UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

CASE NO. 20-CIV-24867-SCOLA/GOODMAN

GRUPO UNIDOS POR EL CANAL, S.A.,
SACYR, S.A.,
WEBUILD S.p.A. and
JAN DE NUL N.V.

Movants/Counter-Respondents,

v.

AUTORIDAD DEL CANAL DE PANAMÁ,

Respondent/Counter-Movant.

MOVANTS' RESPONSE TO ACP'S CONSOLIDATED CROSS-MOTION TO CONFIRM AND ENFORCE THE PARTIAL AND FINAL ARBITRATION AWARDS

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Movants Grupo Unidos por el Canal, S.A., Sacyr, S.A., Webuild, S.p.A., and Jan De Nul, N.V. ("Movants") respectfully submit this Response to the Consolidated Cross-Motion to Confirm the Partial and Final Arbitration Awards (collectively, the "Awards") (D.E. 58) of Respondent and Cross-Movant Autoridad del Canal de Panamá ("ACP"). This Response is supported by the second expert opinions of Professor Chiara Giorgetti ("Second Giorgetti Decl.") and Professor Jack Coe ("Second Coe Decl."), the expert opinion of Judge Stephen M. Schwebel ("Schwebel Decl."), and the Second Declaration of Nicolas Bouchardie ("Second Bouchardie Decl."), attached hereto. The request for confirmation is an extraordinary request due to the scope of non-disclosures and conflicts by the Tribunal infecting the Awards to such an extent that they must be condemned, not confirmed.

INTRODUCTION

The Awards arise out of the project for the Third Set of Locks of the Panama Canal ("the Project"): a multi-billion-dollar project spanning a decade to enlarge the width and depth of, and add a new channel to, the Panama Canal, significantly increasing its vessel capacity.[1] While Movants successfully completed and delivered this historic public-works project to ACP, ACP remains in material breach of the Parties' contracts and of Panamanian law, causing Movants hundreds of millions of dollars in damages and leading them to file multiple arbitrations.[2]

Contrary to ACP's suggestion,[3] confirmation of the Awards in this case is anything but routine. To the contrary, confirmation of the Awards should be denied because it would violate fundamental U.S. public policy against arbitrator partiality, which is a ground for vacating the Awards under Section 10(a) of the Federal Arbitration Act ("FAA")[4] as well as Article V(2)(b) of the New York Convention ("New York Convention" or "Convention").[5] In particular, the Awards were made by a Tribunal tainted by evident partiality due to each of the arbitrator's repeated and disturbing failures to disclose multiple inter-relationships—with each other, prior Tribunal members, and counsel—during crucial stages of the underlying proceedings. Those undisclosed relationships included the following: (1) one arbitrator helped the Tribunal President secure a lucrative appointment worth hundreds of thousands of dollars in a separate arbitration—not

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1 Consol. Mot. to Vacate 1 (D.E. 55).
2 *Id.*
3 Consol. Cross-Mot. to Confirm 7–8, 14–15 (D.E. 58).
4 9 U.S.C. § 10(a).
5 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 251 ("New York Convention"), art. V(2)(b).

disclosed until after issuance of the Partial Award, (2) there were multiple undisclosed cross-appointments and relationships with arbitrators associated with the present dispute, and (3) the arbitrators served on tribunals in other cases where ACP's counsels also served as co-arbitrator or counsel.[6] These potential conflicts, which are direct, definite and capable of demonstration, establish evident partiality. Importantly, the arbitrators' failures to disclose these relationships deprived Movants of the ability to object, and to have their dispute decided by neutral and impartial decision makers.[7]

Both the FAA and the Rules of Arbitration of the International Chamber of Commerce ("ICC Rules"),[8] which apply to this dispute by virtue of the parties' contracts,[9] incorporate the fundamental principle that decisions will be issued by impartial, independent arbitrators in conformity with their applicable standards for impartiality and the obligation to disclose potential conflicts. Under the FAA, evident partiality exists if arbitrators fail to fulfill "the simple requirement that arbitrators disclose to the parties any dealing that might create an impression of possible bias."[10] The ICC Rules, in turn, mandate that arbitrators "*shall disclose* in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence *in the eyes of the parties*, as well as any circumstances that *could give rise to reasonable doubts as to the arbitrator's impartiality*."[11] Yet, the arbitrators concealed such information. In particular, the arbitrators failed to disclose that:

- During the pendency of the Panama 1 Arbitration, ACP's arbitrator, Dr. Gaitskell, nominated (with his co-arbitrator) the Tribunal President, Mr. Gunter, to serve as president in a separate ICC arbitration.[12] This appointment also occurred before the Parties agreed to Mr. Gunter's appointment as chair of the Panama 2 Arbitration between the Parties. This appointment as president is highly lucrative for Mr. Gunter since under the ICC Rules,

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6 *See* Consol. Mot. to Vacate ¶¶ 11–16 (D.E. 55); Declaration of Nicolas Bouchardie ¶¶ 25–42 (D.E. 55-3) ("Bouchardie Decl.").

7 Consol. Mot. to Vacate 9–16 (D.E. 55).

8 Rules of Arbitration of the International Chamber of Commerce ("ICC Rules of Arbitration") (D.E. 55-10).

9 Conditions on Contract, Sub-Clause 20.6(a), (e), (f) (D.E. 55-8); Joint and Several Guarantee ("JSG"), Sub-Clause 9.2(a), (e), (f) (D.E. 55-9). The Movants and ACP also agreed that the seat of the arbitration would be Miami, Florida.

10 *Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1338 (11th Cir. 2002) (quoting *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 149 (1968)).

11 ICC Rules of Arbitration, art. 11(2) (D.E. 55-10) (emphasis added).

12 Bouchardie Decl. ¶ 53; Letter from Pierre-Yves Gunter to the Parties dated Oct. 29, 2020 (D.E. 55-46); *see also* Consol. Mot. to Vacate 10 (D.E. 55).

tribunal presidents can earn at a minimum six-figure fees in any given case, as the ICC compensation chart, appended hereto as **Annex 1**, demonstrates.[13] Even when Mr. Gunter acknowledged the connection—following Movants' disclosure requests—he again failed to disclose that the connection stemmed from Dr. Gaitskell nominating Mr. Gunter to a valuable post.[14] This valuable appointment also gave Dr. Gaitskell the opportunity for additional *ex parte* contact with Mr. Gunter.[15] The fact that Mr. Gunter and Dr. Gaitskell deny that they have discussed the instant case in the absence of the third arbitrator, Mr. von Wobeser, is irrelevant.[16] What matters is that this undisclosed appointment created an indebtedness by Mr. Gunter to Dr. Gaitskell for his support and gave them several opportunities to know each other, communicate, and express their views on procedural and substantive issues which could provide relevant insights into their deliberations.[17]

- Mr. Gunter currently sits in a separate arbitration with Prof. Hanotiau, who served as the tribunal president in the related Cofferdam Arbitration between the Parties.[18] Mr. Gunter and Prof. Hanotiau have each nominated the other as tribunal president in separate arbitrations, and have sat together on multiple arbitrations almost continuously since 2013 (the Cofferdam Arbitration was filed in December 2013).[19] Mr. Gunter was nominated as president of the Panama 1 arbitration in 2015 and failed to disclose this close ongoing relationship with Prof. Hanotiau. This relationship is especially concerning in light of the fact that Mr. Gunter and the other arbitrators were asked to address the preclusive effect of Prof. Hanotiau's majority award in the Cofferdam Arbitration, which was cited substantively in the Partial Award over 60 times,[20] and from which the Partial Award

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13 Consol. Mot. to Vacate 11, 12 (D.E. 55) (noting fee schedule for ICC arbitrators, which ranges from USD $3,000 to over $500,000). *See also* Schwebel Decl. ¶ 20 (describing Mr. Gunter's cross-appointment as "well compensated" and "likely resulting in hundreds of thousands of dollars (if not more) in income for Mr. Gunter").

14 Bouchardie Decl. ¶ 53; Letter from Pierre-Yves Gunter to the Parties dated Oct. 30, 2020 (D.E. 55-47); Consol. Mot. to Vacate 11–12 (D.E. 55).

15 Consol. Mot. to Vacate 11–12 (D.E. 55); Reply in Supp. of Consol. Mot. to Vacate ("Reply") Part II.

16 Resp. to Consol. Mot. to Vacate 14 (D.E. 57).

17 Second Giorgetti Decl. ¶ 81.

18 Bouchardie Decl. ¶ 55; Letter from Pierre-Yves Gunter to the Parties dated Oct. 23, 2020 (D.E. 55-35); Consol. Mot. to Vacate 12–13 (D.E. 55).

19 Bouchardie Decl. ¶ 55; Consol. Mot. to Vacate 12–13, 18 (D.E. 55).

20 Bouchardie Decl. ¶¶ 27–30; Consol. Mot. to Vacate 10–11 (D.E. 55).

imported several key findings.[21] Mr. Gunter failed to report this relationship at all at the time he was appointed.[22]

- Dr. Gaitskell was appointed by Mr. McMullen to sit in another arbitration, during the time Mr. McMullen served as lead counsel for ACP in the Panama 1 Arbitration.[23]
- Dr. Gaitskell chaired an ICC arbitration from July 2010 to July 2012 in which ACP's counsel, Mr. James Loftis, also sat as a party-appointed arbitrator.[24] Dr. Gaitskell failed to disclose this conflict at any point during the constitution of the Tribunals in the Cofferdam, Panama 1, or Panama 2 arbitrations, and only did so after multiple requests for further disclosures following the Panama 1 awards.[25]
- Dr. Gaitskell also refused to investigate any potential conflicts stemming from his membership in Keating Chambers,[26] despite the fact that conflict checks are "now common practice" for English barristers' chambers in international arbitrations.[27]
- The third arbitrator, Mr. von Wobeser, has been sitting with ACP's counsel Mr. Andrés Jana in a separate arbitration since July 2019—during the crucial period in the Panama 1 Arbitration when the closing oral arguments, post-hearing briefing, and tribunal deliberations occurred.[28] ACP's counsel thus was afforded an opportunity to communicate *ex parte* with Mr. von Wobeser under circumstances that would be completely unknowable by Movants—and Mr. von Wobeser did not notify Movants of this circumstance in advance.

The Arbitrators reluctantly—and only following Movants' repeated demands—disclosed such information *after* issuance of the Partial Award.

These composite circumstances leave no room to doubt that Movants were entitled to disclosure, that the arbitrators failed to provide disclosure, and that the nature of the undisclosed

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21 Bouchardie Decl. ¶¶ 15, 27; Consol. Mot. to Vacate 12 (D.E. 55) (noting finding regarding "diligence to be expected from bidders and the application of disclaimers of liability" was imported to the Partial Award from the Cofferdam Arbitration majority award).

22 Mr. Gunter's Statement of acceptance, availability, impartiality and independence in ICC Case No. 20911 (D.E. 55-17); Mr. Gunter's Statement of acceptance, availability, impartiality and independence in ICC Case No. 20910 (D.E. 55-18).

23 Bouchardie Decl. ¶ 66.

24 Email from Robert Gaitskell QC to the Parties dated Oct. 29, 2020 (D.E. 55-45).

25 Email from Robert Gaitskell QC to the Parties dated Oct. 29, 2020 (D.E. 55-45).

26 Bouchardie Decl. ¶ 34.

27 Consol. Mot. to Vacate 14 (D.E. 55).

28 Bouchardie Decl. ¶ 73; Email from Claus von Wobeser to the Parties dated Oct. 28, 2020 (D.E. 55-35); *see also* Consol. Mot. to Vacate 15–16 (D.E. 55).

facts justify vacating (and not confirming) the Awards because they show that "the arbitrator[s] [knew] of, but fail[ed] to disclose, information which would *lead a reasonable person to believe that a potential conflict exists*."[29]

In contending that the Awards should be confirmed, ACP misapprehends and mischaracterizes the standard for finding evident partiality, which does not require a showing of actual partiality of the arbitrators.[30] As noted above, the Court need only determine whether there are circumstances that would lead a reasonable person to believe that a *potential* conflict exists,[31] and that the opportunity for partiality was "direct, definite, and *capable* of demonstration."[32] Movants have fully satisfied this burden, particularly in light of the arbitrators' letters to the ICC,[33] Movants' challenge letters before the ICC,[34] and the information detailed in the declarations of Mr. Nicolas Bouchardie.[35]

Additionally, Movants also have demonstrated that the arbitrators' bias was manifested in key aspects of the Awards, including in the fact that the Tribunal relied on reasoning not advanced by the parties—and to which they therefore had no opportunity to respond. The Tribunal further ignored extensive arguments and evidence by the Parties, reached unsupported conclusions for which it failed to state reasons, and simply copied large parts of its decision from the prior Cofferdam Arbitration majority award adjudicated between the Parties by a different tribunal and based on different facts.[36] The one overlapping member of both the Cofferdam arbitration and subsequent related Tribunals in fact is the one who failed to timely disclose his relationships with

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29 *Gianelli Money Purchase Plan & Tr. v. ADM Inv'r Servs., Inc.*, 146 F.3d 1309, 1312 (11th Cir. 1998) (emphasis added); *see also Mendel v. Morgan Keegan & Co.*, 654 F. App'x 1001, 1003 (11th Cir. 2016) (per curiam) (citing *Gianelli*, 146 F.3d at 1312) (quoting same).

30 Consol. Cross-Mot. to Confirm 11 (D.E. 58); *see also* Resp. to Consol. Mot. to Vacate 2, 13–14, 18 (D.E. 57).

31 *Gianelli Money*, 146 F.3d at 1312.

32 *Id.* at 1312 (emphasis added).

33 *See* Letters dated Nov. 12, 2020 from Pierre-Yves Gunter, Robert Gaitskell QC and Claus von Wobeser to the ICC Secretariat (D.E. 55-54, 55-55, 55-56).

34 *See* ICC Challenge Application in ICC Case No. 20910/ASM/JPA (C-20911/ASM) ("ICC Challenge App. 20910") (D.E. 55-43); ICC Challenge Application in ICC Case No. 22466/ASM/JPA (C-22967/ASM) ("ICC Challenge App. 22466") (D.E. 55-44).

35 *See* Bouchardie Decl. ¶¶ 50–73 (D.E. 55-3) (describing in detail the arbitrators' undisclosed overlapping connections in separate arbitrations and appointments to "remunerative tribunal positions"); *see also* Second Bouchardie Decl. ¶¶ 2–7. Notably, the ICC Court in its decision on Movants' challenge found that the arbitrators violated their disclosure obligations. ICC Statement of Reasons, at 7, 9, 10 (D.E. 55-62).

36 Consol. Mot. to Vacate 23–29 (D.E. 55). The Tribunal acknowledged that the Cofferdam Arbitration majority award was not binding, but notably was decided *inter alia* by one of the arbitrators, who failed to disclose that he was repeatedly sitting with two of the Cofferdam tribunal members. *Id.* at 29.

ACP's counsel, Mr. Loftis and Mr. McMullen, and the Tribunal President, Mr. Gunter. Through these failures, the Tribunal deprived Movants of due process and the opportunity to be heard, failed to state reasons, and exceeded its authority, all of which constitute separate and independent grounds for refusing confirmation of the Awards under Articles V(1)(b), V(1)(c), and V(1)(d) of the New York Convention.[37] ACP's mischaracterizations of the findings in the Awards on these points are of no avail.

In any event, ACP's motion to confirm and enforce the Awards should be summarily denied as moot. Given that ACP does not dispute that both Awards have been satisfied in full and Movants currently do not owe any payments to ACP,[38] ACP's motion serves little purpose beyond an attempt by them to obtain a litigation advantage by having the final word in Movants' vacatur proceeding.

For these reasons, and those set forth in Movants' Consolidated Motion to Vacate and Reply in Support of the Consolidated Motion to Vacate ("Reply"), as well as the first and second expert opinions of Profs. Coe and Giorgetti, the first and second declarations of Mr. Bouchardie, and the expert opinion of Judge Schwebel, which are all expressly incorporated herein, the Court should deny confirmation of the Awards.

ARGUMENT

I. CONFIRMATION SHOULD BE REFUSED UNDER ARTICLE V(2)(B) OF THE NEW YORK CONVENTION BECAUSE RECOGNITION OF THE AWARDS, TAINTED AS THEY WERE BY EVIDENT PARTIALITY, IS CONTRARY TO U.S. PUBLIC POLICY

A. The Court Has a Duty to Scrutinize the Awards Under the New York Convention and the FAA

As detailed in Movants' Consolidated Motion to Vacate and Reply, the Court should deny confirmation of the Awards in light of the fundamental flaws in the Awards and the arbitrators'

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[37] *See* New York Convention, art. V(1)(b) ("Recognition and enforcement of the award may be refused . . . [if] The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case."); New York Convention, art. V(1)(c) ("Recognition and enforcement of the award may be refused . . . [if] the award deals with a different not contemplated or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration . . ."); New York Convention art. V(1)(d) ("Recognition and enforcement of the award may be refused . . . [if] the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.").

[38] Second Bouchardie Decl. ¶ 38; *see also* Declaration of Nicholas Henchie ¶ 240 (D.E. 57-1).

repeated failure to disclose multiple inter-relationships that would cast doubt as to their independence and impartiality in the eyes of any reasonable person.[39] Under both the New York Convention and the FAA, courts have a duty to assess whether grounds for vacatur exist before confirming an award.[40] The degree of judicial deference owed to an arbitral tribunal "does not grant carte blanche approval" to every arbitral award.[41]

In particular, contrary to ACP's contentions, the pro-enforcement "bias" of the New York Convention is not intended to deprive national courts of their essential role of providing a "vital safety net" against "denial[s] of justice in the course of international arbitration," and ensuring that arbitral proceedings are "fairly administered."[42] Domestic courts promote arbitration by ensuring its integrity. Where vacatur is warranted, courts are expected to deny confirmation, particularly where necessary to "safeguard the basic rights of the losing party,"[43] and where the public policy of the country where enforcement is sought is implicated.[44]

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39 Consol. Mot. to Vacate 20–23 (D.E. 55); Reply Part II.

40 *See* 9 U.S.C. § 9 ("[A]ny party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order *unless the award is vacated*, modified, or corrected as prescribed in sections 10 and 11 of this title.") (emphasis added); 9 U.S.C. § 207 (referring to awards governed by the New York Convention) ("The court shall confirm the award *unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award* specified in the said Convention.") (emphasis added). *See also Univ. Commons*, 304 F.3d at 1342–43 (criticizing district court for summarily confirming award without conducting discovery and a proper evidentiary inquiry into an arbitrator's partiality); *Health Services Management Corp. v. Hughes*, 975 F.2d 1253, 1258–59 (7th Cir. 1992) (explaining that in deciding whether to confirm or vacate an arbitral award, the court must adequately consider the parties' allegations on the record as to an arbitrator's partiality).

41 *Universidad Interamericana v. Dean Witter Reynolds, Inc.*, 208 F. Supp. 2d 151, 153 (D.P.R. 2002) (quoting *Challenger Caribbean Corp. v. Union Gen. de Trabajadores*, 903 F.2d 857, 861 (1st Cir. 1990)).

42 Marike Paulsson, Chapter 1: Essential Features, *in The 1958 New York Convention in Action* 13–14 (2016).

43 Schwebel Decl. ¶ 23 (quoting Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires* – Comments on Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, U.N. Doc. E/Conf.26/2, Note by the Secretary General, at 5 (Mar. 6, 1958)).

44 *See Polimaster Ltd. v. RAE Sys.*, 623 F.3d 832, 841, 843 (9th Cir. 2010) (refusing to confirm award where appellant had "established a defense" under Article V of the New York Convention, and finding that neither the "federal policy favoring arbitration" nor the "enforcement-facilitating thrust of the Convention" justified a contrary result); *Changzhou AMEC Eastern Tools & Equip. CP., Ltd. v. Eastern Tools & Equip., Inc.*, No. EDCV 11-00354 VAP, 2012 U.S. Dist. LEXIS 106967, at *60 (C.D. Cal. July 30, 2012) ("The Convention does not mandate categorical confirmation of awards; rather, the Article V(2) defenses contemplate courts will consider domestic laws in confirming an award."). ACP's own expert has acknowledged that confirmation of an award is not appropriate where there are public policy grounds to vacate the award. *See* Gary B. Born, Chapter 26: Recognition and Enforcement of International Arbitral Awards, *in International Commercial Arbitration* 3746 (3d ed.

B. Evident Partiality of the Tribunal is a Ground for Denying Confirmation of the Awards Under the New York Convention

As Movants have established, a court may refuse to confirm an award under Article V(2)(b) of the New York Convention if recognition of the award "would be contrary to the public policy" of the country where enforcement is being sought.[45] While the "evident partiality" nomenclature is derived from the bases for vacatur under Section 10(a) of the FAA, it *also* constitutes a "public policy" that applies as a basis for non-recognition of awards under Article V(2)(b) of the New York Convention.[46] "Evident partiality" of the arbitrator is a sufficiently "defined and dominant" public policy that "violate[s] the forum state's most basic notions of morality and justice."[47] ACP's attempt to dispute this point is incorrect.[48]

First, evident partiality is an explicit public policy as it is codified in U.S. law in Section 10(a) of the FAA as a ground for declining to recognize a domestic award.[49] This provision applies to this dispute because it is part of the applicable law of the Parties' chosen seat and part of the arbitration clause itself.[50] Thus, ACP's suggestion that "Movants do not even try to show [a public policy] 'by reference to the laws and legal precedents'"[51] is simply incorrect.

Second, the public policy against evident partiality has been extensively developed in the "laws and legal precedents" of this Circuit and others.[52] Because the arbitration was seated in the United States and the FAA applies to the Parties' dispute,[53] relevant FAA precedent applies here.[54] In fact, courts previously have accepted the impression of arbitrator bias—including by failure to disclose potential conflicts—as a public policy ground under the New York Convention. In *Commonwealth Coatings*, the Supreme Court held that "any tribunal permitted by law to try cases

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2021) ("[I]t is difficult to see how awards that violate applicable public policy (permitting non-recognition under Article V(2)(b)) could ordinarily be subject to discretionary recognition.").

45 New York Convention, art. V(2)(b); *see also* Consol. Mot. to Vacate 7–8 (D.E. 55); Reply Part I.

46 Consol. Mot. to Vacate 7–8 (D.E. 55); Reply Part I.

47 Resp. to Consol. Mot. to Vacate 10–11 (D.E. 58) (quoting *Cvoro v. Carnival Corp.*, 941 F.3d 487, 496 (11th Cir. 2019)). *See* Consol. Mot. to Vacate 7–8 (D.E. 55); Reply Part I.

48 Consol. Cross-Mot. to Confirm 10–11 (D.E. 58); Resp. to Consol. Mot. to Vacate 6–7 (D.E. 57).

49 9 U.S.C. § 10(a).

50 Conditions of Contract, Sub-Clause 20.6(a) (D.E. 55-8); Joint and Several Guarantee, Sub-Clauses 9.2(a), 9.2(f), 20.6(f) (D.E. 55-9).

51 Consol. Cross-Mot. to Confirm 10–11 (D.E. 58) (citing *Cvoro*, 941 F.3d at 496); Resp. to Consol. Mot. to Vacate 7 (D.E. 57) (same).

52 Reply Part I.

53 Conditions of Contract, Sub-Clause 20.6(a) (D.E. 55-8); Joint and Several Guarantee, Sub-Clauses 9.2(a), 9.2(f), 20.6(f) (D.E. 55-9).

54 Consol. Mot. to Vacate 7 (D.E. 55).

and controversies not only must be unbiased but also must avoid even the appearance of bias."[55] In *Transmarine*, a district court in turn explained that "the Supreme Court's elucidation of arbitral propriety in *Commonwealth Coatings* is a declaration of public policy" and that an award should not be enforced under Article V(2)(b) of the New York Convention if it would "offend the principles declared in that case and its progeny."[56] Similarly, in *Fitzroy*, the court acknowledged that arbitrator partiality can give rise to a public policy-based defense under Article V(2)(b) and noted that the policy against decision-maker partiality "lies at the heart of this nation's due process jurisprudence."[57]

Third, the Restatement (Third) of the U.S. Law of International Commercial & Investor-State Arbitration expressly recognizes that the grounds for vacatur under Section 10(a)(2) of the FAA "correspond with some applications of Articles V(1)(b), V(1)(d), and the public policy exception in Article V(2)(b) of the New York Convention."[58]

The unwillingness of courts to enforce arbitral awards that are the subject of evident partiality is, therefore, a "well-defined and dominant" public policy of the United States. Contrary to ACP's suggestions,[59] and as Movants explain in their Reply,[60] that public policy cannot be overcome by a general and ill-defined pro-enforcement "bias." The rule against enforcing awards tainted by evident partiality is "meant to be applied stringently" and, if anything, "even more scrupulous[ly]" when safeguarding the impartiality of arbitrators, since their decisions are not subject to appellate review.[61]

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55 *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150 (1968).

56 *Transmarine Seaways Corp. v. Marc Rich & Co. A.G.*, 480 F. Supp. 352, 357 (S.D.N.Y 1979).

57 *Fitzroy Eng'g v. Flame Eng'g*, No. 94 C 2029, 1994 U.S. Dist. LEXIS 17781, at *11 (N.D. Ill. Dec. 2, 1994).

58 Restatement (Third) of Int'l Commercial & Inv'r-State Arb ("Restatement of Arb.") (Am. Law Inst., Proposed Final Draft 2019) § 4.18, cmt. a; *see also* Restatement of Arb. § 4.9 cmt. a, Reporter's Note a (recognizing that "courts and commentators have tended to construe the grounds similarly" and that "the grounds . . . are in substance the same"); Expert Report of Jack J. Coe ("Coe Decl.") ¶ 33 (D.E. 55-2).

59 Consol. Cross-Mot. to Confirm 10–11 (D.E. 58); Resp. to Consol. Mot. to Vacate 5–6 (D.E. 57).

60 Reply Part I.

61 *Univ. Commons*, 304 F.3d 1331, 1338 (11th Cir. 2002) (quoting *Commonwealth*, 393 U.S. at 149). *See also Cont'l Ins. Co. v. Williams*, No. 84-2646-CIV-Marcus, 1986 U.S. Dist. LEXIS 20322, at *11 (S.D. Fla. Sept. 16, 1986) ("It is true that arbitrators cannot sever all their ties with the business world . . . but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review."), *aff'd*, 832 F.2d 1265 (11th Cir. 1987).

C. The Tribunal Displayed Evident Partiality Through its Failure to Disclose Potentially Material Conflicts of Interest

i. All Three Arbitrators Violated Their Disclosure Obligations

As Movants have established in their Consolidated Motion to Vacate,[62] the arbitrators in this case were subject to extensive disclosure obligations by virtue of the applicability of the ICC Rules, which are consistent with the broad and affirmative disclosure obligations within the practice of international arbitration.[63] The ICC Rules require arbitrators to disclose any facts or circumstances which may call into question an arbitrator's independence *in the eyes of the parties*.[64]

Despite this clear obligation, which the arbitrators acknowledged when signing their ICC statements of acceptance to serve impartially and independently,[65] all three arbitrators violated their disclosure obligations by failing to disclose *multiple* potential conflicts of interest that call their impartiality into question. Indeed, even the ICC Court found that they violated their duty to disclose.[66] Movants only obtained information about these conflicts after the Partial Award was rendered and after issuing multiple requests for further disclosures and clarifications.[67] Movants still do not know whether the disclosures are complete.[68]

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62 Consol. Mot. to Vacate 9, 18–19 (D.E. 55).

63 *See* ICC Rules of Arbitration, art. 11(2) (D.E. 55-10). *See also* Coe Decl. ¶¶ 18–31; Expert Report of Chiara Giorgetti ("Giorgetti Decl.") ¶¶ 19–25 (D.E. 55-1).

64 ICC Rules of Arbitration, art. 11(2) (D.E. 55-2) (requiring disclosure of "any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality.") (emphasis added); *see also* Consol. Mot. to Vacate 2, 18–19 (D.E. 55).

65 *See* Dr. Gaitskell's, Mr. von Wobeser's, and Mr. Gunter's Statements of acceptance, availability, impartiality and independence in ICC Case No. 20910 (D.E. 55-12, 55-14, 55-18); Dr. Gaitskell's, Mr. von Wobeser's, and Mr. Gunter's Statements of acceptance, availability, impartiality and independence in ICC Case No. 20911 (D.E. 55-15, 55-13, 55-17); Dr. Gaitskell's and Mr. Gunter's Statements of acceptance, availability, impartiality and independence in ICC Case No. 22466 (D.E. 55-19, 55-89); *see also* Coe Decl. ¶ 16 n.21 (citing Karel Daele, *Challenge and Disqualification of Arbitrators in International Arbitration* 55 (2012)) (stating that the ICC's statement-of-acceptance form requires that arbitrators "hav[e] made due inquiry" into potential conflicts of interest and that instructions on the form require that the disclosure be "complete and specific, identifying, *inter alia*, relevant dates (both start and end dates), financial arrangements, details of companies and individuals and all other relevant information").

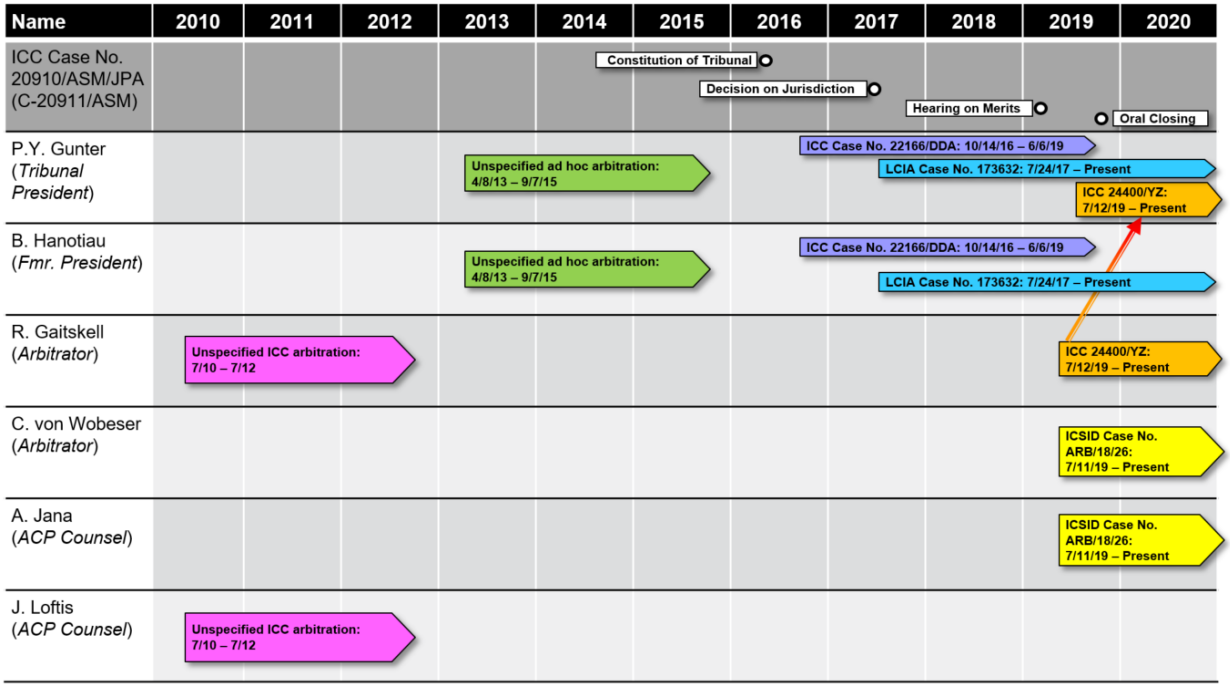
66 Statement of Reasons in ICC Case No. 20910/ASM/JPA (Dec. 29, 2020) ("ICC Statement of Reasons"), at 9, 10 (D.E. 55-62).

67 Bouchardie Decl. ¶¶ 28–30, 49–76; *see also* Consol. Mot to Vacate 5, 11–15 (D.E. 55); Reply Part II.

68 In fact, as Movants note in their Reply, the arbitrators have supplemented their disclosures as recently as September 4, 2021, opting to disclose significantly more remote potential conflicts than they did before being challenged, including at least one potential relationship between Dr. Gaitskell and Prof. Hanotiau to which Movants have objected. *See* Reply Part II (citing Second Bouchardie Decl. ¶¶ 2–6).

As noted in Movants' Consolidated Motion to Vacate,[69] and as the timeline below illustrates, these potential conflicts occurred during all key stages of the underlying arbitration, starting before the Tribunal's formation and extending into the Tribunal's deliberations:

Timeline of Undisclosed Appointments During the Pendency of the Panama 1 Arbitration



ACP misapprehends critical elements of the disclosure obligations of the arbitrators, their system for appointments, and the lucrative compensation available to them for such roles. ACP suggests, for instance, that Movants' arguments regarding the arbitrators' ability to receive lucrative financial incentives from repeated cross-appointments must fail because such appointments are not unilateral and can be vetoed by a co-arbitrator.[70] Further, ACP claims that such recurrent appointments, during the course of the underlying arbitration, do not warrant disclosure because they are not "particularly lucrative" or even "unusual."[71]

These arguments are incorrect. Arbitrators must fulfill the "simple requirement [to] disclose to the parties *any* dealing that might create an impression of possible bias," whether they arise at the outset or later in the arbitration.[72] Valuable cross-appointments in other tribunals,

69 Consol. Mot. to Vacate 17–18 (D.E. 55).
70 Resp. to Consol. Mot. to Vacate 14 (D.E. 57).
71 *Id.* (internal quotation marks omitted).
72 *Univ. Commons*, 304 F.3d at 1338 (emphasis added).

which are undeniably lucrative,[73] clearly warrant disclosure under this standard, as will be further discussed below.

ACP's expert is incorrect that the pool of qualified arbitrators is so small that non-disclosures of such relationships should be "expected" and accepted.[74] Such appointments have no place in modern international arbitration, and at least Mr. Gunter and Mr. von Wobeser are broadly engaged in international arbitration—not solely construction cases.[75] As Judge Schwebel, Movants' expert and former President of the International Court of Justice, explains, there are "far more than a few dozen arbitrators who have the experience and expertise to resolve a large construction dispute," and, in any event, the parties' desire for arbitrator expertise does not imply a surrender of impartiality.[76] To the contrary, as Movants explain in their Reply,[77] parties often choose international arbitration principally for the neutrality and impartiality it affords relative to one of the parties' "home" jurisdiction, and not for the arbitrators' expertise.[78] If anything, a small pool of available arbitrators would make disclosures even "more crucial given the increased opportunity for bias to occur."[79]

In addition, as Movants' experts have explained,[80] the practice of "double hatting," whereby arbitrators have "consistent and overlapping participation in arbitrations," has been increasingly criticized as creating a potential for bias, because it "raises concerns that an arbitrator may decide on, or appear to decide on, an issue in a way that benefits a party that they represent in another issue."[81] Repeat appointments raise similar concerns because a person who has been appointed repeatedly by the same party may develop an affinity, or a financial dependence, with that party and thus have an incentive to decide in its favor.[82] Because bias may be unconscious, this concern is particularly difficult to address.[83] In light of these concerns, disclosure of such

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73 *See* Consol. Mot. to Vacate 11, 12 (D.E. 55) (noting fee schedule for ICC arbitrators, which ranges from USD $3,000 to over $500,000); Schwebel Decl. ¶ 20 (describing Mr. Gunter's cross-appointment as "well compensated" and "likely resulting in hundreds of thousands of dollars (if not more) in income for Mr. Gunter").

74 *See* Expert Opinion of Gary Born ("Born Decl."), ¶¶ 22, 36–39 (D.E. 57-92); *see also* Resp. to Consol. Mot. to Vacate 13, 16–17 (D.E. 57).

75 Second Coe Decl. ¶¶ 64–65.

76 Schwebel Decl. ¶ 17.

77 Reply Part II.

78 Schwebel Decl., ¶ 16; Second Giorgetti Decl. ¶¶ 19–20, 83.

79 Second Giorgetti Decl. ¶ 83.

80 Consol. Mot. to Vacate 20–22 (D.E. 55) (quoting Coe Decl. ¶¶ 28–30; Giorgetti Decl. ¶¶ 22, 38).

81 Giorgetti Decl. ¶¶ 22, 38.

82 *Id.* at ¶ 38.

83 *Id.*

relationships is the minimum, most efficient solution, and it is in line with the arbitrators' obligations under the ICC Rules.[84]

Relying on *Belize Bank*, ACP attempts to minimize the impropriety of the arbitrators' failed disclosures by suggesting barristers are unable to investigate potential conflicts within their chambers.[85] ACP is incorrect. Arbitrators are encouraged to disclose relationships with other arbitrators or counsel who are members of the same chambers.[86] In addition, as Professor Giorgetti explains, even the ICC has held that under certain circumstances, a connection "between an arbitrator and another person connected to an arbitration through membership in the same British Chamber may lead to disqualification."[87] This is despite the fact that "barristers are formally self-employed and British Chambers do not have a collective legal entity" because of how "they are *perceived*, especially where the concept of Chambers is foreign[.]"[88]

In any event, Dr. Gaitskell was well aware of who appointed him and who was appearing before him in other arbitrations and, at a minimum, should have disclosed as much, as even the ICC Court agreed.[89] In fact, it was not until October 2020 that Dr. Gaitskell also disclosed that he had recently sat with ACP's counsel on a tribunal in a separate arbitration.[90]

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84 ACP's suggestion that confirmation of the Awards would be the most efficient solution due to the complexity and expense of the underlying arbitration (Consol. Cross-Mot. to Confirm 13–14 (D.E. 58)) is incompatible with the requirements of fairness. *See Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 470 (4th Cir. 1992) ("While the efficient administration of justice is always an important consideration, fundamental fairness to every litigant is an even greater concern."); *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1111 (9th Cir. 2007) (quoting *Commonwealth*, 393 U.S. at 152) ("While we are cognizant of the public interest in efficient and final arbitration, we believe that a rule encouraging 'arbitrators [to] err on the side of disclosure' is consistent with that interest.").

85 Consol. Cross-Motion to Confirm 12 (D.E. 58) (citing *Belize Bank Ltd. v. Gov't of Belize*, 852 F.3d 1107, 1112 (D.C. Cir. 2017)); *see also* Resp. to Consol. Mot. to Vacate 10–11 (D.E. 57).

86 Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (2016) ("ICC Practice Note") ¶ 28 (D.E. 57-112); International Bar Association Guidelines on Conflicts of Interest in International Arbitration ¶ 3.3.2 (D.E. 57-111) (doubts as to impartiality may exist when "[t]he arbitrator and another arbitrator, or the counsel for one of the parties, are members of the same barristers' chambers.").

87 Giorgetti Decl. ¶ 17 (citing ICC Case No. 16553/GZ, as reported by Maria Nicole Cleis, *The Independence and Impartiality of ICSID Arbitrators* 139 (2017)).

88 *Id.* (emphasis added).

89 ICC Statement of Reasons, at 9 (D.E. 55-62).

90 Email from Dr. Gaitskell to the Parties dated Oct. 29, 2020 (D.E. 55-45).

ii. The Arbitrators' Failures to Disclose Potential Conflicts Satisfy the Applicable Standard of Evident Partiality

"Evident partiality" exists where a party shows that "the arbitrator knows of, but fails to disclose, information which would lead a *reasonable person* to believe that a *potential conflict* exists."[91] Here, and as established in Movants' Consolidated Motion to Vacate and Reply,[92] the arbitrators' repeated failures to disclose significant potential conflicts are more than sufficient to establish evident partiality under this standard.[93] Since vacatur is warranted on these grounds, which are embodied in Article V of the New York Convention, confirmation and enforcement of the Awards should be denied.

Contrary to ACP's persistent assertions,[94] Movants are not required to show that the arbitrators were *actually* biased and breached their duties of confidentiality in order to establish evident partiality. The evident partiality test is met when the undisclosed conflicts and facts "create an impression of possible bias."[95]

Thus, in *Citigroup v. Berghorst*, the court there found the evident partiality standard had been satisfied where an arbitrator presided over an arbitration while failing to disclose he simultaneously was part of an *unrelated dispute* concerning similar subject matter.[96] The court took particular note of the fact that the conflict occurred "during the very time he was serving as an arbitrator in [the underlying] matter"[97] and that "[a]t a minimum, however, these facts at least demonstrate an appearance of partiality, which is all [plaintiff] must show to prevail because the

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91 *Gianelli Money*, 146 F.3d at 1312 (emphasis added); *see also Mendel*, 654 F. App'x at 1004 (per curiam) (citing *Gianelli*, 146 F.3d at 1312) (quoting same).

92 Consol. Mot. to Vacate 20–23 (D.E. 55); Reply Part II.

93 *See, e.g.*, *Univ. Commons*, 304 F.3d at 1338 (requiring disclosure of "any dealing that might create an impression of possible bias" (internal quotation marks omitted)); *Gianelli*, 146 F.3d at 1312 (noting that vacatur is appropriate where "the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists"); *FDIC v. IIG Capital, LLC*, No. 11-CIV-21783-UNGARO, 2011 WL 13223912, at *4 (S.D. Fla. Sept. 27, 2011) (requiring "showing of pecuniary interest on the part of the arbitrator or some other fact to suggest bias" for vacatur). *See also* Schwebel Decl. ¶ 22.

94 Consol. Cross-Mot. to Confirm 11 (D.E. 58); *see also* Resp. to Consol. Mot. to Vacate 2, 13–14, 18 (D.E. 57).

95 *Univ. Commons*, 304 F.3d at 1338 (internal citations omitted); *see also* Consol. Mot. to Vacate 8–9 (D.E. 55); Reply Part II; Schwebel Decl. ¶ 25 (concluding that even in an objective review, the parties do not need to prove that the arbitrators "*in fact* were biased") (emphasis added); Giorgetti Decl. ¶ 28 (explaining that under the U.S. standard for vacatur, the parties do not need to prove *actual bias*) (emphasis in original).

96 *Citigroup Global Mkts., Inc. v. Berghorst*, No. 11-80250-CIV-RYSKAMP/VITUNAC, 2012 U.S. Dist. LEXIS 76459, at *13–14 (S.D. Fla. Jan. 20, 2012).

97 *Id.* at *14.

integrity of the arbitral process depends on arbitrators not only being unbiased in fact but also avoid[ing] even the appearance of bias."[98]

In addition, this Court previously held that "[t]here is no bright-line rule as to whether an arbitrator creates a reasonable impression of bias if he or she knows of, but fails to disclose, certain information."[99] But, even though a court must take into account all unique facts and circumstances in this "fact-intensive, case-specific issue,"[100] "the irreducible minimum requirement . . . is full disclosure."[101] If there "is any doubt as to whether circumstances of which the arbitrator is aware might create an impression of partiality, [the arbitrator] should disclose those circumstances."[102]

As Professors Giorgetti and Coe emphasize in their reports, facts that "may give rise to an impression of bias" must be assessed from the perspective of the parties or a neutral observer, not that of the arbitrator.[103] Prof. Giorgetti explains that "[a] neutral observer would reasonably doubt the independence and impartiality of arbitrators who fail to disclose circumstances which, in the eyes of the parties, must be disclosed."[104] Thus, the fact that the arbitrator himself finds a potential conflict to be "unremarkable" or even "commonplace"[105] is irrelevant.[106] Arbitrators should always resolve any doubt on whether to disclose "in favor of disclosure,"[107] especially because arbitrators constantly overvalue their ability to be impartial.[108]

Here, the arbitrators' failure to disclose significant potential conflicts, their subsequent reticence to disclose despite multiple requests from Movants, and their further decision to decline to investigate them, notwithstanding their lucrative nature, creates a clear and objective impression of bias and "[a]t a minimum . . . demonstrate an appearance of partiality."[109] The potential for bias

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98 *Id.* (internal quotation marks omitted).

99 *Metro. Delivery Corp. v. Teamsters Local Union 769*, No. 19-22649-Civ-SCOLA/TORRES, 2019 U.S. Dist. LEXIS 133452, at *5–6 (S.D. Fla. Aug. 8, 2019).

100 *Id.* at *6.

101 *Cont'l Ins. Co. v. Williams*, 1986 U.S. Dist. LEXIS 20322, at *12.

102 *Fed. Vending, Inc. v. Steak & Ale of Fla., Inc.*, 71 F. Supp. 2d 1245, 1249 (S.D. Fla. 1999).

103 Giorgetti Decl. ¶ 29; Coe Decl. ¶ 27.

104 Second Giorgetti Decl. ¶ 72.

105 Resp. to Consol. Mot. to Vacate 12–13 (D.E. 57); Born Decl. ¶¶ 134–36.

106 Reply Part II.

107 Second Giorgetti Decl. ¶ 32 (citing ICC Practice Note).

108 *Id.* at ¶¶ 43–47 (explaining that, under the ICC Rules, "'the arbitrator is not the judge of his or her own independence and impartiality,'" especially because arbitrators "constantly overvalue their ability to be independent.").

109 *Berghorst*, 2012 U.S. Dist. LEXIS 76459, at *14; *see also* Second Giorgetti Decl. ¶ 69 ("The fact that the arbitrators failed to disclose multiple different circumstances over the course of the critical years of the underlying arbitration adds to the reasonableness of a conclusion that there is an impression of bias that would satisfy the *Gianelli* analysis in the Eleventh Circuit.").

in this case is particularly troublesome because the "financial remunerations and potential future financial incentives" an arbitrator receives from being repeatedly appointed by the same party, or securing a valuable cross-appointment from a co-arbitrator, may lead the adjudicator to "feel an obligation towards the appointing party to decide in a certain way, or [] may develop a financial dependence on a party and decide in a certain way to secure future appointments."[110] The potential for bias is enhanced when, as a result of cross-appointments, only two of the three arbitrators have several opportunities to communicate with each other and exchange views.[111] Finally, the fact that both Dr. Gaitskell and Mr. von Wobeser failed to disclose that they either previously or currently sit as an arbitrator with a member of ACP's counsel team constitutes yet another circumstance supporting the conclusion that a potential for bias clearly has been established in this case.[112]

Furthermore, the Eleventh Circuit Court of Appeals has held that if one arbitrator "partakes in a proceeding in which counsel for one of the parties to the arbitration is also participating" concurrently with the arbitration at issue, that connection creates an impression of bias requiring vacatur.[113] The concern of an impression of bias is "all the more reasonable" when arbitrators "fail[] to disclose [] several, cumulative instances of professional relationships" among themselves and with counsel during the crucial stages of the underlying arbitration, as was the case here.[114] As Judge Schwebel explains, "the cumulative effect of such failures to disclose only strengthens

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110 Giorgetti Decl. ¶¶ 27, 39.

111 Second Giorgetti Decl. ¶ 81; Reply Part II; *see also Schmitz v. Zilveti*, 20 F.3d 1043, 1049 (9th Cir. 1994) ("The arbitrators are not isolated from each other; they hear and decide the case as a panel after joint discussion, debate and deliberation. Each panel member has an opportunity to persuade the others. Thus, notwithstanding a majority of an arbitration panel is required to enter any arbitration award, when one arbitrator is evidently partial, the panel's award must generally be suspect.") (internal citation and quotation marks omitted).

112 Email from Robert Gaitskell QC to the Parties dated Oct. 29, 2020 (D.E. 55-45); Email from Claus von Wobeser to the Parties dated Oct. 28, 2020 (D.E. 55-35); Second Coe Decl. ¶ 11 ("Under the ICC rules as explained in the ICC Practice Note, this professional relationship between opposing counsel and an arbitrator by itself should have been disclosed to Movants . . . This circumstance also reinforces the cumulative effect [of the non-disclosures.]"); Second Giorgetti Decl. ¶¶ 54–56.

113 *Univ. Commons*, 304 F.3d at 1340.

114 Second Giorgetti Decl. ¶ 58; *see also Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1200, 1202 (11th Cir. 1982) (affirming district court's conclusion that the "cumulative effect" of the evidence indicated that an arbitrator's potential conflicts should have been disclosed, and that the arbitrator's "repeated and significant" business dealings with one of the parties justified vacatur) (internal quotation marks omitted); *United States v. International Bhd. of Teamsters*, 814 F. Supp. 1165, 1172 (citing *Commonwealth*, 393 U.S. at 150–51 (White, J., concurring); *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Ben. Funds*, 748 F.2d 79, 84 (2d Cir. 1984)) ("[C]ourts should consider the totality of the circumstances in deciding the existence of evident partiality."); *A&A Farms, LLC v. Rural Cmty. Ins. Servs.*, No. 88 CIV. 4486 (DNE), 2015 U.S. Dist. LEXIS 95323, at *14–15 (D. Kan. Feb. 9, 1993) (same).

the objective appearance of a lack of independence and impartiality."[115]

A reasonable impression of bias is also all the more justified here in light of the fact that the arbitrators' failures to disclose actively deprived Movants' of an opportunity to object to the arbitrators' service in the Tribunal.[116] Indeed, the CEOs of all three Movants filed a letter affirming that had they received the arbitrators' disclosures outlined above in time, they would have objected to the arbitrators' appointment.[117] Accordingly, when Movants learned of these multiple cross-appointments and inter-relationships, they filed challenges with the ICC regarding the arbitrators' continued sitting to decide the disputes, and Movants sought their removal as arbitrators.[118]

ACP cites to *Levy* and *Boll* to argue that the arbitrators did not have to disclose their potential conflicts, and that these potential conflicts do not create an impression of bias.[119] But as Movants elaborate in their Reply, these cases are distinguishable and irrelevant precisely because they deal with situations in which a petitioner had prior knowledge of the potential conflicts at issue before the award was rendered—unlike Movants, who were deprived of a meaningful opportunity to object to the appointment of the arbitrators due to their untimely and incomplete disclosures.[120] ACP's reliance on these cases shows that it fundamentally misapprehends the importance of the Tribunal's continuing obligation of disclosure—in advance of any award—to avoid the appearance of bias. ACP emphasizes "speculation,"[121] but in fact is merely attempting to distract from the Tribunal's failure to satisfy straightforward disclosure requirements in self-serving circumstances that call into serious question the arbitrators' impartiality. For these reasons, the Awards should be denied confirmation and vacated.

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[115] Schwebel Decl. ¶ 22; *see also* Second Coe Decl. ¶ 9 ("[S]everal instances of under-disclosure or non-disclosure by an arbitrator . . . as to concurrent professional relationships can combine to engender legitimate doubts concerning an arbitrator's independence and impartiality."); Giorgetti Decl. ¶ 42 ("[T]he initial failure to disclose these facts, followed by reticence to disclose details of these issues when requested, creates a cumulative and reinforcing effect that gives rise to a reasonable impression of bias. . . . [T]here is no need to prove actual bias: reasonable doubt as to an arbitrator's impartiality assessed by an objective third party is sufficient.").

[116] Reply Part II.

[117] Bouchardie Decl. ¶ 61; Letter from Sacyr, Webuild, and Jan De Nul to the ICC dated Nov. 12, 2020 (D.E. 55-57).

[118] ICC Challenge App. 20910 (D.E. 55-58); ICC Challenge App. 22466 (D.E. 55-44).

[119] Resp. to Consol. Mot. to Vacate 15–16 (D.E. 57) (citing *Levy v. Citigroup Global Mkts.*, No. 06-21802-CIV-UNGARO, 2006 U.S. Dist. LEXIS 115358, at *15–16 (S.D. Fla. Oct. 16, 2006); *Boll v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 04-80031-CIV-PAINE/JOHNSON, 2004 U.S. Dist. LEXIS 27948, at *15 (S.D. Fla. June 25, 2004)).

[120] Reply Part II.

[121] Consol. Cross-Mot. to Confirm 11 (D.E. 58); Resp. to Consol. Mot. to Vacate 1–2 , 8, 14, 18 (D.E. 57).

Finally, because the evident partiality standard requires only an impression of possible bias, and not a showing of actual bias, ACP's argument that this Court should rely on the ICC Court's rejection of Movants' challenge to the arbitrators is mistaken.[122] As Movants explained in their Consolidated Motion to Vacate and Reply,[123] the ICC Court's decision is lacking in reasoning, is not binding on this Court and, in any event, appears to have applied the more exacting test of whether an arbitrator's failure to make disclosure gave rise to "reasonable doubt" as to the *actual* independence of the arbitrator.[124] In addition, and most fundamentally, the ICC Court was applying the standard for arbitrator disqualification, and not the evident partiality standard for vacatur that is set out in the FAA and which applies to this dispute by virtue of the parties' contract and their choice to have Miami, Florida as the seat of the arbitration.[125]

ACP also fails to recognize that the ICC Court, while reaching the wrong decision on removal, still confirmed many of Movants' allegations. To illustrate:

- The ICC Court acknowledged that Mr. Gunter and Mr. Hanotiau serving as co-arbitrators in unrelated cases "created a theoretical opportunity for them to discuss issues relevant to the Panama Canal arbitrations."[126]
- The ICC Court also found that Dr. Gaitskell should have disclosed the fact that he was sitting as president of an arbitral tribunal in another case where Manus McMullan QC of Atkin Chambers—a member of ACP's counsel team—acts for one of the parties.[127]
- The ICC Court agreed with Movants that Mr. von Wobeser should have disclosed the fact

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122 Resp. to Consol. Mot. to Vacate 9–10, 13, 19–20 (D.E. 57).

123 Consol. Mot. to Vacate 16–17 (D.E. 55); Reply Part II.

124 ICC Statement of Reasons, at 7 (D.E. 55-62). *See also* Second Coe Decl. ¶¶ 28–30 ("[T]he ICC Court was not purporting to apply the FAA in general, let alone the specific evident partiality jurisprudence developed by the courts of the seat."); Second Giorgetti Decl. ¶¶ 70–71 ("ICC Court applied a different standard than is applicable here [and] gave no consideration to the applicable vacatur standard under U.S. law").

125 Conditions on Contract, Sub-Clause 20.6(a), (e), (f) (D.E. 55-8); JSG, Sub-Clause 9.2(a), (e), (f) (D.E. 55-9); *see generally* ICC Statement of Reasons (D.E. 55-62). ACP and its expert cite *Belize Bank Ltd. v. Gov't of Belize*, 191 F. Supp. 3d 26 (D.D.C. 2016), to argue that courts afford "substantial weight to arbitral institution decisions in challenge proceedings," particularly where the parties adopt a specific arbitral institution's rules in their agreement. Resp. to Consol. Mot. to Vacate 10 (D.E. 57); Born Decl. ¶ 169. Here, however, the Parties also chose ICC arbitration *seated in Miami*, and the effect is that this Circuit's standard for vacatur—and not the ICC standard for arbitrator disqualification—applies here. To the extent there is any issue of overlap with the ICC Court decision that should be afforded weight, it is the ICC Court's findings, noted below, confirming that each of the arbitrators failed to make the disclosures they were required under the ICC Rules to make.

126 ICC Statement of Reasons, at 7 (D.E. 55-62).

127 *Id.* at 9.

that he was sitting as arbitrator in a separate case alongside ACP's counsel.[128] Thus, the ICC Court's ultimate conclusion is not dispositive and its factual findings actually support Movants' contention that the arbitrators should have disclosed *all* potential conflicts.[129]

Indeed, given the sequence of letters requesting disclosure,[130] and the superficial, but nonetheless condemning, response letters from the arbitrators,[131] Movants—and this Court—cannot be certain that they have a complete record of the arbitrators' potential conflicts. Even on this limited record, however, Movants have demonstrated that the evident partiality ground for vacatur under the FAA has been met and confirmation should be denied. Appropriate disclosures are essential to ensure the "integrity of international arbitration," and it "ultimately falls to courts to address this issue and to ensure that independence and impartiality—and the appearance thereof—are preserved."[132]

D. The Substance of the Awards Demonstrates the Effect of the Tribunal's Evident Partiality

As Movants demonstrated in their Consolidated Motion to Vacate, the Tribunal's appearance of bias is reflected in the Awards themselves.[133] The Tribunal drew conclusions based on its own *sua sponte* reasoning that neither of the Parties ever raised or had an opportunity to respond to. And it failed to justify its decision with the degree of reasoning that the Parties' arbitration agreement required. These failings further demonstrate that the Tribunal's evident partiality compels denial of confirmation of the Awards under Article V of the New York Convention.

ACP attempts to rebut Movants' arguments by misstating the applicable legal standards, mischaracterizing Movants' arguments as objections to the merits, and misidentifying the defective portions of the Awards as *dicta*.[134] None of these arguments, however, refutes what Movants have already shown.

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[128] *Id.* at 10.

[129] As explained in Movants' Reply, the ICC Court's decision is of "limited usefulness" because it appeared to require evidence that the arbitrators "actually met and discussed separately," while U.S. law only requires that there is a *possibility* thereof in the eyes of a reasonable person. Reply Part II; Giorgetti Decl. ¶¶ 32–35; Second Giorgetti Decl. ¶¶ 71–72.

[130] Bouchardie Decl. ¶ 30 (attaching letters to the arbitrators (D.E. 55-24, 55-25, 55-26)).

[131] Bouchardie Decl. ¶ 33 (attaching letters from arbitrators (D.E. 55-35, 55-36, 55-37)).

[132] Schwebel Decl. ¶¶ 21, 23.

[133] Consol. Mot. to Vacate 23–29 (D.E. 55).

[134] Resp. to Consol. Mot. to Vacate 20–29 (D.E. 57).

i. Movants Did Not Have an Opportunity to Respond to the Tribunal's Interpretation of Paragraph 1.07.D.1

Movants and their declarant Mr. Bouchardie have shown that the Tribunal's decision on a central issue in dispute between the Parties rests on arguments neither of the Parties raised or had an opportunity to discuss during the whole length of the Panama 1 Arbitration, and that it is inadequately explained in the Awards.[135] That issue—which the Tribunal called "central to the Parties' dispute"[136] and which ACP itself has said concerned an "important" provision of the Parties' contract[137]—was whether paragraph 1.07.D.1 of section 01 50 00 of the Employer's Requirements constituted a disclaimer of ACP's liability for the unsuitability of certain basalt rock found near the Project ("PLE Basalt") for the production of "concrete aggregates" that were to be used in the Project.[138] Movants had argued during the Panama 1 Arbitration that the disclaimer covered only the aggregate produced from the PLE Basalt. ACP, as Mr. Bouchardie notes, "does not seriously dispute that the Tribunal found the literal terms of the disclaimer to apply only to the aggregate, and not to the basalt itself.[139]

For example, as Movants demonstrated in their Consolidated Motion to Vacate,[140] the Tribunal stated that the disclaimer in paragraph 1.07.D.1 applied both to PLE Basalt *and* to aggregate on the basis of arguments the Parties had never raised. The Tribunal relied in particular on an analysis of paragraph 1.07.D.1 that first divided the disclaimer into three separate elements ("adequacy," "meet[ing] the requirements for the Contractor's proposed design," and "suitab[ility] for the Works") and concluded the first and third elements of the disclaimer covered PLE Basalt, whereas the second element concerned aggregate.[141] The Tribunal also relied on evidence of the questions and answers exchanged at a pre-tender question-and-answer session and concluded it showed the Parties' intention for paragraph 1.07.D.1 to cover both PLE Basalt and aggregate.[142] Importantly, the Tribunal relied on these pre-contractual questions and answers

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135 Consol. Mot. to Vacate 25–28 (D.E. 55).

136 Partial Award in ICC Case No. 20910/ASM/JPA (C-20911/ASM) ("Partial Award") ¶ 919 (D.E. 55-5, 55-6).

137 ACP's Statement of Rejoinder ¶ 2.57(a) (D.E. 55-76) ("This part of the Employer's Requirements is important.").

138 Second Bouchardie Decl. ¶ 9.

139 Second Bouchardie Decl. ¶ 10.

140 Consol. Mot. to Vacate 26–27 (D.E. 55).

141 Partial Award, ¶ 931; *see also* Second Bouchardie Decl. ¶ 12.

142 Partial Award ¶¶ 931, 934–35; *see also* Consol. Mot. to Vacate 26–27 (D.E. 55); Second Bouchardie Decl. ¶¶ 19–20.

notwithstanding the Parties' consensus—and the Tribunal's agreement with that consensus—that the Tribunal should apply a literal interpretation to paragraph 1.07.D.1, without regard to extrinsic evidence. The Tribunal gave no explanation for its departure from that consensus.[143]

ACP, however, insists that this did not deny Movants an opportunity to be heard. In ACP's view, the Tribunal's conclusion was consistent with the "three points" on which ACP based its interpretation of paragraph 1.07.D.1—the text of paragraph 1.07.D.1; paragraph 1.07.D.1's agreement "with the Contract's overall risk allocation;" and "the Contractor's (Movants') own statements during Referral 11 interpreting 1.07 D.1," which according to ACP "essentially agreed with the ACP's interpretation."[144] ACP also denies any consensus between the Parties that paragraph 1.07.D.1 should be interpreted according to its plain meaning.[145] Alternatively, ACP argues that the Tribunal's interpretation of paragraph 1.07.D.1 was *obiter dictum*, rendering any procedural violation harmless.[146]

These arguments are baseless. While ACP insists that the Tribunal based its interpretation of paragraph 1.07.D.1 in part on the "text" of the provision, it does not deny that neither Party ever raised, or had any opportunity to discuss, the three-part analysis of the paragraph adopted by the Tribunal. As Mr. Bouchardie explains, "the Tribunal's conclusion that the disclaimer referred only to aggregate, but then further concluding that the disclaimer also referred to the PLE Basalt, remains unexplained and unsupported."[147] The Tribunal thus devised an interpretation of one of the most crucial and heavily litigated contractual provisions in a six-year arbitration that the Parties *never had any opportunity* to see or discuss before the Awards were rendered.

Similarly, ACP also does not deny that it never proffered evidence from the pre-contractual question-and-answer session in support of its interpretation of paragraph 1.07.D.1 as a disclaimer covering both PLE Basalt and aggregate. ACP instead misleadingly insists that Movants "agreed with the ACP's interpretation" in a pleading submitted during a pre-arbitration dispute resolution

[143] Consol. Mot. to Vacate 26–27 (D.E. 55); Second Bouchardie Decl. ¶ 20.
[144] Resp. to Consol. Mot. to Vacate 24 (D.E. 57); *see also* Second Bouchardie Decl. ¶¶ 21–24.
[145] Resp. to Consol. Mot. to Vacate 24–25 (D.E. 57).
[146] *Id.* at 27; Second Bouchardie Decl. ¶¶ 25–26.
[147] Second Bouchardie Decl. ¶ 11.

process.[148] This assertion is disingenuous and unresponsive. Movants unambiguously argued that they understood paragraph 1.07.D.1 to cover aggregate *but not* PLE Basalt.[149]

Moreover, ACP cannot refute Movants' argument that the Tribunal first formed a literal interpretation of the provision before, without explanation, completely changing such interpretation. Given the crucial nature of paragraph 1.07.D.1, the Tribunal's failure to justify its reasoning on this central issue constitutes a plain violation of the duty to render a reasoned award.[150]

Consequently, the Tribunal's decision regarding paragraph 1.07.D.1 was by no means *obiter dictum*, as ACP insists. The holding cannot be *dictum* because the Tribunal itself indicated *it was relying* on its interpretation of paragraph 1.07.D.1 when it rejected two of Movants' grounds for their concrete aggregate production claim.[151]

ii. The Tribunal Imposed its Own View of Prudent Industry Practices and Ignored Arguments Made by Both Parties

Movants also demonstrated that the Tribunal imposed its own view of Prudent Industry Practices based on a biased and incomplete analysis of the evidence—plainly ignoring crucial arguments made by Movants.[152] In so doing, the Tribunal relied on positions not advanced by ACP's experts or by anyone else.[153] Again, the Tribunal decided a key issue based on interpretations that it conjured itself, without giving Movants any chance to respond to such points.

ACP asserts that Movants' allegation is based on *dicta*, because Movants brought their claim under sub-clause 1.9.4 of the Employer's Requirements. Sub-clause 1.9.4, however, provides Movants a remedy for costs incurred during the Project—but *only if* those costs were caused by an error in the Employer's Requirements that Movants could not have discovered by using Prudent Industry Practices. Further, ACP asserts that Movants are seeking to rehash

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148 *Id.* at 24.

149 *See, e.g.*, Contractor's Reply to Employer's RSOC for Referral No. 11 to the DAB with Respect to Claim No. 43 ¶ 68 (D.E. 57-39) (giving its interpretation of paragraph 1.07.D.1); *see also* Second Bouchardie Decl. ¶¶ 22–23.

150 Movants also continue to press their claim that by so drastically departing from the literal sense of paragraph 1.07.D.1, the Tribunal failed to apply norms that could reasonably be characterized as Panamanian law and in so doing exceeded its authority in a manner requiring vacatur of the Awards under Article V(1)(c) of the New York Convention. *See* Consol. Mot. to Vacate 27 n.135 (D.E. 55).

151 Partial Award ¶¶ 1097–98, n.979 (discussing Movants' claim of breach of the duty to inform); *id.* ¶ 1121 (discussing Movants' claim of breach of the duty to act in good faith); *see* Second Bouchardie Decl. ¶ 26.

152 *See* Second Bouchardie Decl. ¶¶ 27–28.

153 Consol. Mot. to Vacate 28 (D.E. 55); Second Bouchardie Decl. ¶ 28.

evaluation of evidence on vacatur, because Prudent Industry Practices were covered in ACP's experts' report.[154]

ACP's arguments are meritless. Far from being *dicta*, Movants' allegations concern a key part of the Tribunal's reasoning. As ACP concedes, Movants' case was indeed for breach of sub-clause 1.9.4 of the Employer's Requirements because of errors in the Employer's Requirements. The Tribunal agreed that it "must first determine whether any of the referenced language [in the Employer's Requirements] indeed contains an error."[155] The Tribunal left open the possibility that such errors could exist, but effectively deemed them harmless based on an interpretation of Prudent Industry Practices that ACP did not argue. It stated: "[T]he Tribunal considers that such error would have been discoverable by an experienced contractor exercising Prudent Industry Practices, as further explained below."[156]

If Movants had been given the opportunity to rebut the Tribunal's *sua sponte* misinterpretation of Prudent Industry Practices,[157] they would have been in a position to establish material error in sub-clause 1.9.4 of the Employer's Requirements. Furthermore, Movants are not seeking to re-evaluate evidence—rather, Movants have shown that they did not have an opportunity to respond to the Tribunal's own interpretation of Prudent Industry Practices, which was not to be found anywhere in the evidence or the record until the Awards were rendered.

iii. Movants Did Not Have an Opportunity to Respond to the Tribunal's Decision Related to C.A.N.A.L.

Movants also demonstrate that the Tribunal adopted and imposed its own view of Prudent Industry Practices. In so doing the Tribunal, once again *sua sponte*, stated that C.A.N.A.L.'s higher bid price was more reasonable because C.A.N.A.L. had better appreciated the risks associated with the Project, such as the risks of unsuitability of PLE Basalt for aggregate production.[158]

ACP argues that Movants are "griping with the merits," that the Tribunal need not respond to every argument, and that the tenderer's bids had been extensively briefed, before baldly asserting that Movants' point did not matter to the Tribunal's reasoning in any event.[159]

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[154] Resp. to Consol. Mot. to Vacate 27–28 (D.E. 57).
[155] Partial Award ¶ 956.
[156] Partial Award ¶ 972.
[157] *See* Second Bouchardie Decl. ¶ 28.
[158] Consol. Mot. to Vacate 28–29 (D.E. 55); Second Bouchardie Decl. ¶ 29.
[159] Resp. to Consol. Mot. to Vacate 28–29 (D.E. 57).

ACP's arguments are again not responsive. Movants are not "griping with the merits" as ACP contends. Movants are demonstrating that, yet again, the Tribunal fashioned its own interpretations to arrive at its conclusion.[160] This again deprived Movants of an opportunity to respond. Indeed, ACP's contention that "[t]he tenderers' bids were extensively briefed"[161] only strengthens Movants' position. Despite extensive briefing by both Parties, the Tribunal relied on a novel interpretation of the evidence made by neither party. ACP's contention that none of this mattered to the Tribunal's reasoning is baseless. This conclusion is in the Awards, and therefore, inherently part of the Tribunal's reasoning.[162]

iv. The Tribunal's Heavy Reliance on the Cofferdam Arbitration—a Separate Arbitral Proceeding—Ignores Movants' Evidence and Arguments

Movants previously observed that the Tribunal simply copied and pasted large portions of the Cofferdam Arbitration majority award and imported much of that majority's reasoning and conclusions.[163] In so doing, the Tribunal blatantly dismissed additional evidence and argumentation as to why the Cofferdam Arbitration majority award was wrong or irrelevant to the Panama 1 Arbitration.[164] The Tribunal simply ignored these arguments and failed to provide reasons for its decision.[165]

ACP does not deny the facts. Rather, ACP proclaims that the Tribunal decided issues put to it *de novo* because it stated that the findings of the Cofferdam Arbitration majority award "have some persuasive authority."[166] But ACP does not deny that the Tribunal simply copied and pasted large portions of the Cofferdam Arbitration majority award or that the Tribunal did so without any regard for the additional evidence and argumentation provided in the Panama 1 Arbitration. Such blind reliance on a non-binding source by the Tribunal does not amount to providing reasons, further demonstrating the effect of the arbitrators' evident partiality on the Awards.

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160 *See* Second Bouchardie Decl. ¶ 30.

161 Resp. to Consol. Mot. to Vacate 28 (D.E. 57).

162 Partial Award ¶ 1060.

163 Consol. Mot. to Vacate 29 (D.E. 55). The Cofferdam arbitration was decided by Dr. Gaitskell (who had undisclosed conflicts) and Prof. Hanotiau (who was simultaneously sitting—undisclosed—with Mr. Gunter) in the majority and Movants' arbitrator dissenting. Bouchardie Decl. ¶¶ 8–9.

164 Consol. Mot. to Vacate 29 (D.E. 55).

165 *Id.*

166 Resp. to Consol. Mot. to Vacate 29 (D.E. 57).

II. CONFIRMATION SHOULD BE REFUSED UNDER ARTICLES V(1)(B) AND V(1)(D) OF THE NEW YORK CONVENTION BECAUSE MOVANTS WERE DENIED PROCEDURAL DUE PROCESS

The defects described above, as Movants have already shown,[167] require vacatur—and thus denial of confirmation—on the grounds that the Tribunal denied Movants due process. Movants did not get an opportunity to be heard and the arbitrators failed to render an adequately reasoned award as mandated under Articles V(1)(b) and (d) of the New York Convention.[168]

ACP distorts the applicable law. As Movants demonstrated in their Consolidated Motion to Vacate, the New York Convention requires that parties be given the opportunity to comment on and respond to all material legal and factual issues on which a tribunal bases its award.[169] The Convention also requires that the award contain the degree of reasoning for which the parties have contracted in their arbitration agreement.[170] ACP suggests that the requirement of an opportunity to be heard was satisfied by "[t]he sheer length of the proceedings, the mass of evidence and argument, the Partial Award's size and detail, and party costs exceeding $140 million," as well as by the facts that the Parties confirmed "they had no objections as to how the Tribunal conducted the procedural aspects of the arbitration" and that the Tribunal stated it had "considered all arguments" in its Awards.[171] ACP also suggests that the reasoning of the Awards need only have been "bare-bones."[172]

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[167] Consol. Mot. to Vacate 23–29 (D.E. 55).

[168] Denial of the opportunity to be heard creates circumstances in which a party "was . . . unable to present its case" within the meaning of Article V(1)(b) of the New York Convention. *See* Restatement of Arb. §§ 4.11(a)(2) & cmt. a, 4.19 & cmt. a (recognizing "procedural misconduct," including "a serious procedural defect in the arbitral process" that "materially denied the party challenging the award the opportunity to present its case," as a basis for vacatur of a non-domestic award under Article V(1)(b) of the New York Convention). The equivalent ground for vacatur of a domestic award is FAA Section 10(a)(3). *See* Restatement of Arb. § 4.19 cmt. a (recognizing that FAA Section 10(a)(3) "corresponds with some aspects of Articles V(1)(b) and V(1)(d) of the New York Convention . . . which also protect the fundamental fairness of arbitral proceedings and the basic procedural rights of the parties"). Failure to render an adequately reasoned award constitutes a failure to apply an arbitral procedure that was "in accordance with the agreement of the parties" within the meaning of Article V(1)(d) of the New York Convention. *See* Restatement of Arb. §§ 4.13 Reporters' Note a, d, 4.20 Reporters' Note d (recognizing a failure to render an adequately reasoned award as a basis for vacatur of a non-domestic award under Article V(1)(d) of the New York Convention). The equivalent ground for vacatur of a domestic award is FAA Section 10(a)(4). *See* Restatement of Arb. § 4.20 Reporters' Note a (correlating FAA Section 10(a)(4) with New York Convention Article V(1)(d)).

[169] Consol. Mot. to Vacate 23–24 (D.E. 55).

[170] Consol. Mot. to Vacate 24 (D.E. 55).

[171] Resp. to Consol. Mot. to Vacate 21 (D.E. 57).

[172] *Id.* at 22.

These assertions mischaracterize the law. ACP acknowledges that due process requires an opportunity to be heard "at a meaningful time in a meaningful manner."[173] But ACP fails to appreciate the admonition of the U.S. Supreme Court in *Mathews v. Eldridge* that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands."[174] In the context of an international commercial arbitration in which hundreds of millions of dollars are at stake, this requirement prohibits a tribunal from making a decision on the basis of factual or legal considerations that the parties had no opportunity to discuss.[175] The length and cost of a proceeding have no bearing on compliance with the New York Convention if the tribunal's award is based on arguments the parties could not address.

ACP seeks to denigrate Movants' due process by misstating the applicable legal standards, mischaracterizing Movants' arguments as objections to the merits, and misidentifying the defective portions of the Awards as *dicta*.[176] None of these arguments, however, refutes what Movants have already shown. The Tribunal drew conclusions from reasoning that neither of the Parties ever raised or had an opportunity to discuss. And it failed to justify its decision with the degree of reasoning that the Parties' arbitration agreement required. Those failings compel denial of confirmation—and vacatur—of the Awards under Article V of the New York Convention.

As for ACP's defense of the Tribunal's failure to state reasons in its Awards, ACP has no answer to the requirement of Article 32(2) of the ICC Rules that an ICC "award shall state the reasons upon which it is based" except to plead that the ICC reviews awards before they are delivered to the parties.[177] As ACP's own Response to the Consolidated Motion to Vacate indicates, however, and contrary to what it asserts elsewhere in its Response, the ICC Rules specify that this review is "as to its form," not the substance of the reasoning.[178]

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[173] Resp. to Consol. Mot. to Vacate 21 (D.E. 57). *See, e.g.*, *Karaha Bodas Co. v. Perusahaan Pertuambagan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 299 (5th Cir. 2004); *First State Ins. Co. v. Banco de Seguros del Estado*, 254 F.3d 354, 358 (1st Cir. 2001); *Generica Ltd. v. Pharm. Basics, Inc.*, 125 F.3d 1123, 1129–30 (7th Cir. 1997); *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 145–46 (2d Cir. 1992).

[174] *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

[175] Restatement of Arb. § 4.11 Reporters' Note e (recognizing that an award is subject to challenge "if the tribunal's decision is based on facts or legal issues that were not presented or argued by the parties"); *id.* § 4.19 Reporters' Note c (similar).

[176] Resp. to Consol. Mot. to Vacate 20–29 (D.E. 57).

[177] ICC Rules of Arbitration, art. 32(2).

[178] Resp. to Consol. Mot. to Vacate 22 n.134 (D.E. 57) (quoting ICC Rules of Arbitration, art. 33).

In short, over and above its failure to explain away the evident partiality of the members of the Tribunal, ACP has done nothing to rehabilitate the grave procedural defects, including the denial of the opportunity to be heard and the failure to render a reasoned award, that are embodied in the Awards. These defects, just as much as the Tribunal's evident partiality, compel denial of confirmation (and vacatur) of the Awards.

III. CONFIRMATION AND ENFORCEMENT SHOULD BE DENIED BECAUSE MOVANTS HAVE SATISFIED THE AWARDS IN FULL

In its Consolidated Cross-Motion to Confirm, ACP requested this Court to issue a final judgment confirming and enforcing the Awards.[179] This request should be denied as moot because Movants have satisfied both awards in full as of February 23, 2021, a point that ACP does not dispute.[180] A motion to enforce the Awards thus is frivolous, and a waste of the Court's time and resources.

An issue is moot when it "no longer presents a live controversy with respect to which the court can give meaningful relief."[181] In this context, federal courts have refused to confirm or enforce satisfied arbitration awards because of the lack of a dispute.[182] As the *Local 2414 of United Mine Workers* court explained, "to confirm these awards in the absence of any concrete dispute would merely serve to circumvent Congress' goal of eliminating the cost and complexity of litigation. . . ."[183] Here, an order confirming and enforcing the Awards would grant no meaningful relief because there are currently no outstanding payments due from Movants to ACP. Given that fact, ACP's Consolidated Cross-Motion to Confirm is a (telling) tactic intended simply to increase the number of pages available to ACP and have the last word on the matter in Movants' vacatur proceeding.

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179 Consol. Cross-Mot. to Confirm 16–17 (D.E. 58).

180 Second Bouchardie Decl. ¶ 38; *see also* Declaration of Nicholas Henchie ¶ 240 (D.E. 57-1).

181 *Christian Coalition of Fla., Inc. v. United States*, 662 F.3d 1182, 1189 (11th Cir. 2011).

182 *See, e.g.*, *Local 2414 of United Mine Workers v. Consolidation Coal Co.*, 682 F. Supp. 399, 399-400 (S.D.Ill. 1988) ("Given the posture of this case regarding the absence of any dispute (except whether the awards are entitled to confirmation), the Court finds confirmation would only add to the complications of litigation."); *Metro. Delivery Corp.*, 2020 U.S. Dist. LEXIS 120611, at *4, 16–17 (finding that action to enforce award was moot where party requesting enforcement had already been "made whole"); *Beatty v. Passaro*, No. 17-11613 (KM) (JBC), 2018 U.S. Dist. LEXIS 107829, at *9–10 (D.N.J. June 26, 2018) (holding that action to enforce award was moot because defendant had already "issued [plaintiff] a check" satisfying the amounts owed).

183 *See Local 2414 of United Mine Workers*, 682 F. Supp. at 400.

CONCLUSION

For the foregoing reasons, and those set forth in Movants' Consolidated Motion to Vacate and Reply in support thereof, Movants request this Court enter an order denying confirmation of the Partial Award and the Final Award and granting such other relief as the Court should deem proper.

REQUEST FOR ORAL ARGUMENT

Movants request an oral argument on this motion, as well as their motion to vacate. A brief argument will give the Parties an opportunity to address the complex factual background underlying this case and supporting vacatur of the Awards.

Date: September 13, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on September 13, 2021, a true and correct copy of the foregoing document was served on all counsel of record through the CM/ECF system.

/s/ Carolyn B. Lamm
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