

**UNDER THE UNCITRAL ARBITRATION RULES AND SECTION B OF CHAPTER 10 OF THE
DOMINICAN REPUBLIC – CENTRAL AMERICA – UNITED STATES FREE TRADE
AGREEMENT (CAFTA-DR)**

**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.

**THE GOVERNMENT OF COSTA RICA'S RESPONSE TO
CLAIMANTS' NOTICE OF ARBITRATION**

FEBRUARY 24, 2014

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I. Introduction

1. The Republic of Costa Rica (“Respondent,” “Costa Rica,” or the “Government of Costa Rica”) hereby submits this Response to Claimants’ Notice of Arbitration (“Notice of Arbitration”) of David R. Aven, Samuel D. Aven, Carolyn J. Park, Eric A. Park, Jeffrey S. Shiolen, Giacomo A. Buscemi, David A. Janney, and Roger Raguso (“Claimants”) dated January 24, 2014.

2. Respondent reserves its right to submit its Statement of Defense/Counter-Memorial/Counterclaim pursuant to articles 21 and 22 of the United Nations Commission on International Trade Law Arbitration Rules (“UNCITRAL Rules”) in accordance with the schedule and due process determined by the parties and/or the Tribunal.

3. Claimants commenced this action against the Government of Costa Rica pursuant to article 10.16(1)(a), on their own behalf and under article 10.16(1)(b), on behalf of enterprises incorporated in Costa Rica, which Claimants directly or indirectly own or control (“the Enterprises”) under the Dominican Republic – Central America – United States Free Trade Agreement (“CAFTA-DR”). Claimants allege that the Government of Costa Rica has treated them unfairly in violation of articles 10.3 (National Treatment), 10.4 (Most-Favored-Nation Treatment), 10.5 (Minimum Standard of Treatment) and 10.7 (Expropriation and Compensation) of CAFTA-DR. As discussed below, Respondent rejects all claims raised by Claimants in their Notice of Arbitration.

4. While Claimants assert that this dispute falls under the jurisdiction of CAFTA-DR, whether such assertion is correct will depend on the evidence Claimants provide in connection with their substantive submissions. As discussed below, Respondent

thus reserves its right to object on the basis of the Tribunal's lack of jurisdiction *ratione voluntatis*, *ratione personae*, *ratione materiae*, and *ratione temporis*. Likewise, pursuant to article 4.2.e Respondent reserves its right to submit counterclaims or claims for the purpose of a set-off

5. Pursuant to article 4 of the UNCITRAL Rules, in the remainder of this Response the Government of Costa Rica addresses Claimants' Notice of Arbitration and submits the corresponding procedural proposals. In Section II, Respondent introduces the factual background to the dispute. In Section III, Respondent expands on Jurisdictional Issues. In Section IV, Respondent responds to claims in the Notice of Arbitration. In Section V, Respondent responds to Claimants' request for damages. In Section VI, Respondent responds to the request for Interim Measures. In Sections VII, VIII, IX and X Respondent submits proposals for the language of the arbitration, the number of arbitrators, the seat of arbitration, and the name and contact details of Respondent, respectively. In Section XI, Respondent presents its request for relief.

II. Factual Background

Costa Rica's commitment to environmental protection

6. In the 1970's, Costa Rica started to develop a network of national parks and other protected areas that today comprise over 25 percent of its territory, one of the highest land protection rates in the world. Environmental protection and enforcement of conservation rules is effective, and has led to a remarkable result: the forest coverage in Costa Rica has gone from 12 percent of its territory in 1986, to 52.3 percent in 2012,

becoming the first tropical country to reverse deforestation.¹ Currently, these efforts are extended to protect marine zones and wetlands.

7. In this sense, and closely related to this dispute, the Government of Costa Rica has adopted the Ramsar Convention on Wetlands, which came into force on April 27, 1992. This international treaty embodies the commitments of its member countries to maintain the ecological character of their “Wetlands of International Importance” and to plan for the “wise use”, or sustainable use, of all of the wetlands in their territories. In compliance with its international obligations, Costa Rica has adopted several laws which comprise the required protection to wetlands. The Organic Act of the Environment² states that wetlands are to be considered protected areas, and that the Ministry of the Environment and Energy, along with the Municipalities, are in charge of their protection. Additionally, all the wetlands of the country and their conservation are declared of public interest.³

8. The case at hand revolves around the sovereign right of the Government of Costa Rica to protect the environment and wetlands for the benefit of all of its citizens. Costa Rica has an international responsibility to safeguard the environment and to balance public and private interests in pursuit of that goal.

9. Also, the case revolves around the suspension of a real estate project initiated by Claimants, due to irregularities and violations of the environmental legal framework committed by Claimants in the course of its development. Contrary to

¹ OECD (2013), *OECD Investment Policy Reviews: Costa Rica 2013*, OECD Publishing.

<http://dx.doi.org/10.1787/9789264203952-en>

² Organic Act of the Environment, n° 7554 of October 4, 1995, article 32.

³ *Ibid*, article 41.

Claimants' assertions, Costa Rica has suffered severe environmental damage as a result of Claimant's breaches. Clear evidence of this will be provided at the appropriate procedural stage of this proceeding.

III. Jurisdiction

10. Claimants assert that the Tribunal has jurisdiction to hear this case based on Claimants' nationalities and their alleged interest in developing a real state project located in Costa Rica, but they still have the burden to prove that they are investors under CAFTA-DR and that they held qualifying investments in Costa Rica at the time of the alleged breaches. Respondent reserves its right to object to jurisdiction *ratione voluntatis*, *ratione personae* and *ratione materiae* subject to any further evidence Claimants may submit in conjunction with their additional written submissions. Respondent also reserves the right to object to jurisdiction *ratione temporis* based on the fact that the alleged breaches may have taken place before CAFTA-DR came into force in 2009 or may be time-barred under article 10.18(1) of CAFTA-DR.

11. Additionally, Respondent reserves its right to address other objections as a preliminary question, pursuant to article 10.20(4) of CAFTA-DR.

IV. Response to Claimants' Claims

12. Claimants invoke several provisions under Chapter 10 of CAFTA-DR but fail to refer to article 10.11 (Investment and Environment). The claims presented are not entitled to protection under CAFTA-DR since "nothing shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns." The suspension of the

aforementioned real estate project was conducted by the Government of Costa Rica in pursuit of legitimate environmental interests protected under CAFTA-DR, as well as in accordance with the implementation of Costa Rica's international obligations and the provisions of the Organic Act of the Environment, precisely to ensure that investment activity in its territory is undertaken in a manner sensitive to the protection of wetlands. These rules were in place prior to the alleged investment of Claimants and therefore reflect the legal context of their investment intent.

13. Moreover, the Government of Costa Rica's enforcement of such laws and policies was consistent with article 17.2 (Enforcement of Environmental Laws) of CAFTA-DR, which states that "it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic environmental laws." Based on the above, and given that Claimants breached Costa Rica's environmental laws and policies in connection with their alleged investment, Claimants are not entitled to the protection they claim under CAFTA-DR.

Minimum Standard of Treatment (Notice of arbitration paras. 52-54)

14. The Government of Costa Rica rejects Claimants' statement that Costa Rica has breached article 10.5 of CAFTA-DR. Claimants have not been deprived of a fair and equitable treatment, since at no point have Claimants been denied justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process.

15. Costa Rica has not treated Claimants' and their alleged investments unfairly and inequitably. On the contrary, Claimants have proceeded deliberately against the environmental provisions recognized in Costa Rica's laws and policies.

National Treatment and Most-Favored-Nation Treatment (Notice of arbitration paras. 55-58)

16. The Government of Costa Rica likewise rejects Claimants' statement that it has breached its obligations under articles 10.3 and 10.4 of CAFTA-DR to afford a non-discriminatory treatment or a treatment no less favorable than that it accords, in like circumstances, to its own investors or investors of any other Party or of any non-Party. Costa Rica has applied in this case the same legal measures that would have applied to any other other investor, foreign or not, under like circumstances. Moreover, the rationale behind the measure to suspend the aforementioned real estate project was based on environmental protection, never on the investors' nationality.

Expropriation and Compensation (Notice of arbitration para. 59)

17. The Government of Costa Rica rejects Claimants' contention that it has violated article 10.7 of CAFTA-DR by indirectly expropriating their right to the value of their investment. Claimants' property has not been expropriated by the Government of Costa Rica neither directly nor indirectly. On the contrary, Claimants can fully exercise their property rights in compliance with Costa Rica's environmental laws and policies.

General

18. In sum, Respondent rejects Claimants' allegations that Costa Rica has breached its obligations under CAFTA-DR. Claimants also fail to adequately explain how and why Respondent has treated them unfairly, inequitably, or differently than other similarly situated foreign or domestic investors in Costa Rica. This response is not intended to be exhaustive, so Respondent will respond in full to Claimants' allegations once it has received Claimants' full merits pleadings.

V. Alleged damages

19. Claimants estimate preliminary damages to be US \$70 million, subject to expert determination. Claimants have provided no support whatsoever for the alleged damages sought. Respondent reserves the right to rebut any and all damage claims sought by Claimants, including contingent damages in the event of potential lawsuits brought by third parties,⁴ once Claimants have submitted support for their damages argument.

VI. Interim Measures of Protection

20. This is not an appropriate procedural stage to discuss the detail of Claimants' request for interim measures, since no Tribunal has been appointed and no authority has the ability to apply those measures.

21. Allowing *arguendo* that the request for interim measures is applicable, Respondent strongly rejects the interim measures of protection sought by Claimants in light of its sovereign power to apply criminal law by virtue of its *ius puniendi*. Criminal proceedings against Messrs. Aven and Damnjanac for committing environmental offenses are protected under CAFTA-DR in article 17.3 (Procedural Matters), which requires each party to "ensure that judicial, quasi-judicial, or administrative proceedings, in accordance with its law, are available to sanction or remedy violations of its environmental laws." Costa Rica is therefore exercising prerogatives embedded in the same instrument Claimants are using as a basis for their arbitration request.

22. Furthermore, the request for interim measures does not satisfy the requirements established in article 26 of the UNCITRAL Rules. Criminal proceedings underway have no effect on the *status quo* relevant to the dispute. The object of the

⁴ See Claimants' Notice of Arbitration at para. 61, 62 and 63.

criminal procedure is to determine whether the defendants' behavior qualifies as a criminal offence under Costa Rican legislation, whereas this arbitration is aimed at determining whether the Government of Costa Rica violated its obligation to protect investments under CAFTA-DR in connection with the suspension of a real estate development. There is no reason to believe that failure to apply an interim measure would have any negative impact on the result of this arbitration or on the protection of the investment under dispute.

23. The ultimate purpose of interim measures is to preserve the rights of the parties and the subject matter in dispute, pending the determination of the substantive matter. The measures should be ordered only if the matter is absolutely urgent and necessary, and directly connected with the arbitration process. In the present case, the Government of Costa Rica categorically denies that the ongoing criminal proceeding is an attempt to intimidate, injure or pressure Messrs. Aven and Damnjanac, and Claimants fail to support those allegations with any credible evidence. In addition, the request for interim measures does not satisfy the requirements of article 10.20 (8) of CAFTA-DR.

24. Costa Rica's judiciary system is widely considered to be independent and respectful of the rule of law. Mr. Aven has a constitutionally-protected guarantee that he will enjoy -as he has thus far enjoyed- all procedural safeguards that integrate due process. Since Mr. Aven has been declared absent in the criminal proceeding held against him, as recognized by Claimants themselves, his request for the interim measures is obviously an attempt to avoid facing the criminal charges filed against him.

VII. Language of the Arbitration

25. Pursuant to article 19 of the UNCITRAL Rules, Respondent proposes that the procedural languages be English and Spanish. Respondent specifically proposes that:

- (1) routine, administrative or procedural correspondence that is addressed to or sent by the Administrating Authority may be made in either procedural language; any written requests and applications may be submitted in either procedural language;
- (2) Pleadings, expert opinions, and witness statements shall be submitted in either procedural language with the translation of such documents within 30 days thereafter.
- (3) Any other accompanying documentation shall be submitted in one procedural language, provided that a translation of such document to the other procedural language is filed within 30 days thereafter. If the document is lengthy and relevant only in part, it is sufficient if only the relevant parts are translated, provided that the Tribunal may require a fuller or a complete translation. To guarantee their right to fully present their case before the Tribunal, the parties shall have the right to produce complete translations of those documents translated only in part by the opposing party. Such submission may be filed at any time before the hearing, and it shall specify the reasons why the additional translation was justified.
- (4) Translations need not be certified; if a dispute arises as to the accuracy of a translation, the matter shall be decided by the Tribunal; and

- (5) Witnesses and experts may testify at the hearing in their native language; simultaneous interpretation shall be arranged by the administering authority; and
- (6) The Tribunal shall render the final Award, and any other partial award or decision, in English and Spanish simultaneously. Both language versions shall be equally authentic.

VIII. Number of Arbitrators and Constitution of the Tribunal

26. Pursuant to article 10.19 (1) of CAFTA-DR and article 7.1 of UNCITRAL Rules, Respondent proposes that the tribunal consists of three arbitrators.

27. Respondent will notify Claimants of the appointment of its party-appointed arbitrator.

28. Respondent proposes to suspend the appointment of the Presiding arbitrator until the Seat of Arbitration has been resolved. Otherwise agreed, the appointment of the President Arbitral Tribunal shall be made according to article 10.19 (1) of CAFTA-DR.

IX. Seat of the Arbitration

29. Pursuant to article 10.20 (1) of CAFTA-DR and article 18.1 of UNCITRAL Rules, Respondent proposes that the seat of the arbitration be San Jose, Costa Rica.

30. Additionally, pursuant to article 4.2 (b) of UNCITRAL Rules, Respondent proposes ICSID as an appointing authority.

X. Name and Contact Details of Respondent

31. Respondent is the Republic of Costa Rica. For the purposes of this case, all correspondence and notices to Respondent should be addressed to:

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32. All electronic communications should be sent to Ms. González, Ms. Zumbado and Ms. Chanto at their respective email addresses listed above.

33. Respondent reserves its right to name more representatives or advisors.

XI. Relief Requested

34. Respondent respectfully requests that the Tribunal finds that it has no jurisdiction to hear this dispute. If the Tribunal were to find that it had jurisdiction to hear this dispute, Respondent respectfully requests that this Tribunal dismiss Claimants' claims in their entirety, including all interim measures. Respondent also respectfully requests that the Tribunal order Claimants to pay all costs and fees incurred by Respondent in

connection with this dispute. Respondent reserves the right to amend or supplement the above arguments as well to present a counterclaim.

Respectfully,

Anabel González

Anabel González
Ministry of Foreign Trade of Costa Rica



Dated: February 24, 2013