as defined in Decree No. 3, Sacyr's claim nonetheless fails, because it has failed to prove that the issuance of Decree No. 6 constituted differential treatment.[1023]

543. Decree No. 6 was not discriminatory, because it applied to all contractors working on the Canal Expansion Program and not exclusively to those working for GUPC. In a letter to the PAC-4 consortium, Panama's Ministry of Labor made clear that Decree No. 6:

> *Includes all of the Panama Canal Authority's Contractors participating in the Panama Canal Expansion, and not exclusively Grupos Unidos por el Canal [GUPC]. … The Ministry of Employment and Labor Development (MITRADEL) does not legislate for a particular company and is empowered based on the provisions of Article No. 66 of the Constitution of the Republic and Article No. 175 of the Labor Code, to establish and periodically review the minimum wage rates to be applied in the Republic of Panama.*[1024]

544. Decree No. 6 was the codification of a mutually agreed upon settlement agreement that GUPC negotiated. Panama submits that this agreement benefitted GUPC.[1025] The settlement agreement not only curtailed the strike, but also expanded the scope of labour compensation that Sacyr was able to claim under the Contract when compared to compensation for labour costs under a private settlement agreement.[1026] Panama submits that GUPC has received payments from the ACP totalling US$ 21,842,547 in respect of Decree No. 6.[1027] The first payment of US$ 17,771,011.17 was made in July 2014.[1028]

545. Decree No. 6 increased an hourly wage originally set in Decree No. 3 of 4 March 1980.[1029] Pursuant to Decree No. 6 wages rose from B/ 2.90 per hour to B/ 3.34 per hour, an increase of approximately 15%. Panama submits that an increase of 15% after 32 years is not a violation of international law, particularly in the context of a Contract

---

1023 Rejoinder on the Merits, [1078].
1024 Letter from the Ministry of Labor to the PAC-4 Consortium, 11 February 2012, p. 1 (**R-565**).
1025 Rejoinder on the Merits, [1081].
1026 Letter from the Ministry of Labor to the PAC-4 Consortium, 11 February 2012, p. 1 (**R-565**).
1027 DAB Decision on Referral No. 6, 16 November 2012, p. 8 (**C-311**); DAB Decision on Referral No. 13C Part 1, 6 January 2016, p. 8 (**C-397**). A total of UD $21,842,547 (now counterclaimed) was paid by ACP pursuant to those DAB awards. *See Lock Gates and Labor* Arbitration, Final Award, [826] (**C-622**).
1028 *Lock Gates and Labor* Arbitration, Final Award, [811] (**C-622**).
1029 Republic of Panama, Executive Decree No. 3, 4 March 1980, Article 1 (**C-123**).

which included provisions permitting the contractor to recover a substantial portion (or all) of the increase.[1030] The application of a moderate wage increase falls squarely within Panama's ability to regulate in the social sphere and does not constitute a treaty violation. It was neither discriminatory, nor arbitrary, nor unreasonable.

546. Panama submits that, for these reasons, Sacyr's claims for discrimination fail and must be dismissed.[1031]

VII. DAMAGES

(1) Causation, the Counterfactual and Applicable Damages Principles

A. Claimant's Position

547. The Parties agree that Sacyr's damages can be assessed from an *ex-ante* or *ex-post* perspective. The Parties also agree that:

(i) from the *ex-ante* perspective, compensation should bridge the gap between (1) a counterfactual or but-for scenario, i.e., a hypothetical reconstruction of what likely would have happened had the breaches not occurred; and (2) the actual scenario, i.e., what actually transpired due to the breaches;[1032] and

(ii) from an *ex-post* perspective, compensation should be assessed by reference to the actual cost overruns relating to specific breaches.[1033]

548. Sacyr submits that it would not have entered into the Contract but for the misrepresentation and withholding information breaches. Sacyr therefore requests compensation for its: (i) sunk costs, (ii) lost opportunities to use elsewhere the funds it was forced to invest in the Project, and (iii) damage to its reputation.[1034]

549. Panama's expert, Dr. Flores, states that:

> *The appropriate But-for scenario to assess damages is one where events unfold as they did in the Actual scenario, with Claimant executing the Contract and*

1030 Rejoinder on the Merits, [1090].
1031 Rejoinder on the Merits, [1091].
1032 Counter-Memorial on the Merits, [789]; Reply on the Merits, [378].
1033 **RER-3** Flores, [57]; Reply on the Merits, [378].
1034 Reply on the Merits, [379].

> *participating in the construction of the Project, except with compensation for any Alleged Breaches*.[1035]

550. Sacyr submits that this is misconceived. The full reparation principle requires that Claimant be put in the position it would have been in had the breaches not occurred, and this requires consideration of how events would have unfolded without the breaches. The delta in monetary terms between the actual scenario and the counterfactual scenario provides the basis for the assessment of the compensation owed.[1036]

551. In the present case, Sacyr submits that what is most likely to have happened had the breaches not occurred is that Sacyr would not have submitted a tender. Alternatively, had Sacyr decided to submit a tender, its price would have exceeded Panama's available budget for the Project. Under both scenarios, the Contract would not have been awarded.[1037]

i. Claimant Would Not Have Submitted a Tender

552. Sacyr submits that Panama's breaches misled Sacyr into entering the Contract. Had the withheld and misrepresented data been presented, Sacyr would not have submitted a tender. In particular:

(i) the quality of the PLE basalt for concrete aggregates: one of the key features of the Project was the volume of concrete work required: approximately 13.7 million tons.[1038] The anticipated quality of the PLE basalt to be used for concrete aggregate production was therefore a major influence upon the Project's financial and operational viability. Sacyr submits that Panama's withholding of information and misrepresentations as to the quality of the PLE basalt led to a severe underestimation of the complexities and costs of the Project by Sacyr and its consortium partners; and

(ii) reliance on Seismic Data for the Lock Gates: accurate seismic data was paramount for the design, fabrication, transportation, installation and

---

1035 **RER-3** Flores, [85].
1036 Reply on the Merits, [380].
1037 Reply on the Merits, [381].
1038 13,635,964 tons, as per GUPC's Earthmoving Balance, 9 February 2009 (**C-519**).

commissioning of the Lock Gates. Panama's alleged misrepresentations as to the applicability of the Seismic Reduction Factor distorted Sacyr's risk assessment and meant that it underestimated the overall complexity and cost of the works to be performed in designing, constructing and installing the Lock Gates.

553. Mr. Zaffaroni and Mr. Pérez state that but for the alleged breaches, Sacyr would have been in a better position to assess the actual complexity and risk profile of the Project. The volume of aggregate needed for the Project and the rapid pace required during construction meant that going forward with the Project without a secure source of sound aggregates would have constituted a major risk. Mr. Zaffaroni explained:

> *Two thirds of the Project consisted of civil works, out of which the most important component was the concrete, for which the basalt is a key element. It would have been unthinkable to submit a bid with a high level of uncertainty on such a key component. GUPC members were not in the gambling business and would never have participated in a tender to assume a risk potentially worth hundreds or even thousands of millions of dollars on a whim, as Panama seems to suggest.*[1039]

ii. Claimant's Tender Price Would Have Exceeded the Project's Allocated Funds

554. Sacyr submits that if the Tribunal decides that it would have submitted a tender in any event, the price it would have offered would have exceeded the Allocated Funds for the Project.[1040]

555. Panama's Allocated Fund for the Project was US$ 3.48 billion. Sacyr contends that the ACP could not have awarded the Contract for a significantly higher amount without first obtaining authorisation from the Executive, the Legislative and the Panamanian people in a referendum. Panama's TSLP Proposal estimated the total costs of the expansion program at US$ 5.25 billion and the total costs of the Project at US$ 3.35 billion. The TSLP Proposal explained that the "*degree of detail achieved in estimating costs and contingencies makes it possible to ascertain that the estimate is sound and that the*

[1039] **CWS-3** Zaffaroni II, [17].
[1040] Reply on the Merits, [385].

variations that have occurred in some other mega projects will not occur."[1041] Sacyr submits that common sense dictates that ACP could not have awarded the Contract for an amount significantly above the estimated costs, which Panama had insisted had a high level of reliability, without approval from the Executive, the Legislative and from the Panamanian people in a further referendum.[1042]

556. The Allocated Fund for the Project would later be fixed at US$ 3.48 billion. Sacyr submits that ACP acknowledged contemporaneously that it simply could not have awarded the Contract if the tendered price exceeded the Allocated Fund.[1043] Panama's witness, Mr. Miguez, suggested that there was some contingency across the whole Canal Expansion Program.[1044] Sacyr contends that this is incorrect. By the time the Project was put out to tender, only four projects had been awarded. Their values were aligned with the TSLP Proposal's cost estimates.[1045]

557. MRCE explained that: "*concrete aggregate was possibly the most important material needed for the TSL Project construction, and a significant driver of both cost and schedule.*"[1046] The basalt-related incremental costs actually incurred in the Project as assessed by Mr. Hunter have been quantified at US$ 958,191,857.[1047] Sacyr submits that supports its position that GUPC would have significantly increased its bid to account for this major risk.[1048]

558. The other major cost driver of the Project was the Lock Gates. The Seismic Reduction Factor-related incremental costs actually incurred in the Project as assessed by

---

1041 TSLP Proposal, p. 20 of PDF (**C-7**).
1042 Reply on the Merits, [385(a)].
1043 ACP Presentation, "Contractor-Selection Process Third Set of Locks Project", July 2009, p. 30 (**C-235**).
1044 **RWS-3** Miguez I, para. 101.
1045 Sacyr states in particular that: (i) the first three phases of the Pacific Access Channels (dry excavation) (*i.e.*, PAC-1, PAC-2 and PAC-3): The TSLP Proposal estimated US$ 400 million for all four phases. Before awarding the Project to GUPC, ACP signed contracts for a total of US$ 103,243,052.58 for the first three PAC phases. In respect of the fourth phase (PAC-4), the ACP allocated US$ 302,374,000 to PAC-4 which, considering the contract price of US$ 103,243,052.58 for the previous three phases, exceeded the US$ 400 million originally estimated. ACP Report on the Expansion Program, 2010, pp. 1–2, 11 (**C-548**); (ii) Contract for the Pacific Access Channels (dredging): The TSLP Proposal estimated US$ 180 million. The ACP signed a contract for US$ 177,500,676.78, aligning with the estimated cost. ACP Report on the Expansion Program, 2010, p. 11 (**C-548**).
1046 **CER-7** MRCE, p. 26.
1047 **CER-9** Hunter, para. 2.3.
1048 Reply on the Merits, [387(a)].

Mr. Hunter have been quantified at US$ 122,329,510.[1049] BTM priced its Lock Gates at US$ 872 million,[1050] US$ 324 million higher than GUPC's price for the Lock Gates and US$ 270 million higher than C.A.N.A.L.'s price. Sacyr submits that the higher price was in large part due to the inapplicability of the Seismic Reduction Factor, which made BTM's Lock Gates heavier and more expensive.

559. Sacyr therefore submits that GUPC's bid would have been vastly in excess of the Allocated Fund, and GUPC would not have been awarded the Contract.[1051]

iii. Entitlement to Damages if Contract Were Executed

560. Panama initially criticized Sacyr for failing to identify and assign a quantitative value to each alleged breach. In response, Sacyr sets out as an alternative its hypothetical scenario where GUPC participated in the Contract with a revised bid.

561. In the hypothetical scenario, Panama's expert, Dr. Flores argues that Claimant "*would be compensated based on the 'amount of monetary loss' related to [each] breach*"[1052] assessed either "*(i) from an ex ante perspective, using a hypothetical revised bid from GUPC (assuming no Alleged Breach); or (ii) from an ex post perspective, using actual cost overruns for that specific breach.*"[1053]

562. Sacyr submits that the *ex-ante* approach is too speculative. It would require the calculation of a but-for tender price, which involves but-for designs, technical and logistical solutions and contractual negotiations and commercial arrangements. Sacyr therefore adopts Dr. Flores' *ex-post* approach and assesses the costs associated with each of Panama's alleged breaches based on actual costs.

563. Mr. Hart summarises his analysis of damages attributable to each alleged Treaty breach in the table below.

1049 **CER-9** Hunter, para. 2.4.
1050 BTM Tender, Amendment No. 23, Volume V – Contractor's Proposal, Part 9 – Price Proposal and Price Adjustment Timetable, February 2009, pp. 8–9 of PDF (Gates and Recess Closures of the Atlantic at US$ 438,403,500, and Gates and Recess Closures of the Pacific at US$ 433,634,500) (**C-639**).
1051 Reply on the Merits, [390].
1052 **RER-3** Flores, [57].
1053 **RER-3** Flores, [57].

Table 1.2: Summary of Damages – Secondary Damages Opinion[19]

US$ Millions	FET	FPS	Non-Impairment	Discrimination
Direct Damages				
Actual Additional Costs	$ 764.51	$ 21.95	$ 245.93	$ 481.81
Legal Fees	35.04	-	35.04	23.10
Total Direct Damages	**799.55**	**21.95**	**280.97**	**504.91**
Indirect Damages				
Lost ROIC	636.88	17.39	170.71	437.07
Tax Gross Up on Direct Damages	266.52	7.32	93.66	168.30
Reputational Harm	498.41	14.31	160.33	314.11
Other Indirect Damages	**1,401.80**	**39.02**	**424.70**	**919.48**
Total Damages	**$ 2,201.35**	**$ 60.98**	**$ 705.67**	**$ 1,424.40**

Damages caused by Breach of the FET Standard

564. On the basis of actual costs taken from Claimant's construction costs expert, Mr. Hunter, Mr. Hart quantified Sacyr's damages for each of the breaches.[1054]

565. In respect of the FET standard, Mr. Hart opines that GUPC incurred US$ 1.59 billion of outstanding additional costs caused by Panama's alleged breaches. Sacyr's portion of the additional US$ 1.59 billion of costs was its 48% share of GUPC. Sacyr's total share of GUPC's additional costs is US$ 764.58 million, which represents the direct damages resulting from the breaches.[1055] Mr. Hart sets out Sacyr's amounts in the table below:[1056]

1054 Reply on the Merits, [425].
1055 **CER-8** Hart II, [87].
1056 **CER-8** Hart II, p.35 (Table 3.3).

Table 3.3: Summation of Sacyr Amounts[107]

US$ Millions	
Respondent's Alleged Withholding of Information and Misrepresentations	
Basalt Misrepresentations	459.93
Lock Gates Misrepresentations	58.72
Respondent's Alleged Additional Breaches	
Arbitrary Shift of Financial Burden	
Under-certification Claim	7.07
MoUVO Claim	20.74
Arbitrary Waivers Claim	27.26
Decree No. 6 Claim	21.88
Other Financial Burden Claim	168.90
Total	**245.86**
Enactment of Laws	
Law 30 Claim	0.07
Other Conduct	
PAC-4 Claims	459.93
Total Sacyr Amounts	**764.58**

Shifting the Financial Burden of the Project's Cost Overruns

566. Sacyr alleges that Panama breached its legitimate expectations by seeking to shift the financial burden of the Project cost overruns to Claimant.

567. GUPC's bid assumed prompt receipt of payments, crucial for maintaining positive cash flow and for the competitive pricing of its tender. Had Panama promptly certified GUPC's work and made the corresponding payments, GUPC could have generated interest income on these amounts as it had anticipated. Mr. Hunter calculates GUPC's lost interest income, due to under-certification by Panama, at US$ 14,741,125, which required Claimant to provide US$ 7.07 million of additional funding to GUPC.[1057]

568. Sacyr submits that Panama's uncooperative dispute resolution approach led GUPC to incur legal costs it would otherwise have avoided[1058] and this obliged Sacyr to provide US$ 18.85 million of additional funding to GUPC.[1059]

569. Panama allegedly obstructed GUPC's legitimate claims by demanding waivers for necessary contract variations.[1060] The ICC tribunal in the *Lock Gates and Labor* Arbitration found GUPC's claim regarding the load cycles design of the Lock Gates to

1057 **CER-8** Hart II, [87].
1058 Reply on the Merits, [431].
1059 **CER-8** Hart II, [90].
1060 Reply on the Merits, [432].

be justified on the merits, but it concluded that the claim had been waived in VO14.[1061] But for what Sacyr contends was an abusively imposed waiver, GUPC would have recovered US$ 56.79 million, of which Sacyr would have been entitled to US$ 27.26 million.[1062]

570. Sacyr further submits that Panama increased Claimant's financial burden by intervening in the GUPC-SUNTRACS labour dispute and issuing Decree No. 6, which raised wages only for Project employees. Panama's refusal fully to cover the Decree No. 6's cost implications led to additional expenses calculated by Mr. Hunter at US$ 45.58 million.[1063] This forced Sacyr to provide US$ 21.88 million of additional funding to GUPC.[1064]

571. Sacyr submits that after the promulgation of Decree No. 6, labour rates surged in 2014 and 2015 due to a new collective bargaining agreement and a clarifying extraordinary agreement with SUNTRACS. Without Decree No. 6, wage negotiations would have started from the lower baseline set by Decree No. 3, minimizing the impact of subsequent increases. The additional costs stemming from the later wage agreements total US$ 24,435,266, which are partly attributable to the imposition of Decree No. 6 and have been considered in the calculation of Sacyr's damages.[1065]

572. Finally, Sacyr submits that Panama's delay between reaching an agreement in the form of an MOU and the execution of Variation Order No. 108 translated into GUPC having to provide an additional US$ 145 million to the Project. Due to the delay in obtaining financing, Mr. Hunter says that GUPC was forced to accelerate the Works significantly in late 2014 through 2015 and into 2016 to progress the works to compensate for the delays incurred.[1066] Mr. Hunter calculated the amounts paid by GUPC to subcontractors

---

1061 *Lock Gates and Labor* Arbitration, Final Award, [1089] (**C-622**).
1062 **CER-8** Hart II, [87]; **CER-9** Hunter, [2.5].
1063 **CER-9** Hunter, [2.6].
1064 **CER-8** Hart II, [87].
1065 **CER-9** Hunter, [2.6]; Sacyr notes that "*Mr. Hunter assessed the incremental costs incurred because of the 2014 CBA and the 2015 Extraordinary Agreement by comparing it with simulated payrolls which model the cost that GUPC would have incurred but-for these two instruments coming into effect. Claimant can provide a more refined calculation which isolates the aggravating impact of Decree No. 6 on these costs at an appropriate juncture.*"
1066 **CER-9** Hunter, [8.34].

to accelerate the works. Mr. Hunter calculated these additional costs at US$ 43,217,957 million.[1067] Sacyr had to provide additional funding to GUPC of US$ 20.74 million.[1068]

573. Mr. Hunter calculated these additional costs at US$ 351,868,495, "*forcing*" Sacyr to provide additional funding to GUPC of US$ 168.90 million.[1069]

Full Protection and Security

574. Sacyr submits that Panama breached the FPS obligation under the Treaty – in particular, by enacting Law No 30. Mr. Hunter calculates the additional costs to Sacyr in the form of additional funding to GUPC stemming from labour stoppages attributable to protests against Law No. 30 at US$ 70,000.[1070]

575. Sacyr further submits that Panama failed to provide legal protection and security to its investment by: (i) failing to protect Sacyr from the illegitimate actions of the ACP; and (ii) accepting the militant tactics of SUNTRACS in 2012; and (ii) the implementation of the selective minimum wage increases pursuant to Decree No. 6. The damages from these actions amount to US$ 245.86 million (see table at paragraph 565 above).[1071]

576. Sacyr notes that Panama's failures to provide FPS are also presented as breaches of the FET standard. Thus, Sacyr submits that no additional compensation is required if the Tribunal recognizes these as FET standard breaches and awards compensation under that provision of the Treaty.[1072]

Discriminatory Treatment

577. Sacyr submits that Panama discriminated against Claimant and its investment. According to Sacyr, had Panama treated GUPC as it treated the PAC-4 consortium, Panama would also have:[1073]

1067 **CER-9** Hunter, [8.39].
1068 **CER-8** Hart II, [87].
1069 Reply on the Merits, [436].
1070 Reply on the Merits, [483].
1071 **CER-8** Hart II, [87].
1072 Reply on the Merits, [441].
1073 Reply on the Merits, [443].

(i) disclosed the August 2008 Report, thus alerting Sacyr to the low quality of the basalt; and

(ii) conceded the low quality of the PLE basalt in the ICC proceedings.

578. Sacyr submits that it should be compensated for the same amounts set out above in respect of the withholding information and misrepresentation breaches, assuming they have not already been awarded.[1074] In the alternative, Sacyr submits that it should be compensated for its legal costs in briefing this issue before the DAB and in the *Concrete* Arbitration, which would have been avoided, had Panama recognized the low quality of the PLE basalt.[1075] Sacyr has estimated these costs at US$ 12.04 million.[1076]

579. Sacyr alleges that Panama further discriminated against Sacyr and its investment by enacting Decree No. 6, leading to additional costs of US$ 45.58 million, which impelled Sacyr to provide US$ 21.88 of additional funding to GUPC.[1077]

Non-Impairment Clause in the Treaty

580. Sacyr submits that Panama breached the non-impairment clause in the Treaty by enacting controversial laws which provoked protests and Project disruptions, and by arbitrarily shifting the financial burden of the Project's cost overruns to Claimant. This was allegedly done through routine under-certification of GUPC's interim payments without justification, an uncooperative stance in dispute resolution, imposing prospective waivers abusively and enacting targeted, discriminatory legislation against Sacyr.[1078] The damages arising from these actions total US$ 264.78 million. Sacyr clarifies that, should the Tribunal award damages for these actions under another provision or other provisions of the Treaty, it would not seek an award of damages for the same conduct under the non-impairment clause.[1079]

1074 Reply on the Merits, [443(a)].
1075 Reply on the Merits, [444].
1076 Reply on the Merits, [444].
1077 **CER-8** Hart II, [87].
1078 Reply on the Merits, [446].
1079 Reply on the Merits, [447].

Damages to Claimant's Reputation and Loss of Opportunities

581. Sacyr maintains its request for compensation for reputational harm. Its primary case – that is entitled to be placed in the same position it would have been had it not entered into the Contract and in respect of which it claims US$ 681.98 million – is described at paragraphs 610 *et seq.* below.[1080] In the alternative scenario in which the Parties had entered into the Contract (Sacyr's "*secondary damages case*"), Sacyr's quantification of damages for reputational harm amounts to US$ 498.46 million.[1081]

582. Sacyr's loss of opportunity claim is predicated on the additional funding Sacyr says that it was "*forced*" to invest in the Project to cover the additional costs caused by Panama's breaches of the Treaty. Mr. Hart has evaluated the lost opportunity associated with each of Panama's treaty breaches as outlined below:[1082]

US$ Millions	
Respondent's Alleged Withholding of Information and Misrepresentations	
Basalt Misrepresentations	419.77
Lock Gates Misrepresentations	46.49
Respondent's Alleged Additional Breaches	
Arbitrary Shift of Financial Burden	
Under-certification Claim	8.95
MoUVO Claim	11.85
Arbitrary Waivers Claim	21.58
Decree No. 6 Claim	17.30
Other Financial Burden Claim	110.93
Total	**170.62**
Enactment of Laws	
Law 30 Claim	0.09
Other Conduct	
PAC-4 Claims	419.77
Total Lost ROIC	**636.97**

B. Respondent's Position

583. Panama reserves its defences to Sacyr's damages claim in light of the bifurcation of the damages aspects of the case.[1083] Panama submits, however, that the appropriate

[1080] Reply on the Merits, paras. 414 & 464 and Hart II, paras. 16 & 139.
[1081] Reply on the Merits, para. 448 and Hart II, paras. 155 & 164.
[1082] Reply on the Merits, [449].
[1083] Rejoinder on the Merits, [1092].

counterfactual scenario will depend on the nature of any treaty breaches that may be found and Panama invites the Tribunal to clarify the matter of the proper counterfactual scenario in any liability finding it may make.[1084] Panama therefore limits its submissions in its Rejoinder to certain threshold issues relating to causation and Sacyr's principal FET claims, which are summarised below.[1085]

584. The Parties agree that under the full reparation principle, reparation must re-establish the situation which would have existed if the Treaty breach had not been committed. The Parties disagree on the approach to the counterfactual scenario in this case.[1086]

585. Sacyr's primary damages case is based on the theory that in the counterfactual scenario, absent the alleged "*withholding of information and misrepresentation breaches*," Sacyr would not have entered into the Contract. However, even if a Treaty breach in connection with the quality of the basalt and the seismic reduction factor could be found, Sacyr has proffered no evidence that it would have refrained from submitting a tender if it had been in a position to evaluate the information which it alleges was withheld and misrepresented.[1087]

586. Sacyr has failed to establish upon what information it relied and what due diligence it undertook during the RFP period to inform its decision to invest in the TSLP and to determine its tender price. Sacyr has also failed to produce such evidence, despite document production ordered by this Tribunal. Absent such evidence, Panama submits that Claimant cannot prove that the information which it alleges was withheld and misrepresented would have materially altered its conduct.[1088]

587. In any event, the information that Sacyr alleges was withheld and misrepresented was irrelevant for the purposes of any assessment of the TSLP and, consequently, Sacyr's investment in such project. As discussed above, Sacyr distorts both the importance of certain information (e.g. the relevance of the sulfate soundness tests for the assessment of the suitability of the basalt as aggregate) and the content of the documents to which

[1084] Rejoinder on the Merits, [1092].
[1085] Rejoinder on the Merits, [1093].
[1086] Rejoinder on the Merits, [1094].
[1087] Rejoinder on the Merits, [1097].
[1088] Rejoinder on the Merits, [1098].

it refers (e.g., the BTM documentation and the CPP Reports contained no warning regarding the Seismic Reduction Factor).[1089]

588. Sacyr knew, or had reason to know, of the information that it alleges was withheld and misrepresented. It nonetheless chose to take no action when confronted with such information. For example, GUPC did nothing of substance in response to BTM's letter dated 28 July 2009 which allegedly identified the use of the PIANC seismic coefficient as wrong. Panama submits that this suggests that Sacyr would have done nothing differently in the counterfactual scenario.[1090]

589. Panama therefore submits that Sacyr has not carried its burden to prove that it would have abstained from submitting a tender for the TSLP in the counterfactual scenario. At most, in the counterfactual scenario, Sacyr would have submitted a higher tender. However, Sacyr has made no effort to show what that higher tender would have been.[1091]

(2) Compensation for Sunk Costs

A. Claimant's Position

590. Sacyr submits that, but for the breaches, it would not have incurred any expenses related to the Project's construction, because it would not have been awarded the Contract.[1092] Mr. Hart calculates Claimant's sunk costs as totalling US$ 1.05 billion,[1093] net of all payments that were received. Sacyr submits that the sunk cost method is appropriate in this case: compensation based on sunk costs "*restores the situation [to the one] before the investment was made*".[1094]

591. Sacyr submits in this connection that calculating damages based on future cash flows is inapposite in this case, since no expected cash flows would exist without the Contract, and no anticipated future cash flows existed in the scenario where GUPC would not operate the Canal.[1095]

1089 Rejoinder on the Merits, [1099].
1090 Rejoinder on the Merits, [1100].
1091 Rejoinder on the Merits, [1101].
1092 Reply on the Merits, [391].
1093 **CER-8** Hart II, para. 15.
1094 Counter-Memorial on the Merits, [816].
1095 Reply on the Merits, [395].

592. Panama asserts that most of the 'financing' that Sacyr seeks to recover is not for funds that it contributed during the execution of the works or for completion of the Project, but for funds that the ICC tribunals held were not recoverable under the Contract. Sacyr submits that its claim is not rooted in the Contract, but in violations of the Treaty by Panama. Whether certain funds are or not recoverable under the Contract does not determine whether they may be recovered under the Treaty.[1096]

593. Panama states that Sacyr's request for damages must be dismissed, because Sacyr has failed to prove that Panama's Treaty breaches were the sole and direct causes of its purported damages. Other factors were at play, such as labour strikes led by private actors that delayed and/or disrupted the Project. Sacyr submits that the causal link between the alleged breaches and the damages are "*pristine*".[1097] In other words, in the counterfactual scenario, there would have been no Contract and Sacyr would thus have suffered no sunk costs relating to the Project.[1098]

B. Respondent's Position

594. Panama's submissions in its Counter-Memorial are set out below for completeness.

595. Panama submits that sunk costs based on a total loss of investment is not an appropriate basis for assessing damages in this case. If it is determined that Panama is liable for any of the alleged treaty breaches, the impact of such breaches should be assessed specifically.[1099]

596. The sunk costs method for determining quantum of damages is typically appropriate in cases of the deprivation of investments that are expected to generate some profitability. In this case, Sacyr was a shareholder in GUPC, which was a contractor in a lump-sum fixed-price contract, which did not guarantee profitability and in fact carried substantial risk as well as opportunity.[1100]

597. In addition, Panama submits that other tribunals have concluded that the sunk costs approach is a default or alternative method that only applies when other methods that

[1096] Reply on the Merits, [396].
[1097] Reply on the Merits, [397].
[1098] Reply on the Merits, [397].
[1099] Counter-Memorial on the Merits, [814].
[1100] Counter-Memorial on the Merits, [815].

usually would provide more accurate information to determine the value of the investment but for the breach are not applicable. For instance, the tribunal in *Deutsche Telekom AG v. India* concluded that:

> *[I]f because of lack of evidence the Tribunal is incapable of determining the loss by reference to methods that normally would yield more accurately the value of the investment but for the breach, it may resort to sunk costs which restores the situation before the investment was made … where the Tribunal is incapable of determining the value of the investment through other methods because the evidence is insufficient, the award of damages equal to the funds actually expended may represent the best method to achieve full reparation.*[1101]

598. For those reasons, Panama submits that the sunk costs method is not appropriate in this case.

(3) Compensation for Loss of Opportunity

A. Claimant's Position

599. Sacyr submits that Panama's breaches forced Sacyr to invest additional money in the Project. But for those breaches, Sacyr would have had the money at its disposal to invest in other projects.[1102]

600. Panama submits that compensation is only warranted if the loss is sufficiently certain under international law. Sacyr submits that customary international law does not require certainty of opportunities lost to award compensation.[1103] According to Sacyr, Panama selectively quotes from *Caratube v. Kazakhstan.* That case, however, lowered the requirement of sufficient certainty for such damages. The "*sufficient certainty*" threshold required by the *Caratube* tribunal does not equate to absolute certainty; it implies a reasonable expectation of profit based on the preponderance of evidence.[1104]

1101 *Deutsche Telekom AG v. The Republic of India,* PCA Case No. 2014-10, Final Award, 27 May 2020, [288] (**CLA-165**).
1102 Reply on the Merits, [401].
1103 Reply on the Merits, [403].
1104 *Caratube International Oil Co. LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017, [1151] (**RLA-242**).

Moreover, the *Caratube* tribunal agreed that it "*enjoys some discretion in determining the quantum of [claimant's] claim for damages for lost opportunity*".[1105]

601. Sacyr objects to Panama's assertion that the claim for loss of opportunity is speculative.[1106] The essence of Sacyr's claim rests on the reasonable and foreseeable chance of profit. Mr. Hart opines that if Sacyr had not been forced to invest the US$ 1.05 billion it put into the Project, it would have deployed that money for other opportunities. To quantify the loss of business opportunity, Mr. Hart calculates the measure of return that Sacyr earned on the average of its other projects during the damage period. This is known as the Return on Investment Capital ("**ROIC**").[1107] The application of ROIC to Sacyr's direct damages is not a calculation of interest on the award in this arbitration, but rather an additional amount, including future profits and loss of business opportunity.[1108] In addition, Mr. Hart considers that there was an impairment of capital because of the forced investment in the Project, which could not simply be overcome by borrowing additional funds.[1109]

602. Sacyr states that Panama's objection to using ROIC betrays a misunderstanding of the claim. ROIC is not just a performance metric; it is also a reliable indicator of a company's historical success in generating returns. Sacyr does not assert that any capital investment would automatically generate an exact ROIC, but rather that the ROIC provides an empirically grounded and reasonable measure of the returns Sacyr could have expected on its investments.[1110]

603. ROIC determines how efficiently a company puts the capital under its control toward profitable investments or projects and evaluates the risk associated with the investments. Sacyr submits that it is not speculative that if it had further capital under its control it would have invested it to generate returns at the rate it historically achieved at its ROIC ratio.[1111]

1105 *Caratube International Oil Co. LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017, [1152] (**RLA-242**).
1106 Reply on the Merits, [405].
1107 **CER-4** Hart I, [9].
1108 **CER-8** Hart II, [103].
1109 **CER-8** Hart II, [107].
1110 Reply on the Merits, [407].
1111 Reply on the Merits, [407]; **CER-8** Hart II, [125].

604. By using ROIC, Mr. Hart assesses what Sacyr could reasonably have earned from alternative investments. Mr. Hart concludes that Sacyr incurred a loss of opportunity of US$ 871.49 million because its investment in the Project prevented it from using those funds elsewhere in its operations.[1112]

B. Respondent's Position

605. Sacyr requests full reparation for the alleged loss of opportunity that Panama's breach caused. Panama's quantum expert, Dr. Flores, explains that Mr. Hart has calculated Sacyr's loss of opportunity claim by compounding its direct damages claim by a rate of return equal to his estimate of Sacyr's ROIC. Panama submits that ROIC is not a measure of opportunity costs, but rather a financial ratio measuring financial performance.1113 Accordingly, Dr. Flores explains that: "*it is wholly speculative to assume that any of these results could be replicated with any additional funds, as that would incorrectly assume a perfect portfolio of projects with the very same risks.*"[1114]

606. Panama submits that Sacyr's loss of opportunity claim is predicated on the same flaws as its primary damages claims, namely: (i) the claim is based on the wrong damages framework; (ii) the quantum of loss opportunity as calculated is unproven; and (iii) Sacyr has failed to establish that the deployment of capital to other projects was prevented solely by reason of Panama's acts.

607. In particular, Panama submits that both Sacyr's assumption that it suffered losses from capital not invested in other projects and the measure of such alleged loss lack legal merit and are economically speculative. Sacyr's calculations of lost opportunity assume that Sacyr would have been able to invest 100% of the alleged investment and that such investments would have yielded returns in line with Sacyr's historical returns.[1115] Sacyr does not identify, or even attempt to identify, what projects would have been available to invest in that Sacyr says it was not able to invest in as a result of the alleged Treaty breaches. Sacyr does not prove, or even attempt to prove, that it would have had access to projects with the implied level of profitability of its damages claim. By assuming

---

1112 **CER-8** Hart II, [130].
1113 **RER-3** Flores [104].
1114 **RER-3** Flores [105].
1115 Counter-Memorial on the Merits, [842].

perfect capital allocation and generation of profits in line with historical returns, Claimant's theory implies an 100% probability of obtaining such hypothetical projects and profits. Panama submits that such an assumption is both implausible and unsupported.[1116]

608. Panama points out that Sacyr has continued to invest in growing its business over the last decade. Mr. Hart notes that Sacyr's concessions business is growing and that Sacyr transformed its business profile between 2015 and 2020 to become a company focused on the sustainable management of concession assets.[1117]

609. Panama further submits that Mr. Hart and Professor John C. Coates IV fail to consider that Sacyr is a multibillion-dollar international construction company with first class access to international credit markets. Were there other projects that Sacyr had wanted to pursue, it could have obtained the necessary funds with its existing cash, or through debt financing.[1118]

(4) Compensation for Harm to Reputation

A. Claimant's Position

610. Sacyr requests compensation for the reputational harm suffered as a consequence of Panama's alleged breaches of its FET obligations in the form of tangible economic loss.[1119]

611. Sacyr relies on *Rompetrol Group N.V. v. Romania*. Despite dismissing the claimant's request for compensation for reputational harm, the *Rompetrol* tribunal recognised that: "*reputational damage to a protected foreign investor is a perfectly conceivable consequence of unlawful conduct by the State of the investment, and if so is likely to show itself, for example, in increased financing costs, and possibly other transactional costs as well.*"[1120]

1116 Counter-Memorial on the Merits, [840].
1117 **CER-4** Hart I, [86].
1118 Counter-Memorial on the Merits, [841(b)].
1119 Reply on the Merits, [410].
1120 *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, [289] (**RLA-227**).

612. Mr. Hart referenced Fidentiis' express attribution of the decline in Sacyr's share price from October 2013 to January 2014 to "*the problems at the Panama Canal*."[1121] While the SXOP index remained constant, Sacyr's share price suddenly dropped on 3 January 2014, when research analysts commented about Sacyr, the Panama Canal project and the negative campaign by Panama as a result of which market perception of Sacyr was negatively impacted.[1122] The plunge in Sacyr's share price, against the prevailing industry trend, was not attributable to the overall market conditions for the industry. Itwas instead caused by negative marked perceptions arising from the difficulties faced by Sacyr in the Project and Panama's conduct.[1123] Mr. Hart accounted for the specific period in which the analysts' reports attributed the price decline to the problems at the Panama Canal. Utilising the 22 October 2013 closing share price of €3.91 as compared to the 3 January 2014 closing share price of €3.01, Mr. Hart calculated a price decline of 23.02%.[1124]

613. This price decline increased to 25.79% when considering the increase in the SXOP index value of 2.77%.[1125] In order to calculate reputational harm, Mr. Hart applied the price decline percentage to Sacyr's actual stock price of €3.91 per share on 22 October 2013 and multiplied it by the number of shares outstanding at the time.

614. Sacyr therefore claims US$ 681.98 million in damages for reputational harm.[1126]

B. Respondent's Position

615. Assuming that Panama and the ACP's statements could be considered to be disparaging (which is denied), Panama submits that the Treaty does not provide an independent cause of action for injury related to disparaging statements. For any injury related to such statements to be recoverable, they must first be considered to constitute a breach under the Treaty. Sacyr has only articulated one claim of breach of treaty in connection with such statements – that is to say an allegation that Panama has violated its FET

1121 **CER-8** Hart II, [137]; Fidentiis Equities, Sacyr, January 2014, p. 3 of PDF (**CER-8.17**).
1122 **CER-8** Hart II, paras. 136-137.
1123 **CER-8** Hart II, para. 13.
1124 **CER-8** Hart II, [139].
1125 **CER-8** Hart II, [139].
1126 **CER-8** Hart II, [139].

obligation by its public campaign of vilification against GUPC. Panama says that the statements on which Sacyr relies do not rise to the level of a breach of the Treaty.

616. In any event, those statements would not constitute the type of breach for which moral damages are appropriate.[1127] Even when investment tribunals have found that moral damages are recoverable under the full reparation principle, they have established a very high threshold for any award of moral damages, and they have been granted only in *exceptional circumstances.*[1128]

617. Finally, Panama submits that Sacyr has failed to establish that Panama was the direct cause of Sacyr's alleged reputational damage and resulting decrease of its market capitalization.[1129]

618. Sacyr alleges that its average stock price declined 42.5% between 2014–2015 and 2016–2017 and that it performed poorly in comparison with other construction groups in similar markets. Sacyr then attributes such market capitalisation decrease to statements made by Panama and the ACP. Panama submits, first, that it is unclear why Claimant used the aforementioned timeframes for its analysis. Second, and in any event, as explained by Dr. Flores, comparing an average over two separate two-year periods is not appropriate as it would not capture the reputational consequences of events (which, according to the authority on which Claimant and its expert rely, must manifest immediately).[1130] Dr. Flores also notes that between 2014-2015, Sacyr's average stock price increased as compared to the average stock price between 2012-2013.[1131]

(5) Compensation Based on Unjust Enrichment

A. Claimant's Position

619. Sacyr put forward an alternative quantification of damages based on benefits allegedly "*reaped*" by Panama after "*forcing*" GUPC to invest in the Project in violation of the Treaty.[1132] Sacyr relies on the doctrine of unjust enrichment, not as a cause of action,

---

1127 Counter-Memorial on the Merits, [851].
1128 Counter-Memorial on the Merits, [851].
1129 Counter-Memorial on the Merits, [857].
1130 **RER-3** Flores, [118].
1131 **RER-3** Flores, [117].
1132 Reply on the Merits, [416(a)].

but as a basis for assessing compensation. Mr. Hart assessed Panama's unjust enrichment at US$ 1.8 billion, including: (i) a US$ 1.05 billion investment avoided; (ii) returns on this avoided investment of US$ 709.83 million; and (iii) a US$ 138.81 million increase in ROIC.[1133]

B. Respondent's Position

620. Panama submits that Sacyr's alterative damages claim is fundamentally flawed and mischaracterizes the nature of the Claimant's alleged investment.[1134] The concept of "*unjust enrichment*" depends on there being financial advantage without a legal basis. Sacyr invested in GUPC, which was a contractor hired by the ACP to design and construct the Third Set of Locks Project for a set, lump-sum, price. There was never any doubt that following completion of the Project, the ACP would be the owner of the Project and that it would retain any profits, nor that Sacyr would never be entitled to any proceeds from the Third Set of Locks Project. Under these circumstances, there is no basis to say that any enrichment that the ACP or Panama received from the Third Set of Locks Project, is "*unjust*."[1135]

621. Panama submits that the revenue growth of the Canal is due to the physical business traffic and operation of the Canal. Dr. Flores explains that the ACP's operating profit "*is dependent on the traffic and tariffs at the Canal, not additional amounts it spent on the Project*."[1136] Every dollar spent by the ACP on the Project per year is not automatically transformed into annual returns to the ACP. Panama submits that Mr. Hart's assumptions of the increased returns of the ACP due to the alleged underpayment to Claimant cannot be sustained conceptually or numerically.[1137]

622. In conclusion, Panama submits that the ACP was always the owner of the completed Project and the Canal, and Sacyr would never have participated in those profits. Accordingly, the unjust enrichment claim must be dismissed.[1138]

1133 **CER-8** Hart II, [185].
1134 Counter-Memorial on the Merits, [863].
1135 Counter-Memorial on the Merits, [863].
1136 **RER-3** Flores, [131].
1137 Counter-Memorial on the Merits, [872].
1138 Counter-Memorial on the Merits, [873].

(6) Contributory Negligence

A. Respondent's Position

623. Even if Sacyr could establish that it incurred damages resulting from unlawful conduct by Panama, it is open to Panama to demonstrate that Sacyr is not entitled to the damages it seeks to recover, because those damages are attributable to Sacyr's own actions.[1139] Article 39 of the ILC Articles provides:

> *In the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of … any person or entity in relation to whom reparation is sought.*[1140]

624. Article 39 thus reflects the accepted principle that a claimant's contributory fault may reduce or eliminate the compensation to which it would otherwise be entitled.[1141] Applying this principle, tribunals have reduced the amount of an investor's compensation by deducting a percentage calculated on the basis of the role played by the investor in the causation of the injury alleged to have been suffered.[1142]

625. Panama relies, for example, on *MTD v. Chile.*[1143] The tribunal in that case reduced the amount of compensation by approximately 50% to account for the claimants' failure to undertake appropriate due diligence. In reaching this decision, the tribunal considered the level of sophistication of the investors and their failure to act as experienced businessmen. The *MTD* tribunal concluded that:

> *The BITs are not an insurance against business risk and the Tribunal considers that the Claimants should bear the consequences of their own actions as experienced businessmen. Their choice of partner, the acceptance of a land valuation based on future assumptions without protecting themselves contractually in case the assumptions would not materialize, including the*

1139 Counter-Memorial on the Merits, [795].
1140 ILC Articles, Article 39 (**CLA-5**).
1141 Counter-Memorial on the Merits, [796].
1142 Counter-Memorial on the Merits, [796].
1143 Counter-Memorial on the Merits, [797].

> *issuance of the required development permits, are risks that the Claimants took irrespective of Chile's actions.*[1144]

626. Panama submits that Sacyr's own conduct caused, or contributed significantly to, the damages it seeks to recover, particularly considering Sacyr's position as a sophisticated investor.[1145] In particular, Sacyr had an obligation to conduct proper due diligence. As set out above, the Tenderers had numerous opportunities to visit the Site and fourteen months within which to review the tender documents, including the Conditions of Contract and the ACP legal framework.[1146] Moreover, Panama points out that Sacyr claims that BTM was able to discover an alleged "*mistake*" in the tender documents through due diligence and, in any event, the APC had made available to GUPC letters from BTM expressing concerns over the Lock Gates design.[1147]

627. Panama submits that Sacyr has never requested that the Contract be nullified on the grounds of *dolo* (wilful misrepresentation). If Sacyr's allegations were true, and it had sought nullification, and the Contract had been nullified, Claimant would not have incurred the purported cost overruns it claims.[1148]

628. Panama therefore submits that Claimant has contributed to its own losses and it should bear responsibility for its own actions. Were the Tribunal to determine that Panama was liable under international law, then Panama submits that Sacyr's requested damages should be reduced by 50% to account for its contributory fault,[1149] namely its failure to conduct proper due diligence considering the risk allocation under the Contract, its disregard of the "*concerns*" raised by BTM prior to executing the Contract and its failure to request the nullification of the Contract.

1144 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, []–[178] (**RLA-182**).
1145 Counter-Memorial on the Merits, [798].
1146 Counter-Memorial on the Merits, [899].
1147 Counter-Memoria on the Merits , [900]–[901].
1148 Counter-Memorial on the Merits, [898].
1149 Counter-Memoria on the Merits l, [904].

B. Claimant's Position

629. Sacyr rejects Panama's submissions based on contributory negligence. Sacyr contends that Panama's reliance on Article 39 of the ILC Articles is misplaced; not every contribution to causation is sufficient to establish contributory fault. In this respect:[1150]

(i) an action or omission: "*must represent negligent and reproachable behavior. Arbitral practice seems to apply this criterion rather restrictively*";[1151] and

(ii) the contribution must be: "*material and significant*".[1152]

630. Sacyr says that Panama must prove a wilful or negligent act on Sacyr's part that is material enough to interrupt the chain of causation.[1153] Sacyr submits that it exhibited neither negligent nor reproachable behaviour that would warrant a reduction. First, Sacyr did conduct adequate due diligence. Sacyr's submissions on its due diligence are set out at paragraph 246 *et seq*. Second, GUPC interpreted BTM's remarks to ACP "*with some skepticism (not least because we could not have imagined that Panama would have withheld this kind of concern from us, were it warranted)*."[1154] GUPC was at that time bound by the tender and could not retroactively readjust its offer or refuse to sign the Contract based on BTM's reservations.[1155] Third, Sacyr submits that attributing fault to it for not seeking nullification of the Contract is "*a red herring.*"[1156]

631. In the alternative, if the Tribunal were to decide to reduce any award on damages due to contributory negligence, Sacyr submits that any such reduction could not reasonably be more than 25%.[1157]

1150 Reply on the Merits, [451].
1151 I. Marboe, "Calculation of Compensation and Damages in International Investment Law" (2nd edn, 2017), [3.243] (**CLA-227**).
1152 *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. 2005-04/AA227, Award, 18 July 2014, [1600] (**CLA-249**).
1153 Reply on the Merits, [452].
1154 **CWS-3** Zaffaroni II, [80].
1155 Reply on the Merits, [454].
1156 Reply on the Merits, [456].
1157 Reply on the Merits, [457].

(7) Tax Gross-Up

A. Claimant's Position

632. Sacyr rejects Panama's contentions that: (i) its request for a tax gross up has no legal basis and is a form of relief rarely granted in investment arbitration; (ii) it cannot be held accountable for the tax implications of an award on damages in the investor's home country; and (iii) in any event, the complexity of assessing applicable taxes and potential deductions make it impossible to award this head of damage.[1158]

633. Sacyr says that based on the principle of full reparation, "*all the consequences of the illegal act*" must be wiped out and "*the situation which would, in all probability, have existed if that act had not been committed*" must be re-established.[1159] In a context in which an award of damages for Sacyr's sunk costs would be recorded as income, subject to a 25% corporate income tax rate under Law 27/2014 in Spain, Sacyr would be worse-off than it would have been in the counterfactual scenario, if Panama were allowed to escape the tax gross up.[1160]

634. Sacyr submits that its quantum expert, Mr. Hart, has adequately shown the prospective tax impact, which must be computed by the Tribunal when awarding it damages.[1161] Sacyr relies on *JSC Tashkent*,[1162] where the claimants argued that they were entitled to a tax gross-up to account for the prospective income tax which their home jurisdiction would levy on an award on damages. The tribunal found it appropriate to supplement the valuations with a tax gross-up: "*to ensure that the Claimants obtain full reparation*".[1163]

635. Sacyr submits that Panama's argument that it cannot be held liable for the tax implications of an award in a third country is unavailing and fails to capture the legal foundation and a basic causation element of this request.[1164] Sacyr's case is that

---

1158 Reply on the Merits, [458].
1159 *Case Concerning the Factory at Chorzów, Germany v. Poland* (Merits), Judgment, 13 September 1928, PCIJ Series A No 17, p. 47 (**CLA-157**).
1160 Reply on the Merits, [458(a)].
1161 **CER-8** Hart II, [144]–[147].
1162 Reply on the Merits, [458(b)].
1163 *JSC Tashkent Mechanical Plant, JSCB Asaka, JSCB Uzbek Industrial and Construction Bank, and National Bank for Foreign Economic Activity of the Republic of Uzbekistan v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/16/4, Award, 17 May 2023, [787] (**CLA-222**).
1164 Reply on the Merits, [458(c)].

Panama's own conduct has forced an investment of after-tax moneys in breach of the Treaty, and therefore it is liable to re-pay those forced investments with a tax gross-up, so that they are returned to Sacyr on the same after-tax basis.[1165]

636. Sacyr submits that Panama's claim that taxation laws are "*notoriously complex*" and might involve potential deductions or exemptions cannot detract from the principle of full reparation.[1166] Panama's quantum expert, Dr. Flores, refers to Sacyr's alleged failure to show that it was unable to reduce its taxable income in any given year due to its losses in GUPC, deductions that he suggests should be offset against any award in this case.[1167] Mr. Hart objects to this approach as unprincipled.[1168] The difficulty or even the impossibility to determine the exact quantum of any loss should not prevent the claimant from receiving compensation.[1169]

B. Respondent's Position

637. Panama submits that claims for home-State tax gross-ups are seldom made in investment arbitrations and, when raised, they have consistently been rejected.[1170] Panama relies on *Clayton v. Canada*, where the tribunal rejected a tax gross-up request by the claimant, stating that "*there is no legal requirement on the part of a host country to compensate an investor for taxes incurred [in the investor's home State]*."[1171]

638. Panama submits that there is a consistent line of jurisprudence rejecting such gross-up claims, as taxes imposed on an award by the investor's home State cannot be attributed to the host State (nor do they benefit the host State). Any tax liability arising under an investor's home State's tax laws does not qualify as consequential loss arising from a respondent's treaty breach and does not engage a respondent's liability. The imposition of taxes on any award by the home State is its own sovereign decision, separate and apart from the host State's conduct.[1172]

1165 Reply on the Merits, [458(c)].
1166 Reply on the Merits, [458(d)].
1167 **RER-3** Flores, [126].
1168 **CER-8** Hart II, [141].
1169 Reply on the Merits, [458(d)].
1170 Counter-Memorial on the Merits, [877].
1171 *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009- 04, Award on Damages, 10 January 2019, [313] (**RLA-249**).
1172 Counter-Memorial on the Merits, [878].

639. Panama argues that it cannot be required to indemnify Sacyr for any tax that may be imposed by Spain, let alone at the Spanish tax rate of 25%. Even if Sacyr were correct regarding the operation and tax rate of Spanish tax provisions, payment of a gross-up would represent an award of damages incurred outside the territory of Panama as a result of the laws of another sovereign State over which Panama has no control.[1173]

640. Finally, Panama submits, taxation laws are notoriously complex and subject to deductions, exemptions and appeals which could reduce or eliminate the theoretical liability suggested by Sacyr.[1174] Dr. Flores explains that, according to Sacyr's financial statements, it appears that it has already claimed tax deductions or reduced its taxable income for losses related to GUPC.[1175] Dr. Flores explains further that gains from a potential Award in this Arbitration could be off-set against losses claimed from GUPC, resulting in no need to gross up any eventual award in this Arbitration to account for taxes.[1176] In such circumstances, Panama submits that a gross up would place Claimant in a better tax position than if the alleged breaches had not occurred.[1177]

(8) Compound Interest

A. Claimant's Position

641. Sacyr submits that its claim for compound interest is firmly grounded in customary international law and standard arbitration practice.[1178] Sacyr submits that the ILC Articles underscore that compound interest is part of full reparation.[1179]

642. Sacyr submits that Panama's concerns about double-counting are unfounded. Claims for "*loss of opportunity*" and interest have distinct rationales: the former reflects the detriment of being compelled to allocate capital for an unintended purpose, whereas the latter compensates for the time value of money withheld from the Claimant. Sacyr's ROIC measures efficiency in capital allocation, fundamentally different from interest, which updates to current value damages suffered in the past. The ROIC assesses a separate, specific loss resulting from Panama's breaches and does not purport to update

1173 Counter-Memorial on the Merits, [880].
1174 Counter-Memorial on the Merits, [881].
1175 **RER-3** Flores, [125]–[126].
1176 **RER-3** Flores, [125].
1177 Counter-Memorial on the Merits, [881].
1178 Reply on the Merits, [460].
1179 Memorial on the Merits, [363]–[364] citing ILC Articles, ArticleArt. 38 (**CLA-5**).

to current value damages suffered in the past.[1180] In any event, Sacyr would not seek interest on its sunk costs if the Tribunal were to grant its loss of opportunity claim.[1181]

643. In the event the Tribunal were to dismiss its 'loss of opportunity' claim, however, Sacyr submits that it would be reasonable to apply interest to each tranche of funding provided by Sacyr from the date of investment until the date of payment of the award, including on amounts awarded for reputational damage.[1182]

B. Respondent's Position

644. Panama submits that Sacyr has failed to carry its burden of establishing its entitlement to interest, the appropriate interest rate at which compensation should accrue interest, or the dates as of which interests should accrue. Nor has it provided any interest calculation.[1183]

645. Panama does not object to the principle that where a party is entitled to compensation, it may be entitled to interest accrued on that compensation up to the date of payment.[1184] Dr. Flores takes the position that if a claimant is to be compensated on an appropriate basis for the time elapsed between the time when the damages were incurred and the time when the award is paid, a short-term risk-free rate should be used.[1185] Such a rate avoids providing a windfall to Sacyr by compensating it for risks to which any amount awarded has not been exposed.[1186] If Sacyr were to be found to be entitled to compensation and interest, Panama submits that a proper interest rate would be the yield of six-months U.S. Treasury bills.[1187]

(9) Double-Recovery

A. Claimant's Position

646. Sacyr submits that it has carefully revised its damages calculation to account for the results of previous ICC arbitrations. It has subtracted costs already awarded and paid in

1180 **CER-8** Hart II, [103].
1181 Reply on the Merits, [461].
1182 Reply on the Merits, [462].
1183 Counter-Memorial on the Merits, [884].
1184 Counter-Memorial on the Merits, [888].
1185 **RER-3** Flores, [86], [146].
1186 **RER-3** Flores, [86].
1187 **RER-3** Flores, [146].

those arbitrations from its current damages claim. Sacyr commits that if any amounts claimed in this arbitration are awarded under the contract by another tribunal, it will refrain from seeking those same amounts in these proceedings, or vice-versa.[1188]

B. Respondent's Position

647. Panama reiterates that Sacyr pursues in this arbitration compensation for the same alleged breaches that it has previously pursued before various ICC tribunals.[1189] Panama's submissions on double-recovery are set out at paragraph 139(iv) above.

VIII. TRIBUNAL'S ANALYSIS

(1) The Basis of Sacyr's Claim

648. In its Memorial on the Merits, Sacyr set out the six complaints upon which it based its claim that, in breach of Article IV of the Treaty, Panama had frustrated its legitimate expectations – namely, that in the Proposal for the Expansion Program and in the RFQ, Panama had represented that:

(i) it had conducted "*exhaustive studies*" and engaged in a rigorous planning process to prepare the Proposal for the Expansion Program, such that it had developed a Project design "*significantly beyond the conceptual level*";

(ii) the studies provided to tenderers (including those relating to the quality of the PLE basalt and the conditions at the foundation level in the PLE's basalt reach), were "*complete and accurate*", notably the GIR which contained representations in respect of the quality of the PLE basalt and the conditions at the foundation level in the basalt reach of the PLE[1190] and that under the terms of the Contract, GUPC would be compensated for time and/or costs if these studies proved to be incorrect;

(iii) there was a "*high level of reliability*" in the Project cost estimate of US$ 3.35 billion;

1188 Reply on the Merits, [463].
1189 Counter-Memorial on the Merits, [893].
1190 No claim based upon the foundation level claim (said to have been a "*key misrepresentation*" (Memorial, [141]) has been pursued.

(iv) the Project would be funded from a combination of ACP generated funds and external financing, such that it would not require funding from Sacyr or its partners;

(v) it would act "*in a spirit of mutual trust and cooperation without litigation and adversarial attitudes*" during the execution of the Project, committing under the Contract to determine in good faith any amount due to GUPC as a result of the latter's request for payment of additional costs - or, alternatively, make a "*fair*" determination of that amount if no agreement was reached; and

(vi) the Consortium's bid "*fully complied*" with all the requirements specified in the Contract.[1191]

649. Sacyr complained that contrary to those representations, Panama had deliberately concealed the fact that some of the information supplied in the course of the Tender was incorrect and it had withheld information that would have made clear that that was the case. It had refused to produce full versions of the two studies that it had used as the basis of its costs estimate for the Project, it had adopted an uncooperative and adversarial approach towards GUPC and it had shifted the costs burden to GUPC to the extent of some US$ 2.8 billion.[1192]

650. In its Memorial on the Merits, Sacyr's complaint was about Panama's arbitrary attempts in the course of the implementation of the TSLP to shift the financial burden of the cost overruns to GUPC:

> *... by taking the following measures – whether considered individually or, taken together with each other and with Panama's withholding of information and misrepresentations, as a series of cumulative actions –, Panama breached the Treaty*.[1193]

651. By the time the case came to a full hearing, however, only two substantive claims were advanced – the basalt claim and the seismic reduction factor claim; the rest, although they were not formally abandoned, were not developed and simply left on the file. For

[1191] Memorial on the Merits, sections III A.2a and III A.4.
[1192] Memorial on the Merits, [147].
[1193] Reply on the Merits, [242].

that reason, the Tribunal will devote detailed consideration to those two claims which dominated the hearing.

652. The investment protection obligations in an investment treaty are addressed to the State as a sovereign and it is the State as a sovereign and subject of international law that is the party to an investment treaty. Those obligations are designed to protect investments against sovereign risk, because it is that form of risk that private commercial parties cannot usually mitigate or hedge effectively. In contrast, private commercial parties are expected to negotiate their contracts and manage their contractual relationships to mitigate or hedge any perceived commercial risks. That expectation must apply to situations where an executive organ of the State is the counterparty to the contract but is exercising powers that are equally available to the private commercial party. It is not the function of an investment treaty to recalibrate a contractual relationship in light of intervening circumstances or revisit the terms of the contractual bargain itself simply because one party to the contract is an organ of the State. In other words, where the contracting parties are operating on a level playing field in terms of the source of the powers that they are exercising, there is no justification for international law to intervene.

653. For these reasons, many investment tribunals have been careful to stipulate that only sovereign conduct is capable of violating an investment treaty obligation such as the fair and equitable standard of treatment. Put differently, an executive organ must rely on sovereign powers not available to its private counterparty to the contract for the investment protection obligations to be engaged. Some of the relevant jurisprudence is referred to at paragraphs 896, 897, 908, 913, 914 and 915 below.

654. There has been an unfortunate confusion in some awards between the elements required to breach the investment protection obligations (the primary rules) and the secondary rules of state responsibility: just because an act of an executive organ is attributable to the State does not mean it is capable of breaching an investment protection obligation. That is to put the cart before the horse. One must start with the requirements of the obligation itself and if the scope of that obligation is limited to sovereign acts, then only sovereign acts of the executive organ that are attributable to the State can breach the obligation.

655. An example of the correct approach is provided in *Impregilo v. Pakistan* where the tribunal concluded that claims turning on allegedly unforeseen geological conditions were contractual claims which concerned the implementation of the contracts in question. They did not involve:

> *[A]ny issue beyond the application of a contract, and the conduct of contracting parties. In particular, the matter does not concern any exercise of "puissance publique" by the State..*[1194]

656. The Tribunal concluded that:

> *Only the State in the exercise of its sovereign authority ("puissance publique"), and not as a contracting party, may breach the obligations assumed under the BIT.*[1195]

657. The point was brought into sharp focus in the course of an important exchange between Counsel for Sacyr and the Tribunal on Day 1 of the June 2024 hearing:

> *GV: [If] the premise of your question is that … conduct during the Tender would not involve sovereign conduct … we would not accept that. That was not Panama exercising any rights under a contract, which is what you would normally probably refer to as contractual or nonsovereign conduct …*
>
> *ZD: So the management of the Tender is sovereign conduct?*
>
> *GV: Well, all of the conduct of ACP, as you have established in your Partial Award, is attributable to Panama …*
>
> *ZD: But hang on. What's attributable to Panama are acts that are alleged to violate international law. … So we can't say everything they did in relation to the Tender is attributable to Panama, because you are not saying that every single act is a violation of international law.*
>
> *GV: We say that that conduct, taken together, is a violation of the Treaty and of international law, for sure.*

1194 *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, [268] (**RLA-38**).

1195 *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, [260] (**RLA-38**).

> *ZD: The specific acts though. … [W]e have to be careful. We have to hone in on the specific acts that you say are a violation of international law. We can't just say anything that ACP does is attributable, because we're focused on the acts that violate international law, not otherwise.*
>
> *GV: … I'm not sure I would accept that because we're dealing with a composite act where, I think it would be very artificial to slice it up in pieces to try and identify what is, quote/unquote, commercial or contractual, or what is sovereign. This was a course of conduct by entities whose conduct is all attributable to the State of Panama, and whose conduct, taken together, clearly does give rise to an inconsistency with the Treaty obligations of Panama.*
>
> *So when Panama was … withholding and misrepresenting the information during the Tender, you have to place it in the context of what it did subsequently. You have to look at that conduct together, and when you look at all of that conduct together, … we would not accept that that is … "contractual conduct."*
>
> *Yes, it was conduct that happened to occur within a factual matrix that included a contract, but when you withhold and misrepresent information, that can occur in different contexts as well. The fact that there was a Contract within the … factual matrix doesn't change that conclusion.*
>
> *…*
>
> *It is our case that all of that conduct is attributable to Panama, and that the fact that these acts occurred in the context of a Tender, and subsequently a Contract, … doesn't change that conclusion.*[1196]

658. The difficulty with the thesis that (i) all the actions of ACP are attributable to Panama and (ii) those actions taken together breach the Treaty such that (iii) it is unnecessary to examine the context for each of those actions, is that the focus shifts away from the nature of the State's alleged wrongdoing in respect of the individual actions comprising the composite whole. Instead, the touchstone of liability becomes the overall impact of the "composite act" on the investment. But liability established simply on the basis of causal link between a composite act and a loss to an investment is strict liability, which

[1196] Transcript, Day 1, pp. 33–37.

has no place in investment law. It is the requirement of wrongdoing on the part of the State that necessitates an analysis of the context for the individual acts comprising the composite act even if it is contended that the breach of the Treaty is consummated at the end of the series of the acts. Wrongdoing in international investment law is premised on some form of abuse of sovereign power. That might occur, for instance, where a state organ disrupts the level playing field of a contractual relationship with a private entity by relying on public powers to change the equilibrium of the contractual bargain. But obligations such as the FET standard are simply not engaged where the state organ has remained within the contractual realm and has acted in a way that would have been equally available to any private party. Within that contractual realm the parties have the remedies of contract law at their disposal as well as the forum assigned by the contract for the resolution of disputes. It is not the function of an investment treaty to provide a second set of remedial options for grievances that never transcend the contractual realm.

(2) The Treaty Provision upon which Sacyr Places Principal Reliance

659. Article IV.1 of the Treaty ("*Protection*") provides that:

> *Investments made by investors of one Contracting Party in the territory of the other Contracting Party shall receive at all times fair and equitable treatment and shall enjoy full protection and security*. Neither Contracting Party shall at any time grant such investments treatment *less favourable than that required by international law.*[1197]

660. In the absence of a definition in the Treaty of "*fair and equitable treatment*", the Tribunal looks to Article 31.1 of Vienna Convention, which provides that:

> *[a] Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*[1198]

1197 BIT, Article IV(1) (**C-1**).

1198 Vienna Convention on the Law of Treaties, entered into force 27 January 1980 ("**VCLT**"), Article 31(1) (**RLA-13**)

661. The Tribunal understands the Treaty to require Panama to accord fair and equitable treatment to the standard "*required by international law*", that is to say, such treatment as is commensurate with an obligation to provide the minimum standard of treatment required under customary international law.

662. It finds support for its conclusion in the Award of the tribunal in *Diaz Gaspar v. Costa Rica*, a case in which the tribunal was required to interpret an identically worded FET provision in the Spain-Costa Rica BIT.[1199] That tribunal concluded that:

> *... the reference to international law that [the Treaty] makes is to customary international law. That is, the standard of treatment accorded to the investor by ... the Treaty is the minimum standard of treatment under customary international law.*[1200]

663. The tribunal stated that:

> *... the standard of fair and equitable treatment under international law requires, at a minimum, that the State does not act in an arbitrary, blatantly unfair, unlawful, idiosyncratic or discriminatory manner, and that it respects basic notions of transparency and administrative due process.*[1201]

664. The language adopted by the *Diaz Gaspar v. Costa Rica* tribunal followed closely the authoritative statement of the legal standard of treatment under international law articulated in *Waste Management II*:

> *Taken together, the S.D. Myers, Mondev, ADF and Loewen cases suggest that the minimum standard of treatment of fair and equitable treatment [would be] infringed by conduct attributable to the State and harmful to the claimant if the conduct [was] arbitrary, grossly unfair, unjust or idiosyncratic, [it was] discriminatory and expose[d] the claimant to sectional or racial prejudice, or [it involved] a lack of due process leading to an outcome which offend[ed] judicial propriety - as might be the case with a manifest failure of natural*

1199 Agreement for the reciprocal promotion and protection of investments between the Kingdom of Spain and the Republic of Costa Rica, Article III (1), 8 July 1997 (https://www.boe.es/diario_boe/txt.php?id=BOE-A-1999-15684).

1200 *Alejandro Diego Diaz Gaspar v. Republic of Costa Rica*, ICSID Case No. ARB/19/13, Award, 29 June 2022, [356] (**RLA-277**).

1201 *Ibidem*, [363].

> *justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.*[1202]

665. There is a substantial *corpus* of decisions on the basis of which it is well established that a claimant must clear a high bar in order to make good a claim of a violation of the FET standard, not least, because arbitral tribunals must respect the:

> *... high measure of deference which international law generally extends to the right of national authorities to regulate matters within their own borders.*[1203]

666. While the standard is not perfection:

> *... not every process failing or imperfection ... will amount to a failure to provide fair and equitable treatment. ... It is only when a state's acts or procedural omissions are, on the facts and in the context before the adjudicator, manifestly unfair or unreasonable (such as would shock, or at least surprise a sense of juridical propriety) ... that the standard can be said to have been infringed.*[1204]

667. The test was articulated in a different way by the *Saluka* tribunal, which concluded that the conduct complained of must be shown:

[1202] *Waste Management v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, [98] (**CLA-207**). *See also Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, [284] (**CLA-122**) for the propositions that a State should act consistently with specific representations made to the investor, conduct itself transparently and refrain from arbitrary or abusive conduct. *See also* the NAFTA decision in *Glamis Gold, Ltd v. United States of America*, UNCITRAL, Award, 8 June 2009, [616] (**RLA-300**): a violation of the customary international law minimum standard of treatment requires an act to be "… *sufficiently egregious and shocking - a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons - so as to fall below accepted international standards.*"

[1203] *Antaris Solar GmbH and Dr. Michael Göde v. The Czech Republic*, UNCITRAL, PCA Case No. 2014-01, Award, 2 May 2018, [360(9)] (**CLA-152**). *See also RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v, Kingdom of Spain*, ICSID Case No. ARB/13//30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018, [244] (**RLA-248**), *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL (NAFTA), Partial Award, 13 November 2000, [263] (**RLA-176**), *Total S.A. v. Argentine Republic*, ICSID Case No ARB/04/01, Decision on Liability, 27 December 2010, [115] (**RLA-212**).

[1204] *AES Summit Generation Limited and AES-Tisza Erömü Kft v. Republic of Hungary*, ICSID Case No. ARB/07/22, 23 September 2010, [9.3.40] (**RLA-210**). *See also Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, [309]] (**CLA-196**).

> *... manifestly [to] violate the requirements of consistency, transparency, even-handedness and non-discrimination.*[1205]

668. Sacyr contends that on the basis of the record as it stands, there is "*conclusive evidence*" that:

(i) Panama withheld and misrepresented crucial risk information during the Tender;

(ii) Panama committed Sacyr to an investment on terms that purported to shift these undisclosed risks to Sacyr; and

(iii) once those undisclosed risks materialized, Panama denied Sacyr any relief for their catastrophic cost consequences.[1206]

(3) Sacyr's Investor-State Claim in Context

669. The context within which the prosecution of this investment arbitration has developed is unusual. Claimant, Sacyr, is a member of the GUPC Consortium, which was the successful bidder for the TSLP, a constituent part of the Panama Canal Expansion Program. The Contract for the design and construction of the TSLP was signed on 11 August 2009 by the ACP and GUPC. It is a design and build contract based upon the well-known FIDIC form of Conditions of Contract.

670. Since December 2013, GUPC has invoked Sub-Clause 20.6 of the Conditions of Contract entitled "*Arbitration*", subsequently modified by Variation Order No. 108 dated 1 August 2014, to initiate a series of ICC arbitrations against the ACP, four of which, the *Cofferdam*, *Guarantees*, *Concrete*, and the *Lock Gates and Labor* Arbitrations, have been concluded by Final Awards rendered in July 2017, December 2018, February 2021 and May 2023 respectively. The fifth arbitration, the *Disruption* Arbitration, remains pending. In that still pending arbitration, matters that are central to Sacyr's claims in these proceedings, including, specifically, its basalt claim and the 2005 Sulfate Soundness Test, are in issue.[1207]

1205 *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17March 2006, [307]] (**CLA-196**).
1206 Transcript, Day 1, p. 14.
1207 Transcript, Day 6, p. 1780; *see also Disruption* Arbitration, Statement of Claim, Ch. IV, [214], [216] (**R-219**).

671. In their awards, the ICC tribunals in the *Concrete* and *Lock Gates and Labor* Arbitrations considered at length the basalt and the Lock Gates seismic co-efficient issues respectively. By the time this arbitration came to hearing on jurisdiction and the merits, those two issues formed the principal planks of Sacyr's FET claim under the Treaty. They dominated the submissions and the evidence heard by the Tribunal to the extent that Sacyr's discrimination claims (PAC-4 consortium and Decree No. 6) and its full protection and security claims merited scarcely a mention, save by Panama, on the basis that absent a formal abandonment of the claims, they had to be addressed.[1208]

672. To recall, Sacyr's full protection and security claims fall into two categories. The first comprised acts asserted to amount to a failure to protect the investment against the actions of third parties and of the host State, namely:

(i) the enactment, in June 2010 of Law No. 30, affecting the collection of union dues from the workforce and permitting an employer to hire temporary staff during strikes which led to strikes and disruption on both the Pacific and Atlantic sites. Law 30 was suspended on 11 July 2010 and repealed in October 2010;

(ii) the enactment of Law No. 72 on 19 October 2012 to permit the sale of land within the Free Trade Zone in Colón, a port close to the Atlantic entrance to the Canal, which led to riots and eventually to the suspension of work on both the Atlantic and Pacific sites. Law 30 was revoked on 28 October 2012;[1209] and

(iii) the asserted failure of Panama promptly to support the Project during the fraught attempts to conclude a new collective bargaining agreement between CAPAC and SUNTRACS in April – May 2014 which led to a shutdown of all of GUPC's works, including essential maintenance.

673. The second category turns on an asserted failure on the part of Panama to provide legal protection and security to the investment. The complaints included an alleged attempt by the ACP to disavow its obligations under the Contract, its "*systematic rejection*" of

[1208] Notably, claims in respect of Decree No. 6, alleged under-certification of interim payments, the allegedly protracted DAB procedures and the adverse publicity campaign against GUPC are pursued in the *Disruption* Arbitration. *See* Rejoinder on the Merits, Annex 3.

[1209] Panama points out that Law 72 is neither labour related, nor connected with the TSLP (Transcript, Day 6, p. 1747).

Sacyr's claims, its obstructive approach to the DAB (and its refusal to comply with the DAB's decisions on liability) its refusal to resolve in good faith the cash crisis faced by GUPC in 2013-2014 and its prosecution of a defamatory media campaign against Sacyr.[1210]

674. On Day 1 of the Hearing, the Tribunal was addressed by Ms. Jaime, the Head of the Republic of Panama's Investment Arbitration Office. She insisted upon the importance of this Arbitration, stating that it was:

> *... unique, not only because it attacks the most significant and emblematic infrastructure project in Panama, but also because it involves a unique and autonomous entity under Panama's Constitution, the ... ACP.*[1211]

675. Ms. Jaime was trenchant in her criticism of what she maintained was an abuse of the Treaty by Sacyr, noting that:

> *... after multiple Disputes Adjudication Board proceedings, and after bringing one ICC Case after another and after another, and losing those cases, one case after another, and after another, it persists in attacking Panama with fabrications of mistreatment under the Treaty. Really?*[1212]

676. She submitted that the Tribunal did not have jurisdiction over what she described as:

> *... fabricated claims [that] are not more than contractual disputes disguised as Treaty-based disputes ... [T]hese Claims are essentially the same claims Claimant has already lost in the ICC Arbitrations, or/and they are currently litigating in the dispute [sic] arbitration ... When Panama entered into the Treaty, it was not agreeing to give a carte blanche to investors who have lost their contractual disputes to try again and again. ... the Treaty and the investment arbitration system forbid that, and we are very concerned about the precedents this case sets in its very existence.*[1213]

677. The Tribunal acknowledges the importance of these proceedings to both Parties and the sensitivities to which their prosecution has given rise. It is well aware that very

---

1210 Memorial on the Merits, [301].
1211 Transcript, Day 1, p. 212.
1212 Transcript, Day 1, p. 215.
1213 Transcript, Day 1, pp. 215–217.

considerable sums are at stake and that the *Disruption* Arbitration is still pending. These are all matters that weigh with the Tribunal, but they will not distract it from its task to analyse the claims that have been made and to determine whether they may be brought within the ambit of the Treaty protections of which Sacyr maintains it is entitled to the benefit.

(4) Overlap with ICC Arbitrations

678. Sacyr has to address the objection that there is a significant degree of overlap between the salient facts and matters, which are said to underpin these asserted Treaty claims and those which have either already been the subject of detailed scrutiny and carefully reasoned decisions in the concluded ICC arbitrations, or which remain in play in the *Disruption* Arbitration. The claims before the ICC tribunals were, and are, all claims advanced pursuant to the contractual dispute resolution procedures in reliance upon the terms of the Contract which had been affirmed by the GUPC Consortium of which Sacyr is a member.

679. Sacyr says that that objection goes to the issue of the admissibility of its claims rather than to the Tribunal's jurisdiction over Sacyr's Treaty claims.[1214] It was suggested that there was:

> *… nothing mysterious about the same factual predicate being able to sustain a breach of contract and a breach of Treaty … Where the conduct is sufficiently egregious such as to rise to the level of a breach of Treaty, to some extent, it is only to be expected that where there's a Contract within the factual matrix, that same conduct will also give rise to a breach of contract. But the fact that there is that common factual predicate does not in any way detract from the observation that there can be a Treaty breach. … [W]here the State induces an investment on terms that it procured through withholding and misrepresentation of crucial risk information, it is no answer to that claim to say, oh, but, you know, that was in the context of the management of a tender and subsequent conduct in the context of a Contract.*[1215]

[1214] Transcript, Day 6, p. 1603.
[1215] Transcript, Day 6, pp. 1612–1613.

680. Sacyr seeks to draw a clear distinction between Treaty claims based upon Panama's alleged inducement of Sacyr to commit to an investment on terms secured by withholding and misrepresenting crucial risk information and contractual claims submitted to ICC arbitration under the terms of a contract which was the product of that internationally wrongful conduct, such that it was the "*fruit of the poisonous tree*".[1216]

681. It goes further to say that by reason of the wrongful acts by which it induced Sacyr and its fellow consortium members to enter into the Contract, Panama, through the ACP, is not entitled to the benefit of those terms of the Contract,[1217] which placed risk on Sacyr.[1218] Those terms include:

(i) Sub-Clause 4.10.3: Data

> *The Employer gives no warranty as to and shall have no responsibility for the sufficiency, suitability or completeness of any data or information (including geotechnical boring cores) it has provided or does provide regarding physical conditions including sub-surface, hydro-geologic and topographic conditions at the Site and environmental aspects …*

(ii) Sub-Clause 5.1: Design Obligations

> *[T]he Parties agree that the Employer shall not be responsible in any way whatsoever for the Volume VI Documents, including but not limited to the … geotechnical data, reports, documents… and other information included therein and shall not be deemed to have given any warranty, representation of accuracy or completeness in relation to the same. Nothing contained therein shall relieve the Contractor from his responsibility for the design and execution of the Works in accordance with the Employer's Requirements. The parties agree that the Volume VI Documents are included in the Contract for information purposes only, may not be relied upon by the Contractor in any way or for any reason, and shall not give rise to, form the basis of, or be the subject matter of, any claims of any nature against the Employer.*

1216 Transcript, Day 1, pp. 143–144.
1217 RFP, Amendment No. 24, Volume III – Conditions of Contract (Final), February 2009 (**C-222**).
1218 Memorial on the Merits, [260].

682. Moreover, Sacyr says that Panama is precluded from reliance upon the Entire Agreement Clause at Clause 1.16 of the Contract:

> *The Contract and the documents incorporated herein by reference constitute the entire agreement between the Employer and the Contractor and supersede all prior negotiations, commitments, representations, communications and agreements relating to the Contract either oral or in writing.*

683. Sacyr accepts that a mere breach of contract will not rise to the level of a breach of Panama's Treaty obligations,[1219] but it seeks to step back from the provisions of the Contract itself to assert that Panama induced Sacyr to commit to an investment on terms that it had secured by withholding and misrepresenting crucial risk information:

> *When a State induces an investment on terms that it could only secure by withholding and misrepresenting crucial risk information, and then denies the investor any relief when that risk materialized, we say that is neither fair nor equitable within the ordinary meaning of those terms.*[1220]

684. The complaint is thus focussed upon the alleged inducement and Panama's subsequent conduct. Sacyr resisted the suggestion that it was incumbent upon it to identify specific acts attributable to Panama, which might be said to violate international law; it maintained that it had identified a course of conduct by the ACP, all of which was attributable to the State and which was in violation of Panama's Treaty obligations. While Sacyr maintained its allegation that such a course of conduct by the ACP had been intended to induce GUPC to enter into the Contract, it shied away from the suggestion of any specific collaboration, much less, a conspiracy. It suggested that:

> *[T]he fact that Panama was conducting risk assessments of the kind that we saw it conducted in 2005, and taking quantified views on these crucial project parameters, the PLE Basalt and the Lock Gates, does show that there was deliberate thinking about these risks.*[1221]

685. So, the argument goes, there was an awareness of these risks and a kind of considered approach to their assessment. And the materiality, the obvious materiality of this

---

1219 Transcript, Day 1, p. 40.
1220 Transcript, Day 1, p. 30.
1221 Transcript, Day 6, p. 1740.

information, to tenderers permits the inference that there was, at some level, a deliberate thought not to release this information to tenderers because of the potential consequences for the Expansion Program.

686. In order to make good its Treaty claim that Panama:

(i) knowingly withheld and misrepresented crucial risk information;

(ii) procured contractual terms adverse to the interests of the contractor on that basis; and

(iii) once the undisclosed risks materialised, denied Sacyr relief in reliance on those same provisions.

687. Sacyr must:

> *… establish that Panama knew or must have known about the materiality of the information that it was not sharing with [Sacyr]. When it decided not to share that, despite that it knew or must have known about that materiality, that's when [Sacyr says] internationally wrongful conduct commenced.*[1222]

688. That proposition is predicated on the basis that there is, in fact, an evidential record that confirms Panama's state of knowledge in respect of the information that it is alleged to have withheld. Moreover, Sacyr says that it is for Panama:

> *… to disprove the only inference [the Tribunal] can draw from that which is that there was a concerted effort [to withhold material information] and there was intent.*[1223]

689. In the opinion of the Tribunal, Sacyr must overcome a number of obstacles to make good its case. The allegations raised against Panama are serious. Whilst it is not suggested by the Tribunal that there is a direct correlation between the allegations made here and the allegations of corruption that were in play in *ECE v. Czech Republic*, the Tribunal considers apposite to its review of the evidence in this case the observation of the ECE tribunal that the "*mere existence of suspicions cannot, in the absence of*

[1222] Transcript, Day 6, pp. 1624–1625.
[1223] Transcript, Day 6, p. 1625.

sufficiently firm corroborative evidence, be equated with proof."[1224] The Tribunal notes, too, the admonition of the *Rompetrol* tribunal that conjecture is not evidence:

> *The Tribunal starts from the proposition that, whether the conduct in question is stigmatized as 'conspiracy' or as 'organized harassment,' some proof is required, even if all of the actors have the status of State agencies, that different actions pursued on different paths by different actors are linked together by a common and coordinated purpose. This was clearly the view taken by the Rosinvest tribunal, a view which the present Tribunal shares. What degree of proof would be required cannot be stated in the abstract; it would depend on the nature of the allegations and the circumstances of the case. The Tribunal recalls its finding in paragraph 182-183 above as to the sufficient weight of positive evidence that would be required to sustain serious allegations of sustained and coordinated misconduct, as opposed to pure probability or circumstantial inference. The Tribunal is quite prepared to assume as a working hypothesis that, given conditions in Romania at the time, there may have been tensions and rivalries, both commercial and personal, between Mr. Patriciu's enterprises and those connected with RAFO, and that Mr. Talpes may have had personal links to the latter. It is equally prepared to assume that there may have been, or there may have built up, a political hostility between Mr. Patriciu and Mr. Basescu after the latter succeeded Mr. Ion Iliescu as President.* ***But, even if so, this could only go to establish motive, and in investment arbitration the gap between motivation and action is not one that can be leapt over by conjecture rather than evidence.***[1225] [Emphasis added]

690. Sacyr is heavily reliant upon what it describes as "*plausible inference*".[1226] It suggests that it is for Panama to explain and to prove with evidence why it had decided not to provide Sacyr and its fellow consortium members with the allegedly withheld documents.[1227]

1224 *ECE Projektmanagement v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013, [4.876] (**CLA-112**).
1225 *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB06/3, Award, 6 May 2013, [273] (**RLA-227**).
1226 *See, e.g.* Transcript, Day 1, p. 38.
1227 Transcript, Day 1, pp. 19–20.

691. In the course of an exchange between the Tribunal and counsel for Sacyr it was suggested that the record showed that information that the APC officials in question knew to be material had been withheld and misrepresented and that:

> *that record, in the absence of any rebuttal evidence from Panama that explains what exactly went on as between these officials, is sufficient for you to infer that there was an intent to proceed as they did … [O]nce you establish that the officials in question knew about the materiality of the information that was not being shared or that was being misrepresented, you are very, very close already to a case of intent because if they knew the materiality and, yet, decided not to share it, the obvious question then becomes, why not? And that's where Panama should have provided you with an answer, if there was one, other than an intent to deceive.*[1228]

692. Based upon such a "*plausible inference*", Sacyr contended that:

> *The one thing Panama was not entitled to do under the Treaty was to say nothing, commit GUPC to the Contract by issuing [the] Letter of Acceptance, and then deny any relief when the risks it had anticipated materialized, on any view that was neither fair nor equitable.*
>
> *…*
>
> *[T]he fact that Panama was conducting risk assessments of the kind that we saw it conducted in 2005, and taking quantified views on these crucial project parameters, the PLE Basalt and the Lock Gates, does show that there was deliberate thinking about these risks.*
>
> *And so there was an awareness of these risks and a kind of considered approach to their assessment. And the materiality, the obvious materiality of this information to tenderers permits the inference that there was, at some level, a deliberate thought not to release this information to tenderers because of the potential consequences for the Expansion Program.*[1229]

693. That proposition is critical to Sacyr's case, but it is predicated on a number of assumptions. First, that there was material information of which Panama was aware.

[1228] Transcript, Day 6, pp. 1621–1622.
[1229] Transcript, Day 6, pp. 1739–1741.

Second, that having become aware of it, or having been made aware of it, Panama assessed it and took a positive decision not to release the information to Tenderers. Third, that Panama's motivation was that there would be a potential adverse impact upon the Expansion Program if the information were released.

694. The Tribunal hesitates to accept the assertion that such a series of assumptions and inferences is a sufficient basis upon which to ground a conclusion that Panama had breached its FET obligations under the Treaty – and, indeed, that is the only possible conclusion that it can reach. The apparent elision between *inferring* an intent to do something and *establishing* that that was the case is beguiling but inapposite.

695. Nor is it persuaded by Sacyr's contention that the burden of *disproving* its allegations should pass to Panama.

696. The Tribunal notes, first, that it was put to none of Panama's witnesses of fact, Messrs. Fernández, Lorenzo and Pérez, that there had been a concerted effort on the part of the ACP, much less a conspiracy within the ACP, to hide material documents from GUPC.[1230]

697. Second, the Tribunal notes that the 2005 Sulfate Soundness Test, which has assumed so much significance, was the subject of an application made to the Tribunal on the first day of the hearing on 17 June 2024 by Sacyr. Sacyr maintained that the existence of the test had been brought to its attention by (unidentified) "*whistleblowers*".[1231] Sacyr sought confirmation by Panama of the names of the ACP personnel who had authorised and commissioned the 2005 Sulfate Soundness Test. It pressed for an explanation why those individuals had not been produced as witnesses in the arbitration. Alternatively, Sacyr sought leave to introduce the Purchase Order into the record.

698. Having heard the Parties and mindful both of the very late stage in the proceedings in which the document had been introduced by Sacyr and of the lack of clarity as to the circumstances in which it had come to light, the Tribunal allowed the Purchase Order to be admitted into the record by its ruling of 20 June 2024. But it declined to order the disclosure of the names of the ACP personnel involved or to require Panama to explain

[1230] Transcript, Day 6, p. 1769.
[1231] Transcript, Day 1, pp. 15, 105.

why those individuals had not been proffered as witnesses in the arbitration. The Tribunal noted that the 2005 Sulfate Soundness Test was a live issue in the *Disruption* Arbitration, and it observed that there was no reason why the matter might not be pursued there.[1232] (The Tribunal had been told that the 2005 Sulfate Soundness Test had been an in issue in the *Disruption* Arbitration since 2021 and it was the subject of further disclosure requests in that case.)[1233]

699. Third, it is plain that had it wished to do so, Sacyr could have introduced into this arbitration evidence from some or all of the witnesses of fact and experts upon whom it had relied in the *Concrete* and *Lock Gates and Labor* Arbitrations – and, indeed, it had had the opportunity to test the evidence of both Mr. Quijano and Ms. George in cross-examination when they appeared for the ACP before the *Concrete* and *Lock Gates and Labor* tribunals. That evidence is a matter of record as between these Parties and both of those witnesses have made witness statements in the *Disruption* Arbitration.[1234]

700. With the exception of Mr. Zaffaroni, none of the other fact witnesses who appeared for GUPC in the *Concrete* Arbitration was called by Sacyr before this Tribunal. Mr. Zaffaroni and Mr. Pérez were the only two of the 13 witnesses of fact to testify for GUPC in the *Lock Gates and Labor* Arbitration, who appeared in this arbitration.[1235] None of GUPC's technical experts who submitted reports in either of the *Concrete* and *Lock Gates and Labor* Arbitrations gave evidence before this Tribunal.

701. That, given the importance attached to the basalt and seismic reduction factor complaints in this case, might well be thought remarkable.

702. Mr. Zaffaroni's evidence was of limited value. As Proposal Manager and head of the GUPC tender team with a myriad responsibilities, he was unable to deal with the detail

---

1232 Transcript, Day 4, pp. 1047–1048. It emerged in the course of the hearing that the two former contracting officers named on the Purchase Order, Messrs. De Puy and Guerra, are both retired and neither has given, or is giving, evidence in any of the ICC proceedings – *see* Transcript, Day 6, p. 1751.

1233 *See* Transcript, Day 6, p. 1780.

1234 Transcript, Day 6, pp. 1808–1809.

1235 In the course of his evidence, Mr. Pérez confirmed that those witnesses had included Mr. Augustijn, from July 2009, Iv-Groep's Lock Gates Project Manager, Mr. Ceressato, as of end 2010, Project Manager for Cimolai, the fabricator of the Lock Gates which had replaced the original lock gates fabricator, Heerema, pursuant to VO14 in early 2011, Mr. Pappas, BTM's (Bechtel's) Project Manager, Mr. Möder, Salini Impregilo's (Webuild's) Director of International Projects and Mr. Lampiano, Salini Impregilo's Bid Manager, who had supervised the Lock Gates bid preparation. Transcript, Day 3, pp. 889–898.

of Sacyr's two principal complaints – indeed, he conceded that he was neither a geologist nor a geotechnical engineer and he did not hold himself out as a seismic or lock gates expert.[1236]

703. He was able to confirm, however, that:

(i) GUPC knew from the start of the RFQ that the Contract would be a design-build contract;[1237]

(ii) no protest was raised as to the manner in which the ACP conducted the tender[1238] and he confirmed that GUPC had approached the tender phase and the eventual negotiation of the Contract on the basis that it was a normal contract by international standards;[1239]

(iii) he had visited the Site on many occasions, consistent with the ACP's advice that tenderers visit and examine the Site for themselves in order to obtain all the information that they required to prepare their tenders;[1240]

(iv) there was no record that GUPC had ever requested sight of the 8,600 Pacific basalt cores and core logs (although he suggested that GUPC's geologist did carry out an inspection, albeit there is no record to that effect);[1241]

(v) any of the tenderers could raise a formal request for clarification of the RFP to which any answer provided would be made available to all tenderers[1242] (see further (xii) below);

(vi) confidential meetings between the ACP and a particular tenderer would be recorded, but kept confidential and the record was neither disclosed, nor publicly available;[1243]

1236 Transcript, Day 3, pp. 759–760.
1237 Transcript, Day 3, pp. 736–737.
1238 Transcript, Day 3, pp. 750–751, 779.
1239 Transcript, Day 3, p. 741.
1240 Transcript, Day 3, pp. 764–765.
1241 Transcript, Day 3, pp. 769–770.
1242 Transcript, Day 3, p. 775.
1243 Transcript, Day 3, p. 777.

(vii) he was unaware of the basis upon which Iv-Groep had developed the Tender design for the Lock Gates, save that it had sought advice from TNO which had been retained by GUPC at Iv-Groep's request to advise on seismic conditions and Iv-Groep had "*never seen an earthquake in their life*";[1244]

(viii) unlike Mr. Pérez,[1245] he had never read, nor discussed, the findings in the *Labor and Lock Gates* Award;[1246]

(ix) the tenderers were told that the original Seismic Study of 2007, which was included in the RFP and upon which the Conceptual Design had been based, would be changing and that new seismic criteria would be issued by February 2008 – but in fact they were issued in April 2008 (Amendment 7);[1247]

(x) by his letter of 9 April 2008 to the ACP,[1248] Mr. Zaffaroni had sought an extension of two months, because "*[f]undamental documents and information necessary to start the design process, like the Report on seismic criteria and Geotechnical Data Report, will be issued on 18 April*";[1249]

(xi) the Employer's Requirements stipulated neither the size, nor the weight, nor the width, nor the price of the Lock Gates, all of which were matters for the tenderers. The steel price escalation clause changed during the RFP process, because the ACP was aware that the new seismic requirements would increase the size or weight of the gates. The price for steel was index linked, but with a cap on tonnage;[1250]

(xii) BTM's question 18 on the February 2009 Amendment 23 to the effect that the Reference Design for the gates would not be adequate for the specified design loading and its request that the ACP confirm that the Reference Design for the gates did not meet the current design criteria elicited the response: "*Refer to Clause 5.1 of the Conditions of Contract*" [which states that no reliance should

1244 Transcript, Day 3, p. 794.
1245 Transcript, Day 3, p. 886.
1246 Transcript, Day 3, p. 795.
1247 Transcript, Day 3, pp. 796–798.
1248 Letters from GUPC to the ACP, 15 January 2008–12 February 2009 (**R-28**).
1249 Transcript, Day 3, pp. 801–802.
1250 Transcript, Day 3, pp. 804–809.

be placed on Volume VI documents and it is for the tenderer to produce its own design]. The result, as Mr. Zaffaroni acknowledged was that the question answered itself;[1251]

(xiii) he accepted that GUPC's lock gates design was developed under certain principles that were found not to be correct;[1252]

(xiv) he regarded BTM's letter to the ACP of 29 July 2008,[1253] sent after the acceptance of GUPC's tender and in which BTM recorded that it had met GUPC to raise deficiencies in GUPC's lock gate design ("*[the seismic] calculations show the GUPC design analysis of seismic holding was not performed in accordance with the codes and standards in the ERs in a number of important ways*") as principally an attempt to disqualify the GUPC tender rather than the exercise by BTM of a professional duty to draw the ACP's attention to deficiencies in the GUPC design about which the ACP would then be in a position to consult its seismic design experts and to take any necessary corrective action.[1254] He accepted however, that BTM had set out the reasons why it believed GUPC to be in error and that it had made clear that the Japanese expert, Dr Sugano, upon whose work reliance had been placed in proceeding with the application of the PIANC seismic coefficient, had opined that it could not be used in relation to lock gates. Mr. Zaffaroni dismissed as "*fantastic*" the notion that having won the tender, with the assurance from Iv-Groep and CICP that the issue could be resolved in the later design stages and with the project moving forward to mobilisation, he or anyone else "*should spend time in reading the conclusion of Mr. Sugano*."[1255]

(xv) GUPC's mass balance had recorded that "*Since it is expected that there will be a lack of good quality rock for aggregates, various solutions are under*

1251 (Tender Questions and Answer Log, April 2008), p.; 320 of PDF (**R-27**); Transcript, Day 3, pp. 812–816.
1252 Transcript, Day 3, p. 828.
1253 Letter from BTM to the ACP, 28 July 2009 (**R-61**).
1254 Transcript, Day 3, pp. 834–837.
1255 Transcript, Day 3, p. 845.

evaluation to minimise its use." Unlike for Impregilo and Jan de Nul, no such internal risk register for Sacyr had been produced;[1256] and

(xvi) He was not aware that the URS 2008 Report had been in GUPC's hands in PAC-4 since 2009. GUPC had been unconcerned, because basalt for PAC-4 "*means almost nothing. The basalt for our Contract means a lot.*"[1257]

704. For his part, Mr. Pérez confirmed that he had first become involved in the TSLP in October 2010 when he had considered the structural criteria for the lock gates. He had had no involvement in the RFQ and RFP in 2007 and 2007-2009 respectively, nor in the events of the first 10 months of the Project.[1258] He had moved to Panama in May 2011 as the deputy Chief Engineer, assuming the role of Chief Engineer a year later.[1259] He confirmed that he was unable to provide evidence at first-hand about what was said to be GUPC's reliance upon the Reference Design for the seismic design of the Lock Gates or about what were described as BTM's warnings about the seismic design of the Lock Gates.[1260]

705. Mr. Pérez confirmed, however, that:

(i) none of the Iv-Groep employees responsible for the preparation, review and approval of the seismic design for the Lock Gates, Messrs. Koop, Alsemgeest, Vos and Meertins, had given evidence in the *Lock Gates and Labor* Arbitration (and none of them has provided evidence to this Tribunal either);[1261]

(ii) he was unable to explain the extent of any design coordination and discussion, specifically, about the seismic co-efficient, between the entity responsible for the design of the Lock Walls, Montgomery Watson Harza, and Iv-Groep;[1262]

(iii) the *Lock Gates and Labor* tribunal had considered the meetings and correspondence between the ACP and BTM in December 2008 and January

---

1256 Transcript, Day 3, pp. 851–852; *see also* GUPC Steering Committee No. 11, Meeting Report, 8 October 2008 (**R-301**).
1257 Transcript, Day 3, p. 865.
1258 Transcript, Day 3, pp. 899–900.
1259 Transcript, Day 3, pp. 879–880.
1260 Transcript, Day 3, pp. 909, 925.
1261 Transcript, Day 3, pp. 911–912.
1262 Transcript, Day 3, p. 915.

2009 and it had established, first, that the subject of the seismic coefficient had not been raised and, second, that BTM had made very clear its position that the Reference Design should not be used as a reference. Whilst he did not agree with the tribunal's conclusions, Mr. Pérez confirmed that he respected its decision.[1263] Mr. Pérez also acknowledged the finding of the tribunal that nowhere in the documentation or in the exchanges between ACP, BTM and CPP had there been any suggestion that the PIANC seismic coefficient was "*inapplicable*" – indeed GUPC itself had recognised that on the basis of the information available to the engineering profession at Tender stage, that was not a point that would have been obvious. GUPC's use of the seismic reduction factor in its seismic design at Tender stage reflected the information available to the industry at the time such that the use of the seismic reduction factor for lock gates was generally accepted;[1264] and

(iv) he accepted that there were no documentary records to suggest that aggregates had been rejected because they failed the sodium sulfate test[1265] and when asked whether any concrete had been rejected because of a failed sodium sulfate test, he avoided the question, stating only that the source had been changed.[1266]

706. While the record available to the Tribunal is limited by comparison with that which had been available to either the *Concrete* tribunal or the *Lock Gates and Labor* tribunal, the Tribunal has the benefit of the carefully reasoned and detailed awards of both of those ICC tribunals to complement that record.

707. What conclusions can be drawn from the record before this Tribunal, so far as the two principal limbs of Sacyr's case as it is now presented are concerned? Does the evidence demonstrate, as Panama maintains is the case, that there were no such misrepresentations as alleged or that any representations as were made were not, in fact, misrepresentations and cannot be relied upon as such?[1267]

1263 Transcript, Day 3, p. 970.
1264 BTM's letters and presentations to ACP, "Rolling gate width and weight justification", 9 December 2008 – 16 January 2009, p. 4 (**C-214**); Transcript, Day 3, pp. 979–980.
1265 Transcript, Day 3, pp. 988–989.
1266 Transcript, Day 3, p. 992.
1267 Transcript, Day 6, p. 1769.

(5) Basalt

A. Preliminary Remarks

708. There is no dispute as to scale of the requirement for aggregate for the TSLP. The new lock structures required some 5 million cubic metres of concrete. Concrete comprises gravel (coarse aggregate), sand (fine aggregate), cement, and water. Aggregates constitute some 75% of concrete volume and the soundness of the aggregates affects concrete quality.

709. As a preliminary point, it is to be noted that Sacyr has shifted ground from its opening position that Panama had represented that the basalt excavated from the PLE should be used as the primary source of aggregates for concrete production.[1268] In its Reply on the Merits, Sacyr stated that on the basis of Panama's representations (supported by an extensive and "*comprehensive*" testing program on Pacific side basalt that had produced "*acceptable results*"[1269]) it had bid for the Project on the *assumption* that PLE basalt would be its primary source for producing aggregate.[1270]

710. In any event, it was for GUPC as the design-build contractor to decide from where to source materials, including aggregates.[1271] In the course of the RFP period, a Tenderer had asked whether the ACP had any preference regarding the source of aggregates to which the formal response had been:

> *ACP has no preference regarding sources for aggregate.*[1272]

711. Section 2.3 of the GDR had identified a number of potential sources of coarse and fine aggregate, among them, Chagres River gravel and sand, and commercial quarries.[1273] Specifically in the case of the Chagres River, the GDR noted that:

> *In 2000, the segment of the Chagres River near Gamboa was dredged and abundant gravel and sand were extracted from the natural deposits of the river.*

1268 Notice of Arbitration, [28(b)].
1269 GDR, May 2008, p. 23 (**C-186**).
1270 Reply on the Merits, [66].
1271 Rejoinder on the Merits, [152].
1272 Tender Questions and Answers Log, April 2008, p. 93 of PDF, item 162 (**R-27**).
1273 GDR, May 2008, section 2.3 (**C-186**).

> *These materials are suitable for coarse aggregate of diverse sizes, fine aggregate, and material for subbase and base.*[1274]

712. Although Sacyr had suggested that the

> *... so-called freedom to use materials from an alternative source was in fact a myth*[1275]

it had availed itself of the local knowledge and experience of MWH and CUSA to search other locations, including the Chagres River and Santa Comba.[1276] It had concluded as early as October 2008 that there was a deficit of aggregate quality basalt in the PLE, such that it looked to the Aguadulce Quarry to augment supplies from the PLE.[1277]

713. Mr. Klaetsch had contended that, on the basis of the information available to Tenderers:

> *... there really was only one source under consideration [the PLE basalt].*[1278]

714. That proposition was tested in the course of his cross-examination. Confronted with the mass balance of the C.A.N.A.L tender from which it was evident that C.A.N.A.L anticipated that it would be able to source up to 7.85 million cubic metres for concrete aggregate from Chagres River gravel and sand[1279] and the reference to the Chagres River in the GDR, he conceded that it was listed as a "*potential source*".[1280]

715. There was, in fact, *no* requirement to use PLE basalt, as the *Concrete* tribunal made clear:

> *... the Arbitral Tribunal is not convinced by [GUPC's] arguments that the Contract was concluded on the basis of a "fundamental datum" concerning the use of the PLE Basalt as the primary source material for concrete aggregates. Moreover it is clear from the Contractor's Design Plan that it always envisaged the basalt for the production of aggregates would be sourced*

1274 GDR, May 2008, section 2.3.2.3 (**C-186**).
1275 Reply on the Merits, [66(b)].
1276 Email from G. Pico to D. Grimaldo, 30 October 2008 (**R-448**).
1277 GUPC Steering Committee No. 11, Meeting Report, 8 October 2008 (**R-301**).
1278 Transcript, Day 2, p. 377.
1279 Extracts of C.A.N.A.L.'s Tender Proposal, March 2009, p. 59 (**R-282**).
1280 Transcript, Day 2, p. 477.

> *to some extent from the excavation of the Aguadulce Hill and Cocoli Hill quarries.*[1281]

716. Any such "*Fundamental Datum*" would be at odds with the Employer's Requirements, which stipulated at para.1.07D, Section 01 50 00:

> *D. Employer Identified Alternatives*
>
> *1. Aggregate for the Atlantic and Pacific Locks: A potential source of aggregates for the Atlantic and Pacific Sites may be the rock coming from the excavation at the Pacific site and sand that may be manufactured from that rock. The Employer in no way guarantees that such aggregate is adequate or meets the requirements for the Contractor's proposed design or is suitable for the Works. The Contractor may wish to consider other options; however, the Contractor should be aware that the areas of the Chagres River upstream from the Gamboa Bridge cannot be used for supply of aggregates.*[1282]

B. Material documents "withheld" by the ACP

717. Sacyr complains that the ACP withheld certain material documents. The Tribunal considers them in turn, noting that in the course of this case, the relative reliance and emphasis placed upon on the NARA documents, the November 2005 Risk Assessment and the Parsons Brinckerhoff Peer Review has diminished, whereas the 2005 UTP Report and the 2008 URS Report have become front and centre to Sacyr's complaint.

C. The NARA[1283] *documents*

718. In August 1944, the United States Department of Operation and Maintenance Special Engineering Division issued its Final Report on Modified Third Locks Project (the "**Isthmian Report**"). During the RFP process, the ACP made available part of the Isthmian Report.[1284] The copy of the Isthmian Report held by the ACP and provided to Tenderers pursuant to Amendment No. 7 of 18 April 2008 was missing two chapters

---

1281 *Concrete* Arbitration, Partial Award, [1002] (**RLA-167**).
1282 Contract – Employer's Requirements – Section 01 50 00 – Temporary Facilities, Accesses and Controls, 1 November 2008, [1.07.D.1] (**R-79**).
1283 U.S. National Archives and Records Administration.
1284 United States Department of Operation and Maintenance, Special Engineering Division, Final Report on Modified Third Locks Project, Part I and Part II (selected chapters), August 1944 (**C-440**).

from Part III (Chapter 4 (*Pacific Area*)[1285] and Chapter 7 (*Concrete*)).[1286] However, the ACP had made available a copy of the index to the Isthmian Report to Tenderers. The index included the descriptive headings of both of the chapters missing from the ACP's copy.[1287]

719. It is undisputed that the Tenderers were not provided with the complete Part III of the Isthmian Report.[1288] It was Mr. Miguez's evidence that the missing parts of Part III of the Isthmian Report had been unaccounted for in ACP's records unit until early 2010,[1289] after the date of the extended tender submission of 3 March 2009. He acknowledged, however, that copies of the missing Part III Chapters 4 and 7 had arrived at the ACP after Amendment 7 had been issued and prior to the end of the Tender phase.[1290] Mr. Miguez further confirmed that between the date of Amendment 7 and the date of the Tender submission, a further 17 Amendments had been issued. He accepted that if the missing sections of Part III had come to light after Amendment 7 of 18 April 2008, they could have been made available to Tenderers with any of those 17 subsequent Amendments.[1291] In fact, it appears from the contemporary email traffic that copies on paper of the missing chapters had been discovered in the Chiari Library by Mr. Cortizo of the ACP as he reported on 9 April 2008.[1292] On 11 April 2008, Mr. Barber, an ACP employee emailed Patrice Brown of NARA to seek a complete set of Part 3 of the Isthmian Report.[1293] There is no indication on the record of developments further to either email and Mr. Miguez told the Tribunal that his understanding, having spoken to Mr. De Puy, was that the documents had arrived and then been forgotten about.[1294] What is clear, however, is that GUPC never pressed for copies of the missing chapters of Part III of the Isthmian Report[1295] and it had been open to GUPC (and indeed any other

---

1285 United States Department of Operation and Maintenance, Special Engineering Division, Final Report on Modified Third Locks Project, Part III – Construction, Chapter 4 – Pacific Area, January 1944 (**C-439**).
1286 United States Department of Operation and Maintenance, Special Engineering Division, Final Report on Modified Third Locks Project, Part III – Construction, Chapter 7 – Concrete No. 59, April 1946 (**C-441**).
1287 United States Department of Operation and Maintenance, Special Engineering Division, Final Report on Modified Third Locks Project, Part I and Part II (selected chapters), August 1944 (**C-440**).
1288 Transcript, Day 4, p. 1156.
1289 These matters were canvassed in Mr. Miguez's evidence in the *Cofferdam* Arbitration, Miguez Second Witness Statement, 24 November 2015 (**R-256**).
1290 **RWS-6** Miguez II, [29]; Transcript, Day 4, pp. 1156–1158.
1291 Transcript, Day 4, pp. 1157–1158.
1292 Email from E. A. Camargo to L. Cortizo, 9 April 2008 (**R-253**); Transcript, Day 4, p. 1151.
1293 Email from E. Barber to P. Brown (NARA), 11 April 2008 (**C-471**).
1294 Transcript, Day 4, pp. 1158–1159.
1295 **RWS-6** Miguez II, [23].

Tenderer) to contact NARA directly to obtain copies of whatever parts of the Isthmian Report that it required as the documents were publicly available.[1296]

720. Further, there is no suggestion that any attempt had been made wilfully to suppress any part of the Isthmian Report. As Counsel for Panama pointed out, Mr. Klaetsch had conceded that the authors of the Isthmian Report had concluded that the Miraflores basalt should be used for the TSLP (in its then current iteration when the Project restarted after World War 2) and the plan was to use stockpiled Miraflores basalt for the TSLP as it was then conceived in the 1940s.[1297]

721. The Tribunal notes that in the *Cofferdam* Arbitration, a further allegation had been raised that Part III Chapter 6 (Dredging) of the Isthmian Report was also missing. The *Cofferdam* tribunal rejected any suggestion that Chapter 6 had been withheld intentionally or by reason of gross negligence – and in any event, given all other available material it would not have "*added anything to the information that was already available*."[1298]

D. The "withheld" November 2005 Risk Assessment

722. In September 2005, the ACP had issued a Risk Assessment in which it classified the probability that PLE basalt would be "*unsuitable as aggregate*" as so low that it "*almost certainly won't occur*."[1299]

723. Only two months later, the ACP had prepared a further risk assessment in the context of a Project Cost Risk Matrix. The document is an undated spreadsheet, which included a quantitative assessment (including an overall percentage and a cost and time impact) in addition to the qualitative assessment.

724. The ACP now quantified the probability of rock being unsuitable as aggregate at "*20-39%*". Furthermore, the action item to mitigate the risk changed from: "*Conduct laboratory tests in advance*" to: "*Establish in the contract the freedom of the contractor to decide whether to process the available material or use material from another*

1296 **RWS-6** Miguez II, [24].
1297 Transcript, Day 2, p. 430.
1298 *Cofferdam* Arbitration, Final Award, [498]–[501] (**RLA-97**).
1299 ACP, "Design Value Management, Constructability Dialogos and Risk Assessment – Third Lane Locks Project – 22nd August to 26th August 2005", Workshop Report, 14 September 2005, pp. 47 &, 138 (**C-137**).

site."[1300] Such an arrangement, which is standard in a design-build contract, reflected the approach taken when the tender documents were released and of which GUPC would have been well aware. The November 2005 Cost Risk Matrix was not made available to Tenderers.

725. Panama pointed out that the Risk Assessment was the work product of one of a number of workshops at which potential risks to the Project were discussed and characterised (a) as low, medium and high in terms of the likelihood of an occurrence; and (b) low, medium or high in terms of impact. MWH, GUPC's designer, was part of this process. The Tribunal was told that following the workshop, a quantitative assessment had been made, which recognised that although the likelihood of an occurrence (unsuitable basalt) was low, it would have a high impact and thus the attribution of the 20-39% spread. There was no obligation on the ACP to disclose its own internal quantification to tenderers; on the basis of the workshop's low likelihood/potentially high impact evaluation, it was for the Contractor to determine how to approach risk in its tender and to quantify it.[1301] That was the approach taken in the tender documents - and it was an approach appropriate to a design-build contract. Sacyr was aware that this risk was classified as a "moderate" risk, and aware that further testing was undertaken on rock. It was provided with RFP, Volume VI, Part 2, Geotechnical Report,[1302] which concluded that:

> *manufactured sand from the basalt resulted in an acceptable fine aggregates.*

726. The Report contained the recommendation that:

> *studies be carried out to confirm its viability.*[1303]

727. It is not possible to establish whether GUPC ever considered this Report and the caveats and recommendations that it contained. It has become clear, however, that, at tender, GUPC's crushing plant designer, Mr. Buffa, did not even know of its existence.[1304]

1300 ACP, Project Cost Risk Matrix, 1 November 2005, entry 80 (**C-453**).
1301 Transcript, Day 6, pp. 1766–1768.
1302 RFP, Volume VI, Part 2, Geotechnical Report, Section 2.3.3.2, December 2007, p. 35 of PDF (**C-172**).
1303 RFP, Volume VI, Part 2, Geotechnical Report, Section 2.3.3.2, December 2007, p. 35 of PDF (**C-172**).
1304 *See* para. 760 below and *Concrete* Arbitration, Hearing Transcript, Day 4, pp. 127–128 (**R-202**).

E. The Parsons Brinckerhoff Peer Review September 2004

728. In its 2004 Cost Report, the ACP stated that one of the most important assumptions underpinning its cost estimate of some US$ 2.9 billion[1305] was that:

> *[t]he aggregate and crushed stone required for both sites would be obtained from the excavation of the Pacific locks and access channel.*[1306]

729. The Report was further predicated on estimates based on the design-bid-build Concept (that is to say, that the risk inherent in the accuracy of the design rested with the Employer) and that the aggregates for the Atlantic locks would come from the excavation of the Pacific access channel.

730. As the *Concrete* tribunal has noted, the Cost Report was put together with the assistance of Parsons Brinckerhoff and MWH, later to become, with the ACP's full knowledge and consent, GUPC's lead Project designer.[1307]

731. In August 2004, the ACP revised the cost estimate to reflect revisions in the Reference Design of the Lock Gates. The ACP instructed Parsons Brinckerhoff and MWH to review the revised cost estimates. They made clear in their Peer Review that the cost estimate:

> *attempts to overlay the precision normally associated with an engineer's estimate onto a foundation that is less developed than is even usual for a conceptual estimate.*[1308]

732. Parsons Brinckerhoff and MWH flagged their concern about:

1305 Cost Schedule and Constructability Analysis for the Proposed Post-Panamax Locks, Concept Level Design Estimates Report, April 2004, pp. 7, 11 (**C-5**) (USD 2.9 billion = USD 1.5 billion ("Total Pacific Locks Cost") + USD 1.4 billion ("Total Cost Locks" and "Total Owner's Cost" of Atlantic Side)).

1306 Cost Schedule and Constructability Analysis for the Proposed Post-Panamax Locks, Concept Level Design Estimates Report, April 2004, pp. 2–3.

1307 *Concrete* Arbitration, Partial Award, [1024] (**RLA-167**).

1308 Parsons Brinckerhoff International, "Peer Review of the Third Lane Locks, Alignment Channels, Water Savings Basins and Other Related Improvements, Part 1: Locks Program", 30 September 2004, pp. 3, 7 (**C-445**). The Review specifically records that: "*the ET was provided with only 10 to 20 percent design level documents for the Pacific Locks (which were subsequently dimensionally changed) and no directly applicable design documents for the Atlantic Locks, and no design at all for several other project elements*."

> *a lack of suitable natural deposits of coarse and fine aggregates for concrete production.*[1309]

733. The cost estimate had not identified any specific sources for the production of concrete aggregates – in fact, Parsons Brinckerhoff and MWH recommended that a cost benefit analysis be made to compare the cost of crushing the excavated rock:

> *as opposed to mining sand at Bahia de Chame or some other offshore source.*[1310]

734. It is on the basis of that concern as to the volume of fine and coarse aggregates that the Review suggested the 50% contingency for:

> *[l]ack of fine aggregates for concrete – sand fabrication*

upon which Sacyr places some store. Properly understood, it did not arise, as Sacyr sought to infer, from a concern on Parsons Brinckerhoff's and MWH's part as to issues peculiar to the PLE basalt.[1311]

735. The ACP had rejected the review (and the recommendation). The principal reason for the ACP's CEO's, Mr. Alemán's, rejection of the Peer Review was that the March 2004 estimate had been incomplete and that there had been an "*apparent lack of oversight [provided by] the PB team … to the ACP cost team following the expiration of the task order in March [2004]*."[1312]

736. In November 2004, Parsons Brinckerhoff had updated the estimate of the Project Costs to US$ 3.5 billion, noting that there were: "*significant gaps in necessary design data*."[1313]

1309 *Ibidem*, p. 8.
1310 *Ibidem*, p. 9.
1311 Reply on the Merits, [130(a)].
1312 Parsons Brinckerhoff International, Monthly Progress Report No. 3 – September 2004 (October 2004) p. 7 of PDF (**C-446**).
1313 Parsons Brinckerhoff International, "Conceptual Level Cost Estimate and integrated Schedule, Volume 1", 24 November 2004, p. 19 of PDF (**C-448**).

737. Critically, however, the Parsons Brinckerhoff advice is recorded in reviews of the 2004 Cost Estimate produced by the ACP and which was superseded by the 2006 Cost Estimate.[1314]

738. Notably, having recorded the ACP's failure to produce the Parsons Brinckerhoff documents pursuant to the Tribunal's order in the course of its introductory remarks, having indicated that Sacyr would take the Tribunal to them and having suggested that whatever the reasons for the ACP's "*recalcitrance*", they were among the documents that:

> *establish, beyond any doubt, that Panama did withhold and misrepresent crucial risk information during the Tender*'[1315]

the Parsons Brinckerhoff documents were not mentioned again in the course of Sacyr's submissions, nor in the course of the cross-examination of any of Panama's witnesses on Day 4 of the Hearing.

F. The "withheld" 2005 and 2008 Sulfate Soundness Tests

739. Now central to Sacyr's case in this investment treaty arbitration is that Panama withheld the results of two sulfate soundness tests, the 2005 UTP Report and the 2008 URS Report, which recorded failed results, in breach of its Treaty obligation to afford Sacyr fair and equitable treatment. It was said that they would have been "*red flags*" for GUPC, had it known about them, so far as the suitability of the PLE basalt for concrete aggregate production was concerned.[1316]

740. Stepping back for a moment, Sacyr suggests that two sulfate soundness tests, one of which it was unaware and the other of which, it is now accepted, had been in GUPC's possession since 2009, would have had a material impact upon its decision to submit a multi-billion dollar tender or, indeed, to invest in the project at all.

741. This proposition has to be tested against the background that:

1314 ACP, "Cost and Activity Schedule for the Conceptual Design of the Post-Panamax Locks", February 2006 (**C-140**).
1315 Transcript, Day 1, pp. 15–16.
1316 Reply on the Merits, [3(a)], [151]; *see also* Transcript, Day 3, p. 865.

(i) it involves a Project described in GUPC's expert, Mr. Page's, Report in DAB Referral No. 11 as perhaps the most investigated Project in the history of Civil Engineering. He recorded that some 1814 borehole logs were available for inspection.[1317] Sacyr's expert witness, Mr. Klaetsch, himself acknowledged that the TSLP was a project with "*extreme quantities of data*";[1318]

(ii) Tenderers were advised to visit and examine the Site and surroundings and obtain for themselves at their own responsibility all information that might be necessary for the preparation of tenders;[1319]

(iii) the entire Site was freely available to Tenderers[1320] and GUPC had availed itself fully of that opportunity. Mr. Zaffaroni told the *Concrete* tribunal that between January 2008 and March 2009, GUPC and its designers, MWH and Sembenelli Consulting, had visited the Site (and the wider vicinity) on some 20 occasions with the participation of senior geologists and geotechnical engineers;[1321]

(iv) the ACP met Tenderers individually and as a group. In recognition of the scale of the commitment made by Tenderers in the context of bid preparation, it increased the stipend for unsuccessful Tenderers to US$ 15 million;

(v) the experience of the tendering organisations is not to be underestimated; they included some of the biggest names in the world of construction and engineering, including, in addition to the members of the GUPC Consortium itself, Acciona and the ACS Group, Bechtel, Hochtief, Impregilo, Jan de Nul, Mitsubishi and Taisei;

(vi) in addition to Sacyr, the GUPC Consortium included the Panamanian company, CUSA, the largest earthworks concern in Panama with extensive experience of Miraflores Basalt. CUSA was the contractor undertaking the excavation of the Pacific Access Channel Phase 1 Project ("**PAC-1**") and a subcontractor on

1317 Mr. Page Expert Report, DAB Referral No. 11, 24 September 2013, p. 19 (**R-135**).
1318 Transcript, Day 2, p. 462.
1319 RFP, Amendment No. 24, Volume I – Tender Documents, Part I – Instructions to Tenderers, Section A.7 (**C-221**).
1320 Transcript, Day 2, p. 537.
1321 *Concrete* Arbitration, Zaffaroni Second Witness Statement, [50] (**R-382**).

Pacific Access Channel Phase 2 Project ("**PAC-2**"), another part of the Panama Canal Expansion Program. At the time of the TSLP RFP, it was working in local basalts at Cerro Escobar and it had undertaken other work for the ACP in the Pacific Canal Area. CUSA also operated its own crushing plant at Vacamonte. The final member of the Consortium was MWH, which for years had provided consulting services to the ACP and predecessor Panama Canal Administrations;

(vii) while rival Tenderer, C.A.N.A.L, inspected a number of the 8,600 borehole core boxes and undertook its own site testing and drilled its own boreholes,[1322] it was put to Mr. Zaffaroni that the *Concrete* tribunal had found that there was no record of GUPC having sought to inspect any of the basalt core boxes at Tender. Mr. Zaffaroni had suggested that such an inspection would have been undertaken by GUPC's geologist "*whether it is on the record or not in the record*", but there is no contemporaneous evidence from anyone who would have been involved;[1323]

(viii) the Concrete tribunal had recorded that "*[the ACP] stressed in the Contract that they were providing no guarantee as to the suitability of the aggregates produced from such material;*"[1324] and

(ix) to the extent that its own tests showed non-compliant results, the ACP *had* made them available to Tenderers. ACP Technical Report 2006-13 referenced four gradation tests that produced fines percentages which were not in compliance with ASTM C33.[1325]

G. Sulfate Soundness Tests

742. A sulfate soundness test is a chemical test the purpose of which is to determine the relative quality, durability and performance of aggregates used in concrete mixing when subject to weathering and, specifically, when they are subject to freeze-thaw conditions.

1322 C.A.N.A.L Tender: Vol. V Part 5 C.4 Design Report, Concrete, Appendices B – Aggregate Sampling and Testing (**C-531**).
1323 Transcript, Day 3, p. 770.
1324 *Concrete* Arbitration, Partial Award, [1058] (**RLA-167**).
1325 ACP, Technical Report 2006-13, Tests on Pacific Site Basaltic rock as fine aggregate or manufactured sand to replace the natural sand, July 2006, p. 8 of PDF (**C-145**).

743. The Employer's Requirements stipulate that aggregates:

> *shall meet the requirements of ASTM*[1326]*C 33 and shall be classified as not being potentially reactive with alkalis in the concrete mix, in accordance with Appendix XI in ASTM C 33.*[1327]

744. The criteria for aggregate "*soundness*" set by ASTM C33 make reference to ASTM C88 (Standard Test Method for Soundness of Aggregates by use of Sodium Sulfate or Magnesium Sulfate).

745. ASTM C88 defines the scope of the test as follows at Section 1.1:

> *This test method covers the testing of aggregates to estimate their soundness when subjected to weathering action in concrete or other applications. This is accomplished by repeated immersion in saturated solutions of sodium or magnesium sulfate followed by oven drying to partially or completely dehydrate the salt precipitated in permeable pore spaces. The internal expansive force, derived from the rehydration of the salt upon re-immersion, simulates the expansion of water on freezing. This test method furnishes information helpful in judging the soundness of aggregates when adequate information is not available from service records of the material exposed to actual weathering conditions.*[1328]

746. At Section 3.1, it is made clear that:

> *This test method provides a procedure for making a preliminary estimate of the soundness of aggregates for use in concrete and other purposes. … Since the precision of this test method is poor …, it may not be suitable for outright rejection of aggregates without confirmation from other tests more closely related to the specific service intended.*

747. Details of "*Precision*" for the purposes of the test are set out at Section 12.1:

1326 American Society for Testing and Materials.

1327 RFP, Amendment 17, Vol. II, Employer's Requirements, Part 1 – Locks Performance and Design Criteria, Section 03 30 00 – Concrete, October 2008, Article 1.03(A)2 (**C-201**).

1328 ASTM C-88 – 05 – Standard Test Method for Soundness of Aggregates by use of Sodium Sulfate or Magnesium Sulfate (**R-550**).

> *For coarse aggregate with weighted average sulfate soundness losses in the ranges of 6 to 16 % for sodium and 9 to 20 % for magnesium, the precision indexes are as follows… [the coefficient of variation is set out on the basis of both multi-laboratory (different laboratories testing the same samples) and single operator (one laboratory testing a number of samples)].*

748. It is important to note, too, that Panama is considered a "*Negligible Weathering Region*" for the purposes of ASTM C33 – *"[a] climate where concrete is rarely exposed to freezing in the presence of moisture*."[1329] It does not experience the freeze-thaw conditions that the sulfate soundness test is intended to simulate and no sulfate soundness loss limit for coarse aggregates is prescribed.[1330]

749. As Mr. MacDonald pointed out:

> *the RFP says that the aggregates must comply with ASTM C-33. ASTM C-33, in turn, sets out properties, requirements for the aggregate and for the exposure class 2N, which would include waterfront structures under ASTM C-33. There is … no sulfate soundness requirement.*[1331]

750. Sacyr accepts that the Employer's Requirements "*require aggregates to meet the requirements of ASTM C33*",[1332] but Mr. Klaetsch suggested that the Parties had proceeded on the basis of an understanding that an allowable loss limit of 12% would apply to coarse aggregate. He referred to ACP's Technical Report 2006-14, noting that an allowable loss limit of 12% set out in the Technical Report reflected the ASTM C-88 loss limit criteria for Class Designation 4M, which includes: "*water-front structures subject to frequent wetting*."[1333]

751. But Class Designation 4M generally applies in Moderate Weathering Regions – a "*climate where occasional freezing is expected*."[1334] The adoption of a 12% allowable loss limit was no part of the Employer's Requirements; rather, it was the result of a

---

1329 ASTM, Standard Specification for Concrete Aggregates, C33/C33M – 11a, p. 5 (**C-263**).
1330 *Ibidem*; *see also* Klaetsch, Transcript, Day 2, pp. 498–500.
1331 Transcript, Day 2, pp. 665–666.
1332 Reply on the Merits, para. 111.
1333 Transcript, Day 2, p. 389.
1334 ASTM, Standard Specification for Concrete Aggregates, C33/C33M – 11a, p. 5 (**C-263**).

combination of GUPC's own design specification and reference to ACP Technical Report 2006-14, a Volume VI document.

752. As Section 5.1 of the Contract makes very clear:

> *[T]he Parties agree that the Employer shall not be responsible in any way whatsoever for the Volume VI Documents …*
>
> *Nothing contained therein shall relieve the Contractor from his responsibility for the design and execution of the Works in accordance with the Employer's Requirements. The Parties agree that the Volume VI Documents are included in the Contract for information purposes only, may not be relied upon by the Contractor in any way or for any reason, and shall not give rise to, form the basis of, or be the subject matter of, any claims of any nature against the Employer.*[1335]

753. Pressed on the point, Mr. Klaetsch accepted that in the case of coarse aggregate (which was the subject of the UTP Report), ASTM C33 imposed no limit in a Negligible Weathering Region.[1336]

754. So far as fine aggregate was concerned, Section 8.1 of ASTM C33[1337] provided that:

> *[F]ine aggregate subjected to five cycles of the soundness test shall have a weighted average loss not greater than 10 % when sodium sulfate is used or 15 % when magnesium sulfate is used.*

755. But Sections 8.2 and 8.3 add the provisos:

> *8.2 Fine aggregate failing to meet the requirements of 8.1 shall be regarded as meeting the requirements of this section provided that the supplier demonstrates to the purchaser or specifier that concrete of comparable properties, made from similar aggregate from the same source, has given satisfactory service when exposed to weathering similar to that to be encountered.*

1335 RFP, Amendment No. 24, Volume III – Conditions of Contract (Final,) of PDF (**C-222**).
1336 Transcript, Day 2, pp. 498–500.
1337 ASTM, Standard Specification for Concrete Aggregates, C33/C33M – 11a (**C-263**).

> *8.3 Fine aggregate not having a demonstrable service record and failing to meet the requirements of 8.1 shall be regarded as meeting the requirements of this section provided that the supplier demonstrates to the purchaser or specifier it gives satisfactory results in concrete subjected to freezing and thawing tests.*

756. Mr. Klaetsch noted that ASTM C33 requires C88 soundness loss less than 10% for fine aggregate with no exception for weathering severity.[1338]

757. Mr. MacDonald pointed out that it is just as important to keep in mind what a sulfate soundness test would *not* reveal. Notably, it does not address crushability:

> *It tells us nothing about how well a particular rock is going to crush in a particular crushing facility … The [LA] abrasion test gives us direct impact – steel balls onto the particles – much closer in mechanics to the mechanisms that are going to be used to crush the concrete or the aggregate down to smaller sizes.*[1339]

758. That proposition was echoed in the conclusions of the *Concrete* tribunal. It was:

> *convinced that any issues with the crushing of the PLE Basalt could indeed only be discovered by actually crushing the material. GUPC, which had access through its local consortium member CUSA to an actual crushing plant, would have been the best placed to have conducted such crushing tests.*[1340]

759. Notably, the ACP Technical Report 2006-13 (which had been made available to Tenderers) had identified the possibility that crushing basalt for manufactured sand could result in high levels of fines. As the Report made clear in its introduction:

> *When natural sand sources are scarce, the sand produced by crushing machines may be the best substitute for sand. Some negative factors in the use of manufactured sand are particularly related to the poor workability and the*

1338 Transcript, Day 2, pp. 388–389; *see also* MRCE presentation, "Third Set of Locks Project – Pacific Locks Excavation Basalt Aggregates", 18 June 2024, slide 22.
1339 Transcript, Day 2, pp. 632–633.
1340 *Concrete* Arbitration, Partial Award, [1079] (**RLA-167**).

> *fine grains obtained. This is due to the high content of fine particles in the (< 0.75 mm) sieve and irregular forms of manufactured sand.*[1341]

760. Although the 2006-13 Report warned that one of the risks of crushing basalt to make sand (as GUPC planned to do) was that it might produce excess fines and therefore might not be economically viable – the risk that Sacyr now says had materialised - it emerged in the course of evidence in the *Concrete* Arbitration that neither Mr. Buffa, the designer of the crushing plant (nor, it seems anyone else at Sacyr) had even reviewed this report. In fact, Mr. Buffa had been unaware of the existence of the Report during the RFP period.[1342]

761. Panama has suggested that a reasonably prudent tenderer, particularly one considering a commitment to a very substantial fixed price design and build contract, would not base a decision whether or not to use a specific material for concrete aggregate production—much less the decision of whether to bid on a project at all—on sulfate soundness tests alone, especially in a tropical region such as Panama. GUPC had had both access to a wealth of additional information and the opportunity to carry out other studies far more relevant and informative as to how the basalt would behave when processed.

762. Mr. Lewis was asked what would have been his order of priority, if he had been required to extract from such a plethora of data (11,169 tests of various kinds), evidence relevant to an informed assessment as to the suitability of basalt for aggregate. He explained that he would first examine the borehole logs to identify good material in areas where he would expect to mine for aggregate. He would then look for tests within the good material to see if any alarms were raised by reference to strength tests, select durability tests and LA abrasion tests.[1343]

763. In January 2008, the ACP had provided Tenderers with three sulfate soundness tests on Pacific basalt, all of which showed acceptable results:

(i) ACP, Technical Report 2006-14 (September 2006): a coarse aggregate test commissioned on 14 April 2004, on a sample (TPIC-16) taken from '*Corte*

1341 ACP, Technical Report 2006-13, Tests on Pacific Site Basaltic rock as fine aggregate or manufactured sand to replace the natural sand, July 2006, p. 4; *see also* § 3, [5] (**C-145**).
1342 *Concrete* Arbitration, Hearing Transcript, Day 4, pp. 127–128 (**R-202**).
1343 Transcript, Day 2, pp. 614–615.

Culebra' within the PAC-4 works contract area, which showed acceptable results of 0.49%;[1344]

(ii) ACP, Technical Report 2006-14 (September 2006): a further coarse aggregate test, likewise commissioned on 14 April 2004, on another *Corte Culebra* sample (TPIC-17) which showed acceptable results of 9.15%;[1345] and

(iii) ACP, Technical Report 2006-13 (July 2006): a fine aggregate test, conducted on 12 April 2006 on a sample (M-1) taken from '*Corozal*' (the location of the ACP's soils and materials laboratory). The source was identified as "*Pacific Site Basaltic rock*" and the results showed an acceptable result of 2.8%.[1346]

764. Sacyr says that in the GDR of May 2008, the ACP had represented that:

> *[a]ll tests [including chemical tests for sulfate wear] met the standard specifications for concrete aggregates;*[1347]

and

> *[i]n the past, tests such as chemical analysis and abrasion have been made to materials from these sources with acceptable results.*[1348]

765. The May 2008 GDR[1349] also contained a table (Table 19) based upon ACP Technical Report 2008-5 which purported to contain the results of 19 satisfactory discrete sulfate soundness tests undertaken on the Pacific side.[1350]

1344 ACP, Technical Report 2006-14, Laboratory tests on materials from the Third Set of Locks to be used as aggregates, September 2006, p. 10 of PDF (**C-146**) of PDF.

1345 *Ibidem* at p. 3 of PDF.

1346 of PDF ACP, Technical Report 2006-13, Tests on Pacific Site Basaltic rock as fine aggregate or manufactured sand to replace the natural sand, July 2006, p. 51 of PDF (**C-145**).

1347 *Ibidem*, p. 6 of PDF.

1348 GDR, May 2008, p. 23 (**C-186**).

1349 GDR, May 2008, p. 36 (**C-186**).

1350 ACP, Compilation of Test Results Performed for Third Set of Locks of Project, Technical Report No. 2008-5, May 2008, pp. 2466, 2477, 2483, 2484, 2490 (**C-476**). In fact, nine of the 19 tests on the Pacific side table had been performed on coarse aggregate on the Atlantic side, seven fine aggregate sulfate soundness tests on the Pacific side show identical losses of 2.8%, but in fact one single test had been logged incorrectly as seven individual tests and one test taken from Borehole TPIC-21 "*Miraflores*" was recorded, but no test record was provided.

766. In answer to a Tenderers' Q & A, the ACP had also confirmed that it had only considered manufacturing sand from basalt:

> *[d]ue to large volume of material available from the excavation and the suitability of the material for use as aggregate.*[1351]

767. Against this background, Sacyr stated that it had discovered, first, that the ACP had commissioned a sulfate soundness test conducted by the UTP on coarse aggregate Sample M-1 in Location "*Miraflores*" and dated 29 April 2005.[1352] The test had recorded a 14.8% fail.

768. Second, it had become clear that Panama had retained URS to interpret and identify material to be used in the construction of the four Borinquen Dams which were to provide access from the third lock structures to an existing stretch of the Canal called the Gaillard Cut. Three of the dams fell within the scope of the TSLP. The fourth, Dam 1E, was within the scope of the PAC-4 contract.

769. Two Geotechnical Interpretative Reports were undertaken by URS in respect of the three TSLP Borinquen Dams in February 2008[1353] and May 2008[1354] respectively. Each was based upon a "*full range of laboratory testing*" on core samples of sound basalt obtained from outside the Project area, but which was adjudged to be representative of PLE basalt.[1355] Both of these GIRs were made available to Tenderers - in April 2008[1356] and on 16 May 2008[1357] respectively.

1351 Consolidated version of Questions and Answers from the Tender Stage, April 2008–February 2009 (**C-219**), p. 224 of PDF.

1352 Technological University of Panama, Sulfate Soundness Test ASTM C-136-D4791–C131-C88, 29 April 2005 (**C-135**).

1353 URS, Draft Technical Memorandum, "Task A.2.3, In-Situ Construction Materials, Dams 2E, 1W, and 2W, Geotechnical Interpretive Report (GIR)", 15 February 2008 (**C-178**).

1354 URS, Technical Memorandum, "Task A.2.3, In-Situ Construction Materials, Dams 2E, 1W, and 2W, Geotechnical Interpretive Report (GIR)", 12 May 2008 (**C-478**).

1355 URS, Draft Technical Memorandum, "Task A.2.3, In-Situ Construction Materials, Dams 2E, 1W, and 2W, Geotechnical Interpretive Report (GIR)", 15 February 2008, p. 29 of PDF (**C-178**): testing conducted on "*core samples of sound basalt from seven borings*"; "*[w]hile these tests are being performed on samples from basalt located just north of the PAC-7 area, they are expected to be representative of the PAC-7 basalt and of the basalt that would be available from the Pacific Locks Excavation*."

1356 RFP, Amendment No. 7, April 2008, [1.107] (**C-182**); RFP, Amendment No. 7, Volume VI, Part 2 – Geotechnical Data Report No.01-2008, April 2008, p. 296 (**C-469**).

1357 RFP, Amendment No. 8, May 2008, [1.46] (**C-477**); GDR, May 2008, p. 307 (**C-186**).

770. Dam 1E was the subject of URS' Final Technical Memorandum "Task A.2.3, In-Situ Construction Materials, Dam 1E, Geotechnical Interpretive Report" of 15 August 2008.

771. The summary recorded the results of URS' own testing and compared them with the ACP's testing conducted on Pacific-side basalt to determine whether it could be used to produce fine aggregates for the Project. In contrast to the previously disclosed 2006 Fine Aggregate Sulfate Soundness Test with an acceptable 2.85 result, the Memorandum reported a failed result of 23.9%, noting at Table 7-1:

> *The results for sodium sulfate soundness (ASTM C88) by URS are much higher than would be expected and are currently under review.*[1358]

772. Sacyr complained that URS' August 2008 summary of basalt testing in respect of Boringquen Dam 1E (PAC-4) had not been disclosed to the TSLP Tenderers. It says that the (undisclosed) 23.9% result replicated the results of soundness tests that GUPC had carried out on fine aggregate derived from Miraflores basalt from the PLE in the course of construction.

773. Moreover, it contended that all of the 14 sulfate soundness tests carried out by GUPC on PLE basalt in the course of construction between May and September 2011 had yielded results in excess of the 2.8% result for fine aggregate in ACP Technical Report 2006-13 and 10 of them had been in the 15%-30% range. During that period, the feedstock for GUPC's crushing plants was almost exclusively PLE basalt.[1359]

774. According to Sacyr, the fact that two out of five of the ACP's Pacific basalt sulfate soundness tests had failed (and the two which it alleged had been withheld from GUPC) rendered hollow the ACP's representations that the sulfate soundness tests had produced "*acceptable results*" and that they had demonstrated that "*sand manufactured from the basalt result[s] in an acceptable fine aggregate*".[1360]

1358 URS, Final Technical Memorandum, "Task A.2.3, In-Situ Construction Materials, Dams 1E, Geotechnical Interpretive Report (GIR)", pp. 35, 55 of PDF (Table 7-1) of PDF. (**C-489**).
1359 **CER-7** MRCE, p. 24; **CWS-4** Pérez II, [7].
1360 Reply on the Merits, [117]–[118].

775. Those statements amounted, in fact, to a "*serious misrepresentation*".[1361] They were said to give the lie to Mr. Quijano's evidence in the *Concrete* Arbitration that:

(i) "*ACP had been transparent about the tests it had conducted on the basalt and [it] had included the test results in the RFP;*"[1362] and

(ii) the Tenderers "*knew exactly what [the ACP] knew.*"[1363]

776. Sacyr invited the Tribunal to draw adverse inferences that there were further failed results among the alleged set of 19 tests on Pacific-side basalt (including the sulfate soundness test conducted on the sample taken from borehole TPIC-21 in location "*Miraflores*"); that there had been further negative findings from tests conducted in the course of any review of the 23.9% result; and that Panama had withheld additional information that could have alerted the Tenderers to the issues with the PLE basalt.[1364]

H. The 2005 UTP Report

777. This document has had a chequered history. It was said to have come into Sacyr's possession on two separate occasions and in each case, by way of the intervention of "*whistleblowers*", whom Sacyr has never identified.[1365] It first appeared in redacted (and, Panama suggested, manipulated) format as an exhibit to GUPC's Statement of Claim in the *Disruption* Arbitration in October 2021. In addition to certain changes to the text, salient information, including in respect of the test application number and report number, of the location where the tests had been performed and of the identities of the signatory engineers had been removed, together with the university stamp and details of the laboratory and the concluding observations below the table of results.[1366]

778. A different, unredacted, version of the UTP Report, provided by another anonymous source[1367] then appeared as Exhibit C-135 to Sacyr's Memorial in this Arbitration. The provenance of this document remains unknown. No explanation has been volunteered

---

1361 Reply on the Merits, [118].
1362 *Concrete* Arbitration, Quijano Third Witness Statement, [6] (**C-619**).
1363 Concrete Arbitration, Merits Hearing, Transcript, Day 5, p. 238 (**C-620**).
1364 Reply on the Merits, [120].
1365 Transcript, Day 1, pp. 14–19.
1366 Rejoinder on the Merits, [327].
1367 Transcript, Day 1, p. 101.

for the differences between the two versions. Sacyr has not confirmed how long the UTP Report has been in its/GUPC's possession.

779. Very shortly before the start of the June 2024 hearing, and following an extensive search, Panama produced a hard copy of the 2005 Sulfate Soundness Test dated 28 June 2005. The Tribunal was told that it had been found among a number of other documents in an unmarked desk drawer at the ACP laboratory and that the ACP had no idea when, or by whom, it had been put there.[1368] No digital copy was found. The Purchase Order dated 10 June 2005 requesting the test has also been disclosed.[1369]

780. Given the extent of the reliance now placed upon this test, it is important to have in mind, first, that it would have been but one data point among the thousands available to Tenderers, second, that ASTM C-88 itself cautioned that the soundness test was an imprecise instrument and third, that other tests of greater relevance to the quality of the aggregates in the same UTP Report – the LA abrasion tests and the grading by sieve analysis – were within the ASTM acceptance criteria. LA abrasion tests, which are impact tests, are more informative as to how material will behave when crushed. Further, grading by sieve analysis tests on crushed basalt had not indicated a propensity of the material rapidly to degrade and to generate excess fines.

781. As Section 3.1 of ASTM C-88 made clear, a single sulfate soundness test result would not suffice to cause the outright rejection of an aggregate source. Mr. Klaetsch acknowledged that on the basis that it was stated to be no more than a preliminary estimate:

> *... on its own, the test wouldn't necessarily be grounds for outright rejection or acceptance of the aggregates being tested.*[1370]

782. Furthermore, in the course of a combative exchange, Mr. Perez confirmed that there is nothing in the record to demonstrate that aggregates were ever rejected because they had failed a sodium sulfate test.[1371]

1368 Transcript, Day 1, p. 276.
1369 ACP, Purchase Order No. DP0153887KRP, 10 June 2005 (**C-646**).
1370 Transcript, Day 2, p. 506.
1371 Transcript, Day 3, pp. 988, 991–998 (in respect of Fall Line, Third Set of Locks Project: Testing Summary and Reports, 2011 (**R-554**)).

783. Tenderers, which, it is to be recalled, were to undertake the Works on a design and build basis, were well aware where the burden of risk lay and of the importance of the due diligence exercise to be carried out.

784. It is unarguable that the ACP had afforded Tenderers extraordinary levels of access to the Site and to site records. That was not the behaviour of an Employer intent upon concealing information. The Tribunal is inclined to give some weight to Mr. Miguez's forceful rejection of any suggestion that the ACP would wilfully or wittingly have withheld any documents.[1372]

785. As the Tribunal understands it, the circumstances surrounding the 2005 UTP Report are the subject of further requests for disclosure in the *Disruption* Arbitration. It may be that more clarity as to the history and provenance of this particular test will then result. The Tribunal is neither willing, nor in a position, to anticipate the outcome of any such review. But on the basis of the record as it now stands, this Tribunal cannot reach the conclusion that a deliberate decision was taken by the ACP to keep these particular test results under wraps.

I. August 2008 URS Report NOT withheld

786. In its opening statement, Sacyr took the position initially that it had not suggested that the 2008 URS Report was a whistleblower document. It was acknowledged that the Report had been made available to the PAC-4 tenderers for which it had been prepared.[1373] But that amounted to a trimming of its sails, since in its Reply, Sacyr had taken a different tack. It had listed the "*Withheld August 2008 URS Report*" among documents received from "*whistleblowers*".[1374]

787. Later in the course of its opening statement, Sacyr presented yet a further iteration of its position. It asserted that it was not until it had received the "*whistleblower documents*" that it had "*crawled over every single document … and … found a reference to the 23.9*

[1372] Transcript, Day 4, pp. 1133–1134.
[1373] Transcript, Day 1, p. 49.
[1374] Reply on the Merits, [8.b].

percent test."[1375] In other words, it had had the document, but it had failed to appreciate what it contained – a point later conceded in terms. (See paragraph 808 below.)

788. Sacyr was a tenderer for PAC-4. It participated as part of a joint venture, Consorcio ISC Panama, comprising Somague Enghenaria S.A, Impregilo S.p.A (now Webuild S.p.A) and CUSA. Both Impregilo and CUSA were, with Sacyr, members of the GUPC consortium bidding for the TSLP.

789. The 2008 URS Report was referenced in the Geotechnical Interpretive Report for Dam 1E – part of the PAC-4 scope.[1376] Quite apart from the fact that the document was in the public domain, it is not in dispute that the 2008 URS Report had been in Sacyr's possession (as a PAC-4 tenderer) since 30 July 2009 as part of the PAC-4 tender package.[1377]

790. The 2008 URS Report recorded a sulfate soundness test result of 23.9%[1378] in circumstances in which, amongst other compliance requirements such as specific gravity and abrasion resistance, the PAC-4 contract included a compliance criterion of 10% maximum weighted average loss by weight after five cycles for filter and drain material. It is important to note that the test was not performed to assess the material in the area of the PAC-4 contract as potential for use as aggregate for concrete, whether for the PAC-4 or the TSLP.

791. Section Seven of the Report is headed "*Filter, Drain and Transition*".[1379] It records that durability testing of the basalt and agglomerate had involved testing of four samples:

(i) testing by ACP of a sample of basalt taken from a stockpile near Cocoli Hill as part of an evaluation of using crushed basalt in place of alluvial sand as concrete aggregates;

[1375] Transcript, Day 1, pp. 105–106.
[1376] GDR, May 2008 (**C-186**).
[1377] Transcript, Day 1, p. 103.
[1378] The test itself records a figure of 23.6%, but nothing turns on that (Transcript, Day 1, p. 61).
[1379] URS, Final Technical Memorandum, "Task A.2.3, In-Situ Construction Materials, Dams 1E, Geotechnical Interpretive Report (GIR)", 15 August 2008 (**C-489**).

(ii) testing by ACP of two portions of composite basalt and Pedro Miguel agglomerate made from core samples from core borings located within the areas of PCA-2, PAC-4 and PAC-5; and

(iii) testing by URS of a composite sample of basalt and a composite sample of Pedro Miguel agglomerate from core borings in the same general area.

792. Those test results were then compared with minimum values typically required for filter, drain and transition material in embankments. URS had concluded that the basalt material was suitable for such use, but the Pedro Miguel agglomerate had a lower specific gravity than typically was desirable and it was: "*at the lower limit of the desired durability as indicated by the abrasion tests*", such that it should not be used for processing to produce filter, drain and transition material needed for the construction of the Borinquen Dam 1E.[1380]

793. Sacyr accepts that the 2008 URS Report was provided to PAC-4 tenderers, but it says that that does not get Panama off the hook, because by then, the Letter of Acceptance had been issued in respect of the TSLP and GUPC was already committed to the Contract, albeit it had yet to sign it.[1381]

794. Panama challenges that proposition. It notes that even after the Letter of Acceptance had been issued, had the results recorded in the 2008 URS Report been relevant to the TSLP, it would have been open to GUPC to raise the question of the failed sulfate soundness test with the ACP with the option, ultimately, of bringing a claim against the ACP – as indeed a member of the Tribunal pointed out.[1382]

795. That observation prompted the following exchange with Sacyr;

> *[Counsel]: … Panama makes the same argument … [It] says we should have catch [sic] the 23.9 before; and, in fact, they suggested that we did catch it before, but didn't raise it they say, because it was … never of significance to*

[1380] URS, Final Technical Memorandum, "Task A.2.3, In-Situ Construction Materials Dam 1E, Geotechnical Interpretive Report (GIR)", 15 August 2008, p. 35 of PDF (**C-489**); *see also* URS Presentation, "Geotechnical Advisory Board Meeting Design of Borinquen Dam 1E", 26 January 2009, slide 24 (**R-242**).
[1381] Transcript, Day 1, pp. 17, 103–104.
[1382] Transcript, Day 1, pp. 104–105.

> *us … [S]o let me be very clear: We, neither Sacyr nor Counsel, we did not catch it before this Arbitration.*
>
> *When GUPC received the whistleblower documents, we realized that we were only seeing the top of the iceberg here. Because, for instance, the 2005 test, which was obtained through the whistleblower should have been previously provided to GUPC in the previous arbitration.*
>
> *So, indeed, we … crawled over every single document … And … found a reference to the 23.9 percent test.*
>
> *But is Sacyr, or Sacyr's Counsel for that matter, here the Party to blame? For what? For not having caught Panama's withholding of documents earlier on? Isn't the blame to be put on the Party who actually withheld the document from us?*
>
> *[Tribunal]: … just to be clear, though, your Expert relied upon the 2008 Report. So by then they caught it, didn't they; or not?*
>
> *[Counsel]: No. The Expert did refer to the Report in a footnote for the proposition that the location of this 2008 Test … was Corozal.*
>
> *And then the URS Report explained what that location was. That is what the Expert relied on in the ICC arbitration. There is no reference whatsoever to the 23.9 percent test result. … [T]he fact that it took us 15 years to catch that Panama has withheld noncompliant Sulfate Soundness Test is not the point. … [W]hile in all likelihood we're only seeing the tip of the iceberg here, we now have the evidence that Panama … withheld key documents from us, including the 2008 Test.*[1383]

796. GUPC's expert, to whom reference was made in the course of that exchange, was Mr. Shilston. He had produced the 2008 URS Report as an exhibit to his expert reports in the *Concrete* Arbitration.[1384] Although he had referenced the very page of the 2008 URS Report on which the 23.9% sodium sulfate test result was recorded, Mr. Shilston had not drawn attention to it. Mr. Pérez, confirming that he had been unaware of

---

[1383] Transcript, Day 1, pp. 105–107.

[1384] *Concrete* Arbitration, Shilston First Expert Report, 19 June 2017, Chapter 8, [131] (**R-183**); *Concrete* Arbitration, Shilston Second Expert Report, 1 June 2018, Chapter 6, [143] (**R-311**).

Mr. Shilston's reliance on the 2008 URS Report until he had learned about it "*during these proceedings*",[1385] accepted that Mr. Shilston had placed no reliance on the result in the course of his criticism of the ACP:

> *I think he relied probably a specific point of the location in one of the samples. He did not realize – it's very clear from his evidence that he did not realize about the 23.9 percent.*[1386]

797. The subject was raised again in the course of closing argument. In answer to questions from the Tribunal, Sacyr confirmed that in the course of its due diligence, none of the sulfate soundness tests that it had run had been non-conforming; all of the five tests had been compliant.[1387] Sacyr reiterated that:

> *… there's no denial that this was not easy to catch during the Tender phase … We had 12 of the leading companies in the world doing due diligence on this Project, and we didn't catch it.*[1388]

798. But the fact is that no point was taken by Sacyr, and no request was made of the ACP, to provide the test result itself, nor were any other questions raised in respect of this part of the URS 2008 Report. Throughout the PAC-4 tender process, as in the TSLP tender, the PAC-4 tenderers were entitled to ask questions of the ACP. To the best of Panama's knowledge, no Tenderer (including Sacyr and its fellow Consorcio ISC members) mentioned, let alone queried, the sodium sulfate test results noted in the August 2008 URS Report.[1389]

799. Mr. Zaffaroni told the Tribunal that he had been unaware that Sacyr had had the 2008 URS Report in its possession even at the time he had prepared his second witness statement in this Arbitration in January 2024 in which he stated that:

1385 Transcript, Day 3, p. 990.
1386 *Ibidem.*
1387 Transcript, Day 6, pp. 1696–1697.
1388 Transcript, Day 6, p. 1698.
1389 **RWS-5** Fernandez II, [15].

> *… I now understand that Panama had in its possession test results and at least one report from one of its main consultants that indicated that the PLE basalt might not be of adequate quality to manufacture concrete aggregates.*[1390]

800. In evidence to the Tribunal, Mr. Zaffaroni observed that:

> *If anybody had reminded me [that Sacyr had the Report], they should have been giving me a completely useless reference. And I tell you why, if the document for PAC-4 had published when we have submitted the Tender or close to submit the Tender, another team in Sacyr, not our team in the project site, is receiving that document, which kind of information, useful information, is coming to me? Nothing.*[1391]

801. He added that:

> *… PAC-4 is another contract, another group of people preparing the Tender. So this [Report] was somewhere in the Sacyr office perhaps … was not in the possession of those who were supposed to investigate the situation of the basalt. …*
>
> *The basalt for PAC-4 means almost nothing. The basalt for our Contract means a lot. So if Sacyr or whoever was in that tender got to the conclusion that that material was suitable for them, fantastic. … For us, having received all the proper information in due time should have been an important red flag. You are more conscious about what is not going on well than when you are looking at the results that are all compliant.*
>
> *… the quantity of basalt in PAC-4, as far as I know, is very limited. It is just for … something related with earthfill dam. It has nothing to do with our basalt.*
>
> *In any case, are two different dimensions. … I'm not in the position to comment why the other[s] went on with their Tender without commenting on this. … [I]f I had received that information in due time, I should have taken a completely different approach towards the Project.*[1392]

1390 **CWS-3** Zaffaroni II, [21].
1391 Transcript, Day 3, pp. 862–863.
1392 Transcript, Day 3. pp. 863–-866.

802. A number of important points emerge from that evidence:

(i) the URS 2008 Report was in Sacyr's possession - it did not come out of the woodwork in 2024. Had it been drawn to his attention internally within Sacyr, Mr. Zaffaroni says that he would have paid attention to it;

(ii) since the quantities of basalt required for PAC-4 were very limited by comparison with the TSLP, Mr. Zaffaroni acknowledged, first, that the criteria for any evaluation of the risk of using the materials sampled in the URS 2008 Report undertaken by the PAC-4 team would be very different (critically, the PAC-4 contract, unlike the TSLP, was not a 'design and build' model contract) and, second, that the demands and the use to which the materials were to be put in the TSLP were of a different dimension. But while the PAC-4 team might have looked at the 23.9% result in a manner radically different to that of the Sacyr TSLP team, it would not have stopped him from wanting to see it;

(iii) that answer is difficult to reconcile with his previous suggestion that the URS 2008 Report indicated that the PLE basalt might not be of adequate quality to manufacture concrete aggregates. The purpose of the tests recorded in the 2008 URS Report was very different. They were not directed to the suitability of the basalt for aggregate for concrete production;[1393] and

(iv) Mr. Zaffaroni sought to put some distance between the Sacyr PAC-4 and the TSLP. However, he was himself closely involved in both the TSLP and the PAC-4 Tender.[1394] It would be remarkable if, notwithstanding the much lower risk factor inherent in proceeding on PAC-4 in the face of an anomalous sulfate soundness test 23.9% result, given the relatively small quantities of aggregate involved in PAC-4, something which appeared to throw doubt on the quality of

[1393] In fact, on further investigation in 2009, URS had determined that the anomalous 23.9% result was attributable to the fact that the test sample included agglomeratic material softer than basalt and prone to higher losses when subjected to sodium sulfate submersion. It was not in any way representative of sound basalt from the PLE and thus the test said nothing as to the suitability of the basalt for aggregate production. (*See* URS Presentation, "Geotechnical Advisory Board Meeting Design of Borinquen Dam 1E", 26 January 2009, p. 24 (**R-242**)).

[1394] Transcript, Day 6, p. 1755. Mr. Zaffaroni had presented the PAC-4 Tender.

the aggregate were not drawn to the attention of the TSLP team, given the potential ramifications, had Sacyr realised its potential importance.

803. In the course of exchanges between counsel for Sacyr and the Tribunal, it was suggested that the members of Sacyr's team involved in the PAC-4 could not have known about the potential relevance of the 2008 Sulfate Soundness Test for the TSLP, because the two Projects were "siloed":

> *The Tribunal: … if, essentially, it's the same contractor group dealing with these Contracts, they would know, wouldn't they, that there would be a vast quantity of basalt needed on [the TSLP]?*
>
> *And, therefore, anything which threw doubt upon the quality of basalt, even though it was received in the context of PAC-4, could have a ramification. … Is it really right that a silo effect would be created, or would not there be a sharing of the information?*
>
> *Sacyr: … it was a different contract. It was a different team dealing with these other projects … [T]hese teams were simply not really talking to each other …*.[1395]

804. At a later point in the exchanges, the Tribunal observed that:

> *… that really does indicate or confirm a very strict silo within your client about the different projects. Because if what you're saying is that the costs were -- the cost estimates were changed on the basis of these results, on the basis of their knowledge of the poor quality of basalt, then the idea that -- none of that information filters into the other team that's dealing with the – it doesn't filter into the team dealing with the Pacific Locks.*[1396]

805. Regrettably, there is no direct evidence before the Tribunal from anyone who would have reviewed the 2008 URS Report and advised Sacyr what to do. Given the sheer magnitude of the demand for basalt for the TSLP, Mr. Zaffaroni, for all his many other

[1395] Transcript, Day 6, pp. 1658–1659.
[1396] Transcript, Day 6, pp. 1673–1674.

responsibilities, confirmed to the Tribunal that had his attention been drawn to the Report, he would certainly have considered it.

806. That prompted a further line of questions from the Tribunal:

> *But, given that the 2008 Test was provided to your client in the context of the PAC-4, doesn't it make it a little bit less likely that there was a deliberate decision to withhold that test to your client in relation to the ... Project we're talking about[?] Because it would be a little bit stupid for an official to withhold it from you in one context and then, shortly after, provide it to you in another, if that really is what happened. And so, it may go to the probability of the case on deliberate concealment that you're putting forward.*
>
> *And it might also be said that, given that the 2008 Test was higher than the 2005 Test, it might also be said it makes it look a little bit less likely that that was withheld because why would you disclose to you in PAC-4 a result which was higher than the 2005? So it goes to, you know, how likely is this theory, given that it was provided to your client in PAC-4?*[1397]

807. Those are not questions to which direct answers were given, nor was one forthcoming to the suggestion that given the plethora of tenders and contracts under active review at the ACP, the same explanation might explain its conduct - it was simply a question of people not talking, as opposed to taking a positive decision not to inform.

808. It is now incontrovertible that Sacyr had had the 2008 URS Report in its possession since 2009 (and, indeed, it was available publicly). It seems to the Tribunal that the realty was that, as Sacyr now concedes, the point had simply been missed until the start of this Arbitration – by the GUPC consortium members as well as by the ACP.

809. The Tribunal is not persuaded that there had been any attempt at wilful concealment or any attempt to mislead on the part of the ACP in respect of the US 2008 Report.

[1397] Transcript, Day 6, pp. 1656–1657.

(6) The Lock Gates: the Seismic Reduction Factor[1398]

810. The essential elements of Sacyr's complaint that Panama had:

> *... failed to disclose key seismic information material to the design and construction of the Lock Gates*[1399]

are:

(i) Panama knew during the Tender phase that both BTM and CPP (Panama's own designer) had determined that the Seismic Reduction Factor used in the Reference Design prepared by CPP and provided to the Tenderers should not be applied;

(ii) pre-award to GUPC, Panama knew GUPC had relied upon the Seismic Reduction Factor contained in the Reference Design in its Tender Design; and

(iii) notwithstanding warnings in respect of the Seismic Reduction Factor in the Reference Design raised by BTM during the tender process, Panama said nothing and committed GUPC to the Contract.

A. Preliminary points

811. It is uncontroversial that the TSLP Contract is a design and build contract which places responsibility for the design upon the contractor. It is standard international engineering practice for an owner to provide design-build bidders with concept level designs made prior to the bid stage to establish the feasibility of a project. The conceptual design provided to the Tenderers for reference dated back to 2005.[1400] It pre-dated the ER which were developed in 2006-2007. They were themselves subsequently amended by RFP Amendment 7 in April 2008 to include more stringent seismic requirements, notably much higher peak ground accelerations in respect of the Level 1 earthquake (475-year

1398 Sacyr's description of the PIANC seismic coefficient, a seismic coefficient in the design of the Lock Gates as distinct from the overall seismic design criteria for the Lock Gates.
1399 Reply on the Merits, section II.A.2c.
1400 **RWS-4** Lorenzo I, [13].

return period) and Level 2 earthquake (1,000-year return period) performance design criteria to be used in the design.[1401]

812. In his evidence to the *Lock Gates and Labor* tribunal, Mr. Zaffaroni acknowledged that:

> *We were of course aware that ACP had significantly changed the seismic design criteria and the performance requirements from those considered in the Reference Design. These changes in the design criteria and performance requirements implied that the tender designs would have to differ in some respects from ACP's Reference Design.*[1402]

813. The status of the reference drawings is clearly defined in the ER:

> ***1.03 General Performance Criteria****: The Contractor shall design, specify, and construct the Works to meet the following general performance criteria. …*
>
> ***A. Conceptual Drawings****: The conceptual design drawings (refer to Volume VI, Part 1) are general layout drawings of the lock complexes prepared by the Employer to depict the project concept. These conceptual drawings shall not be construed as design drawings for the lock complexes. The Employer's Requirements have precedence over these conceptual drawings: in other words, all data provided in these conceptual drawings shall be contingent upon compliance with the corresponding Sections of the [ER]*[1403]

814. Almost immediately below, at section 1.03C, the point was made in the clearest terms that:

> *These conceptual drawings shall not be construed as design drawings for the lock complexes and the Contractor is referred to the final paragraph of Clause 5.1 (General Design Obligations) of the Conditions of Contract.*[1404]

1401 **RWS-4** Lorenzo I, [22].

1402 *Lock Gates and Labor* Arbitration, Second Witness Statement of Antonio Maria Zaffaroni, 13 July 2021, [12] (**R-214**).

1403 RFP, General Project Requirements, Section 01 10 00, December 2007 section 1.03.A (**R-39**).

1404 RFP, Amendment No. 17, Volume II, Part 1, Employer's Requirement, Section 01 10 00 [General Project Requirements], Amendment No. 17, 17 October 2008, section 1.03.C (**R-52**).

815. The RFP stated:

> *Volume VI, Part I (Reference Drawings).*
>
> *Note: The reference drawings are provided as information only and should not be construed as design plans for the new lock project.*[1405]

816. Each of the drawings themselves bore the rubric in bold type that:

> *This is a conceptual drawing for reference purposes only and shall not be construed as a design plan for the [TSLP].*[1406]

817. Clause 5.1 of the Conditions of Contract[1407] provided that:

> *Notwithstanding any other provisions of the Contract, the Parties agree that the Employer shall not be responsible in any way whatsoever for the Volume VI Documents, including but not limited to the drawings, designs, geotechnical data, reports, documents, design data and other information included therein and shall not be deemed to have given any warranty, representation of accuracy or completeness in relation to the same. Nothing contained therein shall relieve the Contractor from his responsibility for the design and execution of the Works in accordance with the Employer's Requirements. The parties agree that the Volume VI documents are included in the Contract for information purposes only, may not be relied upon by the Contractor in any way or for any reason, and shall not give rise to, form the basis of, or be the subject matter of, any claims of any nature against the Employer.*

818. It follows that GUPC was well aware that during the RFP process and at the time of tender, it was not entitled (and could not have had any expectation that it was entitled) to rely upon the conceptual (or Reference) design.

1405 RFP, Volume II, Part 1, Employer's Requirements Section 01 81 19 Lock Gates, December 2007, section 1.01.C (**R-38**)

1406 CPP, Conceptual Design of Lock Gates [Diseño Conceptual de las Esclusas Pospanamax] VF-1706-118-22 and VF- 1706-118-23, August 2007 (**R-36**).

1407 RFP, Amendment No. 24, Volume III – Conditions of Contract (Final), February 2009, pp. 69–70 of PDF (**C-222**).

B. The Genesis of the GUPC design

819. The Tribunal heard no evidence from anyone directly involved in GUPC's lock gates design.

820. Mr. Zafffaroni knew nothing of the detail of the development of the Iv-Groep's tender design and earthquake analysis, but he was aware that The Netherlands Organization for Applied Scientific Research ("**TNO**") had been brought in to offer specialist advice to the Iv-Groep which, he observed in passing, had "… *never seen an earthquake in their life*…"[1408] He stated that he had not read the Award in the *Lock Gates and Labor* Arbitration.[1409]

821. Sacyr's other witness of fact, Mr. Perez, acknowledged that he, too, had had no involvement in GUPC's lock gates tender design, having first become involved in the TSLP in October-November 2010.[1410]

822. To the extent that the development of the design can be ascertained on the basis of the available documentary record, it appears that:

(i) the conceptual design had adopted the PIANC seismic coefficient for the design of both the Lock Walls and the Lock Gates;[1411]

(ii) by way of departures from the conceptual design, GUPC had adopted the USACE seismic coefficient rather than the PIANC coefficient for the Lock Walls tender design. It carried out dynamic linear and non-linear analyses for the Lock Walls seismic design in contrast to the pseudo-static analysis in the conceptual design;[1412]

(iii) the Lock Gates design was entrusted to Iv-Groep, part of the CICP design consortium. Iv-Groep sought specialist advice from TNO, which produced a Report in October 2008.[1413] The TNO Report made no mention of the conceptual

[1408] Transcript, Day 3, pp. 793–794.
[1409] Transcript, Day 3, p. 795.
[1410] Transcript, Day 3, pp. 903–909.
[1411] ACP, "Update of Pacific Locks Conceptual Design and Harmonization of Atlantic Locks Conceptual Design", 20 May 2005, p. 72 of PDF (Lock Walls) and p. 191 of PDF (Lock Gates) (**C-136**).
[1412] GUPC Tender Volume II – Technical Proposal March 2009, pp.749, 807, 819–821, 825-826 of PDF (**R-80**).
[1413] TNO Report, "The Earthquake Conditions in Panama 'Third Set of Locks' Project", 7 October 2008 (**C-204**).

design. It did refer to the PIANC seismic coefficient, but it did not use it in its calculations, adopting the PGA instead.[1414] An element of uncertainty remained as to the applicability of the PIANC seismic coefficient in that in its Interim Claim of December 2014, GUPC disclosed that it had sought further advice, apparently from TNO, and it had been told that:

> *... whilst this load-factor could probably be used, there was insufficient actual evidence available to be certain;*[1415] and

(iv) the origin of the PIANC seismic coefficient had been a Japanese research paper into loadings on waterfront structures, specifically, quay walls, backed by soil.[1416] It seems that the Iv-Groep had proceeded on the basis that the PIANC seismic coefficient could be applied to the design of the Lock Gates on the understanding that the issues discussed in the Japanese research paper would apply generally to submerged water retaining structures. GUPC's decision to apply the PIANC seismic coefficient was not known to the ACP during the tender process.

C. The CPP Report

823. The CPP Report was issued in final form on 20 March 2009[1417] (with a draft on 7 January 2009).[1418] It had been commissioned by the ACP in September 2008. Mr. Lorenzo explained that for the purposes of its internal cost estimates and a review of the performance requirements in the RFP, the ACP had requested an assessment of the ER requirements in respect of the seismic, ship impact and fatigue requirements on the conceptual design.[1419]

1414 *Ibidem*, pp. 6, 18 of PDF.
1415 GUPC Interim Claim No. 14, December 2014, p. 47 of PDF (**R-44**).
1416 TNO Report, "The Earthquake Conditions in Panama 'Third Set of Locks' Project", 7 October 2008, p. 16 of PDF (**C-204**).
1417 CPP, Final Report, "Task Order No. 1: Review of Lock Gates Requirements", 20 March 2009 (**C-232**).
1418 CPP, Draft Report, "Task Order No. 1: Review of Lock Gates Requirements", 7 January 2009 (**C-212**).
1419 **RWS-4** Lorenzo I, [60].

824. The Task Order set out what was required:

> - *Identify and resolve the differences between the RFP gate requirements and the Conceptual Design of gates developed by CPP (2005).*
> - *Address the impact of the change by ACP in the seismic criteria on the gates requirements.*
> - *Address the fatigue requirements for the gates as specified and in relation to recognized standards or the requirements utilized for the design of rolling gates.*
> - *Determine if the requirements exceed what would normally be required to ensure gate stability, operation, and durability for the specified design life.*
> - *Determine the global impact of the differences on the gates design, including: size, weight and cost.*
> - *Suggest improvements or enhancements to the requirements that would result in a better product for the ACP without greatly increasing the cost.*
> - *Identify any weaknesses and deficiencies in the requirements.*[1420]

825. The timing of the commissioning of the CPP Report disposes of the suggestion that it was a response to any concern raised by BTM with the APC in respect of the use of the PIANC seismic coefficient. (See the revision to Mr. Zaffaroni's evidence introduced on Day 3 of the hearing discussed further at paragraph 864 below.)

826. The Tribunal notes that there was no disagreement between the Parties' respective experts in the *Lock Gates and Labor* Arbitration that CPP had decided to undertake very different analyses from those undertaken for the purposes of the conceptual design.[1421] It adopted three different scaling factors ("kh") to calculate water added masses (in

[1420] Contract No. CMC-____ Engineering Services for Design Review for Third Set of Locks, Task Order No. 1 – Review of Lock Gates Requirements, 1 September 2008, p. 1 (**C-198**).
[1421] *Lock Gates and Labor* Arbitration, Hearing Transcript, Day 7, p. 171 (**R-260**).

substitution for water pressures) that would apply to the Lock Gates in an earthquake, namely kh=1, kh=0 and kh=var according to the PIANC documents.

827. In its final Report, CPP stated:

> *Impulsive water pressures that occur during seismic events are not applied as such but the pressures are substituted by Westergaard-type masses. The magnitude and the spatial distribution of these masses are calculated with the formulae elaborated by Housner. Additionally, these masses are scaled with a factor kh. Three scaling values are used throughout this review: kh=0 (no additional masses), kh=1.0 (no reduction) and kh=var according to the PIANC-documents. It is currently not clear to the authors of this report if the value of the reduction factor mentioned in the PIANC-documents is appropriate for this particular gate type structure. Therefore, the case kh=var was not chosen as the preferred option. Results are given for all three options so that the reader can compare the results.*[1422]

828. While CPP questioned the applicability of the PIANC seismic coefficient in the context of the analyses it had undertaken in that report, which were separate, and very different, from the pseudo-static analysis which had been used to develop the conceptual design, it did not suggest that the PIANC seismic coefficient was inapplicable in the case of the Lock Gates. Rather, in the exercise of its engineering judgment, CPP concluded that the coefficient was not the preferred option. It was not the purpose of the CPP Report to review the conceptual design for errors. There is no mention in either the Draft CPP Report or the final CPP Report of the fact that the PIANC seismic coefficient had been used in the conceptual design (still less that it had been an error to adopt it).

829. In its comprehensive analysis of the circumstances surrounding the CPP Report, the *Lock Gates and Labor* tribunal emphasised the importance of an understanding of the state of engineering knowledge and practice in the industry at the time of Tender, so far as the seismic design of Lock Gates was concerned. It specifically considered three sources: PIANC, CPP and TNO.

[1422] CPP, Final Report, "Task Order No. 1: Review of Lock Gates Requirements", 20 March 2009, p. 26 of PDF (**C-232**).

830. The *Lock Gates and Labor* tribunal recalled that:

> *Under the PIANC 2001 Guidelines on port structures, a seismic reduction factor kh was introduced, as a matter of engineering judgment, for all three of the loads involved: hydrodynamic pressures, inertial loads due to the self-weight of the structure and active earth crushes. In 2009, a PIANC report prepared by an extended panel was dedicated to lock structures specifically and presented as an expert guidance on this subject. It repeated the formula incorporating the seismic reduction factor, now applied to lock gates, for all situations where the PGA of the earthquake is higher than 0,2g.* ***The report noted that the seismic reduction factor from the 2001 guidelines had been applied by the ACP and its designer CPP for the reference design of the TSLP, and indicated that PIANC did not disagree with this procedure****. Only in 2016, a new PIANC 'Design of Lock Gates under Seismic Action' recognized that applying the seismic reduction factor was "only valid for waterfront structures (as quay walls) and not for lock gates, particularly if they are directly founded on the bedrock.* [Emphasis added]
>
> ***Most expert individuals and agencies involved at the time either applied the seismic reduction factor to lock gates, as CPP had done in 2002-05 for the conceptual design, or observed its application without raising any negative comment. The most the CPP Report of 2009 stated regarding a different option was that***
>
> ***"[i]t is currently not clear to the authors of this report if the value of the reduction factor mentioned in the PIANC-documents is appropriate for this particular gate type structure****."* [Emphasis added]
>
> *Despite the doubts thus expressed, the endorsement by PIANC of the seismic reduction factor made it acceptable to the ACP.*
>
> *TNO, the agency advising CICP and GUPC in the preparation of their Tender design, did not object to the use of the seismic reduction factor. As observed by GUPC's expert, Pr. Brancaleoni: "It is noteworthy that the TNO Report does not recommend against using the seismic reduction factor. Instead, TNO refers to the seismic reduction factor, citing PIANC 2001". The TNO Report was described by the expert as "primarily concerned with whether the Housner or Westergaard approach should be applied to the Third Set of Locks", while*

> *there is no relevant distinction between the two approaches as regards the use of the seismic reduction factor. PIANC was briefly referenced in a note, which elicited the comment from the same expert that:*
>
> *"There can have been no purpose in including this reference unless TNO were at the very least neutral toward the seismic reduction factor. In fact, by referring to the seismic reduction factor in this way, TNO gave it a level of credence."*
>
> *Another expert found that neither of TNO reports [sic] refers to the conceptual design and the Horizontal Seismic Coefficient ke at all.*[1423]

831. The tribunal concluded that the "*impropriety*" of applying a seismic reduction factor to a given PGA was not ascertained when the Contract was awarded to GUPC. Even if the conceptual design had been contractual, which it was not, it did not contain an "*error*".[1424]

832. It is to be noted that GUPC advanced a positive case in the *Lock Gates and Labor* Arbitration that it had acted reasonably in using the PIANC seismic coefficient in its own tender design of the Lock Gates "*based on the information available in the industry at that time, which generally accepted the use of a seismic reduction factor for lock gates*."[1425] It is to be noted, too, that in the course of the Tender period, the ACP did not know that GUPC had adopted the PIANC seismic coefficient in its design.

833. The *Lock Gates and Labor* tribunal recorded that the industry had begun to revise its opinion of the applicability of the PIANC seismic coefficient in the course of 2009:

> *Beginning in 2009, because "[l]ocks have different characteristics from structures as dams, reservoirs and those typically found in ports", the use of the seismic reduction factor came to be questioned. In 2011 it was recognized by the engineering profession that the use of the Ke factor was inappropriate for submerged water retaining structures such as lock gates.*[1426]

1423 *Lock Gates and Labor* Arbitration, Final Award, [308]-[310] (**RLA-283**).
1424 *Lock Gates and Labor* Arbitration, Final Award, [311] (**RLA-283**).
1425 *See Lock Gates and Labor* Arbitration, Final Award, [318] (**RLA-283**); *Lock Gates and Labor* Arbitration, Claimants' First Post-Hearing Brief, 3 June 2022, [209] (**R-224**).
1426 *Lock Gates and Labor* Arbitration, Final Award, [312] (**RLA-283**).

834. The tribunal concluded that:

> *… even assuming that the matter of the seismic reduction factor would have been clearly designated during the Tender period, the ACP, a canal operator with no expertise in construction and seismic design, could not be expected to raise a technical point that: i) was far from ascertained within the engineering profession; and ii) GUPC, a consortium of three major construction firms, with advice from prominent designers, did not immediately acknowledge when being advised of an explicit warning from an exterior source.*[1427]

835. That conclusion, with which this Tribunal respectfully agrees, would be a complete answer to a complaint that ACP knew that both BTM, with its particular experience in the seismic design of large lock gates and its own expert designer (CPP) had concluded that the seismic reduction factor should not be applied. That, one might imagine, would be how the complaint would be framed consistent with Sacyr's general allegation that the ACP had wilfully withheld information in respect of the seismic reduction factor that it knew to be material.

836. But that is not how, in its latest iteration, Sacyr puts its complaint. It says that precisely because the ACP had **no** specialist knowledge of its own:

> *[it doesn't] have any basis on which to decide that this is not relevant information to pass to Tenderers. And so [it] should have passed it along. That's what we say [it] should have done. And the fact that [it] didn't is, we say, a breach of the Treaty.*[1428]

837. There is more than an element of "damned if it does and damned if it doesn't" about that proposition. As Counsel for Panama put it in robust terms:

> *Sacyr's Counsel stated that the ACP did not have the expertise to know whether the information from BTM was relevant or not but that, by not providing this information to GUPC, Panama violated the Treaty. So Sacyr's case now appears to be that the ACP did not need to knowingly withhold critical information. It now alleges that the failure to provide information that may or*

1427 *Lock Gates and Labor* Arbitration, Final Award, [317] (**RLA-283**).
1428 Transcript, Day 6, p. 1726.

> *may not be relevant is sufficient to establish a Treaty breach. We submit that this argument is simply absurd.*[1429]

838. The Tribunal might not quite put it in quite those terms, but it would not disagree that there is significant inconsistency in approach on Sacyr's part which it is not possible to overlook.

839. As the ACP put it:

> *… the suggestion that Panama (which was in no way an expert in the seismic design of Lock Gates) should have picked up from the CPP Report that there was an error in the conceptual design, when that was not the prevailing view in the industry at the time and when that is* ***not*** *what was said in the CPP Report, and communicated that to the Tenderers, is fanciful.*[1430]
>
> *[I]t must again be recalled that the ACP had explicitly told the Tenderers that the conceptual design should not be relied upon. Even if (quod non) the CPP Report had raised a "question" about the applicability of PIANC seismic coefficient in the conceptual design, to have communicated that "question" to the Tenderers in March 2009 (at which point the Tenderers' tender designs ought to have been well advanced) would have been a recipe for confusion, in circumstances in which, as the Tenderers all knew, they had been expressly told not to rely upon it. So much more is that the case where the CPP Report did <u>not</u> say anything about the use of the PIANC seismic coefficient in the conceptual design.*[1431]

840. More to the point, the *Lock Gates and Labor* tribunal's findings expose the factual flaws in Sacyr's argument: first, CPP had not concluded that the seismic reduction factor should not be applied – at most, it had said that it was uncertain whether it should be applied. Second, BTM had made clear that the content of its one-to-one meetings with the ACP were to be kept confidential. Third, the ACP had no idea what GUPC would include in its tender design. Fourth, once BTM had made its concerns public on 28 July 2009 about GUPC's use of the PIANC seismic coefficient in GUPC's tender design of the Lock Gates (see paragraphs 266, 379, 431 and 867 *et seq*.), GUPC did not react

1429 Transcript, Day 6, p. 1761.
1430 Rejoinder on the Merits, [516].
1431 Rejoinder on the Merits, [517].

immediately. Rather, Iv-Groep remained confident that whatever concerns BTM had expressed in its letter could be addressed in subsequent design stages.[1432]

D. Was There a "Warning" from BTM?

841. Sacyr has advanced a case that BTM had:

> *... repeatedly warned Panama that the Seismic Reduction Factor applied in Panama's Reference Design could not be applied to the Lock Gates and that the Lock Gates would have to be designed to be heavier and wider than contemplated in the Reference Design, and as a result significantly more expensive to construct.*[1433]

842. Further, it alleged that BTM had: "… *repeatedly urged Panama to tell other tenderers*"[1434] about the problem.

843. In its opening statement, Sacyr told the Tribunal:

> *We say that Panama should have alerted Tenderers to the issue of the Seismic Reduction Factor, and at the very least, should not have committed GUPC to enter into the Contract without doing so.*[1435]

844. At the outset, the Tribunal notes the amendment to Mr. Zaffaroni's First Witness Statement marked in the red text below, made at the start of his evidence on the third day of the hearing,[1436] which would appear to undermine any suggestion that BTM had urged Panama to alert other Tenderers to the issue:

> *BTM went on to alert ACP that it was "inevitable" that a bidder who based its Lock Gates design on the Reference Design would suffer from "increased costs and delay" during the Project's execution and urged it to ~~share~~ consider that information ~~with the other~~ when evaluating bidders to put all players on equal footing.*[1437]

1432 *Lock Gates and Labor* Arbitration, Augustijn Second Witness Statement, [119] (**R-32**).
1433 Memorial on the Merits, [118]; Reply on the Merits, [68].
1434 Memorial on the Merits, [10].
1435 Transcript, Day 1, pp. 204–205.
1436 Transcript, Day 3, p. 704.
1437 **CWS-1** Zaffaroni I, [82]; Transcript, Day 3, p. 704.

845. In a second amendment made on Day 3 of the hearing to his First Witness Statement, Mr. Zaffaroni withdrew his allegation that BTM's warnings about the seismic reduction factor had been extant ever since February 2008 and purported to rely only on facts and matters from December 2008 onwards.

846. The Tribunal will proceed to examine the record of the exchanges involving BTM on that basis.

E. The BTM – ACP Interactions

i. 9 December 2008[1438]

847. The focus of BTM's correspondence in late December 2008 was the impact upon the size and weight (and hence, the price) of the lock gates of the fatigue design requirements in the ER, the higher PGAs in the Amendment 7 revised seismic design criteria and the floating stability requirements. BTM expressed its concern to understand the impact of the size of the gates upon the steel price escalation formula in Amendment No. 19 in respect of the steel plate required for gates and valves fabrication. As Mr. Lorenzo explained,[1439] the formula placed the risk of steel price volatility on the ACP to a maximum weight of steel based on the dimensions and weight of the conceptual design with allowances. With its own commercial interests at stake, BTM was concerned that if other tenderers were to underestimate the amount of steel required for the lock gates, such that they added no contingency for the risk of steel price fluctuations above the maximum weight provided for by the formula, they would gain an advantage in the competitive tender process. As Mr. Lorenzo acknowledged, BTM was:

> *... very concerned with that price ... the amount of steel that they were taking risk for.* [1440]

848. In the position paper attached to its 9 December 2008 letter, BTM considered the seismic design criteria in light of the more stringent PGA requirements introduced by

---

1438 *See* BTM's letters and presentations to ACP, "Rolling gate width and weight justification", 9 December 2008 – 16 January 2009 (**C-214**).
1439 **RWS-7** Lorenzo II, [24].
1440 Transcript, Day 4, p. 1301.

Amendment 7: the question of the applicability of the PIANC seismic coefficient (or Seismic Reduction Factor) did not arise:

> *2.4 Seismic Design*
>
> *2.4.1 Amendment 8 [sic] amended the seismic design criteria for both the Atlantic and Pacific locks. The number of design earthquakes was reduced from four to two but the seismic accelerations were increased from 0.07g and 0.41g in the RFP to 0.520g and 0.718g for the Pacific and 0.33g and 0.42g for the Atlantic.*
>
> *The increased seismic criteria govern the design of some of the members within the gate structures, such as compression members within the internal supporting trusses.*[1441]

849. BTM did not ask the ACP to make any of the information in its letter or position paper available to other tenderers, but it did seek the removal of the steel price escalation formula and a modification of the Tender Evaluation criteria.[1442]

ii. 12 and 17-18 December 2008

850. The transcripts of meetings between BTM and the ACP on the above dates record no discussion of the PIANC seismic coefficient or Seismic Reduction Factor.[1443] It was Mr. Lorenzo's evidence that at the 17 and 18 December 2008 meetings in which he participated, the issue of the application of the PIANC seismic coefficient was not raised (nor was any 'warning' issued) by BTM.[1444] That evidence was not challenged.

851. The *Lock Gates and Labor* tribunal found that:

> *Subsequent meetings were held on 12 December 2008 and 17-18 December 2008, during which "**BTM expressed concern that because the other consortia had apparently not voiced similar concerns regarding the gate design, they likely had not studied the situation is [sic] enough detail**."*

1441 BTM's letters and presentations to ACP, "Rolling gate width and weight justification", 9 December 2008 – 16 January 2009, p. 10, section 2.4 (**C-214**).

1442 BTM's letters and presentations to ACP, "Rolling gate width and weight justification", 9 December 2008 – 16 January 2009, pp. 7, 11–12 (**C-214**), .

1443 Transcript of BTM-ACP Meeting, 12 December 2008 (**R-323**); Transcript of BTM-ACP Meeting, 17 December 2008 (**R-54**); Transcript of BTM Meeting, 18 December 2008 (**R-55**).

1444 **RWS-4** Lorenzo I, [45]; **RWS-7** Lorenzo II, [31].

> *Changes in seismic requirements and the use of a dynamic rather than static analysis were discussed but there was no mention of the seismic coefficient.*[1445]
> [Emphasis added]

iii. 24 December 2008

852. BTM made no mention in its letter of 24 December 2008 of the PIANC seismic coefficient. The letter referenced the recent meetings with the ACP and recorded that:

> *The meetings highlighted the reasons behind the differences in weight of steel plate that have been the subject of discussion in several of our meetings: principally that the reference design is based on preliminary design that only includes allowances for fatigue and was also completed before the ACP's latest seismic criteria were issued.*[1446]

853. The principal focus of BTM's concern is manifest:

> *Following the two days of technical meetings last week, we now believe that the ACP are fully aware of how the various design criteria affect the gate design – in particular that the gates must be significantly heavier and wider than the reference design gate - and can evaluate each of the bidders' specific design submittals.*
>
> *Of course, if a bidder has not done sufficient design development, they will most likely not identify the overall size and weight of gates that is required to meet the ACP technical criteria. In that case, such a bidder will not be able to demonstrate a clear understanding of the requirements for the gates, nor document compliance with the ACP requirements. We would therefore expect that such a bidder would not earn any of the 350 points for tender design of the gates. However, insufficient design development will also lead to a serious underestimation of the amount of steel plate required to fabricate the gates, by as much as 25,000 metric tons compared to the reference design.*
>
> *Since you made it clear at our recent meeting that the ACP can only accept a fixed price, it is quite possible that the various price proposals will be based on different understandings of the real scope of work necessary to meet the*

1445 *Lock Gates and Labor* Arbitration, Final Award, [259] (**RLA-283**).
1446 BTM's letters and presentations to ACP, "Rolling gate width and weight justification", 9 December 2008 – 16 January 2009, p. 5 (**C-214**).

requirements. We would therefore request your assurance that adjustments will be made in evaluation of the technical point scores to offset any potential price advantage that would be gained by underestimating the weight of steel plate required for the gates, or for any of the other basic work elements (e.g., underestimating the size of the gates will also result in underestimating the required size of the lock structures).

It is important to the ACP and to all the bidders that the tenders be evaluated on an equal basis. With the fixed price approach, it will require careful review of the design submittals by the ACP to ensure that each bidder has completed sufficient design development to properly identify the quantities of the basic work elements for the Project.

Where a bidder has underestimated any of the quantities from what will actually be required, they not only fail to demonstrate that they can design and construct the Third Set of Locks Project that meets the requirements, they also gain an unfair price advantage as a result of such a bidder misrepresenting what the Project will actually cost.

As we have discussed, this is not a true price advantage since, once the bidder realizes that they have made such a large error, they will inevitably file claims and attempt to force the ACP to either accept a lesser design or to pay the additional cost. This will, of course, lead to a contentious relationship between the contractor and the ACP for the entire duration of the Project. This is not in the ACP's interest and therefore we recommend that each bidder identify their estimated quantities for the basic work elements as part of their technical submittal so that you can be assured that the bidders are providing price proposals on equivalent designs. .... [1447]

854. Notably at Attachment 3, BTM stated:

Seismic events must consider the dynamic mass of the water in, and acting on, the gates rather than just the mass of the steelwork. The acceleration of the dynamic mass, which is 15 times the mass of the steelwork, in a seismic event will cause out-of-plane bending of all the plates and the reference design gate

[1447] BTM's letters and presentations to ACP, "Rolling gate width and weight justification", 9 December 2008 – 16 January 2009, pp. 5–6 (**C-214**).

> *will fail.* ***The ACP seismic design criteria issued after the reference design was completed require thicker steel plate than was determined in the reference design.***[1448] [Emphasis added]

855. As the *Lock Gates and Labor* tribunal observed:

> *... neither the letter not the Attachment mentioned the seismic reduction factor. And BTM was fully conscious that the so called "reference design" should not be used as the reference.*[1449]

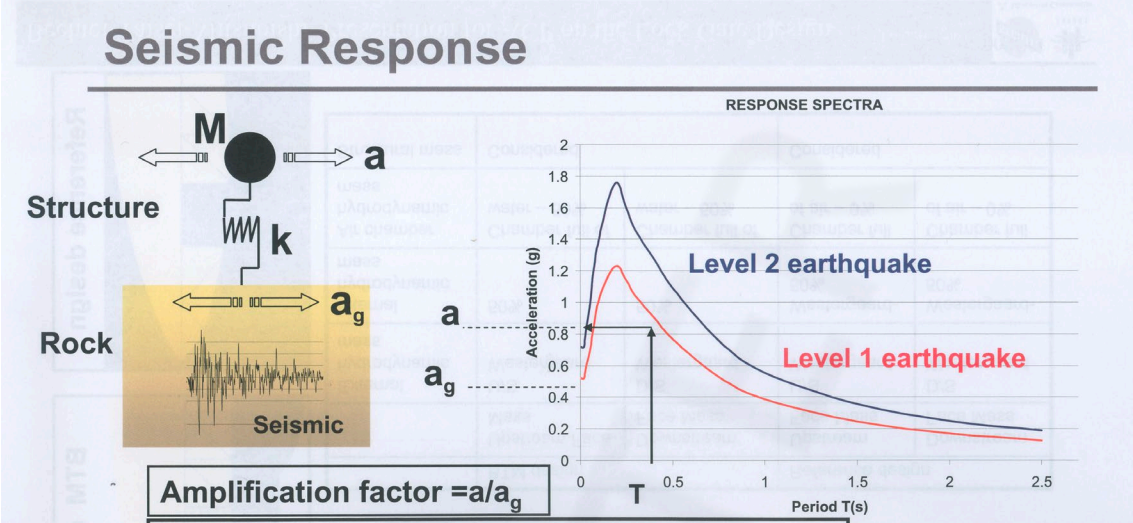
iv. 14 January 2009

856. This meeting has assumed a particular significance by reason of one of the slides, the 16th out of 20, included in BTM's "*Design Concept of the Rolling Gates*" presentation, which set out:

> *... a comparison of the seismic criteria that was used both in the initial reference design and how thats [sic] changed as we've gone through the RFP. And what effect that has on the final design.*[1450]

857. The slide in question is reproduced below.[1451]

[1448] BTM's letters and presentations to ACP, "Rolling gate width and weight justification", 9 December 2008 – 16 January 2009, pp. 27–28 (**C-214**).
[1449] *Lock Gates and Labor* Arbitration, Final Award, [262] (**RLA-283**).
[1450] Transcript of BTM-ACP Meeting, 14 January 2009, p. 4 (**C-213**).
[1451] BTM's letters and presentations to ACP, "Rolling gate width and weight justification", 9 December 2008 – 16 January 2009, p. 45 of PDF (**C-214**).



SEISMIC DESIGN LOADS COMPARISON

	Reference design	BTM design	Ratio
Design earthquake level	2	1	0.72
PGA (g)	0.4	0.522	1.305
Amplification factor	0.614	1.730	2.817
Response acceleration (g)	0.246	0.902	3.666

858. The meeting, which was recorded,[1452] ran for 1 hour and 40 minutes of which the Halcrow seismic presentation accounted for a little over three minutes. The seismic presentation involved a consideration of how the Lock Gates might behave during an earthquake, what PGAs were being used and the basis upon which BTM had calculated an "*amplification factor*" in their design of the Lock Gates based on the Amendment 7 seismic requirements on the Pacific side. It is that reference to an "*amplification factor*" that Sacyr suggests should have been understood by the ACP as a reference to the Seismic Reduction Factor.

859. The *Lock Gates and Labor* tribunal considered the presentation material with care – and with the advantage of the evidence of a number of participants in the meeting, among them, Mr. Pappas of BTM, GUPC's seismic expert, Professor Brancaleoni, and the ACP's expert, Professor Bouaanani. Its consideration of those materials and its conclusions repay careful study:

> *268. The question, however, arises whether the amplification factor appearing in BTM's design was sufficient information for the ACP that the use of a seismic reduction factor in the Conceptual Design was improper, and that its*

[1452] Audio Recording of Meeting between ACP and BTM, 14 January 2009 (**R-257**).

importance justified that the information should be conveyed to the other Tenderers.

269. [GUPC's] view is that the slide « clearly showed that, more than the Amendment 7 changes, the methodology used for the seismic design (particularly the seismic reduction factor) was driving the weight and, thus, cost of the lock gates ». Pr. Brancaleoni opined:

"Here and elsewhere, it must have been clear to ACP that BTM was not adopting the seismic reduction factor and that BTM was concerned about the effect of the unreduced PGAs as compared to the reduced PGAs. It is plain that BTM considered that the adoption of the seismic reduction factor in the Reference Design was a significant issue leading to its conclusion that the reference design gate was not structurally robust enough. BTM also plainly considered that it was likely that the other tenderers would follow the Reference Design approach and adopt the seismic reduction factor."

270. The ACP's expert, Pr. Bouaanani, for his part, "disagree[s] with the suggestion that the PIANC seismic coefficient is the "same thing" as a dynamic amplification/reduction factor. Although these parameters both affect seismic acceleration demands or responses, in my opinion they represent different physical phenomena"; and considers that "it would not be immediately apparent from the slide on the amplification factor that the PIANC seismic coefficient (which represents entirely different phenomena to a dynamic amplification/reduction factor) would be relevant."

271. While Mr. Pappas expressed the opinion that "the amplification factor and the Seismic Reduction Factor is the same (…) and the two concepts are essentially the same" (above), Pr. Brancaleoni himself opined that:

"the seismic reduction factor, I want to clarify this very clearly, and the dynamic amplification belong to two different phenomenon [sic], they are two different things, but they combine in defining final load."

272. The Tribunal concludes on this point that the seismic reduction factor and the amplification factor are not the two faces of one coin, so that the two elements would vary in strict correlation. It remains, nevertheless, to assess

what conclusion the ACP's representatives present at the 14 January meeting could be expected to draw from the slide and the surrounding exchanges.

273. One answer lies in Pr. Brancaleoni's statement quoted above ("Here and elsewhere, it must have been clear…"). Another derives from Pr. Bouaanani's expert opinion, according to which following his review of BTM's presentation at the meeting on 14 January 2009, as well as of the transcript and audio files of the meeting,

"it would not be immediately apparent from the slide on the amplification factor that the PIANC seismic coefficient (which represents entirely different phenomena to a dynamic amplification/reduction factor) would be relevant. The use or value of the PIANC seismic coefficient was not even discussed or referred to in this slide. According to the audio files and the related transcript of the meeting, the presenter did not provide any explanation on the background calculations for the amplification factor corresponding to the conceptual design. Determining how this factor was obtained is not self-explanatory and would require a certain degree of interpretation and analysis/calculation."

Under cross-examination, Pr. Bouaanani confirmed that

"a competent engineer looking at this slide would not immediately notice that it shows that a seismic reduction factor was used in the reference design".

274. The Tribunal concludes on this point that the slide and the presentation were not "clear warnings", as alleged by the Contractor, for the ACP's representatives that were present regarding the application of the seismic reduction factor.[1453]

860. This Tribunal adopts those conclusions. Furthermore, it notes that BTM had made clear that it expected the confidentiality of the one-to-one meeting to be respected.[1454] As the *Lock Gates and Labor* tribunal noted:

The audio recording of the meeting reveals that limited time was spent on the seismic question and confirms that the PIANC seismic coefficient was not

[1453] *Lock Gates and Labor* Arbitration, Final Award, [268]–[274] (**RLA-283**).
[1454] Transcript of BTM-ACP Meeting, 14 January 2009, p. 23 (**C-213**).

> *mentioned, nor any "error" in the Conceptual Design,* ***nor any request that any matter discussed should be imparted to the other Tenderers.***[1455] [Emphasis added]

861. Mr. Zaffaroni acknowledged that such one-on-one meetings were to remain confidential:

> *Q.: Now, you knew that the meetings … the one-on-one meetings between the ACP and an individual Tenderer were confidential; is that right?*
>
> *A.: Yes.*[1456]

862. Following the meeting, BTM did frame a formal question, which, together with the ACP's answer, appeared in the Tender Questions and Answer Log:

Question	Answer
The design criteria provided in Volume II of the Employers Requirements, Pat 1 [sic], Division 01, Section 01 81 19 – Lock Gates, addresses the seismic and fatigue load that the gates must be designed for. Since those criteria have been revised since the reference design was prepared, it is clear that the reference design for the gates will not be adequate for the specified design loading. Can the ACP confirm that the reference design for the gates does not meet the current design criteria?[1457]	Refer to Clause 5.1 of the Conditions of Contract.

863. The question made no mention of the PIANC seismic coefficient or of an "*error*" in the conceptual design. As the Tribunal has established, those matters were not raised at the 14 January 2009 meeting, but had they been matters to which BTM wished to draw the attention of the other Tenderers, this would have been the opportunity to do so. Rather, the point which BTM was making in its formal question was that the reason why the conceptual design for the Lock Gates would not be adequate was because the seismic and fatigue criteria had been revised since the conceptual design had been prepared.

1455 *Lock Gates and Labor* Arbitration, Final Award, [267] (**RLA-283**).
1456 Transcript, Day 3, p. 811
1457 Tender Questions and Answer Log, April 2008, p. 320 (**R-27**).

This was indeed the same point which BTM had previously made to the ACP in its correspondence in December 2008.

864. Mr. Zaffaroni agreed that the question answered itself: it flagged to Tenderers that the conceptual design would not meet the Employer's Requirements:

> *Those who have been writing the question is [sic] also ending up answering to the question. This is your point.*
>
> *And you agree?*
>
> *I agree that this has been written like that.*[1458]

865. In circumstances in which the ACP had made clear to Tenderers that they should not be relying upon the conceptual design, any other answer which the ACP gave would have risked being confusing. BTM's question was a question about the conceptual design. The Tenderers knew that they should not be relying upon the conceptual design – and there was no reason for the ACP to think that any Tenderer would be relying upon the conceptual design.

866. On the basis of the record before it, this Tribunal finds no reason to depart from the conclusion of the *Lock Gates and Labor* tribunal, which found nothing in the pre-Tender exchanges between the ACP and BTM that:

> *... directly and expressly bore on the use of the PIANC factor and that the ACP would have had a duty to signal to the other Tenderers, or that it was asked to communicate.*[1459]

v. The July 2009 Post-Tender Exchanges

867. Post Tender, BTM issued two letters to the ACP on 28 July 2009[1460] in which it expressed concern about GUPC's Lock Gates design and, specifically, its use of the seismic coefficient in the seismic design of the Lock Gates. It stated:

> *1. Seismic calculations were submitted by GUPC to support their gate design in response to queries on the subject raised by ACP in its letter ... dated 15*

[1458] Transcript, Day 3, p. 816.
[1459] *Lock Gates and Labor* Arbitration, Final Award, [291] (**RLA-283**).
[1460] Letter from BTM to the ACP, 28 July 2009 (**R-61**); Letter from BTM to the ACP, 28 July 2009 (**R-65**).

> *June 2009. These calculations show that the GUPC design analysis of seismic loading was not performed in accordance with codes and standards included in the [ER] in a number of important ways:*
>
> *a. the use of a prohibited 50% seismic coefficient reduction;*
>
> *b. the use of a quasi-static seismic load that captures less than 50% of the participating mass;*
>
> *c. the omission of the vertical seismic input;*
>
> *d. the omission of the horizontal water pressure load due to the vertical seismic motion; and*
>
> *ethe unsubstantiated application of a reduced hydrodynamic mass.*
>
> *2.* ***The most significant of these non-compliances is the use by GUPC of the seismic coefficient reduction formula in determining seismic load, resulting in seismic acceleration reduction of approximately 50%, as is shown in the GUPC calculation****.*
>
> *3. The use of the seismic coefficient reduction in the seismic analysis of the lock gates does not comply with the relevant seismic codes allowed by the [ER]. The reduction is only allowable for use in respect of waterfront structures founded on soil to determine effective lateral loading from retained ground. It cannot be used in respect of gates supported by concrete structures founded directly on bedrock that will transmit bedrock motions directly to the gates.*[1461] [Emphasis added]

868. BTM cited to the Japanese research study on loadings on waterfront structures backed by soil to which the TNO Report had referred and to which the Iv-Groep had given particular consideration. It continued:[1462]

> *7. Dr Takahiro Sugano, who is the Director of the Earthquake Disaster Prevention Engineering Division in the Geotechnical and Structural Engineering Department of the Port and Airport Research Institute in Japan, is one of the authors of the report in Attachment 1. Dr Sugano has advised that*

[1461] Letter from BTM to the ACP, 28 July 2009, [1]–[3] (**R-61**).
[1462] Letter from BTM to the ACP, 28 July 2009, [7] (**R-61**).

> *the reduction factor shown in paragraph 4 above and discussed in the paper cited in paragraph 5 above is not applicable to lock gates, and that it is no longer used in Japan for gravity ground retaining structures. Attachment 2 to this letter contains an email from Dr. Sugano to Mitsubishi Corporation dated 25 July 2009*[1463] *confirming these facts.*

869. Having identified "*additional omissions*" in the GUPC tender design,[1464] BTM set out its view of the "*probable consequences of the technical deficiencies*":

> *10. In the event of a Level I or Level II earthquake, lock gates fabricated in accordance with the GUPC tender design are likely to fail and will not then be able to retain Gatun Lake. ...*
>
> *...*
>
> *11. Buckling of structural members will cause the gates to fail structurally. The failure will comprise deformation of the gate, loss of some or all of the seals, and a likely inability to move the gate. The gate is vulnerable to catastrophic failure and possibly complete collapse which will result in a failure to retain Gatun Lake. ....*[1465]

870. It is not in dispute that the ACP forwarded the BTM correspondence to GUPC on 6 August 2009.[1466] The ACP recorded that:

> *[BTM] as a result of their review of GUPC's tender documentation and of their participation in meetings with the evaluators has informed the ACP, by way of two letters dated July 28, 2009, of a number of issues they have become aware [of] which are associated with GUPC tender design for the rolling gates, among others.*

871. In his written evidence, Mr. Zaffaroni recalled, inaccurately, that BTM had: "… *referred to certain alleged errors in the Seismic Reduction Factor included by Panama in the Reference Design* …."[1467] He stated that BTM's conclusion had been based on an analysis of the GUPC tender in the exercise of its right, as an unsuccessful tenderer, to

---

1463 Letter from BTM to the ACP, 28 July 2009, p. 28 of PDF (**R-61**).
1464 Letter from BTM to the ACP, 28 July 2009, [9] (**R-61**).
1465 Letter from BTM to the ACP, 28 July 2009, p. 4 of PDF (**R-61**).
1466 Letter from ACP to GUPC (IACC-21427-C0003), 6 August 2009 (**C-238**).
1467 **CWS-1** Zaffaroni I, [86].

protest the award of the tender. To that extent, GUPC had treated its reaction with "*some skepticism*"[1468] as that of a "*disgruntled bidder*"[1469] or, as he put it at the hearing:

> *There was a competitor that was losing that was complaining. We did not have – especially at that time, in which having won the Contract, you are thinking about the mobilization, to put together all the pieces of this complicated project.*
>
> *In order to move on, I should spend time – someone should spend time in reading the conclusion of Mr. Sugano. Fantastic. We did afterwards, but it's not the first-time reaction when you see this and you have not seen all the pictures that has [sic] been ongoing between ACP and BTM.*[1470]

872. Sacyr now suggests that the BTM letter of 28 July 2009 came too late for GUPC, because it was already locked into the Contract with no opportunity to amend its bid price or projected schedule. That protest was not reflected in the apparently muted reaction to the release of the 28 July 2009 correspondence described above. Sacyr seeks to explain that away on the basis that GUPC had had no inkling of the concerns raised by BTM pre-Award of Tender or by CPP's "*validation*" of BTM's concerns in its March 2009 Report. Had it done so, Mr. Zaffaroni stated that GUPC:

> *... would have certainly approached BTM's letter entirely differently.*[1471]

873. But that evidence cannot be right. First, the premise of the critique is wrong: there is no basis on the record in this case to suggest that BTM's pre-Tender exchanges with the ACP were focussed on GUPC's tender and there was no recorded mention of the Seismic Reduction Factor in the discussion between BTM and the ACP. Nor did the CPP "*validate*" BTM's concerns.

874. Second, even in the face of the stark terms of BTM's July 2009 correspondence and the specific reference to Dr. Sugano's unequivocal opinion that the seismic reduction factor was of no application to the Lock Gates, GUPC's own design team at CICP remained

---

1468 **CWS-3** Zaffaroni II, [80].
1469 **CWS-1** Zaffaroni I, [86].
1470 Transcript, Day 3, p. 845.
1471 **CWS-3** Zaffaroni II, [80]; *see also* **CWS-1** Zaffaroni I, [86]–[87].

unshaken in its confidence in its design of the Lock Gates. According to Mr. Augustijn of Iv-Groep:

> *We were confident that whatever concerns BTM expressed in its letter could be addressed in subsequent design stages*.[1472]

875. Mr. Augustijn confirmed in evidence to the *Lock Gates and Labor* tribunal that it was not until the end of 2009, when GUPC and CICP began their work on the Intermediate Design, that analysis revealed that the stresses were significantly higher than anticipated – a factor immediately attributed to the seismic reduction factor, although the point had not been documented.[1473]

876. The *Lock Gates and Labor* tribunal noted that:

> *… although the more sophisticated analysis for the Intermediate design did not include a reduction factor anymore, GUPC launched an investigation on the issue at the beginning of 2010. The Tribunal notes that this span of time since being apprised of BTM's July 2009 letters does not quite fit with GUPC's contention that, had it been warned of a risk in using the PIANC coefficient at Tender stage, it would immediately have reconsidered, if not revised, its design plans. Still in April 2010, [Iv-Groep] did not identify the seismic reduction factor as being the source of the problems encountered with higher stresses on the gates than anticipated, but rather the damping ratio used. Only in June 2010 did [Iv-Groep] realize that the use of the seismic reduction factor was a major reason leading to the necessity of heavier gates.*[1474] *It is then that the issue of the seismic reduction factor was finally cleared.*[1475]

877. The *Lock Gates and Labor* tribunal continued:

> *… The ACP cannot be held to have been in possession of an information – the impropriety of using the seismic reduction factor – that never was communicated to it as such and which was only recognized later by the*

1472 *Lock Gates and Labor* Arbitration, Augustijn Second Witness Statement, [119] (**R-32**); *see* Transcript, Day 3, p. 841.

1473 *Lock Gates and Labor* Arbitration, Hearing Transcript, Day 3 pp. 53, 55, 119 (**R-444**).

1474 In the course of his evidence, Mr. Pérez acknowledged that the*: "… only error, only big error that we committed was Seismic Reduction Factor*", Transcript, Day 3, p. 951.

1475 *Lock Gates and Labor* Arbitration, Final Award, [314] (**RLA-283**).

> *engineering profession. GUPC itself, on other occasions, acknowledges that "the non- applicability of the seismic reduction factor was not an obvious matter to professionals in the field, including two out of the three Tenderers (GUPC and CANAL), PIANC, CPP and TNO, GUPC's seismic advisor" that "GUPC thus used the reduction factor in its seismic design at tender stage based on the information available in the industry at that time, which generally accepted the use of a seismic reduction factor for lock gates." Mr. Buffel, of CPP, is reported by GUPC as having simply* **"***drawn the reader's attention in [the 2009] report to the application of a reduction factor for the seismic action." The more uncertain an alleged information, the lesser a duty to communicate it.*[1476]

878. The conclusion of the *Lock Gates and Labor* tribunal was that GUPC had not satisfied its burden of proof concerning its assertions, first, that during the Tender period, BTM repeatedly drew the ACP's attention to the fact that the PIANC coefficient should not be applied, and second, that it had requested the ACP to relay such information to the other Tenderers:

> *The ACP did not receive explicit corrective information of a nature to trigger an obligation of disclosure to the other tenderers in view of the surrounding circumstances. Inasmuch as there were exchanges at all on the disputed point, they were not specific (BTM) or conclusive (CPP). In fact, they could not have generated an obligation [upon the ACP] to inform, considering that the engineering practice at the time had not yet forsaken the use of the PIANC coefficient. That the seismic loads had been increased substantially since the conceptual design was for all the Tenderers to see, and to perform their tender design accordingly. It was not something that needed to be conveyed by the ACP to the other Tenderers as a "warning" and the ACP was not asked to. Moreover, the ACP did not know on what bases the Tenderers were planning their Tender designs.*[1477]

879. In the opinion of this Tribunal, those findings are unimpeachable on the basis of the record before it in this Arbitration and the Tribunal respectfully adopts them.

[1476] *Lock Gates and Labor* Arbitration, Final Award, [318] (**RLA-283**).
[1477] Lock Gates and Labor Arbitration, Final Award [319] (**RLA-283**).

880. In the course of Sacyr's closing remarks, it placed considerable weight upon the fact that:

> *… Panama was conducting risk assessments of the kind that we saw it conducted in 2005, and taking quantified views on these crucial project parameters, the PLE Basalt and the Lock Gates …*[1478]

881. Sacyr submitted that that showed:

> *… that there was deliberate thinking about these risks. And there was an awareness of these risks and a kind of considered approach to their assessment. And the materiality, the* ***obvious materiality of this information to tenderers permits the inference that there was, at some level, a deliberate thought not to release this information to tenderers because of potential consequences for the Expansion Program.***
>
> *…*
>
> *You've got the PLE basalt as the source for concrete aggregates on the Project … [T]he concrete needs were enormous, unprecedented. So as soon as you have a red flag about that, you know that the implications could be very serious indeed.*
>
> *Similarly with the Lock Gates, the other critical element of the Project. Once you have in your hands the information that the Seismic Reduction Factor is inappropriate – and recall that … depending on the particular variation of the PIANC factor that's applied, it results in a reduction of the seismic loads of 40 percent, even higher.*
>
> *So this … does … shift the needle quite a lot in terms of the seismic loads that you're going to factor into your Lock Gates Design. So as soon as you have doubts about whether that should be applied or not, you know you've got a pretty serious issue on your hands in terms of the Lock Gates*.[1479] [Emphasis added]

[1478] Transcript, Day 6, p. 1740.
[1479] Transcript, Day 6, pp. 1740–1742.

882. In response to questions from the Tribunal, Sacyr accepted that one would "*assume*" that any such coordinated policy decision to withhold information would have to be determined at level of the seniority of at least Mr. Quijano or Ms. George, namely individuals who would have an appreciation of the potential costs for the project and for the Tenderers:

> *… obviously knowledge of the doorman or the janitor is not going to be enough. But you'd expect these things – even though people in the laboratory may not, themselves, have been able to … calculate in more precise terms the impact - that that information would have been communicated; you would assume that …*[1480]

883. The problem for Sacyr is that on the basis of the facts and conclusions set out above, there is no support for the premise upon which the assumption that any such coordinated policy to withhold material information in respect of the PLE basalt and the Lock Gates is based and which can now be seen to be reliant on speculation, conjecture and a selective application of the facts.

884. But even if Sacyr had been able successfully to establish a factual foundation for its claim, it would still have to demonstrate why it came within the scope of the substantive investment protection obligations in the Treaty. The Tribunal considers that it has failed to do for the reasons set out below.

(7) Failure to Demonstrate any Exercise of *Puissance Publique*

885. By its Decision on a Preliminary Issue of 3 February 2022, this Tribunal held that the ACP is an organ of the Republic of Panama for the purposes of Article 4 of the ILC Articles and that its acts are capable of being attributed to Panama.[1481]

886. But the effect of that decision was not to render every act of the ACP a sovereign act engaging the Treaty obligations of Panama. A distinction was drawn in clear terms by the late Professor James Crawford between a breach of contract *simpliciter* committed by an organ of the State in respect of a commercial contract and an act which would

[1480] Transcript, Day 6, p. 1743.
[1481] Decision on a Preliminary Issue, [251].

amount to a breach of international law. The former does not become a sovereign act merely because it was an act of a State organ which may be attributable to the State:

> *… a State is not, generally speaking, internationally responsible for the 'private law' acts of its organs (e.g. the breach of a commercial contract entered into by the State)….*[1482]

887. In order to engage that international responsibility:

> *Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party.*[1483]

888. Sacyr suggested that in this case involving a project of national significance, it was axiomatic that the actions of the ACP in relation to it were sovereign in nature.[1484] Furthermore: (i) the Project had been approved initially by the Panamanian Executive and the Legislature and it had been put to a referendum;[1485] (ii) the Contract was entered into pursuant to the ACP's regulatory authority;[1486] and (iv) the ACP had performed its duties under the Contract subject to a "system of controls" from the Executive and the Legislature.[1487]

889. In an important exchange with the Tribunal in the course of its closing submissions, Sacyr responded to the enquiry whether it needed to assert sovereign conduct in order to establish a breach of the Treaty.[1488] Sacyr was asked whether it was its case that:

(i) "*this is joined-up conduct in the sense that there are officials in different parts of the Tender process [who may have been in different departments even within the ACP] who collaborated … in a concerted effort to withhold documents in different contexts*;" or

---

1482 J. Crawford, "First Report on State Responsibility" Volume II(1), ILC Yearbook (1998) 1 at 37, [174] (**CLA-30**).
1483 ILC Articles, p. 41 (**CLA-5**).
1484 Reply on the Merits, [339]–[340].
1485 Reply on the Merits, [341], [343(a)].
1486 Reply on the Merits, [344(a)].
1487 Reply on the Merits, [344(b)].
1488 Transcript, Day 6, p. 1617.

(ii) "*individuals acted independently without a concerted effort but the net effect of them acting independently was prejudiced to [Sacyr] because … these different pieces of information were withheld*…."[1489]

890. Sacyr asserted that:

> *… the evidential record you now have before you shows clearly that the information was withheld and misrepresented, and that the officials in question knew the materiality of that information.*[1490]

891. It contended that its complaints turn on the ACP's actions in conducting and negotiating the Tender process and exercising its rights under the Contract, which rise to the level of a breach of the FET standard by Panama. Those claims are based upon what are alleged to have been representations made by the ACP in the course of the Tender process and subsequent actions on its part, which gave rise to legitimate expectations on GUPC's/Sacyr's part and which were inconsistent with those representations:

> *… Panama knew or must have known about the materiality of the information [and] … it decided not to share that [with Sacyr], despite that it knew or must have known about that materiality, that's when we say internationally wrongful conduct commenced.*[1491]

892. Sacyr recognised, as it must, that whilst the conduct of which it complains occurred within the framework of a commercial tender and a commercial contract, the question is whether the conduct is inconsistent with a primary obligation of international law:

> *… whether particular conduct involves a breach of a treaty is not determined by asking whether the conduct purportedly involves an exercise of contractual rights.*[1492]

893. It acknowledged too, that it was its burden to prove that Panama knew or should have known about materiality:

1489 Transcript, Day 6, p. 1620.
1490 Transcript, Day 6, p. 1621.
1491 Transcript, Day 6, pp. 1624–1625.
1492 Transcript, Day 1, p. 32.

> *Beyond that … to what extent there was a conspiracy, to what extent there was a concerted effort to deceive, this is where the burden shifted. … [O]nce you have an evidential record that confirms the knowledge point, then it was for Panama to disprove the only inference you can draw from that which is that there was a concerted effort and there was intent. … First, knowingly withholding and misrepresenting crucial risk information; second, procuring adverse contractual terms on that basis; and then, third, once the undisclosed risks materialised, denying Sacyr relief in reliance on those provisions.*[1493]

894. That, submitted Sacyr, was:

> *… State conduct that cannot be reconciled with Panama's obligation of fair and equitable treatment.*[1494]

895. The thrust of Panama's defence may be summarised as follows: Sacyr's FET and non-impairment claims are based entirely on contractual conduct, which is not capable of constituting a Treaty breach. According to Panama, Sacyr must demonstrate that such conduct of Panama, about which it complains, goes beyond the ordinary commercial behaviour of an ordinary commercial counterparty.[1495] The distinction to be drawn is between *acta iure imperii* (actions going "*beyond that which an ordinary contracting party could adopt and involve State interference with the operation of the contract*")[1496] and *acta iure gestionis* (actions in respect of which "*any private contract partner could have acted in a similar manner.*")[1497]

896. The Tribunal accepts this submission for the reasons of principle given earlier in this Award. There is also a substantive body of *jurisprudence* supporting *it*. For instance, the *Duke Energy* tribunal observed that:

> *Establishing a* treaty *breach is a different exercise from showing a contract breach. Subject to the particular question of the umbrella clause [no longer an*

1493 Transcript, Day 6, p. 1625.
1494 Transcript, Day 6, p. 1625.
1495 *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction 22 April 2005, [254] (**RLA-38**).
1496 *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 7 February 2007, [248], [260] (**RLA-49**).
1497 *Jan de Nul N.V. & Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, [170] (**RLA-53**).

> *issue in this arbitration], in order to prove a treaty breach, the Claimants must establish a violation different in nature from a contract breach, in other words a violation which the State commits in the exercise of its sovereign power.*[1498] [Emphasis added]

897. Put in more concrete terms, if conduct can be seen in the framework of the contractual relationship, it will not amount to a sovereign act.[1499] That point was addressed in *Staur v. Latvia* which involved the relationship between the Latvian airport authority and its contractors in respect of the development of Riga Airport:

> *The conduct of SJSC Airport with which this dispute is concerned is of a quintessentially commercial character, i.e., the management of its relationship with private investors in relation to the development of real estate in accordance with contracts concluded for that purpose on commercial terms and governed by Latvian private law.*[1500]

898. The Tribunal's conclusions are as follows.

899. First, it has concluded that Sacyr has failed to meet its evidentiary burden in proving the factual predicate of its claims. That, in itself, is fatal to its contention that there is a basis to find an established breach of a Treaty obligation on Panama's part.

900. Second, the Parties agree that the same set of facts could, in certain cases, give rise to contractual claims and treaty claims, but the purely commercial nature of those arrangements is evident from the Contract:

(i) it was negotiated and agreed between the ACP and the pre-qualified tenderers, all of which were pre-eminent engineering firms with many decades of international projects experience behind them and with access to sophisticated legal advice and technical expertise;

1498 *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, [345] (**CLA-34**).

1499 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.ş v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, [445], [461] (**RLA-60**).

1500 *Staur Eindom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award, 28 February 2020, [343] (**RLA-307**).

(ii) the template for the first draft of the Contract was a FIDIC standard form commercial construction contract, which was then amended and agreed in the course of multiple exchanges and meetings with the tenderers. It is to be noted that the *Guarantees* tribunal concluded that:

> *The Contract is a fixed price, lump sum, design and build contract based on standard FIDIC Conditions, the price of which is subject to adjustments pursuant to specific conditions set out in the Contract;*[1501]

(iii) the Contract contains many of the standard commercial terms which appear in a commercial construction contract – e.g., access to the site, contractor's responsibilities, Project design, defects, contract price and payment terms, termination rights*, force majeure* and dispute resolution;

(iv) the ACP is defined as the "Employer" and has rights and obligations under an international design-build contract pursuant to terms and conditions to which any non-State employer might agree; and

(v) there is no sovereign immunity waiver provision in the Contract. The Tribunal is not persuaded by Sacyr's suggestion that the decision of the ACP Board to include a sovereign immunity waiver in the ACP's financing contracts informs, much less, confirms the sovereign nature of the ACP's actions. Panama points out that the terms of the financing are entirely separate from those of the principal design-build contract. Furthermore, the ACP Board considered that a sovereign immunity waiver would be required in order to obtain "*commercial financing*".[1502]

901. All this is entirely consistent with Mr. Zaffaroni's explanation that GUPC had sought to establish international standard contract terms in the course of a "*normal tender procedure*"[1503] of Q&A and meetings: "… *[w]e were trying perhaps ingenuously to try to put the rules of the game according to what were the international standards. So we've never been asking for something so strange, but to tell ACP this is normally done*

1501 *Guarantees* Arbitration, Final Award, [469] (**RLA-100**).
1502 Minutes of the Extraordinary Meeting of the Board of Directors of the ACP, 15 January 2008, p. 11 (**C-104**).
1503 Transcript, Day 6, p. 1775.

in the industry…").[1504] The result was the execution of a normal international commercial contract.

902. The Tribunal is also not persuaded that the approval of the Contract by the Executive and the Legislature and thereafter in a referendum is indicative of the sovereign nature of the ACP's actions. Such authorisation of an organ of the State to enter into a project does not mean that all acts carried out in relation to that project become sovereign in nature. It is not uncommon in Latin America for commercial projects of social or public significance to be put to a referendum.[1505]

903. Nor is the Tribunal impressed by Sacyr's suggestion that the Contract was issued pursuant to the ACP's regulatory authority. Article 6 of Law No. 28 of 2006, which was the law approving the Project and on which provision Sacyr seeks to rely, makes no mention of ACP's regulatory authority; rather, it provides for the establishment of an *Ad-hoc* Commission to be in place during the contracting and implementation process of the construction of the TSLP.[1506]

904. All this has to be seen in the context of Article 52 of Law No. 19 of 1997, which is the organic law of the ACP. Article 52 requires that, so far as the procurement of goods and services is concerned, the ACP must:

> *… ensure the best quality, the most favorable prices, efficiency and competitiveness.*[1507]

905. Panama suggests that those obligations (and aspirations) would be recognised and shared by any commercial company contracting for goods and services and they are consistent with the actions of an ordinary employer entering into a contract for construction contract services. That is a submission with which the Tribunal agrees.

1504 Transcript, Day 3, p. 741.
1505 *See* Rejoinder on the Merits, footnote 1311 for examples.
1506, 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, Art. 6 (**C-11**).
1507. Law No. 19 of 1997 "*Por la que se Organiza la Autoridad del Canal de Panamá*," 11 June 1997, Article 52 (**C-4**).

906. In answer to the suggestion that amendments to the ACP's Acquisition Regulations in the course of the tender phase had been made in an exercise of sovereign power:

> *... to protect [the ACP] from the risks it had identified and to illegitimately transfer such risk to Sacyr, which had not been provided with the withheld information so that it could properly evaluate such risks.*[1508]

the Tribunal makes two observations. First, it has established that the premise upon which that assertion is founded is unproven. Second, it accepts the submission that the purpose of the amendments had been to reinforce the primacy of the terms of the Contract in governing the relationship between the ACP and GUPC. The Tribunal notes the finding of the *Concrete* tribunal that:

> *... these provisions merely serve to reinforce the freedom of contract that the ACP enjoys under its special legal regime.*[1509]

907. Finally, the Tribunal agrees with Panama's refutation of the suggestion that the ACP's performance under the Contract had been subject to a system of controls imposed by the Executive and the Legislature. In reality, the "controls" were reporting obligations and transparency requirements *vis-à-vis* the Executive and Legislative branches. The mere fact that the ACP had an obligation to report and to be transparent in the discharge of its activities – in this case, by way of reports to the people of Panama which were published in compliance with Law No. 28, Article 4 – is not enough to demonstrate that specific actions on the part of the ACP are sovereign in nature.

908. For these reasons, the Tribunal is not persuaded that the actions of the ACP attributable to Panama of which Sacyr complains amount to an exercise of *puissance publique*. Each and every one of the alleged misrepresentations relates to matters addressed or regulated by contractual provisions and any claims arising from them are outside the scope of the Treaty obligations. As the *Latam Hydro* tribunal observed:

[1508] Reply on the Merits, [343(d)].
[1509] *Concrete* Arbitration, Partial Award, [654] (**RLA-167**).

> *The fact that there are procedural and administrative formalities of contracting with a sovereign does not translate those contractual acts into governmental ones.*[1510]

909. Sacyr suggests that its Treaty claim based upon assurances that it received from Panama prior to entering into the Contract does not become a contractual claim simply "… *because the parties signed a contract to memorialize Sacyr's investment* ...."[1511] But that is not the thrust of Panama's objection. It is not suggested by Panama that the existence of a contract will preclude a Treaty claim. Rather, it is incumbent on Sacyr to establish that the conduct of which it complains goes beyond the commercial behaviour of an ordinary contractual counterparty, such that Panama should not have the benefit of the protections afforded by the terms of the Contract, because those provisions are the "*fruit from the poisonous tree*"[1512] which would never have come into being but for material misrepresentations which amount to breaches of Panama's Treaty FET obligation. The predicate of that proposition has been shown to be unfounded; the Tribunal has found no basis to support Sacyr's contention that the asserted withholding of Project-related information by the ACP prior to the award of the Contract amounted to a deliberate withholding of information. Even if there had been such a withholding, it would have amounted to wrongful conduct under the Contract, but it would not have constituted an exercise of *puissance publique.*

910. Faced with allegations that there had been a non-disclosure of information by the State prior to the transaction (in that case, a failure to disclose a legal opinion prior to the execution of the contract), the *Parkerings* tribunal decided that any such non-disclosure:

> *... while objectionable, does not, in itself, amount to a breach of international law. It would take unusual circumstances to decide otherwise*....[1513]

911. Finally, it has been suggested by Sacyr that a concern about the Project budget would:

1510 *Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru*, ICSID Case No. ARB/19/28, Award, 20 December 2023 [1216] (**RLA-308**).
1511 Reply on the Merits, [328].
1512 Transcript, Day 1, pp. 143-144.
1513 *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, [307] (**CLA-189**).

> *… **seem[] to explain** … Panama's decision against revealing key seismic information material to the design and construction of the Lock Gates to tenderers, because it appeared to be blinded by a concern that if the Project's cost [sic] were to increase (even by "10, 20 percent") it could no longer be able to justify the economic feasibility of the Project.*[1514]*;*
>
> and that concern further
>
> *… **appeared to have driven** Panama's decision to conceal key information regarding the low quality of the PLE basalt for the production of aggregates*."[1515] [Emphasis added]

912. But even assuming for these purposes that the underlying factual premises were established to be true and leaving aside the attribution of certain risk to the contractor under the terms of the Contract, these are speculations on Sacyr's part, which are unsupported by evidence.

913. The Tribunal accepts that there is nothing indicative of an act of *puissance publique* in the expression of concern on the part of Panama, as contract owner, to ensure that it could justify the economic feasibility of the Project to those to whom it was accountable. And even if information had been withheld, that is something that any party to a commercial contract might do. In the words of the tribunal in *Bureau Veritas v. Paraguay*:

> *There is nothing inherent in the fact that such conduct [in this case, a failure to pay] is undertaken by a State in its capacity as a contracting party that might as such endow them with the quality of sovereign acts such as to catalyse responsibility under an international treaty obligation relating to fair and equitable treatment. There has been no reliance by Paraguay on the powers of a public authority that might not – by analogous means – also be available to a private person or corporation. Attempts to mislead, distort, conceal or otherwise confuse a contractual partner are strategies open to and used by both public and private persons.*[1516]

1514 Reply on the Merits, [343(b)].
1515 Reply on the Merits, [343(b)].
1516 *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction, [241] (**RLA-144**).

914. Having established that the alleged representations which constitute the conduct upon which Sacyr relies are contractual rather than sovereign in nature, the Tribunal agrees with the conclusions of the *UAB/Latvia* tribunal:

> *The breach by a State of a representation made in a contract may not suffice to give rise to a breach of the standard of fair and equitable treatment since a distinction must be made between pure contract claims and treaty claims. The Tribunal considers that, as a general rule, a breach of contract is unlikely on its own to amount to a breach of the standard of fair and equitable treatment, and the State would have to have acted in its sovereign capacity.*[1517]

915. As the *Impregilo* tribunal put it:

> *These are matters that concern the implementation of the Contracts, and do not involve any issue beyond the application of a contract, and the conduct of contracting parties. In particular, the matter does not concern any exercise of "puissance publique" by the State.*[1518]

(8) Summary

916. For the reasons set out above, the Tribunal concludes that Sacyr has failed to make good the two principal substantive claims that it pursued in this arbitration. It has established neither the factual foundation for the claims of misrepresentation by the ACP, nor that the actions of the ACP about which it complains may be attributed to Panama as acts undertaken in the exercise of its *puissance publique*. The claims are dismissed on the merits.

917. The Tribunal has reached these conclusions on the basis of the particular issues advanced by Sacyr and which it developed in argument and evidence at the Hearing. The Tribunal is well aware that there remains a number of additional claims identified in Sacyr's written submissions and prayers for relief, which were neither advanced, nor

---

[1517] *UAB Energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award, 22 December 2017, [838] (**RLA-98**).

[1518] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, [268] (**RLA-38**).

tested at the Hearing and in respect of which no clear confirmation of their formal withdrawal was given by Sacyr.

918. That is a most unsatisfactory position. The Tribunal notes that although these claims have been tabled, but pursued in this arbitration, they have either been the subject of decisions set out in awards already rendered by the various ICC tribunals (and thus, says Panama, they are *res judicata*), or they remain to be addressed (or to be reiterated) in the pending *Disruption* Arbitration proceedings and are properly to be considered *lis pendens*.

919. The Tribunal will now deal with the residual claims, turning first to the claims advanced in support of Sacyr's claim that Panama had engaged in conduct discriminatory of its investment, the Decree No. 6 and PAC-4 claims.

(9) Residual Claims

A. Decree No. 6

920. Sacyr contends that Panama discriminated against its investment by the enactment of Decree No. 6 in January 2012. It maintained that the effect of the Decree was to:

> *... increase[] the minimum wage payable only to workers on the [TSLP] without a reasonable justification*.[1519]

That is not a complaint borne out by the facts.

921. In summary, the pertinent background context is as follows. In January 2012, a simmering dispute between GUPC and its construction workforce came to a head. There were three principal grievances. First, the fact that foreign workers were paid more than Panamanian nationals doing the same work. Second, incidents of alleged mistreatment of Panamanian workers by foreign senior personnel by whom they were supervised. Third, a failure by GUPC correctly to calculate and to pay overtime due in respect of the first half of January 2012. The construction workers demanded that GUPC: (i) pay overtime wages due but not paid by reason of GUPC's failure to correctly calculate its

[1519] Reply on the Merits, [320].

payroll; (ii) increase wages; and (iii) introduce measures to protect Panamanian workers from mistreatment by foreign supervisors.[1520]

922. These demands were rejected by GUPC on 16 January 2012, precipitating an immediate suspension of work and the calling of a strike. The workers demanded direct discussions with MITRADEL to the exclusion of GUPC and SUNTRACS.[1521]

923. MITRADEL intervened as a mediator on 18 January 2012 in an attempt to bring about a prompt return to work. Its efforts were successful, and the parties entered into the Settlement Agreement for the Termination of the Conflict and Resumption of Works of 21 January 201 (the "**GUPC-SUNTRACS Settlement Agreement**").

924. The terms of the GUPC-SUNTRACS Settlement Agreement recorded the acceptance by the workforce of GUPC's offer of an increase in the minimum wage from the equivalent of US$ 2.9/hr to US$ 3.34/hr, a general 12.5% wage increase for skilled labour and an agreement by GUPC to pay the so far unpaid earned overtime. The GUPC-SUNTRACS Settlement Agreement further recorded that:

> *[GUPC] and the workers represented by SUNTRACS, acknowledge that the Executive Branch, through [MITRADEL], has announced that it will issue an Executive Decree establishing the new minimum wage rates for workers engaged in construction activities in the Panama Canal [TSLP] which will become effective as of its promulgation in the Official Gazette.*[1522]

925. GUPC's immediate and public response to the settlement of the dispute was unequivocal:

> *[GUPC] is pleased to announce that, with the mediation of [MITRADEL], an agreement has been reached with the workers working on the [TSLP], which has ended the labor conflict that led to the work stoppage on said project. The workers will resume work normally on Monday, 23 January.*

1520 Request for Settlement Agreement from SUNTRACS to GUPC, 19 January 2012 (**R-101**).

1521 *Disruption* Arbitration, Fossatti Witness Statement, 13 October 2021, [44]. Ms. Fossatti is a witness tendered by GUPC in the *Disruption* Arbitration (**R-216**).

1522. Settlement Agreement for the Termination of the Conflict and Resumption of Works. 21 January 2012, p. 3 (**C-286**).

> *[GUPC] thanks the National Government for its successful mediation in this conflict.*[1523]

926. Decree No. 6 raised the minimum wage for all contractors working on the Panama Canal Expansion and not only those comprising the GUPC workforce. The Tribunal notes that in anticipation of the entry into force of Decree No. 6, the PAC-4 consortium had requested clarification of the scope of application of the Decree from the Ministry of Labour. It asked whether the Decree was to apply to all ACP contractors involved in the Panama Canal Expansion or whether it was to apply:

> *... directly, exclusively, and solely to the Project that [GUPC], who was awarded the contract for the design and construction of the [TSLP], the project which is referenced expressly in Articles No. 2 and No.3 of the aforementioned decree?*[1524]

927. By its reply of 11 February 2012, the Ministry stated that the Decree:

> *... includes all of the [ACP's] Contractors participating in the Panama Canal Expansion, and not exclusively [GUPC]. Moreover, the [ACP] does not issue interpretations of labor regulations. The Ministry of Employment and Labor Development (MITRADEL) does not legislate for a particular company and is empowered based on the provisions of Article No. 66 of the Constitution of the Republic and Article No. 175 of the Labor Code to establish and periodically review the minimum wage rates to be applied in the Republic of Panama.*[1525]

928. The enactment of Decree No. 6 codified the GUPC-SUNTRACS Settlement Agreement. It entailed no discrimination and, as the *Lock Gates and Labor* tribunal had found, the Contract provides a mechanism by which Sacyr and its consortium partners might reclaim increased labour costs arising out of the promulgation of Decree No. 6.[1526]

[1523]. GUPC Press Release, Stoppage by Expansion Workers Ends [*Finaliza Paro de Trabajadores de la Ampliación*] (**R-229**).
[1524] Letter from PAC-4 Consortium to the Ministry of Labour, 25 January 2012, p. 1 (**R-564**).
[1525] Letter from the Ministry of Labor to the PAC-4 Consortium, 11 February 2012, p. 1 (**R-565**.).
[1526] *Lock Gates and Labor* Arbitration, Final Award, [803], [1105(e)] (**RLA-283**).

929. The Tribunal dismisses any suggestion that the promulgation of Decree No. 6 in the exercise of Panama's *puissance publique* amounted to an act of discrimination against Sacyr and thereby a breach of Panama's FET obligations under the Treaty.

B. PAC-4

930. In addition to its Decree No. 6 claim (see above), Sacyr claims that Panama discriminated against it by failing to reimburse it certain costs relating to the quality of the basalt used for the Project yet reimbursing similar costs to another contractor, the PAC-4 contractor.

931. Sacyr says that the PAC-4 consortium encountered similar issues in respect of faulting conditions and the use of basalt in producing aggregates as did GUPC and that it found itself in similar circumstances to GUPC, namely:

(i) both consortia were engaged in the TSLP;

(ii) their relationship with Panama was governed by the same ACP Acquisition Regulation and other Panamanian domestic laws; and

(iii) the bids were presented, based on Panama's representations.

932. Sacyr maintains that PAC-4 meets the criteria identified by the *Apotex* tribunal necessary to identify PAC-4 as an appropriate comparator, namely:

(i) The PAC-4 contractor and Sacyr were in the same economic or business sector;

(ii) they had invested in, or are businesses that compete with the investor or its investments in terms of goods or services; and

(iii) they are subject to a comparable legal regime or regulatory requirements.[1527]

933. PAC-4's claims in respect of faulting conditions and the use of basalt in aggregates production were the subject of the PAC-4 Settlement Agreements pursuant to which, the ACP had settled the PAC-4 claims to the extent of nearly 80% of the amounts

[1527] *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, [8.15] (**RLA-88**).

claimed.[1528] Sacyr suggests that Panama's refusal to engage with its claims on the same basis "… *resulted from its preoccupation with the quantum of GUPC's claims, rather than their merits*."[1529]

934. Panama contends that PAC-4 is not an apposite comparator in this case for the following reasons:

(i) whereas Sacyr had entered into a design and build contract, the PAC-4 contract was a remeasurement contract under which the ACP bore the risk of issues related to design changes;

(ii) the PAC-4 Settlement Agreements[1530] resolved the PAC-4 consortium's claims for ground conditions and faulting, but not claims arising out of the alleged low quality of the basalt. The latter claims were rejected by the ACP[1531] (and see (iii) below). The PAC-4 Settlement Agreements made no reference to, much less acknowledged or agreed to pay for, "*low quality*" or a lack of "*healthy*" basalt. The May 2014 Agreement contained changed quantities for "Drilling of Grouting Holes" and "Injection of Grout". The September 2016 Agreement anticipated an update of the estimated quantities, a further extension of the contract period and other metrics and the contract period was extended to allow for the changed site conditions; and

(iii) critically, the PAC-4 Settlement Agreements listed the PAC-4 consortium's basalt claims among claims presented by the consortium, but as claims with which the consortium was not proceeding, and which had been the subject of express waivers.[1532]

1528 El Economista, "Panama pays FCC what it denies to Sacyr in the Canal", 10 December 2016, p. 1 (**C-403**).

1529 Memorial on the Merits, [294].

1530 Settlement Agreements between Consorcio ICA-FCC-MECO and ACP of 8 May 2014 (**C-606**) and 26 September 2016 (**C-612**); and Modifications No. 33 of 27 June 2014 (**R-248**) and No. 39 of 3 October 2016 (**R-250**).

1531 According to Mr. Fernández, deficiencies encountered in the materials were the result of GUPC's failures in its own performance which had led to the contamination of a substantial amount of basalt that might otherwise have been suitable for use – *see* **RWS-5** Fernández II, [28], [34].

1532 The May 2014 Agreement (**C-606**) records, at p. 2, that: "*THE CONSORTIUM declares that it waives all the claims presented … and also expressly waives the following claims ….*" The September 2016 Agreement (**C-612**) includes statements in identical terms.

935. In the opinion of the Tribunal, these are compelling arguments in support of Panama's contention that the PAC-4 discrimination claim cannot sustain a complaint of a violation of the Treaty's FET standard. The underlying framework of the PAC-4 was that of a remeasurement contract, whereas the TSLP was a design and build contract. Even if similar faulting conditions had been experienced on both contracts, the manner of the resolution between the parties of the issues which had arisen in PAC-4 was a reflection of an allocation of risk and responsibility as between owner and contractor under that contract which bore no resemblance to that under the TSLP contract. That that should be the case is not indicative of discriminatory conduct.

C. The ACP Amendments

936. The August and September 2008 amendments to the Acquisition Regulation were published at least five months ahead of the tender bid deadline. They were a matter of public record, appearing in the Bulletin of the Registry of the ACP as well as being published on the ACP website. They were not amendments of particular application only to the TSLP or Sacyr.

937. Those points are a complete answer to any complaint that the ACP had been guilty of a failure to inform Sacyr of the amendments: they had been made available publicly ahead of the submission of the Tender. Sacyr was in a position to make itself familiar with all of the rules and regulations that would govern its investment.[1533]

938. As the *Global Telecom* tribunal explained, the FET standard does not require a State to:

> *... correct potential misunderstandings of the applicable rules that the investor ... competently counselled throughout the investment process, has chosen to infer.*[1534]

939. In the course of its own consideration of the ACP Amendments issue, the *Concrete* tribunal held that;

[1533] *See Champion Trading Company and Ameritrade International, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Award, 27 October 2006, [164] (**RLA-191**).

[1534] *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Award, 27 March 2020, [570] (**RLA-255**).

> *… these provisions merely serve to reinforce the freedom of contract that the ACP enjoys under its special legal regime.*[1535]

D. The "Cash Flow Crisis" Claims

940. One of the persistent themes of Sacyr's claims in this arbitration (but not one that it chose to develop at the Hearing) is that the ACP sought to starve it of cash flow. Sacyr's principal complaint is that Panama:

> *… forced the Project into a cash flow crisis by under-certifying the interim payments and forcing GUPC to refer all claims to the DAB…*[1536]

941. It seems incontrovertible to the Tribunal that even if such a claim could be made good on the facts, it would be a claim founded on the Contract – as Sacyr points out:

> *… the Contract entitled GUPC to interim payments for works done.*[1537]

942. Sacyr makes a bold attempt to suggest that ACP's concern to limit costs was evidence of conduct motivated by an improper political objective, but the conduct of the ACP acting in its capacity as a construction project employer engaged in the prudent management of project costs and which insists that contractual liability for such costs lies where it falls is not evidence of an exercise of *puissance publique*, simply because it is conduct of a State organ. Moreover, the claims rejected by the ACP have also been rejected by the ICC tribunals.

943. Panama rejects the argument that the ACP's conduct was motivated by alleged constraints on the Project budget by reason of the ACP's obligation to make contributions to the National Treasury in an amount equal to, or exceeding, its contributions in 2005.

944. The ACP's actions are sufficient to dispose of these complaints. First, there is no evidence to support the proposition that ACP's liability to make contributions to the National Treasury had any impact on its conduct towards Sacyr. As a matter of fact, the

---

1535 *Concrete* Arbitration, Partial Award, [654] (**RLA-167**).
1536 Reply on the Merits, [278]–[281].
1537 Memorial on the Merits, [148].].

ACP's contributions to the National Treasury exceeded the amount required by Law No. 28 in every year of the Expansion Program.[1538]

945. Second, Panama points out that when ordered to pay additional sums by the DAB, the ACP paid promptly (albeit having given notice of dissatisfaction). Those payments included a payment of more than US$ 200 million pursuant to the subsequently overturned Referral 11 decision.[1539]

946. Third, the record shows that over the course of 2012 and 2013, the ACP provided financial assistance to GUPC to the extent of some US$ 668 million, although it had been under no contractual obligation to do so.

947. In June 2012, GUPC had alerted the ACP to the fact that the impact of the credit crunch and liquidity problems in Europe upon its principal shareholders meant that it could not finance Project cost overruns and it sought assistance from the ACP.[1540] In its letter of 9 November 2012, it continued to insist that it faced: "*unprecedented difficulties in obtaining working capital*" and that the difficulties were "*particularly acute in Europe, which is the base for GUPC's main shareholders.*"[1541]

948. In response, the ACP provided assistance to the extent of some US$ 275 million in 2012 in the form of cash advances, the early payment of interim certificates and of substantial elements of the Contract Price and the deferral of repayment of the advance payments made by the ACP to GUPC.

949. Notwithstanding a marked deterioration in the relationship between GUPC and the ACP in 2013, culminating in a unilateral declaration by GUPC of its intention to slow down the Works without notice,[1542] the ACP provided further financial assistance to the tune of US$ 393 million.

1538 *See Lock Gates and Labor* Arbitration, Miguez Witness Statement, [104] (**C-421**); Spreadsheet with the Total Contributions made by the ACP to the Panama National Treasury (**R-524**).
1539 DAB Decision on Referral No. 11, 30 December 2014 (**C-387**).
1540 Letter from GUPC to the Employer's Representative (GUPC-IAE-1284), 19 June 2012 (**C-295**).
1541 Letter from GUPC to the Employer's Representative (GUPC-IAE-1545), 9 November 2012, p. 2 (**C-310**).
1542 Letter from GUPC to the Employer's Representative (GUPC-IAE-2273), 25 November 2013 (**C-333**); *see also* Letter from GUPC (P. Möder) to ACP (R. Roy and J. Quijano), 25 November 2013 (**C-331**).

950. On 5 February 2014, GUPC stopped all work under the Contract.[1543] Panama says that faced with the fact that the bespoke lock gates were being held in Italy by GUPC:

> *… ACP had little option but to agree to provide additional financial assistance if it wanted to restart and complete the Project within a reasonable period.*[1544]

951. That, says Panama, is the true basis upon which the ACP entered into the MOU on 13 March 2014, pursuant to which (i) the ACP provided a further cash injection of US$ 100 million (to be matched by GUPC); (ii) the works were to resume; and (iii) the ACP agreed the framework and outline terms of the future Variation Order No. 108 pursuant to which, GUPC would be entitled to further financial assistance.[1545]

952. The signature of VO108 eventually took place on 1 August 2014, but it did not become effective until 8 September 2014 following satisfaction by GUPC of a key condition precedent that it secure US$ 400 million in financing.

953. The Tribunal has no hesitation in dismissing any suggestion by Sacyr that the situation that arose under the TSLP was analogous to that with which the tribunal in *Desert Line* was faced. In *Desert Line*, the tribunal found that the refusal by Yemen to meet requests for payment amounted to a breach of the FET standard. But it did so, having found that the State had used duress to force the investor to enter into a settlement agreement - "*executive interference … of the most errant kind*" – there was evidence of patent inequity and of threats against and harassment of the investor's employers and family members.[1546] What does emerge from *Desert Line* is a clear statement that in order to rise to the level of a Treaty breach, the conduct of the State in relation to the contract must both involve the exercise of *puissance publique* and it must be particularly egregious to meet the threshold for arbitrariness. Those are criteria that Sacyr has failed to meet.

1543 Letter from GUPC to ACP (GUPC-IAE-2407), 5 February 2014 (**C-363**).
1544 Rejoinder on the Merits, [956].
1545 Variation Agreement No. 108 relating to Contract CMC-221427 for the Design and Construction of the Third Set of Locks, 1 August 2014 (**C-48**).
1546 *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, [171], [174], [179], [185] (**CLA-32**).

954. The Tribunal notes, too, that Sacyr has not addressed Panama's submission, based upon *Waste Management II*,[1547] that a breach by a State of its contractual obligations will not amount to arbitrariness, absent an "*outright and unjustified repudiation of the transaction*" or a failure by the State to provide "*some remedy … open to the creditor to address the problem*."

955. Nothing of that kind arises for consideration in this case: the ACP did not repudiate the Contract and Sacyr/GUPC has availed itself of recourse to both the DAB procedure and ICC arbitration.

(10) Admissibility

956. For the reasons set out in this section, and while it has dismissed Sacyr's claims on the merits, the Tribunal explains why it would have deemed them inadmissible in any event. Admissibility objections can of course, in theory, be determined in a preliminary phase of the arbitration and the procedural advantage in taking that course is that a full examination of the merits may be avoided depending on the outcome. In some cases, however, and the present case is one of them, this is neither feasible nor practicable. The admissibility objections in this case arise, first, because the essential basis of the claims is the Contract (such that they must be pursued in the contractually-selected forum) and, second, because of the preclusive effects of the existing awards in the ICC arbitrations, as well as the pending *Disruption* Arbitration. Each of these objections requires a detailed analysis of the issues raised by the claims in this Arbitration, the scope of the obligations under the Contract and the conclusions reached by the tribunals in the ICC arbitrations on these issues (as well as an analysis of the issues that are live before the tribunal in the *Disruption* Arbitration). This is no doubt why the Parties agreed, with the endorsement of the Tribunal, that these admissibility objections were best joined to the merits phase of the arbitration.

957. Returning to the substance of the admissibility objections, this arbitration proceeds against the background of a number of completed ICC arbitrations (and one pending ICC arbitration) initiated pursuant to the Clause 20 dispute resolution provisions of the Contract and in all of which the Contract has been affirmed. In this Treaty arbitration,

---

[1547] *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, [115] (CLA-207).

Sacyr seeks to advance a claim on grounds that it was induced to enter into the Contract on the basis of a series of fraudulent misrepresentations which, if established, would mean consent would be vitiated and the Contract would be void *ab initio*. But rather than seek to unwind the Contract and declare it void *ab initio*, Sacyr seeks damages in connection with the alleged conduct (Treaty breaches) of Panama. Panama says that that amounts to an attempt to rely on the substantive provisions of the Contract while side-stepping its dispute resolution provisions – in other words, Sacyr seeks to approbate and reprobate in respect of the same Contract.[1548]

958. Panama maintains that an application of the *Vivendi I* principle requires this Tribunal to consider whether it is being asked to entertain claims involving alleged contract breaches the "*fundamental*" or "*essential*" basis of which is, in reality, a contract breach rather than a treaty breach. Panama invites the Tribunal to conclude that it is the former and, moreover, to find that Sacyr's claims in this arbitration are rooted in alleged contractual conduct and they have either already been resolved or are pending resolution in ICC arbitration. Sacyr's approach, however, is not consistent: it seeks to pursue its basalt and seismic coefficient claims despite their rejection by the *Concrete* and *Lock Gates and Labor* tribunals respectively and yet it has abandoned its cofferdam claims which were dismissed by the *Cofferdam* tribunal.[1549]

959. Panama submits that Sacyr's strategy amounts to a blatant abuse of the investment arbitration system in order to resuscitate meritless contractual claims. Specifically, it suggested that the real reason for the prosecution of this investment arbitration was the pending *Disruption* Arbitration – the "*elephant in the room*":

> *… if this Tribunal rules in its favor on certain points, particularly regarding its claims related to basalt, it can use those findings to assist its claims in the Disruption Arbitration. As a reminder, Sacyr is currently seeking $615 million in damages under the Contract and the joint and several guarantee in the Disruption Arbitration, while GUPC is seeking $2.4 billion in damages under the Contract.*[1550]

1548 Transcript, Day 1, pp. 42–43.
1549 *See* Reply on the Merits, [329].
1550 Transcript, Day 6, p. 1759.

960. That proposition is rejected by Sacyr. It submits that in this proceeding it is not:

> *... predicating its Treaty claim on a claim of contract breach. There's a contract within the factual matrix. Of course. And we wouldn't be here, you know, but for that Contract. But, again, I think there's to some extent, perhaps, sort of a false dichotomy here when it comes to this question of sovereign conduct. The same facts can give rise to a breach of contract, and they can give rise to breach of Treaty, and where a State induces an investment on terms of it procured through withholding and misrepresentation of crucial risk information, it is no answer to that claim to say, oh, but, you know, that was in the context of the management of a tender and subsequent conduct in the context of a Contract.*[1551]

961. But Sacyr had previously conceded that the *Disruption* Arbitration was not without risk for it:

> *... the ACP argues that Sacyr's claim must be dismissed because Sacyr is not a Party to the Contract, and that most of GUPC's claims are either time-barred or barred by claim preclusion.*
>
> *Now, if successful, these objections would knock out more than 90 percent of GUPC's and Sacyr's claims in the Disruption Arbitration. So, in other words, if ACP were to prevail on these objections, then no significant relief would be available from that Tribunal.*[1552]

962. The reality is that the factual basis of the claims advanced in this arbitration is duplicative of that of the multiple ICC breach of contract claims and, specifically, the basalt and lock gates (seismic reduction factor) claims which have been denied.

963. In a remarkable exchange with counsel for Panama, Mr. Zaffaroni dismissed the finding of the *Lock Gates and Labor* tribunal that GUPC had been in breach of contract over the change of lock gates fabricator:

[1551] Transcript, Day 6, p. 1613.
[1552] Transcript, Day 6, p. 1605.

> *I don't care .... What has been said by the arbitrator is up to the arbitrator to be convinced on what they said, but it is not my opinion.*[1553]

964. That observation is to be contrasted with Mr. Pérez's acceptance of the finality of the ICC tribunal decisions when confronted with the conclusions of the *Lock Gates and Labor* tribunal:

> *... I respect what they have decided. How can I not? How could I not?*[1554]

965. Before this Tribunal, Mr. Perez and Mr. Zaffaroni both conceded that the ICC *Concrete* and *Lock Gates and Labor* tribunals had had the benefit of far more evidence and testimony than Claimant has made available here.[1555]

966. In the opinion of the Tribunal, the conclusions of those tribunals based upon their consideration of extensive and detailed evidence are not lightly to be disregarded. If, on a review of those self-same events, albeit with the addition of what is said to be certain new evidence which was not before the *Concrete* tribunal (the allegedly withheld 2005 UTP Report test and purchase order) or the *Lock Gates and Labor* tribunal (Mr. Lorenzo's evidence),[1556] this Tribunal were to conclude that they gave rise to a breach of Panama's FET obligations under the Treaty, the effect would be that this Tribunal would have found as internationally wrongful conduct matters that the *Concrete* and *Labor and Lock Gates* tribunals had dismissed as failing to establish any breaches of contract at all under a Contract that Sacyr and its fellow GUPC consortium members had affirmed.

A. Issue estoppel

967. Where there exists a valid and final judgment, the parties to that judgment are precluded from re-opening issues already decided by a prior court or tribunal even where the

[1553] Transcript, Day 3, p. 748.
[1554] Transcript, Day 3 p. 976.
[1555] See for example, Zaffaroni at Transcript Day 3, pp. 725, 734 and 735; and Perez Transcript Day 3 p. 977.
[1556] The differences in the factual record attributable to that new evidence are, in light of this Tribunal's findings, not such as to create a material change to the common nucleus of facts.

subsequent causes of action are different. The doctrine has been part of international law since *Orinoco Steamship* in 1910.[1557]

968. The prerequisites are:

1. The relevant issue distinctly put in issue in prior proceeding.
2. Court or tribunal in that prior proceeding decided the issue.
3. The resolution of that question was necessary to resolving the claims.[1558]

969. Where the "*essential predicate*" to the success of a claim is an issue already decided in a prior proceeding involving the same parties, the claim must be dismissed.[1559]

970. Sacyr's contention that:

> *Issue estoppel does not exist in civil law systems, including Panamanian law. It is thus not a principle of international law ….*[1560]

is misconceived: whether or not the concept is part of Panamanian domestic law is not determinative of the question whether it forms part of international law.

971. Both *Amco*[1561] and *RSM* acknowledged and applied the doctrine albeit in different circumstances.

972. *RSM* is particularly pertinent because the claimant brought claims under an investment agreement, which was dismissed. It then re-presented the claims as treaty claims which were in turn dismissed:

> *… an essential predicate to the success of each of Claimants' claims is an ability for the Tribunal to re-litigate and decide in Claimants' favour conclusions of fact or law concerning the parties' contractual rights that have*

1557 *Orinoco Steamship Company Case (United States v. Venezuela)*, 25 October 1910, pp. 227–241 (**RLA-323**); cf *Amco Asia Corporation and others v. Republic of Indonesia*, ISCID Case No. ARB/81/1, Decision on Jurisdiction in Resubmitted Proceeding, 10 May 1988 (**RLA-120**) and *RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010 (**RLA-67**).).

1558 *RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, [7.1.1] (**RLA-67**).

1559 *RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, [7.2.1] (**RLA-67**).

1560 Reply on the Merits, [356(a)].

1561 *See* footnote 1557.

> *already distinctly been put in issue and distinctly determined by the Prior Tribunal.*[1562]

973. In this case, Sacyr seeks to re-litigate and decide conclusions of fact and law already determined in the ICC arbitration proceedings.

974. In his authoritative commentary Professor Vaughan Lowe KC observed that in the context of issue estoppel: "*[i]dentity of cause and object are not, in practice, always required. This is because another doctrine comes to the aid of the party seeking to rely upon the findings of the earlier tribunal*", namely "*the doctrines of collateral estoppel or issue estoppel*".[1563]

975. The Tribunal has considered and rejects Sacyr's objection that ICC decisions as decisions of contract tribunals do not have *res judicata* effect in treaty proceedings.[1564] The cases on which it relies are distinguishable and inapposite:

(i) in *Desert Line v. Yemen*,[1565] the tribunal concluded that the relevant contract and treaty claims were fundamentally distinct from one another;

(ii) in *Helnan v. Egypt*,[1566] the triple identity test was applied, but it is not a requirement for issue estoppel;

(iii) in *Lao Holdings*,[1567] the decision turned on the interpretation of a settlement agreement made between the investor and the State;

(iv) in *SGS v. Pakistan, Fenosa v. Egypt, RDC v. Guatemala, Bayindir* and *Impregilo v. Pakistan*,[1568] the tribunals reached their conclusions in the different context of *lis pendens*.

1562 *RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, [7.2.1] (**RLA-67**).

1563 V. Lowe, "Res Judicata and the Rule of Law in International Arbitration", 8 AFR. J. INT'L & COMP. L. 38, 1996, p. 41 (**RLA-123**).

1564 Reply on the Merits, [356(b)].

1565 *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, [137] (**CLA-32**).

1566 *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, 3 July 2008, [126] (**CLA-45**).

1567 *Lao Holdings v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on the Merits of Claimants' Second Material Breach Application, 15 December 2017, [109] (**CLA-54**).

1568 *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction, 6 August 2003, [182] (**CLA-79**); *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018, [11.30]–[11.35] (**CLA-91**); *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010, [131]–[132] (**CLA-70**); *Bayindir Insaat Turizm Ticaret ve Sanayi*

976. While it is true that the *Guarantees* and *Concrete* tribunals decided not to apply the doctrine of issue estoppel *vis-a-vis* other awards in the ICC Arbitrations, they were applying Panamanian law, which is inapplicable here. Any question that the doctrine of issue estoppel would be problematic by reason of differing conclusions on a particular issue does not arise in the context of the *Concrete* and *Lock Gates and Labor* Arbitration awards.

977. As the Tribunal noted in the course of the Hearing, it has available to it a detailed and substantive record in respect of both the salient basalt and seismic reduction factor issues in the concluded and now unchallenged *Concrete* and *Lock Gates and Labor* Arbitration awards. It quite accepts that the canvas painted by Sacyr is broader than that offered to the ICC tribunals dealing with the discrete disputes.[1569] To the extent that those tribunals dealt and ruled upon precisely the same issues as those which have been presented to this Tribunal, however, the Tribunal has real difficulty with the proposition that no issue preclusion applies, because those principles "*don't operate as between different legal planes.*"[1570]

B. Lis Pendens

978. *Lis pendens* precludes a claim in which (i) the parties and (ii) the matter in dispute are the same in pending proceedings in another forum.[1571]

979. Whilst there is no requirement for the parties and issues to be wholly identical, they must be "*substantially the same*".[1572] In investor-state arbitration, the *lis pendens* doctrine has been applied with consistency in cases involving claims under BITs.[1573]

A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, [264]–[273] (**CLA-16**); *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, [288]–[289] (**CLA-47**). Claimant also cites commentary by Douglas D. Reichert, but such commentary relates to the principle of *lis pendens*, not issue estoppel (D. Reichert, "Problems with Parallel and Duplicate Proceedings: The Litispendence Principle and International Arbitration," (1992) 8(3) Arbitration International 237, p. 249 (**CLA-72**).

1569 Transcript, Day 6, pp. 1618–1619.

1570 Transcript, Day 6, p. 1607.

1571 A. Reinisch, "The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes," THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS, 2004, pp. 50–51 (**RLA-33**).

1572 F. de Ly and A. Sheppard, "ILA Final Report on Lis Pendens and Arbitration," (2009) 25(1) Arbitration International 83, pp. 30–31 of PDF (**CLA-31**).

1573 *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2023, [89] (**CLA-1**).

980. Professor Reinisch is unequivocal in his opinion that it can hardly be disputed that *lis pendens* is also a rule of international law applicable in international proceedings.[1574]

981. It is relevant to this case in that it transpires that a number of matters ostensibly brought before this Tribunal, including the alleged shifting of the financial burden, the alleged refusal fully to certify payments, the complaint of a strict enforcement (and deliberate delay) of the DAB procedure in respect of every claim and the issue of the 2005 UTP Report (basalt claim) have been in issue in the *Disruption* Arbitration since 2021. The Tribunal has been invited specifically to declare the 2005 UTP Report issue inadmissible on *lis pendens* grounds.[1575]

C. The Requirements of Issue Estoppel in this Case

982. The criterion of identity of the parties has been met. Sacyr is a claimant in all of the ICC arbitrations and claimant here. All of the ICC claims have been brought against the ACP and the ACP is a state organ and in privity of interest with Panama.

983. In this arbitration, Sacyr is attempting to relitigate issues distinctly put in issue and distinctly determined in the *Concrete, Cofferdam, Guarantees* and *Lock Gates and Labor* Arbitrations, including the seismic reduction factor. On a proper application of the issue estoppel principles, the Tribunal would have held that those claims are precluded from determination in this arbitration for the reasons set out below if it had not proceeded to the adjudication of those claims on the merits.

i. Basalt

984. In the *Concrete* Arbitration, the claimants (including Sacyr) argued that:

> *ACP consistently represented that: the PLE basalt was a hard and strong basalt; the PLE basalt was suitable for concrete aggregate production; and the PLE would and should be used as the primary source of concrete aggregates for the Project.*[1576]

1574 A. Reinisch, The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes," THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS, 2004, p. 48 (**RLA-33**).

1575 Transcript, Day 6, p. 1780.

1576 *Concrete* Arbitration, Statement of Claim, [8]. *See also id.*, [33] (**R-182**).

985. Sacyr has raised the same argument in this arbitration in support of its legitimate expectations claim:

> *Panama represented that the PLE basalt was both suitable for production of concrete aggregates and could be used as the primary source of material for such production*.[1577]

986. As the Tribunal has already recorded elsewhere in this Award, the *Concrete* tribunal rejected that argument. In its Partial Award, the tribunal stated that:

> *[It did] not accept that the Contract was concluded upon the "fundamental datum" that the PLE Basalt be used as the primary source of concrete aggregates or that the Tenderers were led to believe that this was a "fundamental datum" for the Project*.[1578]

987. Similarly, while Sacyr argues in this arbitration that the PLE Basalt turned out to be unsuitable, because it produced excessive wet fines and that this is Panama's responsibility, this exact same argument was rejected by the *Concrete* Tribunal on multiple bases. It found that GUPC was itself contractually responsible for the basalt and that the vast majority of the basalt that was excavated and processed by GUPC did in fact produce suitable concrete aggregates.[1579]

988. The *Concrete* tribunal also found that the claimants should have carried out bulk testing on the PLE Basalt.[1580]

989. These findings were central to that tribunal's rejection of the claimants' claim for entitlement to damages for alleged breach by the ACP of its legal obligations. Sacyr is precluded from reopening the same issues in the present arbitration pursuant to the doctrine of issue estoppel.

1577 Memorial on the Merits, [128]. *See also* [95], [246]–[247], [260].
1578 *Concrete* Arbitration, Partial Award, [1061] (**RLA-167**).
1579 *Concrete* Arbitration, Partial Award, [895] (**RLA-167**).
1580 *Concrete* Arbitration, Partial Award, [939], [984] (**RLA-167**).

990. As the Tribunal has already noted, among the claims in the pending *Disruption* Arbitration is that concerning the suitability of the basalt (and, in that context, the issue of the "withheld" 2005 UTP Report in particular).

ii. The "Cash Flow Crisis" Complaints

991. The claims raised in this arbitration are mirrored by those raised by the claimants in their return on investment claims in all of the ICC Arbitrations. For example, in the *Concrete* Arbitration, the claimants argued that they had suffered loss due to ACP's "*wrongful requirement that Claimants 2-4 finance the cost overruns resulting from ACP's own breaches, gross negligence, and violations of Panamanian law*", meaning that the claimants were forced to provide significant additional funding to GUPC and that "*actual cash flow was negative on the Project*."[1581]

992. The *Concrete* tribunal rejected these arguments, holding that:

> *[e]ven in the event that the Contractor was faced with additional costs that the Claimants believed to be within the responsibility of the ACP ... they would have to continue to guarantee the completion of the Works – including financing the Works – pending final resolution of the Contractor's claims*

and that:

> *the Arbitral Tribunal does not consider that the ACP treated the Contractor unfairly or acted in bad faith in rejecting those claims.*[1582]

993. The tribunal also rejected the notion that there was a:

> *"secret policy" of the ACP to reject all of the Contractor's claims.*[1583]

994. Given the rejection of these allegations by the *Concrete* tribunal, Sacyr is precluded from re-opening these issues here.

1581 *Concrete* Arbitration, Statement of Claim, [2228], [2244] (**R-182**).
1582 *Concrete* Arbitration, Partial Award, [2191]–[2192] (**RLA-167**).
1583 *Concrete* Arbitration, Partial Award, [2193] (**RLA-167**).

iii. Seismic Reduction Factor

995. The same conclusion pertains to the issues raised in the *Lock Gates & Labor* arbitration, which Sacyr sought to resurrect in these proceedings but which, with the exception of the seismic reduction factor, made no appearance in the Hearing.

996. In the *Lock Gates and Labor* Arbitration, the claimants alleged that one of the other Tenderers, BTM, as well as CPP, had made the ACP aware of a problem with the seismic design of the lock gates, but the ACP had failed to disclose that issue to the other Tenderers.[1584]

997. Sacyr has raised claims in this arbitration, asserting that: "*Panama knew during the tender process that the Seismic Reduction Factor applied in its Reference Design was inaccurate through its discussions with BTM; and … BTM's concerns were validated … by … CPP*", but it "*did not share BTM's concerns or the fact that those concerns were validated by CPP with tenderers*".[1585]

998. The *Lock Gates and Labor* tribunal rejected the claimants' allegation that the ACP had failed to disclose BTM's or CPP's concerns regarding the seismic reduction factor. The tribunal concluded that (even assuming that the matter of the seismic reduction factor would have been clearly designated during the tender period) a canal operator such as the ACP, with no expertise in construction or seismic design, could not be expected to raise a technical point of this nature, not least when the point was "*far from ascertained within the engineering profession*" and when GUPC themselves had had advice from their very own expert, TNO.[1586]

999. Moreover, the tribunal went on to find that the matter had not in fact been clearly raised pre-tender by either BTM or CPP.[1587]

1000. Sacyr's attempt to relitigate the alleged failure to disclose information regarding the seismic reduction factor - which is a principal element of its legitimate expectations

---

1584 *Lock Gates and Labor* Arbitration, Final Award, [208] (**RLA-283**).
1585 Memorial on the Merits, [117].
1586 *Lock Gates and Labor* Arbitration, Final Award, [317] (**RLA-283**).
1587 *Lock Gates and Labor* Arbitration, Final Award, [319] (**RLA-283**).

claim under the FET standard - is therefore precluded (and, in any event, it has been shown to be unsupported by the facts).

1001. The seismic reduction factor issue raised in this arbitration is precisely the same as the issue decided in the *Lock Gates & Labor* arbitration. And, as this Tribunal has already recorded above, the tribunal in the ICC arbitration had the benefit of extensive analysis and evidence, including evidence from seismic experts, which Claimant has chosen not to put before this Tribunal.

iv. Decree No. 6

1002. The Tribunal has already addressed this issue at paragraphs 920-929 above. In the *Lock Gates and Labor* Arbitration, the tribunal was faced with the complaint that in 2012, Panama had (a) "*... enacted Executive Decree No. 6 that increased the minimum wage payable to the employees working on the Project. The Decree was blatantly discriminatory*.";[1588] and (b) refused to reimburse the claimants for labour cost increases resulting from that Decree.[1589]

1003. The *Lock Gates and Labor* tribunal found that the claimants were entitled to reimbursement pursuant to clause 13.7 of the Contract of the additional labour costs resulting from Decree No. 6. It declared that the claimants were entitled to up to USD 34.963 million with respect to those costs (depending upon other matters). The tribunal's declaration was expressly without prejudice to any subsequent determination by the *Disruption* tribunal with respect to the same issue.

1004. GUPC now includes these claims in the *Disruption* Arbitration. Sacyr claims the exact same loss in this Arbitration as it claimed in the *Lock Gates and Labor* Arbitration and of which recovery is sought in the Disruption Arbitration.

1005. In light of the *Lock Gates & Labor* tribunal's declaration, and the fact that the same issue is still pending in the *Disruption* Arbitration (see the analysis of *lis pendens* below), the Tribunal concludes that Sacyr is precluded from raising the issue of liability for losses arising from Decree No. 6 before this Tribunal.

[1588] Memorial on the Merits, [290].
[1589] *Lock Gates and Labor* Arbitration, Claimants' Statement of Claim, Ch. III, [4] (**R-208**).

1006. Finally, the *Lock Gates & Labor* tribunal also rejected the claimants' claims with respect to SUNTRACS, and therefore Sacyr is similarly precluded from raising issues decided by that tribunal in respect of any claim in this arbitration.[1590]

D. Lis Pendens

1007. The final ICC Arbitration that remains pending is the *Disruption* Arbitration. Panama demonstrated in its Counter-Memorial that this fifth arbitration involves (i) the same parties (i.e., Sacyr, the claimant in this arbitration, and the ACP, which the Tribunal has determined is an organ of Panama, the Respondent in this Arbitration); and (ii) substantially the same causes of action as those advanced in this arbitration, including, specifically, the ACP's alleged misrepresentation of the suitability of the PLE Basalt and the adverse impact upon the claimants of labour stoppages said to result from legislation issued by Panama.[1591]

1008. Thus, Panama maintains that Sacyr's claims in this arbitration are precluded by the doctrine of *lis pendens*. In response, Sacyr says that: "*Panama [has failed] to demonstrate that [the lis pendens doctrine's] requirements would be met in this case*."[1592]

1009. Panama reiterates the following points with respect to the *Disruption* Arbitration. First, as Panama has demonstrated, substantially similar issues to those raised in this arbitration have been distinctly put in issue and are pending determination in the *Disruption* Arbitration. For example, the *Disruption* claimants have alleged that the ACP misrepresented (i) that "*the materials excavated from the Pacific Site (including, but not limited to weathered basalt, and stockpiled basalt) would be suitable for re-use in the Works as fill material*", but that the basalt turned out not to be suitable, not least, because it produced excessive wet fines;[1593]and (ii) the "*amount of sand available for concrete production*."[1594]

1590 *Lock Gates and Labor* Arbitration, Final Award, [1105(f)(g)] (**RLA-283**).
1591 Counter-Memorial on the Merits, [580]–[585].
1592 Reply on the Merits, [364].
1593 *Disruption* Arbitration, Statement of Claim, Ch. I, [17], [119] (**R-219**).
1594 *Disruption* Arbitration, Statement of Claim, Ch. X, [17] (**R-219**).

1010. Both of these allegations rely on the very same arguments already determined in relation to the PLE Basalt issues in the *Concrete* Arbitration and which Sacyr has sought to raise again in this arbitration.

1011. The claimants in the *Disruption* Arbitration also make a substantial claim for delay, on the basis that ACP's alleged misconduct and breaches, taken together, seriously depleted the funds available to GUPC for the performance of the Works. They accuse ACP of the wrongful under-certification of Interim Payments and the rejection of GUPC's entitlements, which, they say, resulted in disruption to cash flows needed to pay subcontractors, purchase materials and to progress the Project.[1595]

1012. These arguments are replicated in this arbitration in which Sacyr complains that Panama deliberately starved the Project of cash flow, but this complaint was not developed in argument or in evidence at the Hearing. The *Disruption* claimants have also argued that they were adversely affected by labour stoppages resulting from legislation issued by Panama, which yet again is an argument Claimant repeats in this arbitration, but chose not to pursue in argument or evidence at the Hearing.[1596]

1013. Finally, the claimants in the *Disruption* Arbitration contend that the ACP delayed the signing of the MOU and engaged in a negative press campaign against GUPC and its shareholders in 2014-2015[1597] - allegations repeated (but likewise not developed in oral argument or evidence at the Hearing) in this arbitration.

1014. All of these matters have been or remain distinctly in issue in the ICC Arbitrations. To the extent that they are not already precluded because they are subject to binding decisions of the ICC tribunals and by reason of issue estoppel, Claimant is precluded from raising them in this arbitration pursuant to the doctrine of *lis pendens*.

E. The Essential Basis of the Claims

1015. It is well established that a treaty tribunal must decline to exercise jurisdiction over claims of which the "*essential basis*" is a breach of contract rather than a purported

1595 *Disruption* Arbitration, Statement of Claim, Ch. VII, [2] (**R-219**).
1596 *Disruption* Arbitration, Statement of Claim, Ch. I, [29]–[31] (**R-219**); Memorial on the Merits, [183].
1597 *Disruption* Arbitration, Statement of Claim, Ch. I, [40] (**R-219**).

breach of an international treaty obligation. The *Vivendi I* Annulment Committee concluded that:

> *[i]n a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract.*[1598]

1016. As the *SGS v. Philippines* tribunal observed, the underlying rationale for the adoption of such an approach was to have the parties apply to their contractual disputes the terms of any specific dispute resolution procedure agreed between them rather than the general dispute resolution provisions of a treaty.[1599]

1017. Panama says that Sacyr's conduct in bringing this treaty arbitration gives rise to important considerations relating to the sanctity of commercial contracts and the awards of tribunals constituted to determine disputes under those contracts:

(i) Sacyr's attempt to re-run its contractual claims in the ICC Arbitrations in the guise of treaty claims before this Tribunal undermines the principles of finality, equity and justice that underpin the *res judicata*, issue estoppel and *lis pendens* doctrines. Those principles find their expression in the Latin maxims *interest reipublicae ut sit finis litium* ("it is in the public interest that there should be an end to litigation") and *nemo debet bis vexari pro una et eadem causa* ("no one should be sued twice for the same cause"). It is not in the public interest that Sacyr be permitted repeatedly to litigate the same issues in different fora through the simple expedient of reframing its claims under different legal instruments (i.e., the Contract and the Treaty). Nor is it in the interests of justice or fairness for the ACP to face (and in many cases defeat) claims, only for them to be relitigated against Panama, requiring Panama to expend millions of dollars of taxpayers' money defending claims that have already been rejected;

[1598] *Compañía de Aguas del Aconquija, S.A. and Vivendi Universal v. Argentine Republic* (formerly Compañía de Aguas del Aconquija, S.A and Compagnie Générale des Eaux v. Argentine Republic), ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, [98] (**CLA-27**).

[1599] *SGS Société Générale de Surveillance S.A. v. Republic of Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, [141] (**RLA-35**).

(ii) duplicative claims such as these give rise to the potential for conflicting determinations by the ICC tribunals and this Tribunal regarding the same issues, which would lead to precisely the sort of chaotic result that the doctrines of *res judicata* and *lis pendens* are intended to avoid. By way of example, the *Lock Gates and Labor* tribunal found that no warning had been given by BTM in relation to the seismic reduction factor before the award of the Contract and that the ACP had done nothing wrong. On the basis of substantially less evidence than it had adduced before the ICC tribunal, Sacyr brings the same claim before this Tribunal. Were this Tribunal to have come to a different conclusion from that of the ICC tribunal regarding this issue, how could that conclusion be squared with the previous, binding, award? As Panama explained in its Counter-Memorial, the consequences of conflicting judgments in the international sphere are arguably more serious than in a domestic legal system, because there is no mechanism to resolve such conflicts.[1600]

Moreover, Sacyr uses the term "*Panama*" interchangeably to mean both the Republic of Panama and the ACP, when, in reality, the ACP is a distinct and autonomous entity. However, Panama cannot bring counterclaims on ACP's behalf. Thus, by repurposing its contractual claims against ACP as treaty claims against Panama and bringing them before this Tribunal, Sacyr seeks to avoid the potential for any counterclaims to be brought against it, akin to those that were available to (and were pursued, in many cases successfully by) the ACP in the ICC arbitrations;

(iii) if Sacyr were permitted to relitigate issues that either have been or will be determined in the ICC Arbitrations, the objectives of the New York Convention would be undermined. Article III of the New York Convention (to which both Panama and Sacyr's home State, the Kingdom of Spain are parties) provides that "*[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of*

[1600] Y. Shany, "The competing jurisdictions of international courts and tribunals," 2003, pp. 162–163 (**CLA-83**).

procedure of the territory where the award is relied upon."[1601] In order to ensure that awards are recognised as being binding, they must be given preclusive effect, to "*prevent[] parties from relitigating matters that had already been decided in 'binding' arbitral proceedings*."[1602] For precisely this reason, Sacyr's claims should be precluded in this case; and

(iv) Sacyr's claims give rise to an inherent risk of double recovery. The claims in the ICC Arbitrations and this arbitration seek damages for the same loss.[1603] In such circumstances, as explained by Professor Douglas in his dissenting opinion in *Gardabani v. Georgia*: "*… the idea that the law or justice requires the simultaneous pursuit of a contract claim and a treaty claim in respect of the same loss and two separate awards of compensatory damages for that loss is indefensible*."[1604]

1018. It is no answer to these objections to maintain that: "*all of Sacyr's claims in this arbitration are firmly rooted in the Treaty and reflect systemic violations by Panama of its obligations thereunder.*"[1605] It does not address the point that Sacyr's claims (i) are fundamentally based on the contract, not the Treaty; and (ii) that by those claims, Sacyr is attempting to relitigate issues that have already been decided, or are still being considered, in the ICC Arbitrations. While it is unarguable that the ICC tribunals could not have determined the question whether Panama had breached the Treaty, they could rule (and have ruled) on the substance underpinning all of Sacyr's purported Treaty claims, because such claims were based purely on contractual or commercial conduct by the ACP.

1019. Sacyr submits that Panama should not be entitled to invoke the principles of equity, efficiency and justice, because Sacyr had been "*… induced to invest under false premises*" and Panama had "*reaped the enormous benefits from that investment*."[1606]

1601 United Nations Conference on International Commercial Arbitration, "Convention on the Recognition and Enforcement of Foreign Arbitral Award," 1958, Article 3 (**RLA-171**).
1602 G. Born, "Chapter 27: Preclusion, Lis Pendens and Stare Decisis in International Arbitration," in INTERNATIONAL COMMERCIAL ARBITRATION (3rd Ed., 2021), pp. 4–5 (**RLA-265**).
1603 *See* Counter-Memorial on the Merits, [587], [893]–[896].
1604 *Gardabani Holdings B.V. and Silk Road Holdings B.V. v. Georgia*, ICSID Case No. ARB/17/29, Dissenting Opinion of Professor Zachary Douglas, 27 October 2022, [20] (**RLA-279**).
1605 Reply on the Merits, [368].
1606 Reply on the Merits, [367].

But that submission begs the question: it must necessarily anticipate the acceptance by this Tribunal of Sacyr's case on the merits in respect of claims that the ICC tribunals have already rejected – and that this Tribunal, too, certainly so far as the basalt and seismic reduction factor claims are concerned, has rejected for the reasons set out in this Award.

1020. Finally, Sacyr seeks to address Panama's concerns regarding double recovery on the basis that the *Gardabani* case is distinguishable, because (i) in that case the claimants' contract claims and treaty claims had been consolidated into a single arbitration; (ii) such claims had "*the same remedial basis*" because the treaty claims were for breach of an umbrella clause; and (iii) in this arbitration, Claimant had "*carefully quantified its claims to exclude duplication and has committed to avoid seeking double recovery*."[1607]

1021. There is a number of important differences between the *Gardabani* case and this case. In *Gardabani*, the parties had agreed, first, that Stockholm Chamber of Commerce arbitration proceedings between Gardabani and Georgia and ICSID proceedings between Gardabani and Silk Road and Georgia should be heard by the same tribunal on the basis that they would be coordinated and become the subject of separate awards. Second, the parties had recorded in both cases an undertaking not to seek double recovery. That is not the position here. First, self-evidently, the same tribunal has not been seised of the multiple ICC disputes and this UNCITRAL proceeding. Second, in *Gardabani*, the tribunal had full knowledge and control of the scope of the awards of damages in each case. In contrast, this tribunal is in no position to influence any awards of damages already made in the concluded ICC cases in respect of essentially the same claims as have been maintained before this Tribunal or any eventual award of damages made in the *Disruption* Arbitration in respect of the self-same claims. Third, there is in place no undertaking akin to that proffered to the tribunal seised of both the SCC and ICSID arbitrations in *Gardabani* and, critically, upon which that tribunal could rely in its consideration of both claims.

1022. The claims in this arbitration have "*the same remedial basis*" as Sacyr's claims in the ICC arbitrations, as they are all fundamentally based on the Contract and the heads of

[1607] Reply on the Merits, [369].

loss claimed by Sacyr also almost entirely replicate the heads of loss sought in the ICC arbitrations.

1023. On the basis of what it says is an almost complete overlap between the damages sought in this Arbitration and in the ICC arbitrations (including the *Disruption* Arbitration), Panama urges the Tribunal to treat with caution Sacyr's assertion that it "*carefully quantified its claims to exclude duplication and has committed to avoid seeking double-recovery*."[1608]

1024. The point is most piquant in the context of the pending *Disruption* Arbitration.

1025. In the course of closing submissions, Sacyr stated that:

> *And if the Disruption Tribunal does in the end render an Award on the Merits and awards damages to GUPC and Sacyr, there's also no risk of any double recovery.* ***You know that Sacyr has already given you an undertaking not to attempt any double recovery insofar as there may be any overlap between the relief sought here and in the Disruption Arbitration****.*
>
> *But, in addition, if you render a Damages Award following a phase on quantum in this proceeding, before the Disruption Tribunal does, you will be able to fashion or condition the damages relief in whatever manner you think appropriate to have complete comfort on this point.*
>
> *And if, in the opposite scenario, the Disruption Tribunal renders a Damages Award before you do, you can then adjust your Damages Award so as to avoid any risk of double recovery insofar as there is any overlap between the losses claimed.*
>
> *So, in sum, these ICC arbitrations don't engage questions of abuse of process or related to that double recovery*.[1609] [Emphasis added]

1026. But as Panama pointed out in closing,[1610] this Tribunal will be *functus officio* once it has issued its Award. It will be in no position to supervise or enforce any undertaking given by Sacyr. Panama would be left to rely upon national judges in different jurisdictions

[1608] Reply on the Merits, [369].
[1609] Transcript, Day 6, pp. 1606–1607.
[1610] Transcript, Day 6, p. 1783.

vested with differing powers to seek to prevent double recovery – a proposition which is hardly imbued with finality.

1027. In the opinion of this Tribunal, and in the very different context of this case, Professor Douglas's objection set out in his dissenting opinion in Gardabani remains compelling; a claimant should not be able to:

> *obtain two judgments awarding full compensation for the same loss against a single respondent.*[1611]

1028. The Tribunal has considered a diverse range of submissions under this rubric of the "essential basis of the claims" to demonstrate the reasons of principle underpinning this rule of admissibility. As a rule of admissibility it might be thought of as an "upstream" device to avoid or mitigate the "downstream" problems that are exemplified by this case: the lack of finality to litigation in respect of the same (in essence contractual) issues; the possibility of conflicting determinations of these issues; the lack of an international mechanism to resolve such conflicts; the inability of a contractual counterparty that happens to be a state organ to raise counterclaims in response to treaty claims where the essential basis of those claims is the contract; the undermining of the finality of commercial arbitral awards in contradiction with the New York Convention; and the risk of double recovery and the necessity to rely upon national judges in different jurisdictions vested with differing powers to prevent it. All these problems flow directly from the pursuit of treaty claims that have an essential contractual basis and the rule of admissibility under consideration ensures that such claims are directed to the proper forum—the contractually chosen forum—and declared inadmissible as treaty claims.

1029. For these reasons, had the Tribunal not dismissed the claims on the merits, the Tribunal would have concluded that Sacyr's claims are inadmissible as their essential basis is the Contract.

[1611] *Gardabani Holdings B.V. and Silk Road Holdings B.V. v. Georgia*, ICSID Case No. ARB/17/29, Dissenting Opinion of Professor Zachary Douglas, 27 October 2022, [10] (**RLA-279**).

(11) Observations by the Majority on Dr. Grigera Naón's Separate Opinion

1030. In the spirit of full engagement with the views expressed by Dr. Grigera Naón in his Separate Opinion, the majority of the Tribunal hereby provides its brief reactions.

1031. The majority agrees with Dr. Grigera Naón that "*the mere characterization of conduct as a contractual breach does not exclude that the same conduct may constitute conduct in breach of FET under international law*" (paragraph 3). But nor does it follow that a breach of contract is *ipso facto* a breach of international law and before the advent of investment treaty arbitration, there was not a single international authority for that proposition for sound reasons of principle. The majority has concluded that sovereign conduct is required for a breach of FET such that acts or omissions that could equally have been undertaken by a private party are not actionable under the FET standard.

1032. The same consideration applies to conduct preceding the execution of a contract. Hence Dr. Grigera Naón's statement that "*a misrepresentation or failure to disclose relevant information preceding the making of the contract is a standalone FET illicit conduct*" (paragraph 5) would be qualified by the majority with the proviso that the misrepresentation or failure to disclose would have to have been facilitated by a reliance on sovereign or public powers.

1033. As the majority has explained elsewhere in this Award, there is no justification in principle for superimposing the FET standard over a government's pre-contractual or contractual acts or omissions when that conduct is no different in nature from conduct in which a private party could have engaged. The contrary view upends the settled expectations of the parties based upon the applicable laws of contract and tort and undermines the judicial or arbitral fora that have competence to determine claims arising out of those applicable laws. The purpose of investment law is to mitigate sovereign risk; there is no reason for investment law to provide a supplementary set of remedies to address commercial risk based merely on the identity of one of the parties as a government actor.

1034. The apogee of this contrary view, which has been adopted in some investment awards, is that a government may have acted in conformity with its contractual obligations but nevertheless have breached the FET standard based on a secondary assessment of the

government's "good faith" in respect of conduct of a non-sovereign character. That represents a direct attack on the sanctity of contracts: a government would no longer be able to rely upon the full force and effect of its rights under the contract, because it would be open to an investment treaty tribunal to recalibrate those rights based upon its judgment of the government's good faith in exercising them. It is also an attack on the object and purpose of an investment treaty: if one party cannot rely on the full force and effect of a contractual bargain, then transactional costs will increase to deal with that uncertainty and that will create barriers to foreign investment activity.

1035. A foreign investor has a legitimate expectation that its contract with a government party will be respected in accordance with its applicable law. If the government party relies on sovereign powers to undermine the sanctity of the contract, then investment law protects the foreign investor from that abuse of power. A foreign investor can have no legitimate expectation that the distribution of benefits and burdens under the contract will be recalibrated by an investment tribunal by reference to amorphous notions of good faith applied solely to one party to the contract based on its identity as a government actor.

1036. The majority thus respectfully disagrees with Dr. Grigera Naón's conclusion about the distinction between acta *iure imperii* and acta *iure gestionis*: "*Distinguishing between acta iure imperii and acta iure gestionis impacts only a determination of the kind of governmental authority that may be subject to the jurisdiction of domestic courts, and does not serve the purpose of providing substantive criteria defining the type of conduct susceptible of constituting a FET violation*." (paragraph 8) In fact, it is precisely because a State would be able to invoke its immunity from the jurisdiction of a domestic court for *acta iure imperii* that investment treaties serve a functional purpose: they provide substantive protections against the abuse of sovereign power and a forum for the adjudication of disputes relating to *acta iure imperii* that would otherwise not exist.

1037. Dr. Grigera Naón has discussed the various formulations of the FET standard and compared them with the international minimum standard in customary international law (paragraphs 9-13). In the majority's view, far too much weight has been given to these different formulations in investment awards, which do not constitute a source of law and are often no more than bare proclamations of what, in the eyes of the particular tribunal,

the FET standard should include, without consideration of the relevant principles at stake. The majority has attempted in this Award to provide its reasons based on legal principle for insisting that the FET standard only applies to sovereign conduct.

1038. Finally, Dr. Grigera Naón has questioned whether issue estoppel, collateral estoppel or issue preclusion have the status of rules of customary international law or general principles of law (paragraphs 14-21). He nonetheless concedes that the findings of the ICC Awards on identical issues raised in this arbitration should at the very least be taken into account as relevant "*evidence*" (paragraph 19), such that the ultimate result is the same; viz. there should be no departure from those findings in this case. In view of this common ground the majority does not wish to lengthen this Award further with further comment on the status of issue estoppel, etc, as a general principle of law.

IX. DAMAGES

1039. By reason of the findings and conclusions set out above, the need to consider Sacyr's damages claims does not arise and they are dismissed.

X. COSTS

(1) Claimant's Cost Submissions

1040. By its Updated Statement of Costs of 29 September 2025, Sacyr sought the recovery from Panama of legal fees, experts' fees and expenses totaling US$ 8,311,071.06, broken down between Phase I[1612] and Phase II[1613] of these proceedings as follows:

PAYMENTS TO ICSID		
Phase I	$	426,678.88
Advance on costs	$	426,678.88
Phase II	$	449,948.00
Advance on costs	$	449,948.00
TOTAL ADVANCES PAID TO ICSID	$	**876,626.88**

[1612] The Phase I fees and expenses are those incurred up to the date of the Decision on a Preliminary Issue on 3 February 2022.

[1613] The Phase II fees and expenses are those incurred from 3 February 2022 to date, save the costs paid by Panama in connection with the rescheduling at a late date of the hearing on jurisdiction and attribution.

LEGAL FEES		
Phase I	$	1,627,185.00
Three Crowns LLP	$	1,627,185.00
Phase II	$	3,586,146.46
Three Crowns LLP	$	3,542,191.39
Alcogal	$	43,955.07
TOTAL LEGAL FEES	$	**5,213,331.46**

EXPERT FEES		
Phase I	$	121,977.00
Prof. Jaime Franco	$	121,977.00
Phase II	$	1,610,176.01
Prof. Jaime Franco	$	144,055.68
Prof. John C. Coates IV	$	3,900.00
Credibility International (Timothy Hart)	$	965,000.00
Mueser Rutledge Consulting Engineers, MRCE (P. Deming and A Klaetsch)	$	151,695.91
Yendall Hunter (Martin Hunter)	$	345,524.42
TOTAL EXPERT FEES	$	**1,732,153.01**

EXPENSES		
Phase I	$	76,230.73
Disbursements paid by Three Crowns LLP	$	75,213.27
Disbursements paid by Prof. Jaime Franco	$	1,017.46
Phase II	$	412,728.98
Disbursements paid by Three Crowns LLP	$	399,413.34
Disbursements paid by Sacyr S.A. (including travel expenses for Sacyr's representatives)	$	5,586.00
Disbursements paid by Prof. Jaime Franco	$	2,023.56
Disbursements paid by Yendall Hunter (Martin Hunter)	$	3,148.68
Disbursements paid by Mueser Rutledge Consulting Engineers, MRCE (Peter Deming and Andrew Klaetsch)	$	2,557.40
TOTAL EXPENSES	**$**	**488,959.71**

TOTAL PHASE I	**$**	**2,252,071.61**
TOTAL PHASE II	**$**	**6,058,999.45**

TOTAL COSTS CLAIMED	**$**	**8,311,071.06**

1041. Sacyr maintains that it was obliged to incur additional costs by reason of what it describes as "serial failures"[1614] on Panama's part to meet its disclosure obligations. Among them, Sacyr highlighted (i) the belated disclosure of the 2005 Sulfate Soundness Test and the November 2005 Risk Assessment. It says that had these documents been disclosed (as it says they should have been) in prior ICC arbitrations, "… *the scope of this arbitration, and therefore its costs, could have been drastically reduced*";[1615] (ii) the long drawn out dispute over the production of unredacted copies of the PAC-4 Settlement Agreements; (iii) disruption to the preparation of its Reply and Rejoinder; and (iv) a belated application to bifurcate quantum-related issues.

1042. Sacyr further recalled the fact that it had prevailed on issues of attribution in the preliminary phase of the arbitration.

1043. Sacyr confirms that all fees and expenses claimed have been settled.

(2) Respondent's Cost Submissions

1044. By its Amended Updated Statement of Costs, Respondent submits that Claimant should bear all the costs and expenses of these proceedings, including Respondent's legal fees and expenses totaling US$ 11,907,685.79, broken down as follows:[1616]

PAYMENTS TO ICSID		
Advance on costs	$	900,000.00
TOTAL ADVANCES	**$**	**900,000.00**

LEGAL FEES		
Legal Fees Phase I — Preliminary Objections		
Foley Hoag LLP (August 2018 to February 2022)	$	1,203,814.18
Jenner & Block LLP (March 2019 to January 2022)	$	2,173,551.50
Legal Fees – Phase I Subtotal	**$**	**3,377,365.68**
Legal Fees Phase II — Remaining Preliminary Objections and Merits		
Foley Hoag LLP (February 2022 to March 2024)	$	949,454.96
Arnold & Porter Kaye Scholer LLP (since January 2022)	$	5,849,949.12
Legal Fees – Phase II Subtotal	**$**	**6,799,404.08**
TOTAL LEGAL FEES	**$**	**10,176,769.76**

[1614] Claimant's Statement on Costs, [2(ii)].
[1615] Claimant's Statement on Costs, [2(i)].
[1616] Respondent's Amended Updates Statement of Costs of 7 October 2025.

EXPERT FEES		
Phase I – Preliminary Objections		
Dr. Juan Pablo Fábrega — legal expert	$	53,206.25
Expert Fees – Phase I Subtotal	**$**	**53,206.25**

Phase II – Remaining Preliminary Objections and Merits		
Dr. Luis Ramón Fábrega — legal expert	$	74,400.00
Dr. Daniel Flores (Quadrant Economics) — damages expert	$	334,742.50
Mr. Paul J. Lewis (Gannet Fleming) — technical expert	$	79,850.00
Dr. Kevin MacDonald (Beton Consulting Engineers) — technical expert	$	41,400.00
Mr. Jeffrey Fuchs (Delta Consulting Group) — consulting damages expert	$	57,268.75
Expert Fees – Phase II Subtotal	**$**	**587,661.25**
TOTAL EXPERT FEES	**$**	**640,867.50**

EXPENSES **Counsel and Respondent's Disbursements**		
Phase I – Preliminary Objections		
Foley Hoag LLP[4]	$	8,872.54
Jenner & Block LLP	$	14,133.39
Counsel and Respondent's Disbursements – Phase I Subtotal	**$**	**23,005.93**
Phase II – Remaining Preliminary Objections and Merits		
Foley Hoag LLP	$	48,790.28
Arnold & Porter Kaye Scholer LLP	$	100,233.54
Republic of Panama	$	10,087.95
Counsel and Respondent's Disbursements – Phase II Subtotal	**$**	**159,111.77**
EXPENSES **Expert Disbursements**		
Phase I – Preliminary Objections		
Dr. Juan Pablo Fábrega — legal expert	$	170.00
Expert Disbursements – Phase I Subtotal	**$**	**170.00**
Phase II – Remaining Preliminary Objections and Merits		
Dr. Daniel Flores (Quadrant Economics) — damages expert	$	4,909.38
Mr. Paul J. Lewis (Gannet Fleming) — technical expert	$	2,851.45
Expert Disbursements – Phase II Subtotal	**$**	**7,760.83**
TOTAL EXPENSES	**$**	**190,048.53**

TOTAL COSTS	**$**	**11,907,685.79**

1045. In support of its proposition that it would be appropriate for an order of costs to be made against Sacyr, Respondent emphasised: (i) Sacyr's use of this arbitration as a "*discovery*

vehicle"[1617] for its commercial arbitrations against the ACP and its uncooperative and unreasonable approach to the disclosure phase in this arbitration as a result; (ii) its abandonment of a number of claims, most notably, its umbrella clause and FPS claims, the former having been addressed in the jurisdictional phase of the arbitration and then abandoned in the merits phase, the latter, together with its MFN and national treatment claims, were never formally withdrawn but not pursued at the Hearing; and (iii) the late introduction (a) of new argument and new expert evidence in its Reply and (b) new documents on the eve of the Hearing. Respondent sought interest on any sums awarded to Respondent in respect of its costs until the date of payment at US Dollar Prime rate + 2% per annum.[1618]

(3) The Tribunal's Decision on Costs

1046. Article 40 of the UNCITRAL Rules provides:

> *1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.*
>
> *2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.*[1619]

1047. In the opinion of the Tribunal, an order for costs against Sacyr is warranted, such that Panama should recover a substantial proportion of its legal and expert's fees and attendant expenses. The Tribunal makes due allowance for the fact that Sacyr was successful in the first phase of the arbitration. It might be said with hindsight that this is a case that should never have been brought, and it should therefore follow that Sacyr should not be entitled to any recovery of costs, but Panama could have conceded the

[1617] Respondent's Statement on Costs, p. 3.
[1618] *See* Panama's Prayer for Relief at para. 55 above.
[1619] UNCITRAL Rules, Article 40 (**R-2**).

status of the ACP as an organ of the State and the case could have proceeded with that fundamental issue out of the way.

1048. For that reason, the Tribunal declines to award Panama any recovery of its Phase I legal costs and expenses, namely, those of Jenner & Block fees (US$ 2,173,551.50) and expenses (US$ 14,133.39) and of Foley Hoag in the amounts of US$ 1,203,814.18 and US$ 8,872.54 respectively. The Tribunal also disallows the fees and expenses of Dr. Fábrega, totaling US$ 53,376.25.

1049. So far as the Phase II legal fees are concerned of which Panama seeks recovery, the Tribunal notes that they are more than double those claimed by Sacyr. The Tribunal considers that it would be disproportionate to allow recovery of more than 70% of the claimed total of US$ 6,799,404.08. It therefore awards US$ 4,759,582.86 of the fees claimed by Panama. In addition, Sacyr shall pay US$ 159,111.77 in respect of Panama's own expenses and those of Foley Hoag and Arnold & Porter Kaye Scholer.

1050. The Tribunal further awards Panama its Phase II experts' fees and expenses to be paid in full by Sacyr in the sum of US$ 595,422.08.

1051. Finally, the Tribunal determines that Sacyr shall bear the entirety of the costs of the arbitration, including the fees and expenses of the Tribunal and the Tribunal's Assistant, together with ICSID's administrative fees and direct expenses, amounting to (in US$):

Arbitrators' fees and expenses	
John Beechey	467,164.65
Horacio Grigera Naón	371,000.00
Zachary Douglas	298,490.09
Assistant's fees and expenses	53,327.34
ICSID's administrative fees	314,000.00
Direct expenses (estimated)	251,447.82
Total	**1,755,429.90**

1052. The above costs have been paid out of the advances made by the Parties in equal parts.[1620] Accordingly, the Tribunal orders Sacyr to pay Panama US$ 877,714.95 for the expended portion of Panama's advances to ICSID and US$ 5,514,116.71 in respect of Panama's legal fees, experts' fees and expenses.

1053. The Tribunal is satisfied that it is appropriate to order Sacyr to pay simple interest on the sums awarded to Panama pursuant to paragraphs 1049 to 1052 above from the date of this Award until the date of payment at the US Dollar Prime Rate +2%.

XI. AWARD

1054. For the reasons set forth above, the Tribunal decides as follows:

(1) The Tribunal exercises jurisdiction over Sacyr's claims but dismisses them in their entirety on their merits.

(2) Sacyr shall pay Panama US$ 5,514,116.71 in respect of legal fees and expenses and experts' fees and expenses, together with simple interest thereon calculated at the US Dollar Prime rate plus 2% per annum from the date of this Award until the date of payment.

(3) Sacyr shall pay Panama US$ 877,714.95 as reimbursement for the costs of the arbitration, together with simple interest thereon calculated at the US Dollar Prime rate plus 2% per annum from the date of this Award until the date of payment.

(4) All and any other claims of whatsoever nature are hereby dismissed.

[1620] The remaining balance will be reimbursed to the parties in proportion to the payments that they advanced to ICSID.

Place of Arbitration: Washington, D.C., U.S.A.

Date: 31 October 2025

Dr. Horacio A. Grigera Naón
Arbitrator
Subject to the attached Separate Opinion

Prof. Zachary Douglas KC
Arbitrator

Mr. John Beechey CBE
President of the Tribunal

Place of Arbitration: Washington, D.C., U.S.A.

Date: 31 October 2025

Dr. Horacio A. Grigera Naón
Arbitrator
Subject to the attached Separate Opinion

Prof. Zachary Douglas KC
Arbitrator

Mr. John Beechey CBE
President of the Tribunal

Place of Arbitration: Washington, D.C., U.S.A.

Date: 31 October 2025

Dr. Horacio A. Grigera Naón
Arbitrator
Subject to the attached Separate Opinion

Prof. Zachary Douglas KC
Arbitrator

Mr. John Beechey CBE
President of the Tribunal