Claimants’ Opening Statement

Omega Engineering LLC & Oscar Rivera v. Republic Of Panama
ICSID Case No. ARB/16/42

February 24, 2020
CLAIMANTS’ OPENING STATEMENT

• Melissa S. Gorsline—Partner, Jones Day
  • Claimants and Their Investment
  • Respondent’s Wrongdoing and Corruption Allegations

• Charles T. Kotuby Jr.—Partner, Jones Day
  • Other Jurisdictional Objections and Treaty Standards
  • Restitution and Quantum

• Carlos F. Concepción—Partner, Shook, Hardy & Bacon
  • Conclusion
CLAIMANTS

Oscar I. Rivera

100% Ownership

Omega U.S.
CLAIMANTS HAVE A LONG HISTORY OF IMPRESSIVE PERFORMANCE
CLAIMANTS MADE SUBSTANTIAL INVESTMENTS IN PANAMA
CLAIMANTS MADE SUBSTANTIAL INVESTMENTS IN PANAMA
CLAIMANTS MADE SUBSTANTIAL INVESTMENTS IN PANAMA

Mr. Rivera’s Experience Expertise Reputation
CLAIMANTS MADE SUBSTANTIAL INVESTMENTS IN PANAMA

Claimants’ Investment

- Mr. Rivera’s Experience
- Expertise
- Reputation
- Claimants’ Goodwill
CLAIMANTS MADE SUBSTANTIAL INVESTMENTS IN PANAMA

- Mr. Rivera’s Experience
- Expertise
- Reputation
- Claimants’ Goodwill
- The Omega Consortium
- Contracts
CLAIMANTS SUCCESSFULLY WON NUMEROUS GOVERNMENT CONTRACTS

- Minsa Capsi Contracts
  - Three medical facilities: MC Rio Sereno Contract, MC Kuna Yala Contract & the MC Puerto Caimito Contract (C-0028; C-0030; C-0031)
- Mercado Público de Colón Contract
  - Public market (C-0034)
- Ciudad de las Artes Contract
  - Higher education facility (C-0042)
- La Chorrera Contract
  - Courthouse and parking facility (C-0048)
- Municipality of Panama Contract
  - Public markets (C-0056)
- Municipality of Colón Contract
  - Municipal hall and mayoral offices (C-0051)
CLAIMANTS’ INVESTMENT WAS A PROVEN FINANCIAL SUCCESS

• In 2011, Omega Panama earned [redacted] in revenue
  Compass Lexecon 2 ¶ 60

• By the end of 2013, its revenue had reached nearly [redacted]
  Compass Lexecon 2 ¶ 60

• Going forward its contracts were valued at over [redacted]
  Compass Lexecon 1, Table VIII
RESPONDENT’S MISCONDUCT EXEMPLIFIED: THE CIUDAD DE LAS ARTES PROJECT

**Contract Signed** (July 6, 2012) [C-0042: Contract No. 093-12 dated 6 July 2012]

**Comptroller General’s Endorsement** (Sept. 19, 2012) [C-0042]

**Order to Proceed with Work No. 1** (Sept. 27, 2012) [C-0113: Notice to Proceed for Contract No. 093-12 dated 22 Sept. 2012]

**Order to Proceed with Work No. 2** (April 22, 2013) [C-0150: Notice to Proceed for Contract No. 093-12 dated 22 Apr. 2013]

**Varela is Elected** (May 4, 2014)

**Varela Inauguration** (July 1, 2014)

**Last Comptroller General Endorsed Payment to Omega** (June 2014) [C-0286: CPP No. 12 dated 16 May 2014]

**MEF slashes Project budget by 80%** (Sept. 8, 2014) [C-0067: 2015 Budget presented by Panama’s National Assembly dated 8 Sept. 2014]

**INAC terminates the contract by administrative resolution** (Dec. 23, 2014) [C-0044: Resolution No. 391-14 DG/DAJ from INAC dated 23 Dec. 2014]

**INAC orders Omega to continue working without pay** (Oct. 23, 2014) [C-0595: Meeting minutes between Omega and INAC representatives dated 23 Oct. 2014 at #4]
RESPONDENT’S MISCONDUCT EXEMPLIFIED: THE CIUDAD DE LAS ARTES PROJECT

**Contract Signed** (July 6, 2012)  
[C-0042: Contract No. 093-12 dated 6 July 2012]

**Order to Proceed with Work No. 1**  
(Sept. 27, 2012)  
[C-0113: Notice to Proceed for Contract No. 093-12 dated 22 Sept. 2012]

**Order to Proceed with Work No. 2**  
(April 22, 2013)  
[C-0150: Notice to Proceed for Contract No. 093-12 dated 22 Apr. 2013]

**Last Comptroller General Endorsed Payment to Omega**  
(June 2014)  
[C-0266: CPP No. 12 dated 16 May 2014]

**Varela is Elected**  
(May 4, 2014)

**Varela Inauguration**  
(July 1, 2014)

**MEF slashes Project budget by 80%**  
(Sept. 8, 2014)  
[C-0067: 2015 Budget presented by Panama’s National Assembly dated 8 Sept. 2014]

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(Dec. 23, 2014)  
[C-0044: Resolution No. 391-14 DG/DAJ from INAC dated 23 Dec. 2014]

**INAC orders Omega to continue working without pay**  
(Oct. 23, 2014)  
[C-0595: Meeting minutes between Omega and INAC representatives dated 23 Oct. 2014 at #4]

Herrera states, “Until I left my position as Director, in the summer of 2014, there were no major problems with the Omega Consortium’s performance of the work”  
(June 30, 2014)  
Herrera ¶ 12
"I send you my greetings and congratulations on your hard work in carrying out your activities.

The National Institute of Culture (INAC), on whose behalf I am acting, wishes to deeply thank the Omega Consortium and the Sub-Contractors for the support provided for the dismantling and mobilization work carried out in the offices of the National Directorate of Historical Heritage (DNPH), the Administration of the Museum and Storage, located in the Reina Torres de Arauz Museum, to continue with the construction works on the Ciudad de las Artes Project. We hope to be able to continue to count on your collaboration and support in any other activity required for the duration of the project."

(December 19, 2013)
C-0636
RESPONDENT’S MISCONDUCT EXEMPLIFIED:
THE CIUDAD DE LAS ARTES PROJECT

- Contract Signed (July 6, 2012)
  [C-0042: Contract No. 093-12 dated 6 July 2012]
- Order to Proceed with Work No. 1
  (Sept. 27, 2012)
  [C-0113: Notice to Proceed for Contract
  No. 093-12 dated 22 Sept. 2012]
- Comptroller General’s Endorsement
  (Sept. 19, 2012)
  [C-0042]
- Order to Proceed with Work No. 2
  (April 22, 2013)
  [C-0150: Notice to Proceed for Contract
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- Varela elected (May 4, 2014)
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- Last Comptroller General Endorsed Payment to Omega
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- MEF slashes Project budget by 80%
  (Sept. 8, 2014)
  [C-0067: 2015 Budget presented by Panama’s
  National Assembly dated 8 Sept. 2014]
- INAC terminates the contract by administrative resolution
  (Dec. 23, 2014)
  [C-0044: Resolution No. 391-14 DG/DAJ
  from INAC dated 23 Dec. 2014]

“INAC started withholding approval of payment applications”
(July 2014)
Buendia ¶ 18

Letter from INAC
(Dec. 19, 2013)
[C-0038: Letter No. 098-13 from
INAC to Omega dated 19 Dec. 2013]

INAC orders Omega to continue working without pay
(Oct. 23, 2014)
[C-0595: Meeting minutes between Omega and INAC representatives
dated 23 Oct. 2014 at #]
“In the meeting held yesterday, September 24, 2014 with the of Legal Affairs Directorate of INAC, we informed them of the importance of responding to OMEGA regarding the Certificates of Partial Payment Nos. 13, 14 and 15, which were duly approved by INAC’s Inspectors and the Comptroller General’s Office. It was explained that the delay in this process is seriously affecting the cash flow of the Contractor.”

(September 24, 2014)
C-0593
RESPONDENT’S MISCONDUCT EXEMPLIFIED: THE CIUDAD DE LAS ARTES PROJECT

- **Contract Signed** (July 6, 2012) [C-0042: Contract No. 093-12 dated 6 July 2012]
- **Order to Proceed with Work No. 1** (Sept. 27, 2012) [C-0113: Notice to Proceed for Contract No. 093-12 dated 22 Sept. 2012]
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**2012**

- President Varela’s Cabinet approved the budget proposal. (Mid-August 2014) Zarak ¶ 8

**2013**

- “The MEF was aware that the Ciudad de las Artes Project was significantly behind schedule . . . . The Ciudad de las Artes Project was considered a high-risk project.” (September 2014) Zarak ¶ 15

**2014**

- The INAC confirms intent to pay to Credit Suisse, not Omega (March 15, 2015) C-0606

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**Letter from INAC** (Dec. 19, 2013) [C-0038: Letter No. 098-13 from INAC to Omega dated 19 Dec. 2013]
RESPONDENT BLOCKED OMEGA FROM OBTAINING ANY NEW GOVERNMENT CONTRACTS

• Ciudad de las Artes
  • Administrative Resolution terminating the Ciudad de las Artes Contract on 23 Dec. 2014
    C-0044; C-0230: Resolution No. 391-14 DG/DAJ from INAC dated 23 Dec. 2014

• Municipality of Panama
  • Administrative Resolution terminating the Municipality of Panama Contract on 28 Sept. 2016

• Prohibition on Public Bidding
  • Omega prohibited from bidding until 15 Feb. 2020
    C-0443: List of Debarred Companies, PANAMACOMPRA
Minister of Economy and Finance:
President, the additional funds for the MINSFA (Ministry of Health) in order to pay IBT's CNOs (No Objection Certificates) are 41.6 million and not 40, meaning I have to cut back 1.6 from another institution. Should I cut it back from the MOP (Public Works Ministry) or the ATP (Environmental, Territorial and Participative Policy)?

J: Mop

J: Give them less

J: We'll handle it later

9/16/18 12:27:27 p.m.] +507 6616-4102: Another thing: I have a meeting with the Mexicans from Soho, they are coming on Tuesday, September 25. They say they will have the offer ready.

9/16/18 12:36:26 p.m.] Jj: Ok, let's hold off on that

9/16/18 12:36:26 p.m.] Jj: Until they ask for it

9/16/18 12:36:46 p.m.] Jj: Raul Hernandez has been very disrespectful

9/16/18 12:36:55 p.m.] Jj: But I do want to pay

9/16/18 12:37:30 p.m.] Jj: They're friends

9/16/18 12:37:30 p.m.] Jj: Hold on to it until they call

9/16/18 12:37:34 p.m.] +507 6616-4102: Ok
On 26 November 2015, Victor Almengor, an in-house attorney at the Colón Municipality, told Mr. Lopez that Mr. Varela wanted to rescind the Omega Consortium’s contract with that entity.

On 3 December 2015, Mr. Mandarakas, an engineer working for the Judiciary in the La Chorrera Project, told Mr. Lopez that the decision to terminate the La Chorrera Contract had come from above.

Mr. Barsalio from MINSA, told Mr. Lopez that he had concluded that there were orders coming from the Presidency to the Comptroller General’s Office to interfere with the Omega Consortium’s Contracts.

Mr. Polican, the Mayor of Colon, also confirmed to Mr. Lopez that he had received instructions to cancel the Municipality of Colon Project, and that the pressure he was receiving from the Presidency was severe.

Guillermo Bermudez from the Municipality of Panama personally told Mr. Lopez he had instructions to halt the Omega Consortium’s project until the Moncada Luna investigation had been finalized.

Mr. Blandon, the Mayor of Panama and an ally and appointee of President Varela, informed Mr. Lopez that he did not want the Mercados Perifericos projects, and that he wanted to build a warehouse in the place where the Juan Diaz Market was being built.
Frankie J. Lopez: Lo se [...] pero xndo pienso q todo esta resolviendose de repente se complica
[“I know [...] but when I think everything is getting resolved suddenly it gets complicated”]

Nessim Barsallo: Q pasa en contraloria
[“What’s happening at the Comptroller [General’s Office]”]

Nessim Barsallo: Es un complot?
[“Is it a conspiracy?”]

Frankie J. Lopez: Pareciera
[“It looks like it”]

Nessim Barsallo: Yo concluyo que tienen ordines
[“I conclude they have orders”]

Frankie Lopez: Disq tan verificando en legal bla bla bla por el caso
[“The say they’re verifying in legal blah blah because of the case”]

Frankie J. Lopez: Tu cabes algo?
[“Do you [know] anything”]

Frankie J. Lopez: Sabes*
[“Know***”]

Nessim Barsallo: Eso es de presidencioa
[“That comes from the Presidency”]

See Cis’ Reply ¶ 103
### MR. VARELA PURSUED MR. RIVERA TO TEST LOYALTY

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<th>No.</th>
<th>Date</th>
<th>Time</th>
<th>From</th>
<th>To</th>
<th>Subject</th>
<th>Read Details</th>
</tr>
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<td>46</td>
<td>9/17/2012</td>
<td>11:49:27 PM</td>
<td>[Redacted]</td>
<td>[Redacted]</td>
<td>Hey, check WhatsApp Messenger for BlackBerry, Iphone, Android and Nokia. Download it from <a href="http://whatsapp.com/dl/">http://whatsapp.com/dl/</a> and say goodbye to the SMS (Juan Carlos Varela)</td>
<td>Source file: Oscar Rivera’s Iphone/Library/SMS/sms.db: 0x155C3 (Table: message, handle, Size: 2166784 bytes)</td>
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<td>47</td>
<td>9/17/2012</td>
<td>11:43:58 PM</td>
<td>[Redacted]</td>
<td>[Redacted]</td>
<td>Hey, check WhatsApp Messenger for BlackBerry, Iphone, Android and Nokia. Download it from <a href="http://whatsapp.com/dl/">http://whatsapp.com/dl/</a> and say goodbye to the SMS (Juan Carlos Varela)</td>
<td>Source file: Oscar Rivera’s Iphone/Library/SMS/sms.db: 0x155C67 (Table: message, handle, Size: 2166784 bytes)</td>
</tr>
</tbody>
</table>

C-0518: WhatsApp messages from Ana Graciela Medina to Oscar Rivera dated 17 Sept. 2012

C-0519: Invitations from Mr. Varela to join WhatsApp chat dated 17 Sept. 2012
8. Second, the evidence does not support the Claimants’ allegations that they were targeted or harassed in any way. According to the Claimants, they were targeted because Mr. Rivera refused to make a campaign contribution to then-candidate (now President) Juan Carlos Varela in 2012. There is no credible evidence that this request ever happened. Although Mr. Rivera references this request in his witness statement, there is not a single contemporaneous email, letter, or document in evidence confirming his account. In addition, Panama’s witnesses confirm that their respective ministries were never directed or asked to take any adverse actions against the Claimants.
VARELALEAKS PROVE THE LA TRONA MEETING OCCURRED

[10/05/18 7:20:57 p.m.] Jj: But I never asked
[10/05/18 7:21:09 p.m.] Jj: Yes an attorney partner at igra
[10/05/18 7:21:14 p.m.] Jj: Invited me to dinner
[10/05/18 7:21:19 p.m.] Jj: I did not like the guy
[10/05/18 7:21:25 p.m.] Jj: But I never asked him again

[10/05/18 7:23:34 p.m.] Raul Sandoval: I don’t even remember well who was there
[10/05/18 7:23:44 p.m.] Jj: Ana you l c
[10/05/18 7:30:08 p.m.] Raul Sandoval: I think Jordi, Cholito
[10/05/18 7:21:25 p.m.] Jj: But I never asked him again
VARELA TARGETS “THE CHILDREN OF R[ICARDO] M[ARTINELLI].”
VARELA TARGETS “THE CHILDREN OF R[ICARDO] M[ARTINELLI].”

[04/30/18 8:45:40 a.m.] J]: Good morning attorney general
[04/30/18 8:46:04 a.m.] Kenia Porcell Privado: Hello Sir
[04/30/18 8:46:14 a.m.] J]: I call you
[04/30/18 8:50:49 a.m.] J]: About RM kids for you to know, farah will call the prosecutor so that she may send to her the notification that the criminal jurisdiction was lifted. She needs that before notifying the lawyers. The thing is that once she notifies the lawyers it will be difficult to refuse to deliver any copies. They will be part of a report with a folio and the law would force us do it. I could inform the pgn [Attorney General] but I don't know maybe you want to handle it?
[04/30/18 8:51:26 a.m.] J]: She says the law obliges her
[04/30/18 8:53:59 a.m.] Kenia Porcell Privado: 2 points: - the notification of extradition - the delivery of the copies
Meaning she should notify the extradition today and take her time for the copies request
[04/30/18 8:54:16 a.m.] Kenia Porcell Privado: That's what Tania was talking about
[04/30/18 8:55:09 a.m.] Kenia Porcell Privado: Do not deliver the copies today. Make RE take the legal time to deliver them.
[04/30/18 8:55:39 a.m.] Kenia Porcell Privado: And this would allow delivering the extradition and avoiding they file an appeal to the vice
[04/30/18 8:55:47 a.m.] Kenia Porcell Privado: That’s my opinion
RESPONDENT’S WRONGDOING DESTROYED CLAIMANTS’ INVESTMENT

- Mr. Rivera’s Experience
- Expertise
- Reputation
- Claimants’ Goodwill
- The Omega Consortium Contracts
At this point, due to the current declaration of default and the response time (30 days) required in Panama, we would not be in position to support bids for PR with the Panama outcome still unclear. The default on the largest job in Panama has the potential to put at risk both the Panama and PR operations if a resolution is not reached. Both companies could be at risk with this particular situation in Panama if the options to resolve do not involve a full release of Omega’s obligations to the surety and the surety’s obligations to the government. Until further notice, we will not be able support additional work in PR. We will keep you posted on our discussions with ASSA.

Regards,
Nancy Cruz | Managing Director/Construction Services | Bond & Specialty Insurance
Travelers
3230 W. Commercial Blvd. | Suite 390
Fort Lauderdale, FL 33309
W: 954.677.3374  F: 866.829.0379  C: 954.309.1064
"Dear Mr. Rivera,  
As per Article 1534 of the Civil Code and the Indemnity Documents which Omega Engineering, LLC and Omega Engineering, Inc. as members of the OMEGA CONSORTIUM, granted in favor of ASSA Compañía de Seguros, S.A. (hereinafter ASSA) as a condition precedent for ASSA to issue Performance Bond No. 85564568 and Advance Payment Bond No. 878006018 pertaining to Contract No. 93-12 for the purpose of carrying out the Studies, Design, Provision of Materials, Labor, Equipment, administration and Construction of the City of the Arts Project, hereby we request that OMEGA CONSORTIUM and/or any or all of its members provide a cash collateral in the sum of thirty-eight million dollars ($38,000,000.00) in the legal currency of the United States, corresponding to the amount of the bonded sums."

C-0382: Letter No. VPET-007-2015 from ASSA to the Omega Consortium dated 3 Mar. 2015
RESPONDENT’S WRONGDOING DESTROYED CLAIMANTS’ INVESTMENT

Claimants’ Investment

Mr. Rivera’s Experience Expertise Reputation

Claimants’ Goodwill

The Omega Consortium Contracts
Fiscalía pide a Interpol que emita ‘alerta roja’ para ubicar a 4 empresarios por caso Moncada Luna
RESPONDENT DESTROYED MR. RIVERA’S REPUTATION

“OTHER PARTICIPANTS

..."

In addition, the list of the Office of the Prosecutor Specialized in counteracting Organized Crime includes the entrepreneurs Jorge Espino Méndez, Julián Paris Rodríguez, and Óscar Iván Rivera Rivera; all who conduct business with various state entities, among them the controversial National Aid Program (Spanish initials: PAN). . . .

‘Each of these individuals is directly related to the accounts, or to companies who were involved in the mobilization of the funds, which ultimately were used for the acquisition of the apartments of Mr. Alejandro Moncada Luna and the personal accounts of Mr. Luna and his wife,’ said the press release from the Prosecutor General’s office.”

C-0213: Accounts related to money laundering are seized, LA PRENSA dated 21 Jun. 2015
RESPONDENT DESTROYED MR. RIVERA’S REPUTATION

Detention Order Issued
(Aug. 25, 2015)
[C-0093: Resolution of Detention No. 052-15 dated 25 Aug. 2015]

Red Notice Issued
(Aug. 28, 2015)
[C-0747: INTERPOL Red Notice Request from the Organized Crime Attorney’s Office to Panamanian National Police dated 28 Aug. 2015]

Extradition Sought from the U.S.
(Dec. 21, 2015)
[C-0900: Letter from Panama’s Foreign Affairs Ministry to Panama’s Office of the Attorney General attaching the U.S. State Department’s Denial of Panama’s Request for a Provisional Arrest for the Purpose of Extraditing Mr. Rivera dated 29 Feb. 2016]

Extradition Denied by U.S.
(Dec. 13, 2016)
[C-0900: United States State Department’s Denial of Panama’s Request for a Provisional Arrest dated 29 Feb. 2016]

Red Notice Cancelled after Being Contested
(Nov. 26, 2018)
[C-0908: Provisional Dismissal No. 143 dated 26 Nov. 2018]

Money Laundering Case Nullified
(Sept. 23, 2016)
[C-0008: Judgment of Panama’s Second Superior Tribunal for the First Judicial District dated 23 Sept. 2016]
RESPONDENT’S WRONGDOING DESTROYED CLAIMANTS’ INVESTMENT

Claimants’ Investment

- Mr. Rivera’s Experience
- Expertise
- Reputation
- Claimants’ Goodwill
- The Omega Consortium Contracts
**RESPONDENT BEARS THE BURDEN OF PROVING ITS CORRUPTION ALLEGATIONS**

- The evidence must be “clear,” “fully proven,” “obvious” or “manifest”
  - “The above omissions are clear and were duly proven in the case.”
  - “In the proceedings, it was fully proven that the Claimant was not only not dedicated to operating vehicle inspection stations, but it also did not have any operations or employees.”
  - “Consequently, it is obvious that Inceysa also presented false information concerning its own experience and capacity, thus violating, once again, one of the essential pillars that led El Salvador to award the bid to it.”

  - *Inceysa v. El Salvador (CL-0067) ¶¶ 108, 109, 118*
RESPONDENT BEARS THE BURDEN OF PROVING ITS CORRUPTION ALLEGATIONS

- Respondent bears the burden of proving its corruption allegations.
  - “However, when allegations of corruption are raised, either as part of a claim or as part of a defense, the party asserting that corruption occurred must establish the corruption through clear and convincing evidence.”

Submission of the United States of America dated 3 February 2020 ¶ 45
RESPONDENT AGREES ON KEY POINTS OF FACTS AND LAW

• The *only* allegation of corruption concerns only *one* of the eight contracts at issue, and post-dates the establishment of Claimants’ investment by *years*.

  – “If, at the time of the initiation of the investment, there has been compliance with the law of the host state, allegations by the host state of violations of its law in the course of the investment, as a justification for state action with respect to the investment . . . could not deprive a tribunal acting under the authority of the BIT of its jurisdiction.” *Fraport* (CL-0124) ¶ 345

  – “The Tribunal considers that a distinction has to be drawn between (1) legality as at the initiation of the investment . . . and (2) legality during the performance of the investment.” *Hamester* (RL-0006) ¶ 127
RESPONDENT AGREES ON KEY POINTS OF FACTS AND LAW

- Claimants have been investigated for over five years in Panama, and never been tried or convicted of any crime. Investigations have been nullified or dismissed, and prescription periods have run.

  - “DECLARE the nullity of every act in the criminal proceedings officially initiated and based on accusations from members from the community, for the allegations of money laundering, against ... OSCAR IVÁN RIVERA, ID No. [redacted]; as a result of violation of due process and errors related to general denomination of the crime.” (C-0008)

  - “Based on the above considerations, we respectfully recommend to the Honorable Court that a ruling be issued ordering OBJECTIVE AND IMPERSONAL PROVISIONAL DISMISSAL ...” (C-0942)

  - “The United States cannot proceed with the provisional arrest request at this time, as it does not contain sufficient factual support linking Rivera Rivera to the money laundering charge.” (C-0900)
The Claimants paid bribes to Justice Moncada Luna in exchange for an award of the La Chorrera Contract. This conduct taints all of the Claimants’ investments in Panama and deprives the Tribunal of jurisdiction over their claims.

61. In tandem with the overwhelming proof of the bank transfers that moved money from Omega to Justice Moncada Luna, and the fatal imperfections in the fake real estate documentation relied upon by the Claimants, the opinion of Mr. Pollitt further confirms the Claimants’ misconduct in connection with the La Chorrera Project.
61. In tandem with the overwhelming proof of the bank transfers that moved money from Omega to Justice Moncada Luna, and the fatal imperfections in the fake real estate documentation relied upon by the Claimants, the opinion of Mr. Pollitt further confirms the Claimants’ misconduct in connection with the La Chorrera Project.
CLAIMANTS’ PAYMENTS TO REYNA WERE LEGITIMATE

Ms. Maria Gabriela Reyna Lopez

TWO: The SELLER OFFEROR declares to commit to sell the BUYER OFFEROR and the latter commits to buy from the first one THE RANCH, in accordance with the price convened and adjusted of ONE MILLION AMERICAN DOLLARS WITH 00/100 ($1,000,000.00), legal tender of the United States of America, which The BUYER OFFEROR must pay to the SELLER OFFEROR in the following way:

a. One initial payment of the twenty-five percent (25%) of the total price of the RANCH, that is to say, the amount of TWO HUNDRED AND FIFTY THOUSAND AMERICAN DOLLARS WITH 00/100 ($250,000.00), legal tender of the United States of America, which shall be payable within ten (10) days following the execution of this agreement. The payment above-described shall be paid through certified check or cashier’s check in favor of the law firm Reyna & Asociados, which shall act as the Depository Agent custodian of the funds.
CLAIMANTS’ PAYMENTS TO REYNA WERE LEGITIMATE

Ms. Maria Gabriela Reyna Lopez

“I just want to clarify that the real estate operations carried out with PUNELA INVESTMENT (OMEGA) and with ALPHA BUSINESS CORP are perfectly legal and legitimate acquisitions. I don’t believe that there are any links of any other kind of relationship between OMEGA and the people related to Mr. Ricardo Calvo and other people . . . .”

“He suggested including the Concepto y Espacios payment within the legitimate operations of my client JR BOCAS INVESTMENT.”

Supplemental Declaration of Maria Gabriela Reyna Lopez dated 14 July 2015 (C-0089 resubmitted), at 5, 8.

- See also Jimenez 2 at 38
Mr. Troyano’s Expert Report

• “In my experience, and after analyzing the documentation that was provided to me, I conclude that the Agreement signed by JR Bocas Investment Inc. and Punela Development Corp. is a Promise of Purchase and Sale Agreement for Real Property, as its title indicates, and this Agreement is legally valid. This conclusion is based on the intrinsic content of the clauses contained in the Agreement in question, and in particular those clauses in which the literal meaning and evident intention of the parties show that the parties intended to enter into a Promise of Purchase and Sale for real property.”

- Troyano ¶ 14
THE LAND TRANSACTION WAS LEGITIMATE

ARC’s Expert Report

• “We conclude that the sales price according to the promise of purchase agreement for FINCA 35659, of $12.65 per square meter is considered to be reasonable and within the market range in Cañas at the time of purchase.” – ARC 1 at p. 2

• “The Azuero Peninsula, and Finca 35659 in particular, are home to some of the most unique and attractive attributes in the Panamanian real estate market, including a dry climate, road access, water access, and gentle topography with unobstructed ocean views, making the land highly desirable for investment and project development.” – ARC 2 at p. 33

• “Ultimately, what Respondent and its experts contend are deficiencies in the Promise of Purchase and Sale Agreement are instead mere formalities that are by no means necessary when closing a real estate transaction in Panama, which explains the absence of items like an appraisal and irrevocable promise of payment agreement. Finally, the terms of the Promise of Purchase and Sale Agreement are reasonable in our experience.” – ARC 2 at p. 33

Mr. Rivera’s testimony

• “Further, to make sure the deal was done properly, I secured Panamanian counsel, specifically the law firm of IGRA which at the time was considered one of the most reputable law firms in Panama. IGRA advised not only on the preparation of the Promise Agreement, but also on how the transaction would work.” – Rivera 3 ¶ 12
NATIONAL ASSEMBLY DID NOT PROVE ALLEGATIONS AGAINST CLAIMANTS

Panama’s Designated Prosecutor:

Omega Panama and PR Solutions were “in the range of companies **not linked to the unjustified assets of [Moncada Luna]** according to the theory of the case of the prosecution.”

Transcript of Moncada Luna’s Sentencing Hearing dated 5 Mar. 2015 (C-0930) at 26:36
### NO EVIDENCE OF CORRUPTION IN LA CHORRERA CONTRACT

**Business** | **Amount (Dollars)**
--- | ---
1. Omega Engineering Consortium | B/. 16,495,000.00
2. Constructora Nova, S.A. | B/. 17,387,668.93
3. Constructora Corcione & Asociados, S.A. | B/. 17,984,546.81
4. Consortium Construcciones La Chorrera | B/. 18,150,000.00

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### C-0083 at 7

**Business** | **Amount (Dollars)**
--- | ---
1. Omega Engineering Consortium | B/. 16,495,000.00
2. Constructora Nova, S.A. | B/. 17,387,668.93
3. Constructora Corcione & Asociados, S.A. | B/. 17,984,546.81
4. Consortium Construcciones La Chorrera | B/. 18,150,000.00

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**C-0083: Report from the Vetting Commission dated 9 Oct. 2012 at 1**
NO EVIDENCE OF CORRUPTION IN LA CHORRERA CONTRACT

“The methodology used to prepare this Report has been that of a ‘blind’ analysis by each of the experts, which entails individually assessing the contractual documentation (Annex 2 of the Report identifies the documents of the bid file analyzed in the Expert Report) without any knowledge of the scores awarded by the Evaluation Committee. . . .

The two evaluations agree on the winning company of the Bid: CONSORCIO OMEGA ENGINEERING, as well as in its score, which is 100 POINTS.”

“On October 17, 2012, Justice Moncada Luna, taking into consideration the report from the evaluation commission designated to evaluate the companies that participated in the Public Act, selected Omega as the Contractor for the La Chorrera Project and, at Justice Moncada Luna’s direction, and in accordance with the Law of Public Contracts, the Judicial Authority executed the La Chorrera Contract with Omega on November 22, 2012.”

Vielsa Rios 1 ¶ 12
See also Vielsa Rios 2 ¶¶ 5-6
I conclude that Panama failed to prove that Omega and/or Mr. Rivera engaged in corrupt acts for the following reasons:

- Panama did not provide any evidence that the La Chorrera contract was corruptly awarded to Omega.
- Panama did not provide any evidence that other individuals who would have been co-conspirators in a corrupt awarding of the La Chorrera contract were investigated or charged including the bid’s vetting commission, Vielsa Rios, and the Comptroller General.
- Panama did not provide any evidence of communications, meetings, phone calls, meeting with intermediaries, witness testimony, alleged co-conspirator testimony or other documents evidencing either the bid scheme or quid pro quo.
- Panama relied on flawed financial analysis in the Aguirre and Villalba Reports as well as in Resolutions prepared by both the Organized Crime Prosecutor and Corruption Prosecutor. The flawed financial analysis was the key evidence provided and this evidence is inconclusive, meaning that the allegation that Omega and/or Mr. Rivera was the payor of a bribe to Mr. Moncada Luna is nothing more than a guess.
- Panama provided testimony transcripts and witness statements/declarations from a variety of people including Judicial Authority employees, employees of Omega and competitors of Omega, none of which implicate Omega or Mr. Rivera in any corrupt act.
Respondent has shown no wrongdoing by claimants

Panama Requests Extradition of Mr. Rivera for Money Laundering Charges (Dec. 15, 2015) [C-0900: Letter from Panama’s Foreign Affairs Ministry to Panama’s Office of the Attorney General attaching the U.S. State Department’s Denial of Panama’s Request of a Provisional Arrest for the Purpose of Extraditing Mr. Rivera dated 29 Feb. 2016]

U.S. Department of State Declines Extradition (Feb. 29, 2016) [C-0900: U.S. State Department’s Denial of Panama’s Request of a Provisional Arrest for the Purpose of Extraditing Mr. Rivera dated 29 Feb. 2016]

Money Laundering proceedings against Mr. Rivera declared a nullity by Panama’s Second Superior Tribunal for the First Judicial District (Sept. 23, 2016) [C-0008: Judgment of Panama’s Second Superior Tribunal for the First Judicial District dated 23 Sept. 2016]

Anti-corruption Prosecutor Requested the Provisional Dismissal of the Bribery Investigation (June 29, 2018) [C-0942: Prosecutor’s Opinion No. 43 dated 29 June 2018]

Provisional Dismissal of Bribery Investigation Confirmed by the First Court of the Criminal Circuit of the First Judicial Circuit of Panama (Nov. 26, 2018) [C-0908: Provisional Dismissal No. 143 dated 26 Nov. 2018]

Prescription Period for Bribery Charges Runs (July 2019) [C-0927: Panamanian Criminal Code (excerpts) dated 6 Apr. 2010]

“Based on the above considerations, we respectfully recommend to the Honorable Court that a ruling be issued ordering OBJECTIVE AND IMPERSONAL PROVISIONAL DISMISSAL, pursuant to the provisions of Article 2208, number 1 of the Judicial Code, which will not result in res judicata and with the understanding that a request may be submitted to reopen the case if new evidence comes to light.

C-0942 at p. 9
Based on the merits of the foregoing, the SECOND SUPERIOR COURT OF THE FIRST JUDICIAL DISTRICT, administering justice on behalf of the Republic and as authorized by law . . . DETERMINES: DECLARE the nullity of every act in the criminal proceedings officially initiated and based on accusations from members from the community, for the allegations of money laundering, against . . . OSCAR IVÁN RIVERA, ID No. 421723037; as a result of violation of due process and errors related to general denomination of the crime.
"Under Panamanian law, access to documents related to criminal and public investigations is restricted. Panamanian law specifies who may access government files involving such investigations. Specifically, the law precludes the production of such documents to parties who did not directly participate in the investigation or the judicial proceedings."

The Republic of Panama’s Memorandum in Support of Its Objections to Claimants’ Document Requests ¶ 44
Pollitt states he reviewed materials collected by “both Panama's National Assembly and Prosecutor's Office as they relate to the unjust enrichment and corruption scheme, with a particular focus on Oscar Rivera, Omega US and Omega Panama, in order to assess whether those materials support a conclusion of illicit activity by Mr. Rivera and any of the Omega companies.”

Expert Report of Mr. Roy Pollitt dated 15 Nov. 2019 at 1
The Department of State refers to Diplomatic Note No. NV-15-079, dated December 21, 2015, from the Embassy of Panama, which requested the provisional arrest for the purpose of extradition of Oscar Ivan Rivera Rivera to stand trial in Panama for the crime of money laundering, in violation of Chapter IV, Title VII, of the Crimes against the Economic Order, Book Two of the Penal Code of Panama.

The United States cannot proceed with the provisional arrest request at this time, as it does not contain sufficient factual support linking Rivera Rivera to the money laundering charge. In order to proceed with the request, the United States would need to know the evidence on which the Government of Panama relied to conclude that Rivera Rivera was engaged in a money laundering operation related to the unlawful enrichment conviction against Alejandro Moncada Luna Carvajal. Such evidence could include, for example, an explanation of bank records which show the movement of money by Rivera Rivera and reflect that he knew the money was obtained through illegal means, a summary of testimony given by a co-conspirator, or any other evidence which clearly indicates that Rivera Rivera knowingly participated in the money laundering operation described in the provisional arrest request. Such evidence could include, for example, an
U.S. GOVERNMENT DENIED EXTRADITION DUE TO LACK OF EVIDENCE
“It is also my opinion that Panama failed to show—and certainly could not have proved—that Omega and/or Mr. Rivera engaged in money laundering with respect to corruption allegations involving Moncada Luna. Panama relied exclusively on bank transaction analysis to link Mr. Rivera and Omega to Mr. Moncada Luna. However, Panama’s bank transaction analyses included mathematical errors, illogical assumptions, contradictory interpretations of the same set of transactions and missing days/weeks/months of transactions during which Panama has no idea what happened and cannot ascribe the transactions to anyone, let alone Omega or Mr. Rivera.

The flawed transaction analyses invalidates Panama’s corruption and money laundering allegations against Omega and Mr. Rivera and severs any claimed “link” between Omega and/or Mr. Rivera and Mr. Moncada Luna. Moreover, Panama was unable to produce any other evidence of supposed corruption or money laundering such as communications, witness testimony or computer records to support their conclusion. Finally, Panama failed to either investigate or failed to produce evidence of investigations into certain other individuals who may have been linked to the unjust enrichment of Mr. Moncada Luna.”

Jimenez 2 at p. 3
Charles T. Kotuby Jr.

*Other Jurisdictional Objections and Treaty Standards*

*Restitution and Quantum*
THE BIT AND THE TPA: A CHRONOLOGY

- **BIT Enters Into Force** (May 30, 1991)
- **La Chorrera Contract Signed** (Nov. 22, 2012) [C-0048: Contract No. 150/2012 dated 22 Nov. 2012]
- **Municipality of Panama Contract Signed** (Sept. 12, 2013) [C-0056: Contract No. 857-2013 dated 12 Sept. 2013]
- **Omega-Panama Incorporated** (Oct. 26, 2009)
- **Ciudad de las Artes Contract Signed** (July 6, 2012) [C-0042: Contract No. 003-12 dated 6 July 2012]
- **TPA Enters Into Force** (Oct. 13, 2012)
- **Municipality of Colon Contract Signed** (Jan. 24, 2013) [C-0051: Contract No. 01-13 dated 24 Jan. 2013]
- **Agreed Valuation Date** (Dec. 23, 2014)
THE TPA COVERS THE ENTIRETY OF CLAIMANTS’ INVESTMENT

Article 1.3: Relation to Other Agreements

1. The Parties affirm their existing rights and obligations with respect to each other under the WTO Agreement and other agreements to which the Parties are party.

2. Articles VII and VIII of the Treaty Between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investments, with Annex and Agreed Minutes, signed at Washington on October 27, 1982 (the “Treaty”) shall be suspended on the date of entry into force of this Agreement.

3. Notwithstanding paragraph 2,

(a) for a period of ten years beginning on the date of entry into force of this Agreement, Articles VII and VIII of the Treaty shall not be suspended;

(i) in the case of investments covered by the Treaty as of the date of entry into force of this Agreement; or

(ii) in the case of a dispute that arose prior to the date of entry into force of this Agreement and that is otherwise eligible to be submitted for settlement under Article VII or VIII of the Treaty; and

Article 2.1: Definitions of General Application

covered investment means, with respect to a Party, an investment, as defined in Article 10.29 (Definitions), in its territory of an investor of the other Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter:
RESPONDENT’S PRELIMINARY OBJECTIONS FAIL

- Corruption Allegations
- Commercial Acts Only
- Criminal Investigations Off-Limits
- Dispute Resolution Clauses
RESPONDENT’S PRELIMINARY OBJECTIONS FAIL
RESPONDENT’S PRELIMINARY OBJECTIONS FAIL

Criminal Investigations Off-Limits

Dispute Resolution Clauses
2. In the event of an investment dispute between a Party and a national or company of the other Party with respect to an investment of such national or company in the territory of the first Party, the parties to the dispute shall initially seek to resolve it by consultation and negotiation. The parties may, upon the initiative of either of them and as a part of their consultation and negotiation, agree to rely upon non-binding, third-party procedures, such as the fact-finding facility available under the Rules of the Additional Facility ("Additional Facility") of the International Centre for the Settlement of Investment Disputes ("Centre"). If the dispute cannot be resolved through consultation and negotiation, then the dispute shall be submitted for settlement in accordance with the applicable dispute-settlement procedures upon which they have previously agreed. Such procedures may provide for recourse to international arbitration using a forum such as the Inter-American Commercial Arbitration Commission. With respect to expropriation by either Party, any dispute-settlement procedures specified in an investment agreement between such Party and such national or company shall remain binding and shall be enforceable in accordance with, inter alia, the terms of the investment agreement, relevant provisions of the domestic laws of such Party and treaties and other international agreements regarding enforcement of arbitral awards to which such Party has adhered.
ARTICLE VII

1. For purposes of this Article, an investment dispute is defined as a dispute involving: (a) the interpretation or application of an investment agreement between a Party and a national or company of the other Party; (b) the interpretation or application of any investment authorization granted by its foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.
ARTICLE VII OF THE BIT

2. In the event of an investment dispute between a Party and a national or company of the other Party with respect to an investment of such national or company in the territory of the first Party, the parties to the dispute shall initially seek to resolve it by consultation and negotiation. The parties may, upon the initiative of either of them and as a part of their consultation and negotiation, agree to refer such non-binding, third-party procedures, such as the fact-finding facility available under the Rules of the Additional Facility (“Additional Facility”) of the International Centre for the Settlement of Investment Disputes (“Centre”). If the dispute cannot be resolved through consultation and negotiation, then the dispute shall be submitted for settlement in accordance with the applicable dispute-settlement procedures upon which they have previously agreed. Such procedures may provide for recourse to international arbitration using a forum such as the Inter-American Commercial Arbitration Commission. With respect to arbitration by either Party, any dispute-settlement procedures specified in an investment agreement between such Party and such national or company shall be enforceable in accordance with, inter alia, the terms of the investment agreement, relevant provisions of the domestic laws of such Party and treaties and other international agreements regarding enforcement of arbitral awards to which such Party has adhered.

3. (a) The national or company concerned may choose to consent in writing to the submission of the dispute to the Additional Facility for settlement, either by conciliation or binding arbitration, at any time after six months from the date upon which the dispute arose. Once the national or company concerned has so consented, either party to the dispute may institute proceedings before the Additional Facility, provided the dispute has not, for any reason, been submitted for resolution in accordance with any applicable dispute-settlement procedures previously agreed to by the parties to the dispute, and the national or company concerned has not brought the dispute before the courts of justice, administrative tribunals or agencies of competent jurisdiction of either Party.

(b) Each Party hereby consents to the submission of an investment dispute to the Additional Facility for settlement by conciliation or binding arbitration.

(c) Conciliation or binding arbitration of such dispute shall be done in accordance with the provisions of the Regulations and Rules of the Additional Facility.

(d) Each Party shall provide for the enforcement within its territory of Additional Facility arbitral awards.
THE DISPUTE SETTLEMENT PROVISIONS ARE NOT “APPLICABLE”

• The MINSA Capsi Contracts Do Not Address Investment Disputes


• Ciudad de las Artes and Mercado Público de Colón Contracts Do Not Address Investment Disputes

“THE PARTIES have chosen Panama City, Panama as special domicile . . . Any claim that arises due to the interpretation or enforcement of this Contract shall be resolved by mutual agreement between The Parties, and if it cannot be resolved in this way, the dispute shall be submitted to the Panamanian courts.” C-0042: Contract No. 093-12 dated 6 July 2012; C-0034: Contract No. 043 dated 17 Aug. 2012.
RESPONDENT’S PRELIMINARY OBJECTIONS FAIL
Panama Bilateral Investment Treaty

Signed October 27, 1962; Entered into Force May 30, 1963

Investment Treaty with Panama
99th Congress 2nd Session
SENATE Treaty Doc. 99-14

MESSAGE
FROM
THE PRESIDENT OF THE UNITED STATES
TRANSMITTING
MARCH 25, 1963—Treaty was read the first time and, together with the accompanying papers, referred to the Committee on Foreign Affairs and ordered to be printed for the use of the Senate.
U.S. GOVERNMENT PRINTING OFFICE
71-118 WASHINGTON 25 1963
LETTER OF TRANSMITTAL
To the Senate of the United States:

With a view to receiving the advice and consent of the Senate ratification, I transmit herewith the Treaty between the United States of America and the Republic of Panama concerning the Treatment and Protection of Investments, with Agreed Minutes, signed October 27, 1962, at Washington. I transmit also, for the information of the Senate, the report of the Department of State with

Chapter Ten
Investment
Section A: Investment

Article 10.1: Scope and Coverage
1. This Chapter applies to measures adopted or maintained by a Party relating to:
   (a) investors of the other Party;
   (b) covered investments; and
   (c) with respect to Articles 10.9 and 10.11, all investments in the territory of the Party.
2. A Party’s obligations under this Section shall apply to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party.
3. For greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.

Article 10.2: Relation to Other Chapters
1. In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.
2. A requirement by a Party that a service supplier of the other Party post a bond or other form of financial security as a condition of the cross-border supply of a service does not of itself make this Chapter applicable to measures adopted or maintained by the Party relating to such cross-border supply of the service. This Chapter applies to measures adopted or maintained by the Party relating to the posted bond or financial security, to the extent that such bond or financial security is a covered investment.
3. This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Twelve (Financial Services).

Article 10.3: National Treatment
1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment,
RESPONDENT’S KEY TREATY BREACHES

1. Respondent’s Agencies Refused to Sign Virtually All Change Orders and Payment Applications to the Omega Consortium
2. Comptroller General Refused to Endorse Virtually All Payments to the Omega Consortium, Cutting Off All Cash Flow
3. Comptroller General Refused to Endorse Virtually All Change Orders for the Omega Consortium’s Projects, Causing Contracts to Lapse
4. MEF Slashed the State Budget for the Omega Consortium’s Largest Project
5. INAC Administratively Terminated the Omega Consortium’s Largest Contract, Imposing a Ban on Future Bidding (Without Notice)
6. Municipality of Panama Administratively Terminated Contract, and Imposed a Further Three Year Ban on Bidding
7. Respondent Initiated Bogus Criminal Investigations
8. Criminal Authorities Froze Bank Accounts
9. Criminal Authorities Issued Detention Orders
10. Respondent Issued Extradition Request and Interpol Red Notice

Expropriation:

#1 through #8: The “substantial deprivation” of “virtually all” of an investment

Fair and Equitable Treatment:

#1 through #10: Arbitrariness, a willful neglect of duty and due process, and subjective bad faith

Full Protection & Security:

#8 through #10: Threats to physical security

Umbrella Clause:

#1 through #6: Sovereign failure to “observe obligations . . . with regard to investment”
PARTIES AGREE DEC. 23, 2014 IS THE APPROPRIATE VALUATION DATE

- INAC orders Omega to continue working without pay
  (Oct. 23, 2014)
  [C-0595: Meeting minutes between Omega and INAC representatives dated 23 Oct. 2014]

- Ciudad de las Artes contract terminated, banning the Omega Consortium from future bidding
  (Dec. 23, 2014)
  [C-0044: Resolution No. 391-14 DG/DAJ from INAC dated 23 Dec. 2014]

- Municipality of Panama Contract terminated, banning the Omega Consortium from bidding for another three years
  (Jan. 11, 2017)

VALUATION DATE: DEC. 23, 2014
CLAIMANTS’ LOSSES

- Claimants’ Moral Damages
- Goodwill and Value of Future Contracts
- Value of Existing Contracts
CLAIMANTS’ LOSSES

- Claimants’ Moral Damages
- Goodwill and Value of Future Contracts
- Value of Existing Contracts

* Does not include interest

US$ 8.69 Million*
CLAIMANTS’ LOSSES

Claimants’ Moral Damages

Goodwill and Value of Future Contracts
US$ 42.53 Million*

Value of Existing Contracts
US$ 8.69 Million*

* Does not include interest
CLAIMANTS’ LOSSES

Claimants’ Moral Damages

Goodwill and Value of Future Contracts
US$ 42.53 Million*

Value of Existing Contracts
US$ 8.69 Million*

* Does not include interest
CLAIMANTS’ LOSSES

* Does not include interest

Claimants’ Moral Damages

Goodwill and Value of Future Contracts
US$ 42.53 Million*

Value of Existing Contracts
US$ 8.69 Million*

Pre-award interest has not been applied to moral damages
Carlos F. Concepción
Shook, Hardy & Bacon

Conclusion