INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

CAMPOS DE PESÉ, S.A.

Claimant

and

THE REPUBLIC OF PANAMA

Respondent

ICSID Case No. ARB/20/19

AWARD

Members of the Tribunal
Mr. Eduardo Zuleta, President
Mr. Horacio Grigera-Naón, Arbitrator
Prof. Brigitte Stern, Arbitrator

Secretary of the Tribunal
Mr. Gonzalo Flores

Assistant to the President of the Tribunal
Ms. María Marulanda

Date of dispatch to the Parties: March 1, 2024

REPRESENTATION OF THE PARTIES

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Mr. Daniel Pulecio-Boek
Mr. Tomás Solís
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DEFINED TERMS

§(§)	Section(s)
¶(¶)	Paragraph(s)
1912 Citizenship Law	The 1912 Italian Law on Nationality
26 Individuals	The individuals identified by Claimant in Appendix 1 of its Counter-Memorial on Objections to Jurisdiction (22 April 2023)
ADI Holding	Alcoholes del Istmo Holding Company Inc.
Amended [redacted] Instrument	Amendment to [redacted] Instrument of 28 June 2018 to exclude the requirement of Carlos Pellas' consent [redacted]
Award	The award rendered on the dispute between Campos de Pesé S.A and the Republic of Panama dated March 1, 2024
BIT	Agreement between the Government of the Italian Republic and the Government of the Republic of Panama on the Promotion and Protection of Investments signed on 6 February 2009
BOSS Act	Beneficial Ownership Secure Search System Act
BVI	British Virgin Islands
BVI Companies Act	BVI Business Companies Act of 2004
C-[#]	Claimant's Exhibit
CL-[#]	Claimant's Legal Authority
Campos de Pesé	Campos de Pesé, S.A.
[redacted] Instrument	[redacted] established under the laws of Delaware with Ernesto Palazio as [redacted] and the [redacted]
Cayman or CYM	Cayman Islands

Circolare	The Administrative Instruction (Circolare) of the Italian Minister of Foreign Affairs K.28.1 of 8 April 1991
Claimant	Campos de Pesé, S.A.
Claimant's Memorial	Claimant's Memorial on Jurisdiction and the Merits dated 5 May 2021
Claimant's Counter-Memorial	Claimant's Counter-Memorial on Jurisdiction dated 22 February 2022
Claimant's First Application	Claimant's application of 1 June 2023 to close the Hearing to the public
Claimant's Second Application	Claimant's application of 12 June 2023 requesting authorization for Carlos Pellas and Ernesto Palazio to testify virtually and close the Hearing to the public.
Claimant's Rejoinder	Claimant's Rejoinder on Jurisdiction dated 28 April 2023
Grupo Alcoholes	Grupo Alcoholes, S.A.
Hearing	Hearing on Jurisdiction held in Washington, D.C. on 20 and 21 June 2023
Transcript Hearing [Date], [page:line(s)]	Transcript of the Hearing
ICSID Convention or Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965
ICSID or Centre	International Centre for Settlement of Investment Disputes
Law No. 42	Law of Panama No. 42 of 20 April 2011, "Establishing Guidelines for the National Biofuel Policy and Electrical Energy from Biomass in the National Territory"
Law No. 47	Law of Panama No. 47 of 24 June 2015, Establishing Guidelines for the National Policy on Biofuels and Electricity from Biomass in the National Territory.
M&A	Memorandum and Articles of Association

NSEL	Nicaragua Sugar Estates Limited
Panama	The Republic of Panama
Panama Sugar Estates or PSE	Panama Sugar Estates Corporation, previously Alcoholes del Istmo Holding Company, Inc.
Parties	Collectively, Claimant and Respondent
Passport Law	Italian Law No. 1185 of 1967 on Passports
Pre-hearing organizational meeting	PHOM
R-[#]	Respondent's Exhibit
RL-[#]	Respondent's Legal Authority
Request for Bifurcation	Respondent's request to address the objections to jurisdiction as a preliminary question
Respondent's Reply	Respondent's Reply on Jurisdiction dated 27 January 2023
Respondent	The Republic of Panama
Respondent's Memorial on Jurisdiction	Respondent's Memorial on Objections to Jurisdiction dated 24 November 2021
SER	SER Holding Company Ltd.
SER Board	Board of Directors of SER
[redacted] Instrument	Settlement of 19 April 2013 between [redacted] and Carlos Pellas
[redacted]	Special [redacted] established under Cayman Island laws by [redacted] as original [redacted] and Carlos Pellas as [redacted].
[redacted]	[redacted]
Tribunal	Arbitral tribunal constituted on 16 October 2020, composed of Mr. Eduardo Zuleta, Mr. Horacio Grigera-Naón, and Prof. Brigitte Stern

[redacted] Instrument	[redacted] established under the laws of Delaware with Ernesto Palazio as [redacted] and the [redacted]

CASES

AIG Capital Partners	*AIG Capital Partners, Inc. v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003 [CL-0023]
Bridgestone	*Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, 13 December 2017 [CL-0121]
Cable TV	*Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. Federation of St. Kitts and Nevis,* ICSID Case No. ARB/95/2, Award, 13 January 1997, [CL-0132]
Caratube	*Caratube International Oil Co., LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, 5 June 2012 [RL-0007]
CCL	*CCL v. Republic of Kazakhstan*, SCC Case No. 122/2001, Jurisdictional Award, 1 January 2003 [RL-0021]
Guardian Fiduciary Trust	*Guardian Fiduciary Trust, Ltd, f/k/a Capital Conservator Savings & Loan, Ltd v. Macedonia, former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/12/31, Award, 22 September 2015 [RL-0017]
National Gas	*National Gas S.A.E v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award, 3 April 2014 [RL-0009]
Plama	*Plama Consortium Limited v. Republic of Bulgaria,* Decision on Jurisdiction, 8 February 2005 [CL-0145]
Saba Fakes	*Saba Fakes v. Republic of Turkey,* ICSID Case No. ARB/07/20, Award, 14 July 2010 [RL-0026]

Soufraki	*Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment, 5 June 2007 [RL-0024]
Standard Chartered Bank	*Standard Chartered Bank v. United Republic of Tanzania* I, ICSID Case No. ARB/10/12, Award, 2 November 2012 [CL-0029]
Vacuum Salt v. Ghana	*Vacuum Salt Products Ltd. v. Republic of Ghana*, ICSID Case No. ARB/92/1, Award, 16 February 1994 [RL-0008]

I. INTRODUCTION

A. OVERVIEW OF THE ARBITRATION

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Agreement between the Government of the Italian Republic and the Government of the Republic of Panama on the Promotion and Protection of Investments (the "**BIT**"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "**ICSID Convention**").

2. This dispute relates to the Republic of Panama's alleged breach of the BIT by purportedly (1) expropriating Campos de Pesé's investment (in violation of Article V), (2) failing to accord Campos de Pesé fair and equitable treatment (in violation of Article II(3)), (3) interfering with the use and enjoyment of its investment (in violation of Article II(3)), (4) discriminating against Campos de Pesé (in violation of Article III(1)), and (5) failing to accord Campos de Pesé full legal protection of its investment (in violation of Article III(1)).

B. PARTIES

3. The Claimant is Campos de Pesé, S.A. ("**Claimant**" or "**Campos de Pesé**"), a company incorporated in and governed by the laws of the Republic of Panama.

4. The Respondent is the Republic of Panama ("**Respondent**" or "**Panama**").

5. Claimant and Respondent are collectively referred to as the "**Parties**." The Parties' representatives and their addresses are listed above on page ii.

II. PROCEDURAL HISTORY

6. On 4 May 2020, ICSID received a request for arbitration from Campos de Pesé against Panama (the "**Request**"). The Request invoked Panama's advance consent to ICSID arbitration given in the BIT.

7. On 15 June 2020, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General, in accordance with ICSID Institution Rule 7, invited the Parties to proceed to constitute an arbitral tribunal as soon as possible.

8. On 3 August 2020, the Parties agreed, in accordance with Article 37(2)(a) of the ICSID Convention, that the Tribunal in this case would comprise three arbitrators, one appointed by each Party and the third arbitrator, presiding, to be appointed by the two Party-appointed arbitrators.

9. On 17 September 2020, in accordance with the Parties' agreement and pursuant to ICSID Arbitration Rule 5(2), the Centre proceeded to seek the acceptance of the Parties' appointees: Mr. Horacio Grigera-Naón, a national of Argentina, appointed by Claimant and Prof. Brigitte Stern, a French national, appointed by Respondent. Prof. Stern and Mr. Grigera-Naón accepted their appointments on 26 and 27 September 2020, respectively.

10. On 10 October 2022, Prof. Stern and Mr. Grigera-Naón informed the Centre that they had agreed on the appointment of Mr. Eduardo Zuleta Jaramillo, a national of Colombia, as the third, presiding arbitrator. On the same date, the Centre informed the Parties of Mr. Zuleta's appointment.

11. On 14 October 2020, the Secretary-General, in accordance with Rule 6(1) of the ICSID Arbitration Rules, notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Mr. Gonzalo Flores, ICSID Deputy Secretary-General, was designated to serve as Secretary of the Tribunal.

12. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 15 December 2020, by video conference.

13. On 16 December 2020, the Tribunal issued Procedural Order No. 1 concerning procedural matters. Procedural Order No. 1 provided, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English, and that the place of proceeding would be Washington, D.C. Annex C of Procedural Order No. 1 set out an agreed schedule for the proceeding.

14. In accordance with the agreed schedule, on 5 May 2021, Claimant filed a Memorial on Jurisdiction and Merits (the "**Memorial**"). The pleading was accompanied by two expert reports and six witness statements.

15. On 14 June 2021, Respondent filed a request to address the objections to jurisdiction as a preliminary question ("**Request for Bifurcation**").

16. On 23 July 2021, Claimant filed a response to Respondent's Request for Bifurcation.

17. On 26 August 2021, the Tribunal issued Procedural Order No. 2, deciding to hear Respondent's jurisdictional objection *ratione personae* in a preliminary phase, and,

accordingly, to follow the procedural calendar set forth in Annex C, Scenario 2, Option II(2) of Procedural Order No. 1.

18. On 24 November 2021, Respondent filed its Memorial on Jurisdiction.

19. On 22 February 2022, Claimant filed its Counter-Memorial on Jurisdiction, accompanied by three expert opinions.

20. Following document production requests from both Parties, on 12 April 2022, the Tribunal issued Procedural Order No. 3, ordering the Parties to produce certain documents.

21. On 12 July 2022, the Parties informed the Tribunal of their agreement to suspend the procedural calendar to allow Claimant to determine the additional time needed to complete an agreed-upon supplemental document production.

22. On 2 November 2022, the Parties provided the Tribunal with their agreed schedule for the second round of submissions.

23. On 27 January 2023, Respondent filed its Reply on Jurisdiction. The pleading was accompanied by one expert report and four legal opinions.

24. On 28 April 2023, Claimant filed its Rejoinder on Jurisdiction. The pleading was accompanied by four expert opinions and three witness statements.

25. On May 9, 2023, Respondent requested that the Tribunal refrain from considering eleven exhibits filed by Claimant with its Rejoinder on Jurisdiction ("**Respondent's Application**").

26. On 11 May 2023, Respondent notified Claimant that it wished to cross-examine the following witnesses and experts at the Hearing: (i) Mr. Carlos Pellas; (ii) Mr. Ernesto Palazio; (iii) Mr. Henry Mander; (iv) Mr. Mark Olson; and (v) Mr. Jaime Mora. By correspondence of the same day, Claimant designated the following expert witnesses for cross-examination at the Hearing: (i) Mr. Luis Chalhoub; (ii) Mr. Todd Flubacher; (iii) Mr. Mark J. Forte; (iv) Mr. Robert Lindley; and (v) Ms. Isabel Kunsman.

27. On 15 May 2023, Claimant replied to Respondent's Application.

28. Following the Tribunal's invitation, on 19 May 2023, Respondent filed its reply to Claimant's letter of 15 May 2023, and, on 22 May 2023, Claimant filed its rejoinder regarding Respondent's Application.

29. On 19 May 2023, the Parties also provided a statement outlining their joint proposals for the Hearing and their respective positions on issues where no agreement was reached.

30. On 26 May 2023, a pre-hearing organizational meeting ("**PHOM**") was held between the Parties and the President of the Tribunal *via* video conference. During the PHOM, the Parties discussed outstanding procedural, administrative, and logistical matters in preparation for the Hearing, including Respondent's Application.

31. On 28 May 2023, the Secretary of the Tribunal sent an email to the Parties documenting the agreements reached at the PHOM and the subsequent directions from the Tribunal. In particular, the Secretary manifested that no ruling of the Tribunal was necessary concerning the format of attendance of Mr. Ernesto Palazio as Claimant had confirmed he would be attending in person.

32. On 1 June 2023, Claimant filed an application to close the Hearing to the public ("**Claimant's First Application**") indicating, *inter alia*, that the proposal made during the PHOM was no longer acceptable and that Messrs. Pellas and Palazio would appear at the Hearing in Washington, D.C., only if the Hearing was closed to the public and not recorded. Respondent submitted its opposition to Claimant's First Application on 5 June 2023.

33. On 2 June 2023, Respondent communicated its understanding of the Parties' agreement concerning Respondent's Application. On the same date, Claimant confirmed its agreement with Respondent's communication, subject to certain clarifications.

34. On 7 June 2023, the Tribunal informed the Parties of its decision to deny Claimant's First Application considering that it found no evidence that the situation between the PHOM and the date of the Application had changed and, therefore, there was no reason to depart from the manner of proceeding agreed on 26 May 2023.

35. On 12 June 2023, Claimant filed an application requesting leave for Mr. Pellas to testify virtually and that the Hearing be entirely closed to the public during his testimony. Claimant also indicated that Mr. Palazio would only testify at the Hearing under the same conditions as Mr. Pellas (the "**Claimant's Second Application**"). Respondent objected to Claimant's Second Application on 13 June 2023.

36. On 14 June 2023, the Tribunal informed the Parties of its decision to reject Claimant's Second Application, as it was untimely and unjustified. Considering, however, that the testimony could involve confidential matters, the Tribunal ordered that Messrs. Pellas and Palazio testify in person at the Hearing in Washington, D.C., in a closed session without any video recording, and that the attendance be limited to the Tribunal and its Secretary, the Assistant to the President of the Tribunal, the Parties' Counsel and Representatives, court reporters, designated interpreters (if required), and ICSID's technical team.

37. On 15 June 2023, Claimant informed the Tribunal that Messrs. Pellas and Palazio would not be attending the Hearing.

38. On 16 June 2023, the Tribunal invited Respondent to provide comments on Claimant's notice by the next day. Additionally, both Parties were invited to provide their comments on the application of Section 18(6) of Procedural Order No. 1 to the witness statements of Messrs. Pellas and Palazio, during their opening statements at the Hearing.

39. On 17 June 2023, Respondent submitted comments on Messrs. Pellas' and Palazio's failure to appear at the Hearing and reserved its rights to address the consequences that this should entail during its opening statement at the Hearing.

40. On 18 June 2023, the Tribunal issued Procedural Order No. 4, concerning the organization of the Hearing.

41. The Hearing on jurisdiction was held at the seat of the Centre in Washington, D.C., from June 20 to 21 June 2023. The following persons were present at the Hearing:

Tribunal:

Mr. Eduardo Zuleta Jaramillo	President
Mr. Horacio Grigera-Naón	Arbitrator
Prof. Brigitte Stern	Arbitrator

ICSID Secretariat:

Mr. Gonzalo Flores	Secretary of the Tribunal

For Claimant:

James Boykin	Hughes Hubbard & Reed LLP
Nicolas Swerdloff	Hughes Hubbard & Reed LLP
Eleanor Erney	Hughes Hubbard & Reed LLP
Shayda Vance	Hughes Hubbard & Reed LLP
Alexander Afnan	Hughes Hubbard & Reed LLP
Svitlana Stegniy	Hughes Hubbard & Reed LLP
James Nance	Hughes Hubbard & Reed LLP
[redacted]	[redacted]
Alex Miller	Core Legal Concepts
Ryan Knecht	Core Legal Concepts
Henry Mander	Harney Westwood & Riegels
Mark D. Olson	Morris James LLP
Jaime Mora S.	Alias, Aleman & Mora

Christopher Newton	Maples Group
For Respondent:	
Margie-Lys Jaime	Ministerio de Economía y Finanzas de la República de Panamá
Daniel Pulecio-Boek	Greenberg Traurig LLP
Tomás Solis	Greenberg Traurig LLP
Catalina Brito	Greenberg Traurig LLP
Ryan Fulghum	Greenberg Traurig LLP
Witnesses and Experts:	
Mark Forte	Conyers Dill & Pearman
Robert Lindley	Conyers Dill & Pearman
Luis Chalhoub	Icaza, González-Ruiz & Alemán
Todd Flubacher	Morris, Nichols, Arsht & Tunnell LLP
Isabel Kunsman	AlixPartners

42. On 27 June 2023, the Tribunal issued Procedural Order No. 5, concerning the exclusion of the written testimonies of Messrs. Pellas and Palazio.

43. On 8 September 2023, each Party filed a submission on costs.

III. REQUESTS FOR RELIEF

A. RESPONDENT

44. In its Memorial and Reply, Respondent requests the following relief:

> "For the reasons set forth above, Respondent respectfully submits that the Tribunal lacks jurisdiction *ratione personae*."[1]

B. CLAIMANT

45. In its Counter-Memorial and Rejoinder, Claimant requests the following relief:

[1] Respondent's Memorial on Jurisdiction ("Respondent's Memorial"), ¶ 59; Respondent's Reply on Jurisdiction ("Respondent's Reply"), ¶ 125.

"For the foregoing reasons, Claimant respectfully requests that the Tribunal dismiss Respondent's objection and find that it has jurisdiction *ratione personae* over Claimant's claims."[2]

IV. FACTUAL BACKGROUND

46. Paragraphs 47 to 71 below present the relevant facts alleged by Claimant solely for the purpose of establishing the context of the dispute. This summary does not imply any assessment of the truth or relevance of these facts regarding the case's merits. In analyzing Respondent's jurisdictional objection *ratione personae*, the Tribunal will consider the facts relevant for its jurisdiction.

47. In 2009, the shareholders of SER Holding Company Ltd ("**SER**"), a British Virgin Islands ("**BVI**") headquartered company, sought to expand their investment opportunities in the Republic of Panama, particularly in the alcohol and liquor business.[3] For this purpose, SER acquired 50% of the issued shares of four Panamanian companies: (1) Campos de Pesé, focused then on agricultural operations; (2) Alcoholes del Istmo S.A., which sold alcohol locally; (3) Alcoholes del Istmo Internacional, S.A., which sold alcohol internationally; and (4) Consorcio Licorero Nacional, S.A., which sold liquors.[4] As the holding company of the mentioned subsidiaries, SER created Alcoholes del Istmo Holding Company Inc. ("**ADI Holding**"). ADI Holding subsequently changed its name to Panama Sugar Estates ("**PSE**").[5]

48. In 2009, Campos de Pesé planted sugar cane and sold it to sugar mills that refined it. Then, the company bought the refined sugar back as the raw material required for the production and sale of alcohol.[6]

49. In 2011, Panama enacted a series of laws and executive decrees related to the local production of bioethanol using local materials and labor in order to promote a local bioethanol industry.[7] On 20 April 2011, Panama issued Law No. 42 "Establishing Guidelines for the National Biofuel Policy and Electrical Energy from Biomass in the National Territory" ("**Law No. 42**").[8] Its purpose was to establish general guidelines of the national policy for the promotion, advancement and development of the production

[2] Claimant's Counter-Memorial on Jurisdiction ("Claimant's Counter-Memorial"), ¶ 129; Claimant's Rejoinder on Jurisdiction ("Claimant's Rejoinder"), ¶ 249.

[3] Barrios Witness Statement, ¶¶ 12–13.

[4] González Witness Statement, ¶ 20.

[5] Claimant's Counter-Memorial, ¶ 113.

[6] González Witness Statement, ¶ 12.

[7] Claimant's Memorial on Jurisdiction and Merits, ¶ 3

[8] **CL-2-SPA**, Law No. 42 Establishing Guidelines for the National Biofuel Policy and Electrical Energy from Biomass in the National Territory.

and use of biofuels.[9] Law No. 42 declared the promotion of a domestic biofuel industry "to be of national interest", offering incentives to foreign investors in the field.[10]

50. On 30 June 2011, SER's Board of Directors (the "**SER Board**") decided to change Campos de Pesé's business model considering that Law No. 42 created what they perceived as a stable market for the production and marketing of bioethanol.[11] SER then proceeded to invest through PSE and its subsidiaries in a project for the production of bioethanol. The SER Board decided to capitalize PSE and to initiate the bioethanol project.[12] SER also decided to appoint three Board members to carry out all necessary activities to assess the viability of the bioethanol project: Carlos Pellas, Ricardo Barrios, and [redacted].[13]

51. On 21 September 2011, Campos de Pesé implemented the first stage of the Environmental Impact Study required by the National Environment Authority. This stage focused on the use of the existing facilities at Campos de Pesé and its affiliates.[14]

52. On 22 October 2012, Campos de Pesé obtained a ten-year renewable permit for the biofuel plant issued by the National Energy Secretariat to install and operate the facilities.[15]

53. As of January 2013, all of the systems of the biofuel plant were fully constructed.[16]

54. On 14 May 2013, the Panamanian Government published Executive Order No. 345, requiring oil companies to mix gasoline with anhydrous bioethanol as an oxygenating additive. It also mandated anhydrous bioethanol to be blended with gasoline, with a minimum percentage of 5% and a maximum of 10%. While Law No. 42 called for the sale of blended gasoline by April 2013, the Government had to amend it[17] to provide the 5% blending by September 2013. The percentage would increase respectively to 7% in 2015 and 10% in 2016.

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[9] **CL-2-SPA**, Law No. 42 Establishing Guidelines for the National Biofuel Policy and Electrical Energy from Biomass in the National Territory, Article 1.

[10] **CL-2-SPA**, Law No. 42 Establishing Guidelines for the National Biofuel Policy and Electrical Energy from Biomass in the National Territory, Articles 12-13.

[11] **C-0003**, Minutes of a meeting of the Board of Directors, 30 June 2011.

[12] **C-0003**, Minutes of a meeting of the Board of Directors, 30 June 2011.

[13] **C-0003**, Minutes of a meeting of the Board of Directors, 30 June 2011.

[14] **C-0018**, Administrative Process Against Campos de Pesé, S.A., for the Alleged Environmental Administrative Infringement, 21 July 2014, p. 20

[15] **C-0004-SPA**, Biofuels Plant Permit, 22 October 2012.

[16] González Statement, ¶ 48.

[17] **CL-0093**, Law of Panama No. 21 Modifying Law No. 42, Regarding the Use of Anhydrous Bioethanol and Other Provisions, 26 March 2013.

55. On 22 June 2013, the bioethanol plant was ready for operations and produced bioethanol for the first time the next day.[18] Campos de Pesé started producing bioethanol at an actual cost of USD $1.17 per liter. By then, it had invested a total of USD $75,836,762 in the construction of the plant.[19]

56. On 20 August 2013, the Panamanian Government enacted Cabinet Decree No. 20, establishing the required set price for bioethanol. The incorporated formula resulted in a price of USD $1.22 per liter, giving Campos de Pesé a profit margin of USD $0.05 per liter in its bioethanol sales. The formula would apply until 21 August 2013.[20]

57. In September and October of 2012, as well as October 2013, Campos de Pesé's executives reported the progress on the Bioethanol Project to the SER Board of Directors, including reports on the meetings with the National Energy Secretariat,[21] the progress of the construction of the bioethanol plant,[22] and bioethanol production.[23]

58. On 26 May 2014, Campos de Pesé implemented the second stage of the Environmental Impact Study of the National Environment Authority, focusing on the construction of additional facilities, including the construction of an additional treatment lake.[24]

59. On 19 June 2014, vinasse, a by-product generated in the distillation of bioethanol, spilled into the nearby La Villa River, the source of drinking water for the residents of Chitré, downstream from Campos de Pesé. The vinasse derived from the company's activities in the area.[25] The company conducted the investigation and determined that the leak could not have lasted more than an hour, leaking 44.58 cubic meters of vinasse into the water.[26]

60. From 20 to 24 June 2014, the National Environment Authority conducted an investigation on the vinasse spill.[27]

61. On 24 June 2014, the National Environment Authority filed a formal complaint against Campos de Pesé for the spill, stating that it harmed the "aquatic biota, resulting in the death of many aquatic species from asphyxiation" and endangered "the health of the

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[18] **C-0020**, Presentation by Rafael González to the Board of Directors of Panama Sugar Estates, July 2013, p. 116.

[19] **C-0021**, RCA Auditors, Report on Investments of Ethanol Plant Project, Phase 1 as of 31 December 2013, p. 4.

[20] **CL-0004-SPA**, Cabinet of Panama Decree No. 20, 20 August 2013.

[21] **C-0013**, Presentation by Rafael González to the Board of Directors of Panama Sugar Estates, 9 October 2012, pp. 5–6.

[22] **C-0015**, Presentation to the President of the Republic "Biofuel Project", 10 September 2012.

[23] **C-0017**, Presentation by Rafael González to the Board of Directors of Panama Sugar Estates, dated 8 October 2013.

[24] **C-0018**, Administrative Process Against Campos de Pesé, S.A., for the Alleged Environmental Administrative Infringement, 21 July 2014, p. 20.

[25] Claimant's Memorial on Jurisdiction and Merits, ¶ 119, referring to Witness Statement of Mr. Rafael González dated 4 May 2021, ¶ 68; ¶¶ 71–75.

[26] Claimant's Memorial on Jurisdiction and Merits, ¶ 119.

[27] Claimant's Memorial on Jurisdiction and Merits, ¶ 120.

population of Chitré and Los Santos, which were affected by the lack of drinking water supply."[28]

62. On 28 June 2014, public prosecutors entered Campos de Pesé's warehouses to collect samples for water analysis. On 30 June 2014, the prosecutors obtained a court order requiring Campos de Pesé to suspend all activities for an interim period of 30 days.[29]

63. On 1 July 2014, the recently elected Panamanian President, Juan Carlos Varela, took office. That same day, Campos de Pesé was formally charged by the public prosecutor's office of Panama with (1) environmental pollution and (2) crimes against collective security, in the modality of crimes against public health, alleging that the water samples collected showed traces of atrazine, a commonly used herbicide. Two Campos de Pesé's workers were also charged, the Agricultural Manager and the Head of Irrigation.[30]

64. On 16 July 2014, the court clarified that the suspension of activities was limited to the operations of Campos de Pesé located in the Pesé District at Las Cabras fields, where the leak occurred.[31]

65. On 3 October 2014, the National Environment Authority imposed environmental sanctions on Campos de Pesé, including a fine of USD $608,930.44 payable within the 15 days following the decision.[32] On 24 October 2014, Campos de Pesé filed a request for reconsideration by the National Environment Authority. The request was denied on 29 March 2017.[33] The latter decision was appealed on 9 June 2017 before the Third Contentious-Administrative Chamber of the Supreme Court of Justice of Panama,[34] and the appeal was also rejected.

66. On 11 August 2016, Campos de Pesé was fined for USD $1,000,000.[35] In addition, the Agricultural Manager was sentenced to 4 years in prison and prevented from practicing as an engineer for 4 years after his prison term.[36] The decision in the criminal proceedings

[28] **C-0049**, ANAM, Technical Report ARH–001–2014, Inspection and Monitoring in the Bed of the La Villa River and its Tributaries, 25 June 2014, p. 10.

[29] **C-0052**, Notification No. 1188–2014 to Campos de Pesé, Suspending Activities at Campos de Pesé, 30 June 2014.

[30] Claimant's Memorial on Jurisdiction and Merits, ¶ 129-130.

[31] **C-0053**, Notification No. 1357–2014, Extending Suspension of Activities at Campos de Pesé, 16 July 2014.

[32] **C-0050**, Sentencing Resolution No AG–0688–2014 of the National Environment Authority of the Republic of Panama, 3 October 2014, p. 11.

[33] **C-0057**, Ministry of Environment of the Republic of Panama, Resolution No. DM.0133–2017 in Connection with the Campos de Pesé, S.A.'s Appeal for Reconsideration of the Resolution No. AG–0688–2014 of 3 October 2014, 29 March 2017.

[34] **C-0058**, Campos de Pesé, S.A. Contentious-Administrative Complaint before the Third Chamber of the Supreme Court of Justice, Appealing the Legality of Resolution No. AG–0688–2014, 9 July 2017.

[35] **C-0055**, Judgment No. 11 of the Tribunal of the Province of Herrera in Case No. 201400004758, 11 August 2016, p. 95.

[36] **C-0055**, Judgment No. 11 of the Tribunal of the Province of Herrera in Case No. 201400004758, 11 August 2016, p. 96.

was appealed and the appeal was denied on 20 February 2017.[37] As a last resort, Campos de Pesé sought constitutional protection which was also dismissed.[38]

67. On 19 August 2014, Panama issued Cabinet Decree No. 29 eliminating (i) the fixed price for bioethanol and replacing it with a fluctuating price tied to the international market, and (ii) the requirement to use gasoline with an anhydrous bioethanol additive to the percentages previously described.[39]

68. On 24 June 2015, the National Assembly of Panama enacted Law No. 47 replacing Law No. 42 in "Establishing Guidelines for the National Policy on Biofuels and Electricity from Biomass in the National Territory" ("**Law No. 47"**). Law No. 47 reauthorized the use of bioethanol and reinstituted the mixing percentages of bioethanol and gasoline set by Law No. 42. Nonetheless, under Law No. 47, the use of bioethanol became optional and not mandatory.[40]

69. Claimant alleges that the BIT violations derive from the change in the biofuel policy established by Law No. 42 through the enactment of Cabinet Decree No. 29 on 19 August 2014 and the imposition of administrative[41] and criminal[42] sanctions amounting to USD $1,608,930.44 to the company due to the vinasse spill in La Villa River, downstream from Campos de Pesé's operations, on 19 June 2014.[43]

70. The Parties do not dispute that during the course of the events described above, Campos de Pesé was 100% owned by PSE. Both Campos de Pesé and PSE are incorporated in Panama and governed by Panamanian laws. SER purchased 50% of PSE in 2009.[44] It then increased its ownership interest to 70% in 2011,[45] to 91.46% as of 24 April 2014, and to 99.96% in August 2014. SER holds 100% of PSE's shares since April 2018 to this date.

[37] **C-0059**, Judgment of Cassation issued by the Supreme Court of the Republic of Panama, 20 February 2017.

[38] **C-0060**, Judgment on Appeal issued by the Superior Court of the Fourth Judicial District, 5 April 2018.

[39] **CL-0005**, Cabinet Decree No. 29, 19 August 2014.

[40] **C-0070**, Law No. 47 Amending Law No. 42 of 2011, Establishing Guidelines for the National Biofuel Policy and Electrical Energy from Biomass in the National Territory, 24 June 2015.

[41] **C-0050**, Sentencing Resolution No AG–0688–2014 of the National Environment Authority of the Republic of Panama, 3 October 2014, p. 10.

[42] **C-0055**, Judgment No. 11 of the Tribunal of the Province of Herrera in Case No. 201400004758, 11 August 2016.

[43] González Statement, ¶ 67.

[44] **C-0071**, Shareholder Agreement between Grupo Alcoholes and SER Corp., 3 August 2009; **C-0072**, Board of Directors Meeting Minutes of Alcoholes del Istmo Holding Corp, 3 August 2009.

[45] **C-0003**, Minutes of a meeting of the Board of Directors, 30 June 2011.

71. Claimant alleges that it made an investment in Panama and that it is directly or indirectly owned and controlled through SER, in different ways, by 26 Individuals who allegedly hold Italian citizenship ("**26 Individuals**").[46]

V. POSITION OF THE PARTIES

A. RESPONDENT

1. Burden and standard of proof

72. Based on *Caratube*[47] and *Soufraki*[48], Respondent argues that Claimant has the burden of showing that the Tribunal has jurisdiction in the case at hand.[49] Specifically, for purposes of the BIT, Claimant has the burden of showing that Italian nationals controlled and managed Campos de Pesé as of August 2014, the date of the alleged breaches.[50] Respondent alleges that Campos de Pesé did not meet the burden of proof to establish the jurisdiction of the Tribunal,[51] as the 26 Individuals are not majority shareholders of SER nor do they hold control over it.[52]

2. Jurisdiction *ratione personae*

73. Respondent submits that Campos de Pesé lacks standing to bring this claim under Article I(2) of the BIT. According to Respondent, Campos de Pesé failed to prove that it was controlled and managed by Italian nationals at all relevant times.[53]

74. Respondent's objection is twofold. First, it claims that Claimant failed to prove that the 26 Individuals who claim to own the majority of SER — a BVI offshore company that indirectly holds a majority stake in Campos de Pesé through the Panamanian company PSE — were Italian nationals at the relevant times.[54]

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[46] Claimant's Counter-Memorial, ¶ 3.

[47] *Caratube International Oil Co., LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, 5 June 2012 [RL-0007], ¶ 367.

[48] *Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment, 5 June 2007 [RL-0024], ¶ 58.

[49] Respondent's Reply, ¶ 15.

[50] Respondent's Reply, ¶ 16.

[51] Respondent's Memorial, ¶ 5; Respondent's Reply, ¶ 17.

[52] Respondent's Reply, ¶ 18.

[53] Respondent's Reply, ¶ 17.

[54] Respondent's Memorial, ¶ 4, ¶ 6.

75. Second, Respondent contends that Claimant did not prove that these 26 Individuals controlled and managed SER, PSE, or Campos de Pesé.[55] Respondent argues that both control *and* management must be met for the Tribunal to find jurisdiction *ratione personae* under the BIT, as the Spanish version uses the term "*controlada*", and the Italian version uses the term "*gestita*", which translates to "manage." Italy has not used interchangeably the terms "control" and "manage" in other investment treaties; in fact, there is no other investment treaty where Italy used the term *gestita*.[56] Additionally, Article 25(2)(b) of the ICSID Convention also uses the term "control."[57]

76. Accordingly, Respondent maintains that "[t]he 26 alleged Italians are not SER shareholders and [Claimant] has failed to provide evidence demonstrating that they indirectly own the majority of SER, let alone of Campos de Pesé. The most significant of the 26 alleged Italian nationals [Mr. Carlos Pellas] purports to hold an interest in SER through complicated offshore structures that practically deprive [him] of ownership or control. And there is no evidence that the 26 alleged Italians ever participated in any way, shape or form in [Campos de Pesé]'s investment or activities in Panamá."[58] Respondent argues that Claimant "rests its case on the sole basis that the alleged Italians supposedly are the final beneficiaries (*beneficiarios finales*) of [Campos de Pesé]."[59]

a. Relevant dates

77. Panama alleges that Campos de Pesé was never owned or controlled by Italian nationals at the relevant times: (a) in June 2011, when Claimant initiated the alleged investment in Panama; (b) in August 2014, when the alleged breaches of the BIT took place, and (c) in May 2020, the date of consent to ICSID arbitration.[60]

78. In its Reply, Panama observes that Claimant accepts the relevant date for assessing jurisdiction: August 2014.[61] It further claims that the Tribunal cannot find jurisdiction looking only at May 2020; it must necessarily find that Italians controlled and managed Campos de Pesé as of August 2014.[62]

[55] Respondent's Memorial, ¶ 5.

[56] Respondent's Reply, ¶ 23.

[57] Respondent's Memorial, ¶ 19; Respondent's Reply, ¶ 26.

[58] Respondent's Reply, ¶ 18.

[59] Respondent's Reply, ¶ 28.

[60] Respondent's Memorial, ¶ 3; Respondent's Reply, ¶ 30.

[61] Respondent's Reply, ¶ 30.

[62] Respondent's Reply, ¶ 31.

79. In any event, Panama claims that at no point was Campos de Pesé controlled or managed by Italian nationals, nor were the majority of the company's final beneficiaries Italian nationals.[63]

b. Italian nationality

80. In its Memorial, Respondent argued that Claimant did not prove that all the 26 Individuals were Italian nationals at any relevant time for this dispute.[64] According to Respondent, there is no evidence that they acquired the Italian nationality in compliance with Italian law.[65]

81. Respondent further argued that even if the 26 Individuals were Italian nationals, they did not satisfy the dominant and effective nationality test.[66] In this case, there is an "absence of any credible link connecting to Italy the 26 Individuals who are each claiming shareholder and nationality status."[67] Thus, accepting Campos de Pesé's claim would be an abuse of the system of international investment protection.[68]

82. Moreover, the Respondent argued that most of the alleged 26 Individuals appear to be citizens of Nicaragua,[69] and that Nicaraguan law prohibits Nicaraguan nationals from holding a second nationality absent any double nationality agreement with the other State, and there is no dual nationality agreement between Italy and Nicaragua.[70]

83. According to Respondent, the Pellas Group presents itself to the public as a Nicaraguan business group, and Claimant even recognizes that SER has always been owned by the Pellas family.[71] Also, SER's primary company is Nicaragua Sugar Estates Limited ("**NSEL**"), which has received financing from the International Finance Corporation as a Nicaraguan company.[72] Moreover, in July 2014, Claimant applied to the benefits granted to foreign investors under Panamanian Law 24/1998, but it never argued that it was owned or controlled by Italian nationals. Before this arbitration, none of the 26 Individuals had ever presented themselves as Italian nationals, and Carlos Pellas had even

[63] Respondent's Reply, ¶ 33.

[64] Respondent's Memorial, ¶ 9, ¶ 14.

[65] Respondent's Memorial, ¶ 15–18.

[66] Respondent's Memorial, ¶ 21.

[67] Respondent's Memorial, ¶ 23.

[68] Respondent's Memorial, ¶ 32.

[69] Respondent's Memorial, ¶ 6.

[70] Respondent's Memorial, ¶ 34; Respondent's Reply, ¶ 114(iv).

[71] Respondent's Memorial, ¶ 30.

[72] Respondent's Memorial, ¶ 30, Exhibit A, Exhibit B.

claimed that he was either Nicaraguan or Spanish, not Italian, before the Panamanian National Securities Commission.[73]

84. In its Reply, Respondent noted that Claimant misrepresented that the 26 Individuals – allegedly Italian nationals– were shareholders of SER. If Claimant had disclosed the structures through which these individuals purported to be the "final beneficiaries" of SER, and their ability to indirectly control SER as such, it would have been evident from the start that, regardless of these individuals' actual nationality, SER was never majority-owned by Italians at any relevant time.[74]

85. Nevertheless, Respondent also asserted in its Reply that "[s]ignificant questions continue looming regarding the lack of Italian nationality of the group of 26 alleged Italian "final beneficiaries" and therefore "reincorporate[d] its arguments in its Objections to Jurisdiction regarding the nationality."[75]

c. Control over Campos de Pesé

(i) Definition of control

86. Relying on *Standard Chartered Bank*[76] and *Guardian Fiduciary Trust*[77], Respondent asserts that the "mere passive, indirect and removed shareholding in SER does not suffice"[78] for control to be asserted. On the contrary, under Article 25 of the ICSID Convention, a claimant has the burden of providing the necessary information and evidence showing ownership and real or actual control at all relevant times.[79] Citing *Caratube*[80], Respondent also claims that tribunals have rejected the idea that legal capacity to control is enough, as Claimant asserts.[81]

87. According to Respondent, Claimant failed to demonstrate that the 26 Individuals ever had any incidence in Campos de Pesé's decisions.

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[73] Respondent's Memorial, ¶ 33, Exhibit E, Exhibit G.

[74] See Respondent's Reply, ¶¶ 34–43.

[75] Respondent's Reply, ¶ 114, ¶ 112.

[76] *Standard Chartered Bank v. United Republic of Tanzania* I, ICSID Case No. ARB/10/12, Award, 2 November 2012 [CL-0029], ¶ 257.

[77] *Guardian Fiduciary Trust, Ltd, f/k/a Capital Conservator Savings & Loan, Ltd v. Macedonia, former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/12/31, Award, 22 September 2015 [RL-0017], ¶ 181.

[78] Respondent's Memorial, ¶ 51.

[79] Respondent's Reply, ¶ 95, referring to *CCL v. Republic of Kazakhstan*, SCC Case No. 122/2001, Jurisdictional Award, 1 January 2003 [RL-0021], ¶ 82.

[80] *Caratube International Oil Co., LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, 5 June 2012 [RL-0007], ¶ 407.

[81] Respondent's Reply, ¶ 98.

(ii) Whether Italian nationals controlled Campos de Pesé through SER

88. Respondent argues that the actual shareholders of SER are other entities, different from the 26 Individuals, that lacked Italian nationality as of August 2014.[82] Therefore, only a minority of SER is actually owned by Italians.[83] Additionally, Respondent claims that some of the 26 Individuals are not even indirect "final beneficiaries" of SER.[84]

(a) Shareholder structure of SER

89. According to Respondent, as of August 2014, the date of the alleged breach, the shareholder composition of SER was as follows:[85]

(a) **30.6%** owned by the following BVI companies: [redacted]

(b) **8.06%** owned by the following Panamanian companies: [redacted]

(c) **0.36%** owned by Nicaraguan company [redacted]

(d) **1%** owned by two [redacted] unidentified nationality: the [redacted]

(e) **10.71%** owned by fourteen alleged Italian nationals: (i) [redacted] (ii) [redacted] (iii) [redacted] (iv) [redacted] (v) [redacted] (vi) [redacted], (vii) [redacted], (viii) [redacted] (ix) [redacted] (x) [redacted], (xi) [redacted], (xii) [redacted], (xiii) [redacted], and (xiv) [redacted]

(f) **49.36%** owned by individuals or companies of other nationalities.

90. In any event, as of May 2020, the date of consent to this arbitration, the shareholding of SER was as follows:[86]

[82] Respondent's Reply, ¶ 40, ¶ 57, ¶ 61.

[83] Respondent's Reply, ¶ 49.

[84] Respondent's Reply, ¶ 62.

[85] Respondent's Reply, ¶ 50.

[86] Respondent's Reply, ¶ 52.

(a) **34.95%** owned by the following BVI companies: [redacted], and [redacted]

(b) **5.94%** owned by Panamanian companies [redacted], and [redacted]

(c) **0.36%**: owned by Nicaraguan Company [redacted]

(d) **13%** owned by fourteen alleged Italian nationals (i) [redacted] (ii) [redacted], (iii) [redacted], (iv) [redacted], (v) [redacted], (vi) [redacted], (vii) [redacted], (viii) [redacted] (ix) [redacted], (x) [redacted], (xi) [redacted] (xii) [redacted] (xiii) [redacted], and (xiv) [redacted]

(e) **44.74%** owned by individuals or companies of other nationalities.

91. Respondent notes that, even assuming that the 26 Individuals who are allegedly Italian nationals were actually the direct shareholders of SER (which they are not), Claimant only provided evidence of the existence and nationality of 46% of SER as of August 2014,[87] hence failing to prove that SER was majority owned by Italians as of that date.[88]

92. Indeed, Campos de Pesé failed to provide evidence of the existence and nationality of the [redacted] and [redacted] with its Counter-Memorial on Jurisdiction, or any evidence that those two [redacted] are controlled and managed by Italian nationals. Campos de Pesé did not even produce the share certificates showing that the [redacted] own shares in SER.[89]

93. Furthermore, Campos de Pesé misrepresented the ownership of [redacted] shareholder records indicate that in 2011 and 2014, the company was owned by [redacted] while Claimant has alleged that it was owned by [redacted] Shareholder information from [redacted] and shareholder information from SER do not match. In fact, Campos de Pesé omitted [redacted] in its Request and its Counter-Memorial, and did not provide a power of attorney or consent given by [redacted] to the arbitration. The only document in the record is a passport expired

[87] Respondent's Reply, ¶ 53.

[88] Respondent's Reply, ¶¶ 53–57.

[89] Respondent's Reply, ¶ 54.

in 2005 of [redacted]" There is no evidence that [redacted] is [redacted]. Hence, Campos de Pesé cannot claim that [redacted] is one of the 26 Individuals who are allegedly Italians and shareholders of SER.[90]

94. Lastly, Campos de Pesé cannot count [redacted] as a shareholder of SER at the relevant time, as she conceded in sworn declaration that she became a shareholder in 2018. Claimant provided a "certificate" issued by SER purporting to identify [redacted] as the owner of 1.2% of SER's shares as of August 2014. Therefore, the alleged "certificate" contains false information.[91]

95. In conclusion, "[s]ubtracting the [redacted] and the [redacted] from SER's ownership structure, as well as [redacted] and [redacted] shares (in total, approximately 5.2%), by August 2014, the group of alleged Italians owned only about 46% of SER."[92]

(b) Beneficial ownership

96. Some of the 26 Individuals claim to be "final beneficiaries"[93] of other companies that have an ownership stake in SER. Neither Panamanian nor BVI corporate laws grant or recognize final beneficiaries any powers or authority.[94] The exclusion of these individuals as purported final beneficiaries of SER would lead to SER not being majority owned, even indirectly, by Italians.[95] Relying on the expert opinions of Luis Chalhoub and Mark Forte, Panama claims that even if Carlos Pellas, the [redacted] Ernesto Palazio or [redacted] were considered to be final beneficiaries, they do not hold any control or management under Panamanian law or BVI law.

i. Mr. Carlos Pellas

97. Respondent claims that Mr. Carlos Pellas is not the final [redacted] of [redacted] He does not own or has ownership rights over the corporation as it belonged, as of August 2014, to the [redacted] a [redacted] established in the Cayman Islands.[96] He does not own [redacted] either; it has belonged to [redacted] division at all relevant dates.[97]

[90] Respondent's Reply, ¶ 55.

[91] Respondent's Reply, ¶ 56.

[92] Respondent's Reply, ¶ 57.

[93] Respondent's Reply, ¶ 62.

[94] Respondent's Reply, ¶ 9, ¶ 11, ¶¶ 81–90.

[95] Respondent's Reply, ¶ 64

[96] Respondent's Reply, ¶ 66.

[97] Respondent's Reply, ¶ 66.

98. In this regard, Respondent argues that

> "The [redacted] is a Cayman Islands [redacted] established in February 2013 with the exclusive purpose of holding the shares of [redacted] is the [redacted] of The [redacted] The [redacted] is ultimately irrelevant because, contrary to its stated purpose, it never held shares of The [redacted] again, [redacted] shares are legally and directly owned by [redacted]). And the fact that [redacted] is the [redacted] of the [redacted] does not create an ownership interest by the [redacted] over property owned by [redacted] Moreover, Mr. Pellas is not a [redacted] of the [redacted] Therefore, even if the [redacted] could somehow be considered the direct shareholder of The [redacted] despite that the actual owner is [redacted] this has nothing to do with Mr. Pellas because he is not a [redacted] of the [redacted] and thus has no entitlement to assets owned directly or indirectly by the [redacted]"[98]

99. Furthermore, being the [redacted] of [redacted] does not make Mr. Pellas the final [redacted] of [redacted].[99] Respondent relies on Robert Lindley's expert opinion to support this position: "[u]pon Pellas transferring his [redacted] he [redacted] himself from ownership, with the [redacted] ([redacted] of the [redacted] becoming the owner and ultimate decision maker in relation to such assets."[100] This makes [redacted] the ultimate decision-making authority over the [redacted] not Mr. Pellas.[101]

100. Respondent asserts that the fact that Mr. Pellas is a director of [redacted] does not make him the final [redacted] either. As expert Robert Lindley also explained, Mr. Pellas does not have sole control over the management of [redacted] Mr. Rubén Díaz also serves in that role to the company, and the documents even identify him as "special" director.[102]

101. In this regard, Panama alleges that these types of complex corporate structures are usually built to avoid tax payments. Hence, Mr. Pellas cannot use the structure for said purpose and, at the same time, attempt to claim now that he is the final beneficiary.[103]

102. Finally, [redacted] owner of 4.81% of SER's shares in 2011, cannot be considered to be indirectly controlled by Italians because [redacted] which owns 32.9% of [redacted] and is its largest shareholder, cannot be deemed as controlled by Italians either

[98] Respondent's Reply, ¶ 67.

[99] Respondent's Reply, ¶ 68.

[100] Respondent's Reply, ¶ 69; Legal Opinion of Robert Lindley, ¶ 3.11.

[101] Respondent's Reply, ¶ 69.

[102] Respondent's Reply, ¶ 70.

[103] Respondent's Reply, ¶ 71.

(particularly by Mr. Pellas). Moreover, [redacted] seems to have ceased being a SER shareholder by 2014.[104]

ii. The [redacted]

103. [redacted] cannot be considered as final beneficiaries of SER since Campos de Pesé did not provide any evidence regarding the [redacted] and the [redacted] in their Counter-Memorial on Jurisdiction. Claimant withheld information regarding the existence of these two [redacted] and their share certificates, merely relying on the "Secretary's Certificate" that shows alleged SER's shareholders,[105] and only provided a copy of the [redacted] of these [redacted] with its Rejoinder on Jurisdiction.

iii. Ernesto Palazio

104. According to Panama, Ernesto Palazio cannot be considered the "final beneficiary of [redacted]" at any relevant date. From June 2014 to February 2021, Florential was owned by the [redacted] and [redacted] was owned by the [redacted]. Both [redacted] were established under Delaware law, under which, Ernesto Palazio is merely a [redacted] and [redacted] None of these roles entail ownership or grant Ernesto Palazio management power.[106]

105. Moreover, he cannot be deemed as final beneficiary of SER through the alleged ownership of [redacted] as [redacted] internal shareholder records as of 2011, reveal that it was owned by [redacted], a non-Italian. Ernesto Palazio only became an owner of [redacted] in 2013, contrary to the conclusions drawn from SER's "certificates" of shareholders, which Panama believes to contain false information.[107]

iv. [redacted]

106. [redacted] cannot be considered the final beneficiary of [redacted] since he was not the owner of [redacted] in 2011 or 2014, and he cannot rely on [redacted] —whom Panama believes to be the real owner of the company— as the final beneficiary of the company in this stage of the proceedings, as Claimant has not provided any evidence to support this assertion. Hence, Campos de Pesé waived any arguments regarding [redacted] by not even disclosing his existence and relying on improper documents on this matter.[108]

[104] Respondent's Reply, ¶¶ 79–80.

[105] Respondent's Reply, ¶¶ 72–73.

[106] Respondent's Reply, ¶ 75.

[107] Respondent's Reply, ¶ 78.

[108] Respondent's Reply, ¶¶ 76–77.

(iii) Whether SER's Board of Directors controlled Campos de Pesé

107. Claimant did not provide documentation proving the involvement of the 26 Individuals in PSE or the Board of Directors of Campos de Pesé, or as employees or executives for any of these corporations.[109] In any event , the six alleged Italian individuals that were proven to have been directors of SER, owned only an average of 1.81% of SER's shares.[110] Respondent reiterates that the fact that Italian individuals sit in the SER Board of Directors is not sufficient to establish jurisdiction, when said individuals do not directly hold a significant amount of shares in SER.[111] Additionally, Campos de Pesé only has had one Italian director, officer or employee: Mr. Carlos Pellas until 2011.[112]

B. CLAIMANT

1. Burden and standard of proof

108. Claimant argues that, while it does have the burden to prove the facts to support that the Tribunal has jurisdiction, Respondent also has the burden of proving the facts to support its own jurisdictional objections.[113] Accordingly, Claimant only has to prove that the owners and directors of SER are Italian nationals and that they control Campos de Pesé.[114] Moreover, Claimant argues that the applicable standard of proof to determinations of jurisdiction is the balance of probabilities, as established by the *Bridgestone*[115] tribunal.[116]

109. Regarding the proof of the Italian nationality of SER shareholders and the nationality of the members of its Board of Directors, Claimant submits that domestic determinations of nationality, such as citizenship certificates and passports, create a presumption that is for Respondent to rebut. Respondent's rebuttal of such *prima facie* evidence of nationality is subject to a high standard considering that it involves disregarding the national authority's determination of citizenship, which requires "convincing and decisive evidence."[117] Claimant argues that the passports and consular declarations of SER owners and directors establish a presumption of Italian nationality that Respondent has only sought to rebut

[109] Respondent's Memorial, ¶ 47, ¶ 49.

[110] Respondent's Memorial, ¶ 43.

[111] Respondent's Reply, ¶ 104, ¶ 109.

[112] Respondent's Reply, ¶ 111.

[113] Claimant's Counter-Memorial, ¶ 11, ¶ 13, and ¶ 16.

[114] Claimant's Counter-Memorial, ¶ 14.

[115] *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, 13 December 2017 [CL-0121], ¶ 153.

[116] Claimant's Counter-Memorial, ¶ 21.

[117] Claimant's Counter-Memorial, ¶¶ 24–26.

with allegations on how an Italian national could lose citizenship, without concrete evidence.[118]

110. As to the proof of control over Campos de Pesé, Claimant argues that evidence of majority ownership creates a presumption of control. According to Claimant, the tribunal in *Caratube*[119] established that such presumption applies unless there are elements to create doubt about the owner's actual control.[120] Claimant cites *Cable TV v. St. Kitts and Nevis*,[121] where the tribunal found that the claimant cable companies were controlled by nationals of the United States for the purposes of Article 25(2) of the ICSID Convention, considering that both the holding and operating companies were 99.9% owned, and therefore controlled, by nationals of the United States.[122] According to Claimant, it has submitted evidence that the Italian owners and directors controlled SER, and that SER controlled Campos de Pesé, creating a presumption of control that Respondent has failed to rebut.[123]

2. Jurisdiction *ratione personae*

111. Claimant argues that Campos de Pesé meets the definition of an investor under Article (I)2 of the BIT, since it is an entity established in the territory of Panama "controlled directly or indirectly" by Italian nationals —the owners and directors of SER— at the relevant dates.[124]

a. Relevant dates

112. Claimant dismisses Respondent's suggestion that jurisdiction should also be assessed as of 2011, when Campos de Pesé invested in Panama.[125] According to Claimant, *ratione personae* jurisdiction should be assessed as of 2014, when Panama breached the BIT, and as of 2020, when the Parties consented to arbitration.[126] Claimant argues that, on the one hand, Article IX of the BIT only requires a potential claimant to qualify as an investor at the date of the breach (August 2014) and it does not establish any timeframe for the direct or indirect control.[127] On the other hand, Article 25(2)(b) of the ICSID Convention

[118] Claimant's Counter-Memorial, ¶ 29.

[119] *Caratube International Oil Co., LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, 5 June 2012 [RL-0007], ¶ 264.

[120] Claimant's Counter-Memorial, ¶¶ 30–31.

[121] *Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. Federation of St. Kitts and Nevis,* ICSID Case No. ARB/95/2, Award, 13 January 1997, [CL-0132], ¶ 5.16.

[122] Claimant's Counter-Memorial, ¶ 32.

[123] Claimant's Counter-Memorial, ¶ 34.

[124] Claimant's Counter-Memorial, ¶ 35.

[125] Claimant's Counter-Memorial, ¶ 39.

[126] Claimant's Counter-Memorial, ¶ 38.

[127] Claimant's Counter-Memorial, ¶¶ 40–41.

focuses on the date of consent, which is the date of submission of the request for arbitration, in this case, 4 May 2020.[128] Claimant argues that the owners and directors of SER were Italian nationals that controlled Campos de Pesé at both these relevant dates.

b. Italian nationality

113. Claimant asserts that the passports and consular declarations presented to this Tribunal prove that the owners and directors of SER were Italian nationals at the relevant dates, and continue to be Italian nationals.[129] First, it is for Italy to decide who are its nationals, and, in this case, there is no evidence of fraud or irregularities that cast doubt on Italy's decision to grant the Italian nationality to the owners and directors of SER.[130] Second, if the Tribunal were to analyze the Italian nationality, it should not replace national authorities but should accord great weight to national laws and their interpretation.[131] Moreover, the Tribunal should not apply the "dominant and effective nationality" test, which should be restricted to diplomatic protection cases, as found in *Saba Fakes v. Turkey.*[132] In this regard, Claimant argues that Article 25(2)(b) of the ICSID Convention does not condition the nationality requirement to its "effectiveness" nor does it exclude claims of investors who are dual nationals, insofar as they do not hold the nationality of the host state, which is not the case at hand. Lastly, Claimant adds that the SER owners and directors acquired their Italian nationality long before 2014, and it was not with the purpose of gaining investment treaty benefits.[133]

114. Pursuant to Italian laws and regulations —the 1912 Citizenship Law, the 1992 Citizenship Law, the Passport Law and the Circolare—[134] the Italian passports held by the owners and directors of SER provide presumptive evidence of their Italian citizenship, which is not contested by Respondent's expert.[135] Moreover, SER owners and directors have maintained ties with Italy, having family in the country and exercising their rights under their Italian citizenship by traveling internationally, voting, doing businesses and studying in Italy.[136] Regarding the nationalities of Carlos Pellas and Ernesto Palazio, Claimant argues that there is no evidence on how their public acts and statements regarding their other nationalities change their Italian nationality. In fact, Mr. Pellas has

[128] Claimant's Counter-Memorial, ¶¶ 43–44.

[129] Claimant's Counter-Memorial, ¶¶ 36, 46.

[130] Claimant's Counter-Memorial, ¶¶ 48–50.

[131] Claimant's Counter-Memorial, ¶ 52.

[132] *Saba Fakes v. Republic of Turkey,* ICSID Case No. ARB/07/20, Award, 14 July 2010 [RL-0026], ¶ 69.

[133] Claimant's Counter-Memorial, ¶¶ 59–63.

[134] Claimant's Counter-Memorial, ¶ 64.

[135] Claimant's Counter-Memorial, ¶¶ 64–71.

[136] Claimant's Counter-Memorial, ¶ 75.

publicly acted as Italian and kept ties with the country, while Mr. Palazio's Nicaraguan nationality does not exclude his Italian nationality under Nicaraguan laws.[137]

115. Claimant also asserts that the SER owners and directors have not lost their Italian citizenship. Under Italian and Nicaraguan laws, the mere acquisition of a foreign nationality is not sufficient to cause the loss of either nationality; a voluntary act or decision is required for such loss to occur. Pursuant to the 1917 Citizenship Convention between Italy and Nicaragua "their respective citizens could emigrate to the other country, and both retain and pass down their citizenship to their children, pursuant to their respective national laws."[138] Lastly, Claimant has submitted consular declarations from the Italian embassy in Managua, confirming that none of the SER owners and directors have renounced their Italian citizenship.[139]

c. Control over Campos de Pesé

116. Claimant argues that the Italian SER owners and directors controlled Campos de Pesé in August 2014 and May 2020, the relevant dates.

(i) Definition of "control"

117. Claimant asserts that there is no material difference between the terms "control" and "manage" used in the Spanish and Italian versions of Article 1(2) of the BIT, respectively. In either version, the investor must be directly or indirectly "controlled" *or* "managed" —not "owned"— by Italians.[140] Likewise, under the ICSID Convention, domestic companies may bring claims against their host States on the basis of foreign control.[141] According to Claimant, while the term "control" is not defined in the BIT or the ICSID Convention, it is broad enough to encompass "the legal capacity to control," which the tribunal in *AIG Capital Partners*[142] identified with the "voting control of the stock."[143] Claimant refers to *Plama v. Bulgaria*,[144] where indirect and beneficial ownership was distinguished from control as the ability to, in fact, "exercise substantial influence over the legal entity's management, operation and the selection of members of its Board of directors or any other managing body."[145] Claimant adds that the term "controlled"

[137] Claimant's Counter-Memorial, ¶¶ 76–79.

[138] Claimant's Counter-Memorial, ¶¶ 80–88.

[139] Claimant's Counter-Memorial, ¶ 89.

[140] Claimant's Counter-Memorial, ¶ 92.

[141] Claimant's Counter-Memorial, ¶¶ 91–92.

[142] *AIG Capital Partners, Inc. v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003 [CL-0023], ¶ 10.2.2.

[143] Claimant's Counter-Memorial, ¶¶ 91–92.

[144] *Plama Consortium Limited v. Republic of Bulgaria,* Decision on Jurisdiction, 8 February 2005 [CL-0145], ¶ 170.

[145] Claimant's Counter-Memorial, ¶¶ 93–94.

should be defined both under international law and BVI laws, since SER is a BVI company.[146]

(ii) Italian individuals controlled Campos de Pesé through SER

118. Citing *Caratube v. Kazakhstan*[147], Claimant asserts that majority ownership in a company creates a presumption of control under international law. Claimant adds that such presumption is stronger when the applicable corporate laws and the by-laws of a company "grant governing control over the company to its majority shareholders."[148] According to Claimant, control for the purposes of jurisdiction is not determined by the shareholder's "percentage ownership of the ultimate underlying assets," as argued by Respondent's expert, Ms. Kunsman, but by the shareholder's power to control the company "by voting their shares, and a simple majority."[149]

119. Claimant asserts that, while the Italian individuals held an indirect ownership interest of 45.8% in Campos de Pesé,[150] they were the majority shareholders of SER on the relevant dates, possessing 51.24% of shares as of August 2014, and 55.23% as of May 2020. According to Claimant, this majority shareholding of SER creates a presumption of control over Campos de Pesé.[151] Italian nationals, through the SER Board of Directors (mainly composed by Italian nationals), controlled both PSE and Campos de Pesé.[152]

120. Claimant contends that, unlike the case of *Guardian Fiduciary Trust*[153] cited by Respondent,[154] in this case, there is no "split control" over Campos de Pesé, since the 26 Individuals —allegedly Italian nationals— owned at the relevant times the majority of SER's shares, thus, controlling the company and its subsidiaries. As evidence of such control, Claimant argues that under the SER's memorandum and articles of association ("**M&A**"), all common shares in the company have one vote for all matters requiring shareholder approval. Such matters are decided by the majority of present votes save for "special matters." Also, the majority of shareholders can appoint the Board of Directors of SER and amend its M&A.[155] Considering these powers and Mr. Newton's expert report, Claimant argues that under BVI laws, the 26 Individuals —allegedly Italian

[146] Claimant's Counter-Memorial, ¶ 95.

[147] *Caratube International Oil Co., LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, 5 June 2012 [RL-0007], ¶ 271.

[148] Claimant's Rejoinder, ¶¶ 141–142.

[149] Claimant's Rejoinder, ¶ 145, ¶ 148.

[150] Claimant's Rejoinder, ¶ 148.

[151] Claimant's Counter-Memorial, ¶¶ 97–98.

[152] Claimant's Rejoinder, ¶ 146, ¶ 151.

[153] *Guardian Fiduciary Trust, Ltd, f/k/a Capital Conservator Savings & Loan, Ltd v. Macedonia, former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/12/31, Award, 22 September 2015 [RL-0017], ¶¶ 131–132.

[154] Claimant's Counter-Memorial, ¶¶ 99–100.

[155] Claimant's Counter-Memorial, ¶¶ 101–102.

nationals— holding a majority of common shares of SER and "acting in unison", could control voting power over the company and its Board of Directors.[156] Claimant adds that SER's shareholders have exercised these powers to control in their annual meetings,[157] appointing multiple Board of Directors, and amending the articles of association, where the "approval of the Italian Shareholders was needed to pass the matters."[158]

(a) Structure of control of SER

121. According to Claimant, both in August 2014 and May 2020, Campos de Pesé was fully owned by PSE. By August 2014, 91.46% of the shares of PSE were owned by SER, and by May 2020, SER increased its ownership to 100%. The majority of SER's shares were owned by Italian nationals at both relevant dates, with 51.24% as of August 2014 and 55.23% as of May 2020. The distribution of this majority shareholding in 2014[159] and 2020 was as follows:[160]

August 2014

- **20.7%:** owned by BVI company [redacted] whose shares were held by [redacted] as [redacted] of the [redacted] of which Carlos Pellas, an Italian national, was a [redacted]
- **4.84%:** owned by BVI company [redacted] owned in turn by two Italian individuals, [redacted]
- **2.33%:** owned by Panamanian company [redacted] owned in turn by [redacted]
- **2.98%:** owned by Panamanian company [redacted] owned in turn owned by two Italian individuals, [redacted]

May 2020

- **21.68%:** owned by BVI company [redacted] whose shares were held by [redacted] as [redacted] of the [redacted] of which Carlos Pellas, an Italian national, was a [redacted]
- **5.36%:** owned by BVI company [redacted]., owned in turn by two Italian individuals, [redacted]
- **2.33%:** owned by Panamanian company [redacted] owned in turn by [redacted].
- **3.24%**: owned by Panamanian company [redacted] owned in turn by [redacted]

[156] Claimant's Counter-Memorial, ¶¶ 103–105.

[157] Claimant's Rejoinder, Appendix 3 and 4.

[158] Claimant's Counter-Memorial, ¶¶ 106–109.

[159] Claimant's Rejoinder, ¶¶ 152–158.

[160] Claimant's Rejoinder, ¶¶ 159–165.

- **2.65%**: owned by Panamanian company [redacted], owned in turn by Italian individual, [redacted].
- **1.97%:** owned by BVI company [redacted], owned in turn by [redacted]
- **1.34%**: owned by BVI company [redacted] owned in turn by [redacted]
- **0.98%**: owned by BVI company [redacted]., owned in turn by Italian individual, [redacted]
- **0.95%**: owned by two BVI companies [redacted]. with 0,48% and [redacted] with 0,47%, each controlled by two Italian [redacted] the [redacted] and the [redacted], respectively. Both were held by [redacted] as [redacted] and Ernesto Palazio as [redacted]
- **0.36%:** owned by Nicaraguan company [redacted]., owned in turn by seven Italian individuals: [redacted]
- **0.10%:** owned by Panamanian company [redacted],
- **3.17%**: owned by BVI company [redacted] owned in turn by two Italian individuals, [redacted]
- **1.97%:** owned by BVI company [redacted] owned in turn by [redacted]
- **0.71%**: owned by BVI company [redacted], owned in turn by [redacted]
- **0.99%**: owned by BVI company [redacted]., owned in turn by Italian individual, [redacted]
- **0.95%**: owned by two BVI companies [redacted] With 0,48% and [redacted] with 0,47%, each controlled by two Italian [redacted] the [redacted] and [redacted] respectively. Both were held by [redacted] as [redacted] and Ernesto Palazio as [redacted]
- **0.36%:** owned by Nicaraguan company [redacted] owned in turn by seven Italian inviduals: [redacted]
- **0.37%:** owned by Panamanian company [redacted],

owned in turn by an Italian individual, [redacted].

- **0.08%:** owned by BVI company [redacted] owned in turn by [redacted].
- **12.27%:** owned by 13 Italian individuals and an Italian company, [redacted] as [redacted] of two [redacted] each with an Italian individual as [redacted].

owned in turn by Italian an individual, [redacted].

- **0.08%:** owned by BVI company [redacted], owned in turn by [redacted].
- **14%:** owned by 14 Italian individuals and an Italian company, [redacted] as [redacted] of two [redacted] each with an Italian individual as [redacted].

(b) Claimant is not relying on beneficial ownership

122. Claimant contends that it is not relying on the 26 Individuals and directors' beneficial ownership of Campos de Pesé, but rather on their control over the company. Claimant asserts that "there was no separation of legal ownership from beneficial ownership that deprived the Italian shareholders of their control over their shares in SER."[161] According to Claimant, Respondent's experts mistakenly focus on beneficial ownership laws and on the "final beneficiary" definition under Panamanian law to define who controls a Panamanian entity. Relying on the opinion of its expert, Mr. Mora, Claimant argues that under the Corporation Law of Panama (Law 32 of 1927), the shareholders —and not the final beneficiaries— are the ones that have "the ultimate control of the corporation."[162] Regarding BVI laws, Claimant agrees with Respondent that the concept of ultimate beneficiaries was not regulated in the BVI Business Companies Act of 2004 (the "**BVI Companies Act**"). According to Claimant, this concept was first introduced in the Beneficial Ownership Secure Search System Act ("**BOSS Act**") only as a regulatory report of beneficial owners of BVI companies but does not determine who has "the legal capacity to control."[163] Instead, as explained by Mr. Newton, the ultimate controllers of the voting shares and the directors of a BVI company are the ones who control a BVI company under BVI laws.[164]

123. Claimant further clarified the situation of the Italian individuals that allegedly controlled SER and Campos de Pesé through [redacted] *i.e.*, Carlos Pellas, Ernesto Palazio, and [redacted] and Respondent's allegations on the identity of the owner of [redacted] as follows:

[161] Claimant's Rejoinder, ¶ 166.

[162] Claimant's Rejoinder, ¶¶ 167–169.

[163] Claimant's Rejoinder, ¶ 170.

[164] Claimant's Rejoinder, ¶¶ 170–171.

i. Control by Carlos Pellas

124. Regarding Mr. Pellas, Claimant first observes that what is relevant for the purposes of jurisdiction in this case, is not whether he owned or was the final beneficiary of [redacted] but rather whether he controlled them.[165] Claimant affirms that Mr. Pellas controlled the [redacted] which was the direct owner of SER's shares.[166]

125. Claimant explains that [redacted] is a BVI company,[167] and that its shares were held by [redacted] a Cayman Islands company that was the sole [redacted] of the [redacted], established under the laws of Cayman Islands by a [redacted] of 19 April 2013 between [redacted] and Mr. Pellas (the "[redacted] **Instrument**"), modified on 28 June 2018 to exclude the requirement of Mr. Pellas' consent [redacted] (the "**Amended** [redacted] **Instrument**").[168] Mr. Pellas was director of [redacted] with "extensive control."[169] The shares of [redacted] were held by [redacted], as the sole [redacted] of the [redacted], a [redacted] established under Cayman Island laws by [redacted], as original [redacted] and Mr. Pellas was the [redacted] of the [redacted] (the [redacted]").[170]

126. According to Claimant, Mr. Pellas had extensive powers as [redacted] under the [redacted] Instrument and as [redacted] under the [redacted] They include (1) the removal and appointment of [redacted] (2) preventing [redacted] from transferring any ownership interest of [redacted] in SER or any of its subsidiaries without his consent; (3) the "unfettered" right to [redacted] in the case of the [redacted] 4) the right to [redacted] in the case of the [redacted]; (5) the requirement of his consent for any amendment of the [redacted] Instrument; and (6) also the requirement of his consent for any amendment of the articles of association of [redacted] that changes the director of the company, the way a director is appointed or removed, the voting rights of a director of the company, and the powers of a director of the company, being Mr. Pellas the director.[171]

[165] Claimant's Rejoinder, ¶ 173.

[166] Claimant's Rejoinder, ¶ 183.

[167] Claimant's Rejoinder, ¶ 174.

[168] Claimant's Rejoinder, ¶¶ 174–176.

[169] Claimant's Rejoinder, ¶¶ 178–179.

[170] Claimant's Rejoinder, ¶ 177, ¶ 181.

[171] Claimant's Rejoinder, ¶ 175, ¶ 181.

ii. Control by Ernesto Palazio

127. Claimant argues that Mr. Palazio has control over both the [redacted] and the [redacted], which hold the shares in SER. Claimant explains that both [redacted] were established under the laws of Delaware under two [redacted] agreements between Mr. Palazio as [redacted] and the [redacted] as [redacted] (the "[redacted] **Instrument**" and the "[redacted] **Instrument**", respectively). These [redacted] have 100% of the shares of [redacted] and [redacted], the companies that directly own SER's shares.[172]

128. According to Claimant, the provisions in the [redacted] Instrument and the [redacted] Instrument are identical and act as "will substitutes" that grant Mr. Palazio as [redacted] "effective dominion over and control of [redacted] assets during his lifetime."[173] Those powers include control over the net income of the [redacted] fund, appointment or removal of the [redacted] by the "[redacted] Committee" being Mr. Palazio the initial member, control of investments and voting rights by the "[redacted] Committee" being Mr. Palazio the initial member, [redacted] in whole or in part, and amending the [redacted] agreement.[174]

129. Lastly, regarding Ernesto Palazio's control over [redacted], Claimant asserts that he and [redacted] co-owned and controlled the company in August 2014 and May 2020.[175]

iii. [redacted]

130. Claimant acknowledges that [redacted] do not have the same control over the shares in SER as Mr. Pellas and Mr. Palazio, since they are [redacted] of two [redacted] However, the [redacted] and the [redacted], both established under the laws of the Island of Guernsey, have [redacted] an Italian company, as original [redacted] Thus, "these [redacted] are controlled by Italians."[176]

iv. [redacted]

131. Claimant clarifies that [redacted] and [redacted] were the same person with one name in Spanish and the other in Italian. Furthermore, Claimant explains that [redacted] was incorporated in April 2003 by [redacted] passed in 2014 and his shares were transferred to [redacted], his mother, and siblings. In 2015, the shares

[172] Claimant's Rejoinder, ¶¶ 188–191.

[173] Claimant's Rejoinder, ¶¶ 192–194.

[174] Claimant's Rejoinder, ¶ 192.

[175] Claimant's Rejoinder, ¶ 100.

[176] Claimant's Rejoinder, ¶¶ 184–187.

of [redacted] mother and siblings were transferred to him, and he became the sole owner of the company. Both [redacted] were Italian nationals at all relevant times.[177]

(iii) The SER Board of Directors controlled Campos de Pesé

(a) The Board of Directors

132. Claimant refers to Mr. Newton's expert opinion to argue that, under BVI laws and the M&A, the SER Board of Directors had the powers to "manage and control" the affairs of SER, which included the affairs of Campos de Pesé as its subsidiary.[178] Claimant further argues that the majority of the Board of Directors of SER were Italian nationals, and that evidence of their control over Campos de Pesé is found, first, in their approval of the acquisition of a stake in Campos de Pesé from Grupo Alcoholes in 2009, and a subsequent increase in PSE's ownership interest in Campos de Pesé to 70%.[179]

133. Second, Claimant asserts that the Board of Directors of SER also controlled PSE and, in turn, Campos de Pesé as its subsidiary through a Shareholder Agreement entered into with Grupo Alcoholes. Under this agreement, the majority of the Board of Directors of PSE (five members) was appointed by SER, and Grupo Alcoholes could appoint two members.[180]

134. Third, Claimant asserts that the Board of Directors of SER voted unanimously in multiple decisions over the management and control of PSE, as well as the decision to guarantee credit facilities taken by Campos de Pesé. Lastly, the Board of Directors of SER supervised the Board of PSE, which managed Campos de Pesé, and both Boards shared a common member, Carlos Pellas.[181]

(b) Carlos Pellas as director

135. Claimant argues that while control over Campos de Pesé was "legally and factually" held by the Italian individuals and the SER Board of Directors, Carlos Pellas "exerted a comparable level of control" because he occupied a "power position" considering that he was the single largest shareholder in SER with 21.85% of shares and the Chairman of the Boards of Directors of both SER and PSE.[182] Claimant refers to *Vacuum Salt v. Ghana* where the tribunal found no evidence that a minority shareholder with a directive role in the company "acted or was materially influential in a truly managerial rather than

[177] Claimant's Rejoinder, ¶¶ 196–199.

[178] Claimant's Counter-Memorial, ¶¶ 110–111.

[179] Claimant's Counter-Memorial, ¶ 113.

[180] Claimant's Counter-Memorial, ¶¶ 112–114.

[181] Claimant's Counter-Memorial, ¶¶ 115–116.

[182] Claimant's Counter-Memorial, ¶¶ 120–121.

technical or supervisory vein [as] [a]t all times he was subject to the direction of the Managing Director … who himself apparently controlled the largest single block of shares … and who in turn responded to the board of directors, of which Mr. and Mrs. Panagiotopulos were but two members."[183] Claimant argues that, contrary to *Vacuum Salt v. Ghana*,[184] in this case, Carlos Pellas had clear roles that allowed him to control SER and its subsidiaries, considering that he was not subject to the authority of other individuals. Instead, Mr. Pellas was "the highest officer" and the single largest shareholder. Also, he was in charge of directive tasks, such as supervising the investment of Campos de Pesé in bioethanol production, executing loan guarantees for Campos de Pesé, and concluding financial agreements.[185]

VI. ANALYSIS OF THE TRIBUNAL

A. THE BURDEN OF PROOF

136. The Tribunal agrees with Claimant that it has the burden to prove the nationality of the 26 Individuals as well as their control over Campos de Pesé and that Respondent has the burden to prove its objections to jurisdiction. This means that Claimant must prove the facts that support its allegation that the 26 Individuals who are claimed to be Italian shareholders, had control over Claimant.

137. Before proceeding into the analysis of the facts and the evidence submitted by Claimant the Tribunal must refer to the timing of production of relevant documents by Claimant, and to the reluctance of Mr. Pellas and Mr. Palazio to appear before this Tribunal.

138. The alleged control of Claimant by 26 Individuals who claimed to be Italian nationals was structured through a network of complicated corporate and trust structures in various jurisdictions that required, on the one hand, a complete disclosure of the documentation supporting the structure —subject, of course, to the confidentiality and reserve that applied in this arbitration— and, on the other hand, an explanation of the structure and evidence of the acts of control allegedly exercised by Mr. Pellas.

139. In connection with the documentation supporting the structure, Claimant initially claimed confidentiality over sections of the trust agreements that were relevant for the structure that evidenced the alleged control, and then, in its Rejoinder, decided to submit the documents that were allegedly reserved and confidential, together with expert evidence

[183] *Vacuum Salt Products Ltd. v. Republic of Ghana*, ICSID Case No. ARB/92/1, Award, 16 February 1994 [RL-0008], ¶ 53, referenced in Claimant's Counter-Memorial, ¶ 124.

[184] *Vacuum Salt Products Ltd. v. Republic of Ghana*, ICSID Case No. ARB/92/1, Award, 16 February 1994 [RL-0008].

[185] Claimant's Counter-Memorial, ¶¶ 126–127.

related to such documents. Respondent was therefore placed in a position where it could not submit additional expert evidence to question the new documents, but rather question the experts on such new evidence during the Hearing.

140. As regards the acts of control allegedly performed by Mr. Pellas, Respondent is correct in that a significant number of assertions made by Claimant in its submissions to support the facts related to such purported control relied on the testimonies of Messrs. Palazio and Pellas. Both were called by Respondent for cross-examination during the Hearing and the Tribunal expressly indicated its interest in hearing Messrs. Palazio and Pellas.

141. The Parties had agreed that the Hearing was open to the public and only a few weeks before the Hearing, Claimant first requested that the Hearing be closed to the public invoking issues of security and confidentiality that were not properly justified, much less proven. Finally, despite all reasonable solutions proposed by the Tribunal to facilitate the attendance of Messrs. Palazio and Pellas to the Hearing, and notwithstanding the lack of proper justification of their requests, they decided not to appear.

142. Respondent requested, and Claimant did not object to, the exclusion of their testimonies, the lack of which creates gaps in the evidence submitted to support the facts alleged by Claimant. Such evidentiary gap is only attributable to the unjustified reluctance of Messrs. Palazio and Pellas to comply with their obligation to appear at the Hearing.

B. THE LEGAL FRAMEWORK

143. Article I(2) of the BIT provides:

> "2. The term "investor" includes, for each of the Contracting Parties, the following persons that have made or will make investments in the territory of the other Contracting Party in accordance with the present Agreement:
>
> Any individual who is a national of one of the Contracting Parties, pursuant to its legislation;
>
> b) **Any juridical person**, whether a profit or non-profit organization, **established in the territory of one of the Contracting Parties pursuant to its internal legislation**, and which has its corporate address in the same, or **which is controlled directly or indirectly by nationals of one of the Contracting Parties** or by legal entities with a

corporate address in the territory of one of the Contracting Parties and incorporated pursuant to their legislation."[186]

144. In turn, Article 25 of the ICSID Convention provides:

> "(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and **a national of another Contracting State**, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.
>
> (2) "National of another Contracting State" means:
>
> (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and
>
> (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and **any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because <u>of foreign control</u>, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention**."

145. Invoking the aforementioned articles, Claimant asserts that this Tribunal has jurisdiction because the evidence on the record proves that Claimant is controlled, directly or indirectly, by 26 Individuals and all such individuals are Italian nationals. Respondent challenges both control and nationality.

146. Even though the Parties have made submissions and presented evidence on the nationality of the direct and indirect shareholders of Claimant, both Claimant and Respondent have placed special emphasis and have devoted most of their allegations and evidence to the issue of control. For the purposes of this dispute, Article I(2) of the BIT requires direct or indirect control, on the one hand, and that such direct or indirect control be exercised by Italian nationals. Consequently, the Tribunal must first determine whether Claimant is

[186] **CL-0001**, Agreement between the Government of the Italian Republic and the Government of the Republic of Panama on the Promotion and Protection of Investments signed in Venice, Italy on 6 February 2009.

controlled by the 26 Individuals who, according to Claimant, are Italian nationals. If there is control by such individuals, then the Tribunal must determine whether they have the Italian nationality. If there is no control, the debate on nationality becomes moot.

147. On the issue of control, the Parties do not dispute that the "control" referred to in Article I(2)(b) of the BIT and Article 25 of the ICSID Convention may be legal or de facto[187] and that if a shareholder holds the majority of the shares in a company or corporation, there is a presumption that such shareholder controls the company or corporation, absent evidence to the contrary.[188]

148. It is undisputed that none of the 26 Individuals who claim to be Italian nationals individually holds, directly or indirectly, the majority of the shares of Campos de Pesé.[189] Therefore, the presumption of control does not apply individually to any of the 26 Individuals.

149. The Parties do not differ in that the legal control of Campos de Pesé is a matter that must be established under Panamanian law, the law of the place of incorporation, and the jurisdiction in which it operates,[190] and that the legal control of SER is a matter that must be established under the laws of the BVI, the law of the place of incorporation and the jurisdiction in which it operates.[191]

150. It is also undisputed and supported by the evidence submitted before this Tribunal that, at all relevant times, PSE has held 100% of the shares of Campos de Pesé, and in turn, that SER has individually held the majority of the shares of PSE, also at all relevant times.

C. THE RELEVANT DATES

151. The Parties agree that one of the relevant dates for the purposes of jurisdiction is August 2014, the date of the alleged breach,[192] and they do not seem to have a substantial dispute on the relevance of the date in which Claimant expressed its consent to arbitration by filing the corresponding claim. Respondent, however, adds that the date of the investment (2011) is also relevant to establish jurisdiction, but Claimant disagrees.[193]

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[187] Claimant's Counter-Memorial, ¶ 93.

[188] Respondent's Reply, ¶ 96: "Evidence of actual exercise of control is required, such as through exercise of voting rights, particularly where an investor has not established ownership of the investment that would generally imply the legal right or capacity to exercise control."; Claimant's Rejoinder, ¶¶ 142–143.

[189] Respondent's Memorial, ¶ 58; Claimant's Counter-Memorial, ¶ 36.

[190] Respondent's Reply, ¶¶ 82–83; Claimant's Counter-Memorial, ¶ 95; Claimant's Rejoinder, ¶ 126.

[191] Respondent's Reply, ¶¶ 82–83; Claimant's Counter-Memorial, ¶ 95.

[192] Claimant's Rejoinder, ¶ 48.

[193] Claimant's Rejoinder, ¶ 48.

152. Given that the Tribunal will conclude that there was neither control on the date of the alleged breach nor control on the date of the filing of this arbitration, it does not need to analyze whether Claimant should have also established control on the date of the investment, as alleged by Respondent.

D. THE FORMS OF CONTROL ACCORDING TO CLAIMANT

153. Claimant submits that "it proved control of Campos de Pesé by Italian nationals in three different ways":[194] (1) majority ownership; (2) control over Claimant through the Board of Directors of SER; and (3) control through the actions of Carlos Pellas. The Tribunal will refer in the following paragraphs to each such forms of control and to the evidence submitted in support of each alleged form of control.

1. Control by majority ownership

154. As noted above, it is undisputed that at all relevant times Campos de Pesé was 100% owned by PSE, and in turn, that the majority of PSE's shares have been held individually by SER.

155. Claimant argues that the 26 Individuals collectively owned the majority of shares in SER, (i) some of them directly, (ii) some others through corporations in which they were allegedly controlling shareholders, and (iii) some others through trusts that they allegedly control, which trusts in turn, control corporations that are the direct shareholders of SER, which in turn controls Campos de Pesé through PSE.

156. According to Claimant, this collective and majoritarian ownership over SER's shares (a) creates a "legal presumption" of control under international law, and (b) evidences *de facto* control by the 26 Individuals because they voted their shares "in concert" to appoint SER's Board of Directors and to amend its M&A.[195]

157. Moreover, "as a matter of practice", the alleged Italian individuals who indirectly held shares in SER through holding companies frequently attended SER shareholder meetings to vote their shares in SER.[196]

[194] Claimant's Rejoinder, ¶ 60.

[195] Claimant's Rejoinder, ¶¶ 60–61.

[196] Claimant's Rejoinder, ¶ 105.

a. Legal control of Campos de Pesé under Panamanian law

158. Claimant's case is that 26 Individuals control SER (a BVI company) which in turn controls Claimant and therefore, the 26 Individuals indirectly have legal control of Claimant.

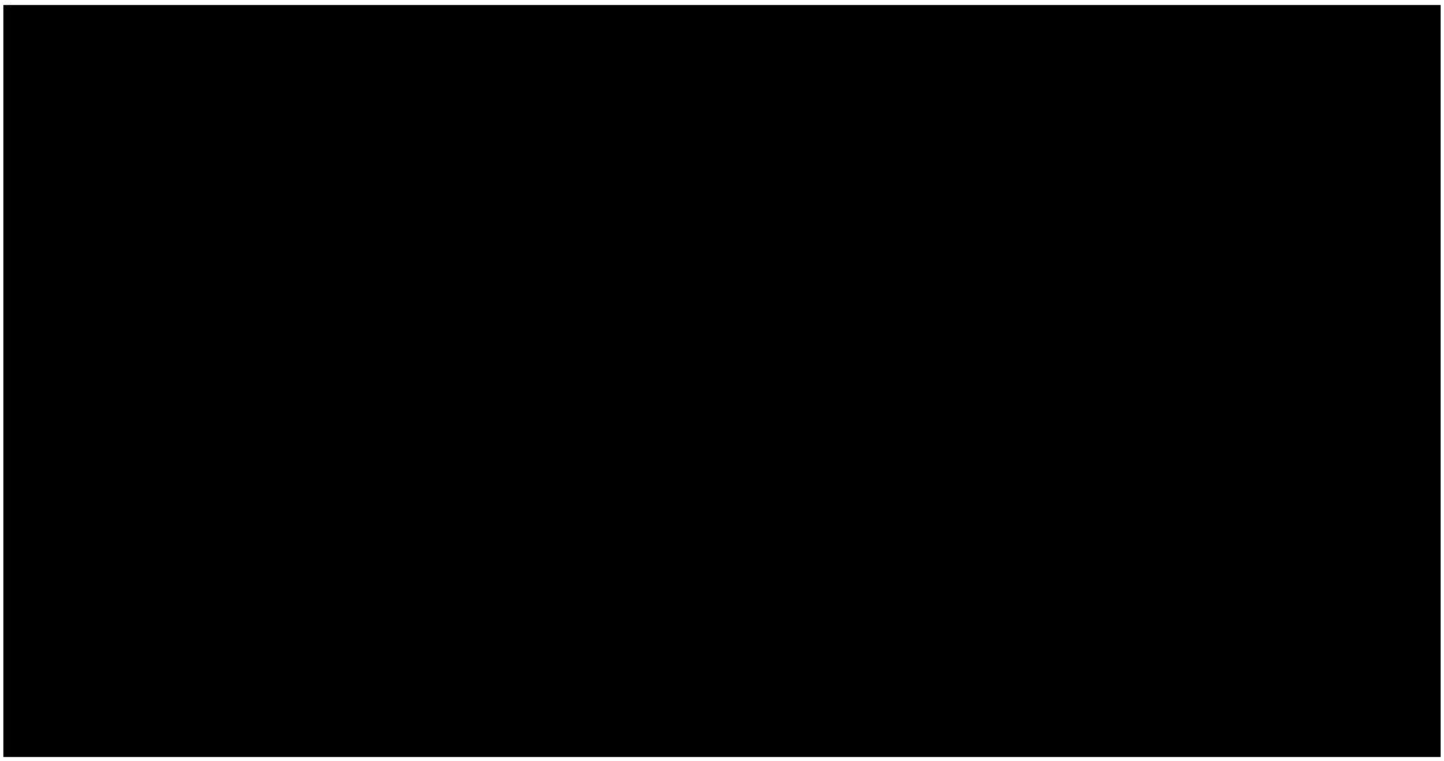
159. None of the 26 Individuals are registered in the books and records of Claimant in Panama as a shareholder of Claimant. Therefore, there is no direct legal control of Claimant by one or more of the 26 Individuals. However, Claimant argued that the 26 Individuals had indirect control of Claimant and submitted the expert report of a Panamanian lawyer, Mr. Jaime Mora, to support its allegation.

160. Mr. Mora in his expert testimony opined that the 26 Individuals had control of Claimant under Panamanian law. However, during the cross-examination at the Hearing he explained that under the laws of Panama the direct control of Campos the Pesé is only exercised by its shareholders (*i.e.*, PSE).[197] Mr. Mora was also questioned on whether there is a legal provision in Panama that defines or refers to indirect control. He indicated that there is no such provision either under Panamanian Law No. 32 or the Commercial Code of Panama.[198]

161. Mr. Mora was specifically asked in cross-examination to opine on the shareholding chart prepared and submitted by Claimant in this arbitration as Exhibit C-204-1. The chart contains 23 pages, each one picturing the corporate or trust structure under which one or more of the 26 Individuals allegedly controlled Claimant as of June 2011, August 2014, and May 2020. An example of one of the charts is copied below (see Exhibit C-204-1, page 3. Exhibit redacted for confidentiality).

[197] Transcript Hearing 20 June 2023, 190: 11–22 – 191: 1–8.

[198] Transcript Hearing 20 June 2023, 199: 2–22 – 200: 1–2.



162. The question put by Respondent to the expert referred to whether the individuals "*at the end of [the] chain*" (green boxes)[199] who allegedly control the trusts and corporations that are shareholders of SER (the 26 Individuals who allegedly control SER, the shareholder of Claimant, and possess Italian nationality), had control of Claimant. Mr. Mora testified that such individuals do not have control or management over a Panamanian company under Panamanian law and, accordingly, under said law the individuals have "*neither direct nor indirect*" control over Claimant.[200]

163. In sum, from the evidence submitted by Claimant it is clear for the Tribunal that, first, legal control of Panamanian companies is exercised by the shareholders; second, none of the 26 Individuals who allegedly control Claimant is a shareholder of Claimant; third, there is no provision under Panamanian law that refers to control through indirect ownership or management; and fourth and last, under Panamanian law none of the 26 Individuals, who allegedly are Italian nationals, exercises legal control over Claimant.

[199] The expert replied when submitted with page 12 of Exhibit C-204-1 but was presented with the entire set of charts found in the same Exhibit, all of which contained green boxes representing the 26 Individuals.

[200] Transcript Hearing 20 June 2023, 195: 9–11, 196: 11–22 – 197: 1–9.

b. Legal control of SER under BVI law

(i) Control by the shareholders of SER

164. Claimant argues that since the 26 Individuals control SER, which in turn controls Claimant, they indirectly control Claimant.

165. As a starting point the Tribunal observes that only 13 out of the 26 Individuals —allegedly Italian nationals—, representing a minority of less than 12% of the shareholdings of SER, were registered as shareholders of SER.[201] The other 13 individuals were not.[202]

166. No evidence was submitted in this arbitration of an agreement amongst the 26 Individuals that imposes on them the obligation to vote in a given sense or to collectively exercise their rights on SER, either directly for those registered as shareholders, or indirectly through their corporate structures for those who are not shareholders.[203]

167. Claimant heavily relies on Mr. Newton's expert report to assert that "[u]nder BVI law, the capacity to "control" and "manage" a company would typically require an individual or group of individuals acting in unison to be able to control voting power to the degree that they can amend the Memorandum and Articles of Association and appoint or remove members of the Board of Directors."[204]

168. According to Claimant, a group of individuals with sufficient voting power to amend the M&A and appoint and remove the members of the Board of Directors is said to have control and management over a company when "acting in unison."[205] Therefore, says Claimant, a group of shareholders may exercise control even if there is no agreement for all the shareholders to vote in a given sense. The mere fact of voting together in one same sense (in "unison", in the words of Mr. Newton), even in the absence of a prior agreement to do so, results in control of the company or corporation.[206]

169. However, neither Claimant nor Mr. Newton cite a provision of BVI law defining voting in "unison" or establishing that voting in "unison", by itself, amounts to legal control over the company or corporation by a group of individuals.

170. The Tribunal recalls that the expert testimony of Mr. Newton was submitted with Claimant's Rejoinder, together with the portions of the trust agreements that Claimant initially claimed were confidential, and therefore, Mr. Mark Forte, the expert of

[201] Claimant's Rejoinder, ¶ 155: Figure 1: Share Ownership in SER as of August 2014 by Italian Individuals and Trusts.

[202] Transcript Hearing 20 June 2023, 159: 3–17.

[203] Transcript Hearing 20 June 2023, 160: 22 – 161: 1–7.

[204] Claimant's Rejoinder, ¶ 93.

[205] First Legal Expert Opinion of Christopher Newton, ¶¶ 4.1–4.2.

[206] First Legal Expert Opinion of Christopher Newton, ¶ 4.3.

Respondent, was granted during the Hearing the opportunity to present his comments, and conclusions on Mr. Newton's legal expert opinions.

171. In redirect during the Hearing, Mr. Forte presented his comments to Mr. Newton's report and presented his conclusions.[207] Claimant chose not to cross-examine Mr. Forte and therefore his opinion and conclusions are uncontested.

172. According to Mr. Forte, under BVI law, for a group of shareholders to be considered to exercise control over a company or corporation, the mere act of voting together is not sufficient. There should be evidence of some agreement "or other record of alignment" to vote together in the same sense.[208] Absent an agreement or a record of alignment, each shareholder maintains the right to vote as it sees fit and there would not be a controlling group. They may vote in the same sense in one or more decisions, but that does not imply that they exercise control.

173. Mr. Newton and Mr. Forte disagreed on the relevance of the BOSS Act under BVI law for purposes of establishing control. The BOSS Act requires that corporations established in the BVI report the names of the beneficial owners of the company or corporation. Claimant and its expert are correct in that the BOSS Act is not a corporate registry or evidence of control under BVI corporate law. Nothing in the record suggests otherwise. However, report or lack thereof under the BOSS Act may be an indication of the existence or absence of control.

174. Mr. Forte explained, and his expert testimony was not questioned or challenged, that reporting under the BOSS Act is mandatory, not merely voluntary. He further explained that the fact that the alleged Italian individuals or their corporations and trusts were not reported as controlling SER is an indication under BVI law that they do not consider themselves as having control. While they each may not own the percentage of shares to individually be controlling entities, if they could "otherwise exercise control,"[209] for instance, by having an agreement to act in unison, they should be reported as controlling beneficial owners, but they were not.[210]

175. As discussed in paragraph 210 *infra*, only [redacted] but there is no evidence that such registration was in effect on the relevant dates.

[207] Transcript Hearing 20 June 2023, 158: 12–15.

[208] Transcript Hearing 20 June 2023, 167: 18–22 – 168:1–14.

[209] Transcript Hearing 20 June 2023, 166: 1–13.

[210] Transcript Hearing 20 June 2023, 167: 18–22 – 168:1–4.

176. The Tribunal therefore does not consider that under BVI law the mere fact that the 26 Individuals have voted certain decisions "in unison" is sufficient to establish legal control of SER by such shareholders.

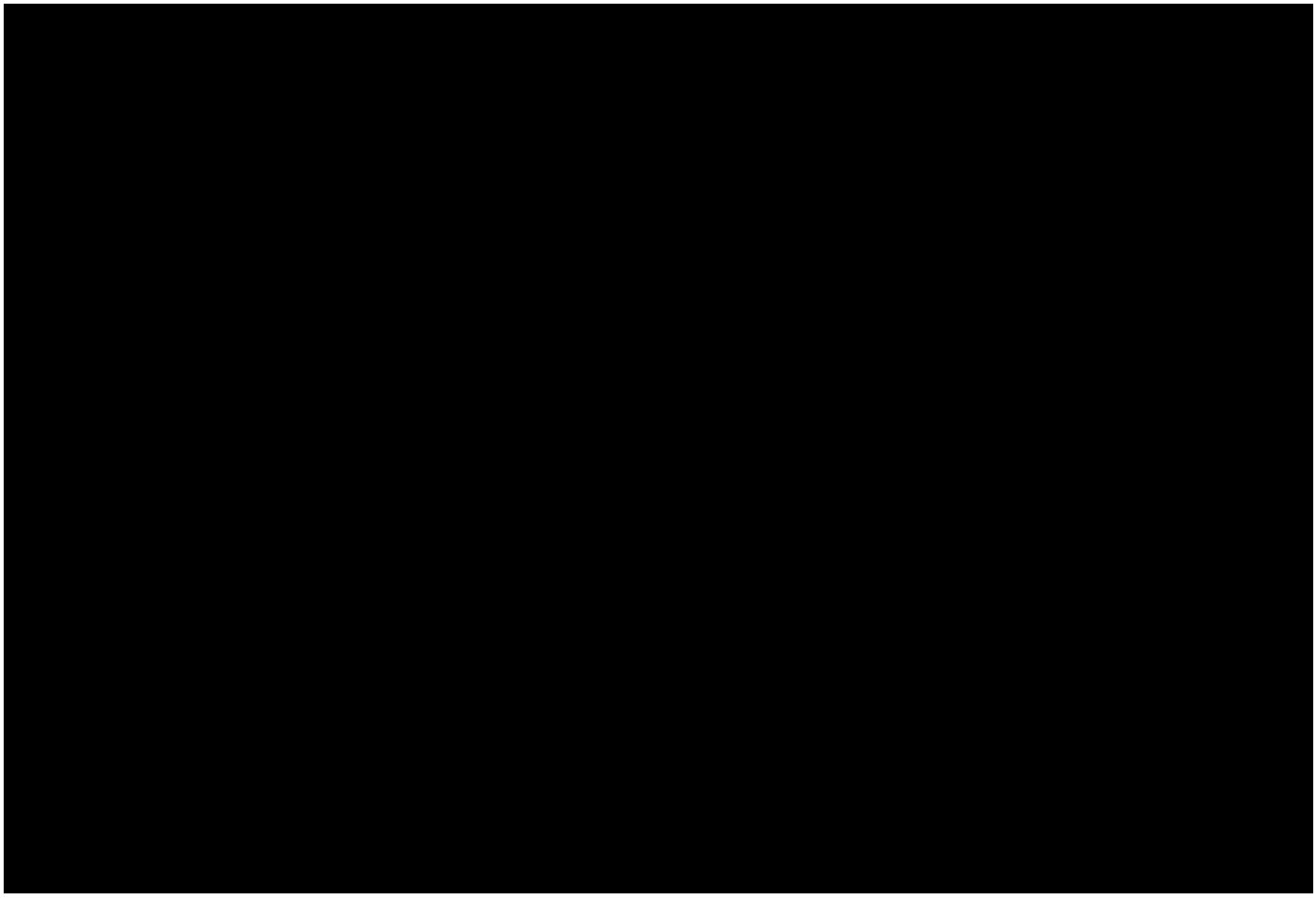
(ii) The [redacted]

177. [redacted] is a BVI company that held 21.68% of the shares in SER as of May 2020, and 20.70% as of August 2014. Claimant's case is that Mr. Pellas controls [redacted] and such company, in turn, is a shareholder of SER and an indirect shareholder of Claimant. Out of the 26 Individuals who claim to be both Italian nationals and direct or indirect shareholders of SER, Mr. Pellas is the one holding the majority of the alleged shareholding participation in SER. Without the shares allegedly controlled by Mr. Pellas, the 26 Individuals would not have —directly or indirectly— the majority of the votes.

178. Therefore, whether Mr. Pellas controls [redacted] is determinative for the resolution of legal control of SER by the 26 Individuals. Even in the scenario submitted by Claimant, where voting together could be considered control, if Mr. Pellas' percentages of participation are excluded, the 26 Individuals would not have the majority of the shares of SER.

179. Claimant submits that the shares of SER were held by [redacted] (BVI), whose shares were [redacted] by the [redacted] with [redacted] (CYM) as the [redacted] shares are held by the [redacted] (CYM) of which [redacted] is the [redacted] Mr. Pellas is the [redacted] of [redacted] and [redacted] of the [redacted] The structure on the relevant dates according to Claimant was as follows: [211]

[211] Transcript Hearing 20 June 2023, 208: 17–22 – 209: 1–12: Lindley's presentation.



180. The evidence submitted by Claimant in this arbitration contains serious gaps and inconsistencies that do not allow the Tribunal to conclude that Mr. Pellas controlled

181. Claimant and its experts on BVI and Cayman law focused on proving the powers of Mr. Pellas in

182. Mr. Pellas is the of the (CYM) and the director of (CYM) where he retained broad powers under its articles of association.[212]

183. Mr. Pellas is also the of the and as he retained ample powers over the itself, including the power to ,

[212] Transcript Hearing 20 June 2023, 227: 1–15, 231: 3–22, 232: 1–13.

[redacted] to himself at any time, and the power to grant or refuse consent for the transfer of any ownership interest in SER.[213]

184. But whatever the powers that Mr. Pellas may have on each of the [redacted] participating in the chain that he structured, the relevant issue in order to determine control by Mr. Pellas is whether the [redacted] he allegedly controlled, in turn, controlled [redacted] (*i.e.*, the BVI company that directly own shares in SER).

185. Neither the documents submitted by Claimant nor the expert report of Claimant's expert, Mr. Mander, evidence that the [redacted] allegedly controlled by Mr. Pellas have control over [redacted]. In particular, there is no persuasive evidence that [redacted] owns the shares of [redacted] and the documents submitted raise serious doubts as to their true dates and even their authenticity.

186. Mr. Lindley, Respondent's expert, indicated during his examination at the Hearing that Claimant did not submit, and therefore he did not have access, to conclusive evidence that [redacted] owns the shares of [redacted] He further indicated that the evidence submitted by Claimant contained a serious inconsistency. [redacted] was allegedly allotted 5,000 shares in [redacted] but according to the register submitted as evidence by Claimant, the allocation of shares was made to [redacted] on a date that preceded the one on which [redacted] came into existence, which is not legally possible.[214]

187. The register of members of [redacted] and the [redacted] Memorandum and Articles of Association state that [redacted] was incorporated on 10 January 2013. However, the register of members of [redacted] states that [redacted] as [redacted] of the [redacted] was allotted 5,000 ordinary shares of [redacted] on 7 October 2005,[215] this is more than seven years before [redacted] came into existence. Moreover, [redacted]. has an authorized capital of 10,000 shares, out of which only 5,000 have been issued and allocated,[216] and there is no evidence of [redacted] owning 10,000 shares.[217]

188. Claimant decided not to cross-examine Mr. Lindley on this point and therefore his findings remain uncontested. Moreover, in cross-examination, Mr. Mander, Claimant's expert, recognized that the registry of members of [redacted] submitted as

[213] Transcript Hearing 20 June 2023, 223: 1–22.

[214] Transcript Hearing 20 June 2023, 210: 10–22 – 211: 1–3.

[215] Transcript Hearing 20 June 2023, 211: 4–16.

[216] Transcript Hearing 20 June 2023, 212: 2–7.

[217] Transcript Hearing 20 June 2023, 240: 19–22 – 241: 1–16.

evidence is "clearly incorrect", precisely because it recorded [redacted] as shareholder before it even existed.[218]

189. The Tribunal concludes that there is no evidence that Mr. Pellas controlled, through [redacted], 20.7% of the shares of SER as of August 2014 or 21.68% of the shares of SER as of May 2020 (the relevant dates according to Claimant). In the absence of control of [redacted] by Mr. Pellas, the other individuals (25) who were allegedly Italian shareholders would not hold, directly or indirectly, the majority of the shares of SER on the said dates and therefore had no control of SER.

c. Control by attending shareholders meeting and voting in such meetings

190. Claimant argues that the 26 Individuals exerted their control over SER by attending shareholder meetings of the company and voting in such meetings in an aligned manner.

191. It is true that the 26 Individuals who are claimed to be Italian nationals attended the shareholder meetings of SER and voted in such meetings. However, the records of the shareholder voting of 2011 submitted in this arbitration indicate that except for [redacted] who were shareholders, voted their own shares and represented around 4.5% per cent of the shares of SER that year. The other individuals who voted in the shareholders meeting were not shareholders of SER and voted as "proxies" for the companies or trusts that they were representing.[219] Therefore, they were not voting in their individual capacity but as representatives or attorneys in fact of companies and trusts. Consequently, even assuming that they are Italian nationals, their votes as proxies of companies or trusts would not result in such vote counting as the vote of an Italian national, but as the vote of the trust or the corporation (which are not Italian).

192. Their acting as proxies, however, may be an indication of *de facto* control by the given individuals, if there is sufficient evidence that the individual exercising the proxy controls (legally or *de facto*) the entity granting the proxy. But even if the shareholders, other than Mr. Pellas, had *de facto* control of SER, the evidence does not support the allegation that Mr. Pellas controlled [redacted] legally or *de facto* and therefore, without the percentage allegedly held by Mr. Pellas, the other 25 remaining individuals who were allegedly Italian shareholders, did not exercise legal or *de facto* control of SER.

[218] Transcript Hearing 21 June 2023, 299: 7 – 301: 19.

[219] **C-0240**, Quorum Tally for Attendance at SER Shareholding Meeting, 22 March 2011.

2. Control by the SER Board of Directors

193. Claimant submits, on the one hand, that the SER Board of Directors was controlled by a majority of Italian nationals who thus controlled the company, and on the other, that it was the Italian nationals who "retained the power to vote their shares and did so in a coordinated manner to elect a common slate of seven Italian nationals to the board."[220]

194. Claimant did not submit persuasive documentary evidence or legal basis to support its allegation that the foreign nationality of the members of a Board of Directors is, by itself, evidence of foreign control of a company or corporation. Admitting this submission would imply that by merely electing directors of the nationality required to be protected under a given investment treaty —irrespective of the nationality of owners, shareholders, and/or controllers— a company could obtain the treaty protection it desires.

195. But even considering the aforementioned allegation in the context of Claimant´s submission there is no persuasive evidence of control. Claimant notes that the control is evidenced by (a) how SER's shareholders voted their shares to indirectly elect the members of the Campos de Pesé Board of Directors, and (b) how the SER Board of Directors controlled the operation of Campos de Pesé.

196. Claimant argues that the 26 Individuals —allegedly Italians— elected the members of the Board of Directors of SER,[221] that SER elected the majority of the Board of Directors of PSE (5 out of 7), that PSE appointed the Board of Directors of Campos de Pesé and therefore, that the 26 Individuals influenced the election of the Board of Directors of Campos de Pesé by appointing the members of the SER Board of Directors and that the latter controlled the operation of Campos de Pesé.

197. The Board of Directors of Campos de Pesé was appointed by its shareholder, PSE, and the Board of Directors of the latter was appointed by SER. The SER Board of Directors was in turn appointed by its shareholders.

198. However, the Tribunal has already concluded that one of those shareholders —[redacted] who holds 20.7% of the shares of SER as of August 2014 and 21.6% as of May 2020— is not controlled by Mr. Carlos Pellas and therefore, the other 25 individuals who were allegedly Italian shareholders, do not have the majority to appoint the Board of Directors of SER. Consequently, the SER Board of Directors is not controlled by a majority of Italian shareholders.

[220] Claimant's Rejoinder, ¶ 87.

[221] Claimant's Rejoinder, ¶ 135.

199. Moreover, to support its allegation of control over Campos de Pesé by the SER Board of Directors, Claimant relies on a series of decisions of the SER Board of Directors.[222] These decisions authorize SER to act as guarantor of loans obtained by Campos de Pesé from third parties. In Claimant's own words, the SER Board caused SER "to guarantee the loans to support that investment," which was the development of a bioethanol plant in Panama.[223]

200. However, a decision by a parent company to grant a guarantee in favor of its subsidiary to secure a third-party loan is not an act of control of the subsidiary by the parent company but rather an act related to the management of the parent company. There is no evidence that SER participated in the negotiation or approval of the loans or that the decision of Campos de Pesé to develop the bioethanol plant was the result of the control allegedly exerted by the Italian nationals. Claimant recognizes that it was Campos de Pesé who decided to increase its production capacity.[224]

201. In sum, even though the decision to guarantee the loans is related to Campos de Pesé, it is not an act of management or control by SER of the operations or activities of Campos de Pesé or evidence that the decision to invest in the biofuel production was made by the SER Board of Directors or at its direction, and not autonomously by Campos de Pesé.

202. Claimant also argues that SER "decided to use Campos de Pesé at (sic) the main implementing vehicle of its bioethanol project." However, the record of such decision is found nowhere in the case file, and there is no evidence of the joint or collective intervention of the alleged Italian nationals in those decisions.

203. The Tribunal concludes that there is no persuasive evidence of control, "active involvement"[225] or "strategic decision making" of the Italian nationals through SER in the operations of Campos de Pesé. The two individuals who may have shed light on this allegation —Mr. Pellas and Mr. Palazio— decided not to attend the Hearing without proper justification.

3. Control by Carlos Pellas

204. According to Claimant, evidence of Mr. Pellas' *de facto* control is found in that (i) he is the "single largest shareholder in SER;" (ii) he had the role of Chairman of the SER and PSE Boards of Directors;[226] (iii) he was a member of the Board of Campos de Pesé from

[222] Claimant's Rejoinder, ¶ 87, ¶ 117.

[223] Respondent's Rejoinder, ¶ 129.

[224] Claimant's Rejoinder, ¶ 118.

[225] Claimant's Rejoinder, ¶ 111.

[226] Claimant's Counter-Memorial, ¶ 120.

2010 until 2015;[227] (iv) he had relevant roles in the operations of Campos de Pesé, specifically in overseeing Campos de Pesé's investment in bioethanol production in Panama, executing loans guarantees for Campos de Pesé, and concluding finance agreements;[228] (v) in addition to his "share ownership" he "often controlled a significant portion or close to the majority of SER shares during its shareholder meetings;"[229] and (vi) [redacted].[230]

205. The evidence on a substantive part of the alleged role of Mr. Pellas in Campos de Pesé and particularly on whether that role could result in a *de facto* control of Claimant by Mr. Pellas, relies on the testimony of Mr. Pellas, which was stricken from the record given his unjustified decision not to attend the Hearing.

206. It is undisputed that Mr. Pellas is not a shareholder in SER and the Tribunal has already found no evidence of his alleged control of [redacted]

207. If Mr. Pellas voted as proxy of other SER shareholders, it does not prove that he had control of the shares he voted. Proxy votes may count as evidence of *de facto* control by the given individual if there is sufficient evidence that the individual controls (legally or *de facto*) the company, corporation or trust that is the actual shareholder in SER. There is no such evidence in the record.

208. Mr. Pellas' directive roles could demonstrate his involvement in the operations of Campos de Pesé, but only in a "supervisory vein"[231] and not in a managerial role with individual decision-making power. There is no evidence in the record that while he served in SER or PSE, Mr. Pellas ever adopted any decision involving Campos de Pesé. The mere allegation of "ample opportunity for control"[232] by Claimant is not enough.

209. Claimant also submits that Mr. Pellas is [redacted] which would be an indication of control. As noted in paragraphs 164 and 165 *supra,* registration [redacted] could be an indication of control.

210. In the case of Mr. Pellas, the only evidence submitted by Claimant of his registration as [redacted] The [redacted] does not indicate when the registration took place. Therefore, there is no evidence that the report on control was in place on the dates

[227] Claimant's Rejoinder, ¶ 136.

[228] Claimant's Counter-Memorial, ¶ 126.

[229] Claimant's Rejoinder, ¶ 138.

[230] Claimant's Rejoinder, ¶ 136.

[231] *Vacuum Salt Products Ltd. v. Republic of Ghana*, ICSID Case No. ARB/92/1, Award, 16 February 1994 [RL-0008], ¶ 237.

[232] Claimant's Counter-Memorial, ¶ 126.

[233] **C-203**, [Confidential].

that the Parties have identified as relevant dates, that is, on the date when the challenged measures were taken, and on the date when the Request was submitted, which in the view of Claimant are the relevant dates for purposes of jurisdiction.

211. Moreover, Claimant did not submit the [redacted], even though it had access to it, and the expert for Respondent, as mentioned below, indicated that the entire file was required to determine the reasons for the registration.

212. Respondent's expert, Mr. Forte —who was not cross-examined by Claimant— expressed doubts as to the registration under [redacted] because Mr. Pellas was not a direct shareholder of SER and, in any case, his alleged beneficial ownership through [redacted]

213. Mr. Forte further indicated that there was no clarity as to the grounds on which Mr. Pellas was reported as beneficial owner. Mr. Forte testified —and Claimant did not challenge such testimony nor did it challenge [redacted] — that only the [redacted].[234] In this regard, Mr. Forte stated during the Hearing that "[T]he only explanation I feel I can come to from that as to why Mr. Pellas would have been reported [redacted] is that they do not actually exercise any control over SER as one definitive unified voting bloc. If they did control SER, they are not reported as doing so, and [redacted] The Company would be in breach."[235]

214. Based on the foregoing, the Tribunal is of the view that Claimant has not proven that Mr. Pellas controlled SER on all the relevant dates, neither legally or *de facto*, and neither directly nor through [redacted]

E. NONATTENDANCE OF MR. PELLAS AND MR. PALAZIO AT THE HEARING

215. The Tribunal has concluded that there is no evidence of control, legal or *de facto*, by the 26 Individuals. It will now briefly refer to the consequences of the unjustified decision of Mr. Palazio and Mr. Pellas not to attend the Hearing, despite having been called for cross-

[234] Transcript Hearing 20 June 2023, 169: 14–22 – 170: 1–5.

[235] Transcript Hearing 20 June 2023, 170: 17–22 – 171: 1–7.

examination, which final decision was communicated to the Tribunal just five days before the Hearing.[236]

216. After the decision of the aforementioned witnesses not to attend, Claimant alleged that it had sufficiently proven indirect control of Italian nationals over Campos de Pesé, and that no claim of adverse inferences over the nonattendance of Mr. Pellas and Mr. Palazio could "contradict reality."[237] However, the Tribunal finds that the testimonies of those witnesses was an essential part of the evidence submitted by Claimant and that their oral examination at the Hearing could have clarified issues that either lack evidence, or for which documents were not sufficient or for which documents required an explanation.

217. The Tribunal does not need to draw adverse inferences from the reluctance of Messrs. Palazio and Pellas, but agrees with Respondent as to the facts that remained unproven due to Mr. Pellas and Mr. Palazio's nonappearance:

(a) That Mr. Pellas controlled Campos de Pesé through the managing position that he held. In Respondent's words: There is no evidence "suggesting that Carlos Pellas was involved in any way in making the decisions of the business and operation and activities of Campos de Pesé."[238]

(b) That Mr. Pellas was the final beneficiary of 20% of SER and the controlling shareholder of Campos de Pesé or SER.[239]

(c) That the SER Board of Directors was involved in the decision making of Campos de Pesé,[240] particularly in the relevant dates identified.

(d) That Mr. Palazio was the final beneficiary of around 3% of SER.[241]

VII. CONCLUSION

218. Based on the above considerations, the Tribunal concludes that the 26 Individuals that allegedly hold Italian nationality did not control, directly or indirectly, legally or *de facto*, Campos de Pesé and therefore Claimant is not a protected "investor" under article I(2)(b) of the BIT.

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[236] See *supra,* ¶ 30.

[237] Transcript Hearing 20 June 2023, 131: 3–7.

[238] Transcript Hearing 20 June 2023, 24: 1–4.

[239] Transcript Hearing 20 June 2023, 24: 7–16.

[240] Transcript Hearing 20 June 2023, 24: 17–22, 25: 1–5.

[241] Transcript Hearing 20 June 2023, 25: 6–12.

219. Consequently, the Tribunal has no jurisdiction to hear Claimant's claims.

VIII. COSTS

A. CLAIMANT'S COSTS SUBMISSION

220. In its submission on costs, Campos de Pesé submits that it is entitled to receive USD $2,286,692.10 for the costs incurred in the jurisdictional phase of these proceedings based on Section 22 of Procedural Order No. 1.[242] These costs include payments to ICSID, professional fees and expenses incurred by Claimant's representatives, professional fees and expenses paid to their expert witnesses and costs in connection with printing, shipping, document production, photocopies, travel, research fees, and translation services.[243] The following chart summarizes Claimant's costs:

Payments to ICSID	USD $400,000
Professional Fees Incurred by Counsel for Claimant	USD $1,510,896.54
Expert Fees and Expenses	USD $358,030.44
Other Costs	USD $17,765.12
TOTAL	**USD $2,286,692.10**

221. Claimant did not make any specific submission on costs in its Counter-Memorial on Jurisdiction or in its Rejoinder on Jurisdiction.

B. RESPONDENT'S COSTS SUBMISSIONS

222. Respondent submits that it is entitled to receive a total amount of USD $1,767,741 for the costs incurred in the arbitration. These costs include payments to ICSID, costs of legal representation, expert witnesses, and travel expenses.[244] The following chart summarizes Respondent's costs:

Payment to ICSID	USD $400,000
Costs of Legal Representation	USD $690,010.69
Experts	USD $673,271.1
Travel Expenses	USD $5,459
TOTAL	**USD $1,768,741.79**

[242] Claimant's Statement of Costs, ¶ 1.

[243] Claimant's Statement of Costs, ¶ 2–3.

[244] Respondent's Statement of Costs, p. 1–2.

223. Respondent did not make any specific submission on costs in its Memorial on Jurisdiction or in its Reply on Jurisdiction. Nonetheless, on 9 May 2023, Respondent requested the Tribunal to consider Claimant's "misconduct" in the production of evidence related to the alleged indirect control of SER for the purposes of the decision on the allocation of costs in this arbitration.[245] At the Hearing, Respondent also requested that the Tribunal consider in the decision on costs the nonattendance of Messrs. Pellas and Palazio at the Hearing.[246]

C. THE TRIBUNAL'S DECISION ON COSTS

1. The applicable rules on allocation of costs

224. Both the 2006 ICSID Rules and the ICSID Convention refer to costs in ICSID arbitration proceedings.

225. Article 28(2) of the ICSID Rules provides that "[p]romptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the Tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding (…)".

226. The Tribunal received the Parties' statements on costs on 8 September 2023.

227. Article 61(2) of the ICSID Convention provides that the "(…) Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award."[247]

228. It is widely recognized that, pursuant to the aforementioned provisions "ICSID tribunals exercise a large measure of discretion on deciding how and by which party such costs shall be paid."[248]

229. On the basis of this discretion, ICSID tribunals have either followed a "costs lie where they fall" approach in which each party covers their own costs, or have applied the "costs

[245] Respondent's Letter of 9 May 2023. See *infra*, ¶ 222.

[246] Transcript Hearing 20 June 2023, 78: 10–16. See *infra*, ¶ 223–224.

[247] ICSID Convention, Article 61(2).

[248] *National Gas S.A.E v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award, 3 April 2014 [RL-0009], ¶ 153.

follow the event" approach, deciding that the unsuccessful party shall cover all costs.[249] As will be further developed in the following subsections, the Tribunal is of the view that Claimant must cover all the costs in this arbitration (i) under the "costs follow the event" approach as the unsuccessful party in the arbitration, and (ii) in light of Claimant's conduct throughout the proceedings.

2. Respondent was successful in its jurisdictional defense

230. For the reasons explained throughout this Award, Panama's objection to the Tribunal's *ratione personae* jurisdiction under Article I(2) of the BIT and Article 25(2)(b) of the ICSID Convention has prevailed. Consequently, Campos de Pesé's allegations have failed, and the Tribunal has declined jurisdiction.

231. Following the "costs follow the event" approach, Claimant as the unsuccessful party is to bear all expenses incurred by both Campos de Pesé and Panama.[250]

3. The procedural conduct of Campos de Pesé merit that it bears all the fees and costs

232. But even if the Tribunal were not to follow the "costs follow the event" approach, the Tribunal has considered Claimant's procedural conduct, and, in particular, its multiple procedural requests, which have seriously impaired the smooth and expedited development of this proceeding, and particularly (1) the unreasonable delay in the production of documents relating to the ownership and control of SER, and (2) the last-minute notice of nonattendance of Mr. Pellas and Mr. Palazio to the Hearing.

233. First, Claimant unreasonably delayed the production of relevant documents relating to alleged indirect ownership of SER, the identities of the managers and directors of each company and their nationalities.[251] The Tribunal recalls that the Parties agreed to extend the deadline to file the pending submissions on jurisdiction — Reply and Rejoinder at that time—,[252] as Claimant had offered to gather and produce those documents.[253] However, the documents were only produced in full with Claimant's Rejoinder and the Tribunal was seized with a request from Respondent to exclude such documents and had

[249] *Guardian Fiduciary Trust, Ltd, f/k/a Capital Conservator Savings & Loan, Ltd v. Macedonia, former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/12/31, Award, 22 September 2015 [RL-0017], ¶ 149–150.

[250] See *Saba Fakes v. Republic of Turkey,* ICSID Case No. ARB/07/20, Award, 14 July 2010 [RL-0026], ¶ 152.

[251] Respondent's Reply, ¶ 119.

[252] **R-0151**, Chain of emails between Respondent's counsel and Claimant's counsel starting on 27 June 2022, p. 9.

[253] Respondent's Letter of 9 May 2023, p. 4, Attachment 3, p. 2.

to make arrangements to deal with a situation where Respondent's Cayman Islands, BVI and Delaware law experts did not have the opportunity to rely on complete documentation for the Reply while Claimant's Rejoinder "extensively relied" on the documents previously considered by Claimant as "irrelevant."[254]

234. Second, as noted in the summary of the procedural history in Section II of this Award,[255] despite the efforts of the Tribunal to accommodate the untimely and unjustified requests of Claimant for the appearance of Messrs. Palazio and Pellas at the Hearing, including the decision to close the Hearing to the public while they were testifying —even though Procedural Order No. 1 provided for a public hearing—, Claimant simply informed on 15 June 2023, just five days before the Hearing, that they would not appear to be cross-examined.

4. Conclusion

235. In accordance with the foregoing, Claimant shall bear its own fees and expenses and the following amounts (in USD):

(a) Respondent's legal fees, costs, and expenses: **USD $1,368,741.79**.

(b) The costs of the arbitration proceedings, including the fees and expenses of the Tribunal, ICSID's administrative fees, and direct expenses, as follows:

(i)	Arbitral Tribunal Fees and Expenses:	
(1)	Mr. Eduardo Zuleta:	USD $126,398.93
(2)	Prof. Brigitte Stern:	USD $90,428.48
(3)	Mr. Horacio Grigera-Naón:	USD $107,888.57
(ii)	ICSID Administrative Fees:	USD $168,000
(iii)	Direct expenses	USD $82,494.56
Total:		**USD $575,210.54**

The above costs have been paid out of the advances made by the Parties in equal parts in the total amount of USD $800,000.

[254] Respondent's Letter of 9 May 2023, p. 4.

[255] See *supra*, ¶ 25–28.

The ICSID Secretariat will refund the balance left in the case account at the end of the proceeding in the same proportion as the advances were made (*i.e.,* 50%/50%).

Claimant shall accordingly reimburse Respondent the amount of **USD $287,605.27** corresponding to the **USD $400,000** advanced by Respondent, plus the Respondent's share in the investment income accrued in the case account, amounting to **USD $11,311.55,** minus **USD $123,706.28**, to be reimbursed by the ICSID Secretariat to Respondent.

IX. DECISION

236. For the reasons set forth above, the Tribunal decides as follows:

(1) The Tribunal does not have jurisdiction over the claims filed by Claimant, Campos de Pesé, S.A., against Respondent, the Republic of Panama.

(2) Claimant, Campos de Pesé, S.A., shall bear its own costs, fees, and expenses, the costs of this arbitration, and the fees, costs, and expenses of the Republic of Panama as per paragraph 235 of this Award.

(3) All other requests for relief are rejected.

[Signed]

Horacio Grigera Naón
Arbitrator

Date: 28 February 2024

[Signed]

Brigitte Stern
Arbitrator

Date: 27 February 2024

[Signed]

Eduardo Zuleta
President of the Tribunal

Date: 28 February 2024