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Date: May 18, 2020

Memorandum Recounting actions performed and observed by Legal Counsel

TO: Mr. David Richard Aven
Las Olas Real Estate Project
Parrita, Costa Rica

FROM: Manuel Ventura
FACIO ABOGADOS
San José, Costa Rica

1. ***Private and confidential; this memorandum is only intended for the private use of Mr. Aven and his legal counsel that is formally authorized by him to review.***

2. This detailed analysis is for claims of alleged professional solicitor negligence to be asserted by David Aven against the London law offices of Vinson & Elkins. The negligence allegedly occurred in their handling in a case entitled David Aven et al vs. Costa during the years of April of 2015 to September of 2018. The following recounting is to be analyzed by United Kingdom legal professionals in order to determine the qualification of the actions undertaken by said legal firm, under the existing statutes and precedents established under the laws of the United Kingdom.

3. ***Duty of care.*** Under Costa Rican legal and ethical standards, Duty of Care Civil Law provisions apply, and I understand similar standards apply for the UK. As a result, legal professionals must perform up to the highest standards defined by the Bar Association. Legal professionals must effectively use relevant evidence in the client's case that will enable him or her achieve the success they hired the legal professionals to secure. Under Civil Law standards, the client retains the legal professional in order to guide the client through legal proceedings to a successful outcome. Moreover, it is also understood that legal professionals must adhere to a client´s wishes, unless they are illegal or could jeopardize his or her integrity or well-being. If there is a situation that arises where legal professionals do not wish to follow their client´s case, the professional must decide whether or not he or she can continue to represent said client. The attorneys do not have the option to refuse to follow the client's instruction and make decisions they deem as best for the client, without his or her consent. This memorandum is being written to present certain facts and evidence in order to determine if Vinson & Elkins failed to operate under their Duty of Care to their client that may have resulted in serious damages to Mr. Aven. The Legal Professionals in the United Kingdom must apply corresponding standards under UK law to the following set of facts with regard to Duty of Care.

4. ***Responsibility assumed by Legal Counsel.*** Damages in the case pursued by Mr. Aven were in excess of 100 million United States of America dollars including pre and post judgment interest. Legal counsel retained by Mr. Aven for this specific purpose may be able to determine which type and to what extent legal professionals in his arbitration case are liable. There were other damages listed below in paragraph 107 for your consideration.

5. Early on Mr. Aven told me the following adage that appropriately characterizes his concerns with this case and the role of his legal counsel. Aristotle observed that "***nature abhors a vacuum***". Aristotle said every space in nature needs to be filled with something and if there is a vacuum it will be soon be filled. In this case, it is Mr. Aven´s belief that Vinson & Elkins´ inability to use truthful and compelling evidence to fill up the vacuum in their case, was filled up with inaccurate and unproveable evidence by Counsel for Costa Rica.

6. The relevant facts and evidence were given to Vinson & Elkins in 2014 prior to their engagement. In turn they gave the facts and evidence to the Attorneys for Freshfields, Bruckhaus, Deringer, who were engaged by Vannin Capital, the prospective litigations funders. The purpose was a legal opinion on the likelihood of success in the case; whether the case would move forward would hang on the findings in the legal opinion. The Freshfields Legal Opinion is heavily relied upon and a number of excerpts from that opinion are cited because they show that many specific recommendations to Vinson & Elkins to achieve success were not followed.

7. The main recommendation in the Freshfields Legal Opinion was not carried, specifically, the instruction stating: ***"The likelihood of success will directly depend on the Claimants' ability to provide evidence of their allegations in the Notice of Arbitration (e.g. bribes, prosecutorial misconduct, government conspiracy targeting Mr. Aven."*** A careful analysis of the case transcripts will reveal that evidence of the audio bribery recording was not produced, no evidence was presented to show prosecutorial and judicial misconduct and no evidence was presented in order to show a possible Government conspiracy targeting Mr. Aven. There was prima facia evidence of prosecutorial misconduct by the Costa Rican prosecutor since Mr. Aven had received all the legal permits and was nine months into infrastructure construction when the prosecutor shut the project down with a false charge of violating a wetland. There was no intent to commit a crime since all reports that Mr. Aven saw stated there were no wetlands.

8. A brief example of this started early in the hearing held in Washington, DC., by Counsel for Costa Rica, Christian Leathley, during his opening statement on page 236 of the transcripts.

> ***"The story gets bleaker. After having duped the authorities by withholding or concealing critical information that they then presented in an unlawful way they undertook works in order to concealthe wetlands. This was done by filling them."***

9. There was no objection to the above unsubstantiated allegation by Counsel for Costa Rica. Mr. Aven was never accused of duping the Costa Rican Government at his criminal trial in Costa Rica and he confirmed this during the hearing. However, that allegation was a

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continuing theme throughout the trial, by Counsel for Costa Rica and the Vinson & Elkins Attorneys did not seriously object on the grounds of lawyer testimony or to produce their relevant evidence. The vacuum created was soon filled by unprovable allegations and assertions by Counsel for Costa Rica with no facts, evidence, or direct testimony to back it up.

10. The following transcription of Counsel for Costa Rica verifies the previous assertion; ***"Mr. Aven's testimony was weak. Faced with a critical lack of evidence regarding the Claimants' ownership of the various plots that we have identified, his frail offering was an ambiguous indication of some kind of arrangement which the documents do not support. He has also essentially testified that he has committed a "fraude de ley," constructive fraud. Mr. Aven describes his evasion of Costa Rican laws as "one of those quirky laws in Costa Rica." With respect, Costa Rican law disagrees."***

11. Under Costa Rican law, accusing someone of Fraud is a serious criminal matter. The fraud allegation is related to a concession that was leased by the Las Olas project from the Municipality of Costa Rica. There was no evidence that Mr. Aven committed any fraud and he was never charged for that crime in his criminal trial in Costa Rica in December of 2012 or as of the date of this memorandum.

12. ***The Legal Opinion rendered by Freshfields, Bruckhaus, Deringer*** is a relevant document that must be carefully considered. Very few cases have had the benefit of having a legal opinion written before a case was commenced. However, in this case one was produced and stated the case could achieve success if the road map laid out in the legal opinion was followed; if compared with the transcripts it will clearly show the opinion was not followed. This document was requested by Vannin Capital, which funded the arbitration proceedings, pursued by Mr. Aven, based on the Central American Free Trade Agreement (CAFTA). This is a 44-page legal opinion issued in December of 2014. It was written by attorneys and for attorneys, and precisely stated the case could achieve success if specific details, specified in the opinion, were presented effectively by the Claimants attorney during the case. It gave the legal professionals a dot by dot explanation of how to use the documentary facts and evidence in order to attain success. Based on the legal opinion and instructions for success set forth in the Freshfields Legal Opinion, both Vannin Capital and Vinson & Elkins committed substantial monies and human resources to the *David Aven et al vs. Costa Rica* case. Mr. Aven has documented that Vannin Capital committed 3 million United States of America Dollars; afterwards, it had to increase that amount by four hundred thousand USD. Mr. Aven has also documented that Vinson & Elkins, lost 3 million USD and another one million United States of America Dollars was lost to their service providers. Furthermore, Mr. Aven has determined that Counsel Todd Weiler was owed $500,000 USD, the Batalla Costa Rica Law Firm was owed $100,000 USD, and Compass Lexicon, the damage expert was owed $400,000 USD dollars at the end of the trial. Mr. Aven believes there are other amounts still owed to other providers.

13. A central aspect to the arbitration proceedings was centered on two cases of attempted bribery. In one instance Mr. Aven claimed he made a recording of a bribery attempt in which he allegedly was asked to pay a bribe of $200,000 USD in April of 2009. The audio Bribery

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recording confirmed the truthfulness of said allegation which was described in the Notice of Intent (NOI) and the Notice of Arbitration (NOA). I personally served both of the above notices to the Government of Costa Rica. Further, there was contemporaneous evidence to back up Mr. Aven's allegations about the bribery audio. Shortly after he made the audio bribery recording, Mr. Aven contacted Fernando Zumbado, who was a former high-level member of several Costa Rica Administrations that Mr. Aven personally knew. Mr. Zumbado gave a witness's statement for the CAFTA case and talked about his conversation about the bribery recording in our office. This issue is also addressed in more detail in paragraph 35. Despite the fact that the bribery attempts were central to the CAFTA case, the issue was not directly addressed or brought up during the CAFTA hearings during December 5 through 12, 2016. The recording was made in April of 2009 and was given to Vinson & Elkins, according to Mr. Aven, in the fall of 2014. Mr. Aven, who I met with practically daily throughout the hearings, insisted several times -and at different instances- to Mr. Burn, the importance of the evidence that had to be addressed –especially including the bribery recording. According to Mr. Aven he had provided the audio bribery recording to both King & Spalding and Vinson & Elkins. Despite the instructions in the Freshfields Legal opinion to use the Bribery Audio, if allowed, and despite the Instructions of Mr. Aven, Vinson & Elkins ignored both requests. The recording was not addressed directly and/or debated; the audio was not heard during the hearing, hardly any mention of bribery was brought up and there was no cross of any witnesses about bribery or the bribery recording although it was a key piece of evidence mentioned in the NOI and NOA. Furthermore, Mr. Aven grew increasingly frustrated that the use of time allocated to his legal team was not being used properly. Mr. Aven was also very upset that Counsel for Costa Rica was constantly alleging that Mr. Aven was guilty of misleading SETENA and of committing other crimes without being objected to as lawyer testimony since there was no direct testimony from any Government witness to support the Counsel for Costa Rica allegations.

14. The relevance, validity, and use of the attempted bribery was discussed in various instances with Vinson & Elkins, including during our meetings in Costa Rica. As previously indicated, the attempted bribery had also been discussed during meetings Mr. Aven and I had in Washington, D.C. seeking legal representation. It was also discussed in the Freshfields Opinion that instructed Vinson & Elkins to put it into Evidence and in many emails that Mr. Aven sent to the Vinson & Elkins instructing them to put it into evidence. It is customarily understood in legal circles the importance to produce what you say you have in your legal pleadings. It is also understood the resulting consequential damage to creditability if such key evidence is not produced. This was expressed in email to Mr. Aven in November of 2016 by Legal Counsel and second chair Todd Weiler when he wrote this to Mr. Aven, Mr. Burn and Ms. Woods: ***"If they have a gut feeling that the claimants are really to blame for their own situation, or if they just don't like the claimants' personality, they will find a way to have them lose. The lesson, accordingly, is to make sure they like us. The second lesson is the same…So we take nothing for granted, and make sure that we can fully answer the objections in this case, while also ensuring that the tribunal likes and empathizes with all of our claimants."*** Although Mr. Weiler is articulating the proper course of action, and Mr. Burn wrote back saying he agreed, it is clear that Vinson & Elkins failed in their duty of care to ensure that the Tribunal liked and empathized with the claimants by failing to produce the cornerstone piece of evidence that the NOI and NOA stated they had. It is no doubt the failure

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to produce that key evidence had the negative consequences in the ruling that was spelled out by Mr. Weiler in his email to Mr. Aven, Mr. Burn and Ms. Woods. It seems it was very important to the tribunal based upon their in Paragraph 635. ***"Although the solicitation of bribes is indeed a punishable crime in Costa Rica, and should not be tolerated under any jurisdiction, there is no corroborating evidence to the fact that there was such a solicitation except for the statement made by Mr. Damjanac. Even though in their Notice of Arbitration, Claimants stated that "The Investors have in their possession a tape recording of the solicitation of this bribe" such supposed tape recording was never produced as evidence during the arbitration. There is also no evidence that there was retributory action against Claimants for having failed to comply and pay the bribe."***

15. **The UK Attorneys will have to analyze the above as it applies with UK Law, as well as other legal opinions in the** Freshfields Memorandum. Following are some key EXCERPTS from recommendations in the Legal Opinion regarding using the facts and evidence effectively for a successful outcome in the CAFTA case. You will see a number of mentions about using the audio recording. I normally would put these in an Exhibit, but for continuity purposes I am putting it within this memorandum.

16. **(page 18 paragraph 37 a and b)** "*Arbitral tribunals have found that measures similar to those at stake in this case constituted a breach of the FET standard in violation of the right to transparency, due process and freedom from arbitrary treatment. In particular:"*

17. *a. "With respect to the revocation of existing permits motivated on political considerations: in Abengoa v. Mexico, permits of the investor were revoked following a change in the municipal government, and in the midst of local opposition and a political campaign by the new government to close down the project. In reaching its decision that Mexico had violated its FET obligations under the Spain-Mexico BIT, the tribunal accorded weight to the fact that the decision to revoke existing permits seemed to have been motivated by political considerations and unfounded reasons, rather than on true—and demonstrable—potential environmental concerns. Here, the Municipality and Mr. Bogantes' alleged bribery attempts and the suspension of the project when it had already been cleared by the relevant authority seem to provide support for arguments of political motivations."*

18. *"a. With respect to the direct inconsistency between the attitudes of different organs of the State towards the investment:"*

19. *(footnote 64 page 14 "There is an outstanding question of whether the recordings of the bribery attempt may be admissible as evidence in this arbitration, especially if Costa Rican law forbids recordings of third-parties without their consent. The recordings' admissibility will depend on the evidentiary legal standards that will apply to this arbitration. According to the Treaty Article 10.22 ("Governing Law"), the tribunal "shall decide" the "issues in dispute" under the Treaty and "applicable rules of international law." Because there is no universally accepted evidentiary legal regime under international law, tribunals have some flexibility in choosing which evidentiary legal standards to apply. Typically, investment tribunals have referred to the International Bar Association's Rules on the Taking of Evidence in International*

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Arbitration as a guideline to decide such evidentiary legal issues. These Rules allow for challenges to evidence based on "legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable." See Rule 9.2(b). If Costa Rican law applies, and if it prohibits recordings without consent, there is the potential that, under Rule 9.2(b), the tape of the bribery- attempt may be found inadmissible. In any event, local counsel should be consulted to determine whether Costa Rican law allows this type of evidence."

20. *(page 22 paragraph ANNEX A Footnote 87.) "Establishing a link between the bribery attempts and the process that led to the Injunctions would certainly give Claimants' case the political flavor that normally pervades arbitrary treatment in the context of FET violations." See Abengoa v Mexico, ¶¶ 649-651. For a discussion of the evidentiary value of the recordings see footnote 64.*

21. *Exhibit C-21 "Complete Administrative Environmental Proceedings File No. 34-11-01-TAA. To understand the outcome of these proceedings, and whether the injunction was lifted or remains in place."*

22. *(pages 39 and 40 Annex A) "Complete Criminal No. 11-000009-611-PE. To further understand the criminal proceedings against Claimant Mr. Aven."*

23. *(page 17, footnote 67) Notice of Arbitration, ¶¶ 31-32. "According to Claimants, the second bribery attempt is documented on tape." See Statement of David Aven, ¶¶ 11(a), 19*

24. *(Page 2 b) "Claimants' case would be strengthened if they can provide evidence of bribery, unfair trial and threats to Mr. Aven, or other elements that would indicate political motivation behind the measures."*

25. I am a lawyer licensed to practice in Costa Rica since 2002. My law degree was obtained at the University of Costa Rica, followed by an LL.M in Law and Government from the American University Washington College of Law, in Washington, D.C. Afterwards, I received my Doctorate in Law from Universidad Carlos III de Madrid, in Madrid, Spain. I later worked for the law firm Larrauri & López Ante, in Madrid, and, after, moved to Costa Rica to join BLP Abogados. Following my stay at BLP Abogados, I started my own firm, Ventura & Brom, in 2011; my firm later merged with Facio Abogados (known during a brief stint as FH Legal). Throughout my years as a practicing law attorney, I have specialized, mainly, in Administrative Law and Regulatory Policy, Constitutional Law, Environmental Law, and how they apply to Real Estate and Urban Planning. I also have ample experience in civil litigation against governments and public entities.

26. It was during the time that I practiced at my own firm, in 2011, that I initially came into contact with Mr. David Aven. He introduced himself as a developer working in the Costa Rican Central Pacific Region and described the properties he owned in that area. Specifically, he mentioned the Las Olas Project and the problems he was encountering. Initially, he brought me documentation related to the project and described the problems he had been having with local regulatory agencies, concretely, MINAE (*Ministerio de Ambiente y Energía*).

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I explained to Mr. Aven that this fell into my area of expertise and that I could assist him, if he required it. After a number of meetings, he retained me to help him with his legal problems and other business and personal matters. A major part was the criminal complaint that was filed against Mr. Aven for violating a wetland by the Prosecutor´s Office in San Jose related to Environmental Crimes. He explained in detail how these actions were affecting his project that could eventually lead to bankruptcy. Mr. Aven explained that he was very concerned and confused about the actions of the criminal prosecutor since he had acquired all the legal permits and was nine months into infrastructure construction.

27. The issues brought up by Mr. Aven drew my immediate attention because I had recently been involved in a case that presented similar circumstances; both were related to projects that were fully permitted and had local authorities alleging environmental noncompliance. In the case of Mr. Aven, the environmental matters all revolved around alleged wetlands. Mr. Aven showed me a number of approvals he had received for the project, which included the following: (1) an April 8, 2008 letter from MINAE addressed to Mr. Aven's architect and engineering firm Mussio/Madrigal, who Mr. Aven engaged to acquire the initial Environmental Project Clearance from SETENA (*Secretaría Técnica Nacional Ambiental*). The above clearance letter from MINAE was one of many required documents that SETENA needed before they would issue the project´s Environmental Viability. (2) The SETENA Environmental Viability Resolution issued on June 2, 2008, which did not list any wetlands in the project´s areas. The Environmental Viability resolution authorized the project to proceed to the construction phase. The Environmental Viability Resolution also outlined other necessary steps that Mr. Aven had to take prior to acquiring the Construction permits from the Municipality. For instance, one of those steps was to put up a cash bond with Costa Rica´s Banco Nacional. (3) Mr. Aven showed me the construction permits he acquired from the municipality of Parrita in July and September of 2010. (4) Mr. Aven showed me a second SETENA Resolution issued by SETENA on September 10, 2010 confirming again that there were no wetlands on the project site. (5) Mr. Aven also showed me an inspection report done by MINAE in July of 2010 stating there were no wetlands on the project site. In that report it stated that there were two other MINAE reports that were done in January and February of 2010 both of which said there were no wetlands on the project site. Both of these inspections were conducted based upon a complaint filed by a resident who lived in the community who said there were wetlands on the project site.

28. **MR. DAVID AVEN CRIMNIAL INVESTIGATION AND EVENTUAL TRIAL IN COSTA RICA.** I believe it is necessary to be clear about Mr. Aven's criminal trial in Costa Rica in which I was heavily involved. It differs from what Counsel for Costa Rica accused Mr. Aven of criminally in the CAFTA case. It is important that you clearly understand the difference since it reveals a key aspect of the possible negligence of the Vinson & Elkins attorneys. In the Costa Rica case, the Criminal prosecutor started a criminal investigation of Mr. Aven in February of 2011 for allegedly draining wetlands. In the CAFTA case, Counsel for Costa Rica accused Mr. Aven of duping and defrauding SETENA along with a number of other crimes. Costa Rica Counsel never called anyone from SETENA to provide direct testimony to the allegations made against Mr. Aven; nor did any other state witness provide any direct testimony that Mr. Aven committed crimes alleged by Counsel for Costa Rica, although he had every opportunity to

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call state witnesses for direct testimony. The following is important to understand regarding the criminal allegations against Mr. Aven in Costa Rica and in the CAFTA case.

1. At the time the Costa Rica criminal prosecutor, Mr. Luis Martinez, started his criminal investigation, Mr. Aven had acquired all the necessary permits from the Costa Rica Government and was nine months infrastructure construction.
2. The most important permit was the SETENA Environmental Viability permit that stated there were no wetlands, forest, bird sanctuaries or anything else environmentally problematic. Therefore, SETENA cleared the project to proceed forward to the next steps in acquiring the Construction permits. Those permits were issued in July and September of 2010.
3. Mr. Aven alleged he was asked for a bribe by Christian Bogantes, the head of the MINAE office in Quepos, in August of 2010. He refused to pay that bribe because it was illegal and a crime in both the US and Costa Rica.
4. There was no basis in Costa Rica Criminal law to start a criminal investigation against Mr. Aven since he had all the necessary permits. Further, the SETENA Resolution determination, issued in June of 2008, stated there were no wetlands, therefore there was no intent on Mr. Aven's part to drain a wetland. Since SETENA, is the only Costa Rican agency given the authority by the Government and the courts to issue Environmental Viabilities permits, the permit Issued to Las Olas determined there were no wetlands. SETENA resolutions have the force of law behind them requiring compliance by Mr. Martinez and everyone else.
5. According to SETENA regulations, if anyone challenged a SETENA Resolution determination, they are supposed to take that to SETENA, tell them the nature of their challenge and then SETENA becomes the investigate body to investigate and render a decision. That was told to us by Esau Chavez the director of operation in a December of 2012 meeting I had with Mr. Aven in his office.
6. In April of 2011, Mr. Martinez, as part of his investigation, called Mr. Aven in for questioning to give a statement and answer questions. Mr. Aven appeared with his attorney and was advised not to answer questions since it was criminal and whatever he said could be used against him. However, Mr. Aven waived that right and spoke to the Prosecutor and evidence that proved he had committed no crime and had no intent to commit a crime. He presented his evidence as mentioned in paragraph 27. However, Mr. Martinez rejected exculpatory evidence presented to him by Mr. Aven and continued his investigation. He told Mr. Aven that he was ordering another wetland report.
7. In May of 2011, the INTA report was issued and sent to Mr. Martinez (see paragraph No. 32), The report stated there were no wetlands. However, in discussing that report with Mr. Martinez, Mr. Aven was told by Mr. Martinez that he didn't believe that report; objective evidence was ignored. Despite the exculpatory evidence, Mr. Martinez filed criminal charges against Mr. Aven for criminally violating a wetland

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without any proof that he did so. This was clearly a case of malicious prosecution for reasons only Mr. Martinez knows, but it was never brought up by Vinson & Elkins attorneys during the cross examination of Martinez.

8. The criminal charges alleged by Counsel for Costa Rica in the CAFTA case stated that Mr. Aven duped and defrauded SETENA and engaged in all manner of other crimes. This is what was said in Costa Rica's counter memorial in April 8, 2016. On page 77 paragraph 298, ***"Having been duped by Claimants, it is probable that some public officials at SETENA and SINAC sought to avoid varying the initial EV. But, contrary to Claimants' allegations, the existence of certain inconsistent site visit reports by SETENA and SINAC is irrelevant:"*** In a search of this one document Criminal appears 91 times, crime appears 22 times, and bribe or bribery appears 20 times. It was the strategy of Counsel for Costa Rica to make their defense on baseless allegations that Mr. Aven was a serial criminal and responsible for what happened. This was with no direct testimony by any state witness that David Aven committed any crimes with no strong push back by Vinson and Elkins attorneys.
9. From 2011 and until today in May of 2020, although it was alleged by Costa Rica Counsel that David Aven committed a number of crimes in Costa Rica, there has never been any criminal charges filed against him in Costa Rica for alleged crimes.
10. Although the Freshfields Attorneys, who render the legal opinion, were clear that the Vinson & Elkins Attorneys should use the criminal trial record to prove bias on the part of the prosecutor and the Judiciary, that never occurred.
11. It was very clear to everyone involved in this case that the Government was trying to make David Aven a serial criminal, so he would be perceived by the Tribunal as a dislikable person, who they would rule against. Vinson & Elkins did not retain or consult with a criminal defense attorney to defend Mr. Aven against an onslaught of criminal accusations that he was a serial criminal during the entire proceedings and into the trial. Clearly, a criminal defense attorney, with experience in Costa Rican law would have provided competent representation that would have effectively debunked the false allegations being made by Counsel for Costa Rica.
12. Moreover, the Vinson & Elkins attorneys made David Aven look like a disreputable person when they failed to produce the audio recording.
13. Finally, the fact the Mr. Aven was branded a criminal by Counsel for Costa Rica caused him reputational harm he shall carry the rest of his life. Mr. Aven´s UK counsel should weigh in into this situation regarding reputational harm caused by Vinson and Elkins due to their failure to engaged the services of criminal Barrister.

29. In relation to this issue, it is important to stress that SETENA is the main and most important environmental agency in Costa Rica. It is the only agency with legal authority to issue an Environmental Viability decisions, which, is the only official document that can authorize the Municipality to issue the project construction permits. Throughout the hearing, SETENA´s role was not properly detailed or explained. On the contrary, there was confusion as to what

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its authority was and how it was structured within the Costa Rican Government. Specifically, despite the fact that SETENA is structurally within MINAE, it has independent status, and cannot receive directions from other MINAE offices or officers; deference and compliance must be given to its rulings and decisions. In fact, Mr. Aven correctly stated at the hearing that SETENA was the only agency that was given the authority by the Government and the courts that could issue an Environmental Viability Resolution, and whose rulings carry deference from private persons and public government agencies. Mr. Julio Jurado, the Head of the Costa Rican Government Attorneys´ Office, who was called as a witness by the Government said the same in his witness statement.

30. Mr. Aven clearly understood these issues, despite not being an attorney he explained that to his legal team and to two different judges during his criminal proceedings in Costa Rica. He also explained the same during his testimony at the CAFTA hearings. Additionally, based on this understanding, he insisted on having the so-called Protti Report be addressed throughout the hearings, so it would not be mischaracterized. Costa Rican counsel repeatedly used the Protti report to undermine Mr. Aven´s credibility and made him appear that he was lying or was misleading SETENA. Costa Rica Counsel falsely alleged that the Protti report proved there was wetlands on the project site, however the report never said that. Counsel for Costa Rica also alleged that Mr. Aven knew about the report, withheld it from SETENA and therefore misled SETENA. That again was incorrect and not proven or objected to. Counsel for Costa Rica alleged that would automatically invalidate the SETENA Environmental Viability decision. Although neither SETENA officials or Mr. Protti were called to provide testimony about the allegations presented by the Counsel for Costa Rica. There was no objection by Vinson & Elkins attorneys about the alleged lawyer testimony. I will stress again, at no point did SETENA or Protti, or its officials, ever state that Counsel for Costa Rica accusations were true. There were no such charges made in the criminal accusation filed against Mr. Aven by the Costa Rica criminal prosecutor in 2011, nor were criminal charges related to this ever brought against Mr. Aven by the state, even though duping and defrauding a Government is a serious crime. On the contrary, Mr. Esau Chaves, SETENA´s head of compliance indicated to me and Mr. Aven that Mr. Aven was being negatively and improperly affected by the actions of the Costa Rican Government. However, there was no evidence presented by Vinson & Elkins attorneys from the criminal trial record per the instructions from the Freshfields Attorneys. There was no evidence presented from the Esau Chaves memorization letter that I wrote to him and personally delivered to SETENA; that vacuum was filled up with, as Mr. Aven said during his testimony, with “fabricated evidence and fake news.”

31. During the time of above-mentioned criminal charges for violating wetlands in Costa Rica, Mr. Aven engaged my legal services. I explained to him that he would need to engage a criminal defense attorney with experience in environmental law. He said he had engaged one but was not satisfied with the representation and asked me if I could recommend one. In 2012, I referred him to a young and effective criminal defense attorney Nestor Morera, a colleague of mine, whom I have known since law school. Mr. Morera accepted the case and Mr. Aven asked me to stay on the defense team, in order to assist Mr. Morera and provide any input based on my knowledge of Environmental and Administrative Law. We met with Mr. Morera in his office, and discussed the situation regarding the project, the shutdown

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notices, and trial strategy. As the case unfolded, I confirmed situations that I had already experienced, where prosecutors zealously pursued a case, even though the competent environmental authorities had determined that there was no fault or illegality. Moreover, Mr. Aven was not an environmental expert or lawyer, so it was not possible to allege that he had willfully and with intent took any action that caused damage to wetlands. In fact, Dr. Diógenes Cubero, from INTA, in a report ordered by the Prosecutor, testified at Mr. Aven's criminal trail and clearly said there were no wetlands and that it was not up to the Developers to know what wetlands were; such determination was to be made by experts, claimed Mr. Cubero.

32. It was during the criminal investigation the prosecutor ordered an additional wetland study from INTA (*Instituto Nacional de Innovación y Transferencia en Tecnología Agropecuaria*) who was a high-ranking wetland authority in Costa Rica. INTA possesses the technical expertise to determine the existence of a wetlands via soil samples; that report came back also stating that there were no wetlands and that the project site did not have wetland soil. However, Mr. Aven testified that the criminal prosecutor told him that "he didn't believe that report." Mr. Aven testified to that fact under oath at the hearing in Washington, DC. Mr. Aven's statement went without objection and was not challenged or refuted by Counsel for Costa Rica. Mr. Aven also stated clearly in his witness statement and at the hearing in Washington, DC in *David Aven et al vs. Costa Rica* CAFTA case, that a prosecutor does not have the option "not to believe" objective evidence, which is correct. Again, his statement was never objected to or refuted by opposing counsel. Counsel for Costa Rica never asked Mr. Aven any questions about his assertions and never objected to them. Strangely, Vinson & Elkins attorney was vague in its questions to Mr. Luis Martinez, the criminal prosecutor, about any of the above key facts during the 6-day hearing.

33. I first met the Vinson & Elkins team, composed of George Burn and Alex Slade, who flew into Miami, Florida, in June 2015 shortly after Mr. Aven signed the engagement agreement with them and Vannin Capital. Mr. Burn and Mr. Slade flew in from London to the US, since Mr. Aven could not travel safely due to INTERPOL having issued a Red Notice for him at the request of Costa Rica. That prevented Mr. Aven from traveling to London for that meeting. During that three-day meeting, Mr. Burn and Mr. Slade met with a number of other people involved in the case including myself. Presentations were made by other attorneys who wanted to be involved in the case under the Vinson & Elkins umbrella since it was a high value and high visibility case.

34. I explained that I was Mr. Aven's attorney since 2011 and had intimate knowledge about the facts of the case. I went on to become closely involved with Vinson & Elkins as the case proceeded forward. Moreover, lawyers from the Costa Rican law firm of Batalla Abogados also were present and outlined their observations regarding environmental matters. Later, Vinson & Elkins retained Batalla Abogados as local counsel. Todd Weiler a Canadian Attorney who had extensive experience in International arbitration was also there to speak. He was also retained by Vinson & Elkins to work on the case. I was asked to assist on the case, based on my past history with Mr. Aven.

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35. Mr. Burn visited Costa Rica in October 2015, in order to visit the project site and interview Jovan Damjanac, the projects Sales and Marketing manager, who was also criminally charged for cutting a forest. I accompanied Mr. Burn during his visit to Las Olas. Later on, in early 2016, another VE attorney, Peter Danysh, traveled to Costa Rica to accompany the Costa Rican legal team during their site visit, for case matters, and work with the Costa Rica legal team. I met with the Vinson & Elkins team once more in Costa Rica, at the Batalla law offices, in preparation for the December 2016 hearing; this was a short hour-long meeting during which we discussed my possible testimony. Vinson & Elkins attorneys interviewed a number of witnesses who would provide testimony in the case. As stated above one key witness was Fernando Zumbado, who was a former high-level Costa Rica Government official who personally knew Mr. Aven. After Mr. Aven made the Audio Bribery recording in April of 2009, he indicated to me that he immediately invited Mr. Zumbado to listen to the recording. Mr. Zumbado came over to my office and Mr. Burn and I sat down with him and discussed what he would say in his witness statement. At that time, Mr. Zumbado told Mr. Burn he had heard the Audio Bribery recording as well as other things he could testify to. However, when the draft of the witness statement was typed up, it made no mention that Mr. Zumbado had heard the bribery audio. I saw an email that Mr. Aven sent to Mr. Burn and Ms. Woods that amended the draft to include the fact that Mr. Zumbado heard the audio right after Mr. Aven recorded it. However, according to Mr. Aven, without Vinson & Elkins notifying him, they took out his edits of truthful statements and removed any mention of the bribery recording from Mr. Zumbado's final statement that was then signed and submitted as his final statement.

36. Below are more relevant excerpts from the Freshfields Opinion.

37. *"(page 8 Paragraph 12) "Under the Treaty, a tribunal has jurisdiction only with respect to protected "investors" and "covered investments." We provide below our analysis of the Claimants' arguments and evidence with respect to their standing as protected investors and their covered investments"*

38. *(page 13, paragraph 26)" "Claimants allege that La Canícula and three of the Enterprises (i.e., Mis Mejores Años Vividos, S.A., Cerros de Esterillos del Oeste, S.A. and Inversiones Cotsco) hold nine construction permits and two Environmental Permits. As already explained, La Canícula holds one Environmental Permit for the Hotel, while Inversiones Cotsco obtained a second Environmental Permit for the development of the Villas. In our opinion, the Notice of Arbitration contains sufficient evidence of ownership in this regard: Claimants attached copies of the two Environmental Permits, which appear to be valid to date, as well as copies of the nine construction permits corresponding to these entities. "*

39. *(pages 17 & 18 paragraph 36) "Provided that evidence is submitted and accepted by the Tribunal, the following facts would likely serve to reinforce the Claimants' arguments with respect to the unlawfulness of the measures above:"*

    (a) "The fact that the Environmental permits for the Villas and Hotel did not mention the presence of wetlands or call for any particular action from the Claimants in that respect".

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(b) "The fact that at least four follow-up reports prepared by authorities from the Ministry of Environment (MINAE) and SETENA up to August 2010, many of which were based on site inspections, expressly confirmed there were no wetlands on the Las Olas Project (together with (a) above, the Resolutions and Reports);"

(c) "The fact that government officials presumably requested bribes from Mr. Aven on two opportunities: one time by Mr. Christian Bogantes (the Director of the MINAE office in Quepos) during a site visit, and another by the Municipality of Parrita;"

(d) "The fact that the MINAE, where Mr. Bogantes worked, suddenly changed its stance as to the presence of wetlands in Las Olas only after Mr. Aven refused to pay the above-mentioned bribes;"

(e) "The fact that Steven A. Bucelato, the neighbour who filed the complaint that led to the Administrative Injunction, was a competitor allegedly "acting in cahoots" with MINAE to close down the Project;"

(f) "The fact that Claimants Mr. Aven and Mr. Shioleno were victims of a murder attempt preceded by threatening emails, presumably tied to their activity in Costa Rica"

40. *Page 21 paragraph 40 "We note, however, that tribunals have found that government acts do not create legitimate expectations if they are based on erroneous or misleading information provided by the investor. We understand found no evidence that this was the case in the present dispute". (page 21 paragraph 40)*

41. *Page 21 paragraph 41. "Subject to our observations below, and in light of existing case law, we believe that Claimants are more likely than not to prevail in an FET claim with respect to the Injunctions that halted the work on the Project, ignoring that Claimants had followed the required procedures and obtained the necessary permits (which were reaffirmed by the competent authority SETENA in its decision of November 15, 2011). The evidence in the record generally supports these allegations and prior tribunals have found that these types of measures constitute a breach of the FET standard. This conclusion should be irrespective of whether new inspections and expert assessments ultimately determine that the Project area did have wetlands. "*

42. *(page 22, paragraph 42). "The Claimants' case might be further strengthened if: (i) they can provide tangible evidence of the bribery allegations (and this evidence is accepted by the Tribunal); (ii) the evidence submitted in the criminal trial supports the Claimants' position; (iii) they can provide evidence of the alleged assassination attempt of Messrs. Aven and Shioleno and its link with governmental action; and (iv) they can produce evidence that Mr. Steven Bucelato, who filed the claim that resulted in the Administrative Injunction, was a direct competitor acting with government officials to shut down Las Olas."*

43. *(footnote 87, page 22). "Establishing a link between the bribery attempts and the process that led to the Injunctions would certainly give Claimants' case the political flavor that normally pervades arbitrary treatment in the context of FET violations. See Abengoa v*

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Mexico, ¶¶ 649-651. For a discussion of the evidentiary value of the recordings see footnote 64 above. "

44. *(page 25 paragraph 50). "This case could be instructive if Mr. Aven could support his allegation that both the Prosecutor and the Judge that ordered the Criminal Injunction were clearly prejudiced against him or the Project. We note that there is no evidence in the record that would support such an allegation."*

45. *Page 21 paragraph 41. "Subject to our observations below, and in light of existing case law, we believe that Claimants are more likely than not to prevail in an FET claim with respect to the Injunctions that halted the work on the Project, ignoring that Claimants had followed the required procedures and obtained the necessary permits (which were reaffirmed by the competent authority SETENA in its decision of November 15, 2011). The evidence in the record generally supports these allegations and prior tribunals have found that these types of measures constitute a breach of the FET standard. This conclusion should be irrespective of whether new inspections and expert assessments ultimately determine that the Project area did have wetlands. "*

46. *(page 26 paragraph 52). "Subject to confirmation by local counsel that the criminal judge's interpretation and/or application of the Criminal Code of Procedure were outrageous and clearly misguided (and that indeed a Retrial can only be granted in favor of the accused), there could be enough grounds to substantiate a claim for denial of justice. This claim could be strengthened by providing evidence to support Claimants' allegations that the Prosecutor and MINAE were conspiring to shut-down the Project"*

47. *(page 27, page 27). "Claimants' success will thus depend in great part on the evidence available regarding the threats to Mr. Aven, the links between these threats and governmental action, and the risks incurred if he were to go back to Costa Rica. We do not have in the record any evidence that would allow us to assess the evidentiary weight of such threats, links and risk."*

48. *(page 61-page 31a, b, & c)*. "In light of the above, the investor's expropriation claims face three hurdles:"

49. *"Is the deprivation permanent? Provided that Claimants can submit evidence of the threats to Mr. Aven, they should be more likely than not to succeed in showing that the Injunctions have permanently deprived them of the use and enjoyment of their investments."*

50. *"If not, have the measures eliminated or frustrated the operative capacity of the investment? If these Injunctions were finite, Claimants will need to prove that they had a "immediate and dramatic impact […] substantially eliminating or frustrating the operative capacity of the enterprise," as In Tza Yap Shum".*

51. *"The likelihood of success will directly depend on the Claimants' ability to provide evidence of their allegations in the Notice of Arbitration (e.g. bribes, prosecutorial misconduct, government conspiracy targeting Mr. Aven"*

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52. *(page 37, paragraph 79). "Here, Claimants allege that Costa Rica has "caused and continues to cause Mr. Aven […] significant pain and suffering, including physiological suffering due to fear of imprisonment and harassment, risk to life […] reputational harm and the impact of a potential criminal record."*

53. *(page 37, paragraph 80). "In light of existing precedents, to succeed, Claimants would need to prove: (i) the extent of any reputational losses he endured; and/or (ii) evidence of actions by Costa Rica that gravely threatened his physical or physiological integrity. In his Statement, Mr. Aven claims that he received threatening emails, some from government entities. He also claims that on April 15, 2013, people linked to Costa Rica attempted to murder him and another investor, Mr. Shioleno, forcing him to flee the country. We found no evidence of any of these claims in the documents reviewed, aside from Mr. Aven's own account. Assuming these claims can be established and proved, Mr. Aven may improve his odds of obtaining moral damages, although as already explained the likelihood of success of these types of claims is generally low."*

54. As you can confirm by a review of the transcript and or the trial video, none of the aforementioned instructions and admonishments of using specific facts and evidence to achieve success were carried out effectively by the Vinson & Elkins attorneys. It is worth noting again what the Freshfields Opinion stated in their Legal Opinion; ***"The likelihood of success will directly depend on the Claimants' ability to provide evidence of their allegations in the Notice of Arbitration (e.g. bribes, prosecutorial misconduct, government conspiracy targeting Mr. Aven."*** Mr. Aven, believes the failure of Vinson & Elkins attorneys to follow the instructions in the legal opinion, and to follow Mr. Aven's instructions not only constituted professional solicitor negligence, but also constitutes a more serious offense of malfeasance.

55. In making the above statement in the legal opinion, the Freshfields Attorneys assumed Vinson & Elkins would assign competent attorneys who would present a professional, effective, and methodical use of the facts and evidence in the CAFTA case to achieve success. The transcripts, videos, and final arbitration panel decision speak for themselves regarding their inability of the Vinson & Elkins Attorneys to carry out the duty of care to their clients.

56. The relevant evidence in the case was the same evidence that was presented at the preliminary hearing for the criminal trial in June of 2012. At the hearing, Mr. Aven's attorney Nestor Morera asked Mr. Aven to present the relevant evidence since Mr. Aven had intimate knowledge about the facts and evidence and had enlarged all of the relevant documents and had an easel to display them for the Judge. Mr. Aven presented them one by one and I translated what Mr. Aven told the Judge. The documents that were duly cited, included, amongst others: (1) The April 8, 2008 letter from MINAE to Mr. Aven's architect and engineering firm who Mr. Aven had engaged to acquire the initial Environmental Project approval from SETENA. The above clearance letter from MINAE was a required document that SETENA needed before they would issue the Project

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Permit. The MINAE letter said there were no wetlands and cleared the project for SETENA's approval. (2) The SETENA Environmental Viability Approval Permit Resolution issued on June 2, 2008. This permitted the developers to take the next steps required toward their final objective of acquiring the construction permits. The June 2008 Environmental Viability resolution found there were no wetlands no orhwe environmental issues on the project site. The EV permit authorized the Developers to move forward, as previously indicated. (3) Mr. Aven showed the Judge the construction permits issued by the municipality of Parrita in July and September of 2010. (4) Mr. Aven showed the SETENA's second Resolution they issued on September 10, 2010 where they did a second inspection and again confirmed there were no wetlands on the project site. That was yet another resolution that was supposed to be complied with by all but it was not. (5) Mr. Aven showed the Judge an inspection report done by MIANE in July of 2010, around the same time that SETENA did their inspection report which stated there were no wetlands on the project site. The report also stated there were two other MINAE reports done in January and February of 2010, both of which said there were no wetlands on the project site. From January to September of 2010 there were 4 inspections of the Las Olas Project all saying there were no wetlands. (6) Mr. Aven showed the Judge an INTA report dated May of 2011 which also stated there were no wetlands. INTA reports are valid and relevant in areas where wetlands may exist, and environmental authorities encourage their use. However, the criminal prosecutor, according to Mr. Aven, told him he didn't believe that report. As stated above that issue was not addressed by Vinson & Elkins attorneys during their cross examination of Mr. Martínez. Mr. Aven believes the failure to exploit that was Solicitor Negligence on the part of Vinson and Elkins Attorneys.

57. After the Judge witnessed Mr. Aven´s presentation, and the exculpatory evidence, the defense team felt confident that the case would be dismissed that day. To make matters worse for the prosecution, the Judge asked Mr. Aven if he would accept questions from the Prosecutor. His attorney Mr. Morera told him he did not have to, but Mr. Aven said he would accept questions. However, after the Judge asked Mr. Martinez if he had any questions for Mr. Aven, the Prosecutor immediately said no. That response was certainly surprising to everyone sitting in the hearing since very seldom, given an opportunity, would a prosecutor have no question for a person they accused of a crime.

58. During that hearing the prosecutor presented no evidence, while Mr. Aven´s side presented strong exculpatory evidence showing no intent to commit a crime and no criminal predicate to move forward. Therefore, we all were shocked and surprised a week later when the Judge ruled there was sufficient evidence to proceed to trial and scheduled the trial for December 5, 2012. It is important to note that at no point did the Prosecution allege in his criminal accusation that Mr. Aven had misled, lied to or duped SETENA or any other governmental agency; that allegation was later contrived by Counsel for Costa Rica as a defense strategy for their CAFTA case; it was a necessary strategy to get around the fact that Mr. Aven had acquired all the legal project permits and was nine months into infrastructure construction. However, it's important to understand there was no direct testimony by any state witness to

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back up the lawyer testimony that Mr. Aven Duped SETENA. However, there was no strong pushed back from any Vinson & Elkins attorney for this lawyer testimony or any strong cross examination of key Government witnesses to counter the lawyer testimony that Mr. Aven Duped SETENA.

59. However, the above set of facts of what happened in the Criminal Preliminary hearing presented exactly the kind of evidence that the attorneys suggested that Vinson and Elkins seek out when they said this on page 25 paragraph 50 of their legal opinion: ***"This case could be instructive if Mr. Aven could support his allegation that both the Prosecutor and the Judge that ordered the Criminal Injunction were clearly prejudiced against him or the Project. We note that there is no evidence in the record that would support such an allegation."***

60. It is important to understand that preliminary hearings in Costa Rica are required. The hearing is for both parties to provide their relevant evidence and then the Judge would decide if there was enough evidence to proceed to trial. The prosecutor, Mr. Luis Martinez, provided no evidence; for two hours he just read his accusation to the Judge, which is not evidence it's an accusation. On the other **hand, Mr.** Aven showed all of the relevant evidence that he had acquired all the lawful permits. It is important to state that ***the SETENA Environmental Viability Approval Permit Resolution, issued on June 2, 2008, a***s stated by Mr. Aven and confirmed by Mr. Julio Jurado in his witness statement, was obligatory to all parties and Government authorities. Further, during Mr. Aven´s presentation of his evidence, there was not one objection from the criminal prosecutor about anything that Mr. Aven said, and that Mr. Martinez had no questions for Mr. Aven. So all of what Mr. Aven presented as evidence went without objection.

61. The above set of facts made it clear that the Prosecutor failed to provide evidence to proceed to trial. It also provided evidence the hearing Judge was biased since based on the evidence presented in the hearing, the Judge should have dismissed the case for lack of evidence to proceed. It was a shock and surprise to both Mr. Aven and his legal team when they learned a week later that the Judge referred the case to trial. Clearly, it was either incompetence or bias on the part of the Costa Rican Judge and was precisely the kind of evidence that the Freshfields Opinion instructed the Vinson & Elkins attorneys to discover, develop and use in the CAFTA trial. However, the trial transcript reveals that the Vinson and Elkins attorneys failed to do what the legal opinion attorneys instructed them to do.

62. The following was said during questions asked of Mr. Luis Martinez, by arbitrator Mark Baker about the preliminary hearing; it appears on Page 1178 in Transcript:

> ***Page 1178 in Transcript ARBITRATOR BAKER: "So, the intermediate judge, does he actually go through the same process that you yourself went through? In other words, does he listen to and read reports that came to different conclusions on whether or not there were wetlands on this property before deciding to make his decision? I'm trying to get a feel for this. Is this a procedure that lasts an hour? Is this a procedure that lasts two days? I really just don't know. So, can you help me with that?"***

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THE WITNESS: "Yes. In the hearings--in the preliminary hearing--this is what they're called, preliminary hearings--at present we have the principal--the verbal principal, the oral principle where the judges require that the parties make oral substantive statements. So, each one of the people who take the floor has to explain to the judge what is...the evidence, what are the considerations they've taken into account in order to reach a conclusion. So, in the case of the prosecutor's office, if it's there, it's because the charge was fraud, and it is asking that this be brought to trial. And in the case of the defense, they also have the opportunity to submit to the judge substantive information where they normally reviewed. Well, normally there's a difference of opinion. Obviously, a prosecutor wants to bring this to trial when there's a charge, and the defendant wants to file to dismiss this."

"So, that is the time when the defense attorney must submit all his arguments to contradict what the Prosecutor's Office is saying so that the judge, if he has any doubts, can refer to the documents and do the review and exam. <u>It is an obligation of the parties to give the judge substantive information in the preliminary hearing so that once that information is provided, the judge can make the decision."</u>

The Freshfields Opinion recommended to the attorneys that they obtain the trial record and use it to prove bias against Mr. Aven. Even though costly translations of the criminal trial transcripts into English were obtained that showed what Mr. Martinez told the Tribunal was different from what actually happened in the above-mentioned hearing. The Vinson & Elkins failed to follow the instruction of the Freshfields Attorneys, that would have proved bias by the prosecutor and the Judge. They also failed to use the evidenced that would have proved that Mr. Martinez was not being honest about what he told Mr. Baker about what really happened in the preliminary hearing. Unfortunately, this was never exploited and exposed by the Vinson & Elkins attorneys as revealed in the trial transcript.

63. Mr. Jurado´s testimony could also be considered to be possibly biased against Mr. Aven as well. The following is from the transcript of his Mr. Jurado's cross examination by the President of the Tribunal. Mr. Siqueiros:

64. **(From the transcript pages 1541, 1542 and 1543.)** ***PRESIDENT SIQUEIROS: "I have a question that may or may not fall within the ambit of your specialization. You will tell me whether it is or not and whether or not you can answer. At some point during the process, it has been said that sometimes foreigners acquire an Enterprise that has a Concession in a Costa Rican national as temporary holder of 51 percent of the shares. And perhaps there is no purchase by the Costa Rican, but the Costa Rican is merely providing a service. Situations such as this, are they assessed by the office you head? And what Costa Rican law would govern in cases such as this?***

65. ***THE WITNESS: "Yes, they are assessed by my office. And I would like to explain that by law concerning these areas. We are the legal controller of compliance of the Maritime Terrestrial Zone law. We have a special mandate for that. And it has issued many opinions about it, including--except criteria such as this. When I say "criteria," it is because we play a double role. The Office of the Attorney General is the superior advisory organ for Public Administration. And it issues criteria that are binding for Public Administration when it***

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seeks the opinion of the Attorney General. And it defends the State in the administrative litigation. When I say, "the State," I mean Central Government. In this advisory role, it has issued many opinions from municipalities when they consult matters having to do with the Maritime Terrestrial Zone, so one has been this topic. And the office has said that this practice is what is called a "legal fraud."

66. ***Witness Continues: "In other words, using a legal procedure, what they are doing is evading from something set forth in a different law. And what's happening here is that there are Costa Ricans who act as trustees for others in order to ensure that the right number of shares are held by a Costa Rican allowing foreigners to have Concessions that pursuant-- or foreign companies, rather. Foreign companies can have Concessions when the law for the Maritime Terrestrial Zone expressly indicates a percentage shareholding, that 51 percent has to be held by a Costa Rican in order to be a Concessionaire. That is a way of avoiding that law. It's by using this mechanism. So, I give shares to Costa Ricans who, obviously, have absolutely nothing to do with the activity that has been carried out in the Concession. They're not involved. They just lend their name for the operation. And this is "legal Fraud." This has been pointed out to the municipalities because this is a criterion used by our office."***

67. ***PRESIDENT SIQUEIROS: Do you know whether a similar matter has been questioned or reviewed by Costa Rican courts?***

68. ***THE WITNESS: No, sir. I couldn't tell you if there has been a case brought before a Tribunal in which this has been discussed.***

69. ***PRESIDENT SIQUEIROS: During your professional experience, have you ever had a case in this regard?***

70. ***THE WITNESS: No. I've never dealt with this issue.***

71. ***PRESIDENT SIQUEIROS: Thank you very much, Mr. Jurado"***

72. Mr. Aven´s legal defense team did not question or attack the above statement by Mr. Jurado, nor did they show that Mr. Aven had relied constantly on professional legal advice during on all matters related to the Las Olas project. Nor did they explain that it was a Costa Rica Attorney who set up 51% ownership structure for the concession lease as normally was accustomed. Therefore, there was no predicate or basis in the law for Mr. Jurado to accuse Mr. Aven of directly violating Costa Rican law.

73. At the criminal trial, Mr. Aven was given an opportunity to make a declaration. He presented the same relevant evidence and exhibits and told the trial Judge what he had told the Judge in the preliminary hearing. After carefully watching Mr. Burn and the defense team during the six-day trial at the World bank in Washington. DC., I can state unequivocally that Mr. Aven, who is not a lawyer but a simple client, made an effective presentation of relevant evidence that if presented in the CAFTA case in Washington, DC., by the Vinson and Elkins attorneys would have served the case well. In fact, Mr. Aven mailed the trial exhibits used

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in his criminal trial in Costa Rica, to Vinson & Elkins, and told Mr. Burn to use them in the hearing, but Mr. George Burn refused to use them in the CAFTA case.

74. I attended the entire 6-day trial of the arbitration proceedings held in Washington, DC., from December 5, 2016 through the December 12th. The outline made in the Freshfields Legal Opinion was not presented and the Vinson & Elkins legal strategy differed from both Freshfields and Mr. Aven´s recommendations and instructions. Mr. Aven´s presentation at his criminal trial was not used and was mostly ignored. In line with this, the criminal trial evidence was not shown to witnesses for cross examination, and, Mr. Martínez, the prosecutor, was not confronted about any conflicts with the criminal trial case in Costa Rica or with Mr. Aven duping SETENA. Moreover, the issue of whether there was intent on the part of Mr. Aven was not addressed directly in cross examination. No relevant documents were used to cross examine any Government witnesses nor their relevance ever discussed or explained to the tribunal. The four reports in 2010 all saying there were no wetlands were not effectively or methodically used during cross examination; all hearing transcripts will prove that. SETENA´s legal status and authority was not made clear. Furthermore, the question of why the prosecutor did not believe the INTA report, was not addressed. Additionally, any perceived biases during his criminal prosecution, were not explored. As a Costa Rican environmental attorney and expert on judicial deference, I expected Vinson & Elkins attorneys would ask Mr. Martinez probing questions about all of the above and specifically why he did not comply with the SETENA Resolution that determined that there were no wetlands as required by law. In my opinion, this was an aspect that needed to be addressed directly, by Vinson & Elkins consistently, aggressively and methodically during cross examination of each Government witnesses.
75. During the trial, I met with Mr. Aven several times. The issue about Mr. Burn not using the key evidence effectively or aggressively was extensively discussed. As mentioned above there was key and compelling evidence Vinson & Elkins had and needed to use to be successful, but they failed to use it for reasons inexplicable other than solicitor negligence.

76. Mr. Aven was also very disconcerted about the following: (1) the false allegation by Counsel for Costa Rican that Mr. Aven misled or lied to SETENA; that statement went without objection and therefore Mr. Aven told Mr. Burn that he needed to ask Mr. Aven a question, before his cross examination began by Counsel for Costa Rica, permitting him to respond to what he considered to be false, slanderous and defaming statements made about him by Counsel for Costa Rica in his opening statement.

77. Also during his opening statement, and according to the **transcript on pages 264 and 265,** Counsel for Costa Rica said the following critically damaging statement that severely affected the case. It needed to be addressed truthfully and attorneys have a legal and ethical duty to be truthful to the court. However, Vinson & Elkins failed to respond truthfully to the following statement by Counsel for Costa Rica.

> ***"…claimants allege that they had a tape recording of the solicitation of this alleged bribe. They make that in page 7 of their Notice of Intent to Submit a Claim to Arbitration on the CAFTA back in 2013. A cornerstone piece of their case in inexplicably missing."***

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PRESIDENT SIQUEIROS: Thank you. So, let's take a 10-minute break.

"PRESIDENT SIQUEIROS: Please go ahead.
MR. LEATHLEY: Absolutely, sir.
PRESIDENT SIQUEIROS: Thank you.
MR. LEATHLEY: Let me just take one step back.
PRESIDENT SIQUEIROS: Sorry for my interruption.
MR. LEATHLEY: No. Of course, sir. "Claimants say they had a tape recording of this alleged bribery incident. They said this in 2013 at the time King & Spalding were representing them. As of today there is no recording. Such a cornerstone of their entire case is inexplicably missing."

When those allegations were made by Counsel for Costa, Vinson & Elkins were listening closely. Hearing the above statement they knew the following: (1) That Mr. Aven had provided the recording in question to Vinson & Elkins in 2014, as well as to the other firms he had interviewed. I went to Washington, DC in June of 2013 to interview 5 law firms with Mr. Aven, and he sent each firm the audio prior to the meeting. Every firm mentioned that it was a relevant piece of evidence, (2) that Mr. Aven made that recording at the Municipality of Parrita in April of 2009; (3) that one can hear David Aven, Gavridge Perez his lawyer at the time, and a Municipal employee asking Mr. Aven for a $200,000 bribe, (5) that Mr. Aven refused to pay the bribe, (6) that Fernando Zumbado also heard the recording shortly after Aven made it and told Mr. Burn that he heard it, (7) that Mr. Aven instructed Mr. Burn to put that into evidence and he did not do it. Mr. Aven instructed Vinson & Elkins many times to fill up that vacuum with the existing evidence, but they refused. Therefore, that vacuum was filled up with Counsel for Costa Rica by saying it was inexplicably missing. In other words, David Aven was lying about having it audio recording. (8) the Freshfields attorneys instructed Vinson & Elkins to use it if allowed.

78. Mr. Aven was always talking about case strategy, to present the relevant documents to prove their case at the hearing and wanted the Vinson & Elkins attorneys to aggressively cross examining all state witnesses during. This did not occur as can be attested by watching the videos or reading the transcripts.

79. Mr. Aven actively tried working with his legal team in order to make reasonable and adequate suggestions as to what he thought was a proper legal strategy for the case. It is important to note I never saw any basis for alleging that Mr. Aven misled or lied to SETENA; moreover, he was not accused by local criminal authorities of lying to or misleading SETENA. The Vinson & Elkins attorneys were aware of that key fact but never brought it up in the cross examination of Mr. Luis Martinez, the criminal prosecutor, when Mr. Burn cross examined him during the trial hearing.

80. As stated above, Counsel for Costa Rica used a mostly ignored and irrelevant document known as the Protti Report to alleged that Mr. Aven duped SETENA. That report was not required by any Government agency or SETENA during the Environmental permitting phase. That was a report that was ordered by a company that the Architect and engineering firm contracted with to do soil studies for the infrastructure work. Costa Rican counsel repeatedly used the Protti report to undermine Mr. Aven´s credibility and have him appear as lying and

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misleading SETENA. However, at no point did SETENA or its officials imply such an accusation was true. Counsel for Costa Rica never got a statement from SETENA to back up their erroneous and unproven allegation, nor were criminal charges related to this brought against Mr. Aven. On the contrary, Mr. Esau Chaves, SETENA´s head of compliance, indicated to me and Mr. Aven that Mr. Aven was being negatively affected by the actions of the Costa Rican Government. I wrote a memorandum to Mr. Chaves based upon our two meetings and personally delivered the letter to SETENA. It was presented as evidence in the *David Aven et al vs. Costa Rica,* was the closest thing to having a statement from SETENA, it had a lot of exculpatory information, and countered a lot of false allegations being told about Mr. Aven. However, for reasons unknown the Vinson & Elkins Attorneys did not confront any Government witness about any of this relevant evidence.

81. Appropriate opportunities to talk about the Protti report, were not exploited adequately. The following is from the transcript during Burns redirect of Mr. Aven when Burn brings up the Protti Report. In this exchange Mr. Aven was asked about the Protti report and gave Mr. Burn a perfect opportunity to debunk it. Instead, his comments were inappropriate and further damaged their CAFTA case.

82. **From pages 872, 873, and 874 in the trial transcript**. ***"Q. Now, Mr. Leathley took you to some questions about the so-called "Protti Report." It's a report on the headed paper of an outfit called Geotest.***
83. ***Do you remember that?***
84. ***A. Yes.***
85. ***Q. Is it your understanding of that report--or what do you understand that report says about wetlands on the site?***
86. ***A. Well, what I read about that report in terms of later--I really didn't become aware of that report until the Respondent brought it up. I've never seen that report.***
87. ***But after becoming aware of it and reading it, I didn't find anywhere--and I think I got a translation--I got--it was translated in English for me. I didn't see anywhere that it mentioned in that report that there's a wetlands.***
88. ***So I really--I really was befuddling about what they were talking about and relying so heavily in that report saying that there's a wetlands. And I--and they used that as a basis of saying that I duped SETENA.***
89. ***Look, I don't--I didn't dupe anybody. You know, duping the federal government is a very serious crime. Deceiving a government is a very serious crime.***
90. ***And what I would say is this: I think--I still think SETENA is a governing--an agency that is still in business in Costa Rica. I haven't heard that it's closed its doors. And when you--when you make a serious charge like that, where is SETENA? Where is their statement?***
91. ***Where is somebody--you know, they could--the government could go--they work for the government.***
92. ***They could go to their office--SETENA office and say, "Look, we have evidence that David Aven duped you. We want do get a statement from you to confirm that."***
93. ***Isn't that what you do normally when you try to--before you start accusing somebody of serious crimes? Go get your evidence to prove it. Everything I read in the memorial statement, in all the witness statements and everything thing in this--from what the Respondent said that I've heard is what I would call fabricated, fake stories. Like you've heard about fake news. They just create it. None of this stuff that they're saying now was***

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in the criminal trial record.

94. ***Q. Okay.***
95. ***A. This is all newly created stuff. So--***
96. ***Q. Well, I think anybody who has been following Donald Trump's election campaign will be very familiar with fake news.'***

97. The above statement from Mr. Burn caused immediate concern for the case. Mr. Burn´s comments made during the hearing related to United States politics that were unnecessary and uncalled for at a hearing; concretely, issues related to so called fake news and the current United States of America President, Donald Trump, were made during the examination of witnesses. Evidently, the use of politics can hurt sensibilities of any of the participants that are present. In my experience, and from what I have learned throughout my education and career is that issues related to politics and religion are best avoided. I have discussed with Mr. Aven that these issues should be carefully examined by competent UK counsel to determine if the above attorney conduct breached the duty of care to clients under UK by Mr. Burn in saying the above.

98. In summary, I am a partner in a Law Firm and over the years I have dealt with numerous clients and tried hundreds of cases. I have been involved with numerous attorneys in many more cases. Considering the stakes that were in play, I am very concerned about the things that I saw and that I discussed with Mr. Aven. As a lawyer, I can understand Mr. Aven´s concern and frustration, when Costa Rican counsel, represented by Mr. Leathley mentioned that it was inexplicable that the Claimants failed to produce a cornerstone piece of their evidence. This is an issue of the utmost importance and seriousness because it relates to the credibility of Mr. Aven, which had not been questioned by anyone up to that point. This goes to precisely what Mr. Weiler was talking about in his email to Mr. Aven in November of 2016. There is no question that when the Vinson & Elkins Attorneys heard the above statement, they had a duty of care to their client to stand up immediately and tell the tribunal the truth that they had the audio in their possession and had heard it and would provide it to the Tribunal so they could confirm that fact.

99. It is clear from the information provided by Mr. Aven that Vinson & Elkins´ Management approved this high value, high profile 100-million-dollar case, including the terms and conditions in the Vannin Capital Litigation Funding Agreement; also, it was evident that they accepted the modified contingency arrangement by agreeing to take 50% of their fees up front and the other 50% on the backend once the case was won.

100. There was another possible important breach of the Vannin Capital Agreement, by Vinson & Elkins, according to Mr. Aven. The agreement was signed by Mr. Aven, George Burn for Vinson & Elkins and Yasmin Muhammad for Vannin. In that agreement there was a specific budget of 2.9 million (USD) that Vinson & Elkins agreed upon to try the case through to the ruling. However, based on the final numbers in filings made to the Tribunal by Vinson & Elkins, reviewed by Mr. Aven, the total spent appears to have been three times as much. In summary, based on these details, Vannin Capital ended up losing 3.4 million United States of America dollars, Vinson & Elkins ended up losing over 3 million United States of America dollars, and vendors of Vinson & Elkins lost another million. Mr. Burn told Mr. Aven he was

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looking for more money less than a year after the funding agreement was signed. In order to pay for bills after Vannin reached their funding limit, Burn was able to have Vinson & Elkins& Elkins come up with the money that was owed on the case and that is how they ended up losing over 3 million.

101. According to Mr. Aven, he was informed that Mr. Burn left Vinson & Elkins in July of 2017, for reasons unknown, and the terms of his separation were not made know to him. After Mr. Burn´s departure, his partner, Jim Loftis, from the Houston Texas office took over. Unfortunately, Mr. Aven believes he was no better than Mr. Burn. Mr. Aven contacted Mr. Loftis numerous times after Mr. Burn left and told him he had to tell the panel the truth about having the audio bribery recording during their deliberations. Mr. Aven told Mr. Loftis to take this to the top Vinson & Elkins management and get it front of him. Mr. Aven indicated that if this was not done, they were jeopardizing the entire case to a loss. Mr. Aven indicates to me that he never got a reply to any of his emails. Clearly, this resulted in a decision where one of the main issues cited was that evidence offered was not produced by counsel. This is what the tribunal said about the bribery recording not being produced. Once again here it is:

102. **From page 199 of award paragraph 635: *"Although the solicitation of bribes is indeed a punishable crime in Costa Rica, and should not be tolerated under any jurisdiction, there is no corroborating evidence to the fact that there was such a solicitation except for the statement made by Mr. Damjanac. Even though in their Notice of Arbitration, Claimants stated that "The Investors have in their possession a tape recording of the solicitation of this bribe" , such supposed tape recording was never produced as evidence during the arbitration. There is also no evidence that there was retributory action against Claimants for having failed to comply and pay the bribe".***

103. The above statement by the tribunal calls into question the strategies that were followed and the decision made not to produce the audio tape; there is no question that it exists, thus, one cannot understand any rationale for not using it.

104. Another issue that proved disconcerting was the answer provided by Vinson & Elkins to the Tribunal's question about who had the ultimate authority on environmental issues in Costa Rica. Under Costa Rican law, as the Batalla Law Firm and I indicated to Vinson & Elkins, and as Esau Chaves from SETENA indicated in our meetings with him, SETENA has ultimate authority for issuing Environmental Viabilities; SETENA issue the final position of the Costa Rican Government on environmental matters. In relation with this issue, it is important to stress that SETENA is the main and most important environmental agency in Costa Rica; it is the only one with legal authority to issue an Environmental Viability decision, which, is the only official document that can authorize the municipality to issue construction permits of any type. Throughout the hearing, SETENA´s role was not properly detailed or explained; on the contrary, there was confusion as to what its authority was and how it was structured within the Costa Rican Government. The fact that the Tribunal had to ask that question demonstrates the failure on the part of the Vinson & Elkins to make that clear during the 6-day trial. Specifically, despite the fact that SETENA is structurally within MINAE, it has independent status, and cannot receive directions from other MINAE offices or officers; deference must be given to its rulings and decisions. Moreover, this was confirmed by Mr.

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Chaves and by SETENA´s own actions throughout the wetlands´ analyses throughout 2007, 2008, 2009 and 2010 and 2011. This was also confirmed by other reports that were carried out on the project site during the same years.

105. To add to the above, in October of 2012, Monica Vargas wrote MINAE an email and asked them to come down and demarcate the wetlands at Las Olas. On October 30, 2012 MINAE responded to that letter and said the following: **SUBJECT**: "***Wetlands demarcation request. Las Olas project. ACOPAC understands your request of the protection of the wetland located in Las Olas project, but the demarcation request is competency of the National Geographic Institute. (IGN) Reason why this request is out of our competency. I recommend that the local government should redirect the request to this entity in attention to LIC. Max Lobo Hernandez. SIGNED BY ALFONSO DUARTE ACOPAC".***

106. As clearly seen, the, MINAE/SINAC agency states that they were not the competent agency to determine wetlands. Further, Ms. Vargas put the following in her Witness Statement for the CAFTA Trial Hearing on page 13, paragraph 45 and 46 that said the following statement:74. ***"On October 17, 2012, we requested that the ACOPAC demarcate the wetland and declare that "our purpose [was] to prevent any damage to the natural heritage and in turn decide the status of the project so that they can continue their work".***

107. ***On October 30, 2012, the ACOPAC replied that it was not competent to carry out the demarcation of the wetland in the Las Olas project since that task is the responsibility of the National Geographic Institute ("IGN").Paragraph***

108. ***46)*** *"On November 6, 2012, the Municipal Council decided to accept the request to lift the closure of the project based on the decision by the* ***SETENA*** *in Resolution No. 2850-2011 and formally inform Mr. David Aven that the Municipal Council agreed that the Las Olas project could continue, as long as it complies with prevailing legislation on the matter, pursuant to the central issue of the presence of a wetland, whose demarcation efforts were ongoing, without this being an obstacle to the development of the project in the rest of the territory.*

109. *Further , on September 13, 2012, in the same time period, at a meeting I was present at in the MUNI, the Council member put the following in part from their council meeting minutes that night:* ***"After an exhaustive investigation from SETENA, it was dictated a resolution indicating at first inclusion, regarding any injunction, to continue the development of this project (this project refers to the Las Olas Project) <u>As this tribunal knows, and according to the article Number 50 of the politics constitution SETENA is the maximum technical and environmental authority, according to the valid legislation. Precisely, based on these determinations the tribunal can act".</u>***

110. Vinson & Elkins knew about these documents because they were provided to them and discussed at length. As indicated above, it is difficult to understand the rationale for the lack of clarity on these matters and why Vinson & Elkins would agree with Counsel for Costa Rica that MINAE was the top authority in light of ample evidence showing that that it was

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clearly SETENA who had the ultimate authority on the Environmental Viability decision.

111. In conclusion, based on the issues that have been identified, I recommend Mr. Aven to present this memorandum to the UK attorneys he considers competent to evaluate this information for their opinion and analysis in order to evaluate Solicitor Professional negligence and determine if there are grounds for breach of Duty of Care and subsequent damages.

112. DAMAGES: This will be for the competency of the UK attorneys, but the following items should be considered:

1. The 70 million claimed in the Case by Claimants.
2. Pre and post judgement interest.
3. The 3 million that claimant requested to pay back all people who bought lots.
4. Moral damages that were claimed, but never argued. 5 million
5. I think a new charge could possibly be filed against Vinson & Elkins for Reputational harm to the name and reputation of David Aven. This was caused when Vinson & Elkins failed to engage the services of a Criminal Barrister to defend Mr. Aven against criminal accusations being made by Counsel for Costa Rica alleging that David Aven Duped SETENA or that he committed fraud. It's apparent that none of VE attorneys were criminal Barrister and therefore were unqualified to defend Mr. Aven against being a serial criminal.

If you have any questions about this memorandum, please do not hesitate to contact me.

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