

International Court of Arbitration of the
International Chamber of Commerce
Case N° 20910/ASM (C-20911/ASM)

Terms of Reference

according to Article 23 of the ICC Arbitration Rules

in the arbitration between

- (1) Grupo Unidos por el Canal, S.A. (Panama)
- (2) Sacyr, S.A. (Spain)
- (3) Salini-Impregilo, S.p.A (Italy)
- (4) Jan De Nul, N.V. (Belgium)

Claimants

and

Autoridad del Canal de Panama (Panama)

Respondent

I. THE PARTIES AND THEIR REPRESENTATIVES

A. THE CLAIMANTS

1. The First Claimant in this Arbitration is Grupo Unidos por el Canal, S.A. (hereinafter referred to as "GUPC S.A." or the "First Claimant"), a corporation duly organized under the laws of Panama, with its registered address at:

Grupo Unidos por el Canal, S.A.
Building 22B, Brujas Road
Cocoli,
Republic of Panama

2. The Second Claimant is Sacyr, S.A. (hereinafter referred to as "Sacyr" or the "Second Claimant"), a company incorporated under the laws of Spain, with its registered address at:

Sacyr, S.A.
Paseo de la Castellana 83-85-28046
Madrid
Spain

3. The Third Claimant is Salini-Impregilo, S.p.A (hereinafter referred to as "Salini-Impregilo" or the "Third Claimant"), a company incorporated under the laws of Italy, with its registered address at:

Salini-Impregilo, S.p.A
Via dei Missaglia, 97
20142 Milan
Italy

4. The Fourth Claimant is Jan De Nul, N.V. (hereinafter referred to as "Jan De Nul" or the "Fourth Claimant"), a company incorporated under the laws of Belgium, with its registered address at:

Jan De Nul, N.V.
Tragel 60, 9308 Hofstade-Aalst
Belgium

5. The First, Second, Third and Fourth Claimants are jointly and collectively referred to as the "Claimants".

6. The Claimants are represented in this Arbitration by:

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B. THE RESPONDENT

7. The Respondent in this Arbitration is Autoridad del Canal de Panama (hereinafter referred to as the "Respondent"), an autonomous legal entity of the Republic of Panama having its offices at:

Building 740, Corozal West,
Panama,
Republic of Panama

8. The Respondent is represented in this Arbitration by: Vinson & Elkins RLLP and Mayer Brown International LLP. All correspondence to the Respondent may be addressed solely to its legal representatives, whose contact details are as follows:

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C. CHANGES IN REPRESENTATION OF THE PARTIES

9. By signing these Terms of Reference each party confirms that its representatives, as identified above, are the only representatives currently retained by it in relation to this arbitration. Should either party engage any additional or alternative representative (other than members of the same law firm) in relation to this arbitration, that party will disclose the change (giving the identity of the additional or alternative representative) within seven days of such engagement to all other parties, the Tribunal and the Secretariat. The Tribunal shall have the power, on application from any party or of its own motion, to exclude any additional or alternative representative from this arbitration if the Tribunal concludes (having allowed the parties due opportunities to make representations) that such exclusion is necessary to protect or preserve the integrity of this arbitration, including the constitution of the Tribunal and/or the enforceability of any Award.

II. THE ARBITRAL TRIBUNAL

10. On 23 July 2015, the International Court of Arbitration of the International Chamber of Commerce, pursuant to Article 13(1) of the ICC Rules of Arbitration, confirmed Mr Claus von Wobeser as co-arbitrator upon the nomination of the Claimants.

Mr Claus von Wobeser
Von Wobeser y Sierra, S.C.
Guillermo Gonzalez Camarena 1100, Piso 7,
Col. Santa Fe, Centro de Ciudad, Del Alvaro Obregon,
México, D.F., C.P. 01210
Mexico

Tel.: +52 (55) 5258 1000
Fax: +52 (55) 5258 1098

Email: cvonwobeser@vwys.com.mx

11. On 23 July 2015, the International Court of Arbitration of the International Chamber of Commerce, pursuant to Article 13(1) of the ICC Rules of Arbitration, confirmed Dr Robert Gaitskell QC as co-arbitrator upon the nomination of the Respondent.

Dr Robert Gaitskell QC
Keating Chambers
15 Essex Street
London WC2R 3AA
United Kingdom

Tel.: +44 20 75 44 2600
Fax: +44 20 75 44 2700

Email: rgaitskell@keatingchambers.com

12. By letter dated 4 April 2016, the Secretariat of the ICC International Court of Arbitration confirmed that pursuant to Article 13(2) of the ICC Rules, the Secretary General had confirmed Mr Pierre-Yves Gunter on 4 April 2016 as president of the arbitral tribunal nominated pursuant to the agreement of the Parties and that his confirmation would be reported to the International Court of Arbitration of the International Chamber of Commerce.

Mr Pierre-Yves Gunter
PYTHON
6, rue François-Bellot
1206 Geneva
Switzerland

Tel.: +41 22 702 15 15

Fax: +41 22 702 15 55

E-mail: pygunter@pplex.ch

13. By execution of these Terms of Reference, the Arbitrators confirm their acceptance of their mandate in these proceedings.
14. By execution of these Terms of Reference, the undersigning Parties confirm that, on the date hereof, they have no grounds for objecting to the arbitrators.

III. SECRETARIAT COUNSEL OF THE ICC INTERNATIONAL COURT OF ARBITRATION

15. The Counsel in charge of this file at the Secretariat of the ICC Court is Ms Ana Serra e Moura and the Deputy Counsel is Mr Gustavo Scheffer da Silveira, ICC International Court of Arbitration, 33-43 avenue du Président Wilson, 75116 Paris, France (direct tel.: +33 1 49 53 30 28; direct fax: 0033 1 49 53 57 79; e-mail: ica1@iccwbo.org).

IV. BACKGROUND TO THE DISPUTE

16. The following factual and contractual background is a short summary based on the Parties' initial submissions and documents. It is not deemed to be exhaustive, does not bind the Parties or the Arbitral Tribunal and serves the practical purpose of introducing the background to the dispute.
17. The present dispute relates to a Contract Agreement dated 11 August 2009 (the "Contract") concluded between, on the one hand, a non incorporated consortium named Grupo Unidos por el Canal comprising the Second to Fourth Claimants (and a company Constructora Urbana S.A. ("CUSA") not party to this arbitration) and, on the other hand, the Respondent (Exhibit C-1 case N°20911/ASM). The Contract is related to the design and construction of the Third Set of Locks for the Panama Canal.
18. The Contract incorporates the Conditions of Contract dated February 2009 (the "Conditions of Contract" (Exhibit C-2 case N°20911/ASM)).
19. An Assignment and Acceptance Agreement (the "AAA") was executed on 31 May 2010 between, on the one hand, the Claimants (and CUSA, not party to this arbitration), and, on the other hand, the Respondent (Exhibit C-8 case N°20911/ASM). The AAA

provides that the “Assignor and the Employer have entered into a contract, on a joint and several basis, for the design and construction of a third set of locks”; that “[p]ursuant to and subject to the condition of Sub-Clause 1.7 [Assignment] of the Contract, the Assignor desired to assign the Contract to the Assignee;” and that “[p]ursuant to the Joint and Several Guarantee, dated May 31, 2010 (“Joint and Several Guarantee”), among the Assignor, the Members of the Assignor and the Employer, the Assignor and each Member of the Assignor have, jointly and severally, agreed to guarantee the due and punctual performance by the Assignee, as the new Contractor, of each and all the obligations, warranties, duties, liabilities, and undertakings of the Assignor under and pursuant to the Contract and according to the terms of the Contract.” The AAA was stated to be effective from the original date of the Contract. On the same day, a Joint and Several Guarantee (the "JSG") was executed between, on the one hand, the Second to Fourth Claimants (and the company Constructora Urbana S.A. not party to this arbitration), and, on the other hand, the Respondent (Exhibit C-7 case N°20911/ASM).

20. Furthermore, a Guarantor Arbitration Agreement was entered into on 1 August 2014 by, on the one hand, the Second to Fourth Claimants (and the companies CUSA and Sofidra S.A. not parties to this arbitration) and, on the other hand, the Respondent (the "GAA") (Exhibit C-9 case N°20911/ASM).
21. The Claimants make their claims under the arbitration agreement in the Contract. In addition and/or in the alternative, the Second, Third and Fourth Claimants make their claims under the arbitration agreement in the JSG. Further, in the alternative, the Second, Third and Fourth Claimants make their claims under the arbitration agreement in the GAA.
22. A dispute has arisen between the Parties regarding their respective rights and obligations under the various above mentioned contracts.

V. THE ARBITRATION PROCEEDINGS

23. The arbitration cases N°20910/ASM and N°20911/ASM were consolidated further to the Parties' agreement communicated to the Arbitral Tribunal on 25 April 2016 and confirmed by the ICC Secretariat on 27 April 2016. The description below of the arbitration proceedings prior to such consolidation will distinguish, where relevant, the case N°20911/ASM, in which the Parties are those described herein under Chapter I., and the case N°20910/ASM in which the Claimant is Autoridad del Canal de Panama (Respondent in case N°20911/ASM) and the Respondent is GUPC, S.A. (First Claimant in case N°20911/ASM). For the sake of clarity, when referring to case N°20910/ASM, the Parties will be referred to in the same manner as in case N°20911/ASM i.e. Autoridad del Canal de Panama will be referred to as the Respondent and GUPC, S.A. will be referred to as the First Claimant.
24. On 17 March 2015, the Claimants filed their Request for Arbitration with the ICC along with Exhibits C-1 to C-9 and designated Mr Claus von Wobeser as their arbitrator (case N°20911/ASM).

25. Also on 17 March 2015, the Respondent filed its Request for Arbitration with the ICC along with Exhibits 1 to 9 and designated Dr. Robert Gaitskell QC as its arbitrator (case N°20910/ASM).
26. These Requests for Arbitration were received by the ICC Secretariat on 17 March 2015.
27. By letter dated 20 March 2015 (case N°20910/ASM), the ICC Secretariat notified the Request for Arbitration to the First Claimant and invited it to submit its Answer to the Request within 30 days. The First Claimant was informed that the Respondent had submitted that the arbitration agreement provided for English as the language of arbitration and that unless the First Claimant indicated otherwise in its Answer or in any request for extension of time for submitting its Answer then it would be understood that English would be the language of the arbitration.
28. By letter dated 2 April 2015 (Case N°20911/ASM), the ICC Secretariat notified the Request for Arbitration to the Respondent and invited it to submit its Answer to the Request within 30 days. The Respondent was informed that the Claimants had submitted that the arbitration agreement provided for English as the language of arbitration and that unless the Respondent indicated otherwise in its Answer or in any request for extension of time for submitting its Answer then it would be understood that English would be the language of the arbitration.
29. By letter dated 15 April 2015, the counsel for the Respondent requested that consent be sought from all the Parties for the arbitration case N°20911/ASM to be consolidated with the related case N°20910/ASM filed on the same day in which the Respondent, Autoridad del Canal de Panama, was the Claimant.
30. The Respondent further submitted that pursuant to Sub-Clause 20.5 of the Conditions of Contract between the Parties to case N°20910/ASM which was according to it also the Contract between the First Claimant and the Respondent in case N°20911/ASM, neither party could proceed to arbitration before the 56th day following a notice of dissatisfaction with a decision of the Dispute Adjudication Board (the "DAB"). According to the Respondent, the subject matter of both Requests for Arbitration concerned the DAB's decision in referral Number 11 under the Contract. The 56th day following that decision was 17th March 2015 and both parties were dissatisfied with such decision leading to the Requests for arbitration. The Respondent reserved its right to make a formal request for consolidation pursuant to Article 10(b) and/or 10(c) of the ICC Rules failing the agreement of the parties to consolidation.
31. By letters dated 16 April 2015 to the Parties (cases Nos 20910/ASM and 20911/ASM), the ICC Secretariat acknowledged receipt of the Respondent's letter of 15 April 2015 and invited the Claimants to comment with respect to the Respondent's request for consolidation by 23 April 2015.
32. By letter dated 21 April 2015 (case N°20910/ASM), the First Claimant requested a 45-day time-extension until 8 June 2015 to serve its Answer and nominated Mr. Claus von Wobeser as arbitrator.

33. By letter dated 30 April 2015 (case N°20911/ASM), the Respondent requested a 42-day time-extension until 19 June 2015 to serve its Answer and nominated Dr Robert Gaitskell as arbitrator.
34. On 8 June 2015, the First Claimant (case N°20910/ASM) submitted its Answer to Request and Counterclaim for Arbitration along with Exhibits R-1 to R-6.
35. By letter dated 11 June 2015 (case N°20910/ASM), the ICC Secretariat acknowledged receipt of the First Claimant's Answer to Request for Arbitration and Counterclaim, invited the Respondent to submit its Reply within 30 days and confirmed that English was the language of the arbitration since both Parties submitted that the arbitration agreement provided for English as the language of the arbitration.
36. By letter dated 19 June 2015 (case N°20911/ASM), the Respondent submitted its Answer to Request for Arbitration and Counterclaim against the First Claimant along with Exhibits R-1 to R-10.
37. By letter dated 23 June 2015 (case N°20911/ASM), the ICC Secretariat acknowledged receipt of the Respondent's Answer to Request for Arbitration and Counterclaim against the First Claimant. The ICC Secretariat noted that the Respondent had raised a plea pursuant to Article 6(3) of the ICC Rules requesting that the decision on such plea be taken by the arbitral tribunal and that such arbitral tribunal would decide any question of jurisdiction or of whether the claims may be determined together after providing the parties with an opportunity to comment.
38. By letter date 29 June 2015 (cases Nos 20910/ASM and 20911/ASM), the Claimants provided their comments on the consolidation of the ICC cases N°20910/ASM and N°20911/ASM and indicated that the reasons for consolidation pursuant to Article 10 of the ICC Rules were not met and the cases should not be consolidated. According to the Claimants, first, the discussions between the Parties on the consolidation were ongoing and no agreement had yet been reached. Second, the claims in the arbitrations were not made under the same arbitration agreement nor between the same parties since the Second, Third and Fourth Claimants in case N°20911/ASM are not parties to case N°20910/ASM.
39. By letters dated 8 July 2015, the ICC Secretariat invited the Respondent to comment by 15 July 2015 on the Claimants' letter of 29 June 2015 regarding rejecting consolidation.
40. On 9 July 2015 (Case N°20910/ASM), the Respondent submitted its Reply to the Counterclaim and the ICC Secretariat acknowledged receipt thereof on 15 July 2015.
41. By letter dated 14 July 2015, the Respondent indicated that the arbitrations N°20910/ASM and N°20911/ASM were eligible for consolidation under the ICC Rules and should be consolidated as a matter of logic and efficiency. The Respondent reserved its rights to make a formal application in the event the Parties ultimately did not agree to consolidation. With respect to the nomination of the president of the arbitral tribunal, the Respondent indicated that the Parties would attempt further discussions and that they would jointly inform the ICC if such discussions were unsuccessful so that it could appoint the president pursuant to the ICC Rules.

42. On 16 July 2015 (case N°20911/ASM), the Respondent submitted an Answer to Request for Arbitration and Amended Counterclaim against the First Claimant.
43. Also on 16 July 2015 (case N°20910/ASM), the Respondent submitted an Amended Request for Arbitration against the First Claimant.
44. By letter dated 17 July 2015 (case N°20910/ASM), the ICC Secretariat acknowledged receipt of the Respondent's Answer to Request for Arbitration and Amended Counterclaim against the First Claimant dated 16 July 2015.
45. Also, by letter also dated 17 July 2015 (case N°20910/ASM), the ICC Secretariat acknowledged receipt of the Respondent's Amended Request for Arbitration against the First Claimant dated 16 July 2015.
46. By letter dated 23 July 2015, the ICC Secretariat indicated that the International Court of Arbitration of the International Chamber of Commerce ("ICC International Court of Arbitration") had confirmed Mr Claus Von Wobeser as co-arbitrator upon the Claimants' nomination and Dr Robert Gaitskell as co-arbitrator upon the Respondent's nomination and invited the Parties to nominate the president of the arbitral tribunal pursuant to their agreement by 23 September 2015.
47. On 14 August 2015, the Respondent requested pursuant to Article 10 of the ICC Rules the consolidation by the Court of cases N°20910/ASM and N°20911/ASM.
48. By letter dated 19 August 2015, the ICC Secretariat invited the Claimants to provide any comments they may have on the Respondent's request for consolidation by 26 August 2015.
49. By letter dated 26 August 2015, the Respondent objected to the Claimants' request for a time-extension until 4 September 2015 to comment on the Respondent's request for consolidation.
50. By letter dated 28 August 2015, the ICC Secretariat granted the Claimants an extension until 4 September 2015 to provide any comments they may have on the Respondent's request for consolidation.
51. On 4 September 2015, the Claimants submitted their comments on the Respondent's request for consolidation and indicated that the conditions set out in Article 10 of the ICC Rules were not met and that the arbitrations could not be consolidated.
52. By letter dated 10 September 2015, the Respondent responded to the Claimants' comments on its request for consolidation.
53. On 17 September 2015 (case N°20910/ASM), the First Claimant submitted its Amended Answer and Counterclaim to the Amended Request for Arbitration along with Exhibits R-1 to R-10.
54. By letter dated 19 September 2015, the Claimants provided their comments to the Respondent's letter dated 10 September 2015 regarding consolidation.

55. By letter dated 22 September 2015 (case N°20910/ASM), the ICC Secretariat acknowledged receipt of the First Claimant's Amended Answer and Counterclaim to the Amended Request for Arbitration dated 17 September 2015.
56. By letter also dated 22 September 2015 (case N°20911/ASM), the ICC Secretariat acknowledged receipt of the Claimants' Reply to the Respondent's Answer to Request for Arbitration and Amended Counterclaim against the First Claimant dated 17 September 2015.
57. By letter dated 24 September 2015, the ICC Secretariat notified the decision of the ICC International Court of Arbitration not to consolidate the cases N°20910/ASM and N°20911/ASM.
58. By letter dated 12 October 2015, the Respondent requested the Court to reconsider its decision not to consolidate the cases N°20910/ASM and N°20911/ASM.
59. On 21 October 2015, the Claimants submitted their comments on the Respondent's request for reconsideration of 12 October 2015 and requested that it be dismissed.
60. By letter dated 6 November 2015, the ICC Secretariat notified the decision of the ICC International Court of Arbitration not to reconsider its decision not to consolidate cases N°20910/ASM and N°20911/ASM.
61. By email dated 25 January 2016, the Parties informed the ICC Secretariat that they had reached an agreement on a procedure for the selection of the president in the cases N°20910/ASM and N°20911/ASM in respect of the Contract, the JSG and the GAA and enclosed the Protocol setting out the agreement including a deadline for such nomination.
62. By email dated 7 March 2016 to the Parties, the co-arbitrators indicated that the procedure agreed by the Parties had resulted in Mr Pierre-Yves Gunter being designated to act as president of the arbitral tribunal.
63. By letter dated 4 April 2016, the Secretariat of the ICC International Court of Arbitration confirmed that pursuant to Article 13(2) of the ICC Rules, the Secretary General had confirmed Mr Pierre-Yves Gunter on 4 April 2016 as president of the arbitral tribunal nominated pursuant to the agreement of the Parties and that his confirmation would be reported to the ICC International Court of Arbitration.
64. By email dated 17 April 2016 to the Parties, the Arbitral Tribunal indicated that pursuant to Article 23(1) of the ICC Rules, the Arbitral Tribunal would draw up the Terms of Reference and prepare draft Specific Procedural Rules which would be submitted to the Parties for review. The Parties were also informed that pursuant to Article 24(1) of the ICC Rules, the Arbitral Tribunal would convene a Case Management Conference ("CMC"). The Parties' Counsel were invited to inform the Arbitral Tribunal about their joint position or separate positions by 20 April 2016 as to whether the CMC be held by way of a meeting or by way of a telephone conference or video-conference and whether the proposed dates were suitable. Furthermore, the Parties were requested, once the date of the CMC had been agreed upon, to submit to the Arbitral Tribunal one week before the CMC a joint proposal regarding the Procedural Timetable or in case of disagreement separate proposals. The Arbitral Tribunal also indicated that during the

Case Management Conference, the Terms of Reference, Specific Procedural Rules and Procedural Timetable would be finalized.

65. By email dated 19 April 2016, the Arbitral Tribunal, in the context of the drawing up of the draft Terms of Reference, invited the Parties in cases Nos 20910/ASM and 20911/ASM to submit to the Arbitral Tribunal by 25 April 2016, a 2 to 3 page summary of their claims and relief sought together with the amount of any quantified claim and to the extent possible an estimate of the monetary value of any other claims (Art. 23.1 (c) of the ICC Rules).
66. By email dated 25 April 2016 to the Arbitral Tribunal, the Parties indicated that they had agreed to consolidate the ICC cases Nos. 20910/ASM and 20911/ASM into a single arbitration and agreed that i) Grupo Unidos Por el Canal, S.A., Sacyr, S.A., Salini-Impregilo, S.p.A and Jan De Nul, N.V. would go first in making their submissions in the substantive merits phase, and Autoridad del Canal de Panama would then respond (in accordance with the procedural calendar to be determined), ii) for the administrative purposes of the ICC, the caption for the consolidated arbitration would be: 1. GRUPO UNIDOS POR EL CANAL, S.A. (Panama) 2. SACYR, S.A. (Spain) 3. SALINI-IMPREGILO, S.P.A. (Italy) 4. JAN DE NUL, N.V. (Belgium) vs/ AUTORIDAD DEL CANAL DE PANAMA (Panama) and iii) the jurisdictional issues would be bifurcated and therefore heard and decided before the merits phase of the arbitration. The Parties also agreed to postpone the submission of the summaries of their position, claims and relief until Friday 29 April 2016.
67. By letter dated 27 April 2016 enclosing a Financial Table of the same date, the ICC Secretariat indicated that pursuant to the Parties' agreement the case N°20911/ASM was consolidated in case N°20910/ASM with the new caption as agreed by the Parties.
68. By email dated 29 April 2016, the Parties informed the Arbitral Tribunal that they had agreed to postpone the submission of the summaries of their position, claims and relief sought until 3 May 2016.
69. By emails dated 3 May 2016, the Parties submitted their respective summaries of their positions and relief sought.
70. By email dated 12 May 2016 to the ICC Secretariat, the Arbitral Tribunal requested clarifications regarding the amount in dispute indicated on the ICC Financial Table dated 27 April 2016.
71. By email dated 27 May 2016, the ICC Secretariat provided the requested clarifications.
72. By letter dated 30 May 2016, the ICC Secretariat informed the Arbitral Tribunal and the Parties that on 19 May 2016 the ICC Court extended the time-limit for establishing the Terms of Reference until 29 July 2016.

VI. SUMMARY OF THE PARTIES' POSITION AND RELIEF SOUGHT

73. The Arbitral Tribunal invited the Parties to submit summaries of their respective positions for these Terms of References. The purpose of such summaries which are reproduced below is to satisfy the requirements of Article 23(1) (c) of the ICC Rules and such summaries are without prejudice to any other or further allegations, arguments or

contentions contained in the pleadings or submissions already filed and in such submissions as will be made in the course of this Arbitration.

74. No statement or omission in the summary of either party is to be interpreted as a waiver of any issue of fact or law. By signing these Terms of Reference, neither party subscribes to or acquiesces in the summary of the other party.

A. THE CLAIMANTS' POSITION AND RELIEF SOUGHT

75. On 3 May 2016, the Claimants provided the Arbitral Tribunal with the following summary of their claims and relief sought (as amended on 7 July 2016):

1. SUMMARY OF GUPC'S POSITION

A. JURISDICTION AND STANDING

1. *The dispute between the Parties arises out of and in connection with a set of interrelated contracts, including the Contract dated 11 August 2009, the Joint and Several Guarantee ("JSG") dated 31 May 2010, the Assignment and Acceptance Agreement ("AAA") dated 31 May 2010, as well as the Guarantor Arbitration Agreement ("GAA") dated 1 August 2014.¹ The subject of all of these contracts was the design and construction of the Third Set of Locks Project of the Panama Canal ("TSLP" or "Project"). As detailed further below, the JSG relates to, and is intertwined with, the Contract and its subject matter (i.e., the Project), and requires that Sacyr S.A. ("Sacyr"), Salini-Impregilo S.p.A. ("Salini-Impregilo") and Jan De Nul N.V. ("Jan De Nul") (together the "GUPC Consortium Members"² and together with GUPC S.A. the "GUPC Parties" or "GUPC") remain "primary obligors" and responsible for the "due and punctual performance" by the Contractor under the Contract. The GAA relates both to the Contract and the JSG, and is a reaffirmation of the Parties' responsibilities with respect to the disputes between them.*

1. Ratione personae

2. *The Tribunal has jurisdiction over all of the Parties named in this arbitration, and all the GUPC Parties have standing to assert claims against ACP pursuant to the Parties' agreements to arbitrate contained in the interrelated contracts: the Contract (Sub-Clause 20.6), the JSG (Clause 9.2) and the GAA (Sub-Clauses 6.2 and 6.3).³ All of the arbitration clauses contained in these interrelated contracts are compatible, and establish that all disputes between the Parties shall be resolved by international arbitration under the ICC Rules.*
3. *The Tribunal's jurisdiction over the Parties and the dispute, and GUPC's standing in this arbitration, is in accordance with the ICC Rules. Specifically, Article 9 of the ICC Rules envisions the inclusion of claims arising "out of or in connection with more than one contract ... irrespective of whether such claims are made under one or more than one arbitration agreement" into a single arbitration. This is also in*

¹ Unless stated otherwise, capitalized terms in this summary are defined as provided for in the Contract.

² For the avoidance of doubt, the consortium also includes Constructora Urbana, S.A., which is not a party to this arbitration.

³ Contrary to ACP's allegation, a partial award rendered in a separate arbitration between the Parties is not binding on this Arbitral Tribunal, especially in view of the GUPC Consortium Members' ongoing participation in the Project with respect to managerial and technical expertise, as well as their continued substantial funding of the Project and performance under the Contract, the JSG and/or Panamanian law, including since the issuance of the said partial award. In any event, even assuming it is relevant, that partial award did not decide the issue of whether the GUPC Consortium Members may bring claims under arbitration clauses included in instruments other than the Contract, such as the JSG and/or the GAA.

accordance with the fundamental due process right that allows the parties to fully present their cases based on the entire factual background, all relevant evidence, and legal analysis.

4. *GUPC seeks its entitlements pursuant to the dispute resolution clause contained in Sub-Clause 20.6 of the Conditions of Contract (as amended), which provides as follows:*

“Unless settled amicably, any dispute in respect of which the DAB’s decision (if any) has not become final and binding shall be finally settled by international arbitration in law (within the meaning of Panamanian law). Unless otherwise agreed by both Parties:

- (a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (the “Rules”);*
- (b) in addition to the Rules, the arbitrators will be guided but will not be bound, by the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration;*
- (c) the dispute shall be settled by three arbitrators who shall all be licensed lawyers appointed in accordance with the Rules;*
- (d) the arbitration shall be decided in law (within the meaning of Panamanian law) and shall be conducted in the language for communications defined in Sub-Clause 1.4 [Law and Language];*
- (e) the venue of the arbitration shall be Miami, Florida - United States of America; and*
- (f) the arbitration agreement and the arbitration shall be governed by the United States Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. ...”*

5. *In addition and/or in the alternative, the GUPC Consortium Members seek their entitlements pursuant to Clause 9.2 of the JSG, which is compatible with, and effectively identical to, Sub-Clause 20.6 of the Contract, and reads as follows:*

“9.2. Any dispute arising out of, under or in connection with this Guarantee or out of the subject matter of this Guarantee shall be finally settled by international arbitration in law (within the meaning of Panamanian law). Unless otherwise agreed by the Parties:

- (a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (the “Rules”);*
- (b) in addition to the Rules, the arbitration shall be conducted according to the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration;*
- (c) the dispute shall be settled by three arbitrators who shall be licensed lawyers appointed in accordance with the Rules;*
- (d) the arbitration shall be decided in law (within the meaning of Panamanian law) and conducted in the English language;*
- (e) the venue of the arbitration shall be Miami, Florida - United States of America; and*

- (f) *the arbitration agreement and the arbitration shall be governed by the United States Federal Arbitration Act, 9 U.S.C. §§ 1 et seq.*

Arbitration may be commenced prior to or after completion of the Works.”

6. *In addition and/or in the alternative, the GUPC Consortium Members seek their entitlements pursuant to Sub-Clauses 6.2 and 6.3 of the GAA, which also are compatible with Sub-Clause 20.6 of the Contract and Clause 9.2 of the JSG, and provide:*

“6.2 Any and all disputes or controversy arising out of or related to this Agreement, including its interpretation, application and enforcement, shall be resolved by international arbitration in law (within the meaning of Panamanian law).

6.3 Unless otherwise agreed by both Parties:

- (a) *the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (the “Rules”);*
- (b) *in addition to the Rules, the arbitrators shall be guided, but will not be bound, by the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration;*
- (c) *the dispute shall be settled by three arbitrators who shall all be licensed lawyers appointed in accordance with the Rules, provided that the two arbitrators nominated by the Parties shall nominate by mutual agreement the presiding arbitrator;...”*

7. *GUPC notes that ACP has not objected to jurisdiction or standing with regard to GUPC S.A.. Notwithstanding ACP’s objections as to the GUPC Consortium Members, Tribunal has jurisdiction over all GUPC Parties further to the dispute resolution provisions described above. As detailed further below, all GUPC Parties also have standing to seek their entitlements against ACP in this arbitration since the subject matter of those entitlements relate to the completion of the TSLP.*

2. **Ratione materiae**

8. *GUPC’s entitlements arise out of its performance of the Project pursuant to the interrelated contracts governing the Parties’ relationship, and as a matter of law, either as the Contractor (i.e., GUPC S.A.), or as a group of companies that originally signed the Contract and own, control, and manage the Contractor (i.e., the GUPC Consortium Members). Those contracts include the Contract, the JSG, the AAA, and the GAA.*
9. *On 13 November 2007, Sacyr, Impregilo, Jan De Nul (i.e., the GUPC Consortium Members), and Constructora Urbana, S.A (“CUSA”) joined as members in a consortium to jointly participate in the tender process for the Project, combining their major construction experience, technical expertise, and financial standing.*
10. *ACP awarded the Project to the GUPC Consortium Members and CUSA, as the consortium Grupo Unidos Por el Canal (“GUPC Consortium”), on 8 July 2009 based on ACP’s determination that the GUPC Consortium offered the “best value” proposal, consisting of the best combination of the technical and price scores. On 11 August 2009, the GUPC Consortium Members, along with CUSA, signed the Contract for the TSLP with ACP.*
11. *Sub-Clause 1.1.2.4 of the Conditions of Contract envisaged the creation of a local project company for practical purposes under Panamanian law. Under Sub-Clause 1.7.1 of the Conditions of*

Contract, ACP allowed for assignment of the Contract to such a project company, on the condition that the GUPC Consortium Members remain fully responsible for the performance of the Project and subject to the Contract. Specifically, under Sub-Clause 1.7A.1, the GUPC Consortium Members were required to “perform the obligations, warranties, duties and undertakings of the Contractor in the same manner that the Contractor is required to perform such obligations, warranties, duties and undertakings according to the terms of the Contract.”

12. *On this basis, the GUPC Consortium Members created GUPC S.A. as the local project company to be designated as “the Contractor.” Upon the execution of the AAA and the JSG on 31 May 2010, the Contract was assigned to GUPC S.A., and the GUPC Consortium Members immediately became guarantors of the Contractor’s continued due and punctual performance of the Contract. The JSG was expressly designated as a condition of assignment pursuant to sub-paragraph (e) of Sub-Clause 1.7.2 of the Conditions of Contract, and has the form set out at Annex E Volume 1, Part 3 of the RFP.*
13. *Clause 2 of the AAA requires that the GUPC Consortium Members “shall remain jointly and severally liable for all ... obligations, warranties, duties, liabilities and undertakings [under the Contract] pursuant to the Joint and Several Guarantee.” Further, pursuant to Clause 1.1(a) of the JSG, the GUPC Consortium Members remained “primary obligors” for the performance of the Project. Each of the GUPC Consortium Members “as primary obligor and not as surety, unconditionally, jointly and severally guarantee[d] to [ACP] the due and functional performance” of GUPC S.A.. Further, pursuant to Clause 1.1(b) of the JSG, the GUPC Consortium Members “shall forthwith perform the obligations, warranties, duties and undertakings” of GUPC S.A..*
14. *In addition, following a series of negotiations between ACP and GUPC, ACP required the GUPC Consortium Members to sign a Memorandum of Understanding (“MOU”). On 13 March 2014, the Parties executed the MOU undertaking to use their best efforts to ensure that all present and future claims are finally settled by arbitration by 31 October 2018. As a result of the signed MOU, the Parties entered into Variation Order No. 108 on 1 August 2014, whereby the GUPC Consortium Members re-issued their joint and several guarantee. On the same day, the Parties executed the GAA, as a part of Variation Order No. 108, to reaffirm their responsibility to undertake any liability that arose in the form of an arbitral award against any of the GUPC Parties.*
15. *The existence of a recognized entitlement by GUPC, and its standing to assert claims both under the Contract and the JSG, is evident in ACP’s actions. The GUPC Consortium Members remained in complete control of GUPC S.A. and responsible for the performance of the Project. ACP recognized this, and throughout the course of the Project (both before and after the AAA and JSG were executed) made explicit demands to representatives from the GUPC Consortium Members for financing and continued participation of the GUPC Consortium Members.*
16. *As explained further below, the delays and cost overruns that necessitated the provision of additional financing by the GUPC Consortium Members were the result of material breaches by ACP of its obligations during both the course of the tender for the Project and the performance of the Contract. Accordingly, the Tribunal has jurisdiction over all the Parties to this dispute, and has jurisdiction over the subject matter of the entitlements sought by all GUPC Parties.*

B. MERITS

1. Factual background to the Project

17. *ACP accepted GUPC's tender for the Project (which was submitted on 3 March 2009) and, as explained above, the Parties entered into the Contract on 11 August 2009. Among other things, the Contract incorporated certain terms as Conditions of Contract and Employer's Requirements ("ER").*
18. *Pursuant to the Contract, GUPC began work in 2009, and the Works are now close to completion. The initial Base Contract Price was USD 3,118,880,001.00 and the initial Time for Completion was 1,827 days after the Commencement Date.*
19. *From the outset of the Project, GUPC has made extraordinary efforts to progress the Works, including spending hundreds of millions of dollars of its own funds in order to complete the Project as expeditiously as possible.*
20. *In contrast to GUPC's efforts, ACP has substantially failed to perform its obligations under the Contract in numerous respects, including the following, which are set out for illustrative purposes and without limitation:*
 - (a) *ACP has breached its obligations regarding the provision of accurate and reliable information regarding the true nature of the existing conditions at the Site. ACP has also withheld critical information from GUPC regarding the status of other aspects of the Panama Canal expansion which have had, and are having, a substantial impact upon the Project.*
 - (b) *ACP has failed and refused to allow GUPC to develop designs for the Project, or to approve compliant designs for the Project, and has otherwise frustrated the design-build process for the Project. With specific regard to this dispute, ACP repeatedly and wrongfully rejected, inter alia, compliant concrete mix designs developed by GUPC.*
 - (c) *ACP has repeatedly failed to certify payments in accordance with Sub-Clause 14.6 of the Conditions of Contract, and has rejected significant amounts requested by, and due to, GUPC.*
 - (d) *ACP has failed to comply with its own rules and regulations, which are part of the Contract requirements, including those rules and regulations which, inter alia: (i) preclude forcing GUPC to waive rights in exchange for issuing Variations; (ii) oblige ACP to treat GUPC equitably and in good faith with respect to GUPC's various entitlements; and (iii) require the maintenance and restoration of the financial equilibrium of the Contract.*
 - (e) *ACP has disrupted the dispute resolution process under the Contract, by, among other things, refusing to agree to any supplemental rules for Dispute Adjudication Board ("DAB") proceedings (as is normal for international projects such as this), refusing to work constructively with GUPC to reach agreement on disputes, introducing obstacles to the DAB process, and refusing to give effect to various decisions of the DAB in favor of GUPC.*
 - (f) *ACP has failed to comply with its obligations under the Contract with respect to the administration of GUPC's work by, among other things: (i) providing inaccurate and/or ambiguous information regarding the Site conditions; (ii) withholding information regarding the Site conditions; (iii) failing properly to implement the design-build process that ACP selected for the Project; (iv) abusing the design development process required*

under the Contract; (v) abandoning of the “over the shoulder” process specified in the Contract; and (vi) improperly changing and developing the ER throughout the design review process.

21. *ACP has breached the Contract and acted in breach of its obligations under Panamanian law and treated GUPC in an arbitrary and unfair manner. These and other issues have obliged GUPC to issue over 116 notices of claim on the Project, and to submit to ACP numerous documented claim submissions requesting additional time and payments under the Contract and applicable law. To date, there have been 20 formal Referrals to the DAB for decisions on claims by GUPC, and the DAB has presently issued decisions on 14 of those Referrals. This arbitration relates at this time to Referral 11 regarding concrete aggregate production and concrete mix design, and to Referrals 1 and 10⁴ regarding the provision of external laboratory services, all of which the DAB decided in GUPC’s favor. As noted in Section C below, additional claims may be brought.*

2. Factual background to DAB Referral 11 (Claims 43 and 52)

22. *The dispute covered by DAB Referral 11 arises in connection with two major issues faced by GUPC on the Project: (i) difficulties with the production of concrete aggregates arising from inaccurate geotechnical and other information supplied by ACP; and (ii) ACP’s wrongful rejection of contractually compliant concrete mix designs for structural marine concrete (“SMC”) and corresponding delay to the start of SMC placement - all of which are the responsibility of ACP.*

23. *By decision dated 30 December 2014, the DAB found that ACP was negligent and awarded GUPC an extension of time of 176 calendar days and damages totaling USD 233,234,316 up to September 2014, and also recognized GUPC’s entitlement for works carried out post-September 2014 in an amount of USD 10,826,997. Notices of Dissatisfaction were sent by ACP on 20 January 2015 and by GUPC on 22 January 2015. The reason for GUPC’s dissatisfaction is that the DAB did not accept all of GUPC’s positions on its entitlements on liability and quantum, which are described below.*

(a) Concrete Aggregate Production

24. *In planning the Project and in order to secure approvals from the Government of Panama and the people of Panama (as required by the Panamanian Constitution), one of the most important cost and schedule assumptions made by ACP for the feasibility of the Project was that the basalt from the Pacific Locks Excavation (“PLE”) would be used as the primary source of material for the production of concrete aggregates (coarse aggregates and sand). ACP has admitted that the importation of basalt for use as processed aggregate would have been completely uneconomical and impractical in the context of the competitive tender process and the overall financial feasibility of the Project.*

25. *In the different documents issued at tender stage, ACP portrayed the PLE basalt as of very good quality and “eminently suitable” for use as feed material to the crushing plant to produce aggregates, and ACP did not identify any significant problems with the PLE basalt.*

26. *GUPC relied on ACP’s representations and planned to process the PLE basalt at its Pacific Site crushing plant and to use the PLE as the primary concrete aggregate source for the Project.*

27. *Shortly after the start of the crushing operations, however, GUPC encountered very serious difficulties in processing the PLE basalt, which generated excessive amounts of fines wastage, in a percentage*

⁴ See also para. 40, below, regarding Referral 14B.

well above that reasonably foreseen at tender stage and well above that represented by ACP. These difficulties were caused by certain undisclosed properties of the basalt and prevented the necessary crushing plant outputs.

28. *GUPC was ultimately forced to abandon the PLE as the Project's primary concrete aggregate source and was thereafter forced to open the Aguadulce Hill Quarry ("AHQ") for that purpose. While the AHQ basalt has proven useable for concrete aggregate production, that basalt has also generated excessive amounts of fines not suitable for concrete production. As a result, GUPC was required to excavate substantial additional quantities from the AHQ to produce the necessary concrete aggregates. Among other things, GUPC was forced to implement numerous and extensive modifications to the crushing plant in order to produce usable coarse aggregate and sand in compliance with the relevant technical specifications.*
29. *In light of these facts, GUPC is entitled to an extension of time and to full compensation, including additional costs and profits, for the losses incurred in connection with the concrete aggregate production, and/or to the restoration of the technical and economic conditions of the Contract that have been altered due to the unforeseen/undisclosed Pacific Site conditions.*

(b) Concrete Mix Design

30. *The ER provide, as a design requirement, that the SMC used on the Project must have a 100-year design life. Concrete durability is influenced by several parameters, including the concrete's resistance to chloride ion penetration, and the ER provided in this context for the use of the ASTM⁵ C1202 test protocol (a rapid chloride ion penetration test or "RCPT").*
31. *GUPC started working on the development of its concrete mix designs in early 2010 and aimed to achieve the planned start date for SMC works in January 2011. The Parties then agreed, at ACP's instigation, that GUPC would hire a specialized sub-contractor SIMCO and implement SIMCO's STADIUM software and test protocol (which addressed the known limitations of ASTM C1202 and which provides more reliable test results with respect to chloride ion penetrability) to substantiate the durability of the SMC.*
32. *GUPC developed concrete mix designs that were tested by SIMCO, implementing the STADIUM test protocol as well as ASTM C1202 and other tests set out in the ER. The results showed that the concrete mix designs met the 100-year durability requirement, including with respect to chloride ion penetrability.*
33. *In February 2011, GUPC submitted a compliant concrete mix design (for low salinity areas) for ACP's review, which ACP wrongfully rejected.⁶ ACP then ultimately instructed GUPC to use silica fume in the SMC, which was not required under the ER and was a less technically sound (yet more complicated and expensive) solution. GUPC had no other choice but to comply with ACP's instructions and designed new SMC mixes with silica fume, which ACP approved in August 2011, almost 7 months after the planned start of concrete placement.*
34. *Further, in June 2012, ACP ultimately approved the very concrete mix designs that it had initially rejected. Since July 2013, GUPC has used*

⁵ ASTM stands for "American society for testing material" (now called ASTM International).

⁶ In particular, ACP raised unfounded issues with the STADIUM input parameters, required the approval of the Project Designer, C1CP (which was not required under the Contract), and disregarded the compliant ASTM C1202 test results, which also meant renegeing on the Parties' agreement to use STADIUM and its improved ASTM C1202 test protocol.

these concrete mixes successfully and almost exclusively throughout the Project for structural marine applications, which further confirms that ACP's initial rejection in February 2011 was wrongful.

35. *In light of these facts, GUPC is entitled to an extension of time and to full compensation, including additional costs and profits, for the losses incurred in connection with the concrete mix design process.*

3. **Factual background to DAB Referrals 1 and 10⁷ (Claim 19)**

36. *After the signature of the Contract, ACP instructed GUPC that all operations of the on-Site laboratories had to be sub-contracted to an external third-party testing organization, which was not required under the Contract. In its decision in connection with the corresponding reference to the DAB ("**Referral 1**"), dated 23 August 2011, the DAB correctly found that ACP's instruction constituted a Variation to the Contract for which GUPC is entitled to compensation.*

37. *ACP failed to issue a timely Notice of Dissatisfaction with the DAB's decision in Referral 1. ACP produced an email dated 9 September 2011, which is not a valid Notice of Dissatisfaction, since it did not comply with the provisions of the Conditions of Contract applicable to the transmittal of notices. Under Sub-Clause 20.4 of the Conditions of Contract, the DAB's Referral 1 decision therefore became final and binding on the Parties on or around 21 September 2011, and may not be contested in arbitration or otherwise.*

38. *In its decision on GUPC's reference No. 10 to the DAB ("**Referral 10**"), dated 29 April 2013, the DAB further correctly found that the subcontract for laboratory services entered into between GUPC and Fall Line Testing and Inspection Panama, S. de R.L. ("**Fall Line Subcontract**"), falls within the ambit of the above-mentioned Variation instructed by ACP, and awarded GUPC additional payment in the total amount of USD 14,822,970.54 for the original duration of the Fall Line Subcontract.*

39. *On 24 May 2013, GUPC sent to ACP a notice of dissatisfaction in connection with the DAB's decision in Referral 10, on the basis that it denied GUPC the right to recover the additional overhead costs that were claimed by GUPC in the Referral.*

40. *On 3 July 2015, GUPC submitted a new reference to the DAB ("**Referral 14B**"), claiming, further to the DAB's decisions in Referrals 1 and 10, additional payment in an amount of USD 7,681,879.53 for the extended on-Site laboratory costs incurred and to be incurred by GUPC from May 2014 until the completion of the Project, as well as the financing costs as awarded by the DAB in Referral 10 with regard to the original duration of the Fall Line Subcontract. To this day, the DAB has not issued its decision in respect of Referral 14B, but GUPC anticipates that the subject matter of Referral 14B will become part of this arbitration.*

4. **Contractual and legal entitlements**

41. *The law applicable to this arbitration is defined in the Contract and the JSG. Both the Contract and the JSG provide that the arbitration agreement shall be governed by the United States Federal Arbitration Act, § 9 U.S.C. With respect to the substantive applicable law, both the Contract and the JSG provide that the Contract shall be governed by Panamanian law. As explained above, the GUPC Parties are entitled to seek their entitlements against ACP under both the Contract and the JSG.*

42. *Relevant contractual provisions include, among others, Sub-Clauses 1.9 [Errors in the Employer's Requirements], 4.10 [Site Data], 4.12*

⁷

See also para. 40, below, regarding Referral 14B.

[Unforeseeable Physical Conditions], 8.4 [Extension of Time for Completion], 8.4A [Extension of Milestone Dates], 13 [Variations and Adjustments], and 19 [Force Majeure]. These clauses must be interpreted and enforced in accordance with Panamanian law, including but not limited to administrative and private law provisions.

43. *In addition, the Panamanian law requires, among others, that ACP act in good faith and with transparency and equity in its dealing with GUPC. ACP had a duty to disclose all material information in its possession, specifically before and during the tender process, and is liable for misrepresenting (willfully or negligently) or failing to disclose information that was needed by the GUPC Consortium Members in order to accurately prepare and submit their price and schedule proposals. The GUPC Parties thus, as a matter of law, are entitled to seek their entitlements also for ACP's failure to comply with its duties under Panamanian law, including but not limited to:*
- (i) Article 1109 of the Panamanian Civil Code, Law No. 19, Law No. 22 on public contracting and ACP's Regulation, which set forth ACP's duties of good faith, collaboration, transparency, economy, and responsibility;*
 - (ii) The Panamanian Constitution and administrative law, which impose upon ACP a duty to inform and obligation to provide GUPC with accurate and relevant information during both the pre-contractual and contractual phase of the Project.*
 - (iii) Article 133 of ACP's Regulation, which imposes upon ACP the obligation to proceed in a timely manner so its actions do not create a burden for GUPC in complying with its obligations;*
 - (iv) Article 986 of the Civil Code, which provides that ACP is liable for willful misrepresentation or negligence in the performance of its contractual obligations;*
 - (v) Articles 34-C and 987 of the Civil Code, by effect of which, whenever acting negligently, ACP loses the right to rely on contractual clauses excluding or limiting its liability or risk.*
44. *Under Panamanian law and pursuant to the Contract and the JSG, GUPC is entitled to recover the additional payments it has made in connection with the subject-matter of this dispute, including all additional costs, overhead costs, and financial costs. Under Panamanian law, GUPC is entitled to full compensation, including lost opportunity costs and lost profits, in accordance with Articles 986, 987, 990, 991, and 992 of the Civil Code.*
45. *In addition, under Panamanian law and pursuant to the Contract and the JSG, the GUPC Consortium Members are entitled to recover all damages, lost opportunity costs and lost profits they incurred by providing, among others, additional financing and additional managerial time to the Project due to ACP's misrepresentations and failure to disclose information, as well as ACP's other breaches of its contractual and legal duties.*
46. *Alternatively, Panamanian law provisions impose on ACP the duty to restore the contractual balance. GUPC is entitled to have the contractual balance restored, with an appropriate extension of time and monetary relief.*

5. ACP's new delay damages claim

47. *With respect to delay damages claim asserted by ACP against GUPC S.A. and the Shareholders, Claimants seek the denial of such claims as both outside of the jurisdiction of this Tribunal and premature and thus inadmissible in the present arbitration. There is a prior agreement between ACP and the Claimants to suspend the timing of any ACP entitlement to delay damages until a final determination as to*

the liability for all Project delays by way of ICC arbitration adjudicating the disputes between the Parties. In this prior agreement, ACP and the Claimants agreed in the Memorandum of Understanding dated 13 March 2014 (Article 9, and Annex A Clauses 9, 10.3, and 10.5), and in the amendment of the language of Sub-Clause 20.11 [Delay Damages Dispute Procedure] of the Conditions of Contract (revised by VO 108), that delay damages would only be due after the adjudication in the final ICC arbitration proceedings where the responsibility for, or level of, delay damages (if any) that may be due to ACP or to the Contractor could be finally determined. Moreover, GUPC S.A. and the Shareholders maintain that the delays to the Project were the result of ACP's repeated violations to the Contract and Panamanian law, including through breaches of obligations, misrepresentation, gross negligence, and failures to make fair determinations on the Contractor's entitlements, among other actions and omissions. The Claimants' entitlements have not been determined with respect to major remaining disputes between the Parties - including, e.g., the lock gates design claim, multiple disruption claims, and claims regarding the MOU and VO 108 - and even the matters already in arbitration are not yet concluded. Thus there has been no final determination as to liability for the Project's delay, or damages (if any) associated with such delay. Further, the claim for delay damages against the Second through Fourth Claimants is also premature. Since GUPC S.A. has not been found liable for any delay, in final arbitral proceedings, no obligation to pay delay damages has arisen under the JSG or the GAA. In this regard, the terms of the Contract and the JSG / AAA / GAA must be interpreted pursuant to Panamanian principles of contract interpretation. In addition to Claimants' reservation of rights below, Claimants expressly reserve all rights to any further claims and defenses under the Contract, JSG, AAA, GAA, and any other instrument, and Panamanian law, with respect to ACP's delay damages claim.

* * *

48. *In light of the above, GUPC denies the presentation of the facts and the counterclaims put forward by ACP in this arbitration.*

C. ADDITIONAL CLAIMS

49. *In addition to the dispute relating to the Referral 11 claims and the laboratories claim (Referrals 1 and 10,⁸ addressed in Section B.3, above), the Parties have referred and will refer, under the terms of Sub-Clauses 20.1, 20.4 and 3.5 of the Contract, various other disputes to the DAB. Consistent with the Parties' undertaking to facilitate the resolution of such disputes in order to achieve a final decision on all disputes no later than 31 October 2018, and in accordance with Articles 10 and 23.4 of the ICC Rules concerning consolidation of claims, GUPC reserves the right to refer to this Arbitral Tribunal any additional claims that GUPC may deem arbitrable under Sub-Clause 20.6 of the Conditions of Contract upon conclusion of the DAB proceedings, or otherwise as permitted by the MOU and the implementing Variation Order No. 108, and as Notices of Dissatisfaction are issued by either Party following the DAB's decisions. GUPC is raising the issue of additional claims to allow for the establishment of a procedure should additional claims develop to the point that they are ripe to be considered by this Arbitral Tribunal.*

⁸ See also para. 40, above regarding Referral 14B.

D. RELIEF SOUGHT

50. *In relation to its claims arising from Referral 11, GUPC seeks its full entitlement to an extension of time, currently estimated to be 265 calendar days, and full monetary entitlement under the Contract and Panamanian law for all losses it has incurred, including all losses suffered by GUPC S.A. as well as additional losses (including lost Return on Investment) suffered by the GUPC Consortium Members, currently estimated to be USD 577,109,179, to the extent those sums have not already been paid by ACP following the DAB's decision in Referral 11, the net amount currently being estimated at USD 333,047,866.*
51. *Included in this monetary entitlement is an estimated USD 100 million that relates to damages under the Contract, the JSG and Panamanian law for harm suffered by the GUPC Consortium Members - subject to more precise substantiation in the course of these proceedings - resulting from ACP's breaches of the Contract and Panamanian law, including (willful or negligent) misrepresentations, failure to disclose information, negligence (indeed gross negligence) and breaches of the duties of good faith, collaboration, transparency, economy, and responsibility.*
52. *In relation to its claims arising from Referrals 1 and 10,⁹ GUPC seeks its full entitlement in connection with the on-Site laboratories matter and the Fall Line Subcontract.*
53. *In addition, GUPC seeks the denial of all relief requested by ACP.*
54. *GUPC also seeks any other relief that the Arbitral Tribunal considers appropriate, and the costs of the arbitration, including the fees and expenses of the Arbitral Tribunal, the ICC's costs and the costs of GUPC's legal representation.*

E. RESERVATION OF RIGHTS

55. *This summary of GUPC's position and relief sought is not intended to prejudice or waive any right that GUPC may have under the Contract, the JSG, the GAA or any other instrument. GUPC reserves all of its rights under national and/or international law, including, without limitation, the right generally to rectify, amend and supplement this summary, among other things, to include additional disputes referred by GUPC to the DAB for decision with which GUPC is dissatisfied, and request other relief, including additional interim/provisional relief and damages, as GUPC may consider necessary or appropriate to enforce and/or defend its rights.*
56. *In agreeing the Provisional Procedural Timetable appended to the Specific Procedural Rules, the Claimants do so without prejudice to, and in no way waive, their rights and positions as to the operative dates in 2018 (as to dispute resolution, repayments and otherwise) in the MOU and Variation Order 108 and the Claimants' requirement that the operative dates in the MOU and Variation Order 108 will be extended."*

B. THE RESPONDENT'S POSITION AND RELIEF SOUGHT

76. On 3 May 2016, the Respondent provided the Arbitral Tribunal with the following summary of its claims and relief sought (which has been amended in part for the purposes of establishing these Terms of Reference):

⁹ See also para. 40, above regarding Referral 14B.

"A. THE RESPONDENT'S POSITION

1. Pursuant to Rule 23(1)(c) of the ICC Rules, the Autoridad del Canal de Panamá ("**Respondent**") provides the following summary of defenses, counter claims and relief sought in ICC Case No. 20910 (c-20911/ASM) (the "**Arbitration**"). The Respondent relies on the facts and defenses asserted in its Answer and Amended Counterclaim dated 16 July 2015 in case 20911/ASM and in its Amended Request for Arbitration dated 16 July 2015 in case 20910/ASM (both deemed incorporated herein) and its related pleadings, and on the general summary set forth below. The Respondent reserves the right to supplement and/or amend its positions and relief claimed, it being understood that the below positions are an extremely high level summary of the Respondent's position and relief claimed and do not set out all of the Respondent's legal, contractual and technical arguments and entitlements.

a) **Jurisdiction and Standing**

2. The Second to Fourth Claimants have failed to properly assert arbitral jurisdiction and lack standing to assert a claim under the arbitration agreement in the Conditions of Contract of 11 August 2009 (the "**Contract**"). As the Tribunal in ICC Case No. 19962 correctly determined, in its 19 December 2014 Interim Award on Jurisdiction, the Second to Fourth Claimants are "no longer parties to the Contract" and their "cause of action" under the Contract "expire[d]" when they entered into the Assignment and Acceptance Agreement of 31 May 2010 (the "**AAA**"). Under U.S. federal law, which governs the arbitration agreement in Sub-Clause 20.6 of the Contract, the Tribunal's Interim Award precludes the Second to Fourth Claimants from asserting a claim under the Contract, whether in this or any other arbitration. The Respondent denies the Claimants' argument that the "GUPC Consortium Members' ongoing participation in the Project" has any effect on the binding nature of the Tribunal's decision in the Interim Award. The issue of whether the Second to Fourth Claimants may assert claims under the Contract has already been decided. The Second to Fourth Claimants' alleged "participation in the Project" does not entitle them to ignore the Interim Award or the terms of the AAA or create rights where there are none. For the avoidance of doubt, the Second to Fourth Claimants have no rights under the Contract (any such rights having been assigned to the First Claimant pursuant to the AAA).

3. The Second to Fourth Claimants have also failed to properly assert arbitral jurisdiction and lack standing to assert a claim under the Joint and Several Guarantee dated 31 May 2010 (the "**JSG**") and the Guarantor Arbitration Agreement dated 1 August 2014 (the "**GAA**"). Prior to the Claimants' Request for Arbitration in ICC Case No 20911, no claim had been advanced by the Second to Fourth Claimants against the Respondent in respect of the subject matter of this arbitration.

4. Accordingly, no dispute with regard to any claim by the Second to Fourth Claimants capable of being referred to arbitration has crystallised as between the Second to Fourth Claimants and the Respondent under the JSG or the GAA. The JSG was an agreement produced to guarantee the obligations of the Contractor (First Claimant) and cannot give rise to any right or cause of action by the Second to Fourth Claimants against the Respondent in relation to the subject-matter of this arbitration, or at all. Similarly, the GAA is a guaranty agreement pertaining to payment of arbitral awards. The subject matter of this arbitration is outside the scope of Sub-Clauses 6.2 and 6.3 of the GAA.

b) **Additional Claims**

5. *Whether additional claims are referred to arbitration by the First Claimant will in fact depend upon the actual decisions of the DAB, and whether matters can be settled amicably (under Sub-Clause 20.5). Further, should the First Claimant win such DAB proceedings, it is possible that it would be the Respondent who would need to serve Notice(s) of Dissatisfaction and commence arbitral proceedings (not the First Claimant). The timing, make-up and constitution of any future arbitral Tribunal to hear such further claims if they eventuate should be dealt with in accordance with the Contract at the time. Neither Party should be bound to refer a future and entirely separate dispute to the same Tribunal indefinitely. The Respondent does not consent to the Claimants' request to extend the jurisdiction of this Tribunal beyond the disputes over DAB Decisions in respect of Referrals No. 1, 10 and 11 and any subsequent DAB decision in relation to the dispute concerning the operation of the on-Site testing laboratories (including but not limited to Referral 14B) and the Respondent's claims under the JSG and/or the GAA against the Second to Fourth Claimants as set out in these Terms of Reference. In any event, the Second to Fourth Claimants cannot refer additional claims under Sub-Clause 20.6 of the Contract, to which the Second to Fourth Claimants are not parties, which is a position which has been previously confirmed by virtue of an interim arbitral award.*

c) **Merits**

6. *In addition, and without prejudice to the foregoing arguments, the Respondent generally denies each of the allegations set forth by the Claimants in the Request for Arbitration. In support of its arguments, the Respondent relies on the full Contract for its true meaning and effect and will rely upon all relevant factual matters and the applicable law.*

7. *This arbitration concerns the Panama Canal Expansion Project (the "Project"), and in particular the construction of a third set of lock complexes at each end of the Panama Canal. The Second to Fourth Claimants, acting together with Panamanian company Constructora Urbana, S.A ("CUSA") through an unincorporated consortium called Grupo Unidos por el Canal ("GUPC"), entered into a contract for the design and construction of the Third Set of Locks in the summer of 2009 (the "Contract"). They subsequently assigned all of their rights under the Contract in May 2010 to Grupo Unidos por el Canal S.A. (the "Contractor" or "First Claimant"), a Panamanian entity in which the Second to Fourth Claimants (and CUSA) are shareholders.*

8. *The disputes that are the subject of the Arbitration generally concern: (1) the excavated basalt as a source of coarse and fine aggregate; (2) the delays caused by the Contractor's structural marine concrete mix design; and (3) issues related to on-site testing laboratories. These disputes were brought before the DAB in Referrals No. 1, 10, 11 and 14B. The Respondent, in disagreement with the DAB decisions in Referrals No. 1, 10 and No. 11, seeks in this arbitration the return of the sums paid or that will be paid to the First Claimant pursuant to, or in connection with, these DAB decisions.*

9. *In addition, the Respondent seeks payment of delay damages from the First Claimant (Contractor) and, on the basis set out in paragraph 27 below, the Second to Fourth Claimants as a consequence of the late completion of the Works caused, inter alia, by the issues related to the Contractor's concrete mix designs (including on-Site testing laboratories) and/or concrete aggregate issues.*

i. Concrete Aggregate Claim

10. *An integral part of the works under the Contract was the excavation by the Contractor of various materials, including basalt, in order to be able to construct the lock structures. However, the Contract did not require the Contractor to use the excavated materials for any particular purposes, or for the Project at all.*
11. *The Contract is a design build contract under which the Contractor was solely responsible for its own construction means and methods. Pursuant to the express terms of the Contract, the parties chose to allocate the risk of Unforeseeable physical conditions in a precise and detailed manner as set out in Sub-Clause 4.12 [Unforeseeable Physical Conditions]. The Contract also permitted the Contractor to use materials such as basalt as it saw fit, but at its own risk. It is clear from the contractual risk allocation that the excavation of the basalt, the properties of the basalt, and the selection of the sources for aggregate, were entirely the risk of the Contractor.*
12. *There was never any common assumption, agreement, or representation between the Parties that the Contractor must use the excavated basalt from the Pacific site as its primary source of concrete aggregate, or indeed at all. For example, the Respondent identified numerous potential aggregate sources, both within the Site and elsewhere in Panama. Even if there had been such a common assumption, agreement or representation, it would have been on the basis of the Contractor taking responsibility and risk for its own choices of how and what material to harvest and use.*
13. *Moreover, many of the problems apparently encountered by the Contractor were caused by the Contractor's own mistakes. As the Contractor began to excavate the basalt, it failed to implement proper quality and selection controls and opted to stockpile the basalt close to the area where the crushing plant was being erected. In doing so, the Contractor contaminated the stockpile with unsuitable material for the crushing process, including unsuitable clays, overburden and other weathered materials.*
14. *Further, there is no evidence that the Contractor experienced excessive fines from the crushed material. Moreover, the Contractor made the decision to crush basalt into both fine sand and coarse aggregate. By its very nature, the production of fine sand generates a larger amount of "fines" than coarse aggregate.*
15. *The Respondent did not withhold or conceal information related to the suitability of the basalt. The Respondent provided more than 45,000 pages of information that spanned decades during the tender period, including studies, reports, and investigations into the feasibility of the Project. A large portion of this information was for reference purposes only. The information was provided for review, but it was the Contractor's responsibility to interpret and expand upon the reference information as it saw fit.*
16. *The Respondent submits that the Claimants are not entitled to relief for the concrete aggregate claim, and seeks from the First Claimant and, on the basis set out in paragraph 27 below, the Second to Fourth Claimants the return in this arbitration of all of the sums it has paid the First Claimant pursuant to or in connection with the DAB's decision in Referral 11.*

ii. Concrete Mix Design Claim

17. *One of the most critical aspects of the Project is the Contractor's production of concrete to be used in constructing the lock structures on the Pacific and Atlantic sides. The Contractor planned to commence structural marine concrete production in January 2011.*

However, the Contractor failed to even submit its first final concrete mix design for review until 4 February 2011.

18. *Additionally, when the Contractor finally did submit the mix design, it did not comply with the Contract in numerous respects. For example, the Contractor did not include the approval of its designer of record and Project Designer, Consultores Internacionales del Canal de Panama (CICP). The reason for this, as has since been revealed, was that CICP believed, correctly, that the Contractor's concrete mix design was not compliant with the Contract. Inter alia, it did not comply with ASTM C 1202 requirements and the shrinkage requirements in the Contract.*
19. *Thereafter, the Contractor abandoned its original mix designs in favour of interim mixes that were also not approved by CICP. This period of non-compliance caused critical delays that left the Respondent with little choice other than to relax its design requirements for specific, limited locations not exposed to saline conditions. It was only after that relaxation that the Contractor received CICP's approval of the mix design. As a result of the Contractor's failure to develop a contractually compliant concrete mix design, completion of the Works was significantly delayed.*
20. *The Respondent submits that the Claimants are not entitled to any relief for the concrete mix design claim, no extension of time is due (as wrongly awarded by the DAB to the First Claimant) and the Respondent seeks from the First Claimant and, on the basis set out in paragraph 27 below, the Second to Fourth Claimants the return in this arbitration of the sums it has paid the First Claimant pursuant or related to the DAB's decision in Referral 11.*

iii. On-Site Testing Laboratories

21. *Pursuant to the Contract, on-site laboratories were required to be established by independent organisations in order to test Materials and plant.*
22. *As stated in Section J of Sub-Clause 1.10 [Quality Control and Verification of the Works] of Section 01 40 00 [Quality Requirements], "Any on-Site laboratories shall be established by independent testing organizations". Despite this clear and unambiguous language, the Contractor indicated in early 2010 that it would set up and operate the on-Site laboratories itself, with its own staff.*
23. *The Respondent rejected this position as non-compliant with the Employer's Requirements. The Contractor then claimed, in late 2010, that it received instruction from the Respondent to establish an on-site laboratory through an external organisation and claimed this to be a Variation to the Contract. This is denied by the Respondent.*
24. *The dispute regarding the on-Site laboratories was the subject of DAB Referrals 1, 10 and 14B. Pursuant to the DAB decision in Referral 10, the Respondent made payments to the First Claimant. The Contractor has no entitlement to these amounts under the Contract or under Panamanian law and the Respondent seeks from the Contractor and, on the basis set out in paragraph 27 below, the Second to Fourth Claimants the return in this arbitration of all sums it has paid, or will pay, to the Contractor pursuant to, or in connection with, the DAB's decisions in Referrals 1 and 10, and/or any subsequent DAB decision in relation to the dispute concerning the operation of the on-Site testing laboratories (including but not limited to Referral 14B).*

iv. Additional Allegations

25. *The Respondent denies that it withheld information or provided any unreliable information, whether knowingly or otherwise. The Respondent also denies the allegation that it frustrated the design-*

build process or the dispute resolution process in any way. The Respondent scrupulously followed its procurement regulations, which are the rules that govern the Respondent's acts, before and after the RFP process. The Claimants failed to properly review and interpret the substantial data disclosed by the Respondent in the RFP, and the Site, both of which revealed conditions that are the subject of the claims. The Respondent also denies that the Memorandum of Understanding (MOU), which is between the First Claimant and the Respondent, has any relevance to the issues in this arbitration.

26. *Finally, the Respondent denies that it did not act with transparency, equity, and/or good faith in its dealings, or that there has been any negligence (including gross negligence), misrepresentation or wilful misrepresentation, or other failings by the Respondent.*

c) The Second to Fourth Claimants

27. *The Respondent seeks and demands, under the terms of the JSG and / or the GAA, including any and all demands made thereunder, that the Second to Fourth Claimants on a joint and several basis pay and/or indemnify the Respondent in respect of:*

- a. *all sums the Respondent has paid to the First Claimant pursuant to or in connection with the DAB's decision in Referral 11 in relation to the concrete aggregate claim;*
- b. *all sums the Respondent has paid to the First Claimant pursuant to or in connection with the DAB's decision in Referral 11 in relation to the concrete mix design claim;*
- c. *all sums the Respondent has paid, or will pay, to the First Claimant pursuant to, or in connection with, the DAB's decisions in Referrals 1 and 10, and/or any subsequent DAB decision in relation to the dispute concerning the operation of the on-Site testing laboratories (including but not limited to Referral 14B);*
- d. *delay damages pursuant to Sub-Clauses 8.7.7 [Delay Damages] and 20.11 [Delay Damages Dispute Procedure] of the Contract;*
- e. *any and all other sums as may ordered by the Tribunal to be paid to the Respondent by the First Claimant, including but not limited to the costs of the arbitration; and / or*
- f. *all losses, damages, costs and expenses which the Respondent has incurred, or may incur, arising out of or in connection with any and all proceedings (including the present proceedings) for the enforcement of the Respondent's claims under the JSG, the GAA and/or the Contract.*

d) Reservation of Rights

28. *Without prejudice to any of the matters set out in the foregoing section, and for the avoidance of any doubt, the Respondent reserves all of its rights to pursue the above-referenced claims separately against:*

- a. *CUSA under the terms of the JSG and/or the GAA; and/or*
- b. *Sofidra S.A. under the terms of the parent company guarantee in respect of the JSG dated 31 May 2010 and/or the GAA.*

29. *With reference to Sub-Clause 20.10 and the MOU and Variation Order 108, the ACP contends that it has offered on 7 July 2016 to agree a procedural timetable without a bifurcated jurisdiction procedure, reserving the issues which were to be bifurcated for consideration in the merits phase. In the ACP's view, this would have permitted the Tribunal to render a final award in this Arbitration before 31 October 2018. The ACP reserves its position on the questions of the proper*

interpretation of Sub-Clause 20.10 and the MOU and Variation Order 108.

e) **Requested Relief**

30. *The Respondent respectfully requests the following relief from the Tribunal:*

- a) *Declare that it has no jurisdiction over the claims of the Second to Fourth Claimants and that they have no standing to bring a claim in this arbitration;*
- b) *Subject to its decision on jurisdiction, dismiss as inadmissible all claims asserted by the Second to Fourth Claimants;*
- c) *Dismiss as without merit all of the Claimants' claims for declarations or other relief;*
- d) *Order that the Contractor and the Second to Fourth Claimants pay to the Respondent the sum of \$134,553,492 USD plus interest, being the sums wrongly awarded to the Contractor by the majority of the DAB in Referral 11 and paid by the Respondent to the Contractor in relation to the concrete aggregate claim and/or such other sums, plus interest, as have been, or may be paid, by the Respondent pursuant to, or related to, the DAB's decision in Referral 11;*
- e) *Order that the Contractor and the Second to Fourth Claimants pay to the Respondent the sum of \$98,680,824 USD plus interest, being the sums wrongly awarded to the Contractor by the majority of the DAB in Referral 11 and paid by the Respondent to the Contractor in relation to the concrete mix design claim and/or such other sums, plus interest, as have been, or may be paid, by the Respondent pursuant to, or related to, the DAB's decision in Referral 11;*
- f) *Order that the Contractor and the Second to Fourth Claimants pay to the Respondent the sum of \$10,826,997 USD, plus interest, being the sums wrongly awarded to the Contractor by the majority of the DAB in Referral 11 in relation to costs the DAB assessed as those which would not have been incurred by the Contractor at the time of the Referral 11 hearing and which were subsequently paid by the Respondent to the Contractor once the Contractor had confirmed that all aggregate processing and concrete activities impacted by the concrete aggregate claim and concrete mix design claim were completed;*
- g) *Declare that the Contractor has no entitlement to an extension of time concerning either the aggregate production (basalt) issues or the structural marine concrete mix design issues; and revise the DAB's decision in Referral 11 regarding its award of an extension of time to the Contractor;*
- h) *Order that the Contractor and the Second to Fourth Claimants pay to the Respondent delay damages, at a rate of \$300,000 USD per day, pursuant to Sub-Clause 8.7.7 [Delay Damages] and 20.11 [Delay Damages Dispute Procedure] of the Contract;*
- i) *Order that the Contractor and the Second to Fourth Claimants pay to the Respondent the sum of \$14,822,970.54 USD, plus interest, being the sums wrongly awarded to the Contractor by the DAB in respect of Referrals 1 and 10 and paid by the Respondent to the Contractor in relation to the on-Site testing laboratories claim and/or such other sums, plus interest, as have been, or may be paid, by the Respondent to the Contractor pursuant to, or related to, the DAB decisions in Referrals 1 and 10 and/or any subsequent DAB decision in*

relation to the dispute concerning the operation of the on-Site testing laboratories (including but not limited to Referral 14B);

- j) Declare that the Contract requires the Contractor to engage the services of an independent third party to operate and manage the on-Site testing laboratories and that such a requirement is not a Variation to the Contract.*
- k) Award to the Respondent any other relief and/or such other sums which the Arbitral Tribunal considers appropriate;*
- l) Order the Claimants to pay the costs of the arbitration, including the fees and expenses of the Arbitral Tribunal, the ICC's costs and the legal and other costs of the Respondent, including the costs of its legal representatives; and*
- m) Order that the Second to Fourth Claimants pay by way of indemnity in accordance with the JSG and/or the GAA all losses, damages, costs and expenses which the Respondent incurs in the enforcement of any award made in the Respondent's favour."*

VII. THE ARBITRATION CLAUSES

77. Sub-Clause 20.6 of the Conditions of Contract entitled "Arbitration" (Exhibit C-2 case N°20911/ASM), as modified by Variation Order N° 108 dated 1 August 2014, provides:

"Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration in law (within the meaning of Panamanian law). Unless otherwise agreed by both Parties:

- (a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (the "Rules");*
- (b) in addition to the Rules, the arbitrators will be guided but will not be bound, by the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration;*
- (c) the dispute shall be settled by three arbitrators who shall all be licensed lawyers appointed in accordance with the Rules;*
- (d) the arbitration shall be decided in law (within the meaning of Panamanian law) and shall be conducted in the language for communications defined in Sub-Clause 1.4 [Law and Language];*
- (e) the venue of the arbitration shall be Miami, Florida - United States of America; and*
- (f) the arbitration agreement and the arbitration shall be governed by the United States Federal Arbitration Act, 9 U.S.C. §§ 1 et seq.*

The arbitrators shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Employer's Representative, and any decision of the DAB, relevant to the dispute. Nothing shall disqualify the Employer's Representative from being called as a witness and giving evidence before the arbitrators on any matter whatsoever relevant to the dispute.

Neither Party shall be limited in the proceedings before the arbitrators to the evidence or arguments previously put before the DAB to obtain its decision, or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DAB shall be admissible in evidence in the arbitration.

Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties, the Employer's Representative and the DAB shall

not be altered by reason of any arbitration being conducted during the progress of the Works."

78. Sub-Clause 20.10 of the Conditions of Contract entitled "Arbitration Procedure" (added by Variation Order N° 108 dated 1 August 2014, Exhibit C-6 case N°20911/ASM) provides:

"The Employer and the Contractor agree that it is their intention that all disputes referred to ICC arbitration pursuant to Sub-Clause 20.6 [Arbitration] of the Contract shall be the subject of final award by no later than October 31, 2018. The Employer and the Contractor agree to work together with each other, the DAB, any ICC tribunal and the ICC in good faith to put in place mutually agreeable timetables for all disputes so as to facilitate this goal. The Employer and the Contractor agree that they will each honor and promptly give full effect to and comply with any ICC arbitral award, notwithstanding that any such Party so complying may subsequently challenge or otherwise appeal or dispute such award in any court of competent jurisdiction."

79. Clause 9.2 of the JSG of 31 May 2010 (Exhibit C-7 case N°20911/ASM) provides as follows:

"Any dispute arising out of, under or in connection with this Guarantee or out of the subject matter of this Guarantee shall be finally settled by international arbitration in law (within the meaning of Panamanian law). Unless otherwise agreed by the Parties:

- (a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (the "Rules");*
- (b) in addition to the Rules, the arbitration shall be conducted according to the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration;*
- (c) the dispute shall be settled by three arbitrators who shall all be licensed lawyers appointed in accordance with these Rules;*
- (d) the arbitration shall be decided in law (within the meaning of Panamanian law) and conducted in the English language;*
- (e) the venue of the arbitration shall be Miami, Florida – United States of America; and*
- (f) the arbitration agreement and the arbitration shall be governed by the United States Federal Arbitration Act, 9 U.S.C. §§ 1 et seq.*

Arbitration may be commenced prior to or after completion of the Works."

80. The GAA of 1 August 2014 (Exhibit C-9 case N°20911/ASM) provides at its Sub-Clauses 6.2 and 6.3:

"6.2 Any and all disputes or controversy arising out of or related to this Agreement, including its interpretation, application and enforcement, shall be resolved by international arbitration in law (within the meaning of Panamanian law).

6.3 Unless otherwise agreed by both Parties:

- (a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (the "Rules");*
- (b) in addition to the Rules, the arbitrators shall be guided, but will not be bound, by the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration;*
- (c) the dispute shall be settled by three arbitrators who shall all be licensed lawyers appointed in accordance with the Rules,*

provided that the two arbitrators nominated by the Parties shall nominate by mutual agreement the presiding arbitrator;

- (d) the arbitration shall be decided in law (within the meaning of Panamanian law) and shall be conducted in the English language;*
- (e) the seat, or legal place, of the arbitration shall be Miami, Florida – United States of America; and*
- (f) the arbitration agreement and the arbitration shall be governed by the United States Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. except as modified herein or by the Rules."*

VIII. ISSUES TO BE DECIDED (ART. 23.1 (D) OF THE ICC RULES)

81. Without prejudice to the provisions of Article 23.4 of the ICC Rules, the issues to be determined shall be those resulting from the Parties' submissions, statements and pleadings and which are relevant to the adjudication of the Parties' respective claims and defences.

IX. THE APPLICABLE SUBSTANTIVE LAW

82. According to the Contract Agreement and to Sub-Clause 1.4 of the Conditions of Contract, the Contract is governed by Panamanian law. According to its Sub-Clause 9.1, the JSG is governed by Panamanian law, as is the GAA according to its Sub-Clause 6.1.
83. Pursuant to Sub-Clause 20.6(d) of the Conditions of Contract, "*the arbitration shall be decided in law (within the meaning of Panamanian law)*". Sub-Clause 9.2(d) of the JSG and Sub-Clause 6.3(d) of the GAA provide that "the arbitration shall be decided in law (within the meaning of Panamanian law)". Clause 8 of the AAA provides that the AAA "shall be governed by, and construed in accordance with, the laws of the Republic of Panamá."

X. PROCEDURAL RULES

A. APPLICABLE RULES

84. Sub-Clause 20.6 of the Conditions of Contract, as modified by Variation Order N° 108 dated 1 August 2014, provides:

"Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration in law (within the meaning of Panamanian law). Unless otherwise agreed by both Parties:

- (a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (the "Rules");*
- (b) in addition to the Rules, the arbitrators will be guided but will not be bound, by the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration;*
- (c) (...)*

(d) *the arbitration shall be decided in law (within the meaning of Panamanian law) and shall be conducted in the language for communications defined in Sub-Clause 1.4 [Law and Language];*

(e) *(...)*

(f) *the arbitration agreement and the arbitration shall be governed by the United States Federal Arbitration Act, 9 U.S.C. §§ 1 et seq.*

The arbitrators shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Employer's Representative, and any decision of the DAB, relevant to the dispute. Nothing shall disqualify the Employer's Representative from being called as a witness and giving evidence before the arbitrators on any matter whatsoever relevant to the dispute.

Neither Party shall be limited in the proceedings before the arbitrators to the evidence or arguments previously put before the DAB to obtain its decision, or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DAB shall be admissible in evidence in the arbitration.

Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties, the Employer's Representative and the DAB shall not be altered by reason of any arbitration being conducted during the progress of the Works."

85. Sub-Clause 9.2 of the JSG provides as follows:

"(...) Unless otherwise agreed by the Parties:

(a) *the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (the "Rules");*

(b) *in addition to the Rules, the arbitration shall be conducted according to the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration;*

(c) *(...)*

(d) *the arbitration shall be decided in law (within the meaning of Panamanian law) and conducted in the English language;*

(e) *(...)*

(f) *the arbitration agreement and the arbitration shall be governed by the United States Federal Arbitration Act, 9 U.S.C. §§ 1 et seq.*

Arbitration may be commenced prior to or after completion of the Works."

86. Sub-Clauses 6.2 and 6.3 of the GAA provide as follows:

"6.2 Any and all disputes or controversy arising out of or related to this Agreement, including its interpretation, application and enforcement, shall be resolved by international arbitration in law (within the meaning of Panamanian law).

6.3 Unless otherwise agreed by both Parties:

(a) *the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (the "Rules");*

(b) *in addition to the Rules, the arbitrators shall be guided, but will not be bound, by the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration;*

(c) *(...)*

(d) *the arbitration shall be decided in law (within the meaning of Panamanian law) and shall be conducted in the English language;*

(e) (...)

(f) *the arbitration agreement and the arbitration shall be governed by the United States Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. except as modified herein or by the Rules."*

87. In addition to the above, the Arbitration shall be conducted in accordance with the "Specific Procedural Rules" issued by the Arbitral Tribunal on 8 July 2016 after consultation with the Parties. Where any of the above-mentioned provisions and rules or the Specific Procedural Rules are silent, the proceedings shall be governed by the rules agreed by the Parties or which the Arbitral Tribunal will issue after consultation with the Parties.

B. PLACE OF ARBITRATION

88. In accordance with Sub-Clause 20.6 (e) of the Conditions of Contract the venue of the arbitration shall be Miami, Florida in the United States of America. Sub-Clauses 9.2 of the JSG and 6.2 and 6.3 of the GAA also state Miami, Florida as the venue of the arbitration.

C. LANGUAGE OF THE ARBITRATION

89. On the basis of Sub-Clauses 1.4 (referring to the Appendix to Tender) and 20.6 (d) of the Contract, Clause 9.2(d) of the JSG and Sub-Clause 6.3(d) of the GAA, the language of the Arbitration shall be English.

D. AMOUNT IN DISPUTE

90. The amount in dispute is provisionally quantified at USD 591,932,149.54 (excluding interest and costs).

91. In accordance with Article 2(13), Appendix III of the ICC Rules, the Parties acknowledge that amounts paid to the arbitrators are not inclusive of VAT or related compulsory contributions. The Parties undertake to pay the applicable VAT and related compulsory contributions directly to the arbitrators upon request and upon submission of an invoice addressed to them by the arbitrators.

E. PROVISIONAL TIMETABLE OF THE PROCEEDINGS

92. To be issued, after consultation with the Parties, as soon as possible after the execution of the Terms of Reference.

XI. EXCLUSION OF LIABILITY AND INDEMNITIES

93. The Parties agree not to hold any of the current or former members of the Tribunal liable to any party whatsoever for any act or omission in connection with any arbitration conducted by reference to these Terms of Reference and release that member to the fullest extent permitted by law, except in the case of fraud.

94. If a party commences proceedings against the Tribunal or any member thereof, save in respect of any fraud, that party shall indemnify the Tribunal and each member thereof

from and against all resulting claims, actions, suits, proceedings, disputes, differences, demands, costs, expenses and damages of any kind, arising out of or in any way referable to any act or omission by the Tribunal in relation to or concerning the arbitral proceedings.

XII. TIME LIMIT FOR RENDERING THE FINAL AWARD

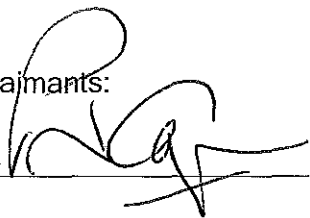
95. If the time limit of 31 October 2018 for the rendering of the Final Award cannot be met, the ICC Court is authorized to extend such time limit for the purpose of this Arbitration.

ICC Case N° 20910/ASM (C-20911/ASM)

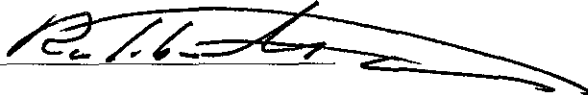
XIII. DATE AND SIGNATURE

- 96. In witness whereof the Parties and the Arbitral Tribunal have executed these Terms of Reference in eleven originals.
- 97. The persons whose signatures appear below for the Claimants and the Respondent are duly authorized to enter into these Terms of Reference on behalf of the Claimants and the Respondent.
- 98. The Signatory Parties agree with the above Terms of Reference of the Arbitral Tribunal.


Place of Arbitration: Miami, Florida, USA
Date: 7 July 2016

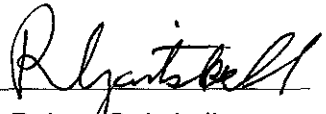
For the Claimants:
By: 


WHITE & CASE LLP

For the Respondent:
By: 
Troyer Brown International LLP

The Arbitral Tribunal


Mr Claus von Wobeser
Co-Arbitrator


Dr Robert Gaitskell
Co-Arbitrator


Mr Pierre-Yves Gunter
President