

**IN THE MATTER OF AN ARBITRATION UNDER THE DOMINICAN REPUBLIC - CENTRAL
AMERICA – UNITED STATES FREE TRADE AGREEMENT AND THE 2010 UNCITRAL RULES
OF ARBITRATION**

Between:

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

Claimants

- and -

THE REPUBLIC OF COSTA RICA

Respondent

RESPONDENT'S SUBMISSION ON COSTS

Submitted on behalf of the Respondent by:

MINISTERIO DE COMERCIO EXTERIOR DE COSTA RICA

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I. INTRODUCTION

1. In accordance with paragraph 27 of Procedural Order No. 1 dated September 10, 2015 and the Tribunal's letter dated March 1, 2018, the Republic of Costa Rica ("**Costa Rica**" or "**Respondent**") respectfully submits this Statement on Costs in support of its defense against the arbitral proceeding initiated by Mr David Richard Aven, Mr Samuel Donald Aven, Ms Carolyn Jean Park, Mr Eric Allan Park, Mr Jeffrey Scott Shiolen, Mr David Alan Janney, and Mr Roger Raguso ("**Claimants**") pursuant to Articles 10.16 and 10.28 of the Dominican Republic – Central America – United States Free Trade Agreement ("**DR-CAFTA**" or the "**Treaty**").
2. This submission details the costs incurred by Costa Rica in the arbitral proceeding. However, in the absence of a final award, Respondent is prevented from providing full arguments in relation to, for instance, the determination of which party shall bear the costs of the proceeding. Therefore, Costa Rica reserves the right to make such submissions once the award is rendered.

II. COSTS INCURRED BY COSTA RICA IN THE ARBITRAL PROCEEDING

3. Article 40(2) of the UNCITRAL Rules lists the "costs" that the Tribunal shall decide upon:
 - "(a) the fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;
 - (b) the reasonable travel and other expenses incurred by the arbitrators;
 - (c) the reasonable costs of expert advice and of other assistance required by the arbitral tribunal;
 - (d) the reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
 - (e) the legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
 - (f) any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-general of the PCA."
4. Pursuant to the above, Respondent requests the reimbursement of the costs it has incurred in this arbitration in the total amount of US\$ 2,461,747.58. These costs include: (i) advances of fees and expenses of the members of the Tribunal and ICSID's administrative fees; (ii) cost of expert advice; (iii) costs of legal representation and assistance; and (iv) other reasonable costs incurred by Costa Rica in relation to the arbitration.
5. Respondent attaches to the present submission a summary of all costs as Annex I. In case the Tribunal deems it necessary, Costa Rica can provide copies of the invoices to support the aforementioned costs.
6. The Tribunal should consider these costs as reasonable to the extent that: (i) Costa Rica had to reply to voluminous presentations submitted by Claimants; (ii) Respondent had to

carry out extensive work considering the complexity of the case; (iii) as explained below, Claimants' conduct during the proceedings aggravated the costs by prolonging the process unnecessarily. In addition, Claimants must pay any interest at a reasonable commercial rate applicable from the date of the award is rendered until the date they are paid in full.

III. RELEVANT FACTORS IN ANY FUTURE DETERMINATION OF COSTS

7. Subject to any further Respondent's submission on costs once the award is rendered, Respondent notes certain circumstances which aggravated the costs of the arbitral proceeding due to Claimants' conduct. For example:
8. First, Claimants did not pursue the legal recourses they had available within the Costa Rica legal system, and instead, decided to submit an international law claim against Respondent. If they had sought the remedies in Costa Rica, any costs would have been borne by the state as a natural administrative cost of the judicial system. Nevertheless, Claimants inadequately decided to commence an arbitration proceeding, forcing Respondent to instruct external counsel.
9. Second, the Tribunal had originally ordered in Procedural Order No. 1¹ that the hearings for the case would take place in December 2016. Nevertheless, on July 23, 2016, Claimants informed the Tribunal and Respondent, that *"it is impossible for [Mr Abdala – Claimants' quantum expert] to attend to give evidence in the period set down for the hearing (or in the days adjacent to that period), including on the reserve day (12 December 2016) set aside in the timetable."*² Claimants subsequently proposed that both quantum experts be examined in a separate, one-day hearing.
10. Recognizing the unexpected expenses arising from such situation, Claimants offered, *"Claimants are content for the reasonable additional flight, train and hotel expenses of the Members of the Tribunal and the representatives of the Respondent to fall on the Claimants."*³
11. Respondent replied to such letter welcoming the concession offered by Claimants to bear all reasonable costs to be incurred by Respondent (including its party representatives) to attend the additional hearing date.⁴ The additional hearing date was then scheduled to February 7, 2017.⁵
12. Against this background, when assessing the costs of the proceedings, the Tribunal should not only consider the concession made by Claimants due to the re-schedule of the hearing,

¹ Procedural Order No. 1, 10 September 2015.

² V&E Letter to the Tribunal, 23 July 2016.

³ *Id.*

⁴ HSF letter to the Tribunal, 27 July 2016.

⁵ Correspondence from the Tribunal to the parties, August 10, 2016.

but also Claimants' behavior (informing a few months before the hearing about a "misunderstanding" between its party representatives and the members of Compass Lexecon) which inevitably extended the length of the proceedings.

13. Third, once the written submissions phase concluded — and two weeks before the December hearing — Claimants submitted an extemporaneous witness statement from Jorge Antonio Briceño Vega and seven exhibits accompanying said statement.⁶ As per the direction of the Tribunal, Respondent had to reply to such untimely presentation⁷ — when its efforts had to be focused on the preparation of the February hearing for the *quantum* experts.
14. Fourth, and few weeks before the December hearing, Claimants sought the Tribunal's permission to submit a pre-hearing brief, an agreed *dramatis personae*, an agreed chronology, and an agreed list of issues.⁸ This extremely late submission led to an extensive discussion between the Parties on the appropriateness of said pre-hearing brief and, discussions on Claimants' proposed chronology and list of issues. As Respondent indicated opportunely,⁹ the parties should have been on preparation mode, instead of dealing with Claimants' baseless applications.
15. Lastly, during the hearing on December 5, 2016, the Tribunal asked the representatives from the United States of America to identify the submissions they have made with respect to the Articles 10.5 and 10.7 of DR-CAFTA.¹⁰ Mr Todd Weiler, Claimants' representative, offered to aid in such task¹¹ and sent to Respondent an 800-page document purportedly containing the answer to the request made by the Tribunal.
16. This submission obliged Respondent to review such extensive document to find out that it widely exceeded the request made by the Tribunal attempting to incorporate new documents into the record — circumstance which was described in detail to the Claimants¹² and was brought to the attention to the Tribunal.¹³ Again, Claimants placed Respondent in a situation where it had to review said presentation when its efforts had to be focused on the preparation of its Post-Hearing Brief.
17. Although the referenced examples do not pretend to be an exhaustive analysis of the circumstances that created additional costs for Costa Rica —and as stated above,

⁶ Mr Briceño's Witness Statement, 18 November 2016.

⁷ Respondent's Reply Memorial to Mr Briceño's Witness Statement, 17 January 2017.

⁸ V&E Letter to the Tribunal, 11 November 2016.

⁹ HSF letter to the Tribunal, 14 November 2016.

¹⁰ Day 1 Hearing Transcript, 5 December 2016, 312:15-22; 313:1-4.

¹¹ Day 2 Hearing Transcript, 6 December 2016, 657:3-16.

¹² HSF letter to V&E, 8 March 2017.

¹³ HSF letter to the Tribunal, 13 March 2017.

Respondent reserves its right to make further submissions on costs once the award is rendered—, it can be concluded that Claimants' unreasonable conduct in the proceedings certainly aggravated the costs of the arbitration. Those costs should be borne by Claimants in any event.

Respectfully Submitted

A handwritten signature in black ink that reads "Herbert Smith Freehills New York LLP". The signature is written in a cursive, flowing style.

Herbert Smith Freehills New York LLP

MINISTERIO DE COMERCIO EXTERIOR DE COSTA RICA

ANNEX I
SUMMARY OF COSTS REQUESTED BY RESPONDENT

Cost		Amount (in US\$)
Advances of fees and expenses of the members of the Tribunal and ICSID'S administrative fees		
1.	Advances from Costa Rica	US\$ 899,914
Cost of expert advice		
2.	Credibility Consulting LLC (Mr Tim Hart)	US\$ 230,000
3.	Kevin Erwin Consulting Ecologist (Mr Kevin Erwin)	US\$ 295,000
4.	Green Roots Consultants S.A. (Drs Johan M Perret and B.K. Singh)	US\$ 17,080
5.	Siel Siel Asesores Ambientales (Ms Priscilla Vargas)	US\$ 6,300
Costs of legal representation and assistance		
6.	Herbert Smith Freehills New York LLP	US\$ 970,000
Other reasonable costs of incurred by Costa Rica		
7.	Allowances and costs of the witnesses and representatives of the Government	US\$ 43,453.58
TOTAL		US\$ 2,461,747.58