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 PANAMA,

Respondent/Counter-Movant.

GRUPO UNIDOS POR EL CANAL, S.A. ET AL.'S CONSOLIDATED MOTION TO VACATE PARTIAL AND FINAL ARBITRAL AWARDS AND INCORPORATED MEMORANDUM OF LAW

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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. move pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 9, 10, 201, 208 (2018), for an order vacating a partial and a final arbitral award ("Partial Award" and "Final Award" respectively and, collectively "Awards") rendered in ICC Case No. 20910/ASM/JPA (C-20911/ASM) (the "Panama 1 Arbitration") following an arbitration in Miami, Florida.[1]

INTRODUCTION

The Awards arise out of Movants' claims under a construction contract for the Third Set of Locks of the Panama Canal (the "Project"), a multi-billion-dollar project, spanning a decade, to enlarge the Canal by adding a third set of locks, significantly increasing its vessel capacity. Movants—construction firms domiciled in Panama, Spain, Italy, and Belgium[2]—successfully completed and delivered this historic public-works project to Respondent, Autoridad del Canal de Panamá ("ACP"), an instrumentality and domiciliary of the Republic of Panama, the operator of the Panama Canal. Despite Movants' successful completion of the Project, ACP refused to take responsibility for its material breaches of the Parties' contracts and of Panamanian law, causing Movants hundreds of millions of dollars in additional costs during the Project.

In Sub-Clause 20 of the Parties'[3] construction contract ("Conditions of Contract" or "Contract"), the Parties agreed to resolve any disputes through arbitration, subject to the Rules of Arbitration of the International Chamber of Commerce ("ICC Rules"), applying Panamanian substantive law and the entirety of the Federal Arbitration Act ("FAA"), and establishing the seat of the arbitration in Miami. Movants subsequently arbitrated some of their claims before the arbitral tribunal (the "Tribunal", composed of Mr. Pierre-Yves Gunter, Mr. Claus von Wobeser, and Dr. Robert Gaitskell QC) that produced the Partial and Final Awards.

International arbitration is initiated solely through the consent of the parties to a dispute, and the consent in the underlying Panama 1 Arbitration is found in Sub-Clause 20 of the Contract.

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[1] A certified copy of the Final Award is submitted as **Exhibit 1** and a certified copy of the Partial Award is submitted as **Exhibit 2** to the attached Declaration of Nicolas Bouchardie ("Bouchardie Decl."). All subsequent references to "Exhibits" are to the exhibits to the Bouchardie declaration. The Partial Award was signed by the Tribunal on September 21, 2020 and was notified to Movants on September 28, 2020, while the Final Award was signed by the Tribunal on February 17, 2021 and was notified to Movants on February 22, 2021. *See* Bouchardie Decl. ¶ 1 (indicating the dates of filing and delivery of the Awards). This motion is further supported by the expert opinions of Professor Chiara Giorgetti ("Giorgetti Decl.") and Professor Jack Coe ("Coe Decl."), attached hereto.

[2] **Exhibit 1:** Final Award in ICC Case No. 20910/ASM/JPA (C-20911/ASM) ("Final Award") ¶¶ 3–6.

[3] Movants and ACP collectively will be referred to as the "Parties."

That agreement is premised on the application of all sections of the FAA, as well as the ICC Rules, the *lex arbitri* of Florida law (given the Miami *situs*), and Panamanian substantive law. The Tribunal and the Parties' scope of consent is defined by that clause. In consenting to arbitration, Movants relinquished the due-process right to bring disputes before independent, vetted, disinterested, and impartial federal judges, based primarily on the assurance that the arbitrators would adjudicate the dispute in a transparent, fair, and unbiased manner, particularly while paying substantial fees to the Tribunal members.

Specifically, the Tribunal's mandate was to decide the case with independence and impartiality—and to disclose "any facts and circumstances which might be of such a nature as to call into question such 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."[4] Indeed, the ICC Rules require an arbitrator to "immediately disclose in writing . . . any [such] facts or circumstances" even *after* the proceeding begins and the Tribunal is seated.[5] Further, given that Chapter 1 of the FAA was applicable (as the arbitration occurred in Florida), the Parties had an expectation that the Tribunal would proceed in compliance with U.S. law and ethics and avoid any evident partiality.

The members of the Tribunal, however, failed to abide by these critical obligations. Indeed, they did not disclose multiple lucrative cross-appointments among themselves and other arbitrators in related cases while the compromising circumstances were occurring and the parties could reasonably take action. Their undisclosed relationships, coupled with fundamental flaws in the Tribunal's decisions, are such that any reasonable person would perceive them to be biased. Movants thus have been denied their due-process right to be heard by a tribunal whose independence and impartiality were uncompromised.

Movants also have been denied the opportunity to be heard on arguments first raised by the arbitrators, themselves, in the Partial Award and denied due process with respect to findings that are not adequately supported by the Tribunal's reasoning. These and other aspects of the arbitration violate the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 ("New York Convention" or "Convention"), the Parties' agreement to arbitrate, and the FAA, requiring vacatur.

Specifically, as is fully amplified in the attached declaration of Nicolas Bouchardie and in the expert opinions of Professors Jack Coe and Chiara Giorgetti, contrary to the disclosure

[4] **Exhibit 6:** ICC Rules, art. 11(2).

[5] **Exhibit 6:** ICC Rules, art. 11(3).

standards established under the ICC Rules, the FAA, and other aspects of U.S. law, the Tribunal members did not reveal that they were involved in multiple cross-appointments of each other, and served on separate tribunals with the Parties' counsel. Further, they each realized significant fees and gains from those multiple proceedings, while the parties were denied the benefit of their agreement.

As detailed below, in the Eleventh Circuit, the standard for evident partiality under the New York Convention and the FAA—the standard under which vacatur is warranted here—is that evident partiality exists if arbitrators fail to fulfill "'the simple requirement that [they] disclose to the parties any dealing that *might create an impression of possible bias*.'"[6] This broad disclosure obligation is widely accepted and applied throughout the international arbitration world, including in the ICC Rules.[7] Additionally, in deciding arbitral disputes, tribunals must provide parties with an opportunity to be heard and provide adequate reasoning. Here, the composite circumstances leave no room to doubt that Movants were entitled to disclosure, and the nature of the undisclosed facts shows 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[,]"[8] ultimately denying Movants the opportunity to be heard and manifesting itself in Awards lacking the requisite reasoning.

PROCEDURAL BACKGROUND

On March 17, 2015, Movants initiated the Panama 1 Arbitration, which covered claims for ACP's material breaches of the Contract.[9] The parties then appointed the Tribunal—each party appointing one wing arbitrator and jointly appointing the Tribunal President—following each

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6 *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)) (emphasis added).

7 *See* Coe Decl. ¶¶ 27–31 (describing nature of and rationale for broad disclosure requirements in international arbitration); Giorgetti Decl. ¶¶ 23–25 (same). An arbitrator's duty of full disclosure is also recognized by peer courts around the world and may even give rise to personal liability if breached. *See*, *e.g.*, Patrik Schöldström, Chapter 6: the Arbitrators, *in International Arbitration in Sweden: A Practitioner's Guide* 171 (2021) (discussing a Finnish case in which an arbitrator was found personally liable for damages to the parties for failure to disclose conflicts of interest); *Fouchard Gaillard Goldman on International Commercial Arbitration* 597 (Emmanuel Gaillard & John Savage eds., 1999) (same, discussing two French cases).

8 *Gianelli Money Purchase Plan & Tr. v. ADM Inv'r Servs., Inc.*, 146 F.3d 1309, 1312 (11th Cir. 1998); *see Mendel v. Morgan Keegan & Co.*, 654 F. App'x 1001, 1004 (11th Cir. 2016) (per curiam) (citing *Gianelli*, 146 F.3d at 1312) (same).

9 **Exhibit 2:** Partial Award in ICC Case No. 20910/ASM/JPA (C-20911/ASM) ("Partial Award") ¶ 9.

arbitrators' disclosure of potential conflicts of interest in their written Statements of Acceptance, Availability, Impartiality and Independence under the ICC Rules.[10] The Tribunal President failed to disclose at the time of his appointment that he had sat on an *ad hoc* arbitration with Professor Bernard Hanotiau, the tribunal president in an earlier arbitration between the Parties also arising out of the expansion of the Panama Canal (the "Cofferdam Arbitration").[11]

ACP counterclaimed, and, following the Parties' briefing, the Tribunal held a hearing from January 21 to February 15, 2019 in Miami. In the Partial Award the Tribunal provided its decision on liability and certain damages, denying most of Movants' claims and holding that Movants must repay certain amounts they previously had been awarded by the Dispute Adjudication Board.[12] Months later, the Tribunal issued the Final Award, enumerating the damages and costs owed to ACP, with offsets for certain damages that ACP owed Movants. Particularly relevant here, the Final Award reveals that the two party-appointed arbitrators were paid USD 963,250 each for their work, while the Tribunal President was paid USD 1,926,500 (including the fees of the Tribunal's administrative assistant).[13] Lucrative appointments like these are an obvious incentive for arbitrators not to disclose valuable cross-appointments and potential conflicts that could lead to their disqualification and loss of substantial compensation.[14] The undisclosed appointments, in turn, are likely to influence the arbitrators' judgment because the arbitrators will not want to make decisions that could jeopardize the appointments they have secured.[15] Even before Movants learned that the arbitrators earned nearly USD 4 million, they questioned whether the flawed reasoning and due process violations apparent on the face of the Partial Award—which addressed

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[10] **Exhibit 14:** Mr. Gunter's Statement of acceptance, availability, impartiality and independence in ICC Case No. 20910 dated Mar. 24, 2016; **Exhibit 13:** Mr. Gunter's Statement of acceptance, availability, impartiality and independence in ICC Case No. 20911 dated Mar. 23, 2016; **Exhibit 8:** Dr. Gaitskell's Statement of acceptance, availability, impartiality and independence in ICC Case No. 20910 dated Mar. 26, 2015; **Exhibit 11:** Dr. Gaitskell's Statement of acceptance, availability, impartiality and independence in ICC Case No. 20911 dated May 15, 2015; **Exhibit 10:** Mr. von Wobeser's Statement of acceptance, availability, impartiality and independence in ICC Case No. 20910 dated May 7, 2015; **Exhibit 9:** Mr. von Wobeser's Statement of acceptance, availability, impartiality and independence in ICC Case No. 20911 dated Apr. 10, 2015.

[11] Bouchardie Decl. ¶¶ 38, 59.

[12] *See generally* **Exhibit 2:** Partial Award.

[13] **Exhibit 1:** Final Award ¶ 172.

[14] Coe Decl. ¶ 17 (explaining that a potential reason for under-disclosure is that arbitrators "want to serve" in lucrative appointments).

[15] *See id.*; Giorgetti Decl. ¶ 22.

arguments not made by either side, ignored Movants' witnesses and arguments, and reversed the Dispute Adjudication Board's reasoned decisions—were due to a lack of impartiality and independence by the Tribunal members.[16]

As detailed in Section II, after receiving notification of the Partial Award, Movants requested that each Tribunal member update his disclosures.[17] After repeated requests for clarification of the information disclosed and for supplemental disclosures, Movants' investigation revealed that *every* member of the Tribunal failed to disclose cross-appointments and/or inter-relationships among themselves and others involved in this dispute, including: (1) that one Tribunal member enabled the Tribunal President to secure a lucrative appointment in a separate arbitration, (2) multiple undisclosed cross-appointments and relationships with others associated with this dispute, and (3) that Tribunal members served on tribunals in other cases where ACP's counsel served as co-arbitrator or counsel.[18] The Tribunal members' failure to disclose such critical facts resulted in an impression of the Tribunal's bias and evident partiality, which suffices for vacatur. Movants thus initiated challenges against the Tribunal members in the International Court of Arbitration of the ICC ("ICC Court") pursuant to Article 14 of the ICC Rules based on the undisclosed conflicts, as well as on procedural and substantive flaws in the Partial Award.[19] The ICC Court acknowledged that disclosures should have been made, but it applied a heightened standard of actual conflict that does not apply here.[20] As detailed below, for this reason and others, the ICC Court's ruling does not bind this Court. The Tribunal then issued the Final Award on February 22, 2021, which incorporated the Partial Award's findings on liability and finalized the amounts due to ACP, while setting out the Tribunal's decision on fees and costs.

Movants now seek vacatur of the Awards. The arbitrators' relationships between themselves and with other parties involved in the dispute, which created serious conflicts of interest, should have been disclosed before the Partial Award was issued. These undisclosed conflicts certainly "create an impression of possible bias" and would lead a reasonable person to

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[16] The Dispute Adjudication Board is the dispute board established under the Contract. The Board was established to address and rule on any disputes arising under the Contract.

[17] Bouchardie Decl. ¶¶ 28–30.

[18] Bouchardie Decl. ¶¶ 49–76.

[19] **Exhibit 39:** ICC Challenge Application in ICC Case No. 20910/ASM/JPA (C-20911/ASM); **Exhibit 6:** ICC Rules, art. 14 (stating that an arbitrator challenge must be made to the ICC Secretariat, after which the ICC Court decides on admissibility and merits of the challenge).

[20] **Exhibit 58:** ICC Court's Statement of Reasons in ICC Case No. 20910/ASM/JPA ("Statement of Reasons").

believe a conflict exists.[21] The Partial Award thus was infected by the arbitrators' evident partiality and bias, manifesting in a flawed award that denied Movants the opportunity to be heard and lacked the required reasoning. Further, because the determinations made in the Final Award similarly were made without disclosure and flow from the decisions made in the flawed and procedurally improper Partial Award, vacatur of the Partial Award necessarily calls for vacatur of the equally infected Final Award. Movants also seek vacatur of the Final Award on the independent ground—developed below—of the arbitrators' evident partiality insofar as it affected the Tribunal's further conclusions and findings in the Final Award. That evident partiality again arises out of the Tribunal members' failures to disclose their material and lucrative inter-relationships and other connections, amounting to potential conflicts of interest that give rise to a clear impression of bias.

JURISDICTION AND VENUE

Subject-matter jurisdiction. This Court holds subject-matter jurisdiction by virtue of 28 U.S.C. §§ 1330(a) and 1331. The case satisfies the requirements of § 1330(a) because (i) ACP is an organ of the Republic of Panama that comes within the definition of an "agency or instrumentality of a foreign state" under 28 U.S.C. § 1603(b) and is therefore a "foreign state" under 28 U.S.C. § 1603(a), making this proceeding a "nonjury civil action against a foreign state" under 28 U.S.C. § 1330(a); and (ii) ACP is subject to jurisdiction under 28 U.S.C. §§ 1605(a)(1), (2), and (6) by having waived its immunity through agreements to arbitrate in Miami under the FAA,[22] participated in a Miami-seated arbitration in connection with its commercial relationship with Movants,[23] and entered into agreements to arbitrate in the United States.[24] This case also satisfies the requirements of 28 U.S.C. § 1331 because the Awards arise from a commercial relationship among parties which are not United States domiciliaries. The Awards thus are subject to the New York Convention, and this case is thus a "proceeding falling under the Convention" and presenting a federal question under 9 U.S.C. §§ 202–03 and 28 U.S.C. § 1331.

Personal jurisdiction. This Court holds personal jurisdiction over ACP by virtue of 28 U.S.C. §§ 1330(b), 1608(b)(2), and 1608(b)(3)(B), as, before consolidation, Movants served

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[21] *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)).

[22] **Exhibit 1:** Final Award ¶¶ 78, 80–81.

[23] *See* **Exhibit 2:** Partial Award ¶¶ 286, 414–43 (indicating that the arbitration's merits hearing was held in Miami and detailing the commercial background of the Parties' contracts).

[24] **Exhibit 1:** Final Award ¶¶ 78, 80–81.

process on ACP in the manner prescribed by 28 U.S.C. §§ 1608(b)(2) and 1608(b)(3)(B) in the two cases seeking to vacate the Awards.[25]

Venue. Venue is proper under 9 U.S.C. §§ 10(a), 204, and 208 as the Parties' contracts specify Miami as the place of arbitration and Miami is where the Awards were issued.[26]

ARGUMENT

I. EVIDENT PARTIALITY IS AN ESTABLISHED BASIS TO VACATE UNDER THE NEW YORK CONVENTION, THE FAA, AND APPLICABLE ELEVENTH CIRCUIT JURISPRUDENCE

The FAA applies to this dispute through the arbitration clauses contained in the underlying contractual documents. Sub-Clause 20.6(e) of the Contract and Sub-Clause 9.2(e) of a Joint and Several Guarantee ("JSG")[27] make Miami the seat of the arbitration, and Sub-Clause 20.6(a) makes the ICC Rules applicable.[28] Additionally, Sub-Clause 20.6(f) of the Contract and Sub-Clause 9.2(f) of the JSG[29] expressly call for the entirety of the FAA to apply to any dispute. This includes the concept of evident partiality, found in Section 10(a)(2), as it is part of the applicable law of the seat and part of the arbitration clause itself.

Even though Article V of the New York Convention provides the exclusive grounds for vacating international arbitral awards, like the ones here,[30] there is no material difference between these grounds and those for vacatur of domestic awards under Section 10 of the FAA.[31] Article V(2)(b) of the Convention provides for the vacatur of an award that "would be contrary to the public policy" of the country where enforcement is being sought.[32] For Article V(2)(b) to apply, the public policy must be sufficiently "well-defined and dominant."[33] One such policy is the

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25 The consolidated motion will be served on ACP's counsel appearing in this case.

26 *See* **Exhibit 1:** Final Award at 56 (indicating that the Final Award was made in Miami).

27 **Exhibit 4:** Conditions of Contract, Sub-Clause 20.6(e); **Exhibit 5:** Joint and Several Guarantee ("JSG"), Sub-Clause 9.2(e).

28 **Exhibit 4:** Conditions of Contract, Sub-Clause 20.6(a).

29 **Exhibit 4:** Conditions of Contract, Sub-Clause 20.6(f); **Exhibit 5:** JSG, Sub-Clause 9.2(f).

30 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 ("New York Convention" or "Convention"); *see Inversiones y Procesadora Tropical INPROTSA, S.A. v. Del Monte Int'l GmbH*, 921 F.3d 1291, 1297 (11th Cir. 2019) (noting a motion to vacate only can succeed if it asserts a valid defense under the Convention).

31 *See* Restatement (Third) of Int'l Commercial & Inv'r-State Arb. ("Restatement of Arb.") § 4.9 cmt. a, Reporter's Note a. (Am. Law Inst., Proposed Final Draft 2019) ("Restatement of Arb.") (recognizing that "courts and commentators have tended to construe the grounds similarly" and that "the grounds . . . are in substance the same").

32 New York Convention art. V(2)(b).

33 *Cvoro v. Carnival Corp.*, 941 F.3d 487, 496 (11th Cir. 2019) (internal citations omitted).

avoidance of "evident partiality." The policy is express, and thus well-defined and dominant, as it derives from codified U.S. law, FAA Section 10(a)(2), where it is a ground for vacating an award. Further, courts construe the public policy and FAA vacatur grounds "similarly" because the grounds "are in substance the same."[34] This Motion thus relies on authorities under both Article V of the Convention and FAA Section 10.

Some courts also have accepted that the grounds for vacatur in FAA Section 10 may be grounds to vacate international arbitral awards subject to the New York Convention, including a public-policy ground based on avoiding the impression of bias.[35] Moreover, the *Restatement (Third) of the U.S. Law of International Commercial & Investor-State Arbitration* recognizes that the grounds for vacatur under FAA Section 10(a)(2) "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."[36] Evident partiality appears among the explicitly enumerated grounds for vacatur under the FAA. Thus, avoiding evident partiality is a "well-defined and dominant" public policy of the United States.

The evident-partiality test is met when the undisclosed conflicts and facts "create an *impression* of possible bias."[37] This occurs if *either* "(1) an actual conflict exists, *or* (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a *potential conflict* exists."[38] Thus, actual conflict is not required under the FAA for

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[34] Restatement of Arb. § 4.9 cmt. a, Reporter's Note a.; *see also 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) (accepting arbitrator bias as a public policy ground under the New York Convention).

[35] *See Lindo v. NCL (Bahamas) Ltd*., 652 F.3d 1257, 1265 (11th Cir. 2011) ("[T]he Supreme Court proclaimed that the Convention and the FAA provide strongly persuasive evidence of congressional policy[.]") (internal citations omitted); *see also Nat'l Indem. Co. v. IRB Brasil Reseguros S.A.*, 675 F. App'x 89, 90 (2d Cir. 2017) (noting that, when the New York Convention applies to an award rendered in the United States, grounds for vacatur "include all the express grounds for vacating an award under the [FAA]"); *Ario v. Underwriting Members of Syndicate 53 at Lloyds*, 618 F.3d 277, 290 (3d Cir. 2010) ("[T]he FAA vacatur standards presumptively apply to Convention awards rendered and enforced in the United States[.]"); *Transmarine Seaways Corp. v. Marc Rich & Co. A.G.*, 480 F. Supp. 352, 357 (S.D.N.Y 1979) ("The Supreme Court's elucidation of arbitral propriety in *Commonwealth Coatings* is a declaration of public policy.").

[36] Restatement of Arb. § 4.18, cmt. a; *see* Coe Decl. ¶ 33.

[37] *Univ. Commons-Urbana,* 304 F.3d at 1338 (internal quotation marks omitted) (emphasis added).

[38] *Gianelli*, 146 F.3d at 1312 (emphasis added); *see also Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Fund*, 748 F.2d 79, 84 (2d Cir. 1984) (concluding that a son, acting as arbitrator, and a father, acting as president of a party's parent organizations, would lead a reasonable person to conclude that the arbitrator is biased).

a finding of evident partiality.

In addition to the FAA's evident-partiality standard applying here by way of the Contract and JSG, these documents invoke the ICC Rules,[39] thus incorporating the broad, affirmative disclosure obligations under Article 11(2) of the 2017 ICC Rules. Indeed, the disclosure obligations under the FAA mirror those broad, affirmative disclosure obligations within the practice of international arbitration,[40] as Professors Coe and Giorgetti explain in their opinions.[41] The assurance of independent, unbiased, and objective arbitrators is essential to the ICC's ability to provide a reliable and attractive alternative forum for the resolution of international commercial disputes.

The requirement to disclose affirmatively anything that might reasonably give rise to doubt about an arbitrator's independence and impartiality is fundamental to the choice of any alternative dispute-resolution system.[42] As Professor Coe states, "[i]nternational commercial arbitration depends for its legitimacy and reliability on arbitrator disclosure. Such disclosure underpins a private system of justice that produces globally enforceable awards."[43] Professor Giorgetti elaborates that "whether a fact should be disclosed should be determined from the perspective of the parties, and the threshold of disclosure is whether a specific circumstance may give rise to reasonable doubts about the impartiality and independence of an arbitrator."[44]

As detailed below, the Tribunal members here, Mr. Gunter, Dr. Gaitskell QC, and Mr. von Wobeser, manifestly violated the requirements of the New York Convention and the FAA in a pervasive pattern of non-disclosure of what are serious conflicts that would lead a reasonable person to have the impression of bias. Movants, as a result, have been deprived of the opportunity to assess the potential conflicts, object to the confirmation, and/or seek removal of Tribunal members before and during the proceedings. Movants also were not accorded a fair and impartial adjudication of their claims against ACP, which failed due to the evident partiality exhibited by all

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39 **Exhibit 4:** Conditions of Contract, Sub-Clause 20.6(a); **Exhibit 5:** JSG, Sub-Clause 9.2(a).

40 Although the disclosure obligations of the ICC Rules track the obligations under U.S. law, the ICC Court, as discussed below, applied a standard that is inapplicable here. *See* **Exhibit 58:** Statement of Reasons.

41 *See* Coe Decl. ¶¶ 18–31; Giorgetti Decl. ¶¶ 19–25.

42 *See, e.g.*, *Mun. Workers Comp. Fund, Inc. v. Morgan Keegan & Co.*, 190 So. 3d 895, 922 (Ala. 2015) ("A violation of this independent duty to investigate may result in a failure to disclose that creates a reasonable impression of partiality under *Commonwealth Coatings*.").

43 Coe Decl. ¶ 8.

44 Giorgetti Decl. ¶ 15.

the members of the Tribunal.

II. THE TRIBUNAL MEMBERS DISPLAYED EVIDENT PARTIALITY THROUGH THEIR FAILURE TO DISCLOSE POTENTIALLY MATERIAL CONFLICTS OF INTEREST

As supported by the expert opinions of Professors Coe and Giorgetti, evident partiality may be established by the failure to disclose certain potential conflicts, and the nature of the non-disclosure may lead to an impression of bias. Here, the Tribunal members failed to make the required disclosures, and the nature of the non-disclosed conflicts creates a strong impression of bias. This warrants vacatur.

A. Late disclosures show that each Tribunal member failed to disclose critical information that there was a clear obligation to disclose

The Tribunal members violated the fundamental norms of arbitral proceedings and U.S. law by failing to disclose material professional relationships that create an impression of bias. As demonstrated in the timeline below, among these failures, and most egregious, was the undisclosed agreement of ACP's Tribunal member, Dr. Gaitskell, with a co-arbitrator, to appoint the Tribunal President of the Panama 1 Arbitration, Mr. Gunter, to serve as the tribunal president in a separate ICC case, a lucrative post under which the Tribunal President likely will earn hundreds of thousands of dollars.[45] Indeed, over the course of the Panama 1 Arbitration, Dr. Gaitskell and Mr. von Wobeser earned almost USD 1 million each, while Mr. Gunter and his assistant earned almost USD 2 million.[46] Yet, before and during the arbitration, the Tribunal members made only limited and inconsequential disclosures. Notably, the Tribunal President was aware at the time of his appointment—yet failed to disclose—that he had sat on an *ad hoc* arbitration in which he and a co-arbitrator nominated Professor Hanotiau, the chair of the Cofferdam Tribunal, as president.[47] Had Movants known about the Tribunal President's extensive prior professional relationship with Professor Hanotiau, they would have stricken him from the list of potential presidents. When Movants received the Partial Award and saw that the Tribunal had ruled on grounds not put forth by *either* party, referenced the previous Cofferdam Arbitration Tribunal (chaired by Professor Hanotiau) over 100 times (60 of which were substantive in nature), and made findings inconsistent

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[45] *See* **Exhibit 6:** ICC Rules, app. III, art. 3(4) (setting out the fee scale for ICC arbitrators).

[46] *See* **Exhibit 1:** Final Award ¶ 172 (detailing fees received by the arbitrators).

[47] **Exhibit 13:** Mr. Gunter's Statement of acceptance, availability, impartiality and independence in ICC Case No. 20911; **Exhibit 14:** Mr. Gunter's Statement of acceptance, availability, impartiality and independence in ICC Case No. 20910.

with the factual record, Movants promptly requested that each Tribunal member update his disclosures ("Disclosure Requests") to ensure that there were no unknown circumstances that might have affected their impartiality and independence.[48]

The Tribunal members' responses to the Disclosure Requests remain incomplete, but they already confirm that there were several important professional relationships and cross-appointments, as well as appointments together with ACP's counsel, that should have been—but were not—disclosed and that would lead a reasonable person to believe that potential conflicts of interest exist. The failures to disclose here are particularly troubling, as most ICC arbitrations are confidential, and the parties, therefore, are reliant entirely on the integrity of the tribunal members to disclose potentially relevant information.[49] These undisclosed relationships, and the fact that disclosures were made only after issuance of the Partial Award and, then, only after Movants' requests for supplemental disclosures, raise serious questions about the integrity of the Panama 1 Arbitration and require vacatur of the Awards:

Mr. Pierre-Yves Gunter:

(a) As summarized above, before closing arguments and deliberation, ACP's Tribunal member, Dr. Gaitskell, contributed to and supported the appointment of the Tribunal President, Mr. Gunter, as president in a separate ICC arbitration (ICC Case No. 24400).[50] The president of an ICC tribunal can earn several hundreds of thousands of dollars per case, in accordance with the ICC Rules.[51] Yet neither Mr. Gunter nor Dr. Gaitskell disclosed this important and valuable appointment to Movants when it occurred, and it is unclear whether Movants' Tribunal member, Mr. von Wobeser, was aware of this separate connection during the Tribunal's deliberations. Only after Movants' Disclosure Requests (post-notification of the Partial Award) did Mr. Gunter first acknowledge that he was sitting with Dr. Gaitskell as part of another tribunal, and, even then, he did not acknowledge that Dr. Gaitskell was in large part responsible for his receiving that appointment, a critical

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48 *See* Bouchardie Decl. ¶¶ 27–30.

49 *See Univ. Commons-Urbana*, 304 F.3d at 1339 ("[A]n arbitrator is obligated to disclose those facts that create a reasonable *impression* of partiality, or put another way, information which would lead a reasonable person to believe that a potential conflict exists." (internal citations and quotation marks omitted) (emphasis added)).

50 *See* Bouchardie Decl. ¶¶ 33, 53, 64.

51 *See* **Exhibit 6:** ICC Rules, app. III, art. 3(4) (setting out the fees for ICC arbitrators; depending on the amount in dispute, fees range from a minimum of USD $3,000 to over $500,000).

point that only came out after Movants pressed for further clarification.[52] Thus, Mr. Gunter and Dr. Gaitskell sit together on another tribunal and did so while deliberations for the Panama 1 Arbitration were ongoing.[53]

(b) This cross-appointment, which Mr. Gunter knew of but failed to disclose, "would lead a reasonable person to believe that a potential conflict exists."[54] In Movants' eyes, it is apparent that Mr. Gunter was influenced, whether consciously or subconsciously, by the fact that Dr. Gaitskell was responsible for providing him this prestigious and lucrative appointment, which can earn six-figure fees.[55] Whether or not there was a *quid pro quo* between the two, this appointment clearly gave ACP's Tribunal member the ability to interact and build a bond with the Tribunal President on numerous occasions outside the presence of Movants' Tribunal member. The fact that this appointment was not disclosed by either Mr. Gunter or Dr. Gaitskell furthers the impression of bias.

(c) Furthermore, for the first time in response to Movants' post-Partial Award Disclosure Requests, Mr. Gunter revealed that he also sat, again without disclosure, on several arbitral tribunals with Professor Bernard Hanotiau, the tribunal president in an earlier arbitration between the Parties also arising out of the expansion of the Panama Canal.[56] Mr. Gunter's relationship with Professor Hanotiau is highly material because the majority award in the Cofferdam Arbitration—which was issued by Professor Hanotiau and Dr. Gaitskell, over the forceful dissent of Movants' appointee—made findings (such as the diligence to be expected from bidders and the application of disclaimers of liability) that were imported *verbatim* into the Partial Award and Final Award, despite having no binding effect on the Panama 1 Arbitration.[57]

(d) It was not until after Movants pressed for further disclosures that Mr. Gunter clarified that he, in fact, was appointed president in an undisclosed case by Professor Hanotiau and the other tribunal member on July 22, 2017, after the Panama 1 Arbitration started, and that

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52 *See* Bouchardie Decl. ¶ 53.

53 **Exhibit 54:** Updated Challenge Application in ICC Case No. 20910/ASM/JPA (C-20911/ASM) ¶ 24.

54 *Univ. Commons-Urbana*, 304 F.3d at 1339.

55 **Exhibit 6:** ICC Rules, app. III, art. 3(4) (noting fee schedule for ICC arbitrators, which ranges from USD $3,000 to over $500,000).

56 *See* Bouchardie Decl. ¶¶ 33–34.

57 *See* Bouchardie Decl. ¶¶ 8–9, 27, 56.

these proceedings are ongoing.[58]

(e) Movants' research also revealed that Mr. Gunter acted as co-arbitrator on a panel where Professor Hanotiau served as president after being nominated by Mr. Gunter and a co-arbitrator, something Mr. Gunter (again) at first failed to disclose in response to the Disclosure Requests. At Movants' insistence, Mr. Gunter finally confirmed the existence of this other arbitration, Professor Hanotiau's appointment as president in November 2016, and that the award issued in June 2019.[59] Mr. Gunter also belatedly disclosed that he sat in an *ad hoc* arbitration in which he and a co-arbitrator nominated Professor Hanotiau as president in October 2013 and that the award was rendered in September 2015.[60] This means that he and Professor Hanotiau have been sitting together almost continuously, and thus spending substantial time together, since 2013.[61]

(f) As the Tribunal here was being asked to opine on the binding or persuasive effect of Professor Hanotiau's Cofferdam Arbitration majority award (joined by Dr. Gaitskell), a reasonable person learning of the undisclosed connections between Mr. Gunter and Professor Hanotiau would believe that a potential conflict or persuasive influence exists. Mr. Gunter's non-disclosure is especially jarring considering that the Tribunal here, despite having concluded correctly that no issue preclusion attached to the Cofferdam Arbitration majority award, referenced that award nearly *100 times*, sometimes simply cutting and pasting significant portions of it into the Partial Award and, in turn, the Final Award. Indeed, the Tribunal imported the Cofferdam majority's approach into central issues in the Panama 1 Arbitration without warning the Parties and without offering independent analysis or addressing the significant new evidence that Movants presented in the Panama 1 Arbitration.[62] As stated above, had Movants been aware that Mr. Gunter was sitting in an *ad hoc* arbitration with Professor Hanotiau at time of his appointment, they would have stricken his name from consideration to preside over the Tribunal. Movants were deprived of this opportunity, however, because Mr. Gunter's disclosures were meagre and did not

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58 *See* Bouchardie Decl. ¶ 55.

59 *Id.*

60 *Id.*

61 **Exhibit 54:** Updated Challenge Application in ICC Case No. 20910/ASM/JPA (C-20911/ASM) ¶ 24.

62 *See* Bouchardie Decl. ¶ 27.

mention his relationship with Professor Hanotiau.[63] Mr. Gunter similarly failed to disclose his additional conflicts during the time that Movants advocated for him to be appointed as President in a related arbitration (the "Panama 2 Arbitration"), which is ongoing.[64]

Dr. Robert Gaitskell:

(a) ACP's Tribunal member, Dr. Gaitskell, also failed to disclose that he appointed—together with a co-arbitrator—Mr. Gunter as president in another ICC arbitration. This undisclosed appointment reasonably creates the impression of partiality because Mr. Gunter is likely to receive hundreds of thousands of dollars in fees, thanks to ACP's Tribunal member.

(b) Dr. Gaitskell also has refused to investigate any potential conflicts of interest arising from the activities of Keating Chambers (the English barristers' chambers to which he belongs) or its members,[65] claiming to have "'no knowledge of what other members of Keating Chambers do professionally'" and "'no way of knowing.'"[66] That simply is not accurate: clerks in barristers' chambers are able to gather the information needed for a conflict search, which can be accomplished without violating the confidences of the chambers' clients.[67] Dr. Gaitskell's refusal even to attempt to investigate potential conflicts at Keating Chambers is arresting considering that such conflict checks are now common practice in international arbitration, even within English barristers' chambers.[68] The refusal is significant in this context because Keating Chambers' barristers specialize in construction and international arbitration cases and are likely to appoint, appear before, or serve on tribunals with the arbitrators here. Importantly, Dr. Gaitskell's recent refusal to carry out the conflict check shows that he did not carry out any such conflict check when nominated in the Panama 1 Arbitration, either.

(c) Dr. Gaitskell also failed to disclose that he was appointed to sit in another arbitration by

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63 **Exhibit 13:** Mr. Gunter's Statement of acceptance, availability, impartiality and independence in ICC Case No. 20911; **Exhibit 14:** Mr. Gunter's Statement of acceptance, availability, impartiality and independence in ICC Case No. 20910. *See also* **Exhibit 65:** Timeline of Undisclosed Appointments During the Pendency of the Panama 1 Arbitration.

64 **Exhibit 85:** Mr. Gunter's Statement of acceptance, availability, impartiality and independence in ICC Case No. 22466.

65 Bouchardie Decl. ¶ 34.

66 Bouchardie Decl. ¶ 67 (quoting **Exhibit 32:** Letter from Robert Gaitskell QC to the Parties dated Oct. 24, 2020 at 1).

67 **Exhibit 54:** Updated Challenge Application in ICC Case No. 20910/ASM/JPA (C-20911/ASM) ¶ 33.

68 *Id.*

Mr. Manus McMullan QC, who represented one of the parties in the other arbitration, during the time Mr. McMullen served as lead counsel for ACP.[69]

Mr. Claus von Wobeser:

(d) The undisclosed potential conflicts of Mr. Gunter and Dr. Gaitskell also taint the work of Mr. von Wobeser, who was indirectly, but necessarily, affected by the undisclosed potential conflicts described above. Specifically, Mr. Gunter and Dr. Gaitskell had the opportunity to discuss the facts of the Panama 1 Arbitration outside of the presence of Mr. von Wobeser, and to arrive at a united opinion regarding engineering and contract issues with which the Tribunal President and ACP's Tribunal member were more familiar due to their prior engagement with the facts.

(e) In addition, Mr. von Wobeser failed to disclose that, since July 2019, before closing arguments and during the Tribunal's deliberations in Panama 1, he has been sitting in an arbitration with Mr. Andrés Jana, counsel for ACP, as a fellow member of the tribunal.[70] This tribunal was constituted before the oral closing of the Parties here and continued during the Tribunal's deliberations. Such a connection creates the impression of bias in that it gave counsel for ACP, Mr. Jana, the opportunity to liaise directly with Mr. von Wobeser in an *ex parte* manner, outside of the Movants' presence and in circumstances where Mr. von Wobeser necessarily will be seeking Mr. Jana's agreement on an award (and vice versa). Indeed, such a connection is exactly what the Eleventh Circuit already has found to constitute a potential bias requiring vacatur—that is, "if an arbitrator, *concurrently with the arbitration*, partakes in a proceeding in which counsel for one of the parties to the arbitration is also participating."[71] Whether or not there is any *quid pro quo* between them, there is at least the possibility and, therefore, the impression of a conflict of interest. The fact that Mr. von Wobeser did not disclose his relationship with Mr. Jana, a Chilean lawyer who curiously joined ACP's counsel team toward the end of the arbitration to argue issues of Panamanian law, exacerbates the "impression of bias" arising from this

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[69] Bouchardie Decl. ¶ 66 ("In response to Movants' Disclosure Requests, Dr. Gaitskell also disclosed that Mr. Manus McMullan QC of Atkin Chambers (counsel for ACP) is currently representing a party in an ICC arbitration in which Dr. Gaitskell is an arbitrator.").

[70] Bouchardie Decl. ¶ 73.

[71] *Univ. Commons-Urbana*, 304 F.3d at 1340 (emphasis in original); *see also id.* at 1341 ("[S]erving as the decision-maker in one action in which a colleague in another action represents a party clearly poses the possibility of bias, and thus represents a potential conflict that a reasonable person would easily recognize.").

problematic situation. Movants were entitled to know about this professional relationship and object to Mr. van Wobeser's continued service, but were deprived of the opportunity. Individually and collectively, these non-disclosures constitute a potentially serious breach of each arbitrator's impartiality and independence and create an impression of bias for a reasonable person. As a result, Movants were forced to assert challenges based on these undisclosed conflicts in the ICC arbitrations themselves.[72] While the ICC Court rejected Movants' challenges, they were focused on a different goal: removal of the Tribunal members.[73] the ICC Court appears to have applied the more exacting test of whether an arbitrator's failure to disclose gave rise to "reasonable" doubt as to the *actual* independence of the arbitrator.[74] This is *not* the evident-partiality standard to be applied by this Court under U.S. law (the ICC Court's decision is not binding on this Court, in any event).[75] The ICC Court also failed to address many of the potential conflicts Movants identified. Perhaps the most glaring omission was the ICC Court's failure to address the potential untoward financial influence on the Tribunal President (Mr. Gunter) from receiving another appointment as president, potentially *worth hundreds of thousands of dollars in fees*, thanks to ACP's arbitrator (Dr. Gaitskell). This is precisely the type of tribunal imbalance that Professors Coe and Giorgetti describe in their expert reports.[76] Professor Giorgetti notes that the ICC Court "ignore[d] the most critical elements of the factual circumstances" and that "it applied an overly strict standard when assessing the potential for communications among tribunal members generally, and between tribunal members and counsel[.]"[77] Indeed, as the CEOs of the main shareholders of GUPC S.A. stated, they never would have accepted the appointment of the arbitrators "had they been informed at the relevant time of these disclosures, as should have been the case."[78]

The ICC Court, despite reaching the wrong decision, still confirmed many of Movants'

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[72] **Exhibit 39:** ICC Challenge Application in ICC Case No. 20910/ASM/JPA (C-20911/ASM); **Exhibit 40:** ICC Challenge Application in ICC Case No. 22466/ASM/JPA (C-22967/ASM); **Exhibit 54:** Updated Challenge Application in ICC Case No. 20910/ASM/JPA (C-20911/ASM); **Exhibit 55:** Updated Challenge Application in ICC Case No. 22466/ASM/JPA (C-22967/ASM); **Exhibit 56:** ICC Challenge Application in ICC Case No. 22465/ASM/JPA (C-22966/JPA).

[73] **Exhibit 58:** Statement of Reasons.

[74] *Id.*

[75] *Gianelli*, 146 F.3d at 1312; *see also Mendel*, 654 F. App'x 1001, 1003 (citing *Gianelli*, 146 F.3d at 1312).

[76] Giorgetti Decl. ¶¶ 38–39; Coe Decl. ¶¶ 28–31.

[77] Giorgetti Decl. ¶ 34.

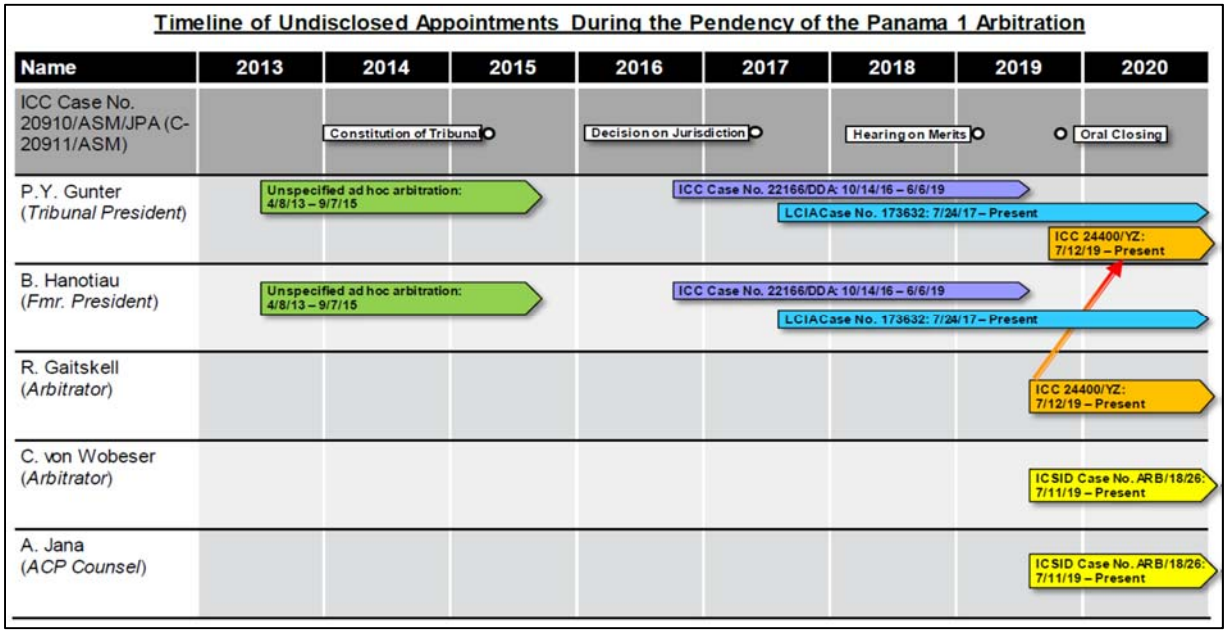
[78] **Exhibit 53:** Letter from Sacyr, Webuild, and Jan De Nul to the ICC.

allegations. For example, the ICC Court acknowledged that Mr. Gunter and Professor Hanotiau serving as co-arbitrators in unrelated cases "created a theoretical opportunity for them to discuss issues relevant to the Panama Canal arbitrations."[79] The ICC Court also found that Mr. Gaitskell failed to make timely disclosure of the fact that he was sitting as president of an arbitral tribunal in another case where Mr. McMullan QC—a member of the ACP counsel team—acts for one of the parties.[80] The ICC recommends disclosure of such circumstances in its Note to Parties and Arbitral Tribunals.[81] As for Mr. von Wobeser, the ICC Court agreed with Movants that he should have disclosed the fact that he was sitting in a separate case alongside Mr. Jana.[82]

It is unsurprising that the ICC Court confirmed that the Tribunal members should have, but failed to, disclose potential conflicts. As Professor Giorgetti explains, "there is no limitation to what may be disclosed" and "arbitrators must be proactive . . . both at the outset of the arbitration and subsequently[.]"[83] This is in part because of the ways in which a failure to disclose can "foster suspicion"; if one party's arbitrator appointed another to serve as a tribunal president in a separate arbitration, "that connection—given the often highly lucrative post of serving as a tribunal president—certainly could raise concerns of potential bias for the other party."[84]

As noted in the Bouchardie Declaration and shown in the chart below—which provides a visual representation of the various appointments described above in relation to the Panama 1 Arbitration—the undisclosed conflicts overlapped for effectively the entirety of the arbitration:

79 **Exhibit 58:** Statement of Reasons at 7.
80 *Id.* at 9.
81 *Id.*
82 *Id.* at 10.
83 Giorgetti Decl. ¶¶ 19–20.
84 *Id.* ¶ 22.



The timeline also demonstrates that the arbitrators had multiple opportunities to disclose their conflicts of interest over their time on the Panama 1 Arbitration Tribunal. Their failure to do so meant that their partiality and lack of independence affected all stages of the proceedings and, as a result, tainted the Awards irreparably.[85]

Providing complete and accurate disclosures at the outset of the arbitration and throughout its duration is crucial to the integrity of arbitral proceedings and essential to ensure confidence in arbitrator confirmations.[86] As Professors Coe and Giorgetti confirm, the ICC Rules on disclosure are purposefully broad because, when panel members fail to provide fulsome disclosures, parties who later discover undisclosed connections "may reasonably wonder why it was not disclosed and whether the deliberative process was all it should have been."[87] Notably, the Tribunal members have not undergone the scrutiny of a judicial-confirmation process, and the absence of the corrective mechanism of a *de novo* appeal from an arbitral award makes it essential that the panel

[85] **Exhibit 65:** Timeline of Undisclosed Appointments During the Pendency of the Panama 1 Arbitration.

[86] Giorgetti Decl. ¶¶ 19–20, 22 (noting there is no limit to "what may be disclosed" and arbitrators "must be proactive" to avoid "foster[ing] suspicion"); 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").

[87] Coe Decl. ¶ 30; *see also* Giorgetti Decl. ¶ 22 ("A refusal to disclose can foster suspicion, and create the impression of bias on the part of the arbitrators that fail to disclose.").

members are, and are seen to be, independent and impartial. As previously stated, Movants felt comfortable relinquishing their rights to submit disputes for initial resolution by an impartial federal judge and plenary judicial review only on the assurance that the arbitrators would comply with their disclosure obligations and remain indisputably impartial.

Potential bias has been found where "familiarity" with a co-arbitrator's views may cause an arbitrator to "take these circumstances into account."[88] This is all the more relevant here, where a lucrative cross-appointment created the perception of feelings of indebtedness and perverse incentives, whether conscious or subconscious.[89] Because the undisclosed cross-appointments between Mr. Gunter (the Tribunal president in the underlying arbitration) and Professor Hanotiau—likely entailing fees of hundreds of thousands of dollars for both gentlemen—were concurrent with the Panama 1 Arbitration *and* where the deference to Professor Hanotiau's decision in the Cofferdam Arbitration was profound, as evidenced by the text of the Awards, such concerns of potential bias are heightened.

Indeed, Professor Coe has explained that the ICC Rules are "purposefully broad" to encourage all appropriate disclosure.[90] What is "most critical is what the *parties* might find significant."[91] As Professor Coe explains, when deciding what to disclose, the ICC Rules

> [are] intended to encourage the arbitrator to stretch his or her mind, to disclose facts that he or she might not consider as calling into question his or her independence, but which might do so in the eyes of the parties. . . . [I]t is especially important that a prospective arbitrator . . . make a special effort to consider the facts and circumstances relative to his or her independence as the parties might view and construe them.[92]

Thus, as Professor Coe further details, the ICC Rules require an arbitrator "to undertake ongoing disclosures of an extensive nature," disclosing anything the parties "'might' consider relevant, rather than what the arbitrator considers to be sufficient."[93] This is "critical to maintaining the necessary trust between the parties and the tribunal members."[94] The "strong disposition" of the ICC Rules therefore favors disclosure.[95]

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88 Giorgetti Decl. ¶ 39.
89 Giorgetti Decl. ¶ 27.
90 Coe Decl. ¶ 20.
91 *Id.* ¶ 22 (emphasis in original).
92 *Id.* ¶ 23 (Stephen R. Bond, *The International Arbitrator: From the Perspective of the ICC International Court of Arbitration*, 12 Northwestern J. of Int'l L. & Bus. 1, 13 (1991)).
93 *Id.* ¶ 26.
94 *Id.*
95 *Id.* ¶ 22.

B. The information, connections, and cross-appointments that the Tribunal members failed to disclose, despite the obligation to do so, create an impression of bias that fully satisfies the standard for vacatur under U.S. law

The Tribunal members' failure to disclose these multiple connections and properly to investigate other potential connections suggests that even they were aware of the potential impression of bias. In fact, the issue goes beyond mere failure to disclose. Not only did both Mr. Gunter and Dr. Gaitskell fail to disclose Mr. Gunter's appointment as president in another arbitration when it occurred, but, 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.[96] It took multiple Disclosure Requests from Movants for such critical information to be disclosed finally.[97] Dr. Gaitskell also refused to investigate potential conflicts stemming from his membership in Keating Chambers, notwithstanding that those conflict checks are now common in international arbitrations.[98]

Tellingly, Mr. Gunter recently provided additional disclosures to the Parties.[99] *First*, he disclosed that he was asked to assist third-party funders in their decision to invest in a Swiss supreme court proceeding that involves certain counsel here but is unrelated to the Panama arbitrations.[100] *Second*, Mr. Gunter disclosed that his firm had been approached on two occasions by firms representing Movants to assist with entirely unrelated matters.[101] It speaks volumes that, after he had been challenged, Mr. Gunter recognized that these entirely unrelated appointments were worthy of disclosure. Yet, prior to being challenged, he chose not to disclose the significant cross-appointments involving co-arbitrators, as well as conflicts known to him at the time of his appointment, such as the fact that he sat on another arbitration with Professor Hanotiau.

Additionally, "consistent and overlapping participation in arbitrations" resulting in arbitrators who often sit together being "called upon to opine on the merits of each other's

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96 Bouchardie Decl. ¶ 53; **Exhibit 43:** Letter from Pierre-Yves Gunter to the Parties dated Oct. 30, 2020.

97 Bouchardie Decl. ¶ 53.

98 Coe Decl. ¶ 25; Bouchardie Decl. ¶ 67.

99 **Exhibit 59:** Email from Mr. Gunter to the Parties dated March 16, 2021; **Exhibit 60:** Email from Pierre-Yves Gunter to the Parties dated June 9, 2021; **Exhibit 61:** Email from Pierre-Yves Gunter to the Parties dated July 18, 2021.

100 **Exhibit 59:** Email from Mr. Gunter to the Parties dated March 16, 2021.

101 **Exhibit 60:** Email from Pierre-Yves Gunter to the Parties dated June 9, 2021; **Exhibit 61:** Email from Pierre-Yves Gunter to the Parties dated July 18, 2021.

decisions may raise a red flag[.]"[102] The practice of "double hatting," as Professor Giorgetti explains, is subject to increasing criticism precisely because of the potential for bias:

> Double hatting 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. Repeat appointments raise similar concerns. The primary concern in both scenarios is that a person "who has been appointed repeatedly by the same party may develop an affinity with that party and thus decide in their favour." Because bias may be unconscious, this problem is particularly difficult to address. . . . [C]oncerns related to repeat appointments are that "an adjudicator might feel an obligation towards the appointing party to decide in a certain way, or that the adjudicator may develop a financial dependence on a party and decide in a certain way to secure future appointments."[103]

The potential conflicts here were particularly troublesome, as Professor Giorgetti states, because situations in which "an arbitrator has an opportunity to . . . communicate with the opposing party's counsel and other arbitrators" and "financial remunerations and potential future financial incentives" may create bias.[104]

Further, as Professor Coe explains, here, inter-arbitrator dealing—particularly between two out of three arbitrators in an arbitration—can create an "imbalance of influence."[105] Not only can

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[102] Giorgetti Decl. ¶ 22.

[103] *Id.* ¶¶ 38–39 (quoting Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement ¶ 53, ICSID Resources (2020), https://icsid.worldbank.org/resources/code-of-conduct Comments); *see also* Alfonso Gomez-Acebo, *Party-Appointed Arbitrators in International Commercial Arbitration*, 34 Int'l Arb. L. Libr. 114–15 (explaining that repeat appointments may be a sign of more problematic underlying relationships between an arbitrator and a party).

[104] *Id.* ¶ 27; *see Monster Energy Co. v. City Bevs., LLC*, 940 F.3d 1130 (9th Cir. 2019) (vacating an arbitral award because the arbitrator failed to disclose his ownership interest in the arbitration organization coupled with the fact that the organization had administered 97 arbitrations for the prevailing party over the past five years). The issue of double-hatting also recently arose in *Eiser Infrastructure Ltd. v. Kingdom of Spain*, in which an arbitral award was annulled because an arbitrator failed to disclose that he had a relationship with an expert in the case arising from his work as counsel in previous cases. *See Eiser Infrastructure Ltd. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on Annulment, 11 June 2020. In a recent article, Professor Chiara Giorgetti explained that *Eiser* reflects a commitment by arbitral institutions to take the issue of double-hatting seriously and to "keep the 'bar high'" for arbitrator disclosure obligations. *See* Caroline Simson, *'Double-Hatting' Gets Spotlight After €128M Award Nixed*, Law360 (Jun. 18, 2020), https://www.law360.com/articles/1284546.

[105] Coe Decl. ¶ 28; *see also* Lisa Bohmer, *PCA Secretary-General Upholds Challenge to Stephen Drymer, Finding Possible Asymmetry of Information With His Co-Arbitrators Given His Participation in Parallel ICSID AF Arbitration*, Investment Arbitration Reporter (July 16, 2021), https://www.iareporter.com/articles/pca-secretary-general-upholds-challenge-to-stephen-drymer-finding-possible-asymmetry-of-information-with-his-co-arbitrators-given-his-participation-in-parallel-icsid-af-arbitration/ (discussing recent arbitral proceeding in which the PCA upheld an arbitrator's removal because he was sitting in a related parallel

these affiliations jeopardize equality among the co-arbitrators in the eyes of the president, but, when that affiliation "seems to involve cross-promotion (i.e., appointment nominations), the ability of those arbitrators to act independently of each other justifiably comes into question."[106] When Tribunal members fail to disclose these relationships, as Mr. Gunter and Dr. Gaitskell failed to do here, a party who later discovers the connection "may reasonably wonder why it was not disclosed and whether the deliberative process was all it should have been."[107]

Further, this Court previously held "[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."[108] Rather, "'[c]ircumstances of such a nature could come together in any number of configurations' because this is a 'fact-intensive, case-specific issue.'"[109] Thus, even though a court must take into account all unique facts and circumstances, "the irreducible minimum requirement . . . is full disclosure."[110] 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."[111] The facts underlying this case leave no doubt 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."[112]

In any event, determining the exact contours of a panel member's potential bias requires an analysis of the facts. As Professor Coe explains, the challenge mechanisms in international arbitration "require close scrutiny" because they rely on "self-judging and self-policing

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arbitration without his co-arbitrators, which created a risk of information asymmetry that tainted the integrity of the proceedings); *Caratube International Oil Co. v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, 20 March 2024, ¶¶ 89–90 ("[D]ue to his serving as arbitrator in the [prior] case and his exposure to the facts and legal arguments in that case, [the arbitrator's] objectivity and open-mindedness with regard to the facts and issues to be decided in the present arbitration are tainted.").

106 Coe Decl. ¶ 29.

107 *Id.* ¶ 30.

108 *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).

109 *Id.* at *6 (quoting *Fed. Vending, Inc. v. Steak & Ale of Fla., Inc.*, 71 F. Supp. 2d 1245, 1247 (S.D. Fla. 1999)).

110 *Cont'l Ins. Co. v. Williams*, No. 84-2646-CIV-MARCUS, 1986 U.S. Dist. LEXIS 20322, at *12 (S.D. Fla. Sept. 17, 1986), *aff'd*, 832 F.2d 1265 (11th Cir. 1987).

111 *Fed. Vending*, 71 F. Supp. 2d at 1249.

112 *Gianelli*, 146 F.3d at 1312; *Mendel*, 654 F. App'x at 1004 (citing *Gianelli*, 146 F.3d at 1312) (same).

participants" and are "not well equipped" to handle belated disclosures.[113] This Court has authorized discovery to determine arbitrator partiality under similar circumstances,[114] and it should do so again here.

Movants have shown that all three Tribunal members failed to make the requisite disclosures of various potential conflicts—omissions that are particularly suspect because of the timing and/or lucrative nature of the potential conflicts. As Professor Giorgetti concludes:

> [I]t is the existence and ready availability of opportunities for bias at all (that were not disclosed to the Parties as I believe they should have been) that is most concerning. In my opinion, the 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.[115]

These circumstances more than suffice to establish evident partiality under the U.S.-law standard, as a reasonable person in such circumstances would believe that a potential conflict exists (and, indeed, it was this evident partiality that ultimately resulted in a lack of due process in the Panama 1 Arbitration).[116] Thus, Movants request that this Court vacate the Awards rendered in the Panama 1 Arbitration due to the evident partiality of each of the Tribunal members, as displayed through their failure to disclose material and significant conflicts.

III. THE TRIBUNAL'S EVIDENT PARTIALITY MANIFESTED ITSELF IN KEY ISSUES IN THE AWARDS

The evident partiality and perception of bias revealed by the foregoing non-disclosures manifested in many ways throughout the Tribunal's Awards. In particular, the Tribunal reached unsupported conclusions—all adverse to Movants—for which it failed to state reasons and based its findings on arguments that neither ACP nor ACP's experts had made—in hundreds of pages of pleadings and some four weeks of hearings—without notice to Movants. The Tribunal thus

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[113] Coe Decl. ¶ 39.

[114] *Metro. Delivery Corp.*, 2019 U.S. Dist. LEXIS 133452, at *7–8 (concluding that discovery would "allow Plaintiff to make an initial inquiry into the relationship . . . to determine . . . the Arbitrator's partiality").

[115] Giorgetti Decl. ¶ 42.

[116] *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).

deprived Movants of the opportunity to respond to these arguments and present witness evidence, expert rebuttal opinions, or cross-examination on these matters. These failures are independent grounds for vacatur under the New York Convention and the FAA:

(a) Under Article V(1)(b) of the New York Convention, when a party has *inter alia* been denied an opportunity to be heard, the award must be vacated.[117] The award also must be vacated where a party is not given notice or an opportunity to respond to an argument.[118]

(b) When parties specially contract to receive a reasoned arbitral award, the New York Convention requires the tribunal to abide by that agreement which, in the present case, requires the Tribunal to state its reasoning.[119] Here, the Parties expressly provided in their contracts that the Tribunal must decide their dispute "under the Rules of Arbitration of the [ICC]."[120] Article 32(2) of the ICC Rules requires that an ICC "award shall state the reasons upon which it is based."[121] For an award to satisfy this requirement the Tribunal's "reasoning must be both thorough and self-sufficient" and must show that each party had "the opportunity to answer the case against it and also any pertinent point raised by the arbitral tribunal on its own initiative, as well as to deal with any fact or allegation brought to the attention of the tribunal."[122]

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[117] *See* New York Convention art. V(1)(b) (providing for vacatur if a party "was otherwise unable to present his case"); *see also Consorcio Rive S.A. v. Briggs of Cancun, Inc.*, 82 F. App'x 359, 364 (5th Cir. 2003) (noting Art. V(1)(b) states an award "need not be enforced" where party was unable to present its case); *Teamsters, Chauffers, Warehousemen & Helpers, Local Union No. 506 v. E.D. Clapp Corp.*, 551 F. Supp. 570, 577–78 (N.D.N.Y. 1982) (granting motion to vacate where petitioner had not had "a full opportunity" to present its case to arbitrator).

[118] *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985) ("The essential requirements of due process . . . are notice and an opportunity to respond."); *Parsons & Whittemore Overseas Co., Inc. v. Société générale de l'industrie du papier (RAKTA)*, 508 F.2d 969, 975 (2d Cir. 1974) ("This provision essentially sanctions the application of the forum state's standards of due process.").

[119] *See*, *e.g.*, *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 841–42 (11th Cir. 2011) (district court vacated award where parties' agreement required a reasoned award); *W. Emp'rs Ins. Co. v. Jefferies & Co.*, 958 F.2d 258, 262 (9th Cir. 1992) (vacating award where panel failed to provide reasoned award as required by arbitration agreement).

[120] **Exhibit 2:** Partial Award ¶¶ 406, 408–09.

[121] **Exhibit 6:** ICC Rules art. 32(2).

[122] Humphrey Lloyd et al., *Drafting Awards in ICC Arbitrations*, 16 ICC Int'l Ct. Arb. Bull. 19 (2005), ¶ 5; *see also id.* ¶ 5.2.3 ("The arbitral tribunal must be sure that it bases its decisions on only the facts and law presented to it by the parties or which it has ascertained (where it is

Thus, as demonstrated herein, not only does the Tribunal's evident partiality and perception of bias serve as a basis for vacatur of the Awards, but the Tribunal's actions also denied Movants the opportunity to be heard by adopting arguments that had not been made by either party and violated the Parties' contractual provision for a reasoned award.

First, the Tribunal's partiality manifested itself in its denial of Movants' opportunity to be heard and its failure to state reasons relating to a central issue at stake in the arbitration:[123] whether paragraph 1.07.D.1 of section 01 50 00 of the Employer's Requirements excluded ACP's liability for the unsuitability of the basalt rock to be excavated for purposes of the Project near the Pacific Ocean ("PLE Basalt") to produce "concrete aggregates" (in particular, sand). Paragraph 1.07.D.1 concerned the source of concrete aggregates to be used and which Movants—based upon ACP's representations—planned to use to produce the millions of cubic meters of concrete required for the Project.[124] When the PLE Basalt proved unsuitable, Movants were forced to excavate rock elsewhere in order to produce aggregates, leading not only to significant additional costs but causing massive difficulties and delays.

Both Parties expressly agreed that paragraph 1.07.D.1 should be interpreted "according to its literal terms."[125] In interpreting paragraph 1.07.D.1, the Tribunal initially conducted such "literal reading"[126] of the provision as Panamanian law required and concluded that the exclusion of liability referred only to aggregate, and not to the PLE Basalt.[127] However, the Tribunal then disregarded its own analysis and Panamanian law, and interpreted "this provision based on arguments not raised by the Parties, including by reference to prior negotiations."[128] The Tribunal did so despite the plain meaning of the Contract governed by Panamanian law, as the Tribunal

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permissible for it to do so) and which the parties have been given a proper opportunity to challenge.").

[123] *See* **Exhibit 2:** Partial Award ¶ 919 (calling the interpretation of paragraph 1.07.D.1 "central to the Parties' dispute").

[124] Bouchardie Decl. ¶¶ 11, 81.

[125] **Exhibit 84:** Transcript of Closing Hearing in ICC Case No. 20910/ASM/JPA (C-20911/ASM) (Day 22) (excerpts) at 174:1; **Exhibit 2:** Partial Award ¶ 906 ("[B]oth Parties consider[ed] that these provisions of the Contract [were] clear and require[d] no interpretation[.]"). The Parties disagreed only about what precisely a literal interpretation of the provision entailed.

[126] **Exhibit 2:** Partial Award ¶ 927.

[127] Under Panamanian law, the plain meaning of a contract is controlling. **Exhibit 2:** Partial Award ¶ 628.

[128] Bouchardie Decl. ¶ 86.

already had found in other parts of the Partial Award.[129] In particular:

(a) The Tribunal relied on a three-part analysis of the applicability of basalt rock to the disclaimer language of paragraph 1.07.D.1—argumentation that ACP had not put forward. The Tribunal analyzed paragraph 1.07.D.1 separately as against "*adequacy*," "*meet*[ing] *the requirements for the Contractor's proposed design*," and "*suitab*[ility] *for the Works*," deciding that adequacy and suitability for the Works applied to the basalt and therefore concluding that the paragraph 1.07.D.1 disclaimer applied to the basalt.[130] ACP, however, never put forward this three-part contextual argument. If Movants had had an opportunity to address this position, they would have shown (including though expert evidence) that it was unfounded.

(b) The Tribunal also took account of "the [P]arties' conduct . . . to assess their mutual intention."[131] However, ACP argued that the literal meaning of the terms of the Contract (not the Parties' conduct) should be used to establish the mutual intent of the Parties. Further, in assessing the Parties' mutual intention, the Tribunal considered the Q&As exchanged at the tender stage, noting that, in the Tribunal's view, the tenderers' questions referred to the sources of the aggregate (i.e., the rock or the PLE Basalt) as "aggregates."[132] Here again, the Tribunal went beyond the arguments made by ACP, which had never argued that the Q&A session held with tenderers for the Project should inform the interpretation of the Contract.[133] On this point too, Movants were denied an opportunity to respond with appropriate evidence and counter-arguments. Had Movants been given such opportunity, they would have explained that none of the tenderers' questions relied upon by the Tribunal came from Movants (rather they came from other tenderers) and cannot therefore evidence Movants' understanding at the time, especially considering that Movants' questions

[129] **Exhibit 2:** Partial Award ¶ 628 ("The first sentence [of article 1132 of the Panamanian Civil Code] reflects the principle of *in claris interpretatio non fit*, and thus imposes the general rule that *if the words of the contract are clear and unambiguous, no interpretation is necessary and the clear terms shall prevail*.") (emphasis added).

[130] **Exhibit 2:** Partial Award ¶ 931.

[131] **Exhibit 2:** Partial Award ¶¶ 934–38.

[132] **Exhibit 2:** Partial Award ¶¶ 934–35.

[133] Bouchardie Decl. ¶¶ 95–96.

clearly distinguished between the basalt (the rock as a source) and the aggregates (the manufactured product).[134]

Further, the Tribunal offered no reasons whatsoever for its departure from what it elsewhere had concluded was the plain meaning of paragraph 1.07.D.1—or from the governing principle, which it had itself espoused, that the plain reading of a contract prevails under Panamanian law. This is all the more remarkable because the Tribunal's total about-face took place within merely a few paragraphs. At paragraph 927 of the Partial Award, the Tribunal established the clear terms and "literal reading of the wording of [paragraph 1.07.D.1]"—but by paragraph 934, the Tribunal contradictorily asserted that paragraph 1.07.D.1 is "objectively ambiguous" and then sought, without taking into consideration any argument raised by the Parties, to rely on the Parties' conduct leading up to the conclusion of the Contract. The Tribunal's reading of paragraph 1.07.D.1, a direct result of its bias, led the Tribunal to exclude ACP's liability for the unsuitability of the PLE Basalt, despite what it had earlier recognized was the plain, literal meaning of the relevant provision.[135]

The consequences of the Tribunal's findings on this issue were far-reaching. In particular, the Tribunal explicitly relied on its interpretation of paragraph 1.07.D.1 to reject Movants' claims

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[134] Bouchardie Decl. ¶¶ 95–97.

[135] In arriving at the above conclusions, which contradicted what the Tribunal itself had said was the "clear distinction" made in paragraph 1.07.D.1 between aggregate and rock and the "literal reading of the wording of this provision," the Tribunal fundamentally exceeded its authority. *See* New York Convention art. V(1)(c) (providing for vacatur of an award that "deals with a difference not contemplated by 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"). An arbitral tribunal exceeds its authority when it "ignore[s] the plain language of the [parties'] contract" by "contradict[ing] the express language of the agreement" or by "modify[ing] clear and unambiguous terms." *Wiregrass Metal Trades Council v. Shaw Envtl. & Infrastructure, Inc.*, 837 F.3d 1083, 1088 (11th Cir. 2016) (internal citations and quotation marks omitted). An arbitral award should also be vacated where a tribunal fails to apply the governing law or simply ignores its provisions. *See Edstrom Indus., Inc. v. Companion Life Ins. Co.*, 516 F.3d 546, 552–53 (7th Cir. 2008) (finding arbitrator failed to apply state law as required by the arbitral agreement), *abrogated on other grounds by Affymax, Inc. v. Ortho-McNeil-Janssen Pharm., Inc.*, 660 F.3d 281, 285 (7th Cir. 2011) (abrogating *Edstrom* insofar as it could be read as resting on the ground of manifest disregard of law). The Tribunal ignored this basic aspect of its mandate and, instead, impermissibly relied on its own vague "notions of . . . justice" rather than applying norms that could even plausibly be characterized as Panamanian law. *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013) (internal citations and quotation marks omitted).

for breach of the duties to inform and to act in good faith,[136] both of which had been put forward by Movants as independent bases for their concrete aggregate production claim.[137] Further, although the Tribunal did not explicitly acknowledge it, its interpretation of paragraph 1.07.D.1 vitiated Movants' alternative theories for their concrete aggregate production claims (such as the breach of the Employer's Requirements).[138]

Second, the Tribunal found that, by failing to conduct additional tests on the PLE Basalt at the tender stage to determine its suitability for crushing into aggregates, Movants had not complied with Prudent Industry Practices.[139] As a result, the Tribunal held that, because Movants failed to do additional testing,[140] Movants "did not undertake sufficient efforts to self-inform" and in turn breached their duty to self-inform.[141] As detailed by Mr. Bouchardie, in doing so the Tribunal effectively imposed its own views of Prudent Industry Practices based on a biased and incomplete analysis of the evidence, and ignoring important arguments raised by Movants.[142] Further, while the Tribunal erroneously claimed it was relying on positions asserted by ACP's experts for its finding that Movants did not conduct sufficient validation tests, no such position was presented.[143] By ignoring the Parties' agreement and evidence, and creating their own view of Prudent Industry Practices, without inviting the Parties' views, the Tribunal reached unsupported conclusions for which it failed to state reasons and denied Movants an opportunity to be heard. Such conduct only heightens the concerns of Tribunal bias.

Third, in support of its conclusion that Movants had failed to appreciate the risk that the PLE Basalt would not be suitable for aggregate production, the Tribunal also noted that one of the

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[136] *See* **Exhibit 2:** Partial Award ¶¶ 1097–98, n.979 (duty to inform); *id.* ¶ 1121 (duty to act in good faith). The contractual exclusion also was relied upon by the minority to reject Movants' claim for breach of the Panamanian law duty to plan. *Id.* ¶¶ 1062–095.

[137] *See* **Exhibit 2:** Partial Award ¶¶ 744, 780–83, 1096, 1103, 1118.

[138] Bouchardie Decl. ¶ 82 *et seq.* With respect to Movants' claim under the Employer's Requirements, the Tribunal's finding that ACP did not bear the risk for the unsuitability of the PLE Basalt necessarily affected the Tribunal's interpretation of the statements included by ACP in the Employer's Requirements regarding the suitability of the PLE Basalt. Similarly, if Movants did not bear the risk for the unsuitability of the PLE Basalt for use as concrete aggregates, that would reduce the level of investigation that Movants would have been expected to carry out prior to submitting their tender.

[139] *See* **Exhibit 2:** Partial Award ¶ 1081.

[140] *See* Bouchardie Decl. ¶ 99.

[141] *Id.*

[142] *See* Bouchardie Decl. ¶¶ 101–04.

[143] *Id.*

tenderers (C.A.N.A.L.) had bid a price much higher than that of Movants and even ACP's own estimate, which the Tribunal inferred was the result of C.A.N.A.L. better appreciating the risks associated with the Project (including the risk of unsuitability of the PLE Basalt for aggregate production).[144] ACP, however, never argued that C.A.N.A.L.'s bid was more reasonable because C.A.N.A.L. had better assessed the unsuitability of PLE Basalt for aggregate.[145] Rather, the bids were significantly different, and even "ACP itself recognized that the bid prices would be very dependent on the quantities of concrete that the Tenderers would plan to use[.]"[146] Thus, Movants were denied the opportunity to introduce evidence and arguments in rebuttal to the Tribunal's own speculation about C.A.N.A.L.'s bid.[147]

Fourth, the Tribunal relied on large block quotes from the Cofferdam Arbitration majority award and imported the Cofferdam majority's approach for many of its conclusions, offering no additional analysis of its own.[148] As the Tribunal itself acknowledged,[149] the Cofferdam Arbitration majority award was *not* binding. Simply copying and pasting from a non-binding source cannot be deemed "providing reasons," especially here, where Movants provided—but the Tribunal ignored—additional evidence and argumentation as to why the Cofferdam Arbitration majority award was wrong.

Thus, the Tribunal's bias resulted in the Partial Award—and by extension the Final Award—being built upon contradictory reasoning—or no reasoning at all—at key junctures, factual determinations unsupported by the record,[150] and unknown or irrelevant grounds, thus demonstrating reasoning "so erroneous . . . or unclear" that the Awards must be set aside.[151]

REQUEST FOR HEARING AND DISCOVERY

Movants request a hearing. A brief hearing will give the Parties an opportunity to address the complex factual background underlying this case and supporting vacatur of the Awards, including the multiple and overlapping relationships between the Tribunal members and others

144 *See* **Exhibit 2:** Partial Award ¶ 1060.

145 *See* Bouchardie Decl. ¶¶ 105–10.

146 Bouchardie Decl. ¶ 109.

147 *See* Bouchardie Decl. ¶¶ 109–10.

148 *See* Bouchardie Decl. ¶ 27.

149 **Exhibit 2:** Partial Award ¶ 1129.

150 *See Detroit Coil Co. v. Int'l Ass'n of Machinists & Aerospace Workers, Lodge No. 82*, 594 F.2d 575, 580–81 (6th Cir.) (holding that an award cannot stand when arbitrator's factual determinations are unsupported by record).

151 *Chevron Corp. v. Republic of Ecuador*, 949 F. Supp. 2d 57, 68 (D.D.C. 2010).

that give rise to a reasonable impression of partiality, the denial of Movants' opportunity to be heard, and the Tribunal's failure to state reasons for their ultimate decision.

Movants also request expedited discovery under Federal Rule of Civil Procedure 26(d)(1). Movants have emphasized in the Parties' Joint Notice on Consolidation[152] that it is of critical importance that consolidation of the vacatur proceedings not affect Movants' rights to seek discovery in accordance with the discovery orders previously issued by this Court.[153] Given that the requested discovery could result in further facts supporting the evident partiality—and acknowledging the difficulty in obtaining such facts due to the Tribunal's reticence to disclose the facts and ACP's failure to address the facts—Movants reserve the right to amend and/or supplement the facts and arguments in this filing.

PRAYER FOR RELIEF

For the foregoing reasons, Movants move this Court to enter an order vacating the Awards in full and granting such other relief as the Court should deem proper.

[152] Parties' Joint Notice on Consolidation (D.E. 50) at 3.

[153] Order Requiring Discovery and Scheduling Conference and Order referring Discovery Matters to the Magistrate Judge, *Grupo Unidos por el Canal, S.A. et al v. Autoridad Del Canal De Panama*, No. 1:21-cv-21509-RNS (S.D. Fla. Apr 19, 2021), ECF No. 13; Magistrate Judge Goodman's Discovery Procedures Order, *Grupo Unidos por el Canal, S.A. et al v. Autoridad Del Canal De Panama*, No. 1:21-cv-21509-RNS (S.D. Fla. Apr 19, 2021), ECF No. 14.

Date: July 23, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on July 23, 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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