ARBITRATION UNDER THE CENTRAL AMERICA-DOMINICAN REPUBLIC-UNITED STATES FREE TRADE AGREEMENT AND THE 2010 UNCITRAL ARBITRATION RULES

DAVID R. AVEN, SAMUEL D. AVEN, CAROLYN J. PARK, ERIC A. PARK, JEFFREY S. SHIOLENO, GIACOMO A. BUSCEMI, DAVID A. JANNEY, AND ROGER RAGUSO,

Claimants

v.

THE REPUBLIC OF COSTA RICA,

Respondent

CLAIMANTS' NOTICE OF ARBITRATION

Guillermo Aguilar Alvarez
Craig S. Miles
Ana Vohryzek
Louis-Alexis Bret
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I. Submission of a Claim to Arbitration

1. Pursuant to the Central America-Dominican Republic-United States Free Trade Agreement ("DR-CAFTA"), the investors listed below ("Investors") hereby submit their claims against the Republic of Costa Rica ("Costa Rica") to arbitration under DR-CAFTA and the 2010 UNCITRAL Arbitration Rules ("2010 UNCITRAL Arbitration Rules"). The Investors submit their arbitration claims (i) under DR-CAFTA Article 10.16(1)(a), on their own behalf, and (ii) under DR-CAFTA Article 10.16(1)(b), on behalf of enterprises incorporated in Costa Rica that the Investors directly or indirectly own or control (the "Enterprises").

2. Costa Rica's consent to submission of claims to arbitration in accordance with the procedures set out in DR-CAFTA is set forth in Article 10.17(1). Article 10.17(2) further provides that a Party's consent under Article 10.17(1) and the submission by a disputing investor of a claim to arbitration shall constitute written consent of the parties to arbitration for the purposes of the 2010 UNCITRAL Arbitration Rules.

3. This claim is also ripe for arbitration and it is otherwise properly submitted.

   a) In accordance with DR-CAFTA Article 10.18(1), less than three years have elapsed from the date on which the Investors first acquired, or should first have acquired, knowledge of the breaches alleged under Articles 10.16.1(a) and 10.16.1(b), and knowledge that the Investors and their Enterprises incurred loss or damage as a result of those breaches.

   b) In accordance with Article 10.16(3), more than six months have elapsed since the events giving rise to the Investors' claims.

   c) In accordance with DR-CAFTA Article 10.16(2), more than 90 days have passed since September 17, 2013, the date on which the Investors properly served Costa Rica with written notice of their intent to submit this claim to arbitration (the "Notice of Intent").[1] Costa Rica received the Notice of Intent on September 19, 2013,[2] but has

[1] **Exhibit C-1**, Notice of Intent to Submit a Claim to Arbitration under DR-CAFTA Chapter 10 dated September 17, 2013.

chosen not to respond. As a State cannot use its own refusal to respond to avoid arbitration, the Investors have thus necessarily satisfied the requirement in DR-CAFTA Article 10.15 that the parties seek to resolve the dispute through consultation and negotiation.

d) Lastly, as required by DR-CAFTA Article 10.18(2)(a), the Investors hereby consent to arbitration in accordance with the procedures set forth in DR-CAFTA Chapter 10 and the 2010 UNCITRAL Arbitration Rules (see also **Annex A**). The Claimants and their Enterprises also provide respectively at **Annexes A and B** to this Notice of Arbitration written waiver of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute-settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16, in accordance with DR-CAFTA Article 10.18(2)(b).

II. Name and Address of the Parties

A. Investor Claimants

4. We collectively refer to the individuals listed below as the "Investors" or "Claimants."

a) **Mr. David Richard Aven**
U.S. Passport Number 496038727
11 E. Washington St., #12A
New Castle, PA 16101

b) **Mr. Samuel Donald Aven**
U.S. Passport Number 483575127
3979 Berwick Farm Drive
Duluth, GA 30096

c) **Ms. Carolyn Jean Park**
U.S. Passport Number 426498473
306 E. Fairmont Ave.
New Castle, PA 16105

d) **Mr. Eric Allan Park**
U.S. Passport Number 426487189

[2] **Exhibit C-2**, Delivery Receipt for Shipment of Notice of Intent dated September 19, 2013.

306 E. Fairmont Ave.
New Castle, PA 16105

e) **Mr. Jeffrey Scott Shioleno**
U.S. Passport Number 498443019
5105 W. Cleveland St.
Tampa, FL 33609

f) **Mr. Giacomo Anthony Buscemi**
U.S. Passport Number 405260799
622 S. Central Blvd.
Broomall, PA 19008

g) **Mr. David Alan Janney**
U.S. Passport Number 474275663
500 S. Semoran Blvd.
Orlando, FL 32807

h) **Mr. Roger Raguso**
U.S. Passport Number 046591410
111 Holiday Lane
Canadaigua, NY 14424

5. As indicated above, the Investors file claims on their own behalf and on behalf of the Enterprises, listed in Section II.B below. As established by the copies of their attached passports,[3] the Investors are all nationals of the United States. Each of the Investors qualifies as an "investor of a Party" for purposes of DR-CAFTA Article 10.28.

B. The Enterprises

6. The Investors also bring this claim under DR-CAFTA Article 10.16(1)(b) on behalf of the Enterprises listed below:

a) Las Olas Lapas Uno, S.R.L.

b) Mis Mejores Años Vividos, S.A. (formerly, Caminos de Esterillos, S.A., Amaneceres de Esterillos, S.A., Noches de Esterillos, S.A., Lomas de Esterillos, S.A., Atardeceres Cálidos de Esterillos Oeste, S.A., Jardines de Esterillos, S.A., Paisajes de Esterillos, S.A. and Altos de Esterillos, S.A.)

c) La Estación de Esterillos, S.A. (formerly, Iguanas de Esterillos, S.A.)

[3] **Exhibit C-3** includes copies of the U.S. passports for the eight Investor Claimants (*i.e.*, David Richard Aven, Samuel Donald Aven, Carolyn Jean Park, Eric Allan Park, Jeffrey Scott Shioleno, Giacomo Anthony Buscemi, David Alan Janney, and Roger Raguso).

d) Bosques Lindos de Esterillos Oeste, S.A.

e) Montes Development Group, S.A.

f) Cerros de Esterillos del Oeste, S.A.

g) Inversiones Cotsco C & T, S.A.

h) Trio International Inc.

7. Documentation of the Enterprises' legal status and ownership is attached at **Exhibit C-4** (Certification of Current Ownership of the Enterprises). **Exhibit C-5** includes each Enterprise's title to portions of the Las Olas Project, which is defined in Section VI.A. The site plan is attached at **Exhibit C-6**.

C. The Investors' 49% Ownership Interest

8. The Investors also own a 49% ownership interest in La Canícula, S.A. **Exhibit C-7** includes proof of the Investors' 49% ownership interest in La Canícula, S.A. and La Canícula's ownership of the concession further described below.

D. Respondent Costa Rica

9. The Respondent is the Republic of Costa Rica. Pursuant to DR-CAFTA Annex 10-G, Costa Rica designated the following address to receive service:

The Republic of Costa Rica
Dirección de Aplicación de Acuerdos
Comerciales Internacionales
Ministerio de Comercio Exterior
San José, Costa Rica

III. Legal Representative and Service of Documents

10. King & Spalding LLP represents the Investors. Please direct all correspondence related to this matter to the following address:

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Craig S. Miles
Ana Vohryzek
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IV. The Agreement to Arbitrate

11. Claimants rely on Section B of Chapter 10 of the DR-CAFTA as the procedural basis for this arbitration. Section B of Chapter 10 of the DR-CAFTA sets out the provisions concerning the settlement of disputes between a Party and an investor of another Party.

12. Pursuant to DR-CAFTA Article 10.17(1), Costa Rica provided its general consent for the submission of a claim to arbitration under DR-CAFTA Chapter 10.

13. DR-CAFTA Article 10.16(3) further provides that the investor may elect to submit its claim to arbitration under the ICSID Convention and the ICSID Rules of Procedures for Arbitration Proceedings, the ICSID Additional Facility Rules, or the 2010 UNCITRAL Arbitration Rules, as modified by Section B of DR-CAFTA Chapter 10. The Investors accordingly submit their claim to arbitration under the 2010 UNCITRAL Arbitration Rules, as modified by Section B of DR-CAFTA Chapter 10.

14. As stated above, DR-CAFTA Article 10.17(2) provides that Costa Rica's consent under Article 10.17(1) and the submission by the Investors of their claims to arbitration (i) on their own behalf under DR-CAFTA Article 10.16(1)(a) and (ii) on behalf of the Enterprises under DR-CAFTA 10.16(1)(b) "shall satisfy the requirements of [...] Article II of the New York Convention for an 'agreement in writing;' and [...] Article I of the Inter-American Convention for an 'agreement.'"

V. Jurisdiction

15. An arbitral tribunal constituted under DR-CAFTA Chapter 10 has jurisdiction over this dispute. The Investors—all United States citizens—are investors of a Party under Article 10.28 of the treaty. The Enterprises are "enterprises" as defined in DR-CAFTA Articles 2.1 and 10.28, and an "investment" of an "investor of a Party" as defined in Article 10.28. Accordingly, a DR-CAFTA arbitral tribunal has jurisdiction over the Investors' claims under DR-CAFTA Article 10.16(a) and (b).

16. Likewise, the Claimants' investments in Costa Rica meet the definition of protected investment under DR-CAFTA Article 10.28. In relevant part, DR-CAFTA Article 10.28 defines "investment" as:

> [...] every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:
>
> (a) an enterprise;
>
> (b) shares, stock, and other forms of equity participation in an enterprise;
>
> [...]
>
> (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
>
> [...]
>
> (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and
>
> (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges [....]

17. Each of the Enterprises is an "enterprise," and, as a result, constitutes a protected investment, as do the Investors' "shares, stock, and other forms of equity participation" in the Enterprises. The Investors' 49% interest in La Canícula, S.A. also constitutes "shares,

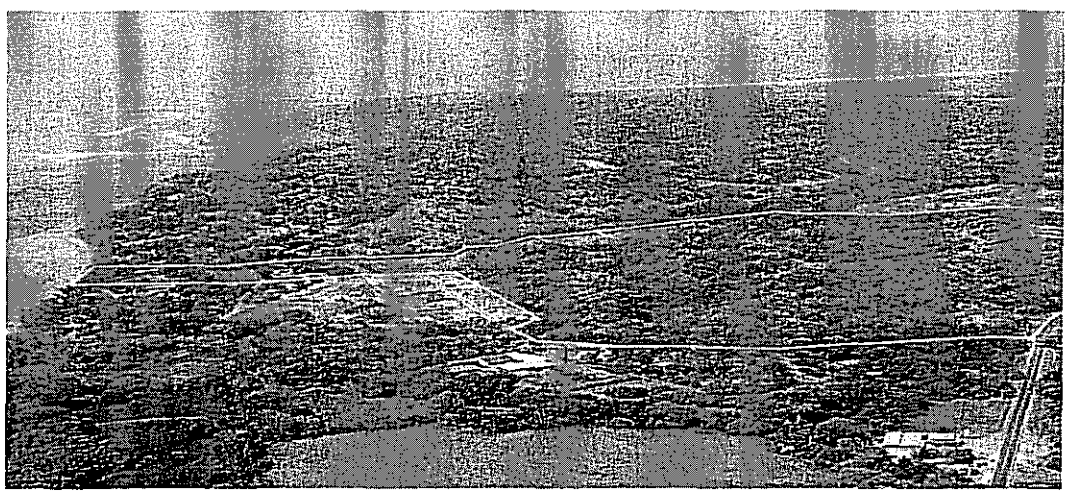
stock, and other forms of equity participation" in an enterprise and is therefore a protected investment.

18. The Investors also own or control, directly or indirectly, the Las Olas Project and the Enterprises' rights over the project. These are "asset[s] that an investor owns or controls," which include without limitation rights pursuant to "(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts" and "licenses, authorizations, permits, and similar rights conferred pursuant to domestic law." They also constitute "(h) [...] other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges."

VI. Factual Basis for the Claim

A. The La Olas Project

19. In 2002, the Investors purchased approximately 39 hectares of land on the Pacific coast of Costa Rica in an area known as Esterillos Oeste.[4] The land included a 2.2-hectare beach concession that backed onto rolling hills with sweeping views of the ocean. After obtaining all of the required permits, the Investors commenced construction of the Las Olas Project, which comprised a hotel, a beach club and 352 villas. The Investors' plan was to create a beautiful, sustainable beach community. The land itself was ideal for building, and there are successful developments on both sides of the Las Olas Project.



[4] **Exhibit C-8**, Agreement for the Purchase-Sale, Endorsement and Transfer of Shares dated April 2002.

20. The Investors, led by David Aven, used Inversiones Cotsco C & T, S.A. ("Inversiones Cotsco") to develop and operate the villas project, which they called Condominio Horizontal Residencial Las Olas.[5] They also had an ownership interest in La Canícula, S.A., which held the beach concession, for the development of the hotel.[6] Together these developments formed the Las Olas Project.

B. From 2006 to 2008, the Las Olas Project Obtained All Requisite Environmental Permits, Which Included a Determination that There Was No Wetland or Forest on the Property

21. With the help of a local firm, Mussio Madrigal, Inversiones Cotsco applied for the permits necessary to develop the land.

22. As legally required, Inversiones Cotsco first filed with the Ministry of Environment and Energy's National Environmental Technical Secretariat (*Ministerio de Ambiente y Energía, Secretaría Técnica Nacional Ambiental* or SETENA), which has the exclusive authority to issue environmental permits (*Viabilidad Ambiental* or Environmental Viability) for real estate projects.

23. In March 2006, SETENA issued the Environmental Viability permit for the 2.2-hectare hotel portion of the Las Olas Project owned by La Canícula in Resolution No. 543-2006-SETENA.[7]

24. As part of this permitting process, SETENA sought and, on April 2, 2008, received an approval letter for the villas portion of the Las Olas Project (the "MINAE Letter") from the Ministry of Environment and Energy National System of Conservation Areas (*Sistema Nacional de Areas de Conservación, Ministerio de Ambiente y Energía* or MINAE).[8]

25. After ensuring that the project was environmentally feasible, on June 2, 2008, SETENA issued the Environmental Viability permit for the villas portion of the Las Olas Project through Resolution No. 1597-2008-SETENA.[9] This Resolution specifically states that

[5] **Exhibit C-9**, Deed of Incorporation for Inversiones Cotsco C&T, S.A. dated February 2, 2001.
[6] **Exhibit C-10**, Concession Agreement (La Canícula S.A.) dated February 18, 2002.
[7] **Exhibit C-11**, Resolution No. 543-2006-SETENA dated March 17, 2006.
[8] **Exhibit C-12**, ACOPAC-OSRAP-00282-08 dated April 2, 2008.
[9] **Exhibit C-13**, Resolution No. 1597-2008-SETENA dated June 2, 2008.

there were "no permanent or intermittent ravines or rivers, and that the vegetation is composed of grass with scattered trees and small sectors of vegetation" and "the area around the Project is used for similar projects, with houses and buildings in construction."

26. Upon receiving the required Environmental Viability permits legally issued by SETENA, the Investors registered the subdivided master site plans with the National Registry and provided a copy to SETENA. After SETENA legally issued the Environmental Viability permits, the Investors obtained approval from the College of Architects (*Colegio Federado de Ingenieros y Arquitectos*), paid the required taxes and fees, purchased insurance, and supplied all of this documentation to the Municipality of Parrita. The Municipality then independently verified all the documentation before approving and issuing the construction permits.[10]

27. The Investors started construction of the Las Olas Project in July 2010.

28. On July 8, 2010, MINAE re-inspected the Las Olas Project property and, on July 16, 2010, issued a report reaffirming its finding from April 2, 2008 that the property did not include wetlands or a protected forest.[11] It further confirmed this finding in a written report dated August 27, 2010.[12]

29. SETENA also re-inspected the property, and issued Resolution 2086-2010 on September 1, 2010, reiterating the findings of the Environmental Viability from June 2, 2008, to the effect that "the project area does not have evidence of bodies of water or wetlands."[13]

C. After Construction Commenced, Costa Rica Enjoined the Project Based on an Unfounded and Arbitrary Determination That the Property Had Wetlands and a Forest

30. The Investors were continuing with construction on the project throughout the fall of 2010, when MINAE suddenly reversed course—following an unsuccessful bribery attempt.

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[10] **Exhibit C-14**, Construction permits.
[11] **Exhibit C-15**, SINAC-ACOPAC Environmental Inspection of Las Olas Project Property dated July 16, 2010, p. 3.
[12] **Exhibit C-16**, Letter (ACOPAC-OSRAP-468-10) from Cristian Bogantes to Hazel Díaz Meléndez (*Directora de Área Calidad de Vida, Sistema Nacional de Áreas de Conservación*, ACOPAC, MINAE) dated August 27, 2010.
[13] **Exhibit C-17**, Resolution No. 2086-2010-SETENA dated September 1, 2010.

31. While visiting the Las Olas Project site, Mr. Cristian Bogantes, the director of the MINAE office in Quepos, told Mr. Aven that things would go a lot easier if Mr. Aven contributed to their retirement funds. This was the second bribery attempt by Costa Rican government officials. The Municipality of Parrita had previously solicited a US$200,000 bribe for continuation of the Las Olas Project. The Investors have in their possession a tape recording of the solicitation of this bribe.

The Investors were continuing with construction on the project throughout the fall of 2010, when MINAE suddenly reversed course-following an unsuccessful bribery attempt.

32. Mr. Aven—an Investor and the Las Olas Project representative—flatly refused to pay either bribe. In fact, Mr. Aven filed a criminal complaint regarding the bribe solicitation, which the local Prosecutor's Office in Quepos ignored.[14] Indeed, when Mr. Aven checked on the status of his complaint over a year later, there was nothing in the file. Worst yet, as further discussed below, far from investigating Mr. Bogantes, the Prosecutor called him as a witness against Mr. Aven.

33. Soon after, MINAE set out to shut down the project. On November 30, 2010, MINAE sent a letter to SETENA alleging that the April 2, 2008 MINAE letter on which SETENA had purportedly relied to issue the Environmental Viability permit was based on a forged document.[15] MINAE also suddenly determined—without any scientific support—that there were wetlands on the Las Olas Project land.

34. On February 14, 2011, MINAE sent Mr. Aven a letter notifying him of a formal complaint made against the Las Olas Project regarding alleged wetlands and forests on the property. As a result, MINAE notified Mr. Aven of an administrative injunction placed on the property, which prevented any further construction or development.

35. Based on these allegations, in April 2011 SETENA shut down the Las Olas Project.[16] The Investors responded immediately. Mr. Aven showed that (i) the supposedly false letter came from MINAE's own files, and (ii) SETENA did not even rely on that letter to grant the permit. Upon internal confirmation that the allegedly false document came from MINAE's own files and that SETENA did not rely on it in issuing the Environmental

[14] **Exhibit C-18**, Criminal Complaint by Mr. Aven against Mr. Bogantes dated September 16, 2011.
[15] *See* **Exhibit C-19**, Resolution No. 2850-2011-SETENA dated November 15, 2011, p. 2 ¶1.
[16] **Exhibit C-20**, Resolution No. 839-2011-SETENA dated April 13, 2011.

Viability permit, on November 15, 2011 SETENA issued Resolution No. 2850-2011-SETENA, lifting the injunction and reinstating the Environmental Viability permit.[17]

36. By then, however, another government agency, the *Tribunal Ambiental Administrativo* ("TAA"), which is a part of the *Ministerio del Ambiente y Energía y Telecomunicaciones*, had placed an injunction on the entire Las Olas Project.[18]

D. Costa Rica Brought Unfounded Criminal Charges Against the Investors

37. Notwithstanding the validity of the Environmental Viability permit and multiple governmental confirmations, including by SETENA, that no wetlands or forests were present on the property, the Environmental Prosecutor's Office opened a criminal investigation against Mr. Aven on grounds that the Las Olas Project was being constructed on wetlands and a forest.

38. During this criminal investigation in April of 2011, Mr. Aven provided Mr. Luis Martínez, the Environmental Prosecutor, all of the government reports and permits from 2006 to 2010, proving beyond doubt that the property did not include wetlands or a forest. Mr. Aven also responded to all of Mr. Martínez' questions and further informed him that Mr. Bogantes had solicited a corrupt payment in exchange for allowing the project to continue. Under the circumstances, Mr. Martínez should have dropped the criminal investigation against Messrs. Aven and Damjanac and pursued one against Mr. Bogantes. But he did exactly the opposite: Mr. Martínez chose not to investigate Mr. Bogantes, relying instead on Mr. Bogantes' testimony to support his spurious criminal investigation against Messrs. Aven and Damjanac.

39. Ignoring these reports, on October 21, 2011, the Environmental Prosecutor filed formal criminal charges against Mr. Aven. The Environmental Prosecutor also criminally charged Mr. Aven's employee, Mr. Jovan Damjanac, with cutting down a forest even though all

[17] **Exhibit C-19**, Resolution No. 2850-2011-SETENA dated November 15, 2011.
[18] **Exhibit C-21**, Resolution No. 412-11-TAA dated April 13, 2011, p. 4.

evidence, including SETENA's determinations, indicated that the area on the property was not a forest.[19]

40. The Environmental Prosecutor also ignored Mr. Aven's statements regarding the bribe solicited by Mr. Bogantes of MINAE. Although extortion and bribery are serious criminal offenses, the Prosecutor (i) failed to investigate Mr. Aven's claim, (ii) maintained the investigation against the Las Olas Project, and (iii) decided to call Mr. Bogantes to testify against Mr. Aven.

41. On November 30, 2011, the Environmental Prosecutor sought and the Criminal Court of Aguirre and Parrita granted an injunction to stop the Las Olas Project.[20] This was two weeks *after* SETENA had issued Resolution No. 2850-2011-SETENA retracting its injunction and reinstating the Las Olas Project permit.[21] Indeed, the Court of Aguirre and Parrita granted the injunction while admitting that SETENA, the only agency with the jurisdiction to make environmental determinations, had "conceded the [Project's] environmental viability."[22]

42. The criminal case went to trial in December 2012. The trial, which is captured on video, was rife with misstatements, admissions, perjury and inequitable treatment.

43. For one, prosecutorial witnesses and government employees admitted that the area had no wetlands or forest, and belied the government's allegations to the contrary. Mr. Carlos Alberto Mora Solano, the prosecution's first witness, testified that, having grown up in the area, he knew that there were no forests or wetlands on the property. Mr. Mora Sorano explained that the property was pasture, previously used for livestock. Ms. Monica Isabel Vargas, an employee of the Municipality of Parrita, subsequently testified that she had received reports from MINAE indicating that there were no wetlands on the property. Ms. Vargas further noted that SETENA had lifted the injunction on the property and had reinstated its Environmental Viability permit. Another government employee who works in Costa Rica's Commission of Wetlands, Mr. Diógenes Antonio Cubero Fernandez,

[19] **Exhibit C-22**, Criminal Complaint against Messrs. Aven and Damjanac dated October 21, 2011.
[20] **Exhibit C-23**, Judicial Injunction on the Las Olas Project dated November 30, 2011.
[21] **Exhibit C-19**, Resolution No. 2850-2011-SETENA dated November 15, 2011.
[22] **Exhibit C-23**, Judicial Injunction on the Las Olas Project dated November 30, 2011, p. 3 ¶3.

likewise testified that he had examined the soil of the property in question and concluded that the soil could not be categorized as the type of soil present in a wetland.

44. In addition, Mr. Minor Arce Solano, a forestry engineer, testified that he had examined the property on two occasions and had determined that—contrary to MINAE's revised finding—there was no forest on the property. Mr. Arce Solano also cited to a report by INGEOFOR, an environmental engineering company, which had similarly found after a systematic study that there were no forests on the property.[23]

45. As indicated above, the Government also called as a witness Mr. Bogantes, whom Mr. Aven had accused of soliciting a bribe and whose testimony contradicted his own written reports. Mr. Bogantes first testified that MINAE had found wetlands in two reports from January and February 2010. The judge admonished him, however, noting that the January and February 2010 reports simply concluded that the body of water identified in the property existed only as a result of rainwater runoff, and was not a wetland. The judge also read Mr. Bogantes the July 16, 2010 MINAE report finding that no wetlands existed on the property. When asked to explain the contradiction between his testimony and the written reports, Mr. Bogantes perjured himself by testifying that he had nothing to do with the July 16, 2010 report. But the judge immediately pointed out that this report mentioned Mr. Bogantes by name. Mr. Bogantes again lied, alleging that he had no involvement in the report and merely drove its author, Mr. José Rolando Manfredi Abarca of MINAE, to the property. This was belied by Mr. Bogantes' acknowledgement in writing that both he and Mr. Manfredi conducted the investigation that led to the July 16, 2010 report.[24]

46. In the end, MINAE's claim that there were wetlands and a forest on the Las Olas Project property was merely reduced to an assertion that MINAE was a government agency empowered to make whatever environmental determination it wanted—and authorized to do so at any time it saw fit. Even if this claim were supported by Costa Rican law, it is certainly not consistent with DR-CAFTA principles proscribing arbitrary treatment, and which require Costa Rica to extend to U.S. investors fair and equitable treatment, among

[23] **Exhibit C-24,** *Análisis de la Cobertura Vegetal en el Proyecto Condominio Horizontal Las Olas, Esterillos Puntarenas* ("INGEOFOR Forestry Report") dated December 2011.
[24] **Exhibit C-16,** Letter (ACOPAC-OSRAP-468-10) from Cristian Bogantes to Hazel Díaz Meléndez (*Directora de Área Calidad de Vida, Sistema Nacional de Áreas de Conservación,* ACOPAC, MINAE) dated August 27, 2010.

other protections. The government employees' statements in this regard are alarming. For example, when pressed during testimony at Mr. Aven's trial, Mr. José Rolando Manfredi Abarca testified that after submitting the July 16, 2010 report that concluded there were no wetlands it was permissible for him to change standards and subsequently determine that there were wetlands, absent any detailed method to draw such a conclusion. And, though construction had commenced under a valid permit based on his earlier determination that there were no wetlands, it was, in fact, legal to enjoin the project indefinitely and bring a criminal case against a property-holder for constructing on wetlands. Even assuming that this were consistent with Costa Rican law, it is not consistent with DR-CAFTA, nor does it liberate Costa Rica from its international obligations to U.S. investors under that treaty.

47. Bolstering the government's arbitrary and indiscriminate power, Mr. Jorge Arturo Gamboa of MINAE testified that wetlands could be classified without meeting the requirements of the Organic Environmental Law and Decree 35803-MINAET, which set forth the particular criteria for "wetlands." According to Mr. Gamboa, the determination was entirely at MINAE's discretion and, apparently, entirely arbitrary. Mr. Dionel Burgos González of MINAE made the same point with respect to forests: MINAE could ignore the requirements of the law and determine that a property had a forest and was thus environmentally protected. This, of course, would also constitute an international wrong. All of this is captured on video to be provided at such time as is determined by the Arbitral Tribunal's procedural schedule.

48. Another element of the trial that falls below the international minimum standard of treatment is the way it concluded. At the end of the trial, it had become clear that the Environmental Prosecutor had not proven his case. But rather than permitting the acquittal of Mr. Aven and the lifting of the injunction on the Las Olas Project, the Environmental Prosecutor desperately maneuvered to maintain the criminal proceedings and prevent the investors from proceeding under their valid permits.

49. On the last day of the trial, at around ten in the morning, only closing statements remained. However, the Prosecutor informed the judge that the parties would not have time to finish that day. Surprisingly, the judge granted a prosecutorial delay—postponing the closing

statements from January 16 to January 25, 2013. On January 24, 2013, the judge called in sick. Then, on January 31, the court granted the Prosecutor's motion for a re-trial on the grounds that more than ten business days had elapsed since January 16 (the last hearing day). The judge ordered a new trial over Mr. Aven's objections.

50. The provision on which the judge relied, Article 326 of the Criminal Procedural Code, exists to protect defendants from protracted criminal trials. It is not intended to permit prosecutors who fail to prove their case a second bite at the apple after hearing the defendants' entire defense. Article 326 of the Criminal Procedural Code does not support double jeopardy, but that is precisely how the Prosecutor and criminal court used it. As a result of this unprecedented application of the Criminal Procedural Code, the Prosecutor and the criminal court continue to unlawfully pursue criminal charges against Messrs. Aven and Damjanac based on the same claims.[25]

51. We further draw the Arbitral Tribunal's attention to the fact that Mr. Aven and Mr. Jeffrey Shioleno—both Investors and Claimants—have experienced an assassination attemp[26]t and threats to their freedom. Ignoring this fact, the criminal court has nonetheless issued an international warrant for Mr. Aven's arrest[27] because he refused to appear at the hearing in San José.

52. The end result is that Costa Rica's conduct has deprived the Investors of their right to develop the Las Olas Project in violation of Costa Rica's international obligations and that Costa Rica is seeking to intimidate Mr. Aven by the international enforcement of an arrest warrant against him.

VII. Legal Basis for the Claim

52. DR-CAFTA Article 10.5 provides that "[e]ach Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."

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[25] **Exhibit C-25**, Judicial Order No. 11-000009-611-PE dated January 13, 2014.
[26] Claimants will provide evidence of this assassination attempt.
[27] Claimants are trying to obtain a copy of the arrest warrant and will provide it to the Arbitral Tribunal upon request.

53. By its conduct, Costa Rica has violated the fair and equitable treatment ("FET") standard of DR-CAFTA Article 10.5, as it did not treat the Investors and their Investments fairly and equitably. Specifically, Costa Rica's conduct violated the Investors' and their investments' rights to transparency, due process and treatment that is not arbitrary, among other fundamental tenets of fair and equitable treatment. Costa Rica's actions also violated the Investors' legitimate expectation that Costa Rica would uphold the rule of law and act in accordance with its own laws and validly-issued permits.

54. The conduct of the Costa Rican judiciary is a separate breach of DR-CAFTA Article 10.5. The municipal court and the appellate and supreme courts gave the Environmental Prosecutor, a government agent, a chance to resuscitate a case that should have resulted in the acquittal of Mr. Aven following the Prosecutor's failure to prove any liability. This type of harassment and re-trial is outlawed in Costa Rica and in any rule-of-law system.

55. Costa Rica has also breached its obligation to afford U.S. investors and their investments non-discriminatory treatment under DR-CAFTA Articles 10.3 and 10.4. Article 10.3 provides that each Party shall accord to investors and covered investments of another Party "treatment no less favorable than that it accords, in like circumstances, to its own investors [and investments in its territory of its own investors] with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory."

56. Article 10.4(1) provides that "[e]ach Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory."

57. Article 10.4(2) also grants that "[e]ach Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."

58. Many similarly-situated and environmentally-comparable neighboring properties have been developed, often by Costa Rican nationals. There is no reasonable nexus to a rational government policy that would justify this discrimination.

59. In addition, Costa Rica violated DR-CAFTA Article 10.7 by indirectly expropriating the Investors' right to the value of their investment without compensation. Article 10.7 provides that "[n]o Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization" except "(a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation . . . and (d) in accordance with due process of law and Article 10.5."

60. By enjoining the Las Olas Project, soliciting bribes, bringing a criminal claim against the project representative, Mr. Aven, and ultimately creating a situation in which Mr. Aven cannot return to Costa Rica, the government of Costa Rica has effectively deprived the Investors of their right to develop the Project, and to enjoy the profits from their investments. What was meant to be a beautiful and profitable real estate project is now empty land with no reasonable prospect of development—certainly not by the Investors, given the reputational harm from the criminal proceedings, and the fact that Mr. Aven, their representative, would be risking his life by returning to Costa Rica.

VIII. Damages

61. The Investors will seek full compensation for the losses and other injuries suffered as a result of Costa Rica's breaches, including pre- and post-judgment interest, costs, and such other relief as the arbitrators deem appropriate. Investors preliminarily estimate damages to be US$70 million, subject to expert determination as provided by the Tribunal in its procedural schedule.

62. In addition, the Investors will seek contingent damages to be held in escrow in the event of a potential lawsuit brought by third parties who purchased lots prior to Costa Rica's breaches and who are now unable to use or occupy the land. The Investors consider likely the possibility of a lawsuit or series of lawsuits, since the lots were purchased with the expectation that the Investors would complete construction of the Las Olas Project. Since

there is now an injunction on all of the Investors' property, along with the lots purchased by third parties, the Investors are now vulnerable to such claims.

63. Lastly, Claimants will request moral damages for harm suffered by lead Investor Mr. Aven as a result of the criminal proceedings against him, in an amount to be provided by the Investors in accordance with the Tribunal's procedural schedule. Moral damages are a part of reparation of an international wrong as clearly established under the International Law Commission's Articles on State Responsibility Articles 31, 36 and 37. Specifically, the criminal case and the conduct of Costa Rica has caused and continues to cause Mr. Aven, an Investor, significant pain and suffering, including psychological suffering due to fear of imprisonment and harassment, risk to life and limb, reputational harm, and the impact of a potential criminal record. It is also a personal affront associated with an intrusion on his personal life.

IX. Interim Measures of Protection

64. The Investors further request that the Arbitral Tribunal adopt interim measures of protection to enjoin the criminal proceedings against Messrs. Aven and Damjanac.

65. The Investors seek protection from criminal prosecution to maintain the *status quo* pending the adjudication of their international law claims.[28] The interim measure requested would also prevent imminent harm from befalling Mr. Aven should the criminal proceedings continue.[29]

66. The Tribunal has broad powers to issue interim measures. DR-CAFTA Article 10.20(8) provides that "[a] tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective."[30] Article 26(1) of the 2010 UNCITRAL Arbitration Rules, under which this Tribunal

[28] 2010 UNCITRAL Arbitration Rules, Art. 26(2)(a).
[29] *Id.* at Art. 26(2)(b)(i).
[30] DR-CAFTA at Article 10.20(8).

operates, further provides that "[t]he arbitral tribunal may, at the request of a party, grant interim measures."[31]

67. Article 26(3) of the 2010 UNCITRAL Arbitration Rules provides three requirements that a party requesting interim relief must satisfy: (1) "harm not adequately reparable by an award of damages is likely to result if the measure is not ordered"; (2) "such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted"; and (3) "there must be a "reasonable possibility that the requesting party will succeed on the merits of the claim."

68. The Investors' request for interim measures satisfies each of these elements, as set forth below.

A. Harm Not Adequately Reparable by an Award of Damages is Likely to Result If This Tribunal Does Not Enjoin the Criminal Proceedings Against Mr. Aven

69. Claimants are likely to suffer harm "not adequately reparable by an award of damages," if this Tribunal does not enjoin the criminal proceedings against Mr. Aven.

70. Unfortunately for Mr. Aven, absent the enjoinment of the criminal proceedings in Costa Rica, he must either return to Costa Rica at the risk of his life or health, or forgo his ability to defend himself in a criminal trial, thereby risking contempt of court, a criminal record, and/or jail if he ever returns. In either situation, the harm is not reparable by damages—it is an assault on his security, freedom, and right to due process—fundamental human rights and tenets of international law.

71. Critically, it would be a reckless endangerment to require Mr. Aven to appear at the criminal hearing given that he has already been the victim of an assassination attempt in Costa Rica. Moreover, the threat to Mr. Aven's safety is only heightened with the filing of this Notice of Arbitration. Accordingly, there is every reason to ensure that Mr. Aven is

[31] Article 26(2) of the 2010 UNCITRAL Arbitration Rules provides that "[a]n interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to: (a) [m]aintain or restore the status quo pending determination of the dispute; (b) [t]ake action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself; (c) [p]rovide a means of preserving assets out of which a subsequent award may be satisfied; or (d) [p]reserve evidence that may be relevant and material to the resolution of the dispute."

not required to return to Costa Rica, as it is unquestionable that a threat to human life and physical safety is not adequately reparable by an award of damages. Should the criminal proceedings proceed, neither this Tribunal nor Costa Rica will have any way of guaranteeing Mr. Aven's security.

72. Even if Mr. Aven's life were not at risk, Costa Rica is nevertheless using the criminal proceedings to intimidate, injure and pressure Messrs. Aven and Damjanac. As made clear by the Prosecutor's decision to seek a delay after his witnesses failed him, and the judge's subsequent decision to grant a re-trial, Costa Rica is using this criminal trial as a way to continue to harm the Investors and to ensure that their investment remains worthless. This is both intimidation and serves to aggravate and extend the dispute. Monetary damages will not fully repair the moral and financial damage suffered through intimidation and prolonging unfounded criminal claims, or the reputational costs to Mr. Aven and his business partners of facing unwarranted criminal proceedings and, in Mr. Aven's case, a criminal record. Mr. Aven has never been charged with a crime in his life.

73. Moreover, the issues in the criminal trial directly relate to the actions and merits of this treaty dispute. Under international law, the interim measures are appropriate where necessary to preserve the *status quo* and/or to prevent a party from aggravating, exacerbating or extending a dispute. The principles of preservation of the *status quo* and non-aggravation of the dispute were upheld by the Permanent Court of International Justice in *Electricity Company of Sofia and Bulgaria*.[32] Investor-State arbitral tribunals have subsequently reaffirmed these rights.[33]

74. For example, the *City Oriente v. Ecuador* tribunal prevented a State from taking matters into its own hands to aggravate the dispute: "pending a decision on this dispute, the principle that neither party may aggravate or extend the dispute or take justice into their own hands prevails."[34] On this understanding, it granted the claimant's request to order

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[32] **Claimants' Legal Authorities (CLA)-1**, *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Judgment of December 5, 1939, PCIJ series A/B, No. 79, p. 199.

[33] *See, e.g.*, **CLA-2**, *Sergei Paushok et al. v. The Government of Mongolia*, UNCITRAL, Order on Interim Measures, September 2, 2008, p. 17, ¶ 11.

[34] **CLA-3**, *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, November 19, 2007, ¶ 57.

Ecuador to stop pursuing administrative and criminal proceedings against City Oriente and its employees.[35]

75. Here too, the criminal proceedings threaten the *status quo*, as the criminal proceedings deal with matters at issue in this arbitration. There is a distinct possibility—based on the prior criminal proceedings—that Mr. Aven will not receive a fair trial (whether or not he is able to attend) and that the court may make a number of determinations and findings in an attempt to either alter the fact-findings in this dispute or penalize Mr. Aven for bringing it. This may include Mr. Aven having a criminal record.

B. The Potential Harm from Continuing the Criminal Proceedings Substantially Outweighs the Harm Costa Rica Will Suffer If They Are Enjoined

76. The harm the Investors face with the continuation of the criminal proceedings substantially outweighs any harm that Costa Rica will suffer if the proceedings are enjoined. As explained above, Mr. Aven faces threats to his physical person, the loss of the right to defend himself, potential imprisonment and a criminal record if the claims continue. All the Investors face reputational costs associated with an unwarranted criminal trial.

77. By contrast, Costa Rica will suffer no harm if the criminal proceeding is enjoined. Mr. Aven is not in the country and is not developing the project—even if he wanted to do so, the TAA has enjoined it. As a result, there is no development occurring on either forest or wetlands, by any definition. And, as explained above, the criminal trial is entirely unfounded, should never have happened, and should have been dismissed in December 2012. There can be no harm where the injunction is on a party's ability to continue a farcical trial.

C. The Requested Measures Are Urgent

78. Though not required by the applicable rules, Claimants wish to stress that the requested interim measures are urgent.

79. "Urgency" in international law is understood to mean that "there is a real risk that action prejudicial to the rights of either party might be taken before the Court has given its final

[35] *Id.* at ¶ 62.

decision."[36] Many arbitral tribunals have adopted this interpretation of urgency.[37] The *Quiborax v. Bolivia* tribunal held, for example, that "the criterion of urgency is satisfied when 'a question cannot await the outcome of the award on the merits.'"[38] The *Biwater Gauff v. Tanzania* tribunal went further and found that in some cases "the only time constraint is that the measure be granted before an award—even if the grant is to be some time hence."[39]

80. Moreover, several arbitral tribunals have accepted that interim measures seeking to protect the integrity of the arbitration or to prevent the aggravation of a dispute satisfy the urgency standard by definition. In *Quiborax v. Bolivia*, the tribunal found that "if measures are intended to protect the procedural integrity of the arbitration, in particular with respect to access to or integrity of the evidence, they are urgent by definition."[40] For its part, the *Burlington v. Ecuador* held that "when the measures are intended to protect against the aggravation of the dispute during the proceedings, the urgency requirement is fulfilled by definition."[41]

81. The hearing in the criminal trial is currently taking place in San José. Mr. Aven—one of the Investors—is being required to appear in a country where he was nearly killed just a short time ago, and in which he has received numerous threats. As indicated above, we further understand that the criminal court just issued an international warrant for Mr.

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[36] **CLA-4**, *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order of October 15, 2008, [2008] ICJ Reports 353 at ¶ 129.

[37] **CLA-5**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1, March 31, 2006, ¶ 76; **CLA-6**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, August 17, 2007, ¶ 59; and **CLA-3**, *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, November 19, 2007, ¶ 67.

[38] **CLA-7**, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, February 26, 2010, ¶ 150.

[39] **CLA-5**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1, March 31, 2006, ¶ 76.

[40] **CLA-7**, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, February 26, 2010, ¶ 153. *See also* **CLA-3**, *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, November 19, 2007, ¶ 69.

[41] **CLA-8**, *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures, June 29, 2009, ¶ 74.

Aven's arrest.[42] This international warrant appears to be based precisely on the fact that Mr. Aven refused to be present at the hearing. This disturbing development further compels granting the Investors' urgent request for injunctive relief.

D. The Investors Have Established a *Prima Facie* Case

82. The Investors have established a *prima facie* case, as required by Article 26(3)(a) of the 2010 Rules.

83. In addressing this particular requirement, the *Paushok v. Mongolia* tribunal stated as follows: "At this stage, the Tribunal need not go beyond whether a reasonable case has been made which, if the facts alleged are proven, might possibly lead the Tribunal to the conclusion that an award could be made in favor of Claimants. Essentially, the Tribunal needs to decide only that the claims made are not, on their face, frivolous or obviously outside the competence of the Tribunal. To do otherwise would require the Tribunal to proceed to a determination of the facts and, in practice, to a hearing on the merits of the case, a lengthy and complicated process which would defeat the very purpose of interim measures."[43]

84. The Investors have clearly established their *prima facie* case on the merit. As set forth above, between 2006 and 2008, Claimants' local companies obtained all of the required permits and commenced construction of the Las Olas Project as legally permitted under the permits. This included environmental permits (Environmental Viability) for both the hotel portion of the project (in March 2006) and the villas portion of the project (in June 2008) from SETENA, the exclusive authority to issue environmental permits for real estate projects. In granting them, SETENA relied on a MINAE resolution concluding that the property contained "no permanent or intermittent ravines or rivers, ... the vegetation is composed of grass with scattered trees and small sectors of vegetation," and "the area around the Project is used for similar projects, with houses and buildings in construction."[44]

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[42] Claimants will provide a copy to the Arbitral Tribunal as soon as they obtain one.
[43] **CLA-2**, *Sergei Paushok et al. v. The Government of Mongolia*, UNCITRAL, Order on Interim Measures, September 2, 2008, ¶ 55.
[44] **Exhibit C-13**, Resolution No. 1597-2008-SETENA dated June 2, 2008.

85. With all the proper permits, Claimants commenced construction in July 2010. MINAE re-inspected the Las Olas Project property and, on July 16, 2010, issued a report reaffirming its finding from April 2, 2008, that the property included no wetlands or a protected forest. It further confirmed this finding in a written report dated August 27, 2010. SETENA also re-inspected the property, and issued Resolution 2086-2010 on September 1, 2010, reiterating the findings of the Environmental Viability from June 2, 2008, to the effect that "the project area does not have evidence of bodies of water or wetlands."

86. Then Costa Rica began to engage in a series of international wrongs. After an unsuccessful bribery attempt, MINAE suddenly determined—without any scientific support—that there were wetlands on the Las Olas Project land. On February 14, 2011, MINAE notified Mr. Aven of an administrative injunction placed on the property, which prevented any further construction or development. Based on certain MINAE allegations, in April 2011 SETENA shut down the Las Olas Project, but lifted the injunction and reinstated the Environmental Viability on November 15, 2011. By then, however, the TAA had placed an injunction on the entire Las Olas Project.

87. Notwithstanding the validity of the Environmental Viability and SETENA's findings to the contrary, the Environmental Prosecutor's Office opened a criminal investigation against Mr. Aven on grounds that the Las Olas Project was being constructed on wetlands and a forest. Subsequently, the Environmental Prosecutor also criminally charged Mr. Damjanac, with cutting down a forest, even though all evidence, including SETENA's determinations, indicated that the area on the property was not a forest. The Prosecutor also obtained an injunction on November 30, 2011, to stop the Las Olas Project. The criminal case went to trial in December 2012. Most of the government's witnesses disavowed any findings of wetlands or forest, and it became clear by the end of the trial that the Prosecutor had failed to prove his case. Instead of entering acquittals, however, the judge granted the Prosecutor's request for a delay in closing arguments, then subsequently granted a new trial on the grounds that more than ten days had elapsed since the last hearing day. The result is that Messrs. Aven and Damjanac are scheduled to be re-tried on the same charges in January 2014.

88. Mr. Aven also survived an assassination attempt, and in light of the criminal re-trial and security risks, it is obvious that he cannot return to Costa Rica. The bottom line is that Mr. Aven and the other Claimants have been deprived of any right to develop the Las Olas Project, which has effectively been expropriated from and rendered valueless to them.

89. There are thus strong grounds to find Costa Rica liable for violating one or more standards of protection in the DR-CAFTA. In particular, Costa Rica's actions *prima facie* violate the prohibitions in DR-CAFTA against (1) measures tantamount to expropriation, (2) unfair and inequitable treatment, and (3) discriminatory treatment.

90. With respect to measures tantamount to expropriation, Article 10.7 provides that "[n]o Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization" except "(a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation . . . and (d) in accordance with due process of law and Article 10.5." Costa Rica's unjustified actions in enjoining the Las Olas Project (and presumably any other development on the site) have effectively put an end to any use, enjoyment or disposal of the property by Claimants. Moreover, the on-going criminal prosecution of Mr. Aven and his lack of personal security (as evidenced by the assassination attempt) have likewise precluded any reasonable possibility of resuming the project, even in the absence of the injunctions. Accordingly, there are strong grounds to find Costa Rica liable for effectively expropriating the property and project.

91. Similarly, Costa Rica's actions are hallmark violations of the FET standard. DR-CAFTA Article 10.5 provides that "[e]ach Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security." There a number of potential heads of FET violations present in this case. Claimants had a "legitimate expectation" that they would be able to develop the Las Olas Project as intended; (2) Claimants relied on that expectation in making and implementing that investment; and (3) Costa Rica violated that expectation by belatedly and unjustifiably reclassifying the property as wetlands/forestry and enjoining the project, thereby violating the fair and equitable treatment provision of the DR-CAFTA. Costa

Rica's actions were also inconsistent and non-transparent in that MINAE and SETENA acted in contradictory ways and at times at cross purposes in their treatment of the project, and MINAE's reclassification was done in a starkly non-transparent manner. In addition, the criminal prosecution is a violation of fair and equitable treatment, in that Costa Rica based it on the alleged existence of wetlands and forestry that contradicted its own prior resolutions, and conducted it in violation of basic notions of due process—such as, most blatantly, the granting of the motion for new trial.

92. Finally, Costa Rica's actions are violations of DR-CAFTA Articles 10.3 and 10.4. DR-CAFTA Article 10.3 provides that each Party shall accord to investors and covered investments of another Party "treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory." DR-CAFTA Article 10.4 similarly provides that each Party shall accord to investors and covered investments of another Party "treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition" of investments in its territory. It appears that many similarly-situated and environmentally-comparable neighboring properties have been developed (including those on either side of the Las Olas Project property), often by Costa Rican nationals. There is no reasonable nexus to a rational government policy that would justify this apparent discrimination. Accordingly, this standard, too, provides fertile grounds for potential liability.

93. Based on the foregoing, Claimants respectfully request that the Tribunal grant their request for an interim measure of protection to enjoin the criminal proceedings against Messrs. Aven and Damjanac.

X. Proposal of an Arbitrator

94. Article 10.19 of the DR-CAFTA provides that "[u]nless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the

disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties."

95. In accordance with DR-CAFTA Article 10.16(6) and Article 4 of the 2010 UNCITRAL Arbitration Rules, the Investors will designate an arbitrator shortly.

XI. Language of Arbitration

96. Pursuant to Article 3 of the 2010 UNCITRAL Arbitration Rules, the Investors propose English as the language of arbitration.

XII. Place of Arbitration

97. Pursuant to DR-CAFTA Article 10.20(1):

> The disputing parties may agree on the legal place of any arbitration under the arbitral rules applicable under Article 10.16.3. If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with the applicable arbitral rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.

98. Article 18 of the 2010 UNCITRAL Arbitration Rules further provides that:

> 1. If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case. The award shall be deemed to have been made at the place of arbitration.
>
> 2. The arbitral tribunal may meet at any location it considers appropriate for deliberations. Unless otherwise agreed by the parties, the arbitral tribunal may also meet at any location it considers appropriate for any other purpose, including hearings.

99. In the event that the parties are unable to agree, the Investors respectfully request the Tribunal to fix the legal venue of the arbitration in Paris, France, without prejudice to holding hearings at any location agreeable to the parties and the Tribunal.

XIII. Reservation

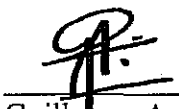
100. The Investors reserve the right to supplement or modify this Notice of Arbitration in response to any arguments or assertions made by Costa Rica.

XIV. Service

101. The Investors have submitted this Notice of Arbitration to the authority designated by Costa Rica pursuant to Annex 10-G of the DR-CAFTA.

102. The Investors have submitted this Notice of Arbitration in English, with a courtesy Spanish translation.

Very truly yours,



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Annex A

Arbitration Under the Central America-Dominican Republic-United States Free Trade Agreement and the 2010 UNCITRAL Arbitration Rules

David R. Aven, Samuel D. Aven, Carolyn J. Park, Eric A. Park, Jeffrey S. Shioleno, Giacomo A. Buscemo, David A. Janney, and Roger Raguso

v.

The Republic of Costa Rica

Claimants' Waiver and Consent

Pursuant to Article 10.18(2)(a) of the Central America-Dominican Republic-United States Free Trade Agreement ("DR-CAFTA"), the Claimants to the above-referenced arbitration proceedings hereby "consent in writing to arbitration in accordance with the procedures set out in this Agreement." In accordance with Article 10.18(2)(b) of DR-CAFTA, the Claimants further waive "any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16."

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Date: _____

Mr. Roger Raguso
U.S. Passport Number 046591410
111 Holiday Lane
Canadaigua, NY 14424

_____

Date: _____

The Claimants

Mr. David Richard Aven
U.S. Passport Number 496038727
11 E. Washington St., #12A
New Castle, PA 16101

_____

Date: _____

Mr. Samuel Donald Aven
U.S. Passport Number 483575127
3979 Berwick Farm Drive
Duluth, GA 30096

_____

Date: _____

Ms. Carolyn Jean Park
U.S. Passport Number 426498473
306 E. Fairmont Ave.
New Castle, PA 16105

_____

Date: _____

Mr. Eric Allan Park
U.S. Passport Number 426487189
306 E. Fairmont Ave.
New Castle, PA 16105

_____

Date: _____

Mr. Jeffrey Scott Shioleno
U.S. Passport Number 498443019
5105 W. Cleveland St.
Tampa, FL 33609

_____

Date: _____

Mr. Giacomo Anthony Buscemi
U.S. Passport Number 405260799
622 S. Central Blvd.
Broomall, PA 19008

Giacomo Anthony Buscemi

Date: Jan 12, 04

Mr. David Alan Janney
U.S. Passport Number 474275663
500 S. Semoran Blvd.
Orlando, FL 32807

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Orlando, FL 32807

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Date: Jan 13, 94

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Canadaigua, NY 14424

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Date: 1-28-2014

Annex B

Arbitration Under the Central America-Dominican Republic-United States Free Trade Agreement and the 2010 UNCITRAL Arbitration Rules

David R. Aven, Samuel D. Aven, Carolyn J. Park, Eric A. Park, Jeffrey S. Shioleno, Giacomo A. Buscemo, David A. Janney, and Roger Raguso

v.

The Republic of Costa Rica

Enterprises' Waiver

Pursuant to Article 10.18(2)(b) of the Dominican Republic-Central America-United States Free Trade Agreement, the Enterprises hereby waive "any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16."

The Enterprises

Las Olas Lapas Uno, S.R.L.
Registration No. 3-102-605243

David Richard Aven, Manager
Date: 1-19-14

Montes Development Group, S.A.
Registration No. 3-101-366052

Paula Elena Murillo Alpizar, Secretary
Date: 1-19-14

Mis Mejores Años Vividos, S.A.
Registration No. 3-101-564211

David Richard Aven, Secretary
Date: 1-19-14

Cerros de Esterillos del Oeste, S.A.
Registration No. 3-101-509725

Paula Elena Murillo Alpizar, Secretary
Date: 1-19-14

La Estación de Esterillos, S.A.
Registration No. 1-0729-0101

Paula Elena Murillo Alpizar, Secretary
Date: 1-19-14

Inversiones Cotsco C & T, S.A.
Registration No. 3-101-289111

Paula Elena Murillo Alpizar, Secretary
Date: 1-19-14

Bosques Lindos de Esterillos Oeste, S.A.
Registration No. 3-101-513533

Paula Elena Murillo Alpizar, Secretary
Date: 1-19-14

Trio International Inc.
Registration No. 3-101-554001

Jeffrey Scott Shioleno, Secretary
Date: 1-21-14