IN THE MATTER OF AN ARBITRATION UNDER THE DOMINICAN REPUBLIC CENTRAL AMERICA FREE TRADE AGREEMENT AND THE UNCITRAL RULES OF ARBITRATION (2010)

Between:

DAVID R. AVEN, SAMUEL D. AVEN, CAROLYN J. PARK, ERIC A. PARK, JEFFREY S. SHIOLENO, DAVID A. JANNEY AND ROGER RAGUSO (United States of America) (Claimants)

v

THE REPUBLIC OF COSTA RICA (Respondent)

CLAIMANTS' COSTS SUBMISSIONS

Counsel for the Claimants

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The Claimants file these costs submissions following the Tribunal's direction of 1 March 2018. The Claimants claim all of their recoverable costs in connection with the arbitration, plus post-award interest on costs.

The Basis and Allocation of Costs

1. The Tribunal's power to make a costs award in this arbitration is set out in Article 10:26(1) of the Dominican Republic Central America Free Trade Agreement (the "**DR-CAFTA**"), Article 40 of the UNCITRAL Rules, and Section 62 of the Arbitration Act 1996, which governs this arbitration since it is seated is London, England.

2. Article 10:26(1) of DR-CAFTA states: "*A tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules.*"

3. Article 40 of the UNCITRAL Rules confirms the Tribunal's power to make a costs award in this arbitration "*to the extent that the arbitral tribunal determines that the amount of such costs is reasonable*." Article 42 provides that the costs of the arbitration should "*in principle be borne by the unsuccessful party or parties*" [emphasis added] and that the Tribunal "*may apportion each of such costs between the parties if it determines that apportionment is reasonable taking into account the circumstances of the case*".

4. Section 61 of the Arbitration Act states: "*(1) The tribunal may make an award allocating the costs of the arbitration as between the parties, subject to any agreement of the parties. (2) Unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs.*" [emphasis added]

Interest

5. The UNCITRAL Rules do not contain any express provisions on the power of the Tribunal to award interest. However, the Claimants submit that the Tribunal in this arbitration has a broad discretion to grant post-award interest on any costs pursuant to Section 49 of the Arbitration Act: "[…] *(2) Unless otherwise agreed by the parties the following provisions apply.* […] *(4) The tribunal may award simple or compound interest from the date of the award (or any later date) until payment, at such rates and with such rests as it considers meets the justice of the case, on the outstanding amount of any award (including any award of interest under subsection (3) and any award as to costs).*" [emphasis added]

The Claimants are entitled to their full costs of the arbitration

6. The Claimants claim both their share of the costs of the arbitration and their reasonable legal and other costs incurred in respect of this arbitration. If the Tribunal concludes that the Claimants have been the successful party in this arbitration, the

Claimants submit that the Tribunal should make a costs award for the full sum of the Claimants' claim for their costs of the arbitration, being US$ 8,856,433.53.

7. Given the provisions of the DR-CAFTA, the UNCITRAL Rules and the Arbitration Act referenced above, it is clear that if the Claimants succeed in the arbitration, they ought to be awarded their costs of the arbitration, including legal and other expenses.

8. Although some investment arbitration tribunals order the parties to bear their own costs, the UNCITRAL Rules and the curial law of this arbitration both start from the presumption that the unsuccessful party bears the costs of the successful party. The clear logic is that the successful claimant has been forced to prosecute its case in arbitration in order to recover the losses and damages suffered as a result of the State's actions. The costs of that arbitration ought to be paid by the State as, otherwise, the successful claimant will not have recovered its full measure of loss and damage (since the costs of obtaining compensation reduce the compensation obtained), thereby infringing the principle of full reparation enshrined in *Chorzów Factory* and the ILC Draft Articles on State Responsibility; see also Achmea B.V. v The Slovak Republic - ¶¶347-348. (UNCITRAL Rules treaty case in which tribunal *"prefers the more recent practice in investment arbitration of applying the general principle of "costs follow the event," save for exceptional circumstances"*).

9. This is particularly true in the present case since, as has been extensively demonstrated in the arbitration, Costa Rica acted in an intentional and unlawful way that resulted in the destruction of the Claimants' investment. The Claimants were forced to resort to arbitration under DR-CAFTA in an effort to recover their investments. The cost of doing so ought to be borne by Costa Rica, since Costa Rica is the guilty party that has breached the terms and conditions of the treaty. This is especially warranted by the facts and evidence revealed in the proceedings. Evidence clearly showed that the Claimants were issued all the required and necessary permits by all the relevant permitting Government agencies. The State illegally, and without due process, shut the project down as the Claimants were in the process of lawfully carrying out the infrastructure construction that was authorized by the permits they had obtained. The State then maliciously slandered and defamed Mr Aven by accusing him, with no proof, of having "defrauded" SETENA, and "duping" SETENA into issuing the relevant environmental permits. This was a preposterous accusation. Mr. Aven keyed in on the absurdity of these accusations during his cross examination, when he noted the simple point that SETENA had never stated that they had been duped. As Mr. Aven pointed out none of "duping" assertions were ever asserted at the criminal trial, and Costa Rica did not produce any SETENA witness to tell the Tribunal that they had been "duped". Mr. Aven categorically denied the duping assertion and there was no testimony by anyone that backed up Costa Rica's allegation. None of things that Mr. Aven stated in his two witness statements, and orally at the hearing, were ever contradicted or denied by any State witnesses. Mr. Aven took an oath to tell the truth and there was no evidence presented that proved any of his testimony was anything but the truth. We state the above not to re-argue the Claimants' case again, but only to show the egregious nature of the Respondent's conduct of this arbitration both before, during, and after the hearing. This conduct fully justifies, if any justification were needed, an award of the Claimants' full costs and expenses as set out in this submission.

10. This is not a case in which merely an honest difference of opinion existed between the State and the investors. This is a case where the Claimants were issued all the required and necessary permits by the relevant agencies. The Claimants were in the process of lawfully carrying out the construction authorized by the permits, when other Government agencies (with no substantiation) made allegations that contradicted the findings on which the permits were based. The State then acted to shut down the Claimants' investment on the basis of these unsubstantiated allegations of wetlands and, furthermore, to prosecute Mr Aven and Mr Damjanac for environmental crimes. The arbitration would not have been necessary had the various Costa Rican agencies simply complied with their own law, their responsibilities and obligations under the law to comply with SETENA resolutions, and the State's obligations under DR-CAFTA. Given all of the above, it is clear that the Claimants' full costs incurred in prosecuting the arbitration ought to be borne by Costa Rica.

11. Further, the Respondent's approach to the arbitration unnecessarily increased the costs the Claimants were required to pay. The Claimants have always maintained that this arbitration is not about the question of whether there were wetlands on the Las Olas project site in 2016. That issue is not relevant to the matters before the Tribunal. The Claimants are confident that the Tribunal would rather have focussed on the true relevant facts that in 2004, 2006, 2008, 2010 and 2011 the appropriate agency, SETENA, determined there were no wetlands on the Las Olas site. The Claimants are also confident that the Tribunal will have focussed on the fact that this issue was not raised in the criminal trial. This "fog of war" defence, regarding the project site in 2015, was newly raised by the Respondent in this arbitration, with wild assertions and no contemporaneous fact or evidence to back it up. Yet, the Respondent's Counter-Memorial devoted significant effort to attempting to prove their fog of war wetlands theory. The Respondent engaged experts to opine on this issue in 2015, since Costa Rica did not want to focus on the fact that MINAE, SETENA and INTA experts were all saying in 2004, 2006, 2008, 2010 and 2011 – that at those relevant points in time there were no wetlands on the Las Olas project site. In making their "fog of war" argument the Respondent forced the Claimants to engage in an after the fact exercise on the existence of wetlands in 2016, an issue which had already been determined by the above various SETENA resolutions confirming that no wetlands existed (backed up by the State-commissioned INTA report).

12. The raising of this irrelevant issue by the Respondent required the Claimants to engage Dr Baillie and Environmental Resources Management ("**ERM**") to rebut the expert evidence presented by the Respondent, and required Vinson & Elkins and Batalla to devote significant time to this issue. This included two separate site visits by the Respondent's experts and varying numbers of the Respondent's personnel (who turned up unannounced), all attempting to prove the that wetlands existed on the project site in 2016. This, as the Claimants have argued, has no bearing on the Tribunal's decision on the Claimants' claims, and the Claimants are confident the Tribunal will have rejected the Respondent's "fog of war" defence.

13. To give the Tribunal an illustration of the effect of the Respondent's irrelevant and unnecessary arguments, the Claimants' costs of dealing with just this issue total at least US$ 410,395.57, amounting to: (a) US$ 90,088.64 in respect of Vinson & Elkins' fees (see Annex A); (b) US$ 201,749.02 in respect of Batalla's fees (see

Annex C); and (c) US$ 118,557.91 in respect of the fees and expenses of Dr Baillie and ERM (see Annex E)

14. The Respondent has repeatedly pushed their "fog of war" defence in an attempt to obscure the truth by interjecting allegations and assertions in the place of facts and evidence. The facts and evidence, that were clear from the very beginning, show that it was the State who established the laws, the rules, the regulations and the procedures that were explicitly followed by the Claimants and the Costa Rican professionals that they hired, including expert Costa Rican attorneys. It was the State that issued the SETENA resolutions in 2004, 2006, 2008, 2010 and 2011. It is preposterous to allege, after the fact, that on 5 different occasions Mr. Aven "duped" SETENA into issuing separate Resolutions stating there were no wetlands. It was the State that issued the construction permits that permitted the Claimants to begin the infrastructure construction. It was a State agency, INTA, that conducted a Wetland inspection using soil studies that determined there were no wetlands. That INTA study was ordered by Mr. Luis Martinez, the criminal prosecutor, however, when INTA determined there were no wetlands on the Las Olas site, the report was summarily rejected by Mr. Martinez, telling Mr. Aven he did not believe that report. As Mr. Aven pointed out at the hearing the law is not based on a prosecutor's belief system, but is based on facts and evidence. Mr. Martinez totally disregarded the very foundation stone of criminal law that states it is objective evidence that determines whether someone has committed a crime, not a prosecutor's personal belief system. Again, this review of the facts and evidence is not made in order to re-argue the Claimants' case on the merits. The Claimants are very confident the Tribunal has already come to the same conclusions as noted above. Rather, this review is made to show Costa Rica's flagrant and egregious actions in order to demonstrate the unreasonableness of the Respondent's approach to this arbitration. The Claimants' intention is to demonstrate to the Tribunal why it ought to award the Claimants their full costs in this case.

Total costs claimed

15. In this costs claim, the Claimants claim the full fees they will be required to pay to Vinson & Elkins and Dr Weiler at their standard hourly rate. These amounts will be payable should the Claimants prevail in the arbitration, and the following constitute the Claimants' reasonable and true costs of bringing this arbitration.

16. The Claimants submit that their claims for costs and interest are reasonable and proportionate in the context of an investment arbitration of this kind, the factual complexity and the issues that were raised by the Respondent and required rebuttal.

17. As to their reasonable legal and other costs, the Claimants claim:

    (a) US$ 5,276,096.55 in respect of Vinson & Elkins' fees and disbursements, summarised in the tables set out in Annex A;

    (b) US$ 563,937.71 in respect of Mr Weiler's Fees, set out in Annex B;

    (c) US$ 535,033.24 in respect of Batalla's Fees, set out in Annex C;

    (d) US$ 76,581.51 in respect of witness costs and expenses, set out in Annex D;

(e) US$ 1,299,784.52 in respect of expert fees and expenses, set out in Annex E;

(f) US$ 1,105,000.00 in respect of Tribunal and ICSID fees, set out in Annex F; and

(g) Post-award interest on the above costs at a rate of 8%, being the rate of interest on judgment debts in England and Wales, the seat of the arbitration.

18. The Claimants acknowledge that, consistent with their letter of 23 July 2016, in the event that the Claimants succeed in the arbitration, they will nonetheless pay the reasonable additional flight, train and hotel expenses incurred by the Tribunal and the representatives of the Respondent in order to attend the hearing on quantum in February 2017. The Claimants reserve the right, if necessary, to comment on the reasonableness of the Respondent's claimed additional expenses.

Conclusion

19. For all of the above reasons, the Claimants respectfully request that the Tribunal order the Respondent to pay the full amount of the Claimants' costs of the arbitration, being US$ 8,856,433.53, and order the Respondent to pay interest at 8% per annum on all sums awarded in respect of costs, from the date of the Award until payment is received by the Claimants.

Respectfully submitted

15 March, 2018

VINSON & ELKINS R.L.L.P.

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ANNEX A

1. Vinson & Elkins RLLP – Fees and disbursements

The Claimants' total legal costs are set out below:

Vinson & Elkins RLLP Fees		
Period	**Fees (US$)**	**Disbursements (US$)**
September 2014	7,757.47	0.00
October 2014	10,154.38	273.30
November 2014	13,678.16	146.76
December 2014	21,319.62	203.25
January 2015	10,413.47	873.96
February 2015	1,522.24	0.00
March 2015	1,044.55	3.48
April 2015	15,737.02	38.25
May 2015	20,132.13	161.12
June 2015	53,559.15	7,225.34
July 2015	69,440.91	12,555.43
August 2015	27,784.09	8,277.48
September 2015	143,552.27	3,439.86
October 2015	286,129.55	36,687.81
November 2015	482,218.18	50,243.37
December 2015	49,361.36	55,622.75
January 2016	42,140.91	884.41
February 2016	25,334.09	1,141.30
March 2016	56,775.00	995.60
April 2016	104,631.82	523.04
May 2016	84,163.64	1,415.19

Vinson & Elkins RLLP Fees		
Period	**Fees (US$)**	**Disbursements (US$)**
June 2016	228,772.73	43,682.01
July 2016	290,095.45	7,882.17
August 2016	201,788.64	28,652.81
September 2016	63,309.09	61,948.01
October 2016	174,518.18	11,837.45
November 2016	483,629.55	95,955.01
December 2016	527,431.82	139,713.62
January 2017	203,268.18	12,841.51
February 2017	403,190.91	28,666.96
March 2017	421,118.18	11,796.74
April 2017	75,586.36	40.79
Post-April 2017		26,768.68
March 2018 (estimated)	26,000	
TOTAL	**4,625,599.09**	**650,497.46**

2. Vinson & Elkins RLLP – Fees relating to environmental issues

Out of the above total, US$ 90,088.64 can be identified as having been incurred in dealing with the environmental issues raised by the Respondent in its Counter-Memorial, in the period from April 2016 to March 2017 (inclusive):

Vinson & Elkins RLLP Fees relating to environmental issues	
Period	**Fees (US$)**
April 2016	1,936.36
May 2016	645.45
June 2016	21,109.09
July 2016	11,638.64
August 2016	684.09

Vinson & Elkins RLLP Fees relating to environmental issues	
Period	**Fees (US$)**
September 2016	5,081.82
October 2016	0.00
November 2016	5,450.00
December 2016	17,981.82
January 2017	265.91
February 2017	4,995.45
March 2017	20,300.00
TOTAL	**90,088.64**

ANNEX B – Todd Weiler Fees

Period	Fees (US$)
11 May to 27 June 2015 inclusive	9,825.91
29 June 2015 to 15 January 2016 inclusive	238,636.09
January 2016 to March 2017 inclusive	315,475.71
TOTAL	**563,937.71**

ANNEX C – Batalla fees

1. Batalla (Costa Rica counsel) – Fees and disbursements

Period	Amount (US$)
Up to and including 31 July 2015	8,002.00
Up to and including 30 September 2015	1,892.00
Up to and including 31 October 2015	27,768.14
Up to and including 30 November 2015	37,808.23
Up to and including 31 December 2015	3,989.37
16 February to 29 February 2016 inclusive	565.00
3 March to 31 March 2016 inclusive	6,677.34
Up to and including 31 May 2016	24,159.79
Up to and including 30 June 2016	38,167.59
Up to and including 31 July 2016	34,318.61
Up to and including 31 August 2016	29,719.82
Up to and including 31 October 2016	54,021.06
Travel expenses relating to hearing for Batalla team	9,161.00
Up to and including 31 December 2016	170,584.82
6 January to 30 April 2017	88,198.47
TOTAL	**535,033.24**

2. Batalla (Costa Rica counsel) – Fees relating to environmental issues

From 8 April 2016 (being the date of receipt of the Respondent's Counter-Memorial), 45% of Batalla's time was spent on environmental issues	**US$ 201,749.02**

ANNEX D – Witness Costs/ Expenses

Witness	Amount (US$)
Manuel Enrique Ventura Rodríguez	21,154.69
Nestor Morera Víquez	7,700.00
Mussio & Madrigal	21,195.33
Esteban Bermudez Rodriguez	1,600.00
Jorge Antonio Briceño Vega	1,099.60
David Aven	6,092.33
Jovan Damjanac	14,916.00
Minor Arce Solano	2,705.29
Eric Park	118.27
TOTAL	**76,581.51**

ANNEX E – Expert Costs

Expert	Amount (US$)
Compass Lexecon	1,108,993.71
Dr Ian Baillie	23,636.70
ERM (Drs Calvo and Langstroth)	94,921.21
BLP Abogados – Luiz Ortiz	41,071.65
Gerardo Barboza	31,161.25
TOTAL	**1,299,784.52**

ANNEX F – Tribunal Costs

Description	Amount (US$)
Tribunal Fees	1,100,000.00
ICSID Registration Fee	5,000.00
TOTAL	**1,105,000.00**