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.

SECOND DECLARATION OF NICOLAS BOUCHARDIE

I, Nicolas Bouchardie, declare as follows:

1. As I explained in my first Declaration (D.E. 55-3), I am a partner in the law firm of White & Case LLP in Paris, France, and act as one of the lead counsel to Movants Grupo Unidos por el Canal, S.A. ("GUPC S.A."), Sacyr, S.A. ("Sacyr"), Webuild S.p.A. ("Webuild") and Jan De Nul N.V. ("Jan De Nul") (collectively "Movants"). Below, I set forth additional important relevant facts from the dispute between Movants and Respondent Autoridad del Canal de Panamá ("ACP") (collectively the "Parties") in light of certain statements made by ACP and its declarant Nicholas Henchie in ACP's Response to Movants' Consolidated Motion to Vacate Partial and Final Arbitral Awards ("ACP's Response") (D.E. 57) and Consolidated Cross-Motion to Confirm and Enforce Partial and Final Arbitration Awards ("Cross-Motion") (D.E. 58). I write to offer clarification as to certain facts presented in ACP's Response and the Declaration of Nicholas Henchie (D.E. 57-1) with regard to the record, Parties' arguments, and the arbitrators' decision and impartiality. In particular, I write to (i) explain further the issues regarding the arbitrators' disclosures; (ii) identify

and explain the defects of the Partial Award; (iii) explain further the role of arbitrator compensation, which I understand is relevant to assess Movants' argument on evident partiality; (iv) address Mr. Henchie's comments regarding the Lock Gates arbitration; and (v) discuss certain issues regarding the Final Award.

I. ARBITRATOR DISCLOSURES

2. As explained in my first Declaration, following Movants' challenges to the arbitrators, Mr. Gunter began disclosing certain appointments or circumstances that, while unrelated to the underlying arbitration at issue here ("Panama 1"), related to the Parties or their counsel in the current proceedings.[1]

3. Mr. Henchie states in his Declaration that Mr. Gunter's recent additional disclosures "quite obviously ha[ve] no bearing whatsoever on his independence and impartiality in the Concrete and Aggregate (or Disruption) arbitration" and that I do not explain how these disclosures are relevant.[2] I believe that Mr. Henchie's statements are incorrect and misleading.

4. In particular, it is in my view telling that Mr. Gunter decided to *willingly* provide disclosures in a closely related ongoing arbitration with the exact same tribunal ("Panama 2"), for the first time since his appointment in Panama 1 or Panama 2, and only after Movants' challenges. As is evident from Mr. Gunter's disclosures, it was simple and minimally burdensome to make such disclosures and I believe far more significant relationships should have been disclosed

---

[1] Declaration of Nicolas Bouchardie ¶ 62 (D.E. 55-3) ("Bouchardie Decl."); *see also* **Exhibit 6:** Email from Pierre-Yves Gunter to the Parties dated September 6, 2021 (restating the same previously disclosed information contained in his July 18, 2021 email to the Parties (D.E. 55-65) that his firm's Lugano office assisted Bonelli Erede Pappalardo, counsel for Movants in Panama 2, in an unrelated transfer pricing matter).

[2] Henchie Decl. ¶¶ 90–91 (D.E. 57-1) ("Henchie Decl.").

earlier, when the potential conflicts arose (either before Mr. Gunter's appointment or during Panama 1).

5. Moreover, since Movants' Consolidated Motion to Vacate, Mr. Gunter and Dr. Gaitskell both have provided additional disclosures. *First*, Mr. Gunter disclosed that he had been approached by a partner in White & Case LLP's Geneva office for a recommendation letter.[3] He further followed up that once that partner had learned of Mr. Gunter's current service in the Panama 2 arbitration, he withdrew his request.[4]

6. *Second*, Dr. Gaitskell recently disclosed that he has been nominated as a party-appointed arbitrator in an arbitration unrelated to the Panama 1 and Panama 2 proceedings. Dr. Gaitskell explained that, in that matter, the other party-appointed arbitrator recommended Prof. Bernard Hanotiau as president for the tribunal.[5] Dr. Gaitskell requested that the Parties inform him of any "comments."[6] Movants objected to this potential cross-appointment of Prof. Bernard Hanotiau, expressing that they are "deeply concerned" over the "legitimate doubt as to the independence and impartiality of those involved, who still have to decide pending disputes on the Panama Canal project."[7] Following this objection, Dr. Gaitskell informed the Parties that, "in view of the contents" of Movants' email, he "shall not take up the proposal made and so Mr[.] Hanotiau will not be appointed."[8] Movants' objection should come as no surprise, given Dr. Gaitskell's earlier failures to disclose similar circumstances, as described in my first Declaration.[9]

---

3 **Exhibit 2:** Email from Pierre-Yves Gunter to the Parties dated August 14, 2021, at 2.

4 **Exhibit 2:** Email from Pierre-Yves Gunter to the Parties dated August 14, 2021, at 1.

5 **Exhibit 3:** Email from Robert Gaitskell to the Parties dated September 3, 2021.

6 *Id.*

7 **Exhibit 4:** Email from Claimants to Robert Gaitskell dated September 6, 2021.

8 **Exhibit 5:** Email from Robert Gaitskell to the Parties dated September 6, 2021.

9 Bouchardie Decl. ¶¶ 63–70 (D.E. 55-3). Indeed, this includes a failure to disclose that he had sat with Jim Loftis, counsel for ACP, in an arbitration up until 2012, shortly before the

7. Issues such as these are the precise reason why, in my view, prompt and full disclosures are essential, as they allow the Parties' concerns to be voiced contemporarily and arbitrators to decide on cross-appointments with the benefit of the Parties' position.

II. COMMENTS ON THE HENCHIE DECLARATION'S STATEMENTS REGARDING THE PARTIAL AWARD

a. The Tribunal's interpretation of the liability disclaimer in paragraph 1.07.D.1. was inconsistent with its literal meaning

8. As explained in my first Declaration and the Consolidated Motion to Vacate, the Tribunal (i) interpreted the liability disclaimer in paragraph 1.07.D.1 of Section 01 50 00 of the Employer's Requirements on the basis of arguments that no Party had offered and to which Movants had no opportunity to respond, and (ii) did not provide a reason for its departure from what it had concluded was the literal meaning of paragraph 1.07.D.1, which I understand should have been dispositive under Panamanian law.[10]

9. A critical question to be decided by the Tribunal was whether the disclaimer in paragraph 1.07.D.1 applied to the basalt itself (*i.e.*, the rock or the source of the concrete aggregate), as opposed to the end product (aggregates) that would be produced from the basalt.[11] As the Tribunal held in another part of the Partial Award, and as I believe was undisputed

---

arbitration at issue here commenced, and which he failed to mention until being forced to disclose in October 2020. *See* Email from Dr. Gaitskell to the Parties dated Oct. 29, 2020 (D.E. 55-45). An updated version of the visual timeline I previously provided in my first Declaration (D.E. 55-69), showing this overlap between Dr. Gaitskell and Mr. Loftis is attached as **Exhibit 8** to this Declaration.

[10] *See* Consol. Mot. to Vacate, at 25–28 (D.E. 55); Bouchardie Decl. ¶¶ 76–92 (D.E. 55-3).

[11] Partial Award in ICC Case No. 20910/ASM/JPA (C-20911/ASM) ¶ 929 (D.E 55-6) ("Partial Award") ("[T]he Claimants . . . take the position that the Contractor's claim relates to the source itself, and therefore is not covered by the exclusion of liability in the second sentence which they argue only covers the end-product aggregates.").

between the Parties, Panamanian law requires that contractual questions be decided exclusively by reference to the express terms where they are clear and unambiguous.[12]

10. I note that Respondent 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.[13] In Mr. Henchie's view, the Tribunal merely said that "a literal reading '*suggests* that the disclaimer concerning "such aggregate" refers only to the aggregate produced from the rock excavated from the PLE, and not to the rock itself,' and that the 'use of the term "such aggregate" *would not necessarily* be understood as a reference to the PLE Basalt prior to being processed into aggregates.'"[14] Mr. Henchie's Declaration does not, however, include all the language contained in the Tribunal's reasoning,[15] which must be read fully, and in conjunction with the preceding sections of the Partial Award. The Tribunal confirmed that, since the first sentence of the provision distinguished between "rock" (*i.e.*, the PLE basalt) and "aggregate", the Tribunal was bound to the literal meaning of the term "aggregates" in the second sentence of paragraph 1.07.D.1, which it could not substitute for "source of aggregate" (*i.e.*, the "rock"):

> [T]he disclaimer in the second sentence refers to 'such aggregate' as opposed to 'such source of aggregate'. Thus, even if such interpretation (i.e. that this disclaimer would be meant to apply to the source of aggregate) could in theory make sense, *the Arbitral Tribunal is of the opinion that in the absence of conclusive evidence, it cannot substitute or modify the clear wording of the provision*.[16]

---

12 Consol. Mot. to Vacate 25–26 (D.E. 55) (discussing Partial Award ¶ 628 (D.E. 55-6).

13 Partial Award ¶ 927 (D.E. 55-6) ("[T]he Arbitral Tribunal is of the view that a literal reading of the wording of this provision indeed suggests that the disclaimer . . . refers only to the aggregate . . . and not the rock itself.").

14 Henchie Decl. ¶ 160 (D.E. 57-1) (emphasis added) (quoting Partial Award ¶ 927 (D.E. 55-6)).

15 *Cf.* Partial Award ¶ 927 (D.E. 55-6) ("As there is *clear distinction* made in the first sentence of Paragraph 1.07.D.1 between aggregate and the rock coming from the PLE, *the Arbitral Tribunal is of the view that a literal reading of the wording of this provision indeed suggests that the disclaimer concerning 'such aggregate' refers only to the aggregate produced from the rock excavated from the PLE, and not to the rock itself*." (emphasis added)).

16 Partial Award ¶ 925 (D.E. 55-6) (emphasis added).

The Tribunal subsequently confirmed:

> As there is a clear distinction made in the first sentence of Paragraph 1.07.D.1. between aggregate and the rock coming from the PLE, the Arbitral Tribunal is of the view that a literal reading of the wording of this provision indeed suggests that *the disclaimer concerning 'such aggregate' refers only to the aggregate produced from the rock excavated from the PLE, and not the rock itself.* The use of the term 'such aggregate' would not necessarily be understood as a reference to the PLE Basalt prior to being processed into aggregates, since the provision refers to the PLE Basalt as 'rock', not as 'aggregate'.[17]

11. However, despite focusing on the contracts' literal meaning, the Tribunal changed course, concluding that "the second sentence cannot be read as an exclusion of liability limited to the source of aggregate, and clearly includes an exclusion of liability for the end-product aggregates" as well.[18] Mr. Henchie reiterates the Tribunal's holding,[19] and attempts to explain this change by stating that the Tribunal "considered that the second sentence referred specifically to 'such aggregate[]'" and that it was "on that basis that the Tribunal concluded that the second sentence could not be read as an exclusion of liability *limited solely to the source* of aggregate."[20] Nonetheless, 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.

12. To support this conclusion, the Tribunal conducted a contextual analysis, and divided the disclaimer into "three distinct aspects, namely (i) the adequacy; (ii) 'meet[ing] the requirements for the Contractor's proposed design', and (iii) the 'suitab[ility] for the [Project],'" concluding that, , aspects (i) and (iii)—but not aspect (ii)—actually disclaimed liability for the

---

17 Partial Award ¶ 927 (D.E. 55-6) (emphasis added).

18 Partial Award ¶ 927 (D.E. 55-6).

19 Henchie Decl. ¶¶ 161–67 (D.E. 57-1).

20 Henchie Decl. ¶ 146 (D.E. 57-1) (emphasis in original).

adequacy and suitability *both* of the PLE Basalt used to make aggregate, *and* of the aggregate itself.[21] Now, Mr. Henchie suggests that this was consistent with the position advocated by ACP during the arbitration, because ACP argued that it "did not guarantee the 'adequacy or suitability of the basalt for use on the Works,' . . . and the ACP then expressly referenced paragraph 1.07.D.1."[22] Mr. Henchie's statement is misleading, and does not change my prior positions in any way.

13. In particular, ACP's statements contradict the paragraph's literal reading.[23] I note that, in his declaration, Mr. Henchie confirms that the literal interpretation of paragraph 1.07.D.1 advanced by ACP was based on a different contextual analysis,[24] involving the interplay of 1.07.D.1 with other contractual provisions,[25] namely: Sub-Clauses 4.12 [*Unforeseeable Physical*

---

[21] Partial Award ¶ 931 (D.E. 55-6) (emphasis omitted) (first and second modification in original).

[22] Henchie Decl. ¶ 137 (D.E. 57-1).

[23] ACP points out, in the Henchie Declaration, that it had "raised" "[t]he importance of the term 'suitability' in the context of paragraph 1.07 D.1." Henchie Decl. ¶ 177 (D.E. 57-1). First, with respect to the element of suitability, "raising" such term—in a different context and for a different argument—cannot possibly have given Movants notice of the different argument that the Tribunal made in its Award. ACP's argument was *not* that the suitability element in that clause meant that the disclaimer applied both to the aggregate and to the source of the aggregate. To the contrary, one of ACP's arguments was that Movants' claim related to the aggregates themselves and was thus covered by the exclusion of liability, regardless of whether it covered the source of the aggregates as well. *See* Partial Award ¶ 929 (D.E. 55-6). Second, in any event, ACP does not contest that it did not "raise" the element of adequacy.

[24] *See* Henchie Decl. ¶ 141 (D.E. 57-1) (referring to ACP's counsel statements at the Closing Hearing regarding ACP's literal interpretation: "he [Mr. McMullan, QC, ACP's counsel] insisted that paragraph 1.07 D.1 had to be construed in the context of the entire agreement and *he listed other provisions of the Contract that bore on the ACP's proffered interpretation* of paragraph 1.07 D.1." (emphasis added)); *see also id.* ¶ 159 ("As discussed above, the ACP did state that its interpretation, or 'construction', of paragraph 1.07 D.1 was the correct interpretation *based on a literal reading of the provision itself, in context*. . . . [T]he ACP stated that *paragraph 1.07 D.1 must be considered in the contract as a whole*." (emphasis added)). Mr. Henchie refers to the other contractual provisions relied upon by ACP in this context, namely Sub-Clauses 4.20 (together with paragraphs 1.07.A, B and C) and 4.12, in other paragraphs. *See* Henchie Decl. ¶¶ 127–30 (D.E. 57-1).

[25] *See* Henchie Decl. ¶ 126 (D.E. 57-1) (confirming that its interpretation had three points: (1) 1.07 D.1's text; (2) that 1.07 D.1 accorded with the Contract's "overall risk allocation . . . as

Conditions] and 4.20 [*Free Issue Materials*] of the Conditions of Contract (together with paragraphs 1.07.A, B and C of Section 01 50 00, covering disclaimers for the "borrow" areas and "accumulated materials").[26]

14. ACP's analysis not only was different from the three-part analysis advanced by the Tribunal, but was expressly rejected by the Tribunal itself in other parts of the Partial Award following detailed consideration.[27] The Tribunal first found that Sub-Clause 4.12 did not apply to the PLE basalt: "[T]he Arbitral Tribunal does not consider that the suitability of the PLE basalt as source material for the production of concrete aggregates can be deemed a 'physical condition' within the meaning set out in Sub-Clause 4.12.1.1[.]"[28] The Tribunal then analysed Sub-Clause 4.20, which disclaims liability for "borrow" and "accumulated" materials, identified in Section 01 50 00, sub-paragraphs 1.07.B and 1.07.C, respectively. The Tribunal found that the PLE basalt referred in paragraph 1.07.D.1 was not an "accumulated" materials covered by the disclaimer in Sub-Clause 4.20 and Section 01 50 00 paragraph 1.07.C: "[t]his language makes clear that 'accumulated material' is therefore the material made available from dredging works, which would not cover the PLE [Basalt] area."[29]

15. The Tribunal separately concluded that the PLE basalt was not a "borrow" material, and thus was not covered by the disclaimer in Sub-Clause 4.20 and Section 01 50 00 paragraph 1.07.B, stating that "[t]he *disclaimers* of responsibility concerning the 'borrow material' *contained*

---

evidenced by other contractual provisions;" and (3) other evidence, like the "Contractor's [Movant's] very own statements during the Referral 11 proceedings" interpreting 1.07. D.1).

[26] Henchie Decl. ¶¶ 127, 128(b) (D.E. 57-1); *see id.* ¶¶ 129–30, 141, 159 (discussing ACP's interpretation).

[27] Partial Award ¶¶ 896–900, 915, 918 (D.E. 55-6) (concluding that Sub-Clause 4.12 did not apply to the suitability of the PLE Basalt).

[28] Partial Award ¶ 899 (D.E. 55-6).

[29] Partial Award ¶ 915 (D.E. 55-6).

in Sub-Clause 4.20 and Sub-Paragraph 1.07.B.3 of Section 01 50 00 therefore do not cover the PLE Basalt."[30] Finally, regarding paragraph 1.07.A.1 of Section 01 50 00 (and Drawing 5803-57 referred therein), the Tribunal found that (i) "Sub-Paragraph 1.07 A.1 of Section 01 50 00 does little to assist"; (ii) the drawing "does not assist the Arbitral Tribunal in its interpretation of these provisions", namely the disclaimer in Sub-Clause 4.20; and (iii) that ACP bore responsibility for the "defective" Drawing 5803-57.[31]

16. Even Mr. Henchie notes that "the Tribunal acknowledged that its own reading of the second sentence of paragraph 1.07 D.1 left an additional question unanswered" that ACP had "raised" "[t]he importance of the term 'suitability' in the context of paragraph 1.07 D.1."[32]

17. With respect to the element of suitability, "raising" such term—in a different context and for a different argument—did not give Movants notice of the different argument that the Tribunal made, for the first time, in its Partial Award. Further, ACP's reference to the term "suitability" was made in the context of the application of the referred contractual provisions, which I just discussed, and which were rejected by the Tribunal. This is clear from reading the full paragraph of ACP's Statement of Defense cited by Mr. Henchie[33]:

> 2.23 The suitability of the basalt for the production of aggregate is exactly what that section of the Employer's Requirements was intended to cover, as the Contractor has admitted already. This is clear from a plain and ordinary reading of Sub-Clause 4.20 [*Employer's Equipment and Free-Issue Material*] and Section 01 50 00 [*Temporary Facilities, Accesses and Controls*] of the Employer's Requirements, as demonstrated below. In fact, Section 01 50 00 [*Temporary Facilities, Accesses and Controls*] and Drawing 5803-57 [*Material Availability*] both *expressly* refer to the use of the PLE basalt and Aguadulce Hill basalt as aggregate.

---

30 Partial Award ¶ 918 (D.E. 55-6) (emphasis added).

31 Partial Award ¶¶ 908–12 (D.E. 55-6).

32 Henchie Decl. ¶¶ 170–71, 177 (D.E. 57-1).

33 ACP's Statement of Defense ¶ 2.23 (D.E. 57-4); *see* Henchie Decl. ¶ 135 (D.E. 57-1) (relying selectively on paragraph 2.23).

18. Mr. Henchie also does not contest that ACP did not "raise" the element of adequacy, which was retained by the Tribunal in paragraph 931 of the Partial Award, and that ACP did not raise the Tribunal's three-part contextual analysis. ACP does, however, suggest that Movants were not entitled to notice of "every specific element and nuance within the Tribunal's reasoning[.]"[34] This is in my view incorrect. I consider that the Tribunal should have given notice of a material argument that it wanted to make in relation to an issue that was at the heart of the Parties' dispute, and which covered a significant portion of Movants' claimed entitlements.

19. The Tribunal also considered questions 108–11 of the Q&As exchanged at the tender stage, noting that, in the Tribunal's view, questions by certain tenderers' (not Movants) referred to the sources of the aggregate (*i.e.*, the rock or the PLE Basalt) as "aggregates".[35] Mr. Henchie does not dispute that ACP did not argue that the question to be decided by the Tribunal *(i.e.*, whether the disclaimer also applied to the PLE Basalt) should be decided by reference to the Q&As exchanged by unrelated tenderers at the tender stage. Rather, Mr. Henchie argues that ACP referred to Q&A 110 and 111 "in support of their case that the ACP was making it clear that the PLE basalt would and could be used as the primary source of concrete aggregates for the Project and the PLE basalt was suitable for that purpose", and "in connection with their case that the ACP had considered only the production of manufactured sand from PLE basalt."[36] These are, however, different arguments, made to prove different points and not raised in connection with the interpretation of Article 1.07.D of Section 01 50 00 of the Employer's Requirements.

---

[34] Resp. to Consol. Mot. to Vacate 25 (D.E. 57).
[35] Partial Award ¶¶ 934–35 (D.E. 55-6).
[36] Henchie Decl. ¶ 180 (D.E. 57-1).

20. Additionally, none of the Q&A questions relied upon by the Tribunal in its decision came from Movants (they came from other tenderers).[37] Movants had no notice that the Q&A questions would be relied upon by the Tribunal, and that these Q&As exchanged during the tender period between ACP and unrelated tenderers would be used to interpret the plain language of the contract. Such a reasoning, I believe, finds no support in Panamanian law, the facts, or the Parties' arguments.

21. Finally, Mr. Henchie's reliance on the Contractor's Referral 11 submissions in relation to the interpretation of paragraph 1.07.D.1 is incorrect and taken out of context. First, Mr. Henchie ignores that the Tribunal seriously mischaracterized Movants' position to decide against Movants. Movants' main position in Referral 11 was the exact same as in the arbitration, namely that paragraph 1.07 D.1 distinguished between "aggregate" and "rock" (*i.e.*, the PLE basalt as the "source of aggregate"), and that ACP only disclaimed liability for the former. In its Post-Hearing Submission to the DAB in Referral 11, Movants thus explained that its claim was "based upon the quality and characteristics for crushing the source of basalt, not the final processed aggregate. The processed aggregate is adequate and suitable for the Works as agreed by the Employer":[38]

---

[37] Mr. Henchie does not mention two of the arguments relied on by the Tribunal in any context. *See* Henchie Decl. ¶ 180 (D.E. 57-1) (failing to provide any references to ACP's submissions covering its arguments in relation to questions 108 and 109).

[38] **Exhibit 1:** GUPC, S.A., Post-Hearing Submission ¶ 65, DAB Referral 11 (Concrete Aggregate Production).

65. The Contractor's response to certain contractual provisions relied upon by the Employer is set out below:

Contract Provision	Contractor's Response
Sub-Clause 4.20 (Employer's Equipment and Free Issue Material) -- The Employer shall not have any responsibility for any shortage, defect, or default in "accumulated materials" or "borrow material"	The PLE was neither "accumulated materials" nor "borrow material" as defined in the Contract. Rather, it was a required excavation which is not subject to Sub-Clause 4.20. The Contractor was forced to exploit Aguadulce Quarry as the primary aggregate source because the PLE proved unsuitable for that purpose
Section 01 50 00 (Temporary Facilities Accesses and Controls) -- The Employer in no way guarantees that the aggregate from the Pacific site excavations is adequate or meets the requirements for the Contractor's proposed design or is suitable for the Works.	The Contractor's claim is based upon the quality and characteristics for crushing of the source basalt, not the final processed aggregate. The processed aggregate is adequate and suitable for the Works as agreed by the Employer.

22. This is in fact what Movants explained in their Panama 1 Statement of Reply:[39]

1229. ACP's purported reliance on GUPC's RSOC in front of the DAB to show that GUPC allegedly admitted that Article 1.07.D of ER Section 01 50 00 covered the suitability of the PLE Basalt to produce concrete aggregates and that "it appreciated this fact during the tender period"[2255] has no basis. ACP conveniently ignores paragraph 68 of the same pleadings it seeks to rely upon, which shows that GUPC's position in front of the DAB was fully consistent with its position in this arbitration:[2256]

> 68. As an initial matter, the Contractor's claim is based upon the nature, quality and condition of the basalt; not the final aggregate product. Therefore, the Employer's statement that it does not guarantee that the *aggregate* is adequate, meets the Contractor's proposed design, or is suitable for the Works is irrelevant to the current claim. The Contractor is not claiming that the aggregate is inadequate or otherwise deficient. Indeed, aggregate from the Pacific site (largely from the AHQ) has been successfully produced and incorporated into the Works, although at significant additional cost.

1230. In light of the above, it is clear that Article 1.07.D.1 does not cover the issues encountered by GUPC when processing the PLE Basalt. There is therefore no basis for ACP to rely on that article to seek to exclude its responsibility for the representations it made regarding the suitability of the PLE Basalt as primary source of material for concrete aggregate production.

23. Importantly, Mr. Henchie ascribes no significance to the fact that, in Referral 11, the DAB found in favor of Movants awarding over USD 118 Million and concluded that ACP acted negligently. Finally, and in any event, this argument was not central to the Tribunal's

[39] Movants' Statement of Reply ¶¶ 1229–230 (D.E. 57-42).

decision to depart from the literal meaning of Article 1.07.D.1 on the basis of arguments not raised by the parties.

24. In ACP's Response, ACP appears to minimize the matter by stating that the Tribunal's departure from the plain meaning of the clause is a mistake of law or fact, or else contractual interpretation.[40] This response misstates Movants' argument. I believe the issue is not whether the Tribunal engaged in contractual interpretation, and then did or did not make a mistake, but whether the Tribunal deprived GUPC S.A. of due process by departing from the method of interpretation agreed by the Parties[41]—and required by law—instead relying on its own conjecture, rather than arguments made by the parties, and based its decision on arguments not made by or discussed with the Parties.

25. Relatedly, Mr. Henchie characterizes the Tribunal's decision on paragraph 1.07.D.1 as "*dicta*."[42] I disagree with this characterization. Although ACP points out that the Tribunal's disposition of one basis for Movants' USD 168 million concrete aggregate production claim did not explicitly turn on the interpretation of paragraph 1.07.D.1, it does not, and indeed cannot, dispute that two other, independent bases for that claim did turn on such an interpretation. Indeed,

---

40 Resp. to Consol. Mot. to Vacate 26 (D.E. 57) ("This is contract interpretation, which courts do not review.").

41 Henchie Decl. ¶¶ 140–41 (D.E. 57-1). Mr. Henchie does not dispute that the Parties agreed that paragraph 1.07.D.1 had to be interpreted in accordance with its literal sense. Mr. Henchie clarifies that the Parties took different positions to the literal interpretation of paragraph 1.07 D.1. This is correct: Although both Parties agreed to a literal reading, GUPC S.A.'s position on the literal reading of the provision emphasized on the difference between the term "rock" and "aggregate" (an interpretation confirmed by the Tribunal at paragraphs 925 and 927 of the Award); ACP relied on the literal interpretation of paragraph 1.07.D.1 in the context of other contractual provisions, as confirmed in in paragraphs 117 to 120 of the Declaration (namely Sub-Clauses 4.20 (together with paragraphs 1.07.A, B and C) and 4.12). However, ACP's interpretation was expressly rejected by the Tribunal. *See* Partial Award ¶¶ 896–900, 915, 918 (D.E. 55-6) (rejecting that suitability of PLE Basalt was covered by Sub-Clause 4.12).

42 Resp. to Consol. Mot. to Vacate 27 (D.E. 57).

the Tribunal "explicitly relied on its interpretation of paragraph 1.07 D.1 to reject Movants'" independent, Panamanian law grounds of ACP's breach of both its duty to inform and duty to act in good faith, which Mr. Henchie does not contest.[43]

26. Instead, Mr. Henchie states that "[t]he Tribunal's decision did not turn *solely* on its interpretation of paragraph 1.07 D.1."[44] I fail to understand this point, for it does not show that the Tribunal's interpretation of paragraph 1.07.D.1 was *obiter dictum*. First, Mr. Henchie appears to accept *a contrario* that the Tribunal's decision turned (on ACP's case, in part) on its interpretation of paragraph 1.07 D.1. As such, I believe it cannot be said to be *dicta*. With respect to the duty to act in good faith, the Tribunal stated that the "agreed contractual terms" (which included paragraph 1.07.D.1) govern.[45] The Tribunal's findings on paragraph 1.07.D.1 thus were necessary for its decision against Movants on ACP's statutory duty to inform, and its duty to act in good faith, which Panamanian law mandated, but which ACP ignored in Movants' submission. Moreover, the explicit language in the Partial Award logically confirms that if ACP rather than GUPC S.A. bore the risk for the suitability of the basalt, that necessarily impacted ACP's duties to inform and to act in good faith towards GUPC S.A., and therefore the Tribunal's ruling.[46]

---

[43] Henchie Decl. ¶ 190 (D.E. 57-1) (stating that Movants overstate the importance of paragraph 1.07.D.1 to the Tribunal's ruling on these claims).

[44] *Id.* ¶ 191 (emphasis added).

[45] Partial Award ¶ 1105 (D.E. 55-6).

[46] For the duty to inform, see Partial Award ¶ 1098 (D.E. 55-6) ("The ACP cannot be said to have breached its duty to inform when it did inform the Tenderers of their own responsibility to self-inform on certain aspects of the Project, and the risk that the PLE Basalt would not be suitable as a source of aggregates was assumed under the Contract."). For the duty to act in good faith, see *id.* ¶ 1121 ("[T]he ACP did not breach its obligation to act in good faith since it was always the responsibility of the Contractor to assess what source of concrete aggregates would be the most suitable for its proposed design.").

b. The Tribunal did not provide any explanation for its assessment on the necessity of bulk testing

27. Movants explained in their Consolidated Motion to Vacate that the Tribunal relied on its own understanding of Prudent Industry Practices, not one advanced by the Parties, without providing any explanation or notice.[47] This issue centers on whether Movants should have conducted what is known as "bulk testing" (*i.e.*, small-scale *industrial* crushing) of the basalt at tender stage, which the Tribunal concluded would have revealed its unsuitability.

28. Movants argue that the Tribunal (i) ignored Movant's arguments to the contrary; (ii) misattributed to ACP's expert, Mr. Pauletto, the view that the contractor should have done bulk testing, whereas he in fact opined that "pilot testing" (which is very different from "bulk testing" and involves far smaller samples) would have sufficed; and (iii) failed to consider that Movant had performed tests on the basalt found at another location understood to have similar properties to the PLE Basalt.[48] Mr. Henchie does not address nor dispute these defects.[49] The Tribunal ignored Movants' arguments, and relied on its own *sua sponte* view of the necessity of "bulk testing"—erroneously misattributed to ACP's expert—and instead designed its own vision of what constituted a Prudent Industry Practice.

c. The Tribunal failed to explain its conclusion regarding the higher bid from C.A.N.A.L.

29. Movants' Consolidated Motion to Vacate explained that the Tribunal speculated that the reason for C.A.N.A.L.'s (another tenderer) higher bid was that C.A.N.A.L., allegedly

---

47 Consol. Mot. to Vacate 28 (D.E. 55).

48 Bouchardie Decl. ¶¶ 99–104 (D.E. 55-3).

49 The Henchie Declaration cites language from its expert that explains the distinction between bulk testing and pilot testing, stating only that bulk testing was "feasible" (but not necessary), or that he "would do the bulk test." Henchie Decl. ¶¶ 193–202 (D.E. 57-1) (describing in detail the differences between the testing methods); *see also* Resp. to Consol. Mot. to Vacate 27–28 (D.E. 57).

unlike Movants, properly appreciated the risk of the PLE Basalt's unsuitability for aggregate production, although the Tribunal provided no explanation for this assertion.[50] This argument was never made by either Party, and the record was devoid of any evidence to support it. It was an unsupported inference drawn *sua sponte* by the Tribunal.

30. ACP and Mr. Henchie do not contest this fact, but instead focus on the Parties' discussions of the bid prices in a different context,[51] and argue that the Tribunal's conclusion was merely a way station.[52] What is relevant for this proceeding is that the Tribunal drew an inference from C.A.N.A.L.'s bid, to fault Movants for allegedly lacking an appreciation of risks when, in fact, there was no evidence to support such an inference. In this context, and contrary to Mr. Henchie's statement,[53] Movants never suggested in these proceedings that the Tribunal ruled that the appreciation of risks was the "sole" reason why it speculated C.AN.A.L's bid price was higher than that of GUPC S.A. However, as Movants showed, it did draw this inference, unsupported by any evidence on record.[54] The text of the Partial Award itself makes clear that the Tribunal did consider its conclusion an important link in its chain of reasoning and conclusion that GUPC S.A. was somehow at fault for not realizing the existence of a risk regarding the suitability of the basalt for aggregate production, which GUPC S.A. undertook to bear, again according to the Tribunal's interpretation of Article 1.07.D of Section 01 50 00 of the Employer's Requirements.[55]

---

50 Consol. Mot. to Vacate 28–29 (D.E. 55).

51 Resp. to Consol. Mot. to Vacate 28 (D.E. 57) (claiming without reference that C.A.N.A.L. accounted for "different risk tolerances"); Henchie Decl. ¶¶ 203–13 (D.E. 57-1).

52 Henchie Decl. ¶ 203 (D.E. 57-1).

53 Henchie Decl. ¶ 212 (D.E. 57-1).

54 *See* Bouchardie Decl. ¶¶ 105–10 (D.E. 55-3).

55 *See* Partial Award ¶ 1060 (D.E. 55-6) ("The position of C.A.N.A.L., who bid for much higher amount, also suggests that a higher contingency for risk had been factored into their tender.").

III. ARBITRATOR COMPENSATION

31. As explained in my first Declaration, the ICC Rules of Arbitration provide for "significant remuneration" for arbitrators.[56] As shown in the tables contained in Appendix III of the ICC Arbitration Rules and attached as Exhibit 6 to my first declaration, an arbitrator's compensation depends on the amount in dispute.[57] In large, complex arbitrations such as the Panama 1 arbitration, arbitrators may earn in excess of a million dollars. This is evidenced by the Final Award, which shows that Mr. Gunter received nearly USD 2 million, while Dr. Gaitskell and Mr. von Wobeser each received nearly USD 1 million, from the ICC.[58]

32. Since the Panama 1 arbitrators are quite experienced, it is unlikely that they would be appointed in arbitrations with small amounts in controversy. While ICC arbitrations generally are confidential, the arbitrators' history allows the likely assumption that the arbitrators generally are appointed to matters with significant amounts in dispute, and thus in turn stand to earn significant financial remuneration from such appointments.

33. Mr. Henchie asserts that "[s]imply because arbitrators stand to be remunerated for their work in accordance with the ICC Rules does not mean, as the Movants seem to suggest, that arbitrators are "incentivized" to act with impropriety" and "[i]f Movants' position were correct . . . awards . . . would be open to challenge simply because of the fees [arbitrators] very properly earned."[59] He further states that the Parties exchanged lengthy submissions regarding

---

[56] Bouchardie Decl. ¶ 50 (D.E. 55-3) (citing ICC Arbitration Rules, app. III, art. 3(4) (D.E. 55-10) (setting out the fee scale for ICC arbitrators)).

[57] ICC Arbitration Rules, app. III (D.E. 55-10).

[58] Final Award in ICC Case No. 20910/ASM/JPA (C-20911/ASM) ¶ 172 (D.E. 55-4).

[59] Henchie Decl. ¶¶ 229–30 (D.E. 57-1); *see also id.* ¶¶ 231–46 (stating that the Parties exchanged lengthy submissions on costs and alleging that I have not challenged any specific issues of the Final Award, stating only that it reveals the sums earned by the arbitration in line with the ICC Rules).

their costs, which the Parties paid over the course of the arbitration, and therefore Movants "had full knowledge of the amounts . . . they paid."[60] Mr. Henchie's comments are misleading and avoid the relevance of such values.

34. Movants' position is not that the level of remuneration—which is, indeed, established by the ICC Rules—was excessive. Rather, Movants refer to the remuneration earned by the arbitrators in this case (nearly USD 2 million for Mr. Gunter, and close to USD 1 million for each wing arbitrator) as indicative of how lucrative prestigious nominations to large commercial arbitrations can be.[61] It is the resulting incentive to be considered for such positions, and to cultivate connections and relationships with other arbitrators to be considered for such nominations—as, indeed, Mr. Gunter received from Dr. Gaitskell during the pendency of the underlying arbitration—which requires that such cross-nominations and appointments must be disclosed.

35. Such financial incentives may create, in my opinion, a "perception of feelings of indebtedness and perverse incentives, whether conscious or subconscious,"[62] and thus are relevant to a Party's view of whether they consider an arbitrator to be unbiased and independent. When such lucrative cross-appointments remain undisclosed, the potential for bias can go unchecked. Further, the significant compensation provides a motivation for the arbitrators to not disclose conflicts so as not to endanger and retain their position on a tribunal.

IV. THE PARTIAL AWARD IN THE LOCK GATES ARBITRATION

36. ACP and Mr. Henchie claim that "[i]n their Lock Gates Statement of Reply, Movants now seek to rely heavily on the Partial Award in purported support of many of their

---

60 Henchie Decl. ¶ 242 (D.E. 57-1).

61 Bouchardie Decl. ¶ 122 (D.E. 55-3).

62 Consol. Mot. to Vacate 19 (D.E. 55).

arguments, whereas in these proceedings, of course, they seek to have that award, along with the Final Award, overturned" and that "there are some 26 paragraphs in which the Movants refer to the Partial Award, and Movants, now seem to rely on the Partial Award where they prevailed."[63] Mr. Henchie's statement is misleading.

37. The deadline for Movants' Lock Gates Statement of Reply fell in July 2021, during the pendency of the present challenge to the Partial and Final Awards. As such, Movants had to plead their case on the basis of available information at the time of their submission, including the Partial Award. If, and indeed when, this Court vacates the Awards, Movants reserve all their rights to amend and restate their positions, taking into account the effect of the vacated Awards.

V. THE FINAL AWARD

38. As I noted in my first Declaration, "[t]he Final Award [received by Movants on February 22, 2021] . . . reiterated and finalized the Tribunal's dismissals of most of Movants' claims in the Partial Award.[64] Movants fully satisfied the Final Award on February 23, 2021. Thus, as of February 23, 2021, there are no outstanding payments due from Movants to ACP. Movants made it clear that their satisfaction of the Final Award does not mean they accept amounts or determinations contained in that award, and Movants reserved all rights in this regard while they continue to challenge the legitimacy of the Partial and Final Awards.[65]

VI. RELEVANT DOCUMENTATION

39. Attached hereto are true and correct copies of the documents referenced in the accompanying index.

---

[63] Henchie Decl. ¶¶ 247–49 (D.E. 57-1).

[64] Bouchardie Decl. ¶ 121 (D.E. 55-3).

[65] **Exhibit 7:** Email from Claimants to Respondent dated February 23, 2021.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this September 13, 2021, in Paris, France.

Nicolas Bouchardie

INDEX OF EXHIBITS TO SECOND DECLARATION OF NICOLAS BOUCHARDIE

NO.	DESCRIPTION	DATE
1.	GUPC S.A. Post Hearing Submission: DAB Referral 11 (Concrete Aggregate Production)	October 22, 2014
2.	Email from Pierre-Yves Gunter to the Parties	August 14, 2021
3.	Email from Robert Gaitskell to the Parties	September 3, 2021
4.	Email from Claimants to Robert Gaitskell	September 6, 2021
5.	Email from Robert Gaitskell to the Parties	September 6, 2021
6.	Email from Pierre-Yves Gunter to the Parties	September 6, 2021
7.	Email from Claimants to Respondent	February 23, 2021
8.	Timeline of Undisclosed Appointments During the Pendency of the Panama 1 Arbitration (Updated)	