INTERNATIONAL CHAMBER of COMMERCE
INTERNATIONAL COURT of ARBITRATION

HIDROELÉCTRICA SANTA RITA, S.A.
(Guatemala)

v.

1. CORPORACIÓN AIC, S.A.
(Guatemala)

-and-

2. NOVACOM, S.A.
(Guatemala)

Case No. 21398/RD/MK

FINAL AWARD

The Arbitral Tribunal
Dr. Gaëtan J. Verhoosel
Mr. Adolfo E. Jiménez
Mr. Aníbal Sabater (President)

Date
October 29, 2018

ICC 21398/RD/MK – Final Award

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TABLE OF ABBREVIATIONS

Advance Payment Bonds	Securities provided by AICSA pursuant to Sections 24.3(a) and 24.5 of the EPC Contract
AICSA	Corporación AIC, S.A.
Arbitration Agreements	Section 32 of the Water-to-Wire Contract and Section 32 of the EPC Contract
CEDER	Centro de Estudios para el Desarrollo Regional
EPC Arbitration Agreement	Section 32 of the EPC Contract
EPC Contract	Engineering, Procurement and Construction Agreement, effective as of March 8, 2012, amended on January 8, 2013, and restated on February 20, 2013
FAA	Federal Arbitration Act
FCPA	Foreign Corrupt Practices Act
FICA	Florida International Arbitration Act
FRCP	Florida Rules of Civil Procedure
HSR	Hidroeléctrica Santa Rita, S.A.
ICC Court	International Court of Arbitration of the International Chamber of Commerce
ICC Rules	Rules of Arbitration of the International Chamber of Commerce in force as from January 1, 2012
ICC Secretariat	Secretariat of the ICC Court
Novacom	Novacom, S.A.
Plant	23.2 megawatt hydroelectric power plant on the Icbolay River, within the Municipality of Cobán, in the Guatemalan department of Alta Verapaz, whose construction is provided for in the EPC Contract
Project	Project for the construction of the Plant
Tribunal	Arbitral Tribunal
Water-to-Wire Arbitration Agreement	Section 32 of the Water-to-Wire Contract

Water-to-Wire Contract	Agreement for the Engineering, Procurement, Construction, Commissioning and Start-up of the Water to Wire Systems for the Project Santa Rita Hydroelectric Power Plant in Alta Verapaz, Guatemala, Central America, dated March 7, 2012

I. INTRODUCTION

1. Counterintuitively, this protracted and intensely-fought dispute stems from the construction of a small facility—a 23.2 megawatt hydroelectric power plant on the Icbolay River, within the Municipality of Cobán, in the Guatemalan department of Alta Verapaz (the "**Plant,**" and the project for its construction, the "**Project**").[1]

2. At odds over the Project are three parties: the owner, **HIDROELÉCTRICA SANTA RITA, S.A.** ("**HSR**"); the contractor, **CORPORACIÓN AIC, S.A.** ("**AICSA**"); and a subcontractor, **NOVACOM, S.A.** ("**Novacom**").

3. HSR and AICSA were parties to an Engineering, Procurement and Construction Agreement, signed on March 8, 2012, amended on January 8, 2013, and restated on February 20, 2013, (the "**EPC Contract**").[2] Under the EPC Contract, HSR engaged AICSA for the full turnkey design, engineering, procurement, construction, start-up, and commissioning of the Plant.[3]

4. AICSA and Novacom, for their part, signed a subcontract ancillary to the EPC Contract, namely the Agreement for the Engineering, Procurement, Construction, Commissioning and Start-up of the Water to Wire Systems for the Project Santa Rita Hydroelectric Power Plant in Alta Verapaz, Guatemala, Central America, dated March 7, 2012 (the "**Water-to-Wire Contract,**" and together with the EPC Contract, the "**Contracts**").

5. By mid-2013, notices to proceed under both Contracts had been issued and construction was underway—but on an extremely limited basis. The Project had never enjoyed the support of the local indigenous community and opposition to it only grew as efforts were made to advance construction. Eventually, members of the community blockaded access to the Project and threatened those working on it.

6. Citing force majeure, HSR issued a Project suspension notice under the EPC Contract on October 1, 2013.[4] In turn, AICSA requested Novacom to suspend work under the Water-to-Wire Contract on October 2, 2013.[5]

7. Asserting that conditions on the ground had not improved and could not be expected to improve anytime soon, HSR terminated for convenience the EPC Contract on March 16, 2015. On the same day, AICSA gave notice to Novacom of termination of the Water-to-Wire Contract.[6]

8. In the wake of these events, several differences arose between the Parties, some of which were brought to this arbitration. On April 7, 2017, this Tribunal issued a Partial Award establishing that it did not have jurisdiction over Novacom or over claims arising out of the

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[1] EPC Contract, Preamble.

[2] Capitalized and not otherwise defined terms in this Final Award have the meaning ascribed to them in the EPC Contract.

[3] EPC Contract, Preamble.

[4] Request for Arbitration, paras. 3 to 5, and AICSA's Request for Joinder of Novacom, paras. 17 and 18.

[5] *Id.*

[6] *Id.*

Water-to-Wire Contract and dismissing Novacom from these proceedings, without prejudice to the decision on fees and costs, which was deferred to the Final Award.

9. As a result, the only disputes presently pending before the Tribunal fall within seven Heads of Claims, as follows:[7]

> The First Head comprises (a) AICSA's claim against HSR for work performed and termination costs under the EPC Contract, and (b) HSR's mirror claim for the return of the advance payments made to AICSA under the EPC Contract, net of payments due to AICSA for work performed and termination costs;
>
> The Second Head comprises AICSA's claim against HSR for reasonable lost profits—a claim resting mostly on allegations that HSR suspended and terminated the Project in bad faith, after grossly mismanaging community relations and paying a bribe;
>
> The Third Head comprises AICSA's claim against HSR for violations to Section 34.13 of the EPC Contract and the FCPA on the allegation that HSR paid a bribe;
>
> The Fourth Head comprises HSR's claim against AICSA for breach of the arbitration agreement;
>
> The Fifth Head comprises HSR's claims against AICSA for breach of an implied covenant of good faith for reasons including AICSA's unlawful retention of balances allegedly owed to HSR and prosecution of harassing litigation in Guatemala;
>
> The Sixth Head comprises a set of additional claims and requests from the parties; and
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> The Seventh Head comprises HSR, AICSA, and Novacom's claims for fees and costs.

10. This Final Award disposes of these seven Heads of Claims.

II. BACKGROUND INFORMATION

A. THE PARTIES AND THEIR REPRESENTATIVES

11. Claimant **HIDROELÉCTRICA SANTA RITA, S.A.** is a *sociedad anónima*, organized and existing under the laws of the Republic of Guatemala, whose purpose is the generation of power. Its current address is at 1ra. Calle 14-92 zona 8 de Mixco Pinares de San Cristóbal, Guatemala.

12. HSR is represented in this arbitration by Messrs. Rafael E. Llano Oddone (rllano@whitecase.com), Sean Goldstein (sgoldstein@whitecase.com), and Pedro José Izquierdo Franco (pedrojose.izquierdo@whitecase.com), from White & Case, S.C., with offices at Torre del Bosque – PH, Blvd. Manuel Ávila Camacho #24, Col. Lomas de Chapultepec, 11000 México, D.F., México; and by Mr. Jorge Rolando Barrios (jrbarrios@bonilla.com.gt), Mr. Edgar Renato Cheng Tabarini (rcheng@bonilla.com.gt), Ms. Lorena Barrios Pinzón (lbarrios@bonilla.com.gt), and Mr. Jaime Rolando Velásquez Velásquez (jaimevelasquez@bonilla.com.gt), from Bonilla, Montano, Toriello & Barrios,

[7] For particulars on these seven Heads of Claims, see Terms of Reference, at paras. 28 to 63.

Avenida de la Reforma 15-54, Zona 9, Edificio Reforma Obelisco, 3er Nivel, Ciudad de Guatemala 01009, Guatemala.

13. Respondent 1 **CORPORACIÓN AIC, S.A.** is a sociedad anónima organized and existing under the laws of the Republic of Guatemala. It is active in the construction business. Its principal place of business is at 9ª Calle 18-18, Zona 14, Ciudad de Guatemala 01014, Guatemala.

14. AICSA is represented in this arbitration by Mr. Santiago J. Padilla (spadilla@frfirm.com), from Fowler Rodriguez LLP with offices at 355 Alhambra Circle, Suite 801, Coral Gables, FL 33134, USA; by Mr. George J. Fowler, III (fow@frfirm.com), from Fowler Rodriguez LLP, with offices at 400 Poydras Street, 30th Floor New Orleans, LA 70130, USA; and by Mr. Juan Luis Aguilar (juanluis@legal.com.gt) and Mmes. María Renee Aguilar (mraguilar@legal.com.gt) and Alejandra Quevedo (aquevedo@legal.com.gt), from Aguilar & Aguilar, 3a. avenida 13-78, zona 10, Torre Citibank, Nivel 17, Penthouse Sur, Guatemala.

15. Respondent 2 **NOVACOM, S.A.** is a sociedad anónima organized and existing under the laws of the Republic of Guatemala, and is active in a variety of industries, including the construction of power generation facilities. Its principal place of business at 8ª Calle 3-14 Zona 10, Ciudad de Guatemala 01010, Guatemala.

16. Novacom is represented in this arbitration by Ms. Jacqueline Hazbun Arias (jhazbun@consultoriastripode.com), from Consultorías Trípode S.A., 8 ave 3-90 zona 14 Edificio La Rambla, Torre 2 Oficina 3-1, Ciudad de Guatemala 01014, Guatemala.

B. THE ARBITRAL TRIBUNAL

17. The Arbitral Tribunal ("**Tribunal**") comprises:

a) **Dr. GAËTAN J. VERHOOSEL** (gaetan.verhoosel@threecrownsllp.com), of Three Crowns LLP, 8-10 New Fetter Lane, London EC4A 1AZ, United Kingdom, co-arbitrator nominated by HSR, and confirmed by the Secretary General of the ICC International Court of Arbitration ("**ICC Court**") on February 8, 2016;

b) **Mr. ADOLFO E. JIMÉNEZ** (adolfo.jimenez@hklaw.com), of Holland & Knight LLP, 701 Brickell Avenue, Suite 3300, Miami, FL 33131, USA, co-arbitrator jointly nominated by AICSA and Novacom and confirmed by the Secretary General of the ICC Court on February 8, 2016; and

c) **Mr. ANÍBAL SABATER** (anibal.sabater@chaffetzlindsey.com), of Chaffetz Lindsey LLP, 1700 Broadway, 33rd Floor, New York, NY 10019, president of the Arbitral Tribunal, directly appointed by the ICC Court on June 29, 2016.

C. THE CLAUSE

18. The jurisdiction of the Arbitral Tribunal over this dispute derives from Section 32 of the EPC Contract, which contains the following arbitration agreement (the "EPC Arbitration Agreement"):[8]

> **32. Settlement Of Disputes**
>
> **32.1. Disputes.** In the event of any dispute, controversy or claim arising out of or in connection with the Documents of the Agreement, including the breach, termination or invalidity thereof ("Dispute"), either Party may serve formal written notice on the other Party that a Dispute has arisen ("Notice of Dispute"). This Section will survive the termination or expiration of this Agreement.
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> **32.2. Negotiation.** The Parties shall attempt in good faith, during a period of thirty (30) days from the date on which the Notice of Dispute is served by one Party on the other Party (or such longer period as may be agreed in writing between the Parties), to resolve the Dispute by amicable negotiation.
>
> **32.3. Arbitration of the Dispute.** If the Dispute has not been resolved through negotiation pursuant to Section 32.2, the Dispute shall be finally settled and resolved by arbitration ("Arbitration") in accordance with the Rules of Arbitration of the International Chamber of Commerce ("ICC Rules") in effect as of the date that a Dispute is submitted to the ICC, and the following provisions shall apply:
>
> **a)** The number of arbitrators shall be Three (3). One (1) arbitrator shall be appointed by each Party in accordance with the ICC Rules, and the third arbitrator ("Umpire") shall be selected by the Two (2) Party-appointed arbitrators or, failing agreement, by the ICC in accordance with the ICC Rules (collectively, the three (3) member panel is hereinafter referred to as the "Tribunal"). The Parties shall be permitted to consult with their respective Party appointed arbitrators during the Umpire selection process.
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> **b)** The Arbitration proceeding shall be conducted in the City of Miami, Florida, United States of America, or such other location upon which the Parties to the Arbitration may agree.
>
> **c)** The language to be used in the Arbitration shall be the English language; provided, however, that any Party may submit testimony or documentary evidence in a language other than English, and shall, upon request of the arbitrator or any other

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[8] The Water-to-Wire Contract contains also an arbitration agreement (this one solely between AICSA and Novacom). The April 7, 2017 Partial Final Award explains why the Tribunal does not have jurisdiction pursuant to that arbitration agreement.

Party to the Arbitration, furnish a translation or interpretation into English of any such testimony or documentary evidence.[9]

d) At any Arbitration hearing of oral evidence, each Party to the Arbitration or its legal counsel shall have the right to present and examine its witnesses and to cross-examine the witnesses of the other Party. No evidence of any Party witness shall be presented in written form unless the other Party shall have the opportunity to cross examine such witness, except as the Parties to the Arbitration otherwise agree in writing or except as the Tribunal may otherwise resolve. A Party shall communicate to the Tribunal and the opposing Party the names and addresses of each witness whose written or spoken testimony it intends to present in the Arbitration and the subject matters upon which, and the languages in which, they will testify at least thirty (30) days prior to the date of the hearing at which such witness may testify.

e) The procedural rules specified in this Section and the ICC Rules shall be the sole procedures for the resolution of Disputes between or among the Parties arising from or relating to the Agreement and/or with regard to the conduct of any Arbitration or the taking of evidence therein. Whenever the procedures of this Section and the ICC Rules are in conflict, the procedures of this Section shall govern and apply.

f) The arbitral award in favor of the prevailing Party shall include an award for pre-award (pre-judgment) interest on the awarded amount and reasonable attorneys' fees and costs incurred in connection with such Dispute.

g) The Tribunal shall be required to apply the substantive law of Guatemala in ruling upon any Dispute, in accordance with the Parties' intent as expressed in Section 1.8 of this Agreement.

32.4. Related Disputes

a) If the Dispute involves or relates to any Third Party or to a Subcontractor, and such Dispute (i) raises issues of fact or law which are substantially similar to, or connected with, issues raised in any Dispute; or (ii) arises out of facts which are substantially similar to, or connected with, facts which are the subject of any dispute or difference between Owner, Contractor, Third Party, Subcontractor or the Guarantor; (iii) the inclusion of

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[9] Procedural Order No. 1 (paragraph 41) allowed the parties to submit evidence and quote legal provisions in Spanish, without having to translate them. It thus became frequent in the course of the case for the parties to submit relevant materials in Spanish, such as Guatemalan legal provisions, without having them accompanied by a translation into English. For ease of reading and completeness, this Final Award occasionally quotes those provisions in their original Spanish and goes on to add an unofficial translation prepared by the Tribunal, which does not purport to change the meaning of the original.

such Third Party, Subcontractor or Guarantor is necessary if complete relief is to be afforded among those who are already parties to the Arbitration and which will arise in such proceedings; or (iv) the Dispute or other matter in question between Owner and Contractor involves the work of Subcontractor, then either Owner or Contractor may include such Third Party, Subcontractor or Guarantor as a party to the Arbitration between Owner and Contractor hereunder, whether before or after the commencement of the Arbitration proceedings, to the extent not specifically prohibited by Law and the ICC Rules.

b) Contractor shall include in all subcontracts a specific provision whereby the Subcontractor consents to it being included in an arbitration between Owner and Contractor involving any Works performed by such Subcontractor.

32.5. The Award

a) Any decision or arbitral award delivered in the Arbitration (collectively, the "Award") shall be final and binding upon the Parties to the Arbitration and shall not be subject to appeal, review or impugn by any Party or by or in a court or tribunal.

b) The Parties agree that the arbitral decision or award may be enforced against the Parties to the Arbitration or their assets wherever they may be found, and that a judgment upon the Award may be entered in any court having jurisdiction thereof in accordance with the Convention on the Recognition and Enforcement of Foreign Awards (New York Convention).

D. RULES, SEAT, AND SUBSTANTIVE LAW

19. As established in Section VIII of the Terms of Reference, the Rules of Arbitration of the International Chamber of Commerce in force as of January 1, 2012 ("**ICC Rules**") apply to this arbitration.

20. As established in Section X of the Terms of Reference, the place of arbitration is Miami, Florida, USA.

21. As established in Section XII of the Terms of Reference, the rules of law to be applied by the Tribunal to the merits of the dispute are the substantive laws of the Republic of Guatemala, except when a different law applies by virtue of party agreement or a statute.

E. PROCEDURAL HISTORY

(i) *Case Initiation*

22. The parties have fought this case heavily from its inception, as attested by their opening submissions, which include: (i) HSR's Request for Arbitration, of October 9, 2015; (ii) AICSA's Request for the Joinder of Novacom, of November 30, 2015; (iii) AICSA's Answer to the Request for Arbitration and Counterclaims against HSR, of December 21, 2015; (iv)

AICSA's Revised Statement of Relief to its Answer and Counterclaim, of January 4, 2016; (v) HSR's Reply to Counterclaims, of February 8, 2016; (vi) Novacom's Answer to the Request for Joinder and Counterclaims against HSR, of February 8, 2016; and (vii) HSR's letter of March 10, 2016 to the Secretariat of the ICC Court ("**ICC Secretariat**"), raising a plea pursuant to Article 6(3) of the ICC Rules, objecting to the joinder of Novacom, and requesting that a decision on the plea be taken by the Arbitral Tribunal once constituted.

23. On June 29, 2016, the Tribunal was constituted as described in Section II.B and the ICC Secretariat transmitted the file to the Tribunal pursuant to Article 16 of the ICC Rules.

24. On August 8, 2016, a case management conference was held by telephone, in accordance with Article 24(1) of the ICC Rules, for the purpose of finalizing the Terms of Reference and consulting the parties on the procedural rules and timetable to govern the conduct of the arbitration. The Parties and the Tribunal participated in the call.

25. On August 22, 2016, the Tribunal submitted to the Court the Terms of Reference duly signed by the parties and the Tribunal.

26. On September 30, 2016, the Tribunal issued Procedural Order No. 1, which included as Annex A the procedural timetable for this arbitration. In light of the issues raised in the parties' opening submissions, the timetable contemplated separate tracks for jurisdiction and merits. Specifically, Track I comprised submissions from the parties on HSR's jurisdictional plea objecting to the joinder of Novacom; and Track II, which was to take place after Track I, comprised submissions from the parties on the merits of the dispute. The timetable made it clear that, even though submissions on jurisdiction (Track I) were to precede submissions on the merits (Track II), Track II would not be suspended or stayed pending adjudication of Track I, as the "Tribunal had discretion as to whether it rules on jurisdiction ahead of, and separate from, [the] Final Award on the Merits."10

27. Adding a layer of complexity to this schedule, an unscheduled filing was made before briefing on Track I commenced: on July 27, 2016, HSR filed an application for interim relief, seeking an order that AICSA provide a replacement bond under Section 30.4 of the EPC Contract. The application would eventually be denied in Procedural Order No. 2 (of November 28, 2016), after two rounds of pleadings, the filing of several expert reports, and a telephonic hearing.

(ii) *Briefing and Disposition of Track I*

28. As set out in the timetable, three submissions were made as part of Track I: HSR filed a Memorial on Jurisdiction (accompanied by exhibits, witness statements and an expert report on Guatemalan law) on October 4, 2016; AICSA filed a Reply to HSR's Memorial on Jurisdiction (accompanied by exhibits and witness statements) on November 2, 2016; and Novacom filed a Reply to HSR's Plea on Jurisdiction (accompanied by exhibits, witness statements and an expert opinion on Guatemalan law) also on November 2, 2016.

29. On November 9, 2016, the Tribunal sent an e-mail to the parties indicating that it did "not consider that further briefing or a telephonic hearing on the jurisdictional plea is necessary. If

[10] Procedural Order No. 1, Annex A.

any party disagrees and considers that a telephonic hearing is warranted, it can submit a reasoned request to that effect by Monday, November 14, 2016."11 No such request was made.

30. On April 7, 2017, the Tribunal disposed of Track I by means of a Partial Award in which it:

> *(a) Declares that it does not have jurisdiction over Novacom's claims;*
>
> *(b) Dismisses AICSA's Request for Joinder of Novacom;*
>
> *(c) Accordingly, except for what is provided in the following sub-paragraph, dismisses Novacom from this arbitration;*
>
> *(d) Defers the disposition of fees and costs concerning Track I to a separate phase on the issue . . .*
>
> *All outstanding matters not addressed in this Partial Award are reserved for a future award.*[12]

(iii) *Briefing and Oral Argument of Track II*

31. As for Track II, HSR filed a Statement of Claim (accompanied by witness statements, expert reports, and exhibits) on October 25, 2016; AICSA and Novacom each filed a Statement of Reply and Counterclaim (accompanied by witness statements, expert reports, and exhibits) on December 5, 2016; the parties exchanged Redfern Schedules on December 17, 2016, objections to document production requests on January 12, 2017, and replies to objections on February 3, 2017. With leave from the Tribunal, HSR and AICSA submitted additional briefing on contested document production requests on February 17, 2017. On February 24, 2017, the Tribunal issued Procedural Order No. 3 disposing of contested document production requests.

32. With Novacom already dismissed from this case except for the ruling on fees and costs, HSR filed its Reply (along with witness statements, expert reports, and exhibits) on April 13, 2017; and AICSA filed its Reply on Claims and Rejoinder on Counterclaims (along with witness statements, experts reports, and exhibits) on May 20, 2017.

33. On June 10, 2017, HSR filed its Rejoinder on Counterclaims (along with witness statements, expert reports, and exhibits).

34. The next step in the case was the evidentiary hearing, which took place in Miami, in two sessions.

35. The first session was conducted from June 26 through June 30, 2017. During those five days, HSR and AICSA delivered oral opening statements and examined seventeen fact and expert witnesses. In chronological order, those were:

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[11] Emphasis omitted.

[12] Partial Final Award, para, 117.

Cross-examined fact witnesses of HSR: (i) Mr. Carlos Cu (community relations manager for HSR), (ii) Mr. Luis Velásquez (former outside political consultant to HSR), (iii) Mr. Gerardo Anleu (former outside counsel to HSR), (iv) Mr. Stephen Pearlman (managing partner of Real Infrastructure Capital Partners LLC, a private equity fund that owns a controlling interest in HSR);

Cross-examined fact witnesses of AICSA: (v) Mr. Rodrigo Tormo (general manager of Secacao, an entity active in the ownership and management of hydro generation projects), (vi) Mr. Ernesto Ruiz Sinibaldi (AICSA's founder and chairman of AICSA), (vii) Mr. Carlos Esquivel (former Globeleq executive who evaluated the Santa Rita Project for Globeleq), (viii) Mr. Norbert Siggelkow (AICSA's manager for the Santa Rita project), (ix) Mr. Ricardo Luna (AICSA engineer), (x) Mr. Erick Pastora (former HSR site manager), (xi) Mr. Juan Carlos Gramajo (former contract negotiator for AICSA), (xii) Ms. Ana Valeria Prado (sustainability and community advisor), (xiii) Mr. Aurelio Asturias (co-owner of the Pontila Project, which is upstream from Santa Rita);[13]

Cross-examined community relations expert of HSR: (xiv) Ms. Margarita Mendoza;

Cross-examined community relations expert of AICSA: (xv) Ms. Carmen Lucía Salguero;

Cross-examined Guatemalan law expert of HSR: (xvi) Dr. José Rolando Quesada; and

Cross-examined Guatemalan law expert of AICSA: (xvii) Dr. Roberto Molina Barretto.

36. When it so considered appropriate, the Tribunal asked questions to the foregoing fact and expert witnesses.

37. A second session for the evidentiary hearing became necessary as, despite use of the chess clock system, procedural incidents in the course of the hearing were frequent and the originally scheduled five hearing days turned out to be insufficient.

38. After numerous scheduling difficulties (stemming mostly from the large teams involved and the disruption caused by hurricane Irma) the second and final part of the evidentiary hearing took place in Miami on November 8, 2017. At this second session, HSR and AICSA examined Mr. Enrique Frohnknecht (HSR's damages expert) and Mr. Scott Gray (AICSA's damages expert) and then delivered oral closing statements.

39. In light of issues raised at the second hearing session, and at the request of AICSA, the Tribunal allowed for a discrete supplementary production of documents mostly on issues allegedly touching on community relations. This supplementary production from HSR and AICSA took place during November 2017.

40. As established by the Tribunal, HSR and AICSA submitted their First Post-Hearing Briefs on January 15, 2018 and their Second Post-Hearing Briefs on January 30, 2018. Along with its First Post-Hearing Brief, AICSA also filed a request for inferences, to which HSR replied along with its Second Post-Hearing Brief.

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[13] Whereas all other fact and experts witnesses to testify at the hearing did so being physically present, Mr. Asturias testified by videoconference.

41. HSR and AICSA filed Briefs on Allocation of Fees and Costs on February 5, 2018. (Novacom did not submit any.) Then, on February 13, 2018, HSR, AICSA, and Novacom provided their respective Statements Quantifying Fees and Costs.

42. On April 9, 2018, HSR and AICSA submitted responses to questions asked by the Tribunal with respect to applicable interest rates. AICSA's responses were accompanied by an opinion from Guatemalan law expert witness Dr. Barretto. On the same April 9, 2018, HSR objected to the submission of Dr. Barretto's opinion. On April 11, 2018, AICSA made a submission opposing the objection. That submission remains the last made in the case as of the date of this Final Award.

43. Proceedings were closed on July 20, 2018.

(iv) *Relevant Administrative Decisions*

44. Procedural decisions of consequence to these proceedings have been issued not only by the Tribunal, but also by the ICC Court. In addition to those related to the constitution of the Tribunal discussed at section II.B, relevant decisions from the ICC Court include the following:

A. With respect to costs:

a. At is session of March 3, 2016, the ICC Court, established the advance on fees and costs at US$530,000, subject to later readjustments;

b. At its session of February 22, 2018, the ICC Court readjusted the advance on costs and increased it from US$530,000 to US$544,000, subject to later readjustments; and

c. At its session of October 4, 2018, the ICC Court established that the costs of this arbitration were US$525,880.

B. With respect to the deadline to issue the final award:

a. At its session of December 8, 2016, the ICC Court extended the time limit to September 29, 2017;

b. At its session of September 7, 2017, it extended the time limit to December 29, 2017;

c. At its session of December 7, 2017, it extended the time limit to April 30, 2018;

d. At its session of April 5, 2018, it extended the time limit to May 31, 2018;

e. At its session of May 3, 2018, it extended the time limit to June 29, 2018;

f. At its session of June 7, 2018, it extended the time limit to July 31, 2018;

g. At its session of July 5, 2018, it extended the time limit to August 31, 2018;

h. At its session of August 2, 2018, it extended the time limit to September 28, 2018;

i. At is session of September 6, 2018, it extended the time limit to October 31, 2018; and

j. At its session of October 4, 2018, it extended the time limit to November 30, 2018.

III. FINAL AWARD STRUCTURE AND KEY ISSUES RAISED BY THE PARTIES

45. The following sections of this Final Award address and dispose of each of the seven Heads of Claims previously identified in Section I. Those claims and their supporting allegations, however, merit a brief introduction on the divergent approaches and expectations with which HSR and AICSA have come to this arbitration.[14]

46. According to HSR, at stake in this arbitration is just a narrow set of claims, mostly of an accounting nature. Central to HSR's claims is the fact that AICSA received about US$11 million in advance payments on account of its expected work on the Project. Both parties agree on the amount, the date, and the reason for the payments (they were made under the EPC, upon issuance of two initial limited notices to proceed and a full notice to proceed). They also agree that, despite the termination of the EPC Contract, AICSA has failed to return any part of the advanced amounts. HSR urges the Tribunal to calculate the amounts to which AICSA is entitled for work performed and termination costs under the EPC Contract; allow AICSA to keep those amounts; and order AICSA to immediately return to HSR the unutilized portion of the advance payments, plus interest.

47. HSR asserts that AICSA's failure to agree to a prompt liquidation of balances and return the unutilized portion of the advance payments is part of a wider bad faith pattern. AICSA, says HSR, is withholding the advance payments to force HSR to settle on unfavorable terms, including by paying amounts not due by HSR (such as lost profits). As part of that bad faith campaign, according to HSR, AICSA has initiated in Guatemala civil claims to prevent HSR from obtaining a reinstatement of contractual guarantees, and criminal litigation against HSR and its executives for fraud and related charges. According to HSR, AICSA's Guatemalan court cases against HSR and executives are frivolous, and constitute harassment and a threat to the integrity of this arbitration.

48. The picture of the dispute drawn by AICSA is diametrically opposed. AICSA denies HSR's claims and insists that the Tribunal should not limit itself to viewing this as an accounting dispute, but rather consider a much wider set of circumstances, which purport to show what AICSA claims is HSR's unlawful scheme. The roots of this dispute, says AICSA, extend back to 2010, when Guatemala granted to HSR—at the time owned by two Guatemalan citizens, Messrs. Roberto López and Gregorio Presa—the right to build and operate the Plant. For a brief stint in 2011 and 2012, power generation multinational Globeleq joined forces with HSR to become a Project co-developer. It was during this stint that AICSA was selected as Contractor (and a first version of the EPC signed) and Novacom was selected as a subcontractor (and the Water-to-Wire Contract was signed).

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[14] For a useful summary of those party approaches and expectations, see generally HSR's Statement of Claim, AICSA's Statements of Reply and Counterclaims, and both parties' respective opening and closing slides used at the evidentiary hearing.

49. AICSA is adamant that HSR and AICSA had been aware all along that local indigenous support for the Project was half-hearted at best, which is why as of early 2012, despite the Contracts being signed, construction of the Project had not started beyond a few preparatory acts.

50. For AICSA, a turning point came in mid-to-late 2012, when Globeleq, frustrated with the lack of progress, exited the Project, and HSR changed hands to be acquired by two investment funds managed by New Jersey-based Real Infrastructure Capital Partners, a private equity firm.

51. Real Infrastructure, says AICSA, made two fatal mistakes—the first was its supposed decision to invest in the Project despite not having a long-term interest in it (according to AICSA, Real Infrastructure just wanted to "flip" the Project or sell it at a profit to another owner); and the second was its alleged unwillingness to significantly invest in the Project.

52. Tainted by those "original sins," HSR, now owned by Real Infrastructure, engaged AICSA in contractual renegotiations, leading to the amendment and re-statement of the EPC Contract. As amended and restated, the EPC Contract was generally less favorable to AICSA, from an economic standpoint, but it still made clear, at least according to AICSA, that the management of community relations was HSR's obligation. AICSA claims that HSR breached that obligation by not investing enough in the communities to win over support for the Project. The community thus became growingly upset and eventually prevented access to the Project's site. (HSR counters that it was AICSA who had the contractual obligation to ensure security and access to the site and failed to do so, probably as a result of underpaying the local community laborers that it hired.)

53. With opposition to the Project spiraling out of control and access to the site barred by local activists, HSR ordered the suspension of contractual activities on October 1, 2013 citing force majeure as the reason to do so. From that point the Project made no additional progress, and in March 2015, HSR issued a notice terminating the EPC Contract. While the notice did not clearly express so, HSR has acknowledged that the termination was made for convenience, that is, not for breach or default by AICSA.

54. Both parties agree that two events ultimately sealed the fate of the Project. First, three people, an adult and two minors, died in an armed incident during the summer of 2013, in the wake of social unrest involving supporters and opponents of the Project. Second, at the same time, the regional government of Alta Verapaz refrained from quelling the social conflict, thus allowing open acts of violence against the Project. AICSA is adamant that HSR is liable for the government's passivity. It claims that in or around 2013, the governor had requested a US$50,000 bribe in exchange for his support for the Project, of which HSR, with characteristic stinginess, would have attempted to only pay US$40,000. While awaiting payment of the alleged bribe, the governor would have given free rein to the local community and de facto allowed the Project die a slow death. When the alleged bribe was eventually paid, the governor would have been late and unable to rein the communities in. HSR acknowledges having made a payment at the request of the governor, but asserts the payment was to buy rooftops for the community affected by the Project and vehemently denies any illegality.

55. AICSA believes that the suspension invoking force majeure and the termination for convenience are "sham" decisions, which under the pretense of impossibility to carry out the Project, aim only at getting rid of what had now become an expensive and inconvenient contractor—AICSA. Had HSR been a diligent owner, says AICSA, it would have realized very early that the management of community relations was complicated and required money. But HSR opted always for the cheapest option. Eventually, it must have become apparent, says AICSA, that the Project would cost HSR more money than it was willing to invest. That is when it decided to terminate it, thus saving all expenses, including those related to working with AICSA and AICSA's subcontractors.

56. AICSA considers that it should not be made the scapegoat of HSR's alleged lack of planning and bad faith. Instead, it claims it is entitled to the be fully compensated for the work it performed on the Project and termination costs, plus a lost profit equivalent to the benefit it would have made had the Project been performed through completion. HSR denies AICSA's entitlement to compensation for work, termination costs, or lost profits, as well as any wrongdoing on its part.

IV. PRAYERS FOR RELIEF

57. HSR's and AICSA's prayers for relief reflect their conflicting case narratives. Initial prayers for relief appeared in the Terms of Reference[15] and were subject to refinement and development in the course of the case. In its most current prayer for relief, HSR seeks "that the Tribunal, in accordance with the Contract:

a) Declare that AICSA has breached Sections 6.6(b), 25.1, 28.3(b), 30.3(a), 30.4, and 32.3 of the Contract, and Articles 1519 and 1653 of the Guatemalan Civil Code and Article 669 of the Guatemalan Commercial Code;[16]

b) Order AICSA to reimburse to Claimant the amount of US$16,199,774.27;

c) Order AICSA to pay exchange-rate loss damages to Claimant in the amount of US$88,679.22;

d) Order AICSA to pay damages to Claimant under Claim No. 2 [Breach of Arbitration Agreement] in the amount of US$43,000;

e) Order AICSA to pay damages to Claimant under Claim No. 3 [Breach of Implied Covenant of Good Faith] in an amount determined by the Tribunal in its discretion;

f) Award Claimant post-award interest at the rate of 18% annually;

g) Order AICSA to reinstate the Advance Payment Bonds, in any amount awarded to Claimant, and in the format previously provided by Claimant;

h) Deny AICSA's Counterclaims in their entirety;

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[15] Paras. 28 to 63.

[16] This request for declaratory relief is addressed at Section X(A) of this Final Award.

i) Order AICSA to pay Claimant all costs and expenses (including, but not limited to, costs payable to the ICC, legal fees and expenses, and experts' and witnesses' fees and expenses) incurred by Claimant in connection with this arbitration;

j) Order Novacom, jointly and severally with AICSA, to pay Claimant all costs and expenses (including, but not limited to, costs payable to the ICC, legal fees and expenses, and experts' and witnesses' fees and expenses) incurred by Claimant in connection with this arbitration up to the submission of Claimant's Statement of Claim; and

k) Grant Claimant such other or different relief as the Tribunal deems just and appropriate in the circumstances."[17]

58. For its part, AICSA's most current prayer for relief reads as follows:

"[S]set forth below is AICSA's detailed prayer for relief:

A. Contractual and Legal Provisions Breached by HSR

[A]ttached hereto as Exhibit "A" are the specific contractual and/or legal provisions breached by HSR, as well as a summary of the facts supporting the breach.[18]

B. Breakdown of the Amounts to which AICSA is Entitled

Pursuant to the Tribunal's specific request, attached hereto as Exhibit "B" are the specific amounts to which AICSA is entitled under the EPC Contract and Guatemalan law, not including attorneys' fees and costs.

C. Setoffs to be Made in Awarding Damages

As agreed by the parties, AICSA and Novacom were advanced the total amount of $9,446,858.60 and €1,138,458.00. As demonstrated above, AICSA and Novacom are entitled to the amount of $6,212,188.55 and €808,783.50, plus attorneys' fees and costs. Reducing these amounts from the amounts advanced by HSR, AICSA would need to return $3,234,670.05 and €329,674.50 to HSR, subject to deducting attorneys 'fees and costs owed to AICSA as discussed above.

D. Net Amounts Sought by AICSA

The net amount sought by AICSA is $6,212,188.50 plus €808,783.50, plus attorneys fees and costs. However, this does not include any amounts with respect to (i) the value of damaged and destroyed construction equipment, and (ii) any claims of Novacom for damages in excess of its termination costs and administrative costs (e.g., lost profits on work not performed).

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[17] HSR's Post-Hearing Brief I, para. 129.

[18] This reference to contractual and/or legal provisions allegedly breached by HSR is addressed at Section X(C) of this Final Award.

E. Applicable Interest Rate

Pursuant to the EPC Contract, the interest to be paid on any amounts owed by one party to the other shall be "at an annual rate equal to Owner's Financial Costs applicable on the last day of the quarter prior to the date on which any of such payments should have been made, plus three percent (3%)," such rate not to " exceed the maximum rate then permitted by the Applicable Laws."Therefore, as provided by the EPC Contract, the prejudgment interest rate on the Works executed should be as calculated by whatever the maximum rate allowed by local laws and regulations in Guatemala. Since AICSA already has the money in a local account earning the local interest rate, AICSA has already been made whole in this respect.

With respect to AICSA's lost profits, the prejudgment interest rate to be applied should be the average historical internal rate of return earned by AICSA on monies in vested in its projects, which is12.98% per annum, compounded annually, as was calculated by Navigant. This prejudgment interest rate would apply from the expected date of completion of the Project, which was expected tohave been completed on or about June 2015, to the date of the award in this case. The rationale being that since AICSA would have had use of this money from June 2015, it would have invested this money in other projects."[19]

59. Exhibit A mentioned in AICSA's prayer for relief lists nine provisions allegedly breached by HSR and is discussed in detail at Section X of this Final Award. Exhibit B quantifies AICSA's total claims at US$6,212,188.55 and €808,783.50 and shall be discussed in detail at Sections V, VI, and VII of this Final Award.

V. FIRST HEAD OF CLAIMS: AICSA's CLAIMS AGAINST HSR FOR WORK PERFORMED AND TERMINATION COSTS UNDER THE EPC CONTRACT; AND HSR's CLAIMS FOR REIMBURSEMENT OF ADVANCE PAYMENTS

A. INTRODUCTION

60. Both parties agree that, pursuant to the two limited notices to proceed, as well as the notice to proceed, AICSA received advance payments totaling US$9,446,858.60 and €1,138,458.[20] They also agree that to this date these funds remain in the possession of AICSA. It is the task of the Tribunal to determine how much of the advance payments AICSA is entitled to keep and how much it should return to HSR.

61. AICSA asserts it should be compensated (and allowed to keep US$3,052,672.31 and €808,783.50 from the advance payments) for the following categories of work performed and terminations costs:[21]

(i) Milestones' work allegedly done but never paid to AICSA;

(ii) Out-of-scope work; and

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[19] AICSA's Post-Hearing Brief I, paras. 189-195 (footnotes omitted; emphasis in the original).

[20] HSR Post-Hearing Brief I, para. 15 and AICSA Post-Hearing Brief I, para. 192.

[21] AICSA Post-Hearing Brief I, paras. 191-192.

(iii) Termination costs, including amortization costs and costs for termination of subcontractors.

62. The following sections of this Award determine the compensation owed to AICSA for work performed and termination costs, as well as the unutilized amounts that need to be returned to HSR. They also dispose of HSR's claims for interest on those amounts and for the extension of the Advance Payment Bonds until those amounts are paid.

B. AICSA'S CLAIMS FOR MILESTONES' WORK

(i) Introduction

63. AICSA worked on several contractually defined Milestones, but a significant part of these Milestones was not completed by the time HSR terminated the EPC Contract. The Parties disagree as to what compensation, if any, AICSA is entitled to for this work. The parties' disagreement is twofold. First, there is the threshold issue of whether AICSA can be compensated at all for incomplete Milestones. Second, and to the extent it can, there is the issue of how much compensation is owed to it as a result of the work performed on those Milestones.

(ii) Threshold Issue: Compensation for Partially completed Milestones

(a) Position of the Parties

64. The parties disagree as to whether AICSA can be compensated for work on incomplete Milestones.

65. HSR argues this question must be answered in the negative in light of Section 6.6(b) of the EPC Contract, pursuant to which, "*Contractor may only request payment of the Contract Price by submitting a Payment Application, issued pursuant to Section 25, when it completes each of the Milestones set forth in Exhibit M-1. In no event shall Owner be obligated for partially completed Milestones.*"[22]

66. HSR relies also on Section 25.1 of the EPC Contract, which addresses Payment Applications. Specifically, Section 25.1(a), argues HSR, allows for the submission of Payment Applications only when there is "*compliance with each of such Milestones as set forth in Exhibit M-1*" to the EPC Contract. Section 25.1(b), for its part, provides in relevant part that "*No payments on account of partial completion of any Milestone shall be made.*" [23] All these provisions, asserts HSR, were carefully drafted by the parties and their unambiguous language should be enforced.[24]

67. HSR acknowledges that, if and when the EPC Contract was terminated for convenience, there would be no further opportunity for AICSA to submit Payment Applications. HSR contends in that case AICSA's full and proper compensations is provided through Section 30.3(a) of the EPC Contract, which affords Contractor reimbursement of costs stemming from termination and a bonus or premium Payment in the amount of 10% of payment

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[22] HSR Post-Hearing Brief I, para. 16.

[23] HSR Post-Hearing Brief I, paras. 18-19.

[24] Id., paras. 25-28

applications submitted through termination.[25] But under no circumstances is a payment envisaged for "percentage completion" of Milestones, argues HSR.[26]

68. Additionally, because in this case "the Project had progressed very little and the Contractor has not yet reached any Milestones," the 10% premium payment is unavailing and AICSA can only claim costs stemming directly from termination.[27]

69. This contractual framework is not superseded, but only ratified by Guatemalan law, says HSR. First, Article 1519 of the Guatemalan Civil Code, according to HSR, requires compliance with the Contract as written.[28] Second, the EPC Contract is neither ambiguous nor contains gaps needing to be filled through Guatemalan laws.[29]

70. AICSA disagrees. According to AICSA, Section 6.6(b) of the EPC Contract is inapplicable for a variety of reasons, including the following:

(a) Section 6.6(b) applies only to pre-termination situations. If the EPC Contract is terminated while there are Milestones pending completion, then Owner must pay for any work it receives, whether complete or incomplete, pursuant to EPC Contract Sections 30.3(b) [termination for convenience] and 30.3(c) [termination by default].[30] AICSA is adamant that legal experts for both parties (Drs. Molina Barretto and Quesada) orally agreed with this conclusion at the hearing.[31]

(b) Pursuant to Article 1519 of the Guatemalan Civil Code and Article 669 of the Guatemalan Commercial Code, contracts must be performed in good faith and in keeping with the parties' intentions. Not paying for work performed is contrary to good faith and those intentions (it was the parties' intention, says AICSA, that Owner would "pay for the civil works that it received from the [C]ontractor").[32]

(c) Pursuant to Article 2011 of the Guatemalan Civil Code, an owner can terminate a construction project for convenience provided it pays, at least, for the works executed.[33]

(d) HSR would be unjustly enriched and even breach AICSA's Guatemalan constitutional right to be compensated for work performed, if it received a good or a service without paying for it in exchange.[34]

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[25] Id., paras. 23-24.

[26] Id., para. 23.

[27] Id., para. 36.

[28] Id., para. 32.

[29] Id.

[30] AICSA Post-Hearing Brief I, para. 15.

[31] Id., paras. 19-20.

[32] AICSA Post-Hearing Brief I, para. 10.

[33] Id., para. 13.

[34] H. Tr. Day 2, 185:24.

(b) Decision of the Tribunal

71. HSR's assertion that it has no obligation to pay for non-completed Milestones, rests on three contractual sentences: "*In no event shall Owner be obligated for partially completed Milestones*" (EPC Contract Section 6(6)(b); "*No payments on account of partial completion of any Milestone shall be made*" (Contract Section 25(1)(b)); and Payment Applications for Milestones can only be submitted "*provided that compliance with each of such Milestones is reached*" (Contract Section 25(1)(a)).

72. Those sentences, however, cannot be read in isolation from the rest of the EPC Contract. The first of the three sentences appears in Section 6(6)(b), titled Payment Terms, which sets out the terms and conditions for payment of the contract price upon completion of Milestones; the other two appear in Section 25(1), tellingly titled Payment Applications, which sets out the cases in which a Payment Application can be sought. Specifically, Section 25(1) allows for payment applications in three cases: (i) when a Milestone has been completed, (ii) when there is an "approved and executed Change Order," or (iii) when there are "Works affected by a suspension according to Section 18" (titled Suspension of Works).[35]

73. The question then is: what are those payable works "affected by a suspension according to Section 18"? Obviously, the works cannot be "new works" performed as a result of a suspension ordered by Owner (such as preservation work undertaken to protect the Project during the duration of the stay), because any such new work would be out-of-scope and give rise to a change order, which is a separately payable category under Section 25(1)(a).

74. But if payable "works affected by a suspension" are neither new works stemming from the suspension nor Milestones completed before the suspension, then only one possibility remains: payable "works affected by a suspension" must be works left unfinished because of a suspension order.

75. That is the only interpretation of Section 25(1)(a) that gives meaning to all its words, and also the only interpretation that prevents the EPC Contract from becoming unconscionable. If HSR were right, then AICSA would be required to work for free and perform work that goes unreimbursed (yet adds value to the Project) when, like in the instance, HSR chooses to suspend for an extended period of time and terminate before Milestones are completed.

76. In sum, Section 25(1)(a) allows for payment applications for a partially completed milestone when a suspension order, as is the case here, prevented the milestone from being completed.

77. One issue, however, remains: In this case AICSA did not submit payment applications for non-complete Milestones, but rather sought directly payment for that work in this arbitration. HSR asserts that AICSA's failure to submit payment applications is a bar to recovery for work done (whether or not complete).[36] The Tribunal disagrees.

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[35] Emphasis in the original.

[36] HSR Post-Hearing Brief I, para. 24.

78. To the extent that HSR's argument is that AICSA's payment demands come too late, the argument fails because the EPC Contract does not set out a deadline by which to submit payment applications.

79. To the extent that HSR's argument is that AICSA's payment demands should have first been submitted as payment applications while the suspension was in place, the argument is contradicted by HSR's own conduct: As further discussed below, HSR relied on the suspension as the reason for not honoring Payment Application No. 4, which called for funds for the acquisition of turbine and generator equipment. AICSA cannot be blamed for relying on HSR's conduct to the effect that payment applications were unavailing during the suspension.

80. To the extent that HSR's argument is that AICSA's payment demands should have first been submitted as payment applications after the EPC Contract was terminated, the argument would still fail. Once a contract is terminated only its surviving provisions remain in force. Typically surviving provisions are clearly identifiable as such. For instance, Section 30.4 of the EPC Contract provides that the contractual provisions governing AICSA's liability for defective work survive termination. No comparable provision exists in Article 25(1) with respect to payment applications.

81. By way of conclusion:

a. The fact that AICSA did not submit payment applications for totally or partially completed work is not a bar to compensation for that work; and

b. AICSA must be allowed to collect on partially completed Milestones and HSR's defense that partially completed Milestones are not payable is dismissed.

(iii) Milestone G1.1 (Limited Notice to Proceed 1): Access Road

(a) Position of the Parties

82. On January 9, 2013, HSR issued Limited Notice to Proceed No. 1 requesting AICSA to work on Milestone G1.1, and on the same date transferred US$500,000 to AICSA as Advance Payment for the value of the totality of this Work.[37] In order to achieve Milestone G1.1, AICSA had to complete the "[r]epair of 12 km[s.] of public access road and entrance to the project."[38]

83. AICSA claims it is entitled to keep the entirety of the transferred amount because the Milestone was completed by June 2013.[39] HSR disagrees. The parties' dispute in this respect focuses on three issues.

84. First, there is the issue of whether the Milestone was actually completed, which led to extensive exchanges at the evidentiary hearing.

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[37] Exhibits C-5 and C-6.

[38] EPC Contract (C-3), Exhibit M-1.

[39] H. Tr. Day 4, 14:28.

85. The starting point of the debate in this respect is a June 24, 2013 letter from AICSA's project manager Ricardo Luna to HSR's construction manager Erik Pastora (for brevity, the "Luna Letter").[40] The Luna Letter is a barebones status report in the form of a chart written by AICSA (Mr. Luna) and displaying handwritten comments from HSR (Mr. Pastora). The chart outlines various milestones and their respective percentages of completion according to AICSA's Mr. Luna. When HSR's Mr. Pastora agreed with a percentage completion offered by Mr. Luna, Mr. Pastora would simply put a check sign next to Mr. Luna's percentage. When he disagreed, he would cross out Mr. Luna's percentage and handwrite the percentage he considered completed.

86. The Luna Letter shows that AICSA asserted that Milestone G1.1 was 100% achieved and HSR agreed with that assertion.[41] On that basis, AICSA claims it is allowed to keep the US$500,000 advanced towards its completion.

87. HSR disputes AICSA's position, arguing that the Luna Letter is not a reliable indicator of completion, and that Mr. Luna's oral testimony at the hearing confirmed that critical elements of the Milestone were missing, including road base repair, drainage work, and in situ soil testing, to the point that little or no work could be deemed performed on the Milestone.[42]

88. AICSA does not dispute that certain original items of the Milestone may have never been completed, but relies on Mr. Luna's testimony to the effect that he and Mr. Pastora had "stricken a deal" whereby performance of those items would not be necessary for the completion of the Milestone and was waived by HSR.[43] HSR argues that Mr. Pastora lacked authority to certify completion of any Milestones and that his handwritten comments on the Luna Letter do not satisfy the necessary contractual requirements to deem the Milestones achieved.[44]

89. AICSA also asserts that an internal May 24, 2013 HSR report (the "May 24, 2013 Report") already conceded that Milestone I was at an approximate 70-75% degree of completion, thus confirming extensive work on the Milestone.[45]

90. Second, and assuming the Tribunal deemed the Milestone effectively achieved, there is the issue of whether its completion was timely.

91. Limited Notice to Proceed No. 1 established a completion date of February 21, 2013, which HSR asserts is strictly enforceable[46] AICSA denies that and asserts that, due to difficulties with local communities, HSR, AICSA, and CEDER (the company then engaged to assist with community relations) agreed to extend indefinitely completion of this Milestone.[47]

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[40] Exhibit R1-112.

[41] AICSA Statement of Defense, paras. 172-173.

[42] HSR Post-Hearing Brief I, para. 50.

[43] AICSA Post-Hearing Brief I, para. 98 and H. Tr. Day 4, 103:24-27.

[44] HSR Post-Hearing Brief I, para. 52.

[45] AICSA Post-Hearing Brief I, para. 100, relying on R1-262, R1-271, R-1 272, R-1 273, and R-1-274.

[46] Id., para. 52.

[47] AICSA Post-Hearing Brief I, para. 97.

92. HSR contests the existence of any such agreement and asserts that a contractually compliant (i.e., written and express) extension of time was necessary to postpone the February 21, 2013 completion date and this extension was never granted.[48]

93. Third, AICSA asserts that the foregoing discussion is immaterial, to the extent that Limited Notice to Proceed No. 1 expressly provides that "upon termination, Contractor shall be entitled to keep the payment of US$500,000 as payment for all direct and indirect costs incurred or committed and not transferred to Owner in the execution of the works up to the effective date of termination."[49]

94. For AICSA, the language just transcribed merely confirms that, to the extent not utilized to compensate AICSA for actual completion of the Milestone, AICSA could keep that amount in the event of termination to be made whole for termination expenses costs otherwise due under the EPC Contract. However, according to HSR, AICSA is due nothing given that neither the Milestone was completed nor significant termination expenses incurred.

(b) Decision of the Tribunal

95. In line with industry practices, the EPC Contract set out two standard methods to monitor progress on Milestones, namely monthly reports from AICSA to HSR (Section 12.2) and monthly meetings between HSR and AICSA (Section 12.3). In this case, however, neither monthly reports nor minutes of high level management meetings have been introduced into evidence with respect to this claim.[50] Whether this is because they do not exist or because the parties had them but chose not to file is immaterial for present purposes.

96. The absence of those documents from the records leaves the Tribunal with only three pieces of contemporaneous evidence to adjudicate this claim. The first is the May 24, 2013 Report,[51] prepared by an HSR employee, Mr. Mario Ávila, and addressed to two other HSR employees (Messrs. Pastora and Guillermo Font). The report discusses advance on the Project during the preceding week and states that, as of its date, "progress [on Milestone G1.1] is between 70-75%, and has benefitted from the decrease in rains in the sector" (unofficial translation of the Spanish original: "el avance es de un 70 a 75% aprovechando la baja de las lluvias en el sector").[52]

97. Second, the Tribunal has before it approximately one thousand pictures submitted by AICSA that purport to show extensive work the Milestone in April and May, 2013.[53]

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[48] HSR Post-Hearing Brief I, para. 42.

[49] AICSA Post-Hearing Brief I, para. 101.

[50] For the avoidance of doubt, the reports herein referenced are the formal reports (one per month) prescribed by Section 12.2 from AICSA to HSR detailing progress on completion of the schedule, including percentages. AICSA has submitted several documents it labels as reports (for instance in attachment to Messrs. Ortega, Luna, and Siggelkow' s witness statements). But these are for the most part AICSA internal communications discussing daily activities and rarely detailing specific percentages of advance in the works.

[51] R1-262.

[52] Id., page 1.

[53] R1-271, R-1 272, R-1 273, and R-1-274.

98. Third, there is the Luna Letter, dated June 24, 2013, in which employees for both parties agree that the Milestone is 100% complete.

99. The Tribunal will not rely on the pictures. They certainly show intense work on a road, but the parties have not established the date when they were taken or the specific area of the Project, if any, shown in them.

100. Instead, the Tribunal will focus on the May 24, 2013 Report and the Luna Letter. The May 24, 2013 Report asserts that the majority of the Milestone was completed; and one month later the Luna Letter asserts that the totality of the Milestone was completed. These are consistent statements—and they both come from HSR (sole author of the May 24, 2013 Report and co-author of the Luna Letter). In the absence of contemporary evidence contradicting them, those statements from HSR must stand.

101. HSR asserts that ultimately Mr. Pastora must have "gotten it wrong" in the Luna Letter because the milestone was never achieved to the contractually agreed level of completion. The difficulty with that argument is that HSR's Mr. Pastora deemed the Milestone completed without reservations, and HSR did not disavow or correct Mr. Pastora's views until this arbitration—let alone question his authority to act for or bind HSR with statements on completion. The Tribunal thus accepts that Milestone G1.1 was 100% completed.

102. This then leaves the Tribunal exclusively with the issue of whether completion was timely. Both parties recognize that completion, to the extent achieved, took place later than the contractually-prescribed February 21, 2013. AICSA, however, asserts that HSR agreed that AICSA could be late for this Milestone in light of community unrest. The Tribunal considers that the undisputed existence of community unrest impacting the Project lend credibility to AICSA's contentions. The Tribunal also notes that there is no indication in the Luna Letter—or for that matter, in the rest of the record—that HSR considered completion of the Milestone untimely for reasons attributable to AICSA. In particular, HSR did not contemporaneously seek to enforce the contractual schedule in Section 5 of the EPC Contract or raised the possibility that AICSA was subject to delay damages. Thus, as AICSA has argued,[54] with its behavior, HSR was either implicitly granting an extension or waiving the right to demand compliance with the contractual schedule. AICSA is entitled to rely on that behavior by HSR so as to conclude that completion was timely.

103. Consequently, AICSA's claim is granted in full and AICSA is entitled to keep US$500,000 for completion of Milestone G1.1.

(iv) Milestone G1.2 (Limited Notice to Proceed No. 2)

104. Pursuant to Limited Notice to Proceed No. 2 (issued on February 20, 2017),[55] AICSA received a US$4.5 million Advance Payment in order to perform several works. Of that amount, AICSA asserts it is entitled to keep US$169,806.97 as compensation for three items.

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[54] AICSA's Post-Hearing Brief I, para. 98.

[55] Exhibit C-7.

105. First, AICSA asserts it is entitled to keep US$50,000 in exchange for the issuance of the so-called "Limited Notice To Proceed 2 Advance Payment Bond"[56]. HSR agrees,[57] thus rendering payment of this amount undisputed.

106. Second, AICSA asserts it is entitled to keep US$13,978 for the 15% completion of Milestone C8.2 ("Construction of new road from Roadcrossing to Powerhouse site"). Milestone C8.2 was to be compensated through two payments, each in the amount of US$46,593.35,[58] up to a total of US$93,186.70. One such payment would be deducted from the advance made under the Limited Notice to Proceed No. 2, the other from the advance made under the Notice to Proceed. AICSA, however, recognizes that only 30% of the Milestone was achieved. It thus seeks to be compensated for a half of its work (15%) against the amounts advanced under Limited Notice to Proceed No. 2, leaving the remaining 15% to be deducted from the amounts advanced under the Notice to Proceed.[59]

107. HSR asserts AICSA's completion estimate is unreliable. Why, says HSR, should the Tribunal agree that 15% of this Milestone was completed when the Luna Letter suggests it was 80%?[60]

108. The Tribunal agrees with AICSA. The Luna Letter is inconclusive on the issue (Milestone G1.2 is not expressly addressed in it), but Messrs. Siggelkow and Ortega have credibly testified substantiating a 30% completion rate.[61] Their testimony is supported by contemporaneous internal AICSA exchanges and not contradicted by HSR's evidence. AICSA is thus entitled to keep US$13,978 of the amounts advanced to it under the Limited Notice to Proceed No. 2 as compensation for the 15% completion of Milestone C8.2.

109. Third, AICSA asserts it is entitled to keep US$105,828.97 that represents 69.3% completion of the entire Milestone C8.3 ("Construction of new road from the Project entrance to the Dam site").[62] The total value of the Milestone was US$305,422.68, of which 50% (or US$152,711.34) was advanced under Limited Notice to Proceed No. 2 and the remaining 50% (the other US$152,711.34) was to be advanced under the Notice to Proceed.

110. AICSA asserts that it completed 69.3% of this Milestone and, as a result, is entitled to keep US$105,828.97 (that is, 69.3% of the 152,711.34 from the monies advanced to it pursuant to Limited Notice to Proceed No. 2).[63] To establish that AICSA completed 69.3% of the Milestone, AICSA relies on Mr. Gray's reports, which reached the conclusion that this was

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[56] HSR Post-Hearing Brief I, para. 45 and AICSA Post-Hearing Brief I, para. 104.

[57] HSR Post-Hearing Brief I, para. 45 and AICSA Post-Hearing Brief I, para. 104.

[58] EPC Contract (C-3), Exhibit M-1.

[59] AICSA Post-Hearing Brief I, paras. 110 and 20.

[60] HSR Post-Hearing Brief I, para. 56.

[61] Norbert Siggelkow' s First Witness Statement (December 5, 2016), para. 73, and Second Witness Statement (May 19, 2017), para. 14; and Joaquín Ortega's Witness Statement (December 3, 2016) paras. 6 to 13 and Annexes 2, 3, 4, and 6 of that Declaration (which are Exhibits R1-143 to R1-146). See also Mr. Navigant Second Report, paras. 32 and 33.

[62] EPC Contract (C-3), Exhibit M-1.

[63] AICSA Post-Hearing Brief I, para. 111 and Exhibit B.

the appropriate completion rate after reviewing the Luna Letter and 2012 internal AICSA progress reports[64]

111. HSR disputes that AICSA has established completing any part, let alone 69.3%, of the Milestone. According to HSR, the Luna Letter is inconclusive as to Milestone C8.3, which is not addressed separately in it, and in the course of his cross-examination, Mr. Pastora admitted that the Luna Letter and his comments to it were not enough to show any work having been performed on the Milestone.[65] HSR denies owing any amounts with respect to this Milestone.

112. The Tribunal agrees with AICSA. The Luna Letter does not contain a standalone item referred to or quantifying completion of Milestone C8.3. It addresses, however, the percentage of "corte y relleno" (cut and fill) activities performed throughout all relevant roads. The Luna Letter says that cut and fill was completed by 75% (according to HSR) and 78% according to AICSA. In his reports, Mr. Gray adopted the more conservative percentage provided by HSR. Mr. Gray (in the Tribunal's mind credibly and without rebuttal or counterevidence from HSR) concluded that such percentage of completion must include the first 2.5 kilometers of the road in Milestone C8.3. Mr. Gray and HSR agree that the remaining 750 meters of the road could not have been addressed in the Luna Letter. Mr. Gray reviewed 2012 AICSA internal progress reports suggesting that such section of the road was significantly less advanced, thus bringing the average percentage of completion of the Milestone to 69.3%. The Tribunal attaches particular credibility to Mr. Gray's calculations as they are detailed and offer corrections to ensure that AICSA is not unduly favored. (For instance, read without the benefit of the 2012 internal reports, a plausible conclusion of the Luna Letter may have been that the cut and fill of the last 750 meters of the road had also been 75% achieved --Mr. Gray, however, stays away from that conclusion.)

113. The Tribunal thus grants AICSA the right to keep US$105,828.97 that represents 69.3% completion of Milestone C8.3. (The Tribunal is mindful that it is not clearly established that compensation for Milestone C8.3 should be deducted from the advance made under Limited Notice to Proceed No. 2—alternatively it may have to be deducted from the advance under the Notice to Proceed or just paid separately. But ultimately HSR has not objected to the amounts being deducted from the second advance and the economic effect of deducting them for that advance or from another one are neutral to the bottom line.)

114. In sum, AICSA is entitled to keep US$169,806.97 from the monies advanced to it under Limited Notice to Proceed No. 2.

(v) Notice to Proceed

115. Under the Notice to Proceed, HSR advanced US$4,446,858.60 to AICSA.[66] Of that amount, AICSA claims it is entitled to keep US$732,330.78 for work on a variety of items.

116. First, AICSA claims it is entitled to keep US$163,916.00 for clearing and grubbing the platform camp and clearing and grubbing within the Project.[67] HSR does not deny that this

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[64] Id., para 111.

[65] HSR Post-Hearing Brief I, para. 59.

[66] AICSA's Post-Hearing Brief I, para. 112.

work (unallocated in the sense that is not covered by any specific Milestone) was performed, but it asserts AICSA's formulation for calculating compensation is inflated.[68]

117. The Tribunal considers AICSA's calculation and methodology appropriate. From the Luna Letter, Mr. Gray inferred that 80% of 2.5 kilometers of Project road clearing and grubbing had taken place and 100% of the clearing and grubbing of the platform had been performed.[69] As for the Project road clearing and grubbing, the Luna Letter indicated that AICSA understood there was an 85% completion rate and HSR considered it was 80%; Mr. Gray went with the more conservative 80%.[70] Mr. Gray then applied the units price in Exhibit L to the Contract to calculate compensation.[71] The Tribunal considers this methodology rigorous and credible. HSR concedes that the work has been performed and has not presented an alternative damages model. AICSA is therefore entitled to keep US$163,916.00 for clearing and grubbing.

118. Second, AICSA asserts it should be allowed to keep US$117,925.46 for completion of the refurbishment of the Chisec-Coban Pave Road to the Project entrance, a Milestone contractually defined as C8.1 and valued at the entire amount claimed by AICSA. The parties dispute hinges here on the Luna Letter, which indicates the Milestone as completed. AICSA considers this a reliable indicator of completion, and HSR does not.[72] As previously noted, the Tribunal considers the Luna Letter, in the absence of contemporaneous corrections, reliable. AICSA can therefore keep US$117,925.46.

119. Third, AICSA asserts it should be allowed to keep US$13,978.00 in compensation for the remaining 15% of the partial completion of the C8.2 (new road) milestone. As previously noted, the Tribunal deems it established that AICSA completed 30% of the C8.2 road Milestone, and is entitled to deduct the equivalent to the payment for a half of that work (15%) from the amounts advanced to it under Limited Notice to Proceed No. 2 and the other half (an additional 15%) from the Notice to Proceed. AICSA's claim to keep an additional US$13,978.00 is thus granted.

120. Fourth, AICSA asserts it is entitled to retain US$120,327.54 for work on Milestone C8.3 ("Construction of new road from the Project entrance to the Dam site"). To recall, the total value of the Milestone was US$305,422.68, of which 50% (or US$152,711.34) was advanced under Limited Notice to Proceed No. 2 and the remaining 50% (the other US$152,711.34) was to be advanced under the Notice to Proceed.

121. AICSA asserts that it completed 69.3% of this Milestone and as a result it is entitled to keep US$105,828.97 (that is, 69.3% of the 152,711.34 from the monies advanced to it pursuant to

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[67] Id., para. 113.

[68] HSR's Post-Hearing Brief I, paras. 72-73.

[69] First Navigant Expert Report, para. 61.

[70] Id.

[71] Id.

[72] AICSA's Post-Hearing Brief I, paras, 115-119; HSR's Post-Hearing Brief I, paras 48-54.

Notice to Proceed), plus 13% of the of the Contract Price included in the advance payment milestones.[73]

122. As previously established, the Tribunal is satisfied that AICSA is entitled to 69.3% of the total value of the Milestone as it has established such completion percentage. The Tribunal is also satisfied that the Notice to Proceed contemplated the requested 13% of the allocable share of the Contract Price.

123. In sum, the Tribunal grants AICSA's claim to be allowed to retain US$120,327.54 for work on Milestone C8.3.

124. Fifth, Milestone G2 was contractually defined as "mobilization to site" and, upon completion, entitled AICSA to receive US$223,212.06. AICSA claims it achieved partial completion of this Milestone, not exceeding 15%, asserts it is conservatively estimating its claim, and seeks to keep US$25,471.17, which is approximately 11% of the amounts advanced to it for this Milestone under the Notice to Proceed .[74]

125. HSR objects to this claim on a twofold basis. First, it argues that AICSA's damages expert Mr. Scott Gray appears to have based his completion calculation on crew and material mobilizations that took place in January and February 2012, before the EPC Contract was signed. Second, it argues that the claim is duplicative from a mobilization charge that also appears among the Limited Notice to Proceed No. 1 charges AICSA seeks to withhold.[75]

126. The Tribunal does not uphold HSR's objections. The EPC Contract was signed after the parties had been engaged in extensive negotiations and had taken preliminary steps towards working on the Project. AICSA should not be prejudiced by its decision to mobilize crews before the EPC Contract was signed, especially as there is no indication in the EPC Contract that recovery is only allowed for activities post-dating its execution (to the contrary, Section 25.1 of the EPC Contract broadly allows for Payment Applications irrespective of the date when the work was performed; and in defining the contents of a Payment Application, Section 25.3 requires only an indication of the work performed—not its date). Also, as of its latest prayer for relief and breakdown of monies sought, the Tribunal detects no duplication between the relief hereby sought by AICSA and that sought under other claims.

127. The Tribunal thus grants AICSA US$25,471.17 for the partial completion of Milestone G2.

128. Sixth, the EPC Contract contemplated a payment of US$75,767.78 to AICSA upon completion of the civil engineering package. AICSA asserts that it completed this Milestone and is entitled to withhold from the amounts received under the Notice to Proceed, a total of US$86,147.97 ("equal to the Milestone amount of US$75,767.78, plus an allocation of 13.7% for the portion of the Contract Price included in the advance payment milestones").[76] According to AICSA, the milestone was completed in July 2013, but HSR refused to accept

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[73] AICSA Post-Hearing Brief I, para. 111 and Exhibit B.

[74] AICSA Post-Hearing Brief I, para. 130.

[75] HSR Post-Hearing Brief I, para. 71.

[76] AICSA Post-Hearing Brief I, para. 121.

delivery because "it did not have an engineer to review the engineering package at the time."[77]

129. HSR opposes AICSA's claim on two grounds. First, says HSR, if the Milestone was completed, then AICSA should have submitted a Payment Application, which it did not (the absence of a Payment Application is, according to HSR, both evidence that the Milestone was never completed and a legal bar to its recovery); second, AICSA has not, according to HSR, established that it completed the Milestone and in particular any attempts to deliver the preliminary engineering to HSR (according to HSR, at the hearing Mr. Siggelkow recanted his earlier statements that there was not a civil engineering at HSR capable of revising the plans).[78]

130. The Tribunal considers that AICSA has established its claim. With respect to HSR's first objection, a Payment Application is the general way to seek payment of completed Milestones. In this particular case, however, the exception already discussed applies: because HSR ex abrupto suspended performance of the EPC Contract (and then terminated it) before Milestones were completed or payment applications for complete Milestones could be submitted, recovery must still be allowed. Absence of a payment application is no bar, in this case, for the recovery of the sought amounts.

131. With respect to HSR's second objection, the record is clear that an extensive civil engineering package exists. It has been submitted as exhibit R1-121. That the package was delivered to HSR (prior to this arbitration) is not a matter contingent on witness testimony in this case. The communication submitted as R1-59 (AICSA letter to HSR on February 27, 2015) explicitly confirms HSR was sent the package two and a half weeks before the EPC Contract was terminated.

132. The Tribunal thus grants AICSA US$86,147.97 for completion of the civil engineering package.

133. Seventh, upon completion of the Project's Final Engineering Package (Milestone D2), AICSA was contractually entitled to receive €240,000 plus US$213.771.26 (for water-to-wire engineering) and US$199,906.81 (for civil engineering). It is undisputed that this Milestone was not achieved. AICSA, however, claims that it completed approximately 90% of the Milestone and is, as result, entitled to keep US$204,564.64 from the amounts advanced to it pursuant to the Notice to Proceed.[79] AICSA maintains that the fact that AICSA provided over 200 engineering drawings to HSR in the course of the Project confirms the advanced stage of completion of this Milestone.[80]

134. HSR, for its part, agrees that AICSA created over 200 drawings concerning the Project but disputes their timeliness. Based on statements made by AICSA's engineering consultant Juan Carlos Gramajo at the hearing, HSR submits that the vast majority of those drawings were created in late 2013 or 2014, after HSR suspended the Project on October 1, 2013,

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[77] Id.

[78] HSR Post-Hearing Brief I, paras. 63-66.

[79] AICSA Post-Hearing Brief I, para. 127.

[80] Id.

which would mean that AICSA failed to mitigate damages and disobeyed the direction to "lay down" tools.[81]

135. The Tribunal partially upholds HSR's defense. HSR's suspension order of October 1, 2013 (Exhibit R1-16) contained a clear and unequivocal order to cease all activities: AICSA, the order said, "shall immediately stop the execution of the Works. The suspension is for all the Works, including but not limited to the manufacturing of the Equipment."

136. The evidentiary hearing showed that drawings were created after this direction was given.[82] AICSA should not be entitled to recover for them. The Tribunal has reviewed the 277 engineering drawings provided as part of the engineering package.[83] Of these, 239 are dated after the suspension (October 1, 2013), and 44 are dated before it.[84] Some of the drawings post-dating the suspension may have been substantially completed or completed indeed before the suspension. But AICSA has not established whether that is the case and if so for how many of the drawings. As a result, AICSA can only be reimbursed for that 16% of the drawings (44 out of 277) that was completed before the suspension order. AICSA is then entitled to US$32,730.34, or 16% of the US$204,564.64 it claimed for the drawings.

137. As a conclusion, adding up all the amounts previously granted, the Tribunal finds that, of the advance payment it received under the Notice to Proceed, AICSA is entitled to keep a total of US$560,496.48.

(vi) Change Order No. 1

138. Change Order No. 1 was issued on July 4, 2013. Pursuant to it, the Contract Price was increased by US$200,000 (payable upon completion of Milestones G2, C8.2 and C8.3) in consideration of delays related to the issuance of the Notice to Proceed. AICSA acknowledges that it did not complete the Milestones that triggered the price increase but that, in light of the partial performance of those Milestones—and of the costs incurred to perform—it is entitled to US$31,533.66 for them.[85]

139. HSR denies any liability on the grounds that partially completed Milestones do not entitle AICSA to any compensation.[86] HSR, in particular, relies on language in page 1 of the Change Order to the effect that payment of the amounts contemplated in it will be made as the relevant Milestones "are completed."

140. The Tribunal, however, has previously explained why contractual language such as that in Change Order No. 1 does not exclude the possibility of seeking partial payments when completion of the milestone was affected by a suspension order, as the case was here. For

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[81] HSR' Post-Hearing Brief I, paras. 68-69.

[82] H. Tr. Day 4, 168:4-170:31.

[83] Exhibit R1-276.

[84] The Tribunal has relied on the date written on the drawing itself, not on the metadata contained in the document.

[85] AICSA Post-Hearing Brief I, para. 138.

[86] HSR Post-Hearing Brief I, para. 78.

those same reasons, AICSA's claim should be granted and the company allowed to keep, from the monies advanced to it, a total of US$31,533.66 pursuant to Change Order No. 1.

(vii) Request for Change Order No. 2

141. AICSA asserts it made three Change Order requests HSR unlawfully denied. AICSA claims it should be allowed to retain the money claimed in those requests. HSR disagrees. These three Change Orders will be addressed in turn.

142. On December 15, 2014, AICSA requested a Change Order (referred to in this arbitration as requested Change Order No. 2) allegedly entitling it to receive US$207,932.92 as compensation for idleness of machinery mobilized to the Site and work performed in connection with (i) a certain site invasion occurred on February 9, 2012, and (ii) the construction of a military campsite and provisions for military forces to address community unrest[87].

143. The parties disagree on whether this Change Order is due for several reasons.

144. First, HSR asserts that the Change Order was waived when AICSA "renegotiated the Contract in late 2012 and early 2013."[88] If AICSA had a claim for out-of-scope compensation, HSR says, it should have brought it up then and made sure that it was recognized by the amended contractual text. AICSA counters that there was an oral agreement, contemporaneous to the Contract, whereby HSR agreed to pay to Globeleq a consulting fee that in turn Globeleq would "pass" to AICSA in compensation for this additional work.[89]

145. Second, failing its first defense, HSR asserts that the Change Order request was untimely. The Contract required that change order requests be filed within 30 days of the occurrence invoked as their basis, but in this case "AICSA presented a Change Order request . . . over two years after the alleged Works were performed . . . ."[90]

146. AICSA's response is that it informed Owner of the relevant events and costs incurred contemporaneously with their occurrence, even if the formal request for the change order was made later.[91]

147. Third and last, HSR claims the Works invoked as the basis for the requested order were performed before HSR and AICSA had privity of contract and as a result, HSR does not have an obligation to pay for them.[92]

148. AICSA's response is that the additional works were requested by Globeleq employees, Messrs. Guillermo Font, Roberto López, and Carlos Esquivel, who at the time and for purposes of Guatemalan law were acting as HSR agents.[93]

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[87] AICSA Post-Hearing Brief, I, para. 140.

[88] HSR Post-Hearing Brief I, para. 80.

[89] AICSA Post-Hearing Brief, I, para. 144.

[90] HSR Post-Hearing Brief I, para. 80.

[91] AICSA Reply, note 277.

[92] HSR Post-Hearing Brief I, para. 80.

149. The Tribunal considers that the integration clause in Section 1.3 of the EPC Contract is dispositive of AICSA's claim. It provides in relevant part: "*The text of the Agreement, including the Documents of the Agreement and the Notice to Proceed, contain all the agreements entered into between the Parties with regard to the subject matter of the Agreement and supersedes any and all negotiations, agreements or declarations that were made or dated prior hereto, whether they be oral or written.*"

150. AICSA's case hinges on the existence of an oral agreement with HSR to the effect that out-of-scope works pre-existing the Contract would be paid for by HSR. The Tribunal need not analyze whether the agreement existed. Even if it did, Section 1.3 of the EPC Contract deprived it of legal effect. For AICSA to be compensated for those works, the oral "deal" should have been incorporated as part of the EPC Contract, which it was not.

151. AICSA's claim involving the request for Change Order No. 2 is thus denied.

(viii) Request for Change Order No. 3

152. On December 15, 2014, AICSA requested a further Changer Order (i.e., No. 3) in the amount of US$47,640.82 for out of scope work allegedly performed before the Notice to Proceed. The parties do not dispute that the work was requested by HSR and performed by AICSA and that it involved the maintenance of a local road, done in order to improve relations with the local communities.[94]

153. This change order request should have been undisputed because HSR actually agreed to it. In an April 21, 2015 letter from HSR's Mr. Perlman to AICSA's Mr. Ruiz Sinibaldi, Mr. Perlman conclusively asserted:

> "HSR acknowledges this work was extra over the Project scope, intended to engaged the local community on the Project and that AICSA was working in accordance with HSR's instructions. HSR approves this change order for $47,640.82."[95]

154. Despite that clear manifestation, HSR now objects to the requested change order. The parties' dispute focuses on the timeliness of the request and the amount payable to AICSA.

155. HSR claims that the out-of-scope work was requested around April 25, 2013 and performed during the next few months, yet the Change Order request was only filed in December 2014.[96]

156. AICSA retorts that it submitted evidence of the work done (including costs and expenses) by August 2, 2013, within the 30-day deadline from the occurrence set forth in Section 28(3)(b) of the EPC Contract.[97]

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[93] AICSA Post-Hearing Brief I, para. 141.

[94] AICSA Post-Hearing Brief I, para 146 and HSR Post-Hearing Brief I, para. 81.

[95] Exhibit R1-36, page 6.

[96] HSR Post-Hearing Brief I, para. 81.

[97] AICSA Post-Hearing Brief I, para. 147.

157. Additionally, HSR alleges that AICSA's costs calculation is inflated and reflects an unrealistic labor cost.[98]

158. On the issue of timeliness, no debate was necessary given that HSR willingly engaged AICSA on the substance of the request and agreed to it—thus waiving any timeliness objection. In any event, the Tribunal notes that on August 2, 2013 AICSA gave proper and timely notice and detailed substantiation to HSR that additional work had been performed and had to be paid for. AICSA Mr. Siggelkow's email to HSR's Mr. Font on that date (R1-133&134) so confirms. While AICSA's email did not specifically use the term "change order" or "out of scope," these were not contractually mandated and the Tribunal shall not impose ritualistic formulations where the contract does not do so and the party's declaration is clear: AICSA wanted to be paid for out-of-scope work, it so requested, and it presented reasonable support for its request.

159. On the issue of the amount owed to AICSA, HSR rightly points out that AICSA's calculations are based on the highest labor costs figures available in the record. Yet, Mr. Gray's calculations are sensible[99] and HSR has not provided an alternative calculation and has agreed to pay the amounts as requested.

160. The Tribunal thus grants to AICSA US$47,640.82 as compensation pursuant to requested Change Order No. 3.

(ix) Request for Change Order No. 4

161. On December 15, 2014, AICSA requested Change Order No. 4[100] in the amount of US$425,438.26, mostly for work connected to social disturbances on site in 2013. The requested Change Order seeks compensation for (i) additional personnel requested on site in July and August 2013 (US$99,247.77), (ii) the hiring of third party security specialists (US$8,390.08), (iii) renewal of Advance Payment Bonds (US$66,819.70) allegedly incurred because of the delays provoked by the social disturbances), (iv) mobilization and demobilization due to work stoppages (US$34,568.46), and (v) additional months of project management (216,412.25).[101] In the Change Order request, AICSA seeks also the reimbursement of damaged Contractor Equipment, but to this date has not quantified its damages, pending resolution of the related claim made with its insurance company.[102]

162. HSR opposes the request on two grounds—that the request was made on December 19, 2014, well after the alleged events took place, and that the amounts requested in it are either unsubstantiated or exaggerated.[103]

163. The different components of this request must be addressed in sequence.

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[98] HSR Post-Hearing Brief I, para. 82.

[99] First Navigant Expert Report, paras. 68-72.

[100] Exhibit C-12.

[101] AICSA Post-Hearing Brief I, para. 150.

[102] Id.

[103] HSR Statement of Claim, paras. 123-138, and HSR Reply, paras. 115-118.

164. First, AICSA claims US$99,247.77 for extra personnel that, it says, HSR demanded be on site from July and through August 19, 2013. AICSA acknowledges that its change order request came only on December 15, 2014, but asserts that HSR was constructively on notice of the request given that AICSA had "provided significant payroll information regarding all of the workers that HSR be maintained" on site.[104] To prove its statements, AICSA points to Exhibit R1-213. The exhibit, however, is insufficient to support AICSA's proposition. It comprises a detailed list of AICSA employees devoted to the Project in July and August 2013, but it shows neither the date when the document was sent or created, nor any indication that it was delivered to HSR, nor any indication that it contained a demand for payment to HSR. In other words, there is no evidence that, within the 30-day deadline prescribed in Section 28(3)(b) of the EPC Contract (i.e., by September 19, 2013), AICSA had made, and substantiated, a payment demand to HSR for extra personnel needed on site. The request thus fails for untimeliness.

165. Second, AICSA claims for the payment to a security specialist. The parties' explanation on the timeliness of this request are somewhat confused and it is not entirely clear when and how payment was requested. But the already discussed letter from HSR to AICSA of April 21, 2015 makes it clear that HSR expressly agreed to pay US$8,421 for the hiring of the security specialist at issue.[105] Of that amount, AICSA now claims only US$8,390.08, which is hereby granted.

166. Third, AICSA seeks compensation for having had to extend at its own expense the Advance Payment Bonds given the duration of the suspension ordered by HSR. HSR objects to the timeliness of this component of the change order request, and also asserts it is not liable for it, given that, under Section 30.4 of the EPC Contract, it was AICSA's obligation to keep in any event the Bond in full force and effect through final settlement to HSR's satisfaction of all claims under the EPC Contract.

167. As for timeliness, the Tribunal finds that prior to this arbitration HSR actively engaged AICSA in a discussion of the merits of this item where timeliness was not raised as an objection.[106]

168. As for whether this payment was to be contractually born by AICSA, HSR's reading is plausible, but in the instance undermined by the language in the April 21, 2015 communication to AICSA in which HSR agreed to bear the costs associated with the renewal of down payment bonds.[107]

169. AICSA's request for US$66,819.70 is thus granted.

170. Fourth, AICSA seeks US$34,568.46 as mobilization and demobilization costs associated with HSR's decision to suspend work. HSR objects to the timeliness of this claim and the Tribunal has no evidence that this portion of the change order was requested or raised along with substantiation before December 15, 2014. The Tribunal, however, observes, that on

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[104] AICSA Post-Hearing Brief I, para 150.

[105] Exhibit R1-36, page 7.

[106] April 21, 2015 communication (Exhibit R1-36).

[107] Id., page 2.

April 21, 2015, HSR agreed to pay to AICSA US$9,377.68 for this concept.[108] The Tribunal sees no reason to allow HSR to recant that agreement, and hereby grants to AICSA the amount of US$9,377.68.

171. Fifth, AICSA seeks US$216,412.25 for the employment of Messrs. Siggelkow and Ruiz at the Project for the duration of the suspension. AICSA sought compensation for this item on December 15, 2014, while the suspension was still in place, and then updated its calculation after the suspension ended and the contract was terminated. Section 28(3)(b) requests that a change order be sought within 30 days of the out-of-scope event being "verified" (a term that is not contractually defined but which, applying a standard definition out of Black's Law Dictionary, can be taken to refer to the moment when the existence and approximate value of a time or cost impact on the Project are known). AICSA's request for compensation is timely because, even though subject to later updates, the order was sought before April 15, 2015, thirty days of the conclusion of the suspension or of the event being verified.

172. HSR asserts that the salaries of Messrs. Siggelkow and Ruiz are part of the contractual price and don't constitute an out-of-scope event for which AICSA is to be compensated. HSR is right insofar as the contractual schedule is fulfilled and the Project advances as scheduled. If that happens, then salaries are absorbed as part of the contractual price mechanism. But if HSR, through its unilateral decision to suspend, extends the duration of the Project and this in turn requires AICSA to pay employees during that additional duration, then AICSA is incurring costs which were not absorbed or incorporated into the original schedule.

173. Section 28.1 of the EPC Contract entitles AICSA to a change order when HSR requires a "change in the activities" which leads to "an increase in Contractor's Costs." In this case, HSR suspended the Project (thus creating a "change in the activities"), and this caused AICSA to incur salaries no longer absorbed into the Contract Price (the increased Contractor's Costs). A change order is then warranted.

174. The analysis does not change by the fact that the suspension was ordered on the basis of force majeure. Section 18.2.(b) of the EPC Contract indicates that HSR shall not be liable for "direct Costs" incurred as a result of the suspension if the suspension was "due to a Force Majeure". But Section 23.1 of the EPC Contract entitles AICSA to seek a change order not only for direct Costs, but generally for any out-of-scope Cost, whether direct or indirect. So what type of costs were Messrs. Siggelkow and Ruiz's salaries during the suspension? Even though the parties are in agreement that direct and indirect costs are different, they and the EPC Contract do not define them or provide an indication as to how to differentiate them.[109] A common usage analysis of the term is thus warranted.

175. In common usage, direct costs are those immediately traceable to the production of an object or rendering of a service. Salaries for the construction of a power plant are, under this approach, direct costs. Indirect costs, by contrast, include supervision salaries and other costs aimed at monitoring a situation or activity. During the suspension, Messrs. Siggelkow and Ruiz were monitoring the Project in general and access to and preservation of the site

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[108] Id., page 8.

[109] First Hill Report, paras. 45 and 138 for use of the term direct and indirect costs as separate and distinct.

and the materials in it, should the Project resume. Their salaries are thus an indirect cost and as such their recovery not barred under Section 18.2(b) of the EPC Contract.

176. Lastly, HSR objects to the amounts sought by AICSA by asserting they are unsubstantiated and excessive. The Tribunal does not consider them unsubstantiated. The payroll information provided by AICSA along with exhibits C-18 and R1-213 is sufficient to calculate the incurred salaries, as Mr. Gray attests.[110] As for the objection that the expenses are excessive, HSR's main contention is that the claimed salaries extend through June 15, 2015, three months after the EPC Contract was terminated. This is not a bar to recovery. As further discussed below, it was necessary for the parties to conduct activities after the termination of the EPC Contract, in order to fully "wrap up" the relationship. Thus for instance, AICSA had to terminate subcontractors and negotiate with them.

177. Accordingly, AICSA's request for US$216,412.25 in project management team standby costs is granted.

178. Sixth, earlier in this process, AICSA also claimed its right to be reimbursed, under requested Change Order No. 4, for equipment damaged during social disturbances. AICSA later confirmed that claim was pending before an insurance company and consequently it was not seeking specific compensation for it in this arbitration. The Tribunal will not issue a ruling on it.

179. The Tribunal thus grants to AICSA US$300,999.71 as compensation pursuant to requested Change Order No. 4.

(x) Termination Costs: Introduction

180. Under Section 30.3(a) of the EPC Contract, HSR is obligated to pay, among other things, the costs AICSA "may reasonably incur as a consequence of the termination of the Agreement, including cancellation expenses paid to third parties in accordance with the terms of any contract executed by [AICSA] or any court order obtained in connection with the termination of any Subcontractor."

181. AICSA has divided those costs in two categories: amortization costs and costs for termination of subcontractors

(xi) Termination Costs: Amortization Costs

182. AICSA alleges it has incurred (and seeks reimbursement of) US$18,102.00 in unamortized costs of a Water to Water feasibility study prepared by consultant McMillen LLC, US$86,646.25 for the depreciation of a tower crane purchased for the Project, and US$18,343.29 in costs for insurance premium for equipment.[111] The total unamortized costs sought amount is US$123,091.54.[112]

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[110] First Navigant Report, paras. 85 and ff. and Annex 5.

[111] AICSA Post-Hearing I, para. 152.

[112] In what appears to be a computational mistake, AICSA's first post-hearing brief lists the total amount of claimed amortization costs as US$116,992.62, stemming from the addition of the three previously listed items—feasibility study, tower crane, and insurance premium. AICSA Post-Hearing Brief I, Exhibit B. The

183. As a preliminary matter, HSR relies on a mitigation defense to resist reimbursing those costs to AICSA. AICSA, says HSR, should have simply terminated the EPC Contract pursuant to Section 33.3(c) in order to decrease or entirely avoid the accrual of depreciation costs.[113]

184. The Tribunal does not follow HSR's argument. Section 33.3(c) addresses the termination of the EPC Contract following the issuance of a force majeure notice. Under Section 33.1, a notice of force majeure is warranted when a party seeks to be excused from a breach of its contractual obligations on the notion that the breach was caused by events beyond its control. If the event causing the force majeure lasts more than a year then, under Section 33.3(c) "either party may request the termination of the Agreement . . . [and] no Party shall demand the payment of any indemnification for Damages to the other."

185. HSR asserts in this arbitration that it gave a force majeure notice on October 1, 2013 and that, to mitigate its depreciation losses, AICSA should have simply terminated the EPC Contract on or shortly after October 1, 2014 pursuant to Section 33.3(c). But those statements are inaccurate.

186. On October 1, 2013, HSR did not give a notice of force majeure—it did not invoke Section 33.1 of the EPC Contract and did not seek to be excused from the performance of any obligation. What it gave was a notice of suspension under Section 18 of the EPC Contract, which it explicitly relied on.[114] Certainly, that notice asserted the existence of a force majeure event, but it neither specified what event that was nor substantiated its existence and effects, which is what a notice of force majeure proper should have done.

187. The consequence is clear: HSR voluntarily avoided the protection and requirements of Section 33 of the EPC Contract and instead exercised the unfettered right to suspend that Section 18 afforded to it. AICSA's right to terminate the EPC Contract under Section 33.3(c) as of October 2014 was thus unavailing, quite simply because that right was premised on the existence of a force majeure notice from HSR which, in the instance, had not been given.

188. However, when the suspension lasted (as in this case it did) more than 120 days, Section 18.2(c) of the EPC Contract allowed AICSA to terminate the EPC Contract "in accordance with Section 30.2.(f)." There are two reasons why AICSA did not breach its mitigation obligations by failing to invoke Section 18.2(c) and to terminate under it.

189. First, Section 18.2(c) of the EPC Contract requires that the termination after 120 days be effected under Section 30.2.(f). Under Section 30.2.(f), however, termination is unavailing if the suspension was caused by force majeure. In this case, it is disputed whether force majeure actually existed, but HSR said it did. AICSA cannot be prejudiced for having taken HSR at its word at the time and thus assumed that termination under 120 days was unavailing.

190. Second, and more significantly, HSR repeatedly committed to AICSA that the Project would move forward as soon as the force majeure situation was removed. On January 6, 2015,

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correct result of the addition, however, is US$123,091.54, as indicated by Navigant. First Navigant Report, Attachment 6, page 1.

[113] HSR Post-Hearing Brief I, paras. 89-90.

[114] Exhibit R1-16.

specifically, it told AICSA: "HSR continues fully committed to proceedings with the construction and operation of the project . . . ."[115] AICSA, again, cannot be prejudiced for having taken HSR at its word and refrained from terminating in hopes that the Project would soon resume.

191. Ultimately, AICSA did not fail to mitigate damages and acted reasonably given the circumstances.

192. The analysis must then turn to each of the three categories of amortization costs that AICSA is seeking.

193. First, there is the US$18,102.00 claim in unamortized costs of a Water to Water feasibility study prepared by consultant McMillen LLC. As HSR rightly points out,[116] the invoice supporting this cost is dated January 4, 2011.[117] It thus pre-dates the EPC Contract. Also, there is no evidence on the face of the invoice that it relates to the performance of the contract. It may simply be part of the due diligence performed by AICSA to determine whether the EPC Contract was worth entering into. The Tribunal is not satisfied this cost was incurred as a result of the contract, far less was amortized or lost value because of the termination of the contract. The claim for it is thus denied.

194. Second, there is the US$86,646.25 claim for the depreciation of a tower crane purchased for the Project. HSR does not deny that the crane was purchased and utilized by AICSA for the Project, but it objects to the claim on the basis that AICSA's financial statements do not list the depreciation of the asset and that the depreciation rate applied by AICSA is too high.[118] That the depreciation of this asset was not included in AICSA's financial statements is not dispositive (it may not be included as a standalone category, but may have been as part of other items; and even if not included, the fact remains that the depreciation took place: AICSA bought an asset in contemplation of the Project and that turned out to be an un-utilized expense given the termination of the contract). As for the accuracy of the depreciation rate relied on by AICSA, Mr. Gray's analysis is conservative, and convincing: the crane was bought and never utilized, yet AICSA only seeks a depreciation amount of about a half of the acquisition price.[119] This claim is thus granted.

195. Lastly, there is the US$18,343.29 claim in costs for insurance premium for equipment. HSR opposes the claim on the basis that this cost was absorbed by the Contract Price and thus separately unrecoverable.[120] The Tribunal disagrees. Section 18.2(a) expressly grants AICSA the right to seek "duly verified additional Costs which Contractor reasonable incurs for the . . . purchase of insurance for the Equipment, the Site and the Power Plant while following the [suspension] instruction of Owner under Section 18." This language alone suffices to dismiss HSR's objection. In addition to it, the Tribunal's prior reasoning also applies now: in a scenario in which the schedule is followed, the insurance costs would have been absorbed

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[115] Exhibit R1-81.

[116] HSR Post-Hearing Brief I, para. 95.

[117] Exhibit R-225.

[118] HSR Post-Hearing Brief I, para. 95.

[119] First Navigant Report, Attachment 6, page 2.

[120] HSR Post-Hearing Brief I, para. 95.

as part of the Contract Price. In this case, however, the schedule was not followed, insurance had to be taken for longer than anticipated due to HSR's extended suspension order, and AICSA cannot be required to bear that cost at the pleasure of HSR and without compensation from HSR the claim is granted.

196. Thus, in total, AICSA is entitled to US$104,989.54 in depreciation costs.

(xii) Termination Costs: Subcontractor termination costs

197. AICSA claims costs related to the termination of three subcontractors—turbine engineering company Litostroj, turbine manufacturer Hyundai Ideal Electric, and Water-to-Wire subcontractor Novacom.[121]

198. As a threshold matter, HSR resists this claim asserting that AICSA has mischaracterized it. AICSA, says HSR, is not genuinely bringing a claim to be reimbursed for costs it had to pay to its subcontractors in order to terminate them (following, in turn, the termination of the EPC Contract). AICSA is, according to HSR, simply bringing a claim to be paid for work allegedly performed by subcontractors—work that those subcontractors have allegedly claimed from AICSA. Those costs, according to HSR, would have simply been absorbed as part of the contractual price, such that AICSA would have been compensated for them if and when it completed Milestones in the course of the performance of the EPC Contract.[122]

199. The Tribunal is not persuaded by HSR's threshold objection. In a scenario in which the EPC Contract is performed through conclusion of the Project, AICSA would not have been entitled to simply "pass on" to HSR the cost of its subcontractors for HSR to pay it. That cost would have been, as HSR says, absorbed as part of the price paid to AICSA. But that is not the scenario in the instance. At will, HSR terminated the EPC Contract before the Milestones involving work from Litostroj, Hyundai, and Novacom were completed. Because of HSR's choice of timing, there was no opportunity for AICSA to submit payment applications that encompassed or absorbed the cost of those subcontractors. Instead, AICSA was faced with a scenario in which it had to terminate its subcontractors and pay them for work AICSA had not been able to invoice HSR for.

200. When HSR terminated the EPC Contract at will, AICSA had to terminate subcontracts and had to pay to its subcontractors all amounts for work they had performed. The costs incurred by subcontractors now became termination costs because they were claimed at the time of termination. The situation was aggravated because in this case, AICSA was terminated and not replaced by another contractor. Had a replacement contractor arrived, the new contractor or the owner may have agreed to continue working with the terminated subcontractors and pay their outstanding bills at no cost to AICSA, as is customary in situations of termination. That not being the case here, AICSA was forced to pay to subcontractors their outstanding bills and, it is quite likely that unless this Tribunal intervenes, AICSA will not be reimbursed for them.

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[121] AICSA Post-Hearing Brief I, Exhibit B.

[122] HSR Post-Hearing Brief I, paras. 96-98.

201. Insofar as not otherwise reimbursed to AICSA, that cost paid to subcontractors is a termination cost within the meaning of Section 30.3(a) of the EPC Contract and must then be paid to AICSA.

202. HSR's threshold objection to the recoverability of these costs is denied. Having so established, the analysis must turn to each specific claim for reimbursement.

203. First, AICSA claims €703.290.00 for engineering work done and claimed by Litostroj. HSR counters that this claim is unsubstantiated as it rests merely on a letter from Litostroj to AICSA stating that €703.290.00 was the value of the "work performed by Litostroj" for AICSA.[123]

204. To address this claim, the Tribunal must then turn to the very document HSR mentions, namely a letter from Litostroj to Novacom of May 29, 2015.[124] The letter is brief but conclusive. It shows that Litostroj was Novacom's subcontractor and as such a Project sub-subcontractor[125] (which is not a bar to AICSA's recovery given that, as contractor, AICSA ultimately became liable for payments owed by a subcontractor to its own sub-subcontractors)[126]. The letter contains a statement of work from Litostroj explicitly confirming that the total value of Litostroj work on the Project was €703.290.00—an amount which, as Mr. Gray verified, has been paid.[127]

205. HSR claims that the amount sought for work done by Litostroj is too high, but does not provide an alternative calculation or an itemized rebuttal of the work Litostroj claims to have performed.

206. AICSA's claim for €703.290.00 for work from Litostroj is thus granted.

207. Second, AICSA claims Hyundai Ideal Electric is seeking to be paid (i) US$265,000 for engineering work it did so that AICSA could issue a Purchase Order for Generators (Milestone P2.2) and as a cancellation fee for space booked in its manufacturing queue,[128] and (ii) US$132,250 in engineering for generators.[129] In its prayer for relief, however, AICSA

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[123] HSR Post-Hearing Brief I, para. 98.

[124] Exhibit R1-117.

[125] The definition of the term sub-subcontractor appears at Section 4.3 of the Water-to-Wire Contract.

[126] There are two reasons why AICSA is liable for Litostroj's services. First, there is the language in the Water-to-Wire Contract. Section 4.3(a) of the Water-to-Wire Contract sets out that: (i) as a general rule, Subcontrator is liable for the performance of its obligations vis-à-vis subcontractors, but (ii) if Subcontractor defaults under its contract with Sub-subcontractor, then that contract may be assigned or transferred to Contractor. In the instance, Sub-subcontractor Litostroj claimed that, through lack of payment, Subcontractor Novacom had defaulted under the Sub-subcontract. See AICSA's letter of September 19, 2013 to HSR (Exhibit R-13), page 1. In light of that default, AICSA assumed the debts from Novacom with Litostroj. Navigant Second Report, paras. 95 and ff. Second, the parties' course of action confirms that sub-contractors' fees and costs operated in practice on a pass-through basis: the sub-subcontractor sought funds from Novacom; Novacom in turn "passed" the fund request to AICSA; and AICSA turned to HSR seeking and advance of money to be deducted later on from the contract price. HSR's Statement of Claim, paras. 40 and ff. Ultimately, Litostroj was paid through HSR's payments to AICSA.

[127] Second Navigant Report, para. 98; and H. Tr., Day 6, 72: 3-18.

[128] AICSA Post-Hearing Brief I, para. 132.

[129] Id., para. 135.

seeks only payment of US$132,500 for the generators' engineering,[130] after relying on Mr. Gray's testimony that this was the only amount he had verified was incurred by and paid to Hyundai.[131]

208. In response to that claim, HSR raises a generic objection that the costs are unsubstantiated and too high.[132] However, it is undisputed that Hyundai worked on the Project, and its costs in the amount of US$132,500 are explicitly substantiated by the letter it sent to Novacom on May 11, 2015.[133] That the costs are too high is speculation in the absence of counter-evidence or mitigation efforts from HSR to try to persuade Hyundai to bill a lower amount.

209. AICSA's claim for US$132,500 for Hyundai work is thus granted.

210. Third, AICSA claims for US$668,746 and €105,493 in connection with work performed by Novacom. The breakdown of those amounts is as follows: US$344,000 are for Novacom's professional services, US$158,233.19 for Novacom's administrative expenses, US$79,426.71 for Novacom's bond costs, and US$107,086.48 and €105,493 for Novacom's administration and profit (15%) overhead.[134] In support of its claim, AICSA relies on Mr. Gray, who has testified that all these amounts have been billed by Novacom to AICSA and that AICSA and Novacom have agreed that the amounts have been or will be paid by allowing Novacom to retain the corresponding portion from the advance payments it received from AICSA.[135]

211. HSR's asserts that this claim is unsubstantiated insofar as it assumes Novacom performed much, if not the entirety of, its scope of work under the Water to Wire Contract.[136] The difficulty with HSR's defense is that it is unsupported by evidence and runs counter to evidence provided by AICSA. Novacom indeed performed significant services within its scope of work under the Water to Wire Contract. As evidence, AICSA has submitted March 2015 statements from Novacom supporting (and breaking down) the amount of its professional services[137] and administrative expenses.[138] Mr. Gray also confirms having reviewed invoices supporting a claim for US$79,426.71 in bond costs.[139] More problematic are the US$107,086.48 and €105,493 claimed for Novacom's administration and profit margin. Mr. Gray includes those amounts in his calculation but does not explain their origin,

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[130] Id., Exhibit B.

[131] Second Navigant Report, para. 100; H. Tr., Day 6, 72: 19-24.

[132] HSR Post-Hearing Brief I, para. 98.

[133] Exhibit R1-118.

[134] AICSA's Post-Hearing Brief I, Exhibit B.

[135] First Navigant Report, para. 13; Second Navigant Report, paras. 5 and 100 and ff.; and H. Tr. Day 6, 153:12-55:22.

[136] HSR's Post-Hearing Brief I, para. 98.

[137] Exhibit R1-337.

[138] Exhibit R1-338.

[139] Navigant Second Expert Report, para. 105.

their support or how they were arrived at.[140] The claim for those amounts cannot simply be taken at face value; it needs substantiation, which is absent here.

212. The Tribunal, in sums, grants a claim of a total of US$581,659.90 for work performed by Novacom (including professional services, administrative expenses, and bond costs) and denies US$107,086.48 and €105,493 for claimed administration and profit margins.

213. **In total then, for subcontractor termination, the Tribunal grants to AICSA US$714,159.90 and €703,290**.

(xiii) Balances Due

214. The following chart summarizes the amounts AICSA is entitled to for work performed and termination costs

Concept	US$	€
Limited Notice to Proceed No. 1 / Milestone G1.1	500,000.00	0
Limited Notice to Proceed No. 2	169,806.97	0
Notice to Proceed	560,496.48	0
Change Order No. 1	31,533.66	0
Requested Change Order No. 2	0	0
Requested Change Order No. 3	47,640.82	0
Requested Change Order No. 4	300,999.71	0
Depreciation Costs	104,989.54	0
Subcontractors' Termination	714,159.90	703,290.00
TOTAL	**2,429,627.08**	**703,290.00**

215. Both parties agree that the amounts owed to AICSA pursuant to the above calculation are to be deducted from the advance payments, which AICSA still needs to return to HSR.[141]

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[140] Id., para. 106 and Attachment 8.

[141] HSR Post-Hearing Brief I, para. 128 and AICSA Post-Hearing Brief I, para. 193.

216. Consequently, the balances AICSA needs to return to HSR are then as follows

	US$	**€**
Amount of the Advance Payments	9,446,858.60	1,138,458.00
Less amounts AICSA is entitled to keep	2,429,627.08	703,290.00
Total Amounts AICSA is ordered to pay to HSR	**7,017,231.52**	**435,168.00**

(xiv) Interest Calculation

217. AICSA does not seek interest on the amounts that HSR owes to it because AICSA is withholding those amounts (along with the rest of the advance payments), "in a local account earning the local interest rate [and] AICSA has already been made whole in this respect."[142]

218. HSR, for its part, seeks interest on the net amounts AICSA is required to return to it.[143] To adjudicate this request, the Tribunal needs to determine the date from which interest is accruing and the applicable interest rate.

219. As for the date of accrual, the EPC Contract is silent. There is no express deadline for the parties to liquidate their relationship and for one party to remit to the other any outstanding balances. HSR claims that this date must have been the date of termination.[144] But this outcome is contractually and legally unsupported, and commercially unrealistic: the parties cannot be expected to address all their outstanding economic differences (created by the termination) on the very day of the termination. It can easily take weeks for a diligent contractor to, for instance, terminate and liquidate its relationship with subcontractor and thus ascertain the total amount of total termination costs for which owner is liable.

220. AICSA, by contrast, has not offered any alternative date from which to calculate interest, and aided by Dr. Barretto's testimony, has instead argued that there is no deadline for the contractual relationship to be liquidated.[145] AICSA's position is untenable. A party cannot indefinitely withhold the other's monies without paying compensation for it.[146]

221. A date then must be established for interest to run on the amounts that AICSA keeps even though they belong to HSR.

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[142] AICSA's Post-Hearing Brief I, para. 194.

[143] HSR's Post-Hearing Brief I, para. 128.

[144] HSR's Post-Hearing Brief I, para. 128.

[145] AICSA's April 9, 2018 submission, and accompanying Dr. Barretto's report, passim.

[146] This conclusion is supported by Article 1946 of the Civil Code: "Salvo pacto en contrario, el deudor pagará intereses al acreedor . . . ." ("Unless otherwise agreed, the debtor shall pay interest to the creditor . . .."). There is no evidence in the instance that the parties agreed to dispense with this provision.

222. In the absence of a contractual provision, the Tribunal must be guided by Guatemalan law. Under Articles 1435 and 1995 of Guatemala's Civil Code, whoever defaults in the obligation to return money owed to another owes interest since the return became due;[147] and under Article 1950 of Guatemala's Civil Code the return of loaned amounts is due within six months of the loan being made.[148] After six months, the loaned amounts accrue interest.[149]

223. Up until the termination of the EPC Contract, AICSA was entitled to keep the advanced monies on account of the Contract Price.[150] After termination, the title to those amounts changed. AICSA was then entitled to keep part of those amounts as compensation for its services—the amounts this Final Award has granted to AICSA—but the part of those amounts it was no longer entitled to—the amounts this Final Award has granted to HSR—had to be returned. From termination AICSA was constructively keeping those amounts on loan. As such, the amounts started to accrue interest on September 16, 2015, namely six months from the date of termination of the EPC Contract and thus from the date on which the constructive loan commenced.

224. A September 16, 2015 accrual date is consistent not only with the applicable law, but also with AICSA's own course of conduct. On April 10, 2015 (less than one month after termination) AICSA sent a letter[151] to HSR providing support and elaboration for its claim to keep *some* of the monies it had been advanced. AICSA knew at the time that a portion of the advance was undoubtedly owed to HSR and the rest *may* be owed to HSR, depending on the outcome of their then quite open dispute. A prudent debtor would have mitigated its damages (i.e., avoided its exposure to interest) by returning to HSR the highest possible amount. This return was a very discrete activity that—giving AICSA the maximum benefit of the doubt—was easily achievable within about a few months of the April 10, 2015 letter.

225. By way of conclusion, the Tribunal determines that interest runs on the net balances owed by AICSA to HSR as of September 16, 2015, six months after HSR's termination of the EPC Contract.

226. As for the applicable interest rate, HSR relies on Section 25.6 of the EPC Contact, which provides as follows:

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[147] Article 1435: "Si la obligación consiste en el pago de una suma de dinero y el deudor incurre en mora, la indemnización de daños y perjuicios, no habiendo pacto en contrario, consistirá en el pago de los intereses convenidos y, a falta de convenio, en el interés legal hasta el efectivo pago." Article 1995: "El depositario que rehuse entregar el depósito, fuera de los casos expresados en el Artículo 1988, responderá por los intereses, desde que incurra en mora, más los daños y perjuicios que se hubieren causado al depositante." See CL-9, pages 192 (for Article 1435) and 257 (for Article 1995); and R1L-17 at pages 261 (for Article 1435) and 351 (for Article 1995).

[148] "Si en el contrato no se ha fijado plazo para la restitución de lo prestado, se entenderá que es el de seis meses si el muto consiste en dinero . . . ." (Unofficial English translation: "If no deadline has been established to return the loan, it shall be understood that the deadline is six months if the loan is monetary . . . ."). Article 1950 is at CL-9, page 253; and R1L-17, page 345. Its unofficial English is the Tribunal's and was prepared for ease of reading of the Final Award. In case of discrepancy with the Spanish original, the Spanish original prevails.

[149] Articles 1435 and 1995 of the Civil Code.

[150] E.g. Limited Notice to Proceed No. 1 (C-5).

[151] Exhibit R1-240.

> *"**Interest.** Any amounts owed, due and unpaid on maturity by any of the Parties shall accrue interest, as from the date of maturity until the actual date of payment of the entire sum owed, at an annual rate equal to Owner's Financial Costs applicable on the last day of the quarter prior to the date on which any of such payments should have been made, plus three per cent (3%). Such rate may not exceed the maximum rate then permitted by the Applicable Laws, in which case, such maximum rate shall apply." [Emphasis in the original]*

227. HSR asserts that its financial costs "have been shown to be" 15% and that consequently (applying the contractual formula of owner's financial costs plus 3%) it is entitled to collect interest at an annual rate of 18%.[152]

228. AICSA opposes HSR's interest rate calculation arguing that Section 25.6 is inapplicable to the instance. AICSA claims that, on its own terms, Section 25.6 applies only to obligations with a maturity date, but in this case there was no date by which balances would have to be liquidated and the unutilized portion of the advance payments returned to HSR, claims AICSA. AICSA also argues that Section 25.6 would not survive termination of the EPC Contract.[153] In addition to stating its opposition to the application of the rate in Section 25.6, AICSA has not clarified the interest rate it considers applicable.

229. The Tribunal is unpersuaded by AICSA's argument that Section 25.6 is irrelevant for purposes of calculating the interest rate. Contrary to AICSA's contentions, return of the amounts owed to HSR cannot be postponed indefinitely for free (that is, without generating interest). Even if the maturity date is not spelled out in the contract, it can still be established —and has just been established a few paragraphs before. Also, Section 25.6 survives termination as its terms indicate: the provision applies to all contractual debts; if the debt continues to exist after the termination of the contract, then the provision continues to apply to it.

230. Accordingly, the Tribunal shall calculate interest on the basis of Section 25.6. The analysis must then turn to the actual language in Section 25.6 and its application to the present case. As HSR, asserts, that language contains a general formulation (owner's financial costs plus 3%) but also an exception: the granted rate cannot exceed the maximum rate allowed under Guatemalan law.

231. The Tribunal specifically asked both parties what that maximum rate was. AICSA did not answer, but HSR did, pointing out Article 1948 of Guatemala's Civil Code,[154] which provides as follows:

> Las partes pueden acordar el interés que les parezca. Cuando la tasa de interés pactada sea manifiestamente desproporcionada con relación al interés corriente en el mercado, el juez podrá reducirlo equitativamente, tomando en cuenta la tasa indicada en el artículo 1947 y las circunstancias del caso.
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> Unofficial English translation:[155]

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[152] HSR's Post-Hearing Brief I, fn. 444.

[153] AICSA's April 9, 2018 submission, paras. 4 to 9.

[154] Exhibit CL-9.

> The parties may agree on the interest rate they deem appropriate. When the agreed interest rate is manifestly disproportionate in light of the current market interest rate, the judge may reduce it on an equitable basis, taking into account the rate set out in Article 1947 and the circumstances of the case.

232. HSR summarizes this provision correctly:

> "the parties are free to agree on the interest rate applicable to their contracts, with the only limitation that a rate that is 'manifestly disproportionate' to the market rate may be equitably lowered by the adjudicator."[156]

233. When Section 25.6 of the EPC Contract and Article 1948 of Guatemala's Civil Code are read together, the conclusion is clear: the Tribunal is to award interest at the annual rate of HSR's financial costs plus three percent, unless that rate is manifestly disproportionate to the market rate.

234. The Tribunal must then engage in a twofold analysis. First, it needs to verify HSR's assertion that its financial costs are 15% annually, which increased by 3% would yield the claimed 18% yearly interest rate. Second, it needs to verify whether the claimed 18% rate is manifestly disproportionate to the market.

235. With respect to the first question, HSR has submitted a document purporting to be an excerpt from the 2014-2015 financial statements of Real Infrastructure's Latin Renewables Infrastructure Fund-A.[157] The excerpt indicates that the "Cost of Capital (discount rate)" for "Equity Securities Guatemala" was 15%. Because of its brevity, the excerpt leaves many questions unanswered. In particular, the excerpt does not mention HSR by name and does not clarify whether HSR is the entity comprised under the "equity securities Guatemala" term. Also, the excerpt seems to suggest that 15% is the financial cost rate of Latin Renewables in connection with its Guatemalan security—not the financial cost rate faced by the security itself. Lastly, the excerpt suggests the statements are unaudited (and thus not independently verified) and does not provide support or elaboration as to how the 15% rate was reached.

236. In a nutshell, HSR has not established a yearly financial cost of 15% or that HSR is otherwise entitled to claim an 18% annual interest rate.

237. Additionally, the Tribunal considers that the claimed 18% yearly interest rate is manifestly disproportionate to the market. The debts awarded by the Tribunal are denominated in U.S. dollars and euros, currencies for which interest rates are in the low-to-mid single digits. Awarding an 18% interest goes twice and even three times higher than standard interest rates for those currencies, and treads openly into leonine territory (a different conclusion may have been reached if the awarded debts were denominated in local Guatemalan

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[155] Procedural Order No. 1 (paragraph 41) allowed the parties to submit evidence and quote legal provisions in Spanish, without having to translate them. Thus, while in their submissions on interest both parties discuss Article 1948, none submitted a translation. The unofficial English translation that follows is the Tribunal's and was prepared for ease of reading the Final Award. In case of discrepancy with the Spanish original, the Spanish original prevails. See footnote 9.

[156] HSR's April 9, 2018 submission, Section 1.

[157] Exhibit C-427.

quetzales—as both parties agree, the legal interest rate in Guatemala for quetzal denominated debts has been around 11 to 14% lately).[158]

238. The Tribunal then, as directed by Article 1948 of the Civil Code, shall award the interest rate it deems equitable, provided the Tribunal takes into account the rate set out in Article 1947.

239. Under Article 1947, legal interest in Guatemala is the average interest rate applied by banks, minus two per cent.

240. The webpage of the Guatemalan Superintendencia de Bancos, on which both parties rely,[159] lists the relevant monthly interest rates applied by banks and seems to indicate that, as of May 31, 2015, the average yearly interest rate for foreign denominated debts in the construction sector was 7.08%. That rate minus 2% would yield a legal interest rate of 5.08%. This local interest rate set by Guatemalan authorities offers a good reference as to the general margins within which the Tribunal should operate. But, as the debt is denominated in non-Guatemalan currencies, the Tribunal should look beyond Guatemalan indicators.

241. In its quest to determine the appropriate rate for the portion of the debt denominated in U.S. dollars, the Tribunal considers that the U.S. prime interest rate offers a reliable point of reference: it is established by the U.S. Federal Reserve and a benchmark for transactions and other rates around the world. It is true that the prime interest rate is short-term in principle; but it has remained relatively stable (albeit on an ascending trend) for years. In particular: as of September 16, 2015 (when interest in the case started accruing) the rate was—and had since December 16, 2008 been—at 3.25% per annum; on December 17, 2015, it changed to 3.5%; on December 15, 2016, it increased to 3.75%; on March 16, 2017, it increased to 4%; on June 15, 2017, it increased to 4.25%; on December 14, 2017, it increased to 4.50%; on March 22, 2018, it went up to 4.75%, on June 14, 2018 to 5%, and on September 27, 2018 to its current 5.25% .[160] In a nutshell, since the debt started to accrue interest through today, the prime rate has averaged 4.25% per annum. The Tribunal considers this figure a reasonable starting point for interest calculation of the U.S. dollar-denominated portion of the debt.

242. In keeping with the philosophy of Section 25.6, the Tribunal also considers it appropriate to add another 3% to that average interest rate, in order to reach a total annual rate of 7.25%. HSR sought a simple (i.e., not compounded) interest rate, and the Tribunal will not disturb that proposition—and it could not (Article 1949 of Guatemala's Civil Code forbids compounding interest). Thus, the hereby granted annual rate of 7.25% for the U.S. denominated portion of the debt will not be compounded.

243. One issue remains: some of the debts in this Final Award are denominated in euros, and for consistency with the U.S. denominated portion of the debt, it now bears considering the European Central Bank's "key" rate for financing operations. This rate was 0.05% per annum when interest started accruing in the case, and on March 16, 2016 went down to—and has

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[158] HSR's April 9, 2018 submission, page 2, section 2; AICSA's April 9, 2018 submission, para. 13.

[159] HSR's April 9, 2018 submission, page 2, footnote 5; for its part, AICSA relies on the opinion of Dr. Barretto (of April 6, 2018), which discusses the webpage at page 5.

[160] The rate is publicly available at http://www.fedprimerate.com/wall_street_journal_prime_rate_history.htm.

since remained at—0%.[161] In a nutshell, the key European rate has averaged 0.025% for the relevant period of time that start with the accrual of interest and reaches through this Final Award. When increased by 3% (in keeping with the philosophy of Section 25.6), it follows that the rate applicable to the euro denominated portion of the debt in this Final Award is 3.025%

244. In sum, AICSA shall pay (i) a simple annual rate of interest of 7.25% accruing from September 16, 2015 on the U.S. portion of the net balance of the advance payments it needs to return to HSR; and (ii) a simple annual rate of interest of 3.025% accruing from September 16, 2015 on the euro portion of the net balance of the advance payments it needs to return to HSR.

(xv) Exchange Rate Loss

245. Ancillary to its claim to be reimbursed for unutilized portions of the Advance Payments, HSR brings to this case an exchange rate claim in the amount of US$88,679.22 on the Euro portions of the debt owed to it.[162]

246. HSR claims that, given that some advance payments were made in euros, as opposed to dollars, and that euros have depreciated from the time of the advances, HSR must be compensated.[163]

247. AICSA has not engaged this claim at any length or provided arguments to address it. This, however, does not exonerate HSR's from its burden to establish its claim. The Tribunal considers that the claim has not been established. First, the claim lacks contractual support: the EPC Contract provides no basis for it, and quite notably Section 25.4, which bears the title "Rate of Exchange," is "reserved"—in other words, empty. The Tribunal cannot afford to HSR a protection for exchange rate loss that the parties appear to have considered but not included in the EPC Contract.

248. Second, the parties chose that the advance payments would be made in two currencies: one portion in U.S. dollars, the other in euros. Also, as previously explained, AICSA is entitled to keep amounts in dollars and in euros from the advances it received. (In fact, Section 25.3 of the EPC Contract explicitly authorizes the use of U.S. dollars and euros in payment applications.) Ultimately, AICSA must return the remaining balances to HSR, in their respective currencies: U.S. dollars and euros. HSR's claim presupposes that all balances are to be returned in U.S. dollars after converting the euros amounts at present exchange rates. There is no contractual support for the conversion. The parties clearly agreed that both currencies could be used and must now live with the consequences of that choice.

249. HSR's claim for exchange rate loss is thus denied.

(xvi) Reinstatement of Advance Payment Bonds

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161 https://www.ecb.europa.eu/stats/policy_and_exchange_rates/key_ecb_interest_rates/html/index.en.html.

162 HSR's Post-Hearing Brief I, para. 128.

163 HSR Reply, para 9 and First HKA Report, p. 44.

250. Also ancillary to its claim for the return of the unutilized portion of the advance payments, HSR seeks the reinstatement (or extension) of two contractual securities in an amount equal to that granted in this Final Award through its payment.[164]

251. Specifically, pursuant to Section 24.3(a) of the EPC Contract, AICSA was required to provide HSR with an Advance Payment Bond (*Fianza de Anticipo*) as follows:

> "Contractor shall furnish Owner, against receipt of each Advance Payment, with an Advance Payment Bond: (i) in the form attached hereto as Exhibit I-2; (ii) in an amount equal to seven million five hundred fourteen thousand and four hundred fifty Dollars fifty six cents (US$7,514,450.56) and the equivalent in Dollars of one million one hundred thirty eight thousand four hundred fifty eight Euros (€ 1,138,458) (equivalent to 20% of the Contract Price); (iii) issued by Afianzadora General, or issued by another bank or financial institution satisfactory to Owner in its sole and absolute discretion (the "Advance Payment Bond")." [Emphasis in the original.]

252. Moreover, pursuant to Section 24.5 of the Agreement, AICSA was required to provide HSR with a Second Limited Notice to Proceed Advance Payment Bond (*Fianza de Anticipo del Limited Notice to Proceed No. 2*) as follows:

> "On the limited Notice to Proceed No. 2 Date, Contractor shall deliver to Owner the Second Limited Notice to Proceed Advance Payment Bond ("*Fianza de Anticipo del Limited Notice to Proceed No 2*") for the faithful and accurate performance of its obligations under the Limited Notice to proceed No. 2: (i) in the form attached hereto as Exhibit I-4; (ii) in an amount of four million five hundred thousand Dollars (US$4,500,000.00); (iii) issued by Afianzadora General, or issued by another bank or financial institution satisfactory to Owner in its sole and absolute discretion; and (iv) that remains in full force and effect from the Limited Notice to Proceed No. 2 Date until the Notice to Proceed Date (the "Second Limited Notice to Proceed Advance Payment Bond"). The Second Limited Notice to Proceed Advance Payment Bond will be issued for a term not to exceed the date specified in Section 8.1.d), provided that (i) if the Notice to Proceed is given within the term specified in Section 8.1 d), then the Second Limited Notice to Proceed Advance Payment Bond will be replaced by the Advance Payment Bond, and (ii) if the Notice to Proceed is not given within term specified in Section 8.1 d), then the Second Limited Notice to Proceed Advance Payment Bond will continue to be in effect until the Notice to Proceed is issued by Owner, unless the Agreement is terminated by Contractor in accordance with Section 30.2e)." [Emphasis in the original.]

253. The Advance Payment Bond and Second Limited Notice to Proceed Advance Payment Bond will collectively be referred to as the "Advance Payment Bonds."

254. AICSA delivered the Advance Payment Bonds to HSR's satisfaction by means of three insurance policies dated respectively February 20, 2013, July 9, 2013, and December 16, 2014. The' value of these policies totaled approximately US$10,441,985.05. The February

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[164] HSR Post-Hearing Brief I, paras. 128 and 129.

20, 2013 and July 9, 2013 policies were issued by Afianzadora General, S.A.,[165] while the December 16, 2014 policy was issued by Afianzadora G&T, S.A.[166]

255. The dispute now centers on whether AICSA should still keep the Advance Payment Bonds in place.

256. HSR asserts it should, and relies to that effect on Section 30.4 of the EPC Contract, which provides as follows: "In case termination of Agreement takes place, [AICSA] shall remain liable for the Works, the Power Plant (when completed) and the Equipment delivered to the Site and [AICSA] shall comply with the provisions and conditions contained in the Documents of the Agreement, including the Performance Guarantees. In the event of any termination of the Agreement, all of the security provided by either Party, including the letters of credit and the bonds, shall remain in full force and effect until the beneficiary of any such security determines, in its sole discretion, that all claims and potential claims and potential claims are fully and finally settled and satisfied and no fact or circumstance exists which may give rise to a claim. Upon such determination in accordance with the preceding sentence, the applicable security shall be returned to the Party which provided such security."

257. AICSA has repeatedly asserted in the course of the case that the Advance Payment Bonds remain in place and have not lapsed, even though in the past the insurance companies rightly denied HSR the right to collect on them.[167]

258. The Tribunal notices that the Advance Payment Bonds are standalone documents issued by entities—the insurance companies—that are not a party to this arbitration. The Tribunal's jurisdiction is subject to the usual limits and does not extend to issues such as whether the insurance companies have complied with the bonds or properly failed to honor them. But the Tribunal certainly has jurisdiction to enforce Section 30.4 of the EPC Contract, whose terms are unambiguous. Pursuant to it, AICSA must keep the Advance Payment Bonds in place until all claims and debts owed to HSR under the EPC Contract are satisfied.

259. Consequently, HSR's claim is granted and AICSA ordered to keep the Advance Payment Bonds in an amount equal to or higher than the amounts granted to HSR in this Final Award through full payment of those amounts. For the avoidance of doubt, given the broad language in Section 30.4, the Advance Payment Bonds shall be, going forward (and through total payment), in amount no less than (i) the net balance of the advance payments that AICSA must return to HSR; (ii) the fees and costs awarded in this Final Award; and (iii) the accrued interest owed by AICSA for the two previous items.

260. With this, the claims for work done, termination costs, and reimbursement of advance payments are disposed of, and the Tribunal shall turn its attention to the remaining heads of claims.

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[165] Exhibits C-14 and C-19 respectively.

[166] Exhibit C-20.

[167] AICSA's Reply to Interim Relief Application, passim.

VI. SECOND HEAD OF CLAIMS: AICSA'S REASONABLE LOST PROFITS CLAIM

261. AICSA claims from HSR US$3,159,516.24, which AICSA asserts is the reasonable profit it would have made on the Project if this had not been cancelled by HSR.[168] AICSA's reasonable lost profits claim rests on two alternative theories, each of which is considered in turn.

A. LOST PROFITS CLAIM UNDER GUATEMALAN CIVIL CODE ARTICLE 2011

(a) Position of the Parties

262. First, AICSA asserts that lost profits are due to it pursuant to Article 2011 of the Guatemalan Civil Code, which establishes that "*El dueño puede separarse del contrato pagando al contratista el trabajo realizado, los materiales empleados y la indemnización que fije el juez*" (unofficial English translation: "*The owner may separate itself from the contract paying to the contractor the work performed, the materials used, and the compensation established by the judge*").[169]

263. According to AICSA the "compensation established by the judge" (or "indemnización que fije el juez") that Article 2011 refers to either encompasses or equates lost profits.[170]

264. Based on this provision, AICSA asserts that an owner that, as HSR here, terminates for convenience owes lost profits as a matter of law to its contractor.

265. HSR objects asserting that the EPC Contract was terminated for convenience and all compensation due to AICSA in this scenario is that set out in Section 30.3.(a) of the EPC Contract, which provides as follows:[171]

> **Termination for convenience or Owner's Default.** In case of a termination of the [EPC Contract] for convenience by Owner pursuant to paragraph a) of Section 30.1, after the Notice to Proceed to Date, or termination by Contractor pursuant to Section 30.2, Owner shall pay Contractor an amount, which will cover Contractor's Costs he may reasonably incur as a consequence of the termination of [the EPC Contract], including cancellation expenses paid to third parties in accordance with the terms of any contract executed by Contractor or any court order obtained in connection with the termination of any Subcontractor (the "Termination Amount"), plus an amount equivalent to ten percent (10%) of Payment Applications for Works executed by Contractor up to the effective date of termination.[172]

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[168] AICSA's Post-Hearing Brief I, para. 164. According to Exhibit B to AICSA's Post-Hearing Brief I, the lost profits claim would include an additional €105,493.50. This, however, seems to be a typographical error: that additional euro amount (i) is not claimed in the brief; (ii) is not added to the bottom line of claimed amounts in Exhibit B; and (iii) seems duplicative of an item claimed two lines prior in Exhibit B. as part of Novacom's alleged administration and profit costs of termination. See paras. 210 and ff. above.

[169] Id., para. 160.

[170] Id.

[171] HSR's Post Hearing Brief I, para. 126.

[172] Emphasis in the original.

266. HSR concludes that, because Section 30.3(a) of the EPC Contract does not mention lost profits, then it implicitly precludes their recovery.[173]

267. Additionally, to the extent there is any discrepancy between the Civil Code and Section 30.3(a) of the EPC Contract, HSR asserts that the EPC Contract prevails because the very Civil Code, by enshrining the pact sunt servanda principle, ensures the primacy of contracts over statutes except in public policy matters, which this one is not.[174]

268. AICSA disagrees and alleges that (i) the compensible items listed in Section 30.3(a) of the EPC Contract are not exhaustive, and (ii) a statutory right to lost profits cannot be validly waived in a contract.[175]

(b) Tribunal Analysis and Decision

269. At the heart of this dispute between the parties is the relationship between Section 30.3(a) of the EPC Contract and Article 2011 of the Civil Code. Are those two provisions consistent? And if they are not, does one prevail over the other? The second question need not be reached, as the Tribunal detects no inconsistency between Section 30.3(a) of the EPC Contract and Article 2011 of the Civil Code.

270. Article 2011 allows contractor to receive "la indemnización que fije el juez" ("the compensation established by the judge") when Owner "separates itself from the contract" ("separarse del contrato"--a quite ambiguous expression, which the Tribunal, following AICSA's reading, is willing to accept as meaning "terminates for convenience," even though alternative readings are certainly plausible). But Article 2011 does not define what that "indemnización" encompasses or how it is calculated.

271. AICSA mechanically equates the "indemnización" due under Article 2011 with loss profits; but "compensation" or "indemnización" is a broad term capable of encompassing payments as diverse as those for punitive damages, nominal damages, and anything in between, such as direct damages and lost profits. Article 2011 does not define the concepts that are payable as part of the "indemnización." In addition, Article 2011 clearly indicates that the indemnización is "established by the judge," not by the law. The law, thus, refrained from imposing a "one-size-fit-all" definition of what is "indemnizable" or "compensible" and deferred that determination to the adjudicator in the instance.

272. How is then the judge (or in this case the Tribunal) to establish what the "indemnización" encompasses? Failing an express definition in Article 2011, it is necessary to look at the remainder of the applicable law and the contract. As for the applicable law, no party has argued that it contains provisions of relevance to flesh out the "indemnización" in Article 2011. As for the contract, the obvious provision to look at is EPC Contract Section 30.3(a): here lies the party-agreed answer to the question of what "compensation" contractor is entitled to in a scenario of termination for default.

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[173] Id.

[174] Id.

[175] AICSA Post-Hearing Brief I, paras. 160 and ff.

273. Article 2011 and Section 30.3(a) thus work in tandem (rather than mutually exclude each other): Article 2011 confirms that contractor is entitled to compensation, and Section 30.3(a) defines what that compensation encompasses, namely, (i) direct termination costs (such as cancellation expenses to third parties or damages owed to subcontractors), and (ii) a so-to-speak "bonus" in the amount of 10% of already submitted Payment Applications.

274. Nowhere in the list is there a reference to lost profits. In fact, the promise of a 10% bonus over Payment Applications would be economically unnecessary—and lead directly to an instance of double recovery—if, in addition to it, contractor was entitled to lost profits. The parties clearly envisaged that, in a scenario of termination for convenience, contractor would suffer disruption and lose a source of revenue; and the way they decided to deal with it was through payment of a 10% bonus over already accrued amounts, instead of through payment of lost profits.

275. The Tribunal cannot give more to AICSA than what the parties contractually covenanted. AICSA's claim for lost profits on the basis of Article 2011 of the Civil Code is thus dismissed.

B. LOST PROFITS UNDER EPC CONTRACT SECTION 31.2 AND CIVIL CODE ARTICLE 1653

(a) Position of the Parties

276. In the alternative to Civil Code Article 2011, AICSA relies on a fraud and bad faith theory for its lost profits claim. This theory rests on two provisions.

277. First, AICSA invokes EPC Contract Section 31.2 ("Indirect Damages"), which provides as follows in relevant part:

> "Except for . . . Damages caused by the fraud, misrepresentations, gross negligence or willful misconduct of the Parties, neither Party shall be liable to the other . . . for any indirect damages, damages for loss of image, lost profits or loss of goodwill and incidental and consequential damages."

278. Second, AICSA relies on Article 1653 of the Civil Code (captioned "Abuso de Derecho" or "Abuse of Rights") which provides: "*El exceso y mala fe en el ejercicio de un derecho, o la abstención del mismo, que cause daños o perjuicios a las personas o propiedades, obliga al titular a indemnizarlos.*" Unofficially translated, this provision establishes: "Excess and bad faith in the exercise of a right, or in the waiver of such, which causes harm or damage to persons or property, requires the owner [of the right] to pay damages."[176]

279. Citing these two provisions, AICSA demands payment of the profits it claims would have obtained, had the EPC Contract been fully performed and the Project brought to completion. AICSA believes it is entitled to those lost profits because of ten instances of bad faith and abusive conduct from HSR, namely:[177]

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[176] Procedural Order No. 1 (paragraph 41) allowed the parties to submit evidence and quote legal provisions in Spanish, without having to translate them. Thus, while in their submissions the parties 1653 no official or party-agreed translation of the provision has been submitted. The unofficial English translation hereby offered is the Tribunal's and was prepared for ease of reading the Final Award. In case of discrepancy with the Spanish original, the Spanish original prevails. See footnote 9.

[177] AICSA, Post-Hearing Brief I, para. 77, and Exhibit A.

i. HSR's decision to suspend the works by improperly declaring force majeure on October 1, 2013 (HSR's failure to substantiate the existence of force majeure constitutes, according to HSR, a breach of Section 33.2(a) of the EPC Contract);

ii. HSR's failure to honor Payment Application No. 4 (dated August 29, 2013) within the 30 days prescribed in Section 25.4(b) of the EPC Contract (this Payment Application sought funds for the purchase of turbine and generator systems for the Project; AICSA sees in HSR's failure to pay the Application evidence of its lack of interest in the Project and undue intention to save costs);[178]

iii. HSR's cancellation in September 2013 of the all risk insurance policy required by Section 29 of the EPC Contract (which AICSA considers is further evidence of HSR's disengagement from the Project);[179]

iv. HSR's demand, while the EPC Contract was still in force, that AICSA return the advance payments in early 2015, without recognizing the value of the Works performed by AICSA to that date;

v. HSR's representation in early 2015 that force majeure continued but that the Project would be resumed in 2016, despite knowing this was highly unlikely as HSR had just lost its prospective power buyer, Omega;

vi. HSR's efforts around March 4, 2015 to collect on the Advance Payment Bonds posted by AICSA, even though the EPC Contract was still in force and no harm to HSR established;[180]

vii. HSR's termination of the EPC Contract on March 16, 2015 through a vague letter, which at the time did not make it clear whether the contract was being terminated for default or for convenience;

viii. HSR's refusal to pay to AICSA (even after the EPC Contract was terminated) for work performed;

ix. Grossly negligent management of community relations, including by paying bribes and failing to secure and document the indigenous peoples consent to the Project, all of which led to breaches of:

-- Section 1.1(a) and Exhibit W (IFC Performance Standards) of the EPC Contract); and

-- Section 8.3 of the EPC Contract, requiring HSR to provide access to the site to AICSA;

x. Scheming in the decision to terminate (as the decision would have been owed to willingness to save money).

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[178] AICSA's Statement of Claim, paras. 32-38.

[179] Id., paras. 40-41.

[180] AICSA invoked in support of this allegations the letters sent on March 4, 2015 by HSR to the bond issues: Exhibits C-49 and C-50.

280. AICSA claims that those ten instances of conduct from HSR constitute breaches not only to specific contractual provisions, but also to the covenant of good faith implied in the EPC Contract.[181]

281. HSR, for its part, opposes AICSA's claim, as it denies having engaged in bad faith conduct capable of causing harm to AICSA and arguing that AICSA's damage calculation is inflated.[182]

(b) Tribunal Analysis

(i) Claim Requirements

282. During the arbitration—and especially at the evidentiary hearing—the parties debated heavily the facts allegedly supporting AICSA's claim for lost profits on the basis of Section 31.2 of the EPC Contract and Article 1653 of the Civil Code. That intense, and often granular debate on the facts, cannot obscure the three legal and contractual requirements for the claim to succeed.

283. First, to prevail on this claim, AICSA must prove the existence of the required offending conduct—either "fraud, misrepresentations, gross negligence or willful misconduct" (under EPC Contract, Section 31.2), or "excess and bad faith in the exercise of a right, or in the waiver of such" (under Civil Code Article 1653).

284. In order to identify whether this requirement has been met, the Tribunal is well assisted by the extensive evidence and argument submitted by the Parties on whether one or more of the ten instances of conduct from HSR alleged by AICSA (i) took place; and (ii) if so, raise to the level of constituting fraud, misrepresentation, or any of the other categories of legally or contractually identified offending conduct.

285. Second, to prevail in this claim, AICSA must show it has sustained lost profits related to the non-completion of the Project.

286. To address this requirement the Tribunal is also assisted by the Parties' argument and damages expert evidence as to what AICSA's profits would have been, had the EPC been fully performed.

287. Third, the link between the first and the second requirements (e.g., between an offending conduct and the loss of the bargained-for-exchange) must be established. Lost profits, according to Section 31.2, are not recoverable as a rule. By exception they can be recovered provided they have been "*caused*" by one of the instances of offending conduct described in it ("fraud, misrepresentations," etc.).

288. Similarly, Article 1633 of the Civil Code allows for the recoverability of damages but only to the extent the offensive conduct (in that case "excess and bad faith" in the exercise or waiver or a right) "causes harm or damage".

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[181] AICSA First Post-Hearing Brief I, Exhibit A.

[182] HSR's Reply on Claims and Counterclaims, paras. 232-234.

289. Put simply, to recover lost profits it is not enough for AICSA to prove that it has sustained that loss and that HSR acted in bad faith or otherwise offensively. HSR's offensive conduct must be the cause of AICSA's loss of profit—and AICSA must establish that it would have received profits on the entirety of the Project, but for HSR's offending conduct.

290. The causal link is significant because it ensures not only that a potential award of lost profits is valid under the law and the contract, but also constitutes reparation for the damages produced by the offending conduct. An award that finds that there is offending conduct and accordingly orders a payment, but does not ensure that the payment equals the damages caused by the offending conduct, is simply imposing a sanction, not remedying a breach. And while civil laws sometimes contemplate sanctions (as it happens with U.S.-style punitive damages) sanctions were positively excluded in this case: with their emphasis on the causal link, both Section 31.2 of the EPC Contract and Article 1653 of the Civil Code make it clear that any lost profits award must aim at repairing the offense, not sanctioning it.

(ii) Causal Deficiencies in the alleged instances of offending conduct

291. Despite its importance, the causal link is largely unaddressed by AICSA's evidence and argument (which have been much more superficial on causation than on the two other requirements necessary to obtain lost profits).

292. The first offending conduct identified by AICSA exemplifies the problem well. It is undisputed that on October 1, 2013, HSR issued a notice calling for the suspension of all work under the EPC Contract and citing force majeure as the reason. The parties have debated extensively a wide array of issues with respect to this notice, such as (i) whether social unrest constituted an unforeseeable event (HSR says "yes," AICSA says "no"); (ii) what HSR's intent was in issuing the notice (according to HSR it was to prudently stay a project hindered by local opposition; according to AICSA it was to avoid having to spend money on community relations and contractors); and (iii) whether the timing of the notice is suspect (which, predictably HSR denies and AICSA asserts by pointing out the notice just preceded a cost-intensive phase of the Project).

293. But that debate is immaterial in light of the limited effect of the notice. Even if it did constitute an offending conduct, the sole effect of the notice was to stay the Project—not to cancel it or terminate the EPC Contract. An improper stay order may have caused damages such as stand by costs or even an opportunity cost for the duration of the stay. But that is not what AICSA is seeking here. AICSA is seeking damages arising out of the cancelation of the Project and the termination of the EPC Contract. Simply put, the notice of stay did not effect that termination or caused the damages now sought by AICSA.

294. Similar causation difficulties affect practically all of the remaining instances of offending conduct alleged by AICSA. HSR's failure to honor Payment Application No. 4 (seeking funds to purchase turbine and generator equipment); HSR's cancellation of the all-risk insurance policy; HSR's demand, while the EPC Contract was still being performed, that AICSA return the advance payments; HSR's representation that the force majeure event continued but that the Project would be resumed in 2016; HSR's refusal to pay for work performed; and HSR's premature efforts to collect on the Advance Payment Bonds posted by AICSA, irrespective of

whether legal or not, did not cause the Project to be cancelled or the EPC Contract to be terminated. The lost profits that AICSA seeks cannot stem from any of that alleged conduct.

295. As for AICSA's contention that the notice of termination was vague and specifically did not clarify whether termination was effected for convenience or default, a similar analysis applies. In response to questions from the Tribunal, AICSA confirmed at the hearing that it does, and has never contested, that the termination notice actually terminated the EPC Contract. Put differently, there may have been an initial lack of certainty as to why the Project was being cancelled, but not as to whether it was being cancelled—indeed it was. Any alleged vagueness in the notice may have caused other difficulties, but did not lead to the cancellation of the Project—the unequivocal portions of the notice did.

296. An identical flaw can be detected in AICSA's allegation that HSR paid a bribe to politicians to try to ensure support for the project and quell local opposition to it, an allegation HSR strenuously denies. This Final Award will address in detail at Section VII AICSA's bribery allegations and the Tribunal's jurisdiction over them. As detailed in those sections, the majority does not find that a bribe was offered or paid. For now, suffice it to say that the reason why the Project was not finished and AICSA could not make a profit on the entirety of it, was that it was terminated pursuant to the contract's at will termination provisions. The alleged bribe may have contributed to the creation of a more difficult working environment for the parties and perhaps led to Project delays (an allegation that AICSA makes but does not support with evidence or analysis); but, considering the proper order of causation, the alleged bribe cannot be the reason of AICSA's lost profits.

(iii) Other alleged instances of offending conduct

297. Of all the instances of offending conduct referenced by AICSA, the alleged mismanagement of community relations and the scheming in the decision to terminate the contract are arguably less prone to causation complications. In the end, social unrest led to the indefinite postponement of the Project and ultimately to the termination of the EPC Contract. What then if HSR at its own peril abetted or negligently ignored community unrest to eventually get rid of Project expense and a supposedly undesirable contractor, such as AICSA? Wouldn't then AICSA be entitled to its lost profits? The answer is still "no."

298. Whether HSR appropriately handled community relations is heavily contested. According to AICSA, a more generous investment in the community would have assuaged opposition and ensured the safe completion of the Project. According to HSR, opposition was so entrenched that no reasonable additional investment would have overcome it. But even if AICSA were right in its contention—and the Tribunal is not passing judgment on whether it is—Section 30.1(a) of the EPC Contract still gave to HSR the right to terminate for convenience:

> **"Termination for Convenience.**
>
> a. Owner may, at its sole discretion, terminate the [EPC Contract] at any moment whatsoever. . . Contractor waives its right to any term which may have been set forth on its behalf before said termination becomes effective . . . ."[183]

[183] Emphasis in the original.

299. Like any other clause in the EPC Contract, Section 30.1(a) needs to be given effect. The parties may have only allowed termination for default or breach—a quite common feature in a variety of contracts. Yet, in this case, they made it legal for HSR to terminate at will, irrespective of the cause—and no equivalent right was afforded to AICSA. The contract emphasizes the freedom that HSR enjoyed to terminate: HSR, says Section 30.1.(a), can terminate "for convenience" and "at its sole discretion." This language has the effect of rendering HSR's motivations immaterial: it does not matter whether termination is effected out of, say, charitable motives, concerns to mitigate losses caused by the Project, or (as AICSA now alleges) HSR's inability to handle community relations and an arbitrary desire to oust AICSA from the Project.

300. When a contract confers the right to terminate for convenience, the motives why the right is exercised become immaterial by the choice of the parties. In this, the Tribunal departs from AICSA's suggestion that a contract can be terminated for convenience, but still have been terminated in bad faith or through an abuse of rights. The Tribunal is not empowered to "pierce the veil" and explore the reasoning behind the decision to terminate.

301. By its own definition, the right to terminate at will cannot be abused or misused. Whichever the true reason for the decision to terminate, the termination was contractually allowed and must stand undisturbed. It does not constitute offending conduct susceptible of giving rise to a claim for lost profits.

(iv) The "economics" of termination for convenience

302. HSR's unfettered right to terminate for convenience, however, came at a price. As previously mentioned, Section 30.3(a) of the EPC Contract required HSR to pay for AICSA's costs arising out of the termination, plus a bonus in the amount of 10% of the value of the payment applications for works executed by AICSA up to the effective date of termination.

303. What AICSA had no right to expect in a scenario of termination for convenience, were the lost profits for the entirety of the Project that AICSA now claims. Section 30.3(a) does not contemplate those as a payable item, and Section 30.1.(a) is clear that any right that AICSA may have had to expect that the Project would be completed vanishes along with the declaration of termination ("*Contractor waives its right to any term which may have been set forth on its behalf before said termination becomes effective*").

304. Certainly, the earlier in the Project termination is effected, the lower the value of the 10% bonus HSR was to pay under Section 30.3(a), as the bonus is a function of the payment applications for work completed prior to termination. Viewed in this way, the bonus is not only compensation to the contractor for the (perhaps) unexpected loss of a source of revenue, but also a reward for the amount of prior work performed (the more work performed, the higher the bonus).

305. In the instance, AICSA appears to complain that the termination for convenience mechanism is being unfairly applied to its detriment, because, even though it performed work prior to termination, it did not submit any payment application for it. Thus, it cannot expect to receive the bonus, which is why it seems to be claiming lost profits. But the Tribunal does not see how AICSA's complaint can change its reasoning to this point.

306. First, there is an absence of proportion between the lost profits claimed in this case (over US$3 million) and the bonus that AICSA would have been entitled to (10% of work performed, when work performed as previously explained in this award does not exceed US$1.8 million). It does not stand to reason that AICSA should be compensated with a large lost profits award in exchange for the unavailability of a small bonus.

307. Second, the Tribunal will not get into the details of an unasserted claim (AICSA is not seeking in this case payment of the 10% bonus on the work it performed), but certainly sees no inherent inequity in the system as contractually set out and applied. The parties freely negotiated it and accepted both the risks and rewards it entailed.

308. The Tribunal, quite simply, cannot dispense with the compensation structure set out in EPC Contract Section 30.3(a) and replace it with another that AICSA may consider more equitable given the circumstances.

(v) Additional Considerations

309. An analysis of AICSA's lost profits claim under EPC Contract Section 31.2 and Civil Code Article 1653 would not be complete without reference to two additional missing elements.

310. First, with respect to key HSR conduct that AICSA characterizes as offensive (the suspension notice, the mismanagement of community relations, and the payment of a bribe) the Tribunal finds the absence of contemporaneous exchanges raising these alleged offenses noteworthy. It was not until this arbitration, that AICSA first characterized that conduct as a fraud or abuse. There is no evidence that AICSA objected to the conduct when it took place. This absence of timely denunciation detracts, in the Tribunal's view, from the credibility of the allegations.

311. Second, with respect to the need to show causation, AICSA has not engaged in an analysis of contributing factors to the cancellation of the Project. As previously determined, the Tribunal does not consider that the vast majority of the instances of alleged offending conduct raised by AICSA actually caused the cancellation of the Project. But even if, for the sake of argument, one were to accept that they did, the Tribunal would still rest on thin ice if it attempted to conclude that (but for them) AICSA would have received the totality of the contractual bargained-for exchange.

312. The record is replete with evidence that the Project's success was not guaranteed, far less was it guaranteed that AICSA would be the contractor to bring it conclusion: HSR had a contractual right to terminate AICSA at will or for convenience at any point in time, even later than when it actually terminated; the Project faced strong community opposition that may or may not have been overcome with more economic involvement from HSR; HSR had difficulty finding a purchaser for the power generated at the Plant; etc. Any of these circumstances could have easily led to termination even if HSR had really engaged in the offending conduct described by AICSA and that conduct had been a factor in the termination. In those circumstances, the lost profits claimed by AICSA are speculation.

C. CONCLUSION

313. AICSA has not shown its entitlement to lost profits either under Article 2110 of the Civil Code or under Section 31.2 of the EPC Contract and Article 1653 of the Civil Code. The claim is thus denied.

VII. THIRD HEAD OF CLAIMS: AICSA's CLAIM FOR BREACH SECTION 34.13 OF THE EPC CONTRACT AND FCPA VIOLATIONS

A. POSITION OF THE PARTIES

314. Section 34.13(a) of the EPC Contract requires the parties to comply with the "applicable laws of the Republic of Guatemala . . . the 1977 United States Act on Foreign Corrupt Practices ["**FCPA**"] . . . and the UK Bribery Act of 2010." AICSA seeks a finding from the Tribunal that HSR breached both this provision and the FCPA proper by "offering to pay a bribe and paying a bribe" to the Alta Verapaz governor in exchange for his support to the Project.[184]

315. In a nutshell, AICSA claims that, instead of building a solid relationship with the community through direct involvement with it, HSR resorted to the governor in hopes that he would rein the community in "through the police and violence." In exchange for his support, the governor demanded US$40,000 in September 2013, which were later increased to US$50,000 in November 2013. HSR initially dragged its feet, but according to AICSA, in December 2013, HSR ended paying the governor the requested US$50,000 through a scheme meant to "disguise" the payment as a donation of roofing equipment ("láminas") for the communities. The payment, however, came too late, says AICSA. By the time the governor threw in his support and agreed to "inflict violence on the communities," these were beyond winnable for the Project. The governor's heavy-handed tactics simply aggravated the conflict and precipitated the collapse of the Project.[185]

316. HSR strongly denies any allegation of wrongdoing. It acknowledges having paid about US$50,000 worth of roofing láminas at the behest of the governor, but denies any impropriety in the payment and asserts that it was a bona fide donation to the community to earn its trust and support. It also points out that AICSA's own CEO, Mr. Ruiz Sinibaldi, was aware of the situation and encouraged prompt payment of the láminas, in hopes that this would facilitate the Project.[186] After extensively arguing the merits of the claim, however, HSR brings a succinct jurisdictional objection:

> "*Moreover, the FCPA does not create a private right of action for litigants like AICSA. Enforcement of the statute belongs to the United States Department of Justice and Securities and Exchange Commission, not to a party to a contract or to a litigant in arbitration or civil litigation. And even these federal agencies must*

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[184] AICSA Post-Hearing Brief I, Exhibit A. AICSA, however, does not seek a finding of breach of the other anti-corruption statute mentioned in Section 34.13(a), namely the UK Bribery Act of 1973.

[185] Closing Statement of AICSA (long English version), Slides 9-18; Closing Statement of AICSA (short English version), Slides 7-8.

[186] HSR Post-Hearing Brief II, pages, 6-7.

have jurisdiction over the matter, which is not apparent from AICSA's recitation of allegations."[187]

B. TRIBUNAL ANALYSIS

(i) Admissibility

317. AICSA's claim for breach of Section 34.13(a) of the EPC Contract and the FCPA is a late comer to this arbitration. It was first raised by AICSA during its opening statement at the hearing.[188] During the rebuttal time of its opening statement, HSR suggested it may have grounds to challenge the timeliness of the claim but declined do so.[189]

318. The Tribunal's inquiry must then commence with the admissibility of the claim. Article 23(4) of the ICC Rules sets out the standard on this issue as follows: "After the Terms of Reference have been signed or approved by the Court, no party shall make new claims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the arbitral tribunal, which shall consider the nature of such new claims, the stage of the arbitration and other relevant circumstances."

319. The Terms of Reference in the case do not mention the FCPA or suggest any claim involving payment of a bribe. However, considering the nature of the claim, the stage of the case when the claim was brought, and other relevant circumstances, the Tribunal decides to authorize its submission.

320. As for its nature, the claim, while stand-alone, relates to issues timely and extensively brought up in the arbitration, namely HSR's management of community relations.[190] The claim, thus, is a not foreign body to this dispute, as defined in the Terms of Reference, but rather an extension of its original elements.

321. As for the stage when it was brought, the claim was asserted when both parties still had ample opportunity to address it—and made use of that opportunity. Specifically, the claim was addressed in detail during fact and expert witness examinations, closing statements, and post-hearing briefs.

322. As for other circumstances, the Tribunal notes that HSR did not object to the submission of the claim and actively defended against it on the merits.

(ii) Section 34.13 and the Structure of the Claim

323. AICSA's claim invokes Section 34.13(a) of the EPC Contract. Yet, to fully understand the claim and its contents the entirety of Section 34.13 needs to be considered. It reads as follows:

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[187] Id., page 7.

[188] H. Tr. Day 1, 51:2 and ff.

[189] H. Tr. Day 1, 84:15-17.

[190] Terms of Reference, para 45, where AICSA brought up HSR's purported mismanagement of community relations.

"**34.13. Corrupt Practices**

(a) Specifically regarding any activity that involves corruption, in addition to the applicable laws of the Republic of Guatemala, Parties agree to comply with and be subject to the 1977 United States Act on Foreign Corrupt Practices (U.S. Foreign Practices Act of 1977) and the UK Bribery Act of 2010.

(b) Contractor declares that it is fully aware of its obligations under the 1977 United States Act on Foreign Corrupt Practices (U.S. Foreign Practices Act of 1977), as amended and including the regulatory rules approved hereunder, and the UK Bribery Act of 2010.

(c) Neither Contractor nor any of its Subcontractors, agents, representatives, Attorneys or general personnel may give or offer any bribe, gift, present, gratuity or commission, neither as a reward or to induce such a person to (i) take or cease to take any action related to the Agreement or the Project; (ii) favor or cease to favor any personnel with regard to the Agreement or the Project.

(d) The breach of any term of this Section will permit Owner to immediately terminate the Agreement and expel Contractor from the Site, for which it will be enough for Owner to send Contractor a notice in that sense with which the Agreement shall be terminated de jure without any further action required. The termination of the Agreement in accordance with this Section must be considered as a termination due to a Contractor's Default Event and it shall proceed in accordance with paragraph c) of Section 30.3."[191]

324. On its face, Section 34.13 sets out two distinct obligations. First, it requires both HSR and AICSA to comply with a set of laws, including the FCPA. With respect to this obligation, AICSA—not HSR—expressly declares to be aware of the text of those laws, including the FCPA. Second, it specifically requires AICSA, its subcontrators, agents, representatives, attorneys, and general personnel not to give or offer bribes, gifts, presents, or commissions related to the Project. Breach of this second obligation allows HSR to immediately terminate the contract and expel AICSA from the site.

325. AICSA's claims concern only the first obligation, namely HSR's obligation to comply with the FCPA. AICSA asserts that "HSR and its principals promised, offered, and actually made [corrupt] payments to the governor of Alta Verapaz and/or the Mayor of Coban . . . This is an obvious violation of the FCPA . . . and Section 34.13 of the Contract."[192] AICSA's claim is thus explicitly tied to the FCPA: HSR allegedly breached Section 34.13 of the EPC Contract because, according to AICSA, HSR breached the FCPA.

326. On this issue, however, the dissent parts ways with the majority. The dissent asserts that "Section 34.13, aptly titled "Corrupt Practices," specifically prohibits either Party from engaging in "any activity that involves corruption." It then goes on to add that "the Parties did not premise their obligation on a court's finding of criminal liability under the FCPA."

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[191] Emphasis in the original.

[192] AICSA's Post-Hearing Brief I, para. 42.

327. The majority disagrees. Section 34.13 imposes different obligations on HSR and AICSA. AICSA is contractually required to (i) refrain from giving or offering bribes, gifts, presents, or commissions, and (ii) comply with Guatemalan laws, the FCPA, and the UK Bribery Act. HSR, by contrast, is contractually required only to comply with Guatemalan laws, the FCPA, and the UK Bribery Act.

328. The majority therefore disagrees with the premise of the dissent that *both* parties are contractually required under Section 34.13 to refrain from engaging in "any activity that involves corruption." The terms of the Contract are clear: Section 34.13 draws a distinction between the obligation not to breach the FCPA and other anti-corruption laws (an obligation binding on *both* HSR and AICSA), on the one hand, and the obligation not to pay bribes, gifts, presents or commissions, on the other hand (an obligation binding *only* on AICSA):

a) paragraph (a) expressly limits HSR's obligation to compliance with the corruption laws listed there;

b) paragraph (c) expressly requires only AICSA to refrain from paying or offering bribes or commissions and making gifts and presents; and

c) paragraph (d) allows only HSR to terminate the contract if AICSA does pay or offer a bribe, commission, gift, or present.

329. As the hearing showed, the parties went through several drafts of the EPC Contract and drafted it with care and attention to detail.[193] It would not make sense to include detailed language making AICSA's obligations significantly broader than HSR's and limiting HSR's obligations to compliance with the FCPA, UK Bribery Act, and Guatemalan laws, if the parties intended for them to have the same obligations. The clear contractual language must stand.

330. AICSA breaches Section 34.13 when it pays, offers, or promises a bribe. For HSR to breach Section 34.13, however, it is necessary that the payment rise to the level of a breach of the FCPA or of some other statute listed in it. In the majority's view, a finding of liability under the FCPA, the UK Bribery Act, or Guatemalan law is therefore necessary for HSR to have breached the EPC Contract.

(iii) The Majority's Analysis and Conclusion

331. The majority concludes that it has no jurisdiction to make such finding of breach of the FCPA. In any event, as detailed at paras. 343 to 347 below, the majority also finds that the record does not contain evidence sufficient to find that, as a matter of fact, a bribe was paid, and that it does establish that the payment in question was made with the full knowledge and even encouragement by AICSA's chairman.

(a) Breach of the FCPA

332. The late arrival of the claim to these proceedings has left the Tribunal with a sketchy record. In particular, while the merits of the claim have been amply addressed, jurisdiction (to use the

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[193] Mr. Anleu's oral examination at the hearing, passim: Day 1, 222:30 – Day 2, 11:30.

same term as HSR)[194] has not. AICSA takes for granted the Tribunal's jurisdiction to entertain the claim and takes the view that, because the Tribunal has jurisdiction to enforce Section 34.13(a) of the EPC Contract, then it must have jurisdiction to make a finding of FCPA breach; HSR, for its part, has filed a brief paragraph asserting that jurisdiction does not exist.

333. Section 34.13(a) of the EPC Contract adopts and incorporates by reference the FCPA (as amended, 15 U.S.C. §§ 78dd-1, et seq.). AICSA wants the Tribunal to declare that Section 34.13(a) has been breached, *because* the FCPA has been breached.[195] (Notably, however, AICSA does not identify the exact provision in the FCPA that has been breached[196] and does not present expert evidence on how the breach took place.) The majority disagrees with AICSA's assumption that it can make this precedent finding of breach of the FCPA. The FCPA is an independent statute with its own causes of action, and only the authority so empowered by the FCPA can make the determination that the FCPA has been breached.

334. For the Tribunal to have jurisdiction to find that the FCPA has been breached, it is necessary to establish that (i) a private party can sue another private party for breach of the FCPA; (ii) such claim, to the extent it exists, is capable of being resolved in arbitration (or is "arbitrable"

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[194] HSR asserts AICSA's claim cannot be entertained—in this or in any other forum—because the FCPA does not establish private causes of action. In so asserting, HSR refers to its defense as one of "jurisdiction." HSR Post-Hearing Brief II, page 7. An argument can be made that the issue is more properly one of admissibility. While the distinction between jurisdiction and admissibility is far from conclusively settled, jurisdiction mostly seems to refer to hurdles that prevent a case from being heard in arbitration or before a specific tribunal, but do not prevent it from being heard at all. An admissibility objection, by contrast, is usually based on a hurdle that prevents the case from being heard in any forum. So as not to disturb the party-chosen language, the Tribunal will refer to the issue as jurisdictional.

[195] AICSA's Post-Hearing Brief, Exhibit A: "HSR breached Section 34.13 of the EPC Contract because it requires that the parties comply with 'the 1977 United States Act on Foreign Corrupt Practices ...' Offering to pay a bribe and paying a bribe to government officials in exchange for favors, constitutes a violation of the U.S. Foreign Corrupt Practices Act and therefore a breach of the EPC Contract." Of note, the only obligation Section 34.13 imposes on owner is that to comply with the FCPA and the anti-corruption laws listed at Section 34.13(a). The general obligation in Section 34.13(c) not to pay bribes applies only to contractor.

[196] Presumably, the breached provision is § 78dd-1(a):

"It shall be unlawful for any issuer which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in

(1) any foreign official for purposes of--

(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person . . . ."

in the sense usually attributed to the term in civil law jurisdictions); and (iii) if the first two requirements are met, the claim falls within the scope of the EPC Arbitration Agreement (or is "arbitrable" in the sense usually attributed to the term in the U.S.).

335. The inquiry must start with the first requirement: Does the FCPA create private rights of action?

336. Remarkably, the FCPA is not part of the arbitral record (an omission probably to blame on the brevity with which the parties have treated key aspects of the claim). But the act is publicly available and both parties have referred extensively to it. The Tribunal will then consider its language.

337. Of note, the FCPA establishes it is unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business.[197] The FCPA then goes on to empower the U.S. government to monitor, facilitate, and ensure compliance with the FCPA.[198] Nowhere, however, does the FCPA mention that a private entity can sue another for FCPA breaches.

338. HSR alludes to two court opinions that supposedly would have inferred from that silence that private actions are barred: Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1024, 1027-39 (6th Cir. 1990) and Citicorp Int'l Trading Co. v. Western Oil & Refining Co., 771 F. Supp. 600, 607 (S.D.N.Y. 1991).[199] But HSR has not provided copies of those decisions or transcribed them on the record.

339. The Tribunal is thus left with the text of the act alone. On its basis, the Tribunal is not satisfied that claims from private entities are allowed. First, claims from private entities are not mentioned in the text of the FCPA, whereas enforcement of the FPCA by government organs (such as the Attorney General, the Department of Justice, or the Securities and Exchange Commission) is.[200] This suggests a deliberate omission (as coined in the trite Latin aphorism: "inclusio unius exclusio alterius").

340. Second, the entire statutory language suggests its aim is to protect and promote a collective interest—transparency and fair-dealing in foreign transactions—as opposed to individual situations. Not once does the FCPA mention, for instance, that a private company might be the victim of the corrupt practices of a competitor or counter-party, but it frequently refers to the U.S. government in ways that imply that it is affected by the corrupt practices companies may engage in overseas and has an interest on behalf of the community to curtail them.[201]

341. Third, the absence of an FCPA remedy does not leave private companies unprotected. A company aggrieved by the corrupt practices of another would typically be able to seek redress though alternative types of company-to-company claims such as anti-trust, unfair

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[197] 15 U.S.C., Sec. 78dd-1.

[198] 15 U.S.C., Secs. 78dd-1(e)(1), 78dd-2(f)(1).

[199] HSR Post-Hearing Brief II, page 7, footnote 51.

[200] 15 U.S.C., Secs. 78dd-1(e)(1), 78dd-2(f)(1).

[201] E.g. 15 U.S.C., Sec. 78dd-1(e), urging the Attorney General to issue guidelines and procedures to ensure compliance with the FCPA.

competition, unjust enrichment, tortious interference with contract, etc. In other words, it is not at all clear that a new private remedy need be created by the FCPA where other statutory and equitable remedies existed.

342. For these reasons, and in the absence of evidence that the FCPA establishes private rights of action, the Tribunal lacks jurisdiction to declare the FCPA breached at AICSA's request and by extension to declare EPC Contract Section 34.13(a) breached.

(b) A bribe paid or offered?

343. The foregoing suffices to dismiss AICSA's claim for breach of Section 34.13(a) of the EPC Contract. However, in the interest of completeness, the majority wishes to make it clear that, in any event, it does not regard the evidence on record as sufficient to prove the existence of a bribe.

344. First, the evidence offered by AICSA in support of its allegations that a bribe was paid is insufficient. AICSA, for instance, argues that the invoice showing payment of the roof tins by HSR to their seller (Macor)[202] is "fraudulent" and evidence of corruption.[203] In support of those statements, AICSA asserts that the bill does not conform to HSR's own billing proceedings (which require issuance of the invoice 15 days prior to payment) and that HSR has not submitted evidence of delivery of the roof tins.[204] None of this is enough to establish that the invoice is actually "sham." Billing procedures may not be followed in urgent cases, and delivery of roof tins to a poor community in a remote area may not be easy to document. HSR, by contrast, has established that Macor was selected to provide roof tins after a competitive bidding process in which at least two providers were considered.[205] This evidence supports the conclusion that the payment was legitimate.

345. Second, the usual features of a bribery payment are absent from this case. Unlike most bribe solicitations (usually made and accepted through intermediaries and rarely in an overt manner), the payment at issue was openly requested by the governor, including in public meetings on the Project with the presence of several attendees, such as HSR/Real representatives.[206] The payment was further discussed with transparency in internal HSR email exchanges and in exchanges between AICSA and HSR, thus leaving a paper trail rarely found in the conduct of those who are knowingly engaged in illegal conduct.[207] In fact, the payment was so openly discussed that, when the governor requested that the payment be increased from US$40,000 to US$50,000, AICSA's chairman weighed in and urged HSR in writing to pay the extra amount, asserting that was a necessary measure to expedite the Project.[208] In the majority's view, this knowledge and encouragement by AICSA not only lends further strength to the claim that no illicit payment was made but likely would also bar AICSA from now claiming breach.

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[202] Exhibit R1-261.

[203] AICSA's Post-Hearing Brief I, paras. 45 and 46.

[204] Id.

[205] Exhibits R1-261 (pages 7 and 11) and C-428.

[206] The meeting took place on October 28, 2013. R1-261.

[207] R1-63; R1-261.

[208] AICSA's letter to HSR on September 20, 2013, p. 18 (R1-63).

346. Moreover, the payment is consistent with AICSA's own theory on how community relations should be managed. Communities must be won over through donations and presents, says AICSA.[209] A payment to buy roof tins for the communities is in keeping that spirit, and it is entirely plausible that a concerned governor wanting to assist the Project may require a payment of that nature not for his own benefit, but for that of the community's and the Project participants.

347. Ultimately, the existence of a bribe is not to be taken lightly. Its existence demands a serious probatory effort. In this case, the evidence submitted by AICSA, and not denied by HSR, confirms that the governor requested a payment to the communities and that the payment was made. What it does not establish, either directly or through sufficiently strong indicia, is that the payment was intended for the governor's own benefit or otherwise had an illicit purpose. The majority thus finds that the evidence on record does not establish a bribe.

(c) Guatemalan laws

348. The Tribunal requested that, in their post-hearing briefs, the parties explicitly list and explain what contractual and legal provisions they each alleged had been breached. As explained, in the Annex A to its first post-hearing brief, AICSA was clear that it considered that Section 34.13(a) of the EPC Contract had been breached because HSR had breached the FCPA. No reference was made there to Section 34.13(a) having breached because HSR had (allegedly) breached Guatemala's corruption laws. In certain passages of its pleadings, however, AICSA asserts that HSR breached Section 34.13(a) not only because it breached the FCPA, but also because it breached Guatemala's criminal laws, which bar the payments of bribes.[210] These references to Guatemalan law do not change the Tribunal's ultimate analysis.

349. First, AICSA's references to the Guatemalan laws that prohibit the payment of bribes are quite succinct and lack elaboration either in briefing or in expert reports. It is not entirely clear what the relevant provisions say, who breached them (whether HSR itself, its owners, or its employees), or how exactly the breach took place.

350. Second, AICSA fails to establish the Tribunal's jurisdiction to make a finding of breach of Guatemala's criminal laws in an arbitration. In fact it does not even address the issue. The Tribunal is not satisfied (for reasons similar to those related to the FCPA) that it is allowed to declare in this proceeding that HSR or its executives engaged in criminal conduct in violation of Guatemala's criminal laws. Most legal systems recognize a strict separation between civil and criminal disputes and reserve to criminal judges the exclusive authority to make findings of breach of criminal law, even at the expense of delaying or halting civil proceedings involving the same facts (the so-called "*prejudicialidad penal*" in civil-law countries). AICSA has adduced nothing to suggest these observations do not apply here.

351. Lastly, as previously established, the majority does not find that the record contains sufficient evidence to establish that a bribe was paid.

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[209] Terms of Reference, paras. 45 and ff.

[210] AICSA's Post-Hearing Brief I, para. 42.

352. Consequently, to the extent asserted, the majority denies any claim from AICSA to the effect that Section 34.13(a) of the EPC Contract was breached by HSR as a result of HSR's breaches of Guatemala's criminal laws.

C. CONCLUSION

353. AICSA's claim for breach of Section 34.13(a) is thus denied.

VIII. FOURTH HEAD OF CLAIMS: HSR'S CLAIMS FOR BREACHES OF THE ARBITRATION AGREEMENT

354. HSR claims that AICSA is liable in the amount of US$43,000 that HSR had to spend in fees and costs defending two claims unlawfully brought by AICSA in Guatemala: (i) a civil suit, seeking damages and an injunction preventing HSR from collecting on the Advance Payment Bonds; and (ii) a fraud criminal action against HSR's personnel and executives.[211] HSR asserts all those actions were in breach of the EPC Arbitration Agreement: the civil action, according to HSR, impinged on HSR's right to draw on the Bonds (purportedly established in Section 30.4 of the EPC Contract) and the criminal actions were a fraudulent attempt to force HSR to the negotiation table and make concessions on its rights under the EPC Contract.

355. AICSA opposes this claim asserting that the Guatemalan actions at issue were proper and needed to preserve its rights, and touched on issues not covered by the EPC Arbitration Agreement.[212]

356. The Tribunal agrees with AICSA that the Guatemalan claims at issue are not covered by the EPC Arbitration Agreement and accordingly do not breach it.

357. First, with respect to the criminal law action, the analysis is straightforward. A criminal law dispute is not arbitrable and as such, even if somehow related to the EPC Contract, cannot fall within the scope of the arbitration agreement contained in it.

358. Second, with respect to the civil lawsuit, several considerations are in order.

359. First, Section 30.4 of the EPC Contract (or for that matter the EPC Contract generally) does not grant HSR a right to draw on the advance payment bonds. Instead, Section 30.4 simply required AICSA to keep the bonds in "full force and effect, until [HSR] determines, in its sole discretion that all claims and potential claims [with AICSA under the EPC Contract] are fully and finally settled and satisfied that no fact or circumstance exists which may give rise to a claim." The circumstances upon which HSR could draw on the bonds were defined in the bonds.

360. Second, even though contemplated in the EPC Contract, the bonds were different from the EPC Contract itself and were issued by insurance companies that are not a party to the EPC Contract: Afianzadora General, S.A.,[213] and Afianzadora G&T, S.A.[214] Thus, a dispute

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[211] HSR Post Hearing Brief I, paras 99-100.

[212] AICSA, Statement of Defense, paras. 239-241.

[213] Exhibits C-14 and C-19 respectively.

[214] Exhibit C-20.

arising out of the bonds does not automatically become a dispute arising out of the EPC Contract or falling with the scope of the EPC Arbitration Agreement.

361. Third, the lawsuit filed by AICSA on April 21, 2015 in Guatemalan court referred strictly to the terms of the payment bonds.[215] Those bonds provided HSR could draw on them if AICSA failed to devote to the Project the funds advanced to it by HSR. In the instance, AICSA argued that HSR had not established that the funds were diverted from the Project. Consequently, said AICSA, draw on the payment bonds should be judicially prevented.

362. AICSA's claim as stated in the lawsuit does not arise from the EPC Contract, but rather from the bonds and the legislation applicable to them. As such, it is not a claim within the Tribunal's jurisdiction.

363. HSR's claim is denied.

IX. FIFTH HEAD OF CLAIMS: HSR'S CLAIM FOR BREACH OF IMPLIED COVENANT OF GOOD FAITH

364. Guatemala's Civil Code Article 1519 establishes: " . . . *un contrato . . . debe ejecutarse de buena fe . . . .*" (". . . a contract must be fulfilled in good faith . . . ."); and Commerce Code 669 ratifies: "Las obligaciones y contratos mercantiles se interpretarán, ejecutarán y cumplirán de conformidad con . . . [la] buena fe guardada . . . ." ("Mercantile obligations and contracts shall be interpreted and fulfilled in accordance with . . . good faith observed . . . .").[216] Both parties agree that from these provisions stems an implied covenant of good faith that is part of the EPC Contract.

365. Invoking that covenant, HSR seeks damages in an amount to be awarded by the Tribunal as a result of AICSA's bad faith conduct retaining the undisputed amount of the advance payments, and initiating civil and criminal actions against HSR and its personnel in Guatemala.[217]

366. AICSA denies any wrongdoing and asserts that its actions were legitimate protection against HSR's abusive conduct and are not subject to review by this Tribunal.[218] AICSA further asserts that HSR has failed to establish specific elements of its claim, including its entitlement to damages.[219]

367. HSR's claim rests on two alleged instances of abuse: the Guatemalan litigation, and the decision from AICSA to not return the undisputed portion of the Advance Payments.

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[215] Exhibit C-32, passim.

[216] Procedural Order No. 1 (paragraph 41) allowed the parties to submit evidence and quote legal provisions in Spanish, without having to translate them. Thus, while in their submissions the parties relied on these two provision, no official or party-agreed translation of them has been submitted. The unofficial English translations hereby offered are the Tribunal's and were prepared for ease of reading the Final Award. In case of discrepancy with the Spanish original, the Spanish original prevails.

[217] HSR Statement of Claim, paras. 175-176; and HSR Post Hearing Brief I, para. 101-105.

[218] AICSA Post-Hearing Brief I, paras. 167 and ff.

[219] Id., paras. 181 and ff.

368. With respect to the first element of the claim, the preceding Section has explained why the Tribunal does not have jurisdiction under the EPC Arbitration Agreement to look into the lawfulness of proceedings in Guatemalan court made available by Guatemalan law as a remedy independent from these proceedings. Far less can the Tribunal pass judgment on the intent (good faith or bad faith) behind the initiation of proceedings beyond its grasp.

369. AICSA's decision to retain undisputed amounts from the advance payment is, by contrast, within the jurisdiction of the Tribunal and, on first impression, hard to defend on the basis of the contract. Yet, the remedy sought by HSR (damages "in an amount to be determined by the Tribunal in its discretion")[220] is quite simply inapposite.

370. First, Guatemalan law is quite clear that claimant has the burden of proving the damages it seeks: Under Article 1465 of the Civil Code, whoever causes injury or harm is liable to the victim ("*Toda persona que cause daño o perjuicio a otra, sea intencionalmente, sea por descuido o imprudencia, está obligada a repararlo, salvo que demuestre que el daño o perjuicio se produjo por culpa o negligencia inexcusable de la víctima.*"); but under Article 1468 of the Civil Code, the victim must establish the damages it has suffered ("*La culpa se presume, pero esta presunción admite prueba en contrario. El perjudicado sólo está obligado a probar el daño o perjuicio sufrido.*")[221]

371. Second, over AICSA's objection, the claim invites the Tribunal to decide on the basis of equity (damages to be awarded "in its discretion") and thus runs counter to the mandate in Article 21(3) of the ICC Arbitration Rules ("**The arbitral tribunal shall . . . decide *ex aequo et bono* only if the parties have agreed to give it such powers**").

372. HSR's claim for an implied covenant of good faith must then be denied.

X. SIXTH HEAD OF CLAIMS: OTHER CLAIMS

373. HSR and AICSA have brought additional claims and requests that need attention.

A. DECLARATORY RELIEF SOUGHT BY HSR

374. In its prayer for relief, HSR seeks a declaration that "AICSA has breached Sections 6.6(b), 25.1, 28.3(b), 30.3(a), 30.4, and 32.3 of the [EPC Contract], and Articles 1519 and 1653 of the Guatemalan Civil Code and Article 669 of the Guatemalan Commercial Code."[222]

375. This claim (elaboration for which is meagre and sometimes unclear) does not stand alone, but is rather ancillary to other claims and propositions HSR has made in the course of the case. Its fate, thus, is contingent on that of the claims and propositions in relation to which it is asserted. For clarity, each of the provisions mentioned by HSR in its request for declaratory relief will be addressed in turn.

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[220] HSR Post-Hearing Brief I, para. 105.

[221] As before (see, e.g., footnotes 9, 155, and 176), the translation of these provisions has been prepared by the Tribunal and is trumped, in case of discrepancy, by the Spanish original.

[222] HSR's Post-Hearing Brief I, para. 129(a).

376. First, HSR appears to claim that, by seeking payment for partially completed Milestones, AICSA has breached Sections 6.6(b) and 25.1 of the EPC Contract, which (according to HSR) forbid such payments. As part of its adjudication of the first of head of claims, the Tribunal has already addressed those provisions at length and explained why AICSA is contractually entitled to compensation on partially completed Milestones. The claim for breach of Sections 6.6(b) and 25.1 is thus denied.

377. Also, HSR seeks a declaration that AICSA has breached Section 28.3(b) of the EPC Contract. This declaration seems to sought on the basis that AICSA would have requested Change Orders without providing the necessary substantiation or abiding by the 30-day contractual deadline to do so. This request for a declaration does not merit separate adjudication. When the Tribunal considered that a change order request from AICSA was untimely or unsubstantiated, it has so indicated and denied the request. That was the exception, however, as the majority of the requested change orders have been granted. Also, the Tribunal is not persuaded that Section 28.3(b) of the EPC Contract can be breached. It does not impose an obligation on AICSA, but rather a burden—it does not order AICSA to do something, but it tells AICSA what process to follow to obtain a change order. If on anyone, Section 28.3(b) imposes an obligation on HSR—issuing a change order if and when AICSA shows entitlement to it.

378. Next, HSR seeks a declaration of breach of Article 30.3(a), a claims that appears to be based on the assumption that AICSA has sought to recover costs and damages beyond those permitted in that provision for a scenario of termination. AICSA has not breached that provision simply because the provision does not impose an obligation on AICSA. It only imposes certain payment obligations on HSR. The fact that AICSA may have sought compensation counter to that provision has been addressed before (the Tribunal has denied any such claims) and does not amount to a breach.

379. Additionally, HSR seeks a declaration of breach of Section 30.4 of the EPC Contract, presumably on the notion that AICSA has breached its obligation to maintain the Advance Payment Bonds. The Tribunal finds persuasive AICSA's explanations as to why it has complied with this obligation.[223] In any event, HSR is entitled to, and the Tribunal has already issued, an injunction so that those Advance Payment Bonds are kept in place through compliance with the Final Award. No more rulings on this provision are then necessary.

380. Moreover, HSR seeks a declaration of breach of Section 32.3 of the EPC Contract (a provision referred to in this award as the EPC Arbitration Agreement). While not elaborated on, this request must be part of HSR's general claim for breach of the EPC Arbitration Agreement. The claim for breach of the arbitration agreement was denied, and for the same reason leading to the denial of that claim, this request for declaratory relief must be denied too.

381. Lastly, HSR seeks a declaration of breach of Articles 1519, 1653, and 669 of the Guatemalan Civil Code. These are provisions invoked by HSR in support of its claim against AICSA for breach of an implied covenant of good faith. That claim was denied for lack of proof of harm, and for the same reason the Tribunal must also deny the declaration of violation of those provisions.

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[223] AICSA's Statement of Claim, paras. 43-45.

B. MOTION TO STRIKE FROM HSR

382. As previously noted, AICSA's April 9, 2018 responses to the Tribunal's questions on interest were accompanied by an opinion from Guatemalan law expert witness Dr. Barretto. On the same April 9, 2018, HSR objected to the submission of Dr. Barretto's opinion arguing it was unauthorized and untimely. On April 11, 2018, AICSA made a submission opposing the objection.

383. HSR's objection is still pending before the Tribunal. The Tribunal denies the objection as moot. Both AICSA's submission on interest and Dr. Barretto's opinion explained in detail why they considered that the amounts advanced by HSR and withheld by AICSA did not accrue interest—in their view, neither the EPC Contract nor the law set out a deadline to return them, and as a result could be kept by AICSA indefinitely and at no cost. That theory has been considered and rejected by the Tribunal at Section V.B(xiv) of this Final Award. As a result, the rulings of the Tribunal are neither based on nor accept Dr. Barretto's opinion, and the motion to strike that opinion has lost its object.

C. PROVISIONS AICSA INVOKES AS BREACHED

384. Exhibit A to AICSA's First Post-Hearing Brief details nine provisions AICSA considers that HSR has breached. Unlike HSR, AICSA does not explicitly seek a declaratory ruling to the effect that these provisions have been breached. In any event, and for the sake of completeness, those provisions bear mentioning. They fall in four categories.

385. First, Exhibit A mentions provisions that AICSA invoked as breached in support of its lost profits' claim. Those provisions are:

i. Section 1.1(a) and Exhibit W of the EPC Contract (which AICSA deems breached as a result of HSR allegedly having grossly negligently managed community relations and failed to obtain the communities' consent for the Project);

ii. Section 8.3 of the EPC Contract (which AICSA deems breached because, by failing to secure consent from the communities, HSR allegedly failed to provide to AICSA access to site);

iii. Section 25.4(b) of the EPC Contract (which AICSA deems breached as a result of HSR's allegedly not having paid Payment Application No. 4 seeking funds to buy turbine and generator equipment);

iv. Section 29 of the EPC Contract (which AICSA deems breached as a result of HSR's alleged failure to renew the contractually required all-risk insurance policy);

v. Section 33.2(a) of the EPC Contract (which AICSA deems breached because AICSA allegedly failed to substantiate its force majeure allegation); and

vi. The covenant of good faith implied in the EPC Contract.

386. The Tribunal has already addressed and considered those provision with respect to AICSA's claims for reasonable lost profits, in support of which they were invoked. That claim has been denied and no further rulings on the issue, or on those provisions is warranted at this stage.

387. Second, AICSA asserts that HSR breached Section 34.13 of the Contract by breaching the FCPA through the alleged offer and payment of a bribe. The alleged breach of this provision has been addressed—and denied for lack of jurisdiction—when disposing of the third head of claims above. No more rulings on the issue are needed at this stage.

388. Third, AICSA asserts HSR breached Section 18.2(a) of the EPC Contract because (i) this section allegedly entitled AICSA to a change order for costs arising out of HSR's decision to suspend the Contract, and (ii) HSR would have refused to issue that change order. In addressing the first head of claims above the Tribunal has already detailed which of the change orders requested by AICSA, including those stemming from the suspension, were warranted and entitle AICSA to compensation. No more rulings are now needed on the issue.

389. Fourth, AICSA asserts that HSR breached Section 32.2 of the EPC Contract by allegedly failing to attempt to negotiate in good faith prior to the institution of the arbitration. Previously transcribed as part of the EPC Arbitration Agreement, Section 32.2 required indeed an attempt to negotiate in good faith for thirty days prior to the institution of the arbitration. A party considering that this two-tier dispute resolution mechanism has not been properly followed can raise a jurisdictional objection so indicating, which no party has done in this case. In the absence of such an objection, the Tribunal need not make a determination on whether the pre-arbitration steps have been fulfilled.[224]

D. AICSA's MOTION FOR INFERENCES

390. Along with its First Post-Hearing Brief on January 15, 2018, AICSA filed also a request for inferences, to which HSR replied along with its Second Post-Hearing Brief on January 30, 2018.

391. In its motion, AICSA sought inferences from the Tribunal to the effect that:

(i) The rate of completion of certain Project Milestones asserted by AICSA was correct (AICSA's stated reason for the inference was HSR's alleged breach of the Tribunal's production order by failing to hand over to AICSA progress reports from Mr. Pastora now supposedly proven to exist);

(ii) HSR paid a bribe (AICSA's stated reason for the inference was HSR's alleged failure to produce any documents showing that the so-called láminas were ever sent to the communities, from which the fact should be deduced—according to AICSA-that the láminas were just a masquerade for an illicit payment to the government); and

(iii) HSR was instructed by the Ministry of Energy and Mines to fire CEDER (AICSA's stated reason for the inference was HSR's alleged breach of the

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[224] As for whether or not pre-arbitration exchanges were conducted in actual in good faith, see Section XI.E below, finding that the parties' conduct at that stage seriously increased the complexity of the dispute and delayed its outcome.

Tribunal's production order by supposedly failing to hand over to AICSA all requested reports and recommendations received from the Ministry).

392. In its reply and opposition to the motion, HSR notes that, with respect to the first and third requested inferences (progress reports and documents received from the Ministry), HSR produced all information in its custody, possession, or control. As for the second requested inference (bribery), HSR claims that there were no documents responsive to AICSA's request, but this should not be assumed as evidence of any wrongful payment.

393. The Tribunal considers the motion moot. The Tribunal has resolved the claims pending before it without needing to resort to inferences. Inferences were unnecessary either because the Tribunal had before it evidence enough to address the issues for which the inferences were being requested (as was the case with the progress reports), or because the inferences referred to issues over which the Tribunal lacked jurisdiction (such as AICSA's allegations that the FCPA was breached) or were not dispositive of the case and thus were not addressed (such as the reasons for the firing of CEDER).

XI. SEVENTH HEAD OF CLAIMS: FEES AND COSTS

A. INTRODUCTION

394. Each party seeks in this arbitration its fees and costs. Specifically,

(i) HSR seeks that AICSA and Novacom be ordered to joint and severally pay US$1,035,182.79 in fees and costs incurred by HSR through issuance of the Partial Final Award on Jurisdiction; and that AICSA be ordered to pay US$663,367.03 in fees and costs incurred by HSR after issuance of the Partial Final Award on Jurisdiction;[225]

(ii) AICSA seeks that HSR be ordered to pay 2,486,213.73 quetzales and US$3,256,585.96 in fees and costs incurred by AICSA.

(iii) Novacom seeks that HSR be ordered to pay US$245,100 in fees and costs incurred by Novacom.[226]

395. Novacom has not detailed the reasons why it considers HSR should reimburse its fees and costs, except for noting that it is HSR which, by instituting case, caused those fees and expenses to be incurred. HSR's and AICSA's submissions are, by contrast, more detailed.

396. HSR seeks fees and costs on a twofold basis: first, according to HSR, costs follow the event, and HSR should be deemed the prevailing party and as such, entitled to its fees and costs; second, as an additional basis, HSR argues that AICSA has unduly protracted the dispute and delayed its resolution, which should be considered as an additional factor in the assessment of fees and costs.[227]

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[225] HSR' Statement on Fees and Costs on February 13, 2018.

[226] Novacom's Statement on Fees and Costs, of February 13, 2018.

[227] HSR's submission of February 5, 2018, passim.

397. AICSA relies on a comparable reasoning to assert its entitlement to fees and costs. It argues it should be deemed the prevailing party and the victim of HSR's bad faith conduct.[228]

398. Neither party, however, provides a definition of "prevailing party" or particulars on the interaction between the various grounds asserted to seek fees and costs. In particular, no party clearly indicates what is the primary ground upon which to award fees and costs and what the additional grounds to be applied in the alternative. All these issues shall be disposed of considering the language in the contract and the Rules.

B. TRIBUNAL AUTHORITY TO ALLOCATE FEES AND COSTS

399. The Tribunal's authority to allocate fees and costs is undisputed and has a twofold source. First, the EPC Arbitration Agreement directs the Tribunal to award "reasonable attorneys' fees and costs."[229]

400. Second, Article 37.4 of the ICC Rules establishes that: "The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties."

401. Of note, Novacom is not a party to the EPC Arbitration Agreement, but insisted on participating in this arbitration and accepted to be bound by the decision of the Tribunal. In fact, as just transcribed, Novacom is asking the Tribunal for an order of fees and costs against HSR.

402. Thus, to the extent any doubts existed as to the Tribunal's jurisdiction and authority to allocate fees and costs for or against Novacom, Novacom's own conduct has dispelled them. The Tribunal has jurisdiction and authority on fees and costs over the three parties to this arbitration.

C. STANDARD TO ALLOCATE FEES AND COSTS

403. In allocating fees and costs, the Tribunal is to follow the standards prescribed to it in the EPC Arbitration Agreement and the ICC Rules.

404. The EPC Arbitration Agreement establishes that:

> "The arbitral award in favor of the prevailing Party shall include an award for . . . reasonable attorneys' fees and costs incurred in connection with such Dispute."[230]

405. Article 37.5 of the ICC Rules, for its part, provides that: "In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner."

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[228] AICSA's submission of February 5, 2018, passim.

[229] Section 32.3(f) of the EPC Contract.

[230] Id.

406. Article 37(5) is understood as affording the tribunal wide discretion in allocating costs. As the ICC's Taskforce report on this subject confirms, some of the relevant considerations Tribunals typically take into account in applying Article 37(5) include:

1. The relative success and failure of the parties;
2. The reasonableness of the costs incurred by the parties;
3. The proof of costs; and
4. The conduct of the parties in the course of the case.[231]

407. In the instance, however, those considerations must cede to the party-agreed criterion established in the EPC Arbitration Agreement: the determining factor to allocate fees and costs is who won. The parties have agreed on the application of both the EPC Arbitration Agreement and the ICC Rules. But the ICC Rules are a general instrument with applicability to a wide array of legal relations and disputes beyond these parties and this case, while the EPC Contract applies to *this* specific relationship. As the *lex specialis* that it is, the Tribunal will apply the criterion in the EPC Agreement (prevailing party) over those typically employed in an analysis under Article 37(5). Article 37(5) factors will be considered to the extent the test under the EPC Agreement yields inconclusive results.

408. The question then is—who is the prevailing party?

D. APPLICATION OF EPC ARBITRATION AGREEMENT TEST: PREVAILING PARTY

409. This arbitration simply has no prevailing party. Several issues of relevance have been brought before this Tribunal and no party has won them all—or even a majority of them.

410. Insofar as the merits of the dispute are concerned, there were two heads of claims manifestly larger (considering the amounts involved) than the rest: first, there was AICSA's claim for work done and termination costs and HSR's mirror claim for the return of the unutilized portion of the advance payments; and, second, there was AICSA's claim for reasonable lost profits. The outcome of those heads of claims has been even.

411. Under the first head of claims, AICSA sought to be allowed to keep US$3,052,672.31 and €808,783.50 from the amounts advanced to it. In this arbitration, HSR only acknowledged AICSA's right to keep US$50,000. Eventually, AICSA has been allowed to keep US$2,429,627.08 and €703,290.00, that is 80% of the dollar and 87% of the euro amounts that it sought. AICSA is the prevailing party in the first head of claims.

412. Under the second head of claims, however, AICSA sought US$3,159,516.24 in lost profits. This second head of claims (whose amount is roughly comparable to that of the first) was dismissed. HSR is the prevailing party in it.

413. Turning to unquantified or smaller amount claims, there was a third head of claims, comprised of AICSA's request for declaratory relief to the effect that Section 34.13 of the EPC Contract and the FCPA had been breached. HSR is the prevailing party in this head of

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[231] ICC Commission on Arbitration and ADR, Report on Decisions on Costs in International Arbitration ("ICC Report"), *available at* https://iccwbo.org/publication/decisions-on-costs-in-international-arbitration-icc-arbitration-and-adr-commission-report/ICC Report, pp. 11-14.

claims (AICSA's claims have been denied in full). That victory, however, is offset by the dismissal of the fourth and fifth head of claims brought by HSR (concerning respectively, HSR's claim for AICSA's alleged breach the EPC Arbitration Agreement and the implied duty of good faith). Unquantified and smaller amount claims are thus a draw.

414. The sixth head of claims (comprising ancillary claims from the parties) required no significant ruling or intervention from the Tribunal.

415. Certainly, HSR has brought one ancillary clam that has been awarded—the request that the Advance Payment Bonds be kept in place (a very straightforward claim in the mind of the Tribunal). But in another ancillary claim that it brought (that for interest), the Tribunal had to introduce significant adjustments to HSR's calculations in order to comply with Guatemalan law. In other words, even with respect to ancillary claims on the merits, there is no clear winner either.

416. Still on the merits of the dispute, a significant component loomed throughout the arbitration, namely the about US$3 million and €300,000 from the advance payments that AICSA was keeping, but that it knew it would have to return to HSR even if all of AICSA's claims for work done, termination costs, and lost profits were granted and all of HSR's quantified claims were denied. This amount was not disputed and as such was not litigated. Insofar as not disputed, there is no prevailing party with respect to it, and no fees should have been generated—or deserve awarding—with respect to it. Insofar as part of the amount of the arbitration, the Tribunal will address it later on.

417. Turning now to jurisdictional and procedural issues, HSR has an edge but not by much. It prevailed on the jurisdictional issue of whether Novacom had been properly joined to these proceedings, but it lost on its interim relief application concerning the Advance Payment Bonds. The jurisdictional objection was disposed of in a lengthy Partial Final Award and the interim relief application in a much shorter Procedural Order. Yet, both issues were extensively argued in writing, in telephonic hearings, and with the aid of various expert reports. The fees and costs from the parties in arguing the jurisdictional objection and the interim relief application must be similar.

418. In a nutshell, there is no clear winner between HSR and AICSA when merits, procedural, and jurisdictional disputes are considered.

419. As for Novacom, its involvement in the arbitration was short lived, but similarly, ambivalent. Its attempt to join the proceedings did not pass the jurisdictional test (one defeat), but in the meantime, the company was required to defend an application for interim relief from HSR that was eventually dismissed and in which Novacom had relatively little at stake, but regarding which it had to invest time, money, and effort (one victory).

420. In view of this landscape without clear winners and losers , it is necessary for the Tribunal to resort to the supplementary fee and cost allocation criteria typically viewed as fitting with the scope of Article 37(5) of the ICC Rules. As previously explained, these include three criteria in addition to that of the prevailing party: the reasonableness of the parties fees and costs, their proof, and the conduct of the parties in the course of the case. As for the second criterion, the Tribunal is satisfied that the parties' claimed fees and costs are established: they have been provided in statements from counsel to which no objection has been raised.

The analysis will then turn to the first and third criterion, both of which are closely intertwined: the reasonableness of the parties' claimed fees and costs, and the parties' conduct in the course of the case.

E. APPLICATION OF TESTS PURSUANT TO ARTICLE 37.5 OF THE ICC RULES: REASONABLENESS OF CLAIMED FEES AND COSTS AND PARTIES' CONDUCT IN THE COURSE OF THE CASE

421. This case has been over-litigated as confirmed both by the amount of claimed fees and costs, and its protracted course.

422. The claimed fees and costs' amounts are quite significant. In particular, the value of AICSA's fees and costs greatly exceeds the value of its lost profits claim, which was in turn slightly under 50% of its total claims. With the arguable exception of Novacom, the parties' claimed fees and costs would have been suitable for an arbitration with an amount in dispute one order of magnitude higher than this one's.

423. Yet, the parties' fees and costs requests will not surprise someone familiar with the record. The case has seen a jurisdictional phase, an interim relief application, two rounds of document exchange (bordering the line of classic U.S. court-style discovery), a whopping nineteen fact and expert witnesses testifying at the hearing (which became a significant factor in the need to split the evidentiary hearing in two sessions), motions to strike evidence, motions for inferences, regular disagreement on procedural issues (from the relatively mundane, such as the office space in which the hearing should be held, to the more serious such as the procedural schedule and the sequence of fact and expert witnesses), very grave accusation exchanged between the parties on the substance of the case (with each party accusing the other of bad faith and AICSA imputing to HSR the payment of a bribe), etc.

424. A significant part of these expenses, however, were not necessary. Concerning AICSA's entitlement to money for work performed and termination costs, HSR has argued against its prior payment commitments and internal progress reports; AICSA's claim for reasonable lost profits has fundamental causation deficiencies preventing the Tribunal from entertaining a significant part of its substance; HSR's claim against AICSA for breach of the implied covenant of good faith is not proven or particularized in a key element (damages) and has been accordingly denied; AICSA's claim against HSR for breach of Sections 34.13 of the EPC Contract and the FPCA exceeds the jurisdiction of this Tribunal (and as such not reviewed on the merits of this award); HSR's claim against AICSA for breach of the arbitration agreement has also been dismissed for lack of jurisdiction, etc.

425. As a general matter, it is impossible to award to either HSR or AICSA all or the majority of its fees and costs when HSR and AICSA would have received an award with an economic value similar to this, yet on a more expedited and cheaper basis, had they circumscribed their dispute in this arbitration to the first head of claims (which, incidentally, the parties argued with helpful detail and the assistance of very clear and useful expert reports). All other claims belong to other fora or are simply meritless and an unnecessary distraction.

426. As for the parties' respective conducts, before the institution of the arbitration both HSR and AICSA took steps that unnecessarily exacerbated the dispute. HSR suspended the contract but assured to AICSA it was committed to the Project—even when contemporaneous

communications suggest it was actually considering termination. With the contract suspended, HSR sought particulars as to the use of the Advance Payments by AICSA; AICSA gave details, which HSR considered insufficient; then HSR demanded to AICSA the full return of the advance payments.[232] It is understandable that HSR wanted to know how the Advance Payments had been used and that it was disappointed in the absence of clear answers from AICSA. AICSA should have been more proactive in its responses and eagerness to engage HSR in a prompt resolution of any accounting issues. But by demanding the full return of the advances while the contract was still in force, HSR also contributed to the escalation of the dispute—the contract does not provide for such a return prior to the settlement of balances that follows the termination of the contract or the completion of the Project.

427. On March 16, 2015, HSR eventually terminated the EPC Contract and simultaneously attempted to draw on the Advance Payment Bonds. Its efforts were thwarted as it apparently could not establish a requirement for the draw—the misuse by AICSA of the Advance Payments.

428. Eventually, the arbitration between HSR and AICSA became unavoidable. The arbitration, however, could and should have been "leaner."

429. First, HSR and AICSA disagreed on whether and if so how much, HSR owed to AICSA for contract work, termination costs, and reasonable lost profits; but it was also quite clear to both of them that AICSA had to return to HSR the unutilized portion of the advance payments. As previously mentioned, HSR and AICSA knew that (even if AICSA was entitled to all the amounts it was claiming—and this award confirms it was not) it would nonetheless have to return to HSR approximately US$3 million and €300,000. AICSA, however, did not return these undisputed amounts to HSR—and there was no legally acceptable reason to act that way.

430. In fact, by failing to promptly return the undisputed amounts to HSR, AICSA was both hurting HSR and failing to mitigate its own damages: AICSA knew it would need to return the undisputed amounts with interest.

431. By retaining the undisputed portions, AICSA also unduly increased the amount in dispute in this arbitration. To be clear, a return of the undisputed amounts would not have solved the parties' differences or warranted an end of the arbitration: the parties would have still been apart on at least US$6,212,188.55 and €808.783.50 in lost profits, termination costs, and work performed (i.e., the first and the second heads of claims). They would also have been at odds over all the other heads of claims (alleged payment of a bribe; alleged breaches to the arbitration agreement and of the implied covenant of good faith; minor claims). A payment of the undisputed amounts would not have resolved the six heads of claims, or reduced their factual and legal complexity. But the amount of the arbitration—and with it the parties' payments to the ICC--would have been lower.

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[232] E.g., HSR's letter of February 24, 2015 to AICSA (Exhibit R1-82).

432. HSR has paid to the ICC US$262,940[233] in fees and costs on the basis of a total amount in dispute of US$17,983,380 (after converting euros to U.S. dollars).[234] Roughly converted into U.S. dollars, the undisputed amounts had a total value of US$3,400,000. Had the undisputed amounts been "out of the equation," the amount in dispute would have decreased from US$17,983,380 to US$14,583,380. In such case, HSR's payments to the ICC would have totaled approximately US$231,000, of which about (i) US$211,500 would have been allocated to the payment of ICC and Tribunal fees[235], and (ii) US$19,500 would have been allocated to the payment of Tribunal expenses.[236] In sum, HSR's payments to the ICC would have been approximately US$31,940 lower had AICSA paid voluntarily the undisputed amounts. This does not mean, however, that HSR is entitled to the entirety of those US$31,940.

433. Second, as already mentioned, HSR also refused to pay to AICSA amounts it had originally committed to pay in its April 21, 2015 letter.[237] This conduct undoubtedly exacerbated the parties' positions and increased the amount of this arbitration (even though not as much as AICSA's decision to withhold the undisputed amounts).

434. In light of those circumstances, the Tribunal considers it appropriate to decrease by US$5,000 the amount of ICC cost for which HSR must be reimbursed. In sum, AICSA is ordered to reimburse HSR for US$26,940 (US$31,940 minus US$5,000) of HSR's ICC costs. Of note, this amount is awarded to HSR not as prevailing party, but in consideration of the parties' conduct over the course of the dispute.

435. HSR seeks post-award interest on any fees and costs granted to it, and invokes to this effect Section 32(3)(f) of the EPC Contract, which establishes that the award on fees and costs shall include interest.[238]

436. The EPC Contract does not contain specific rules on interest as applicable to fees and costs. The general rules in Section 25.6 of the EPC Contract and in Article 1950 of Guatemala's Civil Code should then apply.[239] Under Article 1950, fees and costs shall start accruing

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[233] This is the net amount paid by HSR to the Court. HSR originally paid US$272,000, but upon the Court establishing the costs of the case, HSR obtained a refund of US$9,060. Of the US$262,940 that HSR has paid to the ICC, about US$19,500 correspond to expenses of the Arbitral Tribunal, the rest to the arbitrators' fees and ICC administrative expenses.

[234] Secretariat's Financial Table of March 7, 2018. This amount results from adding US$10,860,007 of HSR's principal claims and US$7,123,373 in (all dollar converted) AICSA's principal claims.

[235] This is the amount of fees that, according to the publicly available ICC cost calculator, HSR would have had to pay to the ICC in a regular case with US$14,583,380 in dispute.

[236] In the instant case, expenses amount to US$39,053, and have been evenly shared by HSR and Respondents, with each paying approximately US$19,500. See footnote 233 above. Yet, as previously indicated, a lower amount in dispute would not have necessarily led to a simpler or more expedited case—or to lower Tribunal expenses. See para. 431 above. Thus the US$19,500 in expenses that HSR has born in this case would have also likely been born even if amount in dispute had only been US$14,583,380.

[237] Exhibit R1-36.

[238] HSR's February 13, 2018, Statement of Fees and Costs, page 1.

[239] See Section V.B(xiv) of this Award for discussion of Section 25.6 of the EPC Contract and Article 1950 of the Civil Code

interest within six months of the date the debt is established.[240] Given that the debt has been established in this Final Award, interest on fees and costs shall start to accrue from the sixth month of the date AICSA receives the Final Award through full payment. Also, applying the criteria stemming from Section 25.6 of the EPC Contract, the applicable rate will be the current U.S. prime interest rate (as it is currently that the debt is incurred) increased by 3%. The current U.S. prime interest rate is 5.25% per annum.[241]

437. Consequently, the amount of US$26,940 in ICC costs that AICSA must pay to HSR amount shall accrue interest at the simple annual rate of 8.25% from the sixth month of the date AICSA receives the Final Award through complete payment of that amount.

438. All other claims for fees and costs are dismissed. Specifically, the claims from AICSA and Novacom for their fees and costs to be paid by HSR are dismissed. AICSA and Novacom shall each bear their own fees and costs.

F. FINAL REMARKS ON FEES AND COSTS

439. The Tribunal is aware of the time, effort, and expense HSR and AICSA have devoted to this case. Despite the case's limited economic value—in relative terms—they worked on it with zeal. It is precisely in cases of this scale that the use of the Tribunal's authority to allocate fees and costs is most urgent. While considerations of efficiency and effectiveness of the arbitral remedy may warrant a particular allocation of costs in those circumstances, those considerations must yield to the arbitration agreement and the applicable rules, which—for better and for worse—bind the Tribunal.

XII. RULING

440. Based on the foregoing, the Tribunal denies all claims and counterclaims brought in this arbitration except for the following:

a. The Tribunal declares that, of the amounts AICSA received as advance payments under the EPC Contract, AICSA is entitled to keep US$2,429,627.08 and €703,290.00, and shall return the rest;

b. Specifically, the Tribunal orders AICSA to return to HSR (i) US$7,017,231.52 plus interest at a simple annual rate of 7.25% from September 16, 2015 through full payment; and (ii) €435,168.00, plus interest at a simple annual rate of 3.025%, from September 16, 2015 through full payment;

c. Also, the Tribunal orders that HSR, AICSA, and Novacom each bear its own fees and costs as incurred in this arbitration, except that the Tribunal orders AICSA to reimburse HSR for US$26,940 of the costs incurred by HSR with the ICC, plus interest on that amount at a simple annual rate of 8.25%, from the sixth month of the date AICSA receives the Final Award through full payment of that amount; and

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[240] Article 1950 is at CL-9, page 253; and R1L-17, page 345.

[241] http://www.fedprimerate.com/wall_street_journal_prime_rate_history.htm.

d. The Tribunal orders AICSA to keep the Advance Payment Bonds in place in an amount equal to or higher than the amounts granted and accrued under para. 440, sub paragraphs b and c of this Final Award through full payment of those amounts.

441. All other requests and claims are rejected.

This Final Award is made in the place of arbitration, Miami, Florida, USA.

Date: October 29, 2018

Gaëtan J. Vermoosel
Arbitrator

Adolfo E. Jiménez
Arbitrator (partially dissenting)

Aníbal Sabater
President of the Arbitral Tribunal

Partial Dissent

While I join the Tribunal in the Final Award, I disagree with one section of the Final Award and submit this partial dissent in connection with section VII, the Third Head of Claims addressing AICSA's claim for breach of Section 34.13 of the EPC Contract. The Tribunal has jurisdiction to consider whether HSR breached Section 34.13 of the EPC Contract. Notably, Section 34.13, aptly titled "Corrupt Practices," specifically prohibits either Party from engaging in "any activity that involves corruption." [EPC Contract § 34.13(a).] The EPC Contract includes a list of such corrupt practices, including giving or offering a "bribe, gift, present, gratuity or commission" to induce another to "take or cease to take any action related to the Agreement or the Project." [EPC Contract § 34.13(c).] This comports with the common meaning of the term "corruption," which, however one views it, would include the payment of a bribe. The Parties further specified that they agree "to comply with . . . the 1977 United States Act on Foreign Corrupt Practices [(the "FCPA")]. . . and the UK Bribery Act of 2010." [EPC Contract § 34.13(a).] Notably, the Parties did not premise their obligation on a court's finding of criminal liability under the FCPA. Rather, the Parties imposed on themselves the contractual obligation to not engage in corruption or to act in a manner contrary to the FCPA, the UK Bribery Act of 2010 and Guatemalan law. Thus, Section 34.13 incorporates by reference these criminal laws not for purposes of establishing criminal liability, but rather, for establishing certain conduct that would result in a breach of the EPC. It just so happens that this conduct is specified by the FCPA. AICSA's claim under Section 34.13 does not seek the Tribunal's enforcement of the FCPA, nor civil enforcement of the FCPA. AICSA simply seeks the Tribunal's examination of whether HSR engaged in conduct that the FCPA prohibits, which would in turn violate Section 34.13(a) of the EPC Contract. This factual and contractual analysis is within the Tribunal's jurisdiction. As discussed in section VII of the Final Award, AICSA presented evidence that HSR bribed a governor using false invoices for metal sheets for roofing that were not delivered to generate illicit payments. The evidence establishes the billing was a sham in violation of Section 34.13 of the EPC Contract. The Tribunal should consider AICSA's damages resulting from the alleged breach of contract.

Executed in Miami, Florida, U.S.A., October 29, 2018.

Adolfo E. Jiménez
Arbitrator