INTRODUCTORY NOTE TO THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES: ANDERSON ET AL. V. REPUBLIC OF COSTA RICA

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[May 19, 2010]
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Introduction

In *Anderson v. Costa Rica*,[1] an International Centre for Settlement of Investment Disputes (''ICSID'') tribunal[2] ruled that investing in a fund, which later turned out to be a Ponzi scheme, is not a protected investment under the Canada – Costa Rica Bilateral Investment Treaty (''BIT'').[3]

Background

One hundred thirty-seven Canadian investors filed an application for arbitration against the government of Costa Rica.[4] Claimants allegedly invested in a fund that promised high interest returns on their deposits and repayment of the principal amount if certain conditions were met. The fund was not authorized by the Central Bank of Costa Rica or any other governmental body as required by law. The government of Costa Rica raided the offices of the fund following an official request by the Canadian Department of Justice and ultimately found that the founders, two Costa Rican brothers, were engaged in an illegal financial intermediation and operated a Ponzi scheme. The fund was shut down, and the brothers were arrested and prosecuted for fraud.[5]

The claimants, having lost their deposits when the fund was shut down by Costa Rican authorities, commenced an ICSID arbitration alleging that their loss was caused by the actions and omissions of the Costa Rican government in violation of the BIT provisions on full protection and security, fair and equitable treatment, due process of law, and protection against expropriation without compensation.

Costa Rica denied that it violated the BIT and countered with five jurisdictional objections, including that the claimants' deposits did not constitute an investment under Article 1(g) of the BIT.

Legal Analysis

The majority of the tribunal's analysis is centered on the jurisdictional objection regarding the definition of investment under the BIT. The tribunal emphasized that in order to exercise jurisdiction, claimants needed to demonstrate that they were ''investors''[6] who owned or controlled an investment as this term is defined in the BIT. According to the tribunal, this analysis requires that three cumulative conditions be met pursuant to the BIT: (1) the deposits constituted ''assets;'' (2) the claimants owned or controlled those assets; and (3) the assets were not excluded from the definition of investment in the BIT.[7] The tribunal reviewed each of the conditions and ultimately decided that they were not all present in this case.

First, relying on the ordinary meaning of the word ''assets,'' which includes ''anything of value,'' the tribunal concluded that claimants' deposits and the resulting legal relationship constituted assets under the BIT. Next, the tribunal reviewed the agreement between the claimants and the fund owners. In this instance, the tribunal found that the deposit of funds constituted assets because the agreement promised a specific return according to a predetermined interest rate; and, in addition, the agreement gave the depositors a right of repayment of the principal deposits if certain conditions were met.

Notably, after determining that the claimants' deposits were assets, the tribunal decided that the claimants did *not* own and control their assets ''in accordance with the . . . laws'' of Costa Rica. In particular, the tribunal emphasized that the claimants' intent to invest in a *bona fide* fund, or their lack of knowledge of the Costa Rican banking law, was irrelevant. According to the tribunal, only ''objective'' and ''categorical''[8] criteria were relevant in determining the fund's legality.[9]

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The tribunal reviewed several factors to determine whether the fund was lawful under Costa Rican law. First, the tribunal pointed to evidence that the brothers established the fund without authorization by the Central Bank or by another governmental body of Costa Rica. This, the tribunal concluded, violated the organic law of the Central Bank, which in turn invalidated the qualification of claimants' assets as investment under the BIT.

The claimants, however, argued that their ownership rights in the investment—the agreed upon interests and principal—were legal obligations under Costa Rican law, and what mattered was the ownership of the rights *per se*, not the process by which the property was acquired. The tribunal rejected this theory as being ''too narrow and not a correct interpretation of the treaty language.''[10]

The tribunal dismissed the case for lack of jurisdiction *rationae materiae*. In its conclusion, the tribunal relied on several legal standards, including ''sound public policy,'' ''sound investment practice,'' and ''due diligence obligation that is neither overly onerous nor unreasonable'' and must be undertaken by ''reasonable investors.'' These criteria, the tribunal noted, were instrumental in determining whether an investment was ''owned in accordance with the laws'' as required by the BIT.

Public Policy and Due Diligence

Although the tribunal rejected the *Anderson* claimants' arguments that their investments qualified as being ''owned in accordance with the laws'' of Costa Rica, this was a credible argument that may have been decided to the contrary in other circumstances. Certainly the fact that the tribunal did not award costs against claimants indicates that their arguments were not deemed frivolous and a waste of the tribunal's time. This was an eminent and experienced tribunal, so it is not surprising that this particular issue was addressed. There have been a number of recent cases that have included question of fraud of the parties and its relation to public policy. In particular, the question arises whether an investor who participates in fraud should be allowed to benefit from it.

Although not an identical fact pattern, the *World Duty Free v. Kenya*[11] arbitration is instructive. In that case, the claimant was knowingly involved in the bribe of government officials to secure the investment in question. The tribunal was sympathetic to the claimant because bribery is widespread in the global business environment. However, in the *Anderson* award, as in the *World Duty Free* award, where both claimants were arguably victims to criminal influences not originally of their own making, claimants' participation (willing or forced) resulted in a decision against them. In *World Duty Free*, the tribunal also rejected claimant's explanations for its payment, and applied the principle *ex turpi causa non oritur actio*.[12]

One failing of the *Anderson* award is that it did not discuss the pubic policy element in more detail. The tribunal only alludes to this issue: ''The Tribunal's interpretation of the words 'owned in accordance with the laws' of Costa Rica reflects both sound public policy and sound investment practice.''[13]

The tribunal also faults the claimants for not being diligent in making their investment. One could easily criticize the tribunal for being unduly harsh in this conclusion. Especially when the respondent admitted that claimants were not involved in the criminal activities, and when it acknowledged being unaware of the activities in question *until* the Canadian government and the claimants brought the matter to its attention, one could question the tribunal's conclusion regarding the lack of proper diligence. The decade-long success of Bernard Madoff and his New York-based multi billion dollar Ponzi scheme, along with the demonstrated inability of some of the world's most sophisticated regulatory mechanisms to identify and stop that scheme, would imply that other sophisticated investors and regulators may be equally fooled. To exclude the *Anderson* claimants' investment claims on this ground, especially at the jurisdictional phase of the arbitration, arguably shows a lack of consideration that was perhaps warranted in this unfortunate tale.

Conclusion

Discussion has increased in past years concerning the potential overlap between corruption allegations and investment treaty arbitration. Mark Kantor, a commentator on the international discussion forum, OGEMID, observed in 2011 that there was possibly an overlap between international investment disputes and Foreign Corrupt Practices Act ("FCPA") investigations.[14] Rumors regularly circulate in the international investment arbitration community that corruption plays a much larger and mainly unreported role in the failed investor-state relationships so frequently at the heart of international investment claims. According to the FCPA Blog:

> Companies settling FCPA-related charges in 2010 paid a record $1.8 billion in financial penalties to the DOJ and SEC. That compares with $641 million in 2009 and $890 million in 2008, the year of Siemens' $800 million settlement, still the largest ever. Of the 22 corporate enforcement actions resolved in 2010, eight are now among the ten biggest FCPA settlements of all time. They are BAE, Snamprogetti/ENI, Technip, Daimler, Alcatel-Lucent, Panalpina, ABB, and Pride. BAE's $400 million settlement was the year's biggest and the third most expensive of all time.[15]

Perhaps cases such as *World Duty Free* and *Anderson* are merely the tip of the much larger proverbial iceberg that has been identified in United States Foreign Corrupt Practices Act (''FCPA'') investigations. The analysis in the *World Duty Free* award provides a solid contribution for the development of the analytical framework for such issues in the investment arbitration context. It is regrettable that the *Anderson* tribunal did not make a more fulsome contribution to a topic that will likely reemerge in the future.

ENDNOTES

1 Anderson v. Republic of Costa Rica, ICSID Case No ARB(AF)/07/3, Award (May 19, 2010), *available at* http://ita.law.uvic.ca/documents/AndersonvCostaRicaAward19-May2010.pdf.

2 The tribunal was composed of Sandra Morelli Rico (president), Jeswald Salacuse, and Raul Vinuesa.

3 Treaty Concerning the Reciprocal Encouragement and Protection of Investment between the Republic of Costa Rica and Canada, Mar. 18, 1998 (entered into force Sept. 29, 1999) [hereinafter BIT].

4 The claim was filed under the ICSID Additional Facility Rules, which allow the settlement of legal disputes that are not within the jurisdiction of the Centre. An Award rendered under the Additional Facility Rules is subject to judicial review under the law of the seat of arbitration.

5 The fund manager remains fugitive at the time the award was rendered.

6 *See* BIT art. I(h).

7 *Anderson*, ¶ 47.

8 *Id*. ¶ 52.

9 The Tribunal emphasized that ''each claimant'' must meet this requirement.

10 *Anderson*, ¶ 56.

11 World Duty Free Co. Ltd v. Kenya, ICSID Case No. ARB/00/7, Award (Sept. 25 2006).

12 The principle that one cannot benefit from one's own illegal act.

13 *Anderson*, ¶ 58.

14 Posting of Mark Kantor, http://www.transnational-dispute-management.com/ogemid/aleach (Jan. 4, 2011) (on file with author).

15 *2010 FCPA Enforcement Index*, FCPA BLOG (Jan. 3, 2011, 7:02 AM), http://www.fcpablog.com/blog/2011/1/3/2010-fcpa-enforcement-index.html.

ANDERSON ET AL. V. REPUBLIC OF COSTA RICA (ICSID)*
[May 19, 2010]
+Cite as 50 ILM 23 (2011)+

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

IN THE MATTER OF THE ARBITRATION BETWEEN

ALASDAIR ROSS ANDERSON *ET AL*
(CLAIMANTS)

V.

REPUBLIC OF COSTA RICA
(RESPONDENT)

ICSID CASE NO. ARB(AF)/07/3

AWARD

MEMBERS OF THE TRIBUNAL

Dr. Sandra Morelli Rico, President
Prof. Jeswald W. Salacuse, Arbitrator
Prof. Raúl E. Vinuesa, Arbitrator

Secretary of the Tribunal
Natalí Sequeira

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** until August 7, 2009*

Date of Dispatch to the Parties: May 19, 2010

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TABLE OF CONTENTS

I. PROCEDURAL BACKGROUND

1. The procedural background of this proceeding has been long and somewhat convoluted and therefore will only be summarized in its essence.

2. On May 10, 2004, a large number of individuals and companies from several different nationalities submitted a single Request for Arbitration (the ''Request'') to the International Centre for Settlement of Investment Disputes (''ICSID'' or ''the Centre'') against the Republic of Costa Rica (''the Respondent'' or ''Costa Rica''), alleging violations of their rights under at least ten different bilateral investment treaties. The Request included an application for approval by the ICSID Secretary-General of access to the Additional Facility (AF) under Article 4 of the ICSID Additional Facility Rules. Upon receipt of the Request, the Centre requested additional information and sought clarifications regarding a series of errors and defects contained in the Request for Arbitration.

3. Ultimately, on March 27, 2007, after significant revisions, the Secretary-General of ICSID registered the Request for Arbitration, as amended and supplemented[1], by one hundred thirty seven (137) individual nationals of Canada (hereinafter ''the Claimants,'' as listed in Appendix A to the present Award) against the Republic of Costa Rica, pursuant to Article 4(2) of the ICSID Arbitration (Additional Facility) Rules (the ''Arbitration (AF) Rules''). On the same day, the Secretary-General dispatched the Notice of Registration to the parties and transmitted a copy of the Request for Arbitration and its supplemental letters to the Republic of Costa Rica. The Centre invited the Claimants to submit additional copies of the Request for Arbitration, reflecting the amendments and clarifications made subsequent to May 10, 2004. The case was registered as ICSID Case No. ARB(AF)/07/3 with the formal heading of *Alasdair Ross Anderson et al. v. Republic of Costa Rica.*

4. Pursuant to Article 5(e) of the Arbitration (AF) Rules, the Secretary-General invited the parties to proceed as soon as possible to constitute the Arbitral Tribunal. The Claimants appointed Professor Jeswald W. Salacuse, an American national, as arbitrator, and the Respondent appointed Professor Professor Raúl E. Vinuesa, a national of Argentina, as arbitrator. Pursuant to Articles 6 and 10 of the Arbitration (AF) Rules, the Chairman of the ICSID Administrative Council appointed Dr. Sandra Morelli Rico, a Colombian national, as President of the Tribunal.

5. By letter of May 2, 2008, the Acting Secretary-General of ICSID notified the parties that all three arbitrators had accepted their appointments and that, in accordance with Article 13(1) of the Arbitration (AF) Rules, the Tribunal was deemed to have been constituted and the proceeding to have begun on that date. On the same date, the parties were also informed that Ms. Natalí Sequeira would serve as Secretary of the Arbitral Tribunal. A first session was subsequently scheduled between the Tribunal and the parties to discuss preliminary procedural matters.

6. In response to the Secretary-General's request dated March 27, 2007, the Claimants filed on May 14, 2008 a Revised Request for Arbitration reflecting the amendments and clarifications to their original Request for Arbitration, along with various supporting documents.

7. On June 27, 2008, the Tribunal held its first session with the parties at the seat of the Centre in Washington, D.C. During the session, the parties confirmed their agreement that the Tribunal had been properly constituted in

accordance with Articles 6 and 13 of the Arbitration (AF) Rules and that they did not have any objections in this respect. During the session the parties also agreed on a number of procedural matters reflected in written minutes signed by the President and the Secretary of the Tribunal. In particular, these matters concerned: i) the applicable arbitration rules for the proceeding; ii) the representation of the parties; iii) the apportionment of the procedural costs and the advance payments to the Centre; iv) the fees and expenses of the members of the Tribunal; v) the place of arbitration; vi) the procedural languages; vii) the records of the hearings; viii) the means of communication and copies of the instruments; ix) the presence and quorum for meetings of the Tribunal; x) the decisions of the Tribunal by correspondence or any other form of communication; xi) the delegation of power to set time limits and sign procedural orders on behalf of the Tribunal; xii) the phases of the proceeding (written and oral); xiii) number, sequence and schedule of written pleadings; xiv) the production of evidence and witnesses' testimony (written and oral); xv) dates and nature of subsequent sessions; and xvi) publication of the award and the decisions related to the proceeding.

8. During the first session, the parties agreed that since the Respondent intended to raise jurisdictional objections, the Tribunal would deal with the question of jurisdiction as a preliminary matter. The schedule of pleadings on jurisdictional objections was agreed as follows: Respondent's Memorial on Jurisdiction: September 26, 2008; Claimants' Counter-Memorial on Jurisdiction: December 23, 2008; Respondent's Reply on Jurisdiction: February 27, 2009; Claimants' Rejoinder on Jurisdiction: April 27, 2009. In addition, the parties proposed that the Hearing on Jurisdiction be held between August 3 and 7, 2009.

9. During the course of the first session, the counsel for the Respondent, Dr. Stanimir A. Alexandrov, expressed the Respondent's intention to submit a request for provisional measures on costs. On this point, the President stated that in the event such request was formally submitted it would be dealt with pursuant to Article 46 of the Arbitration (AF) Rules and it would determine the schedule for the other party to submit observations. On July 8, 2008 the Respondent filed a Request for Provisional measures whereby it requested that: i) the Tribunal order the Claimants to post a bank guarantee (or an escrow account deposit administered by ICSID) equivalent to the ICSID administrative fees that the Respondent might incur during the course of the proceedings on jurisdiction; and ii) that the Tribunal order Claimants to represent that they agree to be held jointly and severally liable for any amounts that the Tribunal may award to cover Respondent's legal fees and expenses. The Claimants' submitted their observations on the Request for Provisional Measures on August 6, 2008. The Tribunal issued a Decision on Provisional Measures on November 5, 2008. The Tribunal concluded that i) the facts presented by the Respondent did not constitute an urgent situation that risked irreparable harm to the Respondent's rights; ii) the Respondent had only a mere expectation and not a right with respect to an eventual award of costs; iii) the request to order the Claimants to be held joint and severally liable for the payment of any costs eventually awarded to the Respondent is not in the nature of a provisional measure to preserve existing rights; and iv) a Tribunal's decision in this respect might constitute a prejudgment on the responsibility of individual parties. Therefore, pursuant to Article 46 of the Arbitration (AF) Rules, the Tribunal denied Respondent's Request for Provisional Measures.

10. As agreed during the first session, the Respondent filed a Memorial on Objections to Jurisdiction and Admissibility on September 26, 2008. By letter of December 18, 2008, the parties agreed to an extension for the filing of the Claimants Counter-Memorial on Jurisdiction and Admissibility. According to the revised schedule, the subsequent jurisdictional pleadings were submitted as follows: Claimants Counter-Memorial on Jurisdiction and Admissibility, on January 13, 2009; Respondent's Reply on Jurisdiction and Admissibility, on April 10, 2009, and the Claimants' Rejoinder on Jurisdiction and Admissibility on June 10, 2009. By letters of June 8, 2009 the parties agreed to a five day extension for the presentation of the Claimants' Rejoinder on Jurisdiction and Admissibility, which was submitted on June 15, 2009.

11. The hearing on jurisdiction was held as scheduled, from August 3 through August 6, 2009, at the seat of the Centre in Washington D.C. Messrs. Robert Wisner and W. Brad Hanna of the law firm McMillan LLP and Natacha Leclerc of the law firm Cain Lamarre Casgrain Wells s.e.n.c.r.l., were present at the hearing on behalf of the Claimants. Messrs. Stanimir Alexandrov, Patricio Grané, Marinn F. Carlson, and Joshua Robbins of Sidley Austin LLP; Messrs. Esteban Agüero Guier, Mónica Fernández Fonseca, Luis Adolfo Fernández and José Carlos Quirce of the Costa Rican Government as well as Mr. Alan Thompson Chacón, Respondent's legal expert, were present at the hearing on behalf of the Respondent. During the hearing the Tribunal heard the oral examination of the following Claimants' witnesses: Messrs. Patricia Lucie Fleming, Maurice Wilfrid Laframboise, Norman

Albert Barr, and Charles Bergeron, all of whom were also Claimants in this proceeding. The following Respondent's witnesses were also examined: Messrs. Sandra Castro Mora, Walter Espinoza, Elizabeth Flores Calvo and Marietta Herrera Cantillo, all of whom were officials of different Costa Rican state agencies and powers.

12. The Respondent objected to the presence in the hearing room of those Claimants who were to appear also as witnesses prior to providing their oral testimony, on the grounds that Article 39(2)[2] of the Arbitration (AF) Rules referred to the attendance of witnesses only during their testimony, unless otherwise agreed by the parties[3]. The Claimants' counsel strongly objected to the exclusion of any Claimant from the hearing room. They argued that Article 39(2) Arbitration (AF) Rules explicitly gives parties the right to attend the hearing and that a party does not lose its rights simply by being a witness. Moreover, the Claimants argued that to deny a party the right to be present at a hearing in which his or her rights were at stake and to assist counsel in presenting that party's case would constitute a denial of due process.

13. On that point, the Tribunal decided by majority to allow those Claimants who were to testify as witnesses to attend the entire hearing on jurisdiction. Thereafter, the parties informed the Tribunal that they had agreed that the four Claimants scheduled to testify as witnesses would remain in the hearing room until Respondent's witnesses had offered their testimony. When the time came for the four Claimants to testify, they were to leave the hearing room, and each testifying Claimant would then be permitted to stay in the hearing room only after that Claimant had testified[4].

14. The hearing on jurisdiction proceeded to its conclusion on the basis of this agreement. Costa Rica's witnesses namely, Ms. Marietta Cantillo, Mr. Walter Espinosa and Ms. Sandra Castro Mora testified and were cross-examined. Thereafter Claimants Wilfrid Laframboise, Patricia Lucie Fleming, Maurice Norman Albert Barr, and Charles Bergeron testified and were cross-examined.

II. THE FACTS OF THIS CASE

15. This dispute concerns the situation in which the Claimants, 137 individual nationals of Canada, assert separate and distinct claims against Costa Rica for injuries to their alleged individual investments as a result of various breaches of domestic and international law, in particular the Agreement between the Government of the Republic of Costa Rica and the Government of Canada for the Protection and Promotion of Investment, signed on March 18, 1998, in force since September 29, 1999 (hereinafter referred to as ''the BIT'' or ''the Canada-Costa Rica BIT''). Costa Rica is a Contracting Party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, signed in Washington in 1965 (the ''ICSID Convention''). As Canada is not a Party to the ICSID Convention, Schedule C of the Rules Governing the Additional Facility for the Administration of Proceedings (hereinafter referred to as ''Additional Facility,'') shall apply as provided by Article XII 4(b) of the BIT.[5]

16. In particular, Claimants alleged that Costa Rica, by failing to provide proper vigilance and governmental regulatory supervision over the national financial system, had injured their investments in violation of the BIT provisions regarding full protection and security, fair and equitable treatment, due process of law, and protection against expropriation.

17. Luis Enrique Villalobos Camacho and his brother Osvaldo Villalobos Camacho (hereinafter the ''Villalobos brothers'' or the ''brothers'') at the time of the incidents giving rise to this case were Costa Rican nationals engaged in various business activities in Costa Rica. In particular, they owned and operated a currency exchange, known first as Casa de Cambio Hermanos Villalobos (''the Villallobos Brothers Money Exchange'') and later renamed Casa de Cambio Ofinter S.A. (''Ofinter''). From at least 1998 until Ofinter's collapse in 2002, the *Superintendencia General de Entidades Financieras* (SUGEF), the Costa Rican governmental financial regulatory agency under the supervision of the Central Bank of Costa Rica, had licensed Ofinter to engage in the money exchange business and regularly included it in the list of authorized money exchanges, which it published periodically for purposes of informing the public. Ofinter had offices in downtown San Jose, the capital city of Costa Rica, and in the San Pedro Mall.

18. Sometime prior to 1996, the Villalobos brothers developed and instituted a scheme whereby individuals and companies would place funds with the brothers in return for a high interest rate on their deposits, as well as the repayment of the principal amount under stipulated conditions. The office in which these transactions were

carried out was located in the San Pedro Mall, adjacent to Ofinter's money exchange business, with a separate entrance from the money exchange business. The Villalobos brothers did not openly undertake a public solicitation of funds, nor did they explain to their clients how they would use the funds raised. Instead, they conducted this part of their business on a highly confidential basis and would accept contributions only from persons introduced to them through recommendations from acquaintances.

19. Individuals or companies placing funds in the scheme were required to make an initial minimum payment of US$10,000. The minimum period of deposit for amounts up to US$99,000 was six months and twelve months for deposits of more than US$100,000. Interest was credited monthly to depositors' accounts and they were entitled to withdraw interest on a monthly basis. In order to withdraw three or more months' worth of interest, a depositor had to provide the brothers at least a two-week written notice. All withdrawals of principal required at least one month's written notice. The Villalobos brothers promised to pay those depositing funds with them a minimum of 3% per month or a total of 36% interest per year. Some persons withdrew their interest regularly when paid and others left the interest to accumulate in their accounts with the brothers. Depositors who were willing to forego monthly withdrawals were promised a rate of 2.8% per month, compounded, which was equivalent to an annual interest rate of 39.29%.

20. Although Claimants argued that the deposits made with the Villalobos constituted a form of participation in an enterprise according to Article I(g)ii of the BIT, evidence on the record shows that deposits with the Villalobos brothers under the above scheme were structured as personal loans to Luis Enrique Villalobos[6]. After filling out a deposit form, depositors made payments of their deposits in one of three ways: 1) in cash delivered to a Villalobos brother or a Villalobos employee at the office in the San Pedro Mall; 2) by check, usually made out to Luis Enrique Villalobos, to Ofinter, to their brokerage account, or to another of their related entities; or 3) by wire transfer to one of their bank accounts in Costa Rica, the United States, or another country.

21. In return, as evidence of the transaction and as a receipt of the depositors' funds, the Villalobos brothers or an employee delivered to each depositor what some Claimants referred to as a ''guarantee check'' drawn on an account in the name of Luis Enrique Villalobos at the *Banco Nacional de Costa Rica* in the amount of the deposit made with the brothers. The checks were undated and the deposit form filled out by the depositors explained that the check was issued by Luis Enrique Villalobos, a physical person, responsible for the amount shown on the check. At same time, the Villalobos employee receiving the deposit made clear that the checks were not to be cashed and that the account on which they were drawn did not have sufficient funds to pay the amount indicated on the check. In fact, the account on which they were drawn remained inactive after 1997 and never had more than US$5,000. Often on the back of the check, a Villalobos employee would write information concerning the interest to be paid on the deposit. If a depositor wished to withdraw principal, he or she would present the guarantee check when requesting payment and surrender it upon payment.

22. Drawn by the high interest rates and the confidential nature of the scheme, more than 6,200 persons deposited a total of approximately US$405 million with the Villalobos brothers over the years of the scheme's operation. Many of the depositors, like the Claimants in this case, were foreign nationals. They often deposited significant sums of money with what appears to be relatively little investigation and research, relying instead on the recommendations of friends and acquaintances who had previously deposited funds with the brothers and attested to the fact that the Villalobos brothers had regularly paid them the high interest rates promised. The Villalobos brothers provided minimal documentation to the persons depositing funds with them, and thereafter issued no periodic reports on the status of the funds received or the enterprises in which the funds were purportedly invested. Moreover, the Villalobos brothers made no reports to the tax or other governmental authorities of Costa Rica or any other government on their operations or on the income earned by depositors in the scheme.

23. It appears that agencies of the Costa Rican government inspected the Villallobos currency exchange operation from time to time. It also appears that such agencies came to suspect that the Villalobos brothers were conducting other unauthorized activities in connection with the currency exchange. Although the authorities pursued such leads, they were unable to gather sufficient evidence to prove wrongdoing. One of the problems they encountered was that the depositors themselves refused to cooperate by revealing to the authorities the nature of their business transactions with the Villalobos brothers.

24. On June 5, 2002, the Costa Rican judicial authorities received a request for cooperation and legal assistance from the Department of Justice of Canada, which suspected that a criminal organization in Canada was using the Villalobos brothers scheme to launder money obtained from criminal activities. Pursuant to this request, Costa Rican law enforcement officials, having obtained a search warrant, raided the Villalobos offices and seized various documents and other items on July 4 and 5, 2002. The operation in the San Pedro Mall was closed as a result, but the Villalobos brothers moved their deposit business to another location in the same shopping mall, where despite public knowledge of the raid, certain persons, including the Claimant Norman Barr, continued to deposit funds with the brothers. After the raid, the Villalobos brothers issued other types of instruments to depositors instead of the so-called ''guarantee checks'' previously provided.

25. The Costa Rican government's investigation after the raid revealed that the Villalobos brothers had been engaged in illegal financial intermediation and had operated a fraudulent Ponzi scheme whereby persons were induced to invest in the scheme by promises of a high return. Interest payments were financed not from the investment of such funds but from subsequent deposits by other persons. On November 27, 2002, the Costa Rican authorities ordered the arrest of the brothers, closed Ofinter, and seized the assets and accounts of the Villalobos brothers and their affiliated enterprises. On December 18, 2002, the Central Bank of Costa Rica formally cancelled Ofinter's authorization to operate a currency exchange.

26. Although Osvaldo Villalobos Camacho was arrested and prosecuted for fraud and illegal financial intermediation, his brother Enrique Villalobos managed to escape capture and still remains a fugitive from justice at this time. Ultimately after a lengthy trial involving many witnesses and voluminous documentation, on May 16, 2007 the Trial Court of the First Circuit of San José found Osvaldo Villalobos Camacho guilty of aggravated fraud and illegal financial intermediation for his participation in operating the brothers' financial scheme. The Trial Court sentenced him to eighteen years imprisonment for his criminal conduct.[7] In their lengthy decision, the judges of the Trial Court concluded that the Villalobos brothers had put in place and operated a Ponzi scheme in which they had used funds received from depositors to pay other depositors and themselves, rather than to invest the funds so as to secure a return for use in paying investors. The judges noted that the brothers' scheme was cloaked in secrecy and was designed to avoid notice by the public or detection by the governmental authorities. On June 2, 2008, a decision of the Supreme Court of Costa Rica upheld the conviction and prison sentence of Osvaldo Villalobos.[8]

27. Since the clients who had provided funds to the brothers were considered victims of fraud, they were permitted under Costa Rican law to file a civil complaint for compensation in connection with the criminal case against Osvaldo Villalobos. At the Hearing on Jurisdiction in the present arbitration proceeding, the auxiliary attorney general of Costa Rica, who was the prosecutor in charge of the criminal prosecution against Osvaldo Villalobos, testified that only 300 persons chose to avail themselves of this procedure.[9] It is not clear whether the reason for this limited participation was the desire of most depositors to avoid the scrutiny of governmental and tax authorities or their belief that such participation would be futile in terms of actually securing a repayment of the funds that they had deposited with the brothers. As with the collapse of any Ponzi scheme, relatively few assets remained under the control of the court to satisfy even this relatively small number of claimants who participated in the criminal proceeding.

28. The Claimants, considering that they have lost their deposits with the Villalbos brothers, commenced this arbitration against the Costa Rican government for compensation for their loss on the grounds that such loss had been caused by various actions or omissions of the government of Costa Rica in violation of the Canada-Costa Rica BIT.

III. RESPONDENT'S OBJECTIONS TO JURISDICTION AND ADMISSIBILITY

29. In response to the Claimants' Request for Arbitration, the Respondent contends that ICSID and this Tribunal lack jurisdiction to hear this dispute. In support of its position, the Respondent advances five distinct jurisdictional objections, as well as an admissibility objection to Claimants' claim on expropriation.

30. The Respondent's first jurisdictional objection is that none of the deposits made by the Claimants with the Villalobos brothers constitute an ''investment'', as that term is defined in Article I of the BIT. Therefore, the Claimants are not entitled to seek the protection of the BIT for the funds that they have allegedly lost as a result

of their participation in the Villalobos scheme since a tribunal under Article XII of the BIT only has jurisdiction to hear disputes concerning ''investments.''

31. The Respondent's second jurisdictional objection is that certain of the Claimants are not ''investors'' for purposes of Article I(h) of the BIT, which grants standing to bring a claim against a BIT contracting state only to persons who are investors.

32. The Respondent's third jurisdictional objection is that the Claimants' claims arising out of the search and seizure of Villalobos assets by Costa Rica, which Claimants allege constituted an unlawful expropriation and denial of due process, are barred by Article XII(3)(d) of the BIT which provides that a Canadian investor may submit a claim against Costa Rica only if ''no judgment has been rendered by a Costa Rican court regarding the measure that is alleged to be a breach of this agreement.'' Respondent contends that Costa Rican Courts have authorized and subsequently ratified the seizure of the Villalobos assets by the authorities of that country.

33. The Respondent's fourth jurisdictional objection is that the majority of the claims in this case are untimely and therefore barred by either Article XII(3)(c) or Article XV of the BIT.

34. The Respondent's fifth and final jurisdictional objection is that any claims of the Claimants based on alleged violations of international agreements other than the BIT or of Costa Rican law are not covered by the BIT and its dispute settlement provisions.

35. The Respondent also alleges that the Claimants' claims of expropriation are inadmissible and premature since the necessary procedural requirements have not been fulfilled.

IV. CLAIMANTS' OPPOSITION TO OBJECTIONS TO JURISDICTION AND ADMISSIBILITY

36. Claimants argue that the Tribunal has jurisdiction to entertain the present case on the basis that jurisdiction has to be determined on a *prima facie* standard and issues of admissibility should not be decided as a preliminary matter.

37. Claimants reject Respondent's main objections to the jurisdiction of the Tribunal, arguing: (i) that they made an investment under Article I (g) of the BIT; (ii) that they are ''investors'' under Article I(h) of the BIT; (iii) that all claims are timely and complied with any necessary procedures under the BIT and (iv) that their claims are not barred by the procedural requirement of Article XII (3)(d) of the BIT.[10]

38. According to the Claimants, the funds provided to the Villalobos brothers are ''investments'' as they fall within the examples listed in Article I (g)(i)(vi) of the BIT and they meet the general definition of ''investments'' provided by that same Article I. They also argue that the said funds are not within the exceptions listed in Article I(g). They affirm that their investments were made in accordance with Costa Rican law and within the territory of Costa Rica.

39. In reference to objections *ratione personae,* Claimants argue that all Claimants are Canadian nationals, some of whom invested in Costa Rica indirectly through non-Canadian holding companies owned and controlled by them. They also maintain that Canadian successors of deceased investors have standing as investors under the BIT, and they assert no claims on behalf of prospective investors.

40. Concerning objections *ratione temporis,* Claimants considered that none of their claims are barred by Article XV which provides that ''This Agreement shall apply to any investment made by an investor of one contracting Party in the territory of the other Contracting Party before or after the entry into force of this Agreement . . . ''.

41. They also maintain that all of their claims were submitted within the limitation period provided by Article XII(3) and that all Claimants filed the notices required under Article XII(2) of the BIT. Claimants also argued that Article XII(2) is procedural in nature and not jurisdictional. They assert that obligations under Article XII (2) and Article XII (3) are independent.

42. Finally, Claimants argue that their expropriation claims are admissible on the basis that at the time of submitting their Counter-Memorial on Jurisdiction and Admissibility, six and a half years had elapsed since Costa

Rican authorities seized the assets of the Villalobos brothers without making these assets available to satisfy the claims of their creditors, including those of the Claimants. Claimants who participated in criminal proceedings against Osvaldo Villalobos have been unable to collect any of the seized assets. Thus, Claimants argue that the exhaustion of Costa Rican legal proceedings by those Claimants who did not participate in such criminal proceedings would be futile.

V. THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

43. At the outset, it should be noted that each of the five jurisdictional objections advanced by the Respondent would, if established, have differing potential effects on this case. A finding by the Tribunal in support of the first jurisdictional objection would constitute a complete bar to the entire case advanced by all 137 Claimants, since each of them must establish that they have an ''investment'', as that term is defined by the BIT, in order to bring an arbitration against Costa Rica. On the other hand, a finding by this Tribunal in support of any or all of the other four jurisdictional objections would have the result that this Tribunal would lack jurisdiction only with respect to certain Claimants or certain issues that they advance. In view of the importance and all-encompassing nature of the Respondent's first jurisdictional objection, the Tribunal will address that objection first.

44. For the Tribunal to have jurisdiction in this case, each of the Claimants, under Article XII(2) has the burden to demonstrate, *inter alia* that he or she is ''an investor'' as defined in Article I(h) of the BIT. An ''investor'' under Article I(h) of the BIT means:

> ''(i) any natural person possessing the citizenship of one Contracting Party who is not also a citizen or the other Contracting Party; or
>
> (ii) any enterprise as defined by paragraph (b) of this Article, incorporated or duly constituted in accordance with the applicable laws of one Contracting Party;
>
> who owns or controls an investment made in the territory of the other Contracting Party.''

45. Thus, in addition to their nationality, the Canadian Claimants must demonstrate that they own or control an ''investment,'' as that term is defined in the BIT, in the territory of Costa Rica.

46. Article I(g) of the Canada-Costa Rica BIT states: '' 'investment' means any kind of asset owned or controlled either directly, or indirectly through an enterprise or natural person of a third State, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws . . . '' It then provides that ''investment'' includes, ''*though not exclusively*'', six listed categories of assets, including (i) movable and immovable property and related property rights; (ii) shares, stocks, bonds and debentures or any other form of participation in an enterprise; (iii) money, claims to money, and claims to performance under contract having a financial value; (iv) goodwill; (v) intellectual property rights; and (vi) rights conferred by law or under contract, to undertake any economic and commercial activity, including any rights to search for, cultivate, extract, or exploit natural resources. Article I(g) also stipulates that certain types of assets are not included within the meaning of investment. These include ''real estate or other property not acquired in the expectation or used for the purpose of economic benefit or other business purposes'' and ''claims to money that arise solely from: (i) commercial contracts for the sale of goods or services ... ; or (ii) the extension of credit in connection with a commercial transaction...''[11]

47. Thus, in order for this Tribunal to have jurisdiction over this dispute, the Claimants must, at a minimum, establish that their deposits and resulting legal relationship with the Villalobos brothers constituted ''investments'' as the term is defined by the Canada-Costa Rica BIT. To do that, they must show that their deposits had three characteristics: 1) that the deposits constituted ''assets'' under the BIT; 2) that the Claimants owned or controlled those assets in the territory of Costa Rica in accordance with Costa Rica law; and 3) that if the deposits satisfied these two characteristics they did not fall within those categories of assets that the BIT expressly excludes from the definition of investment. Thus, in order to find that the Claimants' deposits and resulting relationships with the Villalobos brothers constituted an investment, the Tribunal at the outset must answer two basic questions in the affirmative: A) Did the Claimants' deposits and resulting legal relationships with one or both of the Villalobos brothers constitute ''assets'' within the meaning of the BIT?; and B) If so, did the Claimants own or control those assets ''in accordance with the laws of . . . '' Costa Rica?

A) Did the Claimants' Deposits and Resulting Legal Relationships with either or both of the Villalobos brothers constitute ''assets'' under the BIT?

48. The Canada-Costa Rica BIT does not define the meaning of the word ''asset.'' The French version of the BIT refers to ''*les avoirs de toute nature*'' and the official Spanish version refers to *''cualquier tipo de activo.* The French word ''*avoirs*'' is usually translated into English as ''asset'' and the Spanish word ''*activo*'' is also translated in English as asset. In English, the ordinary meaning of the word ''asset'' is ''anything of value'' or a ''valuable item that is owned.''[12] The Oxford English Dictionary defines ''asset'' as ''an item of value owned'' and Webster's Deluxe Unabridged Dictionary (2nd ed.) defines asset as ''anything owned that has exchange value'' or a ''valuable or desirable thing to have.''[13]

49. On the basis of these definitions, one can say that a Claimant's deposit of funds resulting in an obligation of Enrique Villalobos to pay interest and principal was an asset since it constituted a thing of value owned by that Claimant. As a result of transferring their funds to Villalobos, the Claimants obtained a promise from Enrique Villalobos to repay the principal amount under certain conditions and further to pay the Claimants a specific amount of interest each month. That asset, embodied in an agreement with Villalobos, promised them a specific return each month according to a pre-determined interest rate and the right to the repayment of their principal deposit upon stated conditions including notice. In fact, many of the Claimants received and withdrew periodic payments of funds from their accounts with the Villalobos brothers.

50. That being so, it is clear to the Tribunal that the obligations of Enrique Villalobos to the Claimants as a result of their deposit of funds constituted ''assets'' owned by the Claimants within the meaning of the Canada-Costa Rica BIT.

B) Did the Claimants Own and Control Their Assets In Accordance with the Laws of Costa Rica?

51. Under the BIT, not only must the Claimants demonstrate that they own the assets which they assert constitutes an investment, but they must also demonstrate that they own or control those assets in accordance with the laws of Costa Rica. The French text of the BIT requires that the investments be owned ''*en conformité avec les lois*'' and the Spanish version specifies that the asset must be owned ''*de acuerdo con la legislación.*''

52. In interpreting the phrases ''owned or controlled'' and ''in accordance with the . . . laws . . . ,'' it should first be emphasized that the BIT states this requirement in objective and categorical terms. Each Claimant must meet this requirement, regardless of his or her knowledge of the law or his or her intention to follow the law. Thus, the Claimants' statements that they intended to follow the law or that they did not know the law are irrelevant to a determination of whether they actually owned or controlled their investments in accordance with the laws of Costa Rica.

53. Not all BITs contain a requirement that investments subject to treaty protection be ''made'' or ''owned'' in accordance with the law of the host country. The fact that the Contracting Parties to the Canada-Costa Rica BIT specifically included such a provision is a clear indication of the importance that they attached to the legality of investments made by investors of the other Party and their intention that their laws with respect to investments be strictly followed. The assurance of legality with respect to investment has important, indeed crucial, consequences for the public welfare and economic well-being of any country.

54. In order to prevent economic hardship to individual citizens and reduce the risk of financial crises, governments ordinarily seek to protect the savings of the public from fraud and other harms that can do significant injury not only to individuals but to the economy as a whole. They therefore seek to achieve this objective by regulating the actions of individuals and companies who would raise capital from the public or otherwise seek to serve as financial intermediaries.[14] One means employed by Costa Rica to protect the public savings is the Organic Law of the Central Bank of Costa Rica,[15] one of whose objectives, according to Article 2(d), is ''to promote a stable, efficient, and competitive system of financial intermediation.'' Toward this end, Article 116 of the Law provides that the only entities that may engage in financial intermediation in the country are those that are expressly authorized to do so by law. Furthermore, Article 157 makes it a crime to engage in financial intermediation without authorization.

55. By actively seeking and accepting deposits from the Claimants and several thousand other persons, the Villalobos brothers were engaged in financial intermediation without authorization by the Central Bank or any

other government body as required by law. The courts of Costa Rica after a lengthy and extensive legal process determined that Osvaldo Villalobos, because of his involvement in the scheme, committed aggravated fraud and illegal financial intermediation. In securing investments from the Claimants, the Villalobos brothers were thus clearly not acting in accordance with the laws of Costa Rica. The entire transaction between the Villalobos brothers and each Claimant was illegal because it violated the Organic Law of the Central Bank. If the transaction by which the Villalobos acquired the deposit was illegal, it follows that the acquisition by each Claimant of the asset resulting from that transaction was also not in accordance with the law of Costa Rica. Although the Claimants may not have committed a crime by entering into a transaction with the Villalobos,[16] the fact that they gained ownership of the asset in violation of the Organic Law of the Central Bank means that their ownership was not in accordance with the laws of Costa Rica and that therefore each of their deposits and resulting relationships with Villalobos did not constitute an ''investment'' under the BIT.

56. Claimants' counsel argued that in judging whether the Claimants' deposits were owned in accordance with the laws of Costa Rica, this Tribunal should look only to whether the Claimants ownership rights in their claim to be paid the agreed-upon interest and principal were legal obligations under Costa Rican law. By accepting the deposits under the conditions outlined earlier in this decision, Enrique Villalobos clearly became subject to that legal obligation. However, this Tribunal believes that the approach suggested by Claimants' counsel is too narrow and not a correct interpretation of the treaty language ''owned . . . in accordance with the law'' of Costa Rica.

57. The ordinary dictionary meaning of the verb ''own'' is ''to have or hold a property''[17] or ''to have or possess a property.''[18] In order to determine whether the ownership of a property is in accordance with the law of a particular country, one must of necessity examine how the possession or ownership of that property was acquired and in particular whether the process by which that possession or ownership was acquired complied with all of the prevailing laws. In the present case, it is clear that that the transaction by which the Claimants obtained ownership of their assets (*i.e.* their claim to be paid interest and principal by Enrique Villalobos) did not comply with the requirements of the Organic Law of the Central Bank of Costa Rica and that therefore the Claimants did not own their investment in accordance with the laws of Costa Rica. That being the case, the obligations of the Villalobos brother held by the Claimants do not constitute ''investments'' under the Canada-Costa Rica BIT and therefore this Tribunal lacks jurisdiction to hear the Claimants' claims against Costa Rica under the BIT.

58. The Tribunal's interpretation of the words ''owned in accordance with the laws'' of Costa Rica reflects both sound public policy and sound investment practice. Costa Rica, indeed any country, has a fundamental interest in securing respect for its law. It clearly sought to secure that interest by requiring investments under the BIT to be owned and controlled according to law. At the same time, prudent investment practice requires that any investor exercise due diligence before committing funds to any particular investment proposal. An important element of such due diligence is for investors to assure themselves that their investments comply with the law. Such due diligence obligation is neither overly onerous nor unreasonable. Based on the evidence presented to the Tribunal, it is clear that the Claimants did not exercise the kind of due diligence that reasonable investors would have undertaken to assure themselves that their deposits with the Villalobos scheme were in accordance with the laws of Costa Rica.

59. On the basis of the foregoing analysis, the Tribunal concludes that the Respondent's objection to jurisdiction on the ground that the Claimants did not own or control investments in accordance with the law of Costa Rica is established and that this Tribunal is therefore without jurisdiction to hear and decide the Claimants' claims.

60. In view of the fact that the Tribunal's decision on the Respondent's first objection to jurisdiction is established and justifies a complete dismissal of the Claimants' case, the Tribunal does not consider it necessary or appropriate to consider and decide upon the other objections to jurisdiction and admissibility raised by the Respondent.

61. For the reasons presented and pursuant to Article 45 of the Arbitration (AF) Rules, the Tribunal decides to accept the first objection to jurisdiction raised by the Respondent, and it therefore dismisses the Claimants' Request for Arbitration on the ground that the Tribunal lacks jurisdiction *''ratione materiae''* to hear the dispute which it presents. Therefore and pursuant to Article 44 of the Arbitration (AF) Rules, the Tribunal declares the proceedings closed.

VI. COSTS

62. Article 58(1) of the Arbitration (AF) Rules provides: ''Unless parties otherwise agree, the Tribunal shall decide how and by whom the fees and expenses of the members of the Tribunal, the expenses and charges of the Secretariat and the expenses incurred by the parties in connection with the proceeding shall be borne.'' The Tribunal thus has discretion to determine the apportionment of costs between the parties. The Tribunal notes that in reference to the allocation of costs, the practice of ICSID investment arbitration differs from commercial arbitration, which tends to award costs to the successful party.[19] Most ICSID tribunals have determined that each party should bear its own costs.[20] In a few recent investment arbitration cases the principle that ''costs follow the event'' has been followed by tribunals, which have determined that the losing party should bear all or part of the costs of the proceeding and counsel fees.[21] Such departures from the established previous trend have been justified by tribunals in light of the existence of special reasons or circumstances.

63. In the present case, the Tribunal, in concluding that Claimants' claims lacked jurisdiction *ratione materiae*, based its reasoning on a strict interpretation and application of the BIT to the facts alleged by the Claimants. In evaluating the facts presented, the Tribunal has found no evidence for concluding that special circumstances exist, such as procedural misconduct, the existence of a frivolous claim, or an abuse of the BIT process or of the international investment protection regime.

64. In consequence of the above, the Tribunal, in the application of its discretionary powers conferred by Article 58(1) of the ICSID (AF) Rules concludes that there are no special circumstances that justify a departure from the accepted and rational practice that each party shall bear its own legal costs and expenses and share equally in the costs and charges of the Tribunal and the ICSID Secretariat.

VII. DECISION OF THE TRIBUNAL

65. For reasons stated in the foregoing paragraphs and pursuant to Article 45 of the Arbitration (AF) Rules, the Tribunal decides with unanimity that:

> a) the Respondent's preliminary objection *ratione materiae* to the Tribunal's jurisdiction must be accepted on grounds that the deposits made by the Claimants with the Villalobos brothers did not constitute an ''investment'' as that term is defined in Article I of the Canada-Costa Rica BIT;
>
> b) the Tribunal is accordingly without jurisdiction to entertain the dispute submitted to it either in part or in whole; and
>
> c) the Claimants' Request for Arbitration is therefore dismissed in its entirety.

66. The Tribunal further decides that:

> (a) The costs of the proceedings including the fees and expenses of the Arbitrators and the Secretariat shall be shared by the Parties in equal portion; and that
>
> (b) Each Party shall bear its own costs and expenses in respect of legal fees for their counsel and their respective costs for the preparation of the written and the oral proceedings.

Prof. Jeswald W. Salacuse
Arbitrator
Date: April 29, 2010

Prof. Raúl E. Vinuesa
Arbitrator
Date: May 10, 2010

Dr. Sandra Morelli Rico
President of the Tribunal
Date: May 4, 2010

VIII. ANNEX A

List of one hundred and thirty seven (137) original Claimants attached to the letter sent by the ICSID Secretary-General on March 27, 2007, accompanying the Notice of Registration, by which ICSID approved access to the Additional Facility in this case and registered the Request for Arbitration.

List of Claimants

1. Alasdair Ross Anderson
2. Jeannine Anderson
3. Letty Anderson
4. Jean-Claude Barbu
5. Albert Barkhordarian
6. Norman A. Barr
7. Claude Beauchamp
8. Warren Becker
9. Michel Jean Bellefeuille
10. Lance Llewellyn Ralph
11. Bennett Lance
12. Charles Bergeron
13. Claudette Bernard
14. Susan Frances Berrezueta
15. Martin Eberhart Borner
16. Tessa Osbourne Borner
17. Andrew Leon Bowers
18. Robert M. Browne
19. Brian Roy Brownridge
20. Andrew (Wynne) Burns
21. Jackie (Jacqueline) Burns
22. Leonard B. Campbell
23. Carol Ann Christensen
24. Robert William Church
25. William Stewart Clark
26. Marcel Cloutier
27. Bruno Collet
28. Camille D'Amour
29. Gilles Delamirande
30. Elmer Freeman Dow
31. Gladys Irene Dow
32. Kimberly Karmen Dow
33. William Eugene Draper
34. James Elmaleh
35. Neil Emerson
36. Janet L. Empey
37. Arnold Eric Flather
38. Patricia Lucie Fleming
39. Daniel Fontaine
40. Hazel Vaughan Forte
41. Raynald Paul Forte
42. Diane - Alexis Fournier
43. Diane Fraser
44. Patricia Glennie
45. Peter Jeffrey Glennie
46. Georges-Aimé Gouin
47. Serge Guay
48. Louise Hamel
49. Andre Hebert
50. Francois Hebert
51. Pierre Hebert
52. Serge Hebert
53. Diane Hebert-Barbu
54. Richard Norman Herring
55. Lee Hineson
56. Edward J. Horvath
57. Gerald Walter Hunter
58. Shirley Hupp
59. Paul Hutt
60. Michael William Imbery
61. Gordon Jerry Jantzi
62. Marcel Jette
63. Shell Axel Johanson
64. Desiree Kantrim
65. Franz Kargl
66. Amy Teresa Khoo
67. Peter G. Kinzie
68. Dale Bruce Laverne Klassen
69. Rosemarie Elaine Klassen
70. Kathleen Beverly Knorr
71. Reinhold Knorr
72. Howard Lewis Krangle
73. Dennis Wayne Kurek
74. Rita Kurek
75. Stanley Kurek
76. Maurice Wilfrid Laframboise
77. Carole Lagace
78. Rejean Lagace
79. Marie-France Lamarche
80. Gisele Laurin Lavoie
81. Louise Lebeau
82. Dollard LeBlanc
83. Madeleine LeBlanc
84. Richard Lecavalier
85. Daniel Lefebvre
86. Robert Legault
87. Timothe Levesque
88. Jeffrey H. Macleod
89. Paul Mainville
90. Pierre Maltais
91. Michel A. Messier
92. David Elliott Milgram
93. Stanley Mracek
94. Patrick Murphy
95. Milton Daniel Oliver
96. Roger Ouellette
97. Robert Palmer
98. Jean Paquette
99. Pierrette Paquette
100. Marthe Paquin
101. Jamie Norman Payton
102. Beverly Joyce Penner
103. J. Heinrich Penner
104. Donna Potuzak
105. Robert Potuzak
106. Patrick Racicot
107. Luis Ramirez
108. Earl Reinboldt
109. Joyce Marie Renouf Fertig
110. Marie Ange Rice
111. Eric William Robinson
112. Daniel Stacey Roussel
113. Roger Allen Sanderson
114. Bradley Paul Sanson
115. Pierre Savignac
116. Edward William Saville
117. Jean Adonai Sicotte
118. Arthur Splett
119. Rick Splett
120. Gregory W. Spottiswood
121. Alfred Stopp
122. Luc Tessier
123. William B. Thorkelson
124. Alain Truchon
125. Anthony Adrian Van Leest
126. Margaret Van Leest
127. Herman Tjalke Vandonselaar
128. Gregory Gordon Warrian
129. Sheila Rae Warrian
130. Michael John Williams
131. Alan Reid Wilson
132. Albert Ross Wilson
133. Graham Wilson
134. James P. Wilson
135. Joan Frances Wilson
136. Sheila Wilson
137. Keith Woolford

ENDNOTES

1 By Claimants' letters of May 11, June 4, July 9, July 23, December 3 and December 23, 2004; January 13, January 26, February 16, March 18, April 18, July 26, August 5, September 13, September 30, October 20, 2005; and January 16, February 22, November 29 and December 18, 2006.

2 Article 39(2) of the Arbitration (AF) Rules provides: ''(2) Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their *testimony*, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.'' [emphasis added]

3 The Respondent had initially raised this objection by letter of July 29, 2009 addressed to the Tribunal, in which it stated that the presence in the hearing room of the Claimants who were also witnesses, would allow them to listen to the testimony of any preceding Respondent's witnesses with the result of possibly influencing their own testimony. That circumstance would give the Claimants an unfair advantage with respect to the Respondent whose witnesses would not have a similar opportunity. Thus, according to the Respondent, to allow the Claimant-witnesses to be present in the hearing prior to their testimony would be contrary to the principles of due process and equality of treatment of the parties. The Respondent had no objection to the presence at the hearing of the other Claimants, who would not be called as witnesses. By letter of July 30, 2009 the Claimants stated that it would be a fundamental violation of Claimants' rights to due process denying them the right to be present, since it is a widely accepted principle in arbitration that an arbitral tribunal may not exclude a party who wishes to be present from any hearing. In the Claimants' view, Article 39(1) of the Arbitration (AF) Rules grants the party an absolute right to be present at the hearing, while Article 39(2) only addresses the need for both parties to consent before the hearing is opened to non-parties. Finally, according to the Claimants, the Respondent's concerns about inequality are not substantiated as Respondent would also have representatives present throughout the hearing to instruct counsel. Therefore Claimants requested the Tribunal to deny Respondent's request.

4 Hearing on Jurisdiction Transcript, August 4, 2009, pp. 371-72.

5 Article XII(4) provides that ''*The dispute may be submitted to arbitration under . . . (b) the Additional Facility Rules of ICSID, if either the disputing Contracting Party or the Contracting Party of the investor, but not both, is a Party to the ICSID Convention; . . .* ''

6 Claimants' Counter-Memorial on Jurisdiction and Admissibility, para. 36: ''*Claimants do not dispute that the guarantee cheques and the documents accompanying the Beneficiary Statement establish that Enrique Villalobos was personally liable for payment of the principal advanced along with the interest set out on the cheque. In this sense, the investments were personal loans evidenced by a promissory note or debenture issued by the principal shareholder of Ofinter and its related companies.''*

7 Decision of the Trial Court of the First Circuit of San José No. 435-07, May 16, 2007 (Respondent's Exhibit R-8).

8 Decision of the Third Chamber of the Supreme Court of Justice of Costa Rica, June 2, 2008 (Respondent's Exhibit R-84).

9 Testimony of Walter Espinoza, Hearing Transcript, August 4, 2009, at page 382 line 3.

10 Article XII(3) of the BIT provides that ''*An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if: . . . (d) in cases where Costa Rica is a party to the dispute, no judgment has been rendered by a Costa Rican court regarding the measure that is alleged to be in breach of this Agreement . . .* ''.

11 The full text of Article I (g) of the Canada-Costa Rica BIT is as follows:

''(g) "investment" means any kind of asset owned or controlled either directly, or indirectly through an enterprise or natural person of a third State, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws and, in particular, though not exclusively, includes:

i. movable and immovable property and any related property rights, such as mortgages, liens or pledges;
ii. shares, stock, bonds and debentures or any other form of participation in an enterprise;
iii. money, claims to money, and claims to performance under contract having a financial value;
iv. goodwill;
v. intellectual property rights;
vi. rights, conferred by law or under contract, to undertake any economic and commercial activity, including any rights to search for, cultivate, extract or exploit natural resources;

but does not mean real estate or other property, tangible or intangible, not acquired in the expectation or used for the purpose of economic benefit or other business purposes.

For further certainty, investment does not mean, claims to money that arise solely from:

i. commercial contracts for the sale of goods or services by a national or enterprise in the territory of one Contracting Party to a national or an enterprise in the territory of the other Contracting Party; or
ii. the extension of credit in connection with a commercial transaction, such as trade financing, where the original maturity of the loan is less than three years.

Without prejudice to subparagraph (ii) immediately above, a loan to an enterprise where the enterprise is an affiliate of the investor shall be considered an investment.

For purposes of this Agreement, an investor shall be considered to control an investment if the investor has the power to name a majority of the board of directors or otherwise to legally direct the actions of the enterprise which owns the investment. Any change in the form of an investment does not affect its character as an investment.

For greater clarity, returns shall be considered a component of investment. For the purpose of this Agreement, ''returns'' means all amounts yielded by an investment, as defined above, covered by this Agreement and in particular, though not exclusively, includes profits, interest, capital gains, dividends, royalties, fees or other current income.''

12 The American Heritage Dictionary (2nd ed). *Note by the Tribunal*: in the Spanish version of the Award, the definition of the Spanish word ''*activo*'' is provided from the *Diccionario de la Real Academia Española 22*nd ed).

13 *Note by the Tribunal*: in the Spanish version of the Award, the equivalent definitions are provided from the *Pequeño Larousse Ilustrado (2010)*.

14 See for example the United States Securities Act of 1933 which regulates the sale to the public of a ''security,'' which includes a wide range of financial instruments.

15 *Ley Orgánica del Banco Central de Costa Rica No. 7558* (Respondent's Exhibit R-40).

16 Costa Rica has not prosecuted the Claimants for their participation in the Villalobos scheme. At the Jurisdictional Hearing, the auxiliary attorney general of Costa Rica, Walter Espinoza, stated; ''From our point of view, they [the Claimants] did not violate criminal law.'' Transcript, Hearing on Jurisdiction, Tuesday, August 4, 2009, p. 430.

17 Webster's Third New International Dictionary. *Note by the Tribunal*: in the Spanish version of the Award, the definition of the Spanish word ''*poseer''* is provided from the *Diccionario de la Real Academia Española (22nd* ed).

18 The American Heritage Dictionary of the English Language (2nd ed.). *Note by the Tribunal*: in the Spanish version of the Award, the definition of the Spanish word ''*poseer''* is provided from the *Pequeño Larousse Ilustrado (2010)*.

19 *EDF (Services) Limited v. Romania* (ICSID Case No ARB/05/13), Award of October 8, 2009, para. 322. See also Article 40(1) of the UNCITRAL Arbitration Rules which provides: ''...the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.''

20 *See i.e. Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award of August 30, 2000; *Tradex Hellas S.A. (Greece) v. Albania* (ICSID Case No. ARB/94/2), Award of April 29, 1999; *ADF Group v. United States of America* (ICSID Case No. ARB(AF)/00/1), Award of January 9, 2003; *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award of July 24, 2008.

21 *Phoenix Action Ltd v. the Czech Republic* (ICSID Case No. ARB/06/05), Award of April 15, 2009.