INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceedings between

BANESCO HOLDING LATINOAMÉRICA, S.A. AND BANESCO (PANAMÁ), S.A.

Claimants and

THE REPUBLIC OF PANAMA

Respondent

ICSID Case No. ARB/23/41

AWARD

Members of the Tribunal
Franz X. Stirnimann Fuentes, Chair Rafael
Rincón Ordóñez, Arbitrator
Alvaro Galindo, Arbitrator

Secretary to the Tribunal
Francisco Abriani

Assistant to the Tribunal
Magdalena Bulit Goñi

Date sent to the Parties: 5 May 2026

This page has been left blank intentionally

Representation of the Parties

On behalf of Banesco Holding Latinoamérica, S.A. and Banesco (Panamá), S.A.:

Mr Fernando Irurzun Montoro
Ms Amaia Rivas Kortázar
Mr Fernando Giménez-Alvear Gutiérrez Maturana
Mr Elías Soria Iglesias
Mr Chelo Borrás Retamero
Ms Marina Arraiza Shakirova (*until 10 July 2025*)

Clifford Chance, S.L.P.
Paseo de la Castellana, 110
28046, Madrid
Kingdom of Spain

On behalf of the Republic of Panama:

Ms Margie-Lys Jaime Ramírez
Mr Michelle A. Mastellari Bonilla
Ministry of Economy and Finance
OGAWA Building, Vía España and Calle 52E Bella Vista District – Province of Panama
Panama

and

Mr Jaime Gallego
Ms Domitille Baizeau
Mr Luis Miguel Velarde Saffer Mr Riccardo Loschi
Mr Maël Deschamps

LALIVE S.A.
35 rue de la Mairie
1207 Geneva,
Switzerland

TABLE OF CONTENTS

INDEX OF PROCEDURAL TERMS

Appendix	Appendix of factual evidence or legal authority ("C-…, factual evidence submitted by the Claimants; "R-…", factual evidence submitted by the Defendant; "CL-…", legal authority submitted by the Claimants; "RL-…", legal authority submitted by the Defendant")
Arjona I	Opinion on Panamanian Law by Adán Arnulfo Arjona L., dated 12 August 2024
Arjona II	Second Legal Opinion on Panamanian Law by Adán Arnulfo Arjona L., dated 27 February 2025
Hearing	Hearing held on 28, 29 and 30 July and 1 August 2025, Madrid, Spain
ICSID	International Centre for Settlement of Investment Disputes
CIAM	Madrid International Court of Arbitration
Statement of Defence	Defendant's Statement of Defence, dated 30 December 2024
Defendant's Costs	Statement by the Respondent on Costs dated 3 December 2025
Plaintiffs' Costs	Statement of Costs by the Claimants dated 3 December 2025
CVDT	Vienna Convention on the Law of Treaties
Defendant or Panama	The Republic of Panama
Claimants	Banesco Holding Latinoamérica, S.A. and Banesco (Panama), S.A.
Rejoinder	The Defendant's Rejoinder on the Merits and Reply to the Defendant's Objections to Jurisdiction, dated 30 November 2023
Statement of Claim	Statement of Claim by the Claimant dated 12 August 2024
Palacios I	Opinion Legal of Luis Alberto Palacios Aparicio, 25 December 2024

Palacios II	Second Legal Opinion by Luis Alberto Palacios Aparicio, dated 30 April 2025
Parties	Claimants and Defendant
Prieto	Witness Statement by Alfonso Prieto dated 12 August 2024
Rules of Arbitration	ICSID Arbitration Rules of 2022
Reply	Statement of Rejoinder on the Merits and Statement of Defence on Preliminary Objections by the Claimants, dated 28 February 2025
Request for Arbitration	The Claimants' Request for Arbitration, dated 8 September 2023, registered by ICSID on 8 September 2023

TABLE OF DEFINED TERMS

AAPRI or Treaty	Agreementon the Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the Republic of Panama, which entered into force on 31 July 1998
APADEA	Panamanian Association of Insurers
Articles on State Responsibility [1]	Articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts, adopted by United Nations General Assembly Resolution A/56/83
Subject	Identification of public works projects for which Banesco Seguros S.A. provided surety bonds
Banesco Panama	Banesco (Panamá), S.A., with its registered office at Marbella, Calle Aquilino de la Guardia and Calle 47 Bella Vista, Torre Banesco, Panama City, Republic of Panama
Banesco Seguros	Banesco Seguros S.A., with its registered office at Marbella, Calle Aquilino de la Guardia and Calle 47 Bella Vista, Banesco Tower (25th Floor), Panama City, Republic of Panama
BHL	Banesco Holding Latinoamérica, S.A., with its registered office at Marbella, Calle Aquilino de la Guardia and Calle 47 Bella Vista, Torre Banesco (25th Floor), Panama City, Republic of Panama
CDI	International Law Commission
Circular 20-2021.LEG	Circular No. 20-2021.LEG of the Comptroller General's Office of the Republic, dated 21 June 2021
CONADES	National Council for Sustainable Development of the Republic of Panama
Comptroller General's Office	Office of the Comptroller General of the Republic of Panama
Vienna Convention or CVDT	Vienna Convention on the Law of Treaties. U.N. Doc. A/CONF.39/27 (1969)
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature in Washington on 18 March 1965

[1] The Tribunal notes that the Claimants have submitted the Articles in English, without comments, in **Annex CL-18**; whilst the Respondent has submitted **Annex RL-45** containing the same Articles in Spanish, with comments; as Annex **RL-45** is more comprehensive and is in the language of the arbitration, the Tribunal will refer to **Annex RL-45**.

Supreme Court	Supreme Court of Justice of the Republic of Panama
Decree 317-Leg/2006	Decree No. 317-Leg of 12 December 2006
Decree No. 33-Leg/2000	Decree No. 33-Leg of 8 September 2020
Advance payment guarantee or advance payment bond	A financial product offered by Banesco Seguros to cover the risk that the advance payment granted by the owner or project developer to the contractor
Performance bond	A financial product offered by Banesco Seguros to cover the risk of the contractor failing to fulfil their obligations in accordance with the terms and conditions of the awarded works contract
Act 22 of 2006	Law 22, enacted on 27 June 2006
Law 48 of 2011	Act 48, enacted on 15 March 2011, which codified the text of Act 22 of 2006
Act 61 of 2017	Act 61, enacted on 27 September 2017 which amended Act 22 of 2006
Act 153/2020	Act 153, enacted on 8 May 2020, which further amended Act 22 of 2006
MEDUCA	Ministry of Education of the Republic of Panama
MINSA	Ministry of Health of the Republic of Panama
MIVIOT	Ministry of Housing and Land Use Planning of the Republic of Panama
TAT	Tax Administrative Tribunal
TACP	Administrative Courts for Public Procurement
TBI	Bilateral Investment Treaty
Fair and Equitable Treatment	Standard of fair and equitable treatment
NAFTA	North American Free Trade Agreement
UCEP	Programme Coordination and Implementation Unit of the National Council for Sustainable Development of the Republic of Panama/CONADES

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") pursuant to the Agreement on the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Republic of Panama, which entered into force on 31 July 1998 (the "APPRI" or "Treaty") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the ***"ICSID*** Convention").

2. These arbitration proceedings are governed by the Rules of Arbitration of the ICSID Rules of 2022 (the ***"Rules of*** Arbitration").

A. THE PARTIES

(1) The Claimants

3. The Claimants, who initiated these arbitration proceedings before ICSID, are Banesco Holding Latinoamérica, S.A. (***"Banesco*** Latinoamérica"; "BHL"; or the "Claimant") and Banesco (Panamá) S.A. (***"Banesco*** Panamá" and, collectively, the "Claimants"). Both companies operate in the insurance and surety market and are represented in this arbitration by lawyers from the firm Clifford Chance, S.L.P (Messrs Fernando Irurzun Montoro, Fernando Giménez-Alvear Gutiérrez Maturana, Elías Soria Iglesias, Ms Amaia Rivas Kortázar and Mr Chelo Borrás Retamero, Clifford Chance, S.L.P., Paseo de la Castellana, 110, 28046, Madrid, Kingdom of Spain).

4. Their claim relates to what they allege is the incorrect execution of guarantees granted by the Defendants for infrastructure projects in the Republic of Panama and the resulting damages caused to their alleged investment. They quantify these damages at USD 13,568,317.

(2) The Respondent

5. The respondent, against whom these arbitration proceedings have been initiated, is the Republic of Panama (the "Respondent", or "Panama"). The Respondent is represented by Mr Héctor Alexander, Ms Margie-Lys Jaime Ramírez, Mr Miguel Ángel Clare González-Revilla and Ms Michelle A. Mastellari Bonilla, of the Ministry of Economy and Finance (Ministry of Economy and Finance, OGAWA Building, Vía España and Calle 52E, Bella Vista District – Province of Panama, Panama) and by lawyers from the firm LALIVE S.A. (Mr Jaime Gallego, Ms Domitille Baizeau, Mr Luis Miguel Velarde Saffer, Mr Riccardo Loschi, and Mr Maël Deschamps, LALIVE S.A., 35 rue de la Mairie, 1207 Geneva, Switzerland).

B. BRIEF DESCRIPTION OF THE DISPUTE

6. The Claimants and the Respondent are collectively referred to as the 'Parties'. The representatives of the Parties and their addresses are set out in Section I.A *above*.

7. This case arises from insurance transactions facilitated by the Claimants' surety bonds in relation to infrastructure projects in Panama and from the alleged arbitrary conduct on the part of Panama, which is said to have constituted a breach of the standard of fair and equitable ***treatment*** enshrined in the Treaty (***"Fair and Equitable*** Treatment") and to have caused damages to the Claimants, for which they seek compensation in this arbitration.

8. As a preliminary matter, the Respondent objects to the Tribunal's jurisdiction and contends that the Claimants' claims do not fall within its scope or are inadmissible because (i) the Claimants are not protected investors under the terms of the Treaty or the ICSID Convention,
(ii) the dispute concerns a matter of Panamanian domestic law rather than the Treaty, (iii) there are no disputes regarding certain points raised by the Claimants, and (iv) the Claimants chose to resolve their disputes concerning sixteen Issues before Panamanian courts, which precludes them from doing so before this Tribunal.

9. For their part, the Claimants reject this argument and maintain that the Tribunal must

resolve the disputes raised. In this regard, the Claimants consider that the decision to enforce, or threaten to enforce, the sureties granted by Banesco Seguros without any legal basis constitutes a breach of the Treaty by Panama. This is because they characterise the alleged state conduct as arbitrary and contrary to the standard of Fair and Equitable Treatment. On this basis, they claim compensation for damages, which they consider to include non-pecuniary damages.

10. Specifically, the Claimants request that the Arbitral Tribunal:

> *Declare that the Republic of Panama has breached the obligation to accord the Claimants' investment fair and equitable treatment, as set out in Article IV(1) of the Spain–Panama APPRI.*
>
> *Declare that the Republic of Panama has breached the obligation not to impede the enjoyment of the Claimants' investment through arbitrary measures, as set out in Article IV(2) of the Spain–Panama APPRI.*
>
> *Order the Republic of Panama to cease its arbitrary conduct and to hold the Claimants harmless from any future arbitrary conduct in this matter.*
>
> *Order the Republic of Panama to pay at least 13,568,317 US dollars for the damage caused to the Claimants, as calculated as at the date of this Statement of Claim [sic].*
>
> *Order the Republic of Panama to pay interest on the compensation awarded from the date of the breach of the Spain-Panama APPRI and from the date on which the award is made until the date on which the amount due is paid.*
>
> *Order the Republic of Panama to bear all costs arising from these proceedings, including administrative costs and the costs of the Arbitral Tribunal, as well as the fees of the Claimants' representatives and the experts who have acted on their behalf.*
>
> *Make any other order that the Arbitral Tribunal deems appropriate*[2].

[2] Reply, § 395.

11. The Respondent, in the alternative to the objections regarding jurisdiction and admissibility that it raises, rejects the Claimants' arguments regarding the merits of the case and maintains that the Claimants are not entitled to the remedy they seek. This is based on the understanding that what the Claimants are in fact seeking is for the Tribunal to act as a court of appeal within the Panamanian legal system, without this being justified by an allegation of denial of justice. Panama considers that the allegations seeking a finding of a violation of the standard of Fair and Equitable Treatment under domestic law should be rejected.

12. Specifically, the Respondent requests that the Tribunal:

> *declare that it lacks jurisdiction to adjudicate the claims of Banesco Holding Latinoamérica, S.A. and Banesco (Panamá), S.A., or that these claims are inadmissible;*
>
> *in the alternative to the foregoing, dismiss all claims brought by Banesco Holding Latinoamérica, S.A. and Banesco (Panamá), S.A.;*
>
> *in any event, order Banesco Holding Latinoamérica, S.A. and Banesco (Panamá), S.A. to reimburse the Republic of Panama for all costs incurred in connection with this arbitration, including the costs and fees of the Tribunal, the International Centre for Settlement of Investment Disputes, the legal representation of the Republic of Panama, its witnesses and experts, together with interest accrued prior to (from the date the costs were incurred) and after the award at a commercially reasonable rate until full and final payment of all sums due; and*
>
> *grant any other relief it deems appropriate* [3] .

13. In this Award, the Tribunal rules on its jurisdiction and the admissibility of the Request for Arbitration, as well as on the merits of the Claimants' claims, in so far as these have been the subject of contentious debate between the Parties.

14. The Tribunal has considered the arguments, evidence and authorities submitted by the Parties in the course of these proceedings. The fact that an argument, piece of evidence or

[3] Rejoinder, § 485.

authority is not expressly mentioned in this Award does not mean that the Tribunal has failed to consider it.

C. PROCEEDINGS

15. On 1 August 2023, ICSID received the Request for Arbitration filed by lawyers from the firm Clifford Chance, S.L.P., on behalf of BHL and Banesco Panamá, against Panamá, together with Annexes C-0001 to C-0009 (***"Request for*** Arbitration").

16. On 8 September 2023, the Acting Secretary-General of ICSID registered the Request for Arbitration in accordance with Article 36 of the ICSID Convention and Rules 6 and 7 of the ICSID Rules of Commencement (***"Rules of*** Commencement") and notified the Parties of the registration of the Request for Arbitration. In the Notice of Registration, the Acting Secretary-General invited the Parties to proceed with the constitution of a Tribunal as soon as possible in accordance with Rule 7 of the Rules of Procedure.

17. On 2 November 2023, the Claimants appointed Mr Alvaro Galindo as an arbitrator and, on 6 November 2023, the Respondent appointed Mr Rafael Rincón Ordóñez as an arbitrator.

18. Mr Rafael Rincón Ordóñez and Mr Alvaro Galindo accepted their appointments as arbitrators in this case on 23 and 24 November 2023, respectively.

19. On 5 February 2024, ICSID sent the Parties a list of nine candidates for the election of the Chair of the Tribunal. The Parties returned their forms on 15 and 16 February 2024, both Parties having agreed to appoint Dr Franz X. Stirnimann Fuentes as Chair of the Tribunal.

20. By letter dated 5 March 2024, the Secretary-General, in accordance with Rule 21(1) of the Rules of Arbitration, notified the Parties that the three arbitrators had accepted their appointments and that, consequently, the Tribunal was deemed to have been constituted on that date. The Tribunal is therefore composed of Mr Rafael Rincón Ordónez, a Colombian national, appointed by the Claimants (RINCON CASTRO Abogados, Carrera 7, No. 75-51, Office 502, Bogotá D.C., Colombia); Dr Alvaro Galindo, a

Colombian and Ecuadorian nationality, appointed by the Respondent (Georgetown University Law Centre, 600 New Jersey Avenue NW, 20001 Washington, DC, United States of America); and Dr Franz X. Stirnimann Fuentes, a Swiss and Peruvian national, who chairs the Tribunal and was appointed by agreement of the Parties (STIRNIMANN FUENTES Dispute Resolution Sàrl, Route de Malagnou 6, P.O. Box 3023, 1211 Geneva, Switzerland).

21. By letter dated 2 April 2024, the Tribunal circulated the drafts of Procedural Orders No. 1 and No. 2 for consideration and discussion by the Parties. Furthermore, the Chair of the Tribunal proposed, with the approval of the other members of the Tribunal, that Ms Magdalena Bulit Goñi be appointed as Tribunal Assistant. On 10 April 2024, the Parties submitted their comments on the draft Procedural Order No. 2 and accepted the appointment of Ms Bulit Goñi as an Assistant to the Tribunal.

22. On 12 April 2024, the Tribunal's first session was held via videoconference with the Parties, during which the Parties' comments on the drafts of Procedural Orders No. 1 and No. 2 were discussed.

23. On 29 April 2024, the Tribunal issued Procedural Order No. 1, setting out the Parties' agreement on procedural matters and the Tribunal's decision on the disputed issues. Procedural Order No. 1 provides that the applicable Rules of Arbitration are those in force as from 1 July 2022, that the language of the proceedings shall be Spanish, and that the venue for the proceedings shall be Washington D.C., United States of America. Procedural Order No. 1 also sets out the procedural timetable.

24. On the same date, the Tribunal issued Procedural Order No. 2 adopting the rules on transparency and confidentiality governing these proceedings.

25. On 12 August 2024, the Claimants filed their Statement of Claim ("Claim"), together with the following documents: (i) an Affidavit by Mr Alfonso Prieto dated 12 August 2024; (ii) an Expert Report on Damages by Messrs Antón García and Alan G. Rozenberg dated 12 August 2024, accompanied by

annexes AGAR-1 to AGAR-70; (iii) Legal Opinion on Panamanian Law by Mr Adán Arnulfo Arjona dated 12 August 2024, accompanied by annexes AA-1 to AA-9; (iv) documentary annexes C-10 to C-303; and (v) legal authorities CL-1 to CL-23.

26. On 22 November 2024, the Respondent notified the appointment of lawyers from the firm LALIVE S.A. as its legal representative in these arbitration proceedings.

27. On 30 December 2024, the Respondent filed its Statement of Defence ("Defence"), together with the following documents: (i) Expert Report on Damages by Messrs Sebastián Cerda Norambuena (Econsult Capital SpA), Iván Alonso Herrera and Ítalo Muñoz (Alonso & Muñoz S.A.C.), dated 30 December 2024, accompanied by Annexes SCIAIM-01-01 to SCIAIM-01-03, SCIAIM-02-01 to SCIAIM-02-03, SCIAIM-03-01 to SCIAIM-03-10, SCIAIM-04-01 to SCIAIM-04-03; (ii) Legal Opinion by Luis Alberto Palacios Aparicio, dated 25 December 2024, accompanied by Annexes LP-1 to LP-14; (iii) documentary annexes R-1 to R-92; and (iv) legal authorities RL-1 to RL-63.

28. On 8 January 2025, the Parties submitted to the other party their requests for the production of documents in accordance with the procedure set out in Procedural Order No. 1.

29. On 16 January 2025, the Respondent submitted its substantiated objections to the Claimants' request for disclosure. For their part, the Claimants did not raise any objections to the Respondent's request for disclosure of documents.

30. On 23 January 2025, the Claimants submitted their response to the substantiated objections to the request for disclosure of documents that the Defendant had previously filed.

31. On 6 February 2025, the Court issued Procedural Order No. 3 setting out its decisions and orders regarding the requests for the production of documents.

32. On 28 February 2025, the Claimants filed their Reply Brief ("Reply"), together with the following documents: (i) the Second Expert Report by Messrs.

Antón García and Alan G. Rozenberg, dated 28 February 2025, accompanied by Annexes AGAR-71 to AGAR-111; (ii) the Second Legal Opinion on Panamanian Law by Mr Adán Arnulfo Arjona, dated 27 February 2025, accompanied by Annexes AA-10 to AA-17; (iii) Documentary Annexes C-304 to C-430; and (iv) Legal Authorities CL-24 to CL-65.

33. On 11 March 2025, the Parties informed the Tribunal of their agreement to hold the hearing ('Hearing') at the premises of the Madrid International Court of Arbitration ('CIAM') rather than at the ICSID premises in Washington, D.C. By a communication of the same date, the Tribunal confirmed its availability to hold the Hearing in the city of Madrid.

34. On 24 April 2025, the Respondent informed the Tribunal that it had agreed with the Claimants to extend the deadline for the submission of the Rejoinder ("Rejoinder") by two days. The Tribunal granted the requested extension.

35. On 1 May 2025, the Respondent filed its Rejoinder together with the following documents: (i) Second Legal Opinion by Luis Alberto Palacios Aparicio, dated 30 April 2025, together with Annexes LP-15 to LP-17; (ii) Second Expert Report on Damages by Messrs Sebastián Cerda Norambuena (Econsult Capital SpA), Iván Alonso Herrera and Ítalo Muñoz (Alonso & Muñoz S.A.C.), dated 1 May 2025, together with Annexes SCIAIM-02-04 to SCIAIM-02-07, SCIAIM-03-11 to SCIAIM-03-28 and SCIAIM-04-04; (iii) documentary annexes R-93 to R-283; and (iv) legal authorities RL-64 to RL-154.

36. On 23 May 2025, the Parties submitted their requests for the appearance of the opposing party's experts whom they wished to cross-examine during the Hearing. The Claimants requested the appearance and the opportunity to cross-examine Messrs Luis Alberto Palacios Aparicio, Sebastián Cerdá, Iván Alonso and Ítalo Muñoz. For its part, the Respondent indicated its wish for Messrs Adán Arnulfo Arjona López, Antón García and Alan G. Rozenberg to appear so that it could cross-examine them, and chose not to request the appearance of Mr Prieto González for cross-examination.

37. On 5 June 2025, the Claimants, relying on section § 19(2) of Procedural Order No. 1 and Rule 38 of the ICSID Arbitration Rules, requested that the Tribunal authorise the appearance of Mr Prieto González to give evidence at the Hearing (***"Request for*** Appearance").

38. On 6 June 2025, the Tribunal set a deadline for the Respondent to respond to the Request for Appearance by 9 June at 09:00 am Washington D.C., United States of America – one hour before the scheduled time for the Pre-Hearing Meeting (***"Pre-Hearing Organisational*** Meeting"), in accordance with section § 20 of Procedural Order No. 1, the Procedural Timetable and Rule 31 of the Rules of Arbitration.

39. On 9 June 2025, the Respondent submitted a letter in response to the Request to Appear.

40. On the same date, the Pre-Hearing Organisational Meeting between the Parties and the Tribunal was held via videoconference, during which procedural, administrative and logistical matters were discussed in preparation for the Hearing on jurisdiction and the merits, to be held in person from Monday 28 July to Friday 1 August 2025 inclusive, at the CIAM. Furthermore, the Parties were given the procedural opportunity to present their oral submissions regarding the Request for an Appearance.

41. On 13 June 2025, the Tribunal issued Procedural Order No. 4 concerning the organisation of the hearing and the Request to Appear. In Procedural Order No. 4, the Tribunal rejected the Request to Appear.

42. On 21 July 2025, the Parties submitted a joint application for the admission of new documents to the case file. On 22 July 2025, the Tribunal took note of the Parties' agreement and authorised the inclusion in the case file of the documents indicated by the Parties.

43. From 28 to 30 July and on 1 August 2025, the hearing was held in person, in accordance with Procedural Order No. 4. The following persons were present at the hearing:

Tribunal	
Dr Franz X. Stirnimann Fuentes	President of the Tribunal
Mr Rafael Rincón Ordóñez	Arbitrator
Dr Alvaro Galindo	Arbitrator
ICSID Secretariat	
Mr Francisco Abriani	Secretary to the Tribunal
Assistant to the Tribunal	
Ms Magdalena Bulit Goñi	Court Assistant
On behalf of the Claimants	
Mr Fernando Irurzun Montoro	Clifford Chance
Ms Amaia Rivas Kortázar	Clifford Chance
Mr Elías Soria Iglesias	Clifford Chance
Mr Antón García	Compass Lexecon
Mr Alan Rozenberg	Compass Lexecon
Mr Federico González Loray	Compass Lexecon
Mr Gonzalo Martínez Romero	Compass Lexecon
Mr Adán Arnulfo Arjona	
Mr Chelo Borrás Retamero	Banesco Holding Latinoamérica, S.A.
On behalf of the Defendant	
Mr Jaime Gallego	Lalive
Mr Luis Miguel Velarde Saffer	Lalive
Mr Riccardo Loschi	Lalive
Mr Maël Deschamps	Lalive
Ms Margie-Lys Jaime Ramírez	Investment Arbitration Office of the Ministry of Economy and Finance
Ms Michelle A. Mastellari Bonilla	Investment Arbitration Office of the Ministry of Economy and Finance
Mr Luis Alberto Palacios Aparicio	Lecturer, University of Panama
Mr Sebastián Cerda Norambuena	Econsult Capital
Mr Iván Alonso Herrera	Alonso & Muñoz
Mr Ítalo Muñoz Bazán	Alonso & Muñoz
Ms María Luisa Petitpas Brahm	Econsult Capital
Court reporters	
Mr Paul Pelissier	D-R Esteno
Ms Marta Rinaldi	D-R Esteno

44. The following persons were examined at the hearing:

On behalf of the Claimants
Mr Adán Arnulfo Arjona
Mr Antón García
Mr Alan Rozenberg

On behalf of the Respondent
Mr Luis Alberto Palacios Aparicio
Mr Sebastián Cerda Norambuena
Mr Iván Alonso Herrera

45. On 11 August 2025, the Respondent sent an email to the Tribunal in response to a question put by the Tribunal on the final day of the hearing. On 12 August 2025, the Claimants replied to the Respondent's email of 11 August 2025 regarding the Tribunal's question.

46. The Parties submitted their statements of costs on 3 December 2025.

II. FACTS OF THE CASE

47. The events set out below constitute a brief and non-exhaustive summary of the factual background to the dispute as presented by the Parties. Their sole purpose is to provide context for the Tribunal's decision. They do not constitute the Tribunal's findings on disputed facts.

48. BHL, a company registered and incorporated in Spain [4] , holds the entire share capital of Banesco Panamá, a company registered and incorporated in Panama [5] , and the latter holds the entire share capital of Sociedad Banesco Seguros S.A. [6] , a company also

[4] Statement of Claim, § 20 and **Annex C-1**, Note from the Commercial Register of the Kingdom of Spain regarding Banesco Holding Latinoamérica,
S.A. The Tribunal shall refer to the annexes cited by the Parties in the manner in which they were designated by the Parties in their annexe indexes.

[5] Claim, § 19 and **Annex C-3**, Certification by the Secretary of the Board of Directors of Banesco Holding Latinoamérica, S.A. regarding the shareholding structure.

[6] Claim, § 19. The description is consistent with that provided by the Claimants in their Notice of Dispute, **Annex C-6**, Letter of Notice of Dispute dated 26 October 2022.

registered and incorporated in Panama, which was the entity that entered into the advance payment and performance bond contracts that are the subject of this dispute.

49. The Claimants operated in the insurance and surety market for infrastructure projects in Panama, insuring them either through an advance payment bond or a performance bond, each serving a different purpose. These instruments were required by Panamanian regulations as one of the conditions that successful bidders for public infrastructure project contracts had to meet.

50. In this context, it is not disputed that several of the insured projects encountered problems during their execution. The problems with the projects led to the enforcement of the relevant bonds, which form the basis of the dispute between the Parties. Specifically, six bonds were enforced or their enforcement was sought – corresponding to what are identified as Matters Nos. 5, 11, 13, 17, 25 and 29.

51. One of the points of contention between the Parties concerns whether the enforcement of the bonds and the initiation of the proceedings to enforce them were in accordance with the law. The Claimants assert that they were not, in breach of the standard of Fair and Equitable Treatment recognised by the Treaty, whilst the Respondent maintains that, apart from the fact that the Tribunal lacks jurisdiction to hear the Claimants' claims, the enforcement actions and the procedures followed were in accordance with the law, without compromising Panama's international responsibility under the Treaty.

52. Furthermore, the Claimants contend that the responsible state entities of Panama failed to supervise the insured projects or did so negligently, a claim which is contested by the Respondent. The Claimants argue that this conduct on the part of Panama's state entities—and, consequently, the Respondent—caused them damages, for which they are claiming in these proceedings.

53. Furthermore, the Supreme Court of Panama issued a series of judgments concerning surety contracts and their enforcement, as well as the applicable Panamanian law [7]; the Parties dispute
their scope and effects in the present dispute.

A. LEGISLATIVE DEVELOPMENTS

54. On 27 June 2006, Act 22 of 2006 (***"Act 22 of*** 2006") was enacted, regulating public procurement in Panama [8] .

55. On 12 December 2006, the Office of the Comptroller General of the Republic of Panama (***"Comptroller*** General") issued Decree No. 317-Leg. ("***Decree*** 317-Leg/2006"), which regulates the bonds issued to guarantee the State's contractual obligations and sets out the standard forms for them [9] .

56. On 28 December 2006, Executive Decree No. 366 of the Ministry of Economy and Finance was issued [10] .

57. On 15 March 2011, Act 48 of 2011 (***"Act 48 of*** 2011") was enacted, which provided for the text of Act 22 of 2006 [11] .

---

[7] The judgements were issued on different dates, namely 27 April 2017 (see **Annex C-35**, Judgement of the Third Chamber for Administrative Litigation of the Supreme Court of Justice of 27 April 2017), 20 October 2023 (see **Annex R-33**, Judgment of the Supreme Court, Third Chamber (Case No. 21) of 20 October 2023) and 13 September 2024 (see **Annex R-24**, Judgment of the Supreme Court, Third Chamber (Case No. 4) of 13 September 2024).

[8] Claim, list of defined terms, p. 82; Defence, § 98; **Annex C-34**, Act No. 22 of 27 June 2006 "regulating public procurement, as amended by Act 35 of 2006, Act 2 of 2007, Act 21 of 2008, Act 41 of 2008, Act 69 of 2009, Act 80 of 2009, Act 12 of 2010, Act 30 of 2010, Act 66 of 2010 and Act 48 of
2011", dated 27 June 2006.

[9] Hearing, Day 1, Opening Statements by the Claimants, pp. 43: 3–17 (Mr Irurzun Montoro); Statement of Defence, § 98, **Annex C-33**, Decree No. 317-Leg. "regulating the bonds issued to guarantee the State's contractual obligations and establishing their standard forms" of 12 December 2006. The hearing was recorded and transcripts were prepared, which were duly reviewed and agreed upon by the Parties, who submitted them to the Registrar on 29 September 2025; the Registrar, in turn, circulated the final version in Word format on 30 September. The Tribunal refers to these transcripts.

[10] Defence, § 98; **Annex AA-4**, Executive Decree No. 366 of 28 December 2006.

[11] Claimants' Opening Submissions, Slides 43 and 44; Reply, §§ 208–212; Defence, §§ 98–99; Rejoinder,
§§ 233–240; **Annex C-34**, Act No. 22 of 27 June 2006 "regulating public procurement, as amended by Act 35 of 2006, Act 2 of 2007, Act 21 of 2008, Act 41 of 2008, Act 69 of 2009, Act 80 of 2009,

Act 12 of 2010, Act 30 of 2010, Act 66 of 2010 and Act 48 of 2011", dated 27 June 2006.

58. On 3 April 2012, Act 12 of 2012 was enacted, regulating the insurance sector in Panama [12].

59. On 27 April 2017, the Third Chamber for Administrative Litigation of the Supreme Court of Justice handed down a judgement concerning the enforcement of advance payment bonds [13] .

60. On 27 September 2017, Act 61 of 2017 (***"Act 61 of*** 2017") was enacted, which amended Act 22 of 2006 [14].

61. In March 2018, the Consolidated Text was enacted, which systematised Act 22 of 2006 following its amendment by Act 61 of 2017 [15] .

62. On 28 March 2018, Decree No. 21-Leg. was issued, regulating the sureties issued under Act 61 of 2017 [16] .

63. On 27 September 2019, APADEA sent a letter to the Panamanian authorities regarding the bail system [17] .

64. On 8 May 2020, Act 153 of 2020 (***"Act*** 153/2020") was enacted, further amending Act 22 of 2006 [18] .

---

[12] Statement of Defence, § 100; **Annex R-39**, Act No. 12 regulating insurance activities and laying down other provisions, dated 3 April 2012.

[13] Defence, §§ 125–126; Reply, §§ 206–212; **Annex C-35**, Judgment of the Third Chamber for Administrative Litigation of the Supreme Court of Justice of 27 April 2017.

[14] Plaintiffs' Opening Submissions, Filmina 45; Reply, §§ 210 and 234; Defence, § 99; Duplicate, §§ 233, 239–240; **Annex C-47**, Act No. 61 "amending Act 22 of 2006, which regulates public procurement and sets out other provisions", dated 27 September 2017.

[15] Reply, § 99.

[16] Rejoinder, § 233; **Annex AA-7**, Decree 21-LEG of 28 March 2018, "which regulates the bonds issued to guarantee the State's contractual obligations and sets out their standard forms".

[17] Claim, § 100; Rejoinder, § 98; **Annex C-36**, Communications from APADEA to Panama dated 27 September 2019.

[18] Hearing, Day 1, Plaintiffs' opening submissions, Slides 46 and 48; Rejoinder, § 223; Reply, §§ 210–212; **Annex C-76**, Law 153 'amending Law 22 of 2006, which regulates public procurement and sets out other provisions', dated

8 May 2020.

65. On 7 September 2020, the Consolidated Text ordered by Act 153 of 2020[19].

66. On 8 September 2020, the Comptroller General's Office issued Decree No. 33-Leg., which regulated the bonds issued under Act 153 of 2020[20] .

67. On 25 June 2021, the Administrative Court for Public Procurement issued Resolution No. 073-2021/TACP [21] .

68. On 17 November 2021, the Administrative Tax Court issued Resolution No. TAT-ICC-043 [22] .

69. On 26 May 2022, APADEA sent a letter to the Panamanian authorities regarding the bond scheme [23] .

70. On 30 January 2023, the Administrative Court for Public Procurement issued, amongst others, Resolutions No. 018-2023-Pleno/TACP and No. 020-2023/TACP, relating to Matters 4 and 5, respectively [24] .

71. On 10 August 2023, the Comptroller General's Office issued Resolution No. 2259-2023-LEG/FySE, regulating the bonds issued to guarantee the

[19] Reply, § 233; **Annex C-78**, Art. 130 of the Consolidated Text of Law 22 of 27 June 2006, which regulates public procurement, as amended by Law 153 of 2020.

[20] Rejoinder, § 233; Defence, §§ 131–133; Statement of Claim, §§ 101–104; **Annex C-37**, Decree No. 33-LEG "regulating the bonds issued to guarantee the State's contractual obligations, establishing their standard forms and repealing Decrees No. 21-LEG of 28 March 2018 and No. 43-LEG of 30 July 2018' of 8 September 2020.

[21] Rejoinder, §§ 232–233 and footnotes 311 to 313; Response, footnote 145; **Annex R-30**, Resolution No. 073-2021/TACP of the TACP (Case No. 21) dated 25 June 2021.

[22] Defence, §§ 144–146; **Annex R-28**, TAT Decision No. TAT-ICC-043 (Case No. 29) of 17 November 2021.

[23] Claim, § 103; **Annex C-38**, Communication from APADEA to Panama dated 26 May 2022.

[24] Defence, footnote 145; **Annexes R-31**, TACP Decision No. 018-2023-Pleno/TACP (Case No. 4) of 30 January 2023 and **R-10**, Resolution No. 020-2023/TACP of the TACP (Case No. 13) of 30 January 2023.

the State's contractual obligations, sets out the relevant templates and repeals Decree No. 33-Leg of 8 September 2020[25].

72. On 6 October 2023, the Comptroller-General's Office issued Circular No. 23-2023-LEG/FySE, which regulated the bonds issued to guarantee the State's contractual obligations, established their standard forms and repealed Decree No. 33-Leg of 8 September 2020[26].

73. On 20 October 2023, the Third Chamber of the Supreme Court of Justice handed down a judgement concerning the enforcement regime for performance bonds[27].

74. On 15 January, 4 March, 2 May and 29 July 2024, the Supreme Court of Justice issued interim orders in various proceedings relating to the enforcement of bonds[28].

75. On 7 May 2024, APADEA sent a letter to the Comptroller General's Office regarding the bail system[29].

76. On 13 September 2024, the Third Chamber of the Supreme Court of Justice handed down a judgement concerning the enforcement of advance and performance bonds[30].

---

[25] Hearing, Day 1, Plaintiffs' Opening Statements, p. 36:8–22 (Mr Irurzun Montoro); Answer, §§ 131–133; Rejoinder, § 233; Statement of Claim, § 105; **Annex C-46**, Resolution No. 2259-2023-LEG/FySE "regulating the bonds issued to guarantee the State's contractual obligations, establishing their templates and repealing Decree No. 33-Leg of 8 September 2020" dated 10 August 2023.

[26] Rejoinder, § 233; **Annex C-45**, Circular No. 23-2023-LEG/GySE of the Comptroller-General's Office of 6 October 2023.

[27] Plaintiffs' opening submissions, Slide 49; Rejoinder, § 213; Defence, § 158; **Annex R-33**, Judgment of the Supreme Court, Chamber III (Case No. 21) of 20 October 2023.

[28] Defence, § 129; **Annex C-39**, Case concerning the Vista Alegre Healthcare Units (COC-55-15) (see Decision of the Administrative and Labour Chamber of the Supreme Court of Justice of 15 January 2024; **Annex C-40**, Case concerning the Salamanca Healthcare Units (COC-15-16) (see Decision of the Third Chamber for Administrative and Labour Disputes of the Supreme Court of Justice of 4 March 2024; **Annex C-41**, Case concerning the Pocrí Healthcare Units (COC-26-17) (see Decision of the Third Chamber for Administrative and Labour Disputes of the Supreme Court of Justice of 29 July 2024, and **Annex C-42**, Case concerning the San José Healthcare Units (COC-30-17) (see Order of the Third Chamber for Administrative and Labour Disputes of the Supreme Court of 2 May 2024.

[29] Rejoinder, § 98; **Annex C-309**, Letter from APADEA to the Comptroller General of Panama dated 7 May 2024.

[30] Plaintiffs' Opening Submissions, Filmina 50; Rejoinder, § 213; Defence, §§ 116 and 145–146; **Annex R-24**, Judgment of the Supreme Court, Chamber III (Case No. 4) of 13 September 2024.

B. SURETY CONTRACTS / CASES

77. Within the factual framework of the present case, the events that took place in relation to each of the 35 Cases on which the Claimants base their claims are of particular importance. In order to facilitate understanding of the case and to contextualise the Tribunal's analysis and decision, the following overview is provided of some of the exemplary Cases, taking into account their different characteristics, beginning with the oldest Case and ending with the most recent:

78. Case COC-02-14 relating to the 'Chiriquí Aqueducts' project (***'Case No.*** 1'):

(a) On 21 May 2014, Banesco Seguros issued advance payment bond No. 01-31-3331 and performance bond No. 01-31-3330 in relation to the said contract[31].

(b) On 29 May 2015, CONADES entered into civil works contract No. COC-02-14 relating to the 'Chiriquí Aqueducts' project[32].

(c) On 1 July 2015, the corresponding go-ahead order was issued[33].

(d) On 18 January 2017, Panama sent notices to the contractor and Banesco Seguros regarding the performance of the contract, followed by further notices dated 9 and 10 February 2017 addressed to the contractor[34].

(e) On 21 October 2021, a decision was issued regarding the enforcement of the performance bonds linked to contract COC-02-14[35].

[31] **Annex C-81**, Advance Payment Bond No. 01-31-3331 of 21 May 2014 and **Annex C-80**, Performance Bond No. 01-31-3330 of 21 May 2014.

[32] **Annex C-79**, Civil Works Contract No. COC-02-14 dated 29 May 2015.

[33] **Annex C-82**, Order to Proceed dated 1 July 2015 (CONADES/UCEP-S.E.- 433-2015) in relation to contract COC-02-14.

[34] **Annex C-327**, Letter from Panama to the contractor and Banesco Seguros dated 18 January 2017; **Annex C-328**, Letter from CONADES to the contractor dated 9 February 2017; **Annex C-329**, Letter from Panama to the contractor dated 10 February 2017.

[35] **Annex C-83**, Notification of Panama's intention to terminate contract COC-02-14 dated 21 October 2021.

(f) On 22 February 2022, Panama issued a project closure report indicating 76.34 per cent progress [36] .

79. Case COC-14-15 relating to the 'Sambú Sanitation Units' project (***'Case No.*** 2'):

(a) On 30 May 2016, CONADES entered into civil works contract No. COC-14-15 relating to the "Sambú Healthcare Units" project [37] .

(b) On 3 August 2015, the relevant order to proceed [38]had been issued.

(c) On 21 April 2015, Banesco Seguros issued advance payment bond no. 01-31-3933 and performance bond no. 01-31-3932 in connection with that contract [39] .

(d) Between 28 June and 25 September 2017, electronic communications were exchanged regarding the progress of the project.

(e) On 4 April 2018, a notice was issued regarding the termination of the contract [40] .

(f) On 8 May 2018, Panama issued a report stating that work had progressed by 29.45 per cent.

(g) On 6 August 2024, a resolution was issued regarding the enforcement of the performance bonds relating to contract COC-14-15 [41] .

---

[36] Reply, Annex, p. 129, Item 1, 'Latest follow-up decision/report and percentage of progress'; **Annex C-330**, Panama project closure report dated 22 February 2022.

[37] **Annex C-86**, Order to Proceed of 3 August 2015 (CONADES/UCEP S.E.-546-2015) in relation to contract COC-14-15.

[38] Reply, p. 129 (and footnote 316) and its reference to **Annex C-86**, Order to Proceed dated 3 August 2015 (CONADES/UCEPS.E.-546-2015) in relation to contract COC-14-15.

[39] **Annex C-84**, Performance Bond No. 01-31-3932 dated 21 April 2015; **Annex C-85**, Advance Payment Bond No. 01-31-3933 dated 21 April 2015.

[40] Reply, p. 129 (and footnote 321) and its reference to **Annex C-334**, Communication from Panama to Banesco Seguros and the contractor dated 4 April 2018.

[41] Reply, p. 129 (and footnote 323) and its reference to **Annex C-335**, Resolution No. 126-2024-CONADES of 6 August 2024.

80. Case COC-85-16 concerning the "San Juan Healthcare Units" project (***"Case No.*** 19"):

(a) In relation to that contract, Banesco Seguros issued performance bond No. 03-31-615 dated 17 October 2016 and advance payment bond No. 03-31-616 dated 17 October 2016.

(b) On 27 October 2016, CONADES entered into civil works contract No. COC-85-16 for the 'Construction of 418 sanitation units (including 2 special units) in the administrative districts of San Juan and Corral Falso, San Francisco District, Veraguas Province', signed between MP/CONADES/UCEP and Construcciones y Mantenimiento CAMIT, S.A. (Contract COC-85-16).

(c) During the execution of the project, correspondence was exchanged between the state authorities, the contractor and Banesco Seguros regarding the progress of the works and compliance with the contractual obligations guaranteed by the said bonds.

(d) Subsequently, administrative proceedings were initiated concerning the status of the contract and the obligations guaranteed by the performance bonds issued in relation to Contract COC-85-16.

81. Case O-11-2017 concerning the Colegios de Panamá project (***"Case No.*** 29"):

(a) In relation to that contract, Banesco Seguros issued performance bond No. 02-31-2552 dated 9 March 2017, together with its respective endorsements [42] .

(b) On 5 May 2017, works contract No. O-11-2017 was concluded for the project "Design, construction and refurbishment of the José del Carmen Echevers School, I.P.T. Gumercinda Páez, first cycle of basic education, Tocumen, located in the Province of Panama", signed between the Ministry of Education and the Colegios Panamá Consortium [43] .

---

[42] Claim, Annex I; **Annex C-263**, Performance Bond No. 02-31-2552 dated 9 March 2017.

[43] Claim, Annex I; **Annex C-262**, Contract No. O-11-2017 of 5 May 2017.

(c) The initial term of the contract ran until 19 January 2019 and was subsequently extended by Addendum No. 1 of 12 February 2019 until 8 June 2019 [44] .

(d) Subsequently, on 28 February 2020, Panama resolved the matter administratively contract [45].

82. Case 60-15 concerning the MCM Global Consortium project (***"Case No.*** 30"):

(a) In relation to that contract, Banesco Seguros issued performance bond No. 01-31-4425 dated 30 September 2015 and advance payment bond No. 01-31-4426 dated 30 September 2015, together with their respective endorsements [46] .

(b) On 13 November 2015, works contract No. 60-15 was concluded for the "Supply of materials, labour, equipment and management for the construction of one thousand (1,000) social housing units in the Province of Panama (San Miguelito)", signed between the Ministry of Housing and Land Use Planning and the MCM Global Consortium [47] .

(c) On 23 December 2015, the order to proceed relating to contract [48].

(d) Subsequently, Panama requested the enforcement of the bonds by means of a letter dated 28 January 2020 and an administrative decision dated 26 October 2020 [49] .

---

[44] Statement of Claim, Annex I; **Annex C-262**, Contract No. O-11-2017 of 5 May 2017; and **Annex C-263**, Performance Bond No. 02-31-2552 of 9 March 2017.

[45] Claim, Annex I; **Annex C-262**, Contract O-11-2017; **Annex C-265**, Administrative Decision No. 707 relating to Contract O-11-2017 dated 28 February 2020.

[46] Statement of Claim, Annex I; **Annex C-269**, Performance Bond No. 01-31-4425 dated 30 September 2015; and **Annex C-270**, Advance Payment Bond No. 01-31-4426 dated 30 September 2015.

[47] Claim, Annex I; **Annex C-268**, Contract No. 60-15 dated 13 November 2015.

[48] Claim, Annex I; **Annex C-271**, Order to proceed dated 23 December 2015 in relation to Contract No. 60-15.

[49] Claim, Annex I; **Exhibit C-267**, Communication DM/DNAL-030-2020-26 from Panama to Banesco Seguros dated 28 January 2020, and **Exhibit C-266**, Resolution 3448 from Panama to the Ministry of Economy and Finance (request for enforcement of a guarantee) dated 26 October 2020.

83. Case A-7007-2016 relating to the Maritime Services project (***“Case No.*** 32”):

(a) In relation to that contract, Banesco Seguros issued performance bond No. 01-31-5100 dated 6 September 2016 and advance payment bond No. 01-31-5101 dated 6 September 2016 [50] .

(b) On 13 December 2016, works contract No. A-7007-2016 was signed for the project ‘Preparation of a study, design, development, approval of plans, environmental impact assessment, construction and maintenance of the new auxiliary maritime services terminal in the Pacific sector’, between the Panama Maritime Authority and the Inzelva S.A. Maritime Consortium [51] .

(c) On 19 January 2017, the order to proceed relating to contract [52]was issued .

(d) Subsequently, on 30 May 2019, the contract was terminated by administrative decision, and that decision ordered the enforcement of the relevant performance bonds [53] .

84. Case COC-87-16 concerning the Viento Frío Aqueduct project (***“Case No.*** 33”):

(a) In relation to that contract, Banesco Seguros issued performance bond No. 03-31-675 dated 8 February 2017 and advance payment bond No. 03-31-676 dated 8 February 2017 [54] .

(b) On 11 April 2017, CONADES entered into civil works contract No. COC-87-16 relating to the project ‘Study, design, construction, maintenance and operation of works to improve the water supply system for the Viento communities’

---

[50] Claim, Annex I; **Annexes C-282**, Performance Bond No. 01-31-5100 of 6 September 2016, and **C-283**, Advance Payment Bond No. 01-31-5101 of 6 September 2016.

[51] Statement of Claim, Annex I; **Annex C-281**, Contract No. A-7007-2016 dated 13 December 2016.

[52] Claim, Annex I; **Annex C-284**, Order to proceed dated 19 January 2017 (ADM No. 0093-1-2017) in relation to Contract A-7007-2016.

[53] Claim, Annex I; **Annex C-285**, Administrative decision ordering enforcement dated 30 May 2019.

[54] Statement of Claim, Annex I; **Annex C-291**, Performance Bond No. 03-31-675 of 8 February 2017 and **Annex**

C-292, Advance Payment Bond No. 03-31-676 of 8 February 2017.

Cold andPalmira", signed between MP/CONADES/UCEP and Construcciones and Maintenance CAMIT, S.A. [55] .

(c) On 10 April 2019, Administrative Decision No. 10-19 was issued concerning the contract [56].

(d) Subsequently, by order of 18 March 2024, the enforcement of the relevant bonds was ordered [57] .

85. Case COC-22-17 concerning the Guarumal Healthcare Units project (***"Case No.*** 35"):

(a) In relation to this contract, Banesco Seguros issued the relevant performance and advance payment bonds to guarantee the contractor's obligations.

(b) In 2017, CONADES entered into civil works contract No. COC-22-17 relating to the project "Construction of sanitation facilities in the community of Guarumal" [58] .

(c) During the course of the project, correspondence and reports were exchanged regarding the progress of the contract and compliance with contractual obligations.

(d) Subsequently, administrative notices were issued regarding the status of the contract and the obligations secured by the performance bonds issued in connection with that project.

86. Case COC-10-15 concerning the 'Tucutí Healthcare Units' project (***'Case No.*** 3'):

[55] Claim, Annex I; **Annex C-75**, Civil Works Contract No. COC-87-16 of 11 April 2017.

[56] Claim, Annex I; **Annex C-294**, Administrative Decision No. 10-19 relating to contract COC-87-16 dated 10 April 2019.

[57] Statement of Claim, Annex I; **Annex C-295**, Resolution No. 067-2024-CONADES ordering the enforcement of performance bonds dated 18 March 2024.

[58] **Annex C-312**, Civil Works Contract No. COC-22-17-CONADES dated 5 July 2017.

(a) On 21 April 2015, Banesco Seguros issued advance payment bond No. 01-31-3931 and performance bond No. 01-31-3930 in connection with that contract [59] .

(b) On 12 June 2015, the corresponding order to proceed was issued [60] .

(c) On 14 June 2016, CONADES entered into civil works contract No. COC-10-15 relating to the 'Tucutí Healthcare Units' project [61] .

(d) On 16 December 2016, Panama sent a letter to Banesco Seguros regarding the status of the contract [62] .

(e) On 8 May 2018, Panama issued a document entitled 'project non-conformity' concerning the progress of the works [63] .

(f) On 4 April 2018, a notice was served regarding the termination of the contract.

(g) On 19 March 2024, a decision was served concerning the enforcement of the performance bonds linked to contract COC-10-15.

III. THE PARTIES' CLAIMS AND PRELIMINARY MOTIONS

87. Panama raises a number of objections to the jurisdiction and competence of this Tribunal, which are rejected by the Claimants. For their part, the Claimants consider that Panama acted arbitrarily with regard to their investment, in breach of the Treaty. The disputes surrounding these points will be set out and analysed in this order.

88. Panama contends that the Tribunal lacks jurisdiction for a number of reasons, raised in the alternative, namely: because one of the Claimants, Banesco Panamá, does not qualify as a protected investor under either the BIT or the ICSID Convention (see Section IV.A(1)a,

[59] **Annex C-92**, Advance Payment Bond No. 01-31-3931 of 21 April 2015 and **C-91**, Performance Bond No. 01-31-3930 of 21 April 2015.

[60] **Annex C-93**, Order to Proceed dated 12 June 2015 (CONADES/UCEP-SE 377-2015) in relation to contract COC-10-15.

[61] **Annex C-50**, Civil Works Contract No. COC-10-15 of 14 June 2016.

[62] **Annex C-336**, Letter from Panama to Banesco Seguros dated 16 December 2016.

[63] **Annex C-337**, Document from Panama entitled 'Project Non-conformity' dated 8 May 2018.

below); the disputes raised relate solely to matters of Panamanian domestic law and are not of an international nature or a matter of international law (see Section IV.B(1)a, *below*); and the conditions under which Panama consented to investment arbitration have not been met, namely (i) compliance with pre-arbitration requirements, (ii) the absence of a dispute between the Parties; and (iii) the Claimants have irrevocably opted to resolve disputes before the Panamanian courts (see Section IV.C(1)a, *below*) [64] .

89. The Claimants deny these assertions and consider that the Tribunal should hear their claims, insofar as it has jurisdiction and the claims are admissible (see Section IV.C(1)a(iii), *below*) [65] . On that basis, they allege that Panama failed to act in accordance with the standard of Fair and Equitable Treatment established by the APPRI in relation to their investment (see Section V.E, *below*), and therefore claim compensation.

IV. JURISDICTION

90. It should be noted that neither Party disputes this Tribunal's authority to rule on its own jurisdiction in this case, a power recognised in Article 41 of the ICSID Convention [66] .

A. OBJECTION *RATIONE PERSONAE* REGARDING BANESCO PANAMÁ

(1) The Parties' Positions

91. The Parties dispute whether one of the Claimants, Banesco Panama, can be classified as a protected investor under the terms of the Treaty and the ICSID Convention, and consequently whether this Tribunal has jurisdiction to hear the Claimants' claims.

---

[64] Answer, § 81.

[65] Reply, paragraph 2.

[66] **Annex RL-1**, Convention on the Settlement of Investment Disputes between States and Nationals of Other States, in force since 14 October 1966, p. 17, Article 41.

a. The Respondent's Position

92. The Respondent argues that Banesco Panamá does not meet the requirements set out in the Treaty or in the ICSID Convention to have access to arbitral jurisdiction.

93. By way of summary, and without prejudice to a more detailed discussion, the Respondent maintains that Banesco Panamá is not a protected investor under the terms of the Treaty, as it is not duly incorporated in Spain; rather, it is a national of Panama, and there is no agreement between the Contracting Parties that alters this. In its view, this circumstance also prevents it from being classified as a protected foreign investor under the ICSID Convention.

94. In particular, on the one hand, Panama argues that Banesco Panama does not meet the requirement of Article I(1)(b) of the APPRI, which requires it to be incorporated in Spain [67] . In this regard, it points out that it is not in dispute that Banesco Panama is a company incorporated in Panama [68].

95. It also draws a distinction between recognising as a protected investor a company controlled by investors who would themselves be directly protected – a scenario which, it maintains, is not provided for in the Treaty – and recognising as an investment the local company effectively controlled by the protected investor – a scenario which, it argues, is the one covered by the Treaty [69] . It highlights the term appearing in Article I(1)(b) of the Treaty – 'other', referring, in its view, to the fact that the investor must be incorporated in the *other* Contracting Party, that is to say, not in Panama but in Spain – and points out that this interpretation is consistent with the purpose of the Treaty as set out in the preamble, the scope of application provided for in Article II and its dispute settlement mechanism [70] .

[67] Statement of Defence, § 25, Rejoinder, § 22.

[68] Statement of Defence, § 25 and its reference to the Statement of Claim, § 22 and **Annex C-2**, Note from the

Commercial Register of the Republic of Panama regarding Banesco (Panama), S.A.

[69] Rejoinder, §§ 27–28; Defence, §§ 25–26.

[70] Rejoinder, § 25.

96. Panama rejects the Claimants' argument regarding the possibility that a local company effectively controlled by a foreign investor may be a protected investor [71] .

97. Furthermore, the Respondent points out that Banesco Panama does not meet the requirements of Article 25(2)(b) of the ICSID Convention, in that it is not a national of the other State (Spain). It argues that there is no such agreement—whether express or implied—as required by the aforementioned article of the ICSID Convention to treat a company incorporated in the State receiving the investment as an investor from the other State, nor has the existence of such an agreement been proven [72] .

98. Panama clarifies that Article 25(2)(b) of the ICSID Convention requires that the agreement refer to an 'investor' and not to 'investments', which precludes the view that the APPRI and its terms allow Banesco Seguros to be regarded as a protected investor [73] .

b. The Claimants' Position

99. The Claimants reject the objections raised by their counterpart and assert that international investment law was designed for cases such as this one. In particular, they argue that Banesco Panamá made an investment in Panama and meets the requirements set out in the ICSID Convention, and is therefore a protected investor entitled to arbitration under the ICSID Rules in accordance with the terms of Articles I(1)(b), I(2) and XII of the Treaty and Article 25(2)(b) of the ICSID Convention.

100. The Claimants emphasise that Panama has not objected to the Tribunal's jurisdiction with regard to BHL [74]. Notwithstanding this, they point out that BHL is an investor, within the meaning of the Treaty, in Banesco Seguros through Banesco Panama [75]. They refer to other treaties concluded by Spain with similar wording in support of their arguments [76].

[71] Rejoinder, § 27.

[72] Rejoinder, §§ 23 and 30–31; Defence, §§ 28–32.

[73] Rejoinder, §§ 32–35.

[74] Rejoinder, § 16.

[75] Rejoinder, § 25.

[76] Rejoinder, § 27, with reference to the APPRIs between Spain and the Republic of Nicaragua, Spain and the Republic of Costa Rica, and Spain and the Republic of Colombia.

101. In particular, with regard to the classification of Banesco Panamá as an investor under the terms of the Treaty, the Claimants maintain that Articles I(1)(b) and I(2)(a) of the Treaty—which define 'investor' and 'investments' respectively—must be interpreted together, drawing particular attention to a clarification included at the end of Article I(2)(a) of the Treaty [77] . It follows, in their view, that Banesco Panama, as a legal person incorporated in Panama, is an investor in so far as it holds all the shares in Banesco Seguros [78] .

102. The Claimants argue that the clarification contained in Article I(2)(a) of the Treaty provides that investments made in the territory of a Contracting Party by an enterprise of that Contracting Party but '*effectively* controlled' by investors of the other Contracting Party shall be deemed to be investments. They assert that this provision leads to the correct classification of Banesco Panamá as a foreign investor [79] .

103. Meanwhile, with regard to the classification of Banesco Panamá as an investor under the terms of the ICSID Convention, the Claimants explain that Article 25(2)(b) of the ICSID Convention requires two conditions to be met: (i) foreign control of an enterprise incorporated in the State receiving the investment and (ii) an agreement to treat the investor as a national of the other Contracting Party [80] .

104. They point out that BHL owns 100 per cent of Banesco Panamá and consider that Articles I(2) and XII of the Treaty, read together, constitute the agreement required by the ICSID Convention whereby the local company is recognised as a national of the Contracting Party other than the State receiving the investment [81] .

105. This is because Article XII(1) of the Treaty, which provides for the option of ICSID arbitration, refers to disputes "relating *to* investments" between one of the Contracting Parties and an investor from the other, and Article I(2) of the Treaty defines investments as *"those made*

[77] Reply, §§ 18–24.
[78] Reply, §§ 21–22.
[79] Reply, §§ 23–24.
[80] Reply, § 32.

[81] Reply, § 34.

"*within the territory of a Contracting Party by enterprises of that same Contracting Party which are effectively controlled by investors of the other Contracting* Party" [82] .

(2) The Tribunal's analysis

106. The question before the Tribunal is whether the control of Banesco Panamá – a company incorporated in Panama by BHL, whose status as an investor has not been challenged and is not in dispute [83]– satisfies the requirements set out in Article I(2) of the Treaty and Article 25(2)(b) of the ICSID Convention for the purposes of conferring jurisdiction on this Tribunal. In this regard, the Tribunal concludes that Banesco Panama is not a protected investor under the instruments establishing its jurisdiction in this specific case. This is for the reasons set out below.

107. In these arbitration proceedings, the Tribunal's jurisdiction is established jointly by two instruments: the ICSID Convention and the Treaty; more specifically, Article 25(2)(b) of the ICSID Convention and Article XII of the Treaty. In turn, with regard to the Treaty, Article I(2) *in fine* of the Treaty determines the scope of consent and the Tribunal's potential jurisdiction. In other words, Panama's consent, in this regard, to submit to arbitration under the ICSID Rules is established on the basis of these instruments and their Articles 25(2)(b) and XII respectively, in the light of Article I(2). For their part, the consent of foreign investors is established on the basis of their acceptance of the offer to arbitrate.

108. It follows that those claiming to have the status of a protected investor under these instruments must cumulatively satisfy the requirements agreed by the States in order to be able to resort to arbitration under the ICSID mechanism.

109. Specifically, Article 25(2)(b) of the ICSID Convention provides:

---

[82] Reply, § 34.

[83] Hearing, Day 1, Opening Statements by the Claimants, p. 27:16–22, 66:15–67:3 (Mr Irurzun Montoro); Claim, §§ 21–22; **Annex C-2**, Extract from the Commercial Register of the Republic of Panama relating to Banesco (Panamá), S.A.; Defence, § 25; Hearing, Day 4, Closing Arguments of the Respondent, p. 1064:5–16 (Mr Gallego).

"Jurisdiction of the Centre

Article 25

(1) The Centre's jurisdiction shall extend to disputes of a legal nature arising directly out of an investment between a Contracting State (or any political subdivision or public body of a Contracting State accredited to the Centre by that State) and a national of another Contracting State, which the parties have agreed in writing to submit to the Centre. The consent given by the parties may not be unilaterally withdrawn.

(2) 'National of another Contracting State' shall mean:

(a) any natural person who, on the date on which the parties consented to submit the dispute to conciliation or arbitration and on the date on which the application provided for in Article 28(3) or Article 36(3) was registered, held the nationality of a Contracting State other than the State party to the dispute; but in no case shall it include persons who, on either of those dates, also held the nationality of the State party to the dispute; and

(b) any legal person which, on the date on which the parties consented to the Centre's jurisdiction over the dispute in question, holds the nationality of a Contracting State other than the State party to the dispute, and legal persons which, having held the nationality of the State party to the dispute on that date, the parties have agreed to treat as such, for the purposes of this Convention, on the grounds that they are subject to foreign control [84] *".*

110. For its part, Article I of the Treaty states:

"Article I. Definitions

For the purposes of this Agreement:

[84] **Annex RL-1**, Convention on the Settlement of Investment Disputes between States and Nationals of Other States, in force since 14 October 1966.

> *1. 'Investors' shall mean, in relation to either Contracting Party:*
>
> *a) Natural persons who are nationals of one of the Contracting Parties in accordance with its legislation.*
>
> *b) Enterprises, meaning legal persons, including companies, corporations, commercial partnerships and any association of the foregoing or other organisations, whether profit-making or not, provided that they are incorporated or, in any event, duly organised in accordance with the law of that Contracting Party.*
>
> *2. The term 'investments' means all types of assets or holdings, such as property and rights of any kind, invested in accordance with the legislation of the State receiving the investment and, in particular, though not exclusively, the following:*
>
> *[...]*
>
> *Investments made in the territory of a Contracting Party by enterprises of that same Contracting Party which are effectively controlled by investors of the other Contracting Party shall also be considered investments* [85] *".*

111. It is not disputed that BHL, a company incorporated in Spain, effectively controls Banesco Panamá, a company incorporated in Panama, and that the latter, in turn, holds the entire share capital of Banesco Seguros, also incorporated in Panama, which issued the performance bonds at the centre of the dispute on the Panamanian infrastructure projects market [86] . Thus, the corporate chain is controlled by BHL, incorporated in Spain; its middle link is Banesco Panamá; and the final link is Banesco Seguros, the latter two being incorporated in Panama and controlled directly or indirectly by BHL.

---

[85] **Annex C-7**, Agreement on the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Republic of Panama, signed in Panama on 10 November 1997.

[86] Claim, §§ 21–24; **Annex C-2**, Extract from the Commercial Register of the Republic of Panama relating to Banesco (Panama), S.A.; Defence, § 25; Hearing, Day 1, Opening Statements by the Claimants, p. 66:15–67:3 (Mr Irurzun Montoro); Hearing, Day 4, Closing Arguments of the Respondent, p. 1064:5–16 (Mr Gallego).

112. On this basis, it is necessary to analyse, first of all, whether Banesco Panama can be considered a *'foreign* investor' within the meaning of Article 25 of the ICSID Convention, more specifically, Article 25(2)(b) *in fine*.

113. It should be clarified that what underlies the Claimants' argument that the APPRI contains the agreement between them and Panama required by Article 25(2)(b) of the Convention is the understanding that the agreement between the Parties to this arbitration arises from the offer of arbitration made by Panama in the Treaty with Spain and the acceptance by the Claimants upon filing their request for arbitration.

114. Insofar as is relevant to the issue under consideration, this provision requires the agreement of the parties – in this case, the Claimants and the Respondent – to confer protection under the ICSID Convention and, in the consent between the Parties, to attribute foreign status to the legal person having the nationality of the State party to the dispute on the grounds that it is subject to foreign control.

115. The Claimants consider that a combined reading of Articles I(2) and XII of the Treaty establishes the agreement required by the ICSID Convention, whereby foreign status is attributed. The Tribunal cannot accept this proposition.

116. The Tribunal does not consider that Articles I(2) and XII of the Treaty constitute the agreement required by Article 25(2)(b) of the ICSID Convention. Whilst Article I(2) sets out the definitions of 'investor' and 'investment', Article XII sets out the methods for resolving disputes between a Contracting Party to the Treaty and an investor of the other Contracting Party. Thus, when interpreting Article XII, one must refer to the definitions contained in Article I(2). However, in the Tribunal's view, the fact that one must refer to one article to understand the scope and content of another is far from constituting an agreement, let alone establishing it unequivocally.

117. There is no need to elaborate on the importance of consent to arbitration, on which much has been written, both in legal scholarship and in arbitral awards. It is, however, worth noting that the instruments constituting consent in the present case expressly require an agreement for the purposes of conferring foreign status upon

a company incorporated in the State that is a party to the dispute, in this instance, Panama. In the absence of a clear expression of such consent, one can only conclude that Banesco Panama cannot be regarded as a protected investor under the Treaty and the ICSID Convention.

118. This conclusion is also supported by Professor Schreuer's commentary on the ICSID Convention, in which he rules out the possibility of inferring that a company incorporated in the host State is recognised as a foreign entity on the basis of a mere general expression of consent [87] :

> *"Not every expression of consent to jurisdiction can, in and of itself, serve as a basis for the conclusion that the host State has acknowledged the investor's foreign nationality. This conclusion only makes sense where the investor and the host State have been in direct contact and have entered into a direct agreement. The conclusion that there is an implied agreement on nationality, without further evidence, is impossible where consent to jurisdiction is based on the host State's legislation or on a treaty. If the investor simply accepts a standing offer by the host State to submit to jurisdiction, no agreement to treat that particular investor as a foreign national on the grounds that it is foreign-controlled can be imputed to the host State [88] ".*

119. Furthermore, in the *Amco v. Indonesia* decision, cited in Professor Schreuer's commentary, the tribunal recognised that, whilst the ICSID Convention does not formally require an express clause recognising the foreign nature of a company incorporated in the host State, it does require an agreement between the parties under which that legal entity is to be treated as foreign [89] . In that case, the tribunal concluded that such an agreement existed on the basis of various documents showing that the government was aware of the company's foreign control and that, in those

[87] **Annex RL-3**, S. Schill et al., Schreuer's Commentary on the ICSID Convention (vol. 1, 3rd ed. 2022; extracts).

[88] **Annex RL-3**, S. Schill et al., Schreuer's Commentary on the ICSID Convention (vol. 1, 3rd ed. 2022; extracts), § 1298.

[89] *Amco v. Indonesia*, Decision on Jurisdiction, 25 September 1983, cited in **Annex RL-3** (*Amco v. Indonesia*),

S. Schill et al., *Schreuer's Commentary on the ICSID Convention* (vol. 1, 3rd ed. 2022; extracts), §§ 1284–1286.

circumstances, had consented to arbitration under the ICSID Convention [90] . These circumstances do not apply in the present case.

120. Furthermore, it should be noted that the wording of Article I(2) of the Treaty, to which the Claimants refer, is clear in that it recognises the status of an 'investment' and not that of *an 'investor*'. This constitutes a further obstacle to the conclusion that the agreement required by Article 25(2)(b) of the ICSID Convention has been established.

121. Thus, one of the fundamental requirements under the Treaty and the ICSID Convention has not been met: the existence of an agreement to attribute foreign status to a company incorporated in Panama. Consequently, and in view of the facts of the present case and the terms on which Panama consented to submit disputes to arbitration under the provisions of the ICSID Convention and the Treaty, the Tribunal can only conclude that Banesco Panama is not a protected investor before this forum.

122. Consequently, the Tribunal considers that it has no jurisdiction *ratione personae* in respect of Banesco Panama under the ICSID Convention and the Treaty.

123. The Tribunal does not consider that its conclusion is called into question by the Claimants' references, in support of their arguments, to the decisions of the tribunals in the case *of Millicon v. Senegal* [91] and in the case *of MTD v. Chile* [92] .

124. Firstly, this Tribunal is under no obligation to follow the decision of any other tribunal, without prejudice to the consideration and attention it may give to the analysis and reasoning set out therein. Secondly, the Tribunal considers that the reasoning of that tribunal is not applicable to the present case.

125. Indeed, the factual background of the case *of Millicom v. Senegal*, in which the characterisation of the company Sentel GSM, incorporated in Senegal, as an investor in the

[90] *Amco v. Indonesia*, cited in **Annex RL-3**, S. Schill et al., *Schreuer's Commentary on the ICSID Convention* (vol. 1, 3rd ed. 2022; extracts), §§ 1284–1286, in particular § 1284.

[91] **Annex CL-24**, *Millicom International Operations B.V. and Sentel GSM S.A. v. the Republic of Senegal,* ICSID Case No. ARB/08/20, Decision on Jurisdiction of 16 July 2010 (*Millicom v. Senegal*).

[92] **Annex CL-25**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. the Republic of Chile,* ICSID Case No. ARB/01/7,

Award of 25 May 2004 (*MTD v. Chile*).

under Article 25(2)(b) of the ICSID Convention, differs from the present case. It was precisely factual considerations in that case that led that tribunal to conclude that it did have jurisdiction over Sentel GSM, in particular the conclusion of a concession agreement with that company which expressly referred to ICSID as the means of dispute resolution [93] . Such factors are not present in this case, which precludes the application of that tribunal's reasoning to this case.

126. Similarly, the Tribunal finds no support in the decision in the case *of MTD v. Chile* [94] , cited by the Claimants. This is so – apart from the fact that Chile had not raised any jurisdictional objections in that regard [95] – because the treaty applicable in that dispute expressly recognised in Article 6(2), in which the contracting States consented to arbitration under the ICSID Rules, that companies incorporated in the host State and controlled by foreign companies would be regarded as companies of the other contracting State in accordance with Article 25(2) of the ICSID Convention [96] . In the absence of such a provision in this case, it is not possible to reach a similar conclusion.

127. Thus, it must be concluded that, in this specific case, given the consent expressed by Panama under the terms of the Treaty and the ICSID Convention, Banesco Panama is not a protected investor and, therefore, the Tribunal lacks jurisdiction *ratione personae* with respect to Banesco Panama and the claims brought by it.

128. That said, and as the Parties themselves acknowledged during the Hearing [97], it should be noted that the lack of jurisdiction *ratione personae* in respect of Banesco Panama does not preclude the case in its entirety nor does it affect the Tribunal's uncontested jurisdiction in respect of BHL.

---

93 **Annex CL-24**, *Millicom v. Senegal*, §§ 5–10 and, in particular, 114. Similarly, Professor Schreuer's commentary in **Annex RL-3**, § 1293.

94 **Annex CL-25**, *MTD v. Chile*.

95 **Annex CL-25**, *MTD v. Chile*, § 90. The Tribunal notes that in this case, the respondent did not contest whether the investment had been made by a Malaysian national or not; this was a matter which the Tribunal considered of *its own motion*, based on the claimant's assertion that it did indeed meet the necessary conditions for jurisdiction to exist.

96 **Annex CL-25**, *MTD v. Chile*, § 94 and Article 6(2) of the treaty applicable to the case.

97 Hearing, Day 4, p. 1036:11–17 (Mr Soria Iglesias, for the Claimants) and p. 1064:13–17 (Mr Velarde Saffer, for the Respondent).

This conclusion in no way affects the potential characterisation of Banesco Panama as *a* protected *investment*.

B. OBJECTION *RATIONE MATERIAE* ON THE GROUNDS THAT THE CLAIM DOES NOT ARISE FROM THE TREATY

129. The Parties dispute whether or not the claims submitted to this Tribunal arise from the Treaty and, consequently, whether or not this Tribunal has jurisdiction to adjudicate them.

(1) The Parties' Positions

a. The Respondent's Position

130. In addition to its first objection *ratione personae*, Panama argues that the Claimants' claims are not claims for breach of the Treaty, but rather disputes under Panamanian domestic law, and that, consequently, this Tribunal lacks jurisdiction *ratione materiae* to hear them [98] .

131. On the basis of Article XII(1) of the Treaty, the Respondent considers that only matters governed by the Treaty and relating to its provisions may be submitted to the dispute settlement mechanism provided for therein [99] . It refers to the wording of other treaties concluded by Panama [100] , as well as to decisions of other tribunals [101] .

132. It asserts that, regardless of how it is characterised, what the Claimants are asking the Court to do is to rule on matters of Panamanian domestic law – namely, determining the validity of the sureties and whether or not the entities have complied

---

[98] Defence, paragraph 2.2; Hearing, Day 1, Respondent's opening statements, p. 118:15–20 (Ms Jaime Ramírez).

[99] Defence, §§ 33–37.

[100] The Tribunal notes that the Respondent bases its assertion that "[o]ther treaties do not include this restriction" [on the type of disputes that may be submitted to the tribunal]. See Defence, § 35, with reference to Professor Schreuer's commentary in **Annex RL-3**, S. Schill et al., Schreuer's Commentary on the ICSID Convention (vol. 1, 3rd ed. 2022; extracts), §§ 964–980, which mention: the 2004 Dutch model bilateral investment treaty ("BIT") (§ 964), the France–Argentina BIT in the context of the case *Vivendi v. Argentina*, the Paraguay–Switzerland BIT in the context of the case *SGS v. Paraguay*, the Uruguay–Switzerland BIT in the context of the case *Phillip Morris v. Uruguay*, the Pakistan–Switzerland BIT in the context of the *SGS v. Paraguay*, the 1991 Argentina–United States BIT, the 2012 United States of America Model BIT, the Guatemala–Spain BIT in the context of the *Iberdrola v. Guatemala* case, NAFTA, the Bangladesh–Italy BIT and a reference to the Panama–Uruguay APPRI dated 15 September 1998. See **Annex RL-7**, Panama–Uruguay APPRI of 15 September 1998.

[101] Reply, §§ 38–39 and its reference to **Annex RL-9**, *Iberdrola Energía, S.A. v. Republic of Guatemala*, ICSID

Case ARB/09/5, Award of 17 August 2012 *(Iberdrola v. Guatemala (I)*, pp. 71–75.

public aspects of the procedure for enforcing them – and asserts that this is demonstrated by the numerous references to decrees, laws and Panamanian case law made by the Claimants[102].

133. Panama contends that the Claimants' reference to the Treaty is not genuine, as, in its view, is demonstrated by the brevity of the Claimants' analysis regarding the alleged breach of the Treaty and the purported failure to analyse Panama's conduct in the light of the standards of international law[103]. It adds that the Panamanian courts have already ruled on some of the points under consideration by this Tribunal and that the latter cannot act as an appellate body[104].

b. The Claimants' Position

134. The Claimants reject the jurisdictional objection raised by Panama and assert that Panamanian law is not the subject matter of the dispute, but rather its factual framework for analysing Panama's conduct. In this regard, they consider that the Tribunal's role is not to substitute for the Panamanian courts in interpreting Panamanian domestic law, but rather to assess the Respondent's conduct and its (lack of) consistency with the international standards for investment protection set out in the Treaty[105].

135. Indeed, they assert that they are not asking the Tribunal to make a determination on Panamanian law or based on it, but rather to analyse Panama's conduct in accordance with the provisions of the Treaty, for which Panamanian law is a matter of fact and for which only its content need be analysed[106]. They cite the decision in the *Philip Morris* case *c. Uruguay* in support of their position and, specifically, to argue that the existence of elements of domestic law in a dispute does not in itself deprive an arbitral tribunal of jurisdiction *ratione materiae*[107]. As they explain, in that case the tribunal

---

[102] Rejoinder, §§ 36 and 40–42; Defence, §§ 40–42.

[103] Rejoinder, §§ 42–48 and 50; Reply, §§ 43–44.

[104] Rejoinder, § 49(c); Defence, § 44.

[105] Rejoinder, § 10.

[106] Rejoinder, § 37 and section 2.2.2.

[107] Hearing, Day 1, Claimants' Opening Statements, Slide 71; Rejoinder, § 39, citing **Annex CL-26**, *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. the Republic of Uruguay*, ICSID Case No.

ARB/10/7, Decision on Jurisdiction.

held that the dispute remained a treaty dispute, even though the analysis required an examination of the legality of certain state measures in the light of applicable domestic law. They state that Panama's conduct in enforcing sureties granted by Banesco Seguros that were no longer in force, and without complying with the required procedure, is arbitrary within the meaning of Article IV of the Treaty [108] . In this regard, they explain that the allegation that Panama's conduct was arbitrary requires a demonstration of the extent to which its conduct would have been contrary to Panamanian law [109] .

136. The Claimants add that, in accordance with the same Treaty (Article XII(3)(c)) and the ICSID Convention (Article 42(1)), these proceedings are based not only on the Treaty but also on Panamanian law [110] .

(2) The Tribunal's analysis

137. The question to be answered by the Tribunal at this stage is whether, in accordance with Article XII(1) of the Treaty, the claims submitted by the Claimants are claims relating *to "matters governed by* [the Treaty]" [111] . Panama considers that the Claimants' submissions are based on and derive from domestic law, and are outside the scope of the Treaty and, therefore, outside the Tribunal's jurisdiction. The Claimants reject this argument and characterise their submissions as being based on the Treaty.

138. Without prejudice to the analysis set out below, the Tribunal considers that the objections raised by Panama must be rejected, in so far as, on a *preliminary* analysis, the subject-matter of the claim, the manner in which it is presented and argued, and the legal considerations on which it is based lead to the conclusion that it relates to matters governed by the Treaty and not merely to matters of Panamanian law falling outside the jurisdiction of this Tribunal.

139. The Tribunal emphasises that the considerations and analysis set out in relation to this objection are of a preliminary nature and are formulated strictly within the context of the

108 Reply, §§ 43–44.
109 Rejoinder, § 45.
110 Reply, § 46.
111 **Annex C-7**, Agreement for the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain

and the Republic of Panama, done at Panama on 10 November 1997, Article XII(1).

determination of its jurisdiction. In other words, these are *a priori* considerations and do not prejudge any analysis of the substantive issues.

140. In this regard, the Tribunal does not deny that the formal filing of a claim and mere assertions of a breach of the Treaty are not sufficient to confer jurisdiction on this Tribunal under Article XII(1) [112] . However, and without prejudice to this, it is noted that the Claimants do not dispute the terms of the surety contracts, but rather Panama's exercise of the powers set out in the Panamanian Public Procurement Act, which provide for action by state entities, and whether the exercise of those powers was arbitrary and disproportionate [113] .

141. It is true that the conduct alleged by the Claimants relates to the surety contracts, but they do not identify the conduct itself within the framework of those contracts [114] but rather the actions of the respective Panamanian state entities in relation to them [115] . Furthermore, the complaint raised—that is, the subject matter of the claim—is based on the commitments undertaken by Panama under the Treaty, in particular those relating to Fair and Equitable Treatment, and not on contractual provisions [116] . To this end, in the Notice of Dispute itself, the Claimants had already identified the standard and the provision of the APPRI that they considered to have been breached, as well as the conduct of Panama that resulted in that breach [117] .

---

[112] Rejoinder, §§ 36 and 40–42; Answer, §§ 40–42 and **Annex RL-9**, *Iberdrola v. Guatemala (I)*, § 350.

[113] Hearing, Day 1, Claimants' opening statements, pp. 59:8–60:9 (Mr Irurzun Montoro); Hearing, Day 4, Claimants' Closing Arguments, p. 977:3–13 (Mr Irurzun Montoro: *"What is at issue here is whether Panama used the powers provided for in its Public Procurement Act in an arbitrary and disproportionate manner to interfere with the proper performance of contracts binding the contractor to the guarantor. The issue at stake is whether the legal powers were exercised correctly or whether, as this party contends, they were exercised in an arbitrary and disproportionate manner*.").

[114] The Claimants themselves pointed out that this would not be possible, insofar as Panama is not a party to the insurance contracts in respect of which the claim is made: Hearing, Day 4, Claimants' Closing Arguments, p. 977: 2–4 (Mr Irurzun Montoro: *"What is at issue here are not the terms of the surety contract. What is at issue here is something else*.").

[115] Hearing, Day 4, Closing Arguments by the Claimants, pp. 976–978, in particular p. 977: 3–13 (Mr Irurzun Montoro: *'What is at issue here is not the terms of the surety contract. What is at issue here is something else. What is at issue here is whether Panama arbitrarily and disproportionately exercised the powers provided for in its Public Procurement Act to interfere with the proper performance of contracts binding the contractor to the surety. What is at issue is whether those legal powers were exercised correctly or whether, as this party contends, they were exercised in an arbitrary and* disproportionate manner").

[116] **Annex C-6**, Letter of notification of dispute dated 26 October 2022.

[117] **Annex C-6**, Letter of notification of dispute dated 26 October 2022, pp. 2–3.

142. As previously noted (see Section IV.A(2), *supra*), the Tribunal's review at this stage of the proceedings is a *prima facie* review, which precludes an examination of the merits of the case at this stage of the Tribunal's analysis.

143. Indeed, as concluded, amongst others, by the Tribunal in the case *of Amco et al v. Indonesia*, for claims to be dismissed, they must be improbable, frivolous or reckless [118] . No such circumstances are apparent with regard to the claims made by the Claimants in this case.

144. Indeed, Panama refers to the decision *in Iberdrola v. Guatemala* [119] to support its characterisation of the Claimants' claims as falling outside the scope of the Treaty. The Tribunal considers that the arbitral tribunal's conclusion in that case is not applicable here for several reasons.

145. This is because, in that case, the tribunal declined jurisdiction on the grounds that the claimant had essentially raised a dispute under domestic law, without clearly articulating how the alleged facts constituted a breach of the applicable treaty [120] .

146. Firstly, it should be noted that any assessment of that tribunal's reasoning is limited, given that, in the very terms in which Panama refers to that decision [121], the conclusions of the tribunal *in Iberdrola v. Guatemala (I)* are, in part, based on the manner in which Iberdrola presented its arguments; and, in the record of these arbitration proceedings, only a summary of those arguments and of the debate between the parties is contained in the award, without it being possible to make a direct and detailed assessment of the claims themselves and the manner in which they were formulated.

147. Furthermore, and without prejudice to the foregoing, in that case the claimant "at no time presented a clear and specific argument as to which acts or conduct, under international law and not merely under local law", constituted

---

[118] **Annex RL-68**, *Amco et al. v. Indonesia,* ICSID Case No. ARB/81/1, Decision on Jurisdiction of 25 September 1983, § 38; see also **Annex RL-84**, *Methanex v. United Mexican States*, Ad Hoc Case, Partial Award of 7 August 2002, §§ 110–115.

[119] Rejoinder, §§ 40–49 and its reference to **Annex RL-9**, *Iberdrola v. Guatemala (I)*.

[120] **Annex RL-9**, *Iberdrola v. Guatemala (I)*, §§ 349–356.

[121] Rejoinder, §§ 37–39.

acts of expropriation [122]. As noted by that tribunal, Iberdrola alleged violations of Guatemalan law [123]without specifically identifying which acts of state authority constituted violations of the treaty applicable in that case [124]or demonstrating that the alleged facts could constitute a violation of that treaty [125]. That tribunal made it clear that "[t]*here was, save in a marginal sense, no debate regarding violations of the Treaty, or of international law, or as to which actions of the Republic of Guatemala, in the exercise of State power, had violated certain standards contained in the* Treaty" [126] , which led it to expressly request the parties to state their positions on the alleged breaches of the treaty [127] .

148. Such circumstances did not arise in the present case. As noted *above*, the Claimants, from the time of their Notice of Dispute right up to the Hearing, argued that Panama had adopted a practice or policy of unlawfully and arbitrarily enforcing the advance and performance bonds duly issued by Banesco Seguros [128] . The Parties—albeit on a subsidiary basis in the case of Panama—discussed whether the alleged facts constituted a factual basis for bringing a claim under the Fair and Equitable Treatment clause and whether such a claim would be admissible. This Tribunal did not need to ask the Parties to set out their claims in relation to the Treaty. Furthermore, the tribunal in the *Iberdrola* case found that it was being asked to review Guatemalan regulatory and judicial decisions in the light of Guatemalan law [129] , a point which the Claimants have denied applies in this case [130] . Consequently, it is not appropriate to echo the reasoning in the case cited by Panama.

[122] **Annex RL-9**, *Iberdrola v. Guatemala (I)*, §§ 323 and 349.

[123] **Annex RL-9**, *Iberdrola v. Guatemala (I)*, see, for example, §§ 321–323 and 330–333.

[124] **Annex RL-9**, *Iberdrola v. Guatemala (I)*, § 349.

[125] **Annex RL-9**, *Iberdrola v. Guatemala (I)*, § 350.

[126] **Annex RL-9**, *Iberdrola v. Guatemala (I)*, § 352.

[127] **Annex RL-9**, *Iberdrola v. Guatemala (I)*, § 353.

[128] Hearing, Day 1, Claimants' opening statements, pp. 22:19–22, 25:1–26:18, 40:6–42:2, 73:7–14, 91:15–92:11, 94:6 and 113:11–19 (Mr Irurzun Montoro); **Annex C-6**, Letter of notification of dispute dated 26 October 2022, pp. 2–3.

[129] **Annex RL-9**, *Iberdrola v. Guatemala (I)*, § 354.

[130] Hearing, Day 1, Claimants' Opening Statements, pp. 76:2–79:11 and 81:14–82:16 (Mr Soria Iglesias); Rejoinder, §§ 43–44.

149. The Tribunal notes that Panama's references to the decision in the *Joy* case *Mining*[131] and the decision on the application for annulment in the case of *Vivendi v. Argentina*[132] are not decisive in the circumstances of the present case.

150. In the case *of Joy Mining v. Egypt*, the claim related to a contract for the supply of equipment and systems and the bank guarantees of performance and advance payment between the claimant and a state-owned entity [133] and the claimant's request that the guarantee be declared expropriated in the absence of its return. Whilst the *Joy Mining* case also concerns the failure to release performance and advance payment bonds, one aspect of that case is distinctive: the contract in question was between the claimant and the respondent within the framework of a commercial transaction, a circumstance which the court considered insufficient to alter the nature of the dispute (from a contractual dispute governed by Egyptian domestic law to one governed by international law) [134] . Indeed, the court held that the release of the guarantees depended on the resolution of the dispute concerning the performance of the secured contract [135] . The claims related to the performance of the contract in question and were resolved alongside the resolution of the dispute regarding that performance.

151. In *the Vivendi case*, the *ad hoc* committee, for the purposes of determining whether the application for annulment of the award was admissible, examined whether the tribunal, in declining jurisdiction, had manifestly exceeded its powers. The *ad hoc* committee distinguished between a claim based on contractual obligations and a claim based on an independent breach of an international treaty, noting that both could coexist without the existence of the former depriving the international tribunal of jurisdiction to hear the latter [136] . However, that ruling was based on the premise that the tribunal was required to identify

---

[131] Hearing, Day 1, Opening Statements by the Respondent, pp. 129:16–130:7 (Mr Gallego) and his reference to **Annex RL-80**, *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction of 6 August 2004 (*Joy Mining v. Egypt*).

[132] Hearing, Day 1, Respondent's Opening Submissions, Slide 11.

[133] **Annex RL-80**, *Joy Mining v. Egypt*, §§ 15 and 17.

[134] **Annex RL-80**, *Joy Mining v. Egypt*, § 79.
[135] **Annex RL-80**, *Joy Mining v. Egypt*, §§ 77–78.
[136] **Annex RL-27**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. the Argentine Republic*, ICSID Case No. ARB/97/3, Annulment Award of 3 July 2002 (*Vivendi v. Argentina*), §§ 109–113.

state conduct which, beyond a breach of contract, constituted a treaty violation.

152. In the present case, the Tribunal is not faced with a simple overlap between a contractual claim and a claim under a treaty, but rather with an allegation of composite state conduct comprising multiple administrative and judicial acts, the joint assessment of which, according to the Claimants, constitutes a breach of the APPRI. The issue at this stage of the analysis is therefore not whether this Tribunal may review the interpretation of Panamanian law made by the domestic courts, but whether the sequence of state conduct invoked is, *prima facie*, capable of constituting a breach of the Treaty.

153. Ultimately, none of these cases establishes a rule preventing the Tribunal from examining the State's conduct alleged in this arbitration through the lens of the APPRI. The three precedents reaffirm the distinction between the contractual sphere—or that governed purely by domestic law—and the international sphere, but they do not preclude the possibility that a series of administrative acts and judicial decisions, considered in conjunction, may ultimately be relevant to determining the State's international liability.

154. Consequently, the Tribunal considers that the references to those precedents do not alter the framework of analysis adopted in this Award nor do they, in themselves, lead to the exclusion of the present dispute from the scope of its jurisdiction.

155. The Tribunal also considers relevant Panama's repeated reference to the public interest as a criterion justifying the actions of Panamanian State entities [137] . It is, at the very least, appropriate to question the contractual characterisation of the claims if public prerogatives are invoked as the basis for the conduct in question [138] .

[137] Among others, Hearing, Day 1, Opening Statements by the Defendant, p. 147:10–21 (Mr Velarde Saffer); Hearing, Day 4, Closing Arguments of the Defendant, p. 1055:13–16 (Mr Gallego: '[…] *a bond that guarantees a public works contract and which, therefore, must be guided by the principle of the public* interest'); Rejoinder, §§ 184–188 and Defence, §§ 121 and 173.

[138] Hearing, Day 4, Closing Arguments of the Claimants, p. 977:14–18 ("[…] *it is even conceptually debatable that public prerogatives can be invoked as justification for the conduct and then it is claimed that this is merely a contract*."); Defendant's closing submissions, pp. 1078:8–10, 1076:17–19 (Mr Jaime Gallego: *"Firstly – and this has already been mentioned – because the main objective is to safeguard the public* interest").

156. For the reasons set out above, the Tribunal dismisses the jurisdictional objection raised by Panama on the ground that the Respondents' claims do not comply with the terms of Article XII(1) of the Treaty.

C. OBJECTION *RATIONE VOLUNTATIS*

(1) The Parties' Positions

157. Furthermore, Panama objects to the Tribunal's jurisdiction *ratione voluntatis* on the basis of three arguments.

158. Firstly, in relation to Case 35, concerning the Guarumal Healthcare Units, on the grounds of failure to comply with prerequisites for the commencement of arbitration. Secondly, with regard to the Claimants' claims relating to seven Cases [(139)], on the grounds that no dispute exists (as yet). And, thirdly, Panama maintains that the Tribunal lacks jurisdiction *ratione voluntatis* or that the claims are inadmissible in respect of 27 Matters [140] as they were previously brought before the Panamanian courts and the Treaty precludes recourse to another means of dispute resolution once one has already been chosen.

159. For their part, the Claimants reject all three propositions and assert that the Tribunal must hear their claims.

160. The Court considers that none of the objections *ratione voluntatis* constitutes an obstacle to hearing the present dispute.

a. The Respondent's position

161. Panama contends that the Tribunal lacks jurisdiction *ratione voluntatis* in respect of all or part of the claims submitted to arbitration because, in its view, there is no valid and effective consent on the part of the Republic of Panama to submit certain Matters to the present proceedings. According to Panama, consent to arbitration

[139] The Tribunal notes that in its Statement of Defence (§ 52) the Respondent put forward this argument in respect of six Issues and, in its Rejoinder (paragraph 2.4 and, specifically, §§ 58, 59 and 64), did so in respect of seven Issues.

[140] The Tribunal notes that in its Statement of Defence (§§ 54–59) the Respondent put forward this argument in respect of 16 Issues and, in its Rejoinder (paragraph 2.5), did so in respect of 27 Issues.

International arbitration, as set out in the APPRI between Spain and Panama, is limited and subject to conditions, and is only valid when the disputes submitted strictly comply with the requirements laid down in the Treaty [141] .

162. In support of this objection, the Respondent puts forward three main lines of argument, relating to: (a) the inclusion of the so-called Case 35; (b) the inclusion of seven additional Cases not (yet) in dispute; and (c) the existence of twenty-seven Cases previously brought before the courts of Panama.

(i) The Tribunal's jurisdiction over Issue No. 35

163. The Respondent raises this objection specifically in relation to a Matter that was only recently introduced by the Claimants when they filed their Rejoinder, namely Matter No. 35 (COC-22-17-CONADES) [142] .

164. In this regard, Panama points out that Article XII of the Treaty requires the investor to notify the dispute in writing and with detailed information, in order to give Panama the opportunity to consider the dispute and, where possible, reach an amicable settlement with the investor during the six-month period from the time of notification before commencing arbitration [143] . It asserts that, in Case No. 35, the Claimants did not provide the required notification and considers that the consequence of failing to comply with these requirements is that the Tribunal lacks jurisdiction [144] .

165. The Respondent argues that the Claimants did not offer Panama the opportunity to consider or resolve the alleged dispute amicably before initiating an arbitration claim and therefore failed to comply with these requirements in relation to the Matter

---

141 Rejoinder, §§ 16–18; Statement of Defence, §§ 52–55.

142 Rejoinder, § 258 and its reference to **Annexes C-312**, Civil Works Contract No. COC-22-17-CONADES of 5 July 2017, **C-313**, Performance Bond No. 03-31-701 of 23 March 2017 and **C-314**, Advance Payment Bond No. 03-31-702 of 23 March 2017.

143 Reply, § 54.

144 Rejoinder, § 55.

No. 35 (COC-22-17-CONADES) and that, consequently, this Court should not consider the this matter[145].

166. Panama contends that Article XII of the Treaty requires that every dispute submitted to arbitration must first have been notified with sufficient information regarding its nature and grounds, and that failure to comply with this requirement in relation to Case 35 deprives the Tribunal of jurisdiction *ratione voluntatis* on that point [146]. Panama adds that the Tribunal lacks jurisdiction to examine the claims based on Case 35 [147].

(ii) The Court's jurisdiction in respect of the seven cases

167. The Respondent points out that, as a basis for jurisdiction, Article XII(2) of the Treaty and Article 25(1) of the ICSID Convention stipulate as a condition that there must be a dispute between the parties [148]. It argues that this requires there to be opposing positions on a specific, rather than a theoretical, issue, and that this must have been notified to the other party; it denies that this condition is met in respect of seven of the 34 matters raised [149].

168. In this regard, it explains that in five cases – Cases Nos. 1, 11, 17, 25 and 26 – Panama did not order the administrative termination of the insured contract nor did it claim payment of the bonds issued by Banesco Seguros, a fact acknowledged by the Claimants themselves [150] and that, consequently, there is no impairment of the interests of its counterparty. It adds that, with regard to Case No. 31, the Ministry of Health issued an administrative decision on the works contract but did not order the enforcement of the bonds provided by Banesco Seguros; consequently, there was no infringement of its rights [151] and that, with regard to Case No. 32, the administrative authority – the Maritime Authority – terminated the contract and demanded payment of the bond, but the claims process was set aside and the contract is currently in the process of being wound up [152]. Panama asserts that these seven Cases

[145] Reply, § 55.
[146] Reply, §§ 53–56.
[147] Rejoinder, §§ 54–56.
[148] Defence, § 48.
[149] Rejoinder, § 64; Defence, §§ 49–52.

[150] Claim, Annex I, pp. 104; 115; 130 and 131.

[151] Rejoinder, § 58; Defence, § 52.

[152] Rejoinder, § 59.

constitute separate disputes, each involving specific facts, contracts and state decisions, which cannot be regarded as implicitly covered by a general notification [153] .

169. According to Panama, state consent must be assessed on a case-by-case basis, and the inclusion of these seven matters without meeting the criterion that there be a dispute or a genuine impairment of the Claimants' rights deprives the Tribunal of jurisdiction *ratione voluntatis* in respect of them [154] .

170. The Respondent clarifies that it has not argued that the damage must have materialised for a dispute to exist, but rather that there must be a conflict of positions between the parties [155] . It points out that, as no measures have been taken regarding the Issues in question, no conflict of positions has arisen—an element described as essential by Professor Schreuer, whom they cite [156] . Furthermore, it denies that the preliminary steps which would result in prejudice to the Claimants or their position can be deemed to exist [157] .

171. On the basis of these arguments, the Respondent considers that the Tribunal should decline jurisdiction in respect of these Matters.

(iii) The Tribunal's jurisdiction in respect of 27 Claims

172. Panama explains that Article XII(2) of the Treaty sets out options for forums before which investors may bring disputes with the host State and that, once one of the options has been chosen, the choice is final, as evidenced by the use of the conjunction 'or' in the provision. It maintains that, once an option has been chosen, it is final and precludes an investor from submitting a dispute to an arbitral tribunal if it has already been submitted to a competent Panamanian court (in Latin, the principle of *'electa una via non datur recursus ad* alteram' or, in short, the

[153] Rejoinder, §§ 60–62.
[154] Rejoinder, §§ 57–64; Statement of Defence, §§ 20 and 40–53.
[155] Rejoinder, § 60.
[156] Rejoinder, § 60 and its reference to **Annex RL-17**, C. Schreuer, 'What is a Legal Dispute?' in I. Buffard et al., International Law between Universalism and Fragmentation (2008), p. 961 et seq.; Defence, §§ 49–51.
[157] Rejoinder, §§ 61–62.

'*choice of* forum' clause) [158]. It refers to decisions of other courts in support of its range [159].

173. The Respondent considers that the claim brought by Banesco Seguros in the domestic courts *"clearly overlaps with that raised* [by the Claimants] *in these* arbitration proceedings" and that the same outcome is sought [160].

174. On that basis, Panama asserts that the prior submission of these twenty-seven cases to the Panamanian courts constitutes a conscious choice of domestic judicial proceedings, incompatible with the subsequent invocation of international arbitration consent in respect of the same dispute [161].

175. In this regard, Panama criticises the Claimants' subsidiary argument concerning the 'triple identity' standard or test (of party, subject-matter and cause of action) that must be applied to determine whether the claims brought before the domestic courts constitute a choice of forum, thereby precluding the possibility of resorting to international arbitration [162].

176. In support of this position, Panama invokes a standard which it describes as widely recognised in investment arbitration, according to which the existence of prior or parallel domestic proceedings precludes consent to arbitration where a

---

[158] Rejoinder, §§ 69 and 72–73; Statement of Defence, §§ 55–59.

[159] Reply, §§ 72; 74–76 and its reference to *Iberdrola Energía, S.A. v. Republic of Guatemala*, CPA Case No. 2017-41, Final Award of 24 August 2020 *(Iberdrola v. Guatemala II*), in **Annex RL-20**; *Iskandar Safa and Akram Safa v. the Hellenic Republic*, ICSID Case No. ARB/16/20, Decision on Jurisdiction and Liability of 24 July 2020 (*Safa v. Greece*), in **Annex RL-94**; *Hydro et al. v. the Republic of Albania*, ICSID Case No. ARB/15/28, Award of 24 April 2019 (*Hydro et al. v. Albania*), in **Annex RL-95**; *Finley Resources Inc., MWS Management Inc., and Prize Permanent Holdings, LLC v. United Mexican States*, ICSID Case No. ARB/21/25, Decision on Jurisdiction and Liability (revised) of 8 January 2025 (*Finley Resources et al. v. Mexico*), in **Annex RL-88**, *Freeport-McMoran Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Award of 17 May 2024 (*Freeport-McMoran v. Peru*), in **Annex RL-96**; *Nissan Motor Co., Ltd. v. Republic of India*, CPA Case No. 2017-37, Decision on Jurisdiction of 29 April 2019 (*Nissan v. India*), in **Annex RL-97**, *Supervisión y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award of 18 January 2017 (*Supervisión y Control v. Costa Rica*), in **Annex RL-24**; *H&H Enterprises Investments, Inc. v. the Arab Republic of Egypt*, ICSID Case No. ARB 09/15, Award (extracts) of 6 May 2014 (*H&H Enterprises v. Egypt*), in **Annex RL-25**; *Pantechniki Contractors & Engineers v. the Republic of. Albania*, ICSID Case No. ARB/07/21, Award of 30 July 2009 (*Pantechniki v. Albania*), in **Annex RL-26**; *Vivendi v. Argentina*, in **Annex RL-27**; *the Woodruff case*, US–Venezuela Joint Commission, arbitrator's opinion of 1903, in **Annex RL-28** and Statement of Defence, § 60.

[160] Rejoinder, §§ 81–83; Response, §§ 72–74.

[161] Rejoinder, §§ 65–66; Response, § 66.

[162] Rejoinder, §§ 74–81.

substantial identity of the parties, the subject matter and the cause of action. Panama contends that the triple identity test should not be applied strictly, but rather that this '*fundamental* basis' standard should be applied [163] and that this analysis should focus on the economic and legal substance of the claims rather than on formal differences between the claims or on the legal characterisation employed in each forum [164]. It cites decisions in support of its position [165].

177. On the one hand, the Defendant considers the requirement to satisfy the 'triple identity' test in order for the *'electa una via'* clause [166] to apply to be unfounded. It argues that such a requirement would render the *'electa una via'* clause [167] inapplicable and analyses each of the elements of the test in this case.

178. It specifically points out that it is impossible to satisfy the requirement of identity between the Parties, inasmuch as the Tribunal has no jurisdiction over the claims brought by Banesco Seguros, nor do the Panamanian courts have jurisdiction over proceedings initiated by BHL in relation to Banesco Seguros [168].

179. With regard to the identity of causes of action, the Respondent explains that the proceedings before local courts will be based on the relevant domestic law and not on international law, which precludes compliance with the alleged identity of the causes of action [169].

180. Finally, with regard to the identity of the subject matter, the Defendant concedes that this might apply and that, in that case, the requirement is satisfied [170]. This is because the

163 Rejoinder, §§ 73–74.

164 Rejoinder, §§ 78–81.

165 Rejoinder, §§ 72; 74–76 and its reference to *Iberdrola v. Guatemala (II)*, in **Annex RL-20**; *Safa v. Greece*, in **Annex RL-94**; *Hydro et al. v. Albania*, in **Annex RL-95**, *Finley Resources et al. v. Mexico*, in **Annex RL-88**, *Freeport-McMoran v. Peru*, in **Annex RL-96**; *Nissan v. India*, CPA Case No. 2017-37, decision on jurisdiction of 29 April 2019, in **Annex RL-97**; *Supervisión y Control v. Costa Rica*, in **Annex RL-24**; *H&H Enterprises v. Egypt*, in **Annex RL-25**; *Pantechniki v. Albania*, in **Annex RL-26**; *Vivendi v. Argentina*, in **Annex RL-27**; *Woodruff Case*, US–Venezuela Joint Commission, arbitrator's opinion of 1903, in **Annex RL-28**; Reply, § 60.

166 Rejoinder, §§ 77–84.

167 Rejoinder, §§ 77–79.

[168] Rejoinder, § 79.
[169] Rejoinder, § 80.
[170] Rejoinder, §§ 82–83.

The Claimants request the Tribunal to order the Respondent to cease its allegedly arbitrary conduct, which amounts to refraining from enforcing the bonds in the Cases in question, and which is the same as what they are requesting from the Panamanian courts [171] .

181. On the factual level, Panama states that the twenty-seven cases involve specific legal proceedings that have been resolved or are pending before Panamanian courts [172] . Among these, Panama cites judicial decisions, attached as annexes, which it claims confirm the legality of the state actions in question. It points out that, with regard to Cases 29 and 30, in which the bonds were indeed enforced, it is not disputed that they were litigated before Panamanian courts and that, had they obtained a ruling in favour of their claim, they would have obtained the same remedy as that sought in these arbitration proceedings [173] .

182. Panama points out that the term 'courts' in Article XII(2) of the Treaty encompasses both judicial and administrative courts and their respective decisions [174] and that the determination as to whether or not it is the same dispute must be based on verifying whether the claims have the same basis fundamental [175].

---

[171] Reply, § 82.

[172] Rejoinder, § 66 and its references to **Annexes R-94**, **R-95**, **R-96**, **R-97**, **R-98**, **R-99**, **R-100**, **R-101**, **R-102**, **R-103**, **R-104**, **R-105** and **R-106** in relation to Banesco Seguros's claims for full jurisdiction in Cases Nos. 2, 5, 6, 7, 8, 9, 10, 12, 14, 15, 16, 19 and 35; Statement of Defence, § 75 and its reference to **Annexes R-14**, Banesco Seguros's application for full jurisdiction before the Supreme Court, Chamber III (Case No. 3) of 9 September 2024, **R-15**, Application for full jurisdiction by Banesco Seguros before the Supreme Court, Chamber III (Case No. 18) of 22 October 2024, **R-16**, Application for full jurisdiction by Banesco Seguros before the Supreme Court, Chamber III (Case No. 21) of 22 October 2024; **R-17**, Application for full jurisdiction by Banesco Seguros before the Supreme Court, Chamber III (Case No. 23) of 19 September 2024, **R-18**, Application for full jurisdiction by Banesco Seguros before the Supreme Court, Chamber III (Case No. 24) of 10 April 2024, **R-19**, Application for full jurisdiction by Banesco Seguros before the Supreme Court, Chamber III (Case No. 28) of 22 October 2024, **R-20**, Application for full jurisdiction by Banesco Seguros before the Supreme Court, Chamber III (Case No. 33) of 28 June 2024, **R-21**; Application for full jurisdiction by Banesco Seguros before the Supreme Court, Chamber III (Case No. 34) of 28 June 2024, **R-23**, Application for full jurisdiction by Banesco Seguros before the Supreme Court, Chamber III (Case No. 4) of 24 March 2023, **R-24** (Judgment of the Supreme Court, Chamber III (Case No. 4) of 13 September 2024, **R-25-ESP**; Application for full jurisdiction by Banesco Seguros before the Supreme Court, Chamber III (Case No. 13) of 24 March 2023, **R-26**; Application for full jurisdiction by Banesco Seguros before the Supreme Court, Chamber III (Case No. 20) of 28 June 2024, **R-27**, Application for full jurisdiction by Banesco Seguros before the Supreme Court, Chamber III (Case No. 22) of 19 January 2023.

[173] Rejoinder, § 83; Defence, § 74.

[174] Defence, §§ 61–62.

[175] Defence, § 64.

183. In the context of this theoretical framework, Panama points out that the Claimants brought claims before Panamanian courts in relation to 16 of the 34 Matters, concerning the validity of the sureties and the procedure prior to their enforcement, which form the basis of their claims before this Court, and that ruling on those claims would enable the Claimants to re-litigate the same dispute in this forum [176] .

184. Panama asserts that, under Panamanian law, the courts with jurisdiction to resolve disputes between the State and the surety and the contractor are the Administrative Courts for Public Procurement ('TACP'), and that the courts with jurisdiction to hear disputes relating to third-party claims, interlocutory proceedings, objections and applications for annulment brought by the surety against a payment order issued by the judge responsible for enforcing sureties is the Administrative Tax Court ("TAT")[177].

185. Panama explains that it was the Claimants who, through their subsidiary, Banesco Seguros, brought the claims in the 16 Cases before the various competent Panamanian courts and that they were the *"architects of those actions and, in any event, agreed to* them" [178] . It states that, in respect of six of these, Banesco Seguros initiated administrative proceedings (Cases Nos. 4, 5, 13, 20, 22 and 32), whilst in respect of eight legal proceedings (Cases Nos. 3, 18, 21, 23, 24, 33 and 34) and, in respect of two, proceedings before the TAT (Cases Nos. 29 and 30) [179] .

186. Indeed, Panama points out that in the various ways in which Banesco Seguros was involved in these proceedings and processes – such as in its capacity as an intervening third party in the proceedings brought by the contractor before the TACP with the aim of challenging the administrative decision of a Panamanian body resolving the contracts relating to Cases Nos. 4, 5, 13, 20, 22 and 32 [180] , and in the filing of claims before the

[176] Defence, §§ 54–56, 67 and 70, and section 2.4.2.
[177] Reply, §§ 68–69.
[178] Reply, § 70.
[179] Reply, §§ 71, 75 and 78.
[180] Reply, § 71 and its references to **Annex R-8**, Third-party intervention by Banesco Seguros before the TACP (Case No. 4) of 3 October 2022M; **Annex R-9**, Third-party intervention by Banesco Seguros before the TACP (Case No. 5) of 5 October 2022; **Annex R-10**, TACP Decision No. 020-2023/TACP (Case No. 13) of 30 January 2023; **Annex R-11**, Third-party intervention by Banesco

Panamanian Supreme Court acting on its own authority in Cases Nos. 3, 18, 21, 23, 24, 28, 33 and 34 [181] or the commencement of proceedings before the TAT once the process of enforced collection of sureties has begun [182] – the challenge raised at the various levels overlaps with that raised in these arbitration proceedings and that the sought-after outcome is the same: the validity of the sureties and the refraining from enforcing or threatening to enforce the sureties, respectively [183] .

187. It states that the only claim the Claimants could bring once the proceedings already initiated have been exhausted is a claim for denial of justice, but that they have not done [184].

188. According to Panama, allowing these same matters to be heard again by an international arbitral tribunal would entail not only a duplication of proceedings, but also the risk of conflicting decisions and an undermining of legal certainty, in contravention of the limits on state consent set out in the APPRI.

b. The Claimants' Position

189. The Claimants reject the three objections raised by their counterpart and consider that the Tribunal should hear their claims.

(i) The Tribunal's jurisdiction in respect of Matter No. 35

190. The Claimants argue that disputes do indeed exist in relation to the Matters indicated by the Respondent.

191. The Claimants maintain that Case No. 35 (COC-22-17-CONADES) was correctly incorporated into the present arbitration in their Reply, given that the state act giving rise to the dispute – Resolution No. 134-2024-CONADES of

---

Insurance before the TACP (Case No. 20) of 25 January 2022; **Annex R-12**, Banesco Seguros' third-party intervention before the TACP (Case No. 22) of 27 June 2022 and **Annex R-13**, TACP Resolution No. 051-2020-Pleno/TACP (Case No. 32) of 2 March 2020.

181 Reply, § 75.

182 Reply, § 78.

183 Reply, §§ 74; 76 and 78.

184 Defence, § 80.

8 August 2024, which ordered the enforcement of the bonds – took place a few days before the Complaint was filed and, therefore, could not have been included earlier.

192. The Claimants allege that Case No. 35 exhibits the same pattern of conduct as the other thirty-four cases originally brought before the Tribunal. In particular, they point out that CONADES settled the civil works contract COC-22-17-CONADES by means of Resolution No. 8 of 19 February 2019, allowed a prolonged period to elapse without finalising the contractual settlement and, finally, ordered the enforcement of the performance bonds in August 2024, thereby repeating the same pattern of administrative inactivity followed by the subsequent activation of recovery mechanisms which, according to them, characterises the contested conduct as a whole [185] .

193. According to the Claimants, even based on their own interpretation of Panamanian law, CONADES terminated the contract and claimed payment of the performance bonds within the timeframe for completion of the works, which confirms that Case No. 35 does not constitute an exceptional or distinct case. In their view, this Case falls squarely within the same factual and regulatory sequence as the other performance bond cases covered by the arbitration[186].

194. In response to Panama's objection based on the alleged failure to comply with the pre-arbitration requirements, the Claimants maintain that those requirements cannot be interpreted in a rigid or formalistic manner when the dispute concerns a single course of state conduct. In their view, the dispute submitted to the Tribunal is a single and continuous one; therefore, a separate written notification or a new period of negotiation is not required each time a state authority adopts an additional act that gives effect to or exacerbates the same allegedly unlawful conduct [187] .

195. The Claimants base this position on the concept of a composite fact in accordance with Article 15 of the Articles of the International Law Commission on

[185] Rejoinder, § 258(b)–(e).
[186] Rejoinder, §§ 258.
[187] Hearing Day 1, Claimants' Opening Statements, pp. 60:2–61:22 (Mr Soria Iglesias).

State Responsibility for Internationally Wrongful Acts (***"Articles on State*** Responsibility") of the International Law Commission ("ILC"). In their submissions, they explained that, although a single act or omission by a State may not in itself constitute a breach of the Treaty, a series of acts considered as a whole may amount to internationally wrongful conduct, provided there is a clear link and an underlying pattern that gives them unity [188] .

196. The Claimants maintain that Panama had sufficient knowledge of the general dispute concerning the sureties provided by Banesco Seguros and of the claims made against it, and that it has not demonstrated that it suffered any prejudice or was deprived of a genuine opportunity to resolve the dispute amicably [189] as a result of the absence of specific notification regarding Case No. 35. In their view, the substantive purpose of the cooling-off period provided for in the Treaty was fulfilled with regard to the dispute as a whole [190] . In this regard, they argue that the exchanges between the Parties and the subsequent development of the dispute demonstrate that Panama had sufficient knowledge of the claims raised [191] .

197. The Claimants contend that any discrepancy between the prior notice and the detailed formulation of the claims in the arbitration, to the extent that it exists, should be examined, where appropriate, as part of the substantive analysis, but should not constitute an obstacle preventing the Tribunal from considering the matter [192] .

198. Finally, in their opening statements, the Claimants indicated that the dispute before the Court does not consist of a series of isolated disputes, but rather of a single situation arising from the same state conduct, noting that requiring the independent fulfilment of the prerequisites in respect of each subsequent manifestation

---

[188] Hearing, Day 4, Closing Statements by the Claimants, pp. 952:1–954:13 (Mr Irurzun Montoro); **Annex RL-45**, Articles of the International Law Commission on State Responsibility for Internationally Wrongful Acts (2001).

[189] Hearing, Day 1, Opening Statements by the Claimants, pp. 59:20–61:12 (Mr Soria Iglesias).

[190] Hearing, Day 1, Claimants' opening statements, pp. 59:20–61:22 (Mr Soria Iglesias).

[191] Hearing, Day 1, Opening Statements by the Claimants, pp. 59:20–61:22 (Mr Soria Iglesias).

[192] Hearing, Day 1, Claimants' opening submissions, p. 61:1–12 (Mr Soria Iglesias).

Such conduct would amount to artificially fragmenting the dispute and rendering the arbitral mechanism provided for in the Treaty meaningless [193] .

(ii) The Tribunal's jurisdiction in respect of the seven Cases

199. The Claimants assert that a dispute does exist in Cases Nos. 1, 11, 17, 25, 26, 31 and 32 and that, consequently, the Respondent's respective objection must be dismissed [194] . They contend that these Cases do not constitute separate or independent disputes, but rather specific manifestations of the same course of state conduct that directly affects the protected investment [195] .

200. The Claimants contend that the consent to arbitration granted in the APPRI relates to disputes concerning the investment as a whole and does not require separate acceptance in respect of each individual state act, contract or project involved. In their view, all seven Issues arise from a consistent state practice linked to the enforcement of guarantees and the conduct of Panamanian public entities in relation to the insurer [196].

201. The Claimants add that Panama had sufficient knowledge of these seven Issues as part of the general dispute and that the *ratione voluntatis* objection seeks to selectively exclude those Issues that most clearly illustrate the alleged pattern of state conduct [197] .

202. They explain that accepting the reasoning put forward by Panama would amount to accepting that the Claimants' damages only materialise following the administrative termination of the contract or the enforcement of the performance bonds, whereas damage may arise even before such measures have been enacted or implemented [198] . In this regard, the Claimants

[193] Hearing, Day 1, Claimants' Opening Statements, pp. 58:17–59:7, 61:13–22, 71:11–18 (Mr Soria Iglesias).
[194] Reply, section 2.3.2.
[195] Hearing, Day 1, Claimants' opening submissions, pp. 58:16–59:7 (Mr Soria Iglesias).
[196] Hearing, Day 1, Claimants' opening submissions, pp. 59:8–60:9 (Mr Soria Iglesias).
[197] Hearing, Day 1, Claimants' opening submissions, p. 59:8–15 (Mr Soria Iglesias).
[198] Reply, §§ 98–99 and 105.

argue that the failure to enforce bonds does not prevent their interests from having been affected [199].

(iii) The Court's jurisdiction in respect of 27 matters

203. In essence, the Claimants contend that the Treaty does not provide for an *'electa una via'* clause and, in the alternative, argue that the 'triple identity' test required for the *'electa una via'* clause to apply is not met. Alternatively, they argue that the fundamental basis of the claims brought before Panamanian authorities is distinct from that of the claim brought before this Tribunal.

204. Indeed, as their main argument in relation to this objection, the Claimants maintain that Article XII(2) of the Treaty should not be interpreted as providing options for resolving disputes which, once selected, are irrevocable and preclude recourse to the others [200]. They refer to decisions and treaties similar to the Treaty in support of their position [201]. They emphasise in particular that the Treaty does not explicitly state that there is an irrevocable choice between the various options set out in Article XII(2) and that the use of the conjunction 'or' simply indicates alternatives [202].

205. The Claimants emphasise that the APPRI between Spain and Panama does not contain a *'fork-in-the-road'* clause making consent to arbitration conditional upon the absence of domestic proceedings, nor does it provide for an automatic waiver of arbitration merely by virtue of having brought proceedings before domestic courts [203].

206. Furthermore, the Claimants maintain that, for the alleged *'electa una via'* clause to apply, the triple identity test must be satisfied [204].

207. On that basis, they deny that there is identity of parties, since the parties involved—both the Claimants and the Defendant—are, in their view, distinct from the parties in the

[199] Reply, § 103.
[200] Reply, § 61.
[201] Reply, §§ 62–68.
[202] Reply, § 67.
[203] Reply, §§ 57–59.
[204] Reply, section 2.3.1.2.

local proceedings [205]. They contend that the Respondent's arguments fail to recognise the corporate separation of the Claimants and that the Respondent has not substantiated its assertion that the Claimants were the instigators of the proceedings before Panamanian authorities [206]. They add that in the local proceedings the opposing party was not Panama, but various authorities within it [207].

208. Similarly, the Claimants deny that there is any identity of subject-matter between the local proceedings and these arbitration proceedings, and explain that the claims brought by Banesco Seguros relate to matters concerning the works contracts between the contractors and the Panamanian authorities and the surety bonds entered into [208]. They distinguish this from the claim for redress for economic loss and compensation for the damages suffered as a result of Panama's conduct in breach of the Treaty, without questioning the validity of the administrative acts themselves [209].

209. Furthermore, the Claimants consider that there is also no common cause of action between these proceedings – which seek a declaration of breach of the Treaty – and the proceedings before Panamanian bodies which sought a declaration of breach of administrative obligations under Panamanian law. They also point out that several applications were filed by Banesco Seguros after Panama had been notified of this dispute [210].

210. The Claimants add that the domestic judicial decisions cited by Panama, including those attached as annexes, were limited to examining matters of domestic law and did not address the State's conduct in the light of the Treaty's standards of protection. Consequently, they maintain that such decisions neither exhaust nor substitute for the analysis of international responsibility before the Tribunal [211].

---

[205] Rejoinder, §§ 70 and 74.

[206] Reply, §§ 70–72.

[207] Reply, § 74.

[208] Reply, §§ 75–76.

[209] Reply, §§ 77–78.

[210] Reply, §§ 81–84.

[211] Reply, §§ 81–86.

(2) The Court's analysis

211. The objections will be analysed in the order in which the respective arguments were outlined. In summary, the Tribunal dismisses the three objections raised by the Respondents for the reasons set out below.

a. The Tribunal's jurisdiction in respect of Case No. 35

212. The Tribunal observes, as a starting point, that it is not disputed between the Parties that the Claimants did not engage in prior negotiations specifically relating to Case No. 35; rather, the dispute between the Parties concerns whether such negotiations were necessary or not. It is apparent from the case file, in particular, that the State's conduct giving rise to that Case – Resolution No. 134-2024-CONADES of 8 August 2024, by which the enforcement of certain sureties [212] – took place just a few days before the Claim was filed, on 12 August 2024. This factual detail is relevant to understanding the context in which Panama's jurisdictional objection is raised, without this implying, in itself, any premature assessment of whether the pre-arbitration requirements have been met or not.

213. In light of the foregoing, the legal issue to be resolved by the Tribunal is whether the absence of prior negotiations, or even an opportunity for such negotiations, specifically concerning Case No. 35 precludes the Tribunal from exercising jurisdiction over that Case pursuant to Article XII of the Treaty.

214. The provision in question reads as follows:

> *"Article XII. Disputes between a Contracting Party and investors of the other Contracting Party*
>
> *Any dispute relating to investments arising between one of the Contracting Parties and an investor of the other Contracting Party concerning matters governed by this Agreement shall be notified in writing, including detailed information, by the investor to the Contracting Party receiving the investment. In the*

[212] **Annex C-316**, Resolution No. 134-2024-CONADES of 8 August 2024.

As far as possible, the parties to the dispute shall endeavour to settle these differences by mutual agreement [213] *".*

215. Panama maintains that its consent to submit to arbitration is conditional upon strict compliance with the requirements set out in the Treaty, including notification and prior negotiation of the dispute; consequently, the absence of specific negotiations would deprive the Tribunal of jurisdiction. The Claimants, on the other hand, argue that Case No. 35 does not constitute a separate claim, but rather a new development falling within the scope of an existing and duly notified dispute; consequently, a formal repetition of the prior procedure would not be required. The Tribunal, for the reasons set out below, considers that the Respondent's objection in question must be rejected.

216. The provisions of Article XII(1) form the starting point for this Tribunal in relation to Case No. 35. The Tribunal recalls that the requirements of prior notification and negotiation laid down in investment treaties serve a dual purpose: on the one hand, to enable the State to ascertain, with a sufficient degree of precision, the nature and grounds of the dispute, without this implying that every single fact on which the claim is based must be notified – facts which might even arise after the dispute has been notified [214] ; and, on the other hand, to offer the Parties a genuine opportunity to resolve the dispute amicably before resorting to arbitration.

217. In other words, the aim is to ensure that the party notified of the dispute has sufficient information to identify the dispute and the claims made against it, so that it may take appropriate action. It is in the light of these

[213] **Annex C-7**, Agreement for the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Republic of Panama, done at Panama on 10 November 1997, Article XII.

[214] In this regard, see **Annex RL-89**, *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania,* ICSID Case No. ARB/15/31, Award of 8 March 2024 (*Gabriel v. Romania*), § 676; **Annex RL-66**, *Berschader et al. v. Russia,* SCC Case No. 080/2004, Award of 21 April 2006, §§ 99–100. The Tribunal notes that the decision in the case of *Gabriel v. Romania* was cited in the context of the objection *ratione materiae* and the characterisation and configuration of the composite facts (Rejoinder, footnotes 53, 442, 456, 468, 533, 534, 535 and 537) and that the decision *in Berschader et al. v. Russia* was referred to in the context of the objection *ratione personae* (Rejoinder, footnote 16).

objectives against which the circumstances of the case under consideration must be weighed to determine whether the information provided at the time enabled the fulfilment of these objectives.

218. In this regard, the Tribunal observes that the notice of dispute submitted by the Claimants was drafted in broad and comprehensive terms, covering a series of state actions relating to the administration, validity and eventual enforcement of sureties within the framework of the matters at issue, identified as a set of actions constituting a breach of the Treaty [215]. That notice identified the nature of the claims and their essential grounds, enabling Panama to understand that the Claimants were challenging a pattern of state conduct linked to the enforcement – or threat of enforcement – of sureties which they considered to be contrary to the Treaty. In the same vein, the Tribunal notes that the Treaty is broadly worded and contains no specific requirements for the formation of consent.

219. In this regard, it is also noted that the Claimants have submitted their claim in relation to Panama's conduct, which they describe as comprising various acts and events. Indeed, as early as the notice of dispute, the Claimants identified the standard and the provision of the APPRI that they considered to have been breached as a result of Panama's conduct through the cumulative measures of various government entities and bodies in the 35 Matters [(216),]and this position was maintained right up to the time of their Closing submissions [217].

220. It is also noted that the Claimants do not dispute the terms of the surety contracts, but rather Panama's exercise of the powers set out in the Panamanian Public Procurement Act, which provide for action by state entities, and whether the exercise of those powers was arbitrary and disproportionate [218]. It is true that the conduct criticised by the Claimants relates to the surety contracts, but not

[215] **Annex C-6**, Letter of notification of dispute dated 26 October 2022.

[216] **Annex C-6**, Letter of notification of dispute dated 26 October 2022, pp. 2–3.

[217] **Annex C-6**, Letter of notification of dispute dated 26 October 2022, pp. 3–4; Hearing, Day 4, Closing submissions by the Claimants, pp. 949–951 (Mr Irurzun Montoro).

[218] Hearing, Day 1, Claimants' opening submissions, pp. 22:9–18 (Mr Irurzun Montoro); Hearing, Day 4, Claimants' closing submissions, p. 978:6–17 (Mr Irurzun Montoro).

They do not identify the conduct itself within the framework of those contracts [219] but rather Panama's actions in relation to them [220] . Furthermore, the complaint raised—that is, the subject matter of the claim—is based on the commitments undertaken by Panama under the Treaty, in particular those relating to fair and equitable treatment, and not on contractual provisions [221] .

221. At this point, it should be clarified that the assessment of the Claimants' claim as being based on a composite act of state – comprising various acts and events attributable to different state entities and bodies – constitutes, on the one hand, a *prima facie* assessment for the purposes of the present analysis. On the other hand, this assessment is made without prejudice to any conclusions the Tribunal may reach at a later stage as to whether the alleged conduct meets the necessary criteria to be classified as a composite act within the meaning of Article 15 of the Articles on State Responsibility [222] .

222. The fact that Resolution No. 134-2024-CONADES was issued after the dispute had been notified and a few days before the Complaint was filed does not, in the Tribunal's view, alter this conclusion. This is because the State's conduct forms part of the same factual and legal context previously alleged and notified by the Claimants.

223. Notwithstanding the foregoing, the Court notes that the Respondent has relied on the decisions handed down in *Almasrya for Operating and Maintenance Co. LLC v. Kuwait* [223] and *Guaracachi America, Inc. v. Bolivia* to argue that the lack of specific negotiations regarding Issue No. 35 would preclude the treaty requirement from being deemed fulfilled

[219] The Claimants themselves pointed out that this would not be possible, as Panama is not a party to the insurance contracts in respect of which the claim is made: Hearing, Day 4, Claimants' Closing Arguments, p. 978:2–5 (Mr Irurzun Montoro).

[220] Hearing, Day 4, Claimants' Closing Arguments, pp. 977:4–18, 978:5, 980:8–981:2 (Mr Irurzun Montoro).

[221] **Annex C-6**, Letter of notification of dispute dated 26 October 2022.

[222] **Annex RL-45**, Articles of the International Law Commission on State Responsibility for Internationally Wrongful Acts (2001).

[223] **Annex RL-90**, *Almasrya for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2, Decision on Preliminary Objection of 1 November 2019, and **Annex RL-91**, *Guaracachi America, Inc. v. Bolivia*, PCA Case No. 2011-17, Award of 31 January 2014, respectively.

prior negotiations and, consequently, would deprive the Tribunal of jurisdiction *ratione voluntatis* [224] . However, the Tribunal considers that such precedents are not decisive in the circumstances of the present case, in that in both cases the analysis of those tribunals focused on the substantial identity between the notified dispute and the arbitral dispute, regarded as individualised claims relating to specific state measures.

224. The situation in the present arbitration is different. The Tribunal has already noted that the Claimants do not frame their claim as a series of separate disputes relating to each of the Issues considered individually, but rather as an allegation of composite state conduct, consisting of a series of administrative and judicial acts which, taken as a whole—as, they allege, a composite event—would reveal a practice incompatible with the Treaty. In this context, the dispute submitted to negotiation and subsequently to arbitration is not limited to Matter No. 35 considered in isolation, but rather concerns Panama's overall conduct with regard to the regime governing the validity and enforcement of sureties.

225. The fact that there were no specific and separate negotiations relating exclusively to Case No. 35 does not distort the subject-matter of the dispute as set out in the prior communications. What is relevant, for the purposes of the notification requirement and the possibility of negotiation in accordance with Article 12(1) of the Treaty, is that Panama was made aware of the allegation of a State practice affecting the investment and was given the opportunity to address that dispute in its structural dimension. To require separate negotiations for each factual manifestation of the same composite conduct would amount to artificially fragmenting the dispute and disregarding the unitary nature of the claim as formulated by the Claimants.

226. Consequently, the Tribunal considers that the conclusions reached in *Almasrya* and *Guaracachi* do not alter the determination adopted in the present case. Even accepting the general principles set out in those precedents regarding the function of the period

[224] Reply, §§ 53–55.

Although the parties' negotiations took place, this does not preclude the conclusion that, in the case of a composite factual allegation, the contractual requirement must be assessed with reference to the dispute as a whole and not in relation to each of the individual matters comprising the factual sequence relied upon.

227. The Court therefore dismisses this objection to jurisdiction.

b. The Tribunal's jurisdiction in respect of the seven Cases

228. The issue to be resolved by the Tribunal is whether the absence of a specific order for the enforcement of bonds in respect of the seven Matters referred to by the Respondent precludes the finding that a dispute has arisen within the meaning of Article XII of the Treaty and Article 25(1) of the ICSID Convention.

229. In the present case, the Respondent contends that, as no specific decisions on the enforcement of security have been taken in relation to the seven Cases referred to, there is no dispute capable of being submitted to arbitration under Article XII of the Treaty or Article 25(1) of the ICSID Convention. The Tribunal cannot accept this characterisation. As a starting point, it should be recalled that, for the purposes of determining the existence of a dispute within the meaning of international law, it is not necessary for the alleged state measure to have already produced all its effects, nor for the alleged damage to have definitively materialised. What is decisive is the existence of a conflict of legal positions between the Parties regarding a situation affecting the investment.

230. In this regard, the Respondent contends that, as no decisions have been taken to enforce bonds nor any measures tending towards or equivalent to such enforcement in relation to the said Matters, there is no specific damage nor any conflict of positions between the Parties, which would deprive the Tribunal of jurisdiction *ratione voluntatis*. As previously noted, the Claimants reject this characterisation and assert that the dispute is not limited to the adoption of individual enforcement decisions, but rather relates to a broader situation of legal uncertainty attributed to Panama's actions. In line with the conclusion previously reached by this Tribunal, it is considered that this objection cannot be upheld.

231. In the present case, the Tribunal considers that the dispute alleged by the Claimants – as it has been presented – is not identified exclusively with the actual enforcement of a bond in each Case, but rather with an alleged situation of legal uncertainty attributed to the State's conduct in relation to bonds, including their current or potential enforcement. The Claimants assert that Panama's conduct has created and continues to create legal uncertainty, and that it is impossible to rule out the possibility that a subsequent enforcement may affect their interests, and that this constitutes the disagreement between the Parties.

232. From this perspective, the Tribunal does not consider that the absence, to date, of a specific enforcement order in the seven Cases eliminates, in itself, the divergence of positions between the Parties regarding the State's conduct complained of in its broadest sense. Panama's objection is based on a strict segmentation of the dispute by Case, which does not, *prima facie*, correspond to the manner in which the Claimants have articulated their claim under the Treaty, nor to the approach already set out in this Award regarding the composite nature of the alleged state conduct (see Section IV.C(2)a, *supra*). In these circumstances, requiring the full realisation of each individual manifestation of that conduct would amount to artificially fragmenting the dispute.

233. Consequently, the Tribunal considers that the absence of enforcement decisions in the seven Matters mentioned does not, in itself, preclude the recognition of the existence of a dispute within the meaning of Article XII of the Treaty and Article 25(1) of the ICSID Convention. This is without prejudice to the fact that the degree of specificity of State measures and the possible occurrence of damage in relation to those Cases may prove relevant at later stages of the analysis, in particular when examining the merits or the possible existence and quantification of damages, but they do not deprive the Tribunal of jurisdiction to hear them at this stage.

c. The Tribunal's jurisdiction in respect of 27 Matters

234. The Respondent argues, in the context of its objection *ratione voluntatis*, that with regard to certain Cases the Tribunal lacks jurisdiction or, alternatively, that the claims are inadmissible by virtue of the clause contained in Article XII(2) of the APPRI, which it characterises as an *'electa una via'* clause.

235. According to Panama, *"Article XII(2) of the Treaty contains an 'electa una* vía' clause", the effect of which is that, once a method of dispute resolution has been chosen, that choice is final and irrevocable [225]. In particular, it asserts that the Tribunal *"lacks jurisdiction over such matters or that they must be deemed* inadmissible" [226]. It sets out its literal interpretation of Article XII(2), noting that the conjunction "or" denotes mutually exclusive alternatives and that, consequently, the investor may only choose one of the means listed [227].

236. Panama bases its position on various arbitral awards, citing, amongst others, *Iberdrola Energía S.A. v. Guatemala (II)*, Decision on Jurisdiction, as well as *Pantechniki v. Albania* and *Safa v. Greece* [228]. As regards the applicable standard for determining whether the *'same* dispute' is involved, as already noted *above*, Panama rejects the requirement of the triple identity test and maintains that what is relevant is to ascertain whether the claims have the same fundamental basis [229].

237. The Claimants argue, firstly, that Article XII(2) of the Spain–Panama APPRI does not establish an *'electa una via'* clause [230] and, in the alternative, that Panama has not demonstrated compliance with the 'triple identity' test [231]. They further allege that Panama also fails to satisfy the *'same fundamental* basis' test [232].

238. As regards the literal interpretation of Article XII(2), the Claimants maintain that the text does not contain an express provision of irrevocability and that, for the choice to be exclusive, the Treaty should have been more explicit [233]. They rely on the following in support of their

---

[225] Defence, §§ 55–58.

[226] Reply, § 56.

[227] Defence, § 59.

[228] Defence, §§ 60–61; Rejoinder, §§ 69–72 and its references to **Annex RL-26**, *Pantechniki v. Albania*, and **Annex RL-94**, *Safa v. Greece*.

[229] Defence, §§ 64 et seq.; Rejoinder, §§ 72–74; citing **RL-24**, *Supervisión y Control v. Costa Rica*, §§ 310–311; **RL-25**, *H&H Enterprises v. Egypt*, §§ 367–370; **Annex RL-26**, *Pantechniki v. Albania*, §§ 61; **Annex RL-94**, *Safa v. Greece*, §§ 330 et seq.

[230] Reply, § 59(a).

[231] Reply, § 59(b).
[232] Reply, § 59(c).
[233] Reply, §§ 60–61.

citing the precedent *Mabco Constructions v. Kosovo* [234], in which the court rejected the allegation of breach of a *'una via'* clause despite the wording similar [235].

239. The Claimants reiterated that there is no overlap between the domestic proceedings and their claim under the Treaty, and that the dispute before this Court cannot be equated with individual domestic legal proceedings [236].

240. On the basis of these arguments, the Tribunal observes, first of all, that Panama has raised the objection primarily as a matter of jurisdiction *ratione voluntatis*, although in its submissions it has indicated that the consequence could be a lack of jurisdiction or inadmissibility [237].

241. Secondly, in the present case, the Tribunal considers that it is not necessary to rule definitively on which of these approaches applies to Article XII(2) of the Treaty. Even assuming, for the sake of argument in favour of Panama's position, that the provision could be interpreted as establishing an exclusive choice of forum, the objection raised would not succeed under any of the aforementioned standards.

242. Firstly, the Tribunal notes that the domestic proceedings initiated by Banesco Seguros were aimed at challenging specific administrative decisions relating to the enforcement of performance bonds in the context of public works contracts.

243. In those proceedings, the following were sought, amongst other things: the annulment of administrative decisions ordering the enforcement of performance bonds; a declaration that obligations arising from those bonds were time-barred or non-existent; and the suspension of enforcement measures. These issues were raised before Panamanian administrative and judicial bodies competent to examine the legality of administrative acts in accordance with Panamanian law. The domestic proceedings were brought against various entities

---

[234] Reply, § 62 and its reference to **Annex CL-33**, *Mabco Constructions SA v. Republic of Kosovo,* ICSID Case No. ARB/17/25, Decision on Jurisdiction of 30 October 2020.

[235] Reply, para. 62.

[236] Hearing, Day 1, pp. 83:14–84:22 (Mr Irurzun Montoro).

[237] Defence, § 56.

Panamanian administrative bodies responsible for the management of public works contracts or the enforcement of performance bonds, whereas the present arbitration pits the Claimants against the Panamanian State as a whole. Furthermore, the domestic proceedings are based on provisions of Panamanian administrative law relating, amongst other matters, to the validity of administrative acts and the legal regime applicable to the bonds [238].

244. The present arbitration, by contrast, is based on the alleged breach of international obligations arising from the Treaty, including the standard of fair and equitable treatment. Indeed, the Claimants have structured their claim around an allegation of composite state conduct, comprising a series of administrative acts relating to the management and eventual enforcement of sureties [239]. In accordance with the manner in which the Claimants present their claims and arguments, the dispute before this Tribunal does not concern the isolated review of individual administrative acts, but rather centres on the allegation of a practice or sequence of actions which must be assessed as a whole.

245. Even though certain matters have been the subject of proceedings before Panamanian courts – as the Respondent contends in its Statement of Defence [240] – the treaty-based claim raised in this arbitration is not, ipso facto, identical to those individual domestic disputes. Even under the standard of the very same fundamental basis invoked by Panama, the international dispute before this Tribunal appears to be qualitatively distinct, in that it concerns the State's potential international liability for a course of conduct as a whole, and not exclusively the domestic legality of specific acts.

246. Consequently, the Tribunal concludes, *prima facie* and solely for the purposes of determining its jurisdiction, that the objection based on the *'one-track'* clause cannot be upheld in respect of the 27 issues identified by the Respondent. Having regard to

---

[238] See Annex in Section IX of this Award.

[239] Hearing, Day 4, Closing Arguments of the Claimants, pp. 949–952 and in particular p. 978: 6–17 (Mr Irurzun Montoro).

[240] Statement of Defence, §§ 54–80.

Given the *prima facie* nature of this decision, the Tribunal emphasises that it is made without prejudice to the analysis to be carried out at the stage of the merits regarding the possible existence of a composite act within the meaning of international law, an issue which will be examined in the section dealing with the merits (see Sections V.C(3) and V.E(5), *infra*).

247. Notwithstanding this, it is noted that Panama invokes the award rendered in *Pantechniki v. Albania* [241]to argue that, once an investor decides to submit its dispute to the domestic courts, it could only, if at all, bring a claim for denial of justice at the international level. The Tribunal observes, however, that in *Pantechniki* the investor had submitted substantially the same contractual claim to the domestic courts before commencing arbitration. In the present case, by contrast, the domestic proceedings relied upon by Panama were aimed at challenging specific administrative acts under Panamanian law, whereas the present arbitration is based on the alleged breach of international obligations contained in the Treaty. Furthermore, the claim based on the Treaty is grounded in Panama's conduct following those domestic proceedings. In these circumstances, the Tribunal does not consider that the precedent invoked is decisive for the issue at hand.

248. Panama also invokes the award rendered in *Addiko v. Montenegro* [242] to argue that an investment tribunal cannot act as an appellate body with regard to decisions taken by national courts. The Tribunal shares this general principle. However, the objection raised in the present case does not concern the scope of the Tribunal's review of domestic decisions, but rather whether the domestic proceedings initiated by Banesco Seguros constitute an irrevocable choice of forum. The decisions cited by Panama do not address that issue.

249. Panama also invokes the award in *Iberdrola v. Guatemala (I)* [243] , in which the arbitral tribunal held that it lacked jurisdiction to review questions of law

[241] **Annex RL-26**, *Pantechniki v. Albania*.

[242] **Annex RL-13**, *Addiko v. Montenegro*, ICSID Case No. ARB/17/35, Award of 24 November 2021.

[243] **Annex RL-9,** *Iberdrola v. Guatemala (I)*.

under domestic law that had previously been decided by national courts. The Tribunal observes, however, that the present case does not require a review of the correctness of decisions taken by Panamanian authorities under domestic law, but rather a determination of whether the State's conduct alleged by the Claimants may constitute a breach of the Treaty. Consequently, the cited precedent is not decisive in resolving the objection raised.

250. For all the foregoing reasons, this objection to the Tribunal's jurisdiction is dismissed.

V. MERITS

A. INTRODUCTION

251. As a preliminary matter, and in view of the Tribunal's conclusions regarding the objections to jurisdiction—in particular, the objection *ratione personae* concerning Banesco Panamá—the Tribunal will hereinafter refer solely to the Claimant or BHL.

252. BHL alleges that Panama breached its obligation to accord Fair and Equitable Treatment in accordance with Article IV of the Treaty [244]. Its claim arises from the conduct of multiple Panamanian contracting entities in relation to 35 Matters involving Banesco Seguros, a wholly-owned Panamanian subsidiary of the Claimant [245]. The Claimant contends that these acts, considered as a whole through a 'common thread', constitute a single arbitrary act that breaches the standard of Fair and Equitable Treatment under the Treaty [246].

253. The Respondent denies that there has been any breach of the Treaty [247]. Panama maintains that the contracting parties acted in accordance with the law

[244] Statement of Claim, § 11; Hearing, Day 1, Plaintiffs' opening statements, pp. 29:8–10 and 86:4–14 (Mr Irurzun Montoro).

[245] Statement of Claim, §§ 25–26; Hearing, Day 1, Plaintiffs' Opening Statements, pp. 56:8–15; 57:1–5 and 68:3–13 (Mr Irurzun Montoro).

[246] Hearing, Day 1, Plaintiffs' opening statements, pp. 56:7–17 and 97:6–98:7 (Mr Irurzun Montoro); Hearing, Day 4, Closing Arguments, pp. 996:21–998:7; 998:19–22, 999:1–13 (Mr Irurzun Montoro).

[247] Rejoinder, § 337; Answer, § 267; Hearing, Day 1, Defendant's opening submissions, p. 117:1–3 (Ms Jaime Ramírez) and Hearing, Day 4, Defendant's closing submissions, p. 1108:7–9 (Mr Gallego).

Panamanian [248] , as confirmed by the Supreme Court of Justice [249] and that the claim The BHL case essentially constitutes a dispute under domestic law that is not linked to the international standard [250] .

254. The Tribunal's task is to determine whether the Respondent's conduct – assessed in accordance with the standard set out in Article IV of the Treaty – constitutes a breach of the obligation of fair and equitable treatment. The Tribunal does not act as a court of appeal for the Panamanian judiciary nor does it definitively resolve issues of Panamanian law; rather, it assesses whether the State's conduct, including its application of domestic law, breaches the provisions of the Treaty.

B. SUMMARY OF THE PARTIES' POSITIONS

255. This section provides a non-exhaustive summary of the Parties' positions, with the aim of providing context for the analysis of the arguments presented. These will be discussed in greater detail in subsequent sections, where more detailed summaries of the Parties' positions will be provided.

(1) The Claimant's case

256. The Claimant's case, in essence, is as follows: between 2014 and 2017, Banesco Seguros – a Panamanian subsidiary wholly owned by the Claimant [251]– issued 70 surety bonds [252] (35 advance payment bonds and 35 performance bonds) securing public works contracts in Panama. The underlying contractors defaulted, whereupon the Panamanian contracting authorities sought to enforce the bonds; however, according to the Claimant, they did so years after the bonds had expired under Panamanian law, without following the required contractual procedures and on the basis of a

[248] Rejoinder, § 267 et seq.; Statement of Defence, § 7; Hearing, Day 4, Respondent's Closing Arguments, p. 1106:12–17 (Mr Gallego).

[249] Rejoinder, § 267 et seq.; Hearing, Day 1, Defendant's opening submissions, pp. 188:2–8 and 191:2–7 (Mr Gallego); Hearing, Day 4, Defendant's closing submissions, p. 1112:2–12 (Mr Gallego).

[250] Rejoinder, § 50; Defence, § 3; Hearing, Day 4, the Defendant's closing submissions, pp. 1048:18–21, 1113:2–10 and 1115:17–21 (Mr Gallego).

[251] Claim, §§ 18, 19 and 23–24.

[252] Hearing, Day 4, Closing Arguments of the Claimants, Slides 8–9.

misinterpretation of Panamanian law [253] . BHL contends that this conduct breached the obligation of fair and equitable treatment under Article IV of the Treaty [254] .

257. This is the sole substantive claim – breach of the standard of fair and equitable treatment under Article IV(1) of the APPRI [255] – and the Claimant bases this claim on four interrelated arguments: (i) the enforcement of bonds that had lapsed under Panamanian law [256] ; (ii) systematic delays between the termination of the contract and the enforcement of the bond [257] ; (iii) procedural irregularities, including the failure to endorse bonds and the breach of the 30-day notice requirement [258] ; and (iv) the cumulative effect of these acts as a breach of the standard of Fair and Equitable Treatment [259] .

258. As a result of the breach of the Fair and Equitable Treatment principle, BHL claims to have suffered damage to its investment [260] . It explains that this is not limited to the two sureties that were actually enforced, as it was the systematic pattern of arbitrariness on the part of the Panamanian authorities that affected its investment, leading to the 'collapse' of the business [261] . It maintains that the 33 bonds that have not yet been enforced contribute to the damage through the ongoing uncertainty and reputational harm that all this imposes on Banesco Seguros's insurance business in Panama [262] .

---

253 Reply, §§ 4, 162 and 268–269; Claim, §§ 5–11, 88, 114, 138, 141, 217 and 219.

254 Claim, § 153; Hearing, Day 1, Plaintiffs' opening statements, pp. 29:8–10 and 101:9–17 (Mr Irurzun Montoro).

255 Reply, § 275; Statement of Claim, § 153; Hearing, Day 1, Plaintiffs' opening submissions, Slide 93.

256 Reply, § 162; Claim, § 217; Hearing, Day 4, Plaintiffs' Closing Arguments, pp. 955:2–13, 957:1–4 and 958:18–21 (Mr Irurzun Montoro).

257 Reply, § 223(a); Statement of Claim, § 149; Hearing, Day 1, Plaintiffs' opening submissions, p. 39:9–16 (Mr Irurzun Montoro); Hearing, Day 4, Plaintiffs' Closing Arguments, pp. 956:10–957:20 (Mr Irurzun Montoro).

258 Reply, §§ 4(f) and 162; Claim, §§ 83–84 and 130–152.

259 Reply, §§ 43, 139–143, 155–162, 177–178, 203–205, 240–248, 259–266, 304, 356; Hearing, Day 4, the Claimants, p. 951:2–13 and 998:19–999:13 (Mr Irurzun Montoro); with reference to **Annex CL-18**, Articles on the Responsibility of States for Internationally Wrongful Acts; **Annex CL-29**, *El Paso v. Argentina*, § 516; **Annex RL-89**, *Gabriel v. Romania*, §§ 827–828.

260 Rejoinder, § 309; Application, §§ 10–12, 153 and 198.

261 Rejoinder, § 356; Application, § 12; Hearing, Day 4, Closing Arguments of the Applicants, pp. 1003:12–18, 999:5–13 (Mr Irurzun Montoro).

262 Reply, § 104; Claim, § 206; Hearing, Day 2, pp. 537:19–539:7 (Compass Lexecon).

259. Specifically, the Claimant asserts that the record demonstrates a recurring pattern across the 35 Cases: (i) Panama failed to adequately supervise the contractors [263] ; (ii) the entities did not act promptly in response to the contractors' breach of contract – allowing months or years to pass [264] ; (iii) during this period, the entities did not request endorsement of the bonds or notify Banesco Seguros [265] ; (iv) when the entities finally sought to enforce the bonds, they had lapsed – according to the Claimant's interpretation of the law – [(266)]; and (v) the entities nevertheless proceeded to enforce the bonds, relying on an interpretation which the Claimant describes as erroneous [267]. The Claimant characterises these actions as a pattern reflecting the Panamanian administration's inability to respond to a management problem and systematic pressure on the insurance sector [268] .

260. The Claimant acknowledges the legitimate right of the Panamanian contracting entities to enforce the performance bonds in the event of default by the contractors [269] . Its claim is not that the enforcement *per se* violated the standard of Fair and Equitable Treatment, but rather that the manner in which it was carried out – the delays, the failure to comply with procedural requirements [270] , and the enforcement of performance bonds which the Claimant maintains had already expired [271] – was arbitrary and inconsistent with Panama's obligations under the Treaty [272] .

261. BHL characterises Panama's conduct as a *"repeated, systematic pattern extending across dozens of* cases", describing this pattern as a composite fact in the

[263] Application, §§ 8 and 80.

[264] Application, §§ 10, 140–141 and 152(a); Hearing, Day 4, Closing Arguments of the Applicants, p. 957:6–20 (Mr Irurzun Montoro).

[265] Statement of Claim, §§ 88, 149, 152(b).

[266] Reply, § 162; Statement of Claim, § 217.

[267] Reply, § 109; Hearing, Day 1, Plaintiffs' opening statements, pp. 24:19–25:7 (Mr Irurzun Montoro).

[268] Reply, §§ 126, 131, 304 and 386–387; Claim, §§ 9 and 88–93; and Claim, Annex I.

[269] Hearing, Day 1, Plaintiffs' opening statements, pp. 21:8–22:18 (Mr Irurzun Montoro).

[270] Claim, §§ 11 and 219; Hearing, Day 1, Claimants' opening statements, pp. 24:17–25:7 (Mr Irurzun Montoro).

[271] Reply, § 162; Statement of Claim, § 217.

[272] Reply, § 304; Statement of Claim, §§ 10–11, §149, 153, 170–171, 179 and 219, and Statement of Claim, Annex I; Hearing, Day 1, Claimants' opening statements, pp. 22:9–18, 24:7–25:7 (Mr Irurzun Montoro).

in accordance with Article 15 of the Articles on State Responsibility [273] . Citing *El Paso v. Argentina,* it considers that this composite fact is the mechanism by which the breach of the principle of fair and equitable treatment is established [274] .

262. The Claimant points out that considering the Cases in isolation ignores the cumulative impact of the conduct of the Panamanian state entities and the structural risk they created [275] . According to BHL, the repetition of the same sequence – delays, procedural irregularities and the enforcement of sureties – across the 35 Cases transforms what might otherwise be characterised as individual administrative shortcomings into a systematic violation of the standard of Fair and Equitable Treatment under the Treaty [276] . It argues that in the present case there is a pattern of coordinated non-compliance with the regulatory framework (on which Banesco Seguros relied) by multiple State bodies and, therefore, a composite event under Article 15 of the Articles on State Liability.

263. The Claimant identifies the year 2018 as the approximate date on which the cumulative conduct began and states that "it is not possible to fix a specific date for the breach of the [Treaty]… This would indeed be possible in cases of contractual breaches… but not in the case of arbitrary behaviour that evolves gradually" [277] . It characterises the breach as ongoing: seven matters remain unresolved and the freezing of accounts in 2023–2024 is a continuation of the same pattern [278] . In summary, and without the foregoing constituting an exhaustive description of its case, the Claimant bases

[273] Reply, § 304; Hearing, Day 1, Plaintiffs' opening statements, p. 71:12–18 (Mr Irurzun Montoro); Hearing, Day 4, Plaintiffs' Closing Arguments, pp. 950:8–22 and 952:2–11 (Mr Irurzun Montoro).

[274] Reply, § 304; Hearing, Day 1, Opening Statements, pp. 60:13–18, 71:12–18, and 97:14–98:7; Hearing, Day 4, Claimants' Closing Submissions, 950:8–951:13 (Mr Irurzun Montoro); with reference to **Annex CL-29**, *El Paso Energy International Company v. the Argentine Republic,* ICSID Case No. ARB/03/15, Award of 31 October 2011, (*El Paso v. Argentina*), § 516 and **RL-89**, *Gabriel v. Romania*, § 303; Hearing, Day 4, Closing Arguments of the Claimants, Slide 20.

[275] Reply, § 356(a); Hearing, Day 1, Claimants' Opening Statements, p. 71:2–18 (Mr Soria Iglesias).

[276] Reply, § 304; Hearing, Day 4, Closing Arguments of the Claimants, pp. 951:1–13, 954:3–13 and 955:7–21 (Mr Irurzun Montoro).

[277] Reply, §§ 352–355; Statement of Claim, §§ 151–160 and 171–194; Hearing, Day 4, Plaintiffs' Closing Arguments, pp. 952:3–954:8 (Mr Irurzun Montoro).

[278] Reply, § 379; Hearing, Day 1, Claimants' opening statements, pp. 40:14 and 41:1–18 (Mr Irurzun Montoro) and p. 61:13–22 (Mr Soria Iglesias).

primarily their claim for Fair and Equitable Treatment through a case made up of five arguments.

264. Firstly, it maintains that the regulatory framework governing the validity of the bonds was clear: the advance payment bonds expired at the end of the contractual performance period plus thirty calendar days [279] and performance bonds lapsed once the two-month settlement period prescribed by Article 97 of Law 22 of 2006 (or, in its consolidated version, Law 48 of 2011 [280]) had elapsed [281] . Thus, from his reading of the
Under Panamanian law, it transpired that the enforcement of the sureties by the Panamanian entities took place after the expiry of the settlement period and was therefore out of time, as the sureties had already ceased to exist [282] .

265. Secondly, BHL points to a significant time lag between the alleged expiry dates of the bonds and the State's initiation of enforcement proceedings [283] . This time lag varies across the different cases, ranging from several months to more than five years [284] . The Claimant characterises this pattern as evidence of prolonged administrative inaction which, taken together with the enforcement of expired instruments, demonstrates arbitrary conduct inconsistent with the standard of Fair Treatment
and Fair [285].

---

[279] Reply, §§ 154 and 259.

[280] **Annex AA-11**, Act 48 of 10 May 2011 amending Act 22 of 2006, which regulates public procurement and enacts further provisions (Official Gazette No. 26782 of 11 May 2011).

[281] Reply, §§ 178, 184–186 and 202; Statement of Claim, §§ 94–96 with reference to **Annex C-34**, Act No. 22 of 27 June 2006 "regulating public procurement, as amended by Act 35 of 2006, Act 2 of 2007, Act 21 of 2008, Act 41 of 2008, Act 69 of 2009, Act 80 of 2009, Act 12 of 2010, Act 30 of 2010, Act 66 of 2010 and Act 48
of 2011" of 27 June 2002**[6]**; Hearing, Day 1, p. 288:2–7 (Mr Arjona).

[282] Reply, § 162; Application, §§ 120–122; Hearing, Day 1, Opening Statements by the Applicants, p. 75:7–76:1 (Mr Soria Iglesias); Hearing, Day 4, Closing Statements by the Applicants, Slide 10.

[283] Application, §§ 141 and 172; Hearing, Day 4, Closing Arguments of the Applicants, pp. 957:6–22 (Mr Irurzun Montoro).

[284] Application, §§ 141 and 172; Hearing, Day 4, Closing Arguments of the Applicants, pp. 957:21–958:2, 963:16–22, (Mr Irurzun Montoro); Hearing, Day 2, p. 343:19–22 (Mr Arjona).

[285] Reply, § 304; Statement of Claim, § 219; Hearing, Day 4, Closing Arguments of the Claimants, pp. 957:6–22, –965:1–13 (Mr Irurzun Montoro); Hearing, Day 1, Plaintiffs' opening statements, p. 57:1–15 (Mr Irurzun Montoro).

266. Thirdly, the Claimant alleges that the entities systematically failed to comply with the procedural requirements governing the enforcement of sureties, namely the 30-day notice requirement set out in the model surety approved by the Comptroller General in Decree 317-Leg/2006, as well as the requirement to obtain the guarantor's endorsement of the surety bond in the event of an extension of the secured contract, in accordance with Article 1542 of the Civil Code. The Claimant contends that this conduct deprived Banesco Seguros of its contractual rights and constitutes a denial of due process [286] .

267. Fourthly, the Claimant asserts that the regime applicable to sureties was clearly defined and refers in particular to the established interpretation set out in the Supreme Court's case law, notably its 2017 judgement [287] . Consequently, it alleges that Panama acted in contravention of the Supreme Court's previous ruling
Panamanian[288] .

268. In this context, BHL characterises the Supreme Court's decisions of 2023 and 2024 as a radical shift in the interpretation of the bail regime [289] . It points out that both rulings were handed down after the present dispute had commenced [290] , which rendered them unforeseeable at the time the investment was made [291] . It considers that they cannot be applied retrospectively to justify the State's conduct, and that subsequent case law does not alter the content of the law applicable at the relevant time [292] .

---

[286] Reply, §§ 109, 162, 175, 205, 243(a) (and footnote 179); Claim, §§ 106–107, 142(a)–(b), 145, 149, 152(b) and 217; Hearing, Day 4, Closing Arguments by the Claimants, pp. 998:19–1001:11 (Mr Irurzun Montoro); with reference to **Annex C-33***,* Decree No. 317-Leg. "regulating the bonds issued to guarantee the State's contractual obligations and establishing their standard forms" of 12 December 2006, Article 32, **Annex R-90**, Civil Code of the Republic of Panama, Article 1542, and **Annex C-77**, Circular No. 20-2021.LEG of the Comptroller General's Office of the Republic dated 21 June 2021 (in which it was stated that there are *"situations where entities proceed to enforce bonds without having given the required prior notice of breach to the contractors and the* sureties"); Hearing, Day 1, Plaintiffs' opening submissions, pp. 41:10–42:2 and 45:5–12 (Mr Irurzun Montoro).

[287] Reply, §§ 206 and 209; Statement of Claim, §§ 97–100 and its references to **Annex C-35**, Judgment of the Third Chamber for Administrative Litigation of the Supreme Court of Justice of 27 April 2017; **Annex R-33**, Judgment of the Supreme Court, Third Chamber (Case No. 21) of 20 October 2023; **Annex R-24**, Judgment of the Supreme Court, Third Chamber (Case No. 4) of 13 September 2024.

[288] Application, § 10.

[289] Reply, §§ 208(b) and 213.

[290] Reply, §§ 214 and 219.

[291] Reply, §§ 214 and 221–225.

[292] Rejoinder, §§ 3, 209, 213–214, 224 and 389; Hearing, Day 1, Claimants' opening statements, pp. 49:5–22–52:1–21 (Mr Irurzun Montoro).

269. Fifthly, BHL invokes the theory of a composite fact pursuant to Article 15 of the Articles on State Responsibility. It argues that, although no individual act by the State or its constituent entities might in itself constitute a breach of the standard of Just and Equitable Treatment, the cumulative effect of the various State actions, taken across the 35 Cases, taken as a whole as a composite act, constitutes a breach of the standard of Fair and Equitable Treatment, as there is a systematic pattern of arbitrariness which destroyed the legal certainty on which Banesco Seguros' surety business depends [293] .

(2) The Respondent's Case

270. The Respondent denies that any breach has occurred and asserts that it acted in accordance with its domestic legal framework and in the public interest, and that the Claimant's losses, to the extent that they exist, are attributable to the contractors' failures to perform – an inherent commercial risk in the suretyship business – and not to any conduct on the part of the State [294] .

271. In summary, and without this constituting an exhaustive description of its case, the Respondent's position rests primarily on three pillars.

272. Firstly, Panama maintains that the performance bonds did not lapse at the end of the contractual performance periods but remained in force until the underlying rights of the state entities arising from the works contracts had been settled [295] . This is based on the provisions of Article 101 of Law 48 of 2011 concerning performance bonds and, by analogy, Article 102 of the same law concerning advance payment bonds. It states that this interpretation of the legislation was confirmed by the Supreme Court of Justice in 2023 and 2024 and by the TACP in numerous previous rulings [296] .

---

[293] Reply, §132; Hearing, Day 1, Plaintiffs' opening submissions, pp. 60–62:1–20 (Mr Irurzun Montoro); Hearing, Day 4, Plaintiffs' closing submissions, pp. 950:8–956:6 (Mr Irurzun Montoro); Hearing, Day 4, Plaintiffs' Closing Arguments, Slide 20.

[294] Defence, §§ 108–109, 142 and 150–152.

[295] Reply, §§ 304–305.

[296] Rejoinder, § 112; Defence, §§ 145 and 158.

273. Secondly, the Respondent contends that the enforcement of the performance bonds constituted a legitimate exercise of the State's contractual rights in response to breaches by the contractors. It adds that, in several cases, the contractors' own challenges brought before the TACP and the courts – which had suspensive effect – contributed materially to the delays that the Claimant now characterises as arbitrary [297] . It asserts that the delays reflected the complexity of the multi-stage administrative procedure – investigation, termination, contractors' appeals, review before the TACP and judicial proceedings – and not arbitrary conduct [298] .

274. In this regard, the Respondent maintains that the domestic legal system provided adequate and effective remedies for the various matters dealt with independently by the different contracting authorities. In particular, it highlights the independent review by the TACPs, the correction of administrative decisions made by the TACPs, the interpretations of the Supreme Court of Justice, and the orders of the civil courts requiring contractors to reimburse Banesco for the payment of bonds. Panama characterises these institutional responses as evidence of a functional legal system that is the antithesis of the systemic arbitrariness alleged by the Claimant [299] .

275. The Respondent further contends that the factual dispute relates solely to two instances of the actual enforcement of sureties and that the remaining cases are either still subject to domestic proceedings, have been resolved, or have not been enforced at all [300] .

276. The Respondent emphasises that both Parties agreed on the standard of arbitrariness derived from *Gaspar v. Costa Rica*, pointing to the Claimant's own citation of the conclusion in *Gaspar* that *'not every irregularity on the part of public administrations is in itself sufficient to constitute an arbitrary* act' [301] . The Respondent contended that the authorities acted in response to breaches of contract by the contractors without

[297] Rejoinder, §§ 152–155.

[298] Rejoinder, §§ 164 and 118, and Answer, § 193 and its reference to Palacios I, Question 19 (§§ 116–117), and Question 20 (§§ 135–137).

[299] Rejoinder, §§ 106 and 323–325.

[300] Rejoinder, §§ 65–67; Defence, §§ 10, 14 and 75–79.

[301] Hearing, Day 1, Respondent's Opening Statements, p. 192:3–6 (Mr Gallego).

to have intended to prejudice the Claimant's investment and that the enforcement of the bonds was therefore reasonable: furthermore, Panama argued that its interpretation had been confirmed by the Panamanian courts in accordance with domestic law [302] .

277. Furthermore, with regard to BHL's expectations, Panama explains that the standard of fair and equitable treatment does not guarantee investors a favourable commercial outcome and that the mere application of domestic law – even if the investor disagrees with its content or interpretation – cannot constitute a breach of the standard of fair and equitable treatment in the absence of evidence of egregious, deliberate or discriminatory conduct. Panama emphasises that its actions constituted a neutral and non-discriminatory application of Panamanian law to all contractors and guarantors and that they were not directed against foreign investors [303]. In this regard, the Respondent further argues that the Fair and Equitable Treatment standard does not protect investors against the ordinary evolution of the regulatory framework, and that the change in judicial interpretation from the Supreme Court of Justice's 2017 decision to the decisions of 2023 and 2024 was a normal development that did not frustrate any legitimate expectations [304] .

278. In particular, the Respondent argues that an experienced surety operating in Panama would have been aware of the regulatory complexity of the public procurement regime, the possibility of legislative amendments and the risk that the term of the bonds might be interpreted differently by various State bodies [305] . It adds that the Claimant should have carried out due diligence on the regulatory environment and should have factored the risk of prolonged exposure of the bonds into its premium structure [306] .

279. Furthermore, it points out that Article IV(1) of the Treaty incorporates the minimum standard of customary international law and that, according to that standard, arbitrariness requires

[302] Hearing, Day 1, Opening Statements by the Respondent, p. 195:10–18 (Mr Gallego).

[303] Hearing, Day 1, Respondent's opening submissions, pp. 120:19–121:1 (Mr Gallego).

[304] Rejoinder, §§ 360–361 and 367.

[305] Rejoinder, §§ 135, 138–145 and 288.

[306] Rejoinder, §§ 138–145.

"*exceptionally serious* conduct" [307] and cites the tribunal's decision in *Cargill v. Mexico,* where the tribunal held that mere disagreement with a regulatory outcome or a domestic court's interpretation is insufficient to establish a breach of Fair and Equitable Treatment [308].

280. In this regard, the Respondent carries out a comparative analysis of other bilateral investment treaties concluded by Spain, including the Spain–Kuwait BIT of 8 September 2005, the Spain–Guatemala BIT of 9 December 2002, the Spain–Jordan BIT of 20 October 1999 and the Panama–Finland BIT of 19 February 2009 [309]. It argues that these treaties use similar language linking 'fair and equitable treatment' to the minimum standard of treatment, which demonstrates a consistent state practice of interpreting both standards as substantially equivalent [310]. Panama also refers to the UNCTAD Series on Issues in International Investment Agreements, 'Fair and Equitable Treatment' (2012) [311], in support of its case doctrinal.

281. Furthermore, Panama rejects the characterisation of the 35 cases as a pattern of state conduct, asserting that each case involves different contracting entities, different underlying contractors, different contracts and different factual timelines [312]. The contracting authorities – CONADES, MEDUCA, MIVIOT, MINSA and others – operate in different sectors, did not coordinate their implementation actions and acted on the basis of specific project assessments [313]. Taken together, these Cases

---

307 Rejoinder, § 309; Defence, §§ 282–289.

308 Rejoinder, §§ 304 and 309; Response, §§ 275–276, 282–288 and its reference to **Annex RL-43**, *Cargill Incorporated v. United Mexican States,* ICSID Case No. ARB(AF)/05/2, Award of 18 September 2009 (*Cargill v. Mexico*), § 296.

309 Rejoinder, §§ 305–307 and its references to **Annex RL-99**, Spain–Kuwait APPRI of 8 September 2005, Article 3.1; **Annex RL-100**, Spain–Guatemala APPRI of 9 December 2002, Article 3.1; **Annex RL-101**, APPRI Spain–Jordan of 20 October 1999, Article 4.1; and **Annex RL-102**, APPRI Panama–Finland of 19 February 2009, Article 2.2.

310 Rejoinder, §§ 305–307.

311 Rejoinder, §§ 305–307 and its references to **Annex RL-39**, "Fair and Equitable Treatment", UN Conference on Trade and Development (UNCTAD) Series on Issues in International Investment Agreements (2012), pp. 23–24.

312 Rejoinder, § 322.

313 Rejoinder, §§ 319–323 and Answer, §§ 89–90.

reflects, rather, the structure of the Panamanian public procurement system and not a coordinated state policy directed against guarantor companies [314].

282. In particular, with regard to the Claimant's argument that the Panamanian state entities acted in accordance with a systematic pattern of conduct, the Respondent makes the following points. Firstly, the Claimant has not proved the existence of an underlying common purpose linking the various acts of the state entities [315]. Secondly, there is no central coordination between the contracting entities; rather, they are independent bodies acting under their own mandates [316]. Thirdly, according to the Respondent, the Claimant's failure to identify a specific date of breach precludes the admission of its arguments, since the theory of composite facts under Article 15 of the Articles on State Responsibility requires proof of when the breach occurred [317].

283. Finally, the Respondent draws attention to Banesco's own conduct. According to Panama, Banesco Seguros issued its surety bonds in an inherently risky sector – public infrastructure in Panama – where the business model depends on the prompt completion of the underlying works by contractors and, when the contractors defaulted, the risk materialised to the detriment of Banesco Seguros. The Respondent maintains that BHL's complaint is, in essence, a complaint about the consequences inherent in underwriting surety bonds and not about any irregular conduct on the part of the State. Panama argues that Banesco Seguros bears responsibility for this situation and not Panama [318].

(3) The Court's analysis of the 35 Issues

284. The crux of the dispute lies in the disagreement between the Parties regarding the duration and validity of the surety bonds issued by Banesco Seguros, governed by the provisions of

[314] Reply, §§ 104, 317, 322–323 and 346.
[315] Rejoinder, §§ 316–320.
[316] Rejoinder, §§ 321–324. Similarly, see Statement of Defence, § 109.
[317] Rejoinder, §§ 383–386.
[318] Rejoinder, §§ 41, 88, 116, 133 and 140–145; Defence, § 16.

the surety agreements and by Act 48 of 2011 [319] . The Parties disagree as to whether the sureties lapsed once the time limits provided for by law had elapsed – as the Claimant maintains – or whether, on the contrary, they remained in force until the settlement of the underlying contracts – as the Defendant maintains. This disagreement is not merely theoretical, but is decisive in determining whether the enforcement of the surety bonds by the institutions constituted the legitimate exercise of a right under the applicable legal system or, on the contrary, the improper enforcement of instruments that had ceased to have legal effect.

285. Before proceeding to analyse this dispute, the Tribunal will set out its factual basis. The 35 Cases at the heart of this dispute share common characteristics, but also substantial differences, which relate to the individual and pattern-based assessments applied to all the Cases. The Tribunal will not analyse the facts of each of the 35 Cases, as the Parties' submissions contain detailed chronologies of each case, which the Tribunal has considered at length. Instead, the Tribunal will proceed to identify factual characteristics, categories and characterisations that are common to each of the 35 Cases.

a. The types of bonds and relevant entities

286. Each of the 35 Cases involves a public works contract entered into between a Panamanian contracting authority and a private contractor, secured by two bonds issued by Banesco Seguros: an advance payment bond (governed by Article 102 of Law 48 of 2011) and a performance bond (governed by Article 101 of the same Act) (see Section IX, Annex to this Award, *below*). The total number of bonds in question is 70 – 35 advance payment bonds and 35 performance bonds – and the total amount insured across all bonds is approximately USD 45.6 million [320] .

287. The vast majority of the 35 Cases – 29 – involve a single contracting entity: CONADES/UCEP. The remaining Cases involve MEDUCA (the Ministry of

---

[319] **Annex C-34**, Act No. 22 of 27 June 2006 "regulating public procurement, as amended by Act 35 of 2006, Act 2 of 2007, Act 21 of 2008, Act 41 of 2008, Act 69 of 2009, Act 80 of 2009, Act 12 of 2010, Act 30 of 2010, Act 66 of 2010 and Act 48 of 2011".

[320] Statement of Claim, § 205.

Education), MIVIOT (the Ministry of Housing), MINSA (the Ministry of Health), the Civil Aviation Authority and the Maritime Authority. The contracts were entered into between 2014 and 2017, during a period of significant investment in public infrastructure in Panama (see Section IX, Annex to this Award).

b. Typical timeline for the performance bonds

288. The 35 Cases largely share a common chronological sequence, which proceeds as follows (see examples in Section II.B. *above*). The sequence begins with (i) the issuance of the bonds between 2014 and 2017, when Banesco Seguros issued advance payment and performance bonds to secure public works contracts. This is followed by (ii) a period of non-compliance by the contractor and administrative inaction, during which the contractors fail to complete the works and the contracting authorities do not promptly initiate termination proceedings. The third stage involves (iii) a delay in the termination of the works contract: months or years after the contract's performance period has expired, the contracting authority issues an administrative termination decision. This is followed by (iv) an appeal procedure following the termination of the works contract, in which the contractor (and sometimes the surety) challenges the decision through an administrative appeal, administrative review before the TACP and judicial review before the Supreme Court of Justice. The sequence concludes (v) with enforcement or settlement proceedings, where the contracting authority claims payment from Banesco under the performance bonds, or the matter is resolved through a settlement, the return of performance bonds, or a court judgement.

289. Whilst this factual sequence is replicated in most of the 35 Cases, it does not do so uniformly. The Cases differ, in particular, in the duration of the delays experienced during the contract termination phase, the various events that occurred during the proceedings and affected their duration – such as the contractor's insolvency, the technical complexity of the projects or administrative delays –
, as well as the stage of the termination proceedings in each Case. These differences will be relevant to the Tribunal's assessment in Section V.E(4), *below*.

c. Status of the bonds at the time of the Hearing

290. As at the date of the Hearing, the 35 Cases can be grouped into four categories based on their procedural status. The first category comprises bonds that have already been enforced: the Respondent acknowledges that two bonds have been collected from Banesco Seguros [321] . The second category comprises bonds subject to ongoing enforcement proceedings: in 26 Cases, enforcement orders have been issued or are pending before the TACP or the courts [322] . The third category comprises bonds that are at risk of being enforced: the Claimant identifies seven cases in which enforcement has not yet been initiated, but in which the bonds have not been returned or cancelled [323] . Finally, the fourth category comprises cases that have already been resolved, either through settlements between the parties regarding the underlying disputes or through the return of the relevant bonds [324] .

C. APPLICABLE LAW

(1) The applicable legal framework

291. Article 42(1) of the ICSID Convention provides that the Tribunal shall decide the dispute in accordance with the rules of law agreed upon by the parties and, in the absence of such agreement, the law of the Contracting State party to the dispute and such rules of international law as may be applicable:

> *"Article 42*
>
> *The Tribunal shall decide the dispute in accordance with the rules of law agreed upon by the parties. In the absence of such agreement, the Tribunal shall apply the law of the State which is a party to the dispute,*

[321] Statement of Defence, §§ 5 and 325; Hearing, Day 4, Closing Submissions of the Respondent, Slide 51, citing Cases TAT 29 (MEDUCA) and 30 (MIVIOT) as examples of bonds that have been enforced.

[322] Statement of Defence, §§ 347 and 352, Annex I; Hearing, Day 1, Opening Statements by the Respondent, pp. 139:2–19 (Mr Gallego).

[323] Hearing, Day 1, the Respondent's opening submissions, p. 131:1–20 (Mr Gallego); Hearing, Day 1, Defendant's opening submissions, Slide 10 and Hearing, Day 4, Defendant's closing submissions, Slide 66, referring to Issues Nos. 1, 11, 17, 25, 26, 31 and 32 in respect of which no enforcement measures have yet been taken; Reply, Annex.

[324] Reply, Annex; Hearing, Day 4, Closing Arguments of the Claimants, p. 958:7–14 (Mr Irurzun Montoro).

including its rules of private international law, and any rules of international law that may be applicable.

[...][325] *".*

292. For its part, Article XII(3) of the Treaty contains provisions regarding the rules on which the arbitration shall be based, starting with the provisions of the Treaty, generally accepted rules and principles of international law, and also the national law of the host country:

"3. The arbitration shall be based on:

The provisions of this Agreement and those of other agreements concluded between the Contracting Parties;

the generally recognised rules and principles of international law;

the national law of the Contracting Party in whose territory the investment has been made, including the rules relating to conflicts of law.

[...][326] *".*

293. Thus, for the purposes of Article 42(1) of the ICSID Convention, this provision operates as the agreement between the Parties regarding the rules of law applicable to the dispute, and provides that disputes shall be settled in accordance with (a) the provisions of the Treaty itself, (b) the applicable rules and principles of international law; and (c) the domestic law of the host State, in that order [327] .

294. In this regard, in accordance with Article 42(1) of the ICSID Convention and Article XII of the Treaty, these three sources interact as follows: (i) the Treaty establishes the primary obligations, (ii) international law (and the Vienna Convention on the

---

[325] **Annex RL-1**, Convention on the Settlement of Investment Disputes between States and Nationals of Other States, in force since 14 October 1966, Article 42(1).

[326] **Annex C-7**, Agreement for the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Republic of Panama, concluded in Panama on 10 November 1997, Article XII(3).

[327] Reply, § 279; Claim, § 156.

Treaty Law ("CVDT") in Article 31(1)) [328] sets out rules on interpretation and the international responsibility of States and (iii) domestic law serves as a relevant factual element for the analysis and determination of whether the treaty obligations were breached.

295. These three sources interact within a defined hierarchy. The Treaty sets out the primary obligations. International law provides the rules of interpretation and the framework for state liability. Finally, in accordance with Article XII(2) of the Treaty, domestic law serves as an essential element – relevant for defining the content of the State's commitments, for identifying the investor's rights and expectations, and for assessing whether the treatment accorded by the State falls below the threshold of fairness and reasonableness required by the Treaty. However, domestic law, in itself, does not determine whether a treaty obligation has been breached: conduct that is lawful under domestic law may nevertheless violate the Treaty, and conduct that is unlawful under domestic law does not, ipso facto, amount to a breach of international law. As the International Court of Justice observed in ELSI, *"the fact that an act of a public authority may have been unlawful under domestic law does not necessarily mean that that act was unlawful under international law, as a breach of treaty or* otherwise" [329].

296. The Tribunal considers it important to emphasise that, in accordance with Article XII of the Treaty, the Tribunal acts as a treaty tribunal and not as an appellate body under the Panamanian legal system. Its mandate is to determine whether the conduct attributed to Panama constitutes a breach of the Treaty and not to rule definitively on matters of Panamanian domestic law. To that end, the Tribunal shall examine the plausibility of each Party's position with regard to the relevant provisions of Panamanian law (which is a matter falling within the jurisdiction of the Panamanian courts), without adopting any such position as the definitive interpretation of the law

[328] Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT) applies, which requires interpretation in good faith, in accordance with the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose. See **Annex CL-5**, Vienna Convention on the Law of Treaties of 23 May 1969.

[329] **Annex CL-10**, *Elettronica Sicula S.p.A. (ELSI)*, ICJ, Judgment of 20 July 1989, § 124.

Panamanian. The Tribunal's analysis shall be governed by the standard of international law: whether Panama's conduct – assessed in the light of the relevant factual context, which includes applicable domestic law – meets the threshold of the obligation of fair and equitable treatment under Article IV of the Treaty.

(2) The nature and content of the standard of fair and equitable treatment under Article IV of the Treaty

a. Article IV of the Treaty

297. Article IV of the Treaty provides, in the relevant part:

> *"(1) Investments made by investors of one Contracting Party in the territory of the other Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security. Neither Contracting Party shall, under any circumstances, accord such investments treatment less favourable than that required by international law.*
>
> *(2) Neither Contracting Party shall, in any way, through arbitrary or discriminatory measures, impede the operation, management, maintenance, use, enjoyment, expansion and sale or, where applicable, the liquidation of such investments. Each Contracting Party shall fulfil any obligation it has undertaken in relation to the investments of investors of the other Contracting Party* [330] *".*

298. Article IV contains two elements. The first guarantees *'fair and equitable* treatment' and *'full protection and security*'. The second prohibits unreasonable or discriminatory measures that impair the operation, management, maintenance, use, enjoyment, expansion and sale or, where applicable, the liquidation of such investments. Both Parties agree that, for the purposes of this dispute, these substantially overlap [331] .

[330] **Annex C-7**, Agreement on the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Republic of Panama, done at Panama on 10 November 1997, Article IV.

[331] See Reply, §§ 270 and 290; Rejoinder, § 298.

b. The Parties' positions

(i) The Claimant's Position

299. The Claimant argues that Article IV(1) establishes an autonomous standard of Fair and Equitable Treatment, independent of and not limited to the minimum standard of treatment under customary international law. It contends that the wording of the provision – which guarantees *'fair and equitable* treatment' without reference to customary international law or the minimum standard of treatment – creates an autonomous obligation, the content of which must be determined by the Tribunal with reference to the object and purpose of the Treaty. The Claimant bases this textual interpretation on the following arguments.

300. Firstly, with regard to the grammatical interpretation [332], he argues that Article IV(1) uses two distinct clauses: the first clause guarantees Fair and Equitable Treatment as an autonomous and independent obligation, whilst the second clause establishes the minimum standard of treatment as a 'floor' below which treatment cannot fall [333]. He maintains that the syntactic structure of the provision distinguishes Fair and Equitable Treatment as an autonomous substantive standard and the minimum standard as a separate minimum threshold, such that the two standards operate independently of one another. He further argues that the antecedent of the phrase *'treatment less favourable than that required by international* law' refers to 'treatment' in general, rather than equating Fair and Equitable Treatment under Article IV of the Treaty with the minimum standard of treatment [334] .

301. Secondly, the Applicant invokes the principle of interpretation based on practical effect [335] . It argues that if fair and equitable treatment were merely synonymous with the minimum standard, the Treaty's explicit reference to *'fair and equitable* treatment' as a distinct concept would be deprived of any independent significance, rendering it superfluous. [336]

[332] Reply, § 278; Claim, § 155.

[333] Reply, § 279; Claim, § 156.

[334] Reply, §§ 278–284.

[335] Reply, § 286; Claim, § 156.

[336] Reply, § 285; Claim, § 156.

302. Thirdly, the Claimant analyses the case law cited by the Respondent – *Gaspar c. Costa Rica*, *Ulysseas v. Ecuador* and *Lauder v. the* Czech Republic– and contends that none of them supports the position that 'fair and equitable treatment' under Article IV of the Treaty is limited to the minimum standard of treatment. [337]

303. With regard to the content of the Fair and Equitable Treatment standard, the Claimant draws on the legal framework of the case *of Saluka v. the Czech Republic* and identifies four elements: (i) protection of the investor's reasonable and legitimate expectations; (ii) the requirement that decisions taken by public authorities be made in good faith and be reasonably justified; (iii) the obligation of stability, transparency and non-discrimination; and (iv) the requirement of due process. The Claimant also relies on *CMS Gas v. Argentina* and *Lemire v. Ukraine* to argue that the prohibition of arbitrary conduct is an integral component of the Fair and Equitable Treatment standard and that an arbitrary measure may constitute a breach notwithstanding the investor's access to judicial review [338].

304. With regard to the definition of arbitrariness, the Claimant relies on the formulation by the International Court of Justice in *ELSI* [339], where the Court distinguished arbitrariness from mere illegality, and on the categorisation adopted in *EDF (Services) v. Romania* [340], drawing on the view of Professor Schreuer, who identifies four categories of arbitrary conduct: (a) a measure based on prejudice or preference rather than reason or fact; (b) a measure adopted for reasons other than those stated by the decision-maker; (c) a measure adopted in deliberate disregard of due process

337 Reply, §§ 290–293; with reference to **Annex RL-36**, *Alejandro Diego Díaz Gaspar v. Republic of Costa Rica*, ICSID Case No. ARB/19/13, Award of 29 June 2022 (*Gaspar v. Costa Rica*), §§ 355, 357 and 363–364; **Annex RL-37**, *Ulysseas v. Ecuador* – Ad hoc Case, Final Award of 12 June 2012, §§ 246 and 249.

338 Statement of Claim, §§ 154–170; with reference to **Annex CL-3**, *Saluka Investments BV v. the Czech Republic,* UNCITRAL 1976, Partial Award of 17 March 2006 (*Saluka v. the Czech Republic*), §§ 302–308; **Annex CL-6***, CMS Gas Transmission Company v. Argentine Republic,* ICSID Case No. ARB/01/08, Award of 12 May 2005 (*CMS Gas v. Argentina*), § 290; **Annex CL-4**, *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Decision on Jurisdiction and Liability of 14 January 2010, §§ 253–254.

339 Statement of Claim, §164 and its reference to **Annex CL-10**, *ELSI*, ICJ, Judgment of 20 July 1989, §§ 124 and 128.

340 Statement of Claim, §166 and its reference to **Annex CL-12**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award of 30 November 2009 (*EDF v. Romania*), § 303. The Claimant states that this categorisation was subsequently upheld in the decision in the case of *Bear Creek Mining Corporation v. the Republic of Peru*, ICSID Case No. ARB/14/21, Award of 30 November 2017 (*Bear Creek v. Peru*), § 547.

and due process; and (d) conduct that shocks or offends the sense of legal propriety [341]. The Claimant contends that this categorisation was subsequently applied in *Bear Creek Mining v. Peru* [342].

305. The Claimant further asserts that the Respondent erroneously raises the standard for assessing arbitrary conduct by relying on awards under the North American Free Trade Agreement ('NAFTA') – in particular *Cargill v. Mexico* and *Glamis Gold v. the United* States – which, in her view, reflect the restrictive interpretation imposed by the NAFTA Free Trade Commission's Interpretative Notes of 31 July 2001, which expressly linked Fair and Equitable Treatment to the minimum standard of treatment [343]. The Claimant contends that such limitations, which are specific to the NAFTA regime, cannot be transposed to the APPRI between Spain and Panama, which contains no equivalent provision. In support, it cites *Occidental v. Ecuador* [344] and *Eco Oro v. Colombia* [345] regarding the

the proposition that fair and equitable treatment constitutes an objective standard which does not require proof of bad faith, intent or deliberate conduct, and is based in particular on the court's conclusion in *Eco Oro* that fair and equitable treatment may be breached by arbitrariness, but also *'even by the mere fact of causing confusion in the* "inverter"'[346].

306. With regard to legitimate expectations, the Claimant argues that its investment in the Panamanian surety business was based on the reasonable expectation that the system of

[341] Reply, § 300(a); Statement of Claim, §§ 164–166; **Annex CL-12**, *EDF v. Romania*, § 303, drawing on Professor Schreuer's opinion in that arbitration; **Annex CL-8**, C. H. Schreuer, 'Protection against Arbitrary or Discriminatory Measures' in The Future of Investment Arbitration 183–198 (Catherine A. Rogers & Roger P. Alford (eds.), Oxford University Press 2009), p. 192.

[342] Claim, § 167; with reference to **Annex CL-13**, *Bear Creek v. Peru*, § 547.

[343] Reply, §§ 295–297; Statement of Claim, §§ 155–157; with reference to **Annex RL-43**, *Cargill v. Mexico*, § 296; **Annex RL-40**, *Glamis v.* the United States, Ad Hoc Case, Award of 8 June 2009, § 616.

[344] **Annex CL-14**, *Occidental Exploration and Production Company v. Republic of Ecuador* (I), LCIA Case No. UN 3467, Award of 1 July 2004 (*Occidental v. Ecuador*), §§ 162–163.

[345] **Annex CL-15**, *Eco Oro Minerals Corp. v. Republic of Colombia,* ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Quantification Guidelines of 9 September 2021 (*Eco Oro v. Colombia*), § 820.

[346] Reply, § 300(b)(i); Statement of Claim, §§ 167–168, 170(d) and 174. Hearing, Day 4, Closing Arguments of the Claimants,

pp. 972:17–973:5 (Mr Irurzun Montoro); with reference to **Annex CL-0015**, *Eco Oro v. Colombia*, § 710.

Panamanian public procurement would operate in accordance with the principle of legality and with defined and predictable procedures [347] .

(ii) The Respondent's Position

307. The Respondent contends that the standard of fair and equitable treatment under Article IV of the Treaty overlaps with the minimum standard of treatment under customary international law. Panama argues that the ordinary meaning of *'fair and equitable* treatment' in the context of Article IV of the Treaty refers to the established minimum international standard and that the phrase *'Neither Contracting Party shall, in any case, accord such investments treatment less favourable than that required by international* law' directly links the obligation of fair and equitable treatment to customary international law, establishing that it cannot be interpreted as imposing obligations beyond that standard. It asserts that this textual interpretation is permissible under Article 31(1) of the CVDT [348].

308. In support of this, the Respondent relies primarily on *Gaspar v. Costa Rica*, which interpreted an identical clause in Article IV(1) of the Spain–Costa Rica APPRI [349] . It contends that the tribunal's conclusion in *Gaspar* – that the parties to that treaty *"did not intend to grant fair and equitable treatment beyond that provided for under international law*" – is directly applicable, given the identical wording. The Respondent also cites *Iberdrola v. Guatemala (I)* and *Discovery Global v. the Slovak Republic* to support the proposition that awards interpreting provisions of similar treaties link 'fair and equitable treatment' to the minimum standard of treatment [350] . Panama also carries out a comparative analysis of other Spanish APPRIs – including those with Kuwait, Guatemala, Jordan and Finland –

---

347 Reply, §§ 108 and 127; Application, §§ 77–78, 79(a) and 79(c).

348 Rejoinder, §§ 298–308 and its references to **Annex CL-5**, the Vienna Convention on the Law of Treaties of 23 May 1969, and **Annex RL-36**, *Gaspar v. Costa Rica*, § 356; Defence, §§ 275–278.

349 Rejoinder, §§ 298, 302, 304 and its reference to **Annex RL-36**, *Gaspar v. Costa Rica*, § 356; Answer, § 279.

350 Rejoinder, § 309 and its reference to **Annex RL-104**, *Discovery Global LLC v. Slovak Republic*, ICSID Case No. ARB/21/51, Award of 17 January 2025 (*Discovery Global v. Slovak Republic*), §§ 409 and 418; Statement of Defence,

§ 280 and its reference to **Annex RL-9**, *Iberdrola v. Guatemala (I),* § 427.

to demonstrate a consistent state practice aimed at interpreting both standards in a substantially equivalent manner [351] .

309. With regard to the applicable threshold, the Respondent invokes the *ELSI* formulation and asserts that what constitutes arbitrariness is '[…] *a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical* propriety' [352] . Panama maintains that compliance with its own administrative procedures – however lengthy they may be – cannot meet this threshold. Furthermore, it relies on *Gaspar v. Costa Rica*, pointing to the Claimant's own citation of the tribunal's conclusion in that case that not every irregularity on the part of public authorities is sufficient in itself to constitute an arbitrary act [353] . The Respondent contends that its conduct was based on a plausible interpretation of its own law, subsequently confirmed by the Supreme Court of Justice, and that a tribunal applying the Fair and Equitable Treatment standard must accord deference to that judicial endorsement [354] .

310. The Respondent further argues that the Fair and Equitable Treatment standard does not guarantee investors a favourable commercial outcome and that the mere application of domestic law – even if the investor disagrees with its content or interpretation – cannot constitute a breach in the absence of egregious, deliberate or discriminatory conduct [355] . Panama emphasises that its actions constituted a neutral application

---

351 Rejoinder, §§ 305–307 and its references to **Annex RL-99**, APPRI Spain–Kuwait of 8 September 2005, Article 3.1; **Annex RL-100**, APPRI Spain–Guatemala of 9 December 2002, Article 3.1; **Annex RL-101**, APPRI Spain–Jordan of 20 October 1999, Article 4.1; and **Annex RL-102**, APPRI Panama–Finland of 19 February 2009, Article 2.2.

352 Rejoinder, § 309; Defence, § 283 and its reference to **Annex CL-10**, *ELSI*, ICJ, Judgment of 20 July 1989, § 128. The Tribunal recalls that in Procedural Order No. 1, paragraph 12.1, it was accepted that documents might be submitted in English without requiring a translation. In order to ensure accuracy with regard to the arguments put forward and the citations made by the Parties, the transcription is provided in the original language.

353 Rejoinder, §§ 298, 302, 304 and its reference to **Annex RL-36**, *Gaspar v. Costa Rica*, §§ 356 and 364 (defining 'fair and equitable treatment' and its relationship to the minimum standard of treatment); Reply, § 284 (and its footnote 405); Hearing, Day 1, Respondent's Opening Statements, p. 192:4–6 (Mr Gallego). At the Hearing, the Respondent also pointed out that both Parties had acknowledged the relevance of this decision. See Hearing, Day 1, Respondent's Closing Arguments, p. 1116:15–22 (Mr Gallego).

354 Rejoinder, §§ 4, 6 and 334; Hearing, Day 4, Closing Arguments of the Respondent, pp. 1106:18–1107:2 (Mr Gallego).

355 Rejoinder, §§ 38, 344 and footnote 25; Statement of Defence, §§ 284–285, 294–295, and its footnote 406; Hearing, Day 1, the Respondent's opening submissions, p. 182:3–7, 188–191 (Mr Gallego).

and non-discriminatory provision of Panamanian law applicable to all contractors and guarantors, and were not directed against foreign investors [356] .

311. It adds that an experienced surety operating in Panama, such as Banesco Seguros, would have been aware of the regulatory complexity of the public procurement regime and the possibility that the validity of the sureties might be interpreted differently by various state bodies, and that the evolution of the Supreme Court's case law from the 2017 decision to the decisions of 2023 and 2024 was a normal development within the rule of law that did not frustrate any legitimate expectations [357] .

c. The Tribunal's analysis

312. As is apparent from the Parties' submissions, the Claimant contends that Article IV of the Treaty establishes an autonomous standard of treatment. The Respondent, for its part, argues that the standard of fair and equitable treatment under Article IV(1) does not go beyond the content of the minimum standard of treatment under customary international law. Thus, in view of the arguments put forward by the Parties, the issue to be resolved by the Tribunal is, first, the content of the standard of fair and equitable treatment under Article IV of the APPRI.

313. The text of Article IV(1) [358]guarantees "*fair and* equitable treatment" without qualification or express reference to customary international law. The second sentence, however, states that such treatment shall in no case be less favourable than that *"required by international law*". It is on this basis that each Party puts forward a different interpretation of the scope of the applicable standard. The Tribunal notes that the relationship between the standard of fair and equitable treatment and the minimum standard of treatment has been the subject of extensive debate in investment arbitration, with divergent conclusions that depend, to a large extent, on the specific wording of the treaty in question.

---

[356] Rejoinder, §§ 7, 323, 345 and 354; Answer, § 44; Hearing, Day 1, Respondent's Opening Submissions, pp. 178–179 and 187–188 (Mr Gallego); Hearing, Day 4, Defendant's closing submissions, p. 1107 and Hearing, Day 1, Defendant's opening submissions, p. 191:19–20 (Mr Gallego).

[357] Rejoinder, § 359.

[358] **Annex C-7**, Agreement for the Promotion and Reciprocal Protection of Investments between the Kingdom of

Spain and the Republic of Panama, done at Panama on 10 November 1997, Article IV(1).

314. However, the Tribunal considers that this distinction is of limited practical relevance in the present case. Whether an autonomous standard of Fair and Equitable Treatment is applied or the minimum standard of treatment is invoked, the essential issue remains unchanged: the question is always whether the treatment accorded by Panama to the Claimant's investment fell below the threshold of justice, reasonableness and non-arbitrariness that international law requires of a host State. Indeed, the minimum standard of treatment has evolved considerably since *ELSI* (359), and contemporary formulations – including the requirement to act in good faith, to respect legitimate expectations and to refrain from arbitrary conduct – converge substantially with the content typically attributed to the autonomous Fair and Equitable Treatment standard. As the tribunal observed in *Saluka v. the Czech Republic*, the difference between the two approaches *"may be more apparent than* real" [360] [Translation by the Tribunal].

315. The Parties themselves appear to share a similar practical understanding. The Respondent insists on the characterisation of the minimum standard, but accepts that the standard has evolved to encompass protections against arbitrary and unfair treatment [361] . The Claimant maintains its argument regarding the autonomous 'fair and equitable treatment' standard, but bases it on the formulation of arbitrariness in *Gaspar v. Costa Rica*, thereby acknowledging, at least implicitly, the convergence between the two approaches [362] . Thus, both Parties analysed at length the decision in *Gaspar*, in which the tribunal interpreted an identical clause in Article IV(1) of the APPRI between Spain and Costa Rica. The Tribunal notes that that treaty was the specific result of negotiations between Costa Rica and Spain and that the decision is not binding on this Tribunal; nevertheless, the fact that it addressed the same wording in the treaty is a relevant consideration. The tribunal in *Gaspar* concluded that the parties to that treaty had not consented to grant Fair and Equitable Treatment beyond that provided for by international law, whilst recognising that the minimum standard is

---

359 **Annex CL-10**, *ELSI*, ICJ, Judgment of 20 July 1989, § 124.

360 **Annex CL-3**, *Saluka v. the Czech Republic*, § 291.

361 Rejoinder, §§ 298, 300, 302–304 and 308–309; Reply, §§ 270 and 275.

[362] Rejoinder, §§ 275, 284, 287 and 290.

an *‘evolving* standard’ that has incorporated safeguards against arbitrariness, lack of transparency and breaches of due process.[363]

316. That being the case, the Tribunal considers that the characterisation of the standard by either Party would not lead to a materially different outcome in the present case. As numerous investment tribunals have observed, the practical content of the Fair and Equitable Treatment standard has converged to the point where the distinction between autonomous and minimum standard interpretations makes little difference to the outcome. Consequently, the Tribunal does not consider it necessary to resolve this debate definitively and will proceed on this basis.

317. In conducting its analysis of the content of the Fair and Equitable Treatment standard under Article IV of the Treaty, the Tribunal applies the interpretative framework set out in Article 31(1) of the CVDT[364], which requires interpretation in good faith, in accordance with the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose.

318. Thus, in line with the approach taken by numerous tribunals – including in the cases of *Saluka v. the Czech Republic*[365], *EDF (Services) v. Romania*[366] and *Gaspar v. Costa Rica*[367] – the The Court considers that the standard of fair and equitable treatment under Article IV encompasses the following elements, which it regards as applicable in any formulation of the standard: (i) protection against arbitrary and unreasonable measures; (ii) procedural impartiality and due process; (iii) protection of legitimate expectations arising from specific representations or an established legal framework; and (iv) the obligation of good faith and consistency in the exercise of sovereign authority. These elements are not separate causes of action; they are facets of the single obligation of Fair and Equitable Treatment.

[363] **Annex RL-36**, *Gaspar v. Costa Rica*, ICSID Case No. ARB/19/13, award of 29 June 2022, §§ 356 and 363–364.

[364] **Annex CL-5**, Vienna Convention on the Law of Treaties of 23 May 1969.

[365] **Annex CL-3**, *Saluka v. the Czech Republic*, §§ 291–294 and 302–308.

[366] **Annex CL-12**, *EDF v. Romania*, § 303.

[367] **Annex RL-36**, *Gaspar v. Costa Rica*, ICSID Case No. ARB/19/13, Award of 29 June 2022, §§ 355–356 and 363–364.

319. Furthermore, the Tribunal will consider whether any element is established on its own and, in accordance with the principle in *El Paso* [368] relied upon by the Claimant, whether a combination of measures which individually fall below the threshold may cumulatively constitute a breach of the standard of Fair and Equitable Treatment under Article IV of the Treaty [369] .

320. As regards arbitrariness, which lies at the heart of the Claimant's case, the Parties agree that the prohibition of arbitrary conduct is an integral component of the Fair and Equitable Treatment standard, whether characterised as an autonomous element or as part of the minimum standard [370] . Both Parties accept, and the Tribunal agrees, that the applicable test for arbitrariness is that set out in *EDF (Services) Ltd v Romania*, based on the work of Professor Schreuer [371] . A measure is arbitrary if: (a) it causes harm to the investor without serving any apparent legitimate purpose; (b) it is based on the administration's prejudices and preferences rather than on legal rules; (c) it is adopted for reasons other than those stated; or (d) it has been implemented without due process. The Parties further agree that this test sets a high threshold: not every administrative error or sub-optimal decision crosses the line into arbitrariness [372] . What is required is conduct that has no rational connection to a legitimate policy objective, as held in the case *of Rompetrol v. Romania* [373] .

321. The Court further considers that the *ELSI* formulation [374] –which defines arbitrariness as *'a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical* propriety'– remains a useful point of reference, whilst recognising that the standard –given its evolution– is not limited to conduct exhibiting bad faith or

---

[368] **Annex CL-29**, *El Paso v. Argentina*, § 518.

[369] Application, §§ 157 and 161; Hearing, Day 4, Closing Arguments of the Applicants, pp. 950–951 (Mr Irurzun Montoro); **Annex CL-29**, *El Paso v. Argentina* 1, § 518.

[370] Reply, § 270; Statement of Claim, §§ 157 and 163; Rejoinder, §§ 298, 300, 308–309 and 318; Defence, §§ 270, 281 and 318.

[371] **Annex CL-12**, *EDF v. Romania*, § 303, based on the expert opinion of Professor Schreuer in that arbitration; **Annex CL-8**, C. H. Schreuer, *'Protection against Arbitrary or Discriminatory* Measures' in *The Future of Investment Arbitration* 183–198 (Catherine A. Rogers & Roger P. Alford (eds.), Oxford University Press 2009), p. 192.

[372] Reply, §§ 290 and 302; Defence, § 287; Claim, § 166.

[373] **Annex RL-105**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award of 6 May 2013 (*Rompetrol v. Romania*), §§ 271–273.

[374] **Annex CL-10**, *ELSI*, ICJ, Judgment of 20 July 1989, § 128.

discriminatory intent. The Tribunal agrees with the Claimant that the assessment of arbitrariness is objective in nature [375] and with the Respondent that not every irregularity in public administration is sufficient in itself to constitute an arbitrary act within the meaning of the Fair and Equitable Treatment standard [376].

322. Consequently, the Tribunal will assess the Claimant's claim for Fair and Equitable Treatment against the following four elements: (i) arbitrariness; (ii) denial of due process; (iii) frustration of legitimate expectations; and (iv) lack of transparency and consistency (see Section V.E, *below*).

(3) Facts established in accordance with Article 15 of the Articles on State Responsibility

a. Article 15 of the Articles on State Responsibility

323. The Claimant bases its case on the characterisation of the conduct of the Panamanian entities as a composite act. To this end, it invokes Article 15 of the Articles on State Responsibility—a provision to which the Respondent has also referred—which provides:

> *"1. A breach by a State of an international obligation through a series of acts or omissions, defined as unlawful taken as a whole, occurs when the act or omission takes place which, taken together with the other acts or omissions, is sufficient to constitute the wrongful act.*
>
> *2. In such a case, the breach extends throughout the entire period beginning with the first of the actions or omissions in the series and continues for as long as those actions or omissions are repeated and their non-conformity with the international obligation persists [377]".*

[375] Rejoinder, §§ 294 and 300(b)(i); Statement of Claim, § 170(d).

[376] Rejoinder, §§ 304–334; Defence, §§ 294–295; Hearing, Day 1, Respondent's opening statements, p. 192:3–19 (Mr Gallego).

[377] **Annex CL-18/Annex RL-45**, Articles of the International Law Commission on State Responsibility for Internationally Wrongful Acts (2001), Article 15.

b. The positions of the Parties

(i) The Claimant's Position

324. The Claimant contends that the 35 Cases reveal a consistent pattern of arbitrary conduct on the part of multiple State entities and characterises it as a *"repeated, systematic pattern extending across dozens of* cases" [378] : across multiple contracting entities, over a period of approximately six years (2018–2024), Panama sought to enforce performance bonds which – according to the Claimant's interpretation of Panamanian law – had lapsed, following a period of administrative inaction during which the Panamanian entities involved failed to supervise the contractors, failed to request endorsements and failed to initiate timely termination proceedings [379] . The Claimant characterises this as *"a specific and deliberate course of conduct on the part of* Panama" [380] which gave rise to a *"systematic pattern of* pressure" and a *"systematic pattern of* arbitrariness" in the Panamanian surety bond sector [381] .

325. In this regard, BHL points out that the conduct in question – administrative delays, failures to notify, late enforcement of bonds and inconsistent application of the regulatory framework – shares common characteristics that establish a *'pattern of* conduct' linking them to a single composite breach [382] . In its view, establishing such a pattern does not require proof of deliberate state intent or evidence of a formally adopted policy [383]; rather, it is sufficient to demonstrate that the acts share common characteristics – in their nature, their effect, or their

[378] Reply, §§ 304 and 356; Hearing, Day 4, Closing arguments by the Claimants, pp. 954:21–955:17 (Mr Irurzun Montoro); Hearing, Day 1, Plaintiffs' opening statements, pp. 58:15–22 (Mr Soria Iglesias).

[379] Statement of Claim, §§ 88 and 114; Hearing, Day 1, Plaintiffs' opening statements, pp. 91:15–92:3, 102:4–103:14 (Mr Irurzun Montoro).

[380] Hearing, Day 4, Closing Arguments of the Claimants, p. 954:7–8 (Mr Irurzun Montoro).

[381] Reply, §§ 131–136 and 356; Claim, §§ 89–90 and 151–160.

[382] Hearing, Day 4, Closing Arguments by the Claimants, p. 951:2–18 (Mr Irurzun Montoro); Hearing, Day 1, Claimants' opening submissions, pp. 58:15–59:1–13 and 97:14–98:7 (Mr Irurzun Montoro).

[383] Hearing, Day 4, Closing Arguments of the Claimants, p. 952:2–11 (Mr Irurzun Montoro); Hearing, Day 1, Opening Arguments of the Claimants, p. 84:2–7 (Mr Irurzun Montoro).

connection with the same administrative practice – which distinguish them from unrelated individual acts [384].

326. As regards the underlying purpose of this alleged pattern [385], the Claimant puts forward two explanations. Firstly, it contends that Panama, faced with budgetary pressures, sought to use the enforcement of sureties as a mechanism for generating liquidity, recouping losses arising from breaches of contract by obtaining payments from the sureties [386]. Secondly, it puts forward a structural explanation: the pattern would reflect an inability on the part of the Panamanian administration to respond adequately to a management problem [387], that is to say, a systemic failure of governance which, whilst not specifically directed against Banesco Seguros, would have had the additional effect of eroding the legal certainty upon which the insurance business in the field of surety bonds relies [388].

327. In support of its argument, the Claimant invokes the principle recognised in the *El Paso* case [389], according to which measures which, taken individually, would not reach the threshold of a breach of the Fair and Equitable Treatment standard may, when considered in their cumulative effect, constitute such a breach. Consequently, she asserts that, even though no single enforcement of a surety, considered in isolation, constitutes in itself a breach of the Fair and Equitable Treatment standard, the pattern resulting from the conduct of the state entities in the 35 Cases constitutes a qualitatively different and legally relevant [390].

---

384 Hearing, Day 4, Closing Arguments by the Claimants, p. 951:6–21 (Mr Irurzun Montoro).

385 Reply, §§ 272 and 384–392; Statement of Claim, § 28.

386 Reply, §§ 4(h), 125–128, 272 and 384–385; Claim, §§ 28 and 218.

387 Reply, §§ 306; Claim, §§ 80–81; Hearing, Day 4, Plaintiffs' closing arguments, pp. 962:16–963:1 (Mr Irurzun Montoro).

388 Reply, §§ 317 and 390; see also Hearing, Day 4, Claimants' closing arguments, p. 962:1–15 (Mr Irurzun Montoro).

389 Hearing, Day 4, Closing Arguments of the Claimants, p. 951:5–13 (Mr Irurzun Montoro); with reference to **Annex CL-29**, *El Paso v. Argentina*, § 558.

390 Hearing, Day 4, Closing Arguments of the Claimants, pp. 950:19–951:13 (Mr Irurzun Montoro).

(ii) The Respondent's Position

328. The Respondent asserts that the Claimant has not demonstrated the existence of a composite act within the meaning of Article 15 of the Articles on State Responsibility [391] . In its view, establishing a composite violation requires proof of the existence of an underlying purpose or plan linking the individual acts into a coherent series [392] , which would constitute a significantly higher standard than the mere repetition of similar administrative decisions [393] .

329. In support of this position, Panama cites the award in *Gabriel Resources v. Romania*, in which the tribunal held that the claimants had to demonstrate that the various events collectively amounted to the alleged breach and that there was an underlying purpose linking them, adding that it is not sufficient merely to demonstrate the repetition of certain events [394] . It also cites *Rompetrol v. Romania* [395] , where the tribunal required *"sufficient*
"the weight of positive evidence that would be required to sustain serious allegations of sustained and coordinated misconduct, as opposed to mere probability or circumstantial inference". The Respondent also cites the decisions in the cases *of Tatneft v. Ukraine* and *Marfin v. Cyprus* in support of its argument [396] .

330. According to the Respondent, the 35 cases *"are factually independent of one* another" [397] . The contracting entities are different government bodies operating in different sectors – CONADES builds healthcare facilities; MEDUCA builds schools; MIVIOT builds housing; the Maritime Authority manages ports [398] . In its view, these entities did not act in accordance with a common strategy,

---

391 Reply, § 326; Hearing, Day 4, Closing Arguments of the Defendants, pp. 1108:10–1109:4 (Mr Gallego).

392 Rejoinder §§ 312 and 320; Hearing, Day 4, Defendants' closing arguments, p. 1109:5–14 (Mr Gallego).

393 Rejoinder §§ 320 and 322; Hearing, Day 4, Closing Arguments of the Defendants, pp. 1109:15–1110:14 (Mr Gallego).

394 Hearing, Day 4, Closing arguments by the Defendant, pp. 1109:15–1110:14 (Mr Gallego); **Annex RL-89**, *Gabriel c. Romania*, § 827.

395 Hearing, Day 4, Respondent's closing submissions, p. 1110:1–4 (Mr Gallego); **Annex RL-105**, *Rompetrol v. Romania*, § 273.

396 Rejoinder, footnote 442, referring to **Annex RL-106**, *Tatneft v. Ukraine*, Ad Hoc Case, Award on the Merits of 29 July 2014, § 330; **Annex RL-107**, *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and Others v. Republic of Cyprus*, ICSID Case No. ARB/13/27, Award of 26 July 2018, § 864.

[397] Rejoinder, §§ 62 and 322.

[398] For example, Rejoinder, § 322; Statement of Defence, § 89.

rather than making decisions based on specific assessments regarding contractors' non-compliance in different projects [399] . The fact that similar administrative delays occurred across multiple entities reflects the structural characteristics of the Panamanian public procurement system – that is, the application by multiple entities of the same procedural framework – and not the existence of a coordinated state campaign [400] .

331. Thus, the Respondent asserts that the Claimant has not established any of the requirements for a composite act under Article 15 of the Articles on State Responsibility [401] :

(a) Firstly, it denies the existence of an underlying purpose. In its view, the Claimant's theory regarding the enforcement of sureties as a mechanism for generating liquidity [402] lacks evidential support in light of the evidence presented at the hearing by Panama to the effect that revenue from the enforcement of sureties is not incorporated into the State's general budget; and the theory of *systemic* government *failure* would constitute, at best, a characterisation of administrative inefficiency and not a purpose of sufficient substance to satisfy the requirement of Article 15 of the Articles on State Responsibility [403] . In this regard, the Respondent points out that the award in the case *of Gabriel Resources v. Romania*, cited by both Parties, requires *"a clear link between a series of events culminating in the* breach", a *"kind of underlying link or purpose between* them" [404] and there must be

[399] Rejoinder, § 323; Hearing, Day 4, Closing Arguments of the Defendants, pp. 1112:2–1113:1 (Mr Gallego).

[400] Rejoinder, § 141 and footnote 197; Hearing, Day 4, Defendants' closing arguments, pp. 1112:21–1114:13 (Mr Gallego).

[401] Rejoinder, §§ 312 and 326.

[402] Rejoinder, §§ 98–103; Hearing, Day 4, Defendants' closing arguments, pp. 1110:17–1112:6 (Mr Gallego).

[403] Rejoinder, §§ 93, 316 and 321; Answer, §§ 10, 28, 86 and 95.

[404] Rejoinder, § 320; Hearing, Day 4, Closing Arguments of the Respondent, p. 1109:5–14 (Mr Gallego). The Tribunal notes that the Applicant shares this interpretation of the case *of Gabriel Resources v. Romania*, § 827 (**Annex RL-89**). See Hearing, Day 4, Claimants' Closing Arguments, pp. 951:18–952:1 (Mr Irurzun Montoro: *"This test consists of requiring that there be a clear link between a series of events, as the first element, and, secondly, that there be some link in terms of an underlying pattern or purpose between those* events").

some form of evidence of the motive or purpose that gives unity to that action, rather than merely a factual commonality [405] .

(b) Secondly, Panama asserts that there is no coordination between the entities. The measures adopted are *"entirely distinct measures, taken by different authorities, in different cases, within specific* contexts" [406] . Thus, for example, the administrative termination of a contract by CONADES in one case would bear no relation to the failure of the Maritime Authority to terminate a different contract in a timely manner in another case [407] . In the absence of evidence that such conduct was linked by a common purpose or design [408] , the Respondent maintains that it cannot be aggregated to constitute a single composite breach [409] .

(c) Thirdly, the Respondent emphasises that the Claimant has not identified a specific date for the alleged breach of the Treaty in respect of a composite event, which, in its view, is fatal both to the theory of the composite event and to the analysis of causation. The Respondent again invokes the judgment in the case *of Gabriel Resources v. Romania,* where it was stated that a lack of consistency between the date of the alleged breach and the date of the damage claimed may lead to the rejection of the claim [410].

---

[405] Rejoinder, § 320; Hearing, Day 4, Closing Arguments of the Respondent, p. 1109:5–14 (Mr Gallego). The Tribunal notes that the Claimant shares this interpretation of the case *of Gabriel Resources v. Romania*, § 827. See Hearing, Day 4, Plaintiffs' Closing Arguments, pp. 951:18–952:1 (Mr Irurzun Montoro: *"This test consists of requiring that there be a clear link between a series of events, the first element, and, secondly, that there be some link in terms of an underlying pattern or purpose between those* events").

[406] Rejoinder, § 322.

[407] Rejoinder, § 322.

[408] Rejoinder, § 321; Hearing, Day 4, Defendant's closing arguments, p. 1109:5–14 (Mr Gallego).

[409] Rejoinder, § 326; Hearing, Day 1, Defendant's opening submissions, pp. 182:8–185:16 (Mr Gallego).

[410] Hearing, Day 4, Defendant's closing arguments, p. 1121:11–17 (Mr Gallego: *"And what the Gabriel v. Romania case does is make it clear that if there is a discrepancy between the date of the violation – which has not even been alleged – and the date on which the claim for damages is made, then this leads to the dismissal of the claim. Quite*

simply, it must be dismissed.”).

c. The Court's analysis

332. Article 15 of the Articles on State Responsibility [411] forms the starting point for the analysis on this point. That provision addresses the scenario in which a series of acts or omissions, considered as a whole, reach the threshold required to constitute a breach of an international obligation. The Court observes that neither Party has contested the relevance of this legal framework [412] .

333. A composite act is neither an instantaneous nor a continuous act – which would fall under Articles 14(1) and 14(2) of the Articles on State Responsibility – but rather a series of acts – actions or omissions – which take on an unlawful character when considered as a whole [413] .

334. In this vein, in its commentary, the UNCITRAL explains what constitutes a series of acts – not specific acts in themselves – and cites, by way of example, *'systematic acts of discrimination prohibited by a* trade agreement' [414], amongst others. It is worth noting that neither the definition of the composite act nor the ILC's commentary expressly states that each act in the series must, in itself, be unlawful; rather, that characterisation is applied to the set of acts as a whole. Thus, in the Court's view, the unlawfulness of the composite act does not necessarily follow from the unlawfulness of the acts of which it is composed.

335. The Court concludes that three elements must be established for a composite act: (i) a series of acts or omissions by the State; (ii) a sufficient connection between those acts to justify their assessment as a single composite act rather than as isolated incidents; and (iii) that the series, taken as a whole, constitutes a breach of an international obligation.

---

[411] **Annex RL-45**, Articles of the International Law Commission on State Responsibility for Internationally Wrongful Acts (2001), Article 15, pp. 65–67.

[412] Cf. Hearing, Day 4, Closing Arguments of the Claimants, pp. 950:12–951:1 (Mr Irurzun Montoro); Hearing, Day 4, Closing Arguments of the Respondent, p. 1108:10–22 (Mr Gallego).

[413] Rejoinder, § 318; **Annex RL-45**, Articles of the International Law Commission on State Responsibility for Internationally Wrongful Acts (2001), Article 15, pp. 65–67.

[414] Rejoinder, § 319 and the footnote on p. 441; **Annex RL-45**, Articles of the International Law Commission on State Responsibility for Internationally Wrongful Acts (2001), Article 15, p. 65, § 2.

336. Furthermore, in the El Paso case, the tribunal characterised the gradual violation of the Just and Equitable Treatment principle as '[…] a process that extends over time and consists of a succession or accumulation of measures which, when analysed individually, would not appear to expropriate the investor but, when analysed as a whole, produce that result' [415] . This approach requires a comprehensive assessment of the cumulative consequences of the State's conduct. The Tribunal considers that this formulation is consistent with the four-part analysis of the Fair and Equitable Treatment standard identified above: (i) arbitrariness; (ii) denial of due process; (iii) frustration of legitimate expectations; and (iv) lack of transparency and consistency (see Section V.C(2)c, supra) and will apply it accordingly.

337. The UNCITRAL Commentary makes it clear that composite acts *"are limited to breaches of obligations concerning a set of behaviours and not to specific acts in* themselves" [416] . A composite act requires more than a series of related events; it requires that the events, taken as a whole, constitute a qualitatively distinct harm – one that arises from their aggregation rather than from any individual act considered in isolation. Both Parties accept, in accordance with *Gabriel Resources v. Romania*, that a composite act requires proof of a clear link between a series of events and some sort of underlying connection or purpose between them [417] . They disagree, however, as to whether such a link has been established in the present case.

338. The Court therefore observes that the disagreement between the Parties regarding the doctrine of composite facts is primarily a matter of degree rather than of nature [418] . Neither Party disputes that Article 15 of the Articles on State Responsibility provides the applicable legal framework or that a fact

---

415 **Annex CL-29**, *El Paso v. Argentina*, § 518.

416 **Annex RL-45**, Articles of the International Law Commission on State Responsibility for Internationally Wrongful Acts (2001), Article 15, p. 65, § 2.

417 Hearing, Day 4, Closing arguments by the Defendant, p. 1109:5–14 (Mr Gallego); Hearing, Day 4, Closing Arguments of the Claimants, pp. 951:18–952:1 (Mr Irurzun Montoro: *"This test consists of requiring, firstly, that there be a clear link between a series of events, and secondly, that there be some link, pattern or underlying purpose between those events*". See also **Annex RL-89**, *Gabriel v. Romania*, §§ 823–829, cited by both Parties regarding the test of connection and unity.

418 Rejoinder, §§ 320 and 322.

presupposes a plurality of acts linked by a sufficient connection [419] . The disagreement centres, rather, on the nature of the required connection – in particular, whether the requirement for a 'common thread' between the different acts necessitates proof of a deliberate state plan or an underlying purpose (in accordance with the principles of *Gabriel* or *Rompetrol*) [420] , or whether it is sufficient to demonstrate that the acts share a pattern of conduct, a systematic behaviour [421] , even in the absence of evidence of coordination.

339. The Tribunal considers that the standard lies between the two positions put forward by the Parties. The requirement of a *'pattern of conduct across 35 bail* cases' [422] does not require proof of a deliberate state plan, a conspiracy or a formally adopted policy. However, it cannot be deemed satisfied by the mere repetition of similar administrative acts in proceedings lacking any substantive connection; in the words of the ILC in its commentary on Article 15, *'obligations concerning a pattern of conduct rather than specific acts in* themselves' [423] . What is required is evidence that the conduct in question shares a structural unity – whether derived from a uniform interpretation of the same legal provisions, from a consistent administrative practice, from a common institutional failure, or from the pursuit of a common, objectively identifiable result – which justifies its assessment as a single composite act rather than a collection of isolated incidents. In that case, a pattern or 'common thread' between these acts of the State could indeed be deemed to exist and, consequently, the Court must assess whether the combination of these acts exceeds the required threshold and whether the composite act constitutes a breach of the standard of fair and equitable treatment. As explained by the

---

[419] Hearing, Day 4, Closing Arguments of the Applicants, pp. 950:4–14 (Mr Irurzun Montoro); Hearing, Day 4, Closing Arguments of the Respondent, p. 1104:12–20 (Mr Gallego).

[420] Rejoinder, § 320; and its reference to **Annex RL-89**, *Gabriel v. Romania*, §§ 823–828, and Rejoinder, § 322; and its reference to **Annex RL-105**, *Rompetrol v. Romania*, § 273; Hearing, Day 4, Closing Arguments of the Respondent, p. 1109:5–14 (Mr Gallego); Hearing, Day 4, Closing Arguments of the Claimants, pp. 951:18–952:1 (Mr Irurzun Montoro).

[421] Hearing, Day 1, Opening Statements by the Claimants, p. 58:15–60:9 (Mr Soria Iglesias); Hearing, Day 4, Closing Statements by the Claimants, p. 951:2–13 (Mr Irurzun Montoro); and its reference to **Annex CL-29**, *El Paso*
v. Argentina, §§ 516 and 518.

[422] Hearing, Day 4, Closing Arguments of the Claimants, pp. 956:8–9 and 954:21–955:7 (Mr Irurzun Montoro).

[423] **Annex RL-45,** Articles of the International Law Commission on State Responsibility for Internationally

Wrongful Acts (2001), Article 15, commentary § 2.

court in the *El Paso* case[424], the individual measures taken as a whole must produce a combined effect that does exceed the threshold for a violation to be established.

340. If, on the other hand, it were found that the delays were due to rational explanations; the procedural irregularities arose from a genuine legal ambiguity; the claim regarding legitimate expectations was not substantiated because the framework was ambiguous from the outset; and the element of transparency was not affected, then there would be no breach of the right to fair and equitable treatment.

341. The Court considers that this structural unity constitutes the central element of the analysis. The mere repetition of similar acts is not sufficient, unless a coherence is demonstrated that integrates them into a legally relevant sequence. At the same time, such unity may arise from sources other than deliberate intent: a sustained pattern of administrative conduct, a shared institutional practice or the systematic application of a particular legal interpretation in multiple proceedings may each be sufficient to establish the required connection.

(4) Burden of proof and standard of proof

342. The Court considers it necessary to make a distinction that is fundamental to the analysis that follows. The question raised – and the one to be resolved – is not whether the contracting entities' interpretation of Panamanian law was correct – a matter on which the Tribunal has deliberately chosen not to rule (see Sections V.C(1) and V.C(3), *supra*, and Section V.C(5), *infra*) – but whether the manner in which that interpretation was implemented in the 35 Cases satisfies the applicable standard.

343. As previously noted (see Section V.C(1), *supra*), a state entity may act on the basis of a legally defensible interpretation of its own law and yet apply that interpretation in a manner that is arbitrary, procedurally unfair or inconsistent with the investor's legitimate expectations; and,

[424] **Annex CL-29**, *El Paso v. Argentina*, § 518.

therefore, in breach of the Fair and Equitable Treatment standard [425]. Consequently, the Tribunal will examine the Claimant's claim not as a matter concerning the substantive right of the entities to enforce the bonds, but as a dispute concerning the reasonableness and procedural regularity of the manner in which the enforcement of the bonds was carried out in the 35 Cases.

344. The burden of proving the existence of a breach of the Right to a Fair and Equitable Hearing rests with the Claimant. This includes, in particular, the obligation to demonstrate: (a) the relevant factual basis – that is, which acts or omissions by the State occurred and at what time –

; (b) that such conduct meets the threshold required under the relevant element of Fair and Equitable Treatment; and (c) in the context of the composite factual allegation, that the State's acts and omissions invoked constitute a *'series of actions or omissions defined collectively as* unlawful', within the meaning of Article 15 of the Articles on State Responsibility.

345. The Tribunal observes that the composite factual allegation entails an additional burden of proof. Under Article 15, it is not sufficient to establish the existence of a series of related events; it is necessary to demonstrate the existence of an underlying pattern or purpose linking them. As the Tribunal noted in the case *of Gabriel Resources v. Romania* – a case cited by both Parties – what is required is *"a clear link between a series of* events' [426] and *'some sort of underlying link or purpose between them'* [427]. The Tribunal will therefore examine whether the Claimant has met this burden.

346. As regards the standard of proof, the Tribunal is guided – without considering them binding – by the decisions in the cases *of Rompetrol v. Romania* [428] *and Gabriel Resources v. Romania* [429] and

acknowledges that both decisions require proof of an underlying purpose that

[425] **Annex CL-14**, *Occidental Exploration and Production Company v. Republic of Ecuador (I),* LCIA Case No. UN 3467, Award of 1 July 2004, §§ 162–163; **Annex CL-15**, *Eco Oro v. Colombia*, § 820; **Annex RL-43**, *Cargill v. Mexico*, §§ 285 and 293.

[426] In the original English version: *"clear link between these series of events and that they all culminated in the taking over*".

[427] **Annex RL-89**, *Gabriel v. Romania*, § 827. In the original English version: *'some link of underlying pattern or*

purpose between them'.

[428] **Annex RL-105**, *Rompetrol v. Romania*, § 271; see in this regard the reference in the Rejoinder, §§ 320–322.

[429] **Annex RL-89**, *Gabriel v. Romania*, §§ 823–828; see the reference in the Rejoinder, §§ 320–322.

linking the individual acts. However, the Tribunal also notes that the factual circumstances of those cases differ materially from those of the present proceedings: in *Rompetrol*, the claimant alleged hostility and animosity on the part of government authorities responsible for criminal investigations, which led that tribunal to require a standard of proof commensurate with the gravity of such allegations [430] . In *Gabriel*, the tribunal analysed whether a series of measures adopted by the State against the investor violated the applicable treaty. In that particular case, the claimant had to demonstrate a clear link and an underlying pattern or purpose between the facts that allegedly constituted the treaty violation [431] . In this vein, the claimant in that case argued that the granting of the permits and authorisations necessary for its investment, as well as other conduct by the respondent State, had a strong political dimension, including, amongst other matters, the alleged public criticism of the terms of the project, the imposition of a renegotiation, the making of the decision to grant the environmental permit necessary for the investment conditional upon a draft bill, and the adoption of a political stance against it [432] .

347. By contrast, the allegations in the present case – relating to administrative delays, deficiencies in notifications and the allegedly inconsistent application of a regulatory framework in public works contracts – are of a qualitatively different nature. The Claimants have not alleged persecution and hostility within the terms of the case *of Rompetrol v. Romania*, nor have they alleged hostile, targeted and politically motivated conduct as in the case *of Gabriel v. Romania*. The Tribunal also recognises that the nature of the allegation – conduct coordinated across multiple state bodies – requires a particularly careful examination of the body of evidence.

(5) The role of Panamanian law

348. In accordance with the applicable legal framework set out in Article XII of the APPRI (see Section V.C(1), *above*), the Tribunal must rely, amongst other things, on Panamanian law. Thus, the

---

[430] **Annex RL-105**, *Rompetrol v. Romania*, § 271.

[431] **Annex RL-89**, *Gabriel v. Romania*, §§ 823–828.

[432] **Annex RL-89**, *Gabriel v. Romania*, §§ 811–818; see also §§ 788–798 (summary of the claimant's position) and

799–804 (summary of the respondent’s position).

Panamanian law is a factor against which it must be assessed whether the Respondent's conduct meets the relevant standard of international law. The Tribunal's role is not to provide an authoritative interpretation of Panamanian domestic law, nor to determine which of the interpretations proposed by the Parties is 'correct'.

349. As the Permanent Court of International Justice observed in the *Brazilian Loans* case, when an international tribunal applies the domestic law of a particular country, it must follow the following principle: *'Once the Court has arrived at the conclusion that it is necessary to apply the domestic law of a particular country, there seems no doubt that it must seek to apply it as it would be applied in that country. It would not be applying the domestic law of a country if it were to apply it in a manner different from that in which that law would be applied in the country in which it is in* force" [433] . The Tribunal therefore acts in its capacity as an international tribunal, and not as an appellate body within the Panamanian judicial system (see also Sections V.C(1) and V.C(2)c, *supra*).

350. This approach reflects a deliberate methodological choice. The Parties have devoted considerable effort to advancing interpretations as to which interpretation of Panamanian law is 'correct'. The Tribunal recognises the strength of the arguments put forward by both sides. However, its mandate is not to resolve that debate concerning Panamanian domestic law, but rather to apply the Treaty in accordance with Article XII, which requires the Tribunal to rely on, amongst other things, Panamanian law as a factor in determining whether there was a breach of the APPRI. It follows that the ambiguity of the domestic legal framework constitutes, in itself, a relevant factor in the Tribunal's analysis: it may influence the assessment of the arbitrariness of the State's conduct, the legitimacy of the investor's expectations and, ultimately, the determination of whether the threshold for a breach of the Fair and Equitable Treatment standard under the Treaty has been crossed. This has even been acknowledged by the Respondent, in that domestic law may form the backdrop against which the existence of a breach of international law is determined [434] .

---

[433] **Annex RL-64**, *Case concerning the payment in gold of Brazilian federal loans contracted in France*, PCIJ, judgment of 12 July 1929, p. 124.

[434] Rejoinder, § 329.

351. This principle has been consistently recognised in investment arbitration. In *Azinian v. Mexico*, the tribunal held that an international tribunal is not called upon to substitute its own interpretation of domestic law for that of the domestic courts [435] . Similarly, in *Eli Lilly v. Canada*, the tribunal held that a review of domestic judicial decisions under the Fair and Equitable Treatment standard requires a finding that the decision produces *"a result that was so surprising that propriety and competence had to be* questioned" [436] , thereby reflecting the high degree of deference due to domestic judicial determinations. The Tribunal considers that this approach is equally relevant in the present case.

352. The Tribunal considers it necessary to carry out a comprehensive assessment of Panamanian law in order to fulfil its task of determining whether or not the Treaty has been breached, in accordance with the terms of Article XII thereof. In this regard, the Tribunal considers relevant the explanation provided by the tribunal in *El Paso v. Argentina*, namely that recourse to the law of the host State is necessary *"in order to determine what rights* [the State] *recognised in* [the investor]*"*, but *"the determination of whether the modification or cancellation of such rights, even if they were legally permissible under* [domestic] *law, constitutes a breach of a protection guaranteed by the BIT is a matter reserved exclusively to the BIT itself and other applicable rules of international* law" [437] .

353. This is, of course, without forgetting that considerable deference must be accorded to the interpretation of domestic law by the State's own courts, particularly its supreme court, unless it is shown that such an interpretation is manifestly unreasonable, arbitrary or made in bad faith. This reflects the principle established in the *Préstamos Brasileños* case of the Permanent Court of Justice

---

[435] **Annex RL-113**, *Robert Azinian, Kenneth Davitian & Ellen Baca v. the United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999 (*Azinian v. Mexico*), §§ 87–94 and 99 (the tribunal held that an international tribunal has no power to substitute its own interpretation of domestic law for that of domestic courts; the tribunal must respect domestic judicial determinations within reasonable limits).

[436] **Annex RL-118**, *Eli Lilly and Company v. Canada*, ICSID Case No. UNCT/14/2, Award of 16 March 2017 (*Eli Lilly v. Canada*), § 219, see also § 224.

[437] **Annex CL-29**, *El Paso v. Argentina*, § 135; Rejoinder, §§ 10, 42 and 46–49; Hearing, Day 1, Claimants' Opening Statements, pp. 73:22–74:15, 79:19–80:21 (Mr Soria Iglesias); Hearing, Day 1, Claimants' Opening Statements, pp. 98:10–18 (Mr Irurzun Montoro); Hearing, Day 1, Opening Statements by the Respondent, pp. 188:2–8 (Mr Velarde Saffer); Hearing, Day 1, Opening Statements by the Respondent, pp. 126:9–13 (Mr Gallego).

International, already cited, according to which an international tribunal called upon to apply domestic law must give the utmost consideration to the decisions of national courts [438].

354. The implications of this approach are significant in the present case. As will be discussed in Section V.D *below*, with regard to the central issues of interpretation under Panamanian law, including, amongst others, the interplay between Articles 97, 101, 102 and 107 of Law 48 of 2011[439], the role of endorsement under Article 1542 of the Civil Code [440] and the effects of recent case law of the Supreme Court from 2017, 2023 and 2024[441] the Parties put forward opposing interpretations, although both are legally plausible. The Court will not rule on these differing interpretations of Panamanian law. Whilst the Court will acknowledge that the Claimant's interpretation – that guarantees expire after fixed statutory periods – is an interpretation based on the text of the relevant provisions and supported by a coherent reading of the legal framework, it will also recognise that the Respondent's interpretation – that bonds remain in force until liquidation is completed – is in turn supported by the text of Article 101, was confirmed by the Supreme Court in 2023 and 2024, and has also previously been endorsed by the TACP in multiple rulings. In other words, both interpretations fall within the spectrum of plausible interpretations of a legal framework characterised by genuine ambiguity.

355. As already mentioned, this acknowledgement of the ambiguity of the Panamanian legal framework does not constitute an evasion of the analysis, but rather its premise. The question before the Tribunal is not which interpretation is correct, but whether the conduct of the state entities – carried out on the basis of a legally defensible interpretation – meets the threshold of

[438] **Annex RL-64**, *Case concerning the payment in gold of Brazilian federal loans contracted in France*, PCIJ, judgment of 12 July 1929, p. 124, which states: *'It follows that the Court must pay the utmost regard to the decisions of the municipal courts of a country, for it is with the aid of their case-law that it will be enabled to decide what are the rules which, in actual fact, are applied in the country whose law is recognised as applicable in a given case*'.

[439] **Annex C-34**, Act No. 22 of 27 June 2006 "regulating public procurement, as amended by Act 35 of 2006, Act 2 of 2007, Act 21 of 2008, Act 41 of 2008, Act 69 of 2009, Act 80 of 2009, Act 12 of

2010, Act 30 of 2010, Act 66 of 2010 and Act 48 of 2011".

440 **Annex R-90**, Civil Code of the Republic of Panama.

441 **Annex C-35**, Judgment of the Third Chamber for Administrative Litigation of the Supreme Court of Justice of 27 April 2017; **Annex R-33**, Judgment of the Supreme Court, Chamber III (Case No. 21) of 20 October 2023; **Annex R-24**, Judgment of the Supreme Court, Third Chamber (Case No. 4) of 13 September 2024.

arbitrariness, denial of due process, frustration of legitimate expectations, or lack of transparency that would constitute a breach of the standard of fair and equitable treatment under international law.

356. That said, and before applying the standard of Fair and Equitable Treatment and the legal framework relating to the composite claim alleged by the Claimants, the Tribunal must examine certain contentious preliminary issues concerning the interpretation and application of Panamanian law. These include, in particular, the validity of the periods for advance payment bonds and performance bonds, the legal regime governing their enforcement, and the relevance of the Supreme Court's evolving case law. These issues will be addressed in Section V.D *below*, in so far as the Tribunal's assessment of any breach of the Treaty depends on the content and scope of the domestic legal obligations that structured the relationship between the Parties.

D. PRELIMINARY ISSUES OF FACT CONCERNING PANAMANIAN LAW

357. Before assessing the factual circumstances alleged to constitute a breach of the Just and Equitable Treatment clause, the Tribunal must outline issues relating to the interpretation and application of Panamanian law, which are as follows: (1) the validity and duration of advance payment bonds; (2) the validity and duration of performance bonds; (3) the two-month settlement period under Article 97 of the 2011 Act; (4) the scope and applicability of Article 107 of the same Act; (5) the 30-day notice requirement;
(6) the endorsement requirements and Article 1542 of the Civil Code; (7) the decisions of the Supreme Court of Justice of 2017, 2023 and 2024; and (8) the hierarchy of norms applicable to the present dispute.

358. The preliminary nature of these considerations stems from the fact that they will, in turn, provide the Tribunal with the factual basis within which the alleged violation of the Treaty must be analysed. The Tribunal emphasises that it is addressing these issues not as a court of appeal reviewing Panamanian law, but as an international tribunal assessing the factual and legal context in which the alleged breaches of the Just and Equitable Treatment clause occurred, in accordance with Articles IV and XII(3) of the Treaty (see Sections V.C(2)a and V.C(5), *supra*).

(1) Advance payment bonds

a. Article 102 of Act 48 of 2011

359. Article 102 of Act 48 of 2011 provides:

> *"Advance payment bond. The advance payment bond guarantees the reimbursement of a specified sum of money paid as an advance to the contractor, provided that it is used for the timely and proper performance of the contract, in accordance with the terms set out in the tender documents.*
>
> *This bond shall in no case be less than one hundred per cent (100 per cent) of the sum advanced, and shall remain valid for a period equal to the main term of the contract plus an additional period of thirty calendar days following its expiry* [442] *".*

b. The Parties' Positions

(i) The Claimant's Position

360. With regard to the facts of the case, the Claimant identifies 23 advance payment bond matters in which Panama was found to have breached its obligation to refund the advance payments after the term of the bond had expired. These include multiple 'Health Centres' projects in various locations (Sambú, Tucutí, Vista Alegre, Santa Clara, El Potrero, Los Milagros, San Carlos, Soná, Monagrillo, Salamanca and others), as well as projects involving MIVIOT, MEDUCA, MINSA, CONADES, MOP and other government bodies [443] .

361. With regard to these matters, the Claimant maintains that: (a) the term of the performance bond was limited to the contract period plus 30 calendar days (Article 102 of Law 48 of 2011); (b) Panama did not enforce the bonds within this period; (c) the bonds therefore expired; and (d) Panama's subsequent steps to enforce expired bonds constitute arbitrary and unlawful conduct [444] .

---

[442] **Annex C-34**, Act No. 22 of 27 June 2006 "regulating public procurement, as amended by Act 35 of 2006, Act 2 of 2007, Act 21 of 2008, Act 41 of 2008, Act 69 of 2009, Act 80 of 2009, Act 12 of 2010, Act 30 of 2010, Act 66 of 2010 and Act 48 of 2011", p. 63, Article 102.

[443] Application, § 110 (and footnote 54 thereto) and Annex I.

[444] Application, §§ 11 and 217.

362. The Claimant further contends that, in many cases, a significant period of time—ranging from several months to several years—elapsed between the end of the contract's term and the adoption by Panama of measures aimed at enforcing the performance bond [445] . It characterises this delay as evidence of the State's failure to manage its infrastructure contracts diligently and of the arbitrary nature of the enforcement attempts late [446].

363. The Claimant provides detailed timelines for representative advance payment bond cases. In Case No. 1 (Chiriquí Aqueduct, Contract COC-02-14), the advance payment bond (No. 01-31-3331) was issued on 21 May 2014 and extended via four endorsements until 31 December 2017. Panama did not initiate settlement proceedings until 21 October 2021, a period of approximately three years and ten months after the bond had expired. In Cases Nos. 6 and 7 (El Potrero and Los Milagros Healthcare Centres, Contracts COC-40-15 and COC-41-15), the advance payment bonds expired in March and April 2017 respectively; however, Panama did not allege a breach of the works contracts until October 2022, periods of approximately five years and seven months and five years and six months, respectively [447] .

364. With regard to the applicable Panamanian law, the Claimant maintains that advance payment bonds have a defined and finite term of validity. It argues that, in accordance with Article 102 of Law 48 of 2011, the advance payment bond remains in force for the *duration of the contract, plus 30 calendar days following its expiry* [448] . Once this period has elapsed, in its view, the bond ceases to exist as a matter of

[445] Hearing, Day 4, Closing Arguments of the Claimants, pp. 957:6–20 and 963:6–15 (Mr Irurzun Montoro).

[446] Application, §§ 80, 82, 141, 148, 180, 217–219; Hearing, Day 4, Closing Arguments of the Applicants, pp. 955:7–21; 957:6–20, 962:16–963:15 and 964:9–22 (Mr Irurzun Montoro); Hearing, Day 1, Plaintiffs' opening statements, pp. 41:9–18 and 42:1–2 (Mr Irurzun Montoro).

[447] Statement of Claim, §§ 225–226 (detailing the initial chronology of advance payment bond No. 01-31-3331, stating that it was executed on 21 May 2014), and Statement of Claim, Annex I (Matters Nos. 1, 6 and 7); **Exhibit C-79**, Civil Works Contract No. COC-02-14 of 29 May 2015 (Matter No. 1); **Exhibit C-120**, Civil Works Contract No. COC-40-15 of 14 September 2015 (Matter No. 6); **Annex C-126**, Civil Works Contract No. COC-41-15 of 14 September 2015 (Case No. 7). See also Hearing, Day 4, Closing Arguments of the Claimant, p. 963:6–15 (Mr Irurzun Montoro).

[448] Claim, §§ 97–110; Reply, §§ 156–162.

right, regardless of whether the advance payment was fully reimbursed by the contractor [449].

365. The Claimant describes the wording of Article 102 as clear and unambiguous and asserts that the legislature did not provide for any open-ended extension mechanism. In contrast, it considers that the Respondent is attempting to misinterpret the phrase *'until full repayment has been* made' – which did not appear in the Act itself but in the bond templates issued by the Comptroller General's Office pursuant to Decree 317-Leg/2006 – as an independent time-limited condition that takes precedence over the statutory term of validity [450].

366. In this regard, Mr Arjona, the Claimant's expert in Panamanian law, points out that the phrase *'until full* reimbursement' appeared in certain bond templates – but not in the Act [451] – but considers that it was not a separate time-limited condition [452], but rather that described the purpose of the bond within the defined term [453]. In this regard, it points out that Resolution 2259-2023 of the Comptroller General's Office removed these words from the bond templates, which it considers to be evidence of their original inclusion incorrect [454].

449 Application, § 94; Reply, § 145.

450 Reply, § 145; Arjona I, section 2.3, pp. 23–24; Arjona II, § B.3, p. 29; with reference to **Annex C-33**, Decree No. 317-Leg. "regulating the bonds issued to guarantee the State's contractual obligations and establishing their standard forms" of 12 December 2006.

451 Hearing, Day 1, p. 228:12–21 (Mr Arjona).

452 Hearing, Day 1, pp. 228:12–21, 286:16–287:3 (Mr Arjona).

453 Hearing, Day 1, pp. 229:14–230:12 (Mr Arjona); see Hearing, Day 1, Opening Statements by the Claimants, pp. 43:20–44:1–4 (Mr Irurzun Montoro).

454 Arjona I, section 2.3, pp. 24, 25; see **Annex AA-9**, Resolution No. 2259-23-LEG/FySE of 10 August 2023 issued by the Comptroller-General's Office. Furthermore, the Court notes that Article 28 of Legislative Decree 317/2006 states *'the sum advanced shall be* reimbursed' and not *'full reimbursement*'. See **C-33**, Decree No. 317-Leg. "regulating the bonds issued to guarantee the State's contractual obligations and establishing their standard forms" of 12 December 2006, Article 28. The wording *"until full* reimbursement" originates from the validity clause of the bond template annexed to Legislative Decree 317/2006, not from Article 28 itself. The validity clause of the model, for its part, states: *"This bond shall remain in force throughout the entire term of the MAIN CONTRACT and for a further period of thirty (30) days following its expiry, or until the advance payment has been fully reimbursed to THE GOVERNMENT BODY, by virtue of this bond*". It is this wording that was incorporated into individual surety contracts. See, for example, **Annex C-101**, Advance Payment Surety No. 04-31-530, Addendum No. 1, Clause 3(b), which is the wording cited both by the TACP in its Resolution No. 018-2023-Pleno/TACP and by the Supreme Court in its 2023 decision. See **Annex R-31**, TACP Resolution No. 018-2023-Pleno/TACP (Case No. 4) of

30 January 2023 and **Annex R-24**, Judgment of the Supreme Court, Chamber III (Case No. 4) of 13 September 2024.

367. Furthermore, BHL invokes the principle of the hierarchy of norms [455]. In accordance with this principle, it argues that, under Panamanian administrative law, a regulation – the bond templates pursuant to Decree 317-Leg/2006 [(456)] cannot create obligations or extend periods of validity beyond what is provided for in Law 48 of 2011, its enabling legislation [457]. The Claimant maintains that, insofar as the bond templates sought to impose a condition *'until full* reimbursement' [458], this clause was *ultra vires* [459]. Mr Arjona explained that the Comptroller-General's bond templates, as subordinate regulatory instruments, cannot take precedence over the clear time limit established by Article 102 of Act 48 of 2011 [460].

368. The Claimant also points out that the Comptroller General's Office itself appears to have recognised this inconsistency when the words *'up to full* reimbursement' were removed from the bond forms by Resolution 2259-2023 – an amendment which the Claimant characterises as the correction of a long-standing regulatory error [461].

369. With regard to the facts of the case, Mr Alfonso Prieto González, Chief Executive of Banesco Panama, stated in his witness testimony that Panama's infrastructure policy during President Martinelli's administration was *"very* expansionary" and that the State was *"unable to supervise* [the projects] *properly*". He stated that at a certain point, the performance bonds ceased to be renewed because *"neither the contractors nor the Panamanian public authorities requested it*". Mr Prieto González also testified that, in his view, officials *"attempted to conceal the economic disaster that had occurred and targeted the entity that had the most money*

[455] Hearing, Day 1, Plaintiffs' Opening Statements, pp. 43:21–44:4 (Mr Irurzun Montoro).

[456] Reply, §§ 147(a) and 212; **Annex C-33**, Decree No. 317-Leg. "regulating the bonds issued to guarantee the State's contractual obligations and establishing their standard forms", dated 12 December 2006.

[457] Hearing, Day 1, Opening Statements by the Claimants, pp. 43:21–44:4 (Mr Irurzun Montoro).

[458] Cf. Hearing, Day 1, pp. 228:12–229:13 (Mr Arjona); Hearing, Day 2, pp. 385:20–386:7 (Mr Arjona).

[459] Hearing, Day 2, pp. 495:8–496:5 (Mr Arjona).

[460] Hearing, Day 1, pp. 494:13–496:5; 502:21–503:6 (Mr Arjona); see also Reply, § 147(b).

[461] Reply, §§ 237 (and its footnote 178); Statement of Claim, §§ 105, 117 and 119; **Annex C-46**, Resolution No. 2259-2023-LEG/FySE "regulating the bonds issued to guarantee the State's contractual obligations, establishing their templates and repealing Decree No. 33-Leg of 8 September 2020" dated 10 August 2023.

briefly: the insurance companies" [462]. The Tribunal cites this testimony without, at this stage, endorsing or rejecting Mr Prieto's characterisation of Panama's grounds González [463].

(ii) The Defendant's Position

370. Panama sets out its interpretation of the relevant provision, referring to the text, the Supreme Court's interpretation and the purpose of the provision, and explains that the bonds remain in force until the payments are repaid, regardless of the passage of time.

371. Indeed, the Defendant argues that the purpose of the advance payment bond is to guarantee the repayment of public funds advanced to the contractor and that the bond must remain in force until that purpose is fulfilled [464].

372. Furthermore, it explains that Article 22 of Law 22 of 2006 provides that public procurement rules shall be interpreted in the light of the principles of public interest, value for money and transparency, with the public interest taking precedence. On this basis, Panama argues that allowing an advance payment bond to lapse whilst public funds remain unreimbursed would be contrary to the public interest and would frustrate the purpose of the bond [465].

373. Mr Palacios, an expert for the Respondent, states that the purpose of the advance payment bond is to guarantee the repayment of the advance and that its validity must, therefore, extend until that purpose is fulfilled. He bases this on the Supreme Court's decision

[462] Prieto, §§ 9–12; see in this regard the Statement of Claim, § 82.

[463] As mentioned in Section I.C, *supra*, the Court rejected the Claimants' request that Mr Prieto González be summoned to be examined at the hearing. The Tribunal stated in Procedural Order No. 3, §§ 26 and 27, that the rejection of the Claimants' request did not in any way constitute an assessment of the probative value of Mr Prieto González's witness statement, which the Tribunal would undertake at the appropriate time. References to Mr Prieto González's witness statement in this Award are consistent with this decision.

[464] Statement of Defence, §§ 106–115.

[465] Response, §§ 106–115; Palacios I, reply to question 3, §§ 46–53.

of the Supreme Court of September 2024 and in the TACP's decision of January 2023 as confirmation of his argument [466] .

374. Panama explains that the removal of the words *'until the advance payment has been* repaid' by Resolution 2259-2023, far from supporting BHL's position, reflects an administrative simplification and does not alter the substantive legal position, which was confirmed by the Supreme Court of Justice [467] . It argues that, even if the temporary wording of Article 102 of the 2011 Act were to be interpreted as proposed by the Claimant, the purpose of the advance payment bond – to guarantee the reimbursement of public funds used for the advance payment – provides an independent legal basis for the bond's validity under Article 22 of Act 22 of 2006, which requires that public procurement rules be interpreted in the public interest [468] .

375. Consequently, based on its interpretation, the advance payment guarantees remained in force until the advance payments had been fully repaid, regardless of the passage of time.

376. With regard to the timeframes identified by the Claimant, the Respondent contends that: (a) the delays were caused by the inherent complexity of the administrative resolution procedures and by contractors' appeals with suspensive effect; (b) in only a limited number of cases were contracts resolved *'months or* years' after the performance period had ended; and (c) each instance of delay was justified by the specific circumstances of the case [469] .

---

[466] Palacios I, pp. 42–43; Palacios II, p. 27; with reference to **Annex R-24**, Judgment of the Supreme Court, Chamber III (Case No. 4) of 13 September 2024; **Annex R-10**, TACP Decision No. 020-2023/TACP (Case No. 13) of 30 January 2023.

[467] Rejoinder, §§ 106 and 180; Reply, §§ 114, 135–136; Palacios II, § 66; with reference to **Annex C-46**, Resolution No. 2259-2023-LEG/FySE *"regulating the bonds issued to guarantee the State's contractual obligations, establishing their standard forms and repealing Decree No. 33-Leg of 8 September* 2020" of 10 August 2023.

[468] Hearing, Day 4, Closing arguments of the Defendants, pp. 1088:5–14 and 1091:1–10 (Mr Velarde Saffer); Hearing, Day 1, Opening arguments of the Defendants, pp. 156:1–15 (Mr Velarde Saffer); Rejoinder, §§ 193–210; Defence,
§ 121; see also Palacios II, §§ 40 and 42 (on interpretation in accordance with Article 22 of Law 22 of 2006).

[469] Defence, §§ 191–194.

377. The Respondent specifically addresses Issue No. 30 (MIVIOT, Advance Payment Bond), where a period of approximately 10 months elapsed between the Comptroller General's refusal to endorse a contract extension in April 2018 and the request for enforcement of the bond in February 2019 [470] . Panama maintains that this delay is explained by the required procedural steps and does not constitute arbitrary conduct [471] .

378. Panama also challenges the Claimant's characterisation of the time limits, in that it sets the period as commencing from the date of legal effect rather than from the date of the underlying breach of contract [472] . It maintains that the relevant timeline begins with the contractor's breach, which occurs through an administrative decision (which may involve multiple extensions, appeals to the TACP with suspensive effect, and consultations with the Comptroller General's Office) [473] and culminates in the claim for enforcement of the performance bond [474] . When measured from the contractor's breach rather than from the bond's stated expiry date, Panama argues, the delays are significantly shorter and attributable to legitimate procedural requirements [475] .

c. *The Court's analysis*

379. From a factual perspective, the question to be analysed by the Court is whether, under Panamanian law in force during the relevant period (2014–2019), advance payment bonds had a defined term of validity (the performance period plus thirty days) or whether, on the contrary, they remained in force until the advance payment had been repaid in full. Having carefully considered the factual and legal arguments put forward

---

[470] Reply, §§ 232 and 300 and footnotes 316 and 317; with reference to **Annex R-56**, Note No. 1404-18-DFG from the Comptroller's Office (Case No. 30) dated 5 April 2018, and **Annex C-273**, Communication DMV-160-2019 from Panama to the contractor and Banesco Seguro dated 13 February 2019.

[471] Rejoinder, §§ 150, and 152–155; Reply, §§ 84, 171 and 308; Palacios II, §§ 15 and 118.

[472] Hearing, Day 4, Closing Arguments of the Respondent, pp. 1071:21–1073:6, 1081:14–1082:9 (Mr Velarde Saffer); Rejoinder, §§ 162–168.

[473] Statement of Defence, § 177; Palacios II, § 18; Palacios I, § 128; Hearing, Day 4, Closing Arguments of the Defendant,
pp. 1102:10–12 (Mr Velarde Saffer).

[474] Defence, § 188; Palacios I, § 128; Hearing, Day 4, Closing Arguments of the Defendant, pp. 1081:15–1082:4 (Mr Velarde Saffer); Hearing, Day 1, Defendant's opening submissions, pp. 141:7–19 (Mr Velarde Saffer).

[475] Rejoinder, §§ 132, 136, 141 and 193; Reply, § 188; Palacios II, § 116; Palacios I, § 128; Hearing, Day 4, Closing Arguments of the Respondent, pp. 1071:21–1073:6 (Mr Velarde Saffer).

by the Parties [476], the Tribunal concludes that this issue was characterised by genuine ambiguity during the relevant period.

380. As a preliminary observation, the Tribunal notes that this is a matter of interpretation of Panamanian law on which the Parties' experts hold differing positions divergent [477].

381. The text of Article 102 establishes a specific period of validity for the advance payment bond, corresponding to the contractual performance period plus thirty calendar days [478]. This wording is, *prima facie*, clear. However, the bond templates approved by the Comptroller General's Office via Decree 317-Leg/2006 also included a reference to the validity period until *'full* repayment' [479], creating a textual inconsistency between the statutory provision and the applicable regulatory instrument. The Claimant's expert, Mr Arjona, acknowledged that this phrase had been present in the Comptroller General's bond templates since at least 2006 [480]. This means that the regulatory framework had operated on the assumption of indefinite validity for a significant period – a practice which, although ultimately corrected by Resolution 2259-2023 [481], contributed to the ambiguity.

382. In this regard, the Court considers it relevant that Resolution 2259-2023 amended the bond forms to remove that reference. Whilst this amendment is consistent with the Claimant's argument that the original inclusion of such wording was

---

[476] Statement of Defence, §§ 149–211; Rejoinder, §§ 43–51; Palacios I, §§ 121–123.

[477] See Arjona I, paragraph 1, p. 15 and paragraph 3.4, p. 28; Palacios II, §§ 11 and 62; Palacios I, § 71; Hearing, Day 1, pp. 228:6–20, 277:14–16, 280:15–18 and 293:10–16 (Mr Arjona); Hearing, Day 2, pp. 408:16–409:6 (Mr Palacios). In this regard, see Hearing, Day 4, Closing Arguments of the Respondent, pp. 1084:3–9 (Mr Velarde Saffer); Duplica, § 42; Replica, §§ 110 and 142–155; Answer, §§ 151–154; Statement of Claim, §§ 94–105.

[478] **Annex C-34**, Act No. 22 of 27 June 2006 "regulating public procurement, as amended by Act 35 of 2006, Act 2 of 2007, Act 21 of 2008, Act 41 of 2008, Act 69 of 2009, Act 80 of 2009, Act 12 of 2010, Act 30 of 2010, Act 66 of 2010 and Act 48 of 2011", Article 102.

[479] **Annex C-33**, Decree No. 317-Leg. "regulating the bonds issued to guarantee the State's contractual obligations and establishing their standard forms" of 12 December 2006.

[480] Hearing, Day 1, pp. 228:4–230:5 (Mr Arjona); see also Hearing, Day 1, Opening Statements by the Respondent, pp. 43:4–7 and 52:2–7 (Mr Irurzun Montoro).

[481] **Annex C-46**, Resolution No. 2259-2023-LEG/FySE "regulating the bonds issued to guarantee the State's contractual obligations, establishing their templates and repealing Decree No. 33-Leg of 8 September 2020" of 10 August 2023.

This anomaly also demonstrates that, prior to the amendment, the regulatory framework did not possess the degree of clarity that BHL now attributes to it.

383. The Court also notes that the decisions of the Supreme Court of Justice of October 2023 [482] and September 2024 [483] interpreted Panamanian law to mean that performance bonds – including advance payment bonds – remain in force beyond the expiry of the contract. The Tribunal must accord due weight to these judicial interpretations by Panama's highest court, without prejudice to the Tribunal's competence to assess their reasonableness in the context of the Fair and Equitable Treatment standard. In this regard, the Tribunal considers Mr Arjona's statement [484]during his cross-examination to be particularly significant; on that occasion, he did not describe the Supreme Court's interpretation of Article 102 as arbitrary, but merely considered it to be *'legally* possible', whilst maintaining that it is not the only permissible interpretation. This statement confirms that the Respondent's interpretation, whilst not the only available reading, falls within the range of reasonable interpretations of Panamanian law.

384. However, the Tribunal finds that the time lapses between the expiry of the validity periods of the bonds (as they might have been understood at the time of their issue) and Panama's subsequent attempts at enforcement are significant. In many cases, enforcement proceedings were initiated months or even years after the legal validity period had expired. Even accepting that the bonds might still be legally enforceable, the combination of prolonged periods of administrative inaction followed by belated enforcement attempts raises questions regarding the consistency, predictability and procedural regularity of the State's conduct—issues which will be examined in the context of the analysis of the Fair and Equitable Treatment standard in Section V.E, *below*. Particularly given the time intervals between the expiry dates of the advance payment bonds and the attempts at enforcement

---

[482] **Annex R-33**, Judgment of the Supreme Court, Chamber III (Case No. 21) of 20 October 2023.

[483] **Annex R-24**, Judgment of the Supreme Court, Chamber III (Case No. 4) of 13 September 2024.

[484] Hearing, Day 1, p. 294:13–19 (Mr Arjona); see also, in this regard, Hearing, Day 4, Closing Arguments of the Defendant, pp. 1056:7–10 (Mr Gallego); Day 4, the Respondent's closing arguments, pp. 1119:20–1120:3 (Mr Velarde Saffer); Hearing, Day 1, pp. 316:4–317:18 (Mr Arjona).

in Panama are substantial and consistent across the various bonds. For example, in the Healthcare Units Cases (Case No. 4 Vista Alegre, Case No. 5 Santa Clara, Case No. 6 El Potrero, Case No. 7 Los Milagros, and others), the intervals range from approximately one year and six months to five years and seven months [485] .

385. The Court notes that in the El Potrero and Los Milagros cases, the advance payment bonds expired several months before the extended contract completion dates, indicating that the government entities failed to request the relevant endorsements when granting contract extensions, a breach which Circular 20-2021.LEG of the Comptroller General's Office subsequently acknowledged [486] .

386. The Court further observes that the advance payment guarantees were issued between 2014 and 2017 within a regulatory framework open to more than one reasonable interpretation. A reasonable guarantor in the position of Banesco Seguros (and therefore BHL as the parent company and investor) would have taken into account both the wording of Article 102 (which pointed towards a limited term of validity) and the wording of the bond templates (which suggested a potentially extended term of validity) and would have taken into account both the text of the law (which pointed to a specific period of validity) and the wording of the guarantee template (which pointed to an indefinite period of validity). The Court notes that subsequent judicial rulings of 2023 [487] and 2024 [488] adopted the latter interpretation, but these

The rulings were handed down several years after the bonds were issued.

[485] **Annex C-103**, Administrative Resolution No. 040-2022-CONADES relating to contract COC-55-15 of 22 September 2022 (Case No. 4 Vista Alegre); **Annex C-112**, Administrative Decision No. 038-2022-CONADES relating to contract COC-38-15 of 21 September 2022 (Case No. 5 Santa Clara); **Annex C-124**, Administrative Decision No. 005-2023-CONADES relating to contract COC-40-15 of 30 January 2023 (Case No. 6 El Potrero); **Annex C-130**, Administrative Decision No. 006-2023-CONADES relating to contract COC-41-15 of 30 January 2023 (Case No. 7 Los Milagros); see also the Annex to this Award in Section IX; Claim, §§ 141–151.

[486] Claim, §§ 240 and 244; Reply, Annex, p. 132 et seq.; **Annex C-124**, Administrative Decision No. 005-2023-CONADES relating to contract COC-40-15 of 30 January 2023 (Case No. 6 El Potrero); **Annex C-130**, Administrative Decision No. 006-2023-CONADES relating to contract COC-41-15 of 30 January 2023 (Case No. 7 Los Milagros); **Annex C-77**, Circular No. 20-2021.LEG of the Comptroller General's Office of 21 June 2021.

[487] **Annex R-33**, Judgment of the Supreme Court, Chamber III (Case No. 21) of 20 October 2023.

[488] **Annex R-24**, Judgment of the Supreme Court, Chamber III (Case No. 4) of 13 September 2024.

387. The Tribunal also notes that, under Panamanian law, the limitation period for claims against the State is fifteen years [489] . This provision, which was known or ought to have been known to market participants, established a framework under which the State's claims relating to advance payments could remain legally enforceable for a period far exceeding the performance schedule of the works contracts.

388. The Tribunal concludes that, as a matter of Panamanian law and as a factual element for its own analysis under Article XII of the Treaty, the duration of the advance payment bonds was genuinely ambiguous during the relevant period. The legal text pointed in one direction (a defined period), whilst the bond templates and subsequent judicial interpretations pointed in another (validity until reimbursement). The Tribunal does not accept either Party's characterisation that the law is clear and unambiguous; rather, there is genuine ambiguity in this regard within the Panamanian legal framework. These conclusions are relevant to the analysis of Fair and Equitable Treatment in Section V.E *below*, given that they relate to the reasonableness of the Claimant's legitimate expectations and the foreseeability of the State's subsequent conduct.

(2) Performance bonds

a. Articles 101 and 97 of Law 48 of 2011

389. Article 101 of Law 48 of 2011 provides:

> *"Performance bond. Once the award has been finalised, in the manner set out in this Act, for contracts whose value exceeds thirty thousand balboas (B/.30,000.00), the contracting authority shall require the tenderer to provide a performance bond for the contract, in accordance with the provisions of the tender documents.*
>
> *This bond guarantees the performance of a contract or the obligation to faithfully carry out its purpose and, once this has been fulfilled, to rectify any defects that may arise. Its validity corresponds to the period of performance of the main contract and until the expiry of the*

[489] Palacios II, § 68; Hearing, Day 2, p. 405:15–18 and 415:17–21 (Mr Palacios); **Annex R-232**, Act No. 8 of 1956 approving the Panama Tax Code of 27 January 1956 and **Annex LP-16**, Act No. 8 of 27 January 1956 (Tax Code), Article 1073; Reply, §§ 139–140 and 359; Hearing, Day 1, Opening Statements by the Defendant,

p. 161:2–7 (Mr Velarde Saffer).

settlement, plus a period of one year, in the case of movable property, to cover latent defects, such as workmanship, defective materials or any other fault or defect in the subject matter of the contract, except for consumable movable property not subject to specific regulations, for which the period of cover shall be six months; and for a period of three years, to cover defects in the reconstruction or construction of the works or immovable property.

The successful tenderer for a lease contract for State property shall provide a performance bond equivalent to one month's rent for each year of the contract's term. For the purposes of latent defects, this bond shall cover six months' rent.

In contracts of indeterminate value, the contracting authority, in coordination with the Comptroller-General's Office, shall set the amount of the performance bond to be lodged.

In cases of procurement through exceptional procedures, the relevant performance bond must be lodged in accordance with the above rules.

In cases of the acquisition of goods through a reverse auction, the bond shall be equivalent to ten per cent (10 per cent) of the appraised value of the goods.

Contracts for promotion and advertising services relating to advertising campaigns and public relations services abroad, as set out in Article 93, shall not require a performance bond, provided that the contracts stipulate that payment to the contractor shall be made following the performance of the subject matter of the contract and the contracting authority issues a certificate of satisfactory acceptance, signed by the appointing authority [490] *".*

390. Two features of this provision are immediately apparent. Firstly, Article 101 requires the contractor to provide a performance bond equal to half the price of the works contract at the time of its execution. Secondly, the validity of the bond extends across two time periods: the period of

[490] **Annex C-34**, Act No. 22 of 27 June 2006 "regulating public procurement, as amended by Act 35 of 2006, Act 2 of 2007, Act 21 of 2008, Act 41 of 2008, Act 69 of 2009, Act 80 of 2009, Act 12 of 2010, Act 30 of 2010, Act 66 of 2010 and Act 48 of 2011", pp. 62–63, Article 101.

performance of the contract itself and the period running from the termination of the contract until the completion of the contract settlement. Unlike Article 102, which links the advance payment bond solely to the period of contract performance, Article 101 links the performance bond to a procedure – the settlement – which may extend well beyond the performance of the works contract.

391. The settlement process is governed by Article 97 of Law 48 of 2011, which provides in the relevant part:

> *"Time limit for the settlement of contracts. For the purposes of this Article, the settlement of contracts shall be understood to mean the procedure through which, once the performance of the contract has been completed, the parties determine the sums owed to one another.*
>
> *The settlement of contracts shall be carried out by mutual agreement within the time limit set out in the tender documents or their equivalent, or within the time limit agreed by the parties for that purpose. In the absence of such a time limit, settlement shall take place within two months of the expiry of the period provided for the performance of the contract, or of the issue of the administrative act ordering its termination, or of the date of the agreement providing for such termination [491] ".*

392. Article 97 defines final settlement as the procedure by which, once the works contract has been fully performed, the parties settle their mutual obligations. Where there is no specific provision, settlement must take place within two months of one of three triggering events: (i) the expiry of the term of performance of the works contract; (ii) the issuance of an administrative act ordering the termination of the contract; or (iii) the date of a consensual agreement to terminate the contract.

393. The central interpretative issue in this case is how Articles 101 and 97 interact. Article 101 states that the validity of the performance bond *"corresponds to the period*

[491] **Annex C-34**, Act No. 22 of 27 June 2006 'regulating public procurement, as amended by Act 35 of 2006, Act 2 of 2007, Act 21 of 2008, Act 41 of 2008, Act 69 of 2009, Act 80 of 2009, Act 12 of 2010, Act 30 of 2010, Act 66 of 2010 and Act 48 of 2011", p. 61, Article 97.

"*upon performance of the main contract and upon completion of the* settlement" [492] . Article 97 states that settlement must take place within two months of the relevant triggering event. Whether the two-month period in Article 97 functions as an outer limit on the validity of the performance bond – such that the bond lapses if settlement is not completed within that timeframe – or whether it is merely an administrative timetable that does not affect the bond's continued enforceability, is at the heart of the Parties' disagreement.

b. The positions of the Parties

(i) The Claimant's Position

394. The Claimant argues that performance bonds have a defined term of validity consisting of the contract performance period plus a defined *'settlement period*'. It maintains that *the* '*settlement* period' referred to in Article 101 of Law 48 of 2011 is the two-month period established by Article 97, which provides that the settlement of the contract must take place within two months of the expiry of the term provided for the performance of the contract [493] .

395. BHL argues that if the contracting authority fails to commence or complete the settlement within that two-month period, the performance bond expires by operation of law. It considers that any other interpretation would render the performance bond 'perpetual', a result inconsistent with the nature of surety instruments, which by definition have limited terms [494] .

396. It argues that the only two plausible interpretations are those it puts forward, as otherwise the provision would be meaningless. It contends that Panama's interpretation of these terms would render meaningless the trigger for the issuance of the administrative act ordering the resolution under Article 97, because, according to Panama's logic,

[492] **Annex C-34**, Act No. 22 of 27 June 2006 'regulating public procurement, as amended by Act 35 of 2006, Act 2 of 2007, Act 21 of 2008, Act 41 of 2008, Act 69 of 2009, Act 80 of 2009, Act 12 of 2010, Act 30 of 2010, Act 66 of 2010 and Act 48 of 2011", pp. 62–63, Article 101.

[493] Reply, §§ 184–192, in particular § 188; Hearing, Day 1, Opening Statements by the Claimants, pp. 47:9–21 (Mr Irurzun Montoro); Hearing, Day 4, Claimants' Closing Arguments, pp. 979:11–16 (Mr Irurzun Montoro); Hearing, Day 1, pp. 233:6–12, 298:16–299:4 (Mr Arjona).

[494] Reply, §§ 177–178 and 246; Hearing, Day 1, Plaintiffs' opening statements, pp. 21:1–20, 44:17–45:12, 47:21–49:12 (Mr Irurzun Montoro); Hearing, Day 4, Plaintiffs' closing submissions, pp. 979:17–980:7 (Mr Irurzun

Montoro); see also Hearing, Day 1, pp. 232:17–233:5 and 298:16–299:4 (Mr Arjona).

the two-month period cannot begin to run until all appeals against the termination of the contract have been resolved and all procedures for the enforcement of the performance bond have been completed – at which point there would be nothing further to settle [495] .

397. The Claimant rejects the Defendant's argument that *the 'settlement* period' under Article 101 is an open-ended concept extending until all administrative and judicial proceedings have concluded, as this interpretation would render performance bonds perpetual instruments – an outcome incompatible with the nature of a bond as a time-limited accessory obligation
defined [496].

398. The Claimant specifically addresses Issue No. 29 (MEDUCA – Performance Bond), and argues that the delay between the original contractor's breach of contract and the eventual claim for payment against Banesco far exceeded any reasonable timeframe, demonstrating Panama's arbitrary approach to the enforcement of bonds. [497] .

(ii) The Respondent's Position

399. The Respondent maintains that performance bonds remain in force *'until the settlement* deadline' in accordance with Article 101 of the 2011 Act and that, for contracts terminated due to the contractor's breach, settlement cannot take place until all appeals and bond enforcement proceedings have been completed.

400. Panama argues that the two-month period – on which the Claimant bases its position – under Article 97 applies solely to the administrative act of settling accounts and not to the entire settlement process, which may involve the enforcement of bonds and the contractor's appeals before the TACP (which have effects

---

[495] Rejoinder, §§ 184–193.

[496] Reply, §§ 184–192; Arjona II, Question D.9, pp. 41–42 and Question E.11, pp. 43–44; see also Mr Arjona's explanations during his cross-examination at the hearing: Hearing, Day 1, pp. 231:3–13, 232:8–12 (Mr Arjona). Hearing, Day 1, Claimants' opening statements, pp. 21:1–22:8, 45:2–5, 48:18–49:12 (Mr Irurzun Montoro). [497] Claim, §§ 114, 217–219 and 318.

suspensive) and subsequent appeals before the Supreme Court of Justice [498]. In Panama's view, when a contract is terminated due to the contractor's breach, *performance* is not *complete* [499] within the meaning of Article 97 until the consequences of that breach have been fully adjudicated [500].

401. Mr Palacios, the Defendant's expert, supports this interpretation, arguing that Article 101 expressly provides that performance bonds remain in force *'upon completion of the* settlement' and that, for contracts terminated due to the contractor's breach, settlement is a multi-stage process that necessarily extends beyond two months. He emphasises that the bond exists to guarantee the State's ability to recover from the guarantor and that allowing the bond to expire before the settlement is complete would frustrate its purpose [501].

402. Panama clarifies that it is not arguing that performance bonds are perpetual, but rather that they remain in force for a determinable period, namely until the liquidation is complete [502]. It also relies on the testimony of Mr Palacios that, under Law 48 of 2011, appeals before the TACP have suspensive effect on the settlement process [503]. This means that once a contractor or surety appeals against an order to enforce a bond, the entire settlement process is suspended until the appeal is resolved, which may take months or years [504]. The Respondent argues that, in these circumstances, it would be illogical for the legislature to have intended that the bond

---

498 Rejoinder, §§ 201, 223; Defence, §§ 206–212; Hearing, Day 1, Defendants' opening statements, pp. 163:17–164:6, 168:2–15 (Mr Velarde Saffer); Hearing, Day 4, Defendants' closing arguments, pp. 1102:10–1103:2 (Mr Velarde Saffer).

499 Rejoinder, § 200, 206; Answer, §§ 140–147; Palacios II, § 97; Hearing, Day 1, Defendants' opening statements, p. 164:4–9 (Mr Velarde Saffer).

500 Hearing, Day 1, Opening statements by the Defendant, pp. 163:10–164:3 and 168:2–14 (Mr Velarde Saffer); Hearing, Day 2, pp. 452:21–453:2 (Palacios); Hearing, Day 4, Closing Arguments of the Defendants, pp. 1100:11–21 and 1103:1–2 (Mr Velarde Saffer).

501 Hearing, Day 2, p. 355:3–12 (Mr Palacios); Palacios II, §§ 84–90; Palacios I, §§ 86–93.

502 Rejoinder, § 198; Answer, §§ 149–150; Hearing, Day 1, Opening Arguments by the Defendant, p. 161:2–7 (Mr Velarde Saffer).

503 Palacios I, § 102; Hearing, Day 1, Defendant's opening submissions, p. 134:10–22 (Mr Velarde Saffer); Day 4, Defendant's closing submissions, p. 1102:9–21 (Mr Velarde Saffer).

504 Palacios II, § 15; Palacios I, § 143.

the period for compliance would expire after two months whilst the very proceedings for which the bond serves as security remain pending [505] .

403. The Respondent cites two Supreme Court decisions – in 2023 and 2024 – which confirmed that performance bonds remain in force throughout the entire liquidation process [506] .

404. It explains that, since none of the disputed contracts has been fully settled, all performance bonds remain in force by virtue of section 101. The Respondent emphasises that the settlement process cannot be completed until all appeals and bond enforcement proceedings have been concluded, and that this process was delayed in many cases by the contractor's appeals to the TACP, which had suspensive effect [507] .

405. With regard to Issue No. 29, the Respondent argues that MEDUCA waited for the TACP to confirm the administrative decision before claiming payment from Banesco, which constituted '*reasonable* conduct' given the suspensive effect of the contractor's appeal. Panama maintains that adherence to due process procedures cannot constitute arbitrary conduct [508] .

---

505 Rejoinder, § 201; Hearing, Day 1, Respondent's Opening Statements, 169:9–14 (Mr Velarde Saffer). See also Reply, §§ 201 and 209–210 (on the complex nature of the liquidation procedure in cases of default); Palacios II, §§ 98, 101.

506 Rejoinder, §§ 106, 224; Defence, §§ 145–146 and 158; Hearing, Day 1, Defendant's opening submissions, pp. 165:9–12, 166:6–18 and 167:9–14 (Mr Velarde Saffer); Hearing, Day 2, p. 414:5–11 (Mr Palacios).

507 Rejoinder, §§ 200–209; Reply, §§ 206–212; Palacios I, §§ 86–93; Hearing, Day 4, Closing Arguments by the Defendant, pp. 1100:9–17 and 1103:14–19 (Mr Velarde Saffer).

508 Defence, §§ 185 (and footnote 237); Hearing, Day 4, Defendant's closing arguments, p. 1056:12–20 (Mr Gallego); **Annex C-0263**, Performance bond No. 02-31-2552 of 9 March 2017; **Exhibit C-265**, Administrative Decision No. 707 relating to contract O-11-2017 dated 28 February 2020; **Exhibit C-267**, Communication DM/DNAL-030-2020-26 from Panama to Banesco Seguros dated 28 January 2020; **Annex R-48**, Resolution No. 102-2020 Plenary/TACP of the TACP (Case No. 29) dated 9 July 2020; **Annex R-49**, Claim No. DV-INFR.E/436-2020 from MEDUCA (Case No. 29) dated 10 August 2020; **Annex R-50**, Letter from Banesco Seguros to MEDUCA (Case No. 29) dated 25 August 2020; **Annex R-51**, MEDUCA Resolution No. 3448 (Case No. 29) dated 26 October 2020; **Annex R-53**, MEDUCA Note No. DM/DNAL-0864-2019-26 (Case No. 29) dated 25 April 2019; **Annex R-92**, Settlement Agreement by Mutual Consent (Case No. 29) dated 13 December 2024; **Annex R-225**, Inspection Report (Case No. 29) dated 9 November 2018.

c. The Court's analysis

406. The Court observes that the interplay between Articles 101 and 97 of Law 48 of 2011 presents a genuine interpretative difficulty. This difficulty arises from the fact that the law was drafted primarily with the normal termination of contracts in mind and does not expressly regulate the distinct situation of contracts terminated due to the contractor's breach [509] .

407. From a textual perspective, Article 101 provides that the performance bond remains in force *'until the settlement of the main* contract' [510]. This wording does not establish a fixed time limit, but rather links the validity of the bond to the conclusion of the settlement procedure [511]. Article 97, for its part, provides for a default period of two months for that process, but does so on the premise that the contract has been fully performed [512], a circumstance that is not clearly present in cases where proceedings are initiated to reach a decision on breach of contract [513].

408. The Court considers Mr Palacios's explanations to be persuasive in that, in cases of termination due to the contractor's breach of contract, this may involve actions that objectively exceed the two-month period, such as the enforcement of performance bonds, appeals with suspensive effect [514] and the final settlement of accounts [515] .

The Claimant's expert, Mr Arjona, acknowledged during cross-examination that such proceedings involve these very same steps – which, in his words, *'obviously are not going to be completed in two* months' [516] . Mr Palacios went further, arguing that the

509 Arjona II, Question C.5, p. 35, § 9 and Question D.8, pp. 39–41, §§ 3–4; Palacios II, § 14 and 88; Palacios I, § 135–136 and 143; Hearing, Day 1, Opening Statements by the Defendant, pp. 140:21–141:18, 168:2–15 and 272:13–22 (Mr Velarde Saffer); Hearing, Day 2, p. 353:10–15 (Mr Palacios).

510 Palacios II, §§ 13 and 82; Palacios I, §§ 86 and 93.

511 Palacios II, §§ 15 and 94; Palacios I, §§ 84 and 94.

512 Palacios II, § 100; Palacios I, §§ 140–143.

513 Hearing, Day 1, Opening Statements by the Defendant, p. 168:2–15 (Mr Velarde Saffer).

514 Hearing, Day 4, Closing arguments of the Defendant, p. 1102:9–20 (Mr Gallego, regarding the testimony of Mr Palacios).

515 Hearing, Day 2, pp. 355:2–12 (Mr Palacios).

516 Hearing, Day 1, pp. 306:14–307:1 (Mr Arjona: *'Well, enforcement is obviously not going to take place within two months because the completion of all the formalities involved in the enforcement proceedings under compulsory jurisdiction will not necessarily be decided within two* months').

the two-month time limit cannot be met in cases of non-compliance and that the legislature was aware of this practical reality. In light of this, the Court is not persuaded that the only interpretation is that the two-month period provided for in Article 97 was intended as an absolute outer limit on the validity of the performance bond and that it cannot be interpreted as the Defendant suggests.

409. This point of agreement amongst the experts is significant. It indicates that, regardless of whether the two-month period in Article 97 is to be understood as mandatory or merely aspirational, the expectation of strict compliance within two months is arguably unrealistic in the context of settlements relating to proceedings to declare the contractor in breach. The Court takes note of Mr Palacios's observation that the legislature, in drafting Article 97, would have foreseen the difficulty of meeting an absolute two-month deadline in the context of contracts terminated due to the contractor's breach and that, consequently, did not provide for such a deadline [517]. The Court considers this testimony to be credible and consistent with the legislative framework. The Tribunal therefore concludes, as a fact relevant to its own analysis, that Article 97 could plausibly be interpreted as an administrative timetable for the settlement of contractual accounts following a normal termination of the contract, rather than a time limit automatically extinguishing the performance bond — as interpreted by the Claimant.

410. Furthermore, the Tribunal notes the decisions of the Supreme Court of Justice from 2023 and 2024, which confirmed that performance bonds remain in force until the completion of the liquidation – as interpreted by the Respondent [518] . Due weight must be given to such interpretations by the highest national court, particularly as they have not been challenged in these proceedings as constituting an independent breach of the Treaty. The Tribunal also considers it significant that Mr Arjona stated during his cross-examination that, in accordance with Law 48 of 2011, the

[517] Hearing, Day 2, pp. 448:11–12 and 452:91–453:2 (Mr Palacios); see also Hearing, Day 1, p. 306:11–307:1 (Mr Arjona).

[518] **Annex R-33**, Judgment of the Supreme Court, Chamber III (Case No. 21) of 20 October 2023, pp. 6–7 and 23; **Annex R-24**, Judgment of the Supreme Court, Chamber III (Case No. 4) of 13 September 2024, pp. 40–41.

Contracts remain 'in force' until liquidation [519]. Whilst this statement does not in itself resolve the issue of the validity of the surety, it helps to support the Defendant's equally plausible interpretation that the obligations under the contractual framework – including surety obligations – persist throughout the liquidation proceedings.

411. At the same time, the Court observes that the existence of a defined legal timetable – even if it may prove aspirational or impracticable in cases of non-compliance – could reasonably have led economic operators in the market, including surety companies, to expect that their exposure in terms of time was limited. In other words, the existence of such a timetable – even if merely aspirational – implies a corresponding and reasonable expectation of diligence on the part of state bodies in conducting the liquidation proceedings in a timely manner.

412. Consequently, the ambiguity is palpable, and there is ample merit to be found in either of the two positions put forward by the Parties.

413. The Tribunal considers it important to clarify that this does not, however, mean that the contracting authorities have an unrestricted power to conduct the liquidation proceedings whilst keeping the surety's liability open. Even if the guarantees remained legally in force, the question remains as to whether the manner in which the Panamanian State entities exercised their rights under those guarantees – including the timeframes, procedural regularity and consistency of their conduct – satisfies the requirements of the standard of Fair and Equitable Treatment under the Treaty. The absence of a clear time limit in cases of default creates what the Tribunal considers to be a regulatory gap. The question of whether, and to what extent, an unreasonable delay in the settlement procedure may give rise to consequences for the guarantee – and, by extension, whether the treatment of specific guarantees in this case exceeded what a reasonable administration would have done –

---

[519] Hearing, Day 1, pp. 158:20–160:18 and 167:9–11 (Mr Velarde Saffer); Hearing, Day 1, pp. 251:17–252:8 (Mr Arjona) ("Q: Although under Act 48/2011, a contract remains in force until its settlement. Is that correct?" / A (Mr Arjona): "Yes, but that is for the purposes of determining the — the start of the settlement phases."); Hearing, Day 1, p. 230:9–12 (Mr Arjona).

must be assessed in the light of the specific factual circumstances of the case, which will be done in Section V.E below.

414. Having addressed the validity and duration of both advance payment bonds (Section V.D(1)) and performance bonds (this Section), the Court will now proceed to analyse the regime governing the return of bonds in accordance with Article 107 of Law 48 of 2011 – a provision which introduces a different timeframe for cases of dismissal without liability and which the Claimant invokes by analogy in support of her broader argument that bonds cannot be retained indefinitely.

(3) Refund of bonds: Article 107 of Act 48 of 2011

a. Article 107 of Act 48 of 2011

415. Article 107 of Law 48 of 2011 governs the return and cancellation of performance bonds securing public contracts. Its first five paragraphs deal with the return of performance bonds where no breach has been declared – that is, where the contractor has fulfilled its obligations and the contracting authority has formally accepted the work. They provide as follows:

> *"Refund and cancellation of guarantees. The guarantee shall be refunded or cancelled when the guarantee period has expired and the contract in question has been satisfactorily performed, or when the contract is terminated through no fault of the contractor.*
>
> *Once the contract has been finalised and the warranty period has elapsed, if no liabilities arise, the bond provided shall be returned or the guarantee or surety bond shall be cancelled.*
>
> *The decision to return the guarantee must be taken and notified to the party concerned within two months of the expiry of the guarantee period. Once this period has elapsed, the contracting authority must pay the contractor the amount due, plus statutory interest for the period from the expiry of the aforementioned period until the date of the guarantee's return, if the return has not been effected for reasons attributable to the contracting authority.*

In the event of partial acceptance, the contractor may only request the return or cancellation of the proportionate part of the guarantee where this is expressly authorised in the tender specifications.

In cases of contract assignment, the guarantee provided by the assignor shall not be returned or cancelled until the guarantee provided by the assignee has been formally established."

416. The sixth paragraph, which is central to the dispute between the Parties, provides:

> *"One year after the date of termination of the contract, if formal acceptance and final settlement have not taken place for reasons not attributable to the contractor, the guarantees shall be returned or cancelled without further delay once the liabilities of the contracting parties have been settled".*

417. Finally, the seventh paragraph provides for the regulation of the Act by the Executive: *"This article shall be regulated by the Executive* [520] ".

418. The sixth paragraph of Article 107 introduces a different time frame: where one year has elapsed since the end of the contract and the entity has failed to formally accept and settle the contract for reasons not attributable to the contractor, the performance bonds must be returned. The Claimant invokes this provision both directly and by analogy. The Claimant argues that this applies to the performance bonds in question because, until an administrative act terminating the contract is actually issued, the contractor is – as a matter of Panamanian law – in compliance. By analogy, the Claimant argues that Article 107 reflects a broader legislative policy: performance bonds cannot be retained indefinitely, and the legal system governing public procurement guarantees includes what the Claimant characterises as *a 'closing* clause' to prevent their validity from remaining open to the discretion of contracting authorities [521] .

[520] **Annex C-34**, Act No. 22 of 27 June 2006 "regulating public procurement, as amended by Act 35 of 2006, Act 2 of 2007, Act 21 of 2008, Act 41 of 2008, Act 69 of 2009, Act 80 of 2009, Act 12 of 2010, Act 30 of 2010, Act 66 of 2010 and Act 48 of 2011', Article 107.

[521] Reply, §§ 194–197; Hearing, Day 4, Closing Arguments of the Claimants, pp. 951:14–952:7 (Mr Irurzun Montoro); Hearing, Day 1, Opening Arguments of the Claimants, p. 46:1–13 (Mr Irurzun Montoro).

b. The Parties' positions

(i) The Claimant's Position

419. On the basis of Article 107(6) of Law 48 of 2011, BHL considers that, where the deadline for settling a contract has not been met through no fault of the contractor, the bond must be returned to the surety without delay. Indeed, the Claimant explains that the provision in question stipulates that, if the settlement of a contract terminated through no fault of the contractor does not take place within one year, the bonds must be returned to the surety *'without further delay'*. It adds that a breach of contract does not occur until the contracting authority issues an administrative act declaring the termination of the contract [522] . Until such a notice is issued, the contractor is not, legally speaking, in breach, even if, de facto, a breach has occurred [523] . It refers to the 2023 circular from the Comptroller General's Office as a contemporary administrative practice that confirms its interpretation [524] .

420. The Claimant argues that this provision establishes a maximum outer limit for the retention of security deposits, applicable directly to all terminated contracts or, at the very least, by analogy to contracts terminated for breach where the State has failed to act within a reasonable time [525] . This point was the subject of specific discussion during the cross-examination of Mr Palacios, the Respondent's expert, who acknowledged that, if there is no breach from a legal point of view, then Article 107(6) applies to the period prior to the decision to terminate the contract issued [526].

---

[522] Hearing, Day 1, Plaintiffs' opening statements, 46:1–13 (Mr Irurzun Montoro). See also Hearing, Day 2, p. 444:14–446:22 (Mr Palacios) (*"Q: [...] the administration discovers that there are no toilets. On 20 January, is there a breach of contract from a legal point of view? / A: No, because a legal breach only materialises upon the administrative termination of the contract.*"); Hearing, Day 2, p. 445:17–22 (Mr Palacios) (*"Q: One year and three months later, is there a breach of contract? / A: We reiterate that there is no breach until it is declared by means of an administrative decision.*").

[523] Reply, § 197; Hearing, Day 4, Closing Arguments of the Claimants, pp. 951:14–952:7 (Mr Irurzun Montoro); Hearing, Day 1, Opening Arguments of the Claimants, p. 46:6–13 (Mr Irurzun Montoro). See also Hearing, Day 4, Plaintiffs' closing arguments, p. 993:6–8 (Mr Irurzun Montoro).

[524] Hearing, Day 4, Closing Arguments of the Claimants, pp. 981:14–22 (Mr Irurzun Montoro); with reference to **Annex C-45**, Circular No. 23-2023-LEG/GySE of the Comptroller-General's Office of the Republic dated 6 October 2023.

[525] Reply, § 197; see also Arjona II, Question C.6, pp. 36–37.

[526] Hearing, Day 2, pp. 453:14–454:4 (Mr Palacios); see also, Hearing, Day 4, Closing Arguments of the Claimants,

pp. 993:13–994:1 (Mr Irurzun Montoro). The Claimant's counsel characterised this

421. The Claimant further develops the following *a fortiori* argument: the legislative purpose of Article 107(6) is to prevent the indefinite retention of bonds by the state entity. If the legislature considered it necessary to impose an outer limit of one year on the retention of performance bonds where the contractor has performed satisfactorily, then it must follow, *a fortiori*, that the State cannot retain performance bonds indefinitely where the contractor has failed to perform and the State has not taken action [527] . In this regard, the Claimant emphasises that, in several of the matters in dispute, the delays between the contractor's breach and the State's attempt to enforce the bond exceeded not only one year but, in some cases, five or more years [528] .

422. Drawing on the analysis provided by its expert, Mr Arjona, BHL considers that Article 107(6) should be understood as a mechanism that fills a legislative gap in the legal framework. This is because, in its view, the Panamanian legislature did not expressly address the situation in which the State terminates a contract for breach but fails to enforce the performance bonds within a reasonable timeframe. It argues that the one-year period set out in paragraph 6 provides the only available legal reference point for resolving this gap and that the principles of legal certainty and proportionality support its analogous application to cases of breach [529] .

423. As regards the delays by Panamanian entities in terminating the works contracts, the Claimant asserts that these were caused by Panama's mismanagement of its infrastructure programme [530] . It identifies the following causal chain: (a) Panama embarked on an excessively expansionist infrastructure policy during the administration of President Martinelli, who was unable to supervise it adequately; (b) government entities repeatedly granted extensions to contractors without

statement as *"key to the entire course of events in the actions of the public* authorities" – and which proved that the agencies' delay in issuing final decisions had the effect of keeping the performance bonds open well beyond the one-year window that Article 107(6) would otherwise have permitted. See Plaintiffs' Closing Arguments, Hearing, Day 4, p. 993:18–21 (Mr Irurzun Montoro).

[527] Hearing, Day 4, Claimants' Closing Arguments, pp. 979:17–980:7 (Mr Irurzun Montoro).

[528] Reply, Annex. See also Application, Annex; Hearing, Day 4, Claimants' Closing Arguments, pp. 957:6–22 and 963:6–15 (Mr Irurzun Montoro).

[529] Reply, § 197; Hearing, Day 1, pp. 232:3–233:17, 260:3–261:18 (Mr Arjona).

[530] Hearing, Day 1, Claimants' opening submissions, pp. 34:11–22, 104:4–11 (Mr Irurzun Montoro).

requiring the relevant endorsements on Banesco's surety bonds; (c) renewals of surety bonds ceased because neither the contractors nor the Panamanian public authorities requested them; (d) by 2018, delays had become a widespread market problem affecting the entire surety sector; and (e) Panama then decided to claim payment on bonds which, in the Claimant's view, had long since expired. It points out that Circular 20-2021.LEG of the Comptroller General's Office recognised the existence of situations where entities proceed to enforce bonds without having given the appropriate prior notices of breach to the contractors and
sureties [531].

(ii) The Defendant's Position

424. Panama considers that Article 107(6) is not applicable to the performance bonds in question, as the condition for its application – performance by the contractor – has not been met. It distinguishes paragraphs 1 to 5 – which govern the procedure for the return of performance bonds where the contractor has performed satisfactorily and the contract is terminated without fault – from paragraph 6, which provides a mechanism for closure in that specific scenario [532] .

425. The Respondent emphasises that the experts from both Parties acknowledged this [533] and that the distinction based on the contractor's fault is the organising principle of the legislative framework: Article 106 governs enforcement in the event of non-performance, whilst Article 107 governs the return of the bond in the event of satisfactory performance. Together with its expert, Mr Palacios, it asserts that interpreting paragraph 6 as applicable to cases of

[531] Claim, §§ 133 and 146; with reference to **Annex C-77**, Circular No. 20-2021.LEG of the Comptroller General's Office of the Republic dated 21 June 2021. Mr Arjona supported the Claimant's position, emphasising that state entities had a legal obligation to ensure that the performance bonds remained in force and to align them with the term of the main contracts. He argues that the failure of the state entities to request extensions of the performance bonds or endorsements when granting contract extensions constituted a breach of this obligation, which directly caused the performance bonds to lapse; Hearing, Day 1, Claimants' opening statement, pp. 36:12–16 and 37:12–18 (Irurzun Montoro).

[532] Statement of Defence, § 211; Rejoinder, §§ 215–223.

[533] Rejoinder, §§ 216–217 and footnote 295; Reply, § 197; Palacios II, § 136; Day 4, Defendant's Closing

Arguments, pp. 1081:20–1082:9 (Mr Velarde Saffer).

Such a breach would create an irreconcilable conflict with Article 106 and undermine the state entity's ability to recover from the guarantor [534] .

426. Panama does not dispute the reasoning put forward by BHL that a distinction must be drawn between 'de facto breach' and 'legal breach'; however, it asserts that Article 107(6) does not apply in cases of non-performance, as it applies solely to situations where, one year after the termination of the contract, formal acceptance of the works has not taken place for reasons not attributable to the contractor [535] . The premise is that the works have been physically completed, not that the contractor's legal position remains formally unresolved. Similarly, it rejects the Claimant's *a fortiori* argument, characterising it as a logical fallacy, and explains that Article 107 provides a simplified refund mechanism for situations where there is no fault because, precisely in such cases, the state entity has no claim against the guarantor. In cases of breach, by contrast, the state entity has an active claim to recover its losses, and the guarantee exists precisely to secure that
complaint [536].

427. With regard to the delays, the Defendant makes two observations: firstly, that liability for the delays is shared between the contractor and the circumstances of each case; and secondly, that the question of who caused the delays is ultimately irrelevant because the performance bonds were in force [537] .

428. The Respondent and its expert, Mr Palacios, point to the contractor's appeals to the TACP as a significant cause of delays, arguing that such appeals

---

534 Palacios I, Question 25, p. 43; Palacios II, §§ 135–137; Rejoinder, §§ 216–223; Day 2, pp. 405:9–447:12 (Mr Palacios).

535 Hearing, Day 2, pp. 406:5–19 (Mr Palacios); Hearing, Day 4, Defendant's closing submissions, Slide 18; Rejoinder, §§ 217–219; Palacios II, §§ 135–137.

536 Rejoinder, §§ 216–217 and 219; Palacios II, §§ 99 and 136–137; Day 4, the Respondent's closing submissions, p. 1080:1–6 and 1080:11–19 (Mr Velarde Saffer); Day 1, the Respondent's opening submissions, pp. 171-13–172:2 (Mr Velarde Saffer).

537 Rejoinder, §§ 11, 210, 212–213 and 295; Reply, §§ 97, 120, 213 and 238; Hearing, Day 4, the Defendant's closing submissions, pp. 1072:6–1073:5, 1102:18–1103:19 (Mr Velarde Saffer).

have suspensive effect and that the state bodies reasonably waited for the appeals to be resolved before proceeding with the enforcement of sureties [538] .

c. The Court's analysis

429. The Tribunal must resolve two issues. Firstly, whether Article 107(6) of Law 48 of 2011 is directly applicable to the bonds in question. Secondly, whether, even in the absence of such direct applicability, the provision reflects a broader legislative principle relevant to the Tribunal's assessment of Panama's conduct in the light of the Treaty.

430. As regards the first issue, the Tribunal considers that the Respondent's interpretation of Article 107(6) is reasonable. The text of Article 107(6) refers to cases in which formal acceptance and final settlement have not taken place for reasons not attributable to the contractor [539], which presupposes a situation in which the contractor has substantially fulfilled its obligations and the contracting state entity has simply failed to process the acceptance and final settlement. Where, on the other hand, the works have not been carried out and the state contracting authority has initiated – or is preparing to initiate – termination proceedings for breach of contract, the factual premise of the provision is not satisfied.

431. The Court agrees with the Defendant that the distinction based on the contractor's liability constitutes a fundamental principle of the legal framework. Whilst Article 106 governs the consequences of breach of contract – including the enforcement of guarantees – Article 107 relates to the return of such guarantees in cases of satisfactory performance. Extending the scope of application of Article 107(6) to cases of breach could reasonably give rise to a conflict with Article 106, which specifically recognises the state entity's right to enforce the performance bond because the contractor has breached the works contract.

[538] Rejoinder, §§ 66; Defence, § 185; Palacios II, § 124; Hearing, Day 2, p. 416:16–18 (Mr Palacios). See also Hearing, Day 4, Closing Arguments of the Defendant, pp. 1102:7–12 and 17–22 (Mr Velarde Saffer).

[539] **Annex C-34**, Act No. 22 of 27 June 2006 "regulating public procurement, as amended by Act 35 of 2006, Act 2 of 2007, Act 21 of 2008, Act 41 of 2008, Act 69 of 2009, Act 80 of 2009, Act 12 of 2010, Act 30 of 2010, Act 66 of 2010 and Act 48 of 2011".

432. This conclusion is supported by the statements of the experts from both Parties. Whilst Mr Arjona argued that Article 107(6) could be applied by analogy, he acknowledged that the provision was not drafted with cases of non-performance in mind, which means that its wording relates to a scenario where there is no fault [540] . For his part, Mr Palacios agreed that this distinction based on the contractor's fault is not merely a matter of doctrinal preference, but is embedded in the structure of the law itself [541] . The Tribunal considers that these points of agreement confirm the textual and structural interpretation adopted above.

433. The Court acknowledges, however, that the Claimant's argument regarding a breach of law [542] highlights a genuine tension within the regulatory framework. Under Panamanian law – and on this point there is agreement amongst the experts – a breach of contract does not produce full legal effects until the notice of termination is issued, and the issuance of that notice depends entirely on the control of the contracting entity [543] . This creates a gap between the factual event of breach and the legal declaration of that breach – a gap during which, in the Claimant's view [544], Article 107(6) would be triggered because the contractor is not yet, in law, in breach. Mr Palacios' acknowledgement of this logical consequence during cross-examination was candid, and the Tribunal notes this [545] .

434. The Court observes that the debate surrounding Article 107(6) highlights a genuine ambiguity in the domestic legal framework. Both the interpretation proposed by the Claimant and that put forward by the Respondent find plausible support in the text, structure and administrative practice associated with Law 48 of 2011. As previously mentioned (see Section V.C(5)), determining which of these

---

540 Arjona II, Question C.6, p. 37, § 5; Palacios II, §§ 136; see in this regard the Hearing, Day 4, the Respondent's closing submissions, p. 1080:20–1081:9 (Mr Velarde Saffer).

541 Hearing, Day 2, pp. 405:9–15, 446:14–447:10 (Mr Palacios); Palacios II, §§ 136 and 137.

542 Statement of Claim, §§ 141–151.

543 Hearing, Day 2, pp. 439:18–440:192, 444:14–445:7, 448:12–18, 449:2–7 and 457:4–13 (Mr Palacios).

544 Application, §§ 141–151; Hearing, Day 2, p. 406:1–21 (Mr Palacios).

545 Cf. Hearing, Day 2, pp. 443, 444 and 449:7 (Mr Palacios); see also Hearing, Day 4, Closing Arguments of the Claimants, pp. 992:9–993:18 (Mr Irurzun Montoro).

which interpretation more accurately reflects Panamanian law is not a matter for the Tribunal in its capacity as an international tribunal.

435. For the purposes of the present proceedings, the relevant issue is not to establish which interpretation of domestic law is definitively correct, but to assess whether the interpretation adopted by the State authorities – in the context of that legislative ambiguity – can be characterised as arbitrary or incompatible with the requirements of the standard of fair and equitable treatment. In particular, the Tribunal will examine whether the manner in which that interpretation was applied in practice, including the timeframes and procedural regularity of the State's actions, exceeded what might be expected of a reasonable administration acting in good faith.

436. In this regard, the Court does not rule out the broader principle that the Claimant seeks to derive from Article 107. The Claimant's characterisation of Article 107(6) as a *'closing* clause' [546]– reflecting a legislative policy under which sureties cannot remain open indefinitely – holds weight as a matter of legal interpretation, even though Article 107(6) does not apply directly in cases of default. The Tribunal considers that this principle is relevant to its assessment of the reasonableness of the entities' conduct – specifically, whether the delay between the factual event of the breach and the eventual enforcement of each guarantee was so prolonged as to exceed what a reasonable administration acting in good faith would tolerate. This is a factual inquiry which will be analysed in Section V.E *below*.

437. Thus, the Tribunal observes that the Claimant has identified a genuine tension within the regulatory framework arising from the absence of a specific time limit for the commencement or conclusion of resolution proceedings in cases of default. Whilst this does not allow for the inference of a precise legal obligation regarding applicable time limits, it does help to define the framework within which it must be examined whether the conduct

[546] Reply, §§ 194 and 243; Palacios II, § 137 (although the Respondent's expert does not agree with its application to this case, he acknowledges that the Claimant derives this principle from Article 107); Hearing, Day 1, Claimants'

opening statements, p. 43:4–44:20 (Mr Irurzun Montoro).

by the State entities was consistent with basic standards of administrative diligence.

438. Consequently, prolonged delays – particularly those measured in years rather than months – between the finding of the contractor's breach and the adoption of measures aimed at terminating the contract or enforcing guarantees may raise legitimate questions from the perspective of the standard of fair and equitable treatment. The absence of a time limit for the retention of bonds in cases of breach does not mean that the State may retain bonds indefinitely – and thereby extend the guarantor's exposure in the same way – without consequences. As already mentioned, the Tribunal will examine this in Section V.E *below*, when considering whether the State's conduct complied with the standards of Fair and Equitable Treatment or whether, on the contrary, it was arbitrary or inconsistent with good faith.

439. Having addressed the three key provisions relating to the validity, duration and refund of bonds – Article 102 for advance payment bonds in Section V.D(1) *above*, Articles 101 and 97 concerning performance bonds in Section V.D(2) *above,* and Article 107 concerning the refund regime in this Section—the Tribunal will now proceed to analyse the procedural requirements governing the enforcement of bonds: the thirty-day notice requirement and the endorsement regime.

(4) The 30-day notice requirement and the need for bonds to be endorsed

a. Applicable legislation

440. The three preceding subsections examined the legal provisions governing the validity and duration of bonds. The Court now turns to a separate issue, namely whether the contracting authorities complied with the procedural requirements governing the enforcement of performance bonds. In particular, it is necessary to analyse the thirty-day notice requirement in the standard performance bond forms and the endorsement regime under the regulations of the Comptroller General's Office and Article 1542 of the Civil Code.

441. In this regard, two clauses contained in the civil works contracts between the contractors and the state contracting authorities, and in the bond templates—on the basis of which

Banesco issued its bonds, are particularly relevant. The first is clause eight concerning the performance bond in civil works contracts, which provides that, in the event of any cause that may give rise to the administrative termination of the contract, the contractor shall extend the term of the performance bond thirty (30) days prior to its expiry, without the need for a formal demand from the State, and that failure to do so or non-compliance *"shall constitute grounds for claiming the bond from THE* GUARANTOR"[547]. The second is the clause relating to the bringing of legal proceedings, which forms part of the breach of contract clause in the model bond forms, invoked by the Parties in relation to the time limits within which the contracting authority must take action against the guarantor[548].

442. These contractual provisions must be read in conjunction with the applicable regulatory framework. In particular, Circular No. 20-2021.LEG of the Comptroller General's Office, issued on 21 June 2021, which instructs contracting authorities to *"request the original endorsements of the surety bonds in a timely manner where* applicable" and, "*in the event of a breach of* contract", to *"issue the relevant notifications to both the contractors and the relevant sureties, in accordance with the terms set out in the Public Procurement Act or in the special rules applicable to the said* contracts"[549]. This Circular therefore presupposes a framework in which endorsements are obtained when contractual amendments occur and notifications are made to the surety when a breach is declared[550].

443. Furthermore, Article 1542 of the Civil Code of Panama provides: *'Any extension granted to the debtor by the creditor without the consent of the guarantor extinguishes the* guarantee'[551]. The Claimant invokes this provision as an independent ground for arguing that

[547] See, amongst many others, **Annex C-49**, clause 8; **Annex C-55**, clause 8; or **Annex C-64**, clause 8; see in this regard the Statement of Claim, § 130.

[548] **Annex C-0033**, Decree No. 317-Leg. "regulating the bonds issued to guarantee the State's contractual obligations and establishing their standard forms" of 12 December 2006, Article 34.

[549] **Annex C-77**, Circular No. 20-2021.LEG of the Comptroller General's Office of 21 June 2021; see in this regard the Application, §§ 146–147.

[550] **Annex C-77**, Circular No. 20-2021.LEG of the Comptroller General's Office of the Republic dated 21 June 2021.

[551] **Annex R-90**, Civil Code of the Republic of Panama, Article 1542; see in this regard the Statement of Claim, §§ 128–140.

Banesco Seguros would have been released from liability in cases where the term of the contract was extended without obtaining Banesco's consent by means of an endorsement.

b. The Parties' Positions

(i) The Claimant's Position

444. The Claimant argues that the surety bond templates approved by the Comptroller General's Office contain a binding requirement that the State must notify the surety within 30 working days of discovering any breach of the underlying contract. They maintain that failure to comply with this requirement exonerates the surety from liability, by virtue of the terms of the bond model and the principle that the State's own contractual obligations are conditions precedent to the surety's liability [552] .

445. The Claimant argues that the terms of the model form approved by Decree 317-Leg/2006 establish a clear and unequivocal condition precedent: if the State fails to notify the guarantor within 30 working days of discovering a breach, the guarantor is released from liability [553] . Mr Arjona explained that this release clause reflects a fundamental principle of suretyship law: the surety's right to receive timely notice so that it may assess its exposure and, where appropriate, exercise its right to remedy the breach or substitute the contractor [554] . BHL contends that the State itself recognised the systemic nature of the failure to give notice through Circular 20-2021.LEG of the Comptroller General's Office, issued on 21 June 2021 [555] .

---

552 Application, §§ 142–144; Arjona I, §§ p. 6, § 11, pp. 16–17.

553 Reply, § 243(a); Statement of Claim, § 142(a); and its reference to **Annex C-33,** Decree No. 317-Leg. "regulating the bonds issued to guarantee the State's contractual obligations and establishing their standard forms" of 12 December 2006, Article 34: *"THE GUARANTOR shall be released from liability under this guarantee in the event that, should any breach occur on the part of the CONTRACTOR, THE GOVERNMENT AGENCY fails to make a claim against THE GUARANTOR for such breach within thirty (30) working days of the date on which it became aware of such* breach"; see also the Statement of Claim, §§ 150, 172, 191 and Arjona I, pp. 13–14.

554 Arjona I, p. 26. See also **Annex C-33**, Decree No. 317-Leg. "regulating the bonds issued to guarantee the State's contractual obligations and establishing their standard forms", dated 12 December 2006, standard bond form, Phase 1 notification clause. See also Reply, §§ 145–154; Hearing, Day 1, pp. 231:7–232:2 (Mr Arjona).

555 Reply, §§ 150–153; Claim, § 146; with reference to **Annex C-77**, Circular No. 20-2021.LEG of the Comptroller General's Office of the Republic dated 21 June 2021.

446. Also noteworthy is the communication from APADEA dated 11 October 2022, in which the Panamanian Association of Insurance Companies expressed concern regarding situations in which entities proceed to enforce surety bonds without having given adequate prior notice of the breach to contractors and guarantors, and maintains that this industry-wide concern corroborates Mr Prieto González's testimony that delays and late enforcement were not exclusive to Banesco Seguros but affected the entire surety bond sector in Panama [556] .

447. With regard to the endorsement requirement, BHL bases this obligation on Article 1542 of the Civil Code, pursuant to which any extension of the principal contract without obtaining the guarantor's consent by means of an endorsement automatically extinguishes the guarantee [557] . It is worth noting that Circular 20-2021.LEG itself confirms that endorsements were required and that the failure of the Panamanian entities to obtain them constituted a breach of the applicable administrative standard. The Claimant maintains that Panama repeatedly extended contracts without obtaining the corresponding surety endorsements from Banesco Seguros, thereby extinguishing the sureties as a matter of law [558] .

448. The Claimant bases the application of Article 1542 of the Civil Code on Article 71 of Law 22 of 2006, which provides for the supplementary application of the Civil Code to public contracts to the extent compatible with the public procurement framework [559] . Indeed, Mr Arjona explains that Article 1542 is complementary to the public procurement regime

[556] Statement of Claim, §§ 87–89, and its reference to **Annex C-31**, APADEA's communication to Panama dated 11 October 2022.

[557] Reply, §§ 175, 205; Application, §§ 108, 142(a), 133–134 and footnotes 73, 146, 151, and Annex, §§ 151–152, 283(c), 284(b) and 286(b); Arjona II, pp. 29–30 and Arjona I, pp. 21 and 25 (point 2.4).

[558] Reply, §§ 162, 175 and 388; Statement of Claim, §§ 128 and Arjona I, pp. 20–21; Hearing, Day 1, Claimants' opening statements, p. 138:7–19 (Mr Irurzun Montoro).

[559] Reply, §§ 173(c) (and footnote 122); Arjona II, Question 7, §§ 3–5; **Annex AA-3**, Act No. 22 of 27 June 2006 regulating public procurement and setting out other provisions, Article 71. **Annex C-34**, Act No. 22 of 27 June 2006

“regulating public procurement, as amended by Act 35 of 2006, Act 2 of 2007, Act 21 of 2008, Act 41 of 2008, Act 69 of 2009, Act 80 of 2009, Act 12 of 2010, Act 30 of 2010, Act 66 of 2010 and Act 48 of 2011”.

public, as it protects the guarantor from having their risk profile unilaterally altered by an extension of the underlying obligation without their consent [560] .

449. It also distinguishes between what occurred with performance bonds and advance payment bonds [561] . On the one hand, it states that the endorsement mechanism was essential to the advance payment bond framework [562] and reports that Banesco granted endorsements in 24 cases when duly requested, but that Panama did not request endorsements in at least five cases [563] . On the other hand, in cases involving performance bonds, government entities initially obtained endorsements to extend the performance bonds but at a certain point *'simply ceased to* do so' [564] . The Claimant argues that this cessation of the endorsement practice – without notice to or consultation with Banesco Seguros – is in itself evidence of arbitrary and inconsistent state conduct. It maintains that the failure to request endorsements during the final extension periods, combined with the subsequent attempt to enforce bonds which the guarantor had no reason to believe were still in force, constitutes *'the true cause of the arbitrary or irrational* behaviour' of which they complain [565] .

(ii) The Defendant's Position

450. The Defendant argues that the 30-day notice requirement in the standard surety bond forms is subject to the legal framework set out in Act 48 of 2011 and that it cannot supersede the legal provisions governing the validity of surety bonds nor does it establish a time limit on the entity's right to enforce the surety bonds. Alternatively, it maintains that, even if such a requirement were to exist, the consequence of non-compliance is not the release of the guarantor but a procedural irregularity that does not affect the validity of the guarantee [566] .

---

[560] Reply, § 173(c) and 175; Statement of Claim, § 134; Arjona I, Question 2.2, pp. 20–21; Arjona II, Question 3, pp. 29–30. See also Claim, §§ 110 and 128 (listing examples in which the entities requested endorsements); Hearing, Day 1, Plaintiffs' opening statements, pp. 44:17–45:5 (Mr Irurzun Montoro).

[561] Statement of Claim, § 123.

[562] Statement of Claim, § 128.

[563] Reply, §§ 155–156, 159–162; Statement of Claim, § 128.

[564] Statement of Claim, § 136.

[565] Statement of Claim, § 137.

[566] Rejoinder, § 247; Defence, §§ 173, 180 and 307; Palacios II, Question 14, §§ 103–112 and § 16; Hearing, Day 1,

Defendant's opening submissions, pp. 174:14–176:14 (Mr Velarde Saffer). Mr Palacios's position is that the 'Breach' clause in the model bond contains two distinct notification obligations and that only

451. Panama characterises Circular 20-2021.LEG as an administrative clarification of internal procedures, not an admission of a legal deficiency, and maintains that it merely allocated responsibilities amongst government entities and the Comptroller General's Office to verify compliance with the notification requirements [567] . It also highlights that the very same Circular cited by the Claimant, whilst acknowledging certain deficiencies in the notification, stated that advance payment bonds do not require endorsement—a position that directly supports Panama's interpretation regarding the validity of the bonds.

452. It points out that the Circular distinguishes between advance payment bonds (in respect of which it states that endorsement is not required) and performance bonds, a distinction which the Claimant does not make and which is important. This is because, whilst the purpose of an advance payment bond is to ensure the reimbursement of the bond, the purpose of a performance bond is to guarantee the performance of the works contract; failure to do so, due to the contractor's breach, will result in the bond being enforced, as the bond is automatically transferred to the State Treasury. Therefore, advance payment bonds do not require notification [568] .

453. Panama emphasises that in virtually all the cases, the Panamanian entity initiated the process of enforcing the bond within the applicable time limit. Mr Palacios testified that the 30-day notification period runs from the date on which the state entity became aware of the breach, which in practice means the date of the administrative decision declaring the contractor to be in breach—not the date of the

---

which triggers the consequence of exoneration. Phase 1 requires the entity to notify the surety within 30 working days of becoming aware of possible grounds for the administrative decision. Phase 2 requires the entity to make a claim against the surety within 30 working days of the administrative decision regarding the contract. The exoneration clause is expressly linked only to Phase 2. See Palacios II, §§ 105–108. In this regard, Mr Palacios asserts that the bond does not provide for any consequence for failure to comply with the Phase 1. See Palacios II, § 108. Consequently, the Defendant's position is that failure to give the Phase 1 notice is, at best, a procedural deficiency with no legal consequence under the terms of the bond – it does not affect the validity of the bond or the guarantor's liability.

[567] Defence, footnote 20 and §§ 189–190; see in this regard **Annex C-77**, Circular No. 20-2021.LEG of the Comptroller General's Office of the Republic dated 21 June 2021. See also Palacios I, Question 12 and its footnote 205; Hearing, Day 1, Defendant's Opening Statements, p. 149:12–150:5 (Mr Velarde Saffer).

[568] Rejoinder, §§ 9. See also Answer, §§ 106, 113 (and footnote 144), 139, 230; Palacios I, §§ 104, 148 (and footnote 156).

underlying event that gave rise to the breach. According to this interpretation, Panama argues that the vast majority of enforcement requests were timely. The Respondent observes that the Claimant has not provided a case-by-case analysis demonstrating specific instances of non-compliance with the 30-day requirement [569] .

454. With regard to Article 1542 of the Civil Code, Panama argues that the Claimant's reliance on it fails to take into account the *lex specialis* nature of the public procurement regime. It explains that the regulatory framework applicable to performance bonds in public contracts – Law 48 of 2011, Decree 317-Leg/2006 and the model bonds approved thereunder – constitutes an autonomous regime which supersedes the general provisions of the Civil Code on suretyship.

455. It points out that endorsements are a commercial practice, not a legal requirement, and that the Supreme Court of Justice's decision of October 2023 definitively rejected the 'myth' that surety bonds become invalid in the absence of endorsements [570]. It adds that Act 61 of 2017, far from weakening its position, strengthens it, in that if endorsements had been legally required prior to 2017, it would not have been necessary for the legislature to enact a new provision imposing that requirement, thereby confirming that no such obligation existed under the previous legal framework [571] .

c. The Court's analysis

456. The Court begins its analysis with the contractual provisions. Interpreted in context, the breach clause imposes an obligation on the contractor to extend the guarantee, and failure to fulfil that obligation gives the state entity grounds for a claim, as described by the Respondent (see Section V.D(4)b(ii), *supra*). It does not, however, establish a corresponding time limit on the part of the state entity, nor does it make the exercise of the

---

[569] Statement of Defence, §§ 88, 184–185, 188, 304 and 307 (arguing that it was complied with in '*virtually* all' cases). Hearing, Day 2, pp. 449:4–6 and 456:9–11 (Mr Palacios). Hearing, Day 4, Closing Arguments of the Defendant, pp. 1106:18–1107:2 (Mr Velarde Saffer); Hearing, Day 1, Opening Arguments of the Defendant, pp. 174:7–176:14 (Mr Velarde Saffer). See also Rejoinder, §§ 110, 213, 247, 251 and 263–265 (on the absence of a case-by-case analysis of non-compliance); Palacios I, Question 17, § 111 and Question 20, §§ 126–128.

[570] Reply, § 158; with reference to **Annex R-33**, Judgment of the Supreme Court, Chamber III (Case No. 21) of 20 October 2023; Palacios I, §§ 77–80.

[571] Palacios II, §§ 73 and 88 (and footnote 78).

right to enforce performance by a specific deadline. The clause is drafted as an obligation imposed on the contractor and not as a condition precedent to the exercise of the rights arising from the guarantee. Consequently, the Tribunal finds no legal basis in Panamanian law to conclude that failure to comply with the thirty-day notice requirement results in the automatic exoneration of the guarantor from liability.

457. The Court observes, however, that the notification regime set out in the model surety bonds comprises two distinct stages. The first arises when the contracting authority becomes aware of circumstances that may give rise to an administrative decision: the authority must notify both the surety and the contractor in writing within 30 working days. The second stage arises once the decision has been issued, when the contracting authority formally makes a claim under the guarantee [572] . These stages serve different purposes: the first allows the guarantor to assess its potential exposure and take mitigating measures; the second triggers the obligation to pay. Consequently, compliance with the notification requirement in the first stage does not automatically satisfy the requirement of the second stage.

458. The notification requirement reflects a principle of due process: the surety is entitled to receive timely notice of a breach so that it may assess its exposure and, where appropriate, exercise its right to remedy the breach – including the option to substitute the contractor. Although the Court does not identify in Panamanian law an automatic consequence of exoneration arising from non-compliance with this requirement, it considers that the repeated or systematic failure to notify the surety in a timely manner may be relevant when examining whether the State's conduct met the requirements of the Fair and Equitable Treatment standard. In particular, a practice that systematically fails to notify the surety of breaches in a timely manner and then seeks to enforce bonds after prolonged periods of inactivity could, in certain circumstances, raise questions regarding procedural regularity and good faith, and subsequently

[572] **Annex C-033,** Decree No. 317-Leg. 'regulating bonds issued to guarantee the State's contractual obligations and establishing their standard forms' of 12 December 2006, pp. 7–8.

relating to compliance with the standard of fair and equitable treatment. The Court will return to this in its analysis in Section V.E, *below*.

459. As regards Article 1542 of the Civil Code [573], the Court considers that the provision raises a more substantive question. Article 1542 is not a procedural rule but a substantive provision of the Civil Code governing the relationship between creditor, debtor and surety. Its effect – that an extension granted without the surety's consent extinguishes the suretyship – is, if applicable, automatic and operates by virtue of the law alone. The question is whether this provision applies in the context of public procurement suretyships governed by Act 48 of 2011 and Decree 317-Leg/2006.

460. The Court notes that there is a tension between two principles. On the one hand, Act 48 of 2011 establishes a framework governing performance bonds for public contracts, including their terms, conditions and standard forms. The standard forms for performance bonds approved under Decree 317-Leg/2006 form part of this framework. Insofar as this framework prescribes the conditions under which bonds are issued and enforced, it may operate as *lex specialis* in relation to the general provisions on bonds in the Civil Code. Furthermore, Article 1542 reflects a fundamental principle of the law of suretyship: a surety cannot be held liable beyond the scope of what they agreed to guarantee. This principle is not merely procedural; it goes to the very substance of the suretyship obligation [574] .

461. The Court accepts that the special regime governing public procurement takes precedence, in principle, over the general provisions of the Civil Code with regard to the validity and enforcement of sureties for public works. This hierarchy was confirmed by the Supreme Court of Justice in its decision of October 2023 [(575)], and the Court sees no sufficient grounds to depart from that judicial determination – particularly in light of the deference this Court must accord to the judgments of Panama's highest court on matters of its own law. In

[573] **Annex R-90**, Civil Code of the Republic of Panama, Article 1542.

[574] Reply, § 175; Arjona II, §§ E.12, F.13; Palacios II, §§ 12, 31 and 76; Palacios I, § 76.

[575] **Annex R-33**, Judgment of the Supreme Court, Chamber III (Case No. 21) of 20 October 2023; Palacios II, §§ 72 and 76; Rejoinder, §§ 4–6; Reply, § 158; Day 2 of the Hearing, pp. 502:6–503:19 (Mr Arjona and Mr Palacios).

Consequently, the Court does not accept that the mere extension of the contractual term without an endorsement automatically resulted in the termination of the guarantees in question.

462. This does not imply that the issue of endorsement is irrelevant. The possible application of Article 1542 will depend on the specific factual circumstances of each case, including whether there was a formal extension of the contract, whether the extension arose simply from administrative inaction, or whether the guarantee form itself provided for a term linked to the liquidation process. Each of these scenarios may have different implications regarding the extension of the guarantor's obligation.

463. The Court notes that both state entities and Banesco Seguros historically followed the practice of requesting and granting endorsements. The evidence produced by the Claimant demonstrates that this practice was followed on a regular basis during the initial stages, before it ceased [576] . The Tribunal considers this to be relevant when assessing the consistency of the State's conduct and the reasonableness of BHL's legitimate expectations, even though the endorsements were not strictly required as a matter of law.

464. The Tribunal further observes that Banesco Seguros's own conduct regarding endorsements is also relevant. The evidence shows that Banesco Seguros granted endorsements in the early stages of several contracts, but subsequently refused to do so when the underlying contractors found themselves in financial difficulty. Without characterising this decision in terms of contributory negligence, the Tribunal considers that such circumstances may bear on the determination of causation of the alleged losses. This observation is relevant to the Tribunal's assessment of whether the State's conduct – rather than the Claimant's own commercial decisions – was the proximate cause of any loss claimed (see the analysis in Section V.E(5), *below*).

465. Consequently, as regards whether the absence of endorsements within the meaning of Article 1542 of the Civil Code or of timely notifications constituted a deviation from the applicable procedural standards, the Tribunal considers that this is a factual analysis which must be

[576] Rejoinder, §§ 160 and 305; Statement of Claim, §§ 128, 136; see also Duplier, § 122 and Defence, § 160; Hearing, Day 1, Plaintiffs' opening submissions, pp. 35:5–14 and 78:22–79:7, 103:1–14 (Mr Irurzun Montoro). The Defendant has not denied this practice on the part of state bodies.

This analysis is conducted in the context of the Tribunal's examination of the Claimant's claim for Fair and Equitable Treatment. This analysis will be set out in Section V.E.

466. The Tribunal notes, however, a broader observation. Circular 20-2021.LEG instructs entities to request endorsements in a timely manner and to issue notifications *'in compliance with the terms set out in the Public Procurement Act or in the special rules applicable to the said* contracts' in the applicable regulations [577] . The Circular reflects the Comptroller General's own understanding that the endorsement regime imposes actual obligations on entities – not merely aspirational guidelines. The fact that the State's own supervisory body deemed it necessary to issue a circular directing government bodies to comply with notification requirements before enforcing bonds is, at the very least, indicative of recognised instances of procedural deficiency which the State itself sought to correct. The Tribunal notes, however, that the Circular itself stipulates that advance bonds do not require endorsement – a position consistent with that of the Respondent. Whether a specific entity's failure to comply with these obligations was material to the validity of a specific bond, or whether it constituted the sort of procedural irregularity that amounts to a breach of the right to fair and equitable treatment, are questions which the Tribunal will address in its factual analysis (see Section V.E, *below*).

467. Having addressed the procedural requirements for the enforcement of bonds, the Court finally turns to an analysis of the Supreme Court's decisions and the broader regulatory framework shaping the legal landscape within which the entities operated.

(5) The decisions of the Supreme Court of Justice and the regulatory framework

468. Before proceeding to analyse the State's conduct in the light of the Fair and Equitable Treatment standard, the Tribunal considers it necessary to place that conduct within the context of the applicable regulatory framework and its evolution during the relevant period. The Parties' extensive references to various legal provisions highlight the importance

[577] **Annex C-77**, Circular No. 20-2021.LEG of the Comptroller General of the Republic dated 21 June 2021, p. 2.

of this regulatory environment to the present dispute. The Tribunal therefore provides a brief overview of that framework and its evolution.

469. In this context, three decisions of the Panamanian Supreme Court of Justice are of particular relevance to this case: (i) the decision of 27 April 2017 in Aseguradora Ancón v. MOP [578] ; (ii) the decision of 20 October 2023 in *Inversiones Herabel v. MiAmbiente* [579] ; and (iii) the decision of 13 September 2024 in *Banesco Seguros v. CONADES* [580] (see Annex to this Award, Section IX, *infra*). The Parties fundamentally disagree on the significance of these decisions for the analysis of Fair and Equitable Treatment. The TACP's previous decisions also set out the legal framework applicable to bonds and within which the contracting entities and BHL acted – and within which the Tribunal must assess the Claimant's claim for fair and equitable treatment.

a. Regulatory developments

470. The system of performance bonds applicable to public contracts in Panama has evolved through various legislative instruments. The original framework, established by Law 22 of 2006 on Public Procurement [581], did not regulate contract settlement as a separate procedural phase; under that regime, the State could not terminate contracts after the expiry of the performance period, and the validity of the bond was consequently linked to the end of the performance period plus a short post-completion window.

471. Act 48 of 2011 [582] amended Act 22 of 2006 and introduced the concept of settlement as a separate phase following the performance of the contract or its termination. The Court notes that this was a significant doctrinal change: Articles 101 and 97 of Act 48 of 2011 extend the legal life of the contract beyond the performance period into the settlement phase, and the bonds are extended accordingly. The approved bond forms

---

[578] **Annex C-35**, Judgment of the Third Chamber for Administrative Litigation of the Supreme Court of Justice of 27 April 2017.

[579] **Annex R-33**, Judgment of the Supreme Court, Third Chamber (Case No. 21) of 20 October 2023.

[580] **Annex R-24**, Judgment of the Supreme Court, Third Chamber (Case No. 4) of 13 September 2024.

[581] **Annex R-34**, Consolidated Text No. S/N of Act 22 of 2006 regulating public procurement, dated 1 March 2018.

[582] **Annex C-34**, Act No. 22 of 27 June 2006 "regulating public procurement, as amended by Act 35 of 2006, Act 2 of 2007, Act 21 of 2008, Act 41 of 2008, Act 69 of 2009, Act 80 of 2009, Act 12 of 2010, Act 30 of 2010, Act 66 of 2010 and Act 48 of 2011".

under Decree 317-Leg/2006 [583], which predated Act 48 of 2011, were drafted with the previous regime in mind. This creates a textual tension between the wording of the form (which in some cases refers to a fixed post-compliance period) and the legal framework introduced by Act 48 of 2011 (which links the validity of the bond to the conclusion of the liquidation).

472. Subsequently, Act 61 of 2017 [584] placed the responsibility on contracting authorities to ensure that the duration of surety contracts coincides with the term of the construction contract and introduced a provision regarding the need to obtain the surety's consent when extending the contract. Decree 33-Leg of 2020 [585] and Resolution 2259-2023 [586] provided further clarifications, the latter addressing an alleged erroneous reference in Decree 33-Leg of 2020. Neither Act 61 of 2017 nor Resolution 2259-2023 altered the core provisions – Articles 97, 101, 102 and 107 – which the Court has addressed in the preceding subsections.

b. TACP rulings and Supreme Court decisions

473. Between 2021 and 2023, the TACP issued a series of rulings consistently interpreting the bond regime under Act 48 of 2011 [587]. The TACP held that performance bonds remain in force during the settlement phase and that advance payment bonds remain in force until the advance payment has been fully reimbursed. These rulings predate the Supreme Court's decisions and form

[583] **Annex C-33**, Decree No. 317-Leg. "regulating bonds issued to guarantee the State's contractual obligations and establishing their standard forms", dated 12 December 2006.

[584] **Annex C-47**, Act No. 61 "amending Act 22 of 2006, which regulates public procurement, and laying down other provisions", dated 27 September 2017.

[585] **Annex C-37**, Decree No. 33-LEG "regulating bonds issued to guarantee the State's contractual obligations, establishing their standard forms and repealing Decrees No. 21-Leg of 28 March 2018 and No. 43-Leg of 30 July 2018", dated 8 September 2020.

[586] **Annex C-46**, Resolution No. 2259-2023-LEG/FySE "regulating bonds issued to guarantee the State's contractual obligations, establishing their templates and repealing Decree No. 33-Leg of 8 September 2020", dated 10 August 2023.

[587] **Annex R-30**, Resolution No. 073-2021/TACP of the TACP (Case No. 21) dated 25 June 2021; **Annex R-31**, Resolution No. 018-2023-Pleno/TACP of the TACP (Case No. 4) of 30 January 2023; **R-10**, TACP Resolution No. 020-2023/TACP (Case No. 13) of 30 January 2023; **R-45**, TACP Resolution No. 101-2023-Pleno/TACP (Case No. 6) of 5 June 2023; **Annex C-290**, Resolution No. 215-2023-PLENO-TACP of the Administrative Court for Public Procurement of 19 October 2023.

part of the administrative practice against which the conduct of the entities must be assessed**.**

474. As regards the decisions of the Supreme Court of Justice of Panama, it issued two decisions directly relevant to this case: one on 20 October 2023 (Case No. 21) [588] and one on 13 September 2024 (Case No. 4) [589] . The first found that performance bonds remain in force until the contract is settled, not merely until the end of the performance period. The Court expressly characterised this as a *'doctrinal* development' arising from the introduction of the concept of settlement by Act 48 of 2011. The 2024 decision confirmed that advance payment bonds remain in force until the advance payment has been fully reimbursed and based this conclusion on Articles 97 and 102 of Law 48 of 2011.

475. It is worth noting that both decisions were handed down after the service of notice in the present dispute. Until the 2023 decision, there was no previous case law from the Supreme Court directly addressing the issue of the validity of bonds in cases of termination for breach under Act 48 of 2011.

c. The Parties' Positions

(i) The Claimant's Position

476. With regard to the TACP's rulings, the Claimant questions the body's independence, pointing out that it is an administrative body whose members are appointed by the Executive, not a judicial institution. The Claimant's expert, Mr Arjona, described the TACP as "part of the Executive Branch" and therefore not an independent adjudicatory body. The Claimant maintains that reliance on TACP rulings as 'precedent' for Supreme Court decisions is not justified [590].

---

[588] **Annex R-33**, Judgment of the Supreme Court, Chamber III (Case No. 21) of 20 October 2023.

[589] **Annex R-24**, Judgment of the Supreme Court, Chamber III (Case No. 4) of 13 September 2024.

[590] Hearing, Day 2, pp. 477:20–478:4 and 480:19–481:8 (Mr Arjona); Hearing, Day 4, Opening Statements by the Claimants, pp. 987:18–988:1, 989:13–990:1 (Mr Irurzun Montoro).

477. The Claimant contends that the 2017 decision was the prevailing judicial interpretation at the time Banesco issued the bonds in question (2014–2017). That decision, it asserts, established that: (a) surety bonds expire in accordance with their stated terms; (b) endorsements are required to maintain the validity of surety bonds when contracts are extended; and (c) the State's negligence in the administration of contracts cannot prejudice the surety. It emphasises that the 2017 decision was not merely an isolated ruling but reflected a well-established understanding of Panamanian surety law that had informed the practices of the insurance and surety industry for over a decade [591] .

478. With regard to the Supreme Court's subsequent decisions – those of 2023 and 2024 – the Claimant points out that they were handed down after the dispute had arisen and without any precedent, representing a radical and unforeseeable shift in judicial interpretation which cannot retroactively validate conduct that was unlawful at the time it occurred [592] .

479. Furthermore, BHL considers that the reasoning in the Supreme Court's decisions is circular. Its lawyers argued at the hearing that the 2023 decision effectively holds that *'until the administrative act declaring the termination of* the contract *has become final through judicial* proceedings' [593] – that is to say, that the sums due cannot be determined until the sums have been determined. The Claimant points out in its submission that the Supreme Court's reasoning does not follow *"the minimum logical* course" and constitutes the sort of *"irrational or* arbitrary reasoning" that investment tribunals are authorised to review under the Fair and Equitable Treatment standard [594] .

---

591 Reply, §§ 4(c), 111, 206 and 209; Application, §§ 96–99; Hearing, Day 4, p. 964:7–14 (Mr Irurzun Montoro: *'what this shows is a clear inability on the part of the Panamanian administration to respond to a management* problem'); Hearing, Day 1, Plaintiffs' opening statements, pp. 50:16–51:9 (Mr Irurzun Montoro); with reference to **Annex C-35**, Judgment of the Third Chamber for Administrative Litigation of the Supreme Court of Justice of 27 April 2017.

592 Reply, §§ 213–227; Hearing, Day 4, Closing Arguments of the Claimants, p. 989:13–990:14 (Mr Irurzun Montoro); Hearing, Day 1, Plaintiffs' opening submissions, p. 51:6–9 (Mr Irurzun Montoro); Plaintiffs' closing submissions, Slides 49–50. See also Statement of Claim, §§ 97–99 (detailing the findings of the 2017 decision).

593 Hearing, Day 4, Closing Arguments of the Claimants, pp. 986:13–18 (Mr Irurzun Montoro).

594 Hearing, Day 4, Closing Arguments of the Claimants, pp. 990:6–14 (Mr Irurzun Montoro).

480. The Claimant invokes the decision in the *Del Rio Prada* case, arguing that a change in judicial interpretation that was not *'reasonably* foreseeable' at the time the investment was made cannot be invoked by the State to justify its conduct [595] .

481. The Claimant notes that the timing of the 2023 and 2024 decisions is striking [596] . The October 2023 decision [597] was issued one year after the

The Claimant notified Panama of this matter under the Treaty, and the decision of September 2024 [598] was issued one month after the Claim was filed. The Claimant does not allege that these decisions were rendered in bad faith or as a result of political interference [599], but submits that their timing – combined with the fact that Banesco itself was a party to the 2024 proceedings – is relevant to the composite factual analysis. Furthermore, it is worth noting that Judge Chen Stanziola dissented in the 2024 decision, in which the dissenting judge supported Banesco's position on the validity of the bonds and criticised the majority's reasoning – demonstrating that the Claimant's legal position was shared by a member of the Court itself [600] .

---

595 Reply, §§ 221–225 and footnote 164 (The Applicant introduces the concept of *'reasonably* foreseeable' case-law, citing *Del Río Prada* as the authoritative case in the context of Article 7 of the European Convention on Human Rights. They argue that judicial interpretation must be *'consistent with the substance of the offence and reasonably* foreseeable' [Claimant's translation] in order to comply with the principle of legality. The Claimant applies this concept to the present arbitration, arguing that the recent 'change' in the case-law of the Supreme Court of Panama regarding the validity of sureties was not *'reasonably* foreseeable' at the time they made their investment). See also **Annex CL-50**, *Del Rio Prada v. Spain*, Grand Chamber of the European Court of Human Rights, Judgment of 21 October 2013, § 93. The specific passage cited from this judgment (see Reply,
§ 222) states that, whilst judicial interpretation may gradually clarify the rules, the outcome must be *'consistent with the substance of the offence and reasonably foreseeable*'. On this basis, the Claimant argues that a State violates legal certainty when it rewrites normative interpretations to the detriment of the investor without clear justification). The Respondent acknowledges that the Claimant relies on the argument of *"reasonably foreseeable* case-law", which stems from this decision of the ECtHR, but argues that this human rights principle does not apply to international investment law (Rejoinder, § 367).

596 Reply, §§ 213–214 and 303; Rejoinder, § 41.

597 **Annex R-33**, Judgment of the Supreme Court, Chamber III (Case No. 21) of 20 October 2023.

598 **Annex R-24**, Judgment of the Supreme Court, Chamber III (Case No. 4) of 13 September 2024.

599 Hearing, Day 1, Opening Statements by the Claimants, pp. 50:13–51:6 (Mr Irurzun Montoro).

600 Reply, §§ 218 and 224; see **Annex R-24**, Judgment of the Supreme Court, Chamber III (Case No. 4) of 13 September 2024 (see 'dissenting opinion' on pp. 47–50).

(ii) The Respondent's Position

482. Panama points out that the TACP had consistently applied the interpretation of indefinite validity in decisions issued in 2021 and 2022, well before the Supreme Court of Justice's ruling of 2023 [601] .

483. The Respondent considers that a distinction must be drawn between the 2017 decision and the 2023 and 2024 decisions, in that the former applies a legal regime prior to 2011 (Act 22 of 2006 prior to its amendment by Act 48 of 2011). It points out that both the 2023 and 2024 decisions and the sureties under consideration are governed by the later version of the Act, that of 2011, which renders the 2017 decision not only inapplicable but also an invalid point of comparison [602] .

484. Panama maintains that the 2023 and 2024 decisions correctly interpreted the framework of Law 48 of 2011 and do not constitute a 'change' in case law but rather the first authoritative rulings on the amended statute [603] . It adds that the Supreme Court's decisions are authoritative interpretations of Panamanian law which confirm what the legal text has provided for since 2011. In his view, the decisions did not create a new regulatory regime, but rather applied the plain meaning of Articles 97, 101 and 102 of Act 48 of 2011 to specific factual scenarios. He emphasises that the TACP had reached the same conclusions in numerous rulings prior to the Supreme Court's decisions [604] .

485. The Respondent further contends that Decision 2023 [605] described the notion that bonds expire by their terms as a 'myth' and confirmed that bonds

[601] Statement of Defence, § 143 (and footnote 184); Rejoinder, §§ 194–196 (footnotes 262 and 263), 230–231.

[602] Rejoinder, §§ 111 (and footnotes 140, 142), 191, 194 (and footnote 263), 230–231 (and footnotes 311–314) (characterising the 2017 decision as inapplicable); Reply, §§ 114 (and footnote 145), 143 (and footnote 184); with reference to **Annex C-35**, Judgment of the Third Chamber for Administrative Litigation of the Supreme Court of Justice of 27 April 2017). See also **Annex C-290**, Resolution No. 215-2023-PLENO-TACP of the Administrative Court for Public Procurement of 19 October 2023.

[603] Rejoinder, §§ 112, 195, 365–366 and its footnote 262; Hearing, Day 4, Closing arguments of the Respondent, pp. 1089:19–1090:2 (Mr Velarde Saffer); Hearing, Day 1, the Defendant's opening submissions, pp. 157:3–158:3 (Mr Velarde Saffer).

[604] Rejoinder, §§ 106, 365; Reply, § 7; Palacios II, §§ 30, 87, 94; Palacios I, §§ 67, 131; Hearing, Day 4, Closing Arguments of the Defendant, p. 1112:2–12 (Mr Gallego).

[605] **Annex R-33**, Judgment of the Supreme Court, Chamber III (Case No. 21) of 20 October 2023.

enforcement remain valid throughout the liquidation [606] . The 2024 decision [607] ,
which directly involved Banesco Seguros and was decided (by a 3-to-1 majority), confirmed the validity of both advance payment bonds and performance bonds [608] . The Respondent argues that the Court must accord considerable deference to these authoritative judicial interpretations [609] . It explains, with regard to the dissenting opinion in the 2024 decision, that a dissenting opinion is precisely the democratic functioning of a collegial court and cannot be used to challenge the authority of the majority decision [610] .

486. The Respondent rejects the Claimant's suggestions regarding the timing of the Supreme Court's most recent decisions and asserts that the suggestion of any connection between the decisions and the arbitration proceedings is both unfounded and inappropriate [611] . Panama points out that the cases decided by the Supreme Court of Justice in 2023 and 2024 involve different parties and different factual circumstances, and that Banesco was a party to the 2024 proceedings in its capacity as a surety company in the ordinary course of domestic litigation – not as a result of this ICSID arbitration. The Respondent contends that challenging the independence of the Panamanian judiciary on the basis of a temporal coincidence would set a dangerous precedent and is not supported by any evidence of political interference or undue influence [612] .

d. The Court's analysis

487. The Court reiterates that, when examining domestic judicial decisions in the light of the Fair and Equitable Treatment standard, its role is not to act as an appellate body with regard to the correctness of the Supreme Court's interpretation of Panamanian law (see also Sections V.C(1) and V.C(5), *supra*). The relevant issue is

606 Rejoinder, § 106, 191–197 and 227; Response, §§ 158–159 and the footnotes on pages 164 and 206; Palacios II, § 79.

607 **Annex R-24**, Judgment of the Supreme Court, Chamber III (Case No. 4) of 13 September 2024.

608 Reply, §§ 114–116.

609 Rejoinder, §§ 4–6 and 112.

610 Rejoinder, § 112.

611 Rejoinder, §§ 106–114 and 324.

612 Rejoinder, §§ 108–109, 111–112, 153–154, 324, 370–371.

to determine whether those decisions amount to such a degree of arbitrariness, unreasonableness or lack of due process that they may be considered incompatible with the international standard.

488. Firstly, the Tribunal observes that the Supreme Court's decisions are consistent with the text of Act 48 of 2011, as the Tribunal itself has interpreted it in the preceding subsections. The Tribunal's own interpretation of Articles 101 and 97 – that performance bonds remain valid until settlement and that the two-month period is an administrative timeframe rather than a condition for the validity of the bond – is consistent with that held by the Supreme Court. This convergence does not mean that the Supreme Court's reasoning was the only possible interpretation, but it does indicate that the interpretation falls within the bounds of reasonableness.

489. The Court notes that the 2017 decision applied the legal framework prior to the amendment introduced by Act 48 of 2011. However, the principles established in that decision – particularly the principle that the negligence of state entities cannot prejudice the surety – were expressed in sufficiently broad terms that a reasonable investor could have understood them as reflecting general principles of Panamanian surety law, not limited to a specific legal framework. The relevance of this circumstance to the assessment of the legitimate expectations invoked will be addressed in Section V.E.

490. The Tribunal also notes that the 2024 decision was adopted by a 3-1 majority, with Judge Chen Stanziola dissenting. The dissenting opinion supported Banesco Seguros' position on the validity of the sureties and criticised the majority's reasoning [613]. Whilst the existence of a dissenting opinion does not affect the legal authority of the majority decision, it does highlight that the position taken by the Claimant was supported by valid legal arguments and is therefore relevant for the purposes of the Fair and Equitable Treatment analysis, insofar as it demonstrates that Banesco Seguros' legal position was not frivolous or unreasonable – a fact which bears on the assessment of the Claimant's legitimate expectations.

---

[613] **Annex R-24**, Judgment of the Supreme Court, Chamber III (Case No. 4) of 13 September 2024 (dissenting opinion of Judge Chen Stanziola), pp. 47–50.

491. Secondly, the Tribunal has considered the Claimant's criticism of the Supreme Court's reasoning in paragraph 97, in particular the allegation of circularity in holding that the liquidation process cannot commence until it has been completed. Having examined the relevant passage, the Tribunal considers that, whilst the wording used by the Supreme Court is not particularly clear, the underlying proposition – namely, that liquidation constitutes an integrated process closely linked to the determination and enforcement of the consequences of breach of contract – cannot be characterised as irrational.

492. Thirdly, the Tribunal does not consider that the timing of the decisions – following the notification of this dispute – is, in and of itself, evidence of impropriety. The cases were initiated years before they were decided, and the Respondent's explanation that the timeline reflects standard court proceedings has not been contested by the Claimant. The Tribunal notes, however, the absence of any previous and directly relevant ruling by the Supreme Court. This circumstance contributes to characterising the regulatory environment in which the state entities acted as one of relative interpretative uncertainty.

493. The implications of this regulatory uncertainty for the Tribunal's analysis of Fair and Equitable Treatment will be addressed in Section V.E, *below*. The Tribunal considers it significant that the 2017 decision [614] addressed the validity of bonds issued under the regulatory framework as it stood prior to the amendments introduced by Act 61 of 2017[615], whilst the decisions from 2023 [616] and 2024 [617] concerned sureties governed by the post-2017 regulatory framework, which introduced significant changes to the provisions on endorsement and extension. The sureties at issue in this arbitration fall predominantly within the pre-2017 regulatory framework. This conclusion reinforces the Tribunal's finding that the shift in case law from 2017 to 2023–2024 does not constitute a reversal

614 **Annex C-35**, Judgment of the Third Chamber for Administrative Litigation of the Supreme Court of Justice of 27 April 2017.

615 **Annex C-47**, Law No. 61 'amending Law 22 of 2006, which regulates public procurement, and laying down other provisions' of 27 September 2017.

616 **Annex R-33**, Judgment of the Supreme Court, Third Chamber (Case No. 21) of 20 October 2023.

617 **Annex R-24**, Judgment of the Supreme Court, Chamber III (Case No. 4) of 13 September 2024.

arbitrary application of established law, but rather reflects the application of a regulatory framework that is evolving into a distinct category of instruments.

494. Fourthly, and with regard to the Claimant's criticism concerning the alleged lack of independence of the TACP, the Court considers that, whilst acknowledging its administrative nature – that is to say, that it is an administrative body, not a court, and its members are appointed by the Executive – its decisions form part of the legal context within which the state entities and the Claimant itself operated. The consistent interpretation of the surety bond regime reflected in numerous TACP decisions therefore constitutes a relevant element of the regulatory environment. These are facts, not disputed allegations. However, the Tribunal does not consider that the administrative nature of the TACP renders its decisions irrelevant. The TACP is the specialised body for public procurement disputes in Panama, and its consistent interpretation of the surety regime – set out in numerous rulings over several years – forms part of the regulatory environment. It should be added that the Claimant's allegations were not supported by the necessary evidence required by the principle of the burden of proof. The weight to be given to these rulings, together with the decisions of the Supreme Court, is a matter for the Tribunal's overall assessment in the light of the standard of fair and equitable treatment (see Section V.E *below* in this regard).

495. The Tribunal observes that the evolution of the case law of the Panamanian Supreme Court must be analysed in conjunction with other regulatory developments that occurred during the relevant period, including legislative reforms, regulatory amendments and administrative guidelines issued by the Comptroller General's Office. Indeed, the period between 2017 and 2024 saw not only judicial developments but also legislative amendments (Law 61 of 2017, introducing a requirement for express endorsement) [618] , regulatory changes (Resolution 2259-2023 of the Comptroller General's Office, removing the phrase *'or until full reimbursement has been* made' from standard surety forms) [619] and circulars

[618] **Annex C-47**, Act No. 61 "amending Act 22 of 2006, which regulates public procurement, and laying down other provisions" of 27 September 2017, Article 66.

[619] **Annex C-46**, Resolution No. 2259-2023-LEG/FySE "regulating the bonds issued to guarantee the State's contractual obligations, establishing their templates and repealing Decree No. 33-Leg of 8 September 2020" of 10

August 2023.

administrative (Circular 20-2021.LEG, acknowledging procedural shortcomings in the enforcement of sureties) [620] .

496. These changes, adopted by various State bodies at different times, contributed to shaping a framework characterised more by evolution and ambiguity than by the clarity now sought by both Parties. The Tribunal will consider the cumulative impact of these developments on BHL's legitimate expectations in the context of its analysis regarding Fair and Equitable Treatment in Section V.E.

497. In summary, the Tribunal concludes that the Supreme Court's decisions of 2023 and 2024 represent a reasonable – albeit not the only possible – interpretation of the bail regime under Act 48 of 2011. Nor can it be said that they constitute a radical or unforeseeable break with previous case-law. Rather, they reflect the judicial application of an evolving regulatory framework. The relevance of this regulatory uncertainty to the assessment of the administrative conduct of state bodies will be examined in Section V.E. Nor does the Tribunal accept the Respondent's characterisation that the 2023 and 2024 decisions merely applied established law. The reality is more nuanced: the applicable legal framework changed (from Act 22 of 2006 to Act 48 of 2011, as amended by Act 61 of 2017) and the judicial interpretation of the amended framework differed from the judicial interpretation of the previous framework. However, the regulatory uncertainty that preceded these decisions – and the question of whether the entities' conduct during that period of uncertainty was consistent with the standards of transparency, predictability and good faith inherent in the obligation of Fair and Equitable Treatment – is a factual investigation reserved for Section V.E, *below*.

[620] **Annex C-77**, Circular No. 20-2021.LEG of the Comptroller General of the Republic dated 21 June 2021.

(6) The hierarchy of legislation

a. The position of the Parties

(i) The Claimant's Position

498. The Claimant alleges that there is a conflict between primary legislation (Act 48 of 2011), regulations (Decree 317-Leg/2006) and the model bond forms approved by the Comptroller General's Office. They note that certain aspects of the regulations and model forms go beyond or conflict with the statutory provisions and consider that, where such conflicts exist, the statute must prevail [621] . In particular, the Claimant refers to the wording 'until *full* repayment' in the model surety forms and asserts that this is inconsistent with the periods of validity defined in the statute [622] .

499. In support of this argument, reference is made to the statements of its expert, Mr Arjona, who explained that Article 35 of Law 38 of 2000 establishes the principle of the hierarchy of norms, placing the Constitution at the apex, followed by laws and decrees having the force of law, executive regulations and administrative instruments at the lowest level. Consequently, the standard bond forms issued by the Comptroller-General's Office, as administrative instruments, occupy the lowest substantive level in this hierarchy and cannot override or supplement the time limits laid down by Statute governing[623].

500. On this basis, he points out that Resolution 2259-2023 of the Comptroller General's Office – which removed the words *'or until full repayment has been* made' from the standard bond forms – had been inconsistent with the legal framework throughout the time[624].

---

[621] Reply, §§ 146 and 147(a)-(b).

[622] Reply, § 151.

[623] Day 1 of the hearing, Plaintiffs' opening submissions, Slide 31; Reply, §§ 146–147(a); with reference to **Annex R-38-ESP**, Law No. 38 approving the Organic Statute of the Office of the Administrative Ombudsman, regulating general administrative procedure and laying down special provisions, dated 31 July 2000, Article 35.

[624] Hearing, Day 1, pp. 228:13–229:9; Hearing, Day 4, Closing Arguments of the Claimants, pp. 981:14–982:7 (Mr Irurzun Montoro); Application, §§ 105 and 118, with reference to **Annex C-46**, Decision No. 2259-2023-LEG/FySE

501. For these reasons, the Claimant contends that the regulatory framework itself contributed to the delays. It points out that Law 22 of 2006 has been amended eighteen times since its enactment and that these successive amendments created a *"confusing regulatory framework conducive to the arbitrary conduct that* […] *the Respondent adopted*". The Claimant contrasts the regulatory instability of Act 22 of 2006 with the clear provisions of Act 48 of 2011 (specifically Articles 101, 102 and 107), arguing that even where the primary procurement legislation was in a state of flux, the specific provisions on performance bonds remained sufficiently clear to establish defined periods of validity [625] .

(ii) The Defendant's Position

502. The Respondent rejects BHL's characterisations and maintains that the legislative framework is internally consistent. It argues that the model surety bond forms implement, rather than conflict with, the statute. Panama explains that the regulatory authority of the Comptroller General's Office includes the power to specify the terms of the model surety bond forms and that these are consistent with the purposive interpretation of the statute required by Article 22. It argues that any textual discrepancy between the statute and the regulations is immaterial [626] .

503. Mr Palacios, the Respondent's expert, observed that the Claimant's assertions rest on a false premise, namely that there is a genuine conflict between the statute and regulatory instruments. He explained that Article 102 of Act 48 of 2011 and the model surety bond forms under Decree 317-Leg/2006 are not in conflict but are complementary: the statute establishes the minimum period of validity (duration of the contract plus 30 days), whilst the regulatory instruments specify the additional condition that the guarantee remains valid until the advance payment has been fully

"whereby bonds issued to guarantee the State's contractual obligations are regulated, their standard forms are established, and Decree No. 33-Leg of 8 September 2020 is repealed", dated 10 August 2023.

625 Reply, §§ 200–202; Statement of Claim, §§ 83, 94–95, 98, 111.

626 Defence, § 121; Palacios I, §§ 40–49.

reimbursed [627]. It emphasised that this complementary relationship is consistent with Article 22 of Law 22 of 2006, which mandates a proactive interpretation in the public interest [628].

504. With regard to Resolution 2259-2023, the Defendant contends that this amendment was prospective in nature, cannot be applied retrospectively to bonds issued prior to 2023, and may reflect administrative simplification rather than the correction of a legal error [629].

b. The Tribunal's analysis

505. In light of the submissions of the Parties and their experts, the Tribunal must determine the structure and hierarchy of the legal system under Panamanian law.

506. In this regard, it is not disputed that the legal hierarchy under Panamanian law places the Constitution at the very top, followed by legislation (Law 48 of 2011), executive regulations (Decree 317-Leg/2006) and administrative instruments (model forms of the Comptroller General's Office). Furthermore, it is noted that there is no genuine conflict between a statutory provision and a subordinate instrument, as the statutory provision takes precedence.

507. Notwithstanding the arguments put forward by the Parties, the Tribunal considers that, in the context of the present dispute, the Panamanian regulatory framework is not characterised by an open conflict between the law and subordinate instruments. However, the wording *'or until full repayment has been* made' in the model bond forms [630], the evolving judicial interpretation and the subsequent amendment of the model forms by the Comptroller General's Office point to a regulatory environment in which the rules

---

[627] Hearing, Day 2, pp. 381:9–383:16 and 390:4–14 (Mr Palacios).

[628] Hearing, Day 2, pp. 382:9–383:16 and 497:1–498:19 (Mr Palacios).

[629] Hearing, Day 1, Opening Statements by the Defendant, pp. 149:12–150:19 (Mr Velarde Saffer); Hearing, Day 4, the Defendant's closing submissions, p. 1095:2–11 (Mr Velarde Saffer); Palacios II, Question 11, § 86 (note 75); Rejoinder, §§ 92–98; and 180; Statement of Defence, §§ 131–132, 135, 240, 166 (regarding **Annex C-46**, Resolution No. 2259-2023-LEG/FySE "regulating the bonds issued to guarantee the State's contractual obligations, establishing their templates and repealing Decree No. 33-Leg of 8 September 2020' of 10 August 2023—Resolution 2259-2023, and its status as a prospective amendment).

[630] **Annex C-33**, Decree No. 317-Leg. "regulating bonds issued to guarantee the State's contractual obligations and establishing their standard forms" of 12 December 2006 (*"This bond shall remain in force throughout the entire period of performance of the MAIN CONTRACT and for a further term of thirty*

(30) days… or until the advance payment has been repaid in full”), p. 10.

were not as clear as either Party now maintains. The very fact that the Parties have argued the matter at such length and with such complexity as they have done is, in itself, evidence of the opacity of the regulatory framework.

508. In particular, the Court considers that the regulatory evolution during the relevant period, from the initial promulgation of the model surety bond forms under Decree 317-Leg/2006, through Circular 20-2021.LEG of the Comptroller General, up to Resolution 2259-2023 (2023) [631] , demonstrates that the State's regulatory framework was in the process of evolving. In this regard, the Court considers the removal of the words *'or until full reimbursement has been* made' by Resolution 2259-2023 to be particularly significant [632] .

509. Whilst the Tribunal accepts as plausible Mr Palacios's expert opinion [633]that this amendment was prospective, its very existence confirms that the Comptroller General's Office recognised a need to clarify the model bond forms—a need that would not have arisen had the pre-existing framework been as clear as both Parties maintain. The Tribunal will apply this conclusion regarding the existence of regulatory ambiguity in its analysis of whether BHL's expectations were objectively reasonable and whether Panama's conduct was consistent with the standards of transparency and procedural regularity required by the Fair and Equitable Treatment standard (see Sections V.E(3) and V.E(4), *infra*).

[631] **Annex C-33**, Decree No. 317-Leg. "regulating the bonds issued to guarantee the State's contractual obligations and establishing their templates" of 12 December 2006; **Annex C-77**, Circular No. 20-2021.LEG of the Comptroller General's Office of 21 June 2021; **Annex C-46**, Resolution No. 2259-2023-LEG/FySE "regulating bonds issued to guarantee the State's contractual obligations, establishing their templates and repealing Decree No. 33-Leg of 8 September 2020" of 10 August 2023.

[632] **Annex C-46**, Resolution No. 2259-2023-LEG/FySE "regulating bonds issued to guarantee the State's contractual obligations, establishing their standard forms and repealing Decree No. 33-Leg of 8 September 2020", dated 10 August 2023 (This resolution, issued by the Comptroller's Office, formally updated the model texts).

[633] Palacios II, §§ 66 and 86.

E. APPLICATION OF THE STANDARD OF FAIR AND EQUITABLE TREATMENT TO THE FACTS

510. The Court proceeds to analyse the substantive elements of the standard of fair and equitable treatment, assessing each one in the context of the 35 Cases. Thus, it will first analyse the alleged arbitrariness, then procedural regularity, followed by legitimate expectations and, finally, the transparency and coherence of the Panamanian legal system.

(1) Arbitrariness – the pattern in the enforcement of performance bonds

511. The Tribunal must determine whether the delays in resolving the works contracts and, consequently, in enforcing the performance bonds constitute arbitrary conduct in breach of the standard of Fair and Equitable Treatment. To reach this determination, the Tribunal will apply the 'test' set *out above* in Section V.C(2).

512. This 'test' will be applied in respect of the time periods identified in Sections V.D(1)–V.D(4) *above*: (a) the period between the expiry of the contractual term and the issuance of the administrative termination notice; (b) the period between the decision and the issuance of the order for the enforcement of the bond; and (c) the period between the enforcement order and the conclusion of the proceedings (payment or cancellation). The Claimant's case focuses primarily on periods (a) and (b); the Respondent's defence focuses on the procedural reasons for the delay at each stage.

a. The duration of proceedings leading to the resolution of works contracts

513. The Tribunal notes that, in the 35 cases, the timeframes between the expiry of the contractual performance period and the issuance of the administrative decision range from several months to several years. In the most extreme cases – such as the Viento Frío Aqueduct (COC-87-16, Case No. 33) [634] or the El Limoncito Aqueduct (COC-24-17, Case No.
34) [635] – enforcement took place five to six years after the termination of the contract. In the Acueductos de Chiriquí (No. 1) case [636] ,

[634] Reply, § 261 and footnote 200, and its Annex, p. 145; Application, § 152(d) and footnote 84, and § 328(e).
[635] Claim, Annex, Issue 34, § 329 and p. 145.

[636] Reply, Annex, p. 129; Claim, § 152(b), Annex, Item 1, § 226(d).

Three years and ten months elapsed between the expiry of the bonds (as interpreted by the Claimant) and the entity's notification of its intention to liquidate.

514. BHL maintains that these delays are, in themselves, evidence of the arbitrary conduct on the part of Panama. It asserts that a diligent state administration does not need years to detect and formalise a contractor's breach of contract in short-term public works contracts. It illustrates the alleged disproportion between the detection of the breach and the implementation of a measure in response with the case in which the Supreme Court of Justice handed down its decision in 2024, cited by Panama: the breach was detected between twelve and fourteen months after the expiry of the contractual term, but the Panamanian authority took four years to issue the decision [637] .

515. The Respondent contends that Act 48 of 2011 does not set a time limit for the issuance of decisions to terminate works contracts and that this is the result of a deliberate legislative choice: the primary objective is to safeguard the public interest, which, in cases of non-compliance, requires a thorough investigation into the contractor's performance before a decision to terminate the works contract can be issued [638] .

516. The Tribunal considers that the absence of a statutory time limit is a significant factor. The Claimant does not allege, nor does the evidence establish, that the entities breached any express provision of Panamanian law by taking the time they did to issue decisions terminating the works contract. The question to be determined is, therefore, whether, in the absence of a specific time limit for terminating contracts, the time taken by the Panamanian entities constitutes a breach of the standard of international law.

517. The Tribunal's conclusion is that, given the circumstances of this case, it does not. It is true that the delays were, in many cases, protracted, but these, in themselves, do not constitute arbitrariness. This is because the conduct must be *"any*

---

[637] Hearing, Day 2, p. 345:1–5 (Mr Arjona); Hearing, Day 4, Closing Arguments of the Claimants, pp. 957:6–18, 964:2–8 and 995:10–15 (Mr Irurzun Montoro); Rejoinder, §§ 248, 357–383; Statement of Claim, §§ 128–141.

[638] See Duplicates, § 164; Answer, § 193; Palacios II, §§ 117–118; Palacios I, § 116; Hearing, Day 1, pp. 247:12–248:3 (Mr Arjona, acknowledging during cross-examination that where Act 48 of 2011 or Legislative Decree 2006 provided for the imposition of a time limit, it did so expressly, and that no such time limit exists for the termination of the works contract); Hearing, Day 4, Closing Arguments of the Defendant, pp. 1071:6–1072:20 (Mr Gallego); Hearing, Day 4, Closing Arguments of the Defendant, Slides 11 and 15.

"*apparent legitimate* purpose" or is *"based not on legal standards but on discretion, prejudice or personal* preference" [639] . This condition is not met, given that the delays had an identifiable procedural explanation: the administrative termination procedure under Panamanian law involves an investigation into the breach, the issuance of a decision, notification to the contractor, and a period for the contractor to respond and appeal [640] . Most of the 35 issues of fact relate to the
CONADES [641].

518. The Tribunal does not suggest that every delay was justified. Some delays may reflect negligence; others may reflect institutional mismanagement, but, in themselves, they do not amount to arbitrariness per se. Furthermore, the Claimant has failed to demonstrate that the specific delays in issuing decisions were motivated by an improper purpose, were directed against Banesco or lacked any rational connection with the administrative procedure. The standard of Fair and Equitable Treatment does not require perfection from state administrations, as the Tribunal observed in the case *of Eastern Sugar v. Czech Republic*; the respondent State is entitled to a certain degree of inefficiency, trial and error, and imperfection [642]. Indeed, the Parties agree with the standard set out in the case *of Gaspar v. Costa Rica*, which establishes that for an administrative irregularity or delay to constitute a breach of the standard of Fair and Equitable Treatment, it is required*, 'at the* very *least, that the State does not act in an arbitrary, manifestly unjust, unlawful, idiosyncratic or discriminatory manner, and that it respects basic notions of transparency and due process*

[639] **Annex CL-12**, *EDF v. Romania*, § 303.

[640] **Annex C-34**, Law No. 22 of 27 June 2006 "regulating public procurement, as amended by Act 35 of 2006, Act 2 of 2007, Act 21 of 2008, Act 41 of 2008, Act 69 of 2009, Act 80 of 2009, Act 12 of
2010, Act 30 of 2010, Act 66 of 2010 and Act 48 of 2011", Article 116; Palacios II, § 113; Palacios I, §§ 102 and 117; Hearing, Day 1, pp. 247:16–249:16 (Mr Arjona); Hearing, Day 4, Closing Arguments by the Respondent, p. 1072:17–22 (Mr Gallego).

[641] Reply, Annex; Statement of Claim, Annex I.

[642] **Annex RL-39**, "Fair and Equitable Treatment", UN Conference on Trade and Development (UNCTAD) Series on Issues in International Investment Agreements (2012), p. 87 and its reference to *Eastern Sugar v. Czech Republic* SCC Case No. 088/2004, Partial Award, 27 March 2007, § 272: *"some measure of inefficiency, trial and error, and imperfection*". Rejoinder, § 368 and its reference to **Annex RL-118***, Eli Lilly v. Canada*, § 421 *("Some level of unpredictability is present in the application of all law. In the Tribunal's view, inconsistency in judicial interpretation on this limited scale is to be* expected").

administrative"[643]. Furthermore, the Claimant has not established that the specific delays in issuing the administrative decisions were based on improper grounds, were directed against Banesco Seguros or lacked a rational connection with the administrative proceedings.

519. Having analysed the delays individually, it is necessary to determine whether the recurrence of similar delays across the 35 cases reveals a systemic arbitrariness that an individual assessment would overlook. Once again, the Tribunal's answer is in the negative.

520. The truth is that one cannot strictly speak of a recurrence: this would require a similar factual basis that is repeated, a circumstance that does not arise in the present case. Indeed, there were delays in some cases and these varied in duration, preventing the establishment of a pattern of recurrence. The case file shows that the time taken to resolve works contracts has varied considerably, with no discernible pattern[644]. The existence of these delays reflects the structural characteristics of the Panamanian public procurement system – a complex administrative process comprising multiple stages, and a legal framework without time limits for the award of works contracts – rather than conduct without any apparent legitimate purpose or conduct based on preferences rather than legal standards.

b. The period between the termination of the works contract and the enforcement of the guarantee

521. The second period – between the issuance of the decision to terminate the works contract and the enforcement order against the guarantor – is also significant in several cases.

522. The Defendant justifies this period on the grounds that the challenge procedure comprises multiple stages[645]: once a termination decision has been issued, the contractor may request a review, appeal to the TACP and, finally, apply for

[643] **Annex RL-36**, *Gaspar v. Costa Rica*, §§ 356, 363–364 and 507; Rejoinder, § 338 and Hearing, Day 1, Claimants' Opening Statements, Slide 96.

[644] See in this regard the Hearing, Day 4, Closing Arguments of the Claimants, Slides 8–10 and 12–13; Application,

Annex; Rejoinder, Annex.

[645] Rejoinder, § 152; Defence, §§ 169–171.

judicial review before the Supreme Court. Panama argues that the authority cannot enforce the bond until the decision is administratively final [646] .

523. In this regard, the Tribunal noted the distinction made by the Claimant between administrative appeals (which automatically suspend the act) and judicial review before the Supreme Court (which does not entail automatic suspension) [647] . As will be discussed in Section V.E(2) *above*, the Claimant argues that once the decision is final at the administrative level – which occurs once the TACP issues its decision – the authority could and should have proceeded with enforcement. The Claimant asserts that the further delay whilst the judicial review was pending was unnecessary: it allowed the authorities to keep the bonds open indefinitely whilst claiming that the proceedings were ongoing [648] .

524. The Court considers that the Respondent's position has merit on this point. The administrative appeal procedure exists for the benefit of both the contractor and, indirectly, the guarantor. An entity that waits for the decision to be confirmed by the courts before enforcing the guarantee is not acting arbitrarily. The alternative – enforcing the bond whilst the decision is under judicial review – carries the risk that the decision may subsequently be set aside, in which case the enforcement would have been unjustified. The Court does not consider it arbitrary for an entity to exercise its discretion to await the outcome of the judicial proceedings or, conversely, to enforce the bond, before taking an enforcement step with significant financial consequences for the guarantor.

525. The Court acknowledges that, taken together, the two periods – pre-decision and post-decision – result in timeframes which, in some cases, are objectively lengthy [649] . No

---

[646] Rejoinder, §§ 137 and 348; Defence, §§ 126–127; 171, 188, 197 and 200.

[647] Defence, § 171, p. 70, 202, footnotes 324, 257.

[648] Rejoinder, §§ 7, 128, 159, 242 and 385; Statement of Claim, § 179.

[649] See, for example: (i) Case No. 3, **Annex R-157**, Indemnity Agreement for Development, Assembly and Civil Works (Case No. 3) of February 2015 and **Annex R-14**, Application for full jurisdiction by Banesco Seguros before the Supreme Court, Chamber III (Case No. 3) of 9 September 2024 (Claim for full jurisdiction before the Supreme Court); (ii) Case No. 4, **Annex R-158**, Duproc Indemnity and Joint and Several Liability Agreements (Case No. 4) of July 2013 and **Annex R-8**, Third-party intervention application by Banesco Seguros before

notwithstanding this, the Tribunal recalls its conclusion in Sections V.D(1)c, V.D(2)c, V.D(3)c and V.D(4)c, *supra*, where the Tribunal determined that the domestic legal framework is genuinely ambiguous and the State's conduct is consistent with a plausible interpretation of that framework. The threshold for arbitrariness is particularly high. Whether or not the Tribunal agrees with the Respondent's interpretation (and, as noted, the Tribunal must not take a position on this matter), the authorities were not acting without a legal basis. That is sufficient to dismiss the claim of arbitrariness.

c. The Claimant's 'proportionality' argument

526. BHL contends that even if the Panamanian authorities had had the right to enforce the bonds, the manner in which they did so was disproportionate [650]. Specifically, the Claimant contends that enforcing performance bonds years after the underlying works were abandoned – without having taken any intermediate steps to mitigate the situation, such as supervising the contractors or completing the projects – demonstrates a lack of proportionality that exceeds the threshold of Fair and Equitable Treatment.

527. The Court is not persuaded by the Claimant's argument on the basis of the evidence presented. Proportionality, in the context of Fair and Equitable Treatment, requires a comparison between the measure adopted by the State and the legitimate objective it pursues. Here, the objective was to recover funds lost due to contractors' breaches of contract in public infrastructure projects. The enforcement of the performance bond was the mechanism contractually stipulated to achieve that recovery. The Court considers that the delay does not constitute disproportionate conduct; rather, the delay, as concluded earlier, is not clearly unlawful or arbitrary in itself; the timeframe is not excessive nor was it motivated by an extra-legal objective, but was the result of various factors, and this, moreover, must be assessed, weighed up and considered in the light of proportionality. The delay may be regrettable, but in this case it does not render the remedy itself disproportionate to the objective.

---

the TACP (Case No. 4) of 3 October 2022 (Third-party intervention proceedings before the TACP) and other similar situations in Case No. 5, Case No. 6, Case No. 7, Case No. 10, Case No. 12 and Case No. 21.

[650] Hearing, Day 1, Claimants' opening submissions, pp. 92:3–11, 94–95:1–4, 96:3–97:5, 104:11–12 (Mr Irurzun Montoro).

528. The Tribunal observes that, where the domestic legal framework is not unequivocal and the State's conduct is consistent with a plausible interpretation of that framework, it is more difficult to establish arbitrariness. A State entity acting on the basis of a textually substantiated interpretation of its own law is not acting *"not based on legal standards but on discretion, prejudice or personal* preference" [651]– even if an alternative interpretation is equally tenable. The existence of a rational legal basis for the conduct is, in the Court's view, a strong indicator that the threshold of arbitrariness has not been crossed.

529. The Tribunal considers that the delays in enforcement, although in many cases protracted, do not constitute arbitrary conduct (see Section V.E(1)a, *supra*). The conduct of the Panamanian authorities had a minimal rational basis: they acted in accordance with a plausible interpretation of the applicable Panamanian law – an interpretation subsequently confirmed by the Supreme Court – and within the procedural framework established by Law 48 of 2011. The Tribunal also notes the absence of a statutory time limit for the resolution of works contracts and the complexity of the multi-stage administrative procedure. The Tribunal reiterates that delay, inefficiency and sub-optimal administration, whilst regrettable, do not cross the threshold of arbitrariness under the test in *EDF v. Romania*, which requires the absence of improper purpose, discrimination, or deliberate disregard of legal standards, none of which has been proven in the present case [652].

(2) Due process – procedural irregularities

530. With regard to BHL's argument concerning the failure by the Panamanian entities to comply with the procedural requirements governing the enforcement of sureties, in particular the 30-day notice requirement in the surety forms, the endorsement regime under Article 1542 of the Civil Code and Circular 20-2021.LEG and the obligation to notify the surety of contractors' breaches, the Tribunal proceeds to analyse whether the procedural conduct of the entities, as considered across the 35 Issues, constitutes

[651] **Annex CL-12**, *EDF v. Romania*, § 303, based on the expert opinion of Professor Schreuer.

[652] **Annex CL-12**, *EDF v. Romania*, § 303; see also **Annex RL-36**, *Gaspar v. Costa Rica*, ICSID Case No. ARB/19/13, Award of 29 June 2022, §§ 363–364.

a denial of due process or an independent basis for a breach of Fair and Equitable Treatment. It is recalled that in Section V.D(4) *above*, the Tribunal has already analysed the legal framework determining the applicable procedural requirements.

a. Alleged breaches regarding endorsements

531. The Claimant points out that, in 24 of the 35 Cases, the contracting entities did not obtain endorsements extending the advance payment bonds when the contractual term was amended or extended [653]. In a further five Cases, the entities did not even seek to obtain extensions. With regard to performance bonds, the Claimant notes that in 27 of the 35 Cases, an endorsement was not required. It contends that these breaches triggered the de facto termination provided for in Article 1542 of the Civil Code. Consequently, the entities' subsequent attempt to enforce bonds that had been extinguished constitutes, in itself, a denial of due process [654] .

532. The Court recalls its conclusion in Section V.D(4) *above* regarding the fact that the interaction between Article 1542 and the public procurement surety regime under Act 48 of 2011 gives rise to a genuine question of interpretation: whether the *lex specialis* of the procurement regime supersedes the general provision on suretyship in the Civil Code, or whether Article 1542 operates as a substantive restriction on the validity of suretyship even within the context of public procurement. The Tribunal noted that this question depends on the specific facts of each case, including whether an extension was, in fact, granted to the debtor within the meaning of Article 1542 (see Section V.D(4), *supra*).

533. In accordance with the methodology set out in Section V.C(5), *supra*, it is not for the Tribunal to resolve this issue of Panamanian law, and it does not do so. The Tribunal does note, however, that the interpretation put forward by both Parties is plausible. Both interpretations are supported by the statutory text; neither is unreasonable. The legal framework governing the endorsement is, in itself, ambiguous; the 30-day clause is an obligation on the contractor and not a condition limiting the contracting authority's right to enforce the contract, and Circular

[653] Reply, §§ 162 and 205; Statement of Claim, §§ 120, 128 and 217.

[654] Claim, §§ 128–136.

It was issued after the bulk of the relevant conduct had taken place and does not provide for any consequences in the event of non-compliance.

534. The consequence of this conclusion is that the fact that the entities did not obtain the endorsements cannot be characterised as a clear procedural breach on which a claim for breach of the standard of Fair and Equitable Dealing could be based. If the law is ambiguous as to whether the endorsement is a prerequisite for the continued validity of the bond – and the Tribunal has found that it is – then the fact that the Panamanian entities did not require the endorsement is, at best, a failure to comply with a plausible interpretation of the law. It does not constitute the sort of manifest procedural irregularity – *"acts issued in complete and exclusive disregard of* procedure" [655], to use the Claimant's phrase – that would amount to a breach of the standard of Fair and Equitable Treatment.

535. Furthermore, and in line with the Respondent's arguments regarding the conduct of Banesco Seguros, one cannot overlook the fact that there is no evidence in the file to show that, when the contractors requested endorsements from Banesco Seguros, it refused them, or that Banesco Seguros objected to the passage of time, or demanded the return of the bonds during the period of the alleged administrative inaction. If Banesco Seguros believed that the bonds had expired, it could have given notice of this fact and requested their cancellation. There is no record in the file that it did so.

536. On the contrary, the Tribunal considers it decisive that the Claimant had access to, and did in fact exercise, all the administrative and judicial remedies available under Panamanian law. Whilst the manner in which the procedure operated might be questioned, it did operate and was accessible. The procedural framework, whilst slow, was functional and accessible. A claim of denial of due process cannot succeed where the investor had a real and meaningful opportunity to challenge the contested measures through the available legal channels.

---

[655] Hearing, Day 4, Closing Arguments by the Claimants, p. 964:21–22 (Mr Irurzun Montoro).

537. In this Court's view, the question arises as to whether the systematic failure to request and obtain the endorsement in the majority of the 35 cases constitutes an infringement of the right to due process which an individual assessment would overlook. The Court does not find this to be the case, but rather considers that the systemic nature of the issue reflects the ambiguity of the legal obligation – the entities did not treat the endorsement as a prerequisite because the law did not clearly require it in the context of public procurement.

b. The 30-day notice requirement

538. The Court reaches a similar conclusion regarding the 30-day notice requirement. In line with the conclusion set out in Section V.D(4), the clause contained in the model performance bonds approved by the applicable regulations requires the contractor to extend the bond 30 days prior to its expiry. Failure by the contractor to do so entitles the contracting authority to claim the bond [656]; that is to say, it creates an additional right, not a condition for the contracting authority's legally and contractually recognised right to enforce the bond. Furthermore, the clause does not stipulate that the contracting authority must act within 30 days or forfeit its right to claim.

539. The Court notes that Circular 20-2021.LEG instructs entities to request endorsements in a timely manner and to notify the guarantors of any breach of the terms set out in the applicable regulations. The Circular reflects an expectation of diligent conduct on the part of the institutions; furthermore, the Court notes that the Circular itself acknowledges that the Panamanian authorities echoed a communication from APADEA regarding situations which it considered to be adversely affecting the activities of insurance companies [657]. However, it cannot be overlooked that the Circular was issued in 2021, after most of the conduct at issue in this case had already taken place. A particularly relevant circumstance, in the Court's view, is that the Circular does not prescribe a specific consequence for non-compliance. It establishes an administrative standard; it does not create a condition for the validity of the surety bond.

[656] Reply, §§ 177 and 242; see, generally, the heading of Section 3.3; Statement of Claim, §§ 130–131 and 171.

[657] **Annex C-77**, Circular No. 20-2021.LEG of the Comptroller General's Office of the Republic dated 21 June 2021, p. 2.

540. The Tribunal therefore considers that, whilst the failure by the Panamanian authorities to notify Banesco Seguros is regrettable from the point of view of good administrative practice, it does not amount to a denial of due process under the standard of Fair and Equitable Treatment. BHL had access to administrative appeal procedures – reconsideration, review by the TACP and judicial review by the Supreme Court – in every matter in which the enforcement of the relevant bond was sought. The Claimant exercised those rights. The procedural framework, whilst it may be characterised as slow, was available and was utilised.

541. In other words, the legal framework governing the endorsement is, in itself, ambiguous; the 30-day clause is an obligation on the contractor and not a condition limiting the contracting authority's right to enforce the bond; and the Circular was issued after most of the relevant conduct had taken place and does not provide for any consequences for non-compliance.

(3) Legitimate expectations and regulatory certainty

542. It is therefore necessary to analyse the third element of Fair and Equitable Treatment invoked by the Claimant: the frustration of legitimate expectations.

543. BHL maintains that Banesco Seguros entered the Panamanian insurance market on the understanding that the surety bond regime under Law 48 of 2011 operated in a specific manner – that is, that surety bonds had an objectively determinable term, expired upon the expiry of the relevant statutory periods, and that the surety's liability was limited. According to the Claimant, the conduct of the contracting parties, as well as the subsequent judicial validation of a different interpretation of the legislation, frustrated those expectations [658] .

544. The Tribunal recalls the well-established standard for legitimate expectations in the context of the standard of fair and equitable treatment. It is for the Claimant to demonstrate that: (i) the receiving State made a specific representation or entered into a specific commitment, or established a regulatory framework that was sufficiently clear and definitive to give

[658] Reply, §§ 108 and 127; Claim, § 159; with reference to **Annex CL-3**, *Saluka v. the Czech Republic*, §§ 302 and 306–308; **Annex CL-15**, *Eco Oro v. Colombia*, § 710.

give rise to reasonable reliance [659] ; (ii) the investor relied on that representation or framework when making its investment [660] ; and (iii) the State subsequently departed from that representation or framework in a manner inconsistent with the expectation created [661] . Mere expectations regarding the profitability of a business or the general stability of a regulatory environment do not qualify. What is required is a specific and justified expectation linked to the State's conduct or representations [662] .

a. Did the regulatory framework give rise to legitimate expectations?

545. The Court determined, in Section V.D *above*, that the statutory regime governing sureties under Act 48 of 2011 is genuinely ambiguous. Sections 97, 101, 102 and 107, taken together, admit of at least two plausible interpretations – that of the Claimant (bonds expire after fixed periods) and that of the Defendant (bonds remain in force until settlement). This ambiguity is not the result of a subsequent judicial reinterpretation, but is inherent in the legal text as enacted in 2011. The normative tension stems from the fact that the legislature did not expressly address the specific situation of contracts terminated due to the contractor's breach, thereby creating a gap that none of the proposed interpretations manages to resolve fully.

546. An ambiguous legal framework does not, by definition, constitute a sufficiently clear and definitive framework—as outlined above—to give rise to the kind of specific and justified expectations that the standard of fair and equitable treatment protects. Whilst, at the time Banesco Seguros entered the Panamanian insurance market, the legislation could reasonably be interpreted one way or the other, the expectation that a particular interpretation would prevail is, at best, merely an assumption

[659] **Annex RL-34**, *Mesa Power v. Canada*, CPA Case No. 2012-17, Award of 26 March 2016, § 505; **Annex RL-48**, *Lone Pine v. Canada*, ICSID Case No. UNCT/15/2, Award of 21 November 2022, § 624; **Annex RL-49**, *Thunderbird v. Mexico*, Ad Hoc Case, Arbitral Award of 26 January 2006, § 127.

[660] **Annex RL-49**, *Thunderbird v. Mexico*, Ad hoc Case, Arbitral Award of 26 January 2006, § 127; **Annex RL-79**, *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005, § 357.

[661] **Annex CL-15**, *Eco Oro v. Colombia*, §§ 710 and 820.

[662] **Annex CL-3**, *Saluka v. the Czech Republic*, §§ 302–308.

a commercial assessment of regulatory risk and not a legitimate expectation based on a clear commitment undertaken by the State.

547. The Tribunal further notes that the Claimant has not identified any specific statement by Panama – whether by the Comptroller General's Office, the contracting authorities or any other state body – to the effect that the bonds would expire after specific statutory periods. Circular 20-2021.LEG [663] , on which the Claimant bases part of its argument, was issued in 2021 – years after most of the performance bonds in question were issued – and, as the Tribunal noted in Section V.E(4) *above*, the absence of an endorsement does not entail the automatic expiry of the performance bonds in the event of such an omission. The bond templates approved by Decree 317-Leg/2006 [664] , even though they contain references to specific time periods in certain respects, must be interpreted in the light of the legal framework governing them; a framework which the Court has already characterised as ambiguous. In the Court's view, these templates do not constitute a specific representation capable of taking precedence over the applicable legal framework.

548. The Respondent considers Banesco Seguros's own conduct to be relevant and contends that Banesco Seguros, as a sophisticated commercial player in the Panamanian insurance market, was not a passive victim of the State's conduct [665] . According to the Respondent, Banesco Seguros issued performance bonds in a sector – public infrastructure – where the risk of contractor default was well known. Banesco Seguros' business model depended on the prompt completion of underlying works by contractors over whom Banesco Seguros had no control. When the contractors defaulted, the risk that Banesco had accepted materialised [666] .

549. The Court does not consider this point to be decisive when taken in the abstract: an investor's commercial sophistication does not preclude the State's potential liability

---

[663] **Annex C-77**, Circular No. 20-2021.LEG of the Comptroller General's Office of the Republic dated 21 June 2021.

[664] **Annex C-33**, Decree No. 317-Leg. "regulating the bonds issued to guarantee the State's contractual obligations and establishing the relevant templates", dated 12 December 2006.

[665] Rejoinder, §§ 117, 127, 130–133, 449, 451, 453 and 455; Defence, §§ 16, 70–71, 75, 160, 247–248, 256–257.

[666] Rejoinder, §§ 10, 126, 132; Reply, §§ 16, 354; Hearing, Day 1, Defendant's opening submissions, pp. 134:6–22; 139:21–22, 140:1–2, 143:5–17 and 168:17–22 (Mr Gallego).

for breaching the standard of Fair and Equitable Treatment, nor should it do so. What is relevant is the expectation that a prudent investor could legitimately have had in the specific context in which the investor in question – BHL – made its investment.

550. The Tribunal does not base its conclusion on the conduct of Banesco Seguros; the standard of Fair and Equitable Treatment is assessed by reference to the conduct of the State. However, these observations reinforce the Tribunal's conclusion that the procedural irregularities identified by BHL, even if they did in fact exist, do not meet the threshold for a denial of due process under the Treaty.

b. The Supreme Court's decisions

551. The Claimant's arguments regarding legitimate expectations focus on the Supreme Court's decisions of 2023 and 2024 [667]. The Claimant contends that these decisions amounted to a retroactive change in the applicable law: until 2023, there was no judicial authority confirming the Respondent's interpretation, meaning that the actions of the authorities during the relevant period (2014–2022) would have been based on a legal interpretation that had not yet been judicially validated. From this perspective, the Supreme Court's decisions would not have constituted a mere clarification of existing law, but rather a novel determination subsequently applied with retroactive effect to validate conduct which, at the time it occurred, lacked legal basis.

552. The Tribunal has already examined the Supreme Court's decisions in Section V.D(5), concluding that they reflect a reasonable—albeit not the only possible—interpretation of Act 48 of 2011. It is now necessary to address the temporal dimension of the Claimant's argument.

553. The Tribunal accepts that the absence of previous rulings by the Supreme Court on the specific issue of the validity of performance bonds in cases of termination of a works contract due to breach meant that, during the period 2014–2022, the

---

[667] **Annex R-33**, Judgment of the Supreme Court, Chamber III (Case No. 21) of 20 October 2023; **Annex R-24**, Judgment of the Supreme Court, Chamber III (Case No. 4) of 13 September 2024.

the law had not been definitively established at the highest level of the Panamanian judiciary. This is a factual finding. Whilst the TACP [668] had consistently issued rulings in favour of the interpretation upheld by the Defendant, that body is administrative in nature and not judicial. Consequently, during the relevant period, the authorities acted on the basis of a legal interpretation that was plausible but had not yet been confirmed by the Panamanian Supreme Court.

554. The decisive question is whether such a state of uncertainty – that is, the existence of a plausible but not definitively confirmed interpretation – can give rise to a claim for frustration of legitimate expectations. The Tribunal considers that it does not.

555. The Fair and Equitable Treatment standard protects investors against the frustration of justified expectations, that is to say, those based on clear commitments by the State or on a sufficiently established regulatory framework. It does not guarantee investors that a regulatory ambiguity will ultimately be resolved in the manner most favourable to their interests. During the period 2014–2022, the legal regime was ambiguous; the Supreme Court resolved that ambiguity in 2023–2024 in line with one of the existing plausible interpretations. BHL's expectation that the alternative interpretation would prevail constitutes, in essence, a commercial assumption regarding regulatory risk and not a legitimate expectation protected by the Treaty.

556. The Tribunal further observes that characterising the Supreme Court's decisions as retroactive is not legally appropriate. As a general principle, the judicial interpretation of a provision in force does not create new law, but rather clarifies the meaning of existing law. The Claimant may disagree with the interpretation – the Tribunal has recognised that its reading is equally defensible from a textual point of view –; however, mere disagreement with a judicial interpretation,

[668] **Annex R-30**, TACP Decision No. 073-2021/TACP (Case No. 21) of 25 June 2021; **Annex R-31**, TACP Decision No. 018-2023-Pleno/TACP (Case No. 4) of 30 January 2023; **R-10**, TACP Resolution No. 020-2023/TACP (Case No. 13) of 30 January 2023; **R-45**, TACP Resolution No. 101-2023-Pleno/TACP (Case No. 6) of 5 June 2023; **Annex C-290**, Resolution No. 215-2023-PLENO-TACP of the Administrative Court for Public Procurement of 19 October 2023.

does not constitute a frustration of legitimate expectations under the standard of fair and equitable treatment.

557. Consequently, the Tribunal finds that the Claimant has not demonstrated a frustration of legitimate expectations (see Section V.E(4), *above*). The regulatory framework was genuinely ambiguous, insofar as both the Claimant's and the Respondent's interpretations of the surety regime find plausible support in the legal text. By definition, an ambiguous framework cannot give rise to specific and justified expectations that the standard of Fair and Equitable Treatment protects. Nor has the Claimant identified any specific representation by any State body to the effect that the bonds would lapse automatically upon the expiry of the specified statutory time limits. The Supreme Court's decisions of 2023 and 2024, whilst resolving the ambiguity in favour of the Respondent, constitute a reasonable interpretation of the law in force and not a retroactive change to it.

(4) Transparency and consistency

558. The Claimant also invokes transparency and consistency as aspects of the obligation of fair and equitable treatment. The argument is that the regulatory framework – the interplay between Law 48 of 2011, Decree 317-Leg/2006, the bond templates, the circulars issued by the Comptroller's Office and evolving case law – was so complex, inconsistent and opaque that it failed to provide the investor with a clear and predictable legal environment.

559. The Court does not dispute the relevance of this observation as a matter of regulatory policy. As set out in Section V.D *above*, the Panamanian bond regime constitutes a complex regulatory framework that was not specifically designed for cases of termination for breach and which has been subject to successive amendments and interpretative developments. Undoubtedly, a greater degree of regulatory clarity would have been desirable.

560. However, the standard of Fair and Equitable Treatment does not require legal perfection. Every legal system contains areas of complexity and ambiguity. The relevant question is whether the regulatory environment was so opaque as to deprive the investor of the

the ability to identify the rules and structure their activities accordingly. The Tribunal does not consider that this threshold has been met.

561. The legal provisions were public, accessible and available. The regulatory environment, whilst complex, was not opaque: the authorities consistently applied the same interpretation, the administrative mechanisms for resolving ambiguity functioned effectively, and Banesco, as a regular participant in the Panamanian insurance market, was in a position to determine the applicable rules and the prevailing interpretative trend. Regulatory complexity, in itself, does not constitute a breach of the duty of transparency. Banesco may not have agreed with the emerging interpretative consensus – but it was not deprived of the ability to ascertain what that consensus was. The element of lack of transparency required to establish a breach of the Fair and Equitable Treatment standard is therefore not established.

562. Furthermore, the Tribunal observes that the Panamanian legal system demonstrated a degree of self-correcting capacity during the relevant period. The TACP developed a consistent line of interpretation regarding the validity of sureties; the Supreme Court resolved the central interpretative question in 2023–2024; and the Comptroller General's Office issued circulars intended to guide administrative practice. Whilst these institutional responses did not entirely eliminate the underlying ambiguity, they demonstrate that the regulatory environment was not one of opacity or dysfunction, but was characterised by the progressive clarification of a contentious issue through the available institutional channels.

563. As regards the alleged pattern, the Tribunal examines whether the conduct of the various entities across the 35 cases was internally consistent—and concludes that it was. The contracting entities consistently applied the same interpretation of the surety bond regime, which was subsequently confirmed by the Supreme Court. The Claimant's complaint does not rest on the State acting inconsistently—with different entities applying different rules to the same guarantor—but rather that the consistent interpretation was incorrect. That is a complaint about the substance of the law, not about the transparency or consistency of its application. The obligation of transparency arising from the principle of Fair and

Equitable Treatment is not compromised where the State's conduct is internally consistent, even if the investor disagrees with the legal basis.

564. Consequently, the Tribunal concludes that the transparency element of the Fair and Equitable Treatment standard has not been established (see Section V.E(4), *supra*). The statutory provisions and model surety bonds were publicly available. Banesco, as a regular participant in the Panamanian insurance market, was in a position to identify the applicable rules and the interpretative trend. The complexity of the regulatory environment, considered in isolation, does not amount to a breach of the obligation of transparency.

(5) The 'pattern' of the State's conduct considered as a whole

565. Having examined each of the elements of Fair and Equitable Treatment in the light of the pattern derived from the 35 Cases, the Tribunal now proceeds to make an overall assessment. In essence, the Claimant argues that the combination of delays, procedural irregularities, regulatory ambiguity and the manner of implementation produces a cumulative effect that exceeds the threshold of Fair and Equitable Treatment, even if no individual element does so.[669] (see Section V.C(3), *supra*). The Tribunal takes this argument seriously, as it lies at the heart of the case as set out by the Claimant and must be assessed on its own terms.

566. The Tribunal acknowledges that its finding of ambiguity in the Panamanian legal framework is central to many aspects of its analysis. This is no coincidence, but rather reflects the very structure of the Claimant's case, which is based on the premise that the entities, according to the Claimant, performed contracts whose term had already expired under Law 48 of 2011. If the question of the validity of the bonds is legally ambiguous, as has already been concluded, the basis for each of the elements of the Fair and Equitable Treatment standard invoked by the Claimant is necessarily undermined. An assessment

669 Rejoinder, §§ 304 and 308; Hearing, Day 1, Claimants' opening statements, pp. 56:4–16 and 70:10–16 (Mr Irurzun Montoro); Hearing, Day 4, Claimants' Closing Arguments, pp. 950:18–951:13 (Mr Irurzun Montoro);

Hearing, Day 4, Claimants' Closing Arguments, Slides 4, 10 and 11.

A cumulative threshold cannot validate a claim whose individual elements rest on a factual premise that the Tribunal has rejected.

567. The Tribunal does not find that the cumulative threshold for Fair and Equitable Treatment has been met. The structural risk across 35 cases, the exposure of approximately USD 45.6 million and the progressive contraction of Banesco Seguros' surety business are real. However, the Fair and Equitable Treatment standard is a standard of State conduct, not a guarantee against the materialisation of commercial risk in an ambiguous regulatory environment.

568. The Tribunal has considered whether, in accordance with the principle established in the *El Paso* case [670]invoked by the Claimant, the combination of the measures identified – the delays, the procedural irregularities, the regulatory uncertainty and the subsequent judicial confirmation – could cumulatively constitute a breach of the Fair and Equitable Treatment standard, even if none of them, taken separately, meets the required threshold. The Tribunal concludes that it does not.

569. Cumulative assessment does not operate as a mechanism for transforming a series of individually insufficient claims into a successful claim. The principle established in the *El Paso* case applies where individual measures, each approaching the threshold, produce a combined effect that does exceed the threshold. Here, the individual elements do not approach that threshold. The delays were due to rational explanations; the procedural irregularities arose from a genuine legal ambiguity; the argument regarding legitimate expectations cannot be upheld because the framework was ambiguous from the outset and the element of transparency is not compromised. The aggregation of measures does not result in a cumulative breach.

570. The Tribunal recognises that this conclusion may be perceived as insensitive to BHL's commercial situation. Banesco Seguros faces a real financial exposure in relation to the 35 Cases, and the prolongation of the administrative proceedings has generated real costs for its business. The Tribunal has no doubt as to the sincerity of the concerns

[670] **Annex CL-29**, *El Paso v. Argentina*, § 518; Hearing, Day 4, Claimants' Closing Arguments, pp. 950:18–22 and 951:1–5 (Mr Irurzun Montoro); Hearing, Day 4, Claimants' Closing Arguments, Slide 3.

on the part of the Claimant. Nevertheless, no underlying purpose or pattern of coordinated conduct on the part of the Panamanian state entities has been identified that would allow the conduct to be characterised as a state policy or a composite act.

571. This does not mean, however, that the legal framework or administrative practice could not be improved. This is because the applicable regime contains areas of ambiguity and regulatory gaps regarding the validity and enforcement of sureties. Nevertheless, the absence of clear regulations on the validity of sureties does not constitute authorisation to maintain indefinitely legal situations that require clarification, in the interests of a secure legal framework.

572. Nevertheless, it is worth noting that the standard of fair and equitable treatment under Article IV of the Treaty is not a guarantee against commercial adversity, regulatory complexity or administrative delays. As has already been established, it is a standard that requires the State to refrain from acting in an arbitrary or unreasonable manner, to respect due process and conduct proceedings impartially, to protect legitimate expectations—whether based on specific statements or on an established legal framework—and to act in good faith and in a manner consistent with the exercise of sovereign authority (see Section V.C(2)c, *supra*). These are all elements which the Court does not consider to be present in the present case on the basis of the evidence that has been submitted (see Sections V.E(1)–V.E(4), *supra*).

573. Whilst the Tribunal has found no breach of the principle of fair and equitable treatment under the Treaty, it considers it appropriate to rule on the characterisation made by the Claimant in relation to Article 15 of the Articles on State Responsibility, given that both Parties put forward extensive arguments on this point.

574. The ICSID Commentary makes it clear that the doctrine of composite acts is limited to *"breaches of obligations concerning a course of conduct and not to specific acts in* themselves" [671] . A composite act requires more than a series of events

[671] **Annex RL-45**, Articles of the International Law Commission on State Responsibility for Internationally Wrongful Acts (2001), Article 15, commentary, § 2.

related; it requires that the events, taken as a whole, constitute a qualitatively distinct wrongful act – one that arises from their aggregation rather than from any individual act considered in isolation. Both Parties accept, in line with the ruling in the case *of Gabriel Resources v. Romania*, that a composite act requires proof of a clear link between a series of events and some sort of underlying connection or purpose between them [672] . The disagreement between the Parties lies in determining whether such a link has been demonstrated.

575. The Tribunal begins with the text of Article 15 of the Articles on State Responsibility [673] . A composite act consists of *"a series of acts or omissions, defined as a whole as* wrongful" [674] . The critical question is whether the 35 Cases, considered as a whole, constitute a 'series' with the required unity of purpose or pattern, or whether they are parallel instances of the same administrative procedure applied independently by different entities to different contractors in different factual circumstances.

576. The Court acknowledges that there are common features across the 35 cases: the performance bonds were all issued by the same guarantor (Banesco Seguros); the underlying contracts were all public works contracts governed by the same statutory regime (Law 48 of 2011); the entities followed the same administrative procedure for the termination of the works contract and the enforcement of the bonds, and various delays are a recurring feature. These similarities are real and the Court does not downplay them [675] .

---

[672] Hearing, Day 4, Closing Arguments of the Claimants, pp. 951:14–954:2 (Mr Irurzun Montoro); Rejoinder, §§ 320–322.

[673] **Annex CL-18/Annex RL-45**, Articles of the International Law Commission on State Responsibility for Internationally Wrongful Acts (2001), Article 15; cf. Hearing, Day 4, Closing Arguments of the Claimants, p. 951:6–13 (Mr Irurzun Montoro); Hearing, Day 4, Closing Arguments of the Claimants, p. 1103:15–16 and 1105:14–18 (Mr Gallego).

[674] **Annex CL-18/Annex RL-45**, Articles of the International Law Commission on State Responsibility for Internationally Wrongful Acts (2001), Article 15, commentary § 9.

[675] Hearing, Day 4, Closing Arguments of the Claimants, pp. 954:7–955:17, 957:6–20 and 958:7–960:8 (Mr Irurzun Montoro); Hearing, Day 1, Claimants' opening statements, p. 40:11–16 (Mr Irurzun Montoro); Hearing, Day 4, Respondent's closing statements, p. 1110:4–11 (Mr Gallego); Hearing, Day 1, Opening Statements by the Respondent, pp. 137:8–138:14 (Mr Gallego); **Annex CL-18/Annex RL-45**, Articles of the International Law Commission on State Responsibility for Internationally Wrongful Acts (2001), Article 15(1).

577. However, the Court does not consider that the commonality of legal regimes or the similarity of administrative procedures is, in itself, sufficient to establish the underlying link or purpose required[by] *Gabriel v.. Romania* [676]. The fact that multiple Panamanian entities applied the same law in the same way to the same guarantor does not, in itself, demonstrate that they were engaged in a coordinated course of conduct. Rather, it highlights the existence of structural features of the Panamanian public procurement system which tend to produce comparable results in different projects and before different authorities.

578. In this regard, the Tribunal considers the Claimant's two theories regarding underlying purpose.

579. Firstly, regarding the Claimant's argument that Panama sought to enforce sureties as a means of generating revenue, the Tribunal finds that the Claimant has not provided sufficient evidence to substantiate this allegation[677].

580. Secondly, as regards the argument that systemic non-performance by state entities reflects an institutional inability to manage the consequences of contractors' non-performance, the Tribunal observes that this argument, even if factually accurate, does not establish the requisite intent under Article 15 of the Articles on State Responsibility. Administrative inefficiency does not amount to state policy. The requirement set out in the UNCITRAL Commentary that the composite act involve a set of actions or omissions defined as wrongful in the aggregate presupposes a propositional dimension: that is, that the conduct is aimed at producing – or has the effect of producing – a specific result constituting the breach. A systemic dysfunction or a generalised institutional failure in administrative management may, in certain circumstances, give rise to individual acts that breach treaty obligations, but it does not transform such conduct

676 **Annex RL-89**, *Gabriel v. Romania*.

677 Rejoinder, §§ 4(f)–(h), 116 and 384; Application, §§ 28, 86, 171. In this regard, see generally the Respondent's defences: Duplier, §§ 320–322; Hearing, Day 4, Respondent's Closing Arguments, pp. 1073:20–1074:9, 1077:2–11 and 1111:11–1112:21 (Mr Gallego).

individual acts within a composite act within the meaning of Article 15 of the Articles on State Responsibility, unless there is evidence that the pattern was deliberate, coordinated, or directed at the investor [678] .

581. The Tribunal also notes an internal inconsistency in the Claimant's case. The Claimant maintains that the composite act consists of the conduct of multiple entities – including CONADES, MEDUCA, MIVIOT and MINSA – acting across different sectors and according to different timelines. However, she has not identified any mechanism for coordination between these entities, any common instruction or directive from central government, or any evidence that the entities were aware of each other's enforcement actions *vis-à-vis* Banesco. The predominance of cases involving CONADES (approximately 23–25 out of the 35) suggests that the pattern is, to a large extent, attributable to institutional shortcomings within a single entity in managing rural infrastructure contracts, rather than to a policy across the entire Panamanian State. The remaining cases – involving MEDUCA, MIVIOT, MINSA and others – are too few and too varied in their circumstances to support an inference of coordinated action [679] .

582. Finally, the Tribunal agrees with the Respondent that the Claimant's failure to identify a specific date for the alleged treaty violation is significant in the context of a composite fact. A composite fact, by its very nature, unfolds over time – yet it must still have an identifiable beginning and a discernible duration. The Claimant's assertion that *'it is not possible to fix a specific date for the violation of the APPRI'* [680] is difficult to reconcile with the requirement under Article 15(2) that the violation *'extends throughout the period commencing with the first*

---

[678] Regarding the Claimant's position: Hearing, Day 4, pp. 951:18–952:2 and 955:8–12 (Mr Irurzun Montoro). Regarding the Respondent's position: Hearing, Day 4, the Respondent's closing submissions, pp. 1057:12–1058:3 (Ms Jaime Ramírez), 1107:6–12, 1108:10–1110:4, 1112:13–1113:1 (Mr Gallego); Rejoinder, §§ 320–322; with reference to **Annex RL-89**, *Gabriel v. Romania*, §§ 823–829 and 1313–1316; **Annex RL-105**, *Rompetrol v. Romania*, §§ 182–183 and 273; **Annex CL-18/Annex RL-45**, Articles on International Responsibility, Article 15 and the commentary thereto.

[679] Regarding the Claimants' position: Rejoinder, § 304; Statement of Claim, § 26. Regarding the Respondent's position: Duplier, §§ 104 and its footnote 131; and § 265 and related footnotes; Answer, § 89.

[680] Rejoinder, § 352.

of the actions or omissions in the series"[681]. If the Claimant cannot identify the first act in the series, the composite factual framework is not operationalised[682].

583. Consequently, the Tribunal concludes that the 35 Cases do not constitute a composite fact within the meaning of Article 15 of the Articles on State Responsibility (see Section V.C(3), *above*). Whilst the cases share characteristics attributable to the structure of the Panamanian public procurement system – the same legal framework, the same administrative procedure and the same surety – the Claimant has not demonstrated the existence of an underlying unity of purpose or coordination between the contracting entities that a composite event requires. The similarity of the outcomes reflects, rather, the architecture of the system and not the implementation of a deliberate or coordinated state policy. The Claimant's argument that Panama sought to enforce performance bonds as a revenue-generating mechanism is not supported by the evidence adduced in the proceedings, whilst the argument of systemic non-compliance on the part of State entities, even if it may have some descriptive value from a factual point of view, does not satisfy the teleological requirement set out in Article 15.

VI. CONCLUSIONS ON LIABILITY

584. The Claimants filed their Claim, alleging that Panama breached its obligation to accord Fair and Equitable Treatment to the Claimant's investment in accordance with Article IV of the Treaty. The Claimant's case was based on two grounds: first, that the individual elements of the entities' conduct – arbitrariness, denial of due process, frustration of legitimate expectations and lack of transparency – constituted a breach of the obligation of Fair and Equitable Treatment, whether considered individually or cumulatively; and, second, that the conduct of multiple entities

---

[681] **RL-45**, Articles of the International Law Commission on State Responsibility for Internationally Wrongful Acts (2001), Article 15(2); Rejoinder, §§ 340–395, pp. 101–116; Claim, §§ 160–176.

[682] Rejoinder, § 352; Hearing, Day 4, Closing submissions of the Claimants, pp. 952:12–953:2 (Mr Irurzun Montoro); Rejoinder, § 387; Hearing, Day 1, Opening submissions of the Respondent, p. 200:9–13 (Mr Gallego); Hearing, Day 4, Closing Arguments of the Respondent, Slide 91; **Annex CL-18** / **Annex RL-45**, Articles of the International Law Commission on State Responsibility for Internationally Wrongful Acts (2001), Article 15.

The conduct of the Panamanian contracting parties in relation to the 35 Matters constituted a composite act within the meaning of Article 15 of the Articles on State Responsibility, in breach of the standard of Fair and Equitable Treatment.

585. The Claimant's case is essentially based on two considerations: firstly, the standard of fair and equitable treatment enshrined in Article IV of the Treaty was breached by a composite act arising from the conduct of the Panamanian entities, in that they acted arbitrarily, violated due process, frustrated BHL's legitimate expectations and failed to act transparently; and, secondly, that these acts by the various Panamanian entities in the 35 Matters constitute a composite act within the meaning of Article 15 of the Articles on State Liability.

586. As regards the first ground, the Tribunal has assessed each element of the Fair and Equitable Treatment standard and has found that none has been established.

587. The standard of Fair and Equitable Treatment under Article IV of the Treaty encompasses protection against arbitrary measures, respect for due process, protection of legitimate expectations and transparent conduct, the duty of good faith, and consistency. The Tribunal has applied these elements to the facts as set out in the preceding sections of this Award.

588. The starting point for the analysis and conclusions is the Panamanian legal framework governing the duration of the bonds: as noted, during the period in question (2014–2019) this framework was ambiguous. The interpretation of both Parties regarding the validity of the bonds has merit and is well-founded, and there is no evidence to suggest that either is manifestly unfounded. Indeed, the Claimant's interpretation regarding the validity of the bonds is plausible. For its part, the Respondent's interpretation is equally plausible.

589. The Tribunal considers it important to make it clear that it does not consider that any of the acts by Panama alleged by the Claimant, taken individually and on their own, constitute a breach of the standard of Fair and Equitable Treatment. The Tribunal has

found the interpretation put forward by each of the Parties regarding the validity of the bonds to be plausible; that the duration of the administrative proceedings was caused by various factors (including, amongst others, the need to follow the administrative procedure in its entirety, the appeals lodged by the respective contractors and even Banesco Seguros); that the failures to notify, whilst systemic, did not deprive Banesco of access to domestic remedies; and that the cessation of the practice of endorsements reflected a legal position, subsequently confirmed by the Supreme Court of Justice of Panama.

590. Notwithstanding this, the Claimant's argument is that these acts, assessed cumulatively in accordance with the principle established in the *El Paso* case [683], constitute a breach of the principle of fair and equitable treatment. The Tribunal has concluded that this is not the case.

591. The Tribunal is not unaware that the shortcomings in the 'manner' in which Panamanian state entities implemented the Panamanian legal system are real and that the system is far from exemplary. Failures to give notice, administrative delays and prolonged periods of regulatory uncertainty imposed costs on Banesco Seguros and, by extension, on its parent company and the Claimant in this case, BHL, which a more diligent state administration would have avoided. However, the issue before the Tribunal is not whether Panama's conduct was exemplary – it was not – but whether it constituted an intentional disregard for due process or, at the very least, conduct that defies the principles of legal propriety. On the basis of the evidence produced in these arbitration proceedings, the Tribunal cannot conclude that it did.

592. As regards the establishment of a composite fact within the meaning of Article 15 of the Articles on State Responsibility, the Tribunal accepts the Claimant's argument that the State's pattern of conduct across the 35 Cases reveals a 'common thread' of recurring shortcomings in the implementation of the Panamanian legal framework – including significant lapses, failures to give notice, and delays in settlement by Panamanian government entities. However, the

[683] Rejoinder, §§ 384–395; Application, §§ 8–12.

The Tribunal does not consider that these facts constitute a single set of facts within the meaning of Article 15. The similarities between the 35 Cases – the same statutory regime, the same administrative procedure, the same guarantor – reflect the structure of the Panamanian public procurement system, not a single set of facts constituting State conduct against the investor.

593. In view of the foregoing, the Tribunal's conclusion is based on five grounds:
(i) the State's legal interpretation was upheld by the Supreme Court of Justice in proceedings involving Banesco Seguros itself; (ii) the State's conduct was not discriminatory, as it affected all guarantors equally, as confirmed by APADEA's own communication; (iii) the Panamanian legal system demonstrated its capacity for self-correction through the TACP, the TAT, the Comptroller General's Office and the Supreme Court of Justice; (iv) the Claimant's own expert conceded that Law 48 of 2011 does not establish any time limit for initiating the termination of a public works contract; and (v) the Claimant has not demonstrated the underlying unity of purpose or coordination between the contracting entities that a composite event requires.

594. The Tribunal wishes to record three observations which, whilst not affecting the operative part of the decision, provide context for this ruling.

595. Firstly, the Court has deliberately refrained from determining the correct interpretation of Panamanian law, as it has no jurisdiction to do so. The Tribunal's conclusion is not based on the merits of the debate concerning domestic law, but on the standard of international law: where the domestic legal framework permits rival, reasonable interpretations and the State's conduct is consistent with one of those interpretations, the threshold for Just and Equitable Treatment is not met. And the interpretations put forward by both Parties are plausible; or, to put it another way, neither is without foundation. This approach reconciles respect for the autonomy of the Panamanian legal system with the mission entrusted to this Tribunal.

596. Secondly, the Tribunal is not unaware that the Panamanian surety regime, as applied to contracts terminated due to the contractor's breach, produces outcomes that impose significant burdens on sureties. The legislative gap identified by the

Tribunal – the absence of express provisions addressing cases of termination for breach – creates genuine uncertainty, and the administrative delays characteristic of the system amplify that uncertainty.

597. Thirdly, the Tribunal takes note of the Claimant's argument that the structural risk generated by the 35 Cases – the ongoing threat of enforcement against an exposure of approximately USD 45.6 million – has damaged BHL's business regardless of whether any individual bond is ultimately enforced. The Tribunal is not insensitive to this concern, but the standard of Fair and Equitable Treatment is a standard of state conduct, not a guarantee against commercial risk. The suretyship business inherently involves exposure to the risk that the principal debtor will default and that the beneficiary will seek enforcement. The materialisation of that risk, even on a large scale, does not constitute a breach of the Treaty unless the State's conduct in pursuing enforcement fails to meet the minimum standard of international law, which has not been demonstrated in the present case.

598. In light of the foregoing, the Tribunal concludes:

(a) The Claimant has not established a breach of the standard of Fair and Equitable Treatment, in accordance with Article IV of the Treaty, whether assessed on the basis of arbitrariness, denial of due process, frustration of legitimate expectations, lack of transparency or cumulative effect.

(b) The 35 Issues do not constitute a breach of the standard of Fair and Equitable Treatment within the meaning of Article 15 of the Articles on State Responsibility.

(c) The Claimant's claim under Article IV of the APPRI is therefore dismissed.

599. Given the Tribunal's finding of no liability, it is not necessary to address the Claimant's claims for damages. The Tribunal now proceeds to the allocation of costs.

VII. COSTS

A. THE POSITIONS OF THE PARTIES

600. As set out in the section on the procedural history, in Section I.C *above*, the Parties agreed to submit '*simple* statements' on costs, *'without supporting* documentation' and without the Parties exercising their right to request such *documentation* [684] .

(1) Statement on costs by the Claimants

601. The Tribunal has jurisdiction to rule on the claims for costs made by both BHL and Banesco Panamá, notwithstanding its decision that it lacks jurisdiction to hear Banesco Panamá's claims. Therefore, for the purposes of the Tribunal's decision on costs, reference will be made to the Claimants.

602. In their statement on costs, the Claimants submit that the Respondent should bear the full costs of the arbitration incurred by them, which include (i) the fees and expenses of the members of the Arbitral Tribunal, (ii) the administrative costs of ICSID, and (iii) the fees and expenses incurred in their defence and by the experts [685] .

603. The Claimants state that the total amount of their costs for the registration fee and two advance payments was USD 425,000 [686] . However, this sum was paid prior to the request for a third advance payment, as set out in a communication from the Secretariat dated 13 February 2026, in the amount of USD 25,000.00 to each of the Parties. Thus, the total amount for registration fees and advance payments to ICSID amounts to USD 450,000.

[684] See the Parties' correspondence (sent by the Respondent and confirmed by the Claimants) dated 4 September 2025, forwarded by the Secretary of the Tribunal: *"Each Party shall simultaneously submit a simple statement which (i) sets out the costs incurred in the arbitration; and (ii) includes brief comments on those costs and the principles the Tribunal should follow when allocating costs. The statement shall be submitted without supporting documentation, without prejudice to the Tribunal's right to request such documentation if it deems it necessary. The Parties may also request such supporting documentation from one another by direct communication, without the need for prior authorisation from the Tribunal. The Parties are under no obligation in any circumstances to share a breakdown of hours, including summaries of hours worked, tasks performed, hourly rates or other related information*."

[685] Claimant's Costs, § 20.

[686] Claimants' Costs, § 19.

604. With regard to the fees of the representing lawyers and the experts, the Claimants state that they incurred expenses totalling EUR 1,179,462.89 and PAB 114,326.70, which they break down as follows [687] :

DESCRIPCIÓN	Importes en Euros/ Dólares EEU/Balboas Panameñas, según corresponda, sin Impuestos indirectos	Importes en Euros/Dólares EEUU/Balboas Panameñas, según corresponda, con Impuestos indirectos
Honorarios de Abogados		
Clifford Chance SLP Madrid	543.004,87€	657.035,9€
Honorarios de Expertos		
Compass Lexecon	429.934,31 €	522.426,99 €
Prof. Adán A. Arjona	105.000 B	114.326,70 B
Gastos CIADI		
Tasa de Registro y dos Anticipos		425.000 $
Total de las Demandantes en Euros		**1.179.462,89 €**
Total de las Demandantes en Balboas		**114.326,70 B**
Total en Dólares EEUU		**425.000 $**

605. The Claimants base their claim on Article 61(2) of the ICSID Convention and Rule 52 of the ICSID Rules, which, they assert, must be applied flexibly and not mechanically [688] . Indeed, they argue that the Tribunal must allocate costs and expenses by first taking into account the outcome of the proceedings in accordance with *the 'costs-follow-the-event'* principle [689] , and then considering the conduct of the Parties [690] , the effort

[687] Claimant's Costs, § 19, Schedule of Costs and Expenses.

[688] Claimants' Costs, §§ 4–7 and their references to **Annex CL-66**, Nicolò Minella, 'The conundrum of cost allocation in international investment arbitrations: a proposed practical solution to enhance predictability of costs decisions', *Arbitration International,* 2024, 40, pp. 473–491; **CL-67**, *Omega Engineering LLC and Óscar Rivera v. Republic of* Panama, ICSID Case No. ARB/16/42, Award of 14 October 2022, § 413, **CL-68**, *BRIF TRES D.o.o. Beograd and BRIF-TC D-o.o. Beograd v. Republic of Serbia*, ICSID Case No. ARB/20/12, Award of 30 January 2023, § 234; and **CL-69**, *Interconexión Eléctrica S.A. E.S.P. v. Republic of Chile,* ICSID Case No. ARB/21/27, Award of 13 December 2024, § 1520.

[689] Claimants' Costs, §§ 6–7.

[690] Claimants' Costs, § 9.

required for the presentation of their arguments [691] and the reasonableness of the costs and expenses incurred [692] .

606. On this basis, they consider that, should the Court dismiss all the jurisdictional objections raised by Panama, declare that Panama has breached the APPRI and determine that BHL suffered damages amounting to USD 13,568,317 as at 28 February 2025, it must be held that BHL has prevailed in all its claims [693] .

607. They add that this conclusion is borne out by their conduct and good faith throughout the proceedings [694] , which they state was always aimed at managing the proceedings efficiently and without any conduct that would require their counterpart to undertake additional work; for example, they produced the documents requested by Panama except where they were unable to locate them, in which case they reported this and provided justification, without requiring the Court's intervention [695] . They also highlighted their willingness to reach agreements with the Respondent, thereby avoiding the need for the Court's intervention [696] .

608. By contrast, they consider that Panama did not follow the same procedural conduct [697]. They point out that the Respondent did not announce its intention to raise jurisdictional objections either during the comments phase on the draft Procedural Resolution No. 1 or during the First Session on 12 April 2024. They consider that reserving this right until the submission of its Statement of Defence prevented the adoption of a Procedural Timetable that adequately reflected the specific requirements necessary in view of these objections [698] . They emphasise that the Respondent itself is said to have acknowledged the lack of practical consequence in raising jurisdictional objections [699] .

---

691 Claimants' Costs, § 13.
692 Claimants' Costs, § 15.
693 Claimants' Costs, § 7.
694 Claimants' Costs, §§ 7–11.
695 Claimants' Costs, § 9.
696 Claimants' Costs, § 10.
697 Claimants' Costs, § 12.
698 Plaintiffs' Costs, § 12(a).
699 Claimants' Costs, § 12(c) and its reference to the Hearing, Day 4, the Defendant's closing submissions, pp.

1058:22–1059:1–15 (Mr Gallego).

609. They add that during the discovery phase, the Respondent objected to all requests on unfounded grounds, as reflected in the Tribunal's decision. They assert that this had an impact on the workload of the Claimants' legal team, increasing it [700] . Furthermore, they point out that during the hearing, the economic experts from Panama attempted to introduce new arguments and that the procedural issue—which was resolved by the rejection of those calculations—caused a disruption and an additional workload [701].

610. The Claimants assert that both Panama's conduct and the manner in which it presented its defence resulted in an increase in the procedural burden on the Claimants in a way that could have been avoided [702] .

611. They assert that the costs and expenses incurred are reasonable, that they should be considered in the light of the total amount claimed, and emphasise that they are even lower than
the average [703].

612. In the alternative, they point out that the professionalism and conduct of both parties is an additional and residual criterion to which the Court might resort as a basis for apportioning costs and expenses [704] .

(2) Statement on Costs by the Respondent

613. In its statement of costs, the Respondent contends that the Claimants should bear the full costs of the arbitration incurred by the Respondent, including legal fees and expenses, which amount to a total of USD 2,502,880.99.

614. As it did in relation to the claims concerning the sums paid to ICSID by the Claimants, this Tribunal notes that the total amount claimed by

[700] Claimants' Costs, § 12(b).

[701] Claimants' Costs, § 12(d).

[702] Claimants' Costs, §§ 13–14.

[703] Claimants' Costs, §§ 15–17 and their references to **Annex CL-70**, *Freeport-McMoran Inc. v. Republic of Peru,* ICSID Case No. ARB/20/8, Award of 17 May 2024, p. 1042 and its references to https://www.biicl.org/documents/136_isds-costsdamages-duration.pdf and Matthew Hodgson, Yarik Kryvoi & Daniel Hrcka, 2021, "Empirical Study: Costs, Damages and Duration in Investor-State Arbitration". The Tribunal notes that the Respondent has also referred to this study.

[704] Claimants' Costs, § 18.

Panama's submission of 3 December 2025 must include the third advance payment of USD 25,000, requested by a communication from the Secretariat dated 13 February 2026. Thus, the subtotal of the Respondent's ICSID-related claims must be updated to include this sum, resulting in a subtotal of USD 425,000.00.

615. With regard to the fees of the representing lawyers and the experts, Panama's legal representation by the firm LALIVE S.A. states that it incurred expenses totalling USD 1,845,081.59, the Ministry of Economy and Finance incurred USD 14,234.00, and the experts USD 243,565.40, which it breaks down as follows [705] :

[705] Respondent's Costs, § 3, Schedule of Costs and Expenses.

Concepto	Importe (USD)	
Representación legal		
LALIVE		
Honorarios (hasta 3/12/2025)	1,805,774.70	
Hotel durante audiencia	28,099.34	
Alquiler de salas de trabajo	3,215.53	
Pasajes aéreos	3,124.49	
Alquiler de equipos informáticos	1,359.55	
Papelería	1,242.50	
Mensajería	1,477.82	
Taxi – transporte público	294.47	
Gastos de comida	493.19	
Subtotal		**1,845,081.59**
MEF (Margie-Lys Jaime y Michelle Mastellari)		
Pasajes aéreos	3,234.00	
Viáticos	11,000.00	
Subtotal		**14,234.00**
Peritos		
Honorarios de EAM (Sebastián Cerda, Luis Alonso e Ítalo Muñoz)	130,000.00	
Gastos de EAM (Sebastián Cerda, Luis Alonso, Ítalo Muñoz y María Luisa Petitpas)	13,098.00	
Honorarios del Prof. Luis Palacios	98,868.00	
Gastos del Prof. Luis Palacios	1,599.40	
Subtotal		**243,565.40**
Tribunal y CIADI		
Primer pago anticipado (8 de mayo de 2024)	150,000.00	
Segundo pago anticipado (10 de septiembre de 2025)	250,000.00	
Subtotal		**400,000.00**
Total		**2,502,880.99**

616. Panama bases its claim on Article 61(2) of the ICSID Convention and Rule 28 of the 2006 ICSID Rules, and points out that the Tribunal has broad discretion to decide on the allocation of the costs and expenses incurred by the Parties [706] .

[706] Respondent's Costs, § 4.

617. It asserts that the most commonly applied rule is the *'costs follow the event'* principle and considers that this is the one that should be applied [707] . In this regard, it points out that Panama's costs are reasonable and cites a study which analysed the average costs incurred by States in their defences in investment arbitrations, noting that Panama's costs are below the
average [708].

618. On that basis, it argues that Panama should be reimbursed for the full amount of the costs it incurred [709] . It also points out that its opponent's claim had no prospect of success from the outset and that the Tribunal should impose an exemplary order for costs to create the appropriate incentives to safeguard the investment protection system [710] .

B. COURT DECISION ON COSTS

(1) Relevant provisions

619. Article 61(2) of the ICSID Convention provides:

> *"In the case of arbitration proceedings, the Tribunal shall, unless the parties otherwise agree, determine the costs incurred by the parties in the proceedings, and shall decide on the method of payment and the manner of apportionment of such costs, the fees and expenses of the members of the Tribunal, and the charges incurred for the use of the Centre. Such determination and apportionment shall form part of the award."*

---

[707] Costs to be borne by the Respondent, §§ 4–5 and 7 and their references to **Annex RL-155***, Unión Fenosa Gas, S.A. v. Egypt*, ICSID Case No. ARB/14/4, Award of 31 August 2018, p. 324, § 12.15; **RL-156**, *Qatar National Bank (Q.S.P.C.) v. South Sudan and the Bank of South Sudan,* ICSID Case No. ARB/20/40, Award of 7 May 2024, §§ 48–49; **RL-157**, *Ahron G. Frenkel v. Croatia*, ICSID Case No. ARB/20/49, Award of 29 January 2025, pp. 96–97, §§ 280 and 282; **RL-158**, *Kornikom Eood v. Serbia*, ICSID Case No. ARB/19/12, Award of 20 September 2023, pp. 174–175,
§§ 749 and 756 and **RL-9**, *Iberdrola v. Guatemala (I)*, § 518.

[708] Costs to be borne by the Respondent, § 6 and its reference to BIICL, "2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration"; pp. 4, 10–11. As noted previously, this study was also cited by the other party (https://www.biicl.org/documents/136_isds-costsdamages-duration.pdf). The Tribunal notes that the Claimants have likewise referred to this study.

[709] Respondent's Costs, § 7.

[710] Respondent's Costs, § 8.

620. Rule 50 of the ICSID Rules, in its 2022 version, applicable to these proceedings, defines the following costs as costs of the proceedings that may be claimed by the Parties:

> *"Costs of the Proceedings*
>
> *Costs of the proceedings consist of all costs incurred by the parties in connection with the proceedings, including:*
>
> *(a) the legal fees and expenses of the parties;*
>
> *(b) the fees and expenses of the Tribunal, persons assisting the Tribunal with the consent of the Parties, and experts appointed by the Tribunal; and*
>
> *(c) the Centre's administrative charges and direct costs".*

621. Rule 52, for its part, sets out the criteria which the Tribunal must take into account when deciding how to apportion costs between the Parties:

> *"Decision on Costs*
>
> *(1) In apportioning the costs of the proceedings, the Tribunal shall take into account all relevant circumstances, including:*
>
> *(a) the outcome of the proceedings or of a part thereof;*
>
> *(b) the conduct of the parties during the proceedings, including the extent to which they have acted expeditiously and cost-effectively and in compliance with these Rules and the orders and decisions of the Tribunal;*
>
> *(c) the complexity of the issues; and*
>
> *(d) the reasonableness of the costs claimed.*
>
> *(2) If the Tribunal renders an award pursuant to Rule 41(3), it shall award reasonable costs to the prevailing party, unless the Tribunal decides that there are special circumstances justifying a different allocation of costs.*

(3) The Tribunal may make an interim decision on costs at any time, either on its own initiative or at the request of a party.

(4) The Tribunal shall ensure that all decisions on costs are reasoned and form part of the award".

(2) The Tribunal's analysis

622. In accordance with the provisions set out above, the Tribunal has broad discretion to allocate the costs of the arbitration between the Parties, including lawyers' fees and other costs, as it deems appropriate.

623. The Parties agree on the *'costs follow the event'* principle, a criterion under which the Tribunal must take into account the outcome of the dispute when deciding on the allocation of costs and expenses [711]. Nevertheless, the Claimants introduce a certain nuance to its application, asserting that the Tribunal may take into account other considerations, such as the conduct of the Parties, the effort required to present their arguments, and the reasonableness of the costs and expenses incurred [712].

624. Rule 52 of the ICSID Rules provides that, for the purposes of apportioning costs, the tribunal shall take into account not only the outcome of the proceedings, but also the conduct of the Parties, including their prompt and efficient conduct, the complexity of the issues and the reasonableness of the costs claimed. The Tribunal notes that the Rule does not establish a hierarchy amongst the elements it lists. Indeed, this contrasts with the provisions of Rule 52(2) for awards made pursuant to Rule 41(3), in respect of which it does give greater weight to one criterion.

625. In view of this, and in the exercise of the powers conferred upon this Tribunal, it is considered that the allocation of costs must take into account the criteria set out in Rule 52 of the ICSID Rules as a whole.

---

[711] Claimant's Costs §§ 6–7; Respondent's Costs §§ 4–5.

[712] Claimant's Costs §§ 6–15.

626. With regard to the outcome of the proceedings, a criterion set out in Rule 52(1)(a) of the ICSID Rules, each of the Parties has prevailed and been unsuccessful on different jurisdictional and substantive claims.

627. With regard to the issues of jurisdiction, the Claimants prevailed and the Respondent failed on the objections *ratione materiae* and *ratione voluntatis*, but the Claimants failed and the Respondent prevailed on the objection *ratione personae* (see Sections IV.B(2), IV.C(2) and IV.A(2) *above*). The Tribunal notes that the Respondent itself acknowledged that the objection which was upheld – *ratione personae* – had no practical impact for the purposes of the disposition of the case and the jurisdiction of this Tribunal [713]. Furthermore, as the Tribunal noted in its decision on jurisdiction, the claims raised on the merits were not improbable, frivolous or reckless (see Section IV.B(2), *above*). Moreover, with regard to the issues on the merits, the Respondent prevailed and the Claimant's respective claims were dismissed (see Section VI, *above*). That said, and as has been observed on numerous occasions, the claims on the merits have largely resulted from a genuine ambiguity in the Panamanian legal framework (see Sections V.D(1)c, V.D(2)c, V.D(3)c and V.D(4)c, *supra*). The Tribunal considers that these are factors which must be taken into account as part of the criteria set out in Rule 52.

628. Similarly, the Parties have been successful to a comparable extent in the various procedural motions filed throughout the proceedings: the Claimants were successful in 15 of their 21 applications for the production of documents (see Procedural Order No. 3; Section I.C, *supra*), but were unsuccessful in their request for Mr Prieto González to appear (see Procedural Order No. 4; Section I.C, *supra*).

629. With regard to the conduct of the Parties, a criterion set out in Rule 52(1)(b) of the ICSID Rules, as stated during the Hearing, the Tribunal acknowledges that the representation of both Parties was conducive to an efficient and effective proceeding and greatly facilitated the work of this Tribunal. In this regard, the Tribunal notes in particular the fact that the Claimants did not raise any objections

[713] Hearing, Day 4, Closing Submissions of the Respondent, pp. 1058:22–1059:15 (Mr Gallego).

to the Respondent's requests for production, as well as the fact that the Respondent did not submit a request to split the proceedings into several stages, which would have required a preliminary decision by this Tribunal.

630. With regard to the criterion of the complexity of the matter, set out in Rule 52(1)(c) of the ICSID Rules, the Tribunal observes that the legal issues raised were of a certain complexity and that the case has required a detailed and thorough analysis, driven by the work of the Parties and their representatives. This was due, in particular, to the significant volume of information submitted by the Parties and the factually intensive nature of the dispute. Indeed, the Tribunal has had to examine submissions involving both Panamanian domestic law and applicable international law, as well as extensive documentation relating to 35 cases heard before various administrative and judicial bodies. With regard to the final criterion set out in Rule 52(1)(d) of the ICSID Rules—the reasonableness of costs—based on the tools available to this Tribunal and, in particular, given that neither Party contested the costs submitted by the other Party, there is no indication that the costs were unreasonable. This is without prejudice to noting a certain difference in costs, both in relation to legal representation and the fees of the financial experts.

631. On the basis of all these circumstances and the arguments and information submitted by the Parties within the procedural framework agreed between them, and in the exercise of its powers under Rule 52 of the ICSID Rules, the Tribunal considers it appropriate, on the one hand, that the Parties should bear equally the costs of the proceedings in respect of the fees and expenses of the Tribunal, the persons assisting the Tribunal with the approval of the Parties under Rule 50(b), as well as the administrative charges and direct costs of the Centre under Rule 50(c); and, on the other hand, that the Claimants bear their own costs in respect of legal fees and expenses in accordance with Rule 50(a), as well as pay the sum of USD 900,000, which is equivalent to approximately 42.8 per cent of the Respondent's legal fees and expenses in accordance with Rule 50(a).

632. With regard to the final criterion in Rule 52(1)(d) of the ICSID Rules, namely the reasonableness of costs, based on the evidence available to this Tribunal and, in particular, given that neither Party contested the costs submitted by the other Party, there is no indication that the costs were unreasonable. This is without prejudice to noting a certain difference in costs, both in relation to legal representation and the costs of the financial experts.

633. Thus, in accordance with Rule 50 of the ICSID Rules, the costs of the present arbitration, including the Tribunal's fees and expenses and the ICSID's administrative fees and charges, amount to (in USD):

Expenses and fees of the arbitrators Franz X. Stirnimann Fuentes Alvaro Galindo Rafael Rincón Castro	325,751.05 150,283.93 130,358.00
Expenses of the Tribunal's assistant	693.81
ICSID administrative fees	156,000.00
Direct costs	81,872.75
Total	**844,959.54**

634. The above costs have been paid by way of advance payments from the Parties, in equal shares, totalling USD 850,000.00 [714] . Consequently, each Party's share of the arbitration costs amounts to USD 422,479.77.

[714] The remaining balance shall be refunded to the Parties in proportion to the payments they have made to ICSID.

VIII. OPERATIVE PART

635. For the reasons set out above, the Tribunal decides as follows:

1. The Tribunal declares that it has jurisdiction to adjudicate the claims brought by Banesco Holding Latinoamérica, S.A., but that it lacks jurisdiction to adjudicate the claims brought by Banesco (Panamá), S.A.

2. The Tribunal finds that:

   (a) the Republic of Panama has not breached its obligation to accord fair and equitable treatment to the investment of Banesco Holding Latinoamérica, S.A., as set out in Article IV(1) of the Agreement for the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Republic of Panama;

   (b) the Republic of Panama has not, either, breached its obligation not to impede the enjoyment of the investment of Banesco Holding Latinoamérica, S.A. through arbitrary measures, as set out in Article IV(2) of the Agreement for the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Republic of Panama.

3. The Tribunal therefore dismisses all claims and demands made by Banesco Holding Latinoamérica, S.A.

4. With regard to the costs of the arbitration, the Tribunal:

   (a) Decides that the Parties shall bear equally the costs of the proceedings in respect of the fees and expenses of the Tribunal and of persons assisting the Tribunal with the approval of the Parties in accordance with ICSID Rule 50(b), as well as in respect of the administrative charges and direct costs of the Centre in accordance with ICSID Rule 50(c);

(b) Decides that Banesco Holding Latinoamérica, S.A. and Banesco (Panama), S.A. shall bear their own costs in respect of legal fees and expenses in accordance with ICSID Rule 50(a);

(c) Orders Banesco Holding Latinoamérica, S.A. and Banesco (Panama), S.A. to pay USD 900,000 in respect of the legal fees and expenses incurred by the Republic of Panama pursuant to ICSID Rule 50(a);

(d) Decides that the Republic of Panama shall bear its own costs in respect of the remaining legal fees and expenses in accordance with ICSID Rule 50(a).

5. All other claims, requests and applications by the Parties are dismissed.

[Signature]

Alvaro Galindo Arbitrator	Rafael Rincón Ordóñez Arbitrator

Franz X. Stirnimann Fuentes Chair of the Tribunal

[Signature]

Alvaro Galindo
Arbitrator

Rafael Rincón Ordóñez
Arbitrator

Franz X. Stirnimann Fuentes, Chair of the Tribunal

Alvaro Galindo, Arbitrator

Rafael Rincón Ordóñez Arbitrator

[Signature]

Franz X. Stirnimann Fuentes, President of the Tribunal

ANNEX – THE 35 ISSUES

(The evidence supporting this Annex is set out in the Annex to the Reply, which has not been contested by the Respondent.)

1	Bajo Cedro Aqueduct Case (COC-46-17)	Case relating to civil works contract No. COC-46-17 of 8 November 2018 for the "Study, design, construction, operation and maintenance of works to improve the water supply system for the communities of Bajo Cedro, Valle Sarón, Loma Venado, El Tamarindo, Loma Noni, Chichica and Quebrada Marín; and the construction of 282 sanitary units (including 1 special unit), in the township of Bajo Cedro, District of Chiriquí Grande, Province of Bocas del Toro', entered into between MP/CONADES/UCEP and the Zafiro Consortium (comprising the companies MSB S.A.S, S.A., and Proinark, S.A.), under which performance bond No. 02-31-3247 of 31 October 2017 and advance payment bond No. 02-31-3248 dated 31 October 2017
2	Subject Aqueduct de El Limoncito (COC-24-17)	Matter relating to civil works contract no. COC-24-17 of 5 June 2017 for the "Study, design, construction, operation and maintenance of works to improve the water supply system in the communities of El Limoncito, Carricillal, El Tábano, Los Macanitos and San Antonio; and the construction of 243 sanitation units (including 5 special units) in the parish of Paritilla, District of Pocrí, Province of Los Santos", entered into between MP/CONADES/UCEP and Construcciones y Mantenimiento CAMIT, S.A., under which performance bond No. 03-31-703 of 23 March 2017, together with its respective endorsement, and advance payment bond No. 03-31-704 of 23 March 2017, together with its respective endorsement
3	Potuga Aqueduct Project (COC-77-16)	Matter relating to civil works contract No. COC-77-16 of 31 October 2016 for the 'Study, design, construction, maintenance and operation of the water supply system for the communities of the Potuga administrative district, in the District of Parita, Province of Herrera', entered into between MP/CONADES/UCEP and Construcciones y Mantenimiento CAMIT, S.A., under which the performance bond No. 03-31-577 of 14 July 2016, together with its respective endorsements, and the advance payment bond No. 03- 31-578 of 14 July 2016, together with its respective endorsements
4	Viento Frío Aqueduct Project (COC-87-16)	Case relating to civil works contract No. COC-87-16 of 11 April 2017 for the 'Study, design, construction, operation and maintenance of works to improve the water supply system for the communities of Viento Frío and Palmira and the construction of 156

		sanitation facilities in the sub-districts of Cuango, Palenque, Palmira, Playa Chiquita, Nombre de Dios, Miramar, Viento Frío, in the District of Santa Isabel, Province of Colón', entered into between MP/CONADES/UCEP and Construcciones y Mantenimiento CAMIT, S.A., under which the performance bond No. 03-31-675 of 8 February 2017 and the advance payment bond No. 03-31-676 dated 8 February 2017
5	Chiriquí Aqueducts Case (COC-02-14)	Case relating to civil works contract No. COC-02-14 May 2015 (of 29 May 2015) for the 'Rehabilitation of rural water supply systems in the Province of Chiriquí', signed between MP/CONADES/UCEP and the company Contratistas Generales y Eléctricos S.A., in which performance bond No. 01-31-3330 of 21 May 2014, together with its respective endorsements, and advance payment bond No. 01-31-3331 of 21 May 2014, together with their respective endorsements
6	Subject: Crundú Health Centre (044 (2017))	Matter relating to works contract No. 044 (2017) of 27 June 2017 for the "Studies, designs, preliminary architectural plans, development, drawing up of plans, technical specifications, mechanical equipment, medical equipment, furniture and demolition of the existing building and new construction of the Curundú Minsa health centre. Order No. 16-3391", entered into between the Ministry of Health and the JOCA-GOC Consortium (comprising the companies Joca Ingeniería y Construcciones, S.A. and GOC, Sociedad Anónima), under which performance bond No. 01-31-5380 of 20 December 2016 was signed, together with its respective endorsements, and advance payment bond No. 01-31-5381 of 20 December 2016, together with its respective endorsements
7	Subject: Quebrada de Hacha Educational Centres (O-27-2017)	Case relating to works contract No. O-27-2017 of 21 June 2017 for the "Design, preparation of plans, demolition of a single-storey structure, refurbishment and construction of new infrastructure for the educational centres: Quebrada de Hacha, Cerro Banco sub-district, and Las Tinajas Educational Centre, Soloy sub-district, Besikó District, Ngäbe Buglé Region, Republic of Panama", entered into between the Ministry of Education and the company Levantina, Ingeniería y Construcción, S.L., under which performance bond No. 02-31-2777 of 22 May 2017 was issued, together with its respective endorsements, and the advance payment bond No. 02-31-2778 dated 22 May 2017, together with its respective endorsements
8	Panama Schools Case (O-11-2017)	under the terms of works contract No. O-11-2017 of 5 May 2017 for the 'Project: design, construction and refurbishment of the José del Carmen Echevers School, I.P.T. Gumercinda Páez, first cycle of basic education, Tocumen, located in the Province of Panama, Republic of Panama', entered into between the Ministry of Education and the Panama Schools Consortium

		(comprising the companies MEYAN, S.A.; IDESTRA, S.A.; GMP Ingenieros S.A.S.; and MSB S.A.S., S.A.), under which performance bond No. 02-31-2552 of 9 March 2017 was issued, together with its respective endorsements
9	Subject Consortium MCM Global (60-15)	Matter relating to works contract No. 60-15 of 13 November 2015 for the "Supply of materials, labour, equipment and management for the construction of one thousand (1,000) social housing units in the Province of Panama (San Miguelito)", entered into between the Minister of Housing and Spatial Planning and MCM Global Consortium (comprising the companies Munilla Construction Management LLC (MCM) and MCM Global, S.A.), under which performance bond No. 01-31-4425 of 30 September 2015, together with its respective endorsements, and advance payment bond No. 01-31-4426 of 30 September 2015, together with their respective endorsements
10	Subject Aerodrome at the Aerodrome (018-2017)	Matter relating to works contract No. 018-2017 of 12 July 2017 for the "Study, Design and Construction of the Road, Car Park and Hangar Complex at Ruben Cantú Aerodrome, Santiago", entered into between the Civil Aviation Authority and Inversiones Solabed, S.A., under which performance bond No. 02-31-2947 of 19 July 2017, together with its respective endorsements, and advance payment bond No. 02-31-2949 of 18 July 2017 together with their respective endorsements
11	Case: Maritime Services (A-7007-2016)	Case relating to works contract No. A-7007-2016 of 16 January 2017 for the "Preparation of a study, design, development, approval of plans, environmental impact assessment, construction and maintenance of the new auxiliary maritime services terminal in the Pacific sector", entered into between the Panama Maritime Authority and the Inzelva S.A. Maritime Consortium (comprising the companies Construcciones Zelda, C.A.; Ingeniería de Consultas Incostas, S.A. (Venezuela), and Ingeniería de Consultas Incostas, S.A. (Panama)), under which performance bond No. 01-31-5100 dated 6 September 2016, together with its respective endorsements, and advance payment bond No. 02-31-5101 dated 6 September 2016, together with their respective endorsements
12	Subject: Cochea Sanitation Units (COC-72-16)	Case relating to civil works contract No. COC-72-16 of 4 October 2016 for the 'Construction of 259 sanitation units in the township of Cochea, District of David, Province of Chiriquí', entered into between MP/CONADES/UCEP and the Wulan S.A. Consortium (comprising the companies Servicios y Soluciones Integrales, S.A. (SESISA) and Grupo C.E.M, S.A.), under which performance bond No. 04-31-673 of 31 August 2016 was signed, together with its respective endorsement, and advance payment bond No. 04-31-6

13	Subject: El Cocal Sanitary Units (COC-78-16)	Matter relating to civil works contract No. COC-78-16 of 10 February 2016 for the ‘Construction of 421 sanitary units (including 7 special units) in the village of El Cocal, Peña Blanca, El Carate and Las Palmitas, Las Tablas District, Los Santos Province, and the construction of sanitation units for the Lidia Barrios de Jaén Nursery School, and the works to interconnect the sewerage networks on Calle 3 de Noviembre and Avenida Moisés Espino in the City of Las Tablas”, entered into between MP/CONADES/UCEP and Construcciones y Mantenimiento CAMIT, S.A., under which performance bond No. 03-31-627 of 29 October 2016 and the advance payment bond No. 03-31-628 dated 29 October 2016
14	Subject: Sanitary Facilities in El Empalme (COC-33-16)	Matter relating to civil works contract No. COC-33-16 of 20 October 2016 for the ‘Construction of 792 sanitation units in the village of El Empalme, Changuinola District, Bocas del Toro Province’, entered into between MP/CONADES/UCEP and Grupo C.E.M., S.A., under which performance bond No. 04-31-619 of 11 April 2016, together with its respective endorsement, and advance payment bond No. 04-31-620 of 11 April 2016, together with its respective endorsement
15	Subject: El Potrero Healthcare Units (COC-40-15)	Matter relating to civil works contract No. COC-40-15 of 14 September 2015 for the ‘Design and construction of 215 sanitation units in the village of El Potrero, Calobre District, Veraguas Province’, entered into between MP/CONADES/UCEP and Contratistas Generales y Eléctricos, S.A., under which the performance bond No. 02-31-1324 of 21 July 2015, together with its respective endorsements, and the advance payment bond No. 2-31-1325 of 21 July 2015, together with its respective endorsement
16	Subject: El Real Healthcare Units (COC-15-15)	Matter relating to civil works contract No. COC-15-15 of 29 June 2015 for the “Design and construction of 226 sanitation units in the village of El Real, Pinogana District, Darién Province’, entered into between MP/CONADES/UCEP and Constructora Pacífico Atlántico, S.A. (COPASA), under which performance bond No. 01-31-3874 of 24 March 2015, together with its respective endorsement, and advance payment bond No. 01-31-3875 of 24 March 2015, together with its respective endorsements
17	Subject: La Encantada Healthcare Units (COC-29-17)	Matter relating to civil works contract no. COC-29-17 of 26 August 2017 for the “Construction of 1,037 sanitary units (including 4 special units) in the townships of La Encantada, Nuevo Chagres, Salud, Palmas Bellas and Piña, Chagres District, Colón Province”, entered into between MP/CONADES/UCEP and the company Idestra, S.A., under which the performance bond

		No. 02-31-2920 dated 11 July 2017 and the advance payment bond No. 02-31-2922 dated 11 July 2017
18	Subject: Lídice Healthcare Units (COC-02-17)	Matter relating to civil works contract No. COC-02-17 of 31 May 2017 for the ‘Construction of 650 sanitary units (including 5 special units) in the village of Lídice, Capira District, West Panama Province’, entered into between MP/CONADES/UCEP and the Capira Consortium (comprising the companies Proinark, S.A. and Constructora Pacífico Atlántico, S.A. (COPASA)), under which the performance bond No. 02-31-2416 dated 19 January 2017 was signed, together with its respective endorsement and the advance payment bond No. 02-31-2417 dated 19 January 2017, together with its respective endorsement
19	Subject: Llano de la Cruz Healthcare Units (COC-05-17)	Matter relating to civil works contract No. COC-05-17 of 11 April 2017 for the “Construction of 371 sanitary units (including 4 special units) in the townships of Llano de la Cruz and Parita Cabecera, District of Parita, Province of Herrera”, entered into between MP/CONADES/UCEP and the company Construcciones y Mantenimiento CAMIT, S.A., under which performance bond No. 03-31-670 of 31 January 2017 and advance payment bond No. 03-31-671 of 31 January 2017
20	Subject: Llano Grande Healthcare Units (COC-18-17)	Matter arising under civil works contract No. COC-18-17 of 19 July 2017 for the ‘Construction of 785 sanitary units (including 11 special units) in the corregimiento of Llano Grande, District of La Pintada, Province of Coclé’, entered into between MP/CONADES/UCEP and the company Idestra, S.A., under which the performance bond No. 02-31-2789 of 25 May 2017 was signed, together with its respective endorsement, and the advance payment bond No. 02-31-2790 of 25 May 2017, together with its respective endorsements
21	Subject: Los Milagros Healthcare Units (COC-41-15)	Matter relating to civil works contract No. COC-41-15 of 14 September 2015 for the ‘Design and construction of 254 sanitary units in the village of Los Milagros, La Mesa District, Veraguas Province’, entered into between MP/CONADES/UCEP and Contratistas Generales y Eléctricos, S.A., under which performance bond No. 02-31-1326 of 21 July 2015, together with its respective endorsements, and advance payment bond No. 02-31-1327 of 21 July 2015, together with its respective endorsement
22	Subject: Monagrillo Sanitary Facilities (COC-14-16)	Matter relating to civil works contract No. COC-14-16 of 26 April 2016 for the “Construction of 447 sanitation units in the village of Monagrillo, Chitre District, Herrera Province”, entered into between MP/CONADES/UCEP and Inversiones Zhong Qiu, S.A., in

		which
		which the performance bond No. 01-31-4512 of 18 November 2015, together with its respective endorsements, and the advance payment bond No. 01-31-4513 of 18 November 2015, together with its respective endorsement, were issued
23	Subject: Pocrí Sanitary Units (COC-26-17)	Matter relating to civil works contract No. COC-26-17 of 17 July 2017 for the 'Construction of 470 sanitary units (including 17 special units) in the village of Pocrí, Aguadulce District, Coclé Province', entered into between MP/CONADES/UCEP and Inversiones Herabel S.A., under which performance bond No. 02-31-2901 of 5 July 2017 and advance payment bond No. 02-31-2902 of 5 July 2017
24	Subject: Salamanca Sanitation Units (COC-15-16)	Case relating to civil works contract No. COC-15-16 of 9 May 2016 for the 'Construction of 600 housing units in the township of Salamanca, Colón District, Colón Province', entered into between MP/CONADES/UCEP and Grupo C.E.M., S.A., under which performance bond No. 04-31-617 of 31 March 2016, together with its respective endorsements, and advance payment bond No. 04-31-618 of 31 March 2016, together with their respective endorsements
25	Subject: Sambú Healthcare Units (COC-14-15)	Matter relating to civil works contract No. COC-14-15 of 30 July 2015 for the "Design and construction of 243 sanitation units in the village of Sambú, Chepigana District, Darién Province', entered into between MP/CONADES/UCEP and the company Fomento, Montaje y Construcciones Civiles, LTDA., under which the performance bond No. 01-31-3932 dated 21 April 2015, together with its respective endorsements, and the advance payment bond No. 01-31-3933 dated 21 April 2015, together with their respective endorsements
26	Subject: San Carlos Sanitary Facilities (COC-18-16)	Case relating to civil works contract No. COC-18-16 of 5 May 2016 for the 'Construction of 298 sanitation units in the township of San Carlos, District of David, Province of Chiriquí', entered into between MP/CONADES/UCEP and Inversiones Zhong Qiu, S.A., under which performance bond No. 01-31-4607 of 30 December 2015, together with its respective endorsements, and performance bond No. 01-31-4607 of 30 December 2015, together with their respective endorsements

27	Subject: San José Healthcare Units (COC-30-17)	Case relating to civil works contract No. COC-30-17 of 3 July 2017 for the “Construction of 453 sanitary units (including 1 special unit), in the village of San José del General, District of Donoso, Province of Colón”, entered into between MP/CONADES/UCEP and the company Idestra, S.A., under which performance bond No. 02-31-2767 of 19 May 2017 together with its respective endorsement and the advance payment bond
		No. 02-31-2768 dated 19 May 2017, together with its respective endorsement
28	Subject: San Juan Healthcare Units (COC-85-16)	Matter relating to civil works contract No. COC-85-16 of 23 December 2016 for the ‘Construction of 418 sanitary units (including 2 special units) in the townships of San Juan and Corral Falso, District of San Francisco, Province of Veraguas’, entered into between MP/CONADES/UCEP and Construcciones y Mantenimiento CAMIT, S.A., under which performance bond No. 03-31-615 of 17 October 2016 and advance payment bond No. 03-31-616 of 17 October 2016
29	Subject: San Lorenzo Healthcare Units (COC-75-16)	Matter relating to civil works contract No. COC-75-16 of 12 October 2016 for the ‘Construction of 344 sanitary units (including 10 special units) in the township of San Lorenzo, District of San Lorenzo, Province of Chiriquí’, entered into between MP/CONADES/UCEP and Consorcio Wulan S.A. (comprising the companies Servicios y Soluciones Integrales, S.A. (SESISA) and Grupo C.E.M, S.A.), under which performance bond No. 04-31-676 of 31 August 2016, together with its respective endorsement, and advance payment bond No. 04-31-677 of 31 August 2016, together with its respective endorsement
30	Subject: Santa Clara Sanitary Units (COC-38-15)	Matter relating to civil works contract No. COC-38-15 of 21 October 2015 for the ‘Design and construction of 487 sanitation units in the township of Santa Clara, District of Arraiján, Province of West Panama’, entered into between MP/CONADES/UCEP and Duproc, S.A., under which performance bond No. 02-31-1311 of 2 July 2015, together with its endorsements, and advance payment bond No. 02-31-1312 of 2 July 2015, together with its endorsements

31	Subject: Soná Sanitary Facilities (COC-16-16)	Case relating to civil works contract No. COC-16-16 of 13 May 2016 for the "Construction of 869 sanitation units in the township of Soná, District of Soná, Province of Veraguas", entered into between MP/CONADES/UCEP and Inversiones Zhong Qiu, S.A., under which the performance bond No. 01-31-4566 dated 9 December 2015 was signed, together with its respective endorsement and the advance payment bond No. 01-31-4567 dated 9 December 2015, together with its respective endorsement
32	Subject: Tucutí Healthcare Units (COC-10-15)	Matter relating to civil works contract No. COC-10-15 of 12 June 2015 for the "Design and construction of 217 sanitation units in the township of Tucutí, Chepigana District, Darién Province', entered into between MP/CONADES/UCEP and the company Fomento, Montaje y Construcciones Civiles, LTDA., under which the performance bond No. 01-31-3930 dated 21 April 2015, together with its respective endorsements, and the advance payment bond No. 01-31-3931 dated 21 April 2015, together with its respective endorsements
33	Subject: Veladero Sanitation Units (COC-80-16)	Matter relating to civil works contract No. COC-80-16 of 8 November 2016 for the "Construction of 969 sanitation units in the sub-districts of Veladero, Quebrada de Piedra, Tolé (administrative centre) and Lajas de Tolé, Tolé District, Chiriquí Province', entered into between MP/CONADES/UCEP and the Tolé Consortium (comprising Constructora Pacífico Atlántico, S.A. (COPASA) and Proinark, S.A.), under which performance bond No. 02-31-2142 of 5 October 2016, together with its respective endorsement, and advance payment bond No. 02-31-2143 dated 5 October 2016, together with its respective endorsement
34	Subject: Vista Alegre Healthcare Units (COC-55-15)	Matter relating to civil works contract No. COC-55-15 of 28 September 2015 for the 'Design and construction of 782 sanitary units in the township of Vista Alegre, District of Arraiján, Province of West Panama', entered into between MP/CONADES/UCEP and the company Duproc, S.A., under which performance bond No. 04-31-529 of 27 August 2015, together with its endorsements, and advance payment bond No. 04-31-530 dated 27 August 2015

35	Subject: Guarumal Sanitary Units (COC-22-17)	Matter relating to civil works contract No. COC_22-17-CONADES of 5 July 2017 for the “construction of 829 sanitary units (including 18 special units), in the village of Guarumal, District of Somá, Province of Veraguas’, entered into between MP/CONADES/UCEP and Construcciones y Mantenimiento CAMIT S.A., under which advance payment bond No. 03-31-702 of 23 March 2017 and performance bond No. 03-31-701 dated 23 March 2017 were signed.

***