ICC (INTERNATIONAL CHAMBER OF COMMERCE)

ICC Case No. 20217/RD/MK

COBRA INFRAESTRUCTURAS HIDRÁULICAS, S.A. V. SOCIETA ESECUZIONE LAVORI IDRAULICI, S.P.A. & SELI OBRAS SUBTERRÁNEAS, S.A.

FINAL AWARD

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30 June 2017

Tribunal:
George A. Bermann (President)
Abby Cohen Smutny (Appointed by the claimant)
Cristian Conejero Roos (Appointed by the respondent)

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Final Award

I. THE PARTIES

1. Claimant Cobra infraestructuras Hidràulicas, S.A. ("Cobra") is a *sociedod anónimo* incorporated and existing under the laws of Spain, with its principal place of business at Calie Cardenal Marcelo Spinola no. 10 28016, Madrid, Spain. It is represented in this arbitration by Dr. Sabine Konrad and Mr. Arne Fuchs of McDermott Will & Emery Rechtsanwälte Steuerberater LLP, Feidbergstrasse 35. 60325 Frankfurt am Main. Germany and McDermott Will & Emery LLP, 333 Avenue of the Americas, Suite 4500, Miami, Florida 33131, USA.

2. Respondent and Counterclaimant 1 Società Esecuzione Lavorl Idraulici, S.P.A. ("SELI Italy") is a società *per azioni* incorporated and existing under the laws of Italy, having its principal place of business at Via Achille Campanile, 73,00144, Rome, Italy. It is represented in this proceeding by Peter R. Chaffetz and Yasmine Lahiou of Chaffetz Lindsey LLP, 1700 Broadway, 33d floor, New York, New York, 10017, USA.

3. Respondent and Counterclaimant 2 SELI Obras Subterràneas, S.A. ("SELI OBRAS") is a sociedad anónimo incorporated and existing under the laws of Guatemala, having its principal place of business at Calle A, San Cristóbal 15-6, Zona 8, Mixco, Guatemala City, Guatemala. It is represented in this proceeding by Chaffetz Lindsey LLP, 1700 Broadway, 33d floor, New York, 10017, USA.

4. For the sake of clarity, SELI Italy and SELI OBRAS will generally be referred to as "SELI" throughout this award unless a specific reference to one of them is necessary to describe the parties' claims, counterclaims, or requests for relief.

II. THE TRIBUNAL

5. The Arbitral Tribunal is composed as follows:
Professor George A. Bermann, Columbia University School of Law, 435 West 116th St., New York, New York, 10027, USA

   Abby Cohen Smutny, White & Case LLP, 701 Thirteenth St., N.W., Washington DC. 20005, USA

   Cristian Conejero Roos, Philippi Prietocarrirosa Ferrero DU & Uria, Av. El Golf 40,20"floor, Las Condas, Santiago, 7550107, Chile.

III. THE SECRETARIAT

6. Counsel in the ICC Secretariat is Marek Krasula, SICANA, Inc., 1212 Avenue of the Americas, New York, New York, 10036, USA.

IV. THE DISPUTE AND ARBITRATION AGREEMENT

7. This case includes both (a) a claim for damages for breach of contract ("the Tunneling Subcontract" or "the Subcontract") and a claim of fraudulent misrepresentation and (b) a counterclaim for damages for wrongful termination of the Tunneling Subcontract. Both parties also seek declaratory and other relief, as outlined below (paras. 185, 189-90,194,196, infra).

8. The arbitration agreement between the parties on which this proceeding is based is found in Clause 8 of the Tunneling Subcontract, which incorporates Section 32 of another contract, the so-called EPC Contract, identified and described below (paras. 155-165, infra). According to the arbitration provision:
If the Dispute has not been resolved through negotiation...., 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 [1], except as those rules may be modified herein or by mutual agreement by the Parties. (Sec. 32.4) [2]

The Arbitration proceeding shall be conducted in the city of Miami, Florida, United States of America or such other location upon which the Parties top the Arbitration may agree. (Sec. 32.4(ii))

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 if such Party provides the other party with advance notice and a written translation into English of such testimony or documentary evidence. (Sec. 32.4(iii)]

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[1] The ICC Rules in force as of the data that this Arbitration commenced are the ICC Rules of 2012.

[2] The provision also states.
(i) 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 ('Arbitral Chair") 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 Arbitral Chair selection process.
(iv) At the 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 under extraordinary circumstances where the interest of justice requires a different procedure. Notwithstanding the ICC Rfles, a Party shall provide a list to the arbitration panel and the opposing parties of the names and addresses of each witness whose written or spoken testimony it intends to present in the arbitration proceeding and the subject matters upon which, and the language in which, they will testify within a reasonable period prior to the date of the hearing at which such witness may testify. Furthermore, and without regard to the provisions of the ICC Rules, any person named by a Party to be a witness shall be made available for deposition by the opposing parties a reasonable period prior to the hearing at which such witness may testify.
(v) The procedural rules specified in this Article and the ICC Rules shall be the sole procedures for the resolution of Disputes between or among the Parties arising from or relating to this Contract and/or with regard to the conduct of any Arbitration or the taking of evidence therein. Wherever the procedures of this Article and the ICC Rules are in conflict, the procedures of this Article shall govern and apply.
(vi) The arbitral award in favor of the prevailing Party shall include an award for pre-award (pro-judgment) interest on the awarded amount and attorneys' fees and costs incurred in connection with such Dispute. Such arbitral award, pre-award (pre-judgment) interest on the awarded amount, attorneys' fees and costs incurred in connection with the Dispute shall all be subject to the limitation on damages contained in Section 31.2.

The Tribunal shall be required to apply the substantive law of the State of New York in ruling upon any Dispute, in accordance with the parties' intent as expressed in Section 1.9 of this Contract. (Sec. 32.4(vii)]

9. As explained further below (paras. 166-169, infra), for security purposes, SELI transferred to Cobra ownership of certain equipment through a separate agreement, the TBM Pledge Agreement, which contained its own arbitration agreement, as follows:
For any issue derived from the interpretation or application of this agreement, the Parties expressly submit to arbitration in accordance with the rules of the Civil and Commercial Arbitration Court (CIMA), which will be responsible for administering the arbitration and designating the sole arbitrator. The arbitration shall take place in Madrid in the Spanish language, and the applicable law shall be Spanish law. [3]

   The term "TBM." used in the phrase "TBM Pledge Agreement." signifies "tunnel boring machine," the equipment to be used in excavation of the tunnel pursuant to the Tunneling Subcontract.

10. However, the parties subsequently agreed that any claims between them in relation to the TBM Pledge Agreement would be determined, not in accordance with the TBM Pledge Agreement's arbitration clause, but rather by the Arbitral Tribunal empaneled pursuant to the arbitration clause of the Tunneling Subcontract. On the other hand, any such claims would be subject to the application of Spanish law. [4]

V. PROCEDURAL HISTORY

11. On April 30, 2014, Cobra filed its Request for Arbitration with the Secretariat.

12. On May 5, 2014, the Secretariat wrote to Cobra, acknowledging receipt of its Request for Arbitration and receipt of the filing fee.

13. On May 7, 2014, the Secretariat wrote to SELI, informing it of Cobra's Request for Arbitration as well as Cobra's request that the time for the co-arbitrators to nominate a Tribunal president be reduced to ten days pursuant to

14. Article 12(5) of the ICC rules, and inviting it to file an Answer within 30 days of receipt of the communication. On the same day. It informed Cobra of its communication to SELI and requested payment of the balance of the required provisional advance in the amount of 102,000.

15. On May 12, 2014, the Secretariat wrote jointly to Cobra and SELI, confirming receipt of the Statement of Acceptance, Availability, Impartiality and Independence of Ms. Abby Cohen Smutny, as Cobra's nominee as co-arbitrator.

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[3] TBM Pledge Agreement, clause 9.

[4] Statement of claim, para. 15; Statement of counterclaim, paras, 3, 13.

16. On May 14, 2014, the Secretariat again wrote jointly to Cobra and SELI reminding counsel that the co-arbitrators were to nominate the President of the Tribunal, doing so within 30 days of the co-arbitrators confirmation or appointment, while also confirming receipt from Cobra of the balance of the required provisional advance in the amount of USD 102,000.

17. On June 9, 2014, Respondent SELI wrote to the Secretariat nominating as its co-arbitrator Mr. Critstián Conejero and requesting an extension of time to file its Answer, while asking the Secretariat to deny Cobra's request to shorten the 30-day time limit for nominating the President of the Tribunal.

18. The next day, the Secretariat wrote to both Parties, granting SELI's request for an extension until June 27, 2014 to submit its Answer and to raise any pleas pursuant to Article 6(3) of the ICC Rules.

19. On June 13, 2014, the Secretariat again wrote to both Parties providing the Statement of Acceptance, Availability, impartiality and independence of Mr. Critstián Conejero.

20. On June 17, 2014, Cobra sent a letter to the Secretariat responding to SELI's opposition to Cobra's request to shorten the 30-day time limit for nominating the President of the Tribunal. On the same day, the Secretariat replied by letter to both Cobra and SELI informing counsel that the co-arbitrators will have 30 days from the date of their confirmation or appointment to nominate a President of the Tribunal.

21. On June 23, 2014, Cobra submitted to the Secretariat a Request for Joinder to the proceedings of SELI OBRAS. The Secretariat wrote to Cobra and SELI on June 25, 2014, confirming receipt of that Request as well as receipt of Cobra's USD 3000 filing fee. On the same day, the Secretariat wrote to SELI OBRAS informing it of the Request for joinder and inviting it to file an Answer to that Request within 30 days of receipt of the correspondence. It informed SELI OBRAS that, where an additional party is joined, and the dispute is referred to three arbitrators, the additional party may jointly nominate an arbitrator with Claimant or Respondent, as the case may be.

22. On June 26, 2014, Cobra confirmed that the amount in dispute in connection with its claim stood at USD 15,038,160.

23. On June 27, 2014, SELI submitted its Answer and Counterclaim.

24. On June 30, 2014, the Secretariat acknowledged receipt of SELI's Answer and Counterclaim.

25. On July 3, 2014, Cobra requested that the ICC Court fix separate advances on costs for the claim and counterclaim under Article 36(3) of the Rules.

26. On July 7, 2014, SELI confirmed, at the Secretariat's request, that the amount of damages sought by it in the arbitration is USD 20 million.

27. On July 8, 2014, the Secretariat confirmed that the total amount in controversy was USD 35,038,160 (USD 15,038,160 on the claim and USD 20,000,000 on the counterclaim).

28. On July 14, 2014, the Secretariat, among other things, requested SELI OBRAS to submit by July 28, 2014 its comments on the constitution of the Arbitral Tribunal, and more particularly to indicate whether it nominates an arbitrator jointly with SELI.

29. On July 21, 2014, SEU OBRAS indicated that it 'fully adopts and incorporates by reference" SELI's Answer, Jurisdictional Observations and Counterclaim. It further indicated that it joined in SELI's nomination of Mr. Critstián Conejero as its party-nominated arbitrator. The Secretariat reminded the co-arbitrators to jointly nominate a President of the Tribunal within 30 days of the date of their confirmation.

30. On July 21, 2014, SELI submitted an Answer to Cobra's request for joinder, consenting to that request and reporting that SELI OBRAS joined in SELI's nomination of Mr. Critstián Conejero as its party-nominated arbitrator.

31. On July 22, 2014, the Secretariat communicated to counsel Ms. Abby Cohen Smutny's and Mr. Critstián Conejero's updated Statements of Acceptance, Availability, Impartiality and Independence. The Secretariat confirmed their appointment the following day.

32. On July 31, 2014, Cobra filed its Reply to the Respondents' counterclaim.

33. On August 6, 2014, the Secretariat notified Professor George A. Bermann of his joint nomination by the co-arbitrators as President of the Arbitral Tribunal and invited him to complete a Statement of Acceptance, Availability, Impartiality and Independence.

34. On August 7, 2014, the Court of Arbitration fixed the advance on costs at USD 560,000, subject to later readjustment.

35. On August 11, 2014, the Secretariat transmitted the arbitration file to the Arbitral tribunal members.

36. On August 30, 2014, Professor Bermann introduced himself to counsel and advised that a draft Terms of Reference would be forthcoming. He circulated a preliminary draft to the co-arbitrators on the following day and, with their approval, communicated it to counsel, as well as the Secretariat, on September 1, 2104.

37. On September 4, 2014, the Secretariat acknowledged receipt of a portion of Cobra's share of the advance on costs in the amount of USD 172,000.

38. On September 11, 2014, the Secretariat shared with Professor Bermann comments on the draft Terms of Reference.

39. On September 16, 2014, the President of the Tribunal invited counsel to confer and agree on as many aspects of the procedural aspects of the arbitration as possible.

40. On October 2, 2014, the Court of Arbitration extended the time for establishing the Terms of Reference until December 31, 2014.

41. On October 16, 2014, counsel communicated to the Tribunal the Parties' agreement to the draft Terms of Reference, along with additions to the list of facts alleged by Cobra and SELI. Counsel also conveyed the areas of agreement and disagreement between the Parties on procedural ground rules of the arbitration. The disagreements, as well as complaints over the other party's conduct in negotiated agreement on the ground rules, were elaborated upon further in communications of October 19 and 20, 2014 from counsel to the Tribunal

42. On October 20, 2014, the Secretariat provided the tribunal additional comments on the draft Terms of Reference.

43. On November 18, 2014, the Tribunal sent to counsel the proposed amended Terms of Reference as well a draft Procedural Order no. 1 and Annex.

44. On November 28, 2014, Cobra wrote to the Tribunal calling attention to the terms of a proposed *concordato preventivo* (restructuring plan) in the Italian insolvency proceedings concerning SELI, and requesting that the arbitration be terminated with prejudice, with each party paying its own share of the fees of the Tribunal and its own legal fees. This would amount to a global settlement including a general release as to any past, present or future claims or counterclaims arising out of the underlying contracts. As part of the arrangement, Cobra would hand over to SELI the TBM and any other machinery still on site, provided that SELI pays all costs related to their removal.

45. On December 5, 2014, SELI objected to Cobra's having unilaterally made the proposal set forth in its November 28, 2014 letter and invited the Tribunal to disregard it. It also rejected Cobra's proposal that the arbitration be terminated.

46. Although Procedural Order no. 1 had not yet been issued, due to remaining disagreements between counsel over the procedural calendar, the Tribunal on December 8, 2014 issued Procedural Order no. 2, in which it ruled that, assuming it was asked to terminate the arbitration and had authority to do so, did not consider the reported circumstances sufficient to warrant termination.

47. On December 12, 2014, counsel for Cobra wrote to the Tribunal complaining that the Respondents had refused to suspend the procedural schedule of the arbitration for the duration of ongoing settlement negotiations and were acting in bad faith. More specifically, Cobra asked the Tribunal to suspend the procedural schedule for the duration of good faith settlement negotiations between the Parties. It further asked the Tribunal, in the event it chose not to suspend the proceedings, to order Respondents to post security for costs in connection with their counterclaim.

48. On December 12, 2014, counsel on both sides submitted proposed revisions to the Terms of Reference and to Procedural Order no 1, including its Annex

49. On the same day, the Tribunal wrote to counsel, agreeing to both Parties' proposed amendments to the Terms of Reference and invited counsel for Claimant to print and sign ten copies of the Terms and forward them to counsel for Respondents for signature. It also indicated that it would very shortly review counsel's proposed revisions to draft Procedural Order no. 1 and issue that order in final form.

50. On December 28, 2014, the Tribunal issued Procedural Order no. 1 together with its Annex,

establishing the procedural calendar.

51. On January 19, 2015, the President of the Tribunal forwarded signed copies of the Terms of Reference to the Secretariat, to counsel and to the co-arbitrators.

52. On January 21, 2015, the Secretariat acknowledged receipt of the Terms of Reference, indicating that it would be forwarding them to the Court of Arbitration, along with Procedural Order no. 1 and its Annex.

53. On January 29, 2015, the President of the Tribunal inquired of counsel as to their views on the necessity of a case management conference. Counsel on both sides eventually indicated that they saw no need for a case management conference.

54. On January 30, 2015, the Tribunal confirmed that the Terms of Reference having been submitted to the Secretariat on January 20, 2015, that would be the start date for the procedural calendar laid down in the Annex to Procedural Order no. 1.

55. On February 2, 2015, Cobra filed a request for security for costs and for immediate suspension of the procedural calendar pending a ruling on that request. By communication of the same date, Respondents urged that those requests be rejected.

56. On February 3, 2015, the Tribunal denied Cobra's request for an immediate suspension of the procedural calendar.

57. On February 10, 2015, Respondents filed their response to Cobra's request for security for costs and request to suspend the proceedings. Counsel for Cobra replied to this response on February 13, 2015, and counsel for Respondents' further responded on February 17, 2015.

58. On February 22, 2015, the Tribunal issued Procedural Order no. 2 denying Cobra’s request for security for costs and for a suspension of the procedural calendar.

59. On March 12, 2015, the Court of Arbitration extended to December 31, 2015 the time limit for the Final Award in this proceeding.

60. Counsel for Cobra wrote to the Tribunal on March 18, 2015, complaining that Respondent or Respondent's counsel by a communication dated March 9, 2015 to SELI's bankruptcy counsel had misrepresented Procedural Order no. 2, dated February 22, 2015, to the *Commisiario* in the Italian insolvency proceedings with the result that the *Commissario* decided not to allow Cobra to vote on the *Concordato Preventivo.* Counsel for Respondents denied that the complaint had any basis.

61. On March 18, 2015, Cobra filed its Statement of Claim, accompanied by an expert report by Delta Consulting Group.

62. On March 19, 2015, the Tribunal issued Procedural Order no. 3, ordering counsel for Respondents to issue a further communication to the Italian authorities correcting any misapprehensions that the prior communication to those authorities may have produced after first submitting that

communication in draft to the Tribunal and opposing counsel. Counsel for Respondents submitted its draft communication on the following day. There ensued further correspondence to the Tribunal dated March 22 and March 23, 2015 from counsel on both sides concerning this matter.

63. On March 24, 2015, the Tribunal issued Procedural Order no. 4, directing counsel for Respondents (a) to send a communication to SELI's bankruptcy counsel containing the exact content indicated in the Procedural Order, (b) to request SELI's bankruptcy counsel to communicate that letter to all authorities and individuals to whom he might have sent or disclosed the March 9, 2015 letter referred to in paragraph 59, supra, and (c) to send the Tribunal and opposing counsel a copy of the required communication as sent, along with a confirmation that SELI's bankruptcy counsel had indeed further communicated it to all authorities and individuals to whom he might have disclosed the March 9, 2015 letter. On March 25, 2015, counsel for Respondents provided a copy of the letter required to be sent to SELl's bankruptcy counsel. On the same day, it provided a communication from SELI's bankruptcy counsel that he had done as requested.

64. On March 25, 2015, counsel for Respondents wrote to the Tribunal seeking an order to Cobra's counsel to submit (a) all fact witness statements in support of its affirmative case, (b) copies of all documents relied upon by Its expert witness, and (c) copies of the original foreign language versions of documents for which Claimant had submitted only an English-language translation. On March 27, 2015, counsel for Cobra replied, agreeing to submit certain of the requested materials, but refusing to submit others. On March 28, 2015, counsel for Respondents replied in turn, confirming that Cobra's counsel had complied with certain requests, but not others, and objected to its refusal to comply with them.

65. On March 29, 2015, the Tribunal issued Procedural Order no. 5, requiring Cobra (a) to submit by a certain date statements from all witnesses whose testimony it contemplated presenting in the proceedings (on pain of exclusion if inexcusably presented only at a later date), (b) to submit by a certain date all documents upon which the expert relied in its report, including those merely cited, unless previously submitted, and (c) to provide opposing counsel with original Spanish-language versions of documents produced only in English translation, unless previously provided. To facilitate the above steps, Procedural Order no. 5 required Respondents to furnish Claimant a complete list of documents relied upon or cited by the expert that neither accompanied the expert report, nor were subsequently furnished to Respondents, *not* were already in Respondents' possession. Respondents furnished Cobra that list on March 30, 2015. On the following day, Cobra objected that the list provided by Respondents was significantly over-inclusive and amounted to premature requests for discovery

66. On April 2, 2015, the Tribunal wrote to counsel conveying its impression that any misunderstanding between counsel in connection with Procedural Order no. 5 had been overcome and that no further procedural ruling was required of the Tribunal at that juncture.

67. However, on April 9, 2015, Respondents wrote to the Tribunal complaining that Cobra had not yet provided all the documents upon which its expert relied, as it was ordered to do in Procedural order no. 5.

68. On April 10, 2015, Cobra provided the English-language fact witness statements of Mr. Jose Luis Gamarra Mompeán and Mr. Raul Martin Rodrigues with attachments. It provided certain missing

Spanish-language versions on April 13, 2015.

69. On April 10, 2015, the Tribunal laid down a detailed procedure according to which ongoing disputes over the adequacy of Cobra's production in response to Procedural Order no. 5 could readily be resolved, with a view to avoiding further delay.

70. On April 13, 2015, Cobra communicated certain additional documentation provided by Delta Consulting Group pursuant to Procedural Order no. 5.

71. Due to ongoing conflict between counsel over compliance with Procedural Order no. 5, the Tribunal on April 13, 2015 issued Procedural Order no. 6 with further detailed instructions designed to identify through tables produced by counsel whether any documents required to be produced to the other side remained unproduced.

72. Having received those tables the following day (April 14, 2015), the Tribunal Issued Procedural Order no. 7, requiring Cobra to produce enumerated documents apparently not yet produced. By communication of April 15, 2015. Cobra objected to Procedural Order no. 7 as denying it fair and equal treatment and requested confirmation that all three members of the Tribunal were consulted on, and agreed to, issuance of Procedural Order no. 7. The President of the Tribunal, on behalf of the full Tribunal, replied on the same day to Cobra's objections, setting forth the basis for all instructions contained in Procedural Order no. 7 and specifically confirming (a) that all three Tribunal members approved the content of Procedural Order no. 7 in advance, (b) that all three regard the Procedural Order as having respected the Parties rights to fair and equal treatment, and (c) that all three approve the present communication.

73. On April 27, 2015, counsel for Respondents complained to the Tribunal that Cobra had refused, on the basis of an allegedly improper assertion of confidentiality, to produce the RENACE Acceleration Plan relied upon by its Request for Arbitration, Statement of Claim and Expert Report. Cobra replied on the next day, among other things, denying that it refused to produce the document, but rather was merely awaiting RENACE's consent to its disclosure, in its reply, Cobra again asserted that its right to fair and equal treatment was being infringed in the proceedings. By e-mail message of the same date, the Tribunal urged continued cooperation between the Parties, while rejecting Cobra's assertion that it had been denied fair and equal treatment.

74. On May 12, 2015, Respondents requested an adjustment of the procedural calendar in its favor to which Cobra consented on condition of a comparable adjustment in its favor. Respondents having consented to that further adjustment, the Tribunal confirmed on May 17, and May 21, 2015 that the calendar adjustments were approved.

75. On May 25, 2015, Respondents/Counterclaimants filed their Statement of Defense and Counterclaim.

76. On July 7, 2015, Cobra requested an adjustment to the procedural calendar, so that its Statement of Defense to Counterclaim would be due July 24, 2015 rather than July 13, 2015 as scheduled, an adjustment to which SELI consented. Cobra also reported that counsel jointly agreed to move the filing date for simultaneous reply submissions to November 13, 2015. On July 12, 2015, the Tribunal indicated its approval of these schedule changes.

77. On July 20, 2015, Cobra wrote to the Tribunal asking it to order SELI to produce copies of enumerated documents relied upon by Navigant Consulting, Inc. in its report in support of SELI's Statement of Defense and Counterclaim, but allegedly not yet provided to Cobra. SELI replied on July 22, 2015, suggesting that the request was untimely and in any event sought documents upon which SELI's expert did not rely. In the same letter, SELI provided two documents that its expert had inadvertently omitted from its report. On July 23, 2015, the Tribunal issued Procedural Order no. 8, granting in part and denying in part Cobra's request.

78. On July 24, 2015, Cobra submitted its Statement of Defense to Counterclaim. In that same letter, it objected to Procedural Order no. 8 which, while not granting an extension of the deadline for submission of the Statement of Defense to Counterclaim, did inform Cobra that it would entertain a request by Cobra to modify or amplify that Statement if Cobra demonstrated that production of documents made by SELI pursuant to the Procedural Order justified such modification or amplification. Cobra complained of unequal treatment of the parties.

79. On July 25, 2015, Cobra claimed that SELI had produced very few of the documents whose production was required by Procedural Order no. 8. Without determining the extent at SELI's compliance, the Tribunal directed SELI to complete production under that Procedural Order by no later than July 28, 2015. SELI agreed to produce project documents reviewed by its expert but not necessarily cited or relied upon in the expert report, on condition that Cobra do the same with regard to project documents reviewed by its expert, but not necessarily cited or relied upon in the expert report.

80. On July 27, 2015, the Tribunal wrote to counsel in clarification of Procedural Order no. 8. The Tribunal stated that it had not ordered SELI to produce all project documents that its expert had consulted, but only documents that the expert mentioned in its report as having specifically been requested from counsel, which documents Respondents then provided in response to that request and the expert thereafter did consult, in the interest of equal treatment, the Tribunal directed Cobra to likewise provide documents that its expert mentioned in its report as having specifically been requested from counsel, which documents Cobra then provided in response to that request and the expert thereafter did consult. The following day, counsel for Cobra charged the Tribunal with aggravating what it regarded as a procedural imbalance in favor of SELI and more generally favoring SELI. On the following day, the Tribunal explained that every action taken had been taken in the Interest of fair and equal treatment of the Parties and that it unanimously rejected as unfounded any suggestion of favoritism on its part at any time toward SELI. On July 30, 2015, Cobra replied that, under Procedural Order no. 8, as clarified, there were no additional documents to be produced. It reiterated its reservation of the right to challenge both the Tribunal and any Award it might render.

81. On August 2, 2015, Respondent wrote that, in compliance with Procedural order no. 8, as clarified, it provided Cobra with all documents that SELI's expert witness specifically requested of SELI and that the expert then reviewed in connection with preparation of its report, except insofar as those documents had already been produced.

82. On August 5, 2015, Cobra produced certain English-language translations and Spanish-language originals that it had inadvertently omitted to produce.

83. On August 21, 2015, Cobra sought leave to amend the Delta Rebuttal Report to take into account two documents produced by SELI pursuant to Procedural Order no. 8. SELI, on the same day, asked for an opportunity to respond to that request. Again on the same day, Cobra objected to SELI's request for that opportunity to comment and stated that, if the Tribunal were to give SELI an opportunity to comment. Cobra would file an objection to the conduct of the arbitration by the Tribunal pursuant to Article 39 of the ICC Rules.

84. On August 21, 2015, counsel jointly proposed that hearings in the case be scheduled for January 4 through 15, 2016. On August 24, 2015, the President of the Tribunal reported that the first weeks available to all three members of the Tribunal were the weeks of March 7 and March 28, 2016.

85. On August 24, 2015, in conformity with Procedural Order no. 8, the Tribunal granted Cobra leave to amend the Delta Rebuttal Report and, correspondingly, its Statement of Defense to Counterclaim. On the same day, SELI asked the Tribunal to clarify that Cobra was given leave to amend the Delta Rebuttal Report and its Statement of Defense to Counterclaim only to the extent that such an amendment specifically reflects the two additional documents provided by SELI. The Tribunal confirmed on that same day that leave to amend the Statement of Defense to Counterclaim was given to Cobra only to the extent that amendments to the Delta Rebuttal Report so required. The following day, the Tribunal indicated that if, upon receiving Cobra's amended submission, SELI can show that some or all of the amendments are ones that Cobra could or should have interposed earlier, or otherwise exceeded the Tribunal's directions, the Tribunal would consider whether such amendments were permissible under Procedural Order no. 8.

86. On August 28, 2015, the Tribunal, having learned of Cobra's unavailability during the two proposed hearing weeks in March 2016, inquired as to counsel's availability during April and May 2016.

87. On August 28, 2015, both Cobra and SELI submitted a Redfern Schedule setting forth their document requests, their opponent's objections and their own replies.

88. On September 2, 2015, the President of the Tribunal requested counsel to jointly produce a procedural calendar showing, unlike the calendar set out in the annex to Procedural Order no. 1, fixed dates for each procedural step, rather than merely intervals of time between them. He also asked counsel to consult their calendars with a view to establishing hearing dates in April or May 2016.

89. On September 3, 2015, SELI indicated its availability for hearings between April 9 and 24, 2016 and between May 7 and May 22, 2016.

90. On September 5, 2015, the Tribunal issued Procedural Order no. 9, attaching the Parties' respective Redfern Schedules with the Tribunal's disposition of each request shown in the final column of the table.

91. On September 11, 2015, Cobra submitted, as invited by the Tribunal, an amended version of the Delta Rebuttal Report and the Statement of Defense to Counterclaim.

92. On September 25, 2015, Cobra indicated its unavailability for hearings in the April 2016 dates proposed by SELI, but indicated its availability for hearings starting on May 23, 2016 and

throughout June 2016.

93. On September 29, 2015, and in conformity with Procedural Order no. 8. Cobra filed its Amended Statement of Defense to Counterclaim and the Amended Delta Rebuttal Report.

94. On October 3, 2015, the Tribunal directed the Parties to focus on the weeks of May 23 and May 30, 2016 for hearings.

95. On October 13, 2015, counsel jointly agreed on hearing dates of May 23-27, 2016 and May 31 to June 3, 2016.

96. On October 15, 2015, the Parties jointly proposed to the Tribunal hearing dates of Monday, May 23 to Friday, May 27, 2016 and Tuesday May 31 to Friday, June 3, 2016.

97. On October 23, 2015, the Tribunal issued Procedural Order no. 10 supplementing Procedural Order no. 9 with a ruling requiring both parties to produce all photographs as well as all photographic reports prepared on the basis of photographs taken in the period 2011 to 2013 insofar as they relate to Respondents' scope of work under the Tunneling Subcontract, except to the extent the other Party is known to be in possession of them.

98. On November 3, 2015, counsel for Cobra reported that they had learned that the Russian Federation, represented by the Washington DC office of White & Case LLP had retained Professor Bermann as legal expert in proceedings pending in the U.S. district court for the District of Columbia in connection with the award rendered in the case of Yukos v. the Russian Republic. Cobra thus asked Professor Bermann for further information on his past and present relationship with White & Case LLP, and notably how often he had been retained by that firm as expert o *r* in any other capacity. On the same day. Professor Bermann replied that, over the course of his forty years of professional activity as expert and arbitrator, as well as Columbia Law School professor, he had been retained by White & Case LLP as expert in one ease in addition to the one referenced by Cobra and had been nominated as arbitrator by the firm on two occasions over the same period.

99. On November 13, 2015, Respondents submitted their Reply to Claimant's Amended Statement of Defense to Counterclaim, with supporting exhibits and authorities, as well as a number of fact and expert witness statements. On the same day. Cobra submitted its Reply to SELI's Statement of Defense, with attachments.

100. On November IS, 2015, Cobra submitted its Reply to the Statement of Defense.

101. On December 28, 2015, the Court of Arbitration extended the time limit for rendering the Final Award in this case to August 31, 2016.

102. On January 1, 2016, the President of the tribunal urged counsel to endeavor in as cooperative a spirit as possible to agree on ground rules governing the hearings scheduled for May and June 2016.

103. On February 21, 2016, the President of the Tribunal reiterated the Tribunal's request that counsel attempt to reach agreement at the earliest possible moment on all aspects of the upcoming hearings.

On February 24, 2016, counsel informed the Tribunal of their agreement to present closing arguments rather than post-hearing briefs and their expectation that all nine days set aside for the hearings would be needed.

104. On March 21, 2016, counsel jointly reported on progress in agreeing on certain procedural ground rules for the hearing. On April 20, 2016, the Tribunal urged counsel to agree on remaining procedural issue relating to the hearing and proposed that a pre-hearing conference call be held on May 17, 2016.

105. On May 2, 2016, the Tribunal reminded counsel of the various understandings on hearing procedure recorded in Procedural Order no. 1. The Tribunal requested from counsel a joint provisional hearing schedule showing the sequence of witnesses, as well as a single full hard copy set of the complete record in the hearing room and a single thumb drive from each party containing all of its submissions, including exhibits and legal authorities. It also recommended having a binder of documents intended to be used or referred to in connection with oral argument and examination or cross-examination of witnesses

106. On May 4, 2016, counsel jointly presented the Tribunal with their further agreed upon hearing arrangements. Thus, hearings were to be held at the Miami, Florida, offices of McDermott Will & Emery LLP, 333 SE 2d Avenue, # 4500, Miami, Florida 33131. The Parties agreed upon a presumptive daily hearing schedule of 9:30 a.m. to 5:30 p.m., with a one-hour lunch and short morning and afternoon breaks. Counsel provided a sequenced calendar of witness testimony, with the understanding that witnesses not shown on the calendar would not be called for cross-examination. It was further agreed that witness Mr. Barioffi, serving also as party representative, would not be sequestered during the hearing. Counsel agreed on there being both opening and closing arguments but no post-hearing briefs. The Parties agreed on retention of Mr. David Kasdan of World-Wide Reporting as court reporter (with each Party initially bearing half the cost) and retention by each side of its own interpreter, as needed.

107. The only point of disagreement between counsel was in relation to the timing of expert witness testimony. SELI favored beginning cross-examination of Cobra's expert witnesses on Thursday, May 26, 2016 and ending it the following day, with cross-examination of SELI's expert witnesses beginning on Tuesday, May 31, 2016 and the hearings concluding on Thursday, June 2 rather than Friday, June 3, 2016. Cobra favored all expert witness examination taking place during the second week of hearings, thus starting on Tuesday, May 31, 2016. On May 5, 2016, the Tribunal resolved the disagreement between counsel over the timing of expert witness in favor of the position taken by Cobra. Thus expert witness testimony would only begin on Tuesday, May 31, 2016.

108. On May 6, 2016, both Parties submitted a certain number of additional exhibits without objection by the other.

109. SELI provided the Tribunal with the requested thumb drive on May 9, 2016, and Cobra did so on May 11, 2016.

110. On May 13, 2016, counsel provided the Tribunal a consolidated chronological list of factual exhibits.

111. On May 17, 2016, a telephonic pre-hearing conference call was held, during which no matters of

disagreement between the parties were raised.

112. On May 21, 2016, the Tribunal issued Procedural Order no. 11. recapitulating all of the agreed upon or otherwise settled procedural arrangements

113. Hearings in the case were held From Monday, May 23 to Thursday, May 26, 2016 and from Tuesday May 31 to Friday, June 3, 2016.

114. On May 24 and May 25, 2016, respectively, SELI and Cobra produced a copy of their power point opening presentations in pdf form.

115. On May 25, 2016, Cobra produced, at the Tribunal's request, copies of the minutes of the Renace II Steering Committee Meeting of March 21, 2013 in its Spanish original and English translation.

116. On May 27, 2016, SELI produced Navigants Supplemental Report of that date.

117. On May 30, 2016, both Cobra and SELI produced, at the Tribunal's request, a table showing exhibits and witness testimony pertinent to the question of the Parties' delay in contract performance.

118. On May 30, 2016, SELI also produced certain outstanding items requested by the Tribunal during the first week of hearings. These included the pdf page numbers reflecting invoices and proof or payment by SELI to APSA as testified to by Mr. Barioffl. The relevant documents are found at NCI Exhibit 48, pdf pages 41-47 and 84-97. They also include the English translation of Exhibit R-105 used in the cross-examination of Cobra's witness Mr. Gamarra Mompean.

119. On May 30, 2016, Cobra produced, at the Tribunal's request, minutes of the Renace II Steering Committee meeting of May 22, 2013.

120. On May 31, 2016, Cobra produced an electronic copy of Delta’s power point presentation of that date.

121. On June 1, 2016, SELI, at the Tribunal's invitation, submitted a letter concerning Cobra's assertion that it had asked for but not received documents from SELI reflecting actual costs borne by SELI in refurbishing the TBM and other equipment.

122. On June 3, 2016, both parties presented hard copies to the Tribunal of their closing arguments.

123. On June 13, 2016, counsel on both sides provided the Tribunal, at its request, with a table of exhibits and transcript testimony in connection with each Party's claims of delay on the other Party's part.

124. In communications of June 10 and 13, 2016, Cobra complained that SELI had not followed the Tribunal's instructions with regard to the table of exhibits and transcript testimony relating to the parties' alleged performance delays and had altered the written version of its closing presentation. SELI responded on June 10 and 14, 2016. On June 14, 2016, the Tribunal rejected Cobra's request that Respondents be ordered to remove additions it had made to the table of references to delay in performance, finding the amplifications potentially useful to the Tribunal. In doing so, the Tribunal invited Cobra to present any amplifications of its own. However, the Tribunal required SELI to

clearly indicate the specific changes it had made in the revised written version of its closing presentation, and SELI did so. On the next day, Cobra asked the Tribunal to strike SELI's revised written closing presentation and to order that SELI produce an unaltered electronic copy of its original dosing presentation, while SELI opposed these requests. On June 15, 2016, the Tribunal issued Procedural Order no. 12, in which it declined to strike any portions of SELI's closing presentation but undertook to examine the contested portions of the presentation in the context of the document as a whole and to disregard any portions it found to represent unwarranted amplifications.

125. On July 20 2016, the Parties jointly submitted corrected versions of the hearing transcripts reflecting track changes by both sides. That communication records Cobra's objections to four corrections to the hearing transcript proposed by SELI.

126. On July 21, 2016, the Secretariat informed counsel that the Court of Arbitration had increased the advance on costs from USD 560,000 to USD 735,000 and requested payment by each side of USD 87,500 by August 4, 2016.

127. On July 29, 2016, the Secretariat acknowledged receipt from Respondents of the amount of USD 87,500.

128. On August 5, 2016, the Secretariat acknowledged receipt from cobra of USD 87,500 in payment of its share of the readjusted advance on costs and confirmed that the entire advance on costs readjusted at USD 735,000 had been paid by the Parties.

129. On August 19, 2016, the Court of Arbitration extended the time limit for rendering the Final Award to September 30, 2016. On September 29, 2016, the Court further extended that time limit to November 30, 2016.

130. On October 17, 2016, the Tribunal invited counsel to present their respective Statements of Costs and urged that they agree on a common format for that purpose.

131. On November 9, 2016, counsel jointly informed the Tribunal that they had agreed to file simultaneous cost submissions according to a common Excel template and without production of time sheets or invoices. They further agreed to have another two weeks to comment on the other side's submission or request supporting documents. However, counsel reported disagreement over the desirability of additional argument in regard to costs. Respondents proposed submitting legal and factual argument in support of claims for fees and costs in a letter brief of no more than ten pages, while Cobra opposed the interposition of additional arguments as unnecessary.

132. On November 12, 2016, the Tribunal informed counsel that it was not in need of further factual or legal submissions with regard to the eventual allocation of fees and costs in the case.

133. On November 29, 2016, both Parties submitted to the Tribunal their statement of costs in the format agreed between the Parties on November 9, 2016.

134. On December 1, 2016, the Court of Arbitration extended the time limit for rendering the Final Award

to January 31, 2017.

135. On December 13, 2016, SELI informed the Tribunal, on its own behalf and on behalf of SELI OBRAS that it had no comments on Cobra's statement of costs. On the same day, however, counsel for Cobra objected to certain of SELI's statements of costs as excessive or otherwise unreasonable. SELI replied rejecting Cobra's challenges to the amount of costs reported in SELI's Statement of Costs.

136. On December 17, 2016, SELI produced, at Cobra's request, invoices showing printing costs incurred by Respondents in the arbitration and proof of their payment. At that point, the Tribunal declared the proceedings closed pursuant to Article 27 of the ICC Rules.

137. On January 6, 2017, the Court of Arbitration extended the time limit for rendering the Final Award to February 28. 2017. The Court of Arbitration subsequently extended the time limit for rendering the Final Award to March 31, 2017, April 30, 2017, May 31, 2017, June 30, 2017, and July 31, 2017.

VI. THE UNDERLYING CONTRACTS

(a) The Tunneling Subcontract

138. As noted, the disputes in the present arbitration arise under a contract entered into between Cobra and SELI ("the Tunneling Subcontract" or "Subcontract") on December 29, 2011.[5] This section provides a description of the Subcontract and the Tribunal's findings concerning specific disputes between the parties over the interpretation of the Subcontract.

139. The Tunneling Subcontract provided for SELI to construct a 4200-meter-long steel fiber reinforced concrete segment tunnel ("Tunnel I") in connection with construction of a 130-megawatt hydroelectric power plant, known as the 'Renace II Project,"[6] situated in the vicinity of Coban, Guatemala. Tunnel I was to conduct water from another facility (the Renace I Project) to a sand trap[7] and reservoir area, after which it would enter into another tunnel ("Tunnel II") and eventually into a Machine House.[8] Though Tunnel II was a pressurized tunnel, the water supply in Tunnel I was to flow without pressure. The Subcontract price was USD 25,967,300.96.[9]

140. The project that is the subject of the Tunneling Subcontract has distinctive components delineated below.

(i) Excavation by the Tunnel Boring Machine Method ("TBM")

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[5] Tunneling Subcontract. Exh. R-1.

[6] Statement of claim, para. 1.

[7] The sand trap was a lecture of the Renace II power plant design serving to filter out silt and debris in water flowing from Tunnel I into the reservoir

[8] Statement of claim, para 3.

[9] Answer and counterclaim, para. 9.

141. The Tunneling Subcontract specifically called *tor* SELI to employ a "TBM drilling technology," a technology that entails use of a "tunnel boring machine" ("TBM").[10] Through the TBM technology, the entire cross-section of a tunnel is drilled, simultaneously with the removal of debris. This technology was newer than, and widely considered as preferable to, the more traditional "drill-and blast" method of excavation. However, use of the TBM method still required that roughly the first fifteen meters of the tunnel be excavated through the "drill-and-blast" method." The excavation of this portion of the tunnel was to be performed not by SELI, but by another company, Proacon.

142. The TBM is also exceptionally large and heavy and therefore transported to the construction site in segments. The TBM drilling method requires very considerable site preparation, as well as the considerable time (six to eight weeks) needed to assemble the TBM. In addition, the assembly process requires use of several heavy cranes. However, the TBM excavate a given length of tunnel with much greater speed than the "drill-and-blast" method, and is both safer and ultimately more economical. It also results in a tunnel with enhanced structural integrity.[11]

143. Assembly of the TBM by SELI was to take place in a dedicated assembly area close to the entry portal of the tunnel. The assembly area was to include a concrete structure or "cradle" that would hold the TBM while assembly takes place.

(ii) Production of the Tunnel lining Segments ('dovelas')

144. While the TBM progressively excavates the tunnel, it also installs a tunnel lining as it proceeds. The Subcontract specified that SELI was to line the tunnel with prefabricated concrete ring segments ("dovelas").[12] It was SELI's responsibility to produce the dovelas at an on-site dovelas factory ("dovelas factory") in parallel with excavation of the tunnel.[13]

145. The dovelas factory consisted of several parts. One part was the "shed," where the equipment needed to fabricate the dovelas (a carrousel, a bridge crane, a boiler, rails, a generator, and dovela molds to be imported from Italy) were to be situated,[14] A second part was a concrete plant to produce concrete for the manufacture of dovelas. The factory site also included a storage area for storing prefabricated dovelas prior to excavation. The entire factory required a building "platform," and all of its parts except the storage area needed a foundation.

(iii) Site Preparation

146. If assembly of the TBM, excavation of the tunnel and construction of the dovelas factory were among SELI's chief responsibilities under the Tunneling Subcontract, a principal obligation of Cobra was preparation of the site. This entailed, among other things, providing (a) a cradle upon which

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[10] Tunneling Subcontract. clause 4.

[11] Lianos ws. paras 22-24

[12] Answer and counterclaim, para 12.

[13] Statement of claim, paras. 22, 26

[14] Exh. R-45 (SELI monthly rpt for Sept 2012).

the TBM would be assembled on-site, (b) platforms for the entire dovelas factory and associated structures, and (c) access routes to both the assembly and the dovelas factory sites. [15]

(iv) Project Timetable

147. The Tunneling Subcontract established, in its Annex II, a series of performance deadlines, as follows: [16]

Feb. 27, 2012 - performance bond guaranteeing completion due from SELI in amount of 12.5 % of contract price or USD 3,245,912.62

Feb. 29, 2012 - completion of access roads to TBM

June 27, 2012 - start of transport of TBM parts

July 23, 2012 - commencement of fabrication of dovelas

Aug 7, 2012 - completion of transport of TBM parts

Aug. 8, 2012 - start of assembly of TBM

Sept 26, 2012 - completion of assembly of TBM

Sept 28, 2012 - commencement of tunnel excavation

July 12, 2013 - completion of tunnel excavation of Tunnel 1

Nov. 30, 2013 - completion of project

148. As noted in paragraphs 209-211, infra, these dates were subsequently modified by agreement between the parties.

(v) Financial Arrangements

149. The Tunneling Subcontract also contained a number of specific provisions, apart from contract price, regarding financial relations between the parties. These provisions follow.

150. First, Cobra was required to make an advance payment to SELI in the amount of USD 2,359.9S7.86, on condition that SELI previously secure and deliver an "advance payment guarantee" in the same amount from a first-rate international bank. [17] Once Cobra made the advance payment, the amount of that payment was to be proportionately deducted from future performance payments owed by

[15] Tunneling Subcontract, declaration 2.

[16] Statement of claim, para. 24.

[17] Tunneling subcontract, sec. 6.6.3

Cobra to SELI over the course of the project [18]

151. Second, SELI was to post a separate "performance guarantee" in the amount of 12.5% of the contract price, or USD 3,245,912.62, within sixty days of execution of the contract (i.e. by February 27, 2012) as a guarantee of completion of its work. [19]

(vi) Miscellaneous

152. Several other specific provisions of the Tunneling Subcontract warrant mention.

153. First, SELI was required to incorporate a subsidiary in Guatemala to perform the Subcontract, and to do so before the first milestone for payment to SELI was reached. [20]

154. Second, the Subcontract contained an option for Cobra to retain SELI at fixed price rates (6,156.58 per meter) [21] for work in connection with a future project - the Renace IlI Project [22] - in the event Cobra was selected as Renace Ill's main contractor SELI promised to work with no other main contractor that might be selected for the project and would be liable to Cobra in the amount of USD 5,038,160 if it failed to honor that commitment. [23] However, if Cobra did not engage SELI for reasons not attributable to SELI, Cobra was required to pay SELI the same amount, namely USD 5,038,160. [24]

(b) The EPÇ Agreement

155. Construction of the Renace II hydroelectric plant, of which the tunnel to be excavated was a part, was itself the subject of an "Engineering, Procurement and Construction Contract" ("EPC contract"), concluded on September 16, 2011 between Cobra and Recursos Naturales y Celulosas, S.A. ("RENACE"), the owner of the project. [25] Under the EPC, Cobra undertook to design, engineer and construct a complete integrated hydroelectric power plant in the vicinity of Coban, Guatemala. The EPC Contract provided that the project would be completed by January 2014 (a date later extended to February 2014) at a contract price of US USD 25,967,300.96.

156. The direct relevance of the EPC to the present dispute is that the Tunneling Subcontract contained a

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[18] Tunneling subcontract, sec. 6.4.3.

[19] Tunneling subcontract, secs. 6.6.4, 24.1.

[20] Tunneling subcontract, preliminary clause, para. 1.

[21] Tunneling subcontract, sec. 6.1.2.

[22] Statement of claim, para. 5.

[23] Tunneling Subcontract, Declaration Four, sec 6.1.3 According to the Subcontract," if the decision is made to develop the project called RENACE III in the EPC Contract, SELI agrees for this project to perform the tunnel, maintaining the price offered in this Contract, without any change for any reason, and accepting the general conditions of the time periods and terms established by the Owner or its successor for performance, and that their participation shall only be as a Subcontractor to COBRA, with SELI or any of its direct or indirect participating companies able to enter into any agreement whatsoever with any other commercial company, within the mentioned project RENACE III, except as established by number 6 1.4 of the EPC."

[24] Tunneling Subcontract, sec. 6.1.4 See Simonetti ws, paras. 21-22. Andrea Simonetti was SELI's commercial director at the time of entry into the Tunneling Subcontract and its modifications, leaving SELI's employ in February 2013.

[25] EPC Contract, Exhs. C-1 at Adobe 38, R-22.

clause incorporating into it the provisions of the EPC, except to the extent that those provisions were modified by the Subcontract itself.[26] The parties are in dispute over whether the EPC provisions incorporated into the Tunneling Subcontract included the EPC's provisions on contract termination. The relevant provision of the Tunneling Subcontract EPC is Clause One, according to which:

[T]he Subcontractor declares, and expressly agrees to abide by, the conditions established in the EPC Contract in all matters regarding the Works, with the exception of the sections of the EPC Contract, which are modified or clarified specifically by the following clauses of this Contract.[27]

157. Although the parties disagree over whether the EPC's termination provisions were incorporated into the Tunneling Subcontract, they do not appear to disagree over the nature of the connection between the two contracts. As Cobra expressed it, "the Subcontract must be read in conjunction with the EPC contract, i.e., the obligations of [SELI] vis-à-vis Cobra must mirror those of the Contractor [Cobra] vis-à-vis the Owner (RENACE) in the EPC Contract."[28]

158. Of particular relevance to the present dispute are the following provisions of the EPC:
Section 5.1

The Contractor shall commence performance of the Work and all of its obligations under this Contract immediately... and..... continuously and diligently proceed with the performance of the Work so that the Work will be completed in accordance with the Project Schedule..... [T]ime is an essential factor for the compliance with the terms and conditions of the Contract Documents."[29]

Section 30.1.2(a)

[Causes for termination of the contract include] failure of the Contractor to achieve Substantial Completion by the Limit Delay Date or... the failure of the Contractor to diligently and competently prosecute the Work so that the Owner's reasonable projections indicate that the Contractor will be unable to achieve Substantial Completion by the Scheduled Substantial Completion Date,[30]..... [failure of the Contractor] to make payments when due to Subcontractors for labor, materials or equipment,[31] [or] any breach by the Contractor of any representation or warranty..."[32]

Section 50.3(b)

In case of a Contractor's Default event, the Contractor shall be liable to the Owner for (i) all costs incurred by the owner or by any Person acting on behalf of the Owner or appointed by the Owner

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[26] Statement of claim, para. 21; Statement of counterclaim, para. 10.

[27] Tunneling Subcontract, clause one. Cobra translates the provision differently, as follows: "The Subcontractor expressly declares and accepts to adhere to the conditions established in the EPC Contract. In everything relating to the Work, with the exception of the sections of this EPC Contract whose amendments or clarifications are specifically contained in the following clause of this Contract" Claimant's Reply to Statement of Defense, para. 30.
Declaration Five to the Subcontract reinforced the incorporation idea: "The Contractor and the Subcontractor agree that the Subcontractor will execute the Works according to the EPC Contract and its Appendices, which form a part of this Contract as Appendix l."

[28] Statement of claim para. 21.

[29] EPC Contract, Exhs C-1 at Adobe 074 et seq., R-22.

[30] EPC Contract, Exhs C-1 at Adobe 153, R-22.

[31] EPC Contract. Exhs C-1 at Adobe 153, R-22.

[32] EPC Contract. Exhs. C-1 at Adobe 154, R-22.

for Completion of the work in accordance with the Contract Documents, including all Costs which it may incur as a result of the accelerated construction methods utilized with the purpose of accomplishing Substantial Completion on the Scheduled Substantial Completion Date or to reduce in any other ways the delays caused by said non-compliance (ii) all Costs incurred by the Owner in the administration of the sub-contracts (whether they are pre-existing or subsequent to the termination of the Contract), (iii) attorneys' fees related to the termination of this Contract, and (iv) all Costs and Damages of the Owner incurred as a result of such Contractor's Default Event.

Section 34.17

The Contractor acknowledges that timely achievement by the Contractor of all of its obligations under the Contract Documents, including, without limitation. Mechanical Completion, Substantial Completion and Final Completion, by the applicable scheduled date thereof is essential to the Owner, and therefore TIME IS OF THE ESSENCE in performing all of the Contractor's obligations set forth herein. [33]

The Tribunal's Findings concerning the incorporation of the EPC's termination provision into the Tunneling Subcontract

159. As noted, the parties disagree over the scope of the incorporation of the EPC into the Tunneling Subcontract. The question, more particularly, is whether the EPC's contract's termination provisions were included in, or excluded from, the incorporation.

160. Cobra claims that there is no basis for excluding the EPC termination provisions from the incorporation, emphasizing the breadth of the parties' undertaking to "adhere to the conditions established in the EPC Contract." [34] According to Cobra, the termination provisions must be regarded as "relating to the Works."

161. SELI takes exception to Cobra's translation of the relevant clause. According to SELI, the proper translation is not "relating to the Works," but rather "regarding the Works." [35] SELI suggests that the notion at "regarding" is narrower than the notion of "relating to," so that while the EPC termination provisions "relate to the Works," they do not "regard the Works." [36] Moreover, according to SELI, the EPC defines the term "Works" narrowly as "the excavation of a tunnel," [37] and nothing more than that.

162. The Tribunal does not agree with SELI that the meaning of the incorporation clause is any different depending on whether the Spanish terms is translated as "relating to" or "regarding." The termination provisions both relate to and regard the parties' performance under the Subcontract

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[33] EPC Contract. Exhs. C-1 at Adobe 175. R-22.

[34] Defense to counterclaim, para. 18

[35] Statement of counterclaim, paras. 166-188, fn. 231.

[36] Defense to counterclaim, para, 20

[37] Exh. R-22, p. 2, deci. two.

163. The parties cite extensive New York case law on the incorporation question. None of the cases relied upon by SELI supports its position, SELI relies heavily on the case of in *Bussanich v. 310 East* 55th *Street Tenonts*[38] for the proposition that incorporation provisions encompass matters of "the scope, quality, character and manner of the work to be performed by the subcontractor,"[39] and assumes that termination provisions do not qualify as matters of "scope, quality, character and manner of the work to be performed." However, these are precisely the considerations upon which a party's right to terminate a contract will likely turn. The other casas that SELI cites do not support the notion that termination provisions are excluded from incorporation unless expressly mentioned in the incorporation clause.[40]

164. The Tribunal is of the view that it would be artificial to distinguish categorically for these purposes between contract provisions that describe a party's obligations and those that specify the consequences of a failure to meet those obligations.

165. The Tribunal thus concludes that the provisions on termination under the Tunneling Subcontract are those provided for in the EPC Contract.

(c) The TBM Pledge Agreement

166. As indicated above,[41] in order to receive an advance payment from Cobra before commencing work, SELI was to secure and deliver to Cobra an advance payment guarantee.[42] It is undisputed that SELI failed to furnish the advance payment guarantee when due.[43]

167. SELI proposed that Cobra accept. In lieu of the advance payment guarantee, an ownership interest in the TBM as collateral, and Cobra agreed.[44] On August 3, 2012, the parties executed an addendum to the Subcontract to this effect in the form of "the TBM Pledge Agreement."[45] The Agreement thus transferred ownership (but not possession) of the TBM from SELI to Cobra, on the understanding that Cobra would recover the advance payment by deducting portions of milestone payments owed to SELI over the contract period, and that ownership in the TBM would revert to SELI upon SELI's full repayment of the advance payment.[46]

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[38] 282 A.D. 2d 243 (App. Div. 2001) (Exh. RA-15)

[39] 282 A.D. 2d at 244.

[40] S. Leo Hirmonay, Inc. v. Binks Mfg Co. 597 F. Supp. 1014, 1025. (S.D. N.Y. 1944), aff'd sub nom, Harmonay. Inc. v. Blumnks Mfg Co., 762 F Zed 990 (2d Clr. 1985) (Exh. RA-36); Wolff & Munier, Inc. v. Whiting-Turner Contracting Co.. 946 F.2d 1001,l008, n.5 (2d Clr. 1991) (Exh. RA21); Gulf Ins. Co. v. Fidelity & Deposit Co. of Maryland, 16 Misc. 3d 1116(A). 2007 WL 216288 (N.Y. Sup. CL 2007); CooperVision. Inc. v. Intek Integration Technologies, Inc, 7 Misc. 3d 592, 600-601 (N.Y. Sup. Ct. 2005) (RA-17J. See [REDACTED] Bast Hatfield. Inc. v. Joseph R. Wunderlich. Inc., 78 A.D. 3d 1270 (App. Div. 2010); Edward J, Minskoff Equities. Inc. v. Crystal Window & Door Sys., Ltd, 108 AD. 3d 488, 970 N.Y.S.2d 194 (App. Div. 2010) (Exh. CA-25); Gonxalez v. Strand Condominium, 17 Misc. 3d 1139(A), 856 N.Y.S.2d 24 (N.Y. 2007) [Exh. CA-26]; Gemma Dev. Co, LLC v. Fid. & Deposit Co, 1 A.D.M 152. 767 N.Y.S.2d 413 (AD. 2003) [Exh. CA-Z7].

[41] See para. 150, supra.

[42] Tunneling Subcontract, secs. 663, 24.2.

[43] Simonetti ws, para. 31.

[44] Simonetti ws, para 31. According to Mr. Simonetti, he explained SELI's difficulty (essentially cash flow problems) in securing the bank guarantee and Mr. Gamarra Mompeán of Cobra "effectively understood [the] situation and was going to wait to hear back from him." See also Statement of claim, para. 47.

[45] TBM Pledge Agreement Exh R-4. Simonetti ws, para. 34

[46] Simonettl ws, para. 33. See also Statement of claim, para. 34, citing Exh. C-1 at Adobe 212-213.

168. The TBM Pledge Agreement was governed by Spanish law and contained its own arbitration provision contemplating arbitration in Madrid under the rules of the Civil and Commercial Arbitration Court.[47] As noted, however,[48] the parties subsequently agreed to submit any disputes arising out of the TBM Pledge Agreement to the jurisdiction of the present tribunal on the understanding that the Agreement would still be interpreted and enforced in accordance with Spanish law.

169. On that basis, on August 8, 2012, Cobra made the advance payment to SELI in the amount of USD 2,359,95736.[49]

(d) The SELI Tunneling Acceleration Plan

170. In August 2012, certain circumstances, described in detail at paragraphs 203-208, infra, caused Cobra and RENACE to make significant changes in the design and schedule of the Renace II project. These changes are reflected in a "Renace II Acceleration Plan."[50]

171. These changes in turn had implications for the design and schedule of the work under the Tunneling Subcontract between Cobra and SELI. They too are described at paragraphs 209-211, infra. The changes thus made to the Tunneling Subcontract are reflected in a "SELI Acceleration Plan."[51]

(e) The September 27, 2012 Tunneling Subcontract Modification

172. On September 5, 2012, during a progress meeting in Guatemala City, Cobra advised SELI that it had decided to make a material design change, namely having water move through Tunnel I under modest pressure (1.5 bars pressure) to drive the turbines, rather than according to the water's natural free flow.[52] On September 21, 2012, SELI sent Cobra a request for compensation in the amount of USD 1,885,685 for the additional work necessitated by the design changes under the SELI Acceleration Plan.[53]

173. On September 27, 2012, the parties executed a Tunneling Subcontract Modification to reflect certain further changes to the project.[54] There is dispute between the parties over whether the modification itself effected a change from free flow of water to modest water pressure in the tunnel, or merely contemplated that possibility.[55] The parties nevertheless confirmed that the tunnel was, as

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[47] TBM Pledge Agreement. Exh. R-4. Appendix IV, Clause Nine.

[48] See para. 10, supra.

[49] Statement of claim, para. 35: Statement of counterclaim, para. 29.

[50] Renace ll Acceleration Plan. Exh.37.

[51] EPC Contract, Exh C- 1 at Adobe 351, 358.

[52] Exh R-5, p. 2 (Sept 8, 2012 minutes of Sept 5 meeting).

[53] ExhR- 6, p. 2 (Sept. 21.2012 email from SELI to Cobra).

[54] Tunneling Subcontract Modification dated Sept 27,2012), Exhs, R-7, C-1 at Adobe 249.

[55] Statement of claim, para. 36; Statement of counterclaim. para. 71.

scheduled under the SELI Acceleration Plan, to be completed by November 30, 2013, unless otherwise agreed. [56]

174. The Tunneling Subcontract Modification also expressed the parties' agreement to an arrangement between RENACE and Cobra whereby RENACE acquired "step-in rights" in the event of a default on Cobra's part. [57]

175. The parties omitted to attach the SELI Acceleration Plan as an Annex II to the Tunneling Subcontract Modification. Cobra maintains that the parties nevertheless contemplated no change in the deadlines set out in that Plan. [58] SELI, however, takes the position that the SELI Acceleration Plan timetable was not to be incorporated into the modified Subcontract because the parties had not yet resolved SELI's request of September 21, 2012 (para. 171, supra) that Cobra compensate SELI in the amount *of USD* 1,884,685 for additional costs arising from design changes. [59] Throughout the proceedings, however, SELI has treated the SELI Acceleration Plan schedule as an integral part of the modified Tunneling Subcontract, and the Tribunal proceeds on the assumption that that is the case.

176. It appears that Cobra never offered SELI any such additional compensation as a result of the modification.

(f) The Second Addendum to the Tunneling Subcontract

177. As noted (para. 153, supra), the Tunneling Subcontract required SELI to incorporate a Guatemalan subsidiary. SELI had not done so when the time came to transport the TBM parts from Italy to Guatemala. Because by that time Cobra held title to the TBM, its authorization was necessary for the export and import transactions to occur. [60]

178. Accordingly, on October 15, 2012, the parties entered into a second addendum to the Tunneling Subcontract whereby Cobra gave that authorization. [61] This agreement allowed SELI to provisionally claim title to the TBM and transport it to Guatemala.

179. It is not disputed that, although SELI was to incorporate its Guatemala subsidiary "before reaching the first payment milestone," SELI did so only on October 24, 2012, some ten months after signing the Tunneling Subcontract. [62]

VII. THE CLAIM ANO COUNTERCLAIM

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[56] Exhs R-7, clauses four, seven.

[57] Exhs. R-7, clause seven; Simonetti ws, paras. 37-38.

[58] Statement of claim, para. 36, n. 42.

[59] Simonetti ws, para. 39.

[60] Statement of claim. para 38

[61] EPC Contract, Exh. C-1 at Adobe 297.

[62] EPC Contract, Exh. C-1 at Adobe 005. See Statement of claim, para. 48.

(a) The Claim

(i) Summary of Claim

180. In this proceeding, Cobra claims that SELI materially breached its contractual obligations under the Tunneling Subcontract by, among other things, "Its repeated and utter failure to timely prosecute and complete the Work as required under the SELI Tunneling Subcontract."[63] In terminating the Subcontract, Cobra cited SELI's alleged "failure... to diligently and competently prosecute the Work so that the [Cobra's] reasonable projections indicate that [SELI] will be unable to achieve Substantial Completion by the Scheduled Substantial Completion Date."[64] More specifically, SELI allegedly failed either to assemble the TBM and perform the tunnel excavation activity or to construct the dovelas factory in accordance with the parties' agreed upon schedule.[65] Cobra claims to have paid SELI nearly USD 4.5 million under the Subcontract.

181. Cobra further claims that, notwithstanding SELI's breaches, it was itself at all times fully ready, willing and able to perform its own obligations under the Subcontract.[66] Moreover, it gave various forms of assistance to SELI not required of it under the Subcontract.

182. Cobra maintains that SELI committed a number of other breaches of the Subcontract, including failure to provide the Advance Payment and Performance Guarantees on a timely basis, failure to incorporate its Guatemalan subsidiary on a timely basis, failure to pay its suppliers and subcontractors, and failure to perform its obligations in connection with the Renace III project. These claims are addressed in Sections IX (a)-(h), infra.

183. Cobra asserts, in addition to a breach of contract claim, claims under the New York law of fraudulent misrepresentation and fraudulent inducement.[67]

184. In support of its dawn and in defense against SELI's counterclaim, Cobra presented and relied on an expert report by Delta Consulting Group, 4330 Prince William Parkway, Suite 301, Woodbridge, Virginia, 22192.

(II) Relief Sought

185. Cobra seeks the following relief in connection with its claim:[68]

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[63] Statement of Claim, para. 92

[64] Defense to counterclaim, para. 3.

[65] Defense to counterclaim, para. 9.

[66] Statement of claim, para. 93.

[67] Statement of clam. para. 106.

[68] Statement of claim, paras. 91. 94,110; Reply to counterclaim, para. 25.

• a declaration that SELI breached the Tunneling Subcontract

• award of damages for injury suffered as a result of SELI's material breaches of the Tunneling Subcontract, including but not limited to actual and consequential damages, in the amount of at least USD 10,000,000 00 [69]

• a declaration that Cobra is the lawful owner of the TBM and that SELI may not draw upon or garnish the TBM or assert any claim of title to it [70]

• a declaration that Cobra may retain and dispose of the TBM and related equipment and use the proceeds to satisfy part of its claims against SELI

• an order to SELI to release all containers retained by Guatemalan customs authorities containing parts of TBM equipment

• a declaration that one or more events constituting a "Contractor's Default Event" occurred.

• a declaration that Cobra's termination of the Subcontract was for cause in accordance with Section 30.1.2 of the incorporated EPC Contract.

• a declaration that SELI must indemnify Cobra against any and all claims brought by third parties, if any. in relation to SELI's conduct related to or arising out of the Subcontract or any modifications thereto

• award of pre-judgment and post-judgment interest at the maximum rate allowed by New Fork law. [71]

• award of all costs, fees (including attorneys' fees) and expenses incurred by Cobra in prosecuting the action

• grant of such other and further relief as the Tribunal deems just and equitable under the circumstances

(iii) Summary of Defense to Claim

186. SELI denies that it committed any of the breaches of contract asserted by Cobra, claiming in particular that any delays on its part in performance of the Subcontract were due to Cobra's own

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[69] Cobra then specified the requested relief included an order to SELI to pay damages, in an amount to be proved during the arbitration, to compensate COBRA for the injury it has suffered from SELI's material breaches of the SELI Tunneling Subcontract, including but not limited to actual and consequential damages, in the amount of at lean USD 9,660,689. Relief on the Statement of Claim and Statement of Reply.

[70] Cobra further modified this relief in the Statement of Reply by requesting a declaration that Cobra has a retention right over the TBM, the TBM parts and the Non-TBM materials.

[71] Cobra invokes N. Y.C.P.L.R 5001-5004, according to which pre-judgment interest is computed from the earliest ascertainable date that the cause of action existed, except that interest upon damages incurred thereafter are computed from the date incurred, if damages were incurred at various times, interest is computed upon each item from the data it was incurred or upon all of the damages from a single reasonable intermediate date. As to post-judgment interest. N.Y.CP.LR 5001--5004u provides for interest to be awarded from the time judgment is rendered until the date of payment. Interest is paid at the rate of 9% per year, accruing on a simple basis.

failures of performance.[72] Accordingly, Cobra's termination of the Subcontract was wrongful.

187. SELI also denies making any fraudulent misrepresentation or fraudulently inducing Cobra in relation to the Subcontract.

188. SELI asserts that termination of the Subcontract was not in fact motivated by any aspect of its contract performance, but rather by Cobra's own practical and commercial reasons.[73] and that Cobra's claim is designed to "give ex post facto cover to Cobra's unilateral decision to terminate the Subcontract for its own business reasons."[74]

(iv) Relief Sought by way of Defense to Claim

189. SELI seeks dismissal of all of Cobra's claims, and a declaration that it is not liable for breach of contract or misrepresentation in connection with the Tunneling Subcontract.

190. SELI further seeks an award of attorneys' fees and other costs in connection with its defense against Cobra's claim.

(b) The counterclaim

(i) *Summary of Counterclaim*

191. In its counterclaim, SELI asserts that it met all of its obligations under the Tunneling Subcontract and that Cobra's termination of the Subcontract was accordingly wrongful

192. In this connection, SELI maintains that any delays on its part were due to Cobra's having prevented SELI from prosecuting its work by falling to complete the preparatory work required for SELI's performance and by making material design changes that further delayed SELI's performance.

193. In support of its defense and counterclaim, SELI presented and relied on an expert report by Navigant Consulting, Inc, 255 Alhambra Circle, Miami, Florida, 33178.

(ii) Relief Sought

194. SELI seeks the following relief in connection with the counterclaim:

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[72] These alleged failures are enumerated in Statement at counterclaim, para. 199.

[73] Answer and counterclaim, para. 68.

[74] Answer and counterclaim, para. 68.

• a declaration that Cobra unjustifiably terminated the Subcontract

• award of damages in an amount of no less than USD 23,210,629 (USD 24,010,629 minus USD 800,000 credit); in the alternative, award of damages in the total amount of USD 24,010,629 but transferring title and possession of the TBM and related equipment to Cobra. [75]

• a declaration that the TBM Pledge Agreement is of no force and effect, and that SELI is the TBM's rightful owner

• an order requiring Cobra to deliver, at its own cost, all of SELI's equipment in Cobra's control to any port designated by SELI

• an order requiring Cobra to refund of the performance bond proceeds with interest [76]

• award of all costs, fees (including attorneys' fees) and expenses incurred by SELI in the arbitration

• award of pre-judgment and post-judgment interest

• grant of any other relief that the tribunal deems appropriate

(iii) Summary of Defense to Counterclaim

195. Cobra maintains, for the same reasons adduced in support of its claim, that it was justified in terminating the Subcontract on the basis of SELI's multiple breaches of contract.

(iv) Belief Sought by way of Defense to Counterclaim

196. Cobra seeks the following relief in connection with the counterclaim:
• a declaration that Cobra justifiably terminated the Tunneling Subcontract and has no liability to SELI on that account

• award of all costs, fees (including attorneys' fees) and expenses incurred by Cobra in defense against SELI’s counterclaim

VIII. CHRONOLOGY OF CONTRACT PERFORMANCE

197. Because the obligations of both parties to the Tunneling Subcontract were highly interdependent - in that certain activities could not be performed by one party until a certain other activity had been performed by the other - It is important to establish, as best can be done, a chronology of the

[75] Relief sought in Reply Io Claimant's Amended Statement of Defense to Counterclaim.

[76] According to SELI, Cobra had no basis for drawing upon the bond once it wrongfully terminated the Subcontract. Answer and counterclaim, para. 81.

activities and events over the contract performance period.

198. However, establishing a complete chronology of the dispute is complicated by the fact that the parties disagree over even the most basic facts, such as the date of delivery of a specific project component or completeness of a particular installation.[77] The chronology thus reflects numerous differences between the parties over the most basic facts, and those differences will inevitably resurface, particularly in the sections of this Award addressing on the merits allegations that SELI impermissibly delayed performance of its principal contractual obligations. (See Section IX (i), paragraphs 290-396, infra).

199. For ease of understanding, the activities and events relevant to this dispute are presented here according to phases of the project over its lifetime. However, within each phase, an attempt is made to distinguish between the two principal sub-projects, viz. the TBM assembly/tunnel excavation and construction of the dovelas factory. The phases into which this chronology is divided are as follows:
(a) Events Following Conclusion of the Tunneling Subcontract

(i) Financial commitments

(ii) Initial project delays

(b) SELI Tunneling Acceleration Plan

(c) Performance of the Subcontract: September 2012 through February 2013

(I) The *TBM assembly and excavation*

(ii) The dovelas factory and related installations

(iii) Access roads

(iv) State of affairs at the end of the period

(d) Performance of the Subcontract: March through April 2013

(i) Further schedule changes

(ii) Complaints by Cobra

(iii) Cobra's retention of Proacon

(a) Suspension and Termination of the Subcontract

(f) Post-termination

(a) Events Following Conclusion of the Tunneling Subcontract

[77] *Compare* Statement of Counterclaim para. 86-92 (Cobra never completes TBM cradle), pera 93-98 (Cobra never completes dovelas factory): para. 99-102 (Cobra failed to provide access roads) *with* Statement of Claim fashion); para. 61 (SELI failed to begin TBM excavation of Tunnel 1 in a timely fashion).

(i) Financial commitments

200. In the Tunneling Subcontract, SELI made certain financial commitments, to be fulfilled at an early stage of the project. They have already been identified at paragraphs 149-151, supra.

201. One such commitment was for SELI to furnish Cobra a performance guarantee in the amount of 12.5 % of the contract price, or USD 3,245,912.62 (see para. 151, supra). That performance bond was due on February 27, 2012. SELI requested that that the due date be extended to November, 15, 2012, and Cobra did not object. SELI furnished the performance guarantee roughly two weeks after the extended deadline, on December 3, 2012. [78]

202. As noted (para. 150, supra), another undertaking by SELI was to secure and deliver an advance payment guarantee to Cobra in the amount of USD 2,359,957.86 before commencing work, with that guarantee serving as collateral for an advance payment by Cobra to SELI in that amount SELI did not furnish the advance payment guarantee when due. The parties agreed to substitute title to the TBM for the advance payment guarantee, and on August 3, 2012, the parties executed the TBM Pledge Agreement as an addendum to the Subcontract to that effect (see paras. 166-169, supra). On that basis, on August 8, 2012, Cobra made an advance payment to SELI in the amount of USD 2,359,957.86.

(ii) Initial protect delays

203. The record indicates that early in 2012 certain issues arose between Cobra and RENACE in relation to the Renance II Project. [79] These issues were the subject of discussion between Cobra and RENACE at a March 2012 meeting in Guatemala. [80] One issue related to the volume of soil and rock that Cobra was required to move in order to perform its work under the Renace II project. Cobra's bidding documents had stated that the project would entail moving 50,000 cubic meters of earthworks. However, according to testimony by SELI's witnesses, upon beginning performance, Cobra discovered and informed RENACE that the earthworks required to be moved were in fact of the magnitude of 400,000 cubic meters. [81] This underestimation raised substantial technical and financial issues, requiring, among other things, reconsideration of the project design. [82] A Cobra witness describes this account as "exaggerated excessively" because, according to him, the actual volume of earthworks was only 129,989 cubic meters rather than 400,000, and because, whatever the volume, the earthworks did not pertain to work to be performed by SELI. [83] On cross-

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[78] Lianos ws, para. 40.

[79] According to the uncontracdicted testimony of Mr. Simonetti, related difficulties had already arisen before the Tunneling Subcontract was signed At a meeting in Madrid on December *29,* 2011, Cobra asked SELI to delay signing the Subcontract due, according to Mr Slmonetti, to "an ongoing preoccupation about the final design of the project" The Tunneling Subcontract was not in fact signed until January 25, 2012, with the document, at Cobra's request, backdated to December 29, 2011. According to Mr. Simonettl, Cobra said that it was concerned over how RENANCE would react if it learned that Cobra had taken so long in signing the Subcontract. Simonettl ws, paras. 25-27. In his testimony at the hearing, Mr. Gamarra Mompeán admitted that the Subcontract had been backdated. Tr. May 25. p. 315. L 5-8.

[80] Statement of counterclaim, paras. 40-42.

[81] Lianos ws. para. 40. Simonetti ws, para. 26.

[82] Lianos ws, para. 44.

[83] Rodriguez 2d ws. paras. 7.8.

examination, Cobra's CEO, Mr. Gamarra Mompeán, admitted that Cobra had reported to RENACE that the earthworks encountered were 300,000 cubic meters greater than estimated, but went on to say that Cobra managed through relocation of the powerhouse to reduce that quantity.[84] Cobra and RENACE also disagreed over the location of the reservoir that was to be built as part of the project.[85]

204. In its monthly report to RENACE of March 2012, Cobra stated that the increase in scope of work could possibly extend the construction schedule by some 608 calendar days, i.e., until August 11,2015.[86]

205. Cobra thereafter, on April 19, 2012, reported to SELI that delays due to these matters would necessarily delay SELI's performance as well,[87] and it instructed SELI to take no action under the Subcontract until the design issues between Cobra and RENACE had been resolved and agreement on a revised schedule had been reached.[88] On April 19, 2012, Cobra's project manager, Mariano Martin de Vidales informed Hector Lianos, SELI's on-site project manager, that "the availability of the entry portal and of the location of the possible dovela factory will be delayed" and advised SELI that its own work schedule would be delayed by at least three months.[89]

206. On June 22, 2012, Cobra and RENACE jointly visited SELI's factory in Aprilla, Italy, and Cobra informed SELI that the TBM should not be shipped to Guatemala before Cobra had defined the areas for the TBM portal and dovelas factory platform, neither of which had by then been established.[90] On June 26, 2012, Mr. de Vidales, informed Mr. Lianos that Cobra and RENACE had as yet found no "definitive solution."[91] Indeed. Mr. de Vidales told SELI that he thought that "[SELI's] schedule and its respective monthly update should refer to blank dates that start from [a] milestone... you think is suitable."[92]

207. The record reveals that, in light of the difficulties encountered, RENACE made Cobra's continuation on the Renace II Project conditional on several requirements, namely (a) that Cobra replace its on-site project manager in Guatemala and its project director in Madrid,[93] (b) that Cobra agree to a revised "accelerated" project schedule,[94] (c) that Cobra grant RENACE "sole discretion" to terminate the EPC Contract, without any cure period, in the event of any delays in performance of the work

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[84] Tr. May 24. 2016, p. 241.l. 3 - p. 245. l.23.

[85] Lianos ws. paras. 40, 43-44; Exh. R-31 (Cobra email to SELI dated March 28, 2012 stating. "We do not yet know what areas we will be able to use to construct the reservoir. The negotiation depends on Renace and it has not made any progress nor does h have on estimate of dates... We win keep you informed of any progress" See also Exhs. R-29, p. 5 (SELI monthly rpt to Cobre dated Mar. 2, 2012), R-33, p. 3 (SELI monthly rpt to Cobra dated May 28, 2012), R-36, p.3 (SELI monthly rpt to Cobra dated June 28, 2012).

[86] Exh. R-105b (Cobra monthly rpt to Renace for March 2012); Lianos ws, paras. 40-49: Simonettl ws. para. 26.

[87] Lianos ws, paras. 46-48; Exhs. R-32 (Cobra email to SELI dated April 19, 2012) ("We do not yet have the areas for the alternative reservoir and the entry portal of the tunnel proposed in our basic design variant. This means that the availability of the entry portal and of the location of the possible dovela factory will be delayed for a minimum of three months in relation to the estimates of SELI's schedule.").

[88] Exh. R-36 (SELI monthly rpt to Cobra dated June 28, 2012) ("We are waiting on the confirmation of the location of the proposed reservoir by the EPC Contractor and based on this, the location of the entry portal of the TBM will be determined. We are waiting on the indication of the date for the meeting for review and coordination of the basic design and associated detail of the access platform and the entry portal."); Lianos ws, paras. 46-48. See also Exh R 33. p. 14 (SELI monthly rpt to Cobra dated May 28, 2012).

[89] Lianos ws, para. 46; Exh. R-32 (Cobra email to SELI dated April 19, 2012).

[90] Exh. R-35 (SELI Internal email dated june 26, 2012)

[91] Exh. R-34 (Cobra email to SELI dated June 26, 2012).

[92] Exh. R-34 (Cobra email to SELI dated June 26, 2012).

[93] Exh. R-106, secs. 4.1.2, 4.1.3 (Amendment to EPC Contract dated June 22,2012).

[94] Exh. R-106 sec. 4.1.7 (Amendment to EPC Contract dated June 22, 2012).

that adversely affected the revised schedule,[95] and (d) that Cobra compensate RENACE for any damages due to Cobra's default.[96] Evidently, RENACE also required that Cobra grant it "step-in-rights" to its Subcontracts in case of Cobra's default.[97] The witnesses disagree over the significance of this request Cobra's witnesses contend that such a provision was entirely standard, and signified nothing unusual.[98] On the other hand, one of SELI's witnesses testified that Cobra itself told him that RENACE made that specific request on account of its concerns over Cobra's delay, and he referred to evidence that Cobra had indeed previously defaulted under the EPC.[99] A Cobra witness at the oral hearing conceded that to be the case.[100] In fact, the document recording these conditions, taking the form of an amendment to the EPC Contract, contained the following recital clause: "Whereas, the Project has suffered delays due to certain Contractor's Default Events affecting the timely performance of the Work."[101]

208. In any event, in July 2012, RENACE and Cobra reached agreement on revised design specifications and a revised schedule in the form of the Renace II Acceleration Plan.[102]

(b) SELI Tunneling Acceleration Plan

209. It is undisputed that the Renace II Acceleration Plan necessitated a revision of the timetable that had been incorporated in the Tunneling Subcontract between Cobra and SELI.

210. On August 3, 2012. Cobra and SELI met in Madrid to discuss the situation.[103] At that meeting, the parties agreed on certain project design changes. Most notably, the TBM was to be assembled in the project's sand trap rather than in a dedicated assembly area, thus necessitating use of a 300-ton crane rather than a 150-ton crane,[104] which in turn necessitated a wider access road and a gentler slope of the terrain.[105] The reservoir was also to be relocated.

211. Most significant for the present dispute, the parties agreed on a fully revised project timetable, referred to in these proceedings as the SELI Tunneling Acceleration Plan[106] (see paras. 170-171, supra). That timetable is as follows:

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[95] Exh. R-106 sec. 5.1.5 (amendment to EPC Contract dated June 22,2012).

[96] Exh. R-106 sec. 5.1.5 (amendment to EPC Contract dated June 22, 2012).

[97] Exh. R-106 secs. 4.1.6, 5.1.5 (amendment to EPC Contract dated June 22,2012).

[98] Gamarra Mompeán ws, para. 26; Lazaro ws, para. 12. Mr. Lazaro of RENACE testified that he was never worried that Cobra might default. Lazaro ws, para. 13.

[99] Lianos 2d ws. para 19. According to Mr. Lianos, he saw a copy of an Amendment no.1, dated June 22, 2012, to the EPC Contract indicating that RENACE considered Cobra to have defaulted under the contract, but was willing to overlook that in exchange for a series of considerations on Cobra's part Lianos 2d ws, para. 20.

[100] Tr. May 24, 2016. p. 265, I. 21-p. 266, I.5 The witness. Mr. Gamarra Mompeán stated, however, that RENACE in his view was unjustified in considering Cobra as in default.

[101] Exh. R-106 sec. 5.1.5 (amendment to EPC Contract dated June 22, 2012).

[102] Exh. R-37 (Renace Acceleration Plan).

[103] Answer and counterclaim, para. 22.

[104] Exh. R-5 (SELI email to Cobra dated Sept. 8, 2012).

[105] Lianos ws, para 76 According to Mr Lianos, the decision to use the sand trap as the TBM assembly site represented "a drastic design change," In part because in order to serve as that site, the sand trap needed to undergo extensive excavations, and no TBM deliveries could be made to the site until that work was accomplished. Lianos 2d ws, para. 15.

[106] Exh C-6 at Adobe 351, 358, Exh. R-2 (SELI email to Cobra dated Aug. 6, 2012).

Sept. 22, 2012: completion of access road to the TBM entry portal, access road to dovelas factory, and platform for dovelas factory

Sept. 23,2012: start of construction of dovelas factory

Oct. 8, 2012: completion of sand trap as TBM assembly site

Dec. 1,2012: completion of shipment of TBM parts

Dec. 11, 2012: delivery of concrete cradle for TBM assembly

Jan. 16, 2013: completion of transport of the TBM to Guatemala

Feb. 4,2013: completion of construction of the dovelas factory

Feb. 28, 2013: completion of assembly of TBM

Mar. 4, 2013: start of excavation of the tunnel

Sept. 30, 2013: completion of excavation of the tunnel

Nov. 30, 2013: completion of project.

(c) Performance of the Subcontract: September 2012 through February 2013

212. Establishing the chronology for the period between September 2012 and February 2013 is impeded by the multitude of contrary factual assertions by the parties. However, the Tribunal here outlines the chronology as best it can.

(i) The TBM *assembly and excavation*

213. According to the SELI Acceleration Plan, transport of the TBM parts to Guatemala was to be completed on January 16, 2013. While it did not fully meet this deadline, SELI maintains that this was due to the inadequacy of the roads, which Cobra denies. The parties also disagree over the quantity of TBM parts that had arrived by January and their sufficiency for starting assembly of the TBM. SELI maintains that by then the majority of the TBM parts, and all the main parts, had in fact arrived at the construction site or were in port in Guatemala, and that the principal impediment to full delivery was the inadequacy of the access roads.[107] Cobra maintains otherwise,[108] though on

[107] Exh. R-72 (SELI email to Cobra dated Feb. 14, 2013). See also Navigant Rpt, para. 80; Answer and counterclaim, para. 71.
In response to SELI's complaint, Cobra replied: "We have become aware that due to SELI failing to pay *for various services* that some earthmoving companies have rendered for the Project you are finding it difficult to acquire the services of a loader. I suggest that you resolve your debts with said companies."
SELI then replied in turn: "I am frankly dumbfounded by your response and your uninformed accusation. I confirm that SELI does not have

December 3, 2012, it nevertheless paid SELI the amount of USD 2,276,225.58, which was due at a project milestone defined as delivering the TBM parts for export to Guatemala. [109]

214. The parties agree that in order for TBM assembly to begin, Cobra had to both prepare the sand trap as an assembly area and install a "cradle" in which the TBM would be situated during assembly. Under the SELI Acceleration Plan schedule, both the sand trap and cradle were to be in place by December 11, 2012. While the record is meagre with respect to progress in preparation of the sand trap, it is undisputed that the cradle was not in place by December 11, 2011, or by the time TBM parts had arrived at the site in January 2013, or even by the time Cobra terminated the Subcontract. As will be seen [paras. 238-241. infra], at the time of termination of the Subcontract, Cobra had decided to have the tunnel excavated by another subcontractor through the "drill and-blast" method, rather than the TBM method, so that a TBM cradle was in any event no longer needed.

215. The Parties are in agreement that, by February 28, 2013, the date by which the TBM assembly was to be completed, the TBM assembly had not yet begun.

(ii) The Dovelas factory and related installations

216. The other principal obligation of SELI under the Tunneling Subcontract was to build the dovelas factory for the manufacture of dovelas. [110] Under the SELI Acceleration Plan, building of the dovelas factory was to have begun on September 23, 2012.

217. It is undisputed that construction of the factory could not be begun until a "dovelas factory platform" was in place. Unfortunately, much of the evidence in the record concerning progress in preparation of the platform is deeply contradictory.

218. Cobra has adduced both testimonial and photographic evidence to show that work on the dovelas factory platform began in September 2012 and that not only the dovelas factory platform, but also the adjacent concrete plant platform, were completed in the second week of November 2012. [111]

219. SELI disputes the accuracy of the photograph and, by contrast, points to evidence suggesting that the dovelas factory platform was not completed until November 29, 2012 [112] and that the concrete plant platform was not completed until February 2013. [113] SELI cities in particular a delivery notice stating that "[t]he signatory parties to this document [i.e., Cobra, APSA and SELI] declare that on

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any type of debt with the local companies, as you claim." Exh. R-72 (SELI email to Cobra dated Feb. 15, 2013).

[108] Statement of claim, para, 60. citing the Delta Expert Report: The four shipments that SELI informed Cobra of in October of 2012 that [were supposed to take place] between October 24 and December 29, 2012 ended up leaving the Italian manufacturing sites between November 3, 2012 and Feb. 10, 2013. This represents at least an additional 43 days of delay to SELI's ability to commence work. Furthermore, of the 83 total containers tracked in the spreadsheet, only 42% of them were on site as of February 18, 2013 29% of the containers were still in Port and the remaining 29% were still in transit."

[109] Delta Rpt App. 5. There is a discrepancy both as to the date and amount of this payment. According to SELI, payment was made on December 5, not December 3, and was made in the amount of USD 2,032,344.27, not USD 2,276,225.58.

[110] Statement of claim, pars. 6 (v).

[111] See para. 152, infra

[112] Exh. R-60 (delivery notice deled Nov. 29, 2012). See also Navigant Rpt. para. 103.

[113] Lianos ws, para.85

November 29. 2012, [Cobra] delivered the area of the platform required for the construction of the Dovelas Factory " [114]

220. Jesus Ortega, Cobra's production chief for the Renace II project, testified that, although Cobra had finished preparing the concrete factory area in November 2012. SELI did not have the necessary machinery on site to perform certain excavations relating to the plant (viz., a pit for the concrete plant's conveyer belt and footings for [...]

224. [...] delay in incorporation of a Guatemalan subsidiary, and SELI's reliance on Cobra to make the advance payment to SELI's subcontractor, APSA.

225. On the other hand, over time, SELI voiced a considerable number of complaints, many in writing, over Cobra's performance or lack thereof in regard to the TBM assembly site, the cradle, the dovelas factory platform, and the access roads. [120]

226. SELI's frustration came to a head when, in a formal letter of November 17, 2012, it gave Cobra notice that, due to Cobra's repeated delays, it regarded the SELI Acceleration Plan, and more particularly its timetable, as "no longer valid and binding," [121] This is a letter to which SELI apparently received no response.

227. SELI's repeated complaints to Cobra became in themselves an issue. On January 31, 2013, Cobra's project manager, Mr. José Luis Orgaz specifically, and apparently coarsely, warned SELI not to send any more letters concerning delays on Cobra's part, indicating that Cobra would take "drastic measures" if SELI continued to do so, [122] On February 11, 2013, at a meeting among Cobra, SELI and INCISA (the Renace ll project designer and engineer), Mr. Orgaz asked SELI to "send less letters, the least possible amount." [123]

228. On the other hand, neither party came close to severing the relationship and, with Cobra's knowledge, SELI continued to perform. SELI asserts that during this entire period, it continued to invest time, money and manpower in performance of the Subcontract, even while continuing to complain of failures on Cobra's part. [124]

229. In early March 2013, SELI took the next anticipated step of engaging a company named Proacon to excavate the first 15 meters of the tunnel using "driil-and-blast technique, [125] as contemplated by the Subcontract. Proacon began the excavation on or around March 3, 2013 and completed its on or around March 17, 2013. [126]

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[114] Exh. R-60 (delivery notice dated Nov. 29, 2012).

[120] See para. 358, infra.

[121] Exh. R-58 (SELI letter to Cobra dated Nov. 17, 2012).

[122] Exh. R-69 (Cobra email to SELI dated Jan. 31, 2013): "I am sick (not to mention up to my [omission of expletive meaning "very fed up") of these littlee letters. Stop writing so much and start[] pulling your weight, Iike the rest of us. If you want something, ask for it, and if it is within our power, it will be yours."

[123] Exh. R-73 (revised INCISA meeting minutes dated Feb 11, 2013).

[124] See pares 319-320, infra.

[125] Statement of counterclaim, para. 112.

[126] Exhs R-80. p. 1 (SELI weekly schedule to Cobra of March 11-17, 2013). R-89, p. s (SELI monthly rpt to Cobra dated Mar. 31, 2013); Defense to counterclaim, para. 127, citing Exh. NCI-40, p. 3.

(d) Performance of the Subcontract: March through April 2013

(i) Further schedule changes

230. As early as February 2013, but mainly during the month of March 2013, there took place a number of meetings and communications between the parties, the apparent purpose of which was to update the project timetable in light of project realities. Thus, on February 11, 2013, Mr. Orgaz told SELI that the cradle would be ready for the TBM assembly by March I5, 2013, as opposed to the original date of December 11, 2012, a date that of course had already passed. [127]

231. Then, at a progress on meeting on March 1, 2013, Cobra informed SELI that it would only start building the TBM cradle on March 15, so that assembly could only begin at around April 15. [128] In that same meeting, Cobra also informed SELI that the grade of the access roads had to be increased from 12% to 20%, necessitating more powerful transportation vehicles, with stronger braking systems. [129] Testifying to the progress Cobra was making in this period, Mr. Rodrigueuez, Cobra's chief technical officer for the project, presented a photograph allegedly showing the installation during the month of March 2013 of a leveling slab required for the cradle. [130] A SELI witness disputes the accuracy of the photograph, pointing out that the thin and flat slab shown there could not have been the slab for the TBM cradle, since the latter was to have been concave and one-meter thick, and the pictured slab was neither. [131]

232. In mid-March 2013, RENACE itself, evidently concerned about progress in performance of the Subcontract, convened a meeting in Guatemala City with Cobra, INCISA and SELI. Among items on the agenda was again a potential change in tunnel design according to which water would flow under low pressure. [132] More specifically, RENACE wanted to know whether such a change would necessitate additional grouting to reinforce the dovelas against the additional water pressure. Cobra therefore asked SELI to prepare two different revised acceleration schedules with new completion dates: one schedule based on the free flow of water, the other one based on a flow under low pressure. [133] Both schedules were to be prepared on the basis of a cradle completion date, not of March 15, 2013, but of April 15, 2013, with TBM assembly starting the nest day. [134] At the meeting, the parties scheduled a further technical meeting in Madrid.

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[127] Exh R-73 (revised INCISA meeting minutas of Feb 11, 2013).

[128] Exh R-78 (SELI internal email dated Mar 2, 2013).

[129] Exh. R-78 (SELI internal email rpt en meeting dated Mar. 2.2013). According to that report: "The problem, in fact, is the access road to the sand trap TBM portal. To date, there are slopes of over 20% which will clearly allow the transport of neither the TBM nor of the dovelas without taking an excessively long time and in dangerous conditions for the TBM parts. Cobra has confirmed... that they are improving this, and that if necessary, the very steep section of the access road will be paved and the gradient will in any case be reduced."

[130] Rodriguez 2d ws. para. 14.

[131] Ciocca 2d ws, para. 13; Exh. R-22 attachment (SELI email to Cobra dated Dec 21, 2012).

[132] Ciocca ws. paras. 14. 73. Under the original free flow design, water would move through the tunnel only by force of gravity. Under the low pressure design, water would be pressurized to 1.5 bar.

[133] clocca ws. paras. 14, 75. According to SELI, Cobra already announced, and therefore knew about the water pressure change in mid-September 2012. Answer and counterclaim, para. 43.

[134] Exh R -84 (attachment to SELI email to Cobra dated Mar, 20, 2013).

233. On or about March 19, SELI provided the two schedules requested.[135] On the basis of the parties' assumption that, after the assembly area had been fully prepared and equipped with the cradle, at least 1.5 to 2 months would be needed to assemble the TBM and start excavation, SELI's schedules provided for excavation to start in June 2013, and more specifically on June 14, 2013 (rather than March 2013, as contemplated by the SELI Acceleration Plan). On this basis, excavation would be completed by no earlier than January 12, 2014, and possibly as late as February 12, 2014.[136] Under both schedules, completion of the dovelas factory would be postponed to May 14, 2013.[137]

(ii) Complaints by Cobra

234. At this point, the parties started trading harsh accusations. On March 19, 2013, upon receiving the two revised schedules from SELI. Cobra's CEO. Jose Luis Gamarra Mompeán sent an email to Mr Giacomo Proio. SELI's regional manager for Latin America, stating that he was "very worried about the course of the contract for Renace II since no significant advances have taken place and unacceptable dates are being offered," and requesting an urgent meeting in Madrid,[138] which eventually took place on April 2, 2013. Mr. Proio replied the same day: "We have the same concern and we have been trying to make you understand for some time now, both verbally as well as in writing. There is a generalised delay of the activities on site that has not allowed us to begin our activities on time, in spite of having the TBM in Guatemala since last December. Not to mention the existing on-site work conditions, which are not compatible with the initial studies and undergo continuous modifications we are not even timely informed of."[139]

235. Then, on March 21, 2013, SELI received a communication from Cobra's new site manager, Mr. Francisco Peinado, accusing SELI of delays in both the TBM assembly and the dovelas factory construction, and instructing SELI "to correct these mistakes and to fulfill the schedule agreed upon in the Acceleration Plan."[140] A lengthy reply from SELI followed, detailing all of Cobra's own delays throughout the course of the project and rejecting Mr. Peinado's "assertions and conclusions [as] Incorrect."[141]

236. According to SELI, up to March 19, 2013, Cobra had never objected to the timing or quality of SELI's work, either as to the TBM assembly or the dovelas factory.[142]

237. Cobra asserts that between this time in March 2013 and suspension of the Subcontract in April 2013, SELI did not substantially advance the works.[143] SELI disagrees and, for its part, asserts that at the end of March Cobra itself stopped preparatory work for the TBM.[144]

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[135] Exh. R-83. p. 2 (SELI email to Cobra dated Mar. 20. 2013]; Navigant Rpt paras. 62, 63, Curiously, Mr. Lazaro, RENACE civil engineer, testified that he was surprised when Cobra and SELI representatives together proposed a new schedule. Lazaro ws, para. 16.

[136] Exhs. R-83 (SELI email to Cobra dated Mar. 20, 2012, attaching revised SELI schedule); R-84 attachment (SELI email to Cobra dated Mar. 20, 2013).

[137] Exh. R-83 (SELI email to Cobra dated Mar. 20, 2012, attaching revised SELI schedule).

[138] Exh. R-85, p. 3 (Cobra letter to SELI dated Mar. 19, 2013).

[139] Exh. R-85 (SELI email to Cobra dated Mar. 19, 2013).

[140] Exh. R-86, p. 3 (Cobra letter SELI dated Mar. 21, 2013); Ciocca ws. para. 80.

[141] EXh. R-87 (SELI email to Cobra dated Mar. 22, 2013).

[142] Statement of counterclaim, paras. 86-114; Respondents' reply to statement of defense to counterclaim, paras. 5, 27.

[143] Defense to counterclaim, para. 202; Calmant's reply to statement of defense, para 47.

(iii) Cobra's Retention of Proacon

238. According to the testimony of SELI's witnesses, not contradicted by Cobra, in the course of March 2013, Cobra engaged Proacon to excavate the entirety of Tunnel I using the conventional drill-and-blast method, rather than the TBM method.[145]

239. SELI's witnesses testified that on March 26, 2013, they unexpectedly found Proacon on site and actually working on portions of the tunnel assigned to SELI.[146] SELI personnel were reportedly informed by the Proacon personnel on site that Proacon had indeed been engaged to excavate the entire tunnel through the drill-and-blast method.[147] SELI's new on-site project manager, Mr. Ricardo Cardellini, then informed Mr. Pelnado that his team observed on March 26 that "the excavation of tunnel I (planned to be excavated with TBM by SELI) was initiated by conventional means by another company unconnected to ours" and complained that "SELI has not received any formal or informal notification [of these] events."[148] Cobra's witness Mr. Rodriguez has confirmed that Cobra had indeed hired Proacon to conduct the tunneling on or around March 27, 2013.[149]

240. In fact, the minutes of a steering committee meeting between Cobra and RENACE held between March 21 and 23, 2013 state that "it was decided to remove SELI from the project and study new alternatives for the excavation of Tunnel I. From the above date, it is decided that tunnel I will be executed using conventional methods."[150] By way of confirmation, a project change order issued by Cobra, dated July 22, 2013, states, with specific reference to the March steering committee meeting, that:

> [according to] the alternative accepted by [RENACE]... [t]he tunnel would be excavated in traditional way by means of explosives and mechanical excavation to be executed by other [of] Cobra's subcontractors and SELI would no longer be a subcontractor for this project.[151]

Remarkably, CEO Gamarra Mompeán testified that both the minutes of the March steering committee meeting and the project change order were "incorrect" and that no decision was made to replace SELI before April or May 2013.[152]

241. On April 1, 2013, SELI presented in person to Mr. Peinado a letter inquiring as to why Cobra had taken this new course of action,[153] Mr. Peinado replied that Cobra had decided to abandon the TBM method of excavation.[154] Yet on the same day, and to SELI's confusion, Mr. Peinado wrote to Mr.

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[144] Statement of count reclaim, para. 110, citing Exhs. R-89 (SELI monthly rpt to Cobra dated Mar 31. 2013), R-92 (SELI letter to Cobra to Apr. 1. 2013).

[145] Ciocca ws. para 75.

[146] Ciocca ws. para. 83.

[147] Exh. R-88 (SELI internal email dated Mar. 27. 2013)

[148] Exh. R-92 (SELI letter to Cobra dated Apr. 1,2013).

[149] Rodriguez 2d ws, pp 16, 18.

[150] Exh. R -138. p. 11 (Cobra monthly rpt to RENACE dated Mar. 2013).

[151] Exh. R-145 [change order no. 2 dated July 22, 2013).

[152] Tr. May 25 p. 344, l.16 - p. 345,l. 21; p. p. 346,l.23 - *p.* 347, I. 2.

[153] Exh. R-92 (SELI letter to Cobra dated Apr. 1, 2013).

[154] Exh. R-93 (SELI internal email dated Apr. 2, 2013).

Gianluca Ciocca, a SELI officer based in Italy and responsible for coordinating the shipment of the TBM and dovelas parts, demanding that SELI perform its Subcontract obligations in accordance with the SELI Acceleration Plan.[155]

(e) Suspension and Termination of the Subcontract

242. At the April 2, 2013 meeting in Madrid that Cobra had previously scheduled, Cobra notified SELI that it intended to terminate the Subcontract, though it was willing to resolve matters amicably. Mr. Ciocca testified that at the meeting, Mr. Gamarra Mompeán, actually acknowledged that Cobra was chiefly responsible for the project delays but that Cobra needed to terminate the Subcontract in order to meet its deadline with RENACE.[156] Also according to SELI, on April 2, 2013, Cobra announced that it intended to compensate SELI for the termination and asked SELI for an estimate of costs, and, that a few days later SELI submitted to Cobra such a statement.[157] Upon cross-examination, Mr. Gamarra Mompeán, Cobra CEO, initially denied that any such request for an estimate of costs was made at the April 2 meeting, but quickly amended that answer in somewhat confusing terms:[158]

Q. Now, you deny, I gather, that you asked... SELI at the April 2 meeting to provide a schedule of the expenses it had incurred in its performance to date; is that right?

A. Yes.

Q. Okay. Turn to —

A. At that meeting, we discussed that both companies should value the costs involved... in terms of terminating the Contract, because both for them and for us it was a real disaster to terminate the Contract.

Q And so you did ask them to provide a schedule of the costs they had incurred?

A. No. Let's see. I was making a call at that meeting to keep calm and keep good senses and ask that both company, but don't take it literally, don't take my words literally. Both companies should value, but value in the broader sense of the word...

243. Cobra further confirmed suspension of the Subcontract by sending SELI a letter of April 4, 2013, stating that delivery of a cradle was no longer critical since the tunnel would be excavated through other means in order to meet deadlines in the EPC Contract.[159]

244. Despite stating its intent to terminate the Subcontract, Cobra nevertheless again insisted that SELI continue performing according to the SELI Acceleration Plan.[160] Thus, in that same April 4 letter,

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[155] Exh. R-90 (Cobra letter to SELI dated Apr 1, 2013).

[156] Ciocca ws, para 89.

[157] Ciocca ws, para 89.

[158] Tr. May 25, 2016, p. 362, l.22 - p. 363, l.1.

[159] Exh. R-94 (Cobra letter to SELI dated Apr. 4, 2013).

[160] Exh. R-94 (Cobra letter to SELI dated Apr. 4, 2013).

Cobra wrote: "In addition to what has been stated above, Cobra must urge you once again to comply with the schedule agreed to in the Acceleration Plan dated 08/06/2012."[161] It appears that SELI did pursue its activities. Thus, for example, on April 16, 2013, SELI reminded Cobra that in the coming days certain heavy equipment would arrive at the worksite, and that the cradle was *needed.*[162]

245. Following the notice of suspension, SELI offered to Cobra to come up with a revised schedule, which Cobra said it would be willing to consider.[163] SELI did so on April 5, 2013, proposing a schedule whereby all work under the Subcontract would be completed by March 15, 2014.[164] Cobra rejected the proposal, though at the same time again inviting SELI to submit a cost estimate with a view to compensation.[165]

246. On April 19, 2013, SELI, apparently confused by what appeared to be mixed signals, asked Cobra for a formal communication regarding the Subcontract:
[i]t is important to emphasize that a prompt, clear, and definitive formal statement is needed from Cobra regarding the situation of our contract with regard both [to] Italy and to Guatemala... [W]e are continuing to invest money and resources, the final amounts of which will continue to increase the costs incurred to date, such as, for example, the transportation of the special pieces that we had agreed to leave stationed at the port, which we are presently executing.[166]

in the same letter, SELI demanded that Cobra pay it the sum of 11,782,986.00 euros (above and beyond the value of TBM) by way of compensation "in the event that the contract in force for Renace II is terminated."[167] Cobra refused.

247. Finally, on April 25, 2013, Cobra, with RENACE's approval, formally suspended the Tunneling Subcontract on account of "constant and confirmed breaches by SELI in the pursuit of its obligations and responsibilities [under the Subcontract]... among them repeated noncompliance with the agreed dates and terms "[168]

248. According to SELI, it then requested on May 7, 2013 a 30-day good faith negotiation pursuant to Section 32 of the EPC Contract. There followed a meeting between Cobra and SELI in Madrid which yielded nothing, as apparently also did a further meeting in Madrid on May 21, 2013.[169]

249. On June 11, 2013, Cobra formally terminated the Tunneling Subcontract.[170] It denied in absolute terms any failures on its part as "Implausible" and rejected any offer to settle as "inappropriate,"

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[161] Exh. R-94 (Cobra letter to SELI dated Apr. 4, 2013). The letter stated in part: "[T]he execution of the assembly cradle is no longer on the critical path. Its execution will be carried out once you confirm to us the date of arrival of the TBM to the Project which for the moment is unknown."

[162] *Exh. R-96 (SELI letter to Cobra dated Apr. 16, 2013).*

[163] Ciocca ws, para. 90.

[164] Exh. R-95 (SELI email to Cobra dated Apr 5, 2013). See also Exh. R-11 (SELI email to Cobra dated Apr. 19, 2013).

[165] Ciocca ws, para 91.

[166] Exh R-11 (SELI email to Cobra dated Apr. 19, 2013).

[167] Exhs. R-11, R-11T (SELI email to Cobra dated Apr. 19,2013).

[168] Exh R-97 (Cobra letter to SELI dated Apr. 25, 2013).

[169] Statement of Claim, para. 74.

[170] Exh. R-99 (Cobra letter to SELI dated June 11, 2013). Cobra said it was terminating the Subcontract "In accordance with, among others, clause 30.1.2(a) of the [EPC] Contract as a result of SELI's lack of aptitude as regards the execution of the Project and for their repeated contract breaches which make the completion of the Project under the terms agreed, impossible."

adding that it would shortly inform SELI of Cobra's own losses due to SELI's breach.

(f) Post-termination

250. According to SELI, starting on June 17 or 18, 2013, Cobra began denying SELI all access to the worksite.[171] A notarial report attests to the fact that, when a SELI official, accompanied by a notary, sought entry to the worksite on June 18, 2013 to view the state of SELI's machinery and equipment, he was blocked by checkpoint personnel who presented a note that read: "ATTENTION: Please note access of all the persons of the SELI Company is forbidden. Order of Mr. Omar Rodriguez and the Cobra Company."[172]

251. On July 2, 2013, Cobra sent SELI a demand letter for damages in the amount of USD 14,320,083.80 on account of SELI's alleged breaches.[173] However, on Aug 2, 2013, Cobra offered to settle its dispute with SELI, but SELI evidently rejected the offer. On February 3, 2014, Cobra drew down the amount of USD 3,245,912.62 under the performance bond that had been issued on SELI's behalf.[174]

252. There followed litigation between Cobra and SELI both in Guatemala and the State of Florida, mostly in connection with requests for protective measures in relation to the TBM equipment and materials.[175] By stipulation and order dated October 10, 2014, the parties resolved all actions pending between them in Guatemala and Florida.

253. The future fate of the Renace II Project, following SELI's replacement, is not directly relevant to this proceeding. But since counsel have addressed the matter. It is briefly alluded to here. According to Mr. Gamarra Mompeán, "once SELI was removed from the project Cobra was able to finish the project within the relevant deadlines using alternative subcontractors even though Cobra had to modify the tunnel design and use the more primitive 'drill-and-blast' method"[176] However, it appears that on June 15, 2013, in an effort to expedite the project and meet the February 15, 2014 deadline, Cobra engaged OBRAS Subterráneas de Guatemala, S.A, ("OSSA"), at a contract price of USD 11,954,688.35,[177] to excavate the tunnel from the opposite end and meet up with Proacon. Yet Cobra apparently still missed the SELI Acceleration Plan's deadlines of November 30, 2013 for completion of the tunnel and February 28. 2014 for substantial completion of the RENACE II project According

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[171] Ciocca ws, para. 95.

[172] Exh R-100 (notarial rpt dated June 18, 2013).

[173] Exh R-102 (Cobra letter to SELI dated July 2, 2013).

[174] Delta Rpt, p. 45

[175] On September 17, 2013, SELI OBRAS brought civil proceedings against Cobra in the civil Court of First instance of the Department of Alta Verapaz for the preservation of evidence of the existence and condition of SELI's machinery and equipment at the worksite. That court dismissed the action on October 23, 2013 on the basis of the Tunneling Subcontract's arbitration provision. However, on March 21, 2014, the Guatemalan Court of Appeals reversed on the ground that SELI OBRAS had sought Interim relief only rather than an adjudication of the merits. See Exh. C-6 at Adobe 763-773. On October 23, 2013, SELI OBRAS filed a complaint with the Office of the Attorney General of Guatemala against Cobra for aggravated larceny and wrongful appropriation and retention of goods. As far as the Tribunal knows, that action is still pending.
On May 16, 2014, Cobra initiated an action against SELI in the U.S. district court for the Southern District of Florida for an order compelling SELI to arbitrate this dispute, a temporary restraining order and permanent injunction barring SELI from maintaining its actions in Guatemala. Exh. R-13 (Cobra v. SELI. complaint for injunctive relief in aid of international arbitration).

[176] Gamarra Mompeán ws, para. 30, n. 6.

[177] Navigant Rpt.. Para. 45.

to SELI, the tunnel was not completed until August 2014,[178] five months later than the projected completion date of March 15, 2014 provided for in SELI's April 5, 2013 proposed schedule revision. According to the testimony of Mr. Carlos Lazaro, project manager for RENACE, the Renace II project only reached completion in September 2004 but did not begin to operate commercially until April 2016, due to structural issues in the tunnel.[179]

IX. SELI'S ALLEGED BREACHES OF THE TUNNELING SUBCONTRACT

254. In this proceeding, Cobra alleges that SELI committed a very substantial number of breaches of the Tunneling Subcontract, citing them both as a basis for recovering damages against SELl and as a defense to SELI's counterclaim for wrongful termination. The following subsections deal with each of these alleged breaches in turn, but without explicitly distinguishing between Cobra's claim and SELI's counterclaim since the two are very much mirror images of one another. The same findings that would show that SELI breached the Subcontract would, if the breaches were substantial enough, defeat SELI's claim that the termination was unlawful. Conversely, a finding that SELI did not breach the Subcontract would suggest that SELI rightly considers the termination to have been wrongful. Thus, for most purposes, the Tribunal's findings will determine both Cobra's entitlement to relief for breach of contract and SELI's entitlement to relief for wrongful termination of contract.

255. The breaches of contract successively addressed in this section are as follows:
(a) SELI's alleged delay in procurement of a performance bond

(b) SELI's alleged failure to procure in advance payment guarantee

(c) SELI's alleged breach of representation and warranty

(d) SELI's alleged delay in incorporating a Guatemalan subsidiary

(e) SELI's alleged failure to pay suppliers and subcontractors

(f) SELI's alleged failure to pay Cobra's costs in connection with the Subcontract's termination

(g) SELI's allegedly wrongful litigation in Guatemala

(h) SELI's alleged failure to perform Renace Ill

(i) SELI's alleged delays in performing its principal contractual obligations

i. SELI's alleged delay necessitating the SELI Acceleration Plan

ii. SELI's alleged delay in shipment and assembly of the TBM parts

iii. SELI's alleged delay in construction of the dovelas factory

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[178] Exh. R-146 (Cobra email dated Aug. 13, 2014).
[179] Tr May 25, 2016, p. 408. l.3 - p. 409, l. 13.

iv. Import of alleged inadequacy of access roods as SELI's defense to delay

v. SELI's right to cure

vi. Conclusion on SELI's alleged delays in performing its principal contractual obligations

(a) SELI' Alleged Delay in Procurement of a Performance Bond

256. Cobra claims that SELI failed to procure on a timely basis the performance bond in Cobra's favor that it was required to procure within 60 days of contract, i.e., by February 27, 2012 (para. 150, supra), and that this failure constituted a breach of Section 24.1, clause 7, of the Subcontract. [180]

257. SELI concedes that it did not meet this deadline. [181] However, it maintains that it asked Cobra to extend the deadline to November 15, 2012, and that Cobra did not object, a fact that Cobra does not dispute. SELI did not in fact provide the bond until December 3,2012. [182] and so missed the deadline even as extended to November 15.

258. In its defense. SELI maintains that, even if it breached its performance bond obligation, that breach was neither material nor prejudicial to Cobra. It also observes that Cobra eventually drew down the bond and now holds its USD 3,245,912.62 proceeds. [183]

259. The Parties acknowledge that, in order to justify a substantial award of damages, a breach of contract must under New York law be material and prejudicial enough to defeat the purpose of the contract. Frank Felix Associates, Ltd. v. Austin Drugs, Inc, 111 F.3d 284, 289 (2d Or. 1997) ("Under New York law, for a breach of a contract to be material, it must "go to the root of the agreement between the parties"); Lipsky v. Cmmw. United Corp., 551 F.2d 887, 895 (2d Cir. 1976) ("material" breach is one that is so substantial as to defeat the purpose of the entire transaction); Cablevision Sys. Corp. v. Town of E. Hampton, 862 F. Supp. 875 (E.D.N.Y. 1994), aff'd, 57 F.3d 1062 (2d Or. 1995) (finding of materiality requires departure from defects of performance pervading the whole of contract and so essential as substantially to defeat object that the parties intended to accomplish); Hadden v. Consol. Edison Co. of New York, Inc, 312 N.E.2d 445, 449 (N.Y. 1974) (factors bearing on materiality include ratio of performance already rendered to that which is unperformed, quantitative character of the default, degree to which purpose behind contract has been frustrated, the willfulness of the default, and extent to which aggrieved party has already received substantial benefit of promised performance). [184]

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[180] Statement of claim, para. 45.

[181] Statement of counterclaim, para. 166. SELI suggests, without explanation, that procurement of the bond may not have been due until November 15, 2012. But SELI had not procured the bond by that date either.

[182] Answer and counterclaim, para. 36: Delta Rpt, app. 5. The bond was, as required, in the amount of USD 3,245,912.62, which was 12.5 % of the contract price.

[183] Delta Rpt, P. 45.

[184] See also *Septembertide Pub,* B.V. v. Stein *and Day.* Inc, 884 F.2d 675, 678 (2d Cir.l989); *Canfield v. Reynolds.* 631 F.2d 169, 178 (2d Clr.1980); *Babylon* Assocs. v. County *of Suffolk.* 101 A.D.2d 207, 215, 475 N.Y.5.2d 869, 874 (2d Dept 1984); citing Callanon v. Powers, 199 N.Y. 268. 284. 92 N.E. 747, 752 (1910); Riviera *Fin. of Taos. Inc.* v. *Capgemini US, LLC,* 511 Fed. Appx. 92, 95 (2d Clr. 2013); Smolev v. Carole Hochman Design Group. Inc., 913 N.Y.S.2d 79 (N.Y. App. Div 1st Dept 2010). Blue Rid *gte* Farms, lnc. v. Crown *Equip.* Corp., 01 CV 84605J, 2005 WL 755756 (E.D.N.Y

260. This particular defect in performance that Cobra claims SELI committed simply does not meet this test.

261. However, the Tribunal does not rest its decision on that ground, but rather on a more fundamental basis that will have application to other breaches that Cobra claims SELI committed. SELI maintains, and Cobra does not dispute, that under New York law a party cannot proceed with performance of a contract and expect the other party to proceed as well, notwithstanding a breach by the other party, and then later maintain that the past breach justifies a termination of the contract. Under that body of law, a party that proceeds with a contract, and expects the other party to do likewise, despite the other party's failures of performance, is deemed to have acquiesced in and accepted those failures.[185] A non-breaching party that continues to perform and accepts the performance of the breaching party cannot in all fairness thereafter invoke those past failures as a basis for termination of a contract.[186]

262. It is tailing in this connection that in December 2012 Cobra not only proceeded with performance of the contract, but actually made a first milestone payment to SELI in the amount of USD 2,032,344.27.[187]

(b) SELI's Alleged Failure to Procure an Advance Payment Guarantee

263. Cobra claims that SELI also breached the Tunneling Subcontract by failing to procure the advance payment guarantee contemplated by the Subcontract (para. 150, supra).

264. SELI unquestionably faded in this respect as well However, the Tribunal agrees with SELI's contention that the Subcontract never imposed an obligation on SELI to procure such a guarantee. The purpose of the guarantee was to enable SELI, to receive an advance payment by Cobra, and the only consequence of SELI's failure to procure the guarantee was its forfeiture of the right to an advance payment from Cobra[188]. SELI was entitled to forego that advantage.

Mar 28, 2005), Miller v. Benjamin, 37 N.E. 631. 632 (N.Y. 1894); La *nvin Inc.* v. *Colonia, Inc,* 739 F.Supp. 182. 195 (S.D.M.Y.1990); *Hotel Cameron. Inc.* v. *Purcell,* 827 N.Y.S 2d 13 (N.Y. App. Div. 1st Dept. 2006).

[185] *Marathon Enterp, Inc. v. Schroter GmbH* & *Co.*. no. 01 clv 0595, 2003 WL 355238, at "6 (S.D.N.Y., Feb 18. 2003) [Exh RA-26]. See also F *ranklin Pavkov Constr. Co.* v. Ultra *Roof, Inc.,* 51 F.Supp. 2d 204. 217 (N.D.N.Y. 1999) [RA-20] ("party may be deemed to have waived the right to timely performance even where the parties have agreed that time is of the essence, by accepting performance after expiration of the time limit"), ESPN, *Inc.* v. Office *of Comm't of Baseball.* 76 F.Supp.2d 383, 392 (S.D. N.Y. 1999) [RA 59] ("when a party terminates after continuing the contract for a parted of time, the party's legal justification for termination has disappeared."); *Walter Sign Corp.* v. state, 31 A.D.2d 729 (App Div. 1968) [RA-68]. Cobra cites 2 cases in which the non-breaching party's acceptance of the breaching party's performance lasted longer than four months Amended defense to counterclaim, para 208. citing *Dun* & *Brodstreet Corp. v. Harpercollins Pub.,* Inc.. 872 F. Supp 103,110 (S.D. N.Y. 1995) [CA-21]; *fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgmt.* L.P., 22 A.D. 3d 204, 210 (App. Div. 2005) (RA-21). The Tribunal does not read New York case law as fixing a length of time that must elapse before a party may be considered a shaving acquiesced in the other party's defective performance.

[186] 33 N.Y. Proc., New York Construction law Manual, sec. 4:16 (2d ed.) (RA-54) ("If the owner "does not terminate the contract immediately, but allows the contractor to continue performance and insists on completion... the owner has waived the contractor's default"). Similarly, a party may not "after allowing a completion date to pass, summarily terminate the contract." 33 N.Y. Prac., New York Construction law Manual sec 4:16 (2d ed.) [RA 54].

[187] Statement of counterclaim, para. 80; Delta Rpt, p. 32

[188] Ultimately, the only consequence to SELI of not receiving the advance payment was the rise of eventual nonpayment by Cobra. SELI would still be entitled to financial compensation for any late payment to it of moneys owed it by Cobra under the Subcontract. Tunneling Subcontract,

265. Also, and in any case, the parties agreed through the TBM Pledge Agreement[189] that Cobra could take title to the TBM machine as security in lieu of the advance payment guarantee, and that arrangement actually won RENACE's assent[190] (see paras. 166-169, supra). On the basis of that agreement, Cobra made the advance payment to SELI and was entitled thereafter to make deductions up to that amount from milestone payments owed to SELI.

(c) SELI'S Alleged Breach of Representation and Warranty

266. Cobra claims that SELI breached representations and warranties under Section 30.1.2(f) of the EPC Contract by falsifying and concealing its financial situation, thereby inducing Cobra to enter into the Subcontract to its detriment.[191] SELI categorically denies this charge.[192]

267. Section 30.1.2(i) of the EPC makes "any breach by [SELI] of any representation or warranty" a ground for termination. The following are the relevant representation and warranty provisions of the EPC, as incorporated into the Subcontract:
[SELI] guarantees and pledges to be at all times qualified and capable of executing the Work so as to complete the Project in accordance with the terms of the Contract. [SELI] guarantees and pledges that the Project shall be designed, mounted and built so that it will comply with all the requirements of this Contract and will be a totally functional Project capable of operating free from Defects during its Design Life. (Sec 34.6.1 EPC)

[SELI] represents and warrants that there is no pending controversy, legal action, arbitration proceeding or investigation instituted, or to the best of [SELI's] knowledge threatened, against or affecting, or that could affect, the legality, validity and enforceability of the Contract Documents or the performance by [SELI] of its obligations under the Contract Documents, nor does [SELI] know of any basis for any such controversy, action, proceeding or investigation. (Sec. 34.6.4 EPC)

[SELI] represents and warrants that it is financially solvent, able to pay its debts as they mature, and possessed of sufficient working capital to complete its obligations under this Contract. (Sec. 34.6.10 EPC)

268. The Tribunal is unconvinced by SELI's argument that it cannot be bound by representations and warranties given by Cobra to RENACE in the EPC because those are not representations that SELI made to Cobra.[193] The Tribunal sees no basis for treating the representation and warranty

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sec. 6.6.6.

189 Exhs. R -4, R -39 (SELI email to Cobra dated July 23, 2012).

190 Simonetti ws, para. 35.

191 SELI had allegedly defaulted on its long-term debt obligations, as a result of which its funding banks demanded an accelerated payment of 26 mllion euros. SELI also failed to pay certain financing fees of over 5.7 million euros and almost 11 million euros in taxes and social security duties in January 2013, a SELI construction site in Florence was seized. Banks then refused an additional credit line increase. On January 13, 2013. SELI proposed to restructure its debt vis-à-vis the banks under Italian bankruptcy law, but the banks did not cooperate. Statement of claim, paras 8-9, 76-90, citing Exh. 7 at Adobe 366-367: Claimant's reply to statement of defense, paras 55-57, 134-141; Defense to counterclaim, at pares. 189 et seq.

192 SELI offers the witness testimony of Alberto Barioffi, SELI manager, who testified to the nature and source of SELI's cash flow difficulties and SELI's accounting practices. He testified that SELI acted in perfect good faith both in connection with the Tunneling Subcontract and the Italian insolvency proceedings.

193 Amended defense to counterclaim, paras. 186-196.

provisions contained in the EPC as less capable of being incorporated by reference into the Tunneling Subcontract than any other EPC provision.

269. The Tribunal is also unconvinced by SELI's argument that it never made any affirmative representations to Cobra about its financial condition. By virtue of the very warranties in the EPC that were incorporated into the Subcontract, SELI may fairly be said to have made such representations.

270. If the Tribunal were to find that SELI did in fact breach representations and warranties under the Tunneling Subcontract, it could possibly hold SELI liable in damages to Cobra. But it is implicit in SELI's argumentation that, in order to recover damages on that basis. Cobra would have to show both that it relied on the representations and warranties that were made to it and that such reliance substantially accounts for the losses, if any, that Cobra suffered. New York law is precisely to that effect See Keywell Corp. v. Weinstein, 33 F.3d 159,165 (2d Cir. 1994) (party claiming fraudulent misrepresentation must prove not only that defendant made a material false representation and intended to defraud plaintiff thereby, but also that claimant reasonably relied on the representation and suffered damage as a result of such rellance); Brown v. lockwood, 432 N.Y.S.2d 186,193 (N.Y. App. Div 2d Dept 1980) (same); Kirk v. Heppt. 532 F. Supp. 2d 586. 590 (S.D.N.Y. 2008) (plaintiff must be able to show a causal link between alleged fraud and claimed damages); *Loub v. Foessel,* 297 AD.2d 28, 30, 745 N.Y.S.2d S34 (N.Y. App. Div. 1st Dept. 2002) (fraud action must fall if claimant falls to prove that misrepresentations directly and proximately caused his investment losses); Kaye v. Grossman, 202 F.3d 611, 614 (2d Clr. 2000) (same); Conti. Cas. Co. v. PricewaterhouseCoopers, LLP, 933 N.E.2d 738, 742 (N.Y. 2010) ("In a fraud action, a plaintiff may recover only the actual pecuniary loss sustained as a direct result of the wrong"). [194]

271. It is impossible, however, for the Tribunal in this case to reach that conclusion without first determining the impact of those conditions on SELI's contractual performance and then determining the impact of SELI's performance on Cobra. In other words, any determination of liability for breach of representation or warranty in this context is inextricably linked to the question of failures of performance under the Subcontract on SELI's part and cannot be determined in isolation from them. It must await the Tribunal's consideration in this Award of the merit of Cobra's claim that SELI impermissibly delayed in performance of its principal contract obligations (see Section IX (i)), paras. 290-396, infra) of the parties' respective claims of default by the other in performance of its contractual obligations.

272. Similarly, the Tribunal cannot determine whether a breach of representation or warranty, if one occurred, justified termination of the Subcontract, without determining whether such a breach itself substantially produced the injury of which Cobra complains. Here, too, the Tribunal finds itself unable to make that determination without considering whether such a breach accounts for that injury.

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[194] See olso *Katora* v. D.E. *Jones Commodities, Inc.,* 835 F.2d 966,970-71 (2d Or.1987), *Cumberland OH Corp.* v. Thropp, 791 F.2d 1037,1044 (2d Or), *cert. denied.* 479 U.S. 950. 107 S.Ct. 436, 93 LEd 2d 385 (1986); *Friedman* v. Anderson. 23 A.D.3d 163, 803 N.Y.S.2d 514. 517 (N.Y. App. Div. 1" Dept 2005); *Kregos* v. *Associated Press, 3* F.3d 656, 665 (2d cir.1993); *Held v. Koufman.* 694 N.E.2d 430, 433 (N.Y 1998); New York *Univ. v. Continental Ins. Co..* 87 N.Y.2d 308, 318, 639 N.Y.2d 283, 662 N.E.2d 763); *Woll St. Transcr. Corp.* v. *Ziff Common. Co.,* 638 N.Y.2d 640, 641 (N.Y. App. Div. 1st Dept. 1996); *Feldman* v. *Grant.* 213 A.D.2d 340, 341, 625 N.Y.S.2d 7, N. *denied* 86 N.Y.2d 701, 631 N.Y.S.2d 605, 655 N.E.2d 702); Maisono v. *Backoff.* 767 N.Y.S.2d 790, 791 (N.Y. App. Div. 2d Dept 2003); Reno v. *Bull.* 226 N.Y. 546,124 N.E. 144 (1919); *Sager* v. *Friedman,* 270 N.Y. 472, 481,1 N.E.2d 971 (1936); *Manas* v. VMS Associates, LL *C.* 863 N.Y.S 2d 4,7 (N.Y. App. Div. 1st Dept 2008).

273. It may be noted at this point that Cobra paid a great deal of attention throughout these proceedings to SELI's financial difficulties, [195] culminating in insolvency proceedings, as well as to its difficulties in performing a series of other construction contracts unrelated to the Renace II project. [196] The Tribunal considers evidence of SELI's financial straits and alleged defaults on other contracts largely irrelevant to the question of SELI's performance under the Tunneling Subcontract. SELI's liability to Cobra and the justification for Cobra's termination of the Subcontract depend solely on the parties' respective performances under the Subcontract. This Award does not therefore give SELI's financial situation or performance record on other projects the attention given to those matters by Cobra in its pleadings and at the hearing.

274. In this proceeding, Cobra asserts, alongside its claims of multiple breaches of contract, that SELI, on the basis of the same facts, committed the tort of fraudulent misrepresentation. [197] To prevail on that claim, the claimant must prove a false representation as to a material fact, an intention to deceive, justifiable reliance on the misrepresentation, and resulting loss. For the same reasons set out above, it is impossible to determine whether all of these elements are present without considering the parties' respective claims of default by the other in performance of its contractual obligations, and the impact of any such defaults.

(d) SELI's alleged Delay in incorporating a Guatemalan Subsidary

275. The Tribunal has already addressed SELI's delay in incorporating a Guatemalan subsidiary. [198] As noted, [199] SELI concedes that it did not incorporate SELI OBRAS until October 24, 2012 and could not until then enter into a binding contract with APSA. However, the Tribunal finds that Cobra willingly agreed to pay APSA on SELI's behalf. Having so agreed and having proceeded to continue performance under the Subcontract, as well as expect continued performance by SELI notwithstanding SELI's delay, Cobra cannot properly treat that delay as a basis for damages or as justification for terminating the Subcontract.

(e) SELI's Alleged Failure to Pay Suppliers and Subcontractors

276. Cobra claims that SELI breached its obligation under the Subcontract to pay its suppliers and subcontractors, as required under the EPC [200]

277. Cobra begins with itself as subcontractor, claiming that it effectively became a SELI subcontractor when, in September 2012, it made payment to APSA on SELI's behalf. [201] Cobra evidently is correct

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[195] Counsel for Cobra referred at length in the first day of hearings to what it described as SELI's "dismal financial slate" Tr. May 23,2016. p. 16,1.14.

[196] See. for example, the witness statement of Gilberto Ferrari Pedreschi testifying to SELI's difficulties in completing the El Alto project, another project involving Cobra. Counsel for Cobra cross-examined SELI's witness Barioffi at great length during the hearings on the fate of certain of SELI's other projects, including El Alto, El Torito and Pando Montellrio Tr. May 24, p. 156ff.

[197] Statement of claim, para 107.

[198] See paras 177, 198, 182, supra.

[199] See para 179, supra.

[200] EPC, sec. 30.1.2(f).

that SELI never reimbursed Cobra for that expense.[202] However, the Tribunal does not consider SELI's failure to reimburse Cobra to represent a failure to pay a subcontractor, not because Cobra is not technically a subcontractor, but because the parties agreed at the time that SELI would reimburse Cobra through offsets against amounts owed by Cobra to SELI as milestone payments to SELL[203]

278. More troubling for SELI is its apparent failure to pay APSA for its subsequent work. On June 11, 2013. APSA strenuously complained in an email from the APSA's President of the Board of Directors and Legal Representative of non-payment of amounts owed, and demanded payment by June 15, 2013.[204]

279. Even so, the Tribunal is reluctant to hold SELI in breach of contract for this failure, First, the demand letter from APSA was sent on June 11,2013, the same day that Cobra formally terminated the contract. It seems anomalous to the Tribunal to treat SELI as in breach of contract when that breach occurred at the time that Cobra terminated the Subcontract (notice of which had been given even earlier). Moreover, even in this letter. APSA extended to June 15, 2013 the deadline for payment.[205]

280. Cobra further claims that SELI never paid Proacon for its excavation of the first fifteen meters of the tunnel.[206] SELI concedes that it never made that payment, and has no present intention of making it.[207] SELI states that it decided to take that position "after learning that Cobra had engaged Proacon to excavate the entirety of Tunnel I in [SELI's] place "[208] Cobra describes SELI's reasoning as circular, insofar as SELI seeks to justify its breach of contract by reference to the contract's termination on account of SELI's own breach.[209] However, the question whether SELI did breach the Subcontract is a question that is before this Tribunal for decision. More importantly, as SELI observes, "SELI was terminated before it was able to complete its scope of work and the [excavation of the first fifteen meters] ultimately became part at the tunnel that Proacon excavated on Cobra's behalf."[210].It appears that Cobra did eventually pay Proacon the amount of USD 260,954,00, without being reimbursed by SELI.[211] But, again, the work done by Proacon at SELI's invitation is work the benefit of which accrued to Cobra.

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[201] Statement of claim, para. 63.

[202] Defense to counterclaim, para. 172.

[203] See para. 221, supra.

[204] APSA's President wrote as follows-
I want to indicate the following thing to you:
1. That are had a contract with you, we fulfilled it and it is you who owes us the balance on the books
2. That we have nothing to do with your relations with Cobra. We have not had a contract with Cobra.
3. That I hope June 15 is enough to receive the payment, or whereas you know that we will present our demand before the competent court, placing a lien against property, etc. This is definitive. You will pay or you would be wrapped up in a quite a suit. I never thought that the loyalty and service extended to you would be so badly returned" Exh. C- 46 (letter from APSA to SELI dated june 11,2013).

[205] Cancelled checks in the record (Exh. NCI-48) indicate that ARSA was paid by SELI.

[206] Statement of claim, paras. 62-65.

[207] Exh. C-15 (letter from Proacon to Cobra, June 17, 2013).

[208] Statement of counterclaim, para 175.

[209] Claimant's reply to statement of defense, para. 123.

[210] Statement of counterclaim, para 122, fn. 164. See Ciocca ws, para 97.

[211] Statement of claim, para. 65. Defense to counterclaim, para. 168

(f) SELI's Alleged Failure to Pay Cobra's Costs in connection with the Subcontracts Termination

281. The Subcontract between Cobra and SELI obligated SELI to pay Cobra damages owed to Cobra in excess of the contract price "within thirty (30) days after the date in which [SELI] receives from [Cobra] an invoice, together with reasonable support documentation of all those quantities.[212] SELI has made no such payment to Cobra. However, SELI cannot fairly be obligated to pay Cobra costs in connection with termination of the Subcontract if that termination was wrongful. Whether termination of the Subcontract was unlawful is a matter for decision by this Tribunal

(g) SELI's Allegedly Wrongful Litigation in Guatemala

282. Cobra further claims that SELI committed a violation of its obligations under the Subcontract, and more specifically under the Subcontract's arbitration provision, by filing suit in Guatemala on September 17, 2013.[213] SELI's stated purpose in bringing the action was to preserve evidence of the existence and condition of equipment left at the worksites and for the relevant verifications to be made.[214] Upon Cobra's petition, the court of first instance dismissed SELI's action on the basis of the arbitration clause.[215] However, this ruling was overturned by the appellate court on March 21, 2014, because it considered SELI's suit to be a request for interim relief, rather than a claim on the merits, and thus not inconsistent with the obligation to arbitrate.[216]

283. This was not the only civil action brought by one of these parties against the other. On May 16, 2014, Cobra brought suit in federal district court in Florida not only for an order compelling arbitration and for dismissal of all judicial actions brought by SELI, but also for an order enjoining a scheduled June 13, 2014 inspection of the equipment at the worksite.[217] In addition, SELI filed a complaint with the Attorney General of Guatemala for Cobra's wrongful appropriation and retention of goods.[218]

284. The Tribunal considers both SELI's and Cobra's requests regarding inspection of equipment at the worksite to be requests for interim relief only and not in breach of the parties' agreement to arbitrate. It is well-established that bringing an action in court for interim relief in connection with an arbitral proceeding does not constitute a violation of the obligation to arbitrate or amount to a waiver of the right to do so.[219]

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[212] EPC Contract, sec 30.4. [check]

[213] Statement of claim, paras. 67-68.

[214] Answer, p. 16. On September 17, 2013, SELI OBRAS brought civil proceedings against Cobra in the Civil Court of First instance of the Department of Alta Verapez for the preservation of evidence of the existence and condition of SELI's machinery a *nd* equipment at the worksite

[215] The court dismissed the action on October 23, 2013 on the basis of the Tunneling Subcontract's arbitration provision.

[216] On March 21, 2014, the Guatemalan Court of Appeals reversed on the ground that SELI OBRAS had sought interim relief only rather than an adjudication of the merits. See Exh. C-6 at Adobe 763-773.

[217] Exh R -13 (Cobra v. SELI: complaint for injunctive relief in aid of international arbitration).

[218] Answer, p. 17. According to SELI's answer in this proceeding, the criminal matter is still pending.

[219] *Carollina Power* & Light Co v. Uronex, 451 F. Supp. 1044 (N.D. Cal 1977)

285. In any event, as previously noted,[220] the parties reached an agreement on October 10, 2014, "to resolve" all Guatemalan and U.S actions between them. While the exact import of their resolution is unclear, it suggests that the parties mutually decided to put those litigations behind them. In the Tribunal's view, one manner of doing so is refraining from seeking either to impose liability or justify termination of the Subcontract on account of those actions.

286. Cobra also asserts in these proceedings what amounts to a related tort claim for conversion.[221] According to Cobra "SELI attempted to improperly convert the TBM by initiating these civil and criminal proceedings in Guatemala, even though SELI knows that it had transferred title to Cobra and that [it thereby acted] in breach of the Parties' agreement to arbitrate.[222] As indicated above (para 286, supra), the Tribunal considers that the parties' "resolution" of disputes between them related to the actions instituted in Guatemala and Florida includes abandonment of claims based on the institution of those actions.

(h) SELI's Allged Failure to Perform Renance III

287. It is uncontested that Cobra and SELI agreed to bid together for the Renace III project. As noted (para. 154, supra), pursuant to that agreement. Cobra promised to engage SELI as subcontractor in the event it was selected by RENACE as main contractor, while SELI in turn promised Cobra that it would not join in on any competing contractor's bid, and indeed that it would pay Cobra the amount of USD 5,038,160 in liquidated damages if it were to breach that obligation.[223] Conversely, Cobra agreed to pay that amount to SELI for any unjustified failure to work with SELI as subcontractor on the project. Cobra now seeks payment by SELI of USD 5,038,160 in liquidated damages.

288. The Tribunal finds no evidence in the record to support Cobra's claim that SELI bid or participated in Renace III with a third party and thus breached its obligation to contract exclusively with Cobra, in fact, according to SELI, Cobra was in the end engaged by RENACE as main contractor for the project, and did not in fact engage SELI as subcontractor.[224]

289. The Tribunal has found that none of the failings by SELI alleged by Cobra and discussed in subsections (a) through (h) of this Section of the Award (i.e., paragraphs 256-288), even if established, is sufficient to warrant the imposition at liability on SELI for breach of contract or fraud or justify contract termination.

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[220] See para. 252, supra.

[221] Statement of claim, para. 67.

[222] Statement of claim, para 67. Cobra asserts that SELI failed to fulfill any of the express conditions set out in the TBM Pledge Agreement before it could recover title. Reply to counterclaim, paras. 11, 15. SELI in turn maintains that it satisfied all the conditions set out in the TBM Pledge Agreement to entitle it to recover title to TBM. SELI also defends against this charge on the ground that TBM Pledge Agreement is unenforceable and its invocation by Cobra an abuse of right Answer and counterclaim, para. 75.

[223] Exh. R-16, p. 7. Clause Six of the Subcontract provider:
"SELI acknowledges that it is aware that the commitment to exclusivity described in this sixth clause was an essential condition for Cobra's acceptance of SELI's offer, and for hiring SELI to do the Works, and therefore any breach of this commitment will result in an obligation on the part at SELI to pay Cobra a fixed sum of USD 5,038,160, without prejudice to any subsequent actions that Cobra may take against SELI due to said breach."

[224] In fact, SELI asserts that Cobra owes SELI liquidated damages under the agreement.

(i) SELI's Alleged Delays in Performing its Principal Contractual Obligations

290. By contrast, at the very heart of this dispute Iie, as noted, serious reciprocal claims by each party that the other substantially delayed performance of its obligations and that those delays alone account for the party's own failures of performance. These claims of delay relate to all major components of the project: delays in preparation of access roads and works sites, delays in shipment of TBM parts, delays in TBM assembly, delays in construction of the dovelas factory platform, delays in construction of the dovelas faculty, and delays in tunnel excavation.

291. In their submissions, both parties largely differentiate between preparation for excavation of the tunnel, on the one hand, and construction of the dovelas factory, on the other, even though these activities were in many respects taking place concurrently and were dependent in part on the same preparations. This section of the Award adopts that distinction to the extent possible.

292. As regards both aspects of the project, the parties disagree sharply over the causes of delay in their accomplishment, and more particularly over the degree to which any particular delay of performance on one's part was attributable to a delay in performance by the other.[225] Cobra thus maintains that SELI did not meet any of the deadlines established under the SELI Acceleration Plan[226] and that those failures account for any delays on its part. In eventually terminating the Tunneling Subcontract, Cobra cited in particular SELI's failure to complete in a timely fashion either the TBM assembly and excavation work or the dovelas factory and manufacture of dovelas. Conversely, SELI attributes virtually every delay in performance of its obligations, both as regards the TBM assembly and the dovelas factory, to Cobra's own repeated failures of performance[227]

293. In addressing the relative importance of SELI's delays to delays by Cobra, Cobra portrays construction of the dovelas factory as the "critical component of delay to SELI's ability to start TBM drilling."[228] According to Cobra's expert, Delta, it was SELI's failure to complete construction of the dovelas factory and to commence testing and production of the dovelas that caused the earliest start date for the TBM excavation to be postponed from September 12, 2012 to July 16, 2013. (To arrive at this date, Delta used SELI's own timing data, including the necessary lead time for production of dovelas before TBM excavation could commence.)[229] By referring to construction of the dovelas faculty as the "critical" component. Cobra appears to suggest that it this on this aspect of the Tunneling Subcontract that successful completion of the project as a whole most heavily depended.

294. SELI disagrees, maintaining that the dovelas did not even become necessary to the project until an operational TBM could be in place to construct the tunnel in which the dovelas were to be installed. According to SELI, Cobra's failure to provide the TBM cradle prevented the TBM from even being assembled.[230] Thus, for SELI, it is not construction of the dovelas factory, but rather the TBM

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[225] Statement of *claim, para.* 66; Respondent's reply to statement of defense to counterclaim, para. 5.

[226] Gamarra Mompeàn ws, para. 9. See also Statement of claim, para. 32

[227] Lianos ws, paras 10, 65.

[228] Amended Delta Rebuttal Rpt. pp. 34, 45.

[229] Dette Rebuttal Rpt. p. 39. See Claimant's Reply to statement of defense. para. 59. According to this data, 57 days were required for equipment delivery, construction and testify before SELI could start fabricating the dovelas, followed by a 25-day "pour period."

[230] Respondents' reply to statement of defense to counterclaim, paras 10-11.

assembly and excavation by the TBM, that was the projects "critical path." To discredit Cobra's claim that the dovelas factory was the critical element of the project, SELI points out that Cobra's own monthly reports to RENACE identified the project's power house as the "critical path." [231]

295. Delta describes the Navigant Report, on which SELI partially relies, as inaccurate in this respect, [232] as well as both "based on many incorrect assumptions and errors" [233] and "conclusory " [234]

296. It appears to the Tribunal that Cobra's and SELI's designation of the dovelas factory's construction and the TBM's assembly, respectively, as "critical" may not be entirely objective. In both cases, the activity designated as "critical" happens to be the one in regard to which each party is confident that the other was most clearly at fault. This will become more apparent in the detailed discussion in later sections.

(i) SELI's alleged delay necessitating the SELI Acceleration Plan

297. In this proceeding, Cobra has suggested that the very need to introduce the SELI Acceleration Plan in August 2012 was itself attributable to delays in performance by SELI. According to Cobra's CEO, Mr. Gamarra Mompeán, those delays were the "sole" cause of that need. [235] SELI disputes this assertion, assigning responsibility for the need for that Plan to disagreements between RENACE and Cobra as well as early performance delays on Cobra's part. [236]

298. It is uncontested that in the first half of 2012, discussions took place between RENACE and Cobra over difficulties in connection with the Renace II project. However, Cobra's witnesses portray the discussions between RENACE and Cobra in this period as basically amicable and non-momentous. [237]

299. By contrast, Mr. Lianos of SELI reports attending a "very tense and unpleasant" meeting in Guatemala in March 2012, during which RENACE and Cobra disagreed not only over unresolved design issues, such as location of the project reservoir, but also over a request by Cobra for considerably more time to perform its contractual obligations. Among the reason for Cobra's request was its discovery that it had seriously underestimated the volume of earthworks required to prepare the project's power house access road. [238] Mr. Lianos describes RENACE's director general, Juan Carlos Méndez, as speaking at that meeting in terms highly critical *of Cobra's* lack of progress in its work on the Renace II project. [239]

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[231] Exhs. R-115, R-116, R-121, R-124, R-131, R-138 (Cobra monthly rpts to Renace for Aug. 2012 to Mar. 2013) Also, on cross-examination, Mr. Gamarra Mompeán admitted that, in presenting the RENACE Acceleration Plan (Exh. R-37) to Cobra he identifled the TBM tunnel as a "critical" activity Tr. May 25, p. 321, I. 3-6.

[232] Delta Rebuttal Rpt. P- 41

[233] Defense to counterclaim, para. 49.

[234] Defense to counterclaim, para 51.

[235] Gamarra Mompeán, para. 17. Mr. Gamarra Mompeán testified that when RENACE and Cobra traveled to Italy in June 2012 to inspect the TBM, SELI reported that it would not be ready to ship the TBM until September 2012. Gamarra Mompeán ws. para. 11.

[236] Answer and counterclaim, paras. 37-50; Respondents' reply to amended statement of defense to counterclaim, para. 21.

[237] Corios Lazaro of RENACE testified as follows; "As regards 'strategic disagreement,' l do not know what SELI is referring to. It is true that Cobra and Renace were discussing certain project details early in 2012. These discussions were always professional and any issues were resolved by June 2012." Lazaro ws, para. 14.

[238] Lianos ws, paras. 40-41. See pera. 203, supra.

[239] Lianos ws, paras 41-22: "Mr. Mendez reacted angrily to Cobra's request and strongly reproached Cobra for its lack of professionalism."

300. On March 27, 2012, Mr. Lianos contacted Mr. Martin de Vidales for an update following the meeting in Guatemala with RENACE, and the latter reported no progress. As earlier noted,[240] on April 19, 2012, following another update request from Mr. Linos, Mr. *de* Vidales reported that "the availability of the entry portal and of the location of the possible dovela factory will be delayed," which would in turn delay SELI's performance by at least three months. SELI was accordingly without any current performance schedule.[241] Mr. Ciocca testified that during RENACE's and Cobra's visit to SELI's factory in Aprilia, Italy, on June 22, 2012, Mr. Martin de Vidales of Cobra and Mr. Lazaro of RENACE advised SELI that the TBM parts should not arrive in Guatemala until Cobra had finished preparing the platforms in any event, as late as June 26, 2012, Cobra still had not provided SELI a definitive timetable.[242]

301. Mr. Gamarra Mompeán of Cobra testified that none of the difficulties arising between RENACE and Cobra during this period and culminating in adoption of the Renace II Acceleration Plan in July 2012[243] actually pertained to the Tunneling Subcontract or changes in design of the tunnel or dovelas factory,[244] but rather to construction of the power house, a component of the Renace II project that did not concern SELI.[245] However, the evidence suggests otherwise. At the very least, the discussions between RENACE and Cobra concerned, among other things, a change in location of the reservoir, a matter of some importance since until that location was settled, the position of Tunnel I itself, including its entry portal, could not itself be settled[246] On cross-examination, Cobra's witness, Mr. Gamarra Mompeán, admitted the importance of the reservoir's location:[247]

Q. Do you agree that the excavation of Tunnel I was to start at the reservoir and proceed uphill to the water source?

A. The excavation of Tunnel I should commence at the lowest point, which was a reservoir and continue up water..

Q. Okay. So the elements that Cobra had agreed to provide... to enable SELI to build the dovela factory and assemble the TBM had to be at the reservoir, correct?

A. At the reservoir or close to the reservoir.

Q. And Cobra couldn't start work on those elements until it knew where the reservoir was going to be, correct?

A. Correct.

302. Cobra's delay in situating the reservoir is well-documented. Minutes of a worksite meeting of March 7, 2012 state that Cobra agreed to confirm the reservoir's location during the week of March 12,

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[240] See pare. 205, supra.

[241] Exhs. R-32 (Cobra email to SELI dated Apr 19, 2012), R-34 (monthly rpt for June 2012), R-36 (Cobra email to SELl dated June *26,* 2012). Sea Lianos ws. paras. 45-46.

[242] See para. 206, supra

[243] Exh. R-37 (Renace Acceleration Plan).

[244] Gamarra Mompeán ws, para. 18.

[245] Gamarra Mompeán ws, para. 16.

[246] Lianos ws, part, 44. According to Mr Lianos, not only could the TBM assembly site not be determined, but neither could the location of the dovelas factory because it needed to be very close to the entry portal.

[247] Tr. May 24, 2016, p. 252 I. S-17.

2012.[248] However, the monthly progress report for May 2012 reports that "[Cobra] is in the process of determining the location of the reservoir and performing the detailed topographic survey. Once the latter information is received by SELI, it will start the detailed engineering for the TBM access portal."[249]

303. Moreover, even if the disagreements between RENACE and Cobra focused mainly on aspects of the Renace II project other than the excavation of the tunnel and construction of the dovelas factory, the fact remains that those disagreements delayed the overall project, and necessarily SELI's contribution to it.[250]

304. In support of the idea that RENACE had deep concerns over Cobra's rate of progress, and that Cobra knew this, Mr. Lianos testified that, starting in September 2012, Cobra asked SELI to prepare two versions of its monthly reports to Cobra: one for RENACE relating progress on the project, and another for Cobra and SELI only, with only the latter version making mention of project delays.[251] Mr. Rodriguez of Cobra flatly denies this assertion, stating that the sole purpose of having two versions was to keep out of the report given to RENACE matters of no concern to it, and that this was Cobra's standard practice with subcontractors.[252]

305. The Tribunal concludes that the need for the SELI Acceleration Plan may not be traced to anything SELI did or failed to do during the period between December 2011 and August 2012. That need resulted strictly from complications that had arisen between Cobra and RENACE.[253] Once it became necessary for RENACE and Cobra to adopt the Renace II Acceleration Plan, adoption of *a* SELI Acceleration Plan necessarily followed.[254]

306. It is obviously not for this Tribunal to gauge the respective responsibilities of RENACE and Cobra for difficulties arising between them during this period. But it is clear from the record that, while affected by these difficulties, SELI had no role in their creation. In sum, the need for the SELI Acceleration Plan and its revised schedule of activity cannot be attributed to any failings on SELI's part.

(ii) SELI's alleged delay in shipment and assembly of the TBM parts

307. Cobra's claim of breach by SELI in the transport and assembly of the TBM parts requires closer and more detailed consideration.

308. Under the Tunneling Subcontract, as modified, SELI was to ship the TBM in pieces from Italy to Guatemala for final assembly at a location at the worksite referred to as the sand trap, with

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[248] Exh, R-32 (SELI email to Cobra dated Mar 10,2012).

[249] Exh.R-33, p. 3 (SELI monthly rpt for May 2012).

[250] Mr. Simonetti of SELI testified that Cobra at no time suggested that SELI was responsible for any of these early delays. Simonetti ws, para. 43.

[251] Lianos ws. para. 19.

[252] Rodriguez 2d ws, para. 4.

[253] See paras. 207-208, supra.

[254] The record indicates that Cobra end SELI had discussions in July 2012 over an accelerated project schedule that would be compatible with the schedule agreed to by RENACE and Cobra in the Renace Acceleration Plan. Exh. R-40 (Cobra email to SELI dated July 27, 2012).

assembly thereafter being conducted on a concrete structure known as the TBM cradle. The SELI Acceleration Plan provided that the TBM parts would be shipped on December 1, 2012, with shipment completed on January 16, 2013, at which point SELI was expected to begin assembly of the TBM. With this in mind, Cobra agreed to install the cradle in the sand trap area by December 11, 2012, so that the TBM parts arriving from Italy could be brought there for assembly. The TBM was then to be assembled from the inside out, with assembly completed by February 28, 2013. [255]

309. However, at RENACE's and Cobra's urging, SELI agreed to advance the shipping. [256] The parties agree that, Cobra having assured SELI that the worksite would be ready to receive the TBM parts upon arrival, [257] SELI began the process of delivery in October 2012. [258]

310. However, the parties disagree fundamentally over the rate of progress of SELI's shipment of the TBM parts and their delivery to the construction site.

311. Mr. Ciocca described in some detail the composition of the TBM parts. They consisted of (a) the main TBM parts, (b) back-up parts (such as water pump, gas. air and lighting systems) which trail behind the TBM to support excavation, and (c) rolling stock parts (cars to transport personnel, dovelas, equipment and debris). [259] He further testified that, as is the usual practice, these items are readied for transport, and transported, at different times, with the shipping sequence reflecting the proper order of TBM assembly at the worksite and the preparedness of the site. [260]

312. The shipping schedule was determined on the occasion of an inspection of the TBM parts in Italy by Mr. Romano Gonzales, chief INCISA engineer for the Renace II project. It was jointly decided that SELI would ship the TBM parts and the dovela factory equipment in four separate and sequenced shipments to "mirror" Cobra's actual progress. The first two shipments, leaving the same day, would contain the main parts of the TBM and the carrousel for the dovelas factory. The third and fourth shipments, leaving at a later time, would contain the rest. [261] On October 22, 2012, Mr. Ciocca and Mr. Gonzales issued a joint report to Cobra, confirming this schedule. [262] There is no evidence in the record to indicate that Cobra voiced any complaints about this schedule.

313. The evidence on the timing of deliveries, however, is conflicting. According to SELI all the main TBM parts, as well as the carrousel, were shipped by mid-November 2012, [263] and had arrived in Guatemala by the end of December 2012. [264] Accordingly, in early December 2012, Cobra made the first milestone payment to SELI in the amount of USD 2,032,344.27, which was to be paid when the TBM was shipped. [265] SELI subsequently shipped the remaining TBM assembly equipment from Italy. [266] Cobra, on the other hand, maintains that, even at the end of February 2012, still only a

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[255] Exh. R-2 attachment (SELI schedule Revision, dated Aug. 6, 2012).

[256] Exh. R-47, p. 3 (Cobra email to SELI dated Oct. 2, 2012)

[257] Exh R-47, p. 1 (Cobra email to SELI dated Oct. 10, 2012). See also Ciocca ws, para. 29, citing Exh. R-5(SELI email to Cobra dated Sept. 8, 2012).

[258] Exh. R-51 (SELI packing list dated Oct 26, 2012).

[259] Ciocca ws, para. 35.

[260] Ciocca ws, para. 35.

[261] Ciocca ws. para. 43.

[262] Exh. R-50 (report prepared by INCISA dated Oct. 22, 2012).

[263] Exh. R-53 (SELI packing list dated Nov. 8, 2012) See Lianos ws, para 68; Ciocca ws. para. 44.

[264] Exh. R-62. pp. 3-7 (monthly rpt dated Dec. 31, 2012). According to Mr. Ciocca. they had all arrived by December 18. Ciocca ws, para. 44.

[265] Delta Rpt. app. 2: Answer and counterclaim, para. 39. The payment was made to SELI's Guatemalan subsidiary, SELI OBRAS, which had been set up on October 24, 2012.

minority of parts had arrived. [267]

314. SELI insists that, even if not every TBM part had arrived, the main TBM parts. i.e. those required to begin assembly of the TBM, were in place by the time assembly was scheduled to begin. It maintains that assembly could in fact have been begun if Cobra had by then prepared the TBM assembly area. [268] There is unfortunately insufficient evidence in the record to enable the Tribunal to determine as a fact whether or not, as SELI alleges and Cobra denies, the TBM parts at the site in January 2013 would have been sufficient in order for TBM assembly to begin.

315. SELI's main contention is that neither the access roads nor the TBM assembly site was even close to ready by the time the TBM parts were arriving. Because the adequacy of the access roads pertains equally to SELI's ability to assemble the TBM and to construct the dovelas factory area, the Tribunal postpones examination of the matter to a later section (paras. 369- 382, infra).

316. Under the SELI Acceleration Plan, Cobra was to have completed preparation of the TBM assembly area by October 8, 2012. Although Mr. Gamarra Mompeán testified that Cobra was willing and able to do all the necessary preparatory work, [269] Cobra did not in fact meet the October 8 deadline. There followed a series of complaints by SELI over the months of October and November 2012. Already on October 10, 2012, SELI voiced its concern that preparation of the TBM assembly area (or, according to SELI, also the access roads) had not yet begun. [270] According to SELI, Cobra at that time acknowledged the delay and promised better progress. [271]

317. Deeply concerned over what it considered a prolonged lack of progress on the TBM assembly platform, as well as access roads, and over Cobra's repeated failure to provide a completion date, Mr. Giacomo Proia, SELI's regional manager for Latin America, sent a letter to Cobra on November 17, 2012, formally notifying it that SELI considered Cobra's delays in preparing the TBM assembly site (and the access roads) as having rendered achievement of the SELI Acceleration Plan schedule impossible, and as having invalidated that schedule. [272] Mr. Proia complained in its communication that Cobra had not only delayed its performance in these respects, but also failed, despite requests on SELI's part, even to give SELI a possible delivery data for the TBM cradle. The letter demanded that the SELI Acceleration Plan schedule "[be] updated based on the dates that Cobra will provide to [SELI] for the different deliveries of the project milestones that are required for the commencement of [SELI's] activities of assembly and construction falling within [SELI's] scope." [273]

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[266] Exh, R-80, p. 5.

[267] Statement of claim, para.60, citing the Delta Expert Report: "The four shipments that SELI informed Cobra of in October of 2012 that [were supposed to take place] between October 24 and December 29, 2012 ended up leaving the Italian manufacturing sites between November 3, 2012 and Feb 10, 2013. This represents at least as additional 43 days of delay to SELI's ability to commence work. Furthermore, of the 83 total containers tracked in the spreadsheet, only 42% of them were on site as of February 18, 2013 29% of the containers were still in Port and the remaining 29% were still in transit "

[268] Navigant Rpt, paras. 80, 94.

[269] Gamarra Mompeán ws, para. 15.

[270] Exh. R-47 (SELI email to Cobra dated Oct 10, 2012). Mr. Lianos writes: "As we discussed yesterday, there is no appropriate place in the project area at this time for the unloading of the TBM shipment and the carrousel."

[271] Exh. R-47 (Cobra email to SELI dated Oct. 10, 2012). In this email message, Mr. Orgaz writes: "In enter to meet the project deadlines, Cobra should accelerate the preliminary works that are necessary in order for SELI's shipment to unload and SELI in turn should adapt to the actual situation of the project which is not having everything perfectly prepared according to its requirements as a normal condition."

[272] Exh. R-58 (SELI letter to Cobra dated Nov. 17, 2012).

[273] Exh. R-58 (SELI letter to Cobra dated Nov. 17, 2012).

318. According to SELI, and undenied by Cobra, Cobra did not object or otherwise respond to this assertion on SELI's part or reaffirm that the SELI Acceleration Plan schedule remained in effect.[274] SELI notes that Cobra made no mention of SELI's November 17, 2012 communication to RENACE, but rather continued through February 2013 to assure RENACE that "(t)he end date for excavation of the tunnel with TBM is scheduled for November 30, 2O13."[275] When asked whether the November 17 letter raised serious charges against Cobra, Mr. Lazaro of RENACE basically dismissed it as a stratagem.[276]

319. TBM parts began arriving in Guatemala on December 18, 2012.[277] The record shows that SELI continued complaining to Cobra through December 2012 and January 2013 that neither the TBM assembly area nor the access roads leading to it had been prepared for the safe arrival and storage of t *he* TBM parts, much less their assembly, and that this circumstance was preventing SELI from embarking on the assembly.[278] In one such communication, sent on December 28, 2012.[279] SELI complained not only of Cobra's failure to prepare the TBM assembly area, but also the dovelas factory platform (see para. 362, infra). In that letter, SELI suggested to Cobra that, pending completion of the TBM assembly site, Cobra should at least finish the dovelas factory platform so that the factory's storage area could be used to safely unload and store the TBM parts and start pre-assembly (as distinct from assembly proper) activities, pending completion of the sand trap,[280] It is unclear whether and how Cobra took up this suggestion. In any event, SELI unloaded the TBM parts, as well as the dovelas factory carrousel, on unprepared ground near the dovelas factory site and hoped to perform at least certain pre-assembly activities.[281] However, according to SELI's witnesses, when SELI unloaded the TBM parts, the ground near the dovelas factory shed was so unready that not even pre-assembly could be begun.[282]

320. At the end of January and into February 2013, SELI was still complaining to Cobra about the TBM assembly site, including the cradle, not having been finished, and about the fact that Cobra had still not given it a completion date for this work.[283] Cobra therefore agreed with Mr. Lianos' proposal to leave the heaviest parts of the TBM at the port for the time being, and that is what was done.[284] Other parts were left in customs, with SELI paying additional costs every two weeks to avoid the equipment being deemed abandoned.[285]

321. It was in apparent response to a January 28, 2013 letter from Mr. Lianos reiterating that the lack of

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[274] Lianos ws. pare. 71, Ciocca ws, para. 49.

[275] Respondents' reply to amended statement of defense to counterclaim, para. 25. citing Exh. R-131 (Cobra monthly rpt to RENANCE dated Feb. 14, 2013).

[276] Tr. May 25, p. 391. I. 3-8: [T]hese are let's say strategies, rather technical strategies that are employed to press the opposite side. This is a usual discussion in work sites. "

[277] Lianos ws. para. 71.

[278] Exh. R-61 (SELI letter to Cobra dated Dec 28, 2012); Exh. R-66 (SELI letter to Cobra dated Jan. 30, 2013).

[279] Exh R-61 (SELI letter to Cobra dated Dec 28, 2012). See also Answer and counterclaim, para 40

[280] Exh. R-61 (SELI latter to Cobra, dated Dec. 28, 2012); Ciocca ws, para. 51. See also Defense to counterclaim, para. 106, citing Rodriguez 2d ws, para. 15.

[281] Ciocca ws, para 52; Lianos ws. para. 75.

[282] Ciocca ws, para 52. Lianos ws, para 75.

[283] Exhs. R-66 (SELI letter to Cobra dated Jan 30, 2013); R-67 (SELI letter to Cobra dated Jan. 30, 2O13). See also Exh R-70 (SELI internal emails of Jan 30 to Feb. 6, 2013).

[284] Lianos ws. para. 75. citing Exh. R-66 (SELI letter to Cobra dated Jan 30, 2013) See also Exh. R-70 (SELI internal emails of Jan. 30 to Feb. 6, 2013)

[285] Exh. R-70 (SELI internal emails of January 30 to Feb. 6. 2013).

site preparation was preventing unloading and assembling the TBM parts (or beginning construction of the dovelas plant),[286] that, as previously noted (para. 227, supra). Cobra's project managar, Mr. Orgaz, coarsely admonished SELI to send no more letters concerning delays on Cobra's part, or also "drastic measures" would follow. It appears from the record that Mr. Orgaz did not in that response dispute the fact of Cobra's prolonged delays.[287]

322. Evidently, in February 2013, Mr. Orgaz asked SELI to provide Cobra a list of all the material and equipment that had been shipped to and arrived in Guatemala. SELI gathered that information and communicated it to Cobra on February 18, 2013.[288] The record does not reveal the exact purpose of Cobra's request. It also does not show any response by Cobra to SELI's submission, and a SELI witness testified that there was in fact none.[289]

323. It is not clear at what point Cobra completed the sand trap. But Mr. Lianos wrote to Cobra on January 30, 2013 complaining that the sand trap was still unprepared and attaching photographic evidence to that effect.[290] Together with other evidence.[291] this points to February 2013 as the date of its completion. In any event, Cobra appears not to dispute SELI's representation that Cobra stopped work on the area at the end of March 2013.[292]

324. However, there is much better documentation of progress, or lack thereof, in production of the TBM cradle. At a February 11, 2013 meeting at the worksite, Mr. Orgaz told SELI that the cradle would be ready for the TBM assembly by March 15, 2013, as opposed to the original date of December 11, 2012.[293] This meant that SELI could only start excavation until May 1, 2013, rather than the scheduled date of March 4,2013.[294]

325. However, at a subsequent meeting, on March 1, 2013, Cobra informed SELI that by March 15, 2013, it would in fact only be able to begin rather than complete work on the cradle, and that the TBM assembly area would accordingly not be available for TBM assembly until April 15, 2013.[295] Taking into account intervals agreed upon in the SELI Acceleration Plan schedule, this meant that excavation of Tunnel I could not begin before June 30, 2013.[296]

326. The record thus shows that from early October to early February 2013 - a period of four months - Cobra failed to ready the TBM assembly site or provide an expected date for doing so. Though Cobra did finally in February 2013 provide a cradle completion date of March 15, 2015, it later extended that date to April 15, 2013.

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[286] Exhs R-66, R-67 (SELI letters to Cobra dated Jan. 30, 2013).

[287] Ciocca ws, para. 60.

[288] Exhs. R-74 (SELI internal email dated Feb. 18 2013), R-75 (SELI letter to Cobra dated Feb. 20, 2013).

[289] Ciocca ws. para 63.

[290] Lianos 2d ws. para. 56. citing Exh R-67 (SELI letter to Cobra dated Jan, 30, 2013).

[291] Exh.R-124, p. 6 (Cobra monthly rpt to RENACE dated Jan 2013); Exh. R-131. p. 7 (Cobra monthly rpt to RENACE dated Feb, 14, 2013). Mr. Lianos testified that the sand trap was still not prepared when he left Guatemala at the end of January 2013. Lianos 2d ws, para. 55.

[292] Exhs R-89, p. 8 (monthly rpt for Mar, 2013). R-92 (SELI letter to Cobra dated Apr. 1, 2013).

[293] Exh. R-73 [revised INCISA meeting minutes *of Feb.* 11, 2013].

[294] Exh. R-73, p. 4 (SELI email to INCISA dated Feb. 16, 2013 with minutes of meeting of Feb. 11, 2013).

[295] Exh R-78 (SELI internal email dated Mar. 2, 2013). In that same letter. Cobra informed SELI that the grade of the access roads had to be increased from 12 to 20%. SELI maintains that necessitated use of more powerful transportation vehicles with stronger braking systems at much greater cost. SELI answer, p. 12.

[296] Statement of counterclaim, para. 107.

327. Cobra does not deny that these successive postponements occurred but, relying on the Delta Report, explains that they were due to SELI's own failure to provide a completed design for the cradle until March 2013.[297] Cobra cites the Delta Report according to which:

> SELI submitted a 'Preliminary' cradle layout and design to Cobra on December 21, 2012. This was subsequently followed by a 'Draft' TBM Cradle and Back-up for Cobra/INCISA approval [But] the information supplied in these two designs was insufficient to construct the final cradle as Cobra required the final, detailed cross sections and full layout for the entire cradle.[298] According to the testimony of Mr. Rodriguez, SELI only provided the final design plans on March 12, 2013.[299] and that upon receiving those plans Cobra immediately started budding the cradle.[300]

328. SELI strongly disagrees. First, according to SELI, in order for it to prepare the cradle drawings, it in turn needed to have Cobra's designs for the reservoir and the sand trap area on which cradle was to be placed,[301] and Cobra did not supply those drawings until November 30, 2012.[302]

329. More to the point, though, SELI insists that it submitted on a timely basis "complete, final drawings that contained full details to enable Cobra to begin construction"[303] Mr. Lianos sent the plans for approval to Domingo Fernàndez of INCISA on December 21. 2012.[304] Immediately upon receipt, Mr. Fernández asked that they be sent in dag format for easier integration with the rest of the engineering materials.[305] Mr. Ciocca followed up the same day asking Mr, Fernández to review and comment so that they could be issued in final form.[306] Within six days, Mr. Fernández reported back that INCISA had approved the design without modification,[307] and five days after that reported that RENACE had incorporated them without change into the RENACE II electronic archive of final project designs.[308] Cobra's monthly report to RENACE for February 2013 appears to include the cradle design,[309] indicating that it had accepted the design in January 2013. The designs were in fact final and never altered.

330. Cobra's claim that the December 21 design was not final appears to be based largely on the fact that they were labeled "draft,"[310] and that some design changes were made as late as March 12, 2013.[311]

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[297] Mr. Rodriguez testified that SELI did not deliver final plans until March 12, 2013. Rodriguez 2d ws, para. 13. See also Amended defense to counterclaim, paras. 138, 140; Delta Rebuttal Rpt. P.5.

[298] Defense to counterclaim, paras. 138-140, citing Delta Rebuttal Rpt. p. 7.

[299] Rodriguez 2d ws, para, 22. See also Delta Rebuttal Rpt, p. 7: Claimant's reply to statement of defense, para. 99, citing email from Gianluco Ciocca to Gonzalo Pilar and Raul Martin with attached drawings, in Delta Rebuttal Rpt, Reference Document, fn, 8.

[300] Rodriguez 2d ws. para. 14.

[301] Exh. R-2, p. 3 (minutes of meeting in Madrid of Aug. 3. 2012) ("COBRA will send SELI the detailed plans of the entry and exit portals of TBM (areas and roads) with information indicated of the level of curves of said areas').

[302] Exh. R-119 (INCISA email to SELI and Cobra dated Nov. 30. 2012).

[303] Ciocca 2d ws, para. 8.

[304] Exh. R-122 (SELI email to Cobra dated Dec. 21. 2012). See Respondents' reply to amended statement of defense to counterclaim, para. 35, dated Dec. 21, 2012); Navigant Reply Rpt, p. 7.

[305] Exh R-123 (INCISA email to SELI dated Dec. 21, 2012)

[306] Exh R-123 (SELI email to INCISA dated Dec 21, 2012)

[307] Ciocca 2d WS, para. 9. Exh. R-123 (emails between INCISA and SELI dated Dec. 21,2012-Jan. 7,2013). Mr. Fernández of INCISA requested, however, that SELI send an additional diagram and that the plan labels contain certain references.

[308] Exh. R-125 (INCISA email to SELI dated Jan. 11, 2013).

[309] Exh. R-132. p. 2 [annex 6.2 to Cobra monthly rpt to RENACE dated Feb. 2013).

[310] Amended defense to counterclaim, para. 138; Delta Amended Rebuttal Rpt, p, 7.

[311] Amended defense to counterclaim, paras. 70,138; Exh. C-19

SELI maintains in response that it labeled the design "draft" for the sole reason that its changes had not yet been approved.[312] As for the March 12, 2013 changes, Mr. Ciocca testified that they had nothing whatsoever to do with the cradle design, but only to do with two unrelated components: the tippler and the tower crane.[313] In his oral testimony. Cobra's witness, Mr. Rodriguez, cast some doubt on whether the designs approved by INCISA and archived by RENACE could be regarded as final, but did not indicate what more was required of them.[314] However, there is no contemporaneous evidence in the record indicating contemporaneous concern on Cobra's part over the alleged lateness of the cradle design. On the basis of these showings, the Tribunal cannot conclude that Cobra's successive delays in completing the TBM cradle were due to delay on SELI's part in providing the cradle design

331. Cobra also maintains that its delay in delivering the cradle was in any event inconsequential because, while that delay did prevent excavation of the tunnel *from* starting before June 17, 2013, SELI would not itself have been prepared to start the excavation until July 16, 2013.[315] The Tribunal rejects this argument. In particular, based on the evidence described in paragraphs 307 et seq., Cobra has not shown that, if in fact SELI could not begin excavation until July 16, 2013, that was due principally to SELI's failures of performance.

332. As further evidence of the harmlessness of its delay in providing the cradle, Cobra claims that SELI could not begin to excavate the tunnel with the TBM on March 4, 2013, as agreed, until the initial 15 meters of the tunnel had been excavated by the drill-and-blast method, and that SELI did not approach Proacon to perform that work until March 4, 2013. The Tribunal rejects this argument as well. As noted above. in February 2013, Cobra informed SELI that the cradle would not be in place before until March 15, 2013, and already by March 1, 2013, that date had been pushed back another month to April 15, 2013. Clearly nothing was lost by virtue of SELI's *not* approaching Proacon until March 4, 2013.

333. Even if SELI had begun the TBM assembly on April 15, 2013, it had become aware well before that date of Cobra's having retained Proacon to excavate the tunnel. Cobra contends that its engagement of Proacon was not an impediment to SELI's continuing its work on the project.[316] According to Mr Rodriguez:

The only reason why Cobra later ceased the construction of the TBM cradle was to mitigate SELI's delays. In light of SELI's failure to deliver the TBM to the site and to complete the construction of the dovelas factory and the concrete plant, Cobra asked Proacon on or around March 27, 2013 to continue dril-and-blast excavation of the tunnel beyond the first 15 meters for which it had been engaged by SELI to prepare TBM drilling.

Importantly, Proacon's work did not in any way prejudice SELI from excavating the tunnel using its TBM technology, but complemented it. The radius of the tunnel excavated by conventional drill-and-blast is more than the radius of the tunnel using TBM technology and very similar to the first 15 meter radius that SELI needed to start with the TBM. Thus, SELI could have started working

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[312] Ciocca 2d ws, para. 9.

[313] Ciocca ws, para 11, Ciocca 2d ws, para, 11.

[314] Tr. May 26. p.459,c1. 16-21; p. 468, I- 2-9.

[315] Delta Rebuttal Rpt. p. 39 et seq.

[316] Claimant's reply to statement of defense. para. 101.

anytime. Any meters advanced by Proacon would have been time won for the excavation with the TBM as the latter, once started, should have had to cover those advanced meters with the dovelas only. That is, Proacon's work would have accelerated SELI's TBM excavation, had SELI finally gotten its equipment to the site and become operational. [317]

Thus, Cobra presents its retention of Proacon to excavate beyond the initial 15 meters as merely an effort to mitigate damages [318]

334. The Tribunal cannot accept Cobra's claim that in the third week of March 2013 it still anticipated SELI's continuing to perform under the Subcontract. The evidence establishes beyond doubt that Cobra had at that time no intention of keeping SELI as subcontractor for Renace II. [319] If Cobra had genuinely intended Proacon's work to be merely "complementary" to SELI's, there would have been no reason to conceal Proacon's involvement from SELI.

335. In a case in which the testimonial evidence adduced by the parties is so contradictory and mutually exclusive, the Tribunal must look closely into the relative credibility and persuasiveness of that evidence. In this respect, the showings by the parties in this case exhibit a striking contrast.

336. First, the witness statements provided by SELI's witnesses significantly surpass those of Cobra's witnesses in their detail, comprehensiveness, and cogency, and their avoidance of conclusory language. More important, however, is the fact that the witness statements proffered by SELI on the issues surrounding the TBM are amply supported by documentary evidence in the record that is contemporaneous with the events in connection with which they are adduced; the witness statements proffered by Cobra are not. The record contains written complaints by SELI about Cobra's performance in connection with the TBM over the several months in which the work was to be accomplished. By contrast, complaints by Cobra, whether written or oral, are few and far between until the third week of March 2013, at which time Cobra had determined to suspend and eventually terminate the Subcontract.

337. Moreover, the record shows that Cobra seldom meaningfully replied to SELI's many serious complaints about delay at the time they were voiced. Although counsel for Cobra described SELI on more than one occasion as having created a "paper trail," [320] the Tribunal has no reason to believe that SELI produced the documentation over the extended course of the Subcontract in anticipation of an eventual termination of the Subcontract or an eventual arbitral proceeding.

338. Although witness statements are undoubtedly valuable, they suffer, by comparison with contemporaneous documents, from distance in time from the events reported and from the fact that arbitral proceedings will have been initiated between the time the events occurred and the time that witness statements are produced.

339. The situation was not helped by the oral testimony of Cobra's principal fact witness at the hearing. CEO Gamarra Mompeán not only had limited recall of the matters under discussion, but admitted

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[317] Rodriguez 2d ws, paras. 16-17

[318] Rodriguez 2d ws, para. 16.

[319] See paras. 238-241, supra.

[320] Tr. May 23.2016. p 19,1.23; p. 26, L 20 - p. 27, I. 4.

that, as supervisor, he had virtually no personal and direct, much less daily, contact with developments at the worksite,[321] and that he neither prepared nor even reviewed the monthly progress reports submitted by Cobra to RENACE.[322]

340. Based on the record, the Tribunal concludes that the delays experienced in assembly of the TBM, and therefore in the start of excavation of the tunnel, were not principally due to failures on the part of SELI. On the contrary, Cobra itself bears that principal responsibility. SELI maintains that a party that has substantially frustrated another party's performance of its obligations under the contract between them may not invoke that other party's failure of performance as a basis for claiming damages for breach of contract or terminating the contract, and Cobra does not appear to deny this proposition as a matter of law. New York case law is in fact replete with cases to that effect. According to a leading case, a subcontractor may not be terminated for failure to comply with the contract schedule if the subcontractor was "unable to complete its work more quickly as its performance was frustrated by obstacles attributable to [the other party] and beyond [the subcontractor's] control."[323] See also Wolff & Munier, Inc. v. Whiting-Turer Contracting Co., 946 F.2d 1003, 1007 (2d clr. 1991) [RA-42] ("each party to a construction contract impliedly agrees not to hinder or obstruct [the other's] performance. Indeed, each party has an affirmative obligation to facilitate the other's performance"); WPA/Partners LLC v. Port Imperial Ferry Corp., 307 AD.2d 234, 237 (AD. 2003) [RA 43) ('one who frustrates another's performance may not hold the frustrated party in breach of contract').[324]

341. The Tribunal accordingly finds that Cobra is not entitled to relief on the basis of SELI's alleged delay in the TBM assembly and excavation and that, by the same token, it cannot rely on this alleged delay as a justification for the Subcontract's termination.

(iii) SELI's alleged delay in construction of the dovelas foctory

342. The other major component of the Tunneling Subcontract was construction of the factory where the dovelas were to be manufactured. Because under the TBM excavation method, excavation and installation of the dovelas were to proceed in tandem, excavation itself could not begin until the dovela factory was in place and operational. The SELI Acceleration Plan deadline for completion of the factory was February 4, 2013. As noted (para. 293, supra), Cobra cites SELI's alleged failure to construct the dovelas factory in accordance with the SELI Acceleration Plan schedule as the most "critical" breach of the Subcontract on SELI's part.

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[321] Tr. May 24, 2018, p. 231, I 21 - p. 232, I. 24.

[322] Tr. May 24, 2016. p. 237, I 14 - p. 238, I 5.

[323] *Bast Hatfield, Inc.* v. *Joseph R. Wunderlich. Inc.,* 78 A.D.3d 1270, 1275 (App Div. 2010).

[324] See also): *Hidden Meadows D Co.v. Parmelee's Forest Prods. Inc., 289* A.D.2d 642,644 (AD. 2001) [RA-24] ("a party to a contract cannot rely on the failure of another to perform when he has frustrated or prevented the performance"); *Plainview S. & S. Concrete Co.* v. NVING *Dev. Corp.,* 151 A.D.2d 654. 655 (AD 1989) (RA-32) (owner in breach because preparatory work had not been completed thus causing contractor to be unable to continue working); *Farrell Heating. Plumbing, Air* Conditioning Contractors, Inc. v Facilities *Dev.* & *Improvement Corp..* 68 A.D.2d 958,959 (A.D.1979) [RA- 19] ("where the party for whom a contract is being performed obstructs the contractor's efforts and thereby greatly disrupts and frustrates the contractor's operation, such conduct serves to excuse the contractor's non-performance"). Cited also is 22A N.Y. Jur. 2d Contracts sec. 419 [RA-49]: "If a contractor agrees to do certain work within a specified time, and the contractor is prevented from performing the contract by the art or default of the other party, performance within such time is excused"); R. *W Granger & Sons Inc. v City Sch. Dist of Albany. 296* A.D. 636,637 (A.D. 2002) (same).

343. The parties appear to agree that the dovelas factory platform actually comprises three sub-areas.[325] The first sub-area is the platform for the factory itself, apparently sometimes referred to as "the shed." The factory was to be the actual dovelas manufacturing area, containing all the equipment needed for that purpose (viz, a carrousel, a bridge crane, a boiler, rails, a generator and molds). The second platform area was to support the concrete plant, where the concrete used to manufacture the dovelas would be produced. The third platform area is described as a "laydown/staging area" serving two functions, viz., as a place where pre-assembly of the TBM could be conducted before the TBM parts were transported to the cradle for final assembly and as a place where finished concrete segments could be stored.[326] This last area required a platform, but no structures or engineered buildings, and therefore no foundation[327]

344. Unfortunately, the term "dovelas faculty platform" appears to be used on some occasions to denote only the platform for the factory itself (i.e, the shed) and on other occasions to denote all three platform areas just described. This lack of consistency in usage has rendered ascertainment of some of this basic facts in this case more difficult than it should have been.

345. The parties appear to agree that the dovelas factory could not begin to be built until the dovelas factory platform, specifically including the concrete plant platform, was prepared. Like assembly of the TBM, construction of the dovelas factory required a platform that was sufficiently leveled and compact to support the weight of equipment and activity at the site.[328] The dovelas factory platform, apparently in its entirety, was due to be completed by September 2 *2,* 2012.[329] Even on that schedule, excavation for the dovelas factory foundation could not commence until November 15, 2012, because a period of seven weeks was needed to complete the engineering, preparation and manufacture of materials for this phase of the project.[330]

346. However, there is deep conflict in the record over the exact time when Cobra had fully prepared the platform for the factory itself and the platform for the concrete plant, as well as over the party to which any delays in their preparation may be attributed. The parties' conflicting assertions as to the time of completion of the platforms are detailed below (paras. 353-367, infra).

347. Cobra's Mr. Ortega acknowledges a delay on its part in preparation of the factory platform, but attributes that delay entirely to defaults on the part of SELI and its subcontractor, APSA.[331]

348. First, Cobra required complete design, engineering and layout plans for the dovelas factory, including its platform, before work on the platform, and thereafter the factory itself, could be begun,[332] yet, according to Cobra, SELI did not furnish that information until October 22, 2012,[333]

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[325] Exh. R-45 (SELI monthly rpt to Cobra dated Sept. 30, 2012).

[326] Delta RebuttaI Rpt, p. 11 et seq.; Ortega ws. para.8; Claimant's reply to statement of defense, para. 68.

[327] Delta Rebuttal Rpt, p. 12 et seq.

[328] Lianos ws, pars. 28.

[329] Exh. R-2. p. 3 (attachment to SELI email to Cobra dated Aug. 6, 2012). According to Mr. Lianos, at a meeting on September 5, 2012 with Mr. Pilar of Cobra, Mr. Pilar assured him that the dovelas factory platform would be ready by that time. Exh. R-5 (SELI email to Cobra, dated Sept-8. 2012); Lianos ws, para. 79.

[330] Claimant's reply so statement of defense, para. 74

[331] See Ortega ws, paras 12-18.

[332] Ortega ws. para. 9. See also Rodrigues 2d ws. para. 13; Delta Rebuttal Rpt. pp. 5 et seq., 17, 18. According to Delta. "SELI did not provide this design until October 2012 and was still making adjustments in November 2012." Delta Rebuttal Rpt, p. 11.

[333] Ortega ws, para. 9. Mr. Rodrigues refers in this connection to an October 12, 2012 email message from Mr. Lianos of SELI to Mr. Pilar of

and was actually still revising it in early November.[334] Cobra asserts that reconsideration of the design was even taking place as late as January and February 2013.[335]

349. Second, Cobra charges SELI with delay in engaging its subcontractor, APSA, for the dovelas factory. It claims that it was delays on SELI's part in the first place that necessitated engagement of a subcontractor to build the factory.[336] Regardless of that, end more fundamentally, according to Cobra, it was SELI's failure to incorporate its Guatemalan subsidiary that prevented it from hiring its subcontractor.[337] The Subcontract indeed provided that the subsidiary was to be incorporated before the first payment milestone was reached.[338] Cobra maintains that the resulting delay in engaging APSA necessarily postponed the latter's excavation work, due to the length of time that APSA was expected to need in order to mobilize for the task.[339]

350. The record shows that in September 2012, Cobra felt compelled to remind SELI of its obligation to engage a subcontractor.[340] It further shows that, because SELI did not promptly do so, Cobra stepped in on September 27, 2012 to engage APSA through a letter jointly signed by Cobra and SELI.[341]

351. Third, according to Cobra, APSA itself was not in fact prepared to mobilize for the work until mid-November. Although Mr. Ortega acknowledged that APSA had by then begun deploying personnel at the site,[342] Cobra maintains that SELI did not have all the equipment or personnel on site needed to perform that work.[343]

352. Fourth, Cobra claims that, looking forward, SELI never carried out the remainder of the work needed to complete the mechanical assembly of the dovelas factory,[344] such as electrical installation, installation of heaters, fans and steamers for the 'maturing chambers,' plumbing, lighting and lift systems to transport the dovelas. Nor had it made arrangements to procure the needed manpower, supply contracts and permits needed in order for the factory to become operational, i.e., fully equipped to serve its function.[345] Cobra maintains that, even leaving aside the necessary transport

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Cobra suggesting that the factory design was not yet ready. Rodriguez ws, para. 15.

[334] Amended Delta Rebuttal Rpt, p. 16. See also Exh. C-34 (SELI emails re planning issues, dated Oct. 17-33, 2012).

[335] Claimant's reply to statement of defense, para 95, citing Exhs. C-41 (emails between SELI and APSA dated Jan. 14, 2013), C-42 (emails between SELI and APSA dated Feb. 5, 2013), Amended Delta Rebuttal Rpt, p. 12 Cobra mentions, but lays no particular emphasis on, SELI having made certain design errors that required it in March 2013 to demolish parts of the building, revise design plans and rebuild those parts. Claimants reply to statement of defense, para. 95, citing Exhs C-43 (email from SELI to APSA dated Feb 28, 2013), C-44 (email from APSA to SELI dated Mar 5, 2013).

[336] Statement of claim, paras. 50-51.

[337] Delta Rebuttal Rpt. p. S et seq.

[338] Exh. R-16, p. 10 (preliminary clause).

[339] According to Delta, APSA needed seven weeks to prepare the site and mobilize. Delta Rebuttal Rpt., p.16 et seq.

[340] Statement of claim, para 52, citing Exh. 14, p. 2 (email from Cobra to SELI dated Sept. 20, 2002). The email stated:
We have been talking about the concrete segments plant since early August. We need to request a new timeline from APSA, working on Saturdays, Sundays and with three shifts per day. If necessary. We cannot delay construction time for the concrete segments plant, it is a simple project and it shouldn't pose any questions. If we are going to be working with three shifts per day in the tunnel. I don't yet understand why we are allowing the construction of the concrete segments plant to lake so long

[341] Amended defense to counterclaim, para. 66. Cobra and SELI jointly signed the engagement letter with APSA. Delta Rpt., fn. 18 (Cobra letter to APSA dated Sept 2 7, 2012). The cost to Cobra of defraying the expanse of hiring APSA was at this point was USD 131,447.89.

[342] Ortega ws, para. 12.

[343] Amended defense to counterclaim, para. 68.

[344] Defense to counterclaim, para. 129.

[345] Defense to counterclaim, para. 131, detailing the allegedly lacking manpower, contracts and permits lacking. See also Claimant's reply to statement of defense, paras. 7, 81.

time, in January and February 2013, SELI was still requesting offers of supply from companies all over the world and it remained for contracts for those supplies to be concluded.[346] Cobra cites RENACE's own director of engineering and construction for the project, Carlos Lazaro, for the proposition that SELI had very few people on site and that they were doing no more than coordinating the arrival of parts.[347] All of this, according to Cobra, demonstrates "that SELI neither had the intention nor the capacity to properly execute the SELI Tunneling Subcontract at the time of termination."[348]

353. According to Mr. Ortega, despite SELI's defaults, Cobra made steady progress in producing the platforms, commencing the work in September 2012 and completing it in the second week of November 2012,[349] thus some 6-7 weeks behind schedule. The record contains photographs, notably a photograph taken on November 12, 2012, suggesting that not only the dovelas factory platform, but also the concrete plant platform were completed by that time.[350] Cobra claims that, even so, at this time APSA was not yet ready to start construction,[351] and SELI was still seeking required health, safety and environmental documents from APSA that would need Cobra approval.[352] Cobra argues that, due to these delays in connection with the dovelas factory, SELI could not have completed that work until July 2013, so that, even if the TRM cradle ware not delivered until mid-June 2013, that would not have delayed the project.[353]

354. SELI presents a quite different picture.

355. First, SELI denies Cobra's charge that it delayed until October 22, 2012 to provide Cobra with complete design, engineering and layout plans for the dovelas factory, including its platform. According to SELL within days of Cobra's informing SELI on August 14, 2012 of the dovelas factory's location,[354] SELI on August 23, 2012 submitted Its factory design to Cobra together with drawings of all three platforms,[355] one of which was updated the following week.[356] The record indicates that at a meeting in early September 2012, Cobra informed SELI that the drawings were sufficient for its preparatory work and that Cobra would start construction of the platform on September 15, 2012.[357] SELI admits that it made a series of design changes later, but maintains that each one of them was made at Cobra's specific request.[358] For example, on September 27, 2012, Cobra indicated a change in the contours and slope of the platforms,[359] which required SELI to provide a revised platform design on October 1, 2012. Similarly, in October, Cobra required still another change in platform slope and thus a redesign.[360]

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[346] Claimant's reply to statement of defense, para. 84.

[347] Lazaro ws, para 17. Mr, Lazaro testified to the same general effect at the hearing. Tr. May 25, 2016, p. 435, I. 20 - p. 436, I. 20.

[348] Defense to counterclaim, para. 133.

[349] Ortaga ws. paras. 11,14.

[350] Ortega ws, paras. 11, 14; Exh. C-22 (photo). Mr. Ortega also attached to his witness statement two undated photographs (pictures 4 and 5) suggesting that by that time, leveling of the area had been completed. See Delta Rebuttal Rpt. reference document fn 23

[351] Ortega ws, paras 12-13; Exh. C-22 (photo).

[352] Clalmant's reply to statement of defense, para, 78, citing Exh. C-25 (emails between SELI and APSA).

[353] Delta Expert Rpt, p. 34; Amended Delta Rebuttal Rpt, p. 46.

[354] Exh. R -109 (Cobra email to SELI dated Aug. 14, 2012). See Lianos 2d ws, para. 27.

[355] Exhs. R-110 (emails Between Cobra and SELI dated Aug. 23, 2012); R-111 (SELI email to Cobra dated Aug 31, 2012).

[356] Lianos 2d ws, para. 27. citing Exh. R-5 (SELI email to Cobra dated Sept 8, 2012).

[357] Exh. R-5, p. 1 (SELI email to Cobra dated Sept 8, 2012).

[358] Respondents' reply to amended statement of defense to counterclaim, para. 59.

[359] Exh. R-46 (SELI email to Cobra dated Oct 1, 2012); Lianos 2d ws, paras. 28-30.

356. Second, SELI denies Cobra's charge that the need for a subcontract with APSA was due to delays on SELI's part. There is indeed evidence in the record to suggest that the understanding from the start was that SELI would subcontract for the factory construction.[361] SELI also maintains that there was no urgency to contract with APSA since Cobra and RENACE had still not until July 2012 resolved the issues that had delayed the start of the project, and Cobra acknowledged as much when the parties met to agree on the SELI Acceleration Plan.[362] In any case, on September 8, 2012, SELI reported arranging with APSA to construct the dovelas factory,[363] though no contract was entered into until the end of that month. According to SELI, this arrangement was made as soon as practicable following agreement on the SELI Acceleration Plan in August.[364] The evidence indicates that by September 12, SELI had prepared and submitted the contract to Cobra for signature.[365]

357. SELI also minimizes the impact on the APSA subcontract of SELI's failure to set up its Guatemalan subsidiary in September 2012, a failure that SELI does not deny. According to SELI, Cobra willingly undertook to contract with APSA on behalf of SELI end did so.[366] The Tribunal finds it difficult under these circumstances to attribute any delay in APSA's commencement of work to SELI's delay in incorporating its Guatemalan subsidiary. The entire point of Cobra stepping in to engage APSA on SELI's behalf was to enable APSA to commence its work on time. In any case, SELI incorporated SELI OBRAS as its subsidiary one month later, on October 24, 2012, thereby earning its first milestone payment, which Cobra paid in early December 2012.[367] SELI OBRAS thereafter, on January 23, 2013, entered directly into contract with APSA to prepare the foundation of the concrete plant.[368]

358. Third, and perhaps most importantly, SELI insists that Cobra did not, as Cobra claims, complete its work on the dovelas factory platform during the second week of November 2012. According to SELI, the dovelas factory platform was not in fact furnished until November 29, 2012,[369] some ten weeks after the September 22 deadline. As noted (para. 219, supra), SELI produced a delivery notice stating that "[t]he signatory parties to this document [i.e., Cobra, APSA and SELI] declare that on November 29, 2012, [Cobra] delivered the area of the platform required for the construction of the Dovela Factory." Thus, although SELI had already begun in September 2012 to take the necessary steps to mobilize personnel and deliver equipment to build the dovelas factory, it could not proceed because Cobra failed to prepare the construction site until the November 29 date.[370] This, according to Mr. Ciocca, explains why the level of SELI's manpower on site remained low in September 2012. It did so precisely because, thanks to the absence of a platform, there was little that SELI could accomplish on site at that time.[371]

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[360] Respondents' reply to emended statement of defense to counterclaim, para. 59. citing Lianos ws, para. 29.

[361] Exh. R-29 (SELI monthly rpt to Cobra dated Mar 2, 2012. pp 7-8); Exh. R-2 (SELI minutes of meeting with Cobra dated Aug. 6, 2012).

[362] Lianos 2d ws, para 33.

[363] Exh. R-5 (SELI email to Cobra dated Sept. 8, 2012).

[364] Lianos 2d ws, para. 34.

[365] Lianos 2d ws, para 35. Exh. R-44 (SELI email to Cobra dated Sept. 12, 2012). Mr. Lianos claims that, after receiving the final APSA contract from SELI, Cobra let two weeks go by before signing it, and that Mr. Lianos himself warned Cobra that such delay in turn delayed APSA's mobilization.

[366] SELI's failure to set up its subsidiary on time postponed Cobra's obligation to make the first milestone payment to SELI.

[367] Delta Rpt app, 2.

[368] Exh. R-65 (SELI letter to APSA dated Jan. 23, 2013); Dleta Rebuttal Rpt, app. 2.

[369] Exh. R-60 (delivery notice dated Nov. 29, 2012); Navigant Rpt. para. 103.

[370] Answer and counterclaim, para. 37.

[371] Ciocca 2d ws, para. 44(a).

359. The record shows that, just as in the case of the TBM assembly site, SELI expressed concern to Cobra throughout the months of October and November 2012 about the state of the factory platform, and how the delay was preventing SELI from starting construction work.[372] Thus, in October 2012, SELI specifically complained that the area designated for the factory platform consisted of unleveled, soft ground that would not allow APSA to start construction work for shed.[373] According to SELI, due to this delay, SELI's subcontractor, APSA, could only begin its work on the factory platform at the end of November. APSA voiced its own repeated complaints.[374] Thus, APSA wrote to SELI on November 9, 2012, complaining that Cobra had not provided a usable platform:

> I want to inform you that the platforms *are* not yet completed and are not in suitable conditions for the commencement of the works. The platform has not been leveled, it does not have the suitable material for its compaction let alone the surface seal; obviously, this situation will cause us delay and extra costs for our equipment and personnel that will remain idle, until the platform that fulfills the characteristics that were requested prior to our contracting is suitably delivered; in the meantime we will use today and tomorrow to set up our temporary installations.[375]

360. That same day, SELI forwarded APSA's photographs of the platform area to Cobra,[376] and followed up again the next day with a serious and sober expression of concern over the delay in furnishing a proper platform for the dovelas factory.[377] Rather than address Mr. Lianos' concern, Mr. Pilar Gravayo of Cobra merely replied:

> I am sorry to tell you that I do not share your views or those of your subcontractor Apsa who with their attitude casts serious doubts on their ability to carry out these works. This letter will serve to notify you of Apse's failure to comply with the rules for entry into the Project that were provided to them with sufficient notice by Our Safety Department.[378]

Cobra's reply appears demonstrably unresponsive to Mr. Lianos' serious statement *of concern,* thus triggering disbelief on the part of SELI's Mr. Prota.[379]

361. However, Mr. Ortega describes APSA's complaints as exaggerated, insisting that the grading and levelling of which SELI and APSA complained was a matter of small local detail and easily fixed, and indeed fixed while APSA was still finishing its preparations.[380] Mr. Ortega thus denies that any lack

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[372] Exhs. R-48 (SELI email to Cobra dated Oct. 10, 2012). R-52 (SELI email to Cobra dated Oct 30, 2012). R-55 (SELI email to Cobra dated Nov. 9, 20121), R-56 (SELI email to Cobra dated Nov. 10-11, 2012)

[373] Exhs. R-49 (APSA rpt dated Oct. 22, 2012), R-54 (APSA letter to SELI dated Nov. 9, 2012).

[374] Exits. R-48 (SELI email to Cobra dated Oct. 10, 2012), R-50 (SELI internal email dated Oct 25, 2012), R-52 (SELI email to Cobra dated Oct 30, 2012), R-55 (SELI email to Cobra dated Nov. 9, 2012), R-56 (SELI email to Cobra dated Nov. 10, 2012), R-58 (SELI letter to Cobra dated Nov. 17, 2012).

[375] Exh. R-54 (APSA letter to SELI dated Nov. 9, 2012).

[376] Exh. R-55 (SELI email to Cobra dated Nov. 9, 2012). See photograph attached to Lianos 2d ws, p.8, which does suggest that the platform area was still neither flat nor compacted, and had collected water. Lianos 2d ws, para. 40.

[377] Exh R-56 (SELI email to Cobre dated Nov 10, 2012) (marked "VERY IMPORTANT").

[378] Exh. R-56 (Cobra email to SELI dated Nov. 10, 2012).

[379] Mr. Proia writes to Mr. Orgaz:
Your people on site teem like they live on another planet.
I want to ask you to meet with us as soon as possible because these and other situations in which your team is putting us are causing us tremendous insecurity to the point that we are reconsidering the conditions of *our* participation in this project
I can meet you any day next week.
Exh. R-56 (SELI email to Cobra dated Nov. 11, 2012).

of site preparation prevented APSA from starting excavation of the foundations.

362. It will be recalled that on November 17, 2012 (para 226, supra), SELI formally complained about Cobra's delays in performance and announced that it considered the SELI Acceleration Plan schedule as "no longer valid or binding." The reason given by SELI was not only Cobra's delay in preparing the TBM assembly site and cradle, but also Cobra's alleged failure to provide the factory platform as required. SELI stated in that letter that "up to the present date, with over two months of delay, this [dovelas factory] platform does not meet the minimum technical standards agreed to, for us or our subcontractor to accept delivery of the platform." [381] As previously noted, [382] Cobra never responded to SELI's November 17 communication. Similarly, in its message to Cobra of December 28, 2012 complaining about the state of the TBM assembly site (para. 319, supra), SELI also complained that, upon arrival of the dovelas factory carrousel, the factory platform was not adequate for its purpose. [383]

363. Fourth, according to SELI, the platform that Cobra furnished on November 29, 2012 was incomplete, in that it included only the dovelas factory platform as such (i.e., the portion of the platform on which the factory shed was to be built), [384] but neither the platform for the concrete plant nor the third portion of the platform, namely the portion to be used for the storage of dovelas. SELI thus disputes Cobra's contention that the concrete plant platform was provided at the same time as the dovelas factory platform. The platform for the concrete plant, according to SELI, was not in fact completed until February 2013, [385] thus preventing APSA from starting to build the concrete plant until February 2013.

364. There is even dispute between the parties over whether Cobra ever prepared the platform for the storage of dovelas. Mr. Ortega testified that work on that part of the platform was satisfactorily completed in January 2013, [386] but the record shows that SELI informed Cobra in its monthly report, dated January 31, 2013, that it was still "awaiting the delivery of the rest of the platform for the storage of dovelas." [387] In March 2013, SELI was in fact still complaining that the platform for the storage area was not dry, level and compact enough to accommodate the dowlas: [388]

> [T]he platform still does not comply with the minimum standard requirements for the movement of trucks, forklifts, etc, to move, store and carry the dowlas made out of concrete. This platform's slope is still not even 3%, it lacks the minimum appropriate compacting, and many parts of it have yet to be completed. The excavation work for the concrete plant's pits is more than a month behind schedule, because the area was not in minimum acceptable conditions for our needs. [389]

Cobra replied on April 1, 2013 that, even though it considered the platform to be adequate, "any

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380 Ortega ws, para. 13.

381 Exh. R-58 (SELI letter to Cobra dated Nov. 17, 2012).

382 See para. 226, supra.

383 Exh R-61 (SELI letter to Cobra dated Dec 28, 2012).

384 Lianos ws, para. 85, citing Exh. R-60 (delivery notice dated Nov. 29, 2012).

385 Exhs. R-71 (APSA email to SELI dated Feb. 8, 2013). R-75, p. 1 (SELI letter to Cobra dated Feb. 20, 2013).

386 Ortega ws, para 19.

387 Exh. R-68. p. 7 (SELI internal Monthly Rpt no. 10, dated Jan. 31. 2013).

388 Exh. R-87 (SELI letter to Cobra dated Mar 22, 2013).

389 Exh. R-87 (SELI letter to Cobra dated Mar 22, 2011).

improvements that are needed will be made." [390]

365. Finally, SELI denies that it was falling to bring the dovelas factory to completion. There is evidence to suggest that it was continuing in March 2013 to construct the dovelas factory and assemble the dovelas manufacturing equipment.n. [391] SELI cites a series of weekly reports that it submitted to Cobra as evidence that, despite the impediments, it had by early March 2013 mobilized the necessary personnel from Italy as well as the necessary local workers. According to these reports, by March 17, 2013, SELI had retained 8 expatriates and 16 local workers for work on the project, [392] was continuing construction of the dovelas factory, assembling the dovelas manufacturing equipment, [393] and handling the arrival and unloading of all remaining equipment from Italy. [394] Mr. Ciocca testified that both skilled and non-skilled workers were coming daily to the site looking for work, [395] but that in any event there was at that time still relatively little work needing to be done on-slte. [396] In addition, according to him, there was at the time plenty of work going on in Italy where SELI was conducting purchasing and refurbishing activities, among others. [397] Mr. Ciocca also testified that SELI had made sufficient arrangements with suppliers to ensure that all the supplies needed for performance of its work would be available and on-site at the time they were needed. [398]

366. SELI remarks, much as it did in connection with the TBM assembly area (para. 318, supra), that Cobra did not inform RENACE of the delays that had occurred, [399] but instead falsely reported to RENACE that it had completed the platform in October 2012, that APSA had started construction of dovela factory in November 2012, and that the tunnel would be completed in accordance with the SELI Acceleration Plan on November 30,2013. [400]

367. The question of responsibility for delays in connection with the dovelas factory platform (including the concrete plant platform) and the dovelas factory itself is perhaps the most hotly contested and difficult factual issue in this proceeding. However, much as in the case of the parties' disagreement in connection with the TBM assembly (see para. 336, supra), the Tribunal is struck by the far greater detail, completeness and cogency of the witness statement testimony offered by SELI's witnesses than by Cobra's, and of their far less conclusory tone. But above all, the documentary evidence in this case lends substantially more support to the version of the facts presented by SELI's witnesses as compared to Cobra's. Once again, the testimonial evidence favoring SELI is entitled to greater

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[390] Ciocca 2d ws, para. 23, Exh. R-90 (Cobra letter to SELI dated Apr. 1, 2013): "Regarding the Platform, this [is] not [a] critical path and even though we consider it adequate, any improvements that are needed will be made." SELI asserts that at the time Cobra decided to replace SELI, the dovela storage platform was still not completed. Respondents' reply to amended statement of defense to counterclaim, para. 73.

[391] Exh. R-80 (schedule of SELI activities on the Renace II Project in week no. 11. Mar. 11-12, 2013).

[392] Ciocca ws, para. 70, Ciocca 2d ws, para. 46(b); Exhs. R-80. p, 5 (SELI weekly schedule to Cobra of Mar, 11-17, 2013), R-139 (annex 1.1 to Cobra monthly rpt to RENACE dated Mar. 2013).

[393] Exhs. R-80, p. 3 (SELI weekly schedule to Cobra of March 11-17, 2013), R-89, pp. 6-7 (SELI monthly rpt to Cobra dated Mar. 31, 2013).

[394] Exhs. R-80, p. 5 (SELI weekly schedule to Cobra of March 11-17, 2013), R-89, pp. 6-7 (SELI monthly rpt to Cobra dated Mar. 31, 2013).

[395] Ciocca 2d ws, para 46(b).

[396] According to Mr Ciocca, when Cobra extended the delivery date for the TBM cradle from mid-March to mid-April 2013, SELI had too many, not too few, workers on site. Ciocca 2d ws, para. 46(b).

[397] Ciocca 2d ws, para 46(a).

[398] Ciocca 2d ws, paras. 46(c)-(h) These supplies included concrete, sand, gravel, fiber, additives, diesel fuel, and heavy machinery, as well as a permit for fuel storage tanks.

[399] Respondents' reply to amended statement of defense to counterclaim, para. 66.

[400] Exhs. R-116, R- 121. R-124. R-131 (Cobra monthly rpts to RENACE for Nov. 2012 - Feb. 2013).

weight because it is consistently supported by contemporaneous documentary evidence; the testimonial evidence favoring Cobra is not. Relatedly, and based on the record, seldom, upon receiving a complaint from SELI, did Cobra deny the allegations.

368. Based on this striking disparity, the Tribunal finds that SELI bears a lesser share of responsibility for the delays associated with construction of the dovelas factory than does Cobra. Having contributed so substantially to those delays. Cobra cannot, under the New York case law cited earlier (see para. 340, supra) fault SELI on account of its performance of obligations in connection with the dovelas factory. Nor can its termination of the Tunneling Subcontract be justified on that basis.

(iv) Alleged inadequacy of access roads as SELLI's defense to delay

369. There is no dispute between the parties that delivery of the TBM parts to the assembly site and to the dovelas factory site could not be completed unless and until the access roads to be built by Cobra were ready. The question of the adequacy of the access roads figured significantly in the preceding discussions of preparation of both the TBM assembly site and the dovelas factory site. The original Tunneling Subcontract provided for completion by Cobra of the access roads by February 2012. When the parties agreed on the SELI Acceleration Plan in August 2012, that date was extended to September 22, 2012.

370. Although the Tribunal has considered carefully all the evidence bearing on the adequacy or inadequacy of the access roads, it ultimately has no need to make a determination on that matter. The Tribunal has already concluded, without reference to the adequacy or inadequacy of the access road or roads, that SELI is not liable to Cobra for delays in its performance under the Subcontract, either in connection with the TBM assembly or the dovelas factory. After all, that question has pertinence only as a justification of delays in performance on SELI's part, whether as a defense to the claim of breach of contract or a challenge to Cobra's termination of the Subcontract. In other words, neither SELI's defense to breach of contract nor its showing that Cobra's termination of the Subcontract was unjustified depends upon a showing of the roads' inadequacy.

371. Nevertheless, since the parties dwelled extensively on the access road matter in their pleadings and their presentations at the hearing, the Tribunal surveys the evidence in this section.

372. In fact, the parties have presented the Tribunal with starkly different accounts of this matter.

373. According to SELI,[401] the road to the sand trap had to be suitable for conveying very large and heavy (45-66 tons) TBM components, as well as a 150-200-ton crane for the unloading of parts and a 300-ton crane for assembling the TBM.[402] SELI maintains that, on account of a lack of adequate preparation of the road, these heaviest parts and equipment could not in fact be safely transported to the worksite.[403] Mr. Lianos testified that the access roads (including the access road from the dovelas factory area to the tunnel entry portal area), which should have been readied by September

[401] Answer and counterclaim, para. 40.

[402] Lianos ws, para. 78. Lianos 2d ws. paras. 55-58; Exhs. R-63 (SELI letter to Cobra dated Jan. 11, 2013). R-66 (SELI letter to Cobra dated Jan. 30, 2013), R-67 (SELI letter to Cobra dated Jan. 30, 2013).

[403] Lianos ws. para. 76.

22, 2012. were not in fact readied before the end of January 2013. [404]

374. As noted (para. 226, supra), on November 17, 2012, SELI wrote to Cobra complaining of the roads' condition and warning that their inadequacy would be a source of delay in completion of the project. [405] SELI sent a similar letter dated January 11, 2013, stating that "[y]our letter [of December 14, 2012] implicitly recognizes that the road is in poor condition, as we stated in our letter, since you have not denied the points we set forth." [406] The record further shows that on January 30, 2013, SELI was still requesting Cobra to confirm the estimated date of availability, not only of the TBM cradle, but also of the access road from the dovelas platform to the positioning platform for the crane in the sand trap. [407] In a February 15, 2013 letter to Mr. Pilar of Cobra, Mr. Cardellini again deplored "the terrible conditions of the access roads to the site," adding "[w]e have written more than once regarding this matter, but evidently you wish to avoid this serious problem and it is still unresolved." [408]

375. According to SELI, only in February 2013 (i.e., four months past the deadline for completion of the access road) did Cobra make significant progress on the road, [409] But SELI claims that even than the roads did not meet Subcontract specifications. [410] SELI's principal concern was evidently the slope of the road. It had been agreed in December 2012 that the access road would have a maximum slope of 12% [411] However, according to SELI, the road was actually built with a slope of 25% rather than the 12%, and was thus too steep (as well as too narrow) for many of the vehicles carrying the TBM parts to the assembly site. [412] and even more so for the 300-ton crane. [413] The record shows that SELI complained to Cobra of that fact on March 18, 2013, [414] stating that the slope made it impossible to mobilize the 300-ton crane required for assembly of the TBM. [415] According to SELI, Cobra never in fact provided SELI a road meeting SELI's specifications, [416] and that only in May 2013, after the Subcontract had been suspended, did Cobra report to RENACE that the access road had been completed. [417]

376. Thus, the record shows a series of contemporaneous written complaints by SELI over time on the condition of the roads, much as it shows in connection with both the TBM assembly and the dovelas factory.

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[404] Lianos ws, para 78,

[405] Exh. R-58 (SELI letter to Cobra dated Nov. 17,2012).

[406] Exh. R-63 (SELI Letter to Cobra dated Jan. 11, 2013). The Letter continues "[T]he current road does not even meet the minimum conditions for transport of common and normal loads, as has been demonstrated by the need to support machinery and the damage to some of the transport vehicles."

[407] Exh. R-67 (SELI letter to Cobra dated Jan 30, 2013).

[408] Exh. R-72 (SELI email to Cobra dated Feb. 15, 2013).

[409] Ciocca 2d ws. para 30, and photographs. Exh. R-130, p. 7 (photographic rpt week no 68 dated Jan.30, 2013)

[410] In its monthly report dated March 31, 2013, SELI reported that "[t]he access road has presented problems that are much worse than originator expected, which have delayed and complicated the arrival of the cargo on site." Exh. R-87. p. 3 (monthly rpt dated Mar. 1, 2013).

[411] Exh. R-82 (SELI email to Cobra dated Mar 18, 2013).

[412] Lianos ws. para. 78

[413] Exh. R-63 (SELI letter to Cobra dated Jan. 11, 2013).

[414] Exh. R-82 (SELI email to Cobra dated Mar 13, 2013).

[415] Ciocca 2d ws. para. 31.

[416] Respondents' reply to amended statement of defense to counterclaim, para. 48.

[417] Exh. R-143 (Cobra monthly rpt to RENACE dated May 2013). According to Cobra's May 2013 report to RENACE, "[t]his month the execution of road No. 1 - access to the Chisap reservoir - was completed."

377. Cobra views the condition of the access roads strikingly differently. It is Cobra's contention, and Cobra provides witness testimony in support of it,[418] that the access roads to the work sites were ready on time and were at all relevant times adequate for their purpose, including for the purpose of accommodating SELI's heaviest equipment. Cobra claims that SELI fully overstates the requirements of the access road for purposes of the project.

378. According to Cobra, the main Renace II road itself was already built at the time of the Subcontract,[419] except for a small portion through which SELI had no reason to pass,[420] and was adequate. The focus, therefore, according to Cobra, should be on the branch of the road that led both to the dovelas factory and to the TBM assembly sites. A different access road - the secondary power house access road - was apparently not contemplated to be used by SELI.[421] According to witness testimony, the branch leading to the worksites was both completed on time and adequate for its needs.[422]

379. The adequacy of the access road was attested to not only by Cobra employees, but also by third parties. Mr. Lazaro, project manager for RENACE, testified that in his opinion, 'the access roads to the entry portal were ready to be used. To my knowledge, SELI never even tried to move a single truck from the dovelas factory to the entry portal area."[423] Similarly, Mr. Douglas Juarez of Excargasa, a Guatemalan heavy loads transportation and logistics service company engaged by Cobra to assist with the project's transportation needs, testified as follows with respect to the TBM assembly area in particular:

> I have been informed that SELI is particularly complaining about the access roads leading to the reservoir/sandtrap area. SELI never asked me to transport any equipment to this area. However, I am familiar with the site and the access roads leading there. I have successfully transported equipment for other companies to this area. This includes the following: (a) machinery for earth movements and excavating machines weighing between 20 and 50 tons, from September 2012 to date, and (b) gates and grill cleaners [whose] weight was not excessive but their volume was. Some of their dimensions exceeded 4 meters.[424]

380. Mr. Juarez further testified that his company successfully transported large and heavy equipment such as pipes (4.2 meters in diameter, 5 meters in length per unit up to 300 meters), valves (measuring 4 x 4 x 3 meters) and transformers (in excess of 60 tons) over the power house access road, which he described as a much steeper road with narrower curves and thus more difficult to navigate.[425] Mr. Juarez added that, as for SELI's heaviest place of TBM machinery, "[his company] could move this piece to the site if SELI told [them] to"[426] Further, a certain Castaneda Report concluded that "no considerable sections of danger to the cargo exist" and that "the transport is able

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[418] Juarez ws. para 8; Rodriguez ws, para. 13; Rodriguez 2d ws, para. 20; Castaneda Rpt. Exh. NCI-35.

[419] Defense to counterclaim, para. 81, citing Rodriguez 2d ws. para. 22; Claimant's reply to statement of defense, para. 106.

[420] Defense to counterclaim, para. 82.

[421] Defense to counterclaim, para. 86, citing Rodriguez 2d ws, para. 8..

[422] According to Mr. Rodriguez, equipment weightier than SELI's was able to be moved successfully along even steeper roads. Rodriguez ws, paras. 13-14; Rodriguez 2d ws, para. 20.

[423] Lazaro ws, para. 18.

[424] Juarez ws, para. 9.

[425] Juarez ws, para. 10 SELI maintains that the weights and dimensions referred to by Mr. Juarez were smaller than those of the TBM crane. Respondents' reply to amended statement of defense to counterclaim, para, 54, citing Exh. R-104b, pp. 4-5 (Technical specifications for 300-ton truck crane).

[426] Juarez ws, para. 13.

to overcome the stretch of dirt road." [427]

381. The Tribunal finds that the fact that this testimony comes from third parties enhances its credibility. [428]

382. However, as noted at the outset, and for the reasons given, the Tribunal does not need to reach a conclusion on the adequacy or inadequacy of the access roads. As stated, this question arises only in connection with SELI's defense to Cobra's claim of breach of contract and as an element of SELI's contention that termination of the Subcontract was wrongful. SELI's position that it did not breach the Tunneling Subcontract and the Subcontract's termination was wrongful does not require a showing by SELI that the access roads were inadequate for their purpose.

(v) *Conclusion on SELI's alleged delays in performing its principal contractual obligations*

383. The Tribunal thus concludes that SELI cannot be faulted for its performance of obligations to Cobra under the Tunneling Subcontract. It cannot therefore be held liable for any such default. Nor, for the same reason, can Cobra's termination of the Subcontract on account of SELI's alleged defaults be justified.

384. As indicated, the Tribunal reaches this conclusion based on the evidence presented to it of the parties' respective performances under the Subcontract. But even if the outcome were not so clear, Cobra's case is powerfully weakened by the fact that neither in connection with the TBM transport and assembly claim, nor the dovelas factory claim, did Cobra gave any indication, throughout the period in which the alleged delays and failures on SELI's part occurred, that it regarded any of them - or, for that matter, as of them taken together - as a sufficient basis for terminating the Subcontract. Apart from early and narrow discussions confined to such issues as the advance payment and performance guarantees and the incorporation of a subsidiary - all of which were rather readily overcome - Cobra's first serious objection to SELI's performance of its principal obligations occurred in the third week of March 2013 at roughly the same time that Cobra had determined to replace SELI as subcontractor. Even after that time, Cobra continued to purport to continue its own performance under the Subcontract and to expect SELI to do the same.

385. Cobra thus chose to maintain the Subcontract, both by continuing to perform and demanding that SELI continue to perform. Under these circumstances, the Tribunal finds that Cobra cannot seek damages or predicate termination on such a failure. As shown (para. 261, supra), this is amply established in New York law.

386. The Tribunal refers here to the settled New York case law, set out earlier (footnote 184, supra), to the effect that that a party that proceeds with a contract, and expects the other party to proceed, despite the other party's failures of performance, is deemed to have acquiesced in and accepted

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[427] Exh. NCI-35, Castaneda Rpt. p. 14.

[428] However, SELI maintains that much of the testimonial and documentary evidence on the adequacy of the access roads pertain to the access road to the powerhouse which had nothing to do with SELI's own area of performance. Amended defense to counterclaim, paras. 91-93, citing Exh C-27. Cobra admits the powerhouse road is irrelevant for this arbitration. Amended defense to counterclaim, para. 85.

those failures, and is barred from subsequently raising them as a basis for termination of the contract.

387. Cobra argues at several points that it should, in effect, be rewarded - or at least not penalized - for the generosity and leniency it showed to SELI over the course of the Subcontract. It claims, despite SELI's many alleged failures of performance, to have repeatedly extended to SELI "a helping hand "[429] Several of Cobra's witnesses echo this claim in their witness statements."[430] Cobra's gestures include (a) its agreeing to substitute the Advance Payment Guarantee with a security interest in the TBM, (b) its paying off SELI's debts to subcontractors, (c) its provision of equipment, materials and other assistance to SELI in building the dovelas factory, and (d) its performing excavation of the staging area for the TBM assembly.[431]

388. The Tribunal does not doubt Cobra's good will in extending these courtesies to SELI. But Cobra consciously chose to extend these courtesies, while continuing thereafter continuing to perform, and without giving any indication that it considered SELI's fallings sufficient to justify termination of the Subcontract SELI accordingly had no reason to believe that it could not, due to its fallings and Cobra's courtesies, confidently continue performing its obligations to Cobra under the Subcontract.

389. Obviously, the fact that up to a point a party overlooks the other party's failures of performance does not mean that it must continue to overlook future failure. Even after acquiescing in a certain number of delays, a party may, when faced with a new and serious default by the other party, terminate the contract.

390. That is not what happened in this case, however. The record shows that Cobra's termination of the Subcontract was not prompted by any new and serious default on SELI's part. None of the alleged breaches of contract on SELI's part was one of which Cobra was unaware long before it terminated the Subcontract, and even well after those alleged breaches Cobra nevertheless continued to demand performance by SELI. Until the very moment that Cobra announced its intention to replace SELI, Cobra continued accepting SELI’s performance with respect to both the TBM transport and assembly and the dovelas factory construction.[432] It even continued to demand performance after it had decided to terminate SELI, but had not yet informed SELI of that fact.[433] Its conduct is only worsened by the fact that it demanded compliance with the SELI Acceleration Plan schedule that, wherever responsibility for the project's delays might lie, was utterly unattainable. The Tribunal considers Cobra's insistence on SELI's adhering to a schedule that could not possibly be achieved (and for which Cobra’s own delays were in large part responsible) to be an act of bad faith, made all the worse by Cobra’s citing SELI's inability to meet that schedule as a ground for termination.

391. On numerous occasions, Cobra accepted and approved performances that were late according to the SELI Acceleration Plan schedule.[434] SELI told Cobra plainly n its November 17, 2012 letter that

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[429] Statement of claim, para 11, detailed in footnote 8, para. 55; Reply to counter claim, para. 16.

[430] Gamarra Mompeán ws. para. 32; Ortega ws, para 167; Rodriguez ws, para. 10.

[431] Reply to counterclaim, para. 7. Cobra cites also its providing SELI a "Loader" on several occasions between December 12, 2012 and February 13, 2003, to physically assist SELI in the unloading of materials. Reply to counterclaim, para. 7.

[432] Exhs. R-62, R-61. R-77, R-80 (SELI monthly rpts to Cobra for Dec. 2012 to Mar. 2013).

[433] See para. 385, supra.

[434] For example. Cobra approved SELI's October 22, 2012 proposed shipment schedule according to which the dovelas factory equipment was to be shipped from Italy in mid-to-late December 2012. Exh, R-5O, p. 2 (Roymar rpt dated Oct. 22, 2012). Since Cobra knew that transport from Italy to Guatemala takes 4-5 weeks, It could not camplain that the equipment had not arrived at the site by January 1, 2013.

compliance with the SELI Acceleration Plan schedule was no longer feasible, yet Cobra made no objection.[435] CEO Mr. Gamarra Mompeán testified at the hearing that he could not recall (a) ever receiving SELI's November 17, 2012 letter, (b) discussing the letter with any colleagues (including Mr. Orgaz, to whom it was also addressed), or (c) making it known to RENACE.[436]

392. Then too, Cobra made the first milestone payment to SELI in December 2012 with full knowledge of the revised schedule.[437] By way of another example, Cobra requested that SELI supply it an updated list showing the transportation status of SELI's TBM parts and dovelas factory equipment, which SELI did on February 18, 2013, without Cobra thereafter making any comment or complaint.[438]

393. SELI's Mr. Lianos testified that when he submitted SELI's monthly reports to Mr. Rodriguez of Cobra, the latter never disputed or even commented on them. In his testimony, Mr. Rodriguez does not dispute this assertion, defending himself solely on the ground that "[his] position at the time did not allow [him] to comment on these reports."[439] Of course, if Mr. Rodrigues' position did not allow him to comment on the sufficiency of Mr. Lianos' monthly reports, nothing prevented him from passing those reports on to a colleague at Cobra who would be in a position to do so. And Mr. Gamarra Mompeán conceded on cross-examination that in its monthly reports to RENACE, Cobra had conveyed no complaints about delay on SELI's part.[440]

394. Cobra does not specifically argue, though it could, that this case law is inapplicable when the underlying contract expressly holds that performance of one or more obligations is "of the essence," as it did in the present case. The EFC contract specifically declared timely performance of the subcontractor's obligations to be of the essence.[441] However, New York case law creates no exception for such circumstances.[442]

395. Cobra does not question the existence of the New York case law presented here. It largely limits itself to the argument that, under New York law, in order to be effective a waiver of rights must be "clear, unequivocal and deliberate."[443] Application of those requirements is entirely straightforward in the case of waiver expressed through a written or oral statement. But waiver can also occur through a party's conduct. Determining whether conduct is "clear, unequivocal and deliberate" enough to constitute waiver is a less straightforward exercise. But the Tribunal has no difficulty in finding a pattern of behavior on Cobra's part that meets those standards.

396. Counsel for SEL[444] and SELI's witnesses[445] suggest that Cobra was motivated by the fact that, due to

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[435] See para 226, supra.

[436] Tr. May 25, p. 318, I 11-21, p. 328, I. 18-19, p. 328, I. 13-17.

[437] Delta Rpt, app. 2.

[438] Ciocca ws, para. 63.

[439] Rodriguez 2d ws, para. 6.

[440] Tr. May 25. 2016. p. 33.I. 1-11.

[441] See EPC. secs. 5.1. 34.1.

[442] *Franklin Pavkov Constr. Co.* v. Ultra *Roof. Inc.*. 51 F.Supp 2d 204, 217 (N.D. N.Y. 1999) [RA-20] ("a party may be deemed to have walved the right to timely performance even where the parties have agreed that time is of the essence, by accepting performance after expiration of the time limit")

[443] *Silverman* v. *Silverman.* 304 A. D.2d 41,46 (N.Y. App. Div. 2003), Exh. C-19; Novillus *Tile v.* Turner *Constr. Co.,* 2 A.D. 3d 209, 210 (N.Y. App. Div. 2003), Exh. C-20.

[444] Tr. May 23, 2016, p. 91. I 19-21.

[445] Ciocca ws, para. 78.

its serious delays, it could no longer meet its obligations under the Renace Acceleration Plan deadline if it still had to prepare the TBM assembly site, and it is for that self-serving reason alone that it abandoned the TBM method altogether in favor of "drill-and-blast alternative and terminative the Subcontract. This may well be the case, but the Tribunal has no need to make any such finding in order to reach its ultimate determinations in this case.

(vi) self's right to cure

397. SELI contends that, even if its conduct constituted a breach of contract, it has a right under New York law to be given a reasonable opportunity to cure the breach, and that Cobra gave it no such opportunity following either suspension or termination of the Subcontract. [446]

398. The Tribunal finds that New York law does afford contracting parties that right, [447] and that the right need not be set forth expressly in the contract between the parties. [448] Cobra does not question the New York case law, but maintains that it gave SELI ample opportunity to cure. [449] The Tribunal confesses some uncertainty as to how a party may cure a failure of performance that takes the form of delay, since once delay has occurred, it cannot be erased, unless a party guilty of delay can "cure" that delay by accelerating its performance of subsequent obligations.

399. But of course the Tribunal ultimately has no need to determine whether SELI was given an adequate opportunity to cure. The Tribunal has found, in the case of each breach alleged by Cobra, that the breach either did not occur or, if it occurred, was essentially waived. Cure of breach does not therefor enter into consideration in this case.

X. TERMINATION FOR CONVENIENCE

400. In defense to the counterclaim. Cobra asserts that its termination of the Tunneling Subcontract may in any event be justified under the provision of the Tunneling Subcontract (EPC Contract, sec. 30.3(a)) providing for termination for convenience. [450] If that is the case. Cobra would presumably be justified in terminating the Subcontract even without any showing of fault on SELI's part.

401. In its reply, SELI argues that the EPC's provisions relating to termination for convenience do not form part of the Tunneling Subcontract [451] That argument must be rejected, however, because as

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[446] Statement of counterclaim, paras. 195, 211-215.

[447] See 5 Bruner & O'Connor Construction Law sec. 18:15 (RA-47): "Providing a cure notice of curable breaches deemed by the non-breaching party to be sufficiently material to warrant termination for cause is a fundamental prerequisite to termination"). See also Decker & *Co.* v. West, 76 F 1573, 1576 n. 2 (Fed. Clr. 1996) [RA-18].

[448] See *U.* S. for Use & *Benefit of Cortolano & Barone. Inc. v.* Marano *Constr. Corp.*. 724 F Supp. 88, 98 (S.D. N.Y. 1989) (RA-39) (finding wrongful termination based on notice of right to cure even though that right was not expressed contractually) SELI invokes specific provisions of the EPC Contract as specifically giving it a contractual right to cure, while Cobra claims that the several of the contractual provisions that SELI breached do not have a right to cure attached to them. Defense to counterclaim, paras. 183, 212. The Tribunal does not need to resolve this difference of views because of its finding that New York law furnishes a right to cure even if not expressed in the parties' contract. *See U.S.* for Use & *Benefit of Cortolono & Barone, Inc.* v. *Morono Constr. Corp.,* supra

[449] Defense to counterclaim, para. 184.

[450] Statement of Defense to Counterclaim as amended under Procedural Order no. 8 dated Sept 11, 2015, para. 216.

indicated above,[452] there is no basis for finding that the provisions on termination provided for in the EPC Contract failed to be incorporated into the Tunneling Subcontract.

402. SELI argues, however, that Cobra's termination cannot be considered as a termination under the termination for convenience provisions of the contract because Cobra in fact did not Invoke those provisions at the time. SELI notes in this regard that Cobra did not provide notice or return the performance bond as those provisions require, in fact Cobra drew down on SELI's performance bond.[453]

403. SELI also cited to New York law authorities for the proposition that a party that wrongfully terminates a contract cannot thereafter rely upon termination for convenience provisions of that contract.[454] Those authorities also support the conclusion that a party acting in bad faith in terminating a contract cannot thereafter invoke contract provisions relating to termination for convenience.[455]

404. As indicated above,[456] the Tribunal considers Cobra's insistence on SELI's adhering to a schedule that could not possibly be achieved, and for which Cobra's own delays were in large part responsible, to be an act of bad faith, made all the worse by Cobra's citing SELI's inability to meet that schedule as a ground for termination. The Tribunal concludes that Cobra's termination of the Tunneling Subcontract cannot be justified on termination for convenience grounds.

405. The Tribunal thus concludes (a) that SELI is not liable to Cobra for breach of the Subcontract and (b) that Cobra breached the Subcontract by unjustifiably terminating it on June 11, 2013. SELI is accordingly not liable in damages to Cobra, whereas Cobra is liable in damages to SELI. The Tribunal thus turns to the question of damages.

XI. DAMAGES

406. With respect to the claim in this case, the Tribunal has ruled that SELI cannot be faulted for its performance of obligations to Cobra under the Tunneling Subcontract and that Cobra is accordingly not entitled to damages for breach of contract.

407. Based on the same considerations, the Tribunal has concluded that Cobra's termination of the Subcontract cannot be justified on the basis of alleged defaults on SELI's part. Nor can it be justified as a termination for convenience.

408. As for the counterclaim in this case,[457] the Tribunal has concluded that Cobra's termination of the

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[451] Reply to Claimant's Amended Statement of Defense to Counterclaim dated Nov.13, 2015. para. 125.

[452] See paras. 159-164, supra.

[453] Respondents' and Counterclaimants' Reply to Claimant's Amended Statement of Defense to Counterclaim dated Nov. 13, 2015, para. 127.

[454] See. eg.. *Milligard Corp, v EE Cruz/Nob/Frontier -Kemper,* No 99 CIV. 2952 (LBS), 2003 WL 22801519 (SDNY Nov 24, 2003) [RA-62]; *Milligard Carp,* v EE Cruz/Nob/Frontier-Kemper, No. 99 CIV. 2952 (LBS), 2004 WL 1488534 (SDNY, July 2, 2004) [RA-63].

[455] Id.

[456] See para. 390, supra.

[457] Statement of Defense and Counterclaim dated May 25, 2015, para. 216 et seq.

Tunneling Subcontract was wrongful. There can be no question but that wrongful termination of a contract constitutes a material contract breach. The Tribunal must accordingly consider, under New York law, whether and in what amount SELI is entitled to recovery of damages from Cobra.

409. Cobra argues that the applicable legal standard under New York law in the event of a wrongful termination of contract is *quantum meruit,* calculated to include "actual job costs plus an allowance for overhead and profit minus amounts paid." [458] SELI, however, argues that under New York law the non-breaching party in a construction contact may elect to claim "either in quantum *meruit* for what had been finished — or in contract." [459] The New York case law cited supports SELI's proposition. A victim of a breach of contract is not limited by way of remedy to the equitable remedy of quantum meruit, but is entitled to recover compensatory damages resulting from the breach.

410. Under principles of New York law, a party in breach of contract must provide the non-breaching party damages in compensation for the costs that the later sustained on account of the breach as well as lost profits. [460]

411. SELI has presented its request for damages as follows:
SELI requests the Tribunal to declare that Cobra's termination of the Subcontract was wrongful and, therefore, award SELI damages in the total amount of USD 23,010,629 (USD 24,010,629 minus USD 800,000), plus a pre-award interest on all damages at the rate of 9% pursuant to NT CPLR 5004. *Alternatively,* SELI requests the Tribunal to award damages in the total amount of USD 24,010,629, but transferring title and possession of the TBM and related equipment to Cobra. [461]

412. More specifically, SELI claims entitlement to the following categories and amounts of damages: [462]

a.	Net value of work performed by SELI but unpaid by Cobra	USD 14,243,493	
	I.	SELI OBRAS costs incurred in Guatemala	USD 14,084,849
	II.	SELI Italy's costs Incurred in Italy	USD 780,566.91
	III.	Profit earned on incurred costs (25.4% of project costs)	USD 3,770,379.09

[458] Statement of Defense to Counterclaim as amended under Procedural Order no. 8 dated Sept. 11. 2015, footnote 217 (citing, *Fehihaber Corp.* v. state, 65 AD2d 119,127,410 NYS24 920. 926 (3rd Dept 1978) [CA-22); *Najjar* Indus; Inc. *v City of New* York, 87 AD2d 329,331-32,451 NYS2d 410,413 (1982) off'd sub nom. *Nojjor Indus. inc. v City of* New *York (Greenpoint Incinerator),* 68 NYS2d 943, 502 NE2d 997 (1986)) [CA-23].

[459] Reply to Claimant's Amended Statement of Defense to Counterclaim dated Nov. 13, 2015, para. 122 (*citing* New Era Homes Corp v Farster, 299 NY 303. 307 (NY Ct App. 1949) [RA-65]; occart *MCK Bidg Assoc.* inc. *v St. Lawrence Univ.*. 301 AD2d 726, 728 (NY App Div 2003) (RA-27)).

[460] Statement of Defense and Counterclaim dated May 25, 2015, para. 217 (citing, Peru Assocs. *Inc. v. State,* 70 Misc. 2d 775, 777 (NV Ct. C. 1971) [RA-30] aff'd 39 A.D.2d 1018 [NY 1972]).

[461] Respondents' and Counterclaimants' Reply to Claimant's Amended Statement of Defense to Counterclaim dated Nov 13, 20I5. para. 144.

[462] Navigant Rpt dated Mav 22, 2015, para. 130. *See also* Navigant Supp. Rpt dated May 27, 2016 (withdrawing claim for USD 5,030,160 in contract damages for failure to award Renace Ill wore as being duplicative).

	iv.	Less amounts paid by Cobra	USD-4,392,302
b.	Lost profits on the Renace II project	USD 1,483,063	
c,	Return of guarantee funds	USD 3,245,912.62	
d.	Contract damages for failure to award Renace III work	USD 5,038,160	

413. Cobra argues as to the first three categories that these claims suffer from errors and inconsistencies, resulting in inflated amounts [463]. *The* Tribunal addresses these arguments as follows.

(a) Net value of work performed by SELI but unpaid by Cobra

414. SELI claims that up to the time that Cobra terminated the Tunneling Subcontract, the "net value" of the work performed by SELI but not paid by Cobra amounts to USD 14,243,493. [464] That amount includes what SELI claims as: (i) performance costs incurred by SELI OBRAS in Guatemala of USD 14,084,849; (ii) performance costs incurred by SELI Italy in Italy of USD 780,566 91; (III) "gross margin" on the work performed by SELI, estimated by SELI's expert, Navigant, to be USD 3,770,379.09; (iv) less amounts paid to SELI by Cobra, which amounts to USD 4,392,302. [465]

415. SELI suggests that prior to termination SELI OBRAS had invested in significant preparatory to work in Guatemala (e.g., reconditioning the TBM, shipping necessary TBM parts, mobilizing in-country project teams, and engaging subcontractors for the civil works, construction of the dovelo plant shed, and the excavation of the first 15 meters of the tunnel). As stated by Navigants expert at the evidentiary hearing the TBM drilling business requires "a very substantial upfront investment. (...) The Contractor has to either purchase or recover assets from a previous project, and then it has to customize and refurbish it to be used on the new project, and it has to buy a lot of other support equipment for the dovelas factory, for the concrete plant." [466] SELI, principally relies on the Navigant report for the calculation of damages. The Report submits that SELI OBRAS and SELI Italy incurred costs in Guatemala and In Italy, respectively. [467]

416. Cobra disputes SELI's claimed costs as well as SELI's claimed "gross margin" on several grounds.

417. Cobra argues that SELI's claims for performance costs incurred should be disallowed insofar as the "vast majority" of costs claimed by SELI are costs that SELI has not paid and, given that SELI has been in bankruptcy proceedings, may never pay. [468] Delta asserts that there is no evidence in SELI's

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[463] Statement of Defense to Counterclaim as Amended under Procedural Order no 8 dated Sept 11, 2015. para. 224.

[464] Statement of Defense and Counterclaim dated May 25, 2015, para. 220.

[465] Navigant Rpt dated May 22, 2015, para 146.

[466] Tr., June 1, 2016, 784.

[467] Navigant Rpt dated May 22, 2015. pp. 40-48.

[468] Delta Amended Rebuttal Rpt dated Sept. 11, 2015, at 43. See also Statement of Defense to Counterclaim as Amended under Procedural

accounting records to show that SELI actually paid the costs that it claim.[469] Navigant confirms that some cost amounts claimed by SELI have not been paid, but asserts that this fact is not relevant to the claim.[470] SELI points to authorities demonstrating that, under New York law, "a debt obligation incurred in reliance upon a contract may be recoverable as reliance damages, even if the obligation has not been paid in full or part."[471] This authority has not been refuted. The Tribunal accordingly concludes that, as a matter of New York law, whether or not SELI has satisfied the debts it has incurred in performance of the Tunneling Subcontract is not relevant to Cobra's liability for contract damages. Moreover, the fact that SELI has been in bankruptcy proceedings does not necessarily mean that its creditors would be without recourse against SELI out of amounts that SELI recovers from Cobra for breach of the Tunneling Subcontract or amounts it may otherwise acquire.

(i) Performance costs incurred in Guatemala

418. According to SELI, SELI OBRAS has incurred costs in Guatemala in the amount of USD 14,084,849, which also include accounts payable.[472] SELI's expert. Navigant, reviewed and analyzed accounting records from SELI OBRAS, including a Project Cost Report, general ledger for the Project, as well as various vendor invoices, purchase orders, and SELI payment vouchers.[473]

419. However, Cobra objects to recovery of this item for the reasons set out in the discussion below:

Purchases from SELI Italy - USD 9,179,965.53:

420. According to SELI, the value of the TBM and all the equipment sent to Guatemala in December 2012, based on intra-company invoicing was USD 9,179,965 53 (consisting of original residual value plus cost of refurbishment), and SELI has included this amount in the "Net Value of Work Performed prior to Termination" of USD 14,243,493 as "Purchases from the Home Office (Equipment from Italy)." The largest cost is USD 9,179,966 for TBM equipment which is shown in Table 2 of the Navigant Report ("Purchases from the Home Office (Equipment from Italy)").[474]

421. Cobra's expert Delta observes that the transfer of equipment is not to be considered a project cost if the party seeking to recover it retains the asset after the project is completed. In relation to the TBM equipment. Delta asserts that a claim for damages in this category would be duplicative of SELI's claim that it is the rightful owner of the TBM and entitled to its return by Cobra.[475]

Order no. 8 dated Sept. 11, 2015, para. 236 (stating "[I]t is unclear if SELI will ever pay these amounts and even if they do they will very likely be subject to significant reductions resulting from SELI's bankruptcy proceedings")

[469] Delta Amended Rebuttal Rpt dated Sept. 11, 2015 at 37-44.

[470] Navigant Reply Rpt dated Nov. 13, 2015. paras. 69-72.

[471] Respondents' and Counterclaimants' Reply to Claimant's Amended Statement of Defense to Counterclaim dated Nov. 13, 2015, para. 137 (citing *Nature's Plus Nordic A/S* v Natural Organics. no. 09-cv-4256 (ADS), 2015 WL 1650854 at 8" (EDNY Apr.14, 2015) (RA-64); John T *Brady & Co. v Bd of Educ of Sch Dist of City of NY, 222 AD 504, 507* (NY App. DIV 1928) [RA-61].

[472] Navigant Rpt dated May 22, 2015, pp. 42-45.

[473] Navigant Rpt dated May 22, 2015, pp. 40-48

[474] Navigant Rpt Attachment, NCI 2-1c.

[475] Delta Amended Rebuttal Rpt dated Sept 11, 2015 at 28

422. SELI's expert Navigant confirms that the USD 9,179,965.53 includes equipment purchased and refurbished by SELI for the Project, i.e., components of the TBM as well as components of the dovelas plant and moulds, locomotive and rolling equipment, grout piant, and other project-related equipment and facilities.[476]

423. As far as TBM-related equipment is concerned, Navigant agrees that if the TBM equipment is returned to SELI, a portion of the claim based on the net value of work performed by SELI but unpaid by Cobra would have to be reduced to reflect the value of the returned equipment.[477] Navigant states that a reduction in that instance should be based on the current value of the TBM equipment, *i.e.,* USD 5,413,973 minus depreciation.

424. For its part, Delta maintains that the value of the equipment is overstated because it includes a "gross margin." According to Mr. Fuchs of Delta, "Navigant just says there is gross margin in these prices. I don't know how much *gross margin is in there. They don't tell me. Thor is kind of the fundamental problem with this whole claim."*[478] Upon cross-examination, Mr. Fuchs asserted that the invoice value contains a 24.5% gross margin, which is the same percentage of gross margin assigned to the overall Renace II Project.

425. The Tribunal must determine whether the invoice amount of USD 9,179,965 fairly represents the value of the TBM at that time, or whether a lesser amount should be considered in light of the application of an alleged gross margin as asserted by Delta.

426. The Tribunal concludes that there is no evidence to establish that the value of the invoice for the sale of the TBM equipment from SELI Italy is overstated due to gross margin. While Delta advanced this proposition, it failed to support it or provide sufficient reasons to persuade the Tribunal that the invoices were in fact overstated. Specifically, at the hearing, Mr. Fuchs acknowledged that he had no basis to sustain this position:
Q. But you haven't identified any factual basis to assert *that SELI did not apply its ordinary course of business methods in determining the transfer prices reflected in those invoices?*

A. Well, I would have no way to determine whether they are or they aren't doing that.

Q. Right.

A. The whole thing seems odd to me, as I've said this morning.

Q. But these invoices were calculated before there was an arbitration.

A. l guess so. I was told, actually, by a Roymar representative that he thought these were used for insurance purposes. That's my understanding of what these represent.

Q Okay. Did Roymar or anybody else inform you that SELI had to pay a 12 percent import duty on the face value of these invoices ?

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[476] Navigant Reply Rpt dated Nov. 13,2015. para. 73.
[477] Navigant Reply Rpt. dated Nov. 13, 2015, para. 79.
[478] *Tr. Day 5, p 696, I 17-20.*

Q. Okay. And the first bullet point in which you identify an alleged overstatement of the value of equipment is you say that NCI claimed price for equipment less duplicated gross margin claimed at 24.5 *percent." Have you seen any documentation to support your conclusion that SELI applied the profit margin of the overall Contract to each invoice?*

A. No. All I know is that is the overhead and profit that Navigant is claiming in its claim when it's marking up figures. So, it was the only one that was available to me.

Q. So, your position is that there's a record of Navigant's methodology which supports your conclusion that they inflated-that SELI included the contractual margin of a 25.4 percent profit in these invoices?

A. I'm not sure, Let me try to answer it this way. Navigant states there's a 25.4 percent gross margin in the Project.

Q. On the overall Contract.

A. Correct.

Q. Right.

A. Number 2, they say that this price, 9.18 million, includes gross margin. So, I put those two facts together and assumed that the 25. 4 percent was in there.

Q, Okay. So. in other words, if I understand you, you believe that Navigant's Report supports your conclusion that they applied the gross profit margin of the Contract-or that SELI-that they understood SELI to *be applying the gross margin to the Contract to the individual invoices?*

A. No. Navigant doesn't say. Navigant just says there is gross margin in these prices. I don't know how much gross margin is in there. They don't tell me. That is kind of the fundamental problem with this whole claim.

Q. I see So, you assumed, based on something you read in Navigant's material, that SELI included a 25.4 percent profit margin in the transfer price invoices?

A. Yes. That's on assumption on my part because I had nothing else to go with, correct. [479]

427. The Tribunal considers Navigant's opinion to be reliable on this point. Navigant's expert. Mr. Gray, testified that, of the USD 9,179,965.53 invoice value, approximately USD 5 million correspond to the TBM (and presumably its refurbishment), with the rest corresponding to the TBM equipment other than the TBM itself. According to Mr. Gray, each component was valued based upon the amounts invoiced by SELI Italy, using its standard company procedure for valuation, which is based on cost. The Tribunal is also persuaded by Navigant's explanation that SELI had no incentive to inflate the equipment cost but, if anything, a disincentive, on account of tax liability. Finally, the Tribunal also finds persuasive that the invoke cost was actually 20% lower than the cost that was stated in the bid. [480] Accordingly, the Tribunal concludes that the invoice amounts reasonably represent the value

[479] Tr. Day 5.pp. 694-699, 03:57:14.

[480] They were done in real time before there was any Iitigation, so, obviously, there was no Incentive to Increase the value. And, you know,

of the TBM equipment

428. In conclusion, the Tribunal finds that SELI OBRAS is entitled to payment of the invoice of USD 9,179,965.53 for the TBM equipment and materials sold by SELI Italy. The question of whether a credit for the current value of the TBM equipment should be deducted from this head of damages is addressed in Section XII, paras. 473-496, infra. This credit, if allowed, should be awarded to SELI OBRAS since this amount was invoiced to it and represents an account payable

Stay/Delay of Containers in Port: USD 2,147,579.94:

429. SELI includes in its performance costs incurred by SELI OBRAS in Guatemala USD 2,147,579.94 in connection with containers that remain in Guatemalan ports as of December 31, 2014.[481] ("Storage & Services for Containers at Port.").[482] These costs are categorized as "accounts payable." but SELI submits that it has the obligation to pay them even if they have not yet been paid.[483]

430. Cobra's expert, Delta, argues that this head of damage is unrecoverable because SELI failed to deliver the equipment to the project site and failed to mitigate damages since SELI would have incurred less cost by transporting the containers to the site. Delta also argues that SELI has produced no invoices to support the claimed amount and that the majority of the containers (28 of the 35 by SELI's account) had arrived at the port prior to SELI's termination. Thus, there would be no reason for SELI not to transport these containers to the site[484] However, Navigant refers to NCI Exhibits 48, 49 and 80, which identify the nature of the costs and the basis for the calculation of the claim as to them.[485] SELI explains that SELI Italy paid for the costs for the acquisition and customization of the TBM equipment for the Project, but has not yet been reimbursed by SELI OBRAS. Thus, it is an "accounts payable" on the books of SELI OBRAS but was actually paid by SELI Italy.[486] SELI maintains that under New York law, "uncertainties that go to quantum cannot be a defense to paying damages,"[487] and that New York law "does not require damages to be calculated 'mathematical certainty "[488]

431. Navigant also points out that "while many of the containers arrived at the port before the formal

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importantly, there's a disincentive to increase the value, which is that you pay custom fees and you pay taxes on any profit that's in that value. So, their standard policy is to do it based on cost without profit, and there's a significant disincentive to overstate that amount. Now, at the time, we did a couple of checks against this valuation. One was to compare it to the cost information that was presented in SELI's presentation to Cobra on April 23 of the cost of the equipment that had been presented. The other was to compare to the bid and to see what is the cost of this equipment in the bid. And, actually. the cost that's been invoiced is about 20 percent lower than the cost that was In the bid.. And so we did those couple of checks, and based on those, we determined that the cost was—the invoices reasonably represent the value of the equipment One issue is that COBRA'S Expert had presented an analysis that said there was a gross profit of 25.4 percent, which was the overall subcontract gross profit in the invoiced value of the equipment, and that is just not-that is just not the case. Again. SELI's policy is to price these internal transfers without any profit on it, and there's no basis. And I've seen nothing at all that would suggest that the Contract profit was included on the invoiced amounts (Tr. Day 6, p. 787-789. 09:44:13).

[481] Delta Amended Rebuttal Rpt dated Sept 11, 2015 at 29.

[482] Delta Amended Rebuttal Rpt dated Sect. 11, 2015 at 29; Navigant Rpt dated May 22, 2015, p. 44

[483] NCI Exh. 80 showing Storage invoice for 35 containers for Hapag-Lioyd; see also Tr., j *une* 1. 2016, Tr. 789-90.

[484] Delta Amended Rebuttal Rpt dated Sept. 11, 2015 at 30-31.

[485] Navigant Reply Rpt dated Nov. 13, 2015, para. 80; NCI Exhibits 48,80.

[486] Navigant Reply Rpt dated Nov. 13,2015, p. 21.

[487] Reply to Amended Statement of Defense and Counterclaim at 58, [RA-58].

[488] Reply to Amended Statement of Defense and Counterclaim at 58, [RA-66].

termination notice was delivered by Cobra, the majority arrived after Cobra's announcements to SELI of its intention to terminate the Subcontract, which Cobra announced first in a meeting on April 2, 2013 and then in its letter dated April 25, 2013. In contrast, 23 of the 35 containers arrived on or after May 10, 2013."[489] The Tribunal finds Navigent's evidence credible and accepts SELI's damage claim in this amount (i.e., USD 2,147,579.54).

432. In conclusion, SELI OBRAS is entitled to allowed performance costs incurred in Guatemala in an amount of USD 14,084,849.

(ii) Performance costs incurred in Italy

433. Turning to SELI's claimed performance costs incurred in Italy, SELI claims that SELI Italy incurred costs in Italy in an amount of USD 780,566.91. According to Navigant, these costs include performance costs in Italy for the management of the project, procurement activities, and other administrative functions.[490] Delta, in turn, asserts that Navigant's claim for "Profit Earned on Subcontract Work Performed" of USD 3,770,379 and for "Lost Profit Suffered by SELI Due to Termination" of USD 1,483,063, includes USD 1,626,065.50 for "Head Office" amounts, which duplicates Navigants claim for "Costs incurred by SELI in Italy Prior to Contract Termination" of USD 780,566. 91, since these are "Home Office Expenses."[491]

434. SELI rejects Delta's objections stating that "Delta has simply (and incorrectly) assumed that, because costs were incurred by SELI's Italy branch or SELI's office in Guatemala, such amounts are 'head office overhead' costs. However, the amounts identified by Delta as being duplicative head office overhead costs are actually direct costs of performing the subcontract work." Navigant further stated that many of the costs incurred by SELI in Italy were expenses paid from Italy but incurred for the performance in Guatemala (i.e., payment of many of the project personnel hired specifically for the project and employed in Guatemala, but paid through payroll in Italy). Moreover, even for the costs incurred in Italy, the claimed amounts all relate to direct costs of the project, rather than head office overhead SELI affirms that the costs included by Navigant for these damages include the direct project personnel that were devoted entirely or in part to tha Renace Project and that no allocations of head office overhead are included in this claim item. Additionally, SELI maintains that the costs incurred in Guatemala relate solely to the Renace subcontract and are direct costs of the performance of the work, not "overhead "[492]

435. In the Tribunal's view. Navigant explains persuasively that the costs incurred in Guatemala identified as potentially duplicative are actually direct costs incurred in relation to the project and do not overlap with any component of SELI's claim for costs incurred in Italy, which relate to "head office overhead."[493] The Tribunal therefore accepts that SELI Italy is entitled to damages in the amount of USD 780,566.91.

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[489] Navigant Reply Rpt dated Nov. 13, 2015, para. 85.

[490] Navigant Rpt dated May 22, 2013, p 45-46 (Table 3).

[491] Delta Amended Rebuttal Rpt dated Sept 11. 2015, at 32.

[492] Navigant Reply Rpt dated Nov 13, 2015, para. 27.

[493] Navigant Reply Rpt dated Nov. 13, 2015, paras. 86-92.

(iii) Profit on work performed by SELI

436. SELI also claims profits on work performed before termination of the subcontract. This profit is based on "the rate of profit included in SELI's estimates prepared at the time it presented its offer to Cobra and the agreed contract price (25.4% of project costs)." [494]

437. According to Navigant, "the calculation from the estimate of the percentage of profitability that was included in the original contract price... the original contract price included RENACE II and RENACE III - USD 54 million in total - and that was composed of USD 43.5 million in cost and USD 11 million in gross profit. This results in a profit percentage of 25.4 percent in the original contract price. We then applied that 25.4 percent [] to the amount of costs that had been incurred to get the amount of that profit that had been earned to date prior to termination." [495] Therefore, Navigant bases this calculation on SELI's bid estimate, which assumed that profits and head office expenses together would be at levels that were approximately 25.4% percentage of project costs [496] Based on total performance costs of USD 14,865,416 incurred prior to termination. Navigant quantifies lost profits at USD 3,770,379.09. [497]

438. In this connection, Navigant cites to SELI's audited financial statements for the years 2008-2010 showing that SELI generally earned gross profits between 15% and 21% of project costs. [498] Navigant then identifies three SELI projects that it argues were particularly comparable to the Renace II project and that yielded profits in the range of 24.1% to 35.2% in profits. [499]

439. Delta disputes the reasonableness of any assumption that SELI would have achieved profits at any rate in excess of 20% of project costs. [500] It considers any such assumption of profitability to be inconsistent with SELI's having been in bankruptcy. [501] However, SELI's witness, Mr. Barioffi, persuasively explains that the tight credit markets beginning in 2008, combined with a number of SELI's projects that were delayed in a short time period due to external factors, created financial difficulties for SELI that were unrelated to its ability to perform on its projects profitably. [502]

440. As for projects described by Navigant as comparable to Renace II, Delta identifies what it maintains are substantial differences between them and Renace it so that the comparison is not apt. in particular, Delta points to the fact that by comparison to the other SELI projects cited, the Renace II project had significantly greater costs. [503] The Tribunal agrees with Delta that there seem to be significant differences between the projects discussed, which differences moreover were effectively

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[494] Navigant Rpt dated May 22, 2015, p. 46.

[495] Tr. June 1, 2016, 791-92.

[496] Navigant Rpt dated May 22, 2015, para. 144; NCI Attachment 2-3.

[497] Navigant Rpt dated May 22, 2015, para. 146.

[498] Navigant Rpt dated May 22, 2015, para. 154; NCI Exh. 54; NCI Exh. 55.

[499] Navigant Rpt dated May 22, 2015, para. 155 (stating that SELI earned gross profit between 15% and 21% of project costs for the years 2008 through 2010 and identifying 3 SELI projects allegedly similar to the Rerace II project with gross profits ranging between 24.1% and 35.2% of project costs). See also Navigant Reply Rpt dated Nov. 13, 2015, para. 100.

[500] Dette Amended Rebuttal Rpt dated Sept. 11, 2015 at 33 et saq.

[501] Delta Amended Rebuttal Rpt dated Sept 11. 2015 at 34.

[502] Statement of Alberto Barioffi dated May 25, 2015.

[503] Delta Amended Rebuttal Rpt dated Sept. 11, 2015 at 35-36.

demonstrated in cross-examination of Navigant on this issue. [504] The Tribunal accepts therefore that the three projects identified by Navigant were not sufficiently comparable to provide a reliable basis for a profitability comparison for Renance II.

441. It is undisputed, however, that SELI prepared its bid for the Renace II and Renace III projects with profits assumed to fall at 25.4%, within the low end of the 24.1% to 35.2% range of profits realized on the other identified projects. [505]

442. As to whether SELI was in fact on track to incur costs in line with its bid, Delta disputes Navigant's reliance on evidence suggesting that SELI's performance of the Renace II project was running under budget; according to Delta, SELI was in fact experiencing cost overruns. [506] However, the Tribunal considers that Navigant responds persuasively by citing SELI accounting records showing that the costs incurred were in line with costs as estimated. [507]

443. Nevertheless, the Tribunal considers that there was some uncertainty as to whether, in view of delays and other obstacles associated with the Renace II project, SELI would have continued to incur costs at the level anticipated in its bid. Taking note of SELI's audited financial statements for the years 2008-2010 showing that SELI generally earned gross profits between 15% and 21% of project costs, the Tribunal concludes that factoring in a gross profit margin of 21% to assess SELI's losses is reasonable. Such a margin is somewhat lower than SELI's bid estimate for this project, (i.e. 25.4%), which the Tribunal considers is appropriate given the existence of some uncertainty over project costs discussed above, but is within the range actually achieved historically.

444. Based on the above considerations, the Tribunal is persuaded that as a result of Cobra's wrongful termination of the Tunneling Subcontract, SELI's losses included a "gross margin" associated with the total performance costs of USD 14,865,416 is USD 3,121,737 (i.e., 21% of USD 14,865,416). Thus, SELI Italy is entitled with respect to this item to damages in the amount of USD 3,121,737.

(iv) Amounts paid by Cobra

445. Finally, the Tribunal agrees with Cobra that SELI's damages claim must take into account the amounts already paid by Cobra to SELI prior to the termination of the Subcontract. The parties agree that Cobra paid SELI a total of USD 4,392,302. [508] Thus, the Tribunal must deduct this amount to arrive at the net value of work performed by SELI but unpaid by Cobra (section (a)). These amounts shall be deducted from amounts owed to SELI OBRAS and SELI Italy according to the

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[504] Transcript Day 6, pp. 919-929

[505] The Tribunal notes that Cobra argues that under New York law, "[i]t is well established that pre-bid estimates made by the contractor to compute a bid price are not a valid basis for computing recovery." Statement of Defense to Counterclaim as Amended under Procedural Order no. 8 dated Sept 11, 2015, footnote 217 *(citnig Najjar Indus.. Inc.* v *City of* New *York.* 87 AD2d 329, 332, 451 NYS2d 410,413 (1982) *aff'd sub nom. Najjar Indus.. Inc. v city of New York,(Greenpoint incelnerator).* 68 NY2d 943, 502 NE2d 997 (1946) [CA-23]). However, a subséquent New York court decision later clarified that the limitation referenced in *Najjar* was "Inapplicable... where the actual costs are known and the only estimated aspect of the recover [based on pre-bid estimate] is a percentage based anticipated prom." Bolemian v *LB* Reel Estate *Dev* Corp, 226 AD2d 213,224 (NY App. Div. 1996) (RA-57).

[506] Delta Amended Rebuttal Rpt dated Sept 11, 2015 at 37.

[507] Navigant Reply Rpt dated Nov 13, 2015. paras 103-04.

[508] Navigant Rpt dated May 22, 2015, p. 47.

allocation indicated in paragraph 466, infra.

446. In conclusion, SELI's losses in the category of the net value of the work performed by SELI but unpaid by Cobra.

Allowed performance costs incurred by SELI OBRAS in Guatemala Performance costs incurred by SELI Italy in Italy Gross margin or lost profit owed to SELI Italy less amounts paid by Cobra	USD 14,084,849 USD 780,566. 91 USD 3,121,737 USD (4,392,302) [509]
Total	USD 13394,850.91

(b) Lost Profits on the Renac e II Project

447. SELI asserts that, due to Cobra's unlawful termination of the Subcontract, SELI is also entitled to lost profits under the Subcontract for the tunneling excavation and construction in connection with Renace II. [510] According to Navigant, lost profits on the remainder of the Renace II project. i.e., the portion of the Tunneling Subcontract that it was denied the opportunity to perform, amounts to USD 1,483,063. [511]

448. Navigant concludes that the "total profit included in the combined RENACE II and RENACE III subcontract price was USD 11,036,644, composed of head office overhead expense of USD 3,416,104 and profit of USD 7,520,540." Navigant then divides the estimated profit of USD 11,036,644 between Renace II and Renace IIl based on the contract price for each (47.6% for Renace II and 52.4% for Renace III). This leaves a total profit for Renace II of USD 5,253,442 and for Renace III of USD 5,783,201. To reach the final total, Navigant subtracted the profit earned prior to termination of the subcontract that was already included in SELI's claim for value of work performed but not paid by Cobra - namely, USD 3,770,379. This leaves the final total of USD 1,443,063.00 for SELI's lost profits on Renace II, which is summarized in Table 5 of the Navigant Report. [512] SELI claims that "New York law unquestionably permits Respondents to use their bid estimate to calculate their lost profit damages." [513]

449. Navigant performed three basic analyses in order to conclude that SELI would have earned USD 1,483,063.00 in profits on the Renace II project if Cobra had not terminated the Subcontract. First, it examined the historical profitability of SELI's overall performance, including projects that involved the provision of TBM equipment and excavation it determined that SELI earned gross profits between 15% and 21% of project costs from 2008 to 2010. This was based on SELI's audited financial statements. Second, it examined SELI's financial performance on three similar projects that involved excavation with the TBM and the installation of the pre-cast segments. In particular, on the Talave-Cenajo (Spain) project, Navigant found that SELI achieved a gross profit of 35.2%. On the

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[509] Navigant Rpt dated May 22, 2015, para 146. These amounts are deducted from amounts payable to SELI OBRAS and SELI Italy according to the allocation Indicated in para. 146, intra (i.e., on the basis of which Respondent received the payments made by Cobra.

[510] Statement of Defense and Counterclaim, para. 222.

[511] Navigant Rpt dated May 22. 2015. paras 149-153.

[512] Navigant Rpt dated May 22, 2015, pp. 44-49

[513] Reply to Claimant's Amendment Statement of Defense and Counterclaim, para. 134.

Sant Just (Spain) project, Navigant found that SELI achieved a gross profit of 24.1%. And on the San Francisco (Ecuador) project. Navigant found that SELI achieved a gross profit of 33.6%. [514]

450. Lastly, Navigant compared the actual costs incurred for the work completed by SELI with the estimated amounts for that work in order to analyze the profitability of the works performed on Renace II prior to termination, It concluded that the works performed were "completed for actual costs less than the estimated amounts, demonstrating that SELI was achieving its estimated profit prior to the termination." [515]

451. Cobra challenges the three premises for Navigant's lost profit estimate on the Renace II project by relying on Delta's expert opinion. Concerning historical profitability, Delta alleges that from 2008 to 2010 SELI's gross profit "was declining from 21.5% in 2008 to 17.3% in 2009 to 14.6% in 2010." Thus, according to Delta, this decline "does not support selecting an estimated profit of 21%." [516] Delta also noted that when SELI submitted its bid for Renace II in December 2011, SELI's financial statements indicated that its parent company ended 2011 with a loss of 15.8 million euros and a negative net financial position of around 78.1 million euros. Concerning SELI's financial performance on similar projects. Delta alleges that "there must be substantial differences between these projects and RENACE II & III simply by looking at the Unit Cost for these tunnels." Delta asserts that Renace ll and III would cost 70% more per meter than the Sant Just Tunnel - Spain (SELI's most expensive comparative project). It also asserts that SELI's cost per meter for the Renace II and III is nearly six times the unit cost for the Talave-Cenajo Tunnel. [517] Finally, concerning completion of activities at less cost than SELI's estimated costs, Delta alleges Navigant's use of SELI's bid estimate is incorrect because it contains several errors. First, the values used in the transfer of the TBM and other equipment from SELI Italy to SELI Guatemala are not supported or verifiable. Second, the bid estimate contains a line Item in Navigant's amount for 1,500,000 euros for reconditioning, but there is no corresponding line item in any of the invoices supplied as support f or the asset transfer from SELI Italy to SELI Guatemala. Third, there are "recorded costs" missing that are needed in order to make Navigants comparison accurate. [518]

452. Navigant, in turn, rejects Delta's objections. With regard to Delta's objections to Navigants reliance on historical profitability. Navigant asserts that Delta's objections are unfounded for several reasons. First, when SELI has obtained a project and been permitted to perform it without "excess interference by the client or third parties," it has historically completed those projects with a high rate of profit. Second, SELI's poor current financial condition was caused by the financial crisis, which restricted its access to credit, and three of SELI's other projects "experienced unusual external impacts" from 2009 to 2012 that also caused its financial condition to suffer. Third, Cobra's wrongful termination of the Subcontract further damaged SELI's financial condition since SELI incurred almost USD 15 million to initiate the project but only received USD 4.4 million prior to termination. [519]

453. Concerning Delta's objections to Navigant's reliance on comparative projects completed by SELI,

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[514] Navigant Rpt dated May 22, 2015, p. 50.
[515] Navigant Rpt dated May 22, 2015, p. 51
[516] Delta Amended Rebuttal Rpt dated Sept 11. 2015 at p. 34.
[517] Delta Amended Rebuttal Rpt dated Sept 11, 2015 at p. 35.
[518] Delta Amended Rebuttal Rpt dated Sept. 11, 2015 at p. 34.
[519] Navigant Reply Rpt dated Nov. 13, 2015. pp 29-30, paras. 94-100.

Navigant asserts that "unit cost per kilometer is not necessarily a dispositive indicator of similarity, and does not change the fact that all of the projects include the same key characteristics of the RENACE project." These characteristics include: excavation using the TBM machine; installation of pre-cast concrete dovelas; and diameter between 4-7 meters. [520]

454. Concerning Delta's objections to Navigant's use of SELI's bid estimate in support of Iost claim for lost profits' Navigant asserts that the alleged "errors" that Delta cites are incorrect. First, Delta ignores other comparisons provided by Navigant that show SELI's initial profitable performance on unimpacted activities. Delta only focuses on the TBM equipment and the dovelas plant and ignores the other four items presented by Navigant in NCI Attachment 3-3. Second, concerning the invoice for reconditioning, Navigant states that "When invoicing for equipment, the seller lists on the invoice the price for each individual item of equipment, rather than listing each step in the manufacturing process that was used to create it" According to Navigant, "Delta's assumption that the Invoices should itemize the refurbishment costs is therefore counter to invoicing norms in the industry and do[es] not invalidate the comparisons provided by Navigant." Finally, concerning "missing costs", Delta incorrectly states that the "construction and erection of the factory" should also be included in the actual costs. [521]

455. After reviewing the Parties' submissions and accompanying expert reports, the Tribunal concludes that SELI is entitled to recover lost profits on the Renace II project. New York law permits the recovery of lost profits for a contract that was wrongfully terminated. See Peru Assoc v. State, 334 N.Y.2d 772 (N.Y. Ct. Cl. 1971) ("If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or ground of damages, namely: first, what he has already expended toward performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract.") (citations omitted). In addition, New York law permits the use of pre-bid estimates to calculate lost profits when actual costs are known on a project. See Baleman v LB Real Estate Dev. Corp. 226 AD.2d 223, 224 (N.Y App. Div. 1996) (permitting the use of pre-bid estimates to calculate lost profits "where the actual costs are known and the only estimated aspect of the recovery [based on pre-bid estimates] is a percentage-based anticipated profit").

456. However, the Tribunal notes that the amount indicated by Navigant is based on an assumption that SELI would have realized profits at the 25.4% level that SELI originally estimated in preparing its contract bid. [522] As noted above (see para. 443, supra), the Tribunal believes that there was some uncertainty as to whether, in view of delays and other obstacles associated with the Renace II project, SELI would have continued to incur costs at the level anticipated in its bid. Taking note of SELI's audited financial statements for the years 2008 to 2010 showing that SELI generally earned gross profits between 15% to 21% of project costs, the Tribunal concludes that factoring in a gross profit margin of 21% to assess SELI's claim for lost profits is reasonable. As such, the Tribunal accepts that SELI's lost profits on the remainder of the Renace II project was USD 1,227,922.24 [523]

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[520] Navigant Reply Rpt dated Nov 13, 2015, p. 30, para. 100.

[521] Navigant Reply Rpt dated Nov. 13,2015, p. 31. paras. 101-104.

[522] Navigant Rpt dated May 22, 2015, para. 144; NCI Attachment 2-3.

[523] Navigant calculates a total profit for Renace II of USD 5,253,442 based on an assumed profit of margin of 25.4% (see para. 448 supra). The Tribunal therefore adjusts that total to reflect a total profit for Renace II based on an assumed profit margin of 21%, which yields total profit for Renace II of USD 4,349,653.54. That figure is calculated as follows: 21% of USD 43,514,001 (the estimated project costs)(Navigant Attachment 2-3) yields USD 9,137,940.21 Dividing that nunber between Renace II and Renace III based on contract price (47.6% for Renace II) yields USD 4,349,659 54 From that total, the Tribunal deducts the prior earned prior to termination of US0 3,121,737.30. That figure is calculates as 21%

SELI Italy is therefore entitled to payment of USD 1,227,922.24.

(c) Return *of Guarantee* Funds

457. In February 2014, Cobra made a call on the performance bond that had been posted on SELI's behalf in the amount of USD 3,245,912.62.[524] SELI seeks the return of those funds on the basis that Cobra did not have a right to call on the performance bond.[525] There is no dispute between the parties that SELI's claim in that regard is valid if the Tribunal rejects Cobra's contract claims against SELI.[526] The Tribunal therefore accepts SELI's claim in the amount of the withdrawn performance bond. i.e., USD 3,245,912.62 which is awarded to SELI Italy

(d) Contract Damages for Failure to Award RENACE III Work

458. SELI claims damages due to the fact that it was not hired to do work on the RENACE III contract.[527] According to SELI, at the time of the negotiations, Cobra asked SELI to reduce the price for its services on the basis of its explicit promise to hire SELI for both projects and, on that basis, SELI in fact reduced the contract price for each project from approximately USD 31 million to USD 23,599 million for Renace II and USD 27,703 million for Renace III. Therefore, the Subcontract provides that if Cobra does not hire SELI for RENACE III through no fault of SELI, Cobra will pay SELI USD 5,038,160.[528]

459. SELI relies on Section 6.1.4 of the Subcontract which provides :
In the event that the tunnel for Renace III is not excavated by SELI, for reasons not attributable to SELI, or the signing of the contract for the execution of the tunnel for the Renace III project is not signed within a period of 12 months from the Final Project Completion Date, COBRA shall pay SELI an additional compensation, which will be added to the final amount of the Contract for the Renace II Works, of USD 5,038,160.00, to compensate for the lack of depredation of the equipment, plants and installations and to pay for the return shipping of those items.[529]

460. Cobra also presents a claim for damage in relation to Renace III on the basis of Section 6 of the Subcontract, referring to Sections 6.1.2 and 6.1.3, which provide:
Consequently, if the decision is made to develop the project called RENACE III in the EPC Contract, SELI agrees for this project to perform the tunnel, maintaining the price offered in this Contract without any change for any reason, and accepting the general conditions of the time periods and

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of USD 14,865,416, which is the total costs incurred by SELI for performance of the Renace II work (Navigant Attachment 2). Deducting USD 3,121,737.30 from USD 4,343,659.54 leaves last profits on the remainder of the Renace II project of USD 1,227,922.24.

524 Delta Amended Rebuttal Rpt dated Sept. 11, 2015, at 44, Navigant Rpt dated May 22, 2015. para. 157; NCI Exh. 51.

525 Reply to Claimant's Amended Statement of Defense to Counterclaim dated Nov. 12, 2015, para. 121.

526 Delta Amended Rebuttal Rpt dated Sept. 11, 2015, at 27,44; Navigant Rpt dated May 22, 2015, paras. 157-58.

527 Respondents' and Counterclaimants' Statement of Defense and Counterclaim dated May 25, 2015, para. 224.

528 SELI's Statement of Defense and Counterclaim, para. 224.

529 Exh. R-16, p. 8.

terms established by The Owner or its successor for performance, and that their participation in this project shall only be as a Subcontractor to COBRA, with SELI or any of its direct or indirect participating companies able to enter into any agreement whatsoever with any other commercial company, within the mentioned project RENACE III, except as established by number 6.1.4 of the EPC.

SELI admits that the commitment to exclusivity described in this Clause Six has become an essential condition for COBRA in accepting the SELI's offer and contracting it for the Work, by which nonfulfillment will result in SELI being obligated to pay COBRA the fixed sum of USD 5,038,160.00, without prejudice to later actions that COBRA may take against SELI for said nonfulfillment." [530]

461. There is no dispute that the Tunneling Subcontract provided for liquidated damages in the circumstances described in the above-cited provisions of Section 6; notably, both parties note that the amount of damages is reasonable. [531]

462. It is also not disputed that Cobra was engaged by Renace as main contractor for the Renace III project, and did not engage SELI as subcontractor. There is no evidence that Cobra asked SELI to perform the Renace III project or that SELI refused to do so at the price agreed. There also is no evidence that SELI sought to bid for the Renace III contract without Cobra. In other words, there is no basis to claim that SELI breached the exclusivity or price undertakings in Section 6 of the Tunneling Subcontract. The Tribunal therefore dismisses Cobra's claim on that basis.

463. On the other hand, the Tribunal considers that SELI has demonstrated that the Renace III tunnel was not excavated by SELI for reasons not attributable to SELI. SELI thus has demonstrated that it is entitled to the liquidated damages indicated in Section 6.1.4 of the Tunneling Subcontract

464. The Tribunal takes note of Cobra's assertion that Renace would not have accepted SELI as a subcontractor on the Renace III project and Cobra’s reference to Mr. Lazaro's testimony. [532] Mr. Lazaro, however, does not state that Renace would not have accepted SELI as a subcontractor on the Renace Ill contract. In any event, the Tribunal considers that the reasons the Renace III tunnel was excavated without SELI are not essentially attributable to SELI.

465. For those reasons the Tribunal accepts SELI's claim for liquidated damages in the amount of USD 5,036,160 for failure to award the Renace III work, which Cobra shall pay to SELI Italy.

(e) Conclusion on Damages

466. To sum up, SELI OBRAS and SELI Italy's damages are the following:
a. SELI OBRAS:

[530] 530Exh. C-001 at Adobe 254.

[531] Statement of Claim dated Mar. 18, 2015, para. 91. n. 75. Respondents' and Counterclaimants' Statement of Defense and Counterclaim dated May 25. 2015, para. 226.

[532] See Transcript, Day 7, p. 1056-1057.

1.	Allowed performance costs incurred by SELI OBRAS in Guatemala	USD 14,084,849
2.	Less First Milestone Payment paid by Cobra	(USD 2,032,344 27) [533]
3.	Total	USD 12,052,504.73

b. SELI Italy

1.	Performance costs incurred by SELI Italy in Italy	USD 780,566.91
2.	Gross margin on work performed but not paid by Cobra on Renace II	USD 3,121,737
3,	Lost profits on Renace II project	USD 1,227,922.24
4.	Return of Guarantee funds	USD 3,24,912.62
5.	Contract damages for failure to award Renace III work	USD 5,036,160
6.	Less Advance payment made by Cobra	(USD 2,359,957.86) [534]
7.	Total:	USD 11,054,340.91

Those losses in total amount to USD 23,106,845.64.

XII. INTEREST

467. Having found liability and damages, the Tribunal turns to the matter of interest.

468. SELI requests interest on damages at the New York statutory rate of 9%. [535] New York law permits pre-judgment Interest from the date of breach and post-judgment interest from the date of an award in Respondents' favor. [536] More specifically, SELI seeks interest in the following categories (noted below with total amounts adjusted by Tribunal in accord with its findings summarized in paragraph 466 above):

a. Value of work performed: an award of pre-judgment interest at the rate of 9% on the sum of USD 13,594,851 from the date of the termination (June 11, 2013);

b. Lost profits (RENACE II and RENACE III): an award of pre-judgment interest at the rate of 9% on

[533] Statement of Counterclaim, para. 80, fn 95.
[534] Id. at para. 68.

[535] NY CPLR && 5001. 5003, Exh. RA-55.
[536] Statement of Defense to Counterclaim, paras. 235-236

the sum of USD 6,266,082 from the date of the termination (June 11,2013); and

c. Performance Bond: an award of pre-judgment interest at the rate of 9% on the sum of USD 3,245,913 from the date Cobra wrongfully drew down on the bond (Feb. 2, 2014).

Net Value of Work Performed by SELI but Unpaid by Cobra	$ 13,594,851	9% interest from date of termination, June 11, 2013.
Lost Profits on the RENACE II Project	$ 1,227,922.24	9% interest from date of termination, June 11, 2013.
Return of Seized Guarantee Funds	$ 3,245,913	9% interest from date Cobra wrongfully drew down on funds, February 2, 2014.
Contract Damages for Failure to Award RENACE III Work	$ 5,038,160	9% interest from date of termination, June 11, 2013.

469. Cobra has not challenged SELI's claim for 9% interest. Indeed, In its own Statement of Claim, Cobra claimed interest at that same rate:
Interest further must be awarded on breach of contract damages, as New York law provides that pre-judgment interest shall be recovered as part of such an award [CA-0009, NYCPLR 5001]. Interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date. Additionally, post-judgment interest shall be awarded from the date the verdict was rendered until the date of payment [CA-0009, NYCPLR 5002, 5003]. New York law provides for interest at the rate of 9% per year, which accrues on a simple basis. [537]

...

Interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date. Additionally, post-award interest shall be awarded from the date the verdict was rendered until the date of payment. New York law provides for interest at the rate of *9%* per year, which accrues on a simple basis [CA-0009, NYCPLR 5004]. Respondents have not disputed this. Their silence should again be deemed as acceptance. [538]

470. Given Cobra's request for interest at the same rate as that demanded by SELI, likewise invoking NYCPLR, the Tribunal rules that SELI is entitled to interest on its claims at that rate. In accordance with New York law, interest is to be calculated on a simple basis. [539]

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[537] Statement of Claim, para. 105.

[538] Reply to Statement of Defense, paras. 159-160.

471. Based on the amounts described above in paragraph 466, SELI Italy and SELI OBRAS are accordingly entitled to pre-award interest at a rate of 9% as from June 11, 2013, the date of breach, [540] except that SELI Italy's pre-award interest on sums wrongfully drawn down from the performance bond is awarded at a rate of 9%, calculated on a simple basis, as from February 2, 2014, the date on which those funds were taken.

472. Further, post-award interest shall accrue at the rate of 9%. calculated on a simple basis, from the date of issuance of this Award to the date of its payment.

XIII. COBRA'S ASSERTION OF A RIGHT OF RETENTION OVER THE TBM AND TBM MATERIALS

473. The Parties are in disagreement over post-termination rights to the TBM and the TBM materials. SELI demands recovery of title and possession of the TBM and TBM materials, while Cobra asserts a right of retention over them.

474. This disagreement requires the Tribunal to address three distinct issues:
(a) whether Cobra wrongfully took possession of the TBM;

(b) whether SELI was discharged of its obligations under the TBM Pledge Agreement upon termination; and

(c) what liabilities, if any, flow from a breach of the TBM Pledge Agreement.

(a) Cobra's Entitlement to Take Possession of the TBM

475. According to SELI, the purpose of the TBM Pledge Agreement, as a pledge-in-trust agreement (contrato de *fiducia) under* Spanish law, is to enable a debtor to provide security for a debt by transferring to its creditor one or more of its assets, while retaining possession of it. Once the debtor fulfills the secured debt, the creditor is required to returns title to the asset to the debtor. On the other hand, if the debtor defaults on the secured debt, the creditor may seek relief by initiating legal proceedings to enforce the guarantee, generally through a court, arbitral tribunal or a notary.

476. SELI submits that, under the TBM Pledge Agreement in this case, SELI transferred title to the TBM conditionally as a guarantee of its repayment of the Advanced Payment received from Cobra. SELI was to regain title to the TBM once it repaid the Advanced Payment, as well as complied with certain formalities. Because SELI's inability to fully perform the Tunneling Subcontract was due to Cobra's wrongful termination of the Subcontract, SELI should not be considered as having defaulted on the secured debt. SELI maintains that, even if the Tribunal were to find that Cobra did not breach the Subcontract by terminating it and that the TBM Pledge Agreement remained enforceable. Cobra

[539] See *Morfio* v. T.C *Ziroot BanKasi,* 147 F. 3d 83, 90 (2d Clr. 1998); Patane v. R *omeo, 235* A.D. 2d 649 (3d dep't 1997).
[540] See para. 405, supra

breached the Agreement by taking possession and control over the TBM without initiating any legal proceedings. In addition, because Cobra acted in bad faith, Cobra is liable in damages to SELI under the Spanish Civil Code.

477. Cobra, in turn, asserts a right of retention (ius or *titulus retlnendi)* over the TBM and the TBM materials under Spanish law [541] because the creditor has that right until the debtor has made the guaranteed performance - in this case, repayment by SELI of the advance payment of USD 2,359,957 made to it by Cobra. Cobra also asserts a right of retention over the non-TBM materials on the basis of the EPC as incorporated in the Tunneling Subcontract. [542] Cobra insists on exercising this right because no award rendered in its favor against SELI would be enforceable due to SELI's dire financial situation. [543] Cobra's claim thus rests upon an assumption that the Tribunal issues an award against SELI in Cobra's favor. [544]

478. According to Cobra's expert witness. Professor Rodriguez-Sastre:
This fiduciary guarantee granted COBRA (i) a formal title of ownership over the TBM; (ii) (In the same way as a pledge) the right to retain the TBM, at least until compliance with the said obligation to repay the advance; (iii) the right to foreclose the guarantee and (iv) a privileged credit up to the amount of the value of the TBM at the time of foreclosure. The termination of the Tunneling Contract between COBRA and SELI does not in any way affect this guarantee right, since (i) SELI's obligation to repay the guaranteed advance remains in place until otherwise established in the arbitration proceedings that are currently under way, and (ii) the EPC Contract specifically establishes the validity of the guarantee despite termination of the Tunneling Contract. [545]

A right of retention affords the creditor a preferential credit up to the value of the collateral [546]

479. Under Clause 30.4 of the EPC, the guarantee secured by the TBM remained in force despite the termination of the Tunneling Subcontract until such time as SELI performed all of its obligations: [547]

In case termination of Contract takes place, the Contractor shall remain liable for all obligations accruing prior to the date for termination and for the Work, the Project (when completed) and the Equipment delivered to the Site (including for warranty obligations) and the Contractor shall comply with the provisions and conditions contained in the Contract Documents, including the Performance Guarantees, in the event of any termination of the Contract, all of the security provided by the Contractor, including the standby letters of credit and the Parent Guarantee provided pursuant to Article 24, shall remain in full force and effect until satisfaction of all of the Contractor's obligations related hereto.

480. The Tribunal concludes that, while the TBM Pledge Agreement conditionally transferred title to the

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[541] Spanish Civil Code, art. 1854.

[542] EPC, art. 30.3(b) (E). entitling Cobra "to take exclusive possession *of the* Work and any and all Equipment (Including without limitation materials delivered or en route to the Site) and Consumables."

[543] *Statement of Defense* to Counterclaim, par. 236.

[544] Statement of Defense to Counterclaim, per. 242.

[545] Rodriguez-Saste Op., Conclusion.

[546] Spanish Civil Code, arts. 1922, 1926

[547] Cobra also cites EPC Section 30.3 (b)(H) in support of its claim of a right to take possession and utilize machinery concerning the work until the project Is completed." Exhibit R-102 letter from Cobra to SELI dated 02.07. 2013.

TBM to Cobra, the right of possession of the TBM remained with SELI. Clause Fourth of the TBM Pledge Agreement reads:
FOURTH: The machinery subject matter of this contract shall remain in SELI's possession, who shall carry out all the appropriate actions at its own expense so that it can be used in the tunneling work for the "Renace II Hydroelectric Project in Guatemala" project, to which the machinery is committed. As a result, SELI shall bear the risk of each and every one of the consequences that may be created due to the loss, destruction or damage that may affect the machinery subject matter of the transfer during the entire time the machinery is in the possession or at the disposition of SELI. SELI declares that said machinery is insured for damages in market conditions for this type of industrial machinery under full risk policy number M9300014706 by the company Grupo SAI Fondiaria.

481. In June 2013, Cobra effectively took possession of the TBM when it prohibited SELI's employees from having access to the worksite.[548] Moreover, in July 2013 Cobra refused SELI's request that Cobra return the TBM to SELI.[549]

482. However, Cobra cannot rely on EPC Section 30.4 EPC because the Subcontract was not validly terminated on account of fault on SELI's part. This is made plain by EPC Section 30.3:
Rights of the Parties in Case of Termination.

(b) Termination for Contractor Default: In those cases where a Contractor's Default Event has occurred, then the Owner shall have the rights listed below which shall be additional to any other right of the Owner hereunder or at law or in equity:

...

(E) the Owner shall be entitled to take exclusive possession of the Work and any and all

Equipment (including without limitation materials delivered or en route to the Site) and Consumables.

483. The Tribunal thus concludes that Cobra did not have the right under the Tunneling Subcontract to take possession of the TBM and the TBM materials.

(b) Discharge of SELI's Obligations under the TBM Pledge Agreement upon Cobra's Wrongful Termination

484. SELI takes the position that, upon Cobra's wrongful termination of the Tunneling Subcontract, its obligation to repay the Advance Payment to Cobra was discharged. SELI relies on its legal expert. Professor Jesus Casas who testified that Cobra's wrongful termination of the Subcontract rendered

[548] Exh. R-100 Notarized Statement.

[549] "[T]the guarantees Sell provided for the appropriate use of the advance payment by Cobra and performance of Sell's obligations Will remain in force as long as Cobra is not adequately compensated for the adverse financial consequences that Seli's default has caused, citing clause 30.4 of the EPC"

the TBM Pledge Agreement no longer effective, so that title to the TBM reverted to SELI without SELI having to repay the Advance Payment. [550]

485. According to Cobra, the TBM Pledge Agreement entailed a guarantee by SELI to repay the advance amount of USD 2,359,957.86 it received from Cobra. This guarantee remains fully in force so long as SELI either fails to repay this amount or completes the work for which the guarantee was given. Cobra again cites EPC Section 30.4 for the proposition that, even in the case of termination (Including termination without cause) of the Subcontract, SELI remains liable for all obligations accruing prior to the date of termination, and that the security remains in full force until satisfaction by SELI of its obligations.

486. SELI has acknowledged that it received an advance payment from Cobra in the amount of USD 2,359,957 in contemplation of completion of the Renace II Project. However, SELI never completed the work. Accordingly, SELI's obligation to repay Cobra the amount of money advanced for work that was not carried out remains in effect.

487. The Tribunal notes that SELI was to repay the advance payment of USD 2,359,957 to Cobra through deductions of 50% from each monthly payment certificate. According to Article 1.3 of the Price Table (see below), a payment installment was owed by Cobra to SELI upon "[e]xcavation of tunnel with dual shield TBM and installation of tunnel lining with prefabricated concrete dovelas."

Art.	Description	UM	Quantity	Unit Price US$	Total Price USS	Status	
1	Advanced payment (amortized as a % in each monthly certificate)				2,359,957.86	paid by Cobra	
1.1	Upon the delivery of the TBM at the SELI factory in Italy	LS		*2,032,344.27*		2,032,344.27	paid by Cobn
1.2	After 10m of tunnel	LS	1.00	677,448.09	677,448.09	not	

[550] See Spanish Civil Code, arts.. 1824, 1859, 1884

	excavation using TBM					paid
1.3	Excavation of tunnel with dual sheild TBM and installation of tunnel lining with prefabricated concrete dovelas	m	4,180.00	3,448.07	14,412,932.60	not paid

488. However, Cobra terminated the Subcontract before SELI could begin excavation of the tunnel. SELI was accordingly unable to repay the advance payment as provided for in Article 1.3 of the Price Table, namely through deductions of 50% from each monthly payment certificate.

489. Regardless of the fact that termination intervened before SELI had fully repaid the advance payment. Section 6.6.3 of the Subcontract stated that Cobra was to make the advance payment to SELI for "mobilization."[551] The Tribunal finds that SELI did in fact perform all the work related to mobilization, even if with some delay. Thus, it shipped the necessary TBM parts, reconditioned the TBM, mobilized in-country project teams, and engaged subcontractors for the civil works (including construction of the dovelas plant shed, and excavation of the first 15 meters of the tunnel). Having substantially performed the mobilization work covered by the advance payment, SELI is under no further obligation to repay the advanced payment to Cobra. Moreover, the amount of the advance payment received by SELI is already reflected in the USD 4,392,302 credit accorded to Cobra in SELI's calculations, referred to in paragraph 445, supra.[552] In sum, SELI is discharged of its obligation to repay the advance payment because SELI performed the works that the advance payment required.

(c) Liability for Breech of the TBM Pledge Agreement

490. Cobra submits that according to Article 1,858 of the Spanish Civil Code, "It is..... characteristic of such agreements (i.e" guarantees such as mortgages and pledges under Articles 1922 and 1926] that, once the principal obligation has expired, the items against which the pledge or mortgage is formed may be disposed of to pay the creditor." Spanish legal doctrine holds that if the debtor has not met its

[551] "6.6.3. The Contractor shall provide an advance payment for mobilization. In the form of an interest-free loan, once the Subcontractor has presented a guarantee securing the amount of the advance payment, or USD 2,359,957.86. The refunds of the advance payment will be calculated by dividing the total of the advance by the contractual price established in the Contract, less the amounts indicated in the Pricing Schedule, articles 1.1 and 1.2." (emphasis added).

[552] Inclusion of this amount is acknowledged in both expert reports (Delta Rpt, p. 44, Navigant Rpt, p. 47).

underlying obligation, the creditor, by virtue of the guarantee (*fiducia cum creditore),* enjoys a ius *distrahendi, or* right to realize the value of the asset, so as to recover the amount of the credit in preference to third party creditors.

491. However, in the Tribunal's view, the question of whether Cobra is to be regarded as the rightful owner of the TBM in its capacity as holder of fiduciary title to the TBM depends on whether Cobra is entitled to return of the advance payment by SELI which was guaranteed by the TBM equipment as collateral. The Tribunal has already concluded that Cobra is not entitled to retain the TBM as collateral because SELI did perform the works covered by the advance payment.[553] SELI is accordingly entitled to return of the TBM which served as collateral.

492. Actually, SELI submits two alternative claims for the Tribunal's consideration as remedies for Cobra's breach of the TBM Pledge Agreement.

493. Under the first, the Tribunal orders Cobra to return the TBM and TBM material to SELI, with Cobra entitled to a credit for the current value of those assets to prevent double recovery by SELI. However, SELI asserts that there has likely been substantial depreciation while the equipment has remained unattended in the project location since its delivery, which is not disputed by Cobra. Navigant agrees that if the TBM equipment is returned to SELI, a portion of the claim based on the net value of work performed by SELI but unpaid by Cobra would have to be deducted to reflect the valve of the returned equipment.[554] Thus, it suggests that such a reduction should be based on the current value of the TBM equipment, i.e., USD 5,413,973, minus depredation. Navigant does not provide evidence of the amount of depreciation, but observes that there has likely been substantial depreciation while the equipment has remained unattended in the project location since its delivery.[555] For SELI, on the other hand, Mr. Barioffi estimates that the current market value of the TBM, taking depreciation into account, would be "at most" USD 800,000, and this is the figure ultimately used by SELI as credit.[556]

494. The Tribunal agrees that, if SELI is awarded ownership and possession of the TBM anti its equipment, their value must reflect actual depreciation, especially inasmuch as such depreciation is largely attributable to Cobra's refusal to return the TBM equipment upon SELI's request. However, the Tribunal is not comfortable calculating the amount of depredation in this case. It does not consider Mr. Barioffi's suggestion to be reliable, as this amount is based solely on his personal opinion and is unsupported by other means of evidence, It also does not take into account the actual conditions and state of the TBM equipment on the site, to which Mr. Barioffi did not have access upon termination of the subcontract. For its part, the Tribunal simply has no evidence to determine what is the current market value of the TBM which should be credited to Cobra based on the depreciation of the TBM equipment.

495. As an alternative, SELI proposes that the Tribunal award SELI the total amount of USD 24,010,629,

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[553] Even Delta concedes that these works were performed. "We will—this a termination for convenience. It has four components. Same thing. If you walk through each four, the first one being the value of the work performed. Well, if you go to Slide 68, they were paid for all the work. This is the schedule of values. They west paid for the Milestone 3, for the TBM in Italy being ready, and they were paid the advance payment. They didn't excavate any tunnel, they didn't produce a single dovela; they didn't perform any other work. So, there is nothing left to pay." Tr. Day 5, p. 541,10:31:25. lines 15-24.

[554] Navigant Reply Rpt dated Nov. 13, 2015, para. 79.

[555] Navigant Reply Rpt dated Nov. 13, 2015, para. 79.

[556] Berioffi Second ws para. 10. See Relief sought in Reply to Claimant's Amended Statement of Defense to Counterclaim

but transfer title and possession of the TBM and related equipment to Cobra.[557] thus allowing Cobra to realize its actual value through its sale and avoiding the uncertainty entailed in estimating the TBM and TBM equipment's residual value.

496. Based on these consideration, the Tribunal finds that SELI is entitled to an award of damages in lieu of return of the TBM and TBM equipment to SELI. For the quantum of damages which amounts to USD 9,179,965.53, the Tribunal refers to paragraphs 420 to 428, supra ("Purchases from Italy"), which provide the reasons why the Tribunal believes this amount is supported and should be awarded in full. On the other hand, instead of giving Cobra credit for the current value of the TBM and TBM equipment, Cobra shall take title and possession of those materials.

XIV. COSTS AND FESS

497. On June 1, 2017, the ICC Court fixed the costs of the arbitration [including the ICC administrative expenses and the arbitrators' fees end expenses) at USD 625,000.

498. Both Parties have sought an award on costs and fees from the Arbitral Tribunal.

499. The ICC Rules give an arbitral tribunal broad discretion and flexibility to allocate the costs of the arbitration as it deems fit.[558] Article 37(5) of the ICC Rules notes that in making a decision on costs, the arbitral tribunal may take into account such circumstances as it considers relevant. Without limiting its discretion, the arbitral tribunal may take into consideration a variety of elements such as the outcome of the case and the proportionate success of the parties in their claims, the cause of the dispute and the procedural conduct.

500. This discretion may, however, be limited by the party's autonomy if the parties have agreed on particular rules for the allocation of cost. In that circumstance the Tribunal is presumably bound to rule in accordance with the parties' agreement.

501. The Tribunal notes that Section 32.4(vi) of the EPC Contract, which is incorporated into the parties' arbitration clause in Clause 8 of the Tunneling Subcontract, provides that "The arbitral award in favor of the prevailing Party shall include an award for pre-award (pre judgment) interest on the awarded amount and attorneys' fees and costs incurred in connection with such Dispute." Such arbitral award, pre-award (pre-judgment) interest on the awarded amount, attorneys' fees and costs incurred in connection with the Dispute shall all be subject to the limitation on damages contained in Section 31.2"[559] (emphasis added)

502. The Tribunal is of the view that the arbitration clause agreed by the Parties imposes on the Tribunal a duty to allocate costs to the prevailing party in the instant arbitration. Given the Tribunal's rulings set out above in this Award, it is clear that all of the claims submitted by Cobra have been rejected by the Arbitral Tribunal, while the claims asserted by SELI have been admitted (although with

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[557] Relief sought in Reply to Claimant's Amended Statement of Defense to Counterclaim.

[558] Fry/Greenberg/Mazza, The Secretariat's Guide to ICC Arbitration, 2012. para. 3-1488; Yves Derains/Eric A. Schwartz. A Guide to the ICC Rules of Arbitration, 2d ed. 2005, p. 371.

[559] For arbitration clause in full, see para. 8 and footnote 1, supra.

slightly lower figures in regard to certain heads of damages). Thus, SELI is to be regarded as the prevailing party in this dispute.

503. In light of the above, it is unnecessary for the Tribunal to address any particulars of the submission on costs and expenses filed by Cobra, as Cobra itself will bear them. The Tribunal notes, however, for the record, that in its November 29, 2016 costs submission, Cobra claimed that it incurred during the arbitration: (1) USD 367,500 in arbitration costs paid to the ICC, (2) 889,584.45 euros in legal costs, (3) USD 380,545.22 in expert costs, (4) USD 30,038.51 in hearing costs, and (5) 47,122.04 euros in miscellaneous others. On December 13, 2016, Cobra submitted an adjustment to its submission on costs and fees after learning that the court reporter at the hearing inadvertently omitted a refund to Cobra in the amount of USD 2,398.53, thus lowering Cobra's hearing costs to USD 27,639.98. On December 13, 2016, SELI informed the Tribunal that it had no comments concerning Cobra's submission on costs and fees.

504. Since, as the losing party. Cobra must bear the above costs, this section of the Award focuses only on the parties' positions concerning SELI's submission on costs and fees.

505. In its submission on costs and fees to the Tribunal on November 29, 2016, SELI requests that the Tribunal award USD 1,529,721.42 for costs and fees incurred in this arbitration up to that date. This total, which excludes an attorney "success fee" discussed more fully below, is divided between (1) paid legal fees of USD 655,862 and (2) arbitration costs *of USD USD* 873,859.42. SELI supported its submission on costs and fees with (a) a summary spreadsheet that reflected its total fees and costs at that date; (b) the initial engagement letter between SELI and its attorneys, Chaffetz Lindsey LLP; and (c) Amendment No. 2 to SELI's engagement letter with Chaffetz Lindsey LLP that modified the fee arrangement for legal services between the parties starting January 1, 2015.

506. Concerning SELI's paid legal fees of USD 655,862, it asserts that this amount includes USD 155,862 for hourly legal fees paid through December 1, 2014, in accordance with the initial engagement letter with Chaffetz Lindsey, and a USD 500,000 flat fee paid pursuant to Amendment No.2 of the engagement letter. Importantly, SELI's paid legal fees of USD USD 655,862 excludes an attorney Success fee, which is set forth in Amendment No.2 to SELI's engagement letter, based on the amounts finally awarded to SELI.

507. According to Amendment No. 2, the success fee has two components: "(a) USD 400,000 ('Lump Sum') to be paid only if SELI actually obtains and collects at least USD 2,000,000 from Cobra, whether by award or settlement and including any amounts awarded as attorneys' fees or arbitrations costs; and (b) 15% of the amount actually collected less out-of-pocket expenses reimbursed or to be reimbursed to the Firm by SELI and the Lump Sum (if payable and actually paid)." [560] Put another way by SELI in its November 29 submission,"(1) if at least USD 2 million is awarded and collected, Success Fee = USD 400,000 + 15% x (Award - Arbitration Costs - USD 400,000); (2) if *less* than USD 2 million is awarded and collected, Success Fee = 15% x (Award - Arbitration Costs)." [561]

508. Concerning SELI's paid arbitration costs at USD 873,859.42, it asserts that this amount includes (1) USD 367,500 in arbitration costs paid to the ICC, (2) USD 212,996.13 in legal expenses separate from attorneys' fees, (3) USD 248,824.43 in expert costs, (4) USD 26,656.23 in arbitral hearing costs, and (5)

[560] SELI emai to the Tribunal dated Nov. 29,2016 ("Amendment No.2 to Engagement letter") (emphasis original).
[561] Ibid.

USD 17,882.63 in other costs. [562]

509. On December 13, 2016, Cobra submitted comments to the Tribunal, objecting to several of the costs and fees claimed by SELI. In particular, Cobra asserted that SELI's legal expenses of USD 212,996.13 were approximately 300% higher than those charged by its attorneys. [563] After requesting and receiving from SELI additional details regarding these expenses. Cobra claimed that SELI's expenses for USD 20,736.36 for "Electronic Database" and USD 24,371.07 for 'Power Point Presentation (outside vendor)" should be rejected by the Tribunal because these costs only "relate to convenience service", were "excessively priced," and "COBRA did not incurred [sic] any such expenses." [564] Cobra also requested that SELI provide proof that its costs for "Printing" for USD 74,814,24 were actually incurred and paid by SELI. [565]

510. Cobra also objected to SELI's request for reimbursement of the success fee. Cobra contends that an award of the success fee "would lead to unreasonable and excessive legal fees" and might entitle SELI to "USD 3.1 million in addition to the USD 655,862.00 in legal fees actually paid by SELI" if the Tribunal granted SELI's counterclaim totaling USD 18.9 million. [566] Cobra further asserts that the success fee arrangement between SELI and its attorneys was never disclosed by SELI, and that such an award would be "entirely unreasonable and disproportionate to (i) the limited complexity of the case, (ii) the legal fees actually paid by SELI and (iii) the legal fees for which Cobra seeks reimbursement (€830,000 v. USD 3.75 million). [567] Cobra claims that this is just another example of SELI "trying to gain an unfair advantage from COBRA." [568]

511. In a responsive email to the Tribunal on December 13, 2016. SELI rejected Cobra's complaints concerning its submission on costs and fees on several grounds. First, SELI contends that Cobra failed to show that its costs "were in any wry unreasonable" given the different locations and circumstances of the parties and their attorneys and the feet that "there will never be an exact parity across the elements of the parties' fees and costs." [569] As an example, SELI notes that Cobra's expert costs (i.e., USD 380,545.22) well exceeded SELI's expert costs (i.e., USD 248,824.43). [570] For SELI, this difference in costs is clearly not evidence per *se* that these costs or any other costs are unreasonable.

512. Second, SELI flatly rejects Cobra's assertion that it had an obligation to disclose the success fee arrangement to Cobra. [571] It contends that disclosure of a party's fee arrangement is not a "condition precedent to recovery" and that SELI "was neither required nor asked to disclose such an arrangement." [572] SELI further contends that Cobra's wrongful termination of the parties Tunneling Subcontract left it no choice but to negotiate the success fee arrangement with its attorneys so that it could continue with the arbitration past December 31,2014. [573]

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[562] Ibid. (SELI Table of Fees and Costs).
[563] Cobra email to the Tribunal dated Dec. 13, 2016.
[564] Ibid.
[565] Ibid.
[566] Ibid.
[567] Ibid
[568] Ibid.
[569] SELI email to the Tribunal dated Dec. 13, 2016.
[570] Ibid.
[571] Ibid.
[572] Ibid.

513. Lastly, SELI rejects Cobra's assertion that it "has ever tried to gain an unfair advantage from Cobra in this arbitration." [574] To the contrary, it contends that SELI has paid more than USD 1.5 million in costs *and fees* because it believes its defenses and counterclaim have merit. [575]

514. On December 15, 2015, SELI submitted to the Tribunal invoices that it incurred in this arbitration for printing costs for USD 24,814.24. [576]

515. The Tribunal is of the view that Section 32.4(vi) of the EPC Contract is not a *"carte blanche"* for the prevailing party to seek recovery of any and all costs and fees incurred in the arbitration. As this arbitration is conducted within the framework of the ICC Rules, the legal and other costs have to be "reasonable" pursuant to Article 37(1) of the ICC Rules. The fact that Section 32.4(vi) is silent on this does not mean that the test of reasonableness should be discarded in this case.

516. The ICC Rules provide no guidance on what that might mean, implicitly granting the Arbitral Tribunal discretion to determine what types of costs are reasonable or not, and in what amount. However, in this case the Tribunal is persuaded that the Parties did not request costs beyond those that are universally recognized as reasonable and appropriate (legal fees and expenses, expert fees, witness costs and filing and hearing-related costs), save for the success fee which the Tribunal will address separately.

517. Specifically' SELI seeks recovery of a total amount of USD 1,529,721.42 for costs and fees incurred in this arbitration up to that date, which result from: (a) legal fees already paid in the amount of USD 655,862 (including (1) USD 155,862 for hourly legal fees, and a (2) USD 500,000 fiat fee), and (b) arbitration costs of USD 873,859.42 (which includes (1) USD 367,500 in arbitration costs paid to the ICC, (2) USD 212,996.13 in legal expenses separate from attorneys' fees, (3) USD 248,824 43 in expert costs, (4) USD 26,656.23 in arbitral hearing costs, and (5) USD 17,882.63 in other costs).

518. Taking into account the amount in dispute, the complexity of the issues discussed and resolved in this arbitration, the number of claims and counterclaims presented by the Parties which required extensive submissions of fact and law and voluminous evidence, the extensive reliance on both sides on experts for evidence not only on quantum but also aspects of liability, and the quality, professionalism and expertise of counsel, the Tribunal concludes that the total amount of costs claimed by SELI as already paid, i.e., US 1,529,721.42 is reasonable and should be awarded in full to SELI.

519. As for the success fee, the Tribunal draws a distinction between the "Lump Sum" component (viz., USD 400,000), predicated on SELI recovering at least USD 2,000,000 from Cobra, and the percentage component (15% of the amount actually collected less out-of-pocket expenses reimbursed or to be reimbursed by SELI). The Tribunal finds the former, both in itself and combined with the above sum of USD 1,529,721.42, to be reasonable. However, the Tribunal believes that, in light of the amounts awarded to SELI in this arbitration, allowance of the percentage component of the success fee would produce a disproportionate amount for legal fees to be recovered from Cobra. Accordingly, while the Tribunal allows the USD 400,000 component of the success fee agreed upon between SELI and

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[573] Ibid.
[574] Ibid.
[575] Ibid.
[576] SELI email to the Tribunal dated Dec 15, 2016.

counsel, it denies SELI recovery of the percentage component of that success fee.

520. In conclusion, the Tribunal orders Cobra to pay SELI an award on costs and fees in the amount of USD 1,529,721.42, plus USD 400,000 representing the allowable success fee, minus USD 55,000.00 (a sum ordered that the ICC Court on June 1, 2017 ordered to be reimbursed to Respondents). The net amount of costs and fees that Cobra must pay to SELI is therefore USD 1,874,721.42.

XV. DISPOSITIVE SECTION

521. On the claim in this case, the Tribunal accordingly:
• denies Cobra's request for a declaration that SELI breached the Tunneling Subcontract and bears liability to Cobra on that basis.

• denies Cobra's request for damages on account of SELI's breach of the Tunneling Subcontract

• denies Cobra's request for a declaration that SELI is obligated to indemnify Cobra against any and all claims brought by third parties, if any. In relation to SELI's conduct related to or arising out of the Subcontract or any modifications thereto

• declares Cobra to have ownership and possession of the TBM and TBM equipment and accordingly grants Cobra's request for an order to SELI to release all containers retained by Guatemalan customs authorities containing parts of the TBM equipment

• denies Cobra's request for a declaration that it justifiably terminated the Tunneling Subcontract either for cause or for convenience

• denies Cobra's request for an award of pre-judgment and post-judgment interest

• denies Cobra's request for recovery from SELI of any portion of SELI's costs, fees (including attorneys' fees) and expenses incurred in connection with these proceedings

• denies all other requests and claims of Cobra against SELI

522. On the counterclaim in this case, the Tribunal accordingly:
• grants SELI's request that Cobra's claims against SELI in these proceedings be dismissed

• grants SELI's request for a declaration that it is not liable for breach of contract

• grants SELI's request for a declaration that Cobra unjustifiably terminated the Tunneling Subcontract

• awards SELI damages against Cobra in the amount of USD 23,106,845.64. This amount is divided between SELI OBRAS and SELI Italy in the following manner:

• SELI OBRAS:

Allowed performance costs incurred by SELI OBRAS in Guatemala	USD 14,084,849
less First Milestone Payment paid by Cobra	(USD 2,032,344.27)
Total:	USD 12,052,504.73

• SELI Italy

Performance costs incurred by SELI Italy in Italy	USD 780,566.91
Gross margin on work performed but not paid by Cobra on Renace II	USD 3,121,737
Lost profits on Renace II project	USD 1,227,922.24
Return of Guarantee funds	USD 3,245,912.62

Contract damages for failure to award Renace III work	USD 5,038,160
Less Advance payment made by Cobra	(USD 2359,957.86)
Total:	USD 11,054,340.91

• awards SELI Italy and SELI OBRAS against Cobra pre-judgment interest starting from June 11, 2013 and post-judgment interest starting from the date of the issuance of this Award to the date of payment on the above-mentioned damages at a rate of 9%, calculated on a simple basis

• grants SELI Italy an order requiring Cobra to refund the performance bond proceeds with pre-judgment interest starting from February 2,2014, at a rate of 9%, calculated on a simple basis.

• denies SELI's request for a declaration that SELI enjoys ownership or possession of the TBM and TBM equipment

• orders Cobra to pay to SELI the costs and fees (including the ICC administrative expenses, the arbitrators' fees and expenses, attorneys' fees, and other expenses) incurred by SELI in connection with these proceedings in the amount of USD 1,874,721.42

• denies all other requests and claims of SELI against Cobra