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 POST-HEARING BRIEF

Submitted on behalf of the Respondent by:

MINISTERIO DE COMERCIO EXTERIOR DE COSTA RICA
Autopista Prospero Fernández,
Centro Comercial Plaza Tempo,
Costado Oeste del Hospital Cima, tercer piso, Escazú
San José, 10201, Costa Rica

HERBERT SMITH FREEHILLS NEW YORK LLP
450 Lexington Avenue, 14th Floor
New York, NY 10017
USA

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I. EXECUTIVE SUMMARY

1. Claimants' case is founded on the allegation that Costa Rica unlawfully stopped the construction work at Las Olas Project. During Claimants' closing submissions, counsel to Claimants emphasized that the consideration of testimony and evidence relating to the "*environmental issues/the Costa Rican law issues*" was "*irrelevant.*"[1] They continued that the analysis of such issues was "ex post facto" – a "*reworking of what happened*."[2] Instead, Claimants framed their case as being *"about permits that were applied for, that were issued, and that were relied upon."*[3]

2. Claimants' attempt to recast the case is an unhelpful and unrealistic attempt to avoid what is undeniably in issue in this arbitration. What Claimants characterize as "irrelevant" is precisely the legality of the permits they say they obtained and relied upon. Necessarily, Claimants' argument that this case is "about permits that were applied for, that were issued, and that were relied upon" must be premised on their legality. And the legality of the said permits is precisely what Costa Rica contests.

3. Not only were the permits unlawfully obtained, and therefore unreasonably relied upon, the illegality attaching to those permits derived from Claimants' own conduct and deception. Therefore, first, the permits that were applied for were applied for and obtained in contravention of Costa Rican law.

4. Second, the permits that were issued (and there is not a complete set of permits to correspond to the works actually undertaken), were not lawfully obtained and therefore were not a *bona fide* basis for the works undertaken.

5. Third, Claimants' were not entitled to rely upon the permits. Moreover, when their flawed legality was discovered, the authorities were more than competent and capable of suspending them. Therefore any legitimate reliance on the permits by Claimants was only as long-lived as the time during which their illegalities remained undetected.

6. It is unsurprising that Claimants should ask the Tribunal not to consider many days of testimony and many hundreds of pages of evidence, when that evidence is so damning of Claimants. Why else would Claimants try to shift the Tribunal's focus, if it were not for the fact the evidence so clearly identifies illegal works?

7. We will show and consolidate in this post-hearing brief that the evidence ***unequivocally shows*** Claimants knew or should have known there were wetlands and protected trees on Las Olas. An unequivocal illustration, of course, is not the standard of proof required to be

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1 Claimants' Closing Statement, Day 6 Transcript, 2004:14-15.
2 Claimants' Closing Statement, Day 6 Transcript, 2004:16-17.
3 Claimants' Closing Statement, Day 6 Transcript, 2004:18-19.

satisfied before this Tribunal – and Respondent maintains that there is a sufficient degree of proof of these illegalities to enable the Tribunal to confidently reject Claimants' claims.

8. Claimants proceeded with construction work *in spite* of the red flags indicating issues, and in either blissful ignorance or direct opposition to their prevailing obligations, they pushed ahead with Environmental Viability Assessments that overlooked the ecosystems in situ.

9. In addition, they cut trees without proper authorization.

10. Claimants literally buried the evidence - the wetlands in the south west corner of the property – their local architects and contractors no doubt mindful of the repercussions if they had to work around the wetlands. Certainly, Claimants in the form of Mr Aven were admittedly clueless as to what was required of them.

11. All permits were obtained unlawfully. Claimants were responsible to search for, identify and disclose the existence (or even possible existence) of wetlands. They failed. Not least, the testimony from the Hearing showed Claimants buried their heads in the sand, or utterly failed to take seriously the possible ecosystems that we know today existed at the time.

12. Claimants contend that SETENA was responsible to check the site, but the testimony before this Tribunal shows otherwise, as does Costa Rican law. Moreover, even if a mistake had been committed by some of the Costa Rican agencies in overlooking the wetlands (as appears in part to be the case), or determining that none existed when they did – this is also incidental to the rightful conclusion the Costa Rican authorities reached.

13. The permits Claimants say they obtained did not establish inalienable rights. At no point were they incapable of being suspended, in circumstances where protected ecosystems were discovered – as indeed happened. We will summarize the Costa Rican law position in this regard, as clearly endorsed by the country's Attorney General.

14. Costa Rican law (at the time Claimants made their investment in 2002, and continually thereafter) clearly was predicated on the authorities being able to change their position, and revoke any permits or revise their assessment on the existence of wetlands, following due process of course. This would have been the legitimate expectation to the extent one needs to be identified under applicable international law.

15. In this post hearing brief we will deal with all relevant issues before this Tribunal. In the next section we will summarize the facts of relevance, as well as precisely the illegalities which now have been clearly proven during the Hearing. To the extent a summary is not included in this post hearing brief, we would refer the Tribunal to Respondent's pleadings, which remain the mainstay of Respondent's defense and counterclaim.

Site	EV	CPs
First Condo	Yes	No
Concession	Yes	Yes
Condo	**Yes** (but unlawfully obtained)	**Yes** (but unlawfully obtained)
Easements	**No**	**Only 7/9** (but all 7 unlawfully obtained)

16. If Claimants' case is *"about permits that were applied for, that were issued, and that were relied upon"* (as Mr Burn concluded during the Hearing) – then the necessary starting point is to review and conclude ***what*** permits this Tribunal must consider.

17. The evidence before this Tribunal definitively proves that the above table is an accurate statement of affairs. This table was presented to the Tribunal during the Opening Statement, and today remains an accurate reflection of the evidence on the record – as the testimony from Claimants' witnesses' shows.

18. The Tribunal's attention should appropriately be focused on the Condominium Section and the Easements. The Condominium Section comprises the main body of the Las Olas site, where 288 homes and condominiums were to be built. This formed the majority of the Las Olas project. This is illustrated in the below map.

 [4]

[4] Claimants' Memorial, p. 18.

19. The Easements Section comprises the sections running along the western road.


[5]

20. Due to the positioning of the wetlands that were identified by Respondent's experts – and which are discussed in detail below – the Easements are a particularly important area for the Tribunal to focus on. For example, it was no coincidence the location of the wetlands was the first site to be developed – and developed in the ***absence*** of a construction permit.

21. In addition to proving the illegality of the development work undertaken by Claimants on both the Condominium and Easement sections, we also have identified the way Claimants approached the EV and construction permits applications by **fragmenting** the Las Olas Project site into these different portions. This was part of a concerted effort to avoid the proper process.

22. The term fragmenting was used inconsistently during the Hearing (alongside fractioning), and might have caused some confusion at certain points. In this post-hearing brief, we will clarify the proper terminology and its legal significance to Costa Rican law and to this Tribunal.[6]

23. The advantage to Claimants of the fragmentation of the whole site into the Condominium and Easement sections (in addition to the Concession and Commercial sections) was that Claimants minimized their reporting and environmental viability assessment obligations. However, they minimized them in violation of Costa Rican law. Ms Priscilla Vargas testified to this in her report as well as her presentation during the Hearing. This is considered further, below.

24. There was no coincidence that Claimants fragmented the overall Las Olas project site in the way they did. Furthermore, the process of fragmentation was taken advantage of very specifically by Claimants in relation to their use of an Environmental Viability applicable to the Condominium section when trying to obtain construction permits for the Easements section – as Mr Bermúdez freely admitted under cross-examination. This was unlawful

[5] Id., p. 16.
[6] See, Section III.H.1.

under Costa Rican law and Mr Bermúdez's testimony in this regard is critically important to the Tribunal's deliberations.

25. This approach of fragmenting the land into separate large sections effectively saw Claimants circumvent Costa Rican law – and facilitated their efforts to side-step the disclosures they should have made in relation to the wetlands.

26. We posed the rhetorical question in our Opening, why did they do this? The answer is not necessary for the Tribunal to be able to render an appropriate award, but the answer now is abundantly clear: speed, money and the desire to avoid environmental controls. Certainly, Mr Aven showed a total lack of awareness of the relevant environmental permitting regime – despite having testified to the contrary in his first witness statement. Therefore, the entire responsibility for the fragmenting process was left in the hands of two individuals (Mr Juan Carlos Esquivel and Mr Gavridge Perez), Claimants' local lawyers who were not presented as witnesses in this arbitration, despite a notable armada of other witnesses having been proffered.

27. Claimants complained in this arbitration that low-level officials were not presented as witnesses on behalf of Respondent. Respondent addressed this empty criticism during the Opening and Closing Submissions at the Hearing. The documents speak for themselves, and the interim conclusions reached were what those documents show. Criminal accusations were leveled against certain individuals, and it is therefore unsurprising that anyone would consider it inappropriate that they be examined in a context where the police power over Claimants is not as robust as a Costa Rican criminal court. Certainly, as we have seen in this arbitration, the respect shown by Claimants to their disclosure obligations has been left seriously wanting.

28. Notwithstanding, what *Claimants* have not explained, is why in a US$100 million claim, that turns on the proper interpretation of Costa Rican law – the only two lawyers seemingly advising Mr Aven and Claimants throughout the relevant period on fragmentation, disclosure obligations and environmental permitting regimes, Mr Juan Carlos Esquivel and Mr Gavridge Perez, were not made available to offer any testimony. There is no evidence of their refusal to testify (which if the case, Mr Aven would have been quick to point out when mentioning their names under cross examination), and therefore, we can safely assume they were not asked by Claimants to testify. This is at least consistent of Claimants' conduct, since neither lawyer has had any of their alleged written or oral legal advice disclosed either.

29. Mr Mussio in his testimony during the Hearing also avoided questions regarding the D1 application, saying that these technical issues were left to Geoambiente. Yet again, no one from Geoambiente was presented to testify what they found, and what that signified as part

of the discharge of their burden of proof.[7] Mr Mussio's partner, Mr Madrigal was also not presented to testify, despite having been the only one of two partners from Mr Mussio's firm to review the Geoambiente report.[8] At the appropriate time in his cross examination, Mr Mussio washed his hands of any direct knowledge of the D1 application. The evasiveness of Mr Madrigal to testify might have something to do with the decision rendered against him for unethical conduct, along with Mr Mussio.[9]

30. Claimants wanted their project to be as profitable as possible, and they needed to expedite the development of the Easements in order to avoid the environmental consequences that would have ensued if wetlands were to have been identified on the Easements and on some sections of the Condominium section.

31. In their work they literally dragged tons of fresh soil over the wetlands, burying them – something which was forensically uncovered by Drs Perret and Singh in their expert report which remains unrebutted by Claimants' expert evidence. Drs Perret and Singh literally identified a strata of wetland material at a significant depth below soil that had been relocated there.

32. Of course, Claimants' motive is irrelevant to any award. What the documentary evidence shows, alongside the witness testimony offered by *Claimants'* witnesses, is as summarised in this post-hearing brief.

33. We know – by reference to the documentary evidence – what Claimants knew regarding the existence of the wetlands. We know of the red flags that Claimants admit to. We know of the current acceptance of possible wetlands by Claimants' own experts. We also know of the soil types admitted by Claimants' experts which actually prove wetlands exist. We also know that these are the very same wetlands that Respondent's experts identify as existing on the site today.

34. This is of paramount importance. Claimants' experts have admitted to the existence or possible existence of wetlands. So have their witnesses. The record is replete with red flags that Claimants' witnesses acknowledge.

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7 Cross Examination of Mauricio Mussio, Day 2 Transcript, 411:14-21. The importance of Geoambiente was emphasised by Mr Mussio in response to Mr Baker's question when Mr Mussio listed the expertise required to input into the D1 Application.
Redirect Examination of Mauricio Mussio, Day 2 Transcript 502:7-13.*"Q: So, with the exception of the civil engineer and – I think you said Vargas – I haven't gone back to look – the second gentleman, you had this other expertise in your firm; is that correct? A: No, sir. Geoambiente was providing them."*

8 Cross Examination of Mauricio Mussio, Day 2 Transcript, 390:7-12.

9 **R-412,** CFIA Sanctions Mussio Madrigal for starting works without an EV, February 22, 2016; Cross Examination of Mauricio Mussio, Day 2 Transcript, 447-6-448:14.
In this sense, Respondent has included in Annex III of the Brief a summary of Mr Mussio's multiple contradictions during his testimony at the Hearing.

35. We consider the findings of Dr Baillie, but the more rigorous soil analysis by Drs Perret and Singh, comprehensively showed that a relatively shallow assessment of soils (such as that undertaken by Dr Baillie) completely missed the covered wetlands soil.

36. Claimants' counsel would have you adopt a blinkered approach – regardless of the facts – and dig to a certain prescribed depth. However, such depth is irrelevant when a top-level of fill has been dragged across the land in question. The land had been manipulated and adherence to a pre-determined depth of soil analysis would only be a sound reference point when there is no such activity.

37. After having failed to discharge their responsibility to investigate and disclose any and every relevant environmental issue – they presented an application to the relevant authorities withholding or concealing critical information. Claimants took exception to this characterization. However, what other description is there for an affirmative failure to share relevant information that was in their possession at the time?

38. Claimants presented information in an unlawful way – and in the knowledge of this, they undertook works in order to conceal the wetlands. Claimants pretend to this Tribunal that they had lawfully obtained all necessary EVs and construction permits. This is a blatant misrepresentation of the documentary record.

39. Having obtained some EVs and construction permits on an unlawful basis – Claimants were approached by certain authorities who began to question the environmental integrity of the project. Yes, it is clear that certain official communiques from agencies engaged indicated an absence of wetlands. But if Claimants had genuinely overlooked the wetlands on first instance – this questioning was their moment to work with the authorities and resolve how to integrate and accommodate the sensitive ecosystems.

40. They did not.

41. Similarly, if the officials investigating Claimants were genuinely mistaken, this was also the time when Claimants should have openly engaged with them to assist their investigations.

42. They did not.

43. However, when Claimants were confronted at a much later stage in 2011, once the evidence had accrued indicating the existence of wetlands and the impermissible cutting of trees, – Claimants *only then* proposed a remedial plan – but it took the specter of criminal proceedings to procure that concession.

44. Notwithstanding, at that point, Claimants still resisted the investigations and requests of the authorities. It beggars belief that Claimants would consider it acceptable recourse to ignore the very authorities that they were happy to rely on when they had previously received helpful reports from those authorities.

45. Claimants ignored the authorities – they ignored and rejected the complaints and in doing so – began their own campaign of demonizing the very officials whose job it was to make these inquiries. The Tribunal has heard the reputations of Respondent's witnesses: Mónica Vargas; Luis Martínez; and Hazel Díaz, all being attacked. This is baseless.

46. Ms Mónica Vargas showed the Tribunal she is a modest, softly spoken, diligent public official, tasked with a specific remit of managing environmental complaints. In fulfilling this role, she would have to pursue complaints in such a way that to the completely uneducated it might appear that she was fostering a claim. However, anyone with a modicum of legal knowledge would have known that it was not Mónica Vargas' complaint, but the underlying complainants.

47. Notwithstanding Claimants overlooking this most basic principle of legal practice, Claimants still pursue (either in ignorance or dumbfounding insistence) the same argument that Mónica Vargas is somehow conspiring against Claimants. (We can only assume this argument is made at the insistence of Claimants, since it is such an obvious point to qualified attorneys such as Claimants' counsel).

48. There is no evidence available to support this silly claim. Apart from no evidence, there was nothing gained by Claimants through Ms Vargas' cross examination.

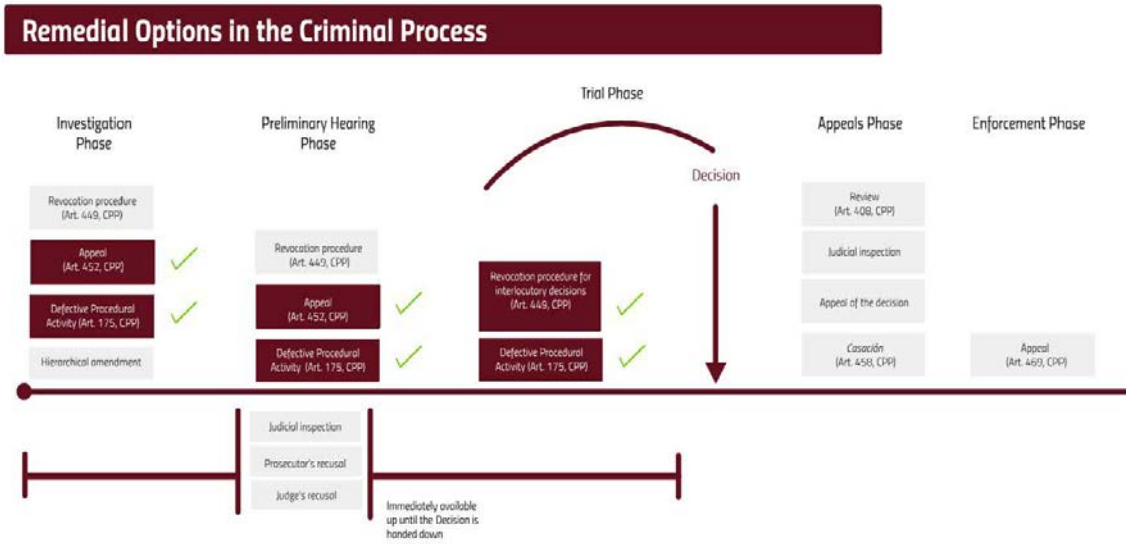
49. The same applies to Ms Díaz – who comprehensively responded to all Claimants' questions – during a cross examination that revealed absolutely nothing of concern to this Tribunal.

50. Finally, Mr Martínez spent considerable time responding to Claimants' and the Tribunal's questions during cross examination. He did so dispassionately, and reflective of the fact that it was not Mr Martínez who was the ultimate decision maker. Indeed, as Mr Martínez said, and the decorated Judge Chinchilla endorsed, it is for the criminal judiciary to decide what steps to take. We will deal with Mr Martínez's testimony in detail below – although yet again, Claimants chase their own shadow.

51. Mr Martínez's decision to pursue a criminal action did not have to satisfy the same standard of proof that the judiciary would have to observe. This is coherent with Costa Rican law. This meant Mr Martínez could rely on the indicators that existed as the launch pad for the investigation. Claimants make an accusation that is so fundamentally flawed as to be an embarrassment given the fora in which this arbitration is taking place. Claimants allege that in doing his job, Mr Martínez was somehow pursuing a personal campaign against Claimants.

52. The echoes of Mr Aven's paranoia are noticeable. And yet, Claimants have not offered a single shred of evidence to show that anything Mr Martínez did was personally motivated. Claimants had the opportunity during his cross examination to reveal any personal vendetta, and yet nothing was revealed.

53. Mr Martínez and the other officials were doing their job – and had absolutely no personal vendetta against any of the Claimants. If Claimants maintain there were failings in some way, they had (and in many respects, continue to have) the entire apparatus of state to harness in civil, administrative and criminal proceedings. Yet stunningly, as Respondent identified with the charts shown during the Closing Submissions, barely any steps were pursued that could have been pursued.



54. It is offensive to Costa Rica that it should be hauled before an international tribunal, with the concurrent damage to its reputation, when Claimants have barely lifted a finger to pursue legitimate remedies in Costa Rica.

55. Compliant with the law, injunctions were issued – to protect the ecosystems – founded on the precautionary principle that has been well accepted under Costa Rican and international law. Indeed, Claimants have not offered any evidence to oppose the existence and application of the precautionary principle under Costa Rican law. In fact, Claimants' own witnesses confirmed the existence and operation of the precautionary principle.[10]

56. The precautionary principle not only permitted but **obliged** officials to act responsively – to the slightest indication of a threat to a protected ecosystem.

57. You heard the testimony of Costa Rica's Attorney General Dr Julio Jurado – who testified as to what Costa Rican law says in this regard. If there were ever a "battle of the experts" presenting itself to this Tribunal, Respondent respectfully submits there is no contest between the Attorney General Dr Jurado and Mr Ortiz. As Dr Jurado testified, these

[10] Cross Examination of Esteban Bermúdez, Day 2 Transcript, 535:22; 536:1-7. "Q: And so, you'd be familiar with the precautionary principle? A: Yes." "*Q: […] And the precautionary principle requires the person who wishes to carry out an activity to prove that it will not cause harm to the environment? A: Yes.*"

injunctions are permissible and in the circumstances, they were necessary to protect the wetlands. It is worth reminding the Tribunal that Dr Jurado previously held the post of executive director of SINAC – and therefore has extensive environmental law expertise.

58. At around the same time, complaints were raised by individuals and investigations began. Any ordinary person would stop in their tracks – fearful of having violated environmental laws and potentially being guilty of criminal offences. At no point in these proceedings have Claimants presented a credible or justifiable basis for why they continued in spite of what the authorities were warning them. If they had consulted lawyers, they would have been advised that the revision to the previous findings of no wetlands was entirely lawful. Costa Rican law does not render the system immutable such that a first finding is set in stone and incapable of being revised for environmental purposes.

59. Mr Aven said he consulted external legal counsel and received legal advice, and yet the documentary record suggests otherwise. This Tribunal has no evidence (documentary or otherwise) before it to indicate what advice they took, or to indicate that their opposition to the exercise of the precautionary principle was well-reasoned or justifiable at the time.

60. When faced with criminal and other complaints, why would Mr Aven not have sought written legal advice – not least to provide suitable comfort to his purported investors? Yet, no written advice exists. The record evidences a lack of proper legal consultation. Therefore, festering with annoyance, and without grounding their reaction in an appreciation of the law, rather than embrace the concerns of the agencies presenting themselves to Claimants they doubled down again and exclaimed that there were no wetlands.

61. The arrogance of this is remarkable. Claimants had been in possession of plenty of documentation that indicated red flags, and the existence of wetlands. Yet, failing to heed those warnings, and undertaking their own illegal construction work covering the very same wetlands, Claimants felt they could protest their way through this period.

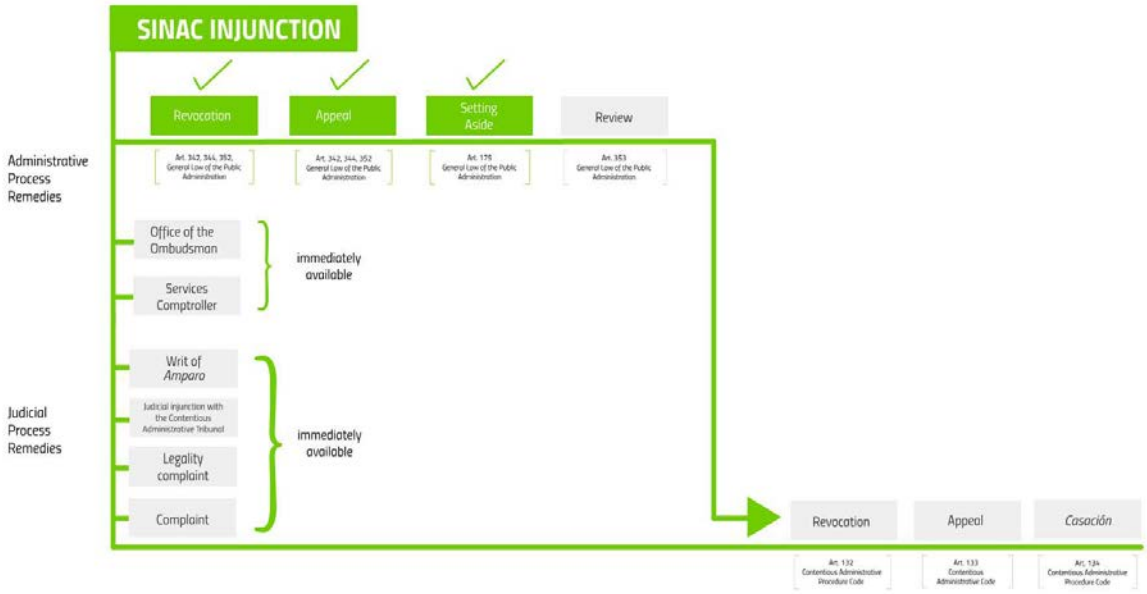
62. They failed. They were caught, and confronted by officials.

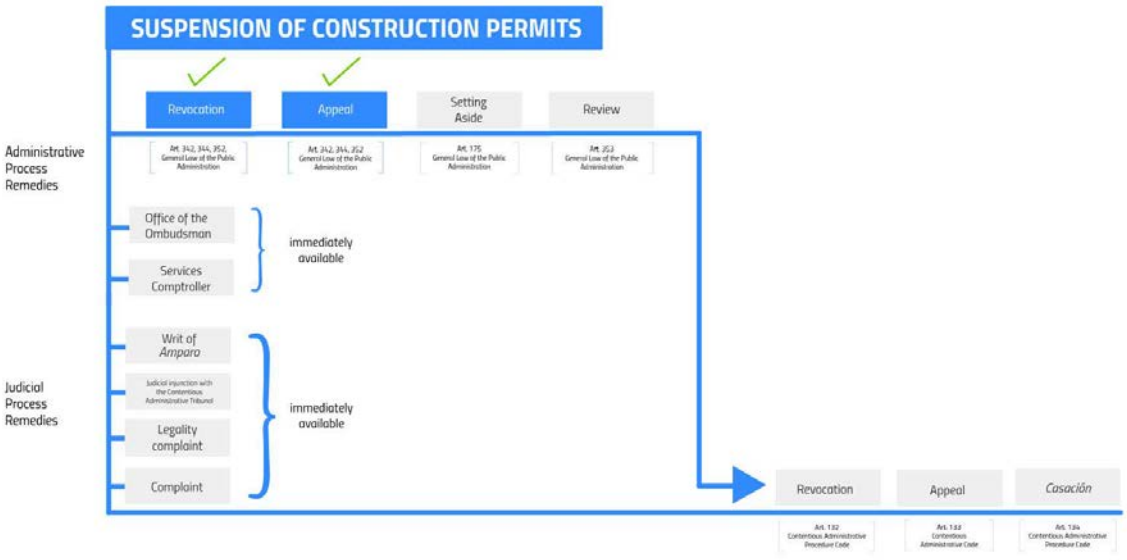
63. Criminal investigations began – against Mr Aven and Mr Damjanac in 2011. Things were getting serious, and yet Claimants showed total disdain for the legal system they were happy to endorse when it was finding in their favor.

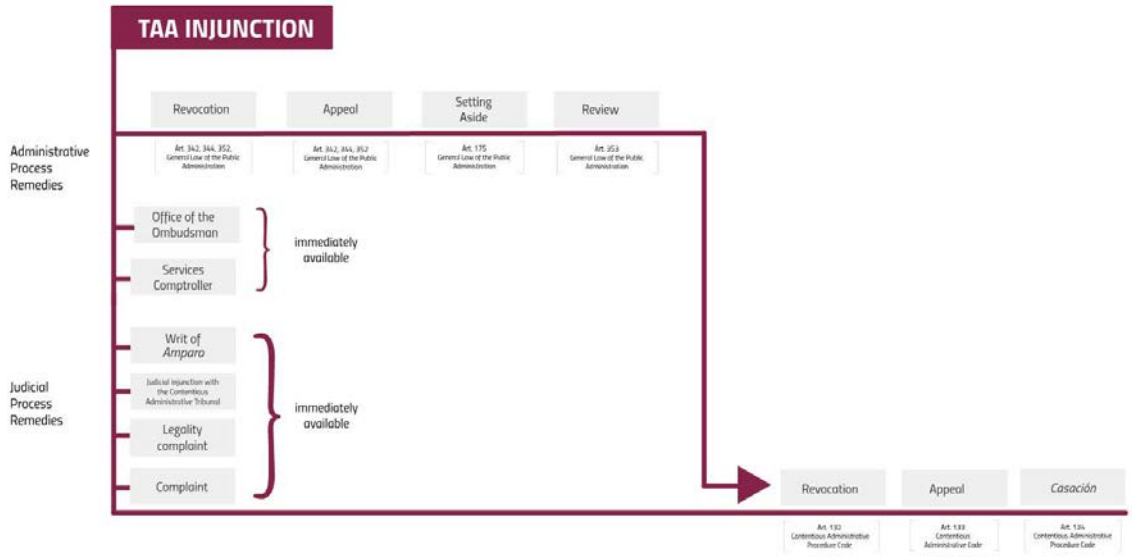
64. In fact, Claimants throughout the Hearing flipped between upholding the credibility of Costa Rican agencies when they were supporting their cause, to condemning them the moment adverse decisions or challenges ensued. Claimants ultimately protested that the entire fabric of Costa Rica's legal system is broken – a system they never even employed.

65. Faced with the criminal investigation, Mr Aven did not stay in the country to defend himself and contest any allegations. He absconded – violating Costa Rican criminal law and triggering a process that results in the Interpol Notices being required.

66. The judicial injunction remains in place as a result, and the status quo of the construction permits is unchanging pending his return. Costa Rican law's protection of Mr Aven's due process rights is the reason the injunctions have been held in abeyance – since criminal decisions cannot be taken without progressing the criminal proceedings, which can only occur with his participation. Yet, Claimants on all fronts showed a remarkable failure to progress any defense or counter-position by pursuing the myriad options available to them in the Costa Rican legal system.







67. We presented illustrations of Claimants' options all of which were totally ignored. It was also apparent that having sought personal protection from the State through the wrong process (and therefore having received an inevitable rejection), Mr Aven failed to seek his own security despite having done so successfully on previous occasions.[11] Therefore, there is no reasonable justification for Mr Aven absconding from Costa Rica.

68. Similarly, there is no credible complaint by Claimants. Wetlands existed and they knew or should have known. They ignored Costa Rican law, and to date, they ignored the options Costa Rica's judicial, criminal and administrative systems offered and continue to offer.

69. Claimants still own the land, and yet they claim US$ 100 million in a creative damages claim that has no precedent under international law. Respondent respectfully asks that the Tribunal dismiss all claims against it and order a corresponding costs award in favor of Respondent's for the expenses related to proceedings that should never have been brought in the first place. Furthermore, Respondent requests the Tribunal award it the reasonable costs that it will take to restore the wetlands, in the absence of Claimants undertaking the same.

70. Finally, during Respondent's closing submissions in the December hearing, reference was made to the implications of an award in favour of Claimants. We repeat those profound concerns. An award in favour of Claimants would re-define international law in a way never previously seen. The floodgates that would be opened would be monumental. This Tribunal would be advertising to the world a troubling list of circumstances that could be overlooked in order to sustain a huge claim for compensation. Those circumstances would include:

- No proof of ownership by self-proclaimed investors;

11 Cross examination of David Aven, Day 3 Transcript, 842: 3-22: 843: 1-2.

- Illegal conduct in the preparation and execution of property development in contravention of domestic law;
- Construction in the complete absence of construction permits (as well as environmental viability assessments);
- Unlawful rejection of criminal proceedings;
- Ignoring local law in multiple environmental aspects by means of completely failing to undertake due diligence;
- Intentional destruction and concealment of protected ecosystems and trees;
- Failure to engage in any meaningful way with domestic civil, criminal and administrative proceedings.

71. Needless to say, the lack of any authority supporting Claimants' case is not coincidental. There is no precedent for this type of claim in these types of circumstances, and for this Tribunal to grant Claimants' claim, would be a severe departure from existing jurisprudence. Furthermore, any award of compensation would give license to budding (but utterly unproven) developers to cobble together a weak business plan, ask testifying experts to upgrade it, and then result in a multi-million dollar award – all of which could be achieved in the absence of *any* track record of accomplishment. For any economist this would constitute a troubling distortion of markets and would cultivate litigation in a way seldom seen before. Again, such claims for compensation as that made in this case, are unprecedented – as illustrated by the total lack of authority offered by Claimants for their grossly inflated claim.

II. INTRODUCTION

72. In accordance with paragraph 20 of Procedural Order No. 5 dated November 25, 2016, the Republic of Costa Rica (**"Costa Rica" or "Respondent"**) respectfully submits this Post-Hearing Brief (the **"Brief"**) in support of its defense against the arbitral proceedings initiated by Mr David Richard Aven, Mr Samuel Donald Aven, Ms Carolyn Jean Park, Mr Eric Allan Park, Mr Jeffrey Scott Shioleno, 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"**).

73. Respondent relies on the exhibits and legal authorities in the indexes attached hereto. The legal authorities and exhibits are submitted in reply to the exhibits and legal authorities introduced by Claimants on the first day of the Hearing on Jurisdiction and Merits (the **"Hearing"**) to which Claimants did not object.[12]

[12] Exchange between counsels, Day 1 Transcript, 14:20-22; 15:1-22; 16:1-22; 17:1.

> "*MR. LEATHLEY: Thank you, sir. Of course, we are very happy to look at these documents. We think it would have been appropriate to send these in advance of today, particularly C-295, which is a document that was being discussed over two weeks ago.*
>
> *Very happy, of course, to look at the 10th of April [2008] document. We think it's appropriate if we're being it's suggested that we should have disclosed something we haven't. I think we ought to have a look at that first before it ends up in the Tribunal's hands.* ***And similarly so on the legal authorities. Absolutely no problem with them being submitted, but I would ask, sir, that we have the right to respond in our post hearing brief.*** *This is additional legal argument on behalf of the Claimants' case that should have been made in their two substantial submissions so far. It is not our claim; it is their claim. And so, sir, I would only ask that we have an opportunity to respond as much as we need to in the post hearing briefs.*
>
> *PRESIDENT SIQUEIROS: Yes. Before these documents are submitted to the Tribunal, I would ask you to share with Respondent, and if there is any objection on the part of Respondent, the Tribunal will decide. So, do I understand also that these legal authorities that you wish to incorporate are in addition to those that you have already incorporated in the past?*
>
> *MR. BURN: That's right. They arise just to be clear, from new legal arguments that are developed in the Rejoinder. So, there's a natural sort of path that we've had to follow, and it's taken us to these additional materials. There is, of course, no regime.* ***Unlike with documentary exhibits, there is no regime around this; and, of course, we as counsel are obliged, actually, to make sure that all of the relevant legal materials are before the Tribunal.***
>
> *PRESIDENT SIQUEIROS: Right.*
>
> ***MR. BURN:*** *But in terms of Mr. Leathley's observations, we have no objection to him having an opportunity to look at the--the three documents that to which we referred.* ***I have no objection to him being given proper opportunity to in this Hearing and after to reflect on the legal authorities that are put forward.*****"**

III. COSTA RICA'S CHRONOLOGY

74. In Respondent's written submissions and Opening Statement at the Hearing, we presented a timeline that we felt would assist the Tribunal orient itself with the various factual lines of inquiry. There is undoubtedly a certain complexity to the various agencies' reports and findings as well as parallel proceedings. As Mr Mussio readily acknowledged, all projects meet with certain challenges.[13] However, to understand the timeline and the overlapping facts is to understand the audaciousness of Claimants' arbitration.

75. Our timeline begins in 2002 when Claimants acquired the land known as Las Olas. Claimants' "investment" in Costa Rica was the acquisition of the real estate. And yet, through counsel's invention, Dr Weiler in his opening submission attempted in vain to suggest otherwise. Dr Weiler said that *"their investment … is maintenance of the Las Olas Project."*[14] Their *"investment in the country,"* he argued, was *"the Las Olas Project."*[15]

76. Dr Weiler's argument is as creative as it is flawed given it is undermined comprehensively by *Claimants'* own witnesses. The project was not the investment – it was the land acquired.[16]

77. It is important to take Claimants' word for how they saw their own investment as opposed to Dr Weiler's, for three reasons. First, it is important to frame what the purported legitimate expectations were. We discuss below, and as supported by the submission from the United States of America, whether this Tribunal even has to entertain the concept of legitimate expectations. As stated in our opening submission, you do not. But even if you did, it would be the expectations objectively gleaned by Claimants at the time the land was acquired – namely in 2002.[17] We set out below what those would comprise.

78. Second, it is important to define the investment as the land acquired because it goes to the core of the protections claimed. Protection is afforded to the investment (namely, the land). The land acquired included the wetlands and forests, and therefore, it was part and parcel of their relationship with the State, in accordance with DR-CAFTA, that the environmental protection would be afforded to the investment. We also consider this further below in the applicable law section.

79. Third, it is important to properly define the "investment," because Claimants make an attempt to argue that their investment was expropriated. Quite clearly it was not. The title to the land (to the extent Claimants have been able to establish lawful title) remains in their

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13 Cross Examination of Mauricio Mussio, Day 2 Transcript, 394:2-6.
14 Claimants' Opening Statement, Day 1 Transcript, 120:18-19.
15 Claimants' Opening Statement, Day 1 Transcript, 120:6-7.
16 Cross Examination of David Aven, Day 3 Transcript, 852:8-22; 853:1-22; Redirect Examination of David Aven, Day 3 Transcript, 894:6-16.
17 It should be noted that not all the Claimants purported to invest at the same time, and we would urge the Tribunal take care to note the respective dates when the respective Claimants claim to have made their investment.

name(s). The suspension of works due to judicial and other injunctions are a product of the legitimate enforcement of Costa Rican law. However, there is no permanent and substantial deprivation of Claimants' investment. Claimants can manage matters in a way to return to construct on the land provided they comply with Costa Rican civil and criminal law. This is hardly an egregious imposition by the State.

80. Accordingly, Claimants can return to develop the land while reconciling the demands of the environment. This simple yet critical point has been overlooked wholesale by Dr Abdala, who supports a novel and gargantuan claim for money while Claimants retain the title to the land.[18]

A. Claimants' decision to invest in Costa Rica

81. Claimants decided to acquire the land during a mission trip that Mr Janney took.[19] During this trip, Mr Aven accompanied him to look at some sites. In answering Mr Baker's questions during the Hearing, Mr Aven confirmed that after seeing the land, and estimating the number of visitors from the U.S. and Canada to Costa Rica, the "investment" in the land acquisition was a *"no brainer."*[20]

82. Mr Aven confirmed immediately thereafter in the Hearing that that brief assessment of visitors was *"the basis of our reasoning and the due diligence we did comparing what was two hours from Costa Rica and the people were coming there."*[21]

83. Mr Baker pressed, *"…did you hire anybody or consult with anybody before you made the purchase about land development restrictions or environmental regulations in Costa Rica, or did that come after you all had secured the purchase?"*[22] Mr Aven responded *"I think before…I bought."*[23] He continued *"you don't invest that kind of money without doing your due diligence."*[24] And yet the record suggests precisely the opposite. There is no evidence of such consultations before the land was acquired. This is presumably why Mr Aven was so uncertain in his response.

84. Mr Aven refers to *"conversations"*[25] he held, but in light of his testimony at the start of his cross examination – that he "generally" received advice *"in writing"*[26] – there is a total lack of any advice, whether legal, environmental or other relevant and necessary regulatory advice. What is more, even if such advice was imparted orally, there is no testimony from

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18 This is without prejudice to the jurisdictional objections made in the course of this arbitration.

19 "*Q: Now, in Paragraphs 13 and 14, you indicate that the trip during which you identified the Las Olas property with Mr. Aven was a trip that you were doing for your charity, World Hope; is that correct?*
A: It was not for World Hope, but it was missions work, yes." Cross Examination of David Janney, Day 2 Transcript, 339:3-8.

20 Redirect Examination of David Aven, Day 3 Transcript, 895:7.

21 Redirect Examination of David Aven, Day 3 Transcript, 895:9-12.

22 Redirect Examination of David Aven, Day 3 Transcript, 896:8-12.

23 Redirect Examination of David Aven, Day 3 Transcript, 896:13-14.

24 Redirect Examination of David Aven, Day 3 Transcript, 896:15-16.

25 Redirect Examination of David Aven, Day 3 Transcript, 896:17.

26 Cross Examination of David Aven, Day 3 Transcript, 814:13.

those who provided the advice, let alone a credible account from any of the Claimants as to what that advice comprised.

85. In evidential terms, such advice does not exist. It has either been inappropriately withheld from this Tribunal by Claimants during the disclosure phase, or it was never provided in the first place. Even if it had been provided orally, it was seemingly only provided to Mr Aven, a non-Spanish speaker.

86. Mr Aven complained that his files and computer had been stolen at one point.[27] However, in re-constituting his records – something he or his counsel would have presumably wanted to do when facing criminal and civil sanctions in Costa Rica – or when having to explain the dire circumstances to the investors Mr Aven was so keen to address during the Hearing – or when launching his claim before this Tribunal – Mr Aven could have gone back to the various "advisors" he purports to have consulted. Those advisors (who almost certainly would have maintained duplicates on their computers, files or emails) could have enabled him to rebuild his record of advice.

87. This was not done.

88. This brings into question whether any such advice existed in the first place. Certainly, what this Tribunal can comfortably conclude is that no evidence of advice exists. Not least, when facing the prospect of the injunctions that suspended construction works, Mr Aven and Claimants would surely have wanted to verify the advice, findings and recommendations received at the time – if nothing else but to hold their own advisors accountable based on their professional indemnity insurance. And yet, seemingly no effort was made. This lack of written evidence is damning proof of the lack of due diligence and awareness of the relevant Costa Rican rules and regulations affecting their land.

89. Any reasonable person commencing an investor-State arbitration for approximately US$ 100 million, with (what Claimants pretend is) an alleged array of helpful legal opinions or consultancy reports would have automatically re-generated such record by reverting to those advisors. Claimants notably have not done anything of the sort. Respondent urges the Tribunal to see this for what it is – a total lack of relevant inquiry undertaken by Claimants.

90. Claimants admit they acquired the land without any *"specific plan"*[28] as to how they were going to develop the land. This manner of acquiring the land is characteristic of the disorganized approach to business Claimants adopted and indeed continued to take for many years. On the first trip they identified the plot, but their due diligence (which they say they undertook thereafter) was not of a standard that matches the sophistication they pretend to boast.

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27 Redirect Examination of David Aven, Day 3 Transcript, 869: 10-14.
28 First Witness Statement of David Aven, para. 21.

91. First, they clearly failed to take proper legal advice, or environmental advice when considering the land to be acquired. Second, their due diligence thereafter was woefully lacking – particularly as Mr Aven's testimony at the Hearing illustrates. Third, the Tribunal should not lose sight of the major handicap they operated under. Mr Aven, the principal investor could not speak Spanish at any point during the period relevant to this arbitration – and still does not speak Spanish. Mr Aven admitted he did not understand anything in Spanish and signed documents without even knowing what was contained in them:

> "Q: Was the content explained to you before you signed?
>
> A: No, it was not."
>
> Cross Examination of David Aven, Day 3 Transcript, 838:1-3.
>
> "A: But he sent it. And he wrote it. I didn't write this letter. As you know, I don't read—write—read or write or speak Spanish.
>
> Now, again, this is a situation where I'm relying on attorneys. Alright? Now, maybe the best thing for him to have done was give me a translation in English and say, 'David, read this thoroughly, and make sure you understand it thoroughly, and then sign it."
>
> Cross Examination of David Aven, Day 3 Transcript, 839:18-22; 840:1-4.
>
> "He didn't do that. He just wrote it. He told me—again, confirming, like, what I said, that most of the time, this was—what the attorneys told me were verbal—maybe they didn't want to take the time to explain it, you know, do the translation from Spanish to English and explain things to me. They said—they just put documents in front of me and said verbally what they were for, and I signed them, and he sent them."
>
> Cross Examination of David Aven, Day 3 Transcript, 840:5-13.

B. Awareness of the law – advice taken upon acquiring the land and thereafter

92. Mr Aven testified at the outset of his cross examination that he took legal advice and obtained it in writing. He also testified that because he did not speak Spanish, the exchanges he had with the authorities, were translated into English, "*generally in writing*."[29]

93. Mr Aven, when pressed on cross examination, was unable to identify any documents showing translation of the advice he had supposedly received. When presented with the privilege log showing the sole document presented by Claimants' counsel offering legal advice, Mr Aven pivoted to a new position. *"… [M]y answer is that most of the legal advice I received from my attorneys was verbal."*[30]

94. Pressed again, Mr Aven continued *"Here's my answer. The only written legal advice I'm aware I received was this one piece of – this one legal advice that's appearing in this*

[29] Cross Examination of David Aven, Day 3 Transcript, 814:13.
[30] Cross Examination of David Aven, Day 3 Transcript, 833:2-3. (Emphasis added)

[privilege] log."[31] And further still, when asked point-blank *"no written legal advice to you or your fellow investors?"* the response came *"just verbal."*[32]

95. One is unlikely to witness a clearer series of contradictions than this. Mr Aven is an unreliable witness and he offers unreliable testimony. The Tribunal should marginalize the weight it affords Mr Aven's testimony in this arbitration (written and oral), since Mr Aven clearly did not offer truthful accounts in his witness statements as is illustrated below. Respondent further asks that the entire credibility of this arbitration be treated with the same skepticism given Mr Aven is the architect of this claim.

96. We can conclude that either the search for documents by Claimants in response to their disclosure obligations was lacking, counsel has withheld documents (which giving the benefit of doubt to opposing counsel, out of professional courtesy, we do not suppose be the case),[33] or they never existed in the first place.

97. Either way, whichever of these options represents reality, the Tribunal is capable of drawing (and should draw) an adverse inference – particularly *vis-à-vis* the diligence employed by Claimants when acquiring the land and managing it thereafter over a number of years.

98. By way of example, Mr Aven referred to a *"huge box of documents"* that he apparently sent to Mr Burn.[34] This does not suggest a well-organized or well managed business. The same is true of their accounting system, wherein all their expenses were grouped together in a disorganized manner – as the Tribunal saw in the February Hearing.[35]

99. Mr Aven also testified that his attorney was *"a key guy."*[36] And yet, despite this being Claimants' case, and Mr Aven being the lead Claimant, as stated they did not present Mr Juan Carlos Esquivel as a witness in these proceedings.

100. Mr Esquivel could have testified to the numerous meetings Mr Aven would have us believe he held during which Mr Esquivel might have explained the legal and regulatory framework in Costa Rica, as well as the environmental obligations Mr Aven and his co-investors were under.[37] No attempt was made, and no evidence of such meetings exists. Mr Esquivel could have presented his legal advice in written form – which Mr Aven initially testified was "*generally*" provided in writing. Waivers of privilege could quite easily have been avoided

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31 Cross Examination of David Aven, Day 3 Transcript, 833:14-17.
32 Cross Examination of David Aven, Day 3 Transcript, 847:12-14.
33 Cross Examination of David Aven, Day 3 Transcript, 825:7-10. "*Q: And have you disclosed all the documents to your lawyers that you were asked to disclose in this Arbitration? A: I believe I have.*"
34 Cross Examination of David Aven, Day 3 Transcript, 829:16.
35 Documents AVE 14.9 and AVE 14.15 as referenced in paragraph 220 of the Second Hart Report.
36 Redirect Examination of David Aven, Day 3 Transcript, 897:4-5.
37 Cross Examination of David Aven, Day 3 Transcript, 831:13-19. "*My recollection is that I do recognize this, this document [being the sole document referenced in the Redfern Privilege Log]. And I don't recall any other documents I ever got from an attorney right now. I may have, but I don't recall any, that it was a written legal advice. Most of the time, the attorneys I dealt with would just give me verbal advice, and verbal directions.*"

with sufficient reservation of rights (and Respondent's agreement) – as is standard in international arbitration.

101. Mr Aven does not mention any other attorney as "*a key guy*", and therefore, presumably Mr Esquivel is the institutional brain behind Claimants' legal strategy for the development of the site.

102. We would invite the Tribunal to ask itself, would it not have been pertinent to offer as a witness the attorney on whose advice Mr Aven now contends that he based all the relevant aspects of his acquisition and development of the land? Would this not be the one and only witness that would definitively show the level of due diligence allegedly undertaken before and after the land acquisition?

103. Moreover, if Mr Aven insists that everything was well considered and undertaken lawfully, given Mr Aven's complete inability to recount that advice or strategy, would Claimants not have been in a rush to ensure Mr Esquivel was heard and seen by the Tribunal in these proceedings?

104. The lack of testimony or evidence supporting Mr Aven's claims is phenomenal. Mr Aven pursues a US$ 100 million claim against a sovereign state, and yet there is not a shred of evidence (oral or written) that he undertook even the most basic inquiries of the legal and regulatory circumstances underlying Claimants' development plans. The mere broad brushed assurances Mr Aven gave under cross examination are wholly insufficient and unconvincing.

105. No diary notes are provided, no minutes of meetings, no emails from Mr Aven relaying such advice to his fellow investors. In short – nothing at all exists to show any due diligence or legal advice either at the time of the investment, or thereafter during a series of legal complaints. Respondent can only invite the Tribunal to draw the only (adverse) inference that is available.

106. Similarly, once Mr Aven was confronted by the Costa Rican authorities to redress his potential violations of Costa Rican law, there is not a shred of evidence showing Mr Aven or any other investor took any steps to apprise themselves of the actual position. Respondent has not been presented with any contemporaneous, counter-position to what Mr Aven faced from the Costa Rican authorities. Respondent posits that this is because it does not exist.

107. As evidenced by Mr Aven's testimony during the Hearing, Mr Aven operated and continues to operate in a fog of confusion.[38]

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[38] Cross Examination of David Aven, Day 3 Transcript, 824:21-22; 825:1. "*I'm not denying that I received the advice. I'm just – I can't recall every document that I signed or reviewed.*"

"…I was relying on these professionals. I never actually was involved in any of that."
Cross Examination of David Aven, Day 3 Transcript, 819:1-2.

108. Quick to blame, slow to learn, seemingly reluctant to accept errors and insistent that the world is out to persecute him. These are characteristics of a businessman who entrusted (probably too much)[39] advisors ahead of a cool, objective and independent assessment of what he and his co-investors were actually getting themselves into.

109. Not least, Mr Aven at the Hearing described himself and his level of knowledge in quite different terms to how he portrayed himself in his first witness statement. In his witness statement, Mr Aven testified *"[i]n the early stages of the project, I was well aware of the demands of the environmental permitting regime in Costa Rica."*[40] By contrast, at the Hearing, Mr Aven insisted in the context of the environmental permitting process *"I'm relying on the professionals that I engaged to do various things for me."*[41] Again, this is a stark contradiction, which completely undermines any confidence that Mr Aven's written testimony is at all credible.

110. Under oath, Mr Aven reveals that he knew little and relied on others. The significance of this utter lack of due diligence is two-fold. The other Claimants' position is even more problematic in that regard as each of Mr Shioleno and Mr Janney admitted at the hearing that they relied on Mr Aven's assessment, and conducted no independent due diligence.[42] First, as a matter of fact and evidence, it shows Claimants had no awareness of what the requirements were. They have not proven their understanding of Costa Rican law, and they have not evidenced a rational, legally reasoned contrary position to justify their conduct for what it was.

111. Second, it goes to the core of their legitimate expectations. As we explain below – even assuming legitimate expectations is an applicable standard (which is not admitted) – Claimants showed no awareness of the law. Weak references to "conversations" in the absence of documentary evidence undermine the finding that they were apprised of the obligations they were under.

112. In turn, ignorance of the law is no defense, and any reasonable, objective, legitimate expectations in 2002 were precisely what the Costa Rican statute books provided. The objective expectations of any investor are to anticipate that their investment will be subject to and treated in accordance with Costa Rican law. No exception exists, since to create

39 Redirect Examination of David Aven, Day 3 Transcript, 871:11-12. "*I'm relying on the professionals that I engaged to do various things for me.*"
40 First Witness Statement of David Aven, para.54.
41 Redirect Examination of David Aven, Day 3 Transcript, 871:11-12.
42 Cross Examination of Jeffrey Shioleno, Day 2 Transcript, 370:8-12; Cross Examination of David Janney, Day 2 Transcript, 353:6-9.

one would render the expectation subjective. Moreover, international law is quite clear on this point.[43]

C. Profile of Development - Phases

113. If Claimants had undertaken any due diligence, they would appreciate how they could not develop on areas covered by wetlands, or destroy trees without the appropriate permits. They would also know that they could not fragment the land into parcels so as to avoid the environmental viability assessments demanded by Costa Rican law.

114. This Tribunal has not seen any written legal advice that would support Claimants' argument that their conduct was lawful, because it does not exist, and could not exist. Costa Rican law does not support Claimants' position. Perhaps for this reason, its absence from the evidentiary record is unsurprising. And yet, the obstacle Costa Rican law placed before Claimants from developing the land in a fragmented away was not heeded.

115. Claimants planned the development in a series of phases – something that would perfectly fit with the desire to side-step the onerous environmental due diligence and disclosure that Costa Rican law requires. The evidence before the Tribunal is quite clear in this regard.

116. In Mr Aven's first witness statement, at paragraph 60, he describes: *"There would be five phases of development."* The first involves the 72 lots coming off the Easements going into Las Olas. The second phase is the beach club, the third the Condo Section, phase four the hotel and lot across from the beach club, while phase five would be the commercial/condo timeshares on the larger piece of land that were carved out from the Condo Parks.

117. This order makes no commercial sense, as Mr Tim Hart identified in the Hearing.[44] The obvious appeal that Mr Aven and Claimants were selling to the market was the beach and the beach club amenities the timeshare property holders were meant to enjoy.[45] And yet the beach club was only planned to be developed *after* the Easements. This was no coincidence.

118. Landfilling took place on the Easements, in order to bury the main wetlands in existence on the Las Olas site. This is considered in more detail below. However, the imperative to move quickly to cover these wetlands was obvious. Once those wetlands were removed, it would allow the ongoing construction to pass off without concern. Thanks only to the Green Roots Report; we now know that wetlands on KECE Wetland No. 1 were literally buried.

119. In the following sections below, we will take the Tribunal back through the relevant chronology – critical to appreciating precisely how Claimants not only ignored a raft of

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43 **RLA-136**, *Charanne v Kingdom of Spain*, SCC, Award, January 21, 2016, paras. 493, 504, 511.
44 Direct Examination of Tim Hart, Day 7 Transcript, 2311: 12-17; 2335:1-11.
45 Second Hart Report, para. 75, fn. 103.

regulations, but affirmatively acted to avoid the environmental protections that would otherwise compromise Claimants' plans in some way.

120. In addition, the legal significance of this to the Tribunal is that the permits they pretend to have been awarded (and on which they insist they can rely), were obtained unlawfully – and in violation of the steps they should have taken.

D. EDSA/NORTON Consulting

121. Despite not having any specific plan when Claimants originally made their investment in Costa Rica, in 2004 they sought advice from land planners EDSA/Norton, to give Claimants *"an initial read of what possibly could be done with the land."*[46]

> "Q: Did you and Mr. Aven at the time you put in the purchase offer put together a plan of action in order to commence the permitting process?
>
> A: We did. And that was where we hired two firms, EDSA and Norton Consulting, to go through the process to help us to determine. We did know enough, having watched the Marriott project at Los Sueños and other projects going in around, that it was suitable for condominium timeshare projects."
>
> Redirect Examination of David Janney, Day 2 Transcript, 359:4-13.

122. Claimants hired EDSA/Norton Consulting in 2004 to provide an assessment of the land use, as well as a comparative study of other resorts in the region. Mr Janney testified that they were *"one of the foremost companies in dealing with land use and understanding environmental issues."*[47]

123. It is therefore noteworthy that EDSA/Norton Consulting identified huge water features to be developed on precisely the same locations as where the wetlands have been identified. For example, on slide 43 of the EDSA/Norton Consulting report, it identified *"this is the proposed integration of water features into the land plan."*[48] Integration is not normally a term used in place of inception, and strongly suggests water features of some kind already existed.

124. These water features are large areas, the maintenance of which would have come at the cost of the development of valuable land space. If there were no underlying wetlands why would such water features have been suggested by these seasoned experts? If the land did not naturally hold water as Claimants suggest, why would EDSA/Norton Consulting recommend a concept that would (on Claimants' case) require huge measures to ensure water retention – such as plastic or concrete underlaying of some kind. Moreover, the Las Olas Project was merely meters from the coast and the proposed beach club with pool. Why would the site have required such water features if the Pacific Ocean was so close?

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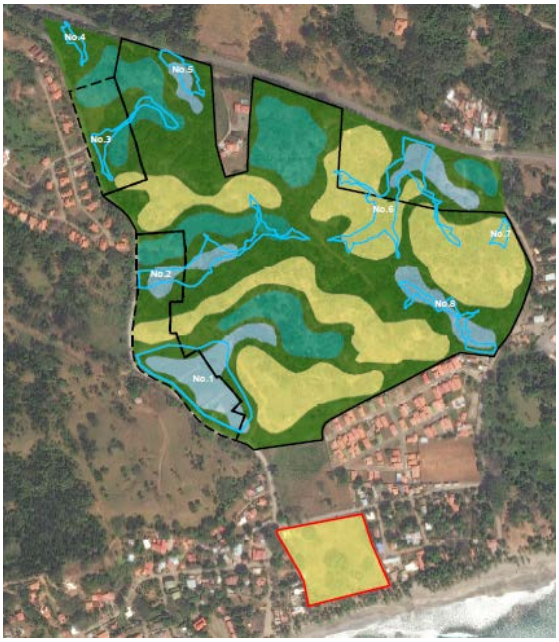
46 Cross Examination of David Aven, Day 3 Transcript, 857:15-16.
47 Cross Examination of David Janney, Day 2 Transcript, 350:18-20.
48 Cross Examination of David Aven, Day 3 Transcript, 865:3-4. (Emphasis added.)

125. Respondent argues that EDSA/Norton Consulting's assessment of the water features was no coincidence. These experienced consultants were capable of identifying water features – namely wetlands – when proposing how Claimants should formulate the property development. They reconciled natural features with the proposed configuration. Perhaps for this reason, the cover page of their report boasted the natural water features the property enjoyed, such as the beach and what seems to be a wetland.

[49]

126. The following graphic shows that what EDSA professionals saw in 2004 is still there today and was found and identified by KECE in 2016:



Superposition of EDSA's water features and ponds and KECE's wetlands

127. Also, one of the pictures attached to the Norton/EDSA Report, shows a wetland and fauna characteristic of wetlands very similar to the pictures that appear in Ms Vargas' Report of April 2009:

[49] C-30, slides 2, 5-6.

 [50]

Norton/EDSA Report

[51]

DeGA's April 2009 Report

128. Mr Aven testified only that he did not agree there were wetlands, although he had no explanation for why the EDSA/Norton Consulting Report proposed large and multiple water features on precisely the wetland locations KECE (and ERM/Dr Baillie, in part) identified. Mr Aven paid a six figure dollar sum for the report, yet seemingly knew nothing about why EDSA/Norton Consulting had recommended large swathes of land be occupied by water features rather than houses.

129. However, the documentary record does not support any finding that Claimants investigated and could conclude that there were no wetlands. As we explain below, it proves the opposite – and there was ample evidence of wetlands or suspected wetlands.

130. On this topic, Mr Janney said that he was unable to say how many environmental studies were undertaken on the property. This is a remarkable admission from someone who was supposedly the key property developer among Claimants. Mr Janney prides himself as someone who *"had a lot of experience in residential development"*[52] – yet he was not aware of any environmental assessment reports.

131. As a purported developer, this is an untenable response.

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50 C-30.
51 **R-26,** Inspection Report (DeGA-049-2009), April 26, 2009.
52 First Witness Statement of David Janney, para.12.

> "We recognized that we would have to depend on these professionals to do all the work needed to get the project through the entire permitting process that would ultimately result in getting the construction permits."[53]

132. Reliance on others undertaking such work does not mean an abandonment of any awareness as to whether such reports were undertaken at all, and if they were what their findings were. Mr Janney also was unable to testify to any contact with legal advisors (despite it apparently being a standard matter for Mr Janney to seek counsel).[54] Again, this is a position that lacks all credibility given the relative experience he boasts in land development. Not least, it is inconsistent with his first witness statement where he noted that:

> "David and I were going to Costa Rica a lot and we would meet with the attorneys, architects, interior design teams, marketing specialists and other professionals."
>
> "We spent a lot of time in Esterillos Oeste with different people and discussing the best development plan for the project site."[55]

133. Mr Janney testified in his first witness statement that he also knew *"about the importance of making sure that there were no environmental problems with the land…"*[56] *"…we both satisfied ourselves that there were no environmental problems on the Las Olas project site."*[57]

134. Yet again, Claimants' witness testimony departs significantly from what the documentary evidentiary record proves. As we consider below, the environmental studies undertaken did show there were "*problems*" with the land – as Claimants' other witnesses confirm.

135. Mr Janney's credibility is lacking, and this is true irrespective of his unbelievable testimony provided under cross examination. Mr Janney – who brings his own credibility into issue in his first witness statement[58] both in personal and professional terms failed to bring to the Tribunal's attention his involvement in scandals at his own Church, as well as his personal bankruptcy proceedings.[59]

136. Mr Janney's response was that many business people enter bankruptcy, but this does not immunize him from similarly being characterized as a bad businessman because of his inability to avoid personal bankruptcy. Yet Mr Janney, when presented with the opportunity in his second witness statement to clarify this relevant fact, decided against it.

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53 First Witness Statement of David Janney, para.15.

54 Cross Examination of David Janney, Day 2 Transcript, 353:15-20 "*Q: … did you actually contract with advisers – legal advisers? A: I can't speak to that. Q: You cannot speak to that because you cannot remember? A: Yes, because I don't know.*"

55 First Witness Statement of David Janney, para.16.

56 First Witness Statement of David Janney, para.21.

57 First Witness Statement of David Janney, para.21.

58 First Witness Statement of David Janney, para.25.

59 Cross Examination of David Janney, Day 2 Transcript, 345:14-20.

137. Mr Janney presents his humanitarian work presumably to offer comfort to the Tribunal that he is a man who can be believed. However, failing to disclose his personal bankruptcy and his contradictory testimony under oath suggests otherwise. What also suggests otherwise is the failure from the outset of Claimants to undertake the appropriate Environmental Viability (EV) assessments – despite Mr Janney testifying that he *"was very familiar with the permitting process for residential developments."*[60]

E. The First EV Application Process was not completed

138. Claimants filed for the first EV on September 30, 2002. This was the first EV application made in relation to the First Condominium site. As the Tribunal may recall, we call it the "first" because the site changed over time. It was originally a development of 48 units, however once Mr Mussio became involved, that mushroomed to 288 units.

139. Even though it would have been necessary in the circumstances, **no** biological study addressing the presence of any wetlands or forests was submitted. The evidentiary record does not provide the Tribunal with any such survey, and no explanation has been given by Claimants at the Hearing.

140. On November 23, 2004, SETENA granted the first EV for the First Condominium site. The EV for the First Condominium site would lapse on February 27, 2007 – meaning a new application had to be made. As explained below, this EV did not relieve Claimants of their original responsibility, and it was not incumbent on SETENA to police Claimants' failings.

141. Claimants use this and the other subsequent occasions of an EV being granted as evidence of their right to develop the property. They say it was for the State to police their application, and they also say it was for the State to visit the property and double-check what had been disclosed in the application.

142. Contrary to Mr Ortiz[61] and Mr Bermúdez's[62] allegations that SETENA has an obligation to visit the site, Dr Jurado explained that this is not an obligation but a power that SETENA has and can exercise at its discretion:

60 First Witness Statement of David Janney, para.21.
61 Cross Examination of Luis Ortiz, Day 5 Transcript, 1398:14-18.
62 Cross Examination of Esteban Bermúdez, Day 2 Transcript, 543: 9-14.

"To repeat, it's not an obligation. It's not even provided for in the regulations of SETENA. It is not established as an obligation. And that article and the regulations have stated that its one of its duties.

And, of course, one of its duties is evidently to confirm if what the developer is saying is correct. But when there's some reasonable doubt about this or it's an important project or a cause of that kind. And it's not an obligation because it would be absurd to think that every application for a viability needs in situ inspection.

There are many applications made every year to SETENA. Many files that are processed. And if every application would necessitate an inspection, of course, the person has sworn that this is true, well, they wouldn't have them swear a statement, and there would not--the viabilities, of course, would be--would have to be credible.

So, of course, they have to decide which need inspection and which don't, and they would have to, of course, do inspection if there's been a complaint.

But if they are basing this on sworn statement and there is a relationship with the developer, which has to give the truthful information about the impacts project, they're not going to go to every project to see if what they've said is correct or not.

Because if not, the system would be organized in another manner. There would just be an application filed and then SETENA would have to gather all the information."

Cross Examination of Julio Jurado, Day 5 Transcript, 1431:3-22 and 1432:1-16.

143. On that basis, Claimants contend, the State failed to identify the wetlands, rather than Claimants.[63] This is absurd. When a taxpayer submits their tax returns, they are under an obligation to disclose all relevant material. The burden is on them. Quite clearly tax authorities cannot be expected to police every individual's return. Of course, if a discrepancy is identified, and there is then a tax investigation or audit of some kind, then the State is entitled to unravel the submission and impose sanctions or seek relief against the taxpayer for their failure to inquire, or non-disclosure. The environmental process is precisely the same. The Costa Rican state does not assume responsibility for the developer's disclosure and application. The Costa Rican State does not expressly or impliedly waived any right to object, suspend or prosecute, simply because an EV or permit is granted (based on the developer's submission/application).

144. Claimants' position is a ludicrous distortion of the obligations Costa Rican law placed on Claimants. Furthermore, testimony from both Dr Jurado and Ms Priscilla Vargas should remove any doubt in the mind of the Tribunal in this regard. Claimants' assertions are wrong as a matter of Costa Rican environmental law.

145. The burden was on Claimants alone: they had to inquire into and disclose environmental sensitivities/wetlands/forests; and if they did not then their applications would be granted on an unlawful basis – capable of being subsequently revoked.

146. This issue attracted considerable debate during the Hearing, and given Mr Burn's closing remark in the Hearing, it is important to the Tribunal's deliberations.

63 Claimants' Reply Memorial, paras. 235-236.

147. If Claimants were to assert that this case is simply *"about permits that were applied for, that were issued, and that were relied upon"*[64] (as Mr Burn stated in his Closing Submission) Claimants would have to redefine the obligations Claimants were under when seeking such permits. Claimants would have to show that they were entitled to do nothing and effectively remain ignorant of the law and passive throughout the process to obtain a construction permit.

148. Specifically, Mr Burn's above paraphrasing of Claimants' case relies completely on a total abandonment of any kind of duty. Such duties include any duty of inquiry, duty to disclose or duty to adhere to standards of Costa Rican environmental law. These are precisely the duties that Costa Rican law imposes on Claimants.

149. Claimants would have to show this Tribunal that Costa Rican law actually frees them in some way from any duty to inquire or investigate, or that it frees them from any duty to submit an accurate and complete EV application. They would also have to show this Tribunal that Costa Rican law frees them from any need to avoid misleading authorities regarding the existence of wetlands when they are discovered.

150. Respondent's position is that such an attempt to redefine Claimants' obligations is a total fiction. Costa Rican law very clearly places the obligation to inquire on Claimants. The EV application process clearly imposes on Claimants an obligation to disclose everything of relevance. Moreover, Costa Rican law does not permit developers the option of either ignoring the law or remaining passive in relation to their awareness of the environment in which they are hoping to construct. And this stands to reason. How could any environmental protection function adequately if such duties were either discretionary or (as Claimants seem to assert) non-existent?

151. How could the environment be effectively protected if Claimants could choose not to disclose reports that indicate sensitive and protected ecosystems exist (or even possibly exist) on site? Moreover, how could it fall to the State to police not only Claimants' conduct (of which they could not be aware without a police power to open and investigate Claimants' files) but the conduct of every single land developer across the entire country in relation to every acre of land? Such obligation would require a standing army of environmental officers Costa Rica could not afford or maintain.

152. And yet Claimants' proposition is that that is required, and the failure of the State to identify the protected ecosystems should leave Claimants free from any responsibility and the State to suffer the consequences.

153. What regime of environmental protection do Claimants pretend should operate in Costa Rica where ecosystems can be destroyed and continue to be destroyed, yet the State

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64 Claimants' Closing Statement, Day 6 Transcript, 2004:18-19.

should only look on helplessly because a construction permit that was erroneously issued beforehand (due to Claimants' intentional wrongs or failures) should trump the environment? This approach would make a mockery of environmental protection. Above all, this is not what Costa Rican law provides.

154. On some occasions, in relation to sections of Las Olas, Claimants secured EVs. However, as Respondent has shown, and will summarize below, they were unlawfully obtained because of the dereliction of Claimants' duties – and because of the misrepresentations made to the authorities.

155. As a result Claimants always ran the risk that their efforts to develop the property would be unwound when the truth was outed.

F. The Burden of Proof in the EV Process

156. The starting point for the EV process is the burden of proof. This rests with Claimants. Claimants contest this. Article 109 of the Biodiversity Law of 1998 states:

> "The **burden** of proving **the absence** of pollution, unauthorized degradation or impact, **lies on the applicant for an approval or permit**, as well as on the party accused of having caused environmental damage."

157. Respondent maintains that this provision determines that when making an application (such as the D1 application Claimants made) the burden was on Claimants to identify the wetlands, or any other fact, relevant to the D1 application. Claimants protested, identifying Article 109 as being located in Chapter IX of the Biodiversity Law, titled "Procedures, Processes, and Penalties in General".[65] This, according to Claimants, illustrates how this provision should be interpreted.

158. Mr Burn, during the cross examination of Mr Mussio, identified Article 105 of the Biodiversity Law, which provides, *"Everyone will have standing to present a case in administrative courts or in the regular courts to defend and protect biodiversity."* This, Mr Burn posited, was the necessary precursor to Article 109 – such that the burden of proof contained therein – was only relevant to sanctions or cases brought under Article 105. Put simply, Claimants argue the burden of proof only becomes relevant after the event, if there is a claim launched.[66]

159. Claimants' interpretation is not sound. The law does not support this, and more pertinently, Claimants' own witnesses and experts do not agree with this.

1. The law does not support Claimants' interpretation of Article 109

160. The fact that Article 109 can be found in the section that raises procedures does not alter Respondent's interpretation. The only difference is the contemporaneity of the burden.

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65 C-207.

66 See for example, Direct Examination of Luis Ortiz, Day 4 Transcript, 1273:7-22; 1274:1-12.

Claimants accept that the burden rests with Claimants in the event of an action.[67] However, this – they maintain – does not mean the burden also applies to Claimants when an approval or permit is being sought. This overlooks the practical reality of what Article 109 would require – even on Claimants' preferred reading.

161. In the event a claim is brought to sanction environmental harm, Claimants must show the absence of pollution, unauthorized degradation or impact. For Claimants to show the absence of impact, they would have to prove the absence of either the harm, or the ecosystem that would attract the environmental protection in the first place. In this case, that translates to requiring Claimants to prove the lack of a wetland, since the harm is quite clearly the development on the wetland.

162. To prove the lack of a wetland at the time of the action/proceeding is only part of the task for Claimants, since quite obviously, Claimants would also have to prove wetlands did not exist just before the moment any harm was inflicted on the site (i.e., before the development commenced).

163. In order to do this, it is quite distinct to show whether a wetland exists today as opposed to a number of months or years before. Indeed, Claimants go to lengths to draw this distinction in their pleadings – alleging that the existence of a wetland today does not necessarily mean a wetland existed when the development commenced.[68]

164. For this reason, the only definitive evidence (in order to discharge the burden of proof on Claimants) is for Claimants to be able to show that at the time before they were about to develop the land, there were no wetlands. Of course, if no legal action/complaint were ever brought against Claimants, then they might argue that they could escape the obligation to prove the lack of a wetland before the commencement of works. However, such an approach would be fraught with risk – since no developer can anticipate whether an allegation of environmental harm might be raised. In fact, Mr Mussio testified that:[69]

> "Any project has an impact. Any project. The idea is that through SETENA's requirements -- for example, some call for very detailed studies; others are more simple in keeping with the impact that the project might generate."
>
> Cross Examination of Mauricio Mussio, Day 2 Transcript, 405:18-22.

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67 As an aside, this is a noteworthy admission, since the first moment an environmental complaint was raised, if indeed Claimants knew the burden of proof was on them, it is all the more remarkable that Mr Aven did not think to reconstruct his "stolen" files, in order to verify what investigations had been undertaken or advice received during the permitting process.

68 Claimants' Opening Statement, Day 1 Transcript, 19:17-22; 20:1-21.

69 Redirect Examination of Mauricio Mussio, Day 2 Transcript, 465:14-18; 20-21. Mr Mussio continued on re-direct examination, *"…any project is going to have people who are against it and people who are for it." "I don't know this article [109 of the Biodiversity Law on burden of proof] but I knew that it's true that a person could put in danger a project that had everything in order…[A]ny person can arrive and say, 'There is environmental danger'.*"

165. In this case, it is a risk that can only be avoided if the developer is 100% confident there is no wetland – something that could only be proven to themselves by definitively investigating the existence or not of wetlands, in the first place. But the legal and practical risk is that without verifying the absence of a wetland before the development, such developer would be immediately condemned to fail to discharge the burden Article 109 would impose on them at a later stage, in circumstances where an allegation or sanction was levelled against them.

166. In any event, here, there is an allegation of harm. Therefore, it is incumbent on Claimants to be able to show there were no wetlands before they started to develop. Accordingly, this placed the burden on Claimants at the time they were planning their development, to be sure there was no wetland.

167. The other legal factor that ensures that Article 109 places the burden of proof on developers from the outset is the practical operation of the precautionary principle. As Mr Bermúdez (Environmental Regent) testified:

> "Q: […] And the precautionary principle requires the person who wishes to carry out an activity to prove that it will not cause harm to the environment?
>
> A: Yes."
>
> Cross-Examination of Esteban Bermudez, Day 2 Transcript, 536:4-7.

168. Dr Jurado also testified that:

> "We have an institution, a body of the environment, in MINAE's ministry which is the National Technical Environmental Secretariat which does the Environmental Impact Assessments. But the operation of this principle [Article 109] is one that presupposes that a private person also has obligations with regard to environmental defense and that he or she has the obligation to give the Administration the necessary information regarding his or her activities that potentially could be damaging to the environment."
>
> Cross Examination of Julio Jurado, Day 5 Transcript, 1428:14-22; 1429:1.
>
> "The Secretariat's role is to see if this is the correct diagnosis and if the commitments of the mitigation of this damage reduction or compensation or relief correspond to the study that is being done about possible damages. Obviously, we use this point of departure that the developer is providing information on his activity in the area of possible damage, that is true, which is why he's asked to make the statement under oath."
>
> Cross Examination of Julio Jurado, Day 5 Transcript, 1429:8-16.

169. Finally, the oath required to be made on the D1 application compels full disclosure in advance of the application, thereby emphasizing the burden on the developers. This oath is recited below.

170. In conclusion, the legal reality is the burden contained in Article 109 transposes itself to the commencement of development.

2. Claimants' witnesses recognize the burden was on Claimants

171. Furthermore, the other authority to support Respondent's interpretation and application of Article 109 is Claimants' witnesses and experts. While his testimony was seriously lacking in certain other respects, as we identify below, Mr Ortiz was clear about this basic principle of the burden of proof.

172. Mr Ortiz was originally asked:

> "Q: …do you agree that the viability application, the Environmental Viability application, it has--it includes a sworn statement that the conditions on the land are what the developer says they are; correct?
>
> A: Yes."
>
> Cross Examination of Luis Ortiz, Day 3 Transcript, 1331:8-13.
>
> "Q: …regardless of the Principle of Precaution or the Principle of Good Faith, would you nonetheless agree that that is the duty of the developer in Costa Rica; that in Costa Rica, a developer has to make a truthful and exhaustive or thorough representation of what the conditions on the land are when he makes he or she makes a filing with an environmental authority?
>
> A: Yes."
>
> Cross Examination of Luis Ortiz, Day 5 Transcript, 1329:20-22; 1330:1-5.

173. This is grounded on the practicalities identified above, and also based on the principle of good faith.

> "Q: And so, the administration--the administration's role in granting the EV, the Environmental Viability, is not to second-guess what the developer is representing; there is a Principle of Good Faith that is assumed and that the developer is expected to comply with. That's correct, yes?
>
> A: Yes."
>
> Cross Examination of Luis Ortiz, Day 5 Transcript, 1331:14-20.

174. This importantly emphasizes the need on Claimants to undertake inquiries and offer all studies and findings as part of the D1 application. This is also an admission by Claimants to the burden of proof being on Claimants.

175. The said statement of truth contained in the D1 application can be found at the front of Exhibit R-13. It provides:

> "We, the undersigned, declare under oath that all the information provided on this form is true **and current** and is provided in accordance with the technical knowledge available. The foregoing, under the penalties that the law establishes for the crime of perjury and conscious of the following clause of environmental responsibility:
>
> The environmental consultant and the developer signing the D1 document will be directly responsible for the scientific technical information they provide in it. As a result, SETENA as an environmental authority of the Costa Rican State

> will oversee that the document submitted complies with the technical guidelines established by the filling guide and, if these are met, accept the information presented as **truthful**, as a sworn affidavit. Based on the data provided, SETENA could make decisions regarding the Environmental Viability of the activity, work or project proposed, so in the event that **false or erroneous** information is provided, **the signatories will not only be responsible for this offense, but also for the consequences of the decisions that SETENA has incurred in when relying on that data**." (emphasis added).

176. This is a clear statement requiring complete and accurate information – and consistent with Mr Ortiz's opinion, the burden was on Claimants to ensure that information was accurate. Furthermore, as the final sentence clarifies, Claimants were also on notice of (and accepted) the fact that if there were a false or misleading declaration that would alter SETENA's treatment of the permitting process, then the consequences rest with Claimants.

177. However, the reference to SETENA does not impose on SETENA the obligation to verify all submissions. This simply does not correspond to how the system works. Dr Jurado was very clear during his testimony on this point:

> "The Administration does not have to verify whether this project actually will generate this harm.
>
> So, that's why the developer has asked for all the studies. If not, the Administration would do the studies. Rather, the developer is requested to provide the studies and the Administration supposes that experts have done these, that they're qualified, and 18 that these are correct."
>
> Direct Examination of Julio Jurado, Day 5 Transcript, 1433:12-19.

178. Claimants' own witnesses confirmed that, even during the construction process, it is unusual (and therefore not required) for SETENA to inspect the Project Site because it relies on the Environmental Regent:

> "ARBITRATOR BAKER: Is that unusual, for an Environmental Regent to never get a site visit or to never get an in-person inspection from the environmental agency?
>
> THE WITNESS: It's—it's usual to not get inspections from SETENA unless there is a complaint. Usually, when—if the project goes—all along the construction project without complaints or things that need to be reviewed by SETENA, they don't go to the site.
>
> ARBITRATOR BAKER: **And the reason for that is because they are, in principle, relying upon the reports that you're sending them each month.**
>
> **Yes."**
>
> Cross Examination of Esteban Bermúdez, Day 2 Transcript, 607:14-22; 608:1-5. (emphasis added.)

179. This is in line with Dr Jurado's explanation of SETENA's functioning.

180. In addition to Mr Ortiz, Claimants' expert, Mr Barboza also endorsed Respondent's interpretation of the burden of proof, during the application phase:

"Q: And would you agree, sir, that, in fact, it's really on the developer to have a look and ensure that before making a D1 Application, that if there is evidence of a possible wetland, that that sort of qualitative or quantitative assessment that you've identified in your experience is undertaken?

A: That's correct."

Cross Examination of Gerardo Barboza, Day 6 Transcript, 1639:6-12.

181. Mr Bermúdez, Claimants' Environmental Regent, also accepted the burden of proof lay with Claimants.

"Q: And according to Article 109 of the Biodiversity Law, it was for the Claimants, as the developers, to prove any potential impact to the environment in their EV Application; right?

A: Yes."

Cross Examination of Esteban Bermúdez, Day 2 Transcript, 536:9-13.

"Q: And so you'd be familiar with the precautionary principle?

A: Yes."

Cross Examination of Esteban Bermúdez, Day 2 Transcript, 535:22; 5361-2.

"Q: And the precautionary principle requires the person who wishes to carry out an activity to prove that it will not cause harm to the environment?

A: Yes."

Cross Examination of Esteban Bermúdez, Day 2 Transcript, 536:4-7.

"Q: So let me reread what comes from your statement Paragraph 8. 'The responsibility to submit all necessary studies is shared by the developer and the consultant.' Would you include reports that are necessary to prove the absence of pollution, unauthorized degradation or impact?

A: Yes.

[…]

Q: And so "necessary" would include reporting about wetlands if any existed?

A: Yes.

Q: And because the precautionary principle applies even if there isn't scientific certainty, then it would be necessary even if you had reason to suspect the existence of a wetland; correct?

A: Correct."

Cross Examination of Esteban Bermúdez, Day 2 Transcript, 538:19-22; 539:1-15.

182. Mr Bermúdez more than any other of Claimants' witness of fact appearing before the Tribunal was well placed to know this, as the environmental consultant from DEPPAT. Indeed, he testified on Claimants' behalf in his first witness statement that part of his role

was to "*help to arrange applications for environmental permits*."[70] He further testified, *"This is a complex process, involving a lot of different steps for different institutions but I am comfortable navigating between the different agencies."*[71]

183. However, Mr Bermúdez, also testified "*I am very familiar with Costa Rican laws and regulations relating to the environment.*"[72]

184. Mr Bermúdez testified repeatedly on the burden of proof:

> "So [SETENA] can if they wish visit the site. But the obligation, as you agreed – in fact, as you testified a moment before, was that it's the obligation on the developers; correct?
>
> A: Yes."
>
> "Q: Ultimately, the buck stops—that is to say, ultimate responsibility lies with the developers, as you've testified a moment ago.
>
> A: Yes."
>
> Cross Examination of Esteban Bermúdez, Day 2 Transcript, 545:7-18.

185. Thus, the position is clear – Claimants had the burden of proving that there were no wetlands, and that their development plans would not impact any protected ecosystem. They failed.

186. Mr Burn said this case is about obtaining permits, but at this first step, the evidence shows that they failed to obtain it by transparent and lawful means, as we illustrate further below.

G. Developments in 2005 and 2006

187. On January 26, 2005, La Canícula applied for an EV for the Concession. DEPPAT was hired as Environmental Regent. On January 20, 2006, SINAC issued confirmation that the Concession is not within a Wildlife Protected Area – or WPA. A WPA is a national categorization of land. Surprisingly, this became an issue during the Hearing,[73] even though we trust the Tribunal has an accurate appreciation of the significance (or for present purposes, irrelevance) of the characterization.

188. A WPA is a protected region, such as a national park, however, simply because a tract of land (such as Las Olas) is not categorized as a WPA, does not mean the full protection afforded to wetlands no longer applies.

189. Thus, just because the Concession (or indeed any other part of Las Olas) was not in a WPA – does not mean that Claimants could ignore the potential existence of wetlands. They were still bound by Costa Rica's strict environmental protection laws. If wetlands existed – as they did on Las Olas, the same protection applied. The protection of wetlands

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70 First Witness Statement of Esteban Bermúdez, para.8.
71 First Witness Statement of Esteban Bermúdez, para.8.
72 First Witness Statement of Esteban Bermúdez, para.11.
73 Cross Examination of Luis Martínez, Day 4 Transcript, 1057 - 1068:1-11.

is completely independent of the characterization that can be given by the State to a certain area as a WPA.[74]

190. More than a year after the application for the EV for the Concession site, SETENA issued the EV on March 17, 2006. As stated during the Hearing, Respondent does not have any complaint to raise in relation to the information provided in order to obtain the EV in relation to the Concession – other than Respondent's jurisdictional objection.

191. On the other hand, in relation to SINAC's confirmation of no WPAs on the Condomium site, during the examination of Mr Martínez, Professor Nikken was curious to understand the context in which SINAC's confirmation of April 2, 2008 that certified that there was no WPA on the Condominium site was issued (Exhibit C-48).[75] The letter that Mussio Madrigal sent to SINAC on March 14, 2008 requested a confirmation that the property assigned to the Condominium site was not within a WPA, as a requirement for the issuance of an EV for the Condominium site:

Estimados señores:

Por medio de la presente misiva me permito saludarlos y a la vez solicitarles de la manera mas atenta me extiendan una certificación u oficio donde indique que la propiedad perteneciente a la sociedad Inversiones Cotsco C&T S.A. cedula jurídica N 3-101-289111, plano catastrado N P-1244761-2007, no esta inmersa dentro de ninguna área silvestre protegida, esto debido a que SETENA lo requiere para poder seguir con el tramite de la viabilidad ambiental, la cual es de suma importancia para poder ejecutar el proyecto de manera tal que se cumpla con todos los lineamientos técnicos y legales que deben, por obligación llevar este tipo de proyectos.

No omito indicar que para cualquier notificación acuso el numero 25-88-01-23

Edgardo madrigal mora
Cedula 1-746-066

[76]

192. Contrary to what Claimants tried to insinuate during the cross examination of Mr Martínez, Mussio Madrigal did not request SINAC to confirm that there were no wetlands or forests in the area. Neither could Claimants or their advisors understand from SINAC's certification that the *"land does not, as far as the relevant agency is concerned, contain a wetland"*[77] or that the agency *"confirmed it doesn't contain a wetland [or] has not identified a specific wetland."*[78] In the letter responsive to Mussio Madrigal's petititon, SINAC confirmed that the area of the project was not within a WPA, meaning it was not categoried under any type of WPA (*categoría de manejo*) under Article 70 of the Regulations to the Biodiversity Law.[79]

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74 Redirect Examination of Luis Martinez, Day 4 Transcript, 1059: 15-20.
75 Cross Examination of Luis Martínez, Day 4 Transcript, 1129:1-22.
76 C-45.
77 Cross Examination of Luis Martínez, Day 4 Transcript, 1064:11-19.
78 Id., 1065:6-8.
79 **R-15**, Regulations to the Biodiversity Law, March 11, 2008.

H. Claimants unlawfully executed the EV application

193. In April 2007, architect firm Mussio Madrigal was hired and undertook surveys in preparation of the EV application for the Condominium section. As stated, the Condominium section had evolved into a larger 288 units. Mauricio Mussio prepared the Master Site Plan – and devised the plan to fragment.[80] It is Respondent's position that fragmentation undertaken in the way they did is unlawful.

1. Fragmentation as undertaken by Claimants was unlawful

194. As stated above, during the Hearing the Tribunal had to deal with the issue of fragmentation or fractioning – an issue of central relevance to the legality of Claimants' conduct. Of course, Claimants would argue that this is irrelevant because the permits were ultimately issued. This would be to ignore the proper application of Costa Rican law.

195. The term fractioning had been used, but in fact the term of art is fragmentation. This is the process of sub-dividing the property into sections so as to then treat each one as if it were a separate project. In so doing, Claimants treated as mutually exclusive (when it advantaged them) each of the sections of the Las Olas project site.

196. The sections that were fragmented were the main sections identified above, and also identified in the five phase program that Mr Aven set out in paragraph 60 of his first witness statement. Therefore, for example, the Easements were divided from the Condominium Section, which were also divided from the Concession, etc.

197. The evidence shows that Claimants divided the Las Olas site into these sections and in addition, sought EV's in respect of only some, not all. Moreover, when an EV was sought, for example, it was not applied for by reference to the overall Las Olas project plan. Therefore, the Costa Rican authorities would not have been able to consider the Las Olas project in its entirety at one single point in time.

198. This is unlawful and permits were obtained on a misleading basis. Claimants should have applied for a single EV, relating to the entire Las Olas Project – disclosing the overall plan, and therefore the overall impact to the site and its environment. They did not – and they undertook this fragmentation in full knowledge of its illegality.[81]

199. Indeed, while they might have exploited an administrative Achilles heel of the municipality (that ultimately was the agency issuing permits), that does *not* absolve Claimants of their unlawful conduct – and it certainly does not preclude the State from remedying this illegality by its subsequent investigations and conduct.

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80 C-54.

81 Cross Examination of Esteban Bermúdez, Day 2 Transcript, 567:4-568:10. Mr Bermúdez confirmed that fragmentation is illegal.

200. Mr Bermúdez confirmed that the Municipality might have been unaware of the different sub-sections to the Las Olas project. While Mr Aven was clear of his five phase program, he had used different corporations (for reasons unknown) to acquire the Easements Section and the Condominium Section. Therefore, the requests for EVs and construction permits were coming from separate corporations:

	No.	**Enterprise at the time of the granting of the permit**	**Enterprise holding the permit today**
Construction permits for the Easements (C-14)	15679	Amaneceres de Esterillos Oeste S.A.	Mis Mejores Años Vividos, S.A.
	15680	Altos de Esterillos S.A.	Mis Mejores Años Vividos, S.A.
	15681	Caminos de Esterillos Oeste S.A.	Mis Mejores Años Vividos, S.A.
	15682	Noches de Esterillos S.A.,	Mis Mejores Años Vividos, S.A.
	15683	Cerros de Esterillos Oeste S.A.	Cerros de Esterillos Oeste S.A.
	15684	Atardeceres Calidos de Esterillos Oeste S.A.	Mis Mejores Años Vividos, S.A.
	15685	Atardeceres Calidos de Esterillos Oeste S.A.	Mis Mejores Años Vividos, S.A.
Construction permit for the Condominium (C-85)	130-10	Inversiones Cotsco S.A.	Inversiones Cotsco S.A.

201. Accordingly, in the same way Mr Bermúdez was unaware that the Easements section pertained to the same project as the Condominium section, the same could be said of the Municipality. If two separate companies present themselves before the Municipality in relation to two separate plots that the Municipality cannot know formed part of the same overall Las Olas Project – the oversight is quite easily going to occur.

202. Mr Burn on re-direct examination asked Mr Bermúdez:

> "Q: And in terms of relationships with the Municipality, would—do you think they would have known there was a relationship between the Easements and the Condominium Section?
>
> A: No."
>
> Redirect Examination of Esteban Bermúdez, Day 2 Transcript, 598:4-8.

203. Mr Burn continued:

"Q: Do you think SETENA would have known?

A: Relationship in which way?

Q: That's--that the project was being developed with in one part, in this condominium part, that there was also an easement part—that--would those agencies have been aware that these different projects were happening at the same time?

A: No."

Redirect Examination of Esteban Bermúdez, Day 2 Transcript, 598:9-16.

204. For precisely this reason, fragmentation is not permitted.

205. During the Hearing we learned of the genesis of the fragmentation. Mr Aven testified that the idea of the separation of the lots came from his lawyer Mr Gavridge Pérez. [82] It is strange and unexplained that the same lawyer also appeared as criminal counsel for Mr Aven in 2011.[83]

"ARBITRATOR BAKER: … Would you comment on the Mussio plan to either fractionate or fragment or whatever you'd like to say about that.

THE WITNESS: Well, actually, that wasn't Mussio who came up with it. But my lawyer, Gavridge Pérez, is the one that actually did it. It wasn't Mussio that did that. The lawyer recommended that whole—and I'm not a lawyer. I'm not—I don't know the distinction between what—fractionalization or fragmentation. I mean, I don't know. I mean, I have no clue. And that's why I depend on lawyers at all times."

Cross Examination of David Aven, Day 3 Transcript, 904:9-20.

206. The separation of the Las Olas project into sections was a second step after Mussio Madrigal had come up with the overall design of Las Olas. Mr Shioleno, Mr Mussio and Mr Aven admitted that the firm Mussio Madrigal was the one in charge of the design of the project:

"Mussio Madrigal is the company that did the design for Las Olas."

Direct Examination of Jeffrey Shioleno, Day 2 Transcript, 380:19-20.

"…And so Mussio came up with the—the conceptual design for the condo project. And there's a lot of talks about the easements. And I heard—I heard every—all the conversations, and Mr. Nikken was asking questions about it."

Redirect Examination of David Aven, Day 3 Transcript, 899:13-17:

"So those lots were subdivided along the main road. And once those lots were subdivided, then—then Mussio-Mauricio Mussio applied for the condo permit. Did the—the concept, the master site plan for the condo project. And that's what was submitted."

Redirect Examination of David Aven David Aven, Day 3 Transcript, 900:18-22; 901:1.

82 Cross Examination of David Aven, Day 3 Transcript, 935:19-22; 936:1-2.

83 **R-161**, Multiple appointments of criminal counsel.

207. This final quote illustrates perfectly the illegality that Claimants perpetrated – subdividing the Easements section from the overall Las Olas site, but only seeking an EV for the Condo Section.[84]

208. Mr Aven was not able to explain what was the business rationale for the fragmentation of the Las Olas Project:

> "PRESIDENT SIQUEIROS: What was the business rationale?
>
> THE WITNESS: Okay. That's a fair question, a good question.
>
> PRESIDENT SIQUEIROS: Because it has been an issue in this arbitration. It's not—my question is simply because this is an issue that has been raised in the arbitration.
>
> THE WITNESS: Absolutely."
>
> Redirect Examination of David Aven, Day 3 Transcript, 934:5-13.
>
> "So—so the same thing with—with Gavridge Pérez. We were talking. And he said, 'Look,' he says, 'the law is if you have property on the main road, you can subdivide it out, and you don't have to be concerned with the EV because it's along the main road.'
>
> And things along the main road—they have access to everything. They have access to electric. They have access to the road. They have access to the water. The water main runs along the road.
>
> So it's not like you're developing something on the interior where you have to put heavy infrastructure in like, you know, roads and underground electricity and sewage treatment plants and all of that—all of the rest of it.
>
> So that was the—that was the motivation for that. It was—but it was based upon legal advice from an attorney. And as far as—as far as I was told, it was perfectly legal."
>
> Redirect Examination of David Aven, Day 3 Transcript, 936:11-22; 937:1-7.

209. However, Mr Aven was wrong, or ill-advised. It was not "*perfectly legal*." In addition, Mr Aven's answer missed the point of the President's question. Mr Aven was responding to how easements operate in and of themselves. In this regard, the Tribunal heard testimony from Mr Ortiz and Ms Priscilla Vargas as to the Costa Rican law treatment of easements – and the number of plots that can be built off each easement (road).

210. However, this is less relevant for present purposes. The President's question went more to the issue of why the Easements section (this is to say, the entire western section which would comprise 72 lots) was separated out from the Condo section, for example, and from the rest of the Las Olas site.

211. Confusion pervaded this topic on other occasions during the Hearing. For example, during the cross examination of Mr Mussio, in response to questions from Mr Baker, Mr Mussio

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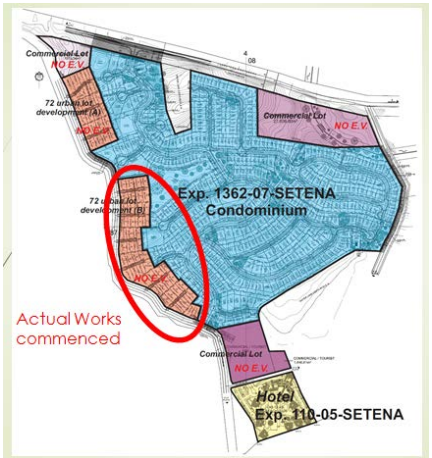
[84] Cross Examination of Esteban Bermúdez, Day 2 Transcript, 541:20-22; 542:1. This was confirmed by Mr Bermúdez during cross-examination who said: "*Q: … the D1 Application [was] for the Condominium Section; is that right? A: Yes. Yes.*"
Cross Examination of Esteban Bermúdez, Day 2 Transcript, 559:19-21.Mr Bermúdez continued "*Q: So there's no Environmental Viability covering the Easement Section; correct? A: Not that I know.*"

was asked whether he had consulted the Municipality with regard to fragmentation. The response was, "*Yes*."[85] However, the fragmentation Mr Mussio was referring to was not the fragmentation that was illegally invoked. Instead, it was the lawful kind of fractioning or segregation of land that permits 6 lots to be developed around a single easement (road).[86] This is apparent from the specific response Mr Mussio provided Mr Baker, when talking about having a lot in front of a public road.[87]

212. Costa Rican law did not permit what Claimants undertook. Ms Priscilla Vargas made this clear in her presentation during the Hearing:

> "If we were to look at the overall Las Olas Project, then they would, obviously, have to be Category A [type of D1 application], where it would need an EIA [Environmental Impact Assessment], because that is the most complex instrument to assess the environment. This brings me to an issue of which you've heard a lot, and this is the fractioning of the EV. No mention was made of the 72 lots [from the Easements section in the D1 application made for the Condo Section]. No mention was made of the other commercial lots which were the ones I showed with the red circle on the first screen or in the different red colors based on the 72 lots. And even if they had not been any commercial lots or if the 72 urban lots hadn't been there, the EV should have been comprehensive with--between the hotel and the condominium if they were part of a single project and provided--that is what is provided. In that case, it should have been a complete EIA as to the geographic space. And this is the point that we're trying to make with this slide. In addition to being geographically integral, it should also have been comprehensive when looking at the ecosystems that exist on the site."
>
> Direct Examination of Priscilla Vargas, Day 6 Transcript, 1832:11-22; 1833:1-11.

213. Ms Vargas was referring to this figure in her presentation:



85 Cross Examination of Mauricio Mussio, Day 2 Transcript, 505;13.

86 Ms Priscilla Vargas also presented on this uncontroversial kind of fragmentation. Note that in order to constitute the 72 lots to be developed on the Easements Section, 8 lots on each of the 9 easements sub-sections were to be built.

87 Redirect Examination of Mauricio Mussio, Day 2 Transcript, 505:19-22. *"…if next week a customer comes and says, Mauricio, I have a lot in front of a public road, I want to do some fragmentation, some land division there, it can be done.*" This is clearly referring to the process of dividing a lot into 8 sub-lots, rather than dividing the Easements Section from the Condo Section, etc. Redirect Examination of Mauricio Mussio, Day 2 Transcript, 507:3-4. "*So, basically, it allows for very small fragmentation.*"

214. The core of the concern is as Ms Priscilla Vargas continued to describe as follows:

> "…we cannot understand the wealth, the value, the dynamics, or the potential impact on an ecosystem if we split it--if we fraction it, and if we look at it as small disconnected elements where the overall value is not assessed."
>
> See Direct Examination by Priscilla Vargas, Day 6 Transcript, 1833:18-22.
>
> Mr Mussio accepted this principle when responding to Mr Baker's questions, in that the EV process "depends on the size of the project."
>
> Redirect Examination of Mauricio Mussio, Day 2 Transcript, 495:11.

215. Fragmentation violates Article 94 of the Biodiversity Law as well as the correct process for an environmental assessment.[88] Article 94 provides:

> "The environmental impact assessment as it relates to biodiversity shall be undertaken **in its entirety**, even when the project is programmed to be developed in stages."[89]

216. The phrase "*in its entirety*" is not redundant – it obliged Claimants to adopt (and offer to the authorities) the overall view of their proposed development. The fact that it might be capable of being divided into five phases (a choice purely of Claimants' making) does not mean the permitting process must be divided into five phases. Mr Bermúdez confirmed that the decision to "divide a project into stages" is solely that of the developer:

> "Q. Let's go back to the wording of Article 94. Could you read it again, sir, and tell me what you think it tells you.
>
> A. Yeah, I read it. I'm familiar with that—with that article. That means that you cannot divide a project in smaller fractions. For example, if—if the developer wanted to develop the Las Olas Condo Project in different phases—let's say one portion then and then one portion another—still they should have—submit the Project as a whole because that's one project."
>
> Cross Examination of Esteban Bermúdez, Day 2 Transcript, 567:4-15.
>
> "Q. Okay. So who defines whether it's the same project or not? Is it the developers?
>
> A. Yeah, the developer."
>
> […]
>
> "Q. But SETENA doesn't actually tell Mr. Aven and his colleagues how to divide up Las Olas Project. That was presumably their decision, correct—
>
> A. Yeah. Yeah.
>
> Q. --and their ownership decision.
>
> A. (Nodded.)"
>
> Cross Examination of Esteban Bermúdez, Day 2 Transcript, 568:8-22; 569:1-4.

88 Direct Examination of Priscilla Vargas, Day 6 Transcript, 1834:8-11.
89 C-207.

217. In addition, as Siel Siel's expert report, dated October 28, 2016 states in paragraph 68, Article 94 is extensively applied by SETENA and the Environmental Administrative Tribunal. Fragmentation is not permitted, even if the plans are to develop the overall property in stages.[90]

218. As Ms Vargas wrote in that same report:

> "Fragmentation must not be confused with developing a Project into phases, a practice which is perfectly legal and proper. However, a project intended to be developed in phases must still be assessed in an integrative and comprehensive manner, taking into account the entire project site of all phases as a whole, the sum of all impacts, the sum of all construction areas, the cumulative and synergistic impacts of the different phases, the influence areas of all subproject sites, etc. Each and every aspect of each and every phase must be comprehensively declared and assessed, including the distribution in time as appropriated, both for the works and for the impacts, as well as for the mitigation measures."[91]

219. Ms Priscilla Vargas also explained that Claimants' conduct violated Article 2 of the General Regulations on the Procedures for Environmental Impact Assessment.[92] This provides:

> "Article 2. Procedure of EIA for activities works or projects. For its nature and purpose, the procedure for the Environmental Impact Assessment (EIA) **must be completed and approved prior to the start of any project activities**, work or activity. **This is particularly relevant in the case of the approval of pre-projects, projects and segregations with urban or industrial purposes**, procedures relevant to land use, building permits and exploitation of natural resources."[93] (emphasis added)

220. In layman's terms, this compelled Claimants to seek an EIA in respect of the aggregation of the Easements Section, Condo Section, Condo and commercial section and the Concession. The D1 application submitted by Claimants (and referenced frequently throughout the Hearing as Exhibit R-13) corresponded only to the Condominium Section. It was not submitted in relation to the Easements and yet works started on the Easements in March 2009 without Claimants obtaining an EV.[94]

221. In addition, there was no application made that would highlight the "sensitive areas" identified by Mr Mussio – something considered further below, along with consideration of the Protti and other reports – each indicating the existence or potential existence of wetlands.

222. Thus, the sub-division of the overall Las Olas project site allowed Claimants a means of circumventing the comprehensive EIA type-assessment (Category A) of the Las Olas development plans. This is plainly unlawful, and therefore any permits issued pursuant to

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90 Siel Siel Report, para.68.
91 Siel Siel Report, para.73.
92 C-208.
93 Id.
94 The EV for the Concession site was obtained in 2005, but the site was never developed. Siel Siel Report of October 28, 2016, para.76.

the EV relating to the Condo Section were unlawfully obtained. Moreover, any permits obtained in relation to the Easements Section were also unlawful because they were not founded on an EV.

223. Claimants' witnesses endorse these views. Mr Bermúdez confirmed the principle of a comprehensive EIA study under Costa Rican law:

> "Q: …That's saying that the environmental impact evaluation in terms of biodiversity and environmental assessments, essentially, should be undertaken in its totality, as a whole, even then the Project is being programmed to be developed in stages; correct?
>
> A: Yes."
>
> Cross Examination of Esteban Bermúdez, Day 2 Transcript, 562:13-19.

224. Mr Baker queried where the line was in the phasing of a project and how that might impact the EV application process. As Ms Vargas responded, the EDSA/Norton Consulting report identified the entire Las Olas Project site as an area proposed to be developed. Furthermore, as Mr Aven's first witness statement identifies, when they were planning on developing phase one, Claimants already knew what phase five would comprise.

225. For this reason, Mr Baker's hypotheticals do not need to be tested, and this case is an example of where a single EV application could and should have been made but was not. Point of conception, not execution is key.[95] Claimants knew their development would encompass the entire Las Olas site, and there was no justification for the divide and rule methodology Mr Perez conceived.

226. The failings of Claimants are best shown by the Master Plan, presented as part of the D1 application.[96] This was produced in 2007 with the assistance of Mr Mussio. And yet the Master Plan clearly excludes certain other sections outside the Condominium section. Indeed, the Easements section which was to be developed first, as part of phase one, is excluded from the map. This is very misleading and a clear violation of Article 94 of the Biodiversity Law.

227. Finally, Ms Vargas made clear that the SETENA exemptions do not apply.[97] Thus, the EV application was deficient since it failed to identify the 72 lots to be constructed on the Easements Section, it failed to mention the other commercial lots, it failed to raise the red flags that existed and were known to Claimants at the time, and it failed to declare the existing relationship with Hotel Colinas del Mar File assigned to the development of the Concession site.[98] The Hotel Colinas del Mar was the hotel that Claimants sought to

95 Direct Examination of Priscilla Vargas, Day 6 Transcript, 1853:5-9.
96 C-222.
97 Direct Examination of Priscilla Vargas, Day 6 Transcript, 1828:9-22; 1831:1-9.
98 C-223.

develop on the Concession section as one of the phases of the Las Olas Project. Instead of including the development of the Concession, the Easements, the Commercial sites and the Condominium in their initial EV application, Claimants decided to fragment the project and file for separate EVs in different time frames.

228. In his Report, Mr Ortiz mentioned the Resolutions from SETENA which deal with the exemptions to the obtaining of an EV.[99] While Mr Ortiz only mentioned these Resolutions as part of the regulations applicable to the environmental viability regime, Ms Vargas analyzed whether any of the exemptions applied to Claimants works on the Easements site at paragraphs 89 to 95 of the Siel Siel Report.[100] The conclusion is one that Claimants have not rebutted: none of the exemptions prescribed by SETENA applied to the paving of roads to create Easements 8 and 9.

229. During the Hearing, Mr Ortiz's defenses for the illegal fragmentation and no obtaining of EVs on part of Claimants was threefold:

- First, he referred in general terms to SETENA's resolutions from 2008 which *"technically defined what type [of] projects were exempted from that. So, SETENA might have had, as is common, changed its mind."* [101]
- Second, Mr Ortiz suggested that because the construction had not initiated yet and *"the developer probably didn't know if he was going to really develop […] then the hypothesis that the Organic Environmental Law establishes to get an EV was not complied with…"*[102]
- Third, *"if the EV was, indeed, necessary, the municipality would have neglected the 'visado municipal'"* [103] or *"INVU or the other National Cadastre or the National Registry"*[104]

230. First of all, Article 98 of the Biodiversity Law has been in force since 1998 and its goal was to promote the undertaking of comprehensive environmental impact studies and therefore, deter fragmentation. Mr Ortiz suggests that because Respondent has put forward as evidence resolutions from SETENA from 2015 that interpret that provision against

99 Expert Report of Luis Ortiz, para. 34.
100 Note that at paragraph 34, Mr Ortiz refers to SETENA Resolution N° 2370-2004, dated December 7, 2004. Respondent notes that the Siel Siel Report did not refer to that resolution, applicable to start of works prior to March 13, 2008 when Resolution N° 583-2008 was issued. In any case, under the SETENA Resolutions of 2004 and 2008, Claimants' works on the easements were not exempted from obtaining an EV. The exemptions are generally the same in both instruments and the relevant exemptions are not applicable to Claimants' works.
101 Cross Examination of Luis Ortiz, Day 5 Transcript, 1348:2-4.
102 Id. 1348:9-17.
103 Id. 1351:3-12.
104 Id. 1352:8-9.

fragmentation of environmental impact studies for development projects, those are not applicable as to what SETENA did in 2008.[105]

231. This does not make any sense. Respondent has already shown that under the 2008 resolutions that Mr Ortiz constantly referred to, Claimants works on the easements were not permitted without an EV. If 2008 is so important for Mr Ortiz, Respondent would direct the Tribunal to look at the TAA's sanctioning decision against the Costa Montaña Project, dated December 1, 2009, which develops the exact same interpretation of Article 98 by repudiating fragmentation of the environmental impact study of that development project.[106] Finally, as mentioned, Mr Ortiz reference to SETENA's resolutions of 2008 without explaining under which exempted activity did the Easements fall in, must be discarded.

232. Second, it is not true that the developers did not know if they were going to develop their project and how they were going to do it. Again this is not what the evidence shows. On April 25, 2007, Claimants engaged Mussio Madrigal to *"design and produce Construction Documents of Infrastructure in a lot at Esterillos Oeste."*[107] The contract shows that by the time, Claimants knew exactly that they were going to fragment the Easements section a part from the Condominium section. Phase No. 1 of the contract establishes:

> **Phase 1, would be the segregation on front of the public road. The detail of the scope is as describe above. For this process the professional fees are $ 70,000.00, subdivide as follow:**

233. In turn, Phase No. 2, would comprise the construction of the Condominium site:

> **Phase 2, would be a Condominium subdivision. For this process the professional fees are $ 125,900.00, It is our recommendation to star this phase as soon as possible, this would give us the chance of give solution to various technical challenges because of the nature of the total project.**

234. The content of this contract mirrors paragraph 60 of Mr Aven's first witness statement, where he describes the stages that the Las Olas Project, as a whole, would have. Thus, Mr Ortiz is wrong in thinking that Claimants did not know how they would develop their land.

235. Finally, regarding Mr Ortiz's final defense, Respondent notes that Claimants have not proven that the Easements were approved by INVU, the National Cadastre or the National Registry. No construction permits were obtained for Easements 8 and 9. Claimants have not provided any evidence that both roads were sanctioned by any of those authorities.

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105 **R-344**, SETENA ruling on fragmentation in the Rio Coronado Land Company's Project, March 2, 2015; **R-345**, SETENA ruling on fragmentation in the Rubi Business Corporation's Project, March 19, 2015.

106 **R-419**, TAA sanctioning resolution for Costa Montaña Project, December 1, 2009, p. 22.

107 C-43.

236. As to the construction permits granted for Easements 1 to 7, Claimants have only produced the construction permits but not approved plans for those easements from INVU, the National Cadastre or the National Registry. The only evidence of information provided to the Municipality is Mr Bermúdez's letter of July 22, 2010, which actually misled the Municipality representing that the easements were covered by the EV granted to the Condominium site.

237. For the avoidance of doubt, Respondent would like to clarify that none of the exhibits attached to Mr Mussio's witness statements show "approval of the easements" by INVU, the National Cadastre or the National Registry:

- Annex C contains plans approving a protection area of 15 meters from the Aserradero Gulley. This map approves that *"retiro"* but does not deal with the easements on the site.
- Annex D contains an approval from the Ministry of Public Works for a map that actually shows the Las Olas Project Site in its entirety, without the segregation of the easements.
- Annex E shows the map of an easement, however it is not clear which easement it is indicating, except for the fact that no construction permits whatsoever were ever granted for Easements 8 and 9.

238. The evidence put forward by Respondent shows that Claimants never intended to comply with these provisions but rather use them as a "free pass" to (i) avoid obtaining an EV from SETENA, (ii) avoid going through complex proceedings to obtain approval of their 72-lots urban development; and therefore, (iii) built on Wetlands Nos. 1, 2 and 3 located on the Easements site.

239. First, Respondent will show that Claimants' conception of the master site plan for the Las Olas Project did not meet the criteria of the Regulations for the National Control of Fragmentation and Urbanization (the "**INVU Regulations**"). Article II.2.1 of the INVU Regulations establishes that:

> *"All of the parcels resulting from a segregation will have a direct access to the public road.* ***In special cases,*** *INVU and the municipalities can admit the subdivision of lots through easements provided that the following rules are complied with:*
>
> ***The easement shall be accepted in special lands*** *where, because of its location or dimension, it can be demonstrated that it was impossible to segregate without an adequate access to existing public roads.* ***Preferably, those easements should be used for cases when there is existing housing in the lots****."*[108] (emphasis added).

[108] **R-409**, National Control Fragmentation Rules and Regulations, March 23, 1983.

240. The plain text of the article shows that the use of this instrument (an easement) was conceived to be exceptional. Certainly, the rules were not meant to be misused for the planning of 9 easements with the subdivision of 72 lots. Claimants frame it as being a perfectly legal use for developing real estate projects.[109] Respondent disagrees. Contrary to what the last sentence of this provision establishes, the Easements section did not have any construction on them yet so its purpose could not have been to provide public access to people inhabiting those lots.

241. Also, a closer look at Mussio Madrigal's master site plan shows that the proposed easements did not go all the way to all the lots as to allow them access to the public road:

[110]

242. In this sense, the INVU Regulations also provides in Article II.1.3 that, *"In front of easements only a maximum of 6 lots can be segregated."*[111] It is clear from the image above, that the 6 lots maximum rule was violated by Claimants.

243. Second, Claimants allege they used the INVU Regulations to take a short cut from what a process for approval of an urban residential development of 72 lots would have meant for them: obviously, more cost, resources and time. Mr Ortiz himself admitted that, for example, one of the complexities of developing an urbanization is that 10% of the area should be dedicated to public space for the Municipality:

> "Q: Now, would it be also--wouldn't it be also the case that, for a development of this size—an urban development of this size, you would have to dedicate, my understanding is, 10 percent of the area to some form of public park or--that would be--that you would be dedicating to--essentially--to the Municipality, where the urban development takes place?
>
> A: I understand that if it's an urbanización, that would be correct."
>
> Cross Examination of Luis Ortiz, Day 5 Transcript, 1341:12-20.

244. Indeed, absent Claimants' inadequate use of the easements, Claimants would have had to go to INVU and the Municipality with an urbanization plan rather than the easements plan

109 Claimants' Reply Memorial, para. 103(g).
110 C-54, Easements 4 and 5.
111 **R-409**, National Control Fragmentation Rules and Regulations, March 23, 1983.

that Claimants submitted. In sum, Claimants not only wanted to avoid the long process of getting approval for a 72-lot urbanization, and the obligations that came with such urbanization, but also wanted to finish the work on the Easements section as soon as possible so Wetlands Nos. 1, 2 and 3 went unnoticed.

2. Red flags existed regarding the presence of wetlands

245. Mr Burn stated in his Closing Submission in the December Hearing:

> "…much of this hearing--most of this hearing--has been taken up with hearing evidence relating to the arguments put by the Respondent that--and you'll recall I said this in opening--is irrelevant--strictly speaking is irrelevant. And we could have refused to engage with it. Now, tactically maybe we made a mistake by engaging with it because it presents it to you on the basis that there is somehow something that is relevant. It is no less irrelevant than it was last Monday. The environmental issues/the Costa Rican law issues are irrelevant. Why are they irrelevant? Because it's ex post facto. This is a reworking of what happened. This case, as I said at the outset, is about permits that were applied for, that were issued, and that were relied upon."[112]

246. Respondent continues to this day to wrestle with how this is even close to being credible. Claimants' development was investigated and suspended because it was found to be continuing on land that contained protected ecosystems – wetlands. Quite how it can be asserted that the analysis of whether there were and continue to be wetlands on the Las Olas site is irrelevant, is beyond comprehension.

247. Respondent understands why Claimants seem so keen to avoid this, because there is now before this Tribunal definitive scientific evidence of wetlands both today, and in existence when Claimants acquired the land. We will take the Tribunal through the evidence – and how the Tribunal can balance the various views, below.

248. What is without doubt is the relevance of understanding what Claimants knew about the existence of wetlands before they commenced development. This means, when they applied for the EV in relation to the Condo Section, pursuant to the submission of the D1 application. This also means before the time Claimants began to undertake works on the Easements Section- which was done without having properly obtained an EV as a precursor to receiving some (not all) construction permits. This is also considered further below.

249. Therefore, in this next section, we consider the red flags that have become clear as a result of Claimants' witnesses' and experts' testimony during the Hearing.

a) <u>Development of the Las Olas Site in 2007: D1 Application (Condominium Section)</u>

250. By 2007, Claimants' plans to develop the site in a major way were progressing. In June 2008, the EV was granted by SETENA for the Condo section, however, this had been

[112] Claimants' Closing Statement, Day 6 Transcript, 2004:3-19.

obtained unlawfully. Specifically, it was obtained in violation of the duty of disclosure that is required both by Article 109 of the Biodiversity Law, and by virtue of the oath undertaken by Claimants' representatives (as agents) in the D1 application made to obtain the Condo Section EV.

251. The D1 application is a paper-intensive exercise, which requires the developers (this is to say, Claimants alone) to disclose all the necessary physical conditions of the site where the activity is to be developed. As set out above, both sides' experts and witnesses concur that the burden was on Claimants.

252. Respondent set out in its Counter-Memorial in paragraph 158 onwards the requirements of the D1 application process. Claimants failed to properly complete this application, in particular:

- They did not identify the wetlands and forests on the property;
- They did not submit a biological study that could identify the number of species in those ecosystems; and
- There were multiple errors – all of which are identified in the Siel Siel Report.

253. Not only does the D1 application fail on its face, but during the course of this arbitration we have uncovered a document that existed from June 2007 – which was never included as part of the D1 application. That omission was not insignificant, and yet Claimants' counsel repeatedly tried to marginalize the document by referring to it as the "so called" Protti Report.

b) The Protti Report

254. The undisputed facts are as follows. Roberto Protti is a hydrogeologist who was hired by TecnoControl – a company contracted by Mussio Madrigal. Claimants sought to characterize Mr Protti as a geologist only (and therefore unqualified to report on the existence of wetlands), but as indicated in Exhibit R-371, which is the list from the College of Geologists of Costa Rica, page 2 lists hydrogeologists which includes Mr Protti. During the Hearing, this was shown to Mr Bermúdez, the Environmental Regent (and biologist)[113] who confirmed its accuracy.[114]

255. Mr Protti prepared his report following a visit to the site in or before June/July 2007. No one from the Claimants or any of the witnesses or experts presented in this arbitration accompanied Mr Protti on this visit. Furthermore, no one from Claimants or any of their witnesses or experts were involved or in contact with Mr Protti before the date of his report's preparation.

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113 Cross Examination of Esteban Bermudez, Day 2 Transcript, 546:20-22; 547: 1-4.
114 Cross Examination of Esteban Bermudez, Day 2 Transcript, 547:5-7.

256. Mr Protti delivered his report to Mussio Madrigal's contractor, Tecnocontrol, in July 2007, which is when the report is dated.[115]

257. The report never saw the light of day, and was filed away. For reasons unknown it was not presented with the D1 application.

258. The only way Respondents happened to come across it was when Mr Aven disclosed it to SINAC in February 2011 (not November 2007), and in turn, Respondent consulted the SINAC file during this arbitration. February 2011 is well after the date when the D1 application was submitted, and after the date when the EV for the Condominium section had been granted.

259. Instead of submitting the Protti Report, Claimants filed an alternative study with the D1 application. That alternative report was from the consultancy Geoambiente. Geoambiente comprised hydrogeologists – precisely like Mr Protti.

260. No representative from Geoambiente was offered to provide any testimony in this arbitration. This is despite the fact that, as Mr Mussio testified, *"Everything that has to do with drawing up D1 and preparation of Environmental Viability is given to consulting firm. It's Geoambiente."*[116] In addition, Mr Madrigal, the person Mr Mussio identified from Mussio Madrigal as responsible for compiling the D1 application (and therefore presumably selecting Geoambiente, and choosing the Geoambiente report over the Protti report), was also not offered as a witness in these proceedings.

261. The parties also seem to be in agreement as to the content of the Protti Report – both Respondent and Claimants citing and quoting extracts of it repeatedly during the Hearing. Certainly, there is no challenge brought by Claimants as to its authenticity – or the translations provided this far.

262. However, where the parties diverge is how to interpret Protti. Respondent maintains that the Protti Report is (at the very least) a "red flag" – a warning that if submitted with the D1 application would have permitted SETENA and any other relevant authorities to pursue the information contained therein, and line of inquiry it would have opened – not least for the Claimants. Claimants reject this interpretation, attempting to discredit Mr Protti's expertise, and suggesting that it in no way indicates the existence (or possible existence) of wetlands.[117]

i. *Respondent's Interpretation of the Protti Report*

263. First, Mr Protti is a scientist, no doubt careful in his use of terminology, particularly in the context of how he was expressly and exclusively hired – to prepare an environmental study

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115 The firm, Mussio Madrigal was hired by Claimants, and were their agents throughout the D1 application process. In fact, Mussio Madrigal signed the D1 application on behalf of Claimants.

116 Cross Examination of Mauricio Mussio, Day 2 Transcript, 411:18-20.

117 Claimants' Reply Memorial, para 241.

for use in the D1 application (as the Protti report states on page 3). Therefore, his clear remit would have been to identify any environmental elements of interest to SETENA, in order to allow further lines of inquiry. Mr Protti has not been offered as a witness by Claimants, and therefore, Respondent has been unable to test this. As stated above, while the Protti report was not produced with Claimants' Memorial, Respondent identified it in the Counter-Memorial, thereby granting Claimants an opportunity to present Mr Protti as a witness if they had wished to.

264. Second, Mr Protti is a hydrogeologist – someone who is adept at studying the flow of water through soil and rock. To suggest that he would be unable to identify at least indicators of wetlands or ecosystems that might be wetlands is unrealistic.

265. Third, Mr Protti identified wetlands using the terminology that Costa Rican law accepts as do the Claimants' own experts – as indicative of wetlands. For instance, on page 2 of the report, he wrote there *are "áreas anegadas de tipo pantanoso con pobre drenaje"* – namely, *"swamp-type flooded areas with poor drainage."* In the section titled "*natural risks*", further swamp-type areas are identified in the west of the property. The same is mentioned on pages 3 and 6.

266. If this could have been a report for some other purpose, such a reference might be innocuous – but given the precise purpose of the Protti Report was exclusively for the D1 application, this is clearly a warning worth heeding.

267. "*Swamps*" are a type of wetland, in accordance with Costa Rican law, as are "*flooded areas.*" Therefore, the invocation of legal and technical terms of art could not leave any doubt that there is suspected evidence of wetlands.

268. Indeed, Mr Barboza, Claimants' own expert on wetlands, includes in his first report the list derived from the MINAE Decree 35803-MINAET, 2010. The referenced decree refers to the following ecosystems as palustrine wetlands:

i. "*Swamps/estuaries/permanent saline/brackish/alkaline pools*.

ii. *Swamps/estuaries/seasonal pools/intermittently saline/brackish/alkaline.*

iii. *Swamps/estuaries/permanent fresh water pools; pools (less than 8 ha),*

iv. *Swamps and estuaries on inorganic soils, with emergent vegetation underwater at least during the majority of the growth period.*

v. *Swamps/estuaries/seasonal pools/intermittent freshwater on inorganic soils; includes flooded depressions (charge and discharge lagoons), potholes, seasonally flooded plains, cypress swamps.*

vi. *Treeless marshes, includes shrub or open bogs, fens, bogs and lowland marshes.*

vii. *Fresh water forest wetlands, includes fresh water swamp forests, seasonally flooded forests, tree swamps on inorganic soils.*"[118]

269. For anyone reading the Protti Report, the use of the term "*swamp*" should have set alarm bells ringing. Similarly, the reference to "*flooded depressions*" would also have alerted Tecnocontrol (and therefore, Mussio Madrigal and Claimants) that there was cause for concern, or at a minimum, cause for further inquiry *and* disclosure.

270. Areas of poor drainage were noted on more than one occasion and not qualified in any way so as to indicate to the reader that it was a seasonal appearance, or some other incidental collection of water.

271. With the benefit of extensive research during the course of this arbitration, the precise location of the wetlands is now clear. Protti's illustration of the whereabouts the *"zona anegada"* (waterlogged area) is in the same location as Wetlands Nos. 1 and 2.

272. Other indicators are identified in the Protti Report. Soil types indicated claying – a red flag for hydric soils (one of the possible indicators of wetlands). Mr Protti also found poor soil permeability, having tested the soil to a significant depth of 6 meters.[119] This tells anyone with any degree of environmental awareness that wetlands possibly existed.

273. Claimants have tried to represent Respondent's position as if the Protti Report is definitive proof of wetlands. That is wrong. Respondent does not pretend this is definitive proof – however, it is proof of the fact that there is sufficient evidence that (in furtherance of Article 109 and the precautionary principle) should have been disclosed.

274. Moreover, Respondent has established that Claimants and their advisors accepted the Protti Report is not only reflective of what was in existence at the time in 2007, but also representative of what the condition of the property is today.

> "THE WITNESS. In regard to the very specific question, my reply is equally specific. **What Mr. Protti saw is something that we can see today."** (emphasis added)
> Cross Examination of Mauricio Mussio, Day 2 Transcript, 422:12-14.

275. Based on these findings – (and ERM's admission of the potential wetlands at Las Olas) – any developer working in good faith would have not only disclosed it, but they would have investigated further precisely the delimitation of the wetlands identified.

276. The Geoambiente Report does not present any such findings. Importantly, there is no evidence, or testimony from Claimants, to suggest that the Geoambiente Report went further than the Protti Report or in some way discredited Mr Protti's findings. There is also no evidence to suggest that Tecnocontrol, Mussio Madrigal or Claimants were in anyway

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118 Barboza Report, p. 13.
119 **R-11**, Protti Report, July 2007.

unhappy with Mr Protti's work. Therefore, the evidence essentially shows discretion was exercised by someone reporting to Claimants, such that (de facto) the findings from the Protti Report were withheld from the D1 application.

277. This is critical, since as Mr Mussio readily recognized that: *"providing false details would constitute bad faith."*[120]

> "Q: […] You just said that providing false details would constitute bad faith. And so, I asked then whether that would presumably also include that providing information that was knowingly inaccurate and incomplete would also constitute bad faith.
>
> A: As far as I can tell regarding this specific point, yes."
>
> Cross Examination of Mauricio Mussio, Day 2 Transcript, 392:22; 393:1-6.

278. Claimants' according to the multitude of witnesses and experts on both sides in this arbitration, confirm that they were under an obligation to disclose these findings – even if they had preferred the report of Geoambiente.

> "Q: …Nothing is left to chance; thus minimizing uncertainty and therefore reducing risk.
>
> A: Correct."
>
> Cross Examination of Mauricio Mussio, Day 2 Transcript, 398:5-7, referring to paragraph 14 of Mr Bermúdez' witness statement.
>
> "Q: And nothing is left to chance because if a wetland were to be found, then this has obvious consequences for any project; correct?
>
> A: Correct."
>
> Cross Examination of Mauricio Mussio, Day 2 Transcript, 398:10-13.

279. If the D1 application had been properly completed, it would have triggered a quite different process. The entire process directs SETENA to assign scores to the results. Based on that scoring system (which is an exercise of assigning a BETA risk value) – the level of environmental clearance changes. Ms Priscilla Vargas testified clearly in this respect during her presentation on direct examination.[121]

280. Because Claimants failed to identify the wetlands and forests, they avoided the Environmental Impact Assessment process (EIA). They instead ended up being processed through the easier Environmental Management Plan process. This process becomes self-fulfilling.

281. The Protti Report is not the only failing identified in the D1 application process. Mr Mussio testified such as to confirm a failure to present to SETENA "*sensitive areas*" he had identified.

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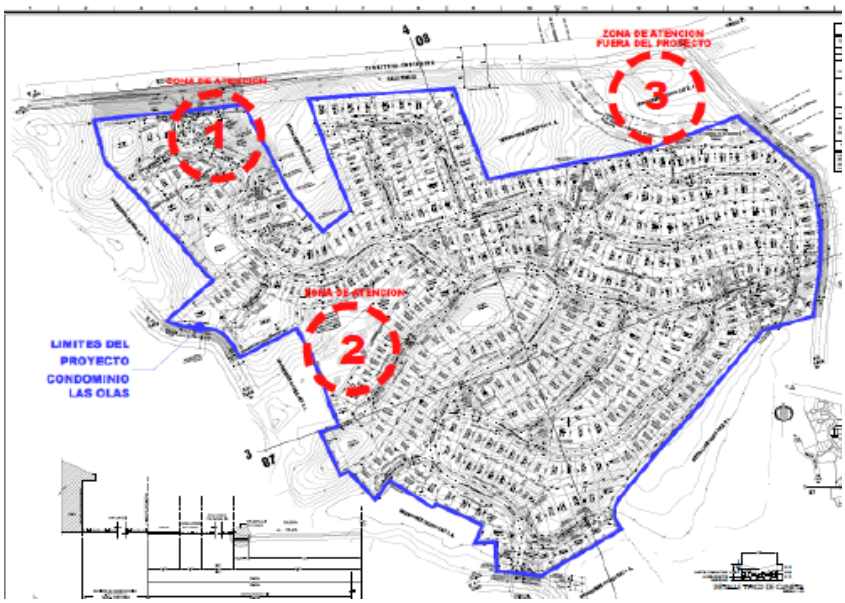
120 Cross Examination of Mauricio Mussio, Day 2 Transcript, 392:14-16.

121 Direct Examination of Priscilla Vargas, Day 6 Transcript, 1848:3-22; 1849:1-13.

282. Mr Mussio in paragraph 23(g) of his only witness statement that:

> "It is absurd to allege that there was damage to the environment when permission to perform the work was obtained; at the time when I was hired, no activity was carried out without the proper permission, nor was any area impacted that was duly indicated by us as a "sensitive" care area from the environmental point of view, and it is important remember that this is precisely why there is an Environmental Management Plan. I would like to reiterate what was just stated: during the time I was hired, at no point in time was there a requirement either by the SINAC-ACOPAC, or by SETENA, for an extension or clarification of any study submitted by the company Geoambiente for obtaining environmental permits (environmental sustainability), nor was there an indication that wetlands existed or that there was any obstacle for developing the Project as was initially suggested after taking into account the "sensitive" care areas that we ourselves had designated, which shows that bad faith never existed in the handling of the information submitted to SETENA."

283. Mr Mussio continues in paragraph 30 of his witness statement: *"In our visits to the property, we determined that there were three areas to watch out for, which we could call "sensitive" or areas of caution from an environmental perspective, which the design of the project sought to accommodate."* At this point, Mr Mussio exhibits (as Exhibit B) a map showing three areas circles designating such areas.



284. Mr Mussio's testimony would be admirable, if it had one key element – the truth. Mr Mussio did not present this map, showing the three "sensitive areas" as part of the D1 application – despite being in control of the D1 submission – and signing the D1 application form.

285. In the Hearing, he tried to respond that *"In D1 Application is based on the information that we have from government entities. If government entities do not--or did not identify these areas as such, then I don't understand why we would have to include it."*[122] This is a

[122] Cross Examination of Mauricio Mussio, Day 2 Transcript, 414:15-19.

peculiar comment, since Mr Bermúdez and Mr Ortiz accepted that the burden of proof lay with Claimants.

286. However, irrespective of Mr Mussio's views, the incontestable fact is that the D1 application (appearing on the record as Exhibit C-222) does not include the Mussio map (with "*sensitive areas*"), as it appears in Exhibit B to the Mussio witness statement.

287. Accordingly, SETENA (or any other entity) would not have been placed on notice of these sensitive areas. Quite clearly, from Mr Mussio's evasive response, this was not an oversight. At best, Mr Mussio failed to respond to whether SETENA had been presented with such information:

> "Q: […] And the SETENA--the application, the D1 Application that was submitted to SETENA for Las Olas Project for the Condominium Section did not identify the sensitive areas that were identified in your witness testimony.
>
> A: Frankly, I don't know."
>
> Cross Examination of Mauricio Mussio, Day 2 Transcript, 416:21-22; 417:1-4.

288. Ms Priscilla Vargas confirmed this fact after her review of the SETENA files assigned to the Condominium site:

> "That really induced me to shock, because I couldn't understand how a professional can say that he reached the site, identified the areas, and these areas—well, they're not even disclosed. They're not indicated to SETENA. SETENA wasn't informed about the existence of these areas."
>
> Direct Examination of Priscilla Vargas, Day 6 Transcript, 1834:19-22; 1835:1-2.
>
> "I cannot conceive that an EIA was conducted for this. There was a submission made to SETENA, that is true; but SETENA was never informed that this was an environmental fragile area, where all experts agreed that there are characteristics of environmental fragility. That is not an acceptable environmental assessment in any country, under any concept."
>
> Direct Examination of Priscilla Vargas, Day 6 Transcript, 1838:8-14.

289. The Tribunal has all these documents on the record, and can verify this for itself. Therefore, yet again there is relevant information (relevant even to Claimants' own architect and D1 affirmant) that had not been disclosed to the authorities, in contravention of Costa Rican law.

c) <u>The Castro de la Torre Report</u>

290. A third red flag, raised for the benefit of Claimants, yet not disclosed is the Castro de la Torre Report, dated July 8, 2002. The report shows *"extremely shallow water tables"* according to Ms Priscilla Vargas - in the area we know as Wetland No.1.

I. Development on the Easements was illegal

291. The other significant area of concern and immediate relevance to the Tribunal's deliberations is the unlawful work undertaken on the Easements Section. This unlawful work can be best summarized in three ways:

- First, no EV was obtained for the Easements Section, in violation of Article 94 of the Biodiversity Law, by virtue of the unlawful fragmentation undertaken. This has been described already. The few permits that were obtained as a result of this fragmentation were unlawfully procured as a result;
- Second, there were sub-divisions within the Easements Section where construction work was undertaken, which did not even benefit from a construction permit (lawfully or unlawfully obtained).
- Third, the work undertaken in certain sub-divisions within the Easements Section was to cover protected wetlands, as identified by Green Roots.

292. Each of these measures was a violation of Costa Rican law – and it is hard to deny that these points (if proven) should not have a direct bearing on whether Claimants were entitled to rely on the permits.

293. Wetlands Nos. 1, 2 and 3 (as identified by KECE) are all located in the Easements Section. As stated by Mr Aven, there are 9 easements within the section we are referring to as the Easements Section. Easements 8 and 9 being at the bottom south west corner of the Las Olas site. The remaining Easements 1-7 run up the west road as this map indicates.

 [123]

[123] C-54.

294. Claimants allege they have construction permits for Easements 1-7 – however, while they have documentation showing construction permits were issued by the Municipality, these were obtained without an EV. Articles 2 and 3 of the General Regulations on the Procedures for Environmental Impact Assessment (2004) specifies (as set out by Ms Priscilla Vargas in her report, at paragraph 83) that work that is segregating urban projects must still seek EV approval

295. Claimants say they did not need an EV – this is simply wrong as a matter of Costa Rican law. During the Hearing we identified why the Municipality would issue construction permits in the absence of an EV from SETENA.

296. As supported by the testimony of Mr Bermúdez, Claimants told the Municipality that the proposed works to be undertaken on the Easements could be considered as work on the overall site – that was characterized as the Condo Section. This is grossly misleading.

297. Specifically, this appears in DEPPAT's document (R-42) (a document Respondent identified at the Municipality – but which was not shared by Claimants). R-42 is a document addressed by DEPPAT (Mr Bermúdez) to the Municipality which was an Environmental Contingencies Plan for Land Movements, dated July 22, 2010.

298. Mr Bermúdez prepared this document and on page 1 represented to the Municipality that the whole project benefits from an EV – and that the work to be carried out on the Easements was covered by the same EV. This is a clear misrepresentation.

299. The first page of R-42 provides:

> El presente documento contiene una evaluación ambiental para las obras de movimientos de tierra y construcción de servidumbres de acceso para el Proyecto Villas La Canícula (Expediente No. 484-2002-SETENA).
>
> Es importante indicar que el proyecto en su totalidad cuenta con la viabilidad ambiental respectiva, otorgada por la SETENA, sin embargo, en este informe se evalúa únicamente uno de los componentes del proyecto, como lo son las servidumbres de acceso frente a la calle pública en el sector oeste de la propiedad.

300. This provides that the document was an environmental evaluation for the earth movement and construction on the Easements, not the Condo Section. This July 2010 Environmental Contingencies Plan was required *"by the Municipality of Parrita before construction could commence"*, according to paragraph 11 of Mr Bermúdez' second witness statement.

301. However, Mr Bermúdez during his cross examination showed a high degree of confusion regarding the project. *"I wasn't familiar with what the Condo Project was and what the Easement Project was. So I got kind of confused when I prepared this document because I was just getting familiar with the--with the project."*[124] This was his initial justification for

[124] Cross Examination of Esteban Bermúdez, Day 2 Transcript, 571:13-17.

having referred to the Condominium Section's EV when seeking a permit in relation to the Easements Section.

302. This communication to the Municipality essentially informed it that the "*totality of the project had an EV from SETENA*."

303. Despite Mr Bermúdez accepting that there was no EV for the Easements Section, Mr Bermúdez testified as follows:

> "Q: But, in the July 2010, this environmental contingencies plan, you're telling the- the Municipality the opposite; right?
>
> A: Yeah. As I told before, that was a mistake, because I thought that was just one project as a whole. But then after I got familiar with the project, I realized that one thing was the Condo Project and the other thing was the easement. And that the Environmental Viability only included the Condo Project."
>
> Cross Examination of Esteban Bermúdez, Day 2 Transcript; 573:9-18.

304. Despite owning up to his mistake, in 2016, 6 years later, critically, Mr Bermúdez admitted that he had not corrected this misunderstanding at any point. He testified that there was *"no correction to this report."*[125]

> "Well, off the back of that, sir—off the back of this plan, which—you didn't correct your understanding, did you, sir, with—you say you're confused, but there was no correction to this report.
>
> No."
>
> Cross Examination of Esteban Bermúdez, Day 2 Transcript, 574:3-7.
>
> "ARBITRATOR BAKER: But he didn't ask you the following question, and so, I'd like to, and that is: After this report was prepared at Claimants' request, as you've told us, did you personally have any discussions with, either on the telephone or in person, with anyone from the Parrita Municipality who received this report?
>
> THE WITNESS: No, sir."
>
> Redirect Examination of Esteban Bermúdez, Day 2 Transcript, 608:11-17.

305. Mr Bermúdez during this line of questioning tried to insist that the Municipality would have cause to believe that *"there was the Condo Project and then the Easements."*[126] However, there is no evidence to support this supposition.

306. Certainly, the Municipality would have been entitled to rely (in good faith) on the accuracy of the communication from Mr Bermúdez. In addition, the Municipality would have only had reference to the entities that owned the Condominium Section and Easements Section, respectively. As shown above, **completely different** corporations owned the Condominium Section and the Easements Section, respectively.

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125 Cross Examination of Esteban Bermúdez, Day 2 Transcript, 574:6.
126 Cross Examination of Esteban Bermúdez, Day 2 Transcript, 574:1-2.

307. Notably, relying on Mr Bermúdez's misrepresentation, the construction permits were granted by the Municipality, in relation to that work to be undertaken on Easements 1-7.

J. Easements 8 & 9 never received construction permits

308. In addition to never seeking an EV, Claimants exhibited even more egregious conduct when it came to Easements 8 and 9. These were the two easements in the most south-westerly corner of the Las Olas project site – and directly on the same location where Wetland No.1 was identified by KECE.

309. Claimants have insisted that there exists construction permits for these easements, yet the evidentiary record confirms that there is *no* construction permit for Easements 8 and 9. Sanctions against construction without EVs are prescribed in Articles 93 and 103 of the General Regulations on the Procedures for Environmental Impact Assessment [127] and sanctions to construction without construction permits are established in Articles 89 and 90 of the Constructions Law. [128]

310. During the Hearing, the evidence in support of the lack of construction permits became apparent. First, the Municipalities records tell us this for 2008 and 2009. Exhibit R-521 is a letter that was presented to Mr Mussio during the Hearing. It comprises two letters. The first is dated November 9, 2016 (days before the commencement of the Hearing). It comes from the Costa Rican counsel to Claimants, and was addressed to the Municipality of Parrita. It requests certification of construction permits for the easements in 2008 and 2009.

311. The second page of Exhibit R-521 is the response from the Municipality, dated November 14, 2016. It confirms that none exist. Specifically the letter states:

> "*I'd like to inform you that it cannot be issued because, according to our records, in this property there has not been any permit there are no approvals for construction permits.*"

312. On cross examination, Mr Mussio insisted that they had obtained construction permits for two easements. He did not specify which ones. Mr Mussio said:

> "We have what we obtained from the Association of Engineers and Architects. They gave us the permit. And this is the process that I explained. First the association and then the municipality."
>
> Cross Examination of Mauricio Mussio, Day 2 Transcript, 436:19-22.

313. When asked if he could show the Tribunal documentary evidence of those construction permits, Mr Mussio was unable. When asked of the whereabouts of those permits Mr Mussio answered, *"[u]nfortunately--let me see. I'll be brief, but I do need to provide a*

127 C-208.
128 C-205.

context."[129] When counsel for Respondent insisted on whether he had those permits, Mr Mussio replied, *"[t]he permits are very old. Ten years old practically."*[130]

314. Having said they existed, and being the Claimants' architect, one would expect Mr Mussio or Mussio Madrigal as a firm, to have retained copies of construction permits, as is customary in any country.

315. Curiously, if this was his understanding in November 2016, he could have looked in his own files to identify the construction permits for easements 8 and 9. He seemingly did not, because Claimants' counsel felt it necessary to seek certification from the Municipality and request copies of the construction permits.

316. Under cross examination, at this point, and without checking with Claimants' counsel as to whether the documents did exist on the record, he immediately began to tell a story regarding flooding at the Municipality of Parrita. He said:

> "...[the Municipality] even lost documents--a significant number of documents due to the flooding after the Alma Hurricane. And I was in the area at the time. And I'm sure that they lost many documents.
>
> Unfortunately, I don't have the permit per se. I said that we looked at the historical documents, and we did find the permits that we presented to the Association of Engineers and Architects."
>
> Cross Examination of Mauricio Mussio, Day 2 Transcript, 437:13-21.

317. Notwithstanding this tale, neither Mussio Madrigal nor Claimants have ever presented to this Tribunal any construction permits for easements 8 and 9.

318. Clearly not content with the evidential void left by the Municipality's letter, dated November 14, 2016 (Exhibit R-521), Claimants sought to rely on a letter from the Municipality, dated November 29, 2016, which they chose to name C-295. However, it is important and insightful to understanding Claimants' strategy to review the *inter partes* correspondence that was exchanged in the weeks before the Hearing.

319. The Tribunal may recall a letter from Claimants, dated November 18, 2016, wherein Claimants presented a series of new documents. This included Exhibits C-282 to C-294 with an accompanying index. In the second paragraph of that letter, Claimants wrote: *"Additionally, the Claimants are currently liaising with the Municipality of Parrita to obtain Exhibit C-295 (the certification of construction permits granted for Las Olas easements and other lots). We will notify the Tribunal and upload this document as soon as it is available."*

320. At that point, Claimants were already in possession of the November 14, 2016 response from the Municipality, yet they failed to submit that letter because it did not provide them

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129 Cross Examination of Mauricio Mussio, Day 2 Transcript, 436:6-7.
130 Id., 436: 13-14.

with their preferred answer. Having obtained a copy of the November 14, 2016 letter from the Municipality to Claimants' Costa Rican counsel, being a matter of public record, Respondent submitted this document as C-295 (believing this to be the document Claimants were referring to).

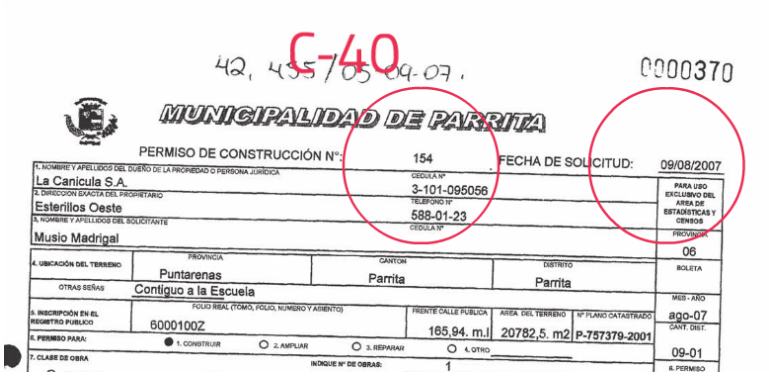
321. Quite clearly, this was not sufficient for Claimants. After receiving the November 14, 2016 letter, Claimants reverted to the Municipality – under the auspices of a representative from Mussio Madrigal who consulted with the Municipality official Kathia Castro Hernandez. The follow up request from Mussio Madrigal was for a more generic response regarding the construction permits obtained for the Condominium Section.

322. Claimants then received a letter, dated November 29, 2016, which the Tribunal can find as Exhibit C-295. This, we are supposed to believe, is the document Claimants were referring to in their November 18, 2016 letter, despite already having received the November 14, 2016 letter from the Municipality regarding the construction permits for the easements.

323. The November 29, 2016 letter from the Municipality listed photocopies of the various files that had been requested. The files themselves were not presented with C-295. During the cross examination of Mr Mussio, he identified the flooding at Parrita as a cause for the inability to obtain the construction permits for easements 8 and 9. Mr Mussio was taken to Exhibit C-295, and when presented with it, he continued to insist that the documents had been lost to flooding.

324. However, this is not accurate. As Respondent explained during the Closing Statement at the Hearing on December, the November 29, 2016 letter does not help Claimants either. The November 29, 2016 letter identifies various files, and in the final bullet point, says that file with reference No.154-2007 could not be found due to flooding as a result of Hurricane Alma. This, Mr Mussio wanted us to believe, was the reference for the construction permits for easements 8 and 9. However, on further review during the Hearing, Respondent confirmed that this was not the case.

325. As identified by reference to the demonstratives in the Closing Statement, the plot which bears construction permit reference No. 154-2007 is the Concession's property under the name of La Canícula:



C-40

42, 455/05-09-07. 0000370

MUNICIPALIDAD DE PARRITA

PERMISO DE CONSTRUCCIÓN N°: 154 FECHA DE SOLICITUD: 09/08/2007

1. NOMBRE Y APELLIDOS DEL DUEÑO DE LA PROPIEDAD O PERSONA JURÍDICA: La Canicula S.A. — CÉDULA N°: 3-101-095056

2. DIRECCION EXACTA DEL PROPIETARIO: Esterillos Oeste — TELÉFONO N°: 588-01-23

3. NOMBRE Y APELLIDOS DEL SOLICITANTE: Musio Madrigal — CÉDULA N°:

PARA USO EXCLUSIVO DEL AREA DE ESTADÍSTICAS Y CENSOS

4. UBICACIÓN DEL TERRENO: PROVINCIA: Puntarenas — CANTÓN: Parrita — DISTRITO: Parrita — PROVINCIA: 06

OTRAS SEÑAS: Contiguo a la Escuela — BOLETA

5. INSCRIPCIÓN EN EL REGISTRO PUBLICO: FOLIO REAL (TOMO, FOLIO, NUMERO Y ASIENTO): 6000100Z — FRENTE CALLE PUBLICA: 165,94. m.l — AREA DEL TERRENO: 20782,5. m2 — Nº PLANO CATASTRADO: P-757379-2001 — MES - AÑO: ago-07

6. PERMISO PARA: ● 1. CONSTRUIR ○ 2. AMPLIAR ○ 3. REPARAR ○ 4. OTRO — CANT. DIST.: 09-01

7. CLASE DE OBRA — INDIQUE Nº DE OBRAS: 1 — 6. PERMISO

326. Exhibit C-40 is one of the construction permits on the record, and this identifies reference No.154-2007 as the Concession. The owner of plot No.6000100Z is listed as La Canicula, S.A., which on Claimants' own case was never owner of any of the easements. We would ask that the Tribunal take note that the person identified as the petitioner for the construction permit is Mussio Madrigal. Even Claimants' own references support this conclusion:

> construction, to ensure the project site was kept clean and tidy and attractive to potential purchasers and also to ensure the site did not become overgrown. As
>
> Claimants' Memorial
>
> 61 *Id.* pp. 69-70
> 62 Exhibit C43, Mussio Madrigal Contract, April 25, 2007
> 63 Exhibit C54, Master Site Plan, September 17, 2008
> 64 Exhibit C190, Beach club rendering aerial view; Exhibit C189, Beach club site rendering
> 65 Exhibit C40, Construction permits for the Concession, 2007
>
> 26

327. Therefore, despite Claimants' scrambling to shore up the deficient evidentiary record, Claimants failed. They and their witnesses have also tried to mislead this Tribunal into believing construction permits exist when they do not.

328. The other evidence on the record showing construction permits obtained (unlawfully) are for the Easements 1 to 7 (Exhibit C-71) and the Condominium site (Exhibit C-85). To date, there exists no evidence of any construction permits for Easements 8 and 9, and there exists no evidence to support Mr Mussio's claim that they were lost in any flooding. In fact, quite the opposite. The documentary evidence confirms that only documents relating to the Concession were lost to flooding, and meanwhile, the Municipality affirmatively confirmed on November 14, 2016 that there are no construction permits for Easements 8 and 9.

329. Furthermore, if on November 18, 2016 the document Claimants were to present as C-295 was a document dated November 29, 2016, there was no way they would have known of its existence 11 days before (and whether they were even going to receive a response). Therefore, how could they attribute an exhibit number to a document that did not exist at that time, and in respect of which they had no guarantee they would receive? What is clear is that C-295 was as Respondent presented it (which then became R-521), but in the

second half of November 2016, Claimants were holding out hope for a better (or more ambiguous response from the Municipality) which would allow them to reference it as evidence of the existence (or destruction) of the construction permits for Easements 8 and 9.

330. Claimants presumably were also hoping that no one would check that reference No. 154-2007 actually pertained to the Concession not the Easements Section. Upon discovering that the story of flooding could not be attributed to the construction permits for Easements 8 and 9, their ruse had failed.

331. Notably, Claimants never presented the November 14, 2016 letter from the Municipality as their own exhibit (*i.e.*, R-521). They replaced C-295 (as presented by Respondent) with their preferred C-295 (letter dated November 29, 2016). Thus, the November 14, 2016 letter only remains on the record by virtue of having been re-presented by Respondent as Exhibit R-521 during the Hearing.

332. This games-playing and scrambling for evidence has been characteristic of these proceedings. Throughout the Hearing Claimants were frequently submitting more documents, in the hope of shoring up a failing claim.

333. What is left is a gaping hole in the evidentiary record, which creates a problem for Claimants. There is ample evidence of works having been undertaken on Easements 8 and 9. Mr Aven testified that in the final quarter of 2007 construction permits had (he says) been obtained to build the first two easements. What we also know is that work on Easements 8 and 9 was undertaken and completed by March 2009.

334. Mr Aven stated in his first witness statement that by 2007, roads were carved out for Easements 8 and 9.[131] The completion of the two roads was also identified in (i) an inspection report from SINAC of October 2008;[132] (ii) Ms Vargas' April 2009 Report;[133] and (iii) aerial photography of March 2009.[134]

335. However, this arbitration has helped explain why work would have been undertaken by Claimants so expeditiously on Easements 8 and 9, and why it was done without the desire to seek construction permits. KECE and the report of Drs Perret and Singh clearly indicate that the wetlands found are located right in the area of Easements 8 and 9.

336. Respondent considers in light of the evidence presented that it is no coincidence that the very first work undertaken on the entire Las Olas project site – was undertaken in this corner on Easements 8 and 9 where the wetlands are.

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131 First Witness Statement of David Aven, para. 90.
132 **R-20**, ACOPAC Visit Report (ACOPAC-SD-087-08), October 1, 2008.
133 **R-26**, Inspection Report (DeGA-049-2009), April 29, 2009.
134 Second KECE Report, Appendix F.

337. First, Claimants have shown a disposition to ignore Costa Rican laws and regulations in order to pursue their goal of construction work. They ignored red flags when they presented themselves through the Mussio sensitive areas, and the Protti Report. While this might have been the choice made by Claimants' advisors, it is still attributable to Claimants as their agents.

338. Second, Claimants were admittedly clueless as to how matters should run in Costa Rica. Mr Aven does not speak Spanish and no one else with any semblance of knowledge or appreciation of land development was managing or overseeing the advisors whose interest would have been to see the project come to fruition. Mr Damjanac, the only other individual present in Costa Rica, was a salesman who lived with Mr Aven.

339. Third, there is sufficient evidence to confirm that in relation to the easements, Mr Bermúdez acknowledged the construction on the two easements prior to the official date of initiation of construction works:

> "No, not that I recall. Because when I got to the property in—for my first inspection, I noted that there were two easements already built."
>
> Cross Examination of Esteban Bermúdez, Day 2 Transcript, 583: 6-8.
>
> "And also, when I got there in June 2010, I noticed that there were already two easements built. That reinforced my—my knowledge that this was a separate—this was a separate segregation or fragmentation that was already done, and that the Condo Project was another—another project that was going to—to start from that time."
>
> Cross Examination of Esteban Bermúdez, Day 2 Transcript, 584:11-17.

340. Ms Mónica Vargas also reported the construction on both easements and the refilling of a wetland on April 2009 in the April 2009 DeGA Report.[135] After the Hearing, Claimants' attempts to discredit Ms Vargas' reports must be dismissed. Ms Vargas' observations of the site back in 2009 were confirmed during her cross examination:

> "A: As the report indicates, these photographs were provided to us by the community. This is a report on an observation, and that's what it says here. What we were conducting was an observation, and the community are the ones who provided the photographs.
>
> Now, when it comes to Figures 3, 4, and 5, I was on site."
>
> Cross Examination of Mónica Vargas, Day 4 Transcript, 1206: 20-22; 1207:1-5.
>
> "Q: Right. And so, you can say categorically that these are photographs taken from the Las Olas site.
>
> A: Yes, sir."
>
> Cross Examination of Mónica Vargas, Day 4 Transcript, 1210:6-8.

135 **R-26**.

341. Claimants insinuations that Ms Vargas visits were only done "offsite":

> "Q: For the benefit of the members of the Tribunal who haven't visited the site, could you say what is visible from the roadway?
>
> A: The land is totally open. There are no walls, no fences. And in the inspection, where one is located, it might be as far as the table over there. And that's where—and the trees—and where the trees were burnt is roughly where you are. And if you just step into it one step, it's the Las Olas Project. It's open space, and there's complete visibility all around on the Project. There's very good visibility."
>
> Redirect Examination of Mónica Vargas, Day 4 Transcript, 1259:6-16.

342. Finally, Ms Vargas' clarification that she went to the site on April 27, 2009 rather than April 26, 2009 (which was actually a Sunday) also discredits any of Claimants' insinuations that public officers do not work on weekends:

> "Paragraph 11, talking about the date of the complaint as 26 April 2009, but I'd like to correct that. It's 27 April. This is, perhaps, a mistake of the time that the date was indicated, because there was an inspection on the Monday. So, I just wanted to correct that. It should read '27 April.'"
>
> Direct Examination of Mónica Vargas, Day 4 Transcript, 1201:20-22; 1202:1-3.

343. Fourth, the scientific evidence supporting the existence of wetlands is sizeable, and this is the focus of the following section. The evidence shows that Wetland No.1 was refilled – precisely at the location where easements 8 and 9 are located, placing three layers of material over the wetland.

> "The fill material has been brought by machinery, and it is very recent, less than ten years."
>
> Direct Examination of B.K. Singh and Johan S. Perret, Day 6 Transcript, 1950: 6-7.
>
> "There is a buried soil down below, and this soil is hydric, definitely."
>
> Direct Examination of B.K. Singh and Johan S. Perret, Day 6 Transcript, 1950: 11-12.
>
> "It creates discontinuities. And these discontinuities—again, soil has memory—**shows us that the filling event was broken down into three filling events at different times.** And this is due to the reduction in the profile." (emphasis added).
>
> Direct Examination of B.K. Singh and Johan S. Perret, Day 6 Transcript, 1954:15-19.

344. Evidence of the refill is to be found in Drs Perret and Singh's testimony which confirmed three layers of refill over the natural soil:

345. Finally, during the Hearing, Claimants attempted to blame the Municipality for any impact to Wetland No. 1.[136] Claimants rely on a letter issued by the Municipality on April 10, 2008 to

[136] Cross Examination of Luis Martínez, Day 4 Transcript, 1028:16-20; 1029:8-15; Cross Examination of Kevin Erwin, Day 6 Transcript, 1905:7-22; 1906-1909.

allege that it was the Municipality who performed works on the southwestern side of the property, where Wetland No. 1 has been identified.[137]

346. First, this letter explicitly refers to the proposal of a canal to be built "on the perimeter of the property" rather than onsite.[138]

347. Second, when cross examined about the content of this letter, Mr Martínez explained that (i) it was not submitted by Mr Aven during the criminal proceedings; (ii) from its face it is not clear whether the Municipality's proposal was accepted by Claimants; and (iii) when he visited the Project Site during his investigation, the workers that he saw and interviewed were private workers (not Municipality public officers) who told him that they were carrying out the works under the instructions of Mr Aven.[139]

348. Third, during his cross examination, Mr Erwin explained that the culverts, that drained Wetland No. 1 were placed by the developer during the carving of roads within the Las Olas Project Site:

> "Q: Do you know who created these culverts?
>
> A: The landowner did.
>
> Q: What's your evidence for that?
>
> **A: Well, the culverts that I was looking at were under the roads that were developed in the Las Olas System. So, I guess somebody else could have put them there.**
>
> But the works that I was looking at was associated with the improvements of the land that was going up along with the development of the lots at Las Olas."
>
> Cross Examination of Kevin Erwin, Day 6 Transcript, 1907:2-12.
>
> "Q: -- you would accept that this type of documentation confirms that works in relation to culverts and the like could and in some cases was work done by the Municipality or done in collaboration with the Municipality? You accept that?
>
> A: It looks like it's—yeah, it looks like it was done in association with, actually, the drainage on the road, though, to be honest with you.
>
> Q: Right.
>
> **A: Not drainage on the site."** (emphasis added).
>
> Cross Examination of Kevin Erwin, Day 6 Transcript, 1909:14-22; 1910:1.

349. In addition, Claimants also rely on the January 2011 SINAC Report prepared by Mr Picado Cubillo which refers to neighbors' comments on the installation of a sewage system by the Municipality around two months ago.[140] Mr Aven in fact referred to this construction in his first witness statement as *"storm drains on two public roads running into Esterillos Oeste"* that *"they were going to connect to the storm drains coming out of the Las Olas property,"*

137 C-296.
138 Id.
139 Cross Examination of Luis Martínez, Day 4 Transcript, 1028:5-1; 1029: 6-7; 1029:16-22; 1030:1-5.
140 Claimants' Opening Statement, slide 21.

which were actually *"put along the internal roads"* on the Las Olas Project Site.[141] Mr Aven's own testimony discards that the Municipality did any works on the Las Olas Project Site but in **public roads**.

350. In summary, there is extensive evidence to show the illegalities committed before the construction works on easements 8 and 9 were representative of a practice of Claimants (or their advisors) to pursue development irrespective of the environment.

351. Claimants' advisors (assuming they were responsible for all stages of the development) were seemingly astute enough to ensure fragmentation, censored environmental reports as part of the D1 application, carefully staged development on the wetlands focusing on the easements first, and then refilling of wetlands on the phase one plots would all ensure the progression of the construction.

K. <u>The scientific evidence supports the existence or possible existence of wetlands</u>

352. A sizeable body of evidence has been presented to this Tribunal on the question of whether wetlands exist on Las Olas project site. In addition, Claimants have sought to draw a distinction between whether wetlands exist now, and whether they existed at the time when work commenced on the Las Olas Project Site.

353. Respondent maintains that the evidence before this Tribunal clearly shows that not only do multiple wetlands exist on the Las Olas Project Site today, but there is also evidence to show they existed many years ago, and were buried by man-made activity. Consistent with the scientific findings, and when construed alongside the other evidence mentioned above, there is clear evidence to support the conclusion that wetlands existed when the land was acquired.

354. KECE found 8 wetlands on site. Mr Erwin showed the Tribunal he is an experienced specialist, who has spent many years with a global focus on the identification and protection of wetlands. He was categorical in his testimony before the Tribunal that what he had seen on the Las Olas Project Site was an array of wetlands. Mr Erwin did not shy from asserting his written conclusions, showing absolute confidence in his findings.

355. We do not need to repeat the findings of the KECE reports in this post-hearing brief. Mr Erwin gave no quarter in his cross examination and we believe his testimony before the Tribunal was entirely consistent with his two reports and the presentation he offered in lieu of direct examination. To this extent, we would urge the Tribunal to revisit his reports and the transcript during his cross examination in the Hearing.

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[141] First Witness Statement of David Aven, para. 114.

356. As we remind the Tribunal of some of the key evidential points discussed during the Hearing, it is also important to define the prism through which this evidence should be considered.

357. Claimant has brought this arbitration claim in order to allege a violation of Costa Rica's international law obligations. As part of Respondent's defense, the illegalities committed by Claimants are relevant to consideration for two reasons: First, as a question of law, the illegalities render inadmissible Claimants' claims. Second, as a question of fact, they undermine the legality of the construction permits that Claimants assert were obtained and relied upon – as a matter of Costa Rican law. This latter point is important in the factual context of what Claimants could expect to happen (in accordance with Costa Rican law) by virtue of their unlawful conduct.

358. A fact relevant to Respondent's allegations of Claimants' illegalities is the existence of wetlands, both at the time development commenced and now. Respondent's position is that if wetlands exist now, then they almost certainly existed at the time Claimants acquired the land.

359. However, the existence of wetlands is first and foremost a question of fact that could and should have been investigated by Claimants. The fact that this I have been investigated in anticipation of the D1 application (and any other works on the Las Olas Project Site) does not seem to be an issue in dispute. Certainly, as noted above and below, Claimants' own experts and witnesses acknowledge this necessity, and the burden of proof Claimants were obliged to honor.

360. However, what remains in dispute is (i) whether Claimants made any inquiries; (ii) if they made inquiries were they sufficiently undertaken; (iii) if they made inquiries, did any indicate the existence or potential existence of wetlands; and (iv) if such inquiries did indicate the existence of potential existence of wetlands, were they or should they have been disclosed to the authorities at the time.

361. Therefore, on the assumption that Claimants accept they were always under an obligation to investigate the existence (or not) of wetlands, the question then becomes what standard should they have applied. As explained above,[142] the burden was most certainly on Claimants – and this duty was an ongoing duty.

362. Consequently, the test in relation to the wetlands was whether Claimants proved that wetlands did not exist. This is very important for present purposes. Because, while Respondent is confident that there is ample evidence on the record in this arbitration indicating that wetlands do (and did) exist, there is (in this arbitration) a comparable burden

[142] See, Section III.F.

of proof on Claimants to disprove their existence – commensurate with the burden that they had to prove (but failed) at the commencement of the development.

363. Where it is helpful to focus is the acceptance of the wetlands and the testimony provided by Mr Barboza and ERM as well as Dr Baillie.

L. Costa Rica's expert testimony

1. KECE

364. During the Hearing, Respondent's environmental expert, KECE, confirmed that wetlands do exist on the Las Olas property.[143] In fact, KECE was able to find eight wetlands which were mapped on site, including Wetland No. 1.[144] These findings are relevant for the characterization of Las Olas as an ecosystem, since, as explained by KECE, wildlife resources existing on the Site are dependent on wetlands and forests.[145]

365. To determine the existence of a wetland, KECE adhered to Costa Rica's definition, which follows the RAMSAR Convention.[146] The Convention establishes a very broad approach, defining wetlands as *"[a]reas of marsh, fen, peatland, whether natural or artificial, permanent or temporary, with water that's static or flowing, fresh or brackish, including areas or marine water, the depth of which does not exceed 6 meters"*.[147] Although the comprehensive definition, KECE explained that the RAMSAR Convention establishes that there are different *systems* of wetlands, being the palustrine wetlands –marshy swamps and bogs–, relevant to this case.[148] The RAMSAR Convention also classifies wetlands in different *types*, and four types are found in the Las Olas Ecosystem: seasonal, intermittent (which not always flooded or dry), irregular rivers, streams and creeks.[149]

366. Since his very first visit to the Project Site, which was even during the dry season, KECE was able to find evidence of wetlands. In his second visit, KECE –together with a group of local botanists and biologists– found that *"every one of the wetlands, including Number 1, [got] standing water in it."*[150] The type of morphology of the landscape, the depressions of the land, the type of vegetation and dependent wildlife, and most importantly, the presence of water, confirmed KECE's findings.[151]

367. As regards the type of vegetation, KECE explained that many plants found on the Project Site could be considered "facultative," which means that they can appear in wetlands as

143 Cross Examination of Kevin Erwin, Day 6 Transcript, 1865:5-8.
144 KECE's Demonstrative, slides 14-18.
145 Cross Examination of Kevin Erwin, Day 6 Transcript, 1865:16-18.
146 Cross Examination of Kevin Erwin, Day 6 Transcript, 1868:17-20.
147 Cross Examination of Kevin Erwin, Day 6 Transcript, 1866:21-22; 1687:1-3.
148 Cross Examination of Kevin Erwin, Day 6 Transcript, 1867:6-12.
149 Cross Examination of Kevin Erwin, Day 6 Transcript, 1868:3-5.
150 Cross Examination of Kevin Erwin, Day 6 Transcript, 1877:10-13.
151 Cross Examination of Kevin Erwin, Day 6 Transcript, 1878:1-14; KECE Hearing Demonstrative, "Wetland Dependent Wildlife", slides 32 and 33.

well as in uplands. The fact that vegetation is facultative confirms –rather than disregards– the existence of wetlands: *"facultative wetland plant by definition in the 1987 U.S. Army 17 Corp. of Engineers Manual […] will tell you that those plants go both ways, so to speak, and about two-thirds of the time, a fat, wet plant is going to be found in wetlands, but about a third of the time, you can find it in uplands. The fact that you can find them in both places doesn't mean that you should throw them out and ignore them. I've never heard of anybody suggesting that."*[152]

368. In relation to Wetland No. 1, KECE noted it had been drained and filled. KECE was able to find fill material, "*because the transition between the fill and the more natural grade is rather abrupt. And when you dig soil pits, we found fill material and not native soil."*[153] After digging some bore holes, he was able to find *"depths of fill material that ranged from just under 1 meter to just over 2 meters in depth. And then below that, the cores reflected hydric soil conditions."*[154] Respondent's soil experts confirmed such findings.

369. Also, Claimants' forestry expert, Minor Arce, confirmed that KECE's wetlands 6, 7 and 8 (described as "intermittent streams") are protected under Costa Rican law:

> "The Forestry Law establishes different types of protection areas which, undoubtedly, are protected and one cannot do any kind of intervention in these protected areas. That is completely correct. And that's what I state there. It is indicated in Article 33 and 34 of the 7575 Forestry Law."
>
> Cross Examination of Minor Arce, Day 2 Transcript, 621: 6-12.
>
> "Q. And Article 33(a) establishes as protected areas those areas that border—or Article 33(b), rather—strip of 50 meters in the rural area and 10 meters in the urban area measured horizontally at both sides in the riverbanks of the rivers, creeks; correct?
>
> A. Yes, correct."
>
> Cross Examination of Minor Arce, Day 2 Transcript, 621:18-22; 622:1-2.

370. Mr Arce also confirmed that these areas are protected from any sort of construction or infrastructure:

152 Cross Examination of Kevin Erwin, Day 6 Transcript, 1878:16-22; 1879:1-5.
153 Cross Examination of Kevin Erwin, Day 6 Transcript, 1881:6-10.
154 Cross Examination of Kevin Erwin, Day 6 Transcript, 1882:15-18.

"Q. Mr. Arce, care to explain what is the importance of the protection of these areas under the Forestry Law?

A. The importance of areas indicated by the Forestry Law basically is—or it's based on two things. The effort to protect part of the environment involves the following: First, strips of land are created around the water flows—the permanent waterways that here are 15 meters, or it could even be up to 50 meters. And these strips are places where we will still have biodiversity and certain types of flora and fauna that need to be protected. Part of that is also--has also to do with the protection of waterways, of water resources. And another essential aspect associated mainly to social and cultural aspects is that these strips are also protection against roads, that is, against the growth of flows, which is why they are established, so that there will be no construction there or any other kind of infrastructure."

Cross Examination of Minor Arce, Day 2 Transcript, 623:18-22; 624:1-22; 625:1.

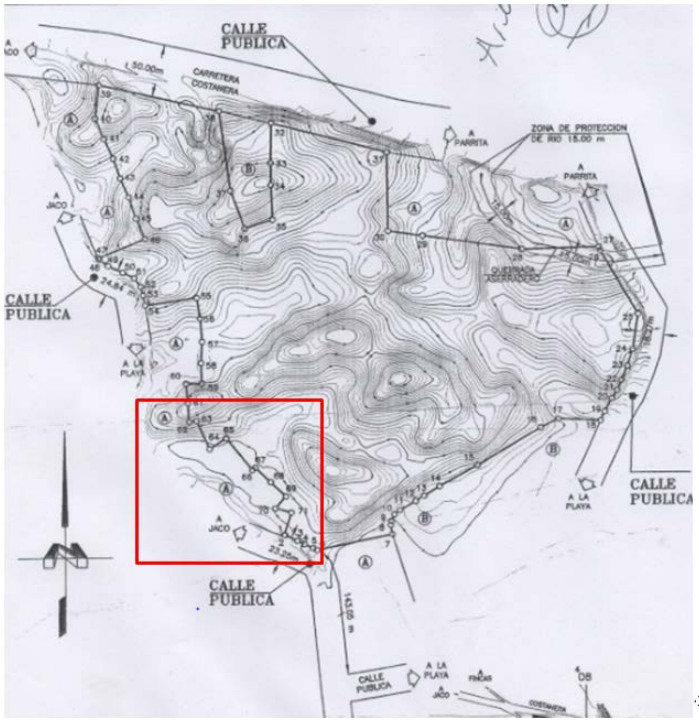
371. During the Hearing, Mr Mussio confirmed he was aware of the protection of these areas. Nevertheless, he decided to disregard them when designing the master site plan.

"In other words, if the expert, the one we hire, shows through evidence that there's a special situation, then that comes to me, where I do the design. And that is—we do envisage it, we isolate it, or we leave it, or—well, to give you an example, creeks have a characteristic of certain protection that is done by the INVU, and generally set a level curve—papers and designs are given, and then we'll respect the setback. It can be 10, 15, or 50 meters. That is determined by the law, and that is determined by an institute—by the Institute itself."

Cross Examination of Mauricio Mussio, Day 2 Transcript, 403:1-11.

372. Finally, during the Hearing, Mr Mussio made a bizarre comment suggesting that the "*lack of maintenance works*" from the Municipality was the cause for the "*floods*" in the area known as KECE's Wetland No. 1.[155] This is a totally unsupported premise. As described in paragraph 91 of the Second KECE Report, Mussio Madrigal's own topographic map of Las Olas shows that because of the low topography of Wetland No. 1, it is physically impossible for a culvert on the public road to "*trap surface waters*":

[155] Cross Examination of Mauricio Mussio, Day 2 Transcript, 499: 7-12.



[156]

373. Thus, Mr Erwin's testimony remained unchallenged by Claimants who were not able to challenge his findings on:

- Seven wetlands exist (wetlands Nos. 1 to 7) on the Las Olas Project Site, and these have existed since Claimants acquired the land;
- "Facultative" wetland vegetation found in the Las Olas Project Site confirm the existence of wetlands;
- Wetland No. 1 has been drained and filled, as evidenced by the refill material found;
- The works of the Municipality do not relate to the impact of Wetland No. 1, since the culverts to drain were placed by the developer;
- Forests exist on the Las Olas Project Site, and these have existed since Claimants acquired the land;
- Wildlife resources dependent on wetlands and forest exist on Las Olas Project Site.

2. Green Roots

374. Because time and resources did not allow and taking into account that the relevance of this dispute focuses on Wetland No. 1, Respondent did not instruct Drs Perret and Singh to carry out soil sampling in each of the wetlands identified by KECE. During the Hearing, Drs Perret and Singh outlined their scientific conclusions as part of their expert testimony:[157]

- The depth of the fill on Wetland No. 1 is over 1 meter and buried soil lies below;

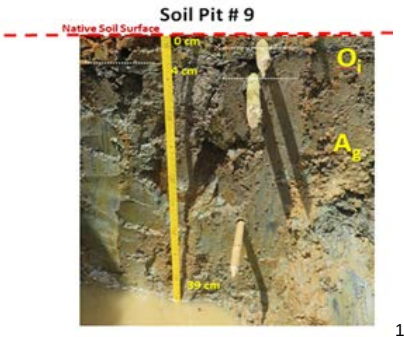
156 Witness Statement of Mauricio Mussio, Annex C.
157 Green Roots' Demonstrative, slide 4.

- The fill material has been brought recently (less than 10 years) with the aid of machinery or hand tools;
- By applying the definition of hydric soils under USDA Field Indicators for Hydric Soils,[158] the buried native soil is hydric and therefore, soils in Wetland No. 1 are hydric.

375. First, a part from the many criticisms that KECE and Drs Perret and Singh have of the Baillie Report,[159] the crucial finding of Drs Perret and Singh is something that Dr Baillie missed: determine the accurate depth of the fill.

376. To put it simply, Dr Baillie did not go deep enough to find the native soil surface. This is a primary requirement under Article 5 of the MINAE Decree No. 35803 whose definition of hydric soils requires looking at the soil *"in its natural conditions."*[160] Because Drs Perret and Singh directed their efforts to finding those natural conditions below the fill, after digging below 1 meter, they were able to find it.

377. The following image, which disregards the fill material on top, shows exactly how the soil surface looked like prior to Claimants' refilling works. This is the surface that both experts should have been looking at when conducting their sampling:



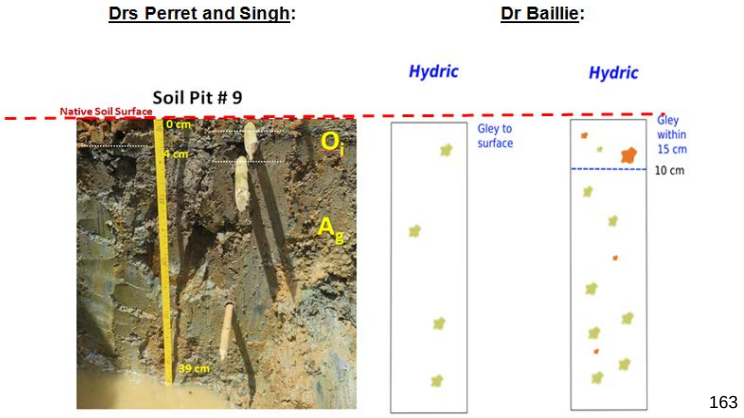
161

378. Even if the Tribunal where to accept Dr Baillie's "unique" theories on the distinction of hydric soils / hydromorphic soils (not supported under Costa Rican law) and poorly drained / imperfectly drained; the Tribunal would conclude that the buried native soil falls within Dr Baillie's "hydric soils" categorization.

379. Dr Baillie testified that *"hydric soils have to be gleyed, i.e., grey colors predominant, grey matrix, **up to very close to the soil surface**."*[162] This is exactly what Drs Perret and Singh found immediately below the native soil surface. Furthermore, Dr Baillie establishes a 15 cm limit below the soils surface where gley must occur for hydric soils to exist. Well, if the Tribunal were to accept that, then, Green Roots' findings fall perfectly within Dr Baillie's

158 **R-524**, USDA's Hydric Soils List Criteria, 2018.
159 See, Second KECE Report, paras. 76-111; Direct Examination of B.K. Singh and Johan S. Perret, Day 6 Transcript, 1940-1956.
160 C-218.
161 Green Roots' Demonstrative, slide 13.
162 Direct Examination of Ian Baillie, Day 6 Transcript, 1666:20-22.

definition of hydric soils. The figure below shows exactly how the native soil found by Drs Perret and Singh fulfills the characteristics of what Dr Baillie considers are hydric soils:



[163]

380. Second, Drs Perret and Singh were able to determine the cause of the refill: manmade.

381. When cross examined on the cause of why one meter of fill material existed over the native soil, Drs Perret and Singh confirmed that those were earth movement works conducted in three seasonal occasions:

> "Q: ...I think I have two questions—further questions for you. Is the—do you have any evidence of an earth movement done by the Investors or within the last ten year of the scale that would be required to take away a meter of material in Wetland 1? And if you do have evidence of it, what is that evidence?"
>
> Cross Examination of B.K. Singh and Johan S. Perret, Day 6 Transcript, 1982: 6-11.

> "A. (Dr. Singh)…"First, evidence. Is that—how that material came there. How? That's the mystery. Okay. Let's try to solve it. Number one, it was not that windy. And, generally, we don't' get wind erosion here that we deposit 1 meter. We looked at the volcanic eruption. Nothing happened in these years to bring—and that would be silt. That's going to be different.
>
> There was no plotting of that magnitude. There was no landslide. There was nothing. I don't know..."
>
> Cross Examination of B.K. Singh and Johan S. Perret, Day 6 Transcript, 1982:15-22; 1983:1-2.
>
> "A: I think it's very clear how that material came. And so uniform. Very loose. Tree activities."
>
> Cross Examination of B.K. Singh and Johan S. Perret, Day 6 Transcript, 1983:4-5.

> "ARBITRATOR BAKER: It couldn't be a mudslide to use examples that we have all around us in this country. It has to be something caused by man.
>
> THE WITNESS: (Dr. Perret) Looking at the definition, definitely. Being on-site in Wetland Number 1, obviously, the logic tells you that all the hypotheses that you had of landslide, alluvial deposit all of that, no, no, no. None of the above."
>
> Cross Examination of B.K. Singh and Johan S. Perret, Day 6 Transcript, 1992:12-22.

[163] Green Roots' Demonstrative, slide 13; Claimants' Opening Statement Demonstrative, slide 46.

382. By this point, it should be obvious to the Tribunal that no one other than Claimants conducted these refilling activities. Aerial photography from March 2009 shows that fill was already placed over Wetland No. 1.[164] Drs Perret and Singh's testimony only confirmed that those filling works took place for two other occasions in 2010 and 2011, which manifest in the discontinuances Drs Perret and Singh saw in the soil profile of Soil Pit No. 9.

383. Third, Drs Perret and Singh, soil scientists based in Costa Rica (unlike Dr Baillie), confirmed that the appropriate instrument to determine hydric soils in Costa Rica is the USDA Field Indicators for Hydric Soils, which is part of the USDA Soil Taxonomy, which Dr Baillie used to conduct its survey and its *"official soil classification system in Costa Rica"*[165]:

> "[T]his is one of the extension of soil taxonomy. Dr. Baillie mentioned that USDA soil taxonomy is the system that is official in Costa Rica, and we are in agreement with that point.
>
> However, the field indicators for hydric soil is part of the USDA methodology. If you go on and find any documents of the USDA, it is there. It's part of the USDA approach."
>
> Direct Examination of B.K. Singh and Johan S. Perret, Day 6 Transcript, 1944:8-18.

384. Thus, Drs Perret and Singh were consistent in their use of USDA Field Indicators for Hydric Soils as it being part of the USDA Soil Taxonomy, the official soil classification system in Costa Rica (as admitted by both parties' experts).

3. Critique of Claimants' Experts (re: Wetlands): ERM, Barboza, Baillie

385. Three of the wetlands identified by KECE have been confirmed by Claimants' experts. For example, when Dr Calvo from ERM was being cross examined he said:

> "Q: And you can see that these correspond—and I think we're going to put this up on the screen so you can compare with KECE's Report. KECE 5 would correspond with Depression 3; KECE 3 would correspond with Depression 2; and KECE 2, Wetland 2, would correspond to Depression 1.
>
> Would you agree with that?
>
> A: (Dr. Calvo) Yes, I do.
>
> Q: And they're also referred to in Dr. Baillie's Report as Bajo B2, B4, and B6; would you generally agree with that?
>
> A: (Dr. Calvo) Yes."
>
> Cross Examination of Dr. Richard Calvo & Dr. Robert Langstroff, Day 6 Transcript, 1780:2-13.

386. This was not simply an exercise in attributing labels to certain locations. ERM's report clearly accepted that evidence of wetlands existed.

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164 Second KECE Report, Figure 10.
165 Cross Examination of Ian Baillie, Day 6 Transcript, 1688:14-18.

a) ERM evidence of wetlands identified

387. ERM reported in their one and only report, at paragraph 37:

> "In conclusion, the three depressional areas located on the west and northwest sides of the Las Olas site show characteristics of a **freshwater marsh** and **are potentially wetlands under the Costa Rica definition of wetland**: 1) dominance of Mexican crown grass, which in itself does not determine that the area is a wetland, and 2) evidence of seasonal flooding. While no systematic soil analysis was conducted, we believe soils in these depressions are subject to seasonal ponding and saturation and may develop hydric characteristics. However, a soil analysis would be required in order to reach a conclusion."

388. "Potential" means that there is evidence to suggest a wetland exists. ERM might indeed be deferring to the Costa Rican authorities who have to definitively determine the existence or not of wetlands, but based on their research, they found evidence indicating wetlands (as opposed to evidence clearly rejecting their existence).

389. During the cross examination of ERM, it became abundantly clear that Dr Calvo was insistent on resisting an express admission that wetlands existed. When confirming the existence of Mexican crown grass, a grass which is associated with wetlands, Dr Calvo preferred to focus on the fact that its presence does not definitively prove wetlands exist. However, in so doing, Dr Calvo clearly was resisting the corollary of this finding, which is that it was an indicator of the possible existence of wetlands.

> "Q: But the Mexican crowngrass can and does, in certain circumstances, grow in wetlands; correct?
>
> A: (Dr. Calvo) It does. It also grows in no wetlands.
>
> Q: Understood, sir.
>
> A: (Dr. Calvo) Yes.
>
> Q: So, for you, the glass is half empty, and for me, the glass is half full; would you agree?
>
> A: (Dr. Calvo) I'm not talking about water in glass, but we have different interpretations, yes."
>
> Cross Examination of Dr. Richard Calvo and Dr. Robert Langstroth, Day 6 Transcript, 1784:4-13.

390. The particular issue for the Tribunal to bear in mind (along with all of the other scientific data that indicate the existence of wetlands), is the precautionary principle, and the burden of proof on Claimants to show there are no wetlands. This has been set out extensively above, and in the pleadings.

391. Accordingly, the burden of proof is on Claimants vis-à-vis the wetlands and the harm or impact caused to the environment, pursuant to Article 109 of the Biodiversity Law. It is not for Respondent to show the wetlands exist. Instead, it is for Claimants to show they do not.

And with this important perspective in mind, there is absolutely no way Claimants manage to discharge their burden of proof.

392. This point was illustrated well by ERM's admission that a preponderance of hydrophilic vegetation is not needed in order to identify wetlands- the mere existence of some suffices.

> "I agree that there is no attempt in the Costa Rican legislation to state that there has to be 51 percent or any other number--any other sort of numerical preponderance or dominance of species. Rather, it specifically--specifically depends on a type of vegetation."
>
> Recross Examination of Dr. Richard Calvo and Dr. Robert Langstroth, Day 6 Transcript, 1801:8-13.

393. This point was also endorsed by Dr Calvo when asked to assume the hypothetical role of a government official – faced with evidence of potential wetlands, and whether (when invoking the precautionary principle) they should err on the side of protecting the wetland or not:

> "I believe that as a government official, I would probably say, "You show me that there are not wetlands because I am believing that there are given the preponderance of information."
>
> Recross Examination of Dr. Richard Calvo and Dr. Robert Langstroth, Day 6 Transcript, 1805:18-22.

394. Thus, even Dr Calvo recognized that the burden is on Claimants to disprove the existence of wetlands, when information and data suggests there are. This resulted in a very practical admission by Dr Calvo, when also asked what he would do if he had to determine the continuation or not of construction works on the suspected wetland:

> "A: I would not make a decision allowing the continuation of works that could affect, but we don't know whether it's a wetland or not.
>
> Q: So, you would suspend the construction?
>
> A: If there was construction already happening, perhaps, yeah."
>
> Recross Examination of Dr. Richard Calvo and Dr. Robert Langstroth, Day 6 Transcript, 1807:4-10.

b) <u>ERM Report is woefully lacking in critical analysis and data and yet the conclusion still shows signs of wetlands</u>

395. The ERM Report as a source of reliable data to disprove the existence of wetlands is woefully lacking.

396. First, Dr Calvo and Dr Langstroff admitted that they did not undertake a comprehensive analysis in order to be able to determine whether there were wetlands, because they admittedly failed to undertake a soil survey. This was seemingly intentional. As a result,

there was no possible way ERM could ever conclude there were wetlands, because they denied themselves a critical data point necessary to establish such fact.[166]

397. This is notwithstanding the fact that in the stated scope of the report it was *"whether the Las Olas project site contains, or has ever contained, wetlands protected by Costa Rican law."*[167]

398. Second, in order to draw a conclusion regarding the stated scope for a period of 14 years, ERM admitted to dedicating only 13 pages to the analysis. This is far from rigorous. Moreover, the data collection to populate the mere 13 pages was also lacking. ERM consulted two photographs and five Google maps for the years 2002, 2012 and 2016. Thus, with three years of aerial snapshots and little else, as well as no plotted GPS locations to verify KECE's report, ERM set about this less-than-forensic exercise. They did not canvas views beyond a single neighbor (introduced to them by Claimants – and therefore unlikely to be objective) and therefore relied exclusively on their own cursory and stunted view of the 38 hectare site. When challenged that these data points were insufficient, Dr Calvo underlined that they were only on the site for two days.[168]

> "Q: So, your Report's a snapshot of the site in July of 2016, essentially.
>
> A: (Dr. Calvo) Plus the understanding gained after looking at the three time-series photographs.
>
> Q: Right. And so, based a photo from 2002 and then an aerial photo from 2014, you are determining whether there ever has been wetlands on the site; is that right?
>
> A: (Dr. Calvo) Yes,"
>
> Cross Examination of Dr. Richard Calvo and Dr. Robert Langstroth, Day 6 Transcript, 1776:9-17.

399. ERM admitted that this was therefore only a basis to try to determine the contemporaneous existence (or not) of wetlands, as opposed to a historical analysis.[169]

400. Third, when pressed on what data was used to compile the report Drs Calvo and Langstroff alluded to having reviewed many other documents relevant to the arbitration.[170] These were not presented with their report, and therefore, there is no basis to assess whether their conclusions were well founded or not.

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166 Cross Examination of Dr. Richard Calvo and Dr. Robert Langstroth, Day 6 Transcript, 1750:10-14. "*Q: So, you could never, in any version of your Report, have concluded that there are wetlands; you were tying your own hands on that conclusion. A: (Dr. Calvo) In reaching that conclusion, you can say that.*"

167 ERM Report, para.1(b).

168 Cross Examination of Dr. Richard Calvo and Dr. Robert Langstroth, Day 6 Transcript, 1749: 22; 1750:1-3.

169 Cross Examination of Dr. Richard Calvo and Dr. Robert Langstroth, Day 6 Transcript, 1776:13-18.

170 Cross Examination of Dr. Richard Calvo and Dr. Robert Langstroth, Day 6 Transcript, 1756: 17-22; 1757:1-9.

401. Fourth, faced with the allegations in the Arbitration of land filling of the wetlands, ERM also admitted to having failed to consider any topographical changes to the site.[171]

> "Q: So, sir, your Report doesn't analyze any of the potential filling or the draining of Wetland 1, does it?
>
> A: (Dr. Calvo) Not directly, no."
>
> Cross Examination of Dr. Richard Calvo and Dr. Robert Langstroth, Day 6 Transcript, 1779:8-11.

402. The consequences of these failings of the ERM report are not to provide comfort to Claimants – as they might have intended. Quite the opposite. The failure of ERM to prove (to the applicable standard of proof) that wetlands do not and/or never existed, is to fail to discharge their burden of proof. Thus, while Costa Rican law applies as a question of fact, the fact is that the burden of proof rest with Claimants.

403. Almost in spite of their deficient analysis, as stated above, ERM still found evidence showing "characteristics of a freshwater marsh and are potentially wetlands under the Costa Rica definition of wetland". In addition, ERM confirmed that while they did not undertake a soils analysis, the issue of hydrology observations and vegetation analysis, this led them to the same conclusion that there was evidence of potential wetlands:

> "Q: So, we have evidence indicating that in the 2 out of 2 elements under Article VI of the MINAE Decree, there are signs potentially indicating wetlands; would you agree?
>
> A: (Dr. Calvo) Potentially."
>
> Cross Examination of Dr. Richard Calvo and Dr. Robert Langstroth, Day 6 Transcript, 1767:14-18.

404. While ERM had not undertaken a soils analysis, they confirmed the terminology similarly between hydric and hydromorphic soils:

> "Q: And so, this [MINAE Decree, Article V] is saying that hydric soils is defined by reference to hydric soils and hydromorphic soils; is that right?
>
> A: (Dr. Langstroff) Hydromorphic soils as used here apparently is a synonym in this particular definition as used in Costa Rica. It appears that's correct."
>
> Cross Examination of Dr. Richard Calvo and Dr. Robert Langstroth, Day 6 Transcript, 1770:6-12.

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171 Cross Examination of Dr. Richard Calvo and Dr. Robert Langstroth, Day 6 Transcript, 1775:7-13. "*Q: But you do not address this change and any possible cause of this change in your Report, do you? A: (Dr. Calvo) What change? Q: Well, any change that is being alleged in this Arbitration regarding the fill of the potential wetlands. A: (Dr. Calvo) No, I don't address that.*"

c) ERM failure to opine on the Precautionary Principle

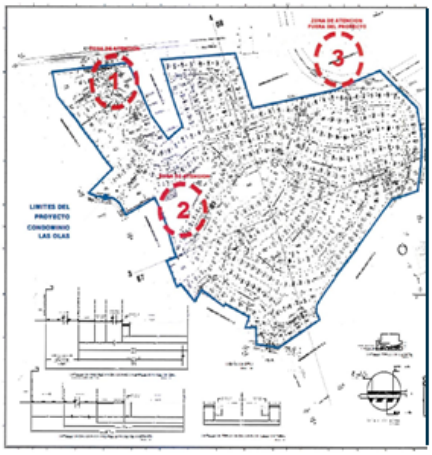
405. Having identified the existence of evidence indicating wetlands, and concluded that there were **potential wetlands**, ERM acknowledged during the Hearing that in light of the precautionary principle, Costa Rican authorities had an obligation to protect them:

> "(Dr. Langstroff). We'd agree, if there are evidence of a potential wetlands, it should be taken seriously. We certainly agree with the importance of Costa Rica's right and obligation to protect wetlands of high biodiversity value."
>
> Cross Examination of Dr. Richard Calvo and Dr. Robert Langstroth, Day 6 Transcript, 1754:17-21.

d) ERM confirm development on Easements

406. Presented with the Master Plan, ERM were unable to comment on the positioning of works to be undertaken in relation to the sensitive areas identified by Mussio Madrigal. With respect to ERM, we find it hard to understand how this is not an obvious point based on the overlapping plans presented below.

Map filed with SETENA in D-1 Form (C-222)



Map identifying sensitive areas (Annex B, Witness Statement of Mauricio Mussio)

407. The evidence clearly shows that the sensitive areas identified by Mussio Madrigal (which as stated above, were not presented as part of the D1 application to SETENA) were situated on precisely the areas of the Master Plan and Easements where development was planned.[172]

e) Conclusion regarding ERM Report

408. The conclusion the Tribunal can draw from reviewing the ERM report, and deliberating the testimony provided during the Hearing is that were this report to have been presented as part of the D1 application, then certainly the inquiry would have deepened, and the

[172] See, Annexes L-48 and L-49.

discovery of wetlands would have been made. If this report had also been presented during the works, ERM also reluctantly admitted that it might suffice to suspend works.

409. However, for present purposes, sufficient evidence exists (even on ERM's affirmative findings) to endorse the first two of three criteria required to be met to conclude wetlands exist (hydrophilic vegetation and hydric conditions). Therefore, the final criteria, (hydric soils) fell to Dr Baillie on behalf of Claimants.

4. Dr Baillie's Report on Soils Confirms Hydric Soils Exist at the Las Olas Project

410. Dr Baillie was taken to the Costa Rican legislation, a country where he had not operated before this Arbitration, and confirmed the interpretation of the MINAE Decree that defines the conditions required to identify a wetland.

> "Hydric soil or hydromorphic soil is designated as that which, in its natural conditions, is saturated, flooded, or dammed with water, or dammed over a long period that permits for the development of anaerobic conditions in its upper sections."
>
> Q: Dr. Baillie, this article does not make a distinction between hydric and hydromorphic soils; correct?
>
> A: Yes. And that--I find that confusing.
>
> Q: But this is the state of Costa Rican law; correct?
>
> A: Correct."
>
> Cross Examination of Ian Baillie, Day 6 Transcript, 1681:21-22; 1682:1-10.

411. This is consistent with the conclusions reached by ERM during their testimony – as well as Green Roots on behalf of Respondent.[173]

412. Dr Baillie also confirmed that the Land Use Classification (employed by INTA), was also of assistance but not necessarily determinative of the existence (or not) of a wetland.

> "Q: And could we go to the next section--to the next paragraph of Article 5(b) which says, "Based on the classification of usability of lands, usually wetland soils correspond to Class 7 and 8." Do you see that?
>
> A. I see that.
>
> Q. The report then--sorry. The decree does not say a Class 7 is required to be hydric soil; correct?
>
> A. I would agree. As I've earlier explained, a Class 7 soil can be on a steep mountain slope or it can be a rocky soil. So, Class 7 is not always hydric."
>
> Cross Examination of Ian Baillie, Day 6 Transcript, 1682:11-22.

413. This is consistent also with the express wording of the MINAE Decree, which provides (as quoted in Mr Barboza's first report in footnote 3 on page 11 of the English version):

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[173] Cross Examination, Day 6 Transcript, 1770:6-12.

> "***Hydric Soils***: A hydric or hydromorphic soil is defined occurring under natural conditions of saturation, flooding, waterlogged or pooling for a long time, which situation permits them to develop anaerobic conditions in their upper zones. The determination of whether a soil has hydric conditions could be very important for mapping, classification and delimitation of a wetland.
>
> Based on the Land Use Capacity Classification (Executive Decree No. 23214-MAG-MIRENEM of June 06, 1994), ***in general***, wetlands have Class VII and VIII soils. Therefore, these lands are only useful as flora and fauna conservation areas, aquifer recharging areas, genetic reserves and scenic beauty."

414. The term "*in general*", or "*por lo general"* in Spanish, is clearly a specific reference to what Dr Baillie was confirming – that such soils are usually associated with Class VII and VIII, but are not in and of themselves the determining factor. Put simply, the classification can indicate wetlands, but does not limit the definition of wetlands to only Class VII and VIII soils.

415. Dr Baillie's agreement with this point is important. Claimants have expended considerable time, insisting that the determination of no Class VII or VIII soil type meant that there was no wetland. Dr Baillie now puts that misconception to rest.

416. The existence or not of hydric soils was of course the main focus of Dr Baillie's testimony. Dr Baillie accepted that there is a no minimum threshold in order to establish the existence of hydric soil indicators – which is to say, one does not need to find a certain volume of hydric soil – it can suffice if there is the most minimal indication:

> "Q: Dr. Baillie, are you aware that under the USDA field indicators of hydric soils methodology, to be identified as hydric, a soil should generally have one or more indicators?
>
> A. Yes.
>
> Q. So, if one of the indicators is present, then we have a hydric soil according to that methodology?
>
> A. Yes."
>
> Cross Examination of Ian Baillie, Day 6 Transcript, 1689:11-18.

417. Dr Baillie's conclusion regarding the hydric nature of the soil in Bajo 1 / KECE's Wetland 1 was to characterize them as *"marginally hydric."*[174] Dr Baillie explained that while this term is not found in the MINAE Decree, the CRLE, nor can it be found as an indicator of hydric soils in the USDA Soil Taxonomy, Dr Baillie used it because of the fill found in the soil survey he undertook at the Las Olas Project Site.

[174] Baillie Report, Figure 6.

418. Specifically, Dr Baillie said when explaining what he meant by "*marginally hydric*":

> "Yes, they are not currently hydric. They are Class 5. But the question is would they be hydric if we discounted the potential fill--the alleged fill.
>
> Q. And marginally hydric does not appear in the MINAE Decree 3503; correct?
>
> A. The reason I use the word "marginally" is because it depends on the thickness of fill."
>
> Cross Examination of Ian Baillie, Day 6 Transcript, 1694:3-9.

419. Therefore, when discounting the fill, this would emphasize the hydric soils that Drs Perret and Singh identified. Notably, Dr Baillie admitted to not having drilled to the same depth as Drs Perret and Singh– which produced gleyed soil findings at a depth of 105 centimeters.[175]

420. Ultimately, of course, anything "marginal" is confirmation of its existence – but simply subject to quantity. This is important, since as stated, there is no requirement under Costa Rican law for a certain quantity of hydric soils to exist in order to positively qualify, and therefore the identification of marginally hydric soils is sufficient evidence to indicate that hydric soils in some form exist.

421. Dr Baillie likewise confirmed that the hydric soil requirement under Costa Rican law refers to soils in their natural condition:

> "Q: …the definition of hydric soil under the Article 5(b) refers to the natural conditions of the soil; correct?
>
> A. Correct.
>
> Q. You have already agreed that--or told us that there were development works that distort those natural conditions of Bajo 1--of the soil in Bajo 1?
>
> A. There had been development works and, therefore, there were effects on soils.
>
> Q. So, those development works would have affected the natural conditions of the soil; correct?
>
> A. Correct."
>
> Cross Examination of Ian Baillie, Day 6 Transcript, 1703:15-22; 1704:1-4.

422. This provides ample support for Green Roots' election to dig to the depth they did in order to try to identify the soil in its natural state, below the fill that Claimants contractors had moved. Not least, Dr Baillie confirmed under cross examination that it was his intention to try to identify the natural soil state below the fill.[176]

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[175] Cross Examination of Ian Baillie, Day 6 Transcript, 1702:18-22; 1703:9.
[176] Cross Examination of Ian Baillie, Day 6 Transcript, 1704:9-11.

423. Dr Baillie when discussing the impact of the soil movement with the landfill, noted that if there had been hydric soils, the soil movement would have impacted it – hence his use of the phrase *"soil modification from hydric to non-hydric."*[177]

5. Barboza Report on existence of wetlands at Las Olas

424. The reports of Mr Barboza were far less helpful. Mr Barboza claimed in his first (and therefore, second) report that wetlands did not exist on the land. This conclusion was reached without having visited the land. Dr Baillie testified that one cannot tell whether a wetland exists merely by looking at it – therefore on this basis, where Mr Barboza did not even go to the extent of visiting the site – his "expert" opinion is all but worthless.

425. In light of the more scientific assessment from the other experts, we do not intend to afford any weight or credibility to Mr Barboza's reports, and we would urge the Tribunal does the same.

M. Claimants' illegal cutting of trees on the Project Site

426. As part of Claimants' environmental damage to the Las Olas Ecosystem, Claimants cut down trees with no permits to do so. The first warning made to Claimants was in the EV they obtained for the Condominium site. The EV established that the cutting of **any tree** required the obtaining of a permit with MINAE.[178]

427. This is consistent with Costa Rican law because it is not only a crime impacting a forest but merely cutting a tree with no permits.[179] This was the crime Mr Damjanac was criminally charged with.[180] A "tree" under Costa Rican law is defined as follows:

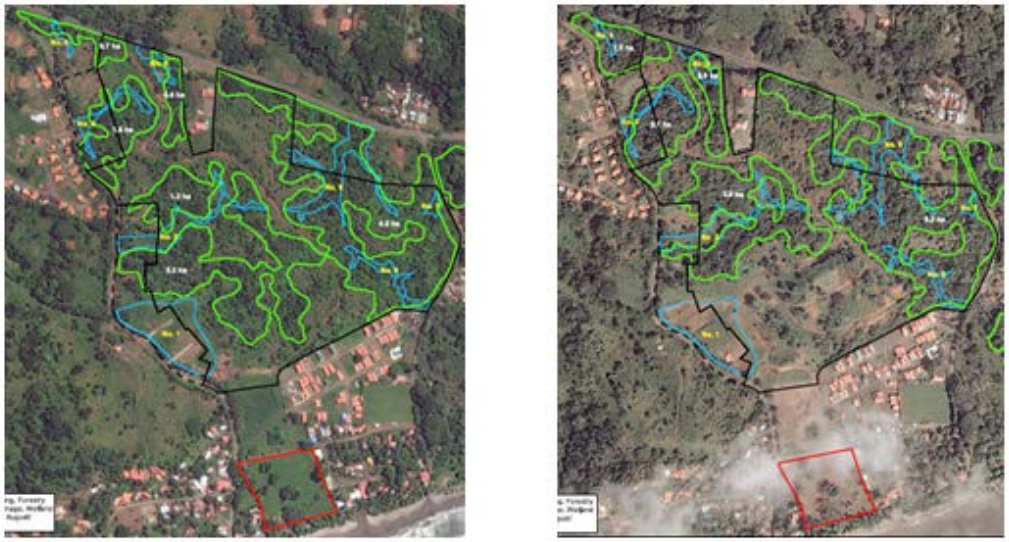
> "Forestry tree: Perennial, woody and elevated trunk that branches to greater or lesser height of the soil, which is source of raw material that gives raise to industries such as sawmills, sheets, matches, cellulose, essential oils, resins and tannins."[181]

428. No distinction is made as to the diameter or height of the tree, but in general, all trees are protected from felling without legal permits. During their development of the Las Olas Project, Claimants never obtained one sole permit for the cutting trees. Claimants also never retained a forestry engineer prior to applying for an EV or during their development of the Condominium site. Claimants only hired Mr Arce to look at the south-western area of the property (the Easements site) on September 2010.[182] In his report, Mr Arce advised

177 Cross Examination of Ian Baillie, Day 6 Transcript, 1705:9.
178 C-52.
179 C-170, Article 27, Article 61(a), Forestry Law.
180 C-142.
181 **R-567**, Article 3, Regulations to Forestry Law, 1997.
182 C-82.

Claimants that if they were to cut more than 10 trees, they needed to obtain a permit from MINAE.[183]

429. Nonetheless, aerial photography shows that 2010 was the year that Claimants engaged in the most intense clearing of the land on the Condominium site for the carving of internal roads, a fact confirmed in paragraphs 124 - 126 of Mr Aven's first witness statement. Aerial photography from 2010 and 2011 also show the change in canopy due to the construction of internal roads identified in paragraph 125 of Mr Aven's statement:



2010 2011 [184]

430. It comes as no surprise then, that in December 2010, SINAC reported impacts to what seemed to be a forest, [185] and in July 2011, SINAC confirmed that fact to Mr Martínez (reporting selective tree clearing SINAC reported selective tree clearing within 7.5 hectares of a forested area).[186]

431. Mr Arce's attempts to discredit the findings of these reports should be dismissed because he admitted during the Hearing;[187] he only visited the south-western side of the property and not the eastern side where SINAC found impacts to a forest in 2011.[188]

N. Costa Rica's enforcement of its laws: the issuance of the Injunctions

432. In view of the risks of further environmental damage caused by Claimants' activities, the authorities enforced Costa Rica's environmental laws and applied the *in dubio pro natura* principle to stop Claimants from continuing with their environmentally damaging activities.

183 C-82.
184 Second KECE Report.
185 **R-66**, Criminal complaint filed by SINAC (ACOPAC-CP-015-11-DEN), January 28, 2011.
186 C-134.
187 Cross Examination of Minor Arce, Day 2 Transcript, 637:13-22.
188 C-134.

433. SINAC was the first agency to issue an injunction on February 4, 2011 after the findings of the January 2010 SINAC Report.[189] SINAC also filed a complaint with the TAA on March 2, 2011 for impacts to wetlands and forests on the Project Site.[190]

434. Given the critical findings of the January 2010 SINAC Report, the Municipal Council also decided to suspend the construction permits granted to the Las Olas Project and investigate the situation at the project further.[191] In fact, the Municipality, requested information from SINAC, ACOPAC and MINAE.[192]

435. The TAA also filed an injunction on April 13, 2011 suspending the works at the Project Site.[193] This injunction is pending a final decision from the TAA. As it will be explained below, the TAA, among other agencies, are today facing the chilling effect of the initiation of this arbitration. In the fear of issuing a contradictory decision that could affect the defense of Costa Rica in this proceeding, Costa Rican agencies have held back from continuing with their proceedings and reaching a final decision.

436. Lastly, the criminal court of Quepos also issued an injunction on November 30, 2011.[194] Respondent has addressed the mandatory effects of this injunction over the Municipality's suspension of the construction permits in paragraphs 79-80 of Respondent's Reply Memorial. In sum, the Municipality has to abide by the judicial injunction and maintain the suspension of the construction permits until the court issues a final decision.

437. Now, Claimants include as part of the injunctive measures adopted by Costa Rican agencies, the *"shutdown notice"* (Exhibit C-125) from the Municipality dated May 11, 2011.[195] Respondent would clarify that Exhibit C-125 is not an injunction issued by the Municipality but a notification order of SETENA's injunction of April 13, 2011.[196] Back at that time, SETENA requested the Municipality to notify Claimants of its injunction, which the Municipality in turn did on May 11, 2011.[197] SETENA's injunction was reversed on November 15, 2011[198] and, consequently, the Municipality also lifted its enforcement order,[199] or what Claimants have preferred to call the *"shutdown notice."* Therefore, the *"shutdown notice"* was not an injunctive measure but the Municipality's enforcement order of SETENA's injunction and it is no longer in place.

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189 C-112.
190 **R-73**, Police Report (ACOPAC-CP-052-11-DEN), March 1, 2011.
191 **R-75**, Agreement by the Municipal Council requesting the Municipality to suspend permits (SM-2011-0172), March 8, 2011.
192 **R-79**, Letter from the Municipality to the MINAE, April 4, 2011; **R-80**, Letter from the Municipality to ACOPAC, April 4, 2011; **R-81**, Letter from the Municipality to SINAC, April 4, 2011.
193 C-121.
194 C-146; **R-143**, Extension of injunction, September 26, 2013.
195 Claimants' Closing Statement Demonstrative, Day 6, slide 10.
196 C-122.
197 **R-92**, Letter by the Municipality to Claimants giving notice of the injunction (OIM No. 119-2011), May 11, 2011.
198 C-144.
199 **R-129**, Municipal Council's approval of lifting of the injunction (SM-2012-802), November 6, 2012.

438. Finally, regarding the Tribunal's inquiry on the hierarchy of injunctions; under Costa Rican law, there is no hierarchy between precautionary measures issued by different agencies because each agency may issue precautionary measures within its specific area of competence and within the corresponding sanctioning procedure. For example:

- SETENA can issue precautionary measures to initiate an investigation and decide whether or not the EV should be annulled.
- SINAC can issue precautionary measures to suspend any conduct or activity that can potentially cause damage to the environment.
- The TAA can also issue injunctions with the purpose of enjoining the violation of any legal provision or preventing the possible commission of damage or the continuation of harmful actions against the environment.

439. Neither SETENA, SINAC nor the TAA are superior to one another. They are all administrative bodies pertaining to MINAE, assigned with different competencies.

440. On the other hand, an injunction issued by a judge does have the power to suspend an administrative injunction from another agency.[200] This will be explained with more detail below,[201] but, in general terms, a user can always challenge the legality of an injunction before Costa Rican courts and then, the court can issue an injunction to suspend the effects of the administrative injunction until its legality is determined in the judicial proceedings.

O. Illegal works after Injunctions

441. Respondent has set out in detail in its pleadings as well as the Opening Submission, the chronology that is relevant to the Tribunal's deliberations. We do not intend to repeat it further here for the sake of efficiency. However, we would urge the Tribunal to revisit the detail offered in that chronology along with the presentation made.

442. Notwithstanding, Claimants kept performing illegal works on the Project Site in spite of the SINAC Injunction, which was followed by an injunction from SETENA, issued April 13, 2011 (which Mr Damjanac refused to receive[202]) and an injunction from the TAA, also on April 13, 2011.

443. From agency reports we know work continued in violation of the SINAC injunction. For example, on May 12, 2011, one day after *notification* of the SETENA injunction, the Municipality reported works being conducted on the Project Site.

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200 **R-248**, Article 19, Administrative Contentious Code.

201 See, Section VIII.A.2(d).

202 Mr Damjanac testified that he contested the authenticity of the documents officially produced by the State. In circumstances where no document from the State has been formally challenged by Claimants in terms of its authenticity, Respondent finds it dubious that Mr Damjanac's late accusation holds water.

444. Claimants have contested the authenticity of these reports. Exhibit R-270. But their own construction logs show Claimants engaged in substantial construction in May 2011. Respondent put up the following photos indicating works that were undertaken at the time.[203]

445. Other work was undertaken on June 9, June 22/23 and June 27. Claimants failed to heed the injunctions, preferring their own interpretation of Costa Rican law, than that ordered by the legitimate authorities. There is simply no justification for this. Claimants are not entitled to take the law into their own hands.

P. Mr Aven fled the country without reasonable justifications

446. Claimants allege that Respondent refused Mr Aven's request for security in Costa Rica after the shooting incident.[204] The truth is that Mr Aven was at all times represented and assisted by criminal counsel to advise him on the legal recourses he had available to seek protection from the state. Mr Morera testified to this during the Hearing:

> "Q: In fact, Mr Aven was always represented by counsel in these proceedings; correct?
>
> A: That's what I recall, yes."
>
> Cross Examination of Néstor Morera, Day 3 Transcript, 744:1-3.

447. Mr Morera testified that after the shooting he sought protection from the government and from the American Embassy.[205] However, what Mr Morera did not mention is that he did not request the right measures for Mr Aven in the correct agency that could have afforded him the protection measures he sought.

448. Mr Morera sought protection for Mr Aven as a criminal defendant in the criminal proceedings but he should have sought that protection as a victim under the criminal complaint initiated after the shooting incident on April 2013.[206]

449. Under Article 71 of Costa Rica's Criminal Procedure Code and the Law for Protection of Victims, Witnesses and other Procedural Parties, Mr Aven could have requested protection for Mr Aven during his ongoing criminal proceedings from a specialized office within the Public Prosecutor's Office.[207] This omission shows not only the quality of legal advice that Mr Aven received from Mr Morera but also the lack of interest Claimants had to pursue available recourses in Costa Rica. This protection is still available to Mr Aven, should he wish to return to Costa Rica. If Mr Aven provides new evidence or indicia relating to the

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203 See the Claimants' construction log, dated May 2, 2011 (**R-512**).
204 Claimants' Closing Statement Demonstrative, Day 6, slide 30.
205 Cross Examination of Néstor Morera, Day 3 Transcript, 767:5-16.
206 C-162.
207 **R-421**, Article 71(2)(a), Criminal Procedure Code,; **R-560**, Article 7, Law for Protection of Victims, Witnesses and other Procedural Parties, March 4, 2009.

criminal complaint he filed for the shooting incident, the Prosecutor could re-open the investigation. A judge would also have to decide whether the statute of limitations has run. In that case, Mr Aven would be able to seek Article 7 protection with the Protection of Victims' Office at the Public Prosecutor's Office.

450. Because Mr Aven received inadequate legal advice, he was forced to hire private security.[208] The mere fact that he hired private security shows that Mr Aven had security for himself and that there was nothing preventing him from returning to Costa Rica. His security was his concern and therefore his responsibility. He is responsible for his own safety as any American is when travelling in Central America. Even the American Embassy did not think he deserved "a special treatment."

Q. Claimants' Criticisms of Respondent in the Arbitration

451. During Claimants' closing submission in the Hearing, Mr Burn repeated certain criticisms of Respondent in terms of how proceedings have advanced, in particular Respondent's alleged failure or refusal to present witnesses that were personally involved in the official reports that form part of the record.

452. Given the repeated criticism, it is necessary for Respondent to address these issues here again.

453. As stated above, the documents speak for themselves, and the conclusions were what those documents show. Respondent does not query their authenticity (except for the Forged Document), while it challenges the reliance that can be placed on those reports for the various reasons set out above and below. It is important, however, to remind the Tribunal of a point made during Respondent's opening submission with regard to the allegations of bribery.

454. So many of Claimants' criticisms are grounded not in the technical information which they describe as "*irrelevant*" and "*ex post facto*" evidence. Instead, they focus on the purported bribes sought by local officials.

455. Respondent repeats, there is no credible evidence whatsoever to prove any bribery occurred. All the Tribunal has is testimony from Mr Damjanac – who says he was approached by Mr Cristian Bogantes. There is no corroboration and no third party witness.

456. If this were a criminal court, such evidence would not even pass the red-face test. And yet, Claimants intend for this Tribunal not only to assume (as if it were a definitively proven fact) that such bribery took place, but to then use that fact as a launch pad for a grand conspiracy theory that led to Claimants' construction permits being investigated and suspended.

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[208] Cross Examination of David Aven, Day 3 Transcript, 841:20-22; 842; 843:1-2.

457. Claimants ask this Tribunal essentially to accept a total speculation over the proven fact that wetlands exist and always existed (as the documentary evidence shows). That is the reason the process ultimately concluded in a suspension of the works in order to protect the environment.

458. Locked into the "Aven-driven" mindset that the world was out to get them, Claimants point to the fact that Mr Bogantes was not presented as a witness to insinuate some degree of discomfort. This is unfounded.

459. If there is an allegation that rises to a level of a legitimate complaint of bribery, it can be raised in Costa Rica where any police power will effectively ensure testimony is properly heard and tested. The Costa Rican criminal courts can also enforce perjury laws – which are not in play in these proceedings.

460. Claimants had an opportunity to bring a **timely** formal complaint against Mr Bogantes – but neither Mr Damjanac nor Mr Aven properly seized the moment – as was customary given the total failure of Claimants to exercise any of their available criminal, civil or administrative rights in Costa Rica.

461. The lack of timeliness was fatal to the delayed complaint Mr Aven commenced. This is not an insignificant omission given how much they now want to rely on the allegation in these proceedings. However, above all, the allegation of bribery is not relevant to the issues in dispute in **this arbitration**.

462. The bribery complaint raised by Mr Aven was rejected – in accordance with Costa Rican criminal law and procedure. It is not central in any way to this Tribunal's determination of the issues. It has no bearing on the expropriation or FET claims. However, it is really fundamental to look beyond headline accusation Claimants make.

463. The allegation of a disgruntled official not getting a purported bribe *could* be feasible *if* it were the case that there were no wetlands. For example, one could imagine – in theory at least – that an official might originally write up a report saying there **was a wetland**, even though there was not. Such conduct would create ideal circumstances in order to leverage an illegal payment from Claimants in order to allow the project to proceed. Having blocked the project, the official could ask for a bribe (in order to correct the record) – and if Claimants rejected that bribe, the official might then refuse to correct the record.

464. However, that leverage exists if the original circumstances identify a wetland when there is none. However, in this case, the original statement the Claimants seek to rely on was the (unlawfully obtained) assessment that there was no wetland.

465. Here is where the flaw in Claimants' theory arises – as the unrebutted and clear scientific data shows from Green Roots and KECE, there are and always have been wetlands on the property.

466. The Tribunal queried whether there is scientific soil data in relation to the other wetlands, and as stated below, time and resources did not permit soil analyses to be collated for all the KECE wetlands. However, Wetland No.1 clearly exists and this is fundamentally important because it means the most natural motivation for a bribery (described above) does not function.

467. What could Bogantes have threatened when he was supposedly refused payment? To reveal the truth having previously fostered a lie? This would not make sense, since the evidence is clear – there **are** wetlands in existence. Therefore, all Mr Bogantes could supposedly threaten was to disclose the truth/the reality.

468. Therefore, based on Claimants assumption that Mr Bogantes requested a bribe, this means one of two things

469. First, it might be that a genuine error was committed in the earlier reviews of the land, and the wetlands (that we know exist) were somehow overlooked. Even if that happened (as we have argued in this Arbitration) this does not prevent the State authorities from revisiting this finding if there were a later investigation into wetlands in order to protect them – which is exactly what has happened – in accordance with Costa Rican law.

470. Alternatively, it was known there were wetlands from the start, and a blind eye had been turned to them by officials when they should have been declared. Of course, we know this was Claimants' approach, based on the evidence, and so in this alternative, perhaps an official committed the same act.

471. However, this is where it gets uncomfortable for Claimants. Because, if this had been the case the Tribunal should ask which party would have been behind such a campaign of ensuring officials were facilitating the concealing of wetlands? Which "stakeholder" would have had a commercial interest to encourage officials to ignore the wetlands? The answer is quite obvious – the Claimants.

472. Therefore, the Claimants' criticism of Mr Bogantes must necessarily be founded on the pre-existing illegality committed by Claimants in the form of some kind of bribe of one or more officials.

473. Of course, we have no evidence to suggest this, and Claimants have (obviously) not alleged it, which ultimately takes the Tribunal to the position that the evidence would (and should) direct the Tribunal to reject Claimants' allegations of Mr Bogantes' supposed bribery as both unproven and lacking in foundation.

IV. THE LAW APPLICABLE TO THE DISPUTE

474. Prior to discussing the lack of merit of Claimants' claims, it is appropriate to summarize the legal rules applicable to this dispute. It is under the legal framework described in the following sub-sections that the relevant facts must be examined.

475. The arbitration is conducted under the 2010 UNCITRAL Rules of Arbitration (the "**UNCITRAL Rules**"). Article 35 (1) of the UNCITRAL Rules provides:

> "**The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute**. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate." (emphasis added)

476. DR-CAFTA Parties agreed in Article 10.22(1) the rules of law applicable to the substance of the dispute to be:

> "1. Subject to paragraph 3, when a claim is submitted under Article 10.16.1(a)(i)(A) or Article 10.16.1(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."

477. Claimants and Respondent have engaged in a discussion about the applicable law in this dispute. Essentially, Claimants contend that (i) Chapter 10 ("Investment") of DR-CAFTA should be read in isolation from any other Chapter of the Treaty; (ii) that no principles of environmental law derive from the international law applicable; and (iii) that Costa Rican law has no bearing on this arbitration.

478. Respondent contends much to the contrary. The Tribunal should read DR-CAFTA *in totem*, in particular with Chapter 17 DR-CAFTA. Respondent will explain how environmental principles apply, as they are part of the "international law applicable rules" under Article 10.22 of DR-CAFTA. Finally, Respondent will show that Costa Rican law is a key element for the Tribunal's findings.

A. Chapter 10 of DR-CAFTA is applicable together with other chapters of the Treaty, and particularly, Chapter 17

479. DR-CAFTA is a free-trade agreement (**"FTA"**), which, unlike traditional bilateral investment treaties (**"BITs"**), is multilateral and not limited to investment protection, covering a wide range of issues such as trade, telecommunications, intellectual property rights, labor, and environment, among others. Therefore, the policy considerations underlying the negotiation of this FTA are quite particular because they raise broader or additional policy concerns than any other BIT or IIA.[209]

480. In this regard, referring to an FTA such as NAFTA, it has been argued that:

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[209] **RLA-141**, Kenneth J Vandevelde, *Bilateral Investment Treaties: History, Policy and Interpretation*, Oxford University Press (2010).

> "[T]he specific provisions of a particular Chapter need to be read, not just in relation to each other, but also in the context of the entire structure of NAFTA if a treaty interpreter is to ascertain and understand the real shape and content of the bargain actually struck by the three sovereign Parties."[210]

481. Following this line of reasoning, Respondent's position in its Counter-Memorial, Rejoinder Memorial and in the Hearing[211] has been that the Tribunal, in deciding this case under Chapter 10 should read the latter together with Chapter 17 titled "Environment", in light of the environmental concerns that the facts bring to the case at hand.

1. A proper interpretation of DR-CAFTA under the VCLT mandates the Tribunal to balance Chapter 10 with other Chapters of the Treaty

482. Respondent's position (borrowing Claimants' words) is backed up by a *"proper orthodox analysis under the Vienna Convention approach"*[212] of DR-CAFTA in order to determine the content of the law applicable to this arbitration.

483. Article 10.22(1) of the Treaty provides that the Tribunal should decide the issues in accordance with DR-CAFTA and applicable rules of international law. The applicable rules of international law are those grounded in customary international law and general principles of law. For the purpose of interpretation of DR-CAFTA, customary international law rules of treaty interpretation apply. The parties agree that the 1969 Vienna Convention of the Law of Treaties (the "**VCLT**") reflects customary international law, particularly Articles 31 and 32 on treaty interpretation.

484. Article 31 of the VCLT provides as follows:

> "General rule of interpretation
>
> **1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose**.
>
> **2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes**:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

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210 **RLA-142**, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Award, January 29, 2003, para. 149

211 Respondent's Counter-Memorial, paras. 434-472; Respondent's Rejoinder Memorial, paras. 34-118.

212 Claimants' Opening Statement, Day 1 Transcript, 72:5-6.

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended." (emphasis added)

485. In light of Article 31 of the VCLT, a literal interpretation of Article 10.22 of DR-CAFTA, an examination of other connected provisions of the Treaty, the object and purpose of DR-CAFTA as a whole as well as consideration of the intention of DR-CAFTA Parties, the Tribunal can conclude that both Chapter 10 and Chapter 17 of the Treaty are applicable to the case at hand.

486. First, Article 31(1) of the VCLT establishes that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty. The applicable law clause contained in Chapter 10 provides that the tribunal shall decide the issues in dispute "in accordance with **this Agreement** and **applicable rules of international law**" (emphasis added). A textual analysis of this provision clearly indicates that the Tribunal should decide the dispute in accordance with DR-CAFTA, not limiting the governing law to "this Chapter", which would be solely Chapter 10. Quite clearly the Tribunal is already being asked to draw on other provisions outside Chapter 10, and therefore, this is no significant departure from Claimants' existing position.[213]

487. Second, Article 31(1) also requires an interpretation that takes into account the context of the terms subject to interpretation. Logically, the terms of a treaty should not be interpreted in the abstract or as if they were contained in a vacuum. In the case at hand, an analysis of other connected provisions of the Treaty should lead the Tribunal to the conclusion that Chapter 10 should be read together with Chapter 17. This is particularly necessary given how Chapter 10 expressly refers to other chapters in DR-CAFTA – directing the reader to contemplate the treaty as a whole.

488. In effect, Article 10.2(1) of Chapter 10 of the Treaty provides that the investment protection contained therein is applicable as long as it is consistent with other chapters of the Treaty:

"**Article 10.2: Relation to Other Chapters**

1. In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency."

489. The *raison d'être* of the provision is to establish that Chapter 10 is not a stand-alone section in the Treaty. As stated, DR-CAFTA covers a wide range of policy considerations, among which is an agreed policy space in relation to the environment in Chapter 17.[214] Thus, in case the investment protection provided in Chapter 10 conflicts with the environmental concerns set forth in Chapter 17, the latter shall prevail.

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213 See for example, Chapter 1, Article 1.4 (Initial Provisions) and Chapter 2 (General Definitions).

214 Respondent's Rejoinder Memorial, para. 42.

490. The United States of America has also argued this approach in its submission as a non-disputing Party, enhancing the critical importance that DR-CAFTA places on the environment:

> "**Chapter Seventeen provides relevant context for purposes of interpretation of Chapter Ten**, including Articles 10.5 and 10.7. As a recent tribunal observed, **Chapter Seventeen highlights generally the critical importance the CAFTA-DR Parties placed on ensuring respect for domestic levels of environmental protection and enforcement**." [215] (emphasis added)

491. This clearly means that in circumstances where there is a potential conflict or tension between Chapter 10 and Chapter 17, Article 10.2(1) provides that the environment prevails:

> "Consequently, the valve represented by Article 10.2 is opened and deference must be shown to Chapter 17 standards of enforcement. Article 10.2 is informing [the Tribunal] that if the environmental protection regulation or the enforcement of such was to be curtailed in some way in order to bend to the standards of Chapter 10, that would in and of itself be a violation of Chapter 17. In short, in the event of a competition between Chapter 10 and Chapter 17, 10.2 decides the winner. The winner is the environment."[216]

492. Article 10.11 also supports this interpretation. This Article addresses the particular relationship between the terms "Investment" and "Environment":

> "**Article 10.11: Investment and Environment**
>
> Nothing in this Chapter 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."

493. This Article shows that DR-CAFTA Parties foresaw environmental concerns in Chapter 10, and that a Party may take steps to ensure that investment is sensitive to the environment.[217] In other words, it means that when deciding a case under Chapter 10, a tribunal should apply the law without preventing a DR-CAFTA Party from adopting, maintaining, or enforcing any measure in a manner sensitive to environmental concerns.[218]

494. As Respondent explained in its Opening Statement, Article 10.11 DR-CAFTA prioritizes measures taken otherwise consistent with Chapter 10, with the purpose of protecting environmental issues over all other provisions in the chapter.[219]

495. Thus, Article 10.11 together with Article 10.2(1) serve the same purpose: they inform the Tribunal that when interpreting Chapter 10, other Chapters of DR-CAFTA become

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215 Submission of the United States of America, as a non-disputing Party in *Aven et al. v. Costa Rica*, December 2, 2016, para. 8.

216 Respondent's Opening Statement, Day 1 Transcript, 177:7-17.

217 **RLA-86**, Christina L. Beharry and Melinda E. Kuritzky, *"Going Green: Managing the Environment Through International Investment Arbitration"* (2015) 30(3) American University International Law Review 383.

218 Respondent's Rejoinder Memorial, paras. 58-64.

219 Respondent's Opening Statement, Day 1 Transcript, 179:11-22; 180:1-8.

applicable, and more expressly, as Article 10.11 states, Chapter 17. Both Articles indicate that when dealing with Chapter 10, primacy to the environment has to be regarded.

496. Moreover, the text of Chapter 17 evidences the aim of DR-CAFTA in terms of policy making in the environmental sphere by ensuring the enforcement of environmental protection. As it will be seen below in detail, the ability of DR-CAFTA Parties to implement sound and efficient measures to protect the environment in Chapter 17 is key to the implementation of the Treaty as a whole. This Chapter is a clear articulation of how Parties to DR-CAFTA agreed that environmental matters would not be subject to the same kind of protection envisaged in Chapter 10.

497. Third, Article 31(1) establishes that the interpreter must look to the object and purpose of the treaty. The starting point in the search for a treaty's object and purpose is logically the text of the treaty itself, and accordingly, a treaty's preamble, according to Article 31(2) VCLT, sheds light on this. DR-CAFTA's Preamble expressly mentions that DR-CAFTA Parties:

> "[…] **IMPLEMENT** this Agreement in a manner consistent with environmental protection and conservation, promote sustainable development, and strengthen their cooperation on environmental matters;
>
> **PROTECT** and preserve the environment and enhance the means for doing so, including through the conservation of natural resources in their respective territories […]."

498. These recitals, which were deliberately omitted by Claimants from their submissions,[220] are self-evident to demonstrate that environmental policy was intended to be protected in DR-CAFTA.[221] The same reading has been made by the United States of America:

> "The provisions of Chapter Seventeen, together with the Preamble and Article 10.11, serve to inform the interpretation of other provisions of Chapter 10. Specifically, these provisions demonstrate the Parties' commitment to preserving policy discretion in the adoption, application and enforcement of domestic laws aimed at achieving a high level of environmental protection […]."[222]

499. DR-CAFTA's Articles 10.2(1) and 10.11, and its Preamble, are the authentic expression of the intention of DR-CAFTA Parties in the sense that when dealing with Chapter 10, Chapter 17 becomes applicable to the extent that environmental concerns are at stake. In this regard, tribunals have held that:

> "[…] the text of the treaty is deemed to be the authentic expression of the intentions of the parties; and its elucidation, rather than wide-ranging

220 Claimants' Memorial, para. 247.
221 Respondent's Rejoinder Memorial, para. 43.
222 Submission as a non-disputing Party of the United States of America, December 2, 2016, para. 7.

> searches for the supposed intentions of the parties, is the proper object of interpretation."[223]

500. Since the intention of DR-CAFTA Parties is relevant to the extent that it finds expression in the text of the Treaty (with which Claimants seem to agree), [224] it can be argued without hesitation that DR-CAFTA Parties committed to protect foreign investors and their investments as long as they achieve and maintain a high level of environmental protection.

501. In sum, a literal interpretation of Article 10.22 DR-CAFTA, together with an analysis of other connected provisions of the Treaty (Articles 10.2(1), 10.11 and Chapter 17), and the object and purpose of the Treaty as a whole as reflected in the Preamble, should lead the Tribunal to conclude that the intention of DR-CAFTA Parties was that Chapter 10 be read together with Chapter 17. Thus, both Chapters are applicable to this case.

2. Claimants have failed to argue that Chapter 10 of DR-CAFTA should be applied in isolation

502. Claimants blame Respondent for engaging in a *"particular stratagem"* of trying *"to establish a false dichotomy between investment protection and environmental protection."* [225] Claimants allege that:

> "Now, our position has always been that the two chapters actually serve complementary but different purposes. And they involve different obligations and approaches."[226]

503. Claimants' restrictive reading to isolate Chapter 10 contradicts DR-CAFTA as a whole. As stated above, DR-CAFTA provisions go beyond establishing a mere complementary relationship between Chapter 10 and Chapter 17. Instead, Articles 10.2, 10.11, the Preamble, and the provisions of Chapter 17 tie both Chapters together to the extent that investment protection has to be reconciled with environmental concerns. This logic that is set out in the Treaty clearly has an impact on the Tribunal's task in deciding the governing law.

504. Each of the arguments that Claimants have made to the Tribunal fail when they are contrasted with the plain text of DR-CAFTA.

505. Claimants suggest that the Tribunal *"must focus on achieving a contemporaneous construction of the disputed treaty text"* in the context of what they call *"resolving the inter temporality problem."*[227] The principle of contemporaneity entails that:

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223 **RLA-4**, *Methanex Corporation v. United States of America,* UNCITRAL, Final Award on Jurisdiction and Merits, 3 February 2006, para. 22. See also **RLA-143**, *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, December 8, 2008, para.88.

224 Claimants' Memorial, para. 245.

225 Claimants' Opening Statement, Day 1 Transcript, 69:21-22; 70:1.

226 Claimants' Opening Statement, Day 1 Transcript, 79:9-12.

227 Claimants' Opening Statement, Todd Weiler's Demonstrative, slide 2.

> "[t]he terms of a treaty must be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in the light of current linguistic usage, **at the time when the treaty was originally concluded**."[228] (emphasis added)

506. Claimants rely on the following passage from an article of Campbell McLachlan to "resolve" the problem of inter temporality:

> "[C]onsistent with the overall approach adopted by the Vienna Convention, it is submitted that a safe guide to decision on this issue will not be found in the chimera of the imputed intention of the parties alone. Rather, the interpreter must find concrete evidence of the parties' intentions in this regard in the material sources referred to in Articles 31-2, namely: in the terms themselves; the object and purpose of the treaty; the rules of international law; and, where necessary, in the *travaux*."[229]

507. Following Campbell McLachlan's *"apt warning,"*[230] the Tribunal will find concrete evidence of DR-CAFTA Parties' intentions (all assessed at the time when the Treaty was originally concluded) above.[231] The terms of the Treaty as well as its object and purpose are abundantly clear in this sense.

508. Consequently, Claimants' assertions that Respondent has imputed a questionable intent on DR-CAFTA Parties can be easily dismissed in the context of the VCLT approach that Respondent has presented above.

a) Claimants' narrow interpretation of Article 10.2(1) expressly contradicts the text of DR-CAFTA

509. Claimants also assert that Respondent's argument on the relationship between international law and investment law based on Article 10.2(1) of DR-CAFTA has no basis because that provision requires the finding of an express inconsistency between the two Chapters, which does not exist in this case.[232] Claimants allege:

> "Article 10.2 only applies to those rare occasions in which achieving compliance with the Chapter 10 provision would necessitate noncompliance with another provision of the agreement. And any party to the treaty potentially faced with such circumstances is, of course, obligated under the general principle of good faith in international law to take all available steps to avoid such conflict."[233]

510. Claimants' argument certainly encourages a narrow interpretation of Article 10.2(1) in an attempt to avoid the application of environmental protection standards to this dispute. To support their position, Claimants rely on the United States of America's submission that

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228 **RLA-144**, Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points", 33 BYIL 203 (1957) 212.

229 CLA-151, Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention* (ICLQ Vol. 54, April 2005) p. 317.

230 Claimants' Opening Statement Demonstrative, slide 2.

231 See, Section IV.A.1.

232 Claimants' Reply Memorial, para. 53; Claimants' Opening Statement, Day 1 Transcript, 84:11-22; 85:1-20.

233 Claimants' Opening Statement, Day 1 Transcript, 84:3-10.

states that if any Chapter, other than Chapter 10, covers a particular matter or issue, this does not remove that matter from the scope of Chapter 10.[234]

511. Furthermore, Claimants allege that because Costa Rica's Explanatory Report uses the word "incompatibility" when commenting on Articles 10.2(1) and 10.11, [235] this:

> "[C]onfirms that there is nothing inherent in investment protection that would damage environmental protection. It accordingly assures the reader that any actions that can be undertaken in furtherance of environmental policy purposes are legitimate just so long as environmental policy is not used as some sort of convenient excuse for harming foreign investors. That, of course, would be incompatible with the rights granted in Chapter 10."[236]

512. It is difficult to follow such "imputed" reading to Costa Rica when the Treaty provides for the opposite. Claimants once again completely misconstrue the meaning of Chapter 17 of DR-CAFTA, and in particular, the role that it plays in the case at hand. Respondent has provided consistent reasons to disregard Claimants' narrow and contradictory interpretation.

513. First, a narrow construction of an "inconsistency" renders without meaning the very existence of Article 10.11 and Chapter 17 of DR-CAFTA. Claimants' argument certainly suggests that DR-CAFTA would contain some superfluous words. [237] Such an interpretation of a treaty provision runs counter to the general principle of effectiveness ('*effet utile*'), by which a legal text should be interpreted in such a way that a reason and a meaning can be attributed to every word in the text. In light of this general principle, Claimants' narrow interpretation ought to be set aside.

514. Furthermore, it is not reasonable to presume that Article 10.2(1) was included because there might be cases where the Parties assumed inconsistent obligations within the same treaty, as Claimants insinuate. Usually, the inconsistencies that might arise between different obligations assumed by a state party occur when those obligations are contained in different treaties that that state has signed. Supporting Claimants' position would mean that DR-CAFTA Parties were negligent when drafting the Treaty.

515. Second, Claimants dismiss the importance of Chapter 17 and Articles 17.1 and 17.2 in particular since they are the precise source of the inconsistency when one considers how Costa Rica has sought to progressively uphold environmental protection.[238]

516. In this regard, the second part of Article 17.1 establishes that each Party shall ensure that its laws and policies provide for and encourage high levels of environmental protection, and shall strive to continue to improve those laws and policies. Also, Article 17.2(1)(a)

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234 Submission as a non-disputing Party of the United States of America, December 2, 2016, para. 6; Claimants' Opening Statement, Day 1 Transcript, 84:11-20.
235 CLA-166 Costa Rica Explanatory Report for DR-CAFTA (2004) COMEX.
236 Claimants' Opening Statement, slide 7; Claimants' Opening Statement, Day 1 Transcript, 85:12-20.
237 Respondent's Opening Statement, Day 1 Transcript, 173:1-22; 174:1-6.
238 Respondent's Opening Statement, Day 1 Transcript, 174:7-12.

establishes that Parties shall not fail to enforce their environmental laws (through a sustained or recurring course of action or inaction) in a manner affecting trade between the Parties.

517. Likewise, Article 17.2(1)(b) recognizes that DR-CAFTA Parties retain the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities.

518. It is clear then that, *"the parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of discretion, or results from a bona fide decision regarding the allocation of resources."*[239]

519. Third, Article 17.2 of DR-CAFTA should also not be dismissed as it is an express recognition that the Parties considered it inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic and environmental laws.[240]

520. Finally, Claimants refer to Article 59 of the VCLT as being relevant to the interpretation of "inconsistency" provided in Article 10.12 of DR-CAFTA because *"it evinces the CIL [customary international law] approach to determining when inconsistency exists between treaty obligations."* [241] Claimants had already raised this argument in their Reply Memorial,[242] and Respondent has been quite clear when it argued that Article 59 relates to the "*Termination or Suspension of the Operation of a Treaty implied by conclusion of a later Treaty.*" [243] This clearly has no bearing on the present situation. We are not in a situation where there is a proposed termination of DR-CAFTA, and therefore, those standards of incompatibility are not relevant. Thus, Article 59 of the VCLT is inapplicable.

521. In sum, Claimants' narrow interpretation on a lack of "inconsistency" and its argument on how "incompatibility" was allegedly interpreted by Costa Rica have no basis when contrasting such assertions to the plain text of Articles 17.1, 17.2(1) and (2) of the Treaty.

b) Claimants' reliance on a NAFTA interpretation of Article 10.2(1) is inappropriate in the context of DR-CAFTA

522. Claimants allege that Article 10.2(1) of DR-CAFTA mirrors Article 1112 of NAFTA, and argue that in cases where the latter had been applied, it was concluded that it could not be used to weaken the protections afforded in the investment chapter unless there is a conflict or inconsistency.[244] To rely on those interpretations in the context of NAFTA, Claimants argue that:

239 Respondent's Opening Statement, Day 1 Transcript, 176:14-18.
240 Respondent's Opening Statement, Day 1 Transcript, 177:2-14.
241 Claimants' Closing Statement, Day 6 Dr. Weiler's comments to slide 2.
242 Claimants' Reply Memorial, para. 57.
243 Respondent's Rejoinder Memorial, paras. 53-54.
244 Claimants' Reply Memorial, paras. 54-56.

> "[…] NAFTA was a direct precursor for the model text. And this is an important factor, which in a few moments I'll demonstrate Costa Rica once also accepted. And that's that every chapter of the DR-CAFTA was an American proposal, and the vast majority were based on American models. So, it is useful, we submit, to refer to American treaty practice when one tries to understand the interpretation of a provision."[245]
>
> "Now, the Claimants explain what we believe to be a consistent and compelling interpretive approach that has been taken to Article 1112 [NAFTA]. And it reflects the Public International Law Doctrine that relates to the concept of incompatibility with regard to treaty interpretation."[246]

523. Claimants' position entails a complete misapprehension of how DR-CAFTA was conceived to work. The effect of Article 1112 of NAFTA cannot be replicated to the same extent to DR-CAFTA. DR-CAFTA has built up environmental issues in a more developed manner than NAFTA, and this has a direct impact on how DR-CAFTA was intended to work.[247] In effect:

> "**The main difference between NAFTA and CAFTA relates to how labor and environmental issues are handled**. As noted above, in NAFTA they were appended through the two side agreements negotiated subsequent to the main economic agreement. CAFTA negotiators, on the other hand, handled all three pillars in the same talks; therefore, CAFTA covers labor and the environment in chapters 16 and 17, respectively. **Thus it is inclusive of the sustainable development paradigm**."[248] (emphasis added)

524. Thus, the interpretation that NAFTA has to offer to Article 10.2(1) is worthless because DR-CAFTA is based on a complete different premise, *i.e.* the environmental protection provided in Chapter 17, which is entirely alien to NAFTA.

525. Likewise, case law relating to Article 1112 of NAFTA should not be replicated to the same extent to interpret DR-CAFTA, as Claimants purport.[249] This of course does not prevent the Tribunal from resorting, in general, to the interpretation made in other cases in relation to other treaty provisions, including NAFTA.[250] Nevertheless, such reliance has to be made

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245 Claimants' Opening Statement, Day 1 Transcript, 73:5-13.

246 Claimants' Opening Statement, Day 1 Transcript, 72:14-19.

247 Respondent's Rejoinder Memorial, para. 51.

248 **RLA-95**, John R. McIntyre and Vera Ivanaj, Multinational enterprises and sustainable development; a review of strategy process research. In John R. McIntyre, Sylvester Ivanaj and Vera Ivanaj (eds), Multinational Enterprises and the Challenge of Sustainable Development (Edward Elgar Publishing Limited 2009) 9

249 Respondent's Rejoinder Memorial, para. 52.

250 For example, the Claimants refer to *"[…] Respondent's Memorial on Jurisdiction and Counter-Memorial in the Spence case at Paragraph 198. There they relied on Article [1105 NAFTA] in construing DR CAFTA Article 10.5. And Costa Rica's reply on jurisdiction and Rejoinder on the merits in the Spence case at Paragraph 162 where they referred to NAFTA Article 1116(2) in order to construe DR CAFTA Article 10.18(1). And other examples -- two other examples -- Pac Rim Cayman and El Salvador, this is known jurisdiction, Paragraph 4.4. The resemblance between Articles 10.12(2) of the DR CAFTA and 1113(1) of the NAFTA. And then, finally, Railroad Development Corporation v. Guatemala. First, there is no jurisdiction at Paragraphs 19 and 55 to 74 generally. The Respondent argues that Article 10.18(2) of the CAFTA is modeled after Article 1121 of the NAFTA. The tribunal agrees with the Respondent and says it is evident that CAFTA Article 10.18 and NAFTA Article 1121 have the same general rationale and purpose*", Claimants' Opening Statement, Day 1 Transcript, 75:12-22; 76:1-10. Claimants based this statement in Legal Authorities CLA-157 *Spence Int'l Investments v. Republic of Costa Rica*, ICSID Case

cautiously given that a number of cases are fact-driven, or are based on treaties that differ from DR-CAFTA in certain respects. If that is the case, then, the findings in those cases cannot be transposed in and of themselves directly to the case at hand.

526. In fact, an example of where DR-CAFTA differs from NAFTA is precisely in Article 10.2(1). The language in Article 10.2(1) evinces the importance that DR-CAFTA places on the environment, which is absent in NAFTA. Therefore, it is inappropriate for Claimants to "export" a NAFTA interpretation on the relationship of the Investment Chapter with "other chapters" as provided in Article 1112 of NAFTA, in part simply because NAFTA does not contain an Environmental Chapter at all.

c) Claimants' new documents on the alleged interpretations of Costa Rica relating to Article 10.2(1)

527. During the Hearing, Claimants attempted to have the Tribunal to believe they found *"the documents"* which allegedly shed light on the actual relationship between Chapter 10 and Chapter 17.[251] Claimants characterized those documents as *travaux préparatoires* of DR-CAFTA in order to rely on Article 32 of the VCLT, in an effort to demonstrate that the intention of DR-CAFTA Parties in drafting the Treaty was not as the Respondent had characterized. For the sake of completeness, Respondent has addressed each of Claimants' new authorities in Annex I of the Brief and shown that none of those authorities constitute *travaux préparatoires* of the Treaty, and moreover, there is no basis on which to invoke Article 32 of the VCLT. For this reason, Claimants' late effort to introduce any such texts is quite misplaced.

B. The Tribunal should apply environmental rules of international law

1. The environmental principles stemming from "rules of international law" are applicable under Article 10.22 of DR-CAFTA

528. Article 10.22(1) of DR-CAFTA provides in pertinent part that *"the tribunal shall decide the issues in dispute in accordance with [DR-CAFTA] and* ***applicable rules of international law"*** [252](emphasis added). Accordingly, the Tribunal should apply public international law comprised of customary international law, treaty law and general principles of law.

529. As result of the plain text of DR-CAFTA itself and in light of the facts of the case at hand, environmental principles – the precautionary principle being one of the prominent

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No. UNCT/13/2, Respondent's Memorial on Jurisdiction and Counter-Memorial on the Merits, July 15, 2014; CLA-158 *Spence Int'l Investments v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Respondent's Reply on Jurisdiction and Rejoinder on the Merits, December 22, 2014; CLA-159 *PAC Rim Cayman LLC v. Republic of el Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Juristdctional Objection June 1, 2012; and CLA-165 R.R. Dev. Corp. and Republic of Guatemala, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdictions CAFTA Article 10.20.5, November 17, 2008.

251 Claimants' Opening Statement, Day 1 Transcript, 76:21-22; 79:1-13.

252 **RLA-6**, Dominican Republic - Central America United States Free Trade Agreement, Chapter Ten

standards of international environmental law[253] – become part of the legal framework applicable to the dispute since they stem from both customary international law and environmental international agreements to which DR-CAFTA Parties are also a party to.[254]

530. Nonetheless, Claimants suggest Respondent has made no efforts to demonstrate and provide evidence on how environmental principles would apply to this case.[255] Claimants' position is based on the "*orthodox sources*" of international law, as set forth in Article 38 of the International Court of Justice Statute.[256] Claimants argue that if a rule is not provided in international customary international law, a treaty, or the general principles, then it is not applicable to this case.[257] Based on this approach, Claimants attempt to disregard the applicability of environmental principles by asserting that they are not found in any of those sources of international law. Nevertheless, none of their arguments support Claimants' theory at all.

a) Environmental principles contained in international agreements form part of the applicable law

531. Not only does Article 10.22(1) DR-CAFTA allow the Tribunal to apply international agreements which become relevant to the case at hand, but Article 17.12(1) of DR-CAFTA indeed encourages the Tribunal to do so.[258] Article 17.12(1) establishes that:

> "**The Parties recognize that multilateral environmental agreements to which they are all party play an important role in protecting the environment globally and domestically and that their respective implementation of these agreements is critical to achieving the environmental objectives of these agreements**. The Parties further recognize that this Chapter and the ECA can contribute to realizing the goals of those agreements. Accordingly, **the Parties shall continue to seek means to enhance the mutual supportiveness of multilateral environmental agreements to which they are all party** and trade agreements to which they are all party." (emphasis added).

532. This provision essentially stresses the importance of environmental agreements to which DR-CAFTA Parties are signatory parties, establishing that those treaties must become applicable to achieve the environmental objectives.[259]

533. Costa Rica is a party to more than 30 multilateral environmental agreements, a fact that demonstrates the significance the environment has for Respondent.[260] A number of those

253 **RLA-106**, Matthias Herdegen, Principles of International Economic Law (Oxford University Press 2013) 122
254 Respondent's Rejoinder Memorial, paras. 66-68.
255 Claimants' Reply Memorial, para. 62; Claimants' Opening Statement, Day 1 Transcript, 92:20-22; 93:1-7.
256 CLA-164, Article 38 of the International Court of Justice Statute p. 26.
257 Claimants' Opening Statement, Day 1 Transcript, 87:12-20.
258 Respondent's Rejoinder Memorial, para. 69; Respondent's Opening Statement, Day 1 Transcript, 182:9-18.
259 Respondent's Rejoinder Memorial, para. 70.
260 Respondent's Counter-Memorial, paras. 54-60; Respondent's Rejoinder Memorial, para. 71; Respondent's Opening Statement, Day 1 Transcript, 182:19-22.

agreements signed with other DR-CAFTA Parties establish the precautionary principle as a key standard to be complied with in order to protect the environment in a wide array of sectors.[261]

534. Central to the text of these environmental agreements is the element of anticipation in environmental matters. All of them reflect the need for effective environmental measures to be based upon immediate actions which otherwise would take a longer-term approach. It means that states agree to act carefully and with foresight when taking decisions which concern activities that may have an adverse impact on the environment.[262]

535. Against this background, Claimants alleged that:

> "What about treaty rules? Well, with treaty rules, **it's really got to be specific obligations owed as between Costa Rica and the USA that are relevant to the treaty obligations upon which the claims are founded.** And I would submit that if you review the many citations to treaties to which Costa Rica is a party and the provisions found therein, that **none of them actually have any specific application to the facts of this case.** And, again, when I say "the facts of this case," I'm talking about the measures that Claimants allege have resulted in a breach. **Unless a treaty provision addresses that kind of measure directly, it's not going to be relevant**."[263] (emphasis added)

536. As Claimants correctly point out, the identity of the Parties is required before other international instruments could be regarded as being applicable between the Parties. For such reason, although Costa Rica is a member of more than 30 multilateral environmental agreements, Respondent solely focused on those environmental international instruments to which both the United States and Costa Rica are signatory parties.[264] Namely:

- The Convention on Biological Diversity;
- The Rio Declaration;
- The United Nations Framework Convention on Climate Change;
- The 1987 Montreal Protocol on Substances that Deplete the Ozone Layer;
- The United Nations Fish Stocks Agreement.

537. In addition, Claimants contend that the international instruments invoked by Respondent do not contain obligations that would authorize Costa Rica to engage in the measures that they allege are in breach of Chapter 10 of DR-CAFTA.[265] In light of this argument, Respondent questions whether Claimants actually read Respondent's submissions, where Costa Rica detailed each of the provisions of those instruments where the precautionary

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261 Id.

262 **RLA-137**, Philippe Sands and others, *Principles of International Environmental Law* (CUP 2012) 224 p. 222.

263 Claimants' Opening Statement, Day 1 Transcript, 88:6-20.

264 Respondent's Rejoinder Memorial, paras. 72-75.

265 Id., also 91:10-14 and 93:15-22; Claimants' Closing Statement, Day 6 Todd Weiler's comments to slide 3 of his presentation.

principle, together with the preventative and non-regression principles, were set forth.[266] Those provisions mandate the parties to those treaties to adopt measures in favor of the environment in spite of the existence of doubt as to irreversible damage. The provisions further encourage and authorize the measures Respondent has adopted in response to Claimants' misconduct, by virtue of Chapter 17 DR-CAFTA.

538. Hence, contrary to Claimants' assertions, these treaties which instruct states to take a precautionary approach in environmental matters are relevant to allow them to frame the measures they adopt in order to achieve their environmental objectives. As such, the content of these treaties cannot be excluded as a source of the precautionary principle embedded in international treaty law.

b) <u>The precautionary principle also stems from customary international law</u>

539. The rules of customary international law become applicable under the mandate of Article 10.22(1) of DR-CAFTA. Both scholars and case law have acknowledged that the precautionary principle forms part of customary international law, and therefore, it can fill any gaps that DR-CAFTA might leave.[267]

540. Respondent has put forward strong evidence from recent decisions of tribunals adjudicating international law claims, including the International Court of Justice and the International Tribunal for the Law of the Sea, which confirms the crystallization of the precautionary principle in customary international law:

> "The Chamber observes that the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law."[268]
>
> "[T]he precautionary principle is not an abstraction or an academic component of desirable soft law, but a rule of law within general international law as it stands today."[269]
>
> "[T]hese principles of environmental law do not depend for their validity on treaty provisions. They are part of customary international law."[270]

541. A fact that has not been ignored by international legal scholars:[271]

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266 Respondent's Counter-Memorial, paras. 55-57; 469-470; Respondent's Rejoinder Memorial, paras. 69-75.

267 Respondent's Opening Statement, Day 1 Transcript, 182:22; 183:1-3.

268 **RLA-145**, ITLOS, Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the area (Advisory Opinion No. 17 requested by the Seabed Disputes Chamber), para. 135.

269 **RLA-146**, ICJ, *Case Pulp Mills on the River Uruguay* (Argentina v Uruguay), Dissenting Opinion of Judge ad hoc Vinuesa to the Request for the Indication of Provisional Measures, July 13, 2006, p.152.

270 **RLA-147**, ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), Dissenting opinion of Judge Weeramantry, July 8, 1996, p.504.

271 Respondent's Rejoinder Memorial, paras. 76-77; Respondent's Opening Statement, Day 1 Transcript, 183:4-12.

> "[…] that the presence of the precautionary principle in numerous international texts testifies to its character as a rule of customary international law."[272]
>
> "[…] it is a general principle of international environmental law having the character of an international customary rule of universal scope, for all the conditions required for the existence of such a rule would now be met."[273]
>
> "The legal status of the precautionary principle is evolving. There is certainly sufficient evidence of state practice to support the conclusion that the principle, as elaborated in Principle 15 of the Rio Declaration and various international conventions, has now received sufficiently broad support to allow a strong argument to be made that it reflects a principle of customary international law."[274]

542. On their side, Claimants contend that the precautionary principle cannot be *"transformed into applicable law by proving its value [as] custom"*[275] accusing Respondent of not making an effort to demonstrate so.[276] Claimants refer to the tribunal's reasoning in the *Grand River Arbitration* case,[277] which provided that the customary standard of protection does not incorporate other legal protections that may be provided under other sources of law. In other words, Claimants argue that the relevant rules of international law cannot override narrow treaty language, and should preclude Respondent from seeking to apply other laws to this case which are based on customary international law.[278]

543. The relevant context of the tribunal's decision in the *Grand River Arbitration* case is that the claimant sought to import contemporary conventional and customary principles concerning indigenous peoples to broaden the scope of protection provided in relation to fair and equitable treatment.[279] Certainly, NAFTA is not a treaty which specifically covers the rights of indigenous peoples, and the tribunal disregarded such argument because it was a clear attempt to expand the protection covered by NAFTA. These facts are clearly different from the present case because DR-CAFTA expressly envisages environmental protection, thus, making it a necessary requirement for the Tribunal to consider such customary international rules. Moreover, the invocation of the precautionary (and other) principle is well-founded in Costa Rican law – and therefore is prima facie permissible.

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272 **RLA-152**, Gilles J. Martin, "Apparition et définition du principe de precaution" (2000) 239 Petites Affiches 7, 9 cited in James R Crawford and others, *The Law of International Responsibility,* OSAIL (2010) 532.

273 **RLA-148**, A Trouwborst, Evolution and Status of the Precautionary Principle in International Law (The Hague, Kluwer Law International, 2002) 260–286.

274 **RLA-137**, Philippe Sands, *Principles of International Environmental Law* (CUP 2nd Edition, 2010) 279. The same conclusion was reached in the third edition of the book (**RLA-137**), p.228.

275 Claimants' Opening Statement, Day 1 Transcript, 98:4-8.

276 Claimants' Opening Statement, Day 1 Transcript, 94:1-5.

277 CLA-101, *Grand River Enterprises Six Nations, Ltd., ET AL. v United States of America*, ICSID Case No. ARB/10/5, Award, (Jan. 12. 2011).

278 Claimants' Opening Statement, Day 1 Transcript, 95:12-22; 96:1-4.

279 The decision in that case seems not to be shared by other NAFTA tribunals. In Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/5, Award, (Nov. 21, 2007)(**RLA-149**) it was sustained in para.111 that "Article 1131 (1) provides that '*a Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.'* The Tribunal agrees with the Respondent that this provision includes the application of rules of customary international law with respect to claimed breaches of Articles 1102, 1106 and 1110."

544. Respondent is not attempting to somehow invent or re-interpret the standards of protection contained in DR-CAFTA; rather Respondent is requesting that the Tribunal refer to the accepted international environmental principles when balancing Costa Rica's conduct against any protective measures that Costa Rica adopted in Chapter 10. This is entirely possible, and the international standards of environmental protection are eminently reconcilable.

545. Separately, it is not clear how the reasoning of the tribunal in the *Grand River Arbitration* case could actually help Claimants' case. Claimants acknowledge that the tribunal was right in considering that the standards of protection provided in investment treaties must remain narrow and attached to the text of the treaty. This totally contradicts Claimants' arguments for an expansive interpretation of Article 10.5 of DR-CAFTA.

546. In addition, Claimants also referred to the secondary sources of international law, namely, judicial decisions and writing of publicists.[280] In a desperate attempt to undermine the authorities cited by Respondent (which confirm that the precautionary principle is part of customary international law), Claimants allege that:

> "[…] there's an awful lot of law journals out there, and there's an awful lot of place a lot of room for a lot of people to write something about whatever the favored topic is. And I would strongly argue that just because you get yourself published doesn't make your--doesn't make you one of the highly qualified publicists that are referred to in this orthodoxy. And unfortunately, there are many examples in our friend's submissions of citations to legal writings which clearly were not authored by highly qualified publicists. And as a result, they cannot be authoritative sources of any international law."[281]
> "'Proof' offered is simply pathetic […]"[282]

547. Claimants once again have engaged in an *ad-hominen* argument.[283] Instead of challenging the content of Respondent's arguments, Claimants decided to question the character of the authors issuing their opinions on environmental matters. It is telling how Claimants' counsel categorizes other publicists, as if he has the authoritative power to decide who is qualified and who is not. We find that quite inappropriate in the circumstances.

548. In their exercise of discrediting legal authorities, Claimants also make reference to an opinion issued by Professor Philippe Sands, suggesting that he might not be the author of such a view, and if he is, that it does not clearly support Respondent's position.[284] However, on the contrary, as Respondent has shown above, Professor Sands has strong views of the precautionary principle being crystalized in customary international law.

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280 Claimants' Opening Statement, Day 1 Transcript, 89:7-12.
281 Claimants' Opening Statement, Day 1 Transcript, 89:13-22; 90:1-3; 96:9-20; 97:7-10.
282 Claimants' Closing Statement, Day 6, Todd Weiler's comments to slide 3 of his presentation.
283 Respondent's Rejoinder Memorial, para. 790.
284 Claimants' Opening Statement, Day 1 Transcript, 97:11-22; 98:1-3.

Respondent has also shown that international tribunals have acknowledged that the precautionary principle is sourced in customary international law.

549. Thus, Claimants have failed to dismiss Respondent's position that the governing law clause contained in DR-CAFTA mandates the application of environmental principles such as the precautionary principle, non-regression and preventative, which will assist the Tribunal in analyzing the conduct of Costa Rica in response to Claimants' wrongdoing.

550. But above all, there is no disputing that Costa Rican law embraces and upholds the precautionary principle. It is the Claimants' failure to respect that principle which has landed them in the complications they now face. Moreover, it is the Costa Rican authorities' respect and observance for the precautionary principle which has justified the conduct that has been pursued. Therefore, with respect the Claimants' desire to employ an international law analysis where possible – they are quite simply 'barking up the wrong tree.'

551. The existence of the precautionary principle, and its relevance to this Tribunal's award, is the observance of such principle under Costa Rican law, as we discuss in the next section. In the absence of any principle of international law *precluding* the application of Costa Rica's lawful invocation of the precautionary (and other) principles, it applies.

C. Costa Rica's environmental domestic law is also relevant to the Tribunal's adjudication

1. Environmental principles stemming from Costa Rican law frame Claimants' rights and obligations and inform the content of commitments made by Respondent

552. As explained, the governing law clause contained in DR-CAFTA requires that the Tribunal decide this dispute in accordance with the Treaty. DR-CAFTA encompasses not only Chapter 10 and the protection contained therein, but also other Chapters of the Treaty which are applicable to this case.

553. Respondent has already argued that it is necessary to review Chapter 17 in order to understand precisely how the Parties saw domestic laws being upheld and insulated from the scrutiny of international arbitral tribunals applying the standards contained in Chapter 10. [285] Moreover, Chapter 17 and particularly, Articles 17.1 and 17.2 mandate the application of Costa Rican law.

554. First, Article 17.1 provides that pre-existing levels of domestic environmental protection that already meet the desired standards of environmental protection will be maintained going

[285] Respondent's Counter-Memorial, paras. 443-444, 446-459; Respondent's Rejoinder Memorial, para. 80.

forward. It also encompasses a commitment for DR-CAFTA Parties to adopt or modify those laws and policies with the aim of encouraging higher levels of protection:

> "**Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and policies,** each Party shall ensure that its laws and policies provide for and encourage high levels of environmental protection, and shall strive to continue to improve those laws and policies." (emphasis added)

555. In this sense, the levels of domestic environmental protection form part of the legal framework to which Claimants were bound when they decided to invest in Costa Rica.

556. Second, Article 17.2 establishes the right of DR-CAFTA Parties to enforce environmental laws. It provides in part as follows:

> **Article 17.2: Enforcement of Environmental Laws**
>
> 1. (a) A Party shall not fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.

557. To "*effectively enforce*" environmental laws does not only mean avoiding under-enforcement. Therefore, this Article is designed to police against under-enforcement (*i.e.* "*omission*", "*inaction*") as well as to safeguard the preservation of certain levels of activity (*i.e.* "*action*") by the Parties to the Treaty.

558. Article 17.2 then provides that:

> 1. (b) The Parties recognize that each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources.

559. DR-CAFTA then provides a Party with the right to exercise with discretion certain powers upheld for the benefit of a Party in order to pursue the aspirational goals contained in Chapter 17 and also as a way to ensure the implementation of its own environmental laws without the fear that it might be in breach of DR-CAFTA (and in particular, in relation to Chapter 10).

560. The term "*effective enforcement*" in Articles 17.2(1)(a) and 17.2(1)(b) is to be interpreted with reference to the second part of the latter article:

> Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources.

561. Hence, this is the threshold that the Treaty establishes for DR-CAFTA Parties to comply with environmental protection enshrined in Chapter 17, and this is therefore precisely the standard that the Tribunal should apply when reviewing the conduct of Costa Rican authorities invoking and upholding established principles of Costa Rican law.

562. Third, Article 17.2(2) is more than eloquent in the sense that the investment protection contained in Chapter 10 should not operate as to weaken or reduce the protection that Costa Rica has established in its domestic laws:

> 2. The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for trade with another Party, or as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.

563. The above sections demonstrate that DR-CAFTA defers to each Party and their respective domestic laws with respect to the question of the standard that environmental laws should uphold. These provisions emphasize the need for enforcement of domestic laws in two ways: by avoiding under-enforcement *and* by maintaining existing levels of activity.

2. Claimants misconstrue Respondent's argument on domestic law – a strategy to dismiss applicable environmental rules

564. During the Hearing, Claimants argued in their Opening Statement that Respondent has attempted to turn these proceedings into *"international proceedings on the application of domestic law,"*[286] suggesting that Respondent's position is that Costa Rican law is the governing law to apply to the dispute:

> "[…] in light of the Respondent's attempt to turn the proceedings into some sort of commission of inquiry into its allegations of Claimants' non-compliance with municipal law […] it's important to recall that the Tribunal's agenda is dictated by the operation of the provisions you see here."[287]

> "Applicable law, of course, also does not include municipal law. Laws of Costa Rica, for a various simple reason of logic, can't possibly be the governing law because they're the evidence. You can't have law which is simultaneously both evidence in a proceeding and the governing law of it. And in this regard, I'm thinking of Paragraph 68 of the Rejoinder where Respondent states that it is its contention that these principles stem from international law and Costa Rican law, which under Article 10.22 DR-CAFTA constitutes the law that the tribunal should apply in deciding the dispute
>
> […]

[286] Claimants' Opening Statement, Day 1 Transcript, 70:5-6.
[287] Claimants' Opening Statement, Day 1 Transcript, 86:20-22; 87:1-4.

> Municipal law is not applicable law under Article 10.22. It makes no mention of the laws of the host State. So, it's not open to a tribunal to consider them."[288]

565. Respondent has never maintained either in paragraph 68 of the Rejoinder Memorial or in any other submission before this Tribunal, that Costa Rican law is the law applicable to the dispute according to Article 10.22 of DR-CAFTA. Article 10.22(1) is clear that the governing law in this case is DR-CAFTA and international law. But Claimants torture this point, and conflate the relevance of international law and the relevance of Costa Rican law. In any case, it is Claimants who have brought a matter of domestic law to an international tribunal.

566. The application of this provision does not override the role that Costa Rican law has in this case. In fact, both Parties have made reference in their written and oral submissions to Costa Rican law, acknowledging that it is relevant to determine Claimants' rights and obligations on the one hand, and to delineate those of Respondent on the other. It is also clearly the reference point for what has taken place in Costa Rica, both in terms of Claimants' conduct and Respondent's conduct. Therefore, any attempt to suggest that an analysis of Costa Rican law is to "apply" Costa Rican law as if it were the governing law, is grossly misplaced.

567. The tribunal in *Gold Reserve v Venezuela* properly determined the role that municipal law has to play in investment disputes where the treaty contained a similar governing law clause to that in DR-CAFTA:

> "The issue is to determine the role to be assigned to international law on the one hand and domestic law on the other. The governing law in this case is the BIT and international law, supplemented by such rules of public international law that shall be applicable. The Tribunal has thus been tasked with determining whether Respondent has breached obligations to Claimant under the BIT. **The role of Venezuelan law is nevertheless important in two respects. On the one hand, it informs the content of Claimant's rights and obligations within the legal framework established by the relevant municipal legislation,** as in the field of mining, social rights and **the protection of the environment. On the other hand, Venezuelan law also informs the content of commitments made by Respondent to Claimant that the latter alleges have been violated**."[289] (emphasis added).

568. The tribunal's decision articulates exactly how Costa Rican law should be treated in the present case, which is entirely consistent with Article 10.22(1). Costa Rican law informs the Tribunal of the content of Claimants' rights and obligations in Costa Rica within its legal framework as well as the content of Respondent's commitments. That is why Respondent asserted that:

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288 Claimants' Opening Statement, Day 1 Transcript, 90:4-19.

289 **RLA-151,** *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, September 22, 2014, para. 534.

> "We do not say that Costa Rican law is an applicable law. It is a fact. Costa Rican law is a fact which has to be proven in this arbitration. But it is a very important fact; and one, therefore, has to understand how Costa Rican law should be applied to focus properly on that involvement". [290]

569. Claimants' seeks to avoid any reference to Costa Rican law because they are intent that domestic environmental rules and principles not be taken into consideration by the Tribunal. It is a desperate attempt to circumscribe and isolate the case to *"Respondent's conduct measured against the standards in the DR CAFTA,"*[291] instead of framing it in the proper context of the relevant environmental law, including domestic law, which applies to the facts and allegations in dispute.

3. The content and effect of environmental principles under Costa Rican law

570. Having demonstrated that Costa Rican law is relevant to the extent that (i) it contextualizes the legal framework in which Claimants decided to make their alleged investment; and (ii) it serves to assess Costa Rica's measures that Claimants' consider are in breach of DR-CAFTA, it is important to remind the Tribunal of the content and effect of Costa Rican law.

571. Respondent has effectively demonstrated that environmental protection has been a strong concern for Costa Rica for more than 50 years.[292] For example, in 1994, the protection of the environment was adopted as an express constitutional principle, [293] the Costa Rican Constitutional Chamber of the Supreme Court of Justice has issued landmark decisions on environmental protection;[294] Costa Rica is a member of various international environmental agreements, and has enacted multiple environmental acts and regulations.[295]

572. This comprehensive legal framework has helped Costa Rica become a key ecological player in the region.[296] At the same time, it enshrines the key objectives of ensuring development that sustains the protection of the environment. In this sense, Costa Rica has recognized the dangers to which it was exposing its population through an intensive exploitation of its resources, and has put in place rules to ensure that economic development can proceed with due regard to the protection of nature.[297]

573. In order to address the intricacies of promoting development on the one hand, and protecting the environment on the other, Costa Rica has provided core principles to guide

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290 Respondent's Opening Statement, Day 1 Transcript, 166:5-10.
291 Claimants' Opening Statement, Day 1 Transcript, 19:15-16.
292 Respondent's Counter-Memorial, para. 464; Cross examination of Dr Julio Jurado, 1422:13-22; 1423:1-5.
293 **R-214**, Article 50, Constitution of Costa Rica.
294 First Witness Statement of Dr Julio Jurado, para. 32; R-166 Decision 3705-93, Constitutional Chamber, Supreme Court of Justice; R-185 Decision 10791-2004, Constitutional Chamber, Supreme Court of Justice, September 29, 2004.
295 Respondent's Counter-Memorial, paras. 54-59.
296 Respondent's Counter-Memorial, paras. 50-60; Cross examination of Dr Julio Jurado, Day 5 Transcript, 1421:21-22.
297 Id., 461.

the conduct of authorities with responsibility for environmental protection in the country, [298] the most relevant being: the precautionary, preventative and non-regression principles.

574. Although these principles are expressly set out in Costa Rican laws and regulations, Mr Ortiz sought, belatedly, [299] to have them considered by the Tribunal as mere principles rather than *"exact rules or regulations established*."[300] Mr Ortiz's position at the Hearing illustrates that even though Mr Ortiz is an expert in Costa Rican administrative law, he is not familiar with environmental regulations.

a) The precautionary principle is a key principle in Costa Rican environmental law

575. As stated in Respondent's submissions, within the international law arena there is a consensus among legal instruments, scholars and jurisprudence that the mere risk of impact to the environment triggers an obligation for the competent authorities to act and protect the environment without a need to be supported by scientific evidence.[301] The lack of scientific certainty when there is a threat of environmental damage is what triggers the application of the precautionary principle in the decision-making.[302]

576. Various states have adopted similar versions of the precautionary principle in their domestic law, and Costa Rica is no exception.[303] The precautionary principle is embedded in Costa Rican law and shows what should have been expected from Claimants when they set foot in Costa Rica to develop their real estate project.

577. Claimants' own expert, Luis Ortiz, when referring to the power of Costa Rican agencies to issue injunctions, emphasized the special character they have when it comes to the environment:

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298 First Witness Statement of Julio Jurado, paras. 32, 39.

299 Mr Ortiz's written testimony does not advance such a proposition.

300 Cross Examination of Luis Ortiz, Day 5 Transcript, 1379:12-13.

301 Respondent's Counter-Memorial, para. 63; Respondent's Rejoinder Memorial, paras. 83-85. See also **RLA-58**, Ellen Hey, "The Precautionary Concept in Environmental Policy and Law: Institutionalizing Caution" (1992) 4(2) The Georgetown International Environmental Law Review 303, 311; **RLA-74**, Arie Trouwborst, "Prevention, Precaution, Logic and Law: The Relationship Between the Precautionary Principle and the Preventative Principle in International Law and Associated Questions" (2009) 2(2) Erasmus Law Review 105,107-8; **RLA-97**, Jacqueline Peel, *The Precautionary Principle in Practice: Environmental Decision-Making and Scientific Uncertainty* (The Federation Press 2005) 18.

302 Respondent's Rejoinder Memorial, paras. 89-90; **RLA-80**, Caroline E. Foster, "Reversing the burden of proof to give effect to the precautionary principle" in *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality* (Cambridge University Press 2011) 240, 257; **RLA-90**, *Philip Morris Asia Ltd v The Commonwealth of Australia*, PCA Case No. 2012-12, Award, December 17, 2015; **RLA-58**, Ellen Hey, "The Precautionary Concept in Environmental Policy and Law: Institutionalizing Caution" (1992) 4(2) The Georgetown International Environmental Law Review 303, 305.

303 **RLA-109**, Jonathan B. Wiener, "Precaution" in Daniel Bodansky and others, *The Oxford Handbook of International Environmental Law* (OSAIL 2008), 599.

> "Well, environmentally, what applies is the precautionary principle, or in dubio pro natura, whose potential damage is irreversible. That's the example I mentioned earlier, but there are many, many more that one could cite. Environmentally, damage will always be irreversible; therefore, one of those three elements when it comes to the environment is practically always met."
>
> Direct Examination of Luis Ortiz, Day 4 Transcript, 1273:7-14.

578. Claimants contend in their Opening Statement that Respondent allegedly used the precautionary principle to shut down a Project, as if it were a "blank check" which authorizes any measure.[304] On the contrary, certain requirements must be met in order for Costa Rican agencies to apply the precautionary principle: a future harm to the environment in case of inaction, and the lack of scientific evidence at the time of adopting the decision.

579. Those requirements had to be met by the agencies. At the time the measures were adopted, there was no certainty either in relation to the existence of wetlands which had been drilled, filled and terraced nor in relation to the existence of forest which was cut without a permit. However, the reasonable doubts triggered by the number of complaints received and agencies reports, together with the likelihood of an irreparable harm, were sufficient to trigger action based on the implementation of the precautionary principle.

580. Mr Luis Martínez, put it very clearly when explaining his decision to prosecute Mr Aven:

> "So, with all of that information, we had to make a decision. We had to decide if we were going to bring charges or if we were going to ask that the file be filed. To a certain extent, we had two positions, but the decision has to be made. And in this case, we weighed, among other things, the precautionary principle that is under our constitution and legal system of environmental protection."
>
> Redirect Examination of Luis Martínez, Day 4 Transcript, 1172:17-22; 1173:1-2.

581. The threshold of harm that might occur where no action is taken has been addressed in a variety of forms: threats of serious irreversible damage,[305] threat of significant reduction or loss of biological diversity,[306] and potential adverse effects.[307] Respondent's experts have highlighted the importance that wetlands and forests have for the environment,[308] which has also been underscored by Costa Rican courts.[309] Having regard to the role that wetlands and forests play in the environment, the negative impact and the threat of

304 Claimants' Opening Statement, Day 1 Transcript, 133:14-22; 134:1-4.
305 **RLA-40,** Rio Declaration on Environment and Development, 1992
306 **RLA-39,** Convention on Biological Diversity, preamble (1992).
307 **RLA-112,** Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Cartagena, January 29, 2000, in force September 11, 2003, 39 ILM 1027, Articles 10(6) and 11(8)., Articles 10(6) and 11(8)
308 First KECE Report, paras. 30-33, 36-37.
309 Second Witness Statement of Dr Julio Jurado, paras. 159-160.

irreversible damage is more than evident.[310] For instance, in the case of the removal of trees, the First KECE Report explains the disruptive effect that it has on the environment.[311]

582. In this context, the actions that were performed by Claimants – by drilling, filling and terracing the wetlands and the cutting of trees – represented a real threat to the environment, which reasonably and lawfully triggered an immediate response from Costa Rica. If it were not for Costa Rica acting under the precautionary principle, an irreparable damage would have occurred.[312]

583. In sum, the precautionary principle endorsed by Costa Rican environmental law is a real substantive weapon,[313] which has the effect of instructing public agencies to act as soon as the likelihood of impact to the environment arises.

b) <u>The preventative principle is the other side of the precautionary principle which should inform the Tribunal's decision</u>

584. The preventative principle also forms part of the protective framework which applied when Claimants chose to develop the Project, and as such should also inform the Tribunal's decision.[314] It has not only been recognized by international scholars,[315] but it also embedded in Costa Rican law.[316]

585. It is therefore clear that the preventative principle warrants action in the event that a project is assessed to cause damage to the environment.[317] As explained by Dr Jurado, the preventive principle is one which compels the State to adopt measures for prevention based on the certainty that a given activity might generate environmental damage.[318]

586. In addition, the Environmental Impact Assessment constitutes a clear application of it:

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310 First KECE Report, Exhibit C.
311 First KECE Report, paras. 38-42.
312 Respondent's Rejoinder Memorial, para.96.
313 Second Witness Statement Dr Julio Jurado, para. 357.
314 Respondent's Rejoinder Memorial, paras. 106-111.
315 **RLA-76**, Nicolas de Sadeleer, The principles of prevention and precaution in international law: two heads of the same coin? in Malgosia Fitzmaurice, David M. Ong, and Panos Merkouris (eds), *Research Handbook on International Environmental Law* (Edward Elgar Publishing Limited 2010) 182; **RLA-74**, Arie Trouwborst, "Prevention, Precaution, Logic and Law: The Relationship Between the Precautionary Principle and the Preventative Principle in International Law and Associated Questions" (2009) 2(2) Erasmus Law Review 105.
316 C-207.
317 Respondent's Counter-Memorial, para. 64.
318 Direct Examination of Dr Julio Jurado, Day 5 Transcript, 1426:20-22, 1427:1.

"Here I would like to especially mention the evaluation of the environmental impact. And as I said before, this arises from Article 50 of the Constitution to the extent that the Environmental Impact Assessment is a naturalization of the preventive principle at its legislative level. The Constitutional Chamber has shown that the basis of Article 17 of the Organic Environmental Law, which is the article that establishes that all human activities that might alter or destroy elements of the environment or might generate toxic or dangerous waste require environmental assessment. And that article is based on Article 50 of the Constitution. It is a legal article which is a direct development of Article 50 of the Constitution because it is a way to materialize the preventive principle. What this means is that a set of obligations are developed by the State and by developers with regard to this idea of complying with the preventive principle."

Direct Examination of Dr Julio Jurado, Day 5 Transcript, 1427:14-22; 1428:1-13.

587. Despite of Claimants' efforts to restrict the application of the principle to very special areas of environmental protection,[319] Costa Rican law does not make those distinctions. As an embedded principle of international law as much as Costa Rican law – and therefore equally relevant to Claimants' legitimate expectations as to how the environmental framework would operate in Costa Rica – the principle constitutes another specific vehicle for the implementation of environmental protection.

c) <u>The non-regression principle is also an interpretative tool for environmental laws</u>

588. The application of the non-regression principle should also guide the interpretation that the Tribunal should follow in the present case. This principle provides that the enactment and interpretation of environmental legislation must not be made to the detriment of environmental protection. This has been the position under both the international law perspective[320] as well as pursuant to Costa Rican law.[321] In this regard, the non-regression principle stems from international treaties and agreements in force in Costa Rica (including DR-CAFTA) [322] and it has also been recognized by the Costa Rican Constitutional Chamber, as mentioned by Dr Jurado.[323]

589. In their Opening Submissions, Claimants alleged that:

> "The nonregression principle, which is put against us, doesn't apply because we don't argue for the modification of environmental law; we're happy with the environmental law as it stands. We're that's not a problem. We complied with it, as it stood. So, the nonregression principle just has-- it's another ─has-- it's another red herring here. If we were challenging the environmental laws, maybe there would be a debate to be had; but we aren't, and there isn't."[324]

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319 Claimants' Reply Memorial, para. 64.

320 **R-110,** Municipality notifies Claimants of complaints of neighbors and requests documentation (OIM 244-2011), 185, July 8, 2011.

321 Respondent's Rejoinder Memorial, paras. 112-118.

322 **R-400,** Mario Pena Chacón, *The Environmental Non-regression Principle in Latin American Comparative Law* (United Nations Development Program 2013).

323 Second Witness Statement of Dr Julio Jurado, para. 169.

324 Claimants' Opening Statement, Day 1 Transcript, 132:20-22; 133:1-8.

590. Apart from the mistaken premise that Claimants complied with Costa Rican environmental law, this proposition constitutes a complete misunderstanding of the non-regression principle, and how it applies. The non-regression principle has not been "put against" Claimants. On the contrary, such principle has been brought by Respondent as an interpretative tool to enable the Tribunal to assess the facts presented in light of Claimants' manifest breaches of environmental law. As Dr Julio Jurado correctly summarizes:

> "It is important to underline that, this being an environmental issue, the analysis must also integrate the environmental law principles already discussed such as the precautionary principle, the preventative principle, the principle of impartiality of environmental protection, the irreducibility and the principle of non-regression".[325]

591. As they did when planning their investment, Claimants continue to disregard the relevant methodology to abide by rules of environmental protection. However, they should have known at the time, and the lawyers testifying on their behalf should certainly know, even as non-specialists of environmental law, that any determination of compliance with environmental laws and regualtions entails the resort to principles such as the non-regression principle. These rules and principles of interpretation also serve to assess how Respondent implemented its environmental laws in a situation where permits were issued as a result of blatant misrepresentations and misinformation of the Costa Rican authorities. In this context, both Costa Rican and international environmental law entitled Respondent to enforce, at all times, its rules of environmental protection. Of course, the permits were granted on foundations of illegality. That enforcement power existed at all times, and Claimants knew or should have known this fact when they purported to invest in Costa Rica.

D. CONCLUSION

592. The standards of protection for the environment in Costa Rica are utterly relevant to the Tribunal's determination of Claimants' alleged entitlement to protections they claim were violated, and of Respondent's conduct in relation to those protections. On one hand, these standards set forth the legal framework on which Claimants planned and made their alleged investment. On the other, they inform on Respondent's conduct, which Claimants put at issue.

593. Chapter 17 of DR-CAFTA defers to each member state and their respective domestic laws as to the standards upheld by their respective environmental laws. Chapter 17 emphasizes the need for the enforcement of domestic laws in two ways: by avoiding under-enforcement and by maintaining levels of activity.

594. Costa Rica's domestic environmental standards have turned the country into a key player in the region. Its entire legal framework provides core principles that guide the conduct of

[325] Second Witness Statement of Dr Julio Jurado, para. 187.

local authorities in the country and certainly guided their actions in relation to Claimants' misconduct.

V. JURISDICTION OF THE TRIBUNAL TO HEAR THE CLAIMS

595. Respondent respectfully challenges the Tribunal's jurisdiction as follows: (i) the Tribunal's jurisdiction *ratione personae* over Mr Aven; (ii) the Tribunal's jurisdiction *ratione materiae* over Mr Shioleno and Mr Raguso's alleged investment; (iii) the Tribunal's jurisdiction *ratione materiae* over the properties that Claimants do not own; and (iv) the Tribunal's jurisdiction *ratione materiae* over the Concession site.

A. Mr Aven is not a protected investor under DR-CAFTA

596. It is undisputed that international law condemns investors' abuse of rights for the sole purpose of benefiting from investment treaty protection.[326] Claimants attempt to allocate DR-CAFTA's protections (afforded to American investors) to Mr Aven, an investor who is seeking treaty protection after having conducted his dealings in Costa Rica as an Italian national.[327]

597. More specifically, international investment tribunals have found an abuse on the part of the investor when he "switches" his nationality *after* the dispute with the host State has arisen.[328] This is exactly what Mr Aven did. Mr Aven testified to using his Italian nationality during the implementation of the Las Olas Project in Costa Rica:

> "ARBITRATOR BAKER: So, as you sit here today, do you remember ever representing yourself in any of the transactions in Costa Rica as an Italian citizen?
>
> THE WITNESS: Yes, I do. And I--I did it as a--you know, just as an option. You know, I just had the Italian passport. And I, you know--on a number of occasions I did. But, I mean, I think for the Project, it was mostly--I was--I was held--I held myself out as a U.S. citizen."
>
> Redirect Examination of David Aven, Day 3 Transcript, 891:13-22.

598. Mr Aven only decided to appear as an American citizen when bringing this claim against Costa Rica. That is after wetlands were discovered by authorities on the Project Site and the state apparatus reacted to prevent continuing damage to the environment.

599. Mr Aven engaged in treaty shopping and the Tribunal cannot grant him the protection of DR-CAFTA.

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326 **RLA-75,** *Phoenix Action, Ltd v The Czech Republic*, ICSID Case No. ARB/06/5, Award, April 16, 2009, paras. 136; **RLA-1**, *Venezuela Holdings, B.V., et al v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, June 10, 2010; **RLA-90**, *Philip Morris Asia Ltd v The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, December 17, 2015.

327 Respondent's Counter-Memorial, paras. 263-267.

328 **RLA-75,** *Phoenix Action, Ltd v The Czech Republic*, ICSID Case No. ARB/06/5, Award, April 16, 2009, paras. 136 et seq;
RLA-1, *Venezuela Holdings, B.V., et al v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, June 10, 2010, paras. 199 et seq;
RLA-90, *Philip Morris Asia Ltd v The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, December 17, 2015, para. 554.

B. Mr Shioleno and Mr Raguso do not hold a covered investment under DR-CAFTA

600. Article 10.28 of the Treaty requires that an asset have characteristics of an investment to be considered a protected investment under the Treaty. Specifically, DR-CAFTA requires that an investor commits capital or other resources for it to be considered the holder of a "covered investment":

> "Article 10.28, definition of ¨investment¨
>
> **investment** means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the **commitment of capital or other resources**, the expectation of gain or profit, or the assumption of risk." (emphasis added).

601. As pointed out by Dr Hart in his Second Expert Report[329] and addressed by Respondent during its Opening Statement during the Hearing,[330] Claimants have presented no evidence of any capital contributed by Mr Shioleno or Mr Raguso to the Las Olas Project. No characteristics of an investment are present in this case because no resources were contributed to the alleged investment, and no assumption of risk could have been raised on their part. Mr Shioleno and Mr Raguso might have had an expectation of gain, but that was not preceded by any contribution to the alleged investment.

602. During the Hearing, Mr Shioleno confirmed this fact himself:

> "Q: So although you said that you did not remember when you acquired the shares, is it correct that you never invested cash in the Las Olas Project but, instead, received your investment in return for services?
>
> A: Yes, that's correct.
>
> Cross Examination of Jeffrey Shioleno, Day 2 Transcript, 365:2-7.
>
> **"Q: Did you commit any capital to this project?**
>
> **A: No. I already stated I did not commit capital.**
>
> Q: And your marketing efforts were limited to—from what we see here—an advertising campaign in your area, in Tampa?
>
> A: That's correct."
>
> Cross Examination of Jeffrey Shioleno, Day 2 Transcript, 371:4-10.
>
> "Q: But you didn't realize any sales during that period; correct?
>
> A: No."
>
> Direct Examination of Jeffrey Shioleno, Day 2 Transcript, 366:4-6.

329 Second Hart Report, paras. 86-87.

330 Respondent's Opening Statement, Day 1 Transcript, 197:8-12. ("*And Claimants have failed to submit any proof of an actual transfer of shares. In fact, Credibility's Second Report, paragraphs 86 and 87, at least with regards to Mr Shioleno and Mr Raguso, no evidence of payment of any form of capital was found.*")

603. Mr Shioleno also confirmed that he never received any stock certificates from Mr Aven, which could have at least proven that he actually held an interest in the project. The same applies to Mr Raguso. If any of the Claimants had in fact received stock certificates from the Enterprises they allege they own, they would have been able to produce them during the Document Production stage of the proceedings. Also, Claimants have not produced any shareholder's registries, which under Costa Rican law, constitutes proof over any stock certificate.[331]

604. Mr Raguso also did not contribute any capital to the Las Olas Project. According to Claimants, Mr Raguso was supposed to provide services as Construction Manager starting mid-2011;[332] however, given the suspension of the works, Mr Raguso never contributed anything to the project. Again, he might have had an unsupported expectation of gain from his conversations with Mr Aven, but that does not equate to actually having contributed a resource with an assumption of risk to the alleged investment in Costa Rica.

605. Because Claimants have not shown that both claimants hold any covered investment under Article 10.28 of the Treaty, the Tribunal must decline jurisdiction over any claims pertaining to Mr Shioleno and Mr Raguso.

C. <u>The Tribunal has no jurisdiction over the properties that Claimants do not own</u>

606. In Annex II of its Rejoinder Memorial, Respondent offered conclusive evidence (derived from Costa Rica's National Registry) that the property lots were not owned by Claimants or by the Enterprises. Claimants have not rebutted in any way the lack of ownership of those 78 properties comprising the Las Olas Project. During their Opening Statement, Claimants simply asserted that it should be for the parties' quantum experts to adjust their calculations accordingly.[333]

607. Therefore, Respondent maintains its objection and requests the Tribunal to decline jurisdiction to hear any claims arising out of the **78 properties** that are not part of Claimants' alleged investment.

D. <u>The Tribunal has no jurisdiction over the Concession site</u>

608. Respondent objects to the Tribunal's jurisdiction over any claims relating to the Concession site because Mr Aven owned the totality of shares in La Canícula (the Concession's titleholder) in violation of Articles 47 and 53 of the ZMT Law. This entailed a serious violation of Costa Rican law during the establishment of the investment and therefore, precludes the Tribunal's jurisdiction.

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331 **R-561**, Second Civil Tribunal, Section I, Decision No. 00356, September 25, 2012, para. IV.
332 First Witness Statement of Roger Francis Raguso, paras. 27, 45.
333 Claimants' Opening Statement, Day 1 Transcript, 106:20-22; 107:1-3.

609. In this sense, international investment case law and scholars agree that when an investor *acquires its investment* in violation of the laws of the host State, it trumps the jurisdiction of the arbitral tribunal:

- In *Inceysa v El Salvador*, the tribunal regarded fraudulent conduct of an investor in obtaining an investment under El Salvador law to be a breach of the principle of good faith, which prevented the tribunal from taking jurisdiction over the claim. In the view of the tribunal in that case, El Salvador had not consented to submit to investment arbitrations in respect of investments acquired in bad faith.[334]
- In *Phoenix v Czech Republic,* the tribunal concluded that the purchase of the investment was not a bona fide transaction and thus the investment was not one that could be protected under the ICSID system. The conduct of the claimant, in the view of the tribunal, was an abuse of process and on that basis the Tribunal concluded that it did not have jurisdiction over the claim.[335]
- In *Alpha v Ukraine,* the tribunal held that if the investment has been acquired by the foreign national in violation of the host State's laws and the effect of that violation is to render the investment 'illegal per se' or 'illegal as such', then the tribunal is without jurisdiction to entertain the foreign national's claims in arbitration.[336]
- In *Saba Fakes v Republic of Turkey*, the tribunal declined jurisdiction on the basis that the foreign national must have acquired an asset that is recognized by the host State's laws in a manner that is effective under such laws.[337]

610. Also, recognized scholars like Zachary Douglas point out that:

> "A related problem arises where the host State alleges that the claimant has violated its law in the acquisition of its investment. If that allegation is substantiated before the investment treaty tribunal, then that must be fatal to the jurisdiction of the tribunal."[338]

611. Against this background, Claimants alleged during the Hearing that Claimants' ownership of La Canícula or the Concession is irrelevant because the Treaty merely requires them to prove *de facto* control over them.[339] In making this argument, Claimants completely ignore the effects of illegality on the acquisition of the investment over the jurisdiction *ratione materiae* of the Tribunal. Respondent will first address Claimants' defenses under international law. The next section will recapitulate Respondent's arguments regarding the illegal acquisition of the Concession. The final sections will deal with Claimants' defenses

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334 **RLA-11**, *Inceysa v. El Salvador*, Award, August 2, 2006, paras. 238-239.
335 **RLA-75**, *Phoenix v. Czech Republic*, Award of April 15, 2009, para. 145.
336 **RLA-163**, *Alpha Projektholding Gmbh v Ukraine*, ICSID Case No ARB/07/16, Award, November 8, 2010, para. 294.
337 **RLA-162**, *Saba Fakes v Republic of Turkey*, ICSID Case No ARB/07/20, Award, July 14, 2010, paras. 147-156.
338 **RLA-51**, Zachary Douglas, The International law of Investment Claims (CUP), 2009, p. 53.
339 Claimants' Opening Statement, Day 1 Transcript, 103:6.

under Costa Rican law and the Tribunal's inquiry as to why Claimants' acquisition of La Canícula has not yet been declared null.

1. Claimants' defences conflate the Tribunal's jurisdiction ratione materiae over the Concession site with legal standing issues

612. During the Hearing, Claimants tried to justify the forfeiture of their interests in La Canícula by alleging that Articles 2.1 and 10.28 of the Treaty only require them to prove *prima facie "ownership or control"* of an investment.[340] Claimants' position would imply that both an entity exercising *de jure* control over an investment and an entity exercising *de facto* control in respect of the same investment could both seek remedies in investment treaty arbitration for the same prejudice. In fact, the holding in *Thunderbird v Mexico,* one of the new legal authorities Claimants rely on, has been critiqued for exactly posing this as problematic.[341]

613. With this theory, Claimants bring arguments relating to the legal standing of the investors in a discussion that solely referred to the Tribunal's jurisdiction *ratione materiae.* The question of "control over an investment" has been discussed by tribunals in the sphere of the standing of a claimant to appear before a tribunal as a "covered investor" under *ratione personae* jurisdiction. Indeed, it has been argued that:

> "The concept of 'control' is used in a great number of investment treaties to designate the **requisite nexus between the claimant and the investment.**
>
> [...]
>
> Whether or not the term 'control' is actually used in the text of the investment treaty, it is clear that it must be implied. In each and every case, the claimant must have had control over the investment that has been affected by measures of the host State **in order to fall within the scope of the tribunal's jurisdiction *ratione personae*.**"[342]

614. In its jurisdictional objection, Respondent has not challenged Claimants' legal standing *vis-à-vis* their investment but has held that Claimants' acquisition of their interests in La Canícula was unlawful. Whether Claimants held direct or indirect control of those interests in Costa Rica is irrelevant to the Tribunal's jurisdiction *ratione materiae* because those illegalities deprive the Tribunal of jurisdiction.

615. In turn, Claimants rely on a series of new legal authorities to support the fact that "mere *de facto* control" of their alleged investment is enough for the Tribunal to exercise jurisdiction. The cases Claimants rely on simply do not support their theory because they do not address the effects of illegal conduct from the investor over "*de facto* control."

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340 Claimants' Opening Statement Demonstrative, slide 16.
341 **RLA-51**, Zachary Douglas, The International law of Investment Claims (CUP), 2009, p. 308-309.
342 **RLA-51**, Zachary Douglas, The International law of Investment Claims (CUP), 2009, p. 299, 300.

616. First, Claimants rely on *Thunderbird v Mexico* as a *"de facto control case."*[343] In *Thunderbird*, the tribunal found that even if the claimant had less than 50% ownership of the minority local subsidiaries, the evidence showed unquestionable de facto control capable of being the driving force of the investment.[344] The tribunal only looked at control after setting out the legal ownership structure and confirming that Thunderbird, albeit being a minority shareholder, actually owned the shares. Furthermore, this case did not deal with illegalities in the acquisition of the investment, as we see in the instant case.

617. Second, Claimants rely on *Perenco Ecuador v Ecuador*, where the tribunal literally looked at the *"exceptional circumstances of this case,"*[345] to accept *de facto* control of some heirs given that, while legal title existed under the host State's laws (France), legal title was not proven at the place of incorporation of the claimant (Bahamas). For equity reasons, the tribunal found that the facts presented satisfied a showing of *de facto* control.[346] Once again, this case did not deal with illegalities committed by the investor during the establishment of its investment.

618. Third, Claimants rely on *SwemBalt v Latvia.*[347] This case does not discuss control over the investment or *de facto* control, as Claimants allege. In *SwemBalt,* the tribunal found that the investor did in fact own the ship that was part of the investment and found that the investor had complied with Latvian law during the establishment of the investment.[348]

619. Fourth, Claimants rely on *Sedelmayer v Russia,* where the tribunal looked into the "control theory" with regards to whether an individual shareholder could be regarded as an investor even with respect to investments formally made by the companies in which he is a shareholder.[349] Nothing is further from the facts in our case. Furthermore, just like in *SwemBalt*, in *Sedelmayer*, the tribunal found that the investor did not *"breach Soviet or Russian laws at any point in time."*[350] Therefore, the tribunal did not make any ruling that would be relevant under international law on the Claimants' lack of ownership or control of the investment.

620. In sum, both cases are inapplicable to this case because neither of the tribunals made any findings of international law but just dismissed the claimants' assertions on the basis of lack of ownership and illegal conduct.

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343 CLA-70, *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award, January 26, 2006.
344 Id., para. 110.
345 **RLA-21**, *Perenco Ecuador Limited v. The Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and Liability, September 12, 2014, paras. 526
346 Id., paras. 525-530.
347 CLA-163, *AwemBalt AB, Sweden v. Republic of Latvia*, Decision by Court of Arbitration, October 3, 2000.
348 CLA-163, Id. paras. 30, 32-35.
349 CLA-162, *Franz Sedelmayer v. Russia Federation*, Arbitration Award, July 7, 1998, paras. 219-227.
350 Id., p. 108.

621. Fifth, Claimants' reliance on *Aguas del Tunari v Bolivia* is irrelevant to the tribunal's analysis because, in that case, the tribunal required that the investor exercised control by actually owning legal rights in the vehicle corporations. This decision did not refer to *de facto* control as Claimants would seek to apply in this case. The Tribunal in *Aguas del Tunari v Bolivia* held:

> The Tribunal, by majority, concludes that the phrase "controlled directly or indirectly" means that one entity may be said to control another entity (either directly, that is without an intermediary entity, or indirectly) if that entity possesses the legal capacity to control the other entity. Subject to evidence of particular restrictions on the exercise of voting rights, such legal capacity is to be ascertained with reference to the percentage of shares held. In the case of a minority shareholder, **the legal capacity to control an entity may exist by reason of the percentage of shares held, legal rights conveyed in instruments or agreements such as the articles of incorporation or shareholders' agreements, or a combination of these.** In the Tribunal's view, the BIT does not require actual day-to-day or ultimate control as part of the "controlled directly or indirectly" requirement contained in Article 1(b)(iii). The Tribunal observes that it is not charged with determining all forms which control might take. It is the Tribunal's conclusion, by majority, that, in the circumstances of this case, where an entity has both majority shareholdings and ownership of a majority of the voting rights, control as embodied in the operative phrase "controlled directly or indirectly" exists.[351]

622. In fact, no mention of *de facto* control is made in this decision and the tribunal only found "control" over the vehicle corporations upon finding that the claimant owned shares in the corporations.[352] This case did not deal with illegalities during the acquisition of the investment.

623. Sixth, Claimants' reliance on *S.D. Myers v Canada* is also not applicable to this case because the tribunal asserted jurisdiction when it found that the final investor in the family chain "indirectly" controlled the investment.[353] Respondent has never challenged Claimants' control of the Enterprises; rather, Respondent is contesting Claimants' **ownership** of their interests in La Canícula and the Concession because of illegal acquisition. The holding of "control" issues in *S.D. Myers v Canada* has been strongly critiqued:

> "**The pitfalls of an unprincipled approach to the requisite degree of 'control' is illustrated by the tribunal's decision in *S.D. Meyers v Canada*.** The claimant…brought a claim pursuant to Article 1116 of NAFTA for damage to its investment in Canada. The investment was a Canadian enterprise, 'Myers Canada'. Canada submitted that Myers Canada was not owned or controlled directly or indirectly by SDMI as required by the definition…of Article 1139 of NAFTA because SDMI did not own the shares of Myers Canada. Instead, members of the Myers family owned the shares of Myers Canada. The evidence was submitted to the tribunal to the effect that the majority shareholder and 'authoritative voice' of SDMI also had control over

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351 CLA-150, *Aguas del Tunari, S.A., v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, October 21, 2005, para. 264.

352 Id., paras. 317, 319.

353 CLA-161, Meyers v. Gov't of Canada, Second Partial Award, 21 Oct. 2002, para. 229.

> Myers Canada; hence Myers tested against the relevant test for control in US legislation. **Instead, the tribunal's decision was based upon an unfortunate appeal to policy.**
>
> […]
>
> **This is tantamount to saying that jurisdictional rules should give way to a good claim on the merits**."[354] (emphasize added).

624. Furthermore, this finding was challenged in judicial review before the Canadian Federal Court as amounting to a decision *ex aequo et bono.*[355] Respondent does not see how Claimants could ask the Tribunal to rely on this case. Moreover, this case did not deal with illegalities during the acquisition of the investment and therefore cannot shed light on the effects of an illegality over a *de facto* control.

625. Finally, Claimants also allege that historically tribunals have been reluctant to deny standing on the basis of non-compliance with formalistic/technical rules.[356] Respondent does not disagree with this premise, but denies that Claimants' violation of the ZMT Law can be considered a mere formality. For example, in *Mytilineos Holdings v Serbia*, the tribunal dismissed illegality allegations from the respondent considering minor breaches when respondent asserted that a mere formality was a cause of the illegality:

> "Respondents submit that the Agreements did not comply with a number of formalities found in Article 17 FIL, a requirement for registration in accordance with Article 26 FIL and a special procedure for federal government approval of investment contracts under Article 22 FIL."[357]

626. Likewise, in *Quiborax v Bolivia*, the tribunal rejected the respondent's illegality allegations as "*trivial*" because they referred to the lack of the secretary's signature in the shareholders' registry.[358] In *Tokios Tokeles v Ukraine*, similar allegations were asserted by the respondent and the tribunal rejected those objections.[359] Ukraine alleged that the subsidiary's name was improper because "*subsidiary enterprise*" but not "*subsidiary private enterprise*" is a recognized legal form under Ukrainian law.[360] The respondent also alleged that there were some errors in the asset procurement and transfer agreements, including, in some cases, the absence of a necessary signature or notarization.[361]

627. Respondent would ask the Tribunal to compare these cases with the evidence Respondent has put forward to show the importance of the 51% rule for Costa Rica's public policy. Dr Jurado's second witness statement has dealt extensively with the importance of ZMT

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354 **RLA-51**, Zachary Douglas, *The International law of Investment Claims (CUP)*, 2009, p. 305-06.
355 Id., p. 306.
356 Claimants' Opening Statement Demonstrative, slide 16.
357 **RLA-153,** *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia*, Partial Award on Jurisdiction, September 8, 2006, para. 53.
358 CLA-123, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, September 16, 2015, para. 281.
359 **RLA-154**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, April 29, 2004, para. 86.
360 Id., para. 83.
361 Ibid.

concessions for the Costa Rican state, including it being considered a public good protected by Costa Rican law under public interest policies. Its importance for Costa Rica derives from the issuance of binding jurisprudence from the Constitutional Chamber and the Attorney General's Office. The former has even qualified practices intentionally targeted to evade the 51% rule as constructive fraud (*fraude de ley*).[362] Cleary, we are not looking at a "*mere*" formality.

628. Indeed, Dr Jurado's testimony during the Hearing raised how this practice is considered constructive fraud and not the violation of "*a mere formality*" as Claimants purport:

> "In this advisory role, it has issued many opinions from municipalities when they consult matters having to do with the Maritime Terrestrial Zone, so one has been this topic. And the office has said that this practice is what is called legal fraud.
>
> In other words, using a legal procedure, what they are doing is evading from something set forth in a different law. And what's happening here is that there are Costa Ricans who act as trustees for others in order to ensure that the right number of shares are held by a Costa Rican allowing foreigners to have Concessions that pursuant--or foreign companies, rather.
>
> Foreign companies can have Concessions when the law for the Maritime Terrestrial Zone expressly indicates a percentage shareholding, that 51 percent has to be held by a Costa Rican in order to be a Concessionaire.
>
> That is a way of avoiding that law. It's by using this mechanism. So, I give shares to Costa Ricans who, obviously, have absolutely nothing to do with that activity that has been carried out in the Concession. They're not involved. They just lend their name for the operation. And this is legal fraud. This has been pointed out to the municipalities because this is a criterion used by our office."
>
> Cross Examination of Julio Jurado, Day 6 Transcript, 1540:12-22; 1541:1-15.

629. In sum, Claimants' jurisdictional defense referring to Claimants' legal standing does not override Claimants' illegal acquisition of their interests in La Canícula.

2. Claimants have the burden to prove the legitimate ownership of their investment

630. It is generally accepted that the claimant must bear the burden of proving that it owns a protected investment. Under Article 24(1) of the UNCITRAL rules *"[e]ach party shall have the burden of proving the facts relied on to support his claim or defense."*

631. In *CCL v Kazakhstan*, the tribunal emphasized this burden of the claimant specifically in light of the respondent statements questioning the investment ownership:

> In consequence hereof **it must be a procedural requirement that a Claimant party, requesting arbitration on the basis of the Treaty, provides the necessary information and evidence concerning the circumstances of ownership and control, directly or indirectly, over [Claimant–investor] at all relevant times. This is especially the case when reasonable doubt has been raised as to the actual ownership of and control over the company seeking protection.** In the present case, by

[362] Second Witness Statement of Julio Jurado, paras. 198-226.

> [Mr. X]'s admission, the sole activity of [Claimant–investor] since the termination of the Agreement by the Kazakh courts, and the sole asset of [Claimant–investor], is the arbitration initiated against [Respondent–Kazakhstan].[363] (emphasis added).

632. Furthermore, in *CCL v Kazakhstan,* because the claimant did not provide the necessary evidence to prove the ownership of the investment, the Tribunal denied jurisdiction on the basis of the treaty.[364] The tribunal in *Perenco Ecuador v Ecuador,* held the same.[365]

633. Likewise, in *Europe Cement Investment v Turkey*, the tribunal drew an adverse inference against the claimant due to the lack of evidence produced to rebut the respondent's allegation of lack of ownership:

> "**The Claimant's failure to provide any serious rebuttal to the Respondent's arguments strongly suggests that it never had such ownership, at least at the relevant time for jurisdiction and that perhaps it never had ownership at all. The burden to prove ownership of the shares at the relevant time was on the Claimant. It failed completely to discharge this burden.**
>
> In the Tribunal's view the circumstantial evidence points strongly to the conclusion that Europe Cement did not own shares in CEAS and Kepez at the relevant time. In view of the failure of the Claimant to produce the documents ordered, the Tribunal has no direct evidence that any particular document placed before it was or was not authentic, but the implication of lack of authenticity is overwhelming. All of the evidence placed before the Tribunal, and not contradicted by the Claimant, is that the share transfer agreements are not what they claim to be and that no transfer of CEAS and Kepez shares to Europe Cement took place at least before 12 June 2003. Indeed**, the evidence points to the conclusion that the claim to ownership of the shares at a time that would establish jurisdiction was made fraudulently**."[366] (emphasis added)

634. In *Europe Cement Investment v Turkey,* the tribunal not only denied jurisdiction for lack of a covered investment[367] but also found that a claim based on the false assertion of ownership of an investment was an **abuse of process**.[368]

635. Having shown that Claimants' new arguments relating to their alleged "control over La Canícula" is meritless; Respondent will now address Claimants' new contentions relating to the facts of the acquisition of their interests in La Canícula.

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363 **RLA-155**, *CCL v Republic of Kezakhstan*, SCC Case No. 122/2001, Jurisdiction Award, January 1, 2003, para. 82.

364 Id., para. 84.

365 **RLA-156**, *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador),* ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, September 12, 2004, para. 98.

366 **RLA-27**, *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, August 13, 2009, paras. 166-167.

367 Id., para. 170.

368 Id., para. 175.

3. Mr Aven acquired the totality of the shares in La Canícula in violation of the ZMT Law

636. For the chronology of acquisition of Claimants' rights in La Canícula, Respondent directs the Tribunal to paragraphs 174 to 186 of the Rejoinder Memorial. During the written pleadings stage, Claimants and Mr Aven admitted that he purchased **the totality of the shares** in La Canícula from Mr Monge on April 1, 2002.[369] During the Hearing, after appreciating how detrimental that admission was for their case, Claimants alleged that they *"realized that there was an error in the dating of one the documents."*[370]

637. Claimants allege that the actual date of acquisition of the land was April 30, 2002 rather than April 1, 2002.[371] This new assertion is in total contradiction with Claimants' written submissions where they constantly alleged that their rights in La Canícula and the Concession's property were acquired on April 1, 2002:

- Claimants' Memorial: *"On April 1, 2002, Inversiones Cotsco acquired property rights in a parcel of land held by La Canícula, for an amount of CRC 100,000."*[372]
- Claimants' Reply Memorial: *"[O]n April 1, 2002, Mr Aven entered into an Agreement for the Purchase-Sale, Endorsement and Transfer of Shares with Carlos Alberto Monge Rojas and Pacific Condo Park pursuant to which he acquired (1) the totality of the shares of La Canicula from its sole shareholder, Mr Monge."*[373]

638. Claimants have changed the date of acquisition of the land in a desperate attempt to avoid the application of the sanction prescribed by Article 53 of the ZMT Law. Claimants now allege that both the Agreement for the Purchase-Sale, Endorsement and Transfer of Shares (referred by Respondent as the **"SPA"**) and the Trust Agreement were executed on April 30, 2002. Then, under Claimants' new set of facts, the totality of the shares in La Canícula would have been transferred directly from Mr Monge to the trust to be administered by Banco Cuscatlán (the **"Trust"**), rather than to Mr Aven. Respondent rejects Claimants' extemporaneous attempts to alter evidence already submitted onto the record to their benefit.

639. Nevertheless, Claimants' new allegation is irrelevant because both the SPA (Exhibit C-8) and the Trust Agreement (Exhibit C-237) prove that Mr Aven acquired the totality of shares in La Canícula and as its sole owner transferred them to the Trust.

640. First, the SPA shows that Mr Aven, as "the Buyer," acquired the totality of the shares in La Canícula from Mr Monge (one of the sellers):

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369 Claimants' Reply Memorial, para. 341; Second Witness Statement of David Aven, para. 27.
370 Claimants' Opening Statement, Day 1 Transcript, 147:18-19.
371 Id.
372 Claimants' Memorial, para. 36(B).
373 Claimants' Reply Memorial, para. 341.

> **SECOND CLAUSE: Purchase-sale, endorsement and transfer:** Being the information provided to the BUYER by the SELLERS and the COMPANIES accurate, valid, correct and complete, in relation thereto, to their assets and the shares of the COMPANIES owned by the SELLERS, and, being the declarations, consents, affirmations, promises and guarantees made by the SELLERS and the COMPANIES accurate, valid, correct and complete, the BUYER herein acquires the shares of the COMPANIES, and the SELLERS herein sell, endorse and transfer to the BUYER the totality of the shares they own in the COMPANIES.
>
> **FOURTH CLAUSE: Ownership and full possession:** The BUYER herein becomes the total and absolute proprietor of all of the shares of the COMPANIES and enters into full possession thereof, and thus, of all that forming the assets of the COMPANIES, without any limitation, condition or restriction whatsoever. [374]

641. It is this acquisition that forfeited Mr Aven's interests in La Canícula onwards. Article 47 of the ZMT Law prescribes that the transfer of more than 51% of the shares in a concession holder to a foreigner will lack any validity.[375] Hence, at this stage, Claimants' forfeited their interests in La Canícula.

642. At a second stage and after acquiring those shares and becoming its sole owner, Mr Aven, acting as trustor, transferred those to the Trust. The only legal means, under which Mr Aven could have transferred those shares into a trust, in his capacity as trustor, was by owning them. As the Latin maxim states, *"no one can give what they do not have"* (*Nemo dat quod non habet*).

643. Mr Aven, therefore, transferred the totality of shares to the Trust. The Recitals of the Trust Agreement confirm this:

> **DAVID AVEN**, who uses no second surname as means of identification, of legal age, married one time, investor, citizen of the United States, resident of Florida, United States of America, Penthouse D 2929 E. Comercial Blvd.. Fort Lauderdale, Fl 33308, bearing passport number 092079784, hereinafter and for the purposes of this agreement designated "**TRUSTOR**", [376]

644. If the SPA and the Trust Agreement would have been executed at the same time and the shares would not have been transferred to Mr Aven, then Mr Monge, its original owner should have appeared as trustor. That is, if Claimants wanted to avoid infringing Article 47 of the ZMT Law, Mr Monge should have appeared as trustor and owner of the totality of the shares.

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374 C-8.
375 C-221.
376 C-237.

645. The duration of the illegal conduct is irrelevant to the application of the sanctions prescribed under Costa Rican law. Dr Jurado precisely testified to the irrelevance of the duration of the illegality for purposes of sanctioning:

> "Q: What happens if the action brought by the relevant agency—let's carry on using the municipality for the sake of argument—initiates its action after the relevant breach has been cured, i.e., there is no longer a breach even if there was a breach for a few days?
>
> A: One would have to be clear as to the seriousness of the defect that meant that there was a change in the shareholding percentage. I think that the flaw is absolute and would result in annulling the Concession.
>
> And once that has occurred, it would have to—one would have to cancel the Concession even if the percentage were restored at a later moment."
>
> Cross Examination of Julio Jurado, Day 5 Transcript, 1529:5-18.

646. The legal authority that supports Dr Jurado's expert opinion is to be found in Articles 835 and 837 of the Civil Code of Costa Rica.[377] Article 835 establishes that a contract would suffer from an "absolute nullity flaw" (*vicio de nulidad absoluta*) if the act lacks any requirement established by the law. In turn, Article 837 sets forth the effects of the absolute nullity of contracts and prescribes that a flaw of this type cannot be corrected by the later ratification of the parties.

647. Therefore, it is clear that Mr Aven's acquisition of the totality of shares in La Canícula and consequent noncompliance with the 51% rule forfeited its acquisition of the Concession and therefore, Claimants do not hold any rights over it.

4. The lack of evidence shows that on the Trust Agreement's termination, Mr Aven held the totality of the shares in La Canícula in violation of the ZMT Law

648. The second moment in which Mr Aven held the totality of the shares in La Canícula was upon the termination of the Trust Agreement.

649. The Trust Agreement was conditioned upon two events established in the Option Agreement: (i) the granting of the Concession to La Canícula; and (ii) payment to the trust beneficiaries, Mr Monge and Pacific Condo Park S.A.[378] The Concession was granted to La Canícula on March 5, 2002.[379] As to the second condition, Clause Third of the SPA established that Mr Aven would pay Mr Monge and Pacific Condo Park S.A. the totality of the purchase price in a twelve-month period from the execution of the SPA.[380] That would be April 1, 2003. Thus, upon the payment of the last instalment, the Trust expired.

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377 **R-534**, Articles 835 and 837 of the Civil Code of Costa Rica
378 C-27.
379 C-28.
380 C-8.

650. During the Hearing, Claimants alleged that Article 659 of the Commerce Code should apply to the extinction of the trust.[381] Article 659 establishes:

> "Article 659 – A trust will terminate upon:
>
> **a) The fulfilment of the purpose upon which it was constituted, or if it turns impossible;**
>
> b) The fulfilment of the obligation depending on a resolutory condition to which it is subject;
>
> c) The express agreement between the trustor and trustee. […]
>
> d) The trustor's revocation […]
>
> e) The lack of a fiduciary when it is impossible to substitute it."[382] (emphasis added).

651. The application of Article 659 leads us to the same conclusion reached by Respondent in its Rejoinder Memorial. The Trust Agreement was terminated upon the fulfilment of the purposes upon which it was constituted. Subsequently, the **totality of the shares** related back to Mr Aven, the trustor, in violation of the ZMT Law.

652. During the Hearing, Claimants' expert, Mr Ortiz, also held that:

> "If we could even accept the fact that the trust had expired, that the stock or the interest went back to Mr. Aven, these are two different legal moments.
>
> So that there is this transfer of stock, two legal acts must take place: First of all, they must be endorsed nominally; and secondly, there is the registering of the transfer of ownership in the books."[383]

653. Claimants have disclosed no evidence of the acts mentioned by Mr Ortiz. On the contrary, the evidence suggests otherwise. Claimants have not produced any evidence to prove:

- The dissolution and liquidation of the Trust Agreement;
- The transfer of 49% of the shares in La Canícula to the Claimants;
- The transfer of 51% of the shares in La Canícula to Paula Murillo.

654. Claimants attempt to excuse these major evidentiary gaps in their ownership history of La Canícula by relying on an alleged break-in at the Las Olas offices in 2012.[384] Even if one could accept that there was actually a "break-in" at the Las Olas offices, why did the SPA, the Trust Agreement and the "letters of intent" addressed to Ms Murillo survive the robbery while the stock certificates and companies' books did not?

655. Moreover, Claimants have not produced stock certificates or the Enterprises' books that would post-date the alleged robbery. Given the shoe box accounting system Claimants employed during the operation of the Las Olas Project, it is not hare-brained to infer that

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381 Claimants' Opening Statement, Day 1 Transcript, 149:14-16.
382 C-299.
383 Direct Examination of Luis Ortiz, Day 4 Transcript, 1288:22; 1289:1-7.
384 Second Witness Statement of David Aven, para. 32.

Claimants never issued stock certificates or registered any interests in any of the Enterprises' books until their decision to start this arbitration in 2013. It was only in March 2013 when Claimants executed replacement registrations of shareholder books granted by none other than Mr Aven's personal counsel, Mr Manuel Ventura.[385]

656. Mr Shioleno, one of the Claimants in this arbitration, admitted never receiving any stock certificates from Mr Aven:

> "Q: Paragraphs 15 and 16 of your witness statement. Were you given any stock certificates?
>
> A: No, I never received any stock certificates."
>
> Cross Examination of Jeffrey Shioleno, Day 2 Transcript, 365:9-11.

657. If the Enterprises were incorporated prior to 2012, why did none of the Claimants have at the time their corresponding stock certificates? The inexistence of these documents was also confirmed by Mr Aven's testimony who contradicted Claimants' own pleadings when admitting that the 2005 Agreement between Mr Aven and Ms Paula Murillo (Exhibit C-242) was merely a *"letter of intent"* but not proof that *"Ms Murillo was assigned 51% of the shares in La Canicula and that Ms Murillo agreed to assign all future profits generated by the La Canicula."*[386] While being examined by Mr Siqueiros, Mr Aven confirmed that this "agreement" was merely a letter of intent and not proof of a transfer of 51% of the shares to Ms Murillo:

> "PRESIDENT SIQUIROS: My question is, as I read this document, I see that there is no transfer of ownership because there's reference to a service that Ms. Murillo is going to provide. That she is not the true owner because she will neither receive the income of any business gain and you have the opportunity at any time to replace her with another person without payment of any purchase price by appointing a different owner."
>
> Cross Examination of David Aven, Day 4 Transcript, 928:7-15.
>
> "And so what happens when—when the way you register the ownership is there's a shareholder book in the corporate books. And you record the shareholders' interest in those shareholder books. So when you make a change, you just you know, you have a meeting, and you have a resolution. This person is going to transfer their shares to another Costa Rican.
>
> **So this was just a letter of intent between Ms. Murillo and my—my—the U.S. Investors. But the actually event took place when Juan Carlos resigned and Paula's name was entered in the shareholder book as the 51 percent owner**." (emphasis added)
>
> Cross Examination of David Aven, Day 4 Transcript, 930:11-22; 931:1.

385 Second Witness Statement of David Aven, para. 32.
386 Claimants' Reply Memorial, para. 337.

658. Apart from the fact that Claimants have not been able to prove Ms Murillo's 51% ownership in La Canícula between the period from the termination of the Trust to Mr Ventura's execution of replacement registrations in 2013, Claimants insinuate that a *de minimus* breach of the 51% rule could not be a basis for cancellation of the Concession. Respondent disagrees. Dr Jurado and the Civil Code's provisions addressed above confirm Respondent's position.

659. Given Claimants' misleading and incomplete explanation of their chain of ownership and operation of the Concession, Respondent requests the Tribunal draw an adverse inference against Claimants for not disclosing the necessary documentary evidence to show the legitimacy of the ownership of their alleged interests in La Canícula. It is not for Respondent to prove a negative fact (that Ms Murillo did not own La Canícula after the termination of the Trust Agreement) but for Claimants to prove that they "complied at all times with the 51% rule" to be able to claim that the Concession forms part of their alleged investment. Clearly, Claimants have not met that burden.

5. The constitutionality of the 51% rule precludes any defense from Claimants based on an alleged discrimination against foreigners

660. During the Hearing, demonstrating both his partiality and lack of expertise in the matters over which he was testifying, Mr Ortiz attempted to justify Claimants' breach of the 51% rule raising two implausible arguments: (i) the alleged violation of international human rights law due to unreasonable discrimination between nationals and foreigners; and (ii) the unconstitutionality of the provisions relating to the 51% rule in the ZMT Law.[387]

661. As to Mr Ortiz's first argument, his reliance on the Inter American Court of Human Rights' case of *Ivcher Bronstein v Peru* was entirely inapposite. As Professor Nikken clarified for Mr Ortiz, *Ivcher Bronstein v Peru*, did not, in any way, address any discrimination issues comparable to the 51% rule whatsoever.[388] Aside from the fact that Claimants have not submitted the decision as evidence, which, in itself, warrants disregarding Claimants' position on discrimination, Claimants simply do not have any support for their proposition that the 51% rule under the ZMT law somehow contravenes human rights principles of non-discrimination.

662. Mr Ortiz's second argument also fails. Dr Jurado explained that the Constitutional Chamber in its Decision No. 11351 of June 29, 2010 has already upheld as constitutional the rationale behind the 51% rule contained in Article 47 of the ZMT Law. In that decision,

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387 Direct Examination of Luis Ortiz, Day 4 Transcript, 1289:20-22; 1290:1-3. ("*Even if we admitted that there was the transfer of ownership and that sometime 51 percent was in the hands of a foreigner, the truth is that this is a case which has been already decided upon on the Inter-American Court of Human Rights and the Constitutional Court.*").

388 Cross Examination of Luis Ortiz, Day 5 Transcript, 1308:20-22; 1309; 1310; 1311:1-8.

the Chamber rejected the claim that Article 47 contained unconstitutional discriminatory provisions.[389] Dr Jurado testified that:

> "And so, there's been questioning of the constitutionality of this provision; and with all due respect, and without getting into theoretically whether that's constitutional or not, this has been upheld, and not because of technicalities; rather, that based on the merit, that this is constitutional to—to have this discrimination for the reasons that the Court developed, because it is public good, et cetera, and the Court has upheld its constitutionality.
>
> Now, of course, legislators could change the law later without any problem. But they haven't done so. And so, the Court has said that the decision of the legislators is in keeping with the Constitution; it is not unconstitutional."
>
> Direct Examination of Julio Jurado, Day 6 Transcript, 1449:21-22; 1450:1-12.

663. To undermine the Constitutional Chamber's ruling, Claimants rely on the Dissenting Opinion of Justice Calzada who held that the 51% rule should be repealed due to transparency issues.[390] Thus, Justice Calzada's Opinion does not even hinge on questions of discrimination. But more importantly, Justice Calzada' s Opinion has no binding effect. As Mr Ortiz should have testified, had he valued his mission as an alleged expert *vis-à-vis* the Tribunal, under Costa Rican law because the majority of the Constitutional Chamber upheld the constitutionality of Article 47,[391] Justice Calzada's Opinion is irrelevant to the binding effect of Article 47. Therefore, Claimants assertion that the 51% rule, contained in Article 47 of the ZMT Law, is unconstitutional is plainly wrong and misleading.

664. Finally, Mr Ortiz also referred to a decision from the Constitutional Chamber known as the "Taca case" where according to him, the court declared unconstitutional a law that *"prohibited that the certificates of aeronautical use were in the hands of foreigners."*[392] Even if this case dealt with nationality issues such as Decision No. 11351, the Chamber declared the rule that was challenged unconstitutional solely on the basis that a limitation to a fundamental right could not be contained in a regulation but rather in a statute issued by the legislative branch.[393] Again, had Mr Ortiz's testimony been truthful, he would have pointed out to the Tribunal that the Chamber did not deal with arguments relating to unlawful discrimination to foreigners. Instead, due to what can only be seen as an unfortunate misunderstanding as to his role in these proceedings, Mr Ortiz chose to mislead and confuse the Tribunal on this point.

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389 C-310.

390 C-310.

391 According to Articles 170 and 171 of Costa Rica's Civil Procedure Code, the majority vote of a tribunal is necessary for there to be a binding resolution. In this case, 7 out of the 8 Justices approved the decision to uphold the constitutionality of the ZMT Law provision which constitutionality was being challenged.

392 Direct Examination of Luis Ortiz, Day 4 Transcript, 1290:20-21.

393 **R-559**, Constitutional Chamber of the Supreme Court of Justice, Decision No. 2006-011560, August 9, 2006.

665. In sum, none of Mr Ortiz's testimony failed to credibly support Claimants' weak explanations as to the mandatory nature of the 51% rule and the legal consequences of their infringement of that rule. Having – knowingly – violated Article 47 of the ZMT law, Mr Aven's acquisition of interests of La Canícula is invalid, and the Tribunal cannot uphold its jurisdiction over any claims relating to that property.

6. Claimants dodged the proper procedure to acquire interests in La Canícula

666. The Tribunal has inquired why the Municipality has not annulled Claimants' acquisition of the Concession. As explained in paragraphs 194 to 197 of the Rejoinder Memorial, Respondent only knew of the illegal acquisition of the shares in La Canícula during the course of this arbitration. Under Costa Rican law, information of the shareholders of companies incorporated in Costa Rica is not registered in a public registry.[394]

667. According to the Regulations to the ZMT Law, the few occasions when a municipality would request information relating to the shareholding of a titleholder of a concession are (i) at the time of the request for the concession, (ii) if the titleholder requests a renewal of the concession; or (iii) if a request for a transfer of the concession is made.[395] In this case, Mr Aven, with the purpose of evading the 51% rule, assured himself that before entering into the SPA with Mr Monge, he, as a Costa Rican national, was granted the Concession.

668. On February 6, 2002, Mr Aven entered into the Option Agreement with Mr Monge to acquire Property No. 6-001004-Z-000 (property of La Canícula).[396] The purchase was contingent upon the granting of the Concession to La Canícula.

669. On March 5, 2002, the Costa Rican Institute of Tourism granted the Concession to La Canícula verifying that Mr Monge was a Costa Rican national who owned the totality of shares in La Canícula. Up until this point, the granting of the Concession was done in according with the law and neither the Municipality nor the Costa Rican Institute of Tourism had any information to second-guess the legality of said act.

670. Claimants were cavalier, to say the least, with the rules of Costa Rican law that governed the setting up of their investment. Consequently, Claimants should not be permitted to claim over a hundred million dollars from the Republic of Costa Rica for the alleged taking of that investment. Claimants' alleged acquisitions of the Concession site and La Canícula were illegal and jurisdiction over any claims related to these sites must, respectfully, be dismissed.

671. Only after Mr Monge had secured the Concession, Mr Aven entered into the SPA to purchase the totality of shares in La Canícula. Thus, Costa Rican agencies had no

394 **R-214**, Article 24, Constitution of Costa Rica, 1949; **R-566**, Commercial Code provisions relating to shareholders' information.

395 **R-563**, Articles 30, 50 and 59, Regulations to the ZMT Law.

396 C-27.

opportunity to find out that Mr Aven's acquisition of La Canícula –after the Concession was granted– was illegal.

672. As a defense to the Municipality's lack of awareness, Claimants have anticipated in their January 6, 2017 letter to the Tribunal that *"the Municipality knew at all times that Mr David Aven and the Claimants were the beneficial owners of La Canícula."* Claimants have not submitted any evidence in this regard. The Municipality had no possible way of learning of Claimants' wrongdoing because Mr Aven acquired La Canícula only after Mr Monge was granted the Concession and subsequently Mr Aven never disclosed his dealings with Banco Cuscatlán or Ms Murillo to that agency.

673. In addition, in that same letter, Claimants allege that the Municipality *"dealt with Mr Aven as the representative of La Canícula regularly."* Slides 47 to 49 of Claimants' Closing Statement Demonstratives seem to be the support for this assertion. These slides show letters from the SETENA File assigned to the Concession (Exhibit C-223) addressed to SETENA, not the Municipality, where Mr Aven appears as President and Legal Representative of La Canícula.

674. Claimants are confusing the prohibition established in the ZMT Law. The prohibition refers to the ownership of the shares in a company awarded a concession. The prohibition does not prevent a foreigner from acting as legal representative or holding a Board of Directors' position (President) in a company awarded a concession. The distinction between the shareholder of a company and the legal representative or president of a company is such a basic concept of corporate law that Respondent believes no further explanation is required.

675. Finally, Respondent has noted that slide 49 of Claimants' Closing Statement Demonstratives contains an extract of Claimants' proposed Exhibit C-305. Respondent demands that this reference and its contents be stricken out of the record and reserve its right to object to any reliance of Claimants or the Tribunal on that document.

7. Conclusion

676. Claimants' claim that their alleged investment is comprised of shares in the Enterprises and the parcels of land owned by those Enterprises, including its interests in La Canícula and the Concession site. It was entirely incumbent on Claimants to establish the legality of their chain of ownership in La Canícula as a necessary precondition to bringing their claim. The burden of researching and producing documents that show that Claimants complied with local law at the moment of establishing its alleged investment lay with Claimants. Claimants have clearly failed to meet that burden and therefore cannot argue that the Concession site constitutes a protected investment under Article 10.28 of DR-CAFTA.

677. Thus, the Tribunal must reject jurisdiction to any claims related to the Concession site and any interests of Claimants in La Canícula.

VI. ADMISSIBILITY OF THE CLAIMS

A. Claimants' unlawful and illegal conduct in the operation of their alleged investment render their claims inadmissible

678. Claimants are precluded from availing themselves of the protections of DR-CAFTA due to the number of illegalities committed during the operation of their alleged investment in Costa Rica.[397] The evidence corroborates each of those illegalities, as it was demonstrated in Section III above.[398]

1. International law does not uphold the protection of illegal claims

679. Under international law, investors are barred from the substantive protection of an investment treaty when they have *obtained* or *operated* their investment illegally. Each of the circumstances described in Section III of the Brief and detailed in the Rejoinder Memorial[399] have shown that Claimants (i) misled Costa Rican authorities by deliberately omitting key information which, at the same time, enabled them to lessen the extent of the environmental impact of their Project; and (ii) acted against the requirements of Costa Rican law and international law.

680. Claimants' illegalities during their operation of the Concession, the concealment of information from Costa Rican authorities, the unauthorized works on the Easements, and the environmental damage caused to Las Olas Ecosystem evince conduct which is contrary to Costa Rican law as well as to international law.

681. Claimants' misconduct precludes them from resorting to international remedies in order to seek any compensation. Consequently, the Tribunal should dismiss their claims based on inadmissibility grounds.[400]

682. A tribunal will dismiss a claim when (even if it considers that the jurisdictional requirements have been met) the Tribunal is unwilling to allow the claim due to a circumstance which restricts or impedes the right to obtain compensation.[401] It is widely recognized that investment tribunals, in the exercise of their jurisdiction, have the power to dismiss claims as inadmissible.[402]

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397 Respondent's Counter-Memorial, paras. 426-432; Respondent's Rejoinder Memorial, Section V.

398 Also, for the sake of brevity, Respondent does not address in the Brief its allegations relating to the illegalities committed during the operation of the Concession. Respondent directs the Tribunal to paragraphs 459-507 of the Rejoinder Memorial where each of those illegalities was pleaded.

399 See, Respondent's Rejoinder Memorial, Section V.

400 Respondent's Counter-Memorial, para. 432; Respondent's Rejoinder Memorial, para. 523.

401 **RLA-157**, Jan Paulsson, "Jurisdiction and admissibility" in *Global Reflections on International Law, Commerce and Dispute Resolution. Liber Amicorum in honour of Robert Briner* (ICC Publishing, Publication 693) November 2005

402 **RLA-16**, Andrew Newcombe, "Investor Misconduct: Jurisdiction, admissibility or merits?" in *Evolution in Investment Treaty Law and Arbitration* (2012), p. 196.

683. One of the circumstances in which a tribunal is allowed to dismiss a claim on grounds of admissibility is an investor's conduct contrary to international law during the operation of its investment. Professor Newcombe agrees with the proposition when a tribunal faces illegalities occurring after the acquisition of the investment:

> "**[S]erious misconduct is not necessarily always a jurisdictional issue** […] the same substantive result might be achieved by applying the principle of substantive admissibility. Where an investor meets the technical conditions for jurisdiction […] the tribunal should proceed to exercise its adjudicative power, rather than imply additional jurisdictional requirements."[403] (emphasis added)
>
> "I should not be understood as saying that illegality, corruption or other serious misconduct can never be a jurisdictional issue. **If there is illegal conduct in the acquisition of an investment, there might have been no property rights acquired under host State law in the first place. In this case, there might be no investment for the purposes of the investment treaty. In such a case, a Tribunal would lack jurisdiction *ratione materiae***."[404] (emphasis added)
>
> "**Using an admissibility approach appears to be particularly suited for egregious cases where the misconduct at issue should be explicitly denounced**. The tribunal in the exercise of its jurisdiction sends a very strong message when it says that, despite having jurisdiction, we are unwilling to allow a claim to proceed."[405] (emphasis added)

684. In *Plama v Bulgaria*, the investor misconduct was not viewed as a jurisdictional issue, but as an issue that affected the substantive inadmissibility of the claim.[406] Since Respondent's contentions on Claimants' claims relate to the illegalities committed *during the performance* of the investment, the Tribunal should consider them a barrier to admit the admissibility of Claimants' claims.

685. While it is true that the majority of decisions dealing with investors' wrongdoings focus on alleged misconduct during the initial investment-making process, (which have lead tribunals to analyze whether they have jurisdiction),[407] there are cases in which a general statement has been made supporting the contention that illegalities arising out of the performance of the investment cannot be substantially protected.

686. Namely, in *Plama v Bulgaria*, although the illegality occurred in the establishment of the investment, the tribunal was ready to find the claim inadmissible irrespective of whether the illegality arises *before* or *after* the establishment:

> "The Tribunal is of the view that granting the ECT's protections to Claimant's investment would be contrary to the principle ***nemo auditor propriam turpitudinem allegans*** invoked above. It would also be contrary to the **basic notion of international public policy** – that a contract obtained by wrongful

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403 **RLA-16**, *Id.,* at p. 198.
404 **RLA-16**, *Id.,* at p. 198, fn. 49.
405 **RLA-16**, *Id.,* at p. 199.
406 **RLA-12** *Plama Consortium Limited v. Republic of Bulgaria,* ICSID Case No. ARB 03 24, Award, August 27, 2008
407 **RLA-158**, Andrew Newcombe and Jean-Michel Marcoux, "Hesham Talaat M Al-Warraq v Republic of Indonesia. Imposing international obligations on foreign investors" ICSID Review, Vol. 30, No. 3 (2015) 525–532, p. 525.

means (fraudulent misrepresentation) should not be enforced by a tribunal".[408] (emphasis added)

687. The reasoning behind this approach is also supported in *Inceysa v El Salvador*, where the tribunal stated:

> "[n]o legal system based on rational grounds allows the party that committed a **chain or clearly illegal acts to benefit from them**."[409] (emphasis added)

688. The decision in *Al-Warraq v Indonesia*[410] contributes to the same approach. Unlike other cases where an investor's claim has been dismissed because of the investor's conduct related to the *acquisition* of the investment, *Al-Warraq* involved alleged illegalities in the *operation* of the investment. Although it dealt with an investor's wrongdoing during the operation of the investment as a *merit issue* –due to the particularities of that case– it considered that such conduct deprived the investor of the protection afforded by the applicable treaty.

689. In sum, international law has been consistent in disregarding claims by investors when they are tainted with illegalities committed during the operation of such investment. Therefore, Claimants' unlawful conduct during the operation of their investment has the effect that any claim based on such conduct should be excluded from receiving the protection of DR-CAFTA.

690. Were the Tribunal to ignore the inherent power to assess illegal conduct as a disqualifying factor to the protection of a purportedly covered investment – then the public policy exception contained in the New York Convention (1958) might ultimately step in to operate so as to protect against the endorsement of conduct which is illegal.

2. Claimants' arguments have failed to camouflage the incontestable illegalities in relation to their investment

691. In their Reply Memorial, Claimants made a very brief defense on the illegality argument raised by Respondent. Nevertheless, taking the opportunity of the Hearing, Claimants delved into their theory of the case and came up with new arguments in this regard. During their Opening Statement, they dedicated only a few minutes to making a reference to the illegalities addressed by Respondent, while in the Closing Statement they did not have time at all. Instead, Claimants' strategy was to write a kind of reply to the Rejoinder Memorial in their demonstratives.

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408 **RLA-12**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB 03 24, Award, August 27, 2008, para. 12.

409 **RLA-11**, *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID case No. ARB 03 26, Award, August 2, 2006, paras. 244, 249.

410 **RLA-159**, *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, December 15, 2014.

692. Consequently, in the exercise of its right to reply and to help the Tribunal in its decision, Respondent has done its best to follow and interpret Claimants' arguments as presented in their demonstratives. However, Costa Rica reserves its right to reply in case Claimants decide to build a new argument departing from what Respondent's interpretation is on their position. It is unacceptable that in Closing Statement and post hearing briefs Costa Rica is required to react to new iterations of Claimants' case in brief.

a) Respondent's *"innovative jurisdictional theory"*

693. In their Opening Statement in the December hearing, Claimants insisted that Respondent *"initially founded this particular objection on an inventive jurisdictional theory"* but *"reformulated its objection for the Rejoinder."*[411] Following this assertion, they insinuated that the reason for such alleged adjustment is that the case law cited by Respondent was irrelevant to its position, since it related to the construction of compliance with a local laws clause, which DR-CAFTA does not contain.[412]

694. On the contrary, and as stated above, Respondent has always framed its argument as an admissibility bar for Claimants' claims.[413] In addition, if Respondent would have considered that the case law submitted in the Counter-Memorial was not helpful, it would not have reiterated it in its Rejoinder Memorial.

b) Claimants' allegation that an admissibility defense is not embedded in the text of DR-CAFTA

695. In its comments to the Opening Demonstratives, Claimants allege that:

> "[T]here is simply no basis in the treaty text for the interposition of a preliminary stage in which the respondent is afforded the opportunity to engage in a post hoc effort to troll for potentially disqualifying evidence of alleged investor non-compliance with host State law […].[414]

696. The fact that neither DR-CAFTA nor the UNCITRAL Arbitration Rules expressly refer to an admissibility stage does not preclude an investment arbitral tribunal from issuing a decision in this regard. On the contrary, it has been argued that this is an inherent power of an arbitral tribunal irrespective of an express provision:

> "[N]otwithstanding the absence of an express reference to the concept of admissibility in arbitration rules, investment treaty tribunals, as creatures of public international law, should be viewed as having inherent or incidental jurisdiction to find that claims are inadmissible for abuses of process or other serious forms of misconduct."[415]

411 Claimants' Opening Statement Demonstrative, slide 19; Claimants' Reply Memorial, para. 39.
412 Claimants' Opening Statement, 107:10-22; 108:1.
413 Respondent's Counter-Memorial, para. 432; Respondent's Rejoinder Memorial, para. 523.
414 Claimants' Opening Statement Demonstrative, slide 20.
415 **RLA-16**, Andrew Newcombe, "Investor misconduct: Jurisdiction, admissibly or merits? in Chester Brown and Kate Miles, *Evolution in Investment Treaty Law and Arbitration* (CUP 2011), p.194; **RLA-160**, *Case*

697. Therefore, the lack of an express provision in the applicable procedural rules does not preclude this Tribunal from rendering a decision on admissibility.

c) Claimants' misunderstanding of "compliance with local laws"

698. Claimants allege that because DR-CAFTA does not contain an *"in accordance with local law"* provision, Respondent is precluded from raising its admissibility defense.[416]

699. Although DR-CAFTA does not *explicitly* require an investment to be in accordance with the law of the host State, it implicitly provides for the inadmissibility of claims based on investments which have been operated in an illegal manner. It would be a perverse proposition to suggest otherwise – essentially that criminal conduct permeating the operation of an investment could still render the investment activity lawful and capable of attracting international protection.

700. Article 1.2 establishes the promotion of fair competition in a free trade area through the application of many principles such as transparency. Thus, it cannot be overlooked that the ultimate aim of the Treaty is to strengthen the rule of law among the State Parties. Accordingly, the Treaty should be interpreted in a manner consistent with this objective, and any attempt to provide substantive protection to an investment operated contrary to the law will be clearly against such purpose.

701. The Tribunal in *EDF International S.A., SAUR International S.A. and Leon Participaciones S.A. v Argentina* found that the condition of not committing a grave violation of the legal order is a *tacit or implicit condition* of any investment treaty, because it is incomprehensible that a State would offer the benefit of protection through investment arbitration if the investor, in order to obtain such protection, has acted contrary to the law.[417]

702. The rule of international law applies even when the applicable treaty does not include specific wording to that effect. In other words, the absence of an express provision requiring the investment to be in accordance with the host State laws does not preclude the power of the Tribunal to prevent the protection of a treaty when facing an illegality.

703. For example, as stated above, in *Plama v Bulgaria,* the tribunal was ready to prevent the protection of the treaty, facing an illegality, in the absence of an express provision requiring the investment to be in accordance to the host State law.[418] According to the tribunal, the Energy Charter Treaty, upon its adoption, was designed to be applied and interpreted in

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Concerning Northern Cameroons (*Cameroon v United Kingdom*) [1963] ICJ Rep 15, Separate Opinion of Sir Gerald Fitzmaurice, paras. 106-107.

416 Claimants' Opening Statement Demonstrative, slide 19; Claimants' Opening Statement, 107:21-22; 108:1-2.

417 **RLA-14** *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines [II]*, ICSID Case No. ARB/11/12, Award, December 10, 2014, fn. 391.

418 **RLA**-**12**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB 03 24, Award, August 27, 2008, paras. 143-146

line with *"generally recognized rules and principles of observance, application and interpretation of treaties."*[419]

704. This was also the understanding of the tribunal in *Fraport v Philippines,* which stated as an *obiter dicta*:

> "[E]ven absent the sort of explicit legality requirement…it would still be appropriate to consider the legality of the investment. As other tribunals have recognized, there is an increasingly well-established international principle which makes international legal remedies unavailable with respect to the illegal investments."[420]

705. Furthermore, in *Gustav v Ghana*, the tribunal held that independently of the text of the treaty, an investment should not be protected when it is considered illegal in violation of *national* or *international* law principles.[421]

706. Finally, Claimants allege in their Opening Statement demonstratives that cases cited by Respondent where the tribunals dispensed the requirement of "compliance with local law" clause, were motivated in the kind of misconduct assessed: *"an apparently very undeserving claimant."*[422] Respondent does not see how Claimants criminally charged with the refilling wetlands (which have been proven to exist), would not fit the bill of "underserving claimants."

3. Respondent is not estopped from raising Claimants' illegalities

707. In its submissions, Claimants alleged that they never heard of illegality complaints from the Respondent prior to this arbitration.[423] However, Claimants never submitted until the Hearing any argument suggesting that Respondent would be precluded from raising Claimants' misconduct as a bar to the protections afforded by the Treaty as a matter of international law.

708. As exposed in paragraphs 511-522 of Respondent's Rejoinder Memorial, under international law, a state would be estopped from raising the illegality of the investment when it had knowingly ratified behavior it later sought to challenge. In other words, to preclude an argument on illegality, Claimants would have to show that the host State knew before the arbitration of such illegality.

709. As described in section III, in most of the cases where illegalities were found before the commencement of this arbitration, those were duly informed to Claimants, and resulted in

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419 **RLA-12**, *Id.* para. 138.

420 **RLA-14**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* [II], ICSID Case No. ARB/11/12, Award, December 10, 2014, para. 332.

421 **RLA-161**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, June 18, 2010, para. 123.

422 Claimants' Opening Statement Demonstrative, slide 19.

423 Claimants' Reply Memorial, para. 142.

local proceedings against Claimants. Therefore, Claimants cannot allege that this is the first time that they heard about their illegalities.

710. In relation to other irregularities, it was not until this arbitration that Respondent became aware of them, due to Claimants' concealment of information from the local agencies or the disclosure of documentation in these proceedings. Thus, Respondent cannot now be precluded from claiming Claimants' misconduct before the Tribunal.

711. In addition, in the Hearing, Claimants introduced an argument in this regard. Now Claimants suggest that Respondent advanced *"ex post facto allegations"* in relation to Claimants' illegalities.[424] In this sense, they consider that *"accepting ex post facto allegations of fact is fundamentally unfair because it violates the principle of contemporaneity, upon which temporal jurisdiction is based."*[425]

712. They also claim that Respondent is precluded from raising their illegalities since:

> "[…] there is no evidence that a government agency actually took the steps that would have been required under such laws to address the alleged non-compliance, or that a Costa Rican court actually adjudicated the matter and rendered a finding of municipal law upon which this Tribunal could base a finding of fact."

713. Moreover, Claimants suggest that:

> "[a]sking the Tribunal to step into the shoes of that local court or to otherwise undertake the municipal legal analysis proffered by Respondent, so as to have the Tribunal reach at conclusions about Claimants' alleged non-compliance with municipal law that never –in fact– occurred, is to exhort the Tribunal to violate a fundamental right of due process, which safeguards all parties to the arbitration by conditioning findings of fact though application of the principle of contemporaneity."[426]

714. Claimants' argument is replete with contradictions. Claimants never availed themselves of the remedies available to them under Costa Rican law, and to therefore allege that this Tribunal is inappropriately being seized of domestic law issues is so ironic as to be tragic. Separately, Respondent's criticism has been that this case is nothing but a litany of complaints that are best heard by a Costa Rican authority.

715. Notwithstanding, contrary to what Claimants assert, it is not necessary to have a local court's decision declaring that an investment has breached the law to allow the Tribunal to conclude that it is illegal. It is the Tribunal's duty to determine whether the legality requirement is met in order to adjudicate this dispute. While that can require the Tribunal to determine illegalities under Costa Rican law, those findings are of fact.

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424 Claimants' Closing Statement Demonstrative, Day 6, slide 32.
425 Claimants' Closing Statement Demonstrative, Day 6, slide 34.
426 Claimants' Closing Statement Demonstrative, Day 6, slide 34.

716. Further, Claimants suggest that arbitral practice provides a number of examples where tribunals adopted the view that ex post facto analysis is completely inappropriate.[427] For the avoidance of doubt, no arguments raised in this arbitration are *ex post facto* arguments.

717. Respondent has to draw the attention of the Tribunal to the inclusion of a number of cases (CLA-167 – CLA-175) included in their Closing Statements' slides *without the agreement of Respondent*. Respondent has never consented to the incorporation of these legal authorities, which were not included in the Index provided by Claimants on the first day of the Hearing. Claimants enumerated those cases in their comments to the Closing Statements' demonstratives without a proper construction of how such case law would help their position. Consequently, Costa Rica reserves its right to reply to any new arguments relying on those authorities. Again, it is a fundamental challenge to due process when Respondent has to anticipate new arguments for the first time in a post-hearing brief. So as not to distract from this post-hearing brief, the authorities cited by Claimants are responded to in Annex A.

B. Claimants have not put forward a claim for full protection and security and the Tribunal must dismiss any attempt to do so

718. During their Closing Statement in the December hearing, Claimants raised as an entirely new cause of action the alleged breach of the full protection and security standard.[428] Claimants allege that *"in the interests of judicial economy,"* they did not include a discursive analysis of how Respondent had breached this standard.[429] This is utter nonsense and nothing short of sharp practice. This is just another example of how Claimants have conducted themselves during this arbitration: last minute submissions, last minute exhibits and now, last minute non-pleaded claims.

719. **Claimants have never raised this cause of action before in this arbitration.** Respondent strongly objects to this claim being launched now, and refuses to engage in any defense on the merits in the circumstances. Moreover any attempt by Claimants to develop this argument in their post-hearing brief should be roundly rejected and struck from the record.

720. Claimants have not pleaded a claim for breach of full protection and security in any of their written submissions:

- In paragraphs 52 to 55 of their Notice of Arbitration, Claimants raised as the legal basis for their claims against Costa Rica Article 10.5 of DR-CAFTA: the breach of fair and equitable treatment. Claimants never mentioned any breach of full protection and security.

427 Claimants' Closing Statement, 2003:2-13.
428 Claimants' Closing Statement Demonstrative, Day 6, slide 29.
429 Id.

- In paragraphs 322 to 392 of their Memorial, Claimants' *"application of Article 10.5 to the facts of this case"* solely refers to alleged actions from Costa Rica that (i) frustrated Claimants' legitimate expectations; (ii) failed to afford due process; (iii) were arbitrary; and (iv) implied an abuse of rights. Claimants never raised any breach of the full protection and security standard.
- Paragraphs 352 to 379 of the Claimants' Reply Memorial mirror the claims brought under Article 10.5 in the Claimants' Memorial with no reference to a breach of full protection and security.

721. Claimants allege that they have dedicated a few paragraphs of its Memorial to pleading the facts that support a claim for breach of the full protection and security standard. [430] Facts are not legal submissions, but particularly when the cause of action has not been articulated. These references can never amount to the bringing of a new claim under Article 10.5 without giving due notice of it to Respondent.

722. Article 16.2 of the Treaty sets forth the need for a *"Notice to submit a claim to arbitration"* and establishes that such notice must specify the provision of the Treaty alleged to have been breached as well as the ***"legal and factual basis for each claim."***[431]

723. Claimants' own assertions confirm this position under DR-CAFTA. When referring to the Tribunal's determination of the issues in dispute, Dr Weiler said:

> "Paragraph (1)(A) requires the Investor to state it's case in this regard. When one provides one's Notice of Arbitration, **one needs to specify how the responding party has actually breached its obligations under Chapter 10, Party A.**
>
> And with regard to Paragraph (2), it also stipulates that the same investor must have already 90 days earlier or no less than the 90—no fewer than 90 days earlier **had to specify the "legal and factual basis for each claim." So, in order to appear before you, the Claimants basically had to set out the issues in dispute.**"[432] (emphasis added).

724. Likewise, in a recent case decided against Costa Rica, the tribunal pointed to the importance of the identification of an investor's claims in the notice of arbitration and to the inadmissibility of any claims which are not pleaded in the notice of arbitration:

> "**Additionally, the Tribunal would like to remind the importance of proper notice, which is an important element of the State's consent to arbitration.** Indeed, proper notice allows the State to examine and possibly resolve the dispute through negotiation.
>
> The failure to duly notify the State receiving the investment of the existence of a dispute constitutes a violation of Article XI.1 of the Treaty. **This implies that any claim that has not been notified is inadmissible in the respective**

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430 Claimants' Closing Statement Demonstrative, Slide 29.

431 **RLA-6**, Dominican Republic - Central America United States Free Trade Agreement, Chapter Ten, Article 16, October 7, 2007.

432 Claimants' Opening Statement, Day 1 Transcript, 86:4-15.

> **proceeding, because the prior negotiation process agreed to by the parties has not been exhausted.**
>
> **In the event that the Investor notifies certain claims to the State, but upon presenting the Request for Arbitration or its Claim Memorial it adds claims different and not directly related to those previously presented, all the claims not notified will be inadmissible.** Thus, the proceeding will only address the previously notified claims under the requirement set forth in Article XI.1 of the Treaty."[433]

725. Thus, the Tribunal should declare any claims relating to an alleged breach of full protection and security standard inadmissible *in limine*. It is outrageous that in a closing submission demonstrative (and even without the courtesy of raising it in oral closing submissions), an entirely new claim is raised against Respondent. There is no place for such sharp practice, and no accommodation should be granted by this Tribunal to Claimants' efforts to compromise due process – illustrated so aptly by their recurring scrambling to construct some semblance of a legal argument.

726. Subject to the Tribunal's ruling before rendering any award, Respondent reserves all its rights to seek leave to respond to any new arguments and claims raised by Claimants in their post-hearing brief. In the absence of being granted such due process right to respond to any cause of action considered by the Tribunal to be admitted, Respondent reserves all its rights.

[433] **RLA-169,** *Supervisión y Control, S.A., v. The Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, January 18, 2017, paras. 339-341.

VII. CLAIMANTS HAVE BROUGHT CLAIMS NOT SUPPORTED UNDER ARTICLE 10.5 OF THE TREATY

A. The standards of protection that Respondent allegedly breached are not provided in Article 10.5 DR-CAFTA

727. During these proceedings, Claimants have asserted various claims under *"customary international law doctrines recalled in DR-CAFTA Article 10.5."*[434] In particular, they allege that Respondent's conduct entails: (i) a breach to provide protection and security; (ii) a frustration of their legitimate expectations under the standard of fair and equitable treatment; (iii) a breach of due process; (iv) what they now call abuse of authority, bad faith; and (v) *abuse de droit*, arbitrariness.[435]

728. Regarding Claimants' allegation that Respondent has violated the standard of providing protection and security to the investors, Respondent has already explained that because the breach was never raised as a claim in the Request for Arbitration, the Tribunal must dismiss such claim as inadmissible.[436]

729. In relation to the remaining claims raised under Article 10.5 of DR-CAFTA, Claimants have failed to demonstrate that they involve a breach of a standard encompassed in the Treaty. Therefore, none of Claimants' claims allegedly brought under Article 10.5 DR-CAFTA is supported by the protections afforded by the Treaty.

730. Article 10.5 provides:

> **"Article 10.5: Minimum Standard of Treatment**
>
> 1. Each Party shall **accord to covered investments treatment in accordance with customary international law**, **including fair and equitable treatment and full protection and security**.
>
> 2. For greater certainty, paragraph 1 prescribes **the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.** The obligation in paragraph 1 to provide:
>
> (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
>
> (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

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434 Claimants' Closing Statement Demonstrative, Day 6, slide 4.
435 Claimants' Closing Statement Demonstrative, Day 6, slide 4.
436 See, Section VI.B.

> 3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article." (emphasis added)

731. A careful analysis of the text shows that neither the concept of legitimate expectations, arbitrariness, due process nor abuse of authority are standards of protection that DR-CAFTA Parties envisaged to be part of the Treaty.

732. In this regard, the United States of America in its submission as a non-disputing Party –filed immediately before the commencement of the Hearing– has shed light on the extent of the protection that DR-CAFTA Parties intended to provide to investors pursuant to Article 10.5.

733. Article 10.5(1) requires that each Party *"accord to covered investment treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."* In order to avoid any misunderstanding, DR-CAFTA Parties included a clarification in the second paragraph of Article 10.5 on the meaning of *"treatment in accordance with customary international law."* In this regard, the Parties expressly agreed that that is "the **minimum** standard of treatment to be afforded to covered investments." In addition, they agreed that the concepts of "fair and equitable treatment" and "full protection and security" do not imply treatment **in addition to or beyond** that which is required by the standard, and most importantly, they **do not create additional substantive rights.**

734. Investment tribunals have extensively discussed the minimum standard of treatment with the aim of determining which its threshold is. The United States has clearly pointed out that tribunals interpreted *"minimum"* as *"[a] floor below which treatment of foreign investors must not fall."*[437] Arbitral decisions support this conclusion. In effect, in *Glamis Gold v United States*, the tribunal concluded that:

> "The customary international minimum standard of treatment is just that, a minimum standard. It meant to serve a floor, an absolute bottom, below which conduct is not accepted by the international community."[438]

735. The "floor" below which treatment of foreign investors must not fall has to be analyzed in light of customary international law, as required by Article 10.5 of DR-CAFTA. Therefore, it is relevant to determine what is the content of customary international law in the protection of a minimum standard. As explained in Respondent's Opening Statement:

> "Customary international law is not a redundant term. It forms the backbone of Chapter 10 for a very specific reason."[439]

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[437] United States of America submission as a non-disputing party, Attachment, Submission of the United States of America in *Spence International Investments LLC, Berkowitz et al v The Republic of Costa Rica*, ICSID Case No UNCT/13/2, para.12.

[438] **RLA-38**, *Glamis Gold Ltd v United States of America,* NAFTA/UNCITRAL, Award, June 8, 2009, para.615.

> "Customary international law holds this Tribunal to judge Costa Rica by reference to a **very limited and minimum standard of treatment**." [440] (emphasis added)

736. The United States made it clear that only few areas have been sufficiently crystallized as to be considered a minimum standard of treatment.[441] DR-CAFTA Parties seemed to have identified those areas because they have expressly included the obligation to provide "fair and equitable treatment" (Article 10.5.2(a)) on the one hand, and "full protection and security" (Article 10.5.2(b)) on the other. The former includes the obligation, as provided in the text of the Treaty, not to deny justice.

737. Furthermore, DR-CAFTA Parties included in Annex 10-B an understanding of what they consider customary international law rules covered by Article 10.5 of the Treaty, requiring general and consistent practice of States and *opinion iuris; i.e.* practice that they follow from a sense of legal obligation. Thus, *"the annex provides important guidance for assessing whether an alleged norm has been sufficiently demonstrated to be an element of customary international law"*.[442]

738. In this sense, the Tribunal must analyze whether the claims alleged by Claimants can be deemed part of the customary international law **minimum** standard of treatment, and therefore, be considered within Article 10.5 DR-CAFTA. We would urge the Tribunal not to lose sight of this restrictive standard, which is expressly linked to the standard of customary international law.[443]

739. Even if it was Claimants burden to prove the existence of a rule of customary international law, [444] Claimants have failed to do so. Respondent's position is that there is not a customary rule of international law which proves that the standards of protection that Claimants have raised (legitimate expectations, arbitrariness, due process and abuse of authority) have the status of a rule of customary international law. Consequently, Respondent's international responsibility cannot arise simply because it has not assumed those alleged obligations under the commitments imposed by DR-CAFTA.

740. Respondent will now address each of Claimants' unsupported claims allegedly covered by the scope of Article 10.5.

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439 Respondent's Opening Statement, Day 1 Transcript, 166:11-13.
440 Respondent's Opening Statement, Day 1 Transcript, 163:1-3.
441 United States of America submission as a non-disputing party, Attachment, Submission of the United States of America in *Spence International Investments LLC, Berkowitz et al v The Republic of Costa Rica*, ICSID Case No UNCT/13/2, para.13.
442 Id., para.15.
443 Respondent's Opening Statement, Day 1 Transcript, 294:12-16.
444 **RLA-38,** *Glamis Gold Ltd v United States of America,* NAFTA/UNCITRAL, Award, June 8, 2009, paras. 601-602.

1. Legitimate expectations are not encompassed under the fair and equitable treatment standard of protection

741. Legitimate expectations cannot be considered under the umbrella of FET protection, taking into account the ordinary meaning of FET:

> "The assertion that fair and equitable treatment includes an obligation to satisfy or not to frustrate the legitimate expectations of the investor at the time of his/her investment does not correspond, in any language, to the ordinary meaning to be given to the terms "fair and equitable..." Therefore, prima facie, such a conception of fair and equitable treatment is at odds with the rule of interpretation of international customary law expressed in Article 31.1 of the Vienna Convention on the Law of Treaties (VCLT) […]."[445]

742. Furthermore, as the United States points out, "legitimate expectations" are not a component element of "fair and equitable treatment" under customary international law that give rise to an independent state obligation:

> "[…] an investor may develop its own expectations about the legal regime governing its investments, but those expectations impose no obligations on the State under the minimum standard of treatment. The United States is aware of no general and consistent State practice and *opinion iuris* establishing an obligation under the minimum standard of treatment not to frustrate investor's expectations; instead, something more is required than mere interference with those expectations."[446]

743. This powerful statement not only forms part of the United States' view on the test that the Tribunal should follow, but this view is also shared by other DR-CAFTA Parties. For instance, in *RDC v Guatemala*, El Salvador appeared as a non-disputing Party and pointed out that:

> "[…] the requirement to provide 'Fair and Equitable Treatment' under CAFTA Article 10.5 does not include obligations of transparency, reasonableness, refraining from mere arbitrariness, or not frustrating investor's legitimate expectations."[447]

744. The same understanding was followed by The Republic of Honduras:

> "However, because the focus should be on the conduct of the State, the Republic of Honduras does not consider it valid or necessary to refer to investor's expectations in order to decide whether there has been a violation of the minimum standard of treatment."[448]

745. The Dominican Republic also held that:

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445 **RLA-172**, *Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Separate Opinion of Arbitrator Pedro Nikken, para. 3.

446 Id., p. 18.

447 **RLA-164**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No ARB/07/23, Submission of El Salvador as a Non-Disputing Party, January 1, 2012, para. 7. This opinion was also reiterated in **RLA-165**, *Teco Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No ARB/12/23, Submission of El Salvador as a Non-Disputing Party, October 5, 2012, para. 16.

448 **RLA-166**, *Railroad Development Corporation v. Republic* of *Guatemala*, ICSID Case No ARB/07/23, Submission of the Republic of Honduras as a Non-Disputing Party, January 1, 2012, para. 10. This opinion was also reiterated in **RLA-170**, *Teco Guatemala Holdings LLC v Republic of Guatemala*, ICSID Case No ARB/12/23, Submission of the Republic of Honduras as a Non-Disputing Party October 5, 2012, para. 10.

> "Given that the focus should be on the practice and conduct of the State, the Dominican Republic also notes that it is wrong to include the investor's expectations of the treatment they expect to receive based on what has been offered, in deciding whether the State has complied with the minimum standard of treatment."[449]

746. Therefore, it cannot be denied that among DR-CAFTA Parties, the understanding is that "legitimate expectations" cannot be considered part of the minimum standard of treatment, and then, the Tribunal should not consider it as a standard provided in Article 10.5 DR-CAFTA. As it has been held:

> "[i]t is not the function of an arbitral tribunal established under NAFTA to legislate a new standard which is not reflected in the existing rules of customary international law."[450]

747. In sum, since the minimum standard of treatment provided under customary international law does not encompass the legitimate expectations, there is no support for a claim of violation of legitimate expectations under Article 10.5 of DR-CAFTA.

2. The prohibition against arbitrariness and abuse of authority

748. As stated in Respondent's Rejoinder Memorial, DR-CAFTA does not contain any express provision on prohibition of arbitrary measures or abuse of authority.[451] In effect, this has been recognized by Claimants in footnote 329 of their Memorial.[452] Thus, the analysis that the Tribunal must follow is whether the **minimum** standard of customary international law prohibits arbitrary measures and abuse of authority.

749. The analysis should then start in the context of the minimum standard of treatment. Arbitral tribunals have considered that the minimum standard of treatment was breached when they found an egregious and shocking conduct on the part of the State:

> "[I]t must be borne in mind that the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise […] To identify arbitrariness with mere unlawfulness would be to deprive it of any useful meaning in its own right. Nor does it follow that an act was unjustified, or unreasonable, or arbitrary that, that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication."[453]

> "Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law ...It is a wilful disregard of due process

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449 **RLA-171**, *Teco Guatemala Holdings LLC v Republic of Guatemala*, ICSID Case No ARB/12/23, Submission of the Dominican Republic as a Non-Disputing Party October 5, 2012, para. 10.

450 **RLA-167**, *Mobile Investments Canada Inc & Murphy Oil Corp v Canada*, NAFTA/ICSID Case No ARB(AF)/07/4, Decision on Liability and Principles of Quantum, May 22, 2012, para. 153.

451 Respondent's Rejoinder Memorial, paras. 925-933.

452 Claimants' Memorial, para. 307 and fn. 329.

453 **RLA-42**, *Elettronica Sicula S.P.A.* (ELSI) (United States of America v. Italy), International Court of Justice (I.C.J.), July 20, 1989, para. 124

> of law, **an act which shocks, or at least surprises, a sense of judicial property**."[454]

750. Therefore, in the absence of egregious and shocking conduct that can be deemed part of the minimum standard of treatment that host States must apply to foreign investments, Claimants' case must fail. As it will be demonstrated below,[455] the conduct that Claimants purport as arbitrary and allegedly entailing an abuse of authority does not meet the standard to constitute a breach of the minimum standard of treatment. Consequently, the prohibition of arbitrariness and abuse of authority are not within the minimum standard of treatment and therefore, they are not standards of protection envisaged in DR-CAFTA.

3. Due process is not an independent standard according to DR-CAFTA

751. DR-CAFTA frames the obligation of due process alongside the promise not to deny justice. In accordance with international law, no claim for denial of justice can be levelled in the absence of domestic proceedings having been exhausted, or proven to have been futile. Therefore, and in light of the plain text of the Treaty, due process is not an independent obligation of the host State, and therefore, is not a standard of protection provided in DR-CAFTA, *unless* the lack of due process could be considered a denial of justice.

752. Article 10.5.2 (a) of DR-CAFTA expressly includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings as part of the "fair and equitable treatment" that the host State has committed to comply with. In particular, the Treaty provides that:

> "'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."

753. Following Article 31 of the VCLT –certainly encouraged by Claimants– an interpretation based on the plain text of the treaty indicates that the obligation not to deny justice is just an element of FET and any breach of this obligation is to be analysed in accordance with the principle of due process. Thus, the provision envisages that due process is not a standard *per se* under Article 10.5.2(a) but a factor that the adjudicator must take into account when analysing a denial of justice claim.[456]

754. As stated in Respondent's Opening Statement:

> "It should not trouble any members of the Tribunal for too long to immediately discern that the drafters of DR CAFTA had a very specific objective when considering the scope and application of FET. Consistent with the restrictive interpretation of FET is the minimum standard of treatment; FET is focused on the denial the justice. But more than this, the denial of justice and the principle of due process are explicitly and inextricably connected. Therefore, the

454 Id., para. 128.
455 See, Sections VIII.B.3 and VIII.C.
456 Respondent's Rejoinder Memorial, para.874. See also paras.870-878.

> standard of due process is a reference point when determining a denial of justice. It is not an independent standard."[457]

755. Although due process can be considered as one of the basic principles governing the administration of justice, it cannot be considered itself a source of obligation in light of the plain text of the Treaty.

756. Furthermore, as in the case of prohibition of arbitrariness and abuse of authority, due process can only be considered included in the minimum standard of treatment when the conduct that allegedly breaches such standard can be deemed as **egregious and shocking** under the "*ELSI* test."

757. As it will be demonstrated below,[458] the actions that Claimants purport as violations of due process do not meet the standard to constitute a breach of the minimum standard of treatment. Thus, due process is not within the minimum standard of treatment and therefore, it could not be considered a standard of protection envisaged in DR-CAFTA.

4. Conclusion

758. In sum, an analysis of the plain text of Article 10.5 evinces that neither the concept of legitimate expectations, arbitrariness, due process nor abuse of authority are standards of protection that DR-CAFTA Parties envisioned to be part of the Treaty. In addition, customary international law minimum standard of treatment has proven not to be of any assistance for Claimants to incorporate those claims.

759. In addition, no rule of customary international law allows Claimants' inclusion of the protection of investment-backed legitimate expectations as an obligation under the minimum standard of treatment.

760. Finally, the minimum standard of treatment imposes a high threshold to allege that arbitrariness, due process and abuse of authority are protected under such standard and capable of serving as a basis for international liability of Costa Rica under the Treaty. In any case, Claimants have not shown any egregious or shocking conduct on the part of Costa Rican agencies that could lead the Tribunal to find a violation of the minimum standard of treatment.

B. Claimants' efforts to extend the protection contained in Article 10.5 DR-CAFTA are fruitless

761. In its Closing Statement, Claimants addressed the extent of the protection contained in Article 10.5 of DR-CAFTA. In particular, Claimants consider that the standards of protection they have alleged in the present case are within the text of Article 10.5 or

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457 Respondent's Opening Statement, Day 1 Transcript, 295:13-22; 296:1-2.
458 See, Section VIII.B.2.

derived from practice, or from the general principle of good faith.[459] Indeed, according to Claimants' position, "*any of these doctrines, alone or in combination, could be used in application of Article 10.5 to the facts of the given case.*"[460]

762. Claimants suggest that there is sort of a consensus on the content of Article 10.5 that *"can be confirmed by reading [its] book."*[461] Respondent respectfully disagrees. Reference to Dr Weiler's book does not constitute support to prove a practice and *opinion iuris* that could allow determining the contents of customary international law minimum standard of treatment. Furthermore, it is slightly regrettable that Claimants' counsel cites his own book to prove the theory of their own case. With respect to counsel, Dr Weiler has published widely on NAFTA, but that is not the full extent of public international law.

763. Claimants also try to support their position by having the Tribunal consider different avenues to *"incorporate by reference"* their claims as if there has been a violation of a standard of treatment.

764. First, Claimants allege that the *"'customary international law minimum standard of treatment of aliens' is a legal term of art adopted by the DR-CAFTA Parties as a shorthand reference to a body of doctrine that protects the economic rights and interest of aliens."*[462] In other words, Claimants encourage the Tribunal to incorporate their claims not expressly contained in Article 10.5 by resorting to "treatment in accordance with international law," as provided in said Article since those standards are contained therein. However, and as stated above, "treatment in accordance with customary international law" is not a blank check which allows the Tribunal to import any alleged standard by the investors.

765. Claimants' position would entail a complete disregard of the intention of DR-CAFTA Parties when agreeing to commit to certain standards of protection, as demonstrated in their submissions as non-disputing Parties in other DR-CAFTA proceedings.

766. In this regard, it is bizarre how Claimants attempt to dismiss the position adopted by the United States as a non-disputing Party, by alleging that *"apparently [Respondent wasn't] familiar with the position that has been taken in previous NAFTA & CAFTA cases, ever since its lawyers started having to defend cases in which the USA was named as Respondent"*.[463] Claimants suggest that because the United States has now faced claims as a respondent, it has now shifted its position. Respondent rejects this approach to how the Tribunal should assess the United States submission. The U.S. submission has demonstrated a strong argument in this regard which draws on the support of other DR-

459 Claimants' Closing Statement Demonstrative, Day 6, slide 4.
460 Id.
461 Id.
462 Id.
463 Id.

CAFTA Parties. Political speculation and narratives from counsel do not advance their cause.

767. Second, Claimants contend that if the Tribunal has regard to the provisions of Chapter 17 as a contextual guide to construe Articles 10.5 and 10.7 of DR-CAFTA, the Tribunal should take into consideration the mandate provided in Article 17.3 DR-CAFTA which establishes the characteristics that domestic proceedings to sanction or remedy violations of environmental laws shall have.[464] In other words, and exclusively regarding due process, they contend that the Tribunal should "import" the standard of protection from Article 17.3.

768. The flip-flopping arguments proposed by Claimants presumably mean that this argument is premised on the acceptance that the environmental protection afforded by Chapter 17 is indeed applicable, and therefore of paramount importance to the Tribunal's deliberations.

769. Due process has been envisaged by the Parties in Chapter 10 as part of the protection not to deny justice. However, this scenario does not automatically imply that Article 17.3 allows the import of an international obligation of due process *per se* to investment protection under the Treaty, when Article 10.5 expressly refers to it as part of the host States' obligation not to deny justice.

770. As stated in Respondent's Opening Statement:

> "What Claimants forget is that their claim is brought under Article 10.5, not 17.3. As the U.S. intervention notes, in effect as well, this Tribunal does not have jurisdiction to decide violations of standards essentially imported from Chapter 17. The only reference in Chapter 10 to due process is quite clearly linked to the denial of justice, and this is the core of the Parties' disagreement."[465]

771. The point remains in this case. References in Chapter 17 might be informative as to how environmental compliance should be framed. But in terms of identifying a private party's right, attracting protection and the enforcement of which is available through means of arbitration – only Chapter 10 is relevant, and this Tribunal only has jurisdiction to uphold and protect those standards expressly articulated by DR-CAFTA, in Chapter 10.

772. Lastly, Claimants consider that there is an avenue for incorporation by reference through Article 31(3)(c) of the VCLT. According to Claimants, because said Article is a source of context for interpretation which refers to *"any relevant rules of international law applicable in the relations between the parties,"* those standards (they argue) can be incorporated by virtue of its application to this case.[466]

773. Respondent has already clarified that the phrase "applicable rules of international law" (which include customary international law) can only be applied when a party can prove

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464 Claimants' Opening Statement, Day 1 Transcript, 82:16-22, 83:1-21; Claimants' Closing Statement Demonstrative, Day 6, slide 6.

465 Respondent's Opening Statement, Day 1 Transcript, 293:17-22; 294:1-5.

466 Claimants' Memorial, para. 249.

that there is enough evidence under customary international law that a determined standard be considered an obligation under the minimum standard of treatment. In this case, Claimants have not met their evidentiary burden. Therefore, no "incorporation by reference" can be applied by virtue of Article 31(3)(c).

774. Furthermore, Claimants seem to agree with the above interpretation of the phrase *"applicable rules of international law."* In effect, the tribunal in the *Grand River Arbitration* case did not allow importing other norms as standards of protection because *"a minimum standard provision needs to remain narrow."*[467] During Claimants Opening Statement, Dr Weiler said:

> "In that case [Grand River Arbitration], as Claimants' counsel, I had argued under both the equivalent of the applicable law provision in the NAFTA and under Vienna Convention Article 31(3)(c) that customary and international law norms that had to do with the sovereign rights of native peoples should be relevant in that case because all of the Claimants were native peoples. Unfortunately, the Tribunal told me that I was wrong, and I would submit that the reasoning that the Tribunal demonstrates is not restricted to telling the Claimants that a minimum standard provision needs to remain narrow. I think that also applies in the context of telling a Respondent that it-- I'm sorry-- telling a Claimant that it can't get any broader."
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> Claimants' Opening Statement, Day 1 Transcript, 95:13-22; 96:1-5.

775. In sum, all the avenues proposed by Claimants to extend the scope of protection of Article 10.5 DR-CAFTA must fail and the Tribunal should dismiss any claims brought under the spectrum of that Article.

[467] Claimants' Opening Statement, Day 1 Transcript, 95:12-22; 96:1-4.

VIII. ALTERNATIVELY, COSTA RICA COMPLIED AT ALL TIMES WITH ARTICLE 10.5.

776. In the event the Tribunal considers that the standards of protection raised by Claimants are within Article 10.5 of DR-CAFTA, the evidence rendered in these proceedings will allow the Tribunal to conclude that Costa Rica complied at all times with the protection envisaged in DR-CAFTA.

A. Claimants have failed to assert a claim that Respondent frustrated their legitimate expectations

1. Claimants have not met the elements of a legitimate expectations claim under international law

777. Claimants argue that Costa Rica violated their legitimate expectations protected by Article 10.5 of DR-CAFTA as to the operation of Costa Rica's real estate development and environmental laws.[468] This submission was reiterated along their Opening Statement during the Hearing.[469]

778. Claimants argue that there is a kind of agreement between both parties as to their legitimate expectations claim. According to Claimants, the first point of agreement is that legitimate expectations provide Claimants *"with the means to vindicate their rights if they were undertaken in reasonable reliance on investment – on legitimate expectations."*[470]

779. There is no such agreement. Legitimate expectations are conditioned on various requirements that Claimants deliberately omit in their submissions simply because they are not met in this case. In this sense, Respondent's position is that (i) Claimants could in theory be entitled to compensation for the frustration of legitimate expectations if such standard was contained in the Treaty (which it is not); alternatively, (ii) Claimants' legitimate expectations have to be assessed at the time the investment was made; and (iii) their content has to be analyzed from an objective perspective.

780. It is not true that there is an agreement between both parties "*on how Claimants frame their position*", as if *reasonable reliance* would be the only requirement for a claim on legitimate expectations to succeed under international law. This is certainly not what international law provides. When the Tribunal considers how international law has defined legitimate expectations, it extends significantly beyond Claimants' assertions, and importantly is gauged by reference to objective, not subjective standards. The following are just some relevant considerations for the Tribunal.

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468 Claimants' Memorial, paras.283-292, 322-334; Claimants' Reply Memorial, paras.69-70, 107, 352-365.
469 Claimants' Opening Statement, Day 1 Transcript, 53:16-19; 111:20-21.
470 Claimants' Opening Statement, Day 1 Transcript, 110:17-22.

a) Claimants admit that their legitimate expectations were that Costa Rica would enforce its environmental laws

781. Claimants consider that there is an agreement on the content of the legitimate expectations under international law:

> "And I also –the third point is—is something else that I—I found in my—my friend submissions. I think we—**we agree with it**, that the **Claimants legitimate expectations did include a belief that Costa Rican officials** would engage in good faith in **enforcement of the country's rules**" but there is a disagreement "as to whether or not any of that happened."[471] (emphasis added)

782. *Critically*, Claimants recognize their legitimate expectations were that Costa Rica's environmental laws would be enforced by Costa Rican authorities. Accordingly, if wetlands were uncovered or any other breach of environmental laws was discovered, Claimants would be held accountable for it.[472]

783. Claimants insist that the analysis of legitimate expectations in accordance with the estoppel rule and legitimate expectations doctrine under Costa Rican law demonstrate that Respondent did not enforce its rules appropriately. [473] However, Claimants confuse, once again, the role that municipal law has to play in the case at hand. The test that the Tribunal should apply is one at international law and not, as Claimants suggest, one borrowed from Costa Rican law.

b) Claimants' alleged expectations have to be assessed at the time the investment was made

784. Claimants allege that Respondent's position is that an investor's expectation:

> "[…] entails objective analysis of her decisions which had to have been made in good faith and both **in light of contemporary business conditions as well as the overall regulatory environment**".[474] (emphasis added).

785. For the sake of clarity, Respondent's position is and has been that legitimate expectations have to be assessed at the time the investment is made and not, as Claimants suggest, taking into account *"contemporary business conditions."*[475] Respondent's position is well-accepted in international law. The introduction of *"contemporary business conditions"* is a misleading venture either into an assessment of circumstances at a point in time other than the time the investment was made, or it is a dangerous escapade into a subjective assessment of such conditions. Neither has any place in this assessment, and there is no precedent offered by Claimants to support their re-writing of the law.

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471 Claimants' Opening Statement, Day 1 Transcript, 111:14-20.
472 Respondent's Opening Statement, Day 1 Transcript, 249:7-9.
473 Claimants' Opening Statement, Day 1 Transcript, 112:8-20.
474 Claimants' Opening Statement, Day 1 Transcript, 111:9-13.
475 Respondent's Rejoinder Memorial, para.796.

786. As argued in the Opening Statement:

> "Even if legitimate expectations were entertained by this Tribunal as a relevant standard, which we do not accept, **the objective--legitimate expectations of the Claimants were those when they invested in Costa Rica**."[476] (emphasis added)
>
> "By the time they invested, was the date they first made their investment in Costa Rica. For Mr. Aven, this was 2002, when he made his first investment into Pacific Condo Park and La Canicula. For the other Claimants, this was around 2004 […] They all invested with the sole objective of developing the property at Las Olas, and those initial investments with a starting point in that development. The time when you make your investment is not an iterative process. Claimants have once--have one investment, and there is one moment when it was made. **Therefore, we look at the objective expectations an investor could have at 2002 and 2004**."[477] (emphasis added)

787. Accordingly, the Tribunal should look at the law (in its entirety) in place at the time Claimants made their alleged investment. Said law has remained in place through all relevant phases in the case at hand: *"it's been clear, it's been stable, it's been predictable."*[478]

788. Investment tribunals have been consistent in ruling that the time when the legitimate expectations have to be assessed is the time of the investment, *i.e.* at the time the investor acquires the assets. For instance, an arbitral tribunal composed by Professor Gabrielle Kaufmann-Kohler (chair), Professor Albert Jan van den Berg and Enrique Gómez Pinzón dismissed two agreements which were concluded **after** the investor acquired the investment finding that those later agreements did not give rise to legitimate expectations:

> "[…] [the Tribunal] is mindful of [legitimate expectations] limitations. **To be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment**. The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest."[479] (emphasis added)
>
> "[…] **legitimate expectations which are protected are those on which the foreign party relied when deciding to invest**. **The Med-Arb Agreements were concluded more than two years later and can thus in no event give rise to expectations protected under the fair and equitable treatment standard**."[480] (emphasis added)

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476 Respondent's Opening Statement, Day 1 Transcript, 163:6-9.
477 Respondent's Opening Statement, Day 1 Transcript, 290:12-22; 291:1-8.
478 Respondent's Opening Statement, Day 1 Transcript, 291:11-12.
479 **RLA-102**, *Duke Energy Electroquil Partners and Electroquil SA v Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, August 12, 2008, para.340.
480 Id. at para.365.

789. Also, the tribunal in *Continental v Argentina* rejected the existence of legitimate expectations based on general legislative "assurances" made after the investor had entered the host State. [481]

790. Therefore, the Tribunal has to assess the alleged expectations *at the time* Mr Aven decided to acquire the land and *at the time* the rest of Claimants invested (respectively). Following events are irrelevant for an assessment of legitimate expectations, unless there has been a specific promise from Costa Rica, which in this case did not occur.

791. Moreover, it is important to realize that legitimate expectations accrue (if applicable) at the time the investment is made. They do not keep reinventing themselves at the beck and call of Claimants. Thus, legitimate expectations are not re-created or re-defined upon issuance of an EV or construction permit, because they only establish themselves when the land was acquired. To have evolving legitimate expectations would defeat the purpose of the concept – which is to crystallize the reference point for State and Investor conduct once any qualifying investment is made. In this regard, the following table will assist the Tribunal.

Claimants	Time of investment
David Richard Aven	February 6, 2002 • C-27, Option Agreement for the Sale and Purchase of Properties.
Samuel Donald Aven	No date since no documentary proof beyond the witness' self-serving testimony of investment. • Samuel Aven did not provide a witness statement for this arbitration • Mr Aven suggests that Samuel Aven made an investment for the amount of $700,000.[482] • Mr Hart did not see any documentation (such as share certificates) proving such investment.[483]
Carolyn Jean Park	No date since no documentary proof beyond the witness' self-serving testimony of investment. • Her witness testimony suggests that she made an investment for the amount of $200,000 — money that came from her mother's estate managed by Mr Aven.[484] • Mr Hart did not see any documentation (such as share certificates) proving such investment.[485]
Eric Allan Park	No date since no documentary proof beyond the witness' self-serving testimony of investment. • He made his alleged investment together with Mrs Park.[486]

481 **RLA-168**, *Continental Casualty Company v Argentine Republic*, ICSID Case No. ARB/03/9, Award, September 5, 2008, para. 259.
482 First Witness Statement of Mr David Aven, para 32.
483 Mr Hart affirmed that *"nothing resembling an accounting has been produced to confirm the investment"*, Second Hart Report, para 89.
484 First Witness Statement of Mrs Carolyn Park, para 7.
485 Second Hart Report, para 89.

	• As stated, there is no evidence of such investment.
Jeffrey Scott Schioleno	N/A — No date since no investment
David Alan Janney	No date since no documentary proof beyond the witness' self-serving testimony of investment. • He insinuated he put in $50,000 regarding the purchase of the land, and $200,000 towards the expense of getting the project through the permitting process.[487] • Mr Hart did not see any documentation (such as share certificates) proving such investment.[488]
Roger Raguso	N/A — No date since no investment.

c) Claimants' based their alleged expectations on an improper subjective analysis

792. Even though only objective expectations can be deemed protected as part of a FET standard, Claimants insist on relying on EVs and construction permits as the basis for their claim on legitimate expectations.[489] Nevertheless, what informs the content of any legitimate expectations is not what they could subjectively believe based on EVs or permits; but, their content is informed by Costa Rica's overall legal framework.[490]

793. As explained in its Counter-Memorial and Rejoinder Memorial,[491] the legal framework that Claimants faced when they decided to invest in Costa Rica obliged them to obtain an EV from SETENA, apply for permits at SINAC in case they were to remove trees, and obtain construction permits from the Municipality. All of these measures had to be carried out in strict compliance with environmental provisions prevailing in Costa Rica. Otherwise, Costa Rica would activate its enforcement procedures to punish any violations of environmental laws. The timing of such enforcement was not limited in a way such as to prevent the steps adopted by the various agencies, and therefore, what occurred squares precisely with the objective expectations.

794. This is the legal framework applicable at the time Claimants decided to invest and which in turn informs any legitimate expectations. Respondent has pointed out that:

> "[…] the submissions from the Claimants have been confused regarding the objective test. It appears from their submissions there have been a number of references to the conversion of a subjective analysis into an objective test. We believe, Sir, that that is the incorrect approach to determining what the objective--the legitimate expectation of the investors would be at the time. It is not to start with their subjective analysis and then see if there was a

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486 First Witness Statement of Mr Eric Park, para 6.
487 First Witness Statement of Mr David Janney, paras 32 (f) and 33.
488 Second Hart Report, para 89.
489 Claimants' Closing Statement Demonstrative, Day 6, slide 5.
490 Respondent's Rejoinder Memorial, paras.792-797; **RLA-28***, Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, April 8, 2013, paras. 531, 536; **RLA-93**, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, July 30, 2010, paras. 222, 226.
491 Respondent's Counter-Memorial, Section III.B.4, Section III.A; Respondent's Rejoinder Memorial, para. 797.

> reasonable and legitimate expectation that could be construed. That is to take things the wrong way around."[492]

795. The objective expectation was the existence and the clear language of Costa Rican environmental law. Claimants were on constructive notice of all of the enforcement mechanisms that were available to Costa Rican authorities in case of breach of environmental law. As stated during the Hearing, "[*i]gnorance of the law is not a defense, and international law upholds this principle."*[493]

796. It is also relevant to consider how projects might fare in Costa Rica against the backdrop of the enforcement regime. For example, Mr Mussio clearly stated that environmental enforcement is always a consideration, as all projects face issues.[494] Thus, if this was the market's experience, it would also reflect in part the legitimate expectations that were imputed to Claimants when they made their investment.

797. It is, therefore, imperative to test how Costa Rican law was complied with. Claimants have not proven their compliance – instead pretending that the factual analysis is "irrelevant". Such failure to seriously show their compliance is self-defeating, since Claimants have offered no evidence to prove their argument on legitimate expectations. On the flip-side, Claimants have not shown how Costa Rican enforcement erred from the law.

d) <u>The granting of EVs or construction permits does not provide a basis for Claimants' frustration of legitimate expectations claim</u>

798. In its Closing Statement, Claimants suggest that the EVs as well as the construction permits issued by Costa Rica constituted "specific assurances" that boosted their legitimate expectations.[495] In particular, Claimants argued that:

> "Two rounds of memorials exchanged between the parties produced consensus on the existence of a duty to honor legitimate expectations under Article 10.5. Claimants' expectations: […] To be able to rely on property rights, certifications, and permits granted by the State to their enterprises […] That the construction permits granted to their enterprises could be reasonably relied upon as governmental authorizations for them to proceed with development of the Las Olas Project according to the plans submitted during the permitting process […]."[496]

799. For the avoidance of doubt, there is absolutely no agreement between Claimants and Respondent with regard to the existence or potential content of Claimants' legitimate expectations.

800. For example, Claimants suggest that Respondent agrees that reliance on specific promises such as permits issued by a host State to an investor create legitimate expectations that

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492 Respondent's Opening Statement, Day 1 Transcript, 291:14-22, 292:1-4.
493 Respondent's Opening Statement, Day 1 Transcript, 292:20-22.
494 Cross Examination of Mauricio Mussio, Day 2 Transcript, 394:2-6.
495 Claimants' Closing Statement, Day 6 Transcript, 1998:17-18.
496 Claimants' Closing Statement Demonstrative, Day 6, slide 5.

must be protected under international law. This is entirely false. On the contrary, Respondent has pleaded that *"not every assurance given by public officials rises to the level of a legitimate expectation,"*[497] because for legitimate expectations to arise, the State's conduct must be specific and clear; there must be an assurance that goes to the immutability (stabilization) of any such purported assurance; and there must be an unambiguous assertion on the part of the State.[498] None of these elements exist in this case.

801. Claimants also argue that:

> "Respondent argued that it had provided no such pr[o]mises, blatantly ignoring the fact that grants property rights, licenses and permits constitute very specific, legal promises. Respondent argued that reliance must be reasonable, bizarrely claiming that Claimants expected not to have CR enforce its environmental laws."[499]

802. Claimants clearly confuse what Respondent's promises are in order to find a breach of the alleged standard. As stated, what Claimants could have expected from Costa Rica is that it would enforce its law in the face of environmental violations.[500] Furthermore, Costa Rica has never made any specific promise that it would not enforce its law against Claimants' misconduct.[501] There is also no evidence of any specific assurances that deviate from Costa Rican environmental law enforcement.

e) Claimants have failed to show that their reliance on EVs and construction permits to defeat environmental protection was "legitimate"

803. Even if the Tribunal considers that Claimants' legitimate expectations are based on the granting of EVs and construction permits, Claimants face the inherent challenge of overcoming the conditionality of those EV's and permits on environmental enforcement rights of the State.

804. In addition, Claimants face an obstacle incapable of being overcome: namely the concealment of information. Claimants deliberately omit to mention the well-developed requirement that promises from the host State are conditioned on the accuracy of the representations made by the investor to the host State.

805. Respondent has proven that international tribunals have been consistent in arguing that State representations based on the scenario where an investor provides incomplete or

497 Respondent's Rejoinder Memorial, para.811.
498 Id.
499 Claimants' Closing Statement Demonstrative, slides 2, 7, 8.
500 Respondent's Rejoinder Memorial, para.812.
501 Respondent's Rejoinder Memorial, paras.911-818.

inaccurate information do not give rise to legitimate expectations.[502] This is a major problem for Claimants' case.

806. Because Claimants misled Costa Rican agencies during the environmental clearing processes and the construction phase by concealing material information on the conditions of the Project Site and the way the development was going to be built (fragmentation), specific promises that could lead to legitimate expectations are incapable of existing under international law. This is without prejudice to the fact that EVs and construction permits would never constitute specific assurances in any event. The reason for this is because Claimants' attempt to ground a specific assurance – as a stepping stone to finding a legitimate expectation – is with a view to arguing that any EV or construction permit should override the State's desire to protect the environment. No EV or construction permit has the legal ability to override the ultimate flexibility of Costa Rican law and the environmental authorities option to suspend or revoke such EVs/permits.

807. Therefore, put another way, Claimants are trying to establish that the EVs and construction permits would petrify rights contained therein, so as to render useless the enforcement rights of Costa Rica of its environmental laws. There is no such language in the EVs/construction permits – and none has been alleged by Claimants.

808. The nature of any specific assurance would have to essentially offer a specific commitment by Costa Rica that it would no longer enforce its environmental protection laws – something which was never done, and for this there is zero evidence.[503]

f) <u>Claimants' ignorance of the law is not an excuse for a claim on legitimate expectations to proceed</u>

809. Claimants assure us they received advice in order to remain in full compliance with Costa Rican law. There is no evidence of this. The protection of legitimate expectations requires also that the investors have to make sure that they abide by the overall regulations:

> "[…] 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."[504]

810. In its Rejoinder Memorial, Respondent proved that the technical and legal advice provided to Claimants was deficient and irregular. This plays against any argument that could be raised by Claimants on the expectation that they would be able to act on the EVs and permits granted.[505]

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502 Respondent's Rejoinder Memorial, paras.798-800; **CLA-70**, *International Thunderbird Gaming Corp. v. United Mexican State*, IIC 136, Award, January 26, 2006, para.151-155.

503 **RLA-136**, *Charanne B.V., and Construction Investments S.A.R.L. v. Spain,* SCC, Award, January 21, 2016, paras. 493, 504, 511.

504 **RLA-119**, *Anderson v Costa Rica*, ICSID ARB(AF)/07/2, Award, May 19, 2010, para.58.

505 Respondent's Rejoinder Memorial, paras. 919-848.

811. The testimony rendered by Mr Janney is pertinent in this regard:

> "Q: How many legal and environmental studies did you obtain upon deciding to team up with Mr. Aven in relation to Las Olas?
>
> A: I could not answer that as far as the number of how many. The property was put under contract. We studied the area. When I say "we studied the area," for all of the uses that were going on in the area. This property rolls down. It's very unusual in that properties on either side of Esterillos Oeste are flatlands. But this property rolls down from the road all the way to the sea."
>
> Cross Examination of David Janney, Day 2 Transcript, 351:15-22; 352:1-3.
>
> "Q: …did you contract with experts and legal advisers in order to make your assessment, as you say, that this is your approach to developing new properties?
>
> A: Yes. That is my approach to developing subdivisions in America whenever I'm buying land. And on this particular piece of property, we looked at the property. The property absolutely passed the visual test of wetlands, of environmental species of tree issues, and—
>
> Q: I'm sorry to interrupt. Does it pass the visual test by the—according to the opinion of the experts that you hired or according to your opinion?
>
> A: According to my opinion."
>
> Cross Examination of David Janney, Day 2 Transcript, 352:18-22; 353:1-9.
>
> "Q: …did you actually contract with advisers—legal advisers?
>
> A: I can't speak to that.
>
> Q: You cannot speak to that because you cannot remember?
>
> A: Yes, because I don't know."
>
> Cross Examination of David Janney, Day 2 Transcript, 353:15-20.

812. Mr Shioleno also admitted to his lack of due diligence:

"Q: So what type of research studies did you review in order to decide that you were going to engage and commit to this project?

A: Well, that was through my conversations and discussions with Mr. Aven, to whom I've had a—an extensive relationship and friendship in business over these last many years."

Cross Examination of Jeffrey Shioleno, Day 2 Transcript, 367:19-22; 368:1-3.

"Q: What due diligence did you do to commit to invest in this project?

A: I had always been associated with Mr. Aven. He's been a very successful business man. When he began to tell me about this project and how beautiful it was in Costa Rica and the opportunities, I was certainly interested."

Cross Examination of Jeffrey Shioleno, Day 2 Transcript, 369:13-19.

"Q: So at the time when you were making this assessment to which you testified here, you had not contracted any expert –

A: That is correct."

Cross Examination of David Janney, Day 2 Transcript, 351:2-5.

813. Finally, Mr Aven confirmed:

"Q: Let me take a step back, because I don't' want to take too long on this. You should have been consulted by your lawyers to disclose any legal advice to be provided in that privileged log. And I'd like to understand what your testimony is. Is it that you did not receive any written advice at all or that you did, but it just doesn't appear in the log?

A: My recollection is that I do recognize this, this document. And I don't recall any other documents I ever got from an attorney right now. I may have, but I don't' recall any, that is was a written legal advice. Most of the time, the attorneys I dealt with would just give me verbal advice, and verbal directions. So, I can't—you know, this—I think, if there's nothing more than this, that's the only thing I had in the way of legal advice."

Cross Examination of David Aven, Day 4 Transcript, 831:6-22.

"ARBITRATOR BAKER: When for the first time did you become aware that environmental process, in your words, could be used in order to cause previously issued permits to be canceled? Was that before or after you bought the property?

THE WITNESS: Oh, much later. Much later. We bought the property in 2002."

Cross Examination of David Aven, Day 4 Transcript, 917:18-22; 918:1-2.

814. However, even after the project had started, Mr Aven admitted not receiving any legal advice on the developer's obligations under the environmental clearance process before SETENA:

"Q: And were you ever advised what your obligations were when submitting the D1 Application?

A: Well, again, I'm not Costa Rican. I don't speak, read, or write Spanish. At all times, I relied upon professionals: Attorneys, people that were—that were engaged in the activities of taking a project through the Environmental Impact studies and on to the permits.

So, I was relying on these professionals. I never actually was involved in any of that. And I relied totally on the professionals. As you said, I don't speak Spanish, I don't read Spanish, I don't write Spanish. And so, I relied totally on the professionals that I had employed.

Q: And you do not recall or if didn't' happen—this is my question—whether you received any advice regarding your disclosure obligations in the D1 Application?

A: I don't' recall any of that whatsoever, because my understanding from the lawyers, and later, Mr. Mussio, was that they were the team that had expertise in shepherding a project through the permitting process, and they knew the requirements."

Cross Examination of David Aven, Day 4 Transcript, 818:15-22; 819:1-15.

815. In sum, (i) Claimants conducted no proper due diligence at the time of the investment or during its operation; (ii) Claimants received no or at best poor legal advice; and (iii) Claimants were negligent when assessing the information they received. Therefore, an expectation cannot be considered legitimate when premised on a misunderstanding or ignorance of the law. This was in effect sustained in the case of *Charanne v Spain*, where the tribunal chaired by the president of the ICC Court of Arbitration held that:

> "In this regard, the Arbitral Tribunal shares the Respondent's position according to which, ***"in order to exercise the right of legitimate expectations, the Claimants should have made a diligent analysis of the legal framework for the investment."*** This position is consistent with the position adopted by other tribunals. The tribunal in ***Frontier***, for example, considered that ***"a foreign investor has to make its business decisions and shape its expectations on the basis of the law and the factual situation prevailing in the country as it stands at the moment of the investment."*** Indeed, **in order to be in violation of the legitimate expectations of the investor, regulatory measures must not have been reasonably foreseeable at the time of the investment.** The Arbitral Tribunal considers that in the present case, the Claimants could have easily foreseen possible adjustments to the regulatory framework as those introduced by the rules of 2010." [506] (emphasis added)

[506] **RLA-136**, *Charanne BV and Construction Investments S.A.R.L v Kingdom of Spain*, SCC, Award, January 21, 2016, para 505;
RLA-177, *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No ARB/05/8, Award, September 11, 2007, para 333;
RLA-178, *Invesmart, B.V. v. Czech Republic, UNCITRAL*, Award (Redacted), June 26, 2009, paras 254, 272.

2. Costa Rica enforced its environmental law in a manner consistent with DR-CAFTA

816. Claimants alleged, prior to the Hearing, that Respondent *"had violated its own law"*[507] without properly framing any of these alleged violations of municipal law into violations of Costa Rica's international law obligations. During the Hearing, Claimants alleged that part of their legitimate expectations was that Costa Rica would enforce its environmental law consistent with DR-CAFTA.[508]

817. To support Respondent's alleged violations of Costa Rican law, Claimants rely on the testimony of Mr Ortiz. During this arbitration, Respondent has shown that while Mr Ortiz has some experience in the field of administrative law, his experience in environmental law is very limited, at best.[509] This is a critical fact that the Tribunal should consider when weighing the evidence on the record and deciding issues of disagreement between the experts.

818. During the Hearing, Mr Ortiz admitted he is not an environmental law expert but an administrative law one:

> "Today I'd like to give you a brief presentation on the most important topics of this case, **especially from the point of view of administrative and public law, which is my specialty.**" (emphasis added)
>
> Cross Examination of Luis Ortiz, Day 4 Transcript, 1265:21-22; 1266:1-2.

819. Mr Ortiz's bio, not attached to his report, shows that his areas of experience are public law and banking law.[510] During his examination, Mr Ortiz had to be corrected on the appropriate terminology by the President of the Tribunal when referring to EVs as "environmental impact assessments"[511] rather than Environmental Viabilities. Mr Ortiz was not able to answer a question from Respondent's counsel without looking "at his law."[512]

820. In the following section, Respondent will first summarize the environmental law principles and regulations that Claimants should have been aware of when deciding to invest in Costa Rica. Second, Respondent will deal with Costa Rica's alleged *"egregious violations of its own law"*[513] and show that Respondent enforced its environmental law in accordance with Costa Rican law and DR-CAFTA. In case Claimants felt that Costa Rica did not comply

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507 Claimants' Reply Memorial, para. 227.
508 Claimants' Opening Statement, Day 1 Transcript, 111:16-19 .
509 **R-522**, Bio of Luis Ortiz; Rejoinder Memorial, paras. 634-635, specially fn. 652; Paragraph 228 of the Second Witness Statement of Julio Jurado provides serious flaws on Mr Ortiz's appreciation of environmental law.
510 **R-522**, Bio of Luis Ortiz.
511 Direct examination of Luis Ortiz, Day 4 Transcript, 1281:12-14.
512 Cross Examination of Luis Ortiz, Day 4 Transcript, 1403:11; 1404:7-8.
513 Claimants' Opening Statement Demonstrative, slide 29.

with a regulation, they had plenty of remedial options available that they could have resorted to.

a) What Claimants should have known when they decided to invest in Costa Rica

821. Like anyone remotely interested in Costa Rica, Claimants could not possibly have ignored the environmental framework that applies to any real estate development in Costa Rica. Costa Rica's entire constitutional and administrative framework is designed to ensure that investments and developments in the country do not hamper the maintenance and revival of biodiversity. It was certainly known to Claimants, as they admit,[514] and it is in this context that Claimants acquired interests in a piece of property in Costa Rica. Certainly, Costa Rica is renowned internationally for its observance of environmental standards, while Claimants' own witnesses highlighted the persistence of environmental issues in any development.[515] Accordingly, any objective expectation in the marketplace (including Claimants) would be the need to observe and anticipate environmental hurdles.

822. As part of the constitutional right to a healthy and ecologically balanced environment, Costa Rica's Constitution recognizes the right of every individual to file a complaint regarding environmental damage, regardless of his or her identity, nationality or technical background.[516]

823. Costa Rica has typified 110 environmental criminal offenses[517] and created a specialized body within the Prosecutor's Office,[518] with the purpose of sanctioning environmental damage not only through civil liability but also criminally.

824. Since the Environmental Organic Act was enacted in 1995, environmental impact assessment has evolved in Costa Rica from being a generic obligation stemming from Article 14 of the Biodiversity Convention, to an obligation weighing on developers to certify that their submission provides an exhaustive, good faith environment impact assessment of their project.[519]

825. Therefore, Costa Rica's historic policy of promoting sustainable development focused on protecting the environment has prompted the creation of a robust administrative apparatus ready to enforce its laws in case of threats of damage to the environment.

b) The injunctions did not have to follow the 15-day term

826. Claimants continue to argue that the injunctions issued by Costa Rican agencies should have followed *"an administrative/judicial review within 15 days or otherwise be*

514 Claimants' Reply Memorial, paras. 355-356.
515 Cross Examination of Mauricio Mussio, Day 2 Transcript, 394:2-15.
516 **R-214**, Constitution of Costa Rica, 1949.
517 Cross Examination of Luis Martínez, Day 4 Transcript, 1140:1-9.
518 **R-216**, Environmental Criminal Prosecution Policy, Prosecutor's Office of Costa Rica, 2005.
519 **RLA-39**, Convention on Biological Diversity, 1992; C-184, Environmental Organic Act.

reversed."[520] Claimants allege that this period applies to all administrative bodies under "*Constitutional Chamber precedent and the Public Administration Act.*"[521] This is not true. Dr Jurado explained in paragraphs 76 to 87 of his second witness statement why this rigid term does not apply in environmental matters.

827. During the Hearing, Dr Jurado also clarified the exception that constitutional law jurisprudence has made for environmental measures:

> "What I want to say is that the 15-day period—the constitutional case law has made an exception for the environment, and it doesn't strictly apply the 15-day period.
>
> In other cases in which the TAA, based on my experience as a prosecutor—because I've had to defend, for example, administrative decisions, the TAA has issued a Precautionary Measure and it has not initiated the penalty phase, which is the main proceeding that the Precautionary Measure depends on, then the Constitutional Court has given longer periods of time. And that's in its case law.
>
> Why? Because sometimes the adoption of this main proceeding requires study by the administration with regard to the environment, which requires more time and to know what it needs to do."
>
> Direct Examination of Julio Jurado, Day 5 Transcript, 1447:6-21.

828. This exception in matters of environmental protection was disregarded by Mr Ortiz. Again, it is unfortunate that Mr Ortiz misconstrued the nature of his mission before the Tribunal. While environmental protection undeniably falls outside the scope of his expertise, one would have expected an administrative law jurist to have enquired more diligently about how the application of the 15-day term to which he testifies in environmental matters such as this case. In short, Claimants' assertion that the 15-day term applies and that Costa Rican agencies acted unlawfully when issuing their injunctions is quite simply unsupported by Costa Rica's environmental law.

829. Moreover and in any event, if Claimants considered that injunctions were issued against them in violation of Costa Rican procedural rules, Claimants had numerous avenues to challenge those injunctions.[522] In this regard, Dr Jurado testified to the existence of procedural recourses when parties wish to challenge injunctions issued against them:

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520 Claimants' Opening Statement Demonstrative, slide 29.
521 Ibid.
522 See, Section VIII.A.2(b).

"Q: Would you agree with me that this reasonable period that the Constitutional Court objectively provided for – well, and – is framed in these provisions that I have read and that falls within proportionality and reasonability, now would you consider that a precautionary measure that lasts without actually completing the administrative procedure depends on and has gone on for two years or three years, would you agree that that violates guarantees and rights of the Constitution?

A. Yes, a precautionary measure without a convenient administrative proceeding, yes, **and Costa Rican law offers to those who are affected by that, procedural measures in order to go forward.**"

Cross Examination of Julio Jurado, Day 5 Transcript, 1488:12-22; 1489:1-3.

830. Claimants appear to have exercised as little diligence in defending their alleged rights as they did in making their alleged investment, and they now wish for the Costa Rican tax payer to carry the burden of their failed diligence.

c) Respondent's conduct was in keeping with good faith principles under Costa Rican law

831. Paragraphs 804 to 810 of the Rejoinder Memorial, address the claim that measures taken by Costa Rican local agencies violated Costa Rican law. During the Hearing, Claimants repeated has their allegations of violation of legitimate expectations/estoppel rule under Costa Rican law because, according to Claimants, *"an administrative body may not annul, revoke or suspend indefinitely an act or resolution that has granted rights to third parties."*[523] Claimants' allegations are wrong.

832. First, Claimants' allegations as to the alleged violation of their legitimate expectations under Costa Rican law relies on Spanish, not Costa Rican, case law.[524] To address the clarification in Dr Jurado's second witness statement that the concepts relied upon by Claimants are foreign to the Costa Rican legal system,[525] Claimants alleged, at the Hearing, that the estoppel rule is an application of Article 34 of the Costa Rican Constitution. According to Claimant, Article 34 prescribes the principle of non-retroactivity of the law.[526] Claimants use the estoppel rule to contend that: (i) agencies should not have disregarded preparatory acts in the midst of the investigations; and (ii) that agencies were bound by the effects of the EVs granted to the Las Olas Project.

523 Claimants' Opening Statement Demonstrative, slide 30.
524 Claimants' Reply Memorial, paras. 262-268.
525 Second Witness Statement of Julio Jurado, para. 127.
526 Direct Examination of Luis Ortiz, Day 4 Transcript, 1278: 22; 1279: 1-9. ("*The principles of good faith and also legitimate expectations--these principles are not a creation that comes from foreign countries. Rather, these are based on the legal framework in Article 34 of the constitution, which sets forth the fundamental right to the fact that administrative acts and laws cannot be retroactive, and 73 of the administration—public Administration law which regulates what I just explained.*").

833. Dr Jurado explained in his second witness statement that because preparatory acts do not generate rights over third parties, the estoppel rule does not apply.[527] Likewise, at the Hearing, Dr Jurado testified that the same rule applies to EVs because they are preparatory acts (*"actos de trámite"*) and cannot generate estoppel:

> "But in administrative litigious cases, where there is a challenge against an EV that, for instance, has been granted to a private individual, that this act cannot be challenged because it is a mere formality that does not generate estoppel, and this has been accepted by the courts, because this is an act that cannot be challenged."
>
> Direct Examination of Julio Jurado, Day 5 Transcript, 1456:6-12.

834. Second, Claimants rely on Mr Ortiz's opinion to assert that local agencies have not taken the steps established by law to annul the permits granted to them. Claimants complain that SETENA and the Municipality have not engaged in *lesividad* proceedings to annul the EV for the Condominium and the construction permits, respectively.

835. According to Mr Ortiz, Costa Rican agencies have applied the wrong remedy by issuing injunctions and not annulling the permits:

> "ARBITRATOR BAKER: So, I understand the fair balance of your testimony is that the wrong remedy was used by the agency? It should have been declared null and void rather than injuncted? Is that the principal thrust of your testimony?
>
> THE WITNESS: Exactly."
>
> Redirect Examination of Luis Ortiz, Day 5 Transcript, 1381:18-22; 1382:1.

836. But, it is not Costa Rica's position that the permits are null and void. Rather, Costa Rica's position is that those permits are suspended pending a final decision from the TAA and the criminal courts of Quepos. The TAA has full powers to order SETENA to annul the EV granted for the Condominium in its final decision. For instance, in the Costa Montaña Project's administrative proceedings, where Mr Mussio was involved, the TAA ordered SETENA to review the EV granted to the project given the developer's untruthfulness when submitting studies for 180 agricultural parcels when the real purpose was to develop a real estate urban development.[528]

837. The purpose of undertaking any *lesividad* proceedings would be to prevent an act that is causing environmental damage from continuing. Therefore, the aim would be to protect the environment. The injunctions issued by SINAC, the Municipality, the TAA and the criminal court of Quepos have *de facto* achieved that aim. In addition, the suspension of a permit

[527] Second Witness Statement of Julio Jurado, paras. 132-134.
[528] **R-419**, TAA sanctioning resolution for Costa Montaña Project, December 1, 2009, p. 33.

gives recourse to the developer to correct the conduct that gave rise to the suspension and continue with his development once the conduct is corrected. Annulling or revoking the permits immediately, as Claimants suggest, would deny the developer this opportunity to correct his conduct and continue with his development.

838. In any event, if Claimants thought that local agencies had "applied the wrong remedy" or "taken too long," as Mr Ortiz suggests, Claimants had the right to challenge those flaws by resorting to all of the available avenues of recourse that Costa Rica's legal system provided them. Claimants' expert, Mr Ortiz, agrees that there are avenues in Costa Rica where Claimants could seek compensatory damages if they consider that the Administration has acted unlawfully:

> "**Q. So if the circumstances warranted, there are procedural avenues for the developers to seek damages in Costa Rica; correct?**
>
> A Well, as a general principle, I don't know if in Costa Rica or in the arbitration whatever.
>
> Q. I mean, what you're saying is—
>
> **A. Yes, the substantial law, once the agency has been condemned, is that he can claim damages."** (emphasis added).
>
> Recross Examination of Luiz Ortiz, Day 5 Transcript, 1410:4:1-8.

839. Claimants were perfectly aware of those steps, because they challenged the SINAC Injunction in the administrative seat and the judicial courts.[529] However, Claimants preferred to (i) abandon that action (by never appearing before the Contentious Administrative Tribunal);[530] and (ii) ignore the rest of the other remedial steps available to them to challenge any other injunction they believed was unlawful.

840. With regard to *whom* bears the burden of activating the remedial steps available to the user, Mr Ortiz testified that while both the user and the Administration can activate them, the Administration bears the principal responsibility based on Article 194 of the General Administration Act.[531] However, Article 194 establishes strict liability of the Public Administration for damages caused to users. It does not establish that the Administration has the burden *sua sponte* to cure flaws. The circumstances in which the Administration has a *sue sponte* obligation to act and cure flaws are very narrow, and do not lie in Article 194.[532] The Administration has no burden to inquire and find flaws in its acts that it can then cure. Additionally, in this case, Claimants misrepresented and concealed information

529 **R-193**, Administrative Tribunal rejects motion to revoke Architects Law, SINAC Injunction, March 25, 2011.

530 Id.

531 Cross Examination of Luis Ortiz, Day 5 Transcript, 1382-83.

532 Under Article 190 of the General Administration Act, the Administration has to cure, *sua sponte,* any flaw it detects in an administrative act. However, in no case does the Administration have the burden to detect *sua sponte* such flaws.

from the Administration, precisely so that the Administration could not identify any shortcomings in the acts issued in relation to the Las Olas Project and their implementation.

841. For his part, Dr Jurado, after explaining to Mr Baker the ways in which the Administration can annul a permit, testified that *"in all cases under all hypotheses, the person on whom rights are conferred by that act must appear."*[533]

842. During Respondent's Closing Statement, Respondent presented the Tribunal with all of the means available to Claimants to appeal against any conduct they considered unlawful from SETENA, SINAC, the TAA, the Municipality and the criminal courts.[534] The purpose of that evidence was to show that Claimants had and still have recourse available to challenge any injunction or decision from Respondent.

d) <u>To date, Claimants still have options available to them</u>

843. During the Hearing, Claimants alleged that the injunctions have suspended indefinitely their permits. Claimants allege that the injunctions:

> "[Represent] the interposition of a legal instrument by the host State, which has mandated a cessation of the exercise of legal rights by, or on behalf of, investors for the purposes of continuing to establish and/or operate an investment."[535]

844. Claimants thus conveniently ignore that (i) local proceedings are ongoing, and that (ii) if their rights are being restrained by those injunctions, there are available remedies, which Claimants neglected entirely. If injunctions are still pending, and the Las Olas Project is still suspended, it is only attributable to Claimants' inactivity, not Costa Rica. Claimants quite simply decided to abscond. Once they initiated this arbitration, Claimants put the relevant Costa Rican agencies in the impossible position whereby any decision they issue might be used against Costa Rica in this arbitration.

845. As to the TAA Injunction, Respondent has already explained that it has not been revised because the circumstances that motivated its issuance (discontinuing the works that were impacting a wetland) have not changed to date. If Claimants disagreed, they could have and still can request the TAA to reverse the injunction at any time. Dr Jurado explained in his second witness statement that this possibility is available to Claimants:

> "Additionally, it must be stated that the permanence of a precautionary measure does not undermine the right of the individual. **The individual can always request the TAA to modify the precautionary measure should they consider that there has been a change in the original situation status. This is because the environmental law allows to move from an injunctive relief system to a process where the immediate and early protection is allowed in order to avoid the occurrence of damage or the**

533 Cross Examination of Julio Jurado, Day 5 Transcript, 1535:2-4.
534 Respondent´s Closing Statement Demonstrative, Day 6.
535 Claimants' Closing Statement Demonstrative, Day 6, slide 28.

> **continuation thereof. Therefore, if [the TAA] verifies that the risk of damage has disappeared, then there would no longer exist the need to extend the precautionary measure**."[536] (emphasis added).

846. With regard to the other injunctions, the principle is the same. Some of the remedies available to Claimants were explained by Claimants' expert, Mr Ortiz:

> "Q: Now moving on, assuming for the sake of the argument that a Provisional Measure is issued and that no process is initiated within the 15-day period—and I am placing this hypothetical in the area of Environmental Law, to be clear—what are the avenues, what are the remedies, for the administrado, for the developer, say, for example, in a situation like this under Costa Rican law?
>
> A: He may request a reversal of the interim relief injunction before the same agency that ordered it. He may also file a judicial review before the Administrative Jurisdiction; or he may file a writ of "amparo" before the Constitutional Court."
>
> Cross Examination of Luis Ortiz, Day 5 Transcript, 1322:3-15.

847. Another remedy and a very important one is the request for a judicial injunction against an administrative injunction. During the Hearing, it was not entirely clear what Claimants' argument was with respect to the administrative injunctions. During the cross examination of Luis Ortiz, he referred to *"contra-cautela"* as *"a condition in which a governmental agency or the Administrative Jurisdiction may order an interim relief injunction."* [537] Respondent would clarify that this is not the recourse that Claimants have available against the administrative injunctions. Rather, Respondent contends that Claimants could have requested a judicial injunction against the administrative injunctions at the contentious administrative courts.

848. For instance, in a very similar case to the Las Olas Project, the TAA issued an injunction against an entire residential project during the investigation for environmental damage. The developer brought a claim before the Contentious Administrative Tribunal seeking a judicial injunction to suspend the effects of the TAA injunction. The court engaged in a balancing exercise between the rights of the developer which were suspended and the protection of the environment. The court partially reversed the injunction finding that it should not have been issued against the whole project but solely on the areas that were under investigation for the alleged environmental damage. The Contentious Administrative Tribunal held that:

> "Thus, for reasons of reasonableness and proportionality and the desire to avoid serious harm to the [developer] in an unnecessary way, this court believes that it is appropriate to maintain the effects of the injunction issued by the [TAA] only with respect to the following areas: a) area designated as forest according to the map of use of the land presented to SETENA during the environmental viability process, b) area of 50 meters counted from the Cruz

536 Second Witness Statement of Julio Jurado, para. 113.
537 Cross Examination of Luis Ortiz, Day 5 Transcript, 1323:1-4.

> gulley, c) area of 4 housing constructions […]. A precautionary measure in administrative proceedings which would apply to an entire project, will be appropriate when based on the evidence presented, it is evident that there is a possibility that the environmental public interest will affect the entire [development]; however, when [the environmental public interest] will only impact part of the [development], the precautionary measure is not applicable to the whole project because the effects of the precautionary measure are seriously detrimental to the [developer]."[538]

849. Claimants were well-aware of the options available to them. On February 24, 2011, the Contentious Administrative Tribunal granted Claimants a provisional, immediate, *prima facie* injunction against the SINAC Injunction.[539] This is proof not only of the possibility of resorting to these measures but also of how they were accessible, as the Tribunal granted them. Nonetheless, the Tribunal requested from Claimants the remaining documents to notify SINAC and to state their claim. After the court requested this information from Claimants on **four occasions** without receiving any response, the court lifted its injunction and ended the proceedings due to lack of interest of Claimant as petitioner.[540] The information requested at that point was a mere formality. The fact that Claimants did not comply with such simple requests shows negligence and a lack of will to actually obtain a positive result.

850. By filing this complaint, Claimants could have requested the courts to suspend the effects of the administrative injunctions, or to modify the scope of the injunction, as administrative injunctions are nothing more than a type of administrative act that is appealable at the judicial fora.

851. Claimants could have also filed a writ of *amparo* with the Constitutional Chamber.[541] If Claimants thought that their constitutional rights were being harmed by the injunctions, Claimants had at all times this remedy available.

852. It is striking that Claimants did not resort to any of these avenues when Claimants' local counsel Mr Manuel Ventura, who identifies himself as *"Mr Aven's personal attorney since January 2012"*[542] says he is *"a Costa Rican lawyer who specializes in Constitutional and Administrative law."*[543]

853. For example, at the time of the measures of, Claimants had, but failed to exercise, the following avenues to challenge any administrative act affecting them:

- *Recurso de revocatoria* under Article 344 of the Public Administration Law;
- *Recurso de apelación* under Article 344 of the Public Administration Law;

538 **R-564**, Contentious Administrative Tribunal, Decision No. 306-2012, June 7, 2012, p. 13.
539 **R-193**, Administrative Tribunal rejects motion to revoke SINAC Injunction, March 25, 2011.
540 Id.
541 **R-428**, Articles 29 and 35, Law 7135, Constitutional Jurisdiction Law, October 11, 1989.
542 First Witness Statement of Manuel Ventura, para.7.
543 Second Witness Statement of Manuel Ventura, para. 10.

- *Recurso de revisión* under Article 353 of the Public Administration Law.

854. However, because of Claimants' own inactivity, the statute of limitations has run out for these three remedies.

855. Nevertheless, Claimants still have options available to challenge measures they consider harmful to them, such as the injunctions. Given that, under Costa Rican law, injunctions issued by administrative agencies are considered administrative acts with continuous effects, the statute of limitations has not expired for several remedial options to which Claimants can still resort to today:

- A complaint to the court (*recurso de queja*) under Article 358 of the Contentious Administrative Procedural Code;
- A request for an injunction against the administrative injunctions with the Contentious Administrative Tribunal under Article 19 of the Administrative Contentious Code;
- A complaint with the *Defensoría de los Habitantes* under Article 12 and 17 of its Law;[544]
- A writ of *amparo* under Article 29 and 35 of the Constitutional Jurisdiction Law;[545]

856. In addition, once the effects of an injunction cease by referring to the abovementioned recourses, Claimants would have the following relief against the Public Administration:

- A *incidente de nulidad* under Article 75 of the Public Administration Law;
- A complaint against the administrative act with the Contentious Administrative Tribunal under Article 49 of the Constitution[546] and the Administrative Contentious Code;[547]
- A complaint with the *Controloría de Servicios* of each agency under Articles 13, 14, 39 to 45 of the Regulatory Law for the National System of the *Contraloría de Servicios;*[548]

857. It is also worth mentioning that after Claimants file a complaint against the Public Administration, three appeals are available to challenge any final decision from the Contentious Administrative Tribunal: (i) a *recurso de revocatoria;* (ii) an appeal; and (iii) a *recurso de casación.*[549]

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544 **R-164**, Law 7319, March 10, 1993. The Defensoría would be able to assist the complainant in cases where his constitutional rights were being violated and guide him with the available remedies and options to remediate the violation. Note that even if the statute of limitations would have already run, the *Defensoría* can exercise its broad discretion to anyways hear a complaint.

545 **R-428**, Law 7135, Constitutional Jurisdiction Law, October 11, 1989.

546 **R-214**, Constitution of Costa Rica, 1949.

547 **R-248,** Articles 1, 2, 9, 10, 12, 19-31, 36, 37, 39-42 and 58, Administrative Contentious Code.

548 **R-569**, Regulatory Law for the National System of the Contraloría de Servicios, 2013. This remedy is available against ineffectiveness of any public officer for inexcusable and unjustified delay, poor service or serious erros committed in performance of its official duties. Note that the recourses mandated by this law were only available starting its entry into force in 2013.

549 **R-248**, Articles 132-134, Administrative Contentious Code.

e) Claimants' new arguments on administrative law violations do not stand up under Costa Rican law

858. Claimants raised during the cross examination of Dr Jurado two new arguments that Respondent believes lay within the legal framework when Claimants made their alleged investment. Because this is the first time Claimants have raised these arguments in this arbitration, Respondent reserves its right to reply to any new argument from Claimants in their post-hearing brief.

859. The first argument refers to a decision from the Constitutional Chamber of September 9, 2009 that declared the word *"creation"* in the last paragraph of Article 7 of the Wildlife Protection Law unconstitutional. Prior to this decision, Article 7 read as follows:

> "The **creation** and delimitation of wetlands will be undertaken through executive decree, according to technical criteria." (emphasis added).

860. As explained by Dr Jurado during his cross examination, the effects of the Constitutional Chamber's ruling are retroactive, and therefore an obligation to 'create wetlands through executive decree' never existed.[550] However, Claimants rely on the last passage of the decision which establishes that the decision has to respect *"acquired rights."*[551]

861. Furthermore, Claimants' theory over acquired rights arising out of the Constitutional Chamber's decision is wrong: their misconduct bars them from claiming any rights that could have been granted to them prior to September 2009. Claimants misrepresented to the Costa Rican agencies the physical conditions of the land. Additionally, they unlawfully obtained environmental clearance and started construction in complete disregard of the ecosystems that the land held. They cannot now assert rights that they unlawfully acquired.

862. The second argument refers to the existence of the zoning plans for Esterillos Oeste and Parrita. Claimants insinuated during the cross examination of Dr Jurado that because the zoning plan did not establish that Las Olas was located on a wetland, when the Municipality issued a certification on the use of land (as part of the process for obtaining the construction permit), the Municipality had to comply with it. Dr Jurado explained that under Costa Rican law, use of land certifications does not grant rights to individuals but merely declares what is contained in the zoning plan:

> "The Attorney's General Office has said that if the Municipality issues a certification regarding the use of land, are declaratory acts. They do not constitute rights."[552]

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550 Cross Examination of Julio Jurado, Day 5 Transcript, 1503:16-19; 1505:3-6.
551 Id., 1505:10-12.
552 Cross Examination of Julio Jurado, Day 5 Transcript, 1505:20-22; 1506:1.

863. Therefore, if the land use certification does not generate rights and is a mere preparatory act (for the issuance of the construction permit), then the Municipality did not have to "comply with it".

864. Furthermore, Claimants cannot argue that a right under the zoning plan allowed them to commit environmental damage. Neither can Claimants assert that they had the right to build on their property solely because the zoning plan failed to integrate the wetlands that existed in the area. The fact that Claimants had no prohibition to build because no wetlands were identified in the zoning plans no shield to Claimants' misconduct. Claimants were required, by law, to protect the wetlands on their property, and were prohibited from building on a wetland, which is an ecosystem protected by law, irrespective of what was stated in the zoning plan.

B. Claimants have failed to assert a claim of denial of justice

865. As stated above,[553] due process and arbitrariness are not independent obligations of the host State, and therefore, are not a standard of protection provided in DR-CAFTA, *unless* the lack of due process or arbitrariness could be considered a denial of justice.

866. If the Tribunal considers that due process and arbitrariness are standards of protection under DR-CAFTA, it has to frame them alongside the express promise not to deny justice, as provided in the text of the Treaty. Consequently, it is Respondent's position that (1) Claimants' disguised denial of justice claim brought under 10.5 must fail, (2) Claimants were afforded due process at all times, and (3) Mr Martínez did not conduct himself arbitrarily.

1. Claimants' disguised denial of justice claim brought under Article 10.5 must fail

867. Claimants have asserted an unsupported claim for Respondent's failure to afford due process and arbitrary conduct with the clear purpose of avoiding the high threshold that a claim of denial of justice entails: exhaustion of local remedies, or in the event that it has not been complied with it, futility of the remedies available.[554]

868. As regards due process, Claimants' strategy appears to suggest that since the doctrine of denial of justice includes administrative proceedings –the conduct of Costa Rican officials they are claiming against–, they did not have to exhaust local remedies:

> "So, it seems to us that it's very clear that since the Doctrine of Denial of Justice was never limited to the judicial branch, it also follows that there is no need to exhaust local remedies if one is not dealing directly with the challenge to a Court decision, which is what the case law says with regard to the need for exhaustion."[555]

553 See, Sections VII.A.2 and VII.A.3.
554 Respondent's Opening Statement, Day 1 Transcript, 160:7-161:1.
555 Claimants' Opening Statement, Day 1 Transcript, 115:1-7; Claimants' Opening Demonstrative, slide 22.

869. However, this is not the reading that can be inferred from Article 10.5.2(a). As it was explained by an arbitral tribunal interpreting such provision in the context of DR-CAFTA:

> "[T]he Tribunal does not believe that an administrative act, in and of itself, particularly as the level of a first instance decision-maker, can constitute a denial of justice under customary international law, when further remedies or avenues of appeal are potentially available under municipal law."[556]

870. Therefore, even if administrative proceedings are encompassed in Article 10.5.2(a), the requirement of exhaustion of local remedies is still applicable.

871. Since Claimants did not advance any new arguments that Respondent has not rebutted above or in its Counter-Memorial and Rejoinder Memorial,[557] Respondent relies on its submissions on Claimants' failure to comply with the requirements of a denial of justice claim.

2. Claimants were afforded due process at all times

872. Alternatively, and if the Tribunal considers that Costa Rica committed to afford due process outside of the scope of Article 10.5 of the Treaty, Respondent has shown that Claimants were afforded due process at all times.

a) <u>The Las Olas Project has not been shut down without a final administrative decision</u>

873. Claimants allege that the project was shut down with no hearing or final administrative decision.[558] To reach this conclusion, Claimants completely decontextualize the facts and the current ongoing status of administrative proceedings in Costa Rica. The TAA Procedural Regulations envisage a public hearing where the developer can appear and exercise its right of defense.[559]

874. The TAA initiated an administrative process against the Las Olas Project starting 2010, after receiving Ms Vargas' request for an investigation, Mr Bucelato's complaint and SINAC's complaint.[560] To date, a final administrative decision on Claimants' liability is pending. As mentioned before, due to the chilling effect of this arbitration, agencies like the TAA have held back from continuing with the proceedings in the fear of issuing a decision that could be inconsistent with any findings from this tribunal or could have an adverse effect on Costa Rica's defense.

875. The record shows that Claimants decided to ignore these proceedings even when they knew about them since September 2010[561] and were given formal notice of them on April

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556 **RLA-150**, *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award, May 31, 2016, para. 248.
557 Respondent's Counter-Memorial, paras.30, 565-577: Respondent's Rejoinder Memorial, paras.869-904.
558 Claimants' Opening Statement, Day 1 Transcript, 20:2-6.
559 C-185, Article 24, Procedural Regulations to the TAA.
560 **R-123**, TAA consolidates three complaints (695-12-TAA), July 17, 2012.
561 **R-372**, First Defamation law suit, October 8, 2010, p. 12. (Prueba documental).

13, 2011.[562] The TAA Injunction is pending upon a final decision from the TAA on the liability of Claimants for environmental damage. If Claimants believe that the TAA has acted unlawfully, Claimants can at any time appear before the TAA and challenge its conduct.

b) Ms Díaz and Ms Vargas did not act in an "utterly non-transparent manner"

876. Claimants allege that the investigations carried out by Ms Díaz and Ms Vargas did not afford them due process because of the non-transparent way in which they were conducted.[563] It is very cynical of Claimants to maintain these investigations constituted a violation of due process, when they were at all times informed of both investigations. As shown in Exhibit R-372, by September 29, 2010, Claimants were aware of the investigations being conducted by SINAC, the *Defensoría,* the DeGA and the TAA.[564] Respondent deals with this fact in paragraphs 578-589 of its Rejoinder Memorial. Claimants have not rebutted this fact but have preferred to persist with their claim that they were "kept in the shadows" from these events.

877. Both Ms Vargas[565] and Ms Díaz[566] have testified that under Costa Rican regulations, they had no obligation to notify third parties of their investigations. Mr Jurado[567] and Mr Ortiz[568] also agree on this issue as a matter of Costa Rican law. Claimants allege that even if it was true that under Costa Rican law, agencies were not required to give notice to Claimants of their investigations due to their preparatory act nature, *"Respondent cannot rely upon its own municipal law to justify an international delict."*[569]

878. Claimants totally take Respondent's defense out of context. As it was stated,[570] the role of Costa Rican law is relevant to the extent that it informs the content of commitments made by Respondent to Claimants which Claimants allege has been violated. Therefore, it is imperative to determine whether Costa Rica had an obligation to notify Claimants of the first stages of the investigations to determine whether there has been a breach that can trigger the international responsibility of Respondent. As shown, no obligation existed at all.

879. Claimants also allege that the *Defensoría's* and the DeGA's investigations *"contributed to the manifestly arbitrary criminal prosecution of Mr Aven."*[571] First, this is not true with regards to the *Defensoría*. Ms Díaz was investigating the legality of the conduct of Costa

562 **R-84,** Notification of TAA injunction to Claimants, April 13, 2011.
563 Claimants' Closing Statement, slide 23.
564 **R-372**, First Defamation law suit, October 8, 2010, p. 12. (*Prueba documental*).
565 Second Witness Statement of Mónica Vargas, paras. 36-37.
566 Second Witness Statement of Hazel Díaz, paras. 20-23.
567 First Witness Statement of Julio Jurado, paras. 115-120.
568 Expert Report of Luis Ortiz, para. 145.
569 Claimants' Closing Statement, slide 23.
570 See, Section IV.C.
571 Claimants' Closing Statement, slide 23.

Rican agencies, not Claimants'. Her investigation actually concluded when the criminal investigation started and Mr Martínez did not use any of the information from the *Defensoría* to bring criminal charges against Mr Aven on October 21, 2011.[572]

880. Second, what contributed to Mr Martínez's criminal investigation were the observations Ms Vargas made in early 2009 when Claimants had already started refilling Wetland No. 1. Ms Vargas's reports were offered as evidence during the criminal proceedings as well as Ms Vargas as a witness; where Mr Aven's criminal counsel had the opportunity to cross-examine her and he did.[573] We do not see how Mr Martínez's reliance on Ms Vargas's first-hand knowledge during the criminal investigation could have possibly violated any rights of Claimants.

881. In sum, Claimants' claim must fail because Respondent has shown that (i) Claimants knew of the investigations since the beginning of the investigations initiated by the *Defensoría* and the *DeGA;* (ii) those agencies had no duty under Costa Rican law to notify Claimants of their initial investigations; and (iii) since Costa Rican law is relevant to the extent that it informs the content of commitments made by Respondent to Claimants, there is no breach that can trigger the international responsibility of Respondent.

c) Costa Rican agencies did not ignore prior agency determinations

882. Claimants allege a violation of due process because local agencies decided to ignore prior agencies determinations. Claimants argue that, *"the relevant agencies had the opportunity to end the investigation process following two decisions from SETENA, but they failed to do so."*[574] Claimants refer to SETENA's September 2010 Resolution which dismissed the complaint filed with the *Defensoría* on the existence of wetlands at the Project Site[575] and to SETENA's November 2011 Resolution which dismissed SINAC's complaint because there was insufficient evidence to find the Claimants guilty of the forgery of the Forged Document.[576]

883. Here, we find it appropriate to refer to the scope of responsabilities of SINAC and SETENA. SETENA and SINAC are bodies that form part of the Ministry of Environment and Energy, and each has different and clearly stipulated functions. Likewise, both organs enjoy the same autonomy and therefore there is no hierarchy between them. SETENA is the body that exclusively monitors the analysis of environmental impact assessment studies and approves them. SETENA determines if the mitigation measures proposed by the

572 C-142. Starting at page 11 Mr Martínez listed all of the documents he relied on as evidence to bring the criminal charges against Mr Aven. None of the 38 documents listed refers to a report or letter from the *Defensoría*.
573 C-142 and C-272.
574 Claimants' Closing Statement, Slide 24.
575 C-83.
576 C-114.

developer are appropriate and in accordance with the environmental characteristics of each site.

884. On the other hand, SINAC is the body responsible for providing protection and control to wetland ecosystems, in accordance with the Wildlife Conservation Law, which in turn is based on the Biodiversity Law.

885. In addition, the Executive decree that created the National Wetlands Program reaffirms SINAC's powers regarding the protection of wetlands through SINAC's Conservation Areas. The decree also indicates that other public entities should collaborate with SINAC to achieve this protection, within the scope of their own competence.[577]

886. Therefore, there is no hierarchy between SINAC and SETENA since both are MINAE's bodies and each has a well-defined scope of action that does not allow shared responsibilities for wetland protection. Article 7(h) of the Wildlife Conservation Law, exclusively assigns to SINAC the management and protection of wetlands, as well as their classification.[578]

887. Thus, regarding the Tribunal's inquiry on which entity has the final authority to determine environmental issues involving wetlands, Respondent can strongly confirm that that entity is SINAC. Respondent directs the Tribunal to paragraphs 22 and 26 of the first witness statement of Julio Jurado who refers to the authority of SINAC involving the protection of wetlands in Costa Rica.

888. Against this background, the Tribunal should assess Claimants' allegations on the favourable resolutions they received from SETENA. First, as to SETENA's September 2010 Resolution, it was Mr Pacheco Polanco of SETENA accompanied by Mr Damjanac, **not SINAC's officers**, who concluded that there were "no bodies of water" on the site. Because SINAC is the only agency in Costa Rica competent to determine the existence of wetlands in Costa Rica, SINAC had the duty and the power to continue its investigations into the Las Olas site, despite SETENA's finding.

889. The *Defensoría* and the Municipality were given notice of SETENA's Resolution; however, by the same time, SINAC had also started carrying out investigations. Those investigations led to the January 2011 SINAC Report in which Mr Picado pointed to the existence of a wetland on the site and recommended that a proper survey was performed to confirm his findings.[579] SINAC was fully authorized to undertake its investigation, despite a finding to the contrary of SETENA.

890. Second, with regard to SETENA's November 2011 Resolution, it is necessary to contextualize it at the time it was issued. By this time, the Prosecutor had already

577 **R-222**, Executive Decree No. 36427-Minaet of 01/25/2011.
578 C-220.
579 **R-262,** January 2011 SINAC Report (ACOPAC-CP-003-11).

dismissed the charge for forgery against Mr Aven.[580] Then, no other agency could have disregarded SETENA's November 2011 Resolution because no other agency dealt with the Forged Document issue after Mr Martínez's dismissal of the charge. If anything, SETENA's resolution was consistent with Mr Martínez *sobreseimiento* because neither of them found evidence to find Mr Aven guilty of the forgery.

891. Notwithstanding, Claimants exaggerate the real content of this resolution and allege that it *"confirmed and verified"* their EV for the Condominium site.[581] What SETENA's November 2011 Resolution did, was merely denying that Mr Aven filed the Forged Document with SETENA.

d) Mr Briceño's recommendations to the Municipal Council show no violations of due process

892. Claimants have also attempted to use Mr Briceño's testimony to claim due process violations against them.[582] Due to both credibility and substantive reasons, the Tribunal must dismiss Mr Briceño's recommendations, as they cannot constitute a basis of international responsibility under the Treaty.

i. *Mr Briceño's recommendations to the Municipal Council have no bearing on Costa Rica's responsibility under DR-CAFTA*

893. The following recommendations form the basis of Claimants' claims for violations of due process: (i) that Ms Vargas brought a formal complaint with the TAA without the Municipal Council's authorization; (ii) that the suspension of permits agreed by the Municipal Council on March 7, 2011 was illegal; (iii) that the Municipal Council did not create an interdisciplinary commission to address the situation of the Las Olas Project; and (iv) that the Municipal Council took a long time to reverse the suspension of works after SETENA's November 2011 Resolution.

894. Respondent has addressed each of these recommendations in paragraphs 43-82 of its Reply Memorial and in its Closing Statement of February 7, 2016.[583]

895. During his examination, Mr Briceño did not testify to any of the recommendations he made to the Municipality. Instead, Mr Briceño brought a new argument relating to the alleged illegality of the Municipal Council's decision to suspend the construction permits. Mr Briceño never mentioned these grounds of alleged illegality before either in his official letters to the Municipal Council (specifically, Exhibit C-284) or in his witness statement. Mr Briceño testified that:

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580 **R-115**, Request for Dismissal of Criminal Charges of Forgery and Disobedience to Authority, October 21, 2011.
581 Claimants' Reply Memorial, para. 233.
582 Claimants' Opening Statement, Day 1 Transcript, 47:10-21.
583 Respondent´s Closing Statement, Day 7 Transcript, 2367:8; 2375:19.

"When you mentioned at first the municipal agreement about the halting of works, what is analyzed here is the due process of reaching a municipal agreement, where due process is occurring [and active administration is not exercised] and what the agreement does, when the Municipality or the mayor says that this must halt the works. [This is not the power of the council.] And so, this is a deliberative body, the municipal council [and not an active body]."

Cross Examination of Jorge Briceño, Day 7 Transcript, 2108:20-22; 2109:1-4. The English transcript does not reflect the complete testimony in Spanish.

"What I analyzed was, the procedure to make a municipal accord, it is illegal because it is based on a complaint of neighbors. And when a decision is made according to the articles that I mentioned before, 44, 45 of the Municipal Code, they must do this processing through a commission.

The commission then issues a report to the council, the Municipal Council, and then they reach an agreement, and then they send it to the mayor. But within that agreement, they cannot halt this, because this is the administration's authority, not the Municipal Council's authority."

Cross Examination of Jorge Briceño, Day 7 Transcript, 2111:6-17.

896. These "procedural flaws" are not supported by Costa Rican law and seem more like a last minute justification to undermine the Municipal Council's Accord. First, with regard to the Municipal Council's lack of power to decide the suspension of works because it cannot be considered "active administration," the Attorney General's Office has established in a 2004 binding opinion that both the Mayor **and the Municipal Council** are considered active administration bodies:

> "Given the functions that the law grants to the Municipal Council and its status as maximum chief of the Municipality, it must be held as part of the Active Administration for the purposes of Article 2 of the Internal Control Act."[584]

897. Second, as to the procedural flaw relating to the establishment of a commission prior to the reaching of an accord by the Municipal Council, Articles 44 and 45 of the Municipal Code (raised by Mr Briceño) provide that:

> "Article 44.- The Council's accords originated by initiative of the mayor or the municipal councilors, shall be decided upon prior to a motion or written draft signed by its proponents. The accords shall be decided upon a previous opinion of a commission and subsequent deliberation. […]
>
> Article 45.- The Council may declare accords as finally approved by a two-thirds majority vote of the members."[585]

898. By relying on these provisions, Mr Briceño attempted to blame the Municipal Council of adopting the March 7, 2011 Municipal Accord illegally because a commission did not submit a previous opinion. What Mr Briceño forgot to mention is that the Attorney

584 **R-554**, Attorney General's Opinion C-048-2004, February 2, 2004.
585 **R-552**, Municipal Code provisions relating to Municipal Council's accords.

General's Office established an exception to the need for a commission in an opinion from 2000.[586] In that opinion, the Attorney General's Office established that when the Municipal Council's quorum adopts an accord by majority, the commission's opinion is unnecessary. The suspension of permits decided by the Municipal Council on March 7, 2011 was reached by the totality of the quorum: its five members. Thus, Mr Briceño's last minute accusation against the Municipal Council's Accord is baseless.

899. Mr Briceño's testimony as to "procedural flaws" only reinforces Respondent's proof that Mr Briceño was and is unqualified to opine on the legality of actions undertaken by the Municipality because (i) he is not a lawyer and; (ii) as Mr Briceño admitted, he did not consult with a lawyer at the Municipality to reach his legal conclusions:

> "Q: So, you didn't have a lawyer on your team with whom you could consult on any legal issues that arose during your investigations; is that right?
>
> A: That is correct."
>
> Cross Examination of Jorge Briceño, Day 7 Transcript, 2065:10-13.
>
> "Q: So, your legal conclusions that you reached were based on no qualified legal input; is that correct?
>
> A: Well, not on the party of any attorney at the municipality, no."
>
> Cross Examination of Jorge Briceño, Day 7 Transcript, 2066:9-13.

ii. *Claimants' position on Mr Briceño's recommendations*

900. In relation to Respondent's position that Mr Briceño's testimony does not have any bearing on Costa Rica's responsibility under the Treaty, Claimants' reply is threefold:

- Article 39 of the Internal Control Act *"establishes administrative liabilities for Municipality employees if they unjustifiably decide against implementing an auditor's recommendations. So, [Mr Briceño's] recommendations were, in effect, binding as a matter of Costa Rican law."*[587]
- Respondent's breach of Article 39 of the Internal Control Act has not been raised as a DR-CAFTA breach.[588]
- Mr Briceño provides evidence of an *"objective and professionally knowledgeable observer of contemporaneous events."*[589]

901. First, Article 39 of the Internal Control Act does not establish the *"binding nature"* of an internal auditor's recommendation. Article 39, in its relevant part, provides that:

586 **R-553**, Attorney General's Office (No. OJ-108-2000 of 2000), September 29, 2000.
587 Claimants' Closing Statement, Day 7 Transcript, 2341:6-10.
588 Id., 2340:10-13.
589 Id., 2341:17-19.

> "Equally, administrative liability will be imposed upon public officers who unjustifiably breach the duties and functions that the chief assigns to them, including the actions to put in place the recommendations issued by the internal auditor, notwithstanding any applicable civil and criminal responsibilities."[590]

902. This article refers to public officers' liability for not complying with administrative orders issued by superiors (in the case of the Municipality, the mayor), which may include an order to establish one of the auditor's recommendations. Therefore, this provision assumes that the superiors has adopted an auditor's recommendations and is ordering the public officers to put those in place. It is clear from its text, that this provision does not grant a mandatory character to the advice of an internal auditor.

903. Second, it is not Respondent's position that the alleged non-compliance of Municipality officers with Mr Briceño's recommendations does not constitute grounds for Costa Rica's international responsibility. Rather, Respondent has argued that Mr Briceño's letters to the Municipality do not amount to final determinations or administrative acts capable of declaring rights of third parties.[591] Mr Briceño admitted that he did not elevate "the illegalities" with the *Contraloría* or the Public Prosecutor's Office after he concluded his investigation:

> "Q. Now, just to be clear, you did not undertake any of these two steps in your investigation of the Las Olas Project; is that right?
>
> A. No, I didn't take any of those two steps. The reports are internal and follow due process, and then when they--in 2013, I again directed a final report to the mayor. […]
>
> "And the Contraloria never issued a report or made any final determination on the alleged illegalities that you were investigating; is that correct?
>
> A. Well, with regard to the Controllership, no, because they did not receive the information. Everything remained internal to resolve it internally. The Municipality had to resolve this in keeping with the reports that were contained in the official letters, of which you have copies. […]
>
> Q. And so, the issue was not elevated to the Contraloría after the 15-day deadline that you set in your 25th of January, 2013, letter; is that correct?
>
> A. No, sir. No, it was not taken to the Controller's Office. It was not taken to the Controller's Office, because after that, I resigned.[592]

904. Absent a final determination from the *Contraloría* (the Municipality or a judicial body, who could have backed up Mr Briceño's "concerns" if they shared them), no right has accrued in favor of Claimants.

905. Third, Mr Briceño's oral testimony confirmed his lack of objectiveness and credibility. Mr Briceño was blatantly unreliable during his examination. The following table summarizes some of Mr Briceño's deviations from reality:

590 **R-526**, Internal Control Act (2002).
591 Respondent's Reply Memorial, paras. 88-97.
592 Cross Examination of Jorge Briceño, Day 7 Transcript, 2093:19-22; 2094:1-3; 2094:8-17; 2095:1-10.

Mr Briceño's testimony…	What Costa Rican law provides…
"In September 2010, the Constitutional Court of Costa Rica, through [decision] 1528, declared that the articles on the pensions were unconstitutional. So I did not have to renounce my pension to be the internal auditor. It is not directly under the central government; rather, it's a municipality."[593]	No decision from the Constitutional Chamber matches Mr Briceño's testimony. Assuming that Mr Briceño referred to Decision 15058 of the Constitutional Chamber of Costa Rica dated September 8, 2010, that decision declared unconstitutional articles 14 and 15 of the General Pension Act. However, that decision did not invalidate Article 76 of the Pension and Retirement of the National Magisterium Act, which applies to Mr Briceño's position at the Municipality. [594] Further, it is not true that because Mr Briceño was working for the Municipality and not the central government, the prohibition did not apply to him. Article 76 establishes that, *"the retired person who returns to work, receiving a salary paid by the State or another of its institutions, will have his or her pension suspended during the time in which he is working."*[595] The Attorney General's Office has also clarified that the prohibition includes public officers aiming to work at municipalities.[596]
"Then in 2011, in August, the Tribunal [Court] – and I think it was 1530 – issued another opinion referring to the prior opinion, and it invalidated it."[597]	The decision that Mr Briceño refers to relates to alimony and has nothing to do with Articles 14 and 15 of the General Pension Act.[598] Article 76 of the Pension and Retirement of the National Magisterium Act has never been challenged and has always been binding to retired public officers that return to work at public institutions.
Referring to Resolution No. 10463 of the *Contraloría de la República* (Exhibit R-551). "This document that you mention is addressed to Mr. Guillermo Zuñiga Trigueros, Mayor of the Municipality of La Unión Cartago, not Jorge Briceño Vega, Internal Auditor of the Parrita Municipality. Therefore, whatever is here is binding for him, not for Jorge Briceño, because this is a	Article 4 of the *Contraloría de la República* General Act provides that *"the guidelines issued by the Contraloría de la República, within the scope of its competence, will be mandatory to the persons subject to its control or audit."*[600]

593 Direct Examination of Jorge Briceño, Day 7 Transcript, 2057:12-17.
594 **R-556,** Constitutional Chamber of the Supreme Court of Justice, Decision No. 15058, September 8, 2010.
595 **R-544**, Pension and Retirement of the National Magisterium Act No. 2248, September 5, 1958.
596 **R-557**, Attorney General's Office, Decision C-096-2014, March 21, 2014.
597 Cross Examination of Jorge Briceño, Day 7 Transcript, 2066:19-21.
598 **R-558**, Constitutional Chamber of the Supreme Court of Justice, Decision No. 1530, February 4, 2011.

totally different matter and a different municipality."[599]	

906. In relation to Mr Briceño's abuse of Costa Rica's pension system, Mr Briceño said he only received two payments in contravention of the law and he settled that "misunderstanding" with the National Commission on Pensions after a complaint was filed against him. Claimants have not submitted evidence of the alleged complaint with the National Commission on Pensions or the alleged settlement agreement entered into between that agency and Mr Briceño. What the record shows is that Mr Briceño received monthly payments from the Municipality and the Retirement and Pension Board of the National Magisterium during the entire period that Mr Briceño served as internal auditor at the Municipality, which is illegal under Costa Rican law.[601]

907. Mr Briceño also put his trustworthiness in issue when attempting to convince the Tribunal that he did not consent to his nomination as Deputy Prosecutor by a political party while he was still the internal auditor at the Municipality. When cross examined about his candidacy Mr Briceño was not capable of explaining why his name was part of an official document issued by the TSE rejecting his candidacy:

> "Q: So, according to his document, in October 2012, while you were still an auditor at the Municipality, you ran for Deputy Prosecutor with the party Acción Ciudadana; is that correct?
>
> Do you recall running for that role, sir?
>
> A: Well, I didn't apply – go as candidate. They asked me if I could serve. And as I said earlier, what I told them was no because I was the internal auditor.
>
> Nonetheless, they were suggesting that I be the Deputy Prosecutor. And I said, "As long as there's no problem, you can include me."
>
> Now, the problem arose, as I said, in this document because the party does not have a structure. So, never did I appear as a member of this structure."
>
> Cross Examination of Jorge Briceño, Day 7 Transcript, 2072:1-15.

908. The TSE would not have rejected Mr Briceño's candidacy if his nomination was not proposed in the first place. His nomination was only possible through his consent to the political party he was affiliated to. It would be unreasonable for the Tribunal to believe that Mr Briceño allowed his name to be proposed for a public office without his consent. This is even more ridiculous, in light of Mr Briceño's active involvement in politics during and after the time he served as internal auditor for the Municipality. Evidence of his nomination as Deputy Prosecutor **while** holding office as internal auditor can be found in Exhibit R-538.

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600 **R-555**, Contraloría de la República General Act, 1994.

599 Cross Examination of Jorge Briceño, Day 7 Transcript, 2075:16-22.

601 **R-549**, Certification by the Retirement and Pension Board of the National Magisterium, January 13, 2017;
R-531, Certification by the Costa Rican Treasury, January 12, 2017, in particular pages 8-14.

909. Finally, Mr Briceño's partiality towards Claimants is reflected in a mysterious note found at this file at the Municipality. Mr Briceño admitted that this was the file he used when carrying out his investigation into the Las Olas Project.[602] The note, clearly written by a non-native Spanish speaker, contained the same arguments Claimants have presented in this arbitration:[603]

- That Claimants had all the permits to develop their project;
- That the Municipality and, not Las Olas, was liable for the works that drained the wetland on the south-western part of the Project Site;
- That after Claimants' drainage works were put in place, flooding problems in Esterillos Oeste decreased;
- That Mr Bucelato has a "personal vendetta" against the Las Olas Project;
- That Mónica Vargas did not have legal standing to "file" a complaint with the TAA.

910. Seemingly, Mr Briceño had contact with the developers during his investigation of the Las Olas Project. Otherwise, there is no explanation for why his file has such English annotations. This not only shows the partiality of his recommendations in favor of the project but also a violation of its obligation of confidentiality under Article 34(e) of the Internal Control Act.

iii. *Conclusion*

911. Any evidence relating to Mr Briceño's appreciations or recommendations to the Municipality is tainted by his partiality towards the developers, his lack of credibility and his poor understanding of Costa Rican law (perhaps unsurprising as a non-lawyer). The Tribunal should dismiss any claims relating to his testimony and its accompanying evidence.

3. Mr Martínez did not conduct himself arbitrarily

912. In the event that the Tribunal considers that Costa Rica has committed to prohibit arbitrary conduct outside of the lens of the denial of justice, Respondent has shown that there was no arbitrary conduct from Mr Martínez.

913. Claimants have portrayed Mr Martínez's conduct as typifying *"the very essence of arbitrariness in official decision-making."*[604] Contrary to Claimants' insinuations, when Mr Martínez appeared before the Tribunal he showed the objectiveness and reasonableness with which he conducted his criminal investigation against Mr Aven. More importantly, Mr Martínez testified to the balancing exercise he engaged in as a Prosecutor when deciding

602 Cross Examination of Jorge Briceño, Day 7 Transcript, 2076:8-22; 2077:1-14.
603 **R-532**, File assigned to the Las Olas Project, p. 8.
604 Claimants' Memorial, para. 369.

whether to file charges against Mr Aven in light of the previous reports issued by SINAC and SETENA:

> "With all of these elements a decision has to be made by prosecutors, just as the arbitrators would have to do it with all the information provided. There are two criteria having to do with wetlands in the file.
>
> Therefore, the prosecutor, when bringing about the accusation or the final request—in this case an accusation—has to weigh whether the documents on file had been prepared, first, at the time in which the inspections were done, second, what they say, in order to determine if the person who committed the fact, if there is evidence about who did commit it, maybe made a mistake or perhaps the information in the documents is in accordance with the facts that had occurred.
>
> In this case, the documents on file allowed us to determine that the impact of that wetland ecosystem was being gradually—starting in 2008 had been encroached on. So, we needed to consider this. It was part of the analysis. And the documents issued by the different institutions needed to be looked at in context relating to the time of the visits to see if they were reliable compared to what the officials had observed."
>
> Cross Examination of Luis Martínez, Day 4 Transcript, 1067:11-22; 1068:1-11.

914. In this sense, Judge Chinchilla explained that under Costa Rican law, the judge analyses the facts of a case and the evidence available on a case-by-case basis rather than engaging in a "mathematical analysis" to decide which party has presented more evidence:

> "Nonetheless, it is the tribunal who determines when that circumstance may occur, on a case-by-case basis and when judgement should be awarded. **The judgement given to the subjects and the type of punishment finally imposed are not based on mathematical probabilities**, but on the consideration of the specific criminal act brought to court and assessed, on the personal accusation of each defendant and on the legal frameworks specified in the applicable rule, which many times is specified in different laws."[605]

915. Another important factor in Mr Martínez's balancing exercise was that he *"was also accompanied by Mr. Jorge Gamboa from the National Wetlands Program. He was with [him] on both visits."*[606] Mr Martínez explained the value of having Mr Gamboa on the site with him, because he was able to hear directly from Mr Gamboa, while he was conducting his survey:

605 Expert Report of Rosaura Chinchilla, para. 24.
606 Cross Examination of Luis Martínez, Day 4 Transcript, 1155:14-16.

"THE WITNESS: I remember that at that time—at least Mr. Gamboa in his opinion—because it is a technical opinion—that somebody with training in the law, such as I am, could only simply listen to him. But Mr. Gamboa said that on that site there was vegetation or, rather, characteristic vegetation—vegetation characteristic of wetland systems. And he described—he gave some names that for him were typical of wetland ecosystems.

Also, Mr. Gamboa made reference to the water conditions in the area on that site that were being eliminated through a kind of channel that was being built or that was already mostly built on that site.

And then, as I mentioned, on the basis of Mr. Gamboa's experience, the reference made to the subject of soils."

Cross Examination of Luis Martínez, Day 4 Transcript, 1161: 22; 1162:1-15.

916. Finally, the Tribunal should consider that ultimately it was for the judge assigned to Mr Aven's case to rule on his criminal liability and not Mr Martínez. Mr Martínez presented to the judge a hypothesis based on probability, and it was for the judge to balance the evidence presented by both parties to decide whether Mr Aven could be found guilty.

917. Respondent will now address in detail the accusations against Mr Martínez and show that his testimony proves that he acted reasonably and objectively at all times.

a) The Tribunal cannot rely on Mr Morera's erroneous understanding of Costa Rican criminal law

918. Prior to addressing each of Claimants' accusations against Mr Martínez's conduct, Respondent feels obliged to touch upon the credibility of Mr Morera as his testimony was untruthful and deviated from what Costa Rican criminal law provides.

919. Mr Morera's publicly available bio shows that his education and practice was strongly focused on intellectual property law.[607] No mention is made of criminal law whatsoever in the document which represents his legal capabilities to the public. Mr Morera admitted that what his bio showed was accurate by 2012, the year in which he started representing Mr Aven in his ongoing criminal proceedings.[608]

920. Moreover, Mr Morera's own testimony confirms his lack of expertise in the field. Mr Morera showed serious flaws in his understanding of Costa Rican criminal law:

Mr Morera's allegations	What Costa Rican law establishes…
"Not all of these witnesses were permitted to testify, as there are limitations on the number of witnesses that can testify in Costa Rican criminal proceedings."[609]	Costa Rican law does not limit the number of witnesses a party can call. Article 320 of the Criminal Procedure Code states that the intermediate judge may reject evidence that

607 **R-523**, Bio of Néstor Morera, May 3, 2012.
608 Cross Examination of Néstor Morera, Day 3 Transcript, 741:22, 742:1-3.
609 Second Witness Statement of Néstor Morera, para. 16.

	he considers clearly abundant or unnecessary.[610]
"There is no particular standard such as 'beyond a reasonable doubt,' but the practice is the same. The state has the burden of proof."[611] (Claimants make the same assertion in slide 38 of their Opening Statement Demonstratives)	"Article 39 of the Political Constitution establishes the principle of innocence. And arising from the principle of innocence, Article 9 of the Criminal Code establishes the principle *in dubio pro reo*, which means that if there's a doubt in the factual questions, judges must favor the defendant. In other words, to convict a person, the Judge or the Court, because courts can be made up by one or three people, the Court must have certainty. So, if there's a doubt on the facts, it must acquit."[612]
"There are three stages in Costa Rican criminal proceedings."[613]	"As for the stages of the process, there are five of them and not three as Mr Morera states in his statements."[614] "The criminal process in Costa Rica has five stages."[615] The Criminal Procedure Code regulates (i) in its Book I all of investigative stages; (ii) Title II regulates the intermediate stage; (iii) Title III refers to the trial stage; (iv) Title IV of Book III regulates the stage of appeals; and (v) Book IV, the enforcement of the decision.[616]
"ARBITRATOR NIKKEN: Does Costa Rican law authorize a judge to make decisions on issues dealt with at a hearing which he did not attend? THE WITNESS: No, not him, but here are superiors who have to make decisions for him and who, in principle—well—administrative—judicial bodies that should decide that case, and they are in the possibility of also solve the problems of the substitution."[617]	"So, within Costa Rican law, we cannot replace a judge who has been present throughout all the cross-examination, who has been able to intervene, to participate, to listen to the Parties--or to hear the Parties directly, to replace him when all of this has, happened so that only with the videos, the second judge makes a decision. He can hear what the Parties say. But if he has any questions, he cannot ask for clarification. So, according to our procedural law, these regulations are clear. They govern the criminal process in the whole process through debate, examination, cross-examination, et cetera. So, the request by Mr. Morera was simply--completely crazy, and I'm sorry to say that."[618] Substituting a judge in the midst of trial

610 **R-421**, Criminal Procedure Code.
611 First Witness Statement of Néstor Morera, para. 24.
612 Direct Examination of Rosaura Chinchilla, Day 5 Transcript, 1552:1-10.
613 First Witness Statement of Néstor Morera, para. 9.
614 Direct Examination of Rosaura Chinchilla, Day 5 Transcript, 1552:16-18.
615 First Witness Statement of Luis Martínez, para. 8.
616 **R-421**, Criminal Procedure Code.
617 Redirect Examination of Néstor Morera, Day 3 Transcript, 783:19-22; 784:1.
618 Cross Examination of Luis Martínez, Day 4 Transcript, 1117:18-22; 1118:1-10.

	would be a manifest violation of the principle of immediacy established in Article 326 of the Criminal Procedure Code and it is not permissible under Costa Rican law. In this sense, Article 328 establishes that, *"The trial will be held in uninterrupted presence of the judges […]."*[619]
"ARBITRATOR BAKER: So, if it's not automatic, who makes the decision in order to flag someone at INTERPOL on behalf of the Costa Rican—if you know? THE WITNESS: "I guess it must be a political decision rather than a technical one."[620]	"A direct effect of the arrest warrant (issued by the Tribunal, not the Prosecutor's Office) is that this is notified to the International Criminal Police Organization or Interpol."[621] After a request is sent to INTERPOL, INTERPOL, not Costa Rica, issues and therefore decides whether to issue an alert (including which type), in accordance with Article 83 of INTERPOL's Rules on the Processing of Data. [622] There is no interference of the Costa Rican government in INTERPOL's decision-making process. The criminal courts send the international arrest warrant and INTERPOL classifies it.

921. Furthermore, the so-called "strategic considerations" of Mr Morera when it was convenient to raise a constitutional right violation show that Mr Aven's constitutional rights were never really violated:

> "ARBITRATOR NIKKEN: Yes, but a subject such as this one, which arose regarding the poor translation—defective translation of Mr. Aven's position, could that be invoked immediately?
>
> THE WITNESS: Yes, it could have been, but it could also have been part of the strategy to reserve it for later.
>
> ARBITRATOR NIKKEN: But not because he had to defer it for a given time? The remedy could have—or the recourse could have been found immediately—in other words, what would the penalty have been? Annulment?"
>
> Redirect Examination of Néstor Morera, Day 4 Transcript, 775:4-15.
>
> "… yes, the remedies can be immediate, and you can have a nullification at the moment, and you can have the—what is—what has to happen is that that declaration issue has to be given again. Okay? It has to be repeated.
>
> But I will be fully sincere with you, and it was not part of my strategy, and as a defendant, I—I can define it that way for a matter of convenience, but also because it was not my most powerful argument. My most powerful argument was the lack of intent. The lack of the demonstration of the intent by the disregarding of the objectiveness principle. Yes. A more substantive issue."
>
> Redirect Examination of Néstor Morera, Day 3 Transcript, 776:4-17.

619 **R-421**, Criminal Procedure Code.
620 Redirect Examination of Néstor Morera, Day 3 Transcript, 782:18-22; 783:1.
621 Expert Report of Rosaura Chinchilla, para. 83.
622 **R-142**, INTERPOL's Rules on the Processing of Data, March 14, 2013.

922. If Mr Aven's rights were truly being violated, Mr Morera would not have waited until the "closing submissions of the trial" to raise them with a judge. This shows exactly why Claimants tried to opt for an “arbitrariness claim” instead of raising a proper denial of justice claim, which would be supported by DR-CAFTA.

b) Mr Bucelato's alleged "personal vendetta" and lack of technical qualifications

923. Claimants have made a big deal out of Mr Bucelato's criminal complaint. Claimants allege that Mr Martínez solely based his investigation upon the sayings of Mr Bucelato, a neighbor who (i) had a "personal vendetta" against Mr Aven and the Las Olas Project and (ii) had no technical qualifications.[623] The evidence shows that Mr Martínez had a duty to proceed with an investigation of the crime regardless of who the complainant was. Both Judge Chinchilla and Mr Martínez have explained the effects of a *noticia criminis* under Costa Rican law.[624] Further, Mr Bucelato's complaint was not the only trigger to the criminal investigation; SINAC also filed a criminal complaint against Claimants, which was consolidated to Mr Martínez's ongoing investigation at the time.[625]

924. During his cross examination, Mr Martínez explained that because the evidence he gathered confirmed the facts denounced in Mr Bucelato's complaint, it made any alleged "personal vendetta" irrelevant for his investigation:

> "But just before we leave Mr. Bucelato's complaint, your evidence, I think, would be--but please tell me if you think I'm wrong--that the fact that Mr. Bucelato lacks technical expertise is of no relevance; and the fact that this may have been some sort of personal vendetta being waged by Mr. Bucelato would also not be relevant to your consideration of the complaint and whether criminal proceedings ought to follow; is that right?
>
> A. Well, not necessarily if it is a personal vendetta. That is, if it were a personal vendetta, it isn't necessarily relevant. The fact is that the facts submitted by Mr. Bucelato before the Public Ministry were investigated and were corroborated by the competent authorities and, to a great extent, on the basis of those facts, is that the accusation came."
>
> Cross Examination of Luis Martínez, Day 4 Transcript, 1020:15-22; 1021:1-8.

925. Thus, Mr Martínez had no duty to undertake any special measures during his investigation because it was Mr Bucelato – and not another person – who filed the criminal complaint in the first place. Mr Bucelato's assertions were later corroborated with evidence that Mr Martínez obtained from the DeGA (the reports from Ms Vargas), the PNH (the reports from Mr Gamboa) and the OIJ (*in situ* investigations' reports).

623 Claimants' Reply Memorial, paras. 193, 200.
624 Expert Report of Rosaura Chinchilla, para. 56; First Witness Statement of Luis Martínez, paras. 9,16.
625 **R-66**, Criminal complaint filed by SINAC (ACOPAC-CP-015-11-DEN), January 28, 2011.

c) Mr Martínez had enough elements to show Mr Aven's intent

926. One of Claimants' main criticisms of Mr Martínez's conduct refers to the proof of Mr Aven's intent to commit the crime he was being accused of. Claimants allege that because Mr Aven was acting under the presumed authority of SETENA's EVs and construction permits, he did not possess the intent required to have committed the crime.

927. Mr Martínez's judgment allowed him to decide that he had sufficient evidentiary elements to show Mr Aven's intent to commit the crime. The record shows that during the operation of the Las Olas Project, there were a series of irregularities that were documented which allowed a finding of intent on the part of Mr Aven. Namely:

- The DeGA reports on the criminal record, documented the neighbors' complaints for burning and cutting of trees during the weekends, when public agencies were closed and public officers do not work.[626] This clearly showed an intention to hide an unlawful activity from the authorities.
- The existence of a forged document on the SETENA file, which contained an EV for the Condominium site and which established that the Las Olas Project was not a threat to the biodiversity of the area.[627]
- The only beneficiary of the silent draining and refilling of a wetland was Mr Aven and his project;
- While on site, Mr Martínez interviewed the workers who were channeling and placing culverts on the wetland and they told Mr Martínez that they were doing so under the instructions of Mr Aven.[628]

928. The fact that Mr Aven assumed that the Las Olas Project had obtained an EV for the Condominium site could not by itself diminish the other elements that Mr Martínez's investigation unveiled. Dr Julio Jurado also confirmed this when answering to Mr Nikken's inquiry on the effects of an EV in a criminal proceeding for the commission of an environmental crime:

> "[T]he granting of an EV, it has not been used at the courts for a case of justification or exculpation in the commission of a crime such as felling of trees or the one that talks about wetland drainage.
>
> **To have an EV is not a cause nor justification, nor does it exclude from guilt.**" (emphasis added).
>
> Cross Examination of Julio Jurado, Day 5 Transcript, 1532:9-13.

626 First Witness Statement of Mónica Vargas, paras. 11-14.
627 C-47.
628 Cross Examination of Luis Martínez, Day 4 Transcript, 1029:16-22; 1030:1.

929. Based on the principle of evidentiary freedom, Mr Martínez was not obliged to have a minimum amount of evidence to support his hypothesis, as Judge Chinchilla testified, one element could be deemed sufficient for a judge to find that the accused had intent to commit a certain crime:

> "[E]videntiary freedom, contrary to some systems where the number of evidence is important, what that means is that a court can base its certainty on just one piece of evidence even though there may be ten on the other side if that evidence, it believes, is credible.
>
> And in order to determine that it is credible, it must express a reasoning for why it is so. For instance, we have a witness who saw the homicide where there are ten who said that that act was not committed, but those ten contradict one another or they make reference to different times, et cetera. But this one witness would withstand questioning, and he has additional elements of credibility, etcetera. So, on the basis of that principle, we can--and it is also constitutional legitimate that the trial base its conviction on just that one evidence. And that evidentiary freedom means that one can also show in that way, with any evidentiary element, the aspect of intentionality."
>
> Direct Examination of Rosaura Chinchilla, Day 5 Transcript, 1554:6-22; 1555:1-4.

930. In any case, the judge was the authority in charge of weighing the evidence presented by Mr Martínez and any exculpatory evidence submitted by Mr Aven and deciding whether Mr Aven had the required intent to commit the crime. It cannot be considered that Mr Martínez acted arbitrarily as he reached a reasonable judgment to prosecute Mr Aven upon the evidence he had gathered, which, under his view, pointed to Mr Aven actually intending to refill the wetland.

d) Mr Martínez charged Mr Aven under the correct law

931. During the Hearing, Claimants brought a new argument against Mr Martínez, accusing him of charging Mr Aven under a law which came into force after the crime had occurred.[629] Mr Martínez charged Mr Aven under Article 98 of the Wildlife Conservation Law on October 21, 2011.[630] Prior to an amendment of Article 98 in September 2009, the punishment for that crime was a fine rather than prison.[631] Because Mr Martínez brought charges against Mr Aven under Article 98 as amended after September 2009, Claimants allege that Mr Martínez charged Mr Aven *"under a law which came into force after the alleged offense occurred."*[632]

932. In making this argument, Claimants disregard the existence of "continuing crimes" (*delito continuo o de efectos permantentes*) under Costa Rican criminal law and how an

629 Claimants' Closing Statement Demonstrative, Day 6, slide 15.
630 C-142.
631 Cross Examination of Luis Martínez, Day 4 Transcript, 1580:16-22; 1581:1-10.
632 Claimants' Closing Statement Demonstrative, Day 6, slide 15.

amendment to the law that prescribes the criminal offense is to be applied in those types of crimes.

933. Continuing crimes are prescribed in Article 32 of Costa Rica's Criminal Procedure Code.[633] Criminal law teachings have looked deeply into its nature and operation. Judge Chinchilla also explained the functioning of this type of criminal offences during her direct testimony:[634]

> "What happened in this case, according to what I have been able to verify and have mentioned here, is that the crime of which they're being accused, which is the drying or emptying of a wetland, is conceptualized--and that's why I spoke about [European Continental law]--it is a [continuing] and permanent crime and not a [continuious] one.
>
> So, what does it mean when we talk about a permanent, continuing crime? It is similar to what happens with kidnapping. It begins today--or to be clear, let me say--let me give an example. An individual today kidnaps a person and releases them in a year's time. That is a single kidnapping, a single crime, despite the fact that it extends over 12 months. What happens if halfway through that period there is an amendment to the law? That does not mean that the fact did not occur or that the crime can be split into two. It is still one crime. And, consequently, what is taken into account is the time of the outcome; in other words, when the person is released or when the person is eliminated from that situation of being a captive."
>
> Cross Examination of Rosaura Chinchilla, Day 5 Transcript, 1582:4-22; 1583:1-4.

934. The criminal offense prescribed in Article 98 falls in the category of a continuing crime because its commission can take place during a continuing period of time (i.e. the refilling of a wetland). In the "statement of facts" of the criminal complaint against Mr Aven and Mr Damjanac, Mr Martínez described the facts upon which he based the criminal complaint as beginning in or around April 2009 **and continuing until February 2011**:

> "FIVE: Without providing a precise date, **from April 2009,** for the benefit of Condominio Horizontal Residencial Las Olas project and of the owners of those lots which had been previously separated from plot 6-142646-000, as specified in paragraph four, the accused DAVID RICHARD AVEN ordered the gradual filling of the wetland located in the western sector of the project. **Such**

633 **R-421**, Criminal Procedure Code.

634 Respondent defers to the Spanish transcript of Rosaura Chinchilla for this part of her testimony:
"*Lo que ocurre en este caso, según lo que pude constatar –y ahí lo mencioné-, es que el delito que se está acusando de secar o rellenar un humedal, se conceptualiza, y por eso hablé del derecho continental europeo, como un delito continuo o permanente, que no es lo que mismo que un deito continuado.*
¿Qué significa un delito continuo o permanente? Es similar a lo que ocurre con el secuestro. Hoy empieza. Hoy un sujeto -- para que quede más claro, utilizo este ejemplo. Un sujeto retiene a una persona y la libera hasta dentro de un año. Se trata de un solo secuestro, un solo delito, aunque se prolongue durante un año. ¿Qué ocurre si a la mitad de ese período se da una modificación de ley? Eso no significa que el hecho haya dejado de ocurrir o que el delito lo partamos en dos. Sigue siendo un delito y en consecuencia lo que se toma en cuenta es el momento del resultado en que se pone en libertad a la persona o se le elimina de la captura que tiene."
(Direct Examination of Rosaura Chinchilla, Day 5 Spanish Transcript, 1233: 21-22; 1234: 1-22).

filling tasks increased between November 2010 and February 2011. […]"[635] (emphasis added).

935. Since part of the facts relied upon by Mr Martínez post-dated September 2009, the amended criminal offense (which prescribed prison as a punishment) was appropriately applied by Mr Martínez when filing criminal charges against Mr Aven.

936. Furthermore, Mr Martínez explained in his oral testimony that ultimately it was for the judge and not for him to decide what was the applicable law to the criminal offense:

> "Q: Mr. Martínez, in the Costa Rican criminal procedure, the prosecutor's opinion links the judge?
>
> A: No. What the Prosecutor's Office—what it does is pose a legal hypothesis. Then the judge can qualify that if the events that have been charged are under another standard.
>
> So, the legal qualification then by the Prosecutor's Office is one that is done—if I may—it's of a temporary nature. And then it's the judge who makes a decision regarding the legal issues.
>
> We have something that says that what are charged are facts and not legal qualifications."
>
> Redirect Examination of Luis Martínez, Day 4 Transcript, 1126:9-20.

937. This shows the operation of a criminal law system governed by the rule of law where nothing is left to an arbitrary decision of a low-level official. An independent judge has the sole authority to ultimately decide on the criminal liability of Mr Aven.

e) <u>Mr Martínez did not ignore contradictory reports, rather he balanced the evidence available to proceed with the bringing of criminal charges</u>

i. *The INTA Report*

938. Claimants allege that Mr Martínez decided to ignore the findings of the INTA Report when bringing criminal charges against Mr Aven. According to Claimants, because Mr Martínez did not obtain proof of "hydric soils," he was unable to establish there was a wetland on the Project Site. Mr Martínez had the opportunity to explain the weighing exercise he undertook when examining the findings of the INTA Report:

635 C-142, p. 4.

> "A: No, sir. This document was one more document that the Prosecutor's Office had to analyze as part of the investigation. And the two previous opportunities in which I spoke about weighing the documents—I indicated that the context in which it is issued has to be analyzed, the conclusion that is being issued.
>
> And in this case, the Wetlands National Program, when it issues its report, states that there are hydric soils, which are the ones that are normally required, according to the regulations and according to my own experience. Those are the ones that usually are defined as part of a wetland.
>
> So, in this case, the conclusion that INTA is referring to is that they might not be typical of a wetland, but they do have to bear in mind the historical moment when the inspection is done by INTA. And that is at that point—well, I took the gentleman from INTA to that site personally. And at that specific point, the site had been filled substantially.
>
> So, all of these elements were weighed at the time when the decision was made."
>
> Redirect Examination of Luis Martínez, Day 4 Transcript, 1114:15-20; 1115:1-15.

939. Another crucial point that Mr Martínez clarified is the fact that Mr Cubero from INTA took the soil samples he references in his report, during the site visit he carried out with Mr Gamboa from the PNH:

> "THE WITNESS: At that time when he did the inspection, Mr. Diógenes Cubero from INTA went along. And during that specific visit, the first visit we did, no samples were taken.
>
> But after that Mr. Diógenes went to the site with Mr. Gamboa, and he did the sampling in the presence of Mr. Gamboa. So, Mr. Jorge was present when the samples were taken for the decision that INTA took."
>
> Redirect Examination of Luis Martínez, Day 4 Transcript, 1161:7-15.

940. In fact, the last paragraph of page 10 of the PNH Report on Wetlands shows that the soil samples from the INTA Report were (i) taken in the presence of Mr Gamboa; (ii) incorporated into Mr Gamboa's report; and (iii) that in the opinion of Mr Cubero during the site visit, those corresponded to hydric soils.[636] Thus, the PNH Report on Wetlands did contain a finding on "hydric soils" of the wetland that Mr Martínez was investigating.

941. In paragraphs 78 and 98 of his first witness statement, Mr Martínez also testified as to the analysis he undertook of the INTA Report and why he decided to rely on the PNH Report on Wetlands rather than in the INTA Report. Specifically, Mr Martínez explained that:

636 **R-76**, PNH Report on Wetlands (ACOPAC GASP-093-11), March 18, 2011.

- INTA has no competence to determine the existence of wetlands in Costa Rica. INTA is a body dependent on the Ministry of Agriculture and Livestock in charge of the improvement and sustainability of the agricultural and livestock sector in Costa Rica.[637]
- The methodology that Mr Cubero relied on to carry out his survey constitutes an agricultural instrument rather than a hydric soils specialized instrument.[638] Even Claimants' own expert, Dr Baillie agrees with the nature of the Land Use Methology:

> "It is designed to assist very general planning of the use of land within the Agroforestal Sector. So, it's primarily aimed at determining whether land is best-suited for arable, pasture, or production forestry, or should be left for conservation purposes."
>
> Cross Examination of Ian Baillie, Day 6 Transcript, 1673:9-14.

- The findings of Mr Cubero were undermined by his conclusion that *"the soils in the area were not typical of a wetland."*[639] Mr Martínez never requested from INTA a report on whether there was a wetland or not on the Project Site. Mr Cubero exceeded his competence by concluding that there was not a wetland on the site.

942. In light of the INTA Report's inconsistencies and because the PNH had already confirmed that the soils in Wetland No. 1 were hydric, Mr Martínez decided to balance the evidence available and move forward with the filing of criminal charges against Mr Aven.

ii. *The July 2010 SINAC Report*

943. Claimants also undermine Mr Martínez's conduct for "ignoring" the July 2010 SINAC Report that concluded that there were no wetlands on the Project Site. Mr Martínez had to engage in another balancing exercise when reviewing the findings of the July 2010 SINAC Report. During his cross examination, Mr Martínez explained this exercise to the Tribunal:

637 Paragraph 396 of the Counter-Memorial deals with INTA's competencies under Costa Rican law. These competencies have not been rebutted by Claimants.
638 Direct Examination of B.K. Singh and Johan S. Perret, Day 6 Transcript, 1944:13-18.
639 C-124.

"A: Yes. If we look at these reports separately, we could consider that there is inconsistencies between them. But the work of the prosecutor means that you have to weigh all the information available and look at when the information was issued, interview the people who drew up the reports and based on that analysis and that weighing that is done by the Office of the Public Prosecutor.

When you draw conclusions about the investigation, a decision must be made to apply some principles that are used in criminal procedure, for example, of maybe probable cause. To draw up an accusation, there must be a degree of probability that a crime has been committed and a degree of probability with regard to who is the perpetrator of that crime. The Office of the Public Prosecutor lays out an accusatory thesis. And then in the intermediate stage, then, there is an independent judge, independent from our office, that decides on that. And then there is a trial judge that makes a decision as to whether the evidence provided by the prosecutor—well, if the defendant should be punished based on the evidence presented.

And, so, several aspects were weighed at that time, and we leaned to use the reports that indicated there is the probability that these wetlands existed. But then the report from the National Wetland Program is conclusive in that there were wetlands and that they had been drained."

Cross Examination of Luis Martínez, Day 4 Transcript, 1088:8-22; 1089:1-14.

944. Mr Martínez in fact considered and analyzed the findings of the July 2010 SINAC Report. He interviewed Mr Bogantes and Mr Manfredi to understand the reasons for their findings and he also took into consideration the fact that by July 2010, the site had already been impacted for at least a year.[640] Against this background, Mr Martínez concluded that the findings of those officers were likely to be erroneous because the wetland had been drained and refilled since April 2009, as indicated by Ms Vargas' reports from that time. Therefore, Mr Martínez decided to rely on the report prepared by Mr Gamboa in March 2011 where he concluded that a wetland existed and it had been impacted and refilled.

945. Mr Baker was curious to know what documents and information Mr Gamboa had investigated before issuing the PNH Report on Wetlands. From the face of the report, Mr Gamboa seems to have reviewed:

- the January 2011 SINAC Report, which reported impact to a wetland and recommended that measures be undertaken;
- DeGA's report of June 16, 2010 that documented Ms Vargas observations to the site starting in March 2009.

946. Both reports documented impacts to the wetland starting April 2009. Mr Erwin also reviewed these reports and concurs with that conclusion.[641] Thus, when Mr Gamboa prepared his report, he was fully aware that what he was looking at on the Project Site

640 Cross Examination of Luis Martínez, Day 4 Transcript, 1110:8-22; 1111:1-3.
641 First KECE Report, paras. 95-100, 104, 117.

could not have been a normal wetland but an impacted one, whose original characteristics had been altered. Nonetheless, Mr Gamboa (as Mr Erwin did some years later) was able to find the three requirements to prove the existence of a wetland on the Project Site. All of Mr Gamboa's conclusions were established in the PNH Report on Wetlands.

947. Thus, Mr Martínez, who accompanied Mr Gamboa to the site in two occasions, opted to give more evidentiary weight to the PNH Report on Wetlands over the erroneous findings of the July 2010 Report.

f) Mr Martínez conducted an appropriate investigation into the Forged Document's authorship and use

948. Claimants allege that Mr Martínez did not engage in an appropriate investigation into the Forged Document's authorship because he did not send the document for forensic analysis.[642] This argument is totally nonsense and Mr Martínez explained the reasons why *the copy* of the Forged Document could not have possibly been sent for a forensic analysis.

949. First, the evidence on the record shows that what was submitted to SETENA, the Forged Document, was a copy not an original document. Claimants and Mr Aven were well aware of this fact when in January 17, 2011, SETENA requested from them the original document:

> "Upon analyzing Administrative File No.: D1-1362-2007-SETENA, it was determined that the ACOPAC-MINAE ruling presented before this Secretariat **was a copy of the original, and it is therefore requested that the original copy of report SINAC-67389RNVS-2008 be presented,** or instead, a copy authenticated by a Notary Public"[643] (emphasis added).

950. Given that neither SETENA nor Mr Martínez had the original copy of the Forged Document, it was not appropriate for Mr Martínez to send the document to a forensic analysis. Assuming he did, what the forensic report would have stated is that the document was not an original document. This just shows how weak this argument is for Claimants.

951. Second, as Mr Martínez explained during the Hearing[644] and in his second witness statement,[645] a forensic analysis was unnecessary because after he interviewed the two officers from SINAC who appeared to sign the document, both confirmed they were not their signatures.

952. Third, Mr Martínez has provided a full explanation of the steps he undertook in this investigation in his oral testimony[646] as well as in his second witness statement[647] that

642 Claimants' Closing Statement Demonstrative, Day 6, slide 17.
643 C-104.
644 Cross Examination of Luis Martínez, Day 4 Transcript, 1104:3-29.
645 Second Witness Statement of Luis Martínez, para. 22.
646 Cross Examination of Luis Martínez, Day 4 Transcript, 1098-1101.
647 Second Witness Statement of Luis Martínez, paras. 22, 24-29.

allowed him to conclude that (i) the document was indeed a forgery; and (ii) there was not sufficient evidence to charge Mr Aven for forgery.

g) Mr Martínez did investigate the Municipality's works offsite of the Las Olas Project Site

953. As part of a new strategy, Claimants have directed their efforts to accuse the Municipality of being responsible for the draining and refilling of Wetland No. 1. Now, Claimants attempt to accuse Mr Martínez of not investigating the works that the Municipality undertook **outside** of the Las Olas Project Site.[648]

954. Claimants never argued that the Municipality was responsible for the draining works during the criminal trial neither did they submit any evidence of these alleged works as part of their exculpatory evidence. Mr Martínez confirmed this fact during his cross examination:

> "Q: What else did you do to investigate the muni's own works here that are referenced in this document? Or was that it? Did you investigate the work that was referenced in this document from two months before, that the muni was doing; or did you just go and say, oh, well, it's only work that's being done by the developers, and just ignore the work that Mr. Picado is saying was being done by the Municipality?
>
> A: Yes. In effect, on this, we also held consultations, and the Municipality stated that the work that being carried out was in a public road outside of the private project and that they could not carry out any sewage work in private property.
>
> And we were told that that sewage work was being done outside of the project in order to channel rainwater from the public road sector to a site which is a place that is outside of the private property."
>
> Cross Examination of Luis Martínez, Day 4 Transcript, 1025:8-22; 1026:1-2.

955. Nonetheless, Mr Martínez explained (twice) the investigation he conducted into these alleged works from the Municipality and testified that when he went to the site and saw workers constructing the drainage system, they told him that they were doing those works under Mr David Aven's orders:

[648] Claimants' Closing Statement Demonstrative, Day 6, slide 18.

"A: Yes. In effect, that is what this paragraph indicates. However, I can explain to you, sir, that during the investigation the Public Prosecutor's Office carried out, two visits were made to the Las Olas Project and specifically to this site, where there is an alleged wetland.

And during these two visits, they found operators, they found some machinery that had been working there on the site, and that were placing culverts and carrying out—or placing channels to take water out of the site. And the operators there told me personally that they were doing it under the order of Mr. Aven."

Cross Examination of Luis Martínez, Day 4 Transcript, 1024:17-22; 1025:1-7

"They never mentioned—that is, the employees that were there—that they worked for the Municipality, nor that they were there receiving orders from any official from the Municipality."

Cross Examination of Luis Martínez, Day 4 Transcript, 1030:2.

956. Hence, Mr Martínez did not "ignore" any activities from the Municipality. He testified that he did consult the Municipality and when he was on the Project Site, he did not see any works being performed by Municipality officers but rather by Mr Aven's employees. If the Municipality was liable for these works, Claimants had the burden to raise it and prove it during the criminal trial, which they did not.

h) Mr Martínez's refusal to extend the trial was legitimate

957. Claimants accuse Mr Martínez of acting arbitrarily for not agreeing to waive the ten-day rule. Mr Martínez explained that this was not a capricious decision; he researched the current state of the law, consulted with his supervisor and jointly agreed with the representative of the Attorney General's Office not to waive the rule. Basically, he did not want the appeals judge to annul the trial once if the final decision was elevated to the court of appeals. Mr Martínez testified that:

> "A: Yes, correct. I rejected the request made my Mr. Morera also to continue after the ten days, because, obviously, that rule is one which, in my opinion, is not aimed at only protecting defendants but also to protect all the parties in the procedure.
>
> The rules established within the Costa Rican criminal code, form that point of view, the point of view of these principles, have not been aimed at protecting only the defendant; all the parties of the procedure have to be able to benefit from the possibility.
>
> Now, it was not an arbitrary decision. At that point, I analyzed case law, appeals, courts in my country, case law which stated that even when appeal courts observe that this ten-day rule has been violated, even when there's been agreement by the parties, they order the annulment of the procedure because there's been a violation of the Principle of Contradiction or the Principle of Presence of the Judge in the discussions."
>
> Cross Examination of Luis Martínez, Day 4 Transcript, 1118:16-20; 1119:1-13.

958. Mr Martínez also confirmed that the most recent case law, **at the time of the events,** pointed to a nullification of the proceedings if the ten-day rule was waived.[649] Mr Martínez also explained that it made no sense for him to "take advantage" of a second trial, because under Costa Rican law, a Prosecutor cannot alter the evidence submitted in the first trial:

> "I did not--I opposed this negotiation in order to have an opportunity, because in any new opportunity that might have arisen during that procedure, we would have had to go with the same evidence that we'd already submitted.
>
> The Public Prosecutor's Office in my country cannot submit additional evidence once the charge is brought. Once the charge was brought, then the Public Prosecutor's Office cannot show more evidence—or cannot accept more evidence for better settlement."
>
> Cross Examination of Luis Martínez, Day 4 Transcript, 1121:5-14.

959. Paragraph 71 of Judge Chinchilla's Expert Report confirms the position under Costa Rican law. Thus, Mr Martínez had no arbitrary motive to deny waiving the 10-day rule. The fact that his decision was reasoned and in accordance with the law eliminates any taint of arbitrariness.

i) Mr Martínez did not "ignore" the Public Prosecutor's Office guidelines when conducting his investigation

960. The Prosecutor Guidelines for the Prosecution of Environmental Crimes (the **"2010 Guidelines"**),[650] introduced by Claimants minutes prior to the cross examination of Mr Luis

649 Cross Examination of Luis Martínez, Day 4 Transcript, 1193.
650 C-297.

Martínez, constitute general guidelines for prosecutors specialized in the prosecution of environmental crimes such as Mr Martínez.

961. The 2010 Guidelines were indeed in force when Mr Martínez initiated the criminal investigation of Mr Aven. The evidence brought to this Tribunal shows that Mr Martínez acted in accordance with these Guidelines. Namely:

- Section 3.5 deals with the "evidentiary elements and the investigation." According to this section, the prosecutor's fundamental evidence is a visual inspection of the site, preferably accompanied by a hydrogeologist or any other specialist in wetlands. Mr Martínez went to the site on two occasions and was accompanied by Mr Gamboa; a biologist specialized in wetlands serving at the PNH.[651]
- The same section establishes that the lack of documentation regarding the existence of the wetland before drainage works started can be supplied with testimony from people who knew the site before the event. Mr Martínez called as witnesses Mr Bucelato and Ms Mónica Vargas who knew the area before the drainage works started and witnessed the refilling works undertaken by Claimants.

962. During the cross examination of Mr Martínez, Claimants brought up Section 3.3 of the Guidelines, which last paragraph establishes three basic requirements for a wetland to exist: (i) soil permeability; (ii) hydric vegetation; and (iii) a slope of no less than or equal to 5%. These requirements are different to the ones established in the MINAE Decree No. 35803. The contradiction between both instruments can easily be resolved through the application of the hierarchy of laws principle extensively explained in paragraphs 144 to 153 of Dr Jurado's second witness statement:

> "This principle allows [establishing] the order of applicability of the legal regulations and **the criterion to settle the contradictions that may arise between regulations of different rank.** The rules for this principle are: the regulation of higher rank prevails over the one of lower rank; the regulation of lower rank cannot modify the regulation of higher rank; and the [legal practitioner] shall always observe the provisions of the regulation of higher rank. […]
>
> The Political Constitution is the fundamental regulation of the legal system of Costa Rica […]
>
> The second hierarchical rank, under the Costa Rican legal system, is covered by the international conventions or agreements duly approved, pursuant to the national law. […]
>
> **The third line is covered by all the laws and acts with force of law, followed by the decrees regulating the laws in the fourth place and then the remaining regulations.** […]."[652] (emphasis added).

963. While the MINAE Decree No. 35803 is an executive decree issued by MINAE in April 2010;[653] the 2010 Guidelines are contained in a circular issued by the Prosecutor's Office

651 Cross Examination of Luis Martínez, Day 4 Transcript, 1155:14-16.
652 Second Witness Statement of Julio Jurado, paras. 145-147.

in September 2010.[654] The MINAE Decree has *erga omnes* effects and is mandatory for every agency in Costa Rica, specially SINAC and the PNH. In contrast, the guidelines issued by the Prosecutor's Office in the form of a circular are only binding to the prosecutors working for the Prosecutor's Office and do not produce general effects. Thus, under the hierarchy of laws principle, the MINAE Decree No. 35803 provisions (hierarchy of general regulations) supersede the 2010 Guidelines (hierarchy of a mere circular).

964. In addition, this is exactly what Mr Martínez explained to Claimants' counsel during his cross examination:

> "A: Yes. These guidelines are current heretofore because they have not been modified. But what may have been amended may be the parameters to determine wetlands, because there are some parameters that came out after 2010, an executive decree from the Executive Branch which provides for new elements and parameters to determine and classify wetlands."
>
> Cross Examination of Luis Martínez, Day 4 Transcript, 1036:1-22.

965. It is also probable that by April 2010, when the MINAE Decree No. 35803 was enacted, the review process of the Guidelines (which deals extensively with almost every criminal offense against the environment in Costa Rica) had concluded and its drafters were not aware of the contents of the Decree. That might be the reason why the Guidelines did not include the latest criteria of the MINAE Decree No. 35803. In any case, Mr Martínez's reliance on the MINAE Decree over the Guidelines cannot be considered arbitrary when he was acting in accordance with Costa Rican law.

j) Mr Martínez acted reasonably when he requested an international arrest warrant against Mr Aven

966. Claimants allege that Mr Martínez charged Mr Aven under the wrong law attempts to ultimately show that the INTERPOL Red Notice should not have been lodged. According to Claimants, if the criminal offense established a fine as punishment, then, an international arrest warrant and an INTERPOL Red Notice were not appropriate.[655] Respondent has already explained that the facts under which Mr Martínez brought the criminal charges against Mr Aven fit into those of a "continuing crime" starting from April 2009 to February 2011. Therefore, Claimants' argument that the previous law should have applied is wrong.

967. Furthermore, it is pertinent to clarify that Mr Martínez's request to the court for the issuance of the international arrest warrant was also appropriate. As explained by Judge Chinchilla,[656] Article 3(e) of Costa Rica's Extradition Law provides that extradition is not

653 C-218.
654 C-297.
655 Claimants' Closing Statement Demonstrative, Day 6, slide 29.
656 Expert Report of Rosaura Chinchilla, paras. 30-31.

appropriate if the crime's punishment is less than a year of prison.[657] During the criminal proceedings, Mr Aven was charged with the draining and refilling of a wetland that under Article 98 of the Wildlife Conservation Law has a punishment of one to three years of prison.[658] Thus, Mr Martínez's request for an international arrest warrant was made in accordance with the law.

968. Finally, the Tribunal should once again bear in mind that Mr Martínez was not the officer in charge of deciding the issuance of the international arrest warrant against Mr Aven. It was a criminal judge who decided that Mr Martínez had applied the right law to charge Mr Aven and that an international arrest warrant should be issued. In addition, neither Mr Martínez nor his Office was involved in the request or the issuance of the INTERPOL Red Notice against Mr Aven.

k) Claimants had plenty of administrative and judicial remedies to pursue any grievances

969. If Claimants considered that Mr Martínez was ultimately misplaced in the execution of his duties, Mr Aven had available administrative and judicial recourse. The following were the recourse available to Mr Aven during the criminal proceedings that he **did not resort to**:

- Request for recusal of the prosecutor under Articles 40 to 43 of the Prosecutor's Office Law;[659]
- *Enmienda jerárquica* under Article 18 of the Prosecutor's Office Law, according to which a high-ranked officer from the Prosecutor's Office can reverse or correct any act from the prosecutor assigned to a criminal investigation.[660]

l) Criminal proceedings are ongoing and Claimants enjoy different avenues to which they have not yet resorted

970. Claimants' arbitrariness claim somehow assumes that the actions undertaken by Mr Martínez were final and that there is no redress available for Mr Aven. The reality is Mr Aven's proceedings have not even reached the third stage (of five) in the criminal process. Upon Mr Aven's return, the trial will resume and Mr Aven will enjoy the following relief, which have already been presented by Respondent in its Closing Statement during the December hearing.[661]

971. During the trial stage, Mr Aven can challenge any interlocutory decision from the judge by raising:

- A *recurso de revocatoria* under Article 449 of the Criminal Procedure Code;

657 **R-407**, Extradition Law.
658 C-220.
659 **R-405**, Prosecutor's Office Law.
660 **R-405**, Prosecutor's Office Law.
661 Respondent's Closing Statement Demonstrative, Day 6, slide 6.

- A *recurso de actividad procesal defectuosa* under Article 175 of the Criminal Procedure Code, which can be filed against any act tainted with an irregularity or defect;

972. Also, until a final decision is issued by the court, Mr Aven has the following immediately available recourses:

- Request for a judicial inspection, under Articles 174 to 180 of the Judiciary General Act, which could lead to a disciplinary proceeding against a public officer from the Judicial branch of the State;[662]
- Request for recusal of the judge under Article 57 of the Criminal Procedure Code;
- Request for recusal of the prosecutor under Articles 40 to 43 of the Criminal Procedure Code;

973. After the court issues a decision, Mr Aven can challenge the decision through Appeals recourse against the decision (Article 458) and Mr Aven can file a *recurso de casación* under Article 467 of the Criminal Procedure Code against that decision.

974. During the fourth stage of the criminal process, the appeals stage, Mr Aven may avail himself of the following relief:

- *Recurso de revisión* under Article 408 of the Criminal Procedure Code;
- Request for a judicial inspection under Articles 174 to 180 of the Judiciary General Act;

975. Finally, during the enforcement stage, Mr Aven can also resort to appeals under Article 478 of the Criminal Procedure Code.

m) Conclusion

976. From any perspective that Claimants take, Mr Martínez's conduct was reasoned and supported by Costa Rican law. It would be easy simply to accuse Mr Martínez of acting arbitrarily without touching upon the context of the proceedings and the judgment Mr Martínez engaged in to decide to bring criminal charges against Mr Aven. However, now that the Tribunal has been presented with the full picture from Mr Martínez himself, it is quite obvious that a claim for arbitrariness against him must fail.

C. Respondent did not engage in abuse of rights or abuse of authority against Claimants

977. Claimants have pleaded three claims on abuse of right treatment.[663] The first two refer to an alleged bribe solicitation from a municipal officer back in 2009 and two other alleged bribe requests from Mr Bogantes, a SINAC officer in 2010. The third claim refers to Respondent's request for a Red notice alert to INTERPOL.

662 **R-568**, Judiciary General Act, July 1, 1993.
663 Claimants' Reply Memorial, para. 366.

1. Claimants' bribery allegations have not been proven and therefore cannot support Claimants' abuse of rights claim

978. Respondent has pleaded paragraphs 593 to 595 of its Counter-Memorial, the standard of proof required under international law – which is clear and convincing evidence- to support any bribery allegations. Claimants agree with Respondent that the threshold to prove bribery allegations under international law is high.[664]

979. Claimants and Respondent disagree on whether Claimants have met their burden of proof in this case. It is Respondent's position that no credible evidence whatsoever exists to suggest any bribery occurred. This is to say there is nothing clear, let alone convincing. Claimants allege that they have presented *"direct evidence"* in the form of *"corroborating witness statements."*[665]

980. Respondent challenges the credibility of Mr Aven and Mr Damjanac as witnesses capable of delivering trustworthy information in this arbitration. Mr Aven's testimony has already been shown to be highly unreliable, comprising inconsistencies and untruths. His testimony regarding an alleged bribe by Mr Bogantes is totally self-serving and lacks any independent corroboration.

981. The Tribunal cannot rely on Mr Damjanac's testimony as *"corroborating evidence."* Claimants would have the Tribunal rely on the word of an individual who (i) is an agent of Claimants; (ii) has a pecuniary interest in the Las Olas Project; and (iii) who *"emphatically"* contests the veracity of public records without having challenged their findings through the corresponding legal recourse in Costa Rica.[666]

982. Claimants have not put forward ***any*** corroborating evidence to support bribery allegations. The alleged tape recording of the bribe solicitation has not been presented to this Tribunal showing that there is no independent corroborating evidence to Mr Aven's account of events.[667]

983. In addition, Claimants allege that Respondent failed to investigate bribery complaints against Mr Bogantes.[668] First, Claimants alleged that Mr Martínez should have investigated these assertions when Mr Aven told him about them.[669] Mr Martínez[670] and Judge Chinchilla[671] have extensively explained why, under Costa Rican law, Mr Martínez did not have a duty to investigate Mr Aven's allegations in the midst of the criminal investigation he

664 Claimants' Reply Memorial, para. 83. Claimants' Closing Statement, slide 26.
665 Ibid.
666 Cross Examination of Jovan Damjanac, Day 3 Transcript, 691-694.
667 Claimants' Notice of Arbitration, para. 31.
668 Claimants' Reply Memorial, para. 108.
669 First Witness Statement of David Aven, para. 185.
670 First Witness Statement of Luis Martínez, paras. 43-49.
671 Expert Report of Rosaura Chinchilla, paras. 30-34.

was conducting into Mr Aven. Claimants have not rebutted Respondent's evidence in this regard.

984. Second, Claimants allege that Respondent failed to investigate the criminal complaint brought by Mr Aven in September 2011 at the Prosecutor's Office at Quepos.[672] In order to make this allegation, Claimants have been forced to contest the veracity of public records from File No. 11-201458-0457-PE, where evidence that the Ethics Prosecutor assigned to the case contacted Mr Aven several times in order to advance the investigation lies.[673] Claimants also challenge this evidence through the tainted testimony of Mr Aven who asserts he was never contacted by the Prosecutor's Office.[674] If Mr Aven disagreed with those public records, Mr Aven could have appeared in the investigation and challenged the Prosecutor's findings at the time that he found out about them.

985. Third, note that Mr Ventura, Mr Aven's counsel, obtained copies of this criminal file.[675] Instead of assisting Mr Aven to challenge these public records or pursue its complaint against Mr Bogantes with the appropriate authorities, Mr Ventura upheld Mr Aven's decision to flee the country and become a fugitive.

986. Finally, regarding Claimants' assertion that *"Respondent has elected to have Mr Bogantes not refute Mr Aven's allegations,"*[676] Respondent has already asserted that this arbitration is not the proper forum to engage in a 'he said/she said' battle with criminal repercussions on an individual who would have to appear unrepresented in these proceedingss.[677]

987. Given the lack of evidence put forward from Claimants in this arbitration, Mr Bogantes' testimony would have contributed nothing to the discussion. Claimants' theory regarding Mr Bogantes' bribe solicitations is used to portray the government's conspiracy against the Las Olas Project as if Mr Bogantes, a low-level employee from SINAC, had the power to control independent entities such as SETENA, the TAA, the *Defensoría,* the Municipality and even criminal courts. Of course, he did not, and no evidence exists from Claimants to extend this accusation of bribery to have any real meaning or relevance.

2. Costa Rica's request for an INTERPOL Red Notice did not entail an abuse of rights

988. Claimants will likely contend that the request for the Red Notice against Mr Aven was illegal because the criminal offense that Mr Martínez should have applied prescribed a fine rather than prison as a punishment. Respondent has already addressed this argument above when referring to the request and issuance of the international arrest warrant against Mr

672 Claimants' Memorial, para. 169.
673 C-167.
674 First Witness Statement of David Aven, paras. 224-225.
675 Id., para. 225.
676 Ibid.
677 Respondent's Opening Statement, Day 1 Transcript, 206:11-17.

Aven. Because the criminal offense that Mr Martínez applied to charge Mr Aven falls under a "continuing crime," the crime was punishable by one to three years of imprisonment.

989. The judge that issued the international arrest warrant against Mr Aven ordered that its contents be communicated to INTERPOL.[678] The international arrest warrant was then notified to OATRI, the specialized office within the Public Prosecutor's Office in charge of handling extradition proceedings and coordinating with INTERPOL.[679] In order to comply with the criminal judge's order, OATRI issued a request for a Red Notice to INTERPOL in accordance with INTERPOL's Rules on the Processing of Data. Article 83 of these Rules sets forth the minimum criteria for the publication of a red notice: (i) that it be a serious ordinary-law crime; and (ii) that the offense is punishable by a maximum deprivation of liberty of at least two years.[680] Judge Chinchilla confirmed that both requirements were satisfied in Mr Aven's case and therefore, OATRI's request to INTERPOL for a red notice was legitimate.[681]

990. Furthermore, Claimants allege that they were not informed of INTERPOL's decision. INTERPOL communicated to the criminal court both its decision to publish the Red Notice as well as its decision to remove it.[682] Mr Aven or his attorney at the time, Mr Ventura, had at all times unrestricted access to the criminal file where those events were being documented. Also, it is fanciful for Mr Aven, in his current condition of a fugitive, to demand that Costa Rican authorities keep him informed of the proceedings in place to extradite him. That would defeat the whole purpose of extradition proceedings and INTERPOL's overall existence.

678 **R-150**, International Arrest Warrant, May 25, 2015.
679 Expert Report of Rosaura Chinchilla, para. 84.
680 **R-142**, INTERPOL's Rules on the Processing of Data (2013)
681 Expert Report of Rosaura Chinchilla, para. 84.
682 Id., para. 86.

IX. COSTA RICA DID NOT EXPROPRIATE ANY OF CLAIMANTS' ALLEGED INVESTMENT

991. Claimants contend that Costa Rica has indirectly expropriated their investment in violation of Article 10.7 of DR-CAFTA. Respondent denies any breach of Article 10.7. With regards to the adjudication of expropriation claims, the Treaty envisages two main provisions that the Tribunal should interpret and apply: Article 10.7 and paragraph 4 of Annex 10-C.

992. In paragraphs 611-613 of the Counter-Memorial, Respondent set forth the steps the Tribunal should undertake to analyze Claimants' expropriation claim under DR-CAFTA. The proposed sequence is supported by the plain text of the Treaty as well as UNCTAD's work on expropriation in investment arbitration practice.[683] In sum, the Tribunal would first have to determine what constitutes Claimants' "covered investment" under Article 10.28 of the Treaty. Second, the Tribunal should determine whether the exception of paragraph 4(b) of Annex 10-C is applicable to this case. If the exception is applicable, then Claimants' expropriation claim would fail in its entirety.

993. If the Tribunal considers that Respondent's conduct does not fall within the exception of paragraph 4(b), then the Tribunal would have to look at each of the elements of an indirect expropriation under paragraph 4(a) to determine whether Respondent has expropriated Claimants' investment and therefore, is liable for breach of Article 10.7 of the Treaty.

994. Respondent will now take the Tribunal through each of the abovementioned steps. The inevitable conclusion is that no expropriation has occurred and Respondent cannot be held liable for the violation of Article 10.7.

A. <u>What is Claimants' investment under Article 10.28 of DR-CAFTA</u>

995. It is very concerning that to date Claimants have not been able to properly articulate what their investment is. Claimants' counsel says one thing, while Claimants themselves and their witnesses say another. The situation is such that the Tribunal has had to request Claimants to explain at the eve of closure of the proceedings **what their investment is.** The latest version of Claimants' contention is that *"[the] focus of their investment was and always has remained, a project."*[684] Notwithstanding, in their opening remarks during the Hearing Claimants referred to it as *"the maintenance of the Las Olas Project."*[685]

996. Since Claimants have changed their position, throughout these proceedings on what their investment really is, Respondent reserves its right to reply to any new argument Claimants' raise in the post-hearing brief that brings new allegations as to what their investment constitutes. Meanwhile, Respondent trusts Claimants' own witnesses to properly identify the investment, which was the acquisition of the land in 2002.

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683 **RLA-15**, United Nations Conference of Trade and Development, UNCTAD Series on Issues in International Investment Agreements II, Expropriation, 2012.

684 Claimants' Opening Statement, Day 1 Transcript, 105:13-14.

685 Claimants' Opening Statement, Day 1 Transcript, 120:19.

1. Claimants' alleged investment comprises the raw land which they still own to date

997. As explained in section II of the Brief, Claimants' investment in Costa Rica is the land they purchased in 2002. This is the moment when Claimants established their investment in Costa Rica and this is the moment that the Tribunal should look to in order to determine whether any investment was expropriated.

2. Claimants' EVs and construction permits are not covered investments capable of being subject to indirect expropriation

998. In the event that the Tribunal were to consider EVs and/or construction permits as part of Claimants' covered investments, the Tribunal should refer to paragraph (g) of the definition of "investment" under Article 10.28 of the Treaty that refers to licenses, permits and authorizations. Importantly, this definition includes a footnote (footnote No. 10) that establishes that whether the permit has the characteristics of an investment would depend on *"the nature and extent of the rights that the holder has under the law of the Party."* The footnote also establishes that among the permits that *"do not have the characteristics of an investment are those that do not create any rights protected under domestic law."* Hence, the Tribunal is bound to consider whether under Costa Rican law, EVs or construction permits create rights **protected under domestic law.**

999. First, Claimants have never alleged that the EVs are part of their covered investment under the definition of Article 10.28(g). However, because Claimants now argue that their investment was the Las Olas Project,[686] Claimants might be tempted to include in that spectrum, the EVs granted to them. Respondent strongly objects.

1000. Claimants hold EVs for the Concession and Condominium site.[687] Claimants' theory is that an EV grants subjective rights to beneficiaries because it requires the filing of an official action to annul it under a Constitutional Chamber precedent.[688] Specifically, Mr Ortiz argues that because the Constitutional Chamber has established a *lesividad* proceeding to declare an EV null and void, then the EV automatically grants rights to its holder.[689]

1001. As Dr Jurado extensively testified during the Hearing, EVs do not grant any rights to its holders. They are merely preparatory acts that authorize the developer to continue with the required permitting process to develop a project. Dr Jurado explained that:

686 Claimants' Opening Statement, Day 1 Transcript, 105:13.
687 C-36, C-52.
688 Claimants' Opening Statement Demonstrative, slide 30.
689 Cross Examination of Luis Ortiz, Day 5 Transcript, 1381:7-20.

"From this perspective, the Environmental Viability—and I said that in my presentation. I want to clarify this—is an act that does not provide the right to do any activity with viability. A developer cannot begin construction immediately of his project, whether it is real estate or a factory. Without viability, they can't do anything. It is a requirement."

Cross Examination of Julio Jurado, Day 5 Transcript, 1453:1-8.

"And that's what the viability is. It's -- it is the approval for the plan to manage Environmental Impacts. That's all. […]

I wanted to say this, and that's why I stated that the granting of Environmental Viability is a preparatory formality, part of a procedure before granting other authorizations. It's not the final act. The final one is the one that entitles somebody to do something. It's a formality. It doesn't per se grant the authority to conduct the activity."

Cross Examination of Julio Jurado, Day 5 Transcript, 1454:3-17.

"The thesis that I've tried to explain here is that EVs is an act—or the act approving the EV—the act approving that EV has no effect on the private individual."

Cross Examination of Julio Jurado, Day 5 Transcript, 1459:19-22.

"It neither gives nor takes from him. It doesn't generate any right for that individual, no license to do what that individual wanted to do. It is an essential requirement. It is needed before seeking other permits. But the viability per se doesn't authorize the individual to do anything."

Cross Examination of Julio Jurado, Day 5 Transcript, 1460:1-6.

1002. The fact that the Constitutional Chamber has issued a decision establishing a proceeding to annul EVs does not by itself mean that the Constitutional Chamber has derived rights under those permits. Mr Ortiz himself testified to the nature of the Constitutional Chamber's ruling as imposing a *"[proceeding that] must be followed."*[690]

1003. In this regard, Claimants tried to impeach Dr Jurado's expert opinion by relying on Exhibit C-298, introduced a few moments before his cross examination. Exhibit C-298 comprises a Resolution from the Attorney General's Office dated September 2, 2016 that replies to a request for legal criteria from the MINAE on the applicability of the *lesividad* procedure to an EV. When cross examined on this Resolution, Dr Jurado explained that the Attorney General's Office's did not issue the legal criteria requested because the consultation was dismissed on admissibility grounds.[691] The Resolution itself explains that it will not opine on any of the alleged grounds on which MINAE was relying to initiate the *lesividad* proceedings. Claimants cannot, therefore, rely on an interlocutory resolution that contains no substantive criteria from the Attorney General's Office.

690 Direct Examination of Luis Ortiz, Day 4 Transcript, 1281:11.
691 Cross Examination of Julio Jurado, Day 5 Transcript, 1525-1528.

1004. Second, as to Claimants' construction permits, while generally they do grant rights under Costa Rican law,[692] critically and of overriding significance for this case, no construction permits can displace or waive the imperative of a continuing obligation not to impact the environment. That is an inalienable right under Costa Rican law. Respondent has proven during this arbitration that the construction permits for the Condominium and Easements were unlawfully obtained due to fragmentation, lack of obtaining of an EV, concealing of information from Costa Rican authorities and impacts to a wetland. Therefore, the Costa Rican authorities were entitled to take the steps they did, which in turn would have a revocatory effect on any rights otherwise accruing under the construction permits.

1005. Notably (and sensibly), Claimants have not pleaded that the construction permits grant them acquired rights, and they have not done so because under Costa Rican law, a permit does not grant a right to be immune from the application of environmental law. If a permit is used to impact the environment, then the precautionary principle comes to play and those permits must be suspended until there is certainty that the environment will not be harmed. Therefore, because the State cannot expropriate a right that does not exist under domestic law, Claimants' allegation that EVs or construction permits constitute a *"permit with the characteristics of an investment"* under footnote 10 of Article 10.28(g) must fail.

1006. The Tribunal's conclusion would be the same whether the analysis is conducted purely under Costa Rican law or under international law. If the analisis is made under international law, the interaction between Chapters 10 and 17 and the express provision of Article 10.11 lead the Tribunal to interpret that the measures Claimants' complain of, *"are appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."* Indeed, Claimants' allegations of expropriation of their construction permits is the perfect example of why Article 10.11 was conceived. Costa Rica has not committed a violation because investment protection under Chapter 10 defers to environmental protection under Chapter 17 when the state uses its police powers to enforce its environmental law. Thus, Chapter 17 and Article 10.11 trump any allegations of expropriation on the part of a Costa Rica for enforcing its laws consistent with environmental protection.

1007. Even in the absence of Chapter 17 (which is not the case), international law would still uphold Costa Rica's responsibility. The principle in international law is that the existence of property and vested rights is a matter to be determined by the domestic law of the host State. Under Costa Rican law, construction permits do not grant an inalienable vested right because they are always subject to the right of the State to suspend or revoke them. Thus, by looking at Costa Rican law, international law would reject a claim for expropriation of a permit which does not exist under international law.

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1009. Even in the absence of Chapter 17 (which is not the case), international law would still uphold Costa Rica's responsibility. The principle in international law is that the existence of property and vested rights is a matter to be determined by the domestic law of the host State. Under Costa Rican law, construction permits do not grant an inalienable vested right because they are always subject to the right of the State to suspend or revoke them. Thus, by looking at Costa Rican law, international law would reject a claim for expropriation of a permit which does not exist under international law.

B. Respondent's conduct falls within the exception established in paragraph 4(b) of Annex 10-C

1010. Claimants allege that paragraph 4(b) should not be interpreted as an exception but rather as some sort of mere declaration by the Parties.[693] To support this argument, Claimants rely on U.S. treaty practice. Respondent objects because U.S. treaty practice cannot replace the intention of DR-CAFTA Parties when they decided to include this provision in Annex 10-C.[694]

1011. During the Hearing, Claimants defended their reliance on these sources, by alleging that Ken Vandevelde's book "U.S. International Investment Agreements" has 36 pages on CAFTA.[695] Well, those specific 36 pages on DR-CAFTA do not deal with the interpretation of Annex 10-C as negotiated and included in DR-CAFTA and therefore cannot provide any support to Claimants' interpretation that paragraph 4(b) was intended to be applied solely as a *"declaratory fiat."*[696]

693 Claimants' Reply Memorial, paras. 89-91.
694 Id., paras. 90-91.
695 Claimants' Opening Statement, Day 1 Transcript, 117:12-13.
696 Claimants' Reply Memorial, para. 89.

1012. Under paragraph 4(b) of the interpretative Annex 10-C of the Treaty, non-discriminatory actions of the host State that are designed and applied to protect the environment do not constitute indirect expropriations.

1013. First, Respondent's actions were not undertaken with a discriminatory animus. Claimants allege that Mr Martínez acted in a discriminatory manner in the prosecution of Mr Aven,[697] and thus, Respondent's conduct does not fall within the exception. The examination of Mr Martínez during the Hearing showed that when investigating the Las Olas Project he acted reasonably and objectively. Mr Martínez has also testified that he did not know Mr Aven prior to his criminal investigation and he had nothing personal against Mr Aven or the Las Olas Project.[698]

1014. Claimants also contend that Mr Bogantes' alleged bribe solicitation was a discriminatory act.[699] First, Respondent does not find support for that assertion and second, Respondent has already addressed that any bribe solicitations have not been proved by "clear and convincing evidence." Thus, Claimants have no evidentiary support to argue that Mr Bogantes' conduct was discriminatory.

1015. Hence, because Claimants have not put forward any other evidentiary element to show a discriminatory animus from Costa Rican agencies and Respondent has shown objectivity and reasonableness in those proceedings, Respondent's actions fall within "non-discriminatory actions" under paragraph 4(b).

1016. Second, Respondent's actions fall within the concept of "regulatory actions designed and applied to protect the environment." Claimants have alleged, without any support, that those regulatory actions only refer to general actions and therefore do not apply to this case. Respondent has showed that as understood by customary internal law, police powers encompass the right of a State **to enforce existing regulation** in relation to a particular investor.[700] Furthermore, because of the clear directions of Article 10.11 of the Treaty, *"regulatory actions"* should be interpreted as encompassing actions intended to enforce existing environmental protection regulations.

1017. During the Hearing, Claimants misconstrued Respondent's interpretative proposition of "*regulatory actions*" by suggesting that because DR-CAFTA contains a chapter devoted to the protection of the environment, then all investment provisions in the Treaty should be super-charged as regards to environmental protection.[701] Respondent's argument is not merely supported by the existence of a chapter that deals with the environment. Rather, Respondent's most important support is found at Article 10.11 of the Treaty which

697 Claimants' Reply Memorial, para. 389.
698 First Witness Statement of Luis Martínez, paras. 37-40.
699 Claimants' Reply Memorial, para. 390.
700 Respondent's Counter-Memorial, paras. 628-629.
701 Claimants' Opening Statement, Day 1 Transcript, 118:13-22, 119:1-14.

expressly addresses the interpretation of provisions involving both environment and investment protection. Therefore, Article 10.11 is the most relevant provision in the interpretation and application of paragraph 4(b) in this case.

1018. Therefore, since the actions of Costa Rica were a legitimate exercise of its police powers in a non-discriminatory manner, the exemption stated in sub-paragraph 4(b) is completely applicable to the case at hand. Thus, the Tribunal should dismiss Claimants' claim for indirect expropriation.

C. Alternatively, the Tribunal would have to apply paragraph 4(a) of Annex 10-C

1019. In the circumstances where the Tribunal considers that Costa Rica's actions do not fall within paragraph 4(b)'s exemption, the Tribunal should analyze the following factors under paragraph 4(a) to determine whether an indirect expropriation has occurred: (i) the economic impact of Respondent's action; (ii) the extent to which Respondent's action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of Respondent's action.

1020. An application of each of these elements to the case at hand will show that Respondent cannot be liable for indirect expropriation because in its exercise of bona fide police powers Respondent did not interfere with Claimants' expectations nor did it deprive Claimants of their alleged investment.

1. Respondent has not permanently deprived Claimants of their alleged investment's value or control

1021. First, under international law, the test for analyzing "the economic impact of the governmental action" is one of permanent deprivation of the investment's value or control.[702]

1022. Costa Rica has not deprived Claimants of the value or control of the Project Site which they own to date. In fact, Claimants acknowledged that the Project Site has the potential of considerable returns upon resale even if the Project was not developed.[703] The best evidence for this is that after May 11, 2011, when Claimants allege the project was shut

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[702] **RLA-1**, *Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc. Mobil Cerro Negro, Ltd. and Mobil Venezolana de Petróleos, Inc. v. The Bolivarian Republic of Venezuela*, ICISID Case No. ARB/07/27, Award, October 9, 2014, para. 286.
RLA-12, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 2August 27, 2008, para. 193.
RLA-21, *Perenco Ecuador Limited v. The Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and Liability,September 12, 2014, para. 672.
RLA-7, *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award, July 17, 2006, para. 176.
RLA-22, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, paras. 152-153.

[703] Claimants' Memorial, para. 41.

down,[704] Claimants kept selling a few lots and profiting from those sales. If Claimants were to have lost control or value of the land, they would not have been able to conduct ongoing business. Evidence of those sales can be found in Annex II of the Rejoinder Memorial which Claimants have not rebutted.

1023. Furthermore, Respondent's alleged expropriatory actions do not have the necessary permanent character. They are temporary measures as they consist of a series of injunctions which ordered the suspension of works until the claims of environmental harm were resolved. Notwithstanding, Claimants, when referring to the injunctions issued by the TAA, the Municipality and the criminal court, allege that:

> "[T]he measure has been in effect for many years and all indications are that it shall remain in force indefinitely.
>
> As such, each measure independently constitutes a measure tantamount to expropriation of the Las Olas Project, because each permanently enjoins the enterprises controlled by Claimants from exercising rights previously granted to, or obtained by, them for the purposes of developing the project site."[705]

1024. It is very cynical for Claimants to argue with such conviction that the injunctions are "permanent" when – because of their own legal nature – they are temporary measures pending upon a final decision in proceedings from which Claimants decided to abscond.

1025. Note that under Costa Rican law, the issuance of injunctions constitutes one of the first steps of administrative and judicial processes. Dr Jurado testified that the injunction is just the first step before commencing the administrative proceeding that may lead to a nullification of any permits granted to Claimants:

> "So, to be speedy, the administration issues Precautionary Measures, and it has a certain period of time to then launch the main proceeding. This is the proceeding which may lead to the nullification of the permits issued by the administration. It's not that the administration has two different ways to go--or it imposes the Precautionary Measures or nullifies the permits; it doesn't have two ways to go."
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> Direct Examination of Julio Jurado, Day 5 Transcript, 1446:14-21.

1026. In the case at hand, the injunctions were issued at the beginning of the administrative proceedings to avoid continuance of any conduct that may cause environmental harm. Neither the TAA nor the criminal courts have yet reached a final decision that could be considered "permanent" if not appealed by Claimants. But for Claimants' inactivity, these proceedings are still ongoing. Had Claimants appeared before those proceedings, the injunctions would have been reversed or a final decision on their liability would have been issued.

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704 Claimants' Memorial, para. 153; Claimants' Reply Memorial, para. 291.
705 Claimants' Closing Statement Demonstrative, Day 6, slide 28.

1027. In sum, the only reason why those injunctions are still in place is because of Claimants' decision to abandon local proceedings. Claimants' own fault cannot be awarded by a finding of expropriation when they still to date have legal recourses they can resort to, to challenge those injunctions.

2. Respondent's actions did not interfere with any "reasonable investment-backed expectations"

1028. Respondent has extensively addressed during this arbitration the expectations Claimants claim under the customary international law doctrine of "legitimate expectations." [706] Respondent has been forced to address this issue as a violation of FET due to Claimants' baseless claims of a violation of legitimate expectations under Article 10.5. Respondent, therefore, directs the Tribunal to section VII of the Brief.

1029. In sum, an analysis of Claimants' legitimate expectations from an objective perspective at the time the investment was made, and the lack of specific promises from Costa Rica, should lead the Tribunal to conclude that Claimants were aware of the environmental provisions which prevail in Costa Rica, and therefore, they could not have expected that Respondent would not enforce its laws in case of a violation of Costa Rican laws.

1030. Claimants were on notice of the public policy decisions available and of Costa Rica's commitment to environmental protection and its strong policy of enforcement of environmental laws, which has been consistently publicized by Costa Rica. Therefore, Claimants could not have reasonably expected that Costa Rica would not have enforced its environmental laws in order to (i) suspend their misconduct against the environment and (ii) sanction Claimants' conduct which was in violation of Costa Rica's criminal and administrative laws.

3. Respondent's actions ought to be characterized as bona fide exercise of police powers which do not support a claim for indirect expropriation under the Treaty

1031. In paragraphs 643 to 645 of its Counter-Memorial, Respondent has addressed the assessment the Tribunal should undertake when analyzing *"the character of"* Respondent's actions under paragraph 4(a)(iii) of Annex 10-C. Basically, it is Respondent's position that the character of the measure should entail an analysis of whether the actions display the characteristics of a bona fide exercise of police powers by the host State.[707]

1032. Respondent notes that in their Reply Memorial, Claimants have only addressed Costa Rica's police powers' defense in the context of the exemption under paragraph 4(b) but have not pointed to how the Tribunal should understand the character of Respondent's

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706 Respondent's Counter-Memorial, paras. 478-505; Respondent's Rejoinder Memorial, paras. 22, 106, 787-868.

707 **RLA-15**, United Nations Conference of Trade and Development, UNCTAD Series on Issues in International Investment Agreements II, Expropriation, 2012.

actions under the third prong of paragraph 4(a). [708] Thus, Respondent stands by the arguments of its Counter-Memorial.

D. For compensation purposes, the Tribunal should consider whether an expropriatory measure was unlawful

1033. Claimants have argued in their Memorial [709] and reiterated during the Hearing, [710] that indirect expropriation is unlawful *per se*. Respondent considers that this discussion is moot since none of the requirements that DR-CAFTA envisages for a violation of Article 10.7 are met in this case.

1034. Notwithstanding, Respondent has been forced to enter into this debate with Claimants to show that Claimants' conclusion is not supported under international law. In this sense, international investment case law supports Respondent's position. [711] Expropriation cannot be considered unlawful if solely based on non-payment of compensation because legality refers to whether the State is authorized to expropriate or not. Compensation is a separate obligation which refers to the consequence of the expropriation.

1035. Respondent reiterates that this distinction is moot in light of Respondent's failure to meet DR-CAFTA's test for an expropriation claim under paragraph 4(a) of Annex 10-C.

E. Conclusion

1036. Claimants' allegations on expropriation do not meet the test provided in the Treaty. First, Claimants' alleged investments are either in total control of the investor or not protected under DR-CAFTA. Claimants still own the land they bought in 2002, the date when they established their investment. Claimants' EVs simply do not grant any vested rights to Claimants under Costa Rican law, and therefore cannot be considered covered investments under Article 28.10(g) of DR-CAFTA. Construction permits do not grant any right in circumstances where they will impact the environment, which is exactly what Claimants used them for. Therefore, Claimants do not hold any covered investment capable of indirect expropriation under Article 10.28 of DR-CAFTA.

1037. Second, Costa Rica's actions fall within the exemption provided by paragraph 4(b) of Annex 10-C of DR-CAFTA. By enforcing its environmental law against Claimants'

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708 Claimants' Reply Memorial, paras. 380-390.
709 Claimants' Memorial, para. 407.
710 Claimants' Opening Statement, Day 1 Transcript, 116.
711 **RLA-53**, Case Concerning the Factory at Chorzów (Ger. v. Pol.), Claim for Indemnity, The Merits, Judgment No. 13, P.C.I.J. Rep Series A No 17, September 13, 1928.
RLA-1, *Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc. Mobil Cerro Negro, Ltd. and Mobil Venezolana de Petróleos, Inc. v. The Bolivarian Republic of Venezuela*, ICISID Case No. ARB/07/27, Award, October 9, 2014, paras. 302-306.
RLA-87, *Tidewater Investment SRL and Tidewater Caribe, C.A. v The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award, March 13, 2015, paras. 140-1.

wrongdoing, Costa Rica engaged in a non-discriminatory regulatory action which cannot be deemed an expropriation under the Treaty.

1038. Alternatively, if the Tribunal finds that Respondent's actions are not exempted under paragraph 4(b), Costa Rica cannot be found to have expropriated Claimants' investment because it has not permanently deprived Claimants' of the value or control of their investment. The measures that Claimants' consider expropriatory consist of injunctions which will only be in place until ongoing proceedings conclude. Those proceedings are pending upon Claimants' return to Costa Rica.

X. DAMAGES

1039. In the event that the Tribunal considers that Respondent should be held liable due to the violations of standards of protection under DR-CAFTA, it is Respondent's position that (i) the quantification of Claimants' damages should be based on a cost approach method, and (ii) Mr Aven is not entitled to moral damages.

1040. Claimants' have presented a damages claim that is so grossly inflated as to be risible. The property was acquired for a mere fraction of the total amount claimed and has not been developed. There is no concrete evidence whatsoever that there is a track record of any profits, as there are no structures of infrastructure on the Las Olas Project Site. Therefore, Claimants' damages claim is an exercise of *pure speculation*.

1041. Investment arbitration is not the realm in which pure speculation can or should occur. It is the forum to redress loss. There is no evidence of loss. A theoretical concoction of a potential project that bears no relation to what exists at the Las Olas Project Site today is not evidence.

1042. Dr Abdala, as accomplished as he may be in investment arbitrations, has truly stretched the boundary of what is acceptable. He has taken a series of half-baked business plans, and set about improving them. Thanks to Dr Abdala – who is not a Claimant in these arbitration proceedings – he has tried to advance Claimants' work and offer a step change in where they had to go. This is not permitted under international law.

1043. Damages claims in investment arbitration are not exercises in "improving" someone's work. Damages claims in investment arbitration are also not exercises in which the party behind a speculative project can be ignored. According to Dr Abdala, the damages claim could be valued at US$100 million whether it was backed by the most accomplished resort developer or a child. The profile and track record of the project is seemingly irrelevant to Dr Abdala.

1044. Of course, this is nonsense, and Dr Abdala's evasiveness on this point under cross examination was palpable. Of course it matters whose project he was valuing, and this is why the disastrous profile of both the Claimants as individuals, and their disastrous track record of pathetic sales means this Tribunal cannot ignore what this investment really was.

1045. The investment is a plot of land. Admittedly in a lovely location and relatively close to the coast. However, the mere location does not convert it into a US$100 million profitable project.

1046. Dr Abdala's report is a ruse. Dr Abdala projects sales that have never existed. He projected construction that had never begun. Dr Abdala projected interest that never manifested itself. He projected successful purchases by wealthy and persistently keen timeshare owners that never showed up. His projection and the money he says it would

recoup are wonderful creations of his own imagination. However, this Tribunal does not have jurisdiction to determine fictitious claims. This Tribunal can only determine loss based on evidence.

1047. Dr Abdala's report relies on a methodology never before seen in investment arbitration. Accordingly, even Dr Abdala's report is an exercise in creative writing inasmuch as his calculations are a fantasy. To project a cash flow where there has never been a cash flow is ludicrous. Claimants and Dr Abdala have no authority or basis to invent a previously never-seen cash flow. Replete with economic invention, Dr Abdala tries to hedge his overly creative imagination by introducing some kind of risk factor – to arbitrarily reduce the number claimed based on the likelihood of success – a likelihood grounded in US practice. The US is as irrelevant to this case as any other country. Interjecting a risk factor, Dr Abdala gives himself a haircut to produce speculative wonder.

1048. Claimants continue to own the land (as much as the evidence shows they do), and it has not been expropriated. Therefore, according to Claimants, if they overcome the environmental challenges they currently face and start developing the project as they seemingly wish to do (and could be entitled to do), they would then be set to make the US$ 100 million Dr Abdala insists they could make, having already pocketed US$100 million from the Republic of Costa Rica in this arbitration.

1049. If the Tribunal were to entertain even a modicum of Claimants' damages claim, you would be re-writing international law. No precedent exists for this approach. This Tribunal would also be opening the floodgates on a multitude of claims by inexperienced and unproven business people who (with the help of a damages expert), can invent cash flows and cash them out through investment arbitration claims.

1050. This leaves us with one final proposal, which is to ask the members of the Tribunal whether having seen Mr Aven testify, they would be prepared to raise their own personal, Gargantuan funds – namely US$100 million, cut a check and hand it over to Mr Aven? Would this Tribunal consider Mr Aven, Mr Shioleno, Mr Janney as sophisticated, world-class resort developers? Would their US$100 million be safe in the hands of Mr Damjanac, who struggled to sell a single property while living out of Mr Aven's house?

1051. Quite clearly Claimants are amateur investors with little to no clue on how to develop resorts, let alone in Costa Rica. And yet an award in favor of Claimants is to entrust them with such large sums of money that any reasonable investor would be foolhardy to pursue such a venture. Notably, Claimants have struggled to attract interest from their own friends, contacts and parishioners with whom they are meant to have good standing. Why on earth would the members of the Tribunal wish to trust them with US$ 100 million of your own money?

1052. This arbitration is not a game. It is not an exercise in producing damages reports that can speculate from the comfort of an office and reach a number that is of no consequence. Asking the Republic of Costa Rica to write a check for US$ 100 million translates to schools that do not get built, or health programs that are not advanced. Rural poverty initiatives that are abandoned or environmental programs that are sidelined. Costa Rica looks to this Tribunal to restore sanity to this analysis, and realize that if this Tribunal or Dr Abdala is not prepared to re-mortgage their entire worldly possessions and abandon their children's college educations, in order to hand over to Mr Aven hard cash so as to try to develop Las Olas, then why should anyone else?

A. The quantification of Claimants' damages should be based on a cost-approach method

1053. Both quantum experts have agreed that in order to calculate Claimants' damages they have to determine the fair market value (the "**FMV**") of the Las Olas Project[712] and the nature of the Las Olas Project as a pre-operational project.[713]

1054. Nevertheless, both experts disagree on the method to determine the FMV of a pre-operational project company: while Dr Abdala proposes a hybrid approach based on a discounted cash flow method ("**DCF**") and the market approach. Mr Hart considers that the cost approach is the most appropriate. It is Respondent's position that, based on the circumstances of this case, the Tribunal should apply a cost approach to determine Claimants' damages.

1. Dr Hart's cost approach is the appropriate method for the valuation of the Las Olas Project

1055. Mr Hart's proposal to determine FMV of the Las Olas Project is a cost approach. The cost approach is the least speculative methodology to determine damages for the Las Olas Project, which is in a pre-operational stage:

> "This is the least speculative valuation methodology. They're admittedly raw land and never a going concern. And it's the way businesses actually account for these properties in fair value statements. It's the way it's done. The only prudent value-added expenses should be considered under the cost approach."[714]

1056. Las Olas cannot be considered a going concern. In effect, Claimants admitted in December 2010 –very close to May 2011, the date of valuation– that the Project was raw land, in a dead market, with almost no sales:

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712 Cross Examination of Manuel Abdala, Day 7 Transcript, 2125:17-18; Cross examination of Timothy Hart, Day 7 Transcript, 2241:21.

713 Cross Examination of Manuel Abdala, Day 7 Transcript, 2123:8-11; Cross examination of Timothy Hart, Day 7 Transcript, 2256:17-18.

714 Cross Examination of Timothy Hart, Day 7 Transcript, 2266:9-15.

"Since that time [after economic crisis] we have sold an additional 16 lots, and taken deposits on a few more."

"So, […] in about one year's time […] we have closed on $875,000 in sales, and taken deposits on another $387,000 in sales which should closed [sic] in the next few months."

"It is very difficult to sell a raw land product which is not improved […]."

"This was a most difficult year to sell real estate down here. Mostly all other deals around us are dead in the in the water."[715]

1057. The scenario portrayed by Claimants demonstrates that Las Olas is raw land in a dead market, with minimum sales to extrapolate future cash flows. Thus, the application of any method other than a cost approach would render the calculation of damages speculative and imprecise.

1058. Dr Hart proposed this approach early in his first report, and during the document production stage Respondent requested the necessary documentation to perform a damages calculation under the cost approach. In response to Respondent's request, Claimants provided hundreds of pages in a disorganized manner, which evinces the way in which the Las Olas Project carried out its "accounting": incomplete financial statements, no tax returns system. This is far from how a resort would manage its accounting. Yet, Claimants compare Las Olas to successful resorts in the area.

1059. This was in effect recognized by Dr Abdala:

"Q: […] **Did you see any other regular accounting documentation from Las Olas?**

A: **No.** Only what I had included as exhibit in my reports.

Q: **Did you see any U.S. tax returns?**

A: **No, I have not.** (emphasis added)

Cross Examination of Manuel Abdala, Day 7 Transcript, 2195:21-22; 2196:1-4.

[715] C-98, paras. 4, 6, 12, 10.

"Q: And would it concur so with **Mr. Aven's testimony in the December Hearing where he admitted that he put thousands of documents he had in a box and sent it to counsel for the Claimants**? Let me read Mr. Aven's testimony. He said, "I remember sending Mr. Burn a huge box of documents after I got that request"--he's referring to the production request--"so there's thousands of documents 1 in evidence in this case. And the documents I was able to find, I sent to Mr. Burn." These are those documents, sir.

A: Okay.

Q: **But they were not consolidated in any report in any way to make sense of them.**

A: **They were not consolidated**, so you would have to reconstruct by dates and link them to the classification of the accounts layers that are in my 10 exhibit in order to tally them.

Q: Uh-huh. **And is this how you'd normally expect to see luxury resort developers manage their accounts?**

A: **You would normally expect to have them--financial statements.** But this is the supporting evidence for some of the cost expenses. I think this is responding to what was asked on the Redfern to support that--those cost expenses that were on the record." (emphasis added)

Cross Examination of Manuel Abdala, Day 7 Transcript, 2198:16-22; 2199:1-19.

1060. Dr Hart had to base his calculations on Claimants' disorganized accounting, and he was able to identify a total of US$ 1,840,385 in costs which seem to be legitimately related to the Las Olas Project, plus US$ 1,647,000 for the original purchase price of the entire property.[716]

1061. Nevertheless, Dr Hart had to reduce this figure in light of the fact that Claimants did not own all of the lots that comprised the Las Olas property.[717] Because Claimants have not provided detailed costs per lot, Dr Hart estimated that the damages must be reduced by at least 22% based on the proportion of the square meters of these non-Claimants owned lots. Therefore, his final estimation of damages is US$2,720,160.[718]

1062. Respondent stands by Dr Hart's reports as to the determination of valuation day (May 2011) and interest (pre-award at the 10-year U.S. Treasury Rate or the 6-month LIBOR+2).

2. Dr Abdala's "hybrid approach" is completely flawed

a) Dr Abdala's approach is entirely speculative

1063. Overall, Dr Abdala's methodology is completely inappropriate to estimate the damages in this case, and it does not resemble a valuation that could be used by a real life buyer or

716 Second Hart Report, paras. 230, 231; Exhibit 12 to Second Hart Report; C-27.
717 Second Hart Report, para. 232; Exhibit 6 to Second Hart Report, Map of Las Olas Property showing lot ownership.
718 Second Hart Report, para. 233.

seller. Dr Abdala says he based his novel approach in literature, but the only scholar quoted is Professor Damodaran. Dr Abdala has not provided any example in which the proposed model was applied in the real world, or by any other investment arbitration tribunal.[719] This is because it does not exist, and for good reason.

1064. The "hybrid" model proposed by Dr Abdala can be summarized as follows:

[*Value of the project as a going concern (based on a DCF model) * a supposed success rate****] + [****supposed value of the land with existing permits and partial construction (based on pre-existing appraisal) * supposed failure rate****] –*** *Value of the land under its restricted used (based on a comparable approach)*

1065. Since Dr Abdala could not purely rely on a DCF model (due to the acknowledged pre-operational character of the Las Olas Project), he mixed two valuation approaches for each component of the calculation: income approach (DCF) and market approach (pre-existing appraisal and comparables).

1066. Although the DCF model is introduced as an element of his complex analysis, the largest portion of damages is based on the value of the project as a going concern, which has to be calculated using a DCF, a model that cannot be applied to this case from any perspective.

1067. On the one hand, Las Olas has never been a going concern. There are minimal sales in order to extrapolate certain future cash flows. Even worse, Claimants did not even provide the necessary supporting documentation of these minimal sales.

1068. The poor evidence rendered in these proceedings demonstrate Claimants' track record with this particular investment has not been very promising to allow a certain estimation of future cash flows:

> "The success of the Las Olas Project depended on Claimants' ability to successfully sell the multitude of lots they purportedly planned to offer. **I have not seen much documentation that confirms successful sales.** In fact, in a letter to investors in December 2010, Mr. Aven disclosed that from 2007 to 2009 they had $640,000 in sales and he further says people were paying $160,000 per lot, which would equal exactly 4 total sales in that 3-year window. At one point prior to the financial crisis, Mr. Aven told the investors that they were selling five lots per month. At best, I have seen documentation of three lot sales a month pre-financial crisis. After the financial crisis, Mr. Aven told the investors he expected 15 sales in the first two months of 2011, despite historical performance showing nothing of the sort. However, given that there were also several months with no sales at all; Las Olas appears to have achieved sales at a rate of 0.77 lots per month pre-financial crisis, and 0.71 lots per month post-financial crisis. Further, I note that of the 17 agreements after the financial crisis, only one was a purchase agreement,

[719] First Abdala Report, para. 54; CLEX-041.

and the remaining 16 were less-committal reservation and option agreements."[720] (emphasis added)

1069. On the other hand, there are no historical figures upon which to base critical inputs such as sales volume, net sales prices, construction costs, and operational costs. This was recognized by Dr Abdala during the Hearing:

> "Q: So, the 16 or 26 [sales] representing about 5 or 6 percent of the total number of lots, and only one house from among those lots had actually been built on the resort. Is that also your understanding, only one property had been built?
>
> A: Well, I understand that there's only 26 lots 21 that were sold before May 2011.
>
> Q: And so, no construction--to state the obvious--on any of the unsold lots either; is that also your understanding?
>
> A: Correct.
>
> Q: And no hotel had been built.
>
> A: No.
>
> Cross Examination of Manuel Abdala, Day 7 Transcript, 2202:16-22; 2203:1-6.

1070. Consequently, any amount derived from this calculation is inflated and uncertain since each of the inputs of the key drivers that Dr Abdala used to calculate the value of Las Olas as a going concern (lots, houses, condos, timeshares, and hotel) is totally speculative.[721]

1071. Furthermore, the comparables used by Dr Abdala as part of the market approach calculation are based on inappropriate and unrealistic data which does not relate to the Las Olas Project at all:

	Component of Dr Abdala calculation	Data on which Dr Abdala relies	Criticism
Value as a going concern	Lots	• Prices from Remax website in 2015[722] • Prices from E-mail from El Mistico in 2015[723]	• Prices are not from 2011[724] • No adjustments for any changes in the real estate market[725] • El Mistico is not similar to Las Olas[726]
	Hotel	Profit margin based on hotel sale transactions in Panama, Mexico	Not clear how these hotels are comparable to a hotel in

720 Second Hart Report, para. 93; C-98, p. 2; Exhibit 5 to Second Hart Report.
721 Second Hart Report, Section 7.2.
722 First Abdala Report, paras. 87-88.
723 Id.
724 Second Hart Report, paras. 121, 122.
725 Ibid.
726 Second Hart Report, Section 7.5.

		and Central America[727]	Costa Rica[728]
	Condos	• Prices from Remax website in 2015[729] • Prices from E-mail from El Mistico in 2015[730]	• Prices are not from 2011[731] • El Mistico is not similar to Las Olas[732]
	Houses	Buyers would have held the properties 10 years before selling, and 90 % of the properties will be sold after that period, based on statistics from the National Association of Realtors investment and vacation home buyers[733]	The survey only incudes data for US households, not comparable to Costa Rica[734]
But-for expected value	Probability of success	• Statistical evidence of survivorship form the Bureau of Labor and Statistics[735] • Successful comparable resorts such as Los Sueños, El Mistico, Residencias Málaga and Costa del Sol[736]	• U.S data is not comparable to data for business in Costa Rica[737] • The resorts are not comparable[738]
Residual Value (Value of the Land in its current state)		• Prices from Remax website in 2015[739] • Three comparable properties[740]	• Prices are not from 2011[741] • No adjustments for any changes in the real estate market[742] • No detailed listings associated with the three comparable properties.[743]

1072. These examples show that Dr Abdala's calculation is based on information which does not relate to the Las Olas Project, it is too uncertain, subjective, and dependent upon

727 First Abdala Report, para. 115; Second Abdala Report, para. 65.
728 Second Hart Report, paras. 165-168.
729 First Abdala Report, para.103; CLEX-082, CL Valuation Model.
730 Id.
731 Second Hart Report, para. 146.
732 Second Hart Report, Section 7.5.
733 First Abdala Report, para. 100; Second Abdala Report, para. 44.
734 Second Hart Report, para. 135.
735 Second Abdala Report, Section II.3.1.
736 Second Abdala Report, Section II.3.2.
737 Second Hart Report, para. 195.
738 Second Hart Report, Table 7.4.
739 Second Abdala Report, para. 106.
740 First Abdala Report, paras. 126, 129.
741 Second Hart Report, para. 201.
742 Ibid.
743 Second Hart Report, para. 202.

contingencies. Tribunals have been reluctant to rely on this type of information, suggesting that extreme caution is required in assessing compensation.

1073. Particularly, and regarding the DCF methodology, tribunals emphasize the speculative character of these calculations when the project does not have a record of profitability. In *Siag v Egypt*, where Dr Abdala also acted as an expert, the tribunal held:

> "Mr Abdala of LECG was asked by the Tribunal a question concerning the differences in valuing the future profits of a business which has been operating for several years, as compared to a "business opportunity" which is still in the development phase. Mr Abdala very candidly acknowledged that there is one particular difference and this is that "… in the [case] that you have a track record of profitability you could say that you have a higher degree of certainty as to what to expect of the performance of the business in the future.
>
> […]
>
> Points such as those just mentioned tend to reinforce the wisdom in the established reluctance of tribunals such as this one to utilise DCF analyses for "young" businesses lacking a long track record of established trading. In all probability that reluctance ought to be even more pronounced in cases such as the present where the business is still in its relatively early development phase and has no trading history at all."[744]

1074. In other words, a DCF would be perfectly applicable to a scenario of an ongoing project because the prospective buyer would estimate the cash flows and discounts to the valuation date, applying a discount rate that accounts for the various types of risks that cash flows are subjected to, as well as the time value of money.[745]

1075. However, the future cash streams of a project must be estimated with a reasonable degree of certainty, **which does not exist in this case**. The Las Olas Project cannot qualify as an ongoing project when it has generated only 16 sales in 9 years.[746]

1076. In sum, although Dr Abdala suggests that he is proposing a "hybrid approach", he is essentially relying on a DCF method, which is not appropriate for this.

b) Dr Abdala omitted crucial information in his calculation of damages

1077. Dr Abdala completely ignored relevant factors when calculating the FMV of the Las Olas Project.

1078. First, he decided not to take into account Claimants' lack of experience in managing resort developments and their lack of due diligence when buying the property, and during the operation of the investment.[747] These factors are decisive when analyzing the financial viability of a project, and Dr Abdala decided to ignore them.

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744 **RLA-173**, *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, June 19, 2009, paras. 567, 570; CLA-38, para. 189.

745 Second Hart Report, para. 106.

746 C-98.

747 See, Section III.B.

1079. During his cross examination, Dr Abdala reiterated that he did not conduct any research on Claimants' experience and their due diligence because that is irrelevant for calculating the FMV.[748]

1080. However, he did recognize its importance for the calculation of the probability of success, a component of its calculation:

> "[…] although it may be an **important consideration in establishing the probability of success** with the Claimants as managers and developers." (emphasis added)
>
> Direct Examination of Manuel Abdala, Day 7 Transcript, 2126:11-13.

1081. In the same line, Dr Abdala added:

> "Q: Yes. And, so, information regarding the identity of the investors would be relevant to the Tribunal in that discretion you've just described that is available to them?
>
> A: I think it would be relevant. It would be useful for the Tribunal to know that as well as to assess what would be the profile of the willing buyer." (emphasis added)
>
> Cross Examination of Manuel Abdala, Day 7 Transcript, 2153:22; 2154:1-6.

1082. In this sense, Brian Headd –quoted by Dr Abdala in his first report– point out that:

> "Characteristics of the owner(s), gender, race, or starting for personal reasons (flexibility for family life and wanting to be one's own boss) seem irrelevant to **survival** because these traits are believed to have little impact on business acumen. **However, being older, more educated, and having previous experience are expected to be positively correlated with survival, as lessons learned often translate into competent decision-making**." [749] (emphasis added).

1083. This is a clear contradiction with his declaration. The reason Dr Abdala omitted doing this research is that if he had inquired further as to who the investors really were, and their lack of experience to manage a resort development, the assumptions that he had relied on would have fallen apart. Quite clearly, when projecting non-existent cash flows and valuing goodwill for a non-existent project, the profile of the authors of that investment which Dr Abdala was meant to be valuing, is relevant. Dr Abdala admitted, he was valuing ***their*** plan. Dr Abdala's evasion on this point was apparent. Had Claimants been sophisticated investors he would no doubt have readily cited such fact as support for his calculation. Instead, Dr Abdala notably avoided at all costs any recognition of their profile and dismal track record.

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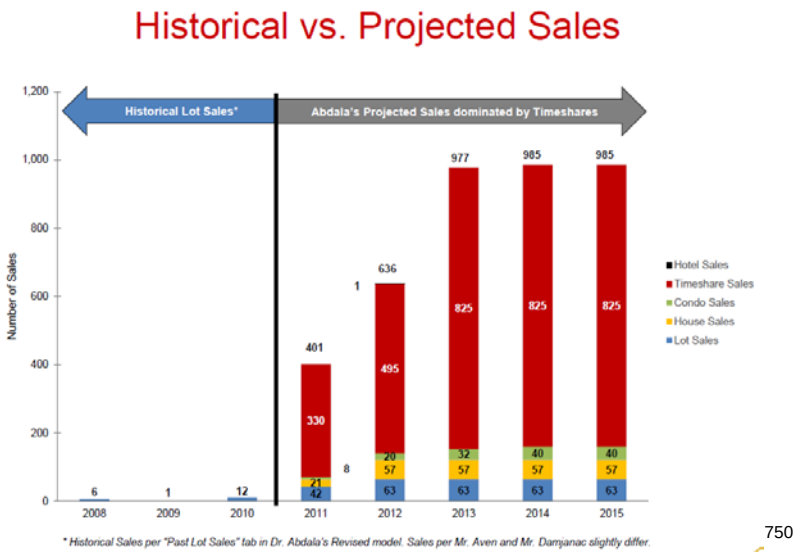
748 Cross Examination of Manuel Abdala, Day 7 Transcript, 2153:5-11; 2165:5-8.

749 CLEX-02, Second Abdala Report, p. 53.

1084. Perhaps the most manifest example of Dr Abdala not taking into account Claimants' lack of experience is the leap in sales that he projected. This is tellingly illustrated by the following graphic, taken from Mr Hart's presentation.



750

1085. This table illustrates the track record of sales and then the Bob Beamon-esque leap of sales – all of which is based on one element – Dr Abdala's personal aspiration. Dr Abdala aspires for these sales to occur to support his numbers, since there is no evidence that even Claimants anticipated such a leap in sales. In effect, Dr Abdala greatly inflated the seemingly baseless plan for lot and condo sales, reduced the house sales, and slashed the timeshare sales.[751] Therefore, at the hand of Claimants' expert, who has paid no regard to what has actually happened in terms of sales, and what those figures are telling any reasonable person, we are left with a revised foundation for cash flow *speculation* which bears no relation to reality.

1086. Second, Dr Abdala did not analyze Claimants' ownership of the property in his reports, when clearly ownership of the land has a substantial effect on the valuation of Claimants' alleged losses. During the Hearing Dr Abdala submitted a new valuation model, in which he shows a proposed reduction of damages. He affirmed:

750 Timothy Hart Demonstrative, slide 26.
751 Second Hart Report, para. 41.

> "Now, the way I propose to adjust for this new information that I did not have prior to my submission of the two reports is to do the following […]"
>
> Direct Examination of Manuel Abdala, Transcript Day 7, 2134:10-12.

> "I asked for full information as to Las Olas lot sales, and I included all the information that I was given at the time of my first report. And now, after Mr. Hart and Respondent presented additional information which was not available to me before, I made these adjustments that imply 1 percent reduction in damages. So I--with new evidence and new information, I adjusted."
>
> Cross Examination of Manuel Abdala, Transcript Day 7, 2171:2-10.

1087. It is concerning that Dr Abdala did not have this information prior to his reports, when such information should have been provided by Claimants, and was relevant for calculating projections.

1088. Finally, Dr Abdala completely disregarded the various iterations of the Business Plans. This is an important indication that the project was not operating as expected. Furthermore, Dr Abdala minimized the fact that the 2010 December Business Plan –on which he relied– was prepared by Mr Damjanac, who had neither experience nor success in real estate in Costa Rica.

1089. The lack of experience of Mr. Damjanac can be inferred from his inability to produce sales:

> "Q: Are you aware that Mr. Damjanac, who prepared the 2010 business plan, began working at Las Olas in September of 2009?
>
> A: I didn't recall that specific date or information.
>
> Q: And then in January 2010, he became the marketing and sales director for the overall resort. Were you aware of that?
>
> A: Okay. Yes.
>
> Q: And even though he made no sales whatsoever between September and December 2009. Were you aware of that?
>
> A: Between those three months? I don't recall whether there was any--any sale."
>
> Cross Examination of Manuel Abdala, Day 7 Transcript, 2182:18-22; 2183:1-9.

1090. In sum, these omissions and red flags in Dr Abdala's report have a clear impact on his valuation of the project, and demonstrate how carelessly he acted as an expert. Had the red flags been considered, the damages amount would have significantly decreased.

1091. In conclusion, and in light of the pre-operational character of Las Olas (no historical figures upon which to base critical inputs such as sales volume, net sales prices, construction costs, and operational costs), the most appropriate method to calculate any damages is the cost approach method suggested by Dr Hart.

B. Mr Aven is not entitled to moral damages

1092. Respondent has fully explained in paragraphs 1106 to 1129 of its Rejoinder Memorial why Claimants have failed to bring a claim for moral damages. Claimants have not rebutted any of Respondent's arguments in this regard but for one mention to moral damages during the Hearing.

1093. Claimants asserted that a finding of the Tribunal of a bribery solicitation *"would be worthy of sanctions and moral damages would be one of the options to [provide] that sanction."*[752] This is a totally unsupported statement. Respondent would remind the Tribunal that in the only case where a tribunal awarded moral damages to the claimant, the tribunal found that the claimant was exposed to physical duress and the state's breach of the treaty was deemed malicious.[753] Certainly the facts of *Desert Line v Yemen* cannot be applied to the case at hand where Claimants have not even brought clear and convincing evidence to support the alleged bribe solicitations.

1094. The other two cases that Claimants rely on were decided *ex aequo et bono* or had as applicable law domestic rules, so its reasoning cannot support a finding of moral damages under international law.[754]

752 Claimants' Opening Statement, Day 1 Transcript, 115:21-22.
753 CLA-85, *Desert Line Projects LLC v The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, February 6, 2008.
754 Respondent's Rejoinder Memorial, para. 1106.

XI. COUNTERCLAIM: CLAIMANTS ARE LIABLE FOR ENVIRONMENTAL DAMAGE AND THEREFORE, MUST RESTORE THE LAS OLAS ECOSYSTEM

1095. During its submissions, Respondent has argued that Claimants undertook works that adversely impacted the Project Site considerably affecting the environment.[755] The evidence rendered supports Respondent's counterclaim, and hence, the Tribunal shall order Claimants to repair the damages caused by their activity noting that (i) the Tribunal has jurisdiction over counterclaims under DR-CAFTA; (ii) Respondent has proven the existence of damages to the Las Olas Ecosystem.

A. <u>The Tribunal has jurisdiction over counterclaims under DR-CAFTA</u>

1096. The Tribunal in the present dispute has jurisdiction over the counterclaim raised by Respondent since (i) the text of the DR-CAFTA envisages the possibility for respondent states to bring counterclaims against investors for misconduct for which they are liable, and (ii) reasons of procedural economy and efficiency justify that the claim and its counterclaim shall be resolved in the same proceeding.

1. The text of the DR-CAFTA envisages the possibility for respondent states to bring counterclaims against investors

1097. To determine whether an investment tribunal has jurisdiction over counterclaims, the Tribunal has to look at the text of the Treaty. DR-CAFTA neither excludes nor prohibits an investment tribunal to exercise its jurisdiction over counterclaims under Chapter 10. The relevant provisions provide as follows:

> "**Section B: Investor-State Dispute Settlement**
>
> **Article 10.15: Consultation and Negotiation**
>
> In the event of an investment dispute, **the claimant and the respondent** should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures such as conciliation and mediation.
>
> […]
>
> **Article 10.16: Submission of a Claim to Arbitration**
>
> 1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:
>
> (a) **the claimant**, **on its own behalf**, may submit to arbitration under this Section **a claim**
>
> (i) that the **respondent has breached**
>
> (A) an obligation under Section A,
>
> (B) an investment authorization, or
>
> (C) an investment agreement;
>
> and

[755] Respondent's Counter-Memorial, paras. 647-655; Respondent's Rejoinder Memorial, Section XI.

(ii) that **the claimant** has incurred loss or damage by reason of, or arising out of, that breach; and

(b) **the claimant**, **on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly**, may submit to arbitration under this Section a claim

(i) that the **respondent has breached**

(A) an obligation under Section A,

(B) an investment authorization, or

(C) an investment agreement.

and

(ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach." (emphasis added).

1098. These provisions are completely neutral as to the identity of the claimant or respondent in an investment dispute arising between the parties, allowing a State Party to sue an investor in relation to a dispute concerning an investment in that country. Then, it is clear that the text of the DR-CAFTA encompasses counterclaims by respondent States within the jurisdiction of the Tribunal.

1099. Furthermore, the only provision referring to "counterclaims" in contained in Article 10.20.7 of DR-CAFTA, clarifies that:

> "A respondent may not assert as a defense, counterclaim, right of set-off, or for any other reason that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract."

1100. It follows that, except for a counterclaim by a respondent State alleging that *"claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract,"* Respondent's right to counterclaim under the Treaty is contemplated and falls within the scope of jurisdiction of a tribunal constituted under the Treaty.

2. Reasons of procedural economy and efficiency justify that the claim and its counterclaim shall be resolved in the same proceeding

1101. Respondent's counterclaim is based on the damages suffered by Costa Rica as result of Claimants' operation of the Las Olas Project, and thus, the relationship between the claim and the counterclaim is direct. Therefore, reasons of procedural economy and efficiency justify that the groundless claim put forward by Claimants and this counterclaim be adequately resolved by this Tribunal in the same proceeding.[756]

1102. In this sense, the tribunal in *Urbaser v Argentina* found that because Argentina's counterclaim was related to the investment and related to the same concession, there was

[756] **RLA-99**, *Spyridon Roussalis v Romania*, ICSID Case No. ARB/06/1, Separate Opinion of Michael Reisman, November 28, 2011.

enough support to establish a connection between the investor's claim and the counterclaim. The Tribunal held:

> "The Tribunal observes that the factual link between the two claims is manifest. Both the principal claim and the claim opposed to it are based on the same investment, or the alleged lack of sufficient investment, in relation to the same Concession. This would be sufficient to adopt jurisdiction over the Counterclaims well. The legal connection is also established to the extent the Counterclaim is not alleged as a matter based on domestic law only. Respondent argues indeed that Claimants' failure to provide the necessary investments caused a violation of the fundamental right for access to water, which was the very purpose of the investment agreed upon in the Regulatory Framework and the Concession Contract and embodied in the protection scheme of the BIT. It would be wholly inconsistent to rule on Claimants' claim in relation to their investment in one sense and to have a separate proceeding where compliance with the commitment for funding may be ruled upon in a different way. Reasonable administration of justice cannot tolerate such a potential inconsistent outcome."[757]

1103. Since the submission of the Rejoinder Memorial, Claimants have not brought any new arguments to contest Respondent's position on the clear text of the Treaty. Thus, Respondent stands by its written submissions in paragraphs 659 to 662 of the Counter Memorial and paragraphs 1138 to 1148 of the Rejoinder Memorial.

1104. Respondent would also point to recent decisions in the field, such as *Urbaser v Argentina* and *Burlington v Ecuador*, where tribunals have admitted jurisdiction to hear counterclaims brought by respondent states for violations of human rights and environmental damage.[758] In the second case, the tribunal imposed an award of US$ 39.2 million on the investor for environmental damage. This trend is likely to continue and shows that investment tribunals are ready to hear counterclaims when dealing with investor wrongdoing.

B. <u>Respondent has proven the existence of damages to the Ecosystems on the Project Site</u>

1105. After the Tribunal asserts jurisdiction to adjudicate Respondent's counterclaim under the Treaty, the Tribunal should find that (i) Claimants unlawfully impacted a wetland, which caused environmental damage to the Project Site; and therefore, (ii) Claimants ought to repair the damage caused to the ecosystem.

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757 **RLA-174**, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No. ARB/07/26, Award, December 8, 2016, para. 1151.

758 **RLA-174**, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No. ARB/07/26, Award, December 8, 2016; **RLA-175**, Burlington Resources Inc v The Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Counterclaims, February 7, 2017.

1. Claimants unlawfully impacted a wetland, which caused environmental damage to the Project Site

1106. To develop the Las Olas Project, Claimants assumed investment obligations which gave rise to *bona fide* expectations by Costa Rica that their investment would indeed be made ensuring the protection to the environment. By failing to make their investment appropriately, Claimants violated domestic provisions as well as the obligation under customary international law to respect the environment.[759] Such obligation is binding not only upon sovereign States, but also upon legal and natural persons such as Claimants:

> "**The Tribunal may mention in this respect that international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce**. This standard includes commitments to comply with human rights in the framework of those entities' operations conducted in countries other than the country of their seat or incorporation. In light of this more recent development, **it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law.**"[760] (emphasis added)

1107. Furthermore, the text of DR-CAFTA supports such understanding when it allows investors to invoke rights resulting from international laws:

> "If the BIT therefore is not based on a corporation's incapacity of holding rights under international law, it cannot be admitted that it would reject by necessity any idea that a foreign investor company could not be subject to international law obligations."[761]

1108. Accordingly, Claimants' conduct shall be analyzed under the concept of international responsibility:

> "[t]o the extent that international organizations and other legal and natural persons may also be subjects of international law, the concept of "state responsibility" may also inform the principle of the liability of other international persons under the rules of public international laws".[762]

1109. Thus, Claimants' unlawful works which caused environmental damage to the Project Site entail a wrongful act on their part under the rules of international responsibility which has to be repaired.

1110. Respondent has proven that Claimants unlawfully impacted a wetland by filling and drainage works, causing environmental damage to the Project Site. However, Claimants allege that Respondent has not shown causation between Claimants' conduct and the damage to the ecosystem.[763] The requirement of causation is in direct connection with the burden of proof that Claimants must bear on environmental matters under Costa Rican law.

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759 **RLA-37**, Philippe Sands, Principles of International Environmental Law (CUP 2003, 2nd Ed).

760 **RLA-174**, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No. ARB/07/26, Award, December 8, 2016, para. 1195.

761 **RLA-174**, Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic, ICSID Case No. ARB/07/26, Award, December 8, 2016, para. 1194.

762 **RLA-37**, Philippe Sands, Principles of International Environmental Law (CUP 2003, 2nd Ed), 872-873.

763 Claimants' Reply Memorial, para. 449.

Under the precautionary principle, the burden of proof of the inexistence of environmental harm always falls on the developer.[764]

1111. This was also recalled in *Burlington v Ecuador* in the context of a counterclaim on environmental damage. Although the Tribunal had to apply domestic law, the principles to be applied were similar –if not the same– as in the case at hand:

> "Applied to the present case, the rule contained in Article 397(1) means that once Ecuador has made a showing of the existence of environmental harm reasonably related to the Consortium's risky activities, for example by way of the IEMS sampling exercise**, Burlington then carries the burden of demonstrating that there is no harm or, if there is harm, what its limits are**."[765] (emphasis added)

1112. Therefore, when it comes to the environment, proof of *causation* is not required by the party alleging it. The precautionary principle reverses the burden of proof on the developer and causation is presumed:

> "While the Tribunal will revert to the issue of successive tort liability**, it disagrees with Burlington's position that Ecuador must prove that the harm was caused during the time of the Consortium's operations. Indeed, proof of causation is not required. Causation is presumed,** with the result that liability ensues from the mere exercise of a risky activity and the occurrence of harm that is plausibly connected to such activity as far as the type and location of the harm is concerned."[766] (emphasis added)

1113. Therefore, it was for Claimants to demonstrate that no harm to the environment had occurred in Las Olas Project. They have failed to do so.

1114. Even though it was Claimants' burden to evidence their lack of liability regarding the damage to Las Olas, Respondent has conclusively shown that Respondent is liable for the refilling of Wetland No. 1 and the consequential environmental damage caused to the ecosystem. Respondent relies on the First and Second KECE Reports as well as the Green Roots Report's conclusive findings.

1115. Moreover, Claimants' own expert, Dr Baillie admits that **Claimants** undertook refilling works on Bajo 1 / KECE Wetland No. 1:

> **"Dr. Baillie, you do acknowledge that the Claimants carried out development works in Bajo 1; right?**
>
> **A. That is quite clear. They did.**
>
> Q. And in Paragraph 56 of your report you mention that the Claimants engaged in the excavation of a 17 drainage ditch; correct?
>
> A. Correct." (emphasis added).
>
> Cross Examination of Ian Baillie, Day 6 Transcript, 1701: 12-19.

764 See, Section III.F.

765 **RLA-175**, *Burlington Resources Inc v The Republic of Ecuador, ICSID Case No. ARB/08/5*, Decision on counterclaims, February 7, 2017, para. 227.

766 Id., para. 232.

1116. During the Hearing, Claimants tried to blame the Municipality for the works that impacted Wetland No. 1. As described in Section III, those assertions are baseless because the Municipality at all times undertook works off-site and Claimants' own construction logs show that drainage works were carried out by Claimants' employees onsite.[767]

1117. As Respondent has demonstrated in this proceeding, Claimants unlawfully impacted a wetland by refilling and draining works, breaching imperative norms of environmental protection in several respects. Respondent has also shown –although it did not have the burden to do so– how Claimants impacted the biodiversity and the ecological conditions of the Project Site, causing environmental damage.

1118. In the First and Second KECE Report, KECE showed the environmental damage caused due to the refilling of Wetland No. 1: [768]

- Construction of the roads, excavation of ditches, placement of culverts, and the removal of vegetative strata of the forest have dramatically decreased the capacity of the forest to properly store and naturally convey water.

Terracing the hillsides to drain the water and flatten the land[769]

[767] **R-509**, Minute of Inspection # 2, April 4, 2011; **R-510**, Minute of Inspection #3, April 12, 2011. **R-511**, Minute of Inspection #4, April 18, 2011; **R-512**, Minute of Inspection #6, May 2, 2011.

[768] First KECE Report, paras. 67, 68.

[769] First KECE Report, Exhibit A, Photo 11; **R-265**. Delimitation of Wetland SINAC Report (ACOPAC GASP-143-11), p. 20, March 11, 2011.

Construction of a house over a wetland[770]

Excavation of drainage ditches[771]

Installing culvert pipes and inlet structures[772]

- These activities are significantly increasing soil sedimentation into the surrounding natural drainage features, and potentially the Aserradero River watershed and estuary.
- Claimants' filing and draining of wetlands has also directly destroyed habitat for fish and wildlife species thus reducing the biological diversity of the Las Olas Ecosystem.

770 Second KECE Report, Exhibit B, Photo 17.
771 Second KECE Report, Exhibit B, Photo 12.
772 First KECE Report, Exhibit A, Photo 6; **R-76**, PNH Report on Wetlands (ACOPAC GASP-093-11), p 68, March 18, 2011.

1119. The ecological conditions of the Project Site are crucial to the sustainability of the Las Olas Ecosystem and surrounding ecosystems:

> "Filling of wetlands decreases the local area's water storage capacity and can cause improper drainage and potential flooding downstream. Degradation of regional water quality may also occur following the filling of wetlands. Wetlands not only store water, but they also trap sediments and filter pollutants that would otherwise flow downstream."[773]

1120. Furthermore, and without any doubt, Drs Perret and Singh's expert testimony evidenced that Claimants refilled Wetland No. 1 on three different seasons and as a consequence buried the wetland and its living species more than 1 meter below the ground. The Green Roots' pictures of their survey speak on their own to the damage caused to Wetland No. 1:

[774]

1121. Thus, the evidence rendered in this proceeding is decisive as to support Respondent's contention that Claimants unlawfully impacted a wetland, which caused environmental damage to the Project Site.

2. Claimants ought to repair the damage caused to the ecosystem

1122. Having demonstrated Claimants' wrongful act, it is a well-established principle under international law that a wrongful act involves responsibility, as recognized in Article 1 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (2001). The obligation to make reparation has been developed by the Permanent Court of International

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773 First KECE Report, para. 52.
774 Green Roots' Demonstrative, slide 7.

Justice in the *Chorzow Factory* case,[775] and the approach has been reaffirmed, in the environmental context, by the International Court of Justice in the *Case Concerning the Gabcikovo-Nagymaros Project*.[776]

1123. DR-CAFTA envisages that reparation of an injury caused by an international wrongful act shall take the form of compensation and/or restitution:

> "**Article 10.26: Awards**
>
> 1. Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only:
>
> (a) monetary damages and any applicable interest;
>
> (b) **restitution of property**, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution." (emphasis added)

1124. Restitution is aimed at re-establishing or restoring the situation which existed before the wrongful act was committed, provided and to the extent that it is not materially impossible.[777] In effect, restoration of environmental harm has been upheld by international investment tribunals.[778]

1125. Thus, under international law principles for reparation and Article 10.26(b) of the Treaty, the Tribunal should order Claimants to repair the damage caused to Respondent by restoring the ecosystems' natural conditions.

1126. In the case at hand, Annex C of the First KECE Report contains a feasible restoration plan that can be put into place to restore the environmental damage caused to Wetland No. 1. This includes:

- Remove all fill placed in Wetland No. 1;
- Plug and/or backfilling drainage ditches in Wetland No. 1;
- Re-grade terraced hills in those areas within the project site that were once forested and have been cleared;
- Remove unpermitted roads that have significantly affected the condition of the wetlands and forests on the Las Olas Site;
- Plant and/or direct seed a ground-cover of native, herbaceous plant species in order to accelerate vegetative cover in the restored wetland and to stabilize the re-graded hill sides;

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775 **RLA-53**, *Case Concerning the Factory of Chorzów* (Germany v Polonia), Claim for Indemnity, Merits, Judgment No. 13, PCIJ, September 13, 1928, p. 21; **RLA-52**, *In Von Pezold v Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, July 28, 2015, para. 682.

776 **RLA-176**, *Case Concerning Gabcikovo-Nagymaros Project* (Hungary v Slovakia), ICJ Judgment, September 25 1997, p. 149.

777 **RLA-37**, Philippe Sands, *Principles of International Environmental Law* (CUP 2003, 2ND Ed) 883.

778 **RLA-175**, *Burlington Resources Inc v The Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on counterclaims, February 7, 2017.

- Plant a specified number and species of native forest trees as seedlings to accelerate the recovery of the forest, rehabilitate and stabilize the soils, as the last phase of the restoration.

1127. Mr Erwin reminded the Tribunal during the Hearing of the possibility of restoring the Las Olas Project Site:

> "So, what's actually required to restore this site and put the ecosystem back together is basically to reverse the existing drainage where the roads are cut into the hillsides with ditches, where ditches have been constructed across a wetland, like in Wetland Number 1, removing at least some amount of the fill in Wetland Number to make it--to make it whole again."[779]

1128. Based on the above, without prejudice to Respondent's jurisdictional and admissibility objections, in light of the damage caused to the Las Olas Ecosystem, and the feasibility of restoration of the land, Respondent respectfully requests that the Tribunal order Claimants to pay damages to Respondent in order to restore *"the situation that existed prior to the occurrence of"*[780] Claimants' wrongful impact of the Project Site.

1129. The kind and costs of the restoration claimed can only be determined upon review of an appropriate restoration plan to be proposed by Claimants and presented for approval to a competent authority in Costa Rica.[781] Respondent has submitted a basis of such restoration proposal with the First KECE Report.

1130. Thus, in the event of a finding of liability under Respondent's counterclaim, and only after the conclusion of the pending domestic proceedings, Respondent proposes a truncated timeframe in which Respondent and Claimants would cooperate to jointly determine the kind and costs of the restoration appropriate for the Las Olas Ecosystem.

779 Cross Examination of Kevin Erwin, Day 6 Transcript, 1887:12-22.
780 CLEX-273, Articles on State Responsibility, p. 213.
781 Respondent's Counter-Memorial, para. 658.

XII. PRAYER OF RELIEF

1131. For all of the reasons set out above, and throughout this arbitration, Costa Rica respectfully requests that the Tribunal:

1. Declare that Mr Aven's lack of standing on the grounds of nationality precludes the Tribunal from seizing jurisdiction of this arbitration vis-à-vis Mr Aven and thereby prevent Mr Aven from seeking redress under the Treaty;

2. Declare that the Tribunal lacks jurisdiction to hear any claims relating to Mr Raguso and Mr Shioleno on the grounds that they do not hold a covered investment under DR-CAFTA;

3. Declare that the Tribunal has no jurisdiction over the properties that Claimants do not own on the basis that they do not qualify as a covered investment under DR-CAFTA;

4. Declare that the Tribunal has no jurisdiction over the Concession or the Concession site and any claims relating to La Canícula;

5. Declare that the Tribunal has no jurisdiction to hear any late submitted claims regarding the purported violation of the full protection and security standard contained in Article 10.5(2)(b), due to Claimants' failure to seek leave to amend its claim;

6. Declare that Claimants' claims are inadmissible on the basis of the illegalities enunciated herein and thereby prevents Claimants from seeking redress under the Treaty;

In the alternative,

7. Dismiss all the claims in their entirety and declare that there is no basis of liability accruing to Respondent as a result of:

    5.1. Any claim of violation by Costa Rica of DR-CAFTA Articles 10.5 and 10.7;

    5.2. Any claim that Claimants suffered losses for which Costa Rica could be liable; or

    5.3. Any claim for the Tribunal's interference with Mr Aven's ongoing criminal trial before the courts in Costa Rica;

8. Furthermore, declare that Claimants have caused environmental harm to Costa Rica;

9. Order Claimants to pay Respondent damages in lieu of the reparation of the environmental damage Claimants caused to the Las Olas Ecosystem;

10. Order that Claimants pay Respondent all costs associated with these proceedings, including arbitration costs and all professional fees and disbursements, as well as the fees of the arbitral tribunal; and

In the alternative, and where appropriate,

11. Reject as inflated and unsupported, Claimants' valuation of their alleged losses, as well as Claimants' methodology as to the interest rate that would apply to any monetary award that might be issued by this Tribunal; and

12. Grant such relief that the Tribunal may deem just and appropriate.

1132. Respondent reserves its right to amend or otherwise supplement or modify its defense, counterclaim, and arguments as necessary, until the proceedings are declared closed.

Herbert Smith Freehills New York LLP

Herbert Smith Freehills New York LLP

MINISTERIO DE COMERCIO EXTERIOR DE COSTA RICA

ANNEX I

1. During the Hearing, Claimants introduced two sets of legal authorities to support their interpretation of the relationship between Chapters 10 and 17.[782]

2. The first set of new documents comprise those referred to by Costa Rica in its post-hearing brief in *Spence v The Republic of Costa Rica* case (footnotes 103 and 104). Claimants' counsel said he *"discovered a reference to summary documents upon which Costa Rica relied as de facto travaux for NAFTA--for CAFTA--for the DR-CAFTA."*[783] Claimants assert that:

> "And from reading these summaries, I realized that this wasn't just a summary that was prepared of the negotiations of the CAFTA generally. This was actually a COMEX Production. This was actually a summary that appears on the SICE website but which is actually Costa Rica's contemporaneous understanding of the conclusion of each of the CAFTA negotiation sessions."[784]

3. A few preliminary points should be made. As we indicated in the Opening Statement, Dr Weiler was counsel to Spence, so his "discovery" is somewhat contrived. Second, recourse to *travaux préparatoires* is only capable in accordance with the VCLT, pursuant to Article 32, when the VCLT permits:

> "SUPPLEMENTARY MEANS OF INTERPRETATION
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) Leaves the meaning ambiguous or obscure; or
>
> (b) Leads to a result which is manifestly absurd or unreasonable"

4. Those circumstances have not arisen, and therefore it is not necessary for the Tribunal to entertain what Claimants might pretend to be relevant, when they are not. This is exactly what McLachlan, quoted by Claimants, supports, *"and, where necessary, in the travaux."*[785]

5. Separately, Costa Rica did not treat the Reports on the Negotiation of DR-CAFTA as *travaux préparatoires* in the post-hearing brief filed in that case. On the contrary, no official preparatory works for DR-CAFTA are to be found.[786] The documents that were referred to in *Spence v The Republic of Costa Rica* and brought to this case by Claimants are unilateral minutes prepared by Respondent, *i.e.* an unofficial report on how the negotiations were developed. They do not, therefore, even qualify as *travaux préparatoires.*

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782 CLA-152, CAFTA Negotiations Round I; CLA-153, CAFTA Negotiations Round II; CLA-154, CAFTA Negotiations Round IV; CLA-155 Report of the Sixth Round of Negotiation; and CLA-156, Report for the Ninth Round of Negotiation.

783 Claimants' Opening Statement, Day 1 Transcript, 77:2-4.

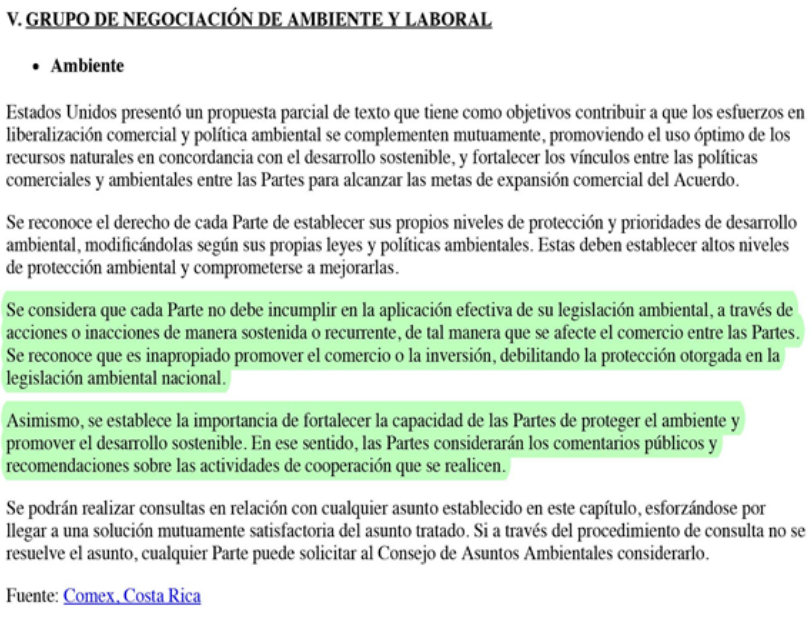
784 Claimants' Opening Statement, Day 1 Transcript, 77:12-19.

785 CLA-151.

786 Respondent's Opening Statement, Day 1 Transcript, 177:7.

6. In spite of lacking official preparatory works for DR-CAFTA, Claimants put emphasis on the alleged *"summaries of DR-CAFTA negotiating rounds"* as if they confirmed their approach that the Investment Chapter and that Environmental Chapter just complement each other and applicability of the latter should prevail. In particular, Claimants refer to the second and fourth negotiating round, which they allege endorse this interpretation.[787]

7. It seems that Claimants' counsel's lack of Spanish knowledge has been an obstacle to understanding properly what Costa Rican officials were actually documenting.[788] For example:



V. GRUPO DE NEGOCIACIÓN DE AMBIENTE Y LABORAL

- **Ambiente**

Estados Unidos presentó un propuesta parcial de texto que tiene como objetivos contribuir a que los esfuerzos en liberalización comercial y política ambiental se complementen mutuamente, promoviendo el uso óptimo de los recursos naturales en concordancia con el desarrollo sostenible, y fortalecer los vínculos entre las políticas comerciales y ambientales entre las Partes para alcanzar las metas de expansión comercial del Acuerdo.

Se reconoce el derecho de cada Parte de establecer sus propios niveles de protección y prioridades de desarrollo ambiental, modificándolas según sus propias leyes y políticas ambientales. Estas deben establecer altos niveles de protección ambiental y comprometerse a mejorarlas.

Se considera que cada Parte no debe incumplir en la aplicación efectiva de su legislación ambiental, a través de acciones o inacciones de manera sostenida o recurrente, de tal manera que se afecte el comercio entre las Partes. Se reconoce que es inapropiado promover el comercio o la inversión, debilitando la protección otorgada en la legislación ambiental nacional.

Asimismo, se establece la importancia de fortalecer la capacidad de las Partes de proteger el ambiente y promover el desarrollo sostenible. En ese sentido, las Partes considerarán los comentarios públicos y recomendaciones sobre las actividades de cooperación que se realicen.

Se podrán realizar consultas en relación con cualquier asunto establecido en este capítulo, esforzándose por llegar a una solución mutuamente satisfactoria del asunto tratado. Si a través del procedimiento de consulta no se resuelve el asunto, cualquier Parte puede solicitar al Consejo de Asuntos Ambientales considerarlo.

Fuente: Comex, Costa Rica

[789]

8. The highlighted text emphasized by Claimants in the second round of negotiations confirms Respondent's approach that investment protection is granted as long as concerns on the environment are safeguarded. The highlighted text states that:

> "**It is considered that each Party must not violate the effective application of its environmental legislation**, through actions or omissions in a sustained or recurring manner, such that trade between the Parties is affected. **It is recognized that it is inappropriate to promote trade or investment which weakens the protection granted in the national environmental legislation.**
>
> **Moreover, the importance is established of strengthening the capacity of the Parties to protect the environment and promote sustainable development**. In this respect, the Parties shall consider the public comments and recommendations on the cooperation activities carried out."[790] (emphasis added)

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787 Claimants' Opening Statement, Day 1 Transcript, 81:9-17.

788 In fact, comments to slide five of his presentation on Day 1 December Hearing (Todd Weiler's presentation) shows that they rely on Google Translation to plead their argument.

789 Claimants' Opening Statement Demonstrative, slide 6.

790 Ibid.

9. The fourth round of negotiations followed the same approach. Claimants seem to also rely on the highlighted sections. English translation follows.

> Se considera que cada Parte no debe incumplir en la aplicación efectiva de su legislación ambiental, a través de acciones o inacciones de manera sostenida o recurrente, de tal manera que se afecte el comercio entre las Partes. Se reconoce que es inapropiado promover el comercio o la inversión, debilitando la protección otorgada en la legislación ambiental nacional. Asimismo, se establece la importancia de fortalecer la capacidad de las Partes de proteger el ambiente y promover el desarrollo sostenible. En ese sentido, las Partes considerarán los comentarios públicos y recomendaciones sobre las actividades de cooperación que se realicen.
>
> En relación con las garantías procedimentales, cada una de las Partes se compromete a contar con los mecanismos procedimentales y jurídicos para garantizar el acceso de personas con intereses jurídicamente reconocidos a los sistemas judiciales y cuasi-judiciales, así como derecho a obtener las medidas reparatorias ante incumplimientos de la normativa ambiental.
>
> [791]

> "It is considered that each Party must not violate the effective application [enforcement] of its environmental legislation, through actions or omissions in a sustained or recurring manner, such that trade between the Parties is affected. It is recognized that it is inappropriate to promote trade or investment which weakens the protection granted in the national environmental legislation.
>
> […]
>
> In relation to procedural guarantees, each of the Parties commits to employing the procedural and legal mechanisms to guarantee access [of] persons with legally recognized interests to the judicial and quasi-judicial systems, as well as the right to obtain reparations in cases of non-compliance with environmental legislation."

10. It is striking how the alleged "summaries of DR-CAFTA negotiating rounds" do not support Claimants' case. Indeed, these unofficial minutes prepared by Costa Rica demonstrate the interest of DR-CAFTA Parties (from the very beginning of the negotiations) to protect the environment in relation to any commitment that has been made in the Treaty in relation to foreign investors: *"it is inappropriate to promote trade or investment which weakens the protection granted in national environmental legislation."*

11. Independently, it is ironic how having complained about Costa Rica seeking to impose its unilateral view in order to advance an interpretation, this is precisely what Claimants seek to do when they thought the above referenced documents revealed something helpful to them. If it would be unfair for Costa Rica to rely on any unilaterally generated documents, then surely Claimants should stand by their own rule.

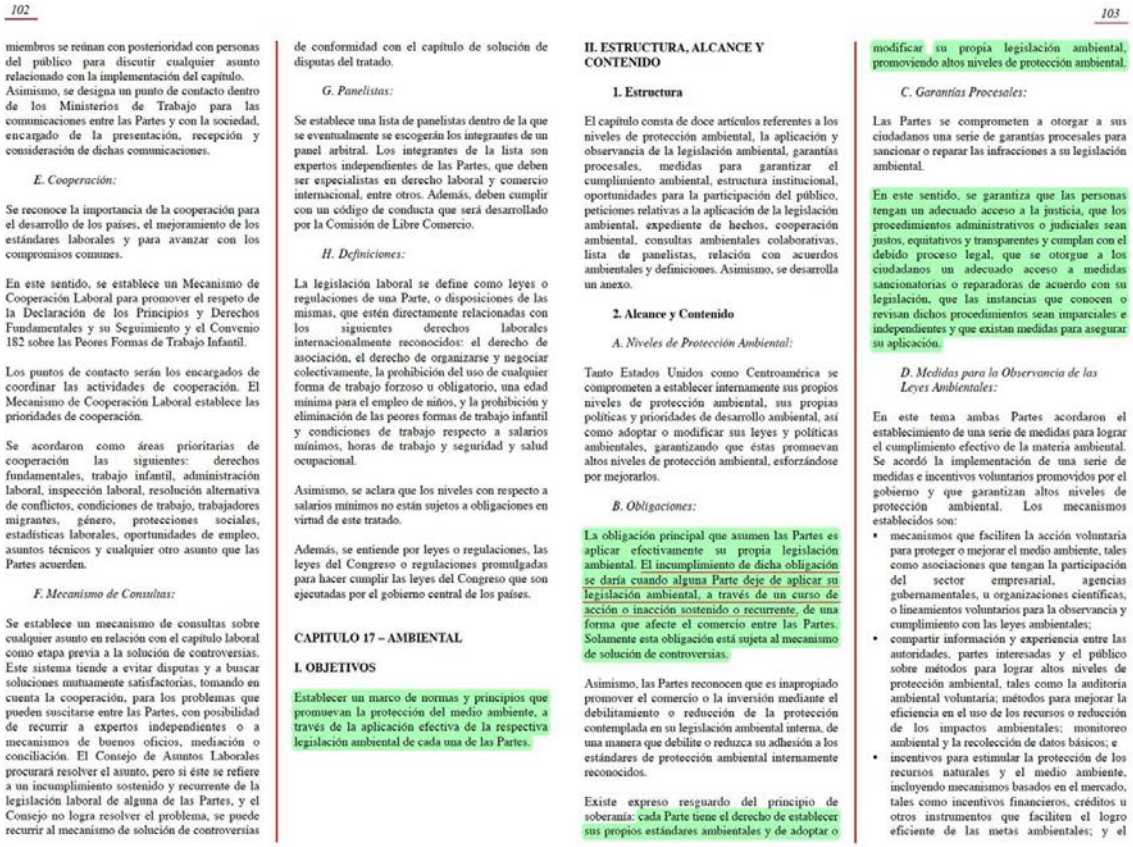
12. Separately, the second set of the new documents incorporated by Claimants is referred by them as an "Explanatory Note issued in 2004 by Costa Rica." [792] Claimants allege that, *"it's*

[791] Ibid.

not uncommon for a government to issue an explanatory text which accompanies the adoption of the treaty in domestic law."[793]

13. The Explanatory Note to which Claimants refer to is not a preparatory work of DR-CAFTA simply because there are no *travaux preparatoires* for the Treaty. Instead, it is a document (a "*document explicativo*") prepared by Respondent addressed to civil society groups to help them to understand certain aspects of DR-CAFTA.[794]

14. In any case, when analyzing closely the text of this document, its content does not support Claimants' position. In particular, Claimants refer to the following sections of the Explanatory Note. English translation follows.



102

miembros se reúnan con posterioridad con personas del público para discutir cualquier asunto relacionado con la implementación del capítulo. Asimismo, se designa un punto de contacto dentro de los Ministerios de Trabajo para las comunicaciones entre las Partes y con la sociedad, encargado de la presentación, recepción y consideración de dichas comunicaciones.

E. Cooperación:

Se reconoce la importancia de la cooperación para el desarrollo de los países, el mejoramiento de los estándares laborales y para avanzar con los compromisos comunes.

En este sentido, se establece un Mecanismo de Cooperación Laboral para promover el respeto de la Declaración de los Principios y Derechos Fundamentales y su Seguimiento y el Convenio 182 sobre las Peores Formas de Trabajo Infantil.

Los puntos de contacto serán los encargados de coordinar las actividades de cooperación. El Mecanismo de Cooperación Laboral establece las prioridades de cooperación.

Se acordaron como áreas prioritarias de cooperación las siguientes: derechos fundamentales, trabajo infantil, administración laboral, inspección laboral, resolución alternativa de conflictos, condiciones de trabajo, trabajadores migrantes, género, protecciones sociales, estadísticas laborales, oportunidades de empleo, asuntos técnicos y cualquier otro asunto que las Partes acuerden.

F. Mecanismo de Consultas:

Se establece un mecanismo de consultas sobre cualquier asunto en relación con el capítulo laboral como etapa previa a la solución de controversias. Este sistema tiende a evitar disputas y a buscar soluciones mutuamente satisfactorias, tomando en cuenta la cooperación, para los problemas que pueden suscitarse entre las Partes, con posibilidad de recurrir a expertos independientes o a mecanismos de buenos oficios, mediación o conciliación. El Consejo de Asuntos Laborales procurará resolver el asunto, pero si éste se refiere a un incumplimiento sostenido y recurrente de la legislación laboral de alguna de las Partes, y el Consejo no logra resolver el problema, se puede recurrir al mecanismo de solución de controversias de conformidad con el capítulo de solución de disputas del tratado.

G. Panelistas:

Se establece una lista de panelistas dentro de la que se eventualmente se escogerán los integrantes de un panel arbitral. Los integrantes de la lista son expertos independientes de las Partes, que deben ser especialistas en derecho laboral y comercio internacional, entre otros. Además, deben cumplir con un código de conducta que será desarrollado por la Comisión de Libre Comercio.

H. Definiciones:

La legislación laboral se define como leyes o regulaciones de una Parte, o disposiciones de las mismas, que estén directamente relacionadas con los siguientes derechos laborales internacionalmente reconocidos: el derecho de asociación, el derecho de organizarse y negociar colectivamente, la prohibición del uso de cualquier forma de trabajo forzoso u obligatorio, una edad mínima para el empleo de niños, y la prohibición y eliminación de las peores formas de trabajo infantil y condiciones de trabajo respecto a salarios mínimos, horas de trabajo y seguridad y salud ocupacional.

Asimismo, se aclara que los niveles con respecto a salarios mínimos no están sujetos a obligaciones en virtud de este tratado.

Además, se entiende por leyes o regulaciones, las leyes del Congreso o regulaciones promulgadas para hacer cumplir las leyes del Congreso que son ejecutadas por el gobierno central de los países.

CAPITULO 17 – AMBIENTAL

I. OBJETIVOS

Establecer un marco de normas y principios que promuevan la protección del medio ambiente, a través de la aplicación efectiva de la respectiva legislación ambiental de cada una de las Partes.

II. ESTRUCTURA, ALCANCE Y CONTENIDO

1. Estructura

El capítulo consta de doce artículos referentes a los niveles de protección ambiental, la aplicación y observancia de la legislación ambiental, garantías procesales, medidas para garantizar el cumplimiento ambiental, estructura institucional, oportunidades para la participación del público, peticiones relativas a la aplicación de la legislación ambiental, expediente de hechos, cooperación ambiental, consultas ambientales colaborativas, lista de panelistas, relación con acuerdos ambientales y definiciones. Asimismo, se desarrolla un anexo.

2. Alcance y Contenido

A. Niveles de Protección Ambiental:

Tanto Estados Unidos como Centroamérica se comprometen a establecer internamente sus propios niveles de protección ambiental, sus propias políticas y prioridades de desarrollo ambiental, así como adoptar o modificar sus leyes y políticas ambientales, garantizando que éstas promuevan altos niveles de protección ambiental, esforzándose por mejorarlos.

B. Obligaciones:

La obligación principal que asumen las Partes es aplicar efectivamente su propia legislación ambiental. El incumplimiento de dicha obligación se daría cuando alguna Parte deje de aplicar su legislación ambiental, a través de un curso de acción o inacción sostenido o recurrente, de una forma que afecte el comercio entre las Partes. Solamente esta obligación está sujeta al mecanismo de solución de controversias.

Asimismo, las Partes reconocen que es inapropiado promover el comercio o la inversión mediante el debilitamiento o reducción de la protección contemplada en su legislación ambiental interna, de una manera que debilite o reduzca su adhesión a los estándares de protección ambiental internamente reconocidos.

Existe expreso resguardo del principio de soberanía: cada Parte tiene el derecho de establecer sus propios estándares ambientales y de adoptar o modificar su propia legislación ambiental, promoviendo altos niveles de protección ambiental.

C. Garantías Procesales:

Las Partes se comprometen a otorgar a sus ciudadanos una serie de garantías procesales para sancionar o reparar las infracciones a su legislación ambiental.

En este sentido, se garantiza que las personas tengan un adecuado acceso a la justicia, que los procedimientos administrativos o judiciales sean justos, equitativos y transparentes y cumplan con el debido proceso legal, que se otorgue a los ciudadanos un adecuado acceso a medidas sancionatorias o reparadoras de acuerdo con su legislación, que las instancias que conocen o revisan dichos procedimientos sean imparciales e independientes y que existan medidas para asegurar su aplicación.

D. Medidas para la Observancia de las Leyes Ambientales:

En este tema ambas Partes acordaron el establecimiento de una serie de medidas para lograr el cumplimiento efectivo de la materia ambiental. Se acordó la implementación de una serie de medidas e incentivos voluntarios promovidos por el gobierno y que garantizan altos niveles de protección ambiental. Los mecanismos establecidos son:

- mecanismos que faciliten la acción voluntaria para proteger o mejorar el medio ambiente, tales como asociaciones que tengan la participación del sector empresarial, agencias gubernamentales, u organizaciones científicas, o lineamientos voluntarios para la observancia y cumplimiento con las leyes ambientales;
- compartir información y experiencia entre las autoridades, partes interesadas y el público sobre métodos para lograr altos niveles de protección ambiental, tales como la auditoria ambiental voluntaria; métodos para mejorar la eficiencia en el uso de los recursos o reducción de los impactos ambientales; monitoreo ambiental y la recolección de datos básicos; e
- incentivos para estimular la protección de los recursos naturales y el medio ambiente, incluyendo mecanismos basados en el mercado, tales como incentivos financieros, créditos u otros instrumentos que faciliten el logro eficiente de las metas ambientales; y el

"[To] [e]stablish a framework of rules and principles that promote environmental protection, through the effective implementation [enforcement] of the respective environmental laws of each of the Parties.

[…]

The main obligation that the Parties undertake is to effectively apply [enforce] their own environmental laws. A breach of said obligation would occur when a Party ceases to apply its environmental laws, through a sustained or recurring course of action or inaction, in a manner that affects trade between the Parties. Only this obligation is subject to the dispute settlement mechanism.

792 CLA-166, Costa Rica Explanatory Report for DR-CAFTA (2004) COMEX.
793 Claimants' Opening Statement, Day 1 Transcript, 78:4-7.
794 Respondent's Opening Statement, Day 1 Transcript, 177:7-9.

> [...] each Party has the right to establish its own environmental standards and to adopt or modify its own environmental laws, promoting high levels of environmental protection.
>
> […]
>
> In this sense, it is guaranteed that people shall have adequate access to justice, that the administrative or judicial procedures will be fair, equitable and transparent and comply with due process, that citizens are granted adequate access to punitive or remedial measures according to their laws, that the bodies that hear or review such proceedings are impartial and independent and that there are measures to ensure their application." [795]

15. Claimants indicate that the above comments that Costa Rica made to Chapter 17 demonstrate that:

> "Now, as these documents indicate, the only obligation that can be subjected to dispute settlement or that was intended to be subjected to dispute settlement in a state-to-state format concern the practice of lowering one's standards to attract trade or investment. Of course, we don't have anything like that here. That's—we—we--the Claimants don't actually challenge the validity of any law or regulation. This case is about enforcement. In its 2004 explanation document, Costa Rica itself notes that the kind of mischief at which Chapter 17 was aimed really would involve the adoption of the measure of general application. And that would foster sustained and consistent programs of underenforcement. And you see that language of "sustained and consistent underenforcement." This is the nature of the measure that this chapter is supposed to avoid. And, again, we don't even have a general measure at issue, much less one which is designed to, for a long period of time, foster sustained and consistent underenforcement of any environmental regulation."[796]

16. Claimants rely on this document to argue that Chapter 17 only addresses cases where a measure of general application is adopted by a State in order to attract foreign investors but has the effect of lowering environmental standards. Under this scenario, Claimants argue, Chapter 17 would not cover their claims because Costa Rica has not issued a general measure with that effect.

17. However, Claimants deliberately omit to highlight another scenario covered by Chapter 17, which clearly applies to this case. Respondent has underlined the section in blue:

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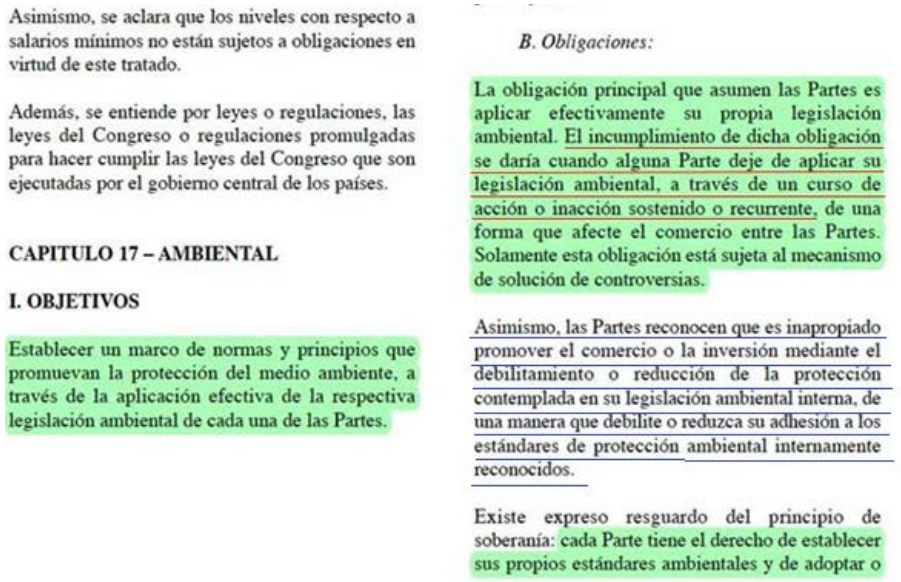
795 Claimants' Opening Statement, slide 5.
796 Claimants' Opening Statement, Day 1 Transcript, 80:1-22; 81:1-2.



Asimismo, se aclara que los niveles con respecto a salarios mínimos no están sujetos a obligaciones en virtud de este tratado.

Además, se entiende por leyes o regulaciones, las leyes del Congreso o regulaciones promulgadas para hacer cumplir las leyes del Congreso que son ejecutadas por el gobierno central de los países.

CAPITULO 17 – AMBIENTAL

I. OBJETIVOS

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B. Obligaciones:

La obligación principal que asumen las Partes es aplicar efectivamente su propia legislación ambiental. El incumplimiento de dicha obligación se daría cuando alguna Parte deje de aplicar su legislación ambiental, a través de un curso de acción o inacción sostenido o recurrente, de una forma que afecte el comercio entre las Partes. Solamente esta obligación está sujeta al mecanismo de solución de controversias.

Asimismo, las Partes reconocen que es inapropiado promover el comercio o la inversión mediante el debilitamiento o reducción de la protección contemplada en su legislación ambiental interna, de una manera que debilite o reduzca su adhesión a los estándares de protección ambiental internamente reconocidos.

Existe expreso resguardo del principio de soberanía: cada Parte tiene el derecho de establecer sus propios estándares ambientales y de adoptar o

> "The Parties also recognize that it is inappropriate to promote trade or investment by weakening or reducing the protection provided for in their internal environmental legislation, in a manner that weakens or reduces their adherence to internally recognized environmental standards."

18. This section evidences that Chapter 17 also addresses the scenario where a Party reduces environmental protection by promoting and protecting an investment. A case where a state remains deliberately passive when facing a violation of its environmental standards "to protect an investment" certainly reduces (if not eliminates) the internally recognized environmental standards. Claimants tried to mislead the Tribunal's reading of this document by carefully selecting those paragraphs that they consider play in their favor.

19. Moreover, Claimants contend that if the Tribunal is going to have regard to the provisions of Chapter 17 as a contextual guide to construe Articles 10.5 and 10.7 of DR-CAFTA, the Tribunal should take into consideration the mandate provided in Article 17.3 regarding the characteristics that the proceedings to sanction or remedy violations of environmental laws should have.[797] According to Claimants, Respondent subjected those proceedings to the same terms of compliance than those used in Article 10.5 in the Explanatory Note.[798]

20. Claimants' position clearly reinforces Respondent's argument that the Treaty should be read as a whole. Nevertheless, as it will be discussed in section VII of the Brief, Claimants' attempt to "import" standards to Chapter 10 has no legal basis.

21. In sum, it is confusing how Claimants purport to use these documents to build their case when, as demonstrated, they actually support Respondent's arguments on the interaction of Chapter 10 and 17 of DR-CAFTA, where the latter always prevails.

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797 Claimants' Opening Statement, Day 1 Transcript, 82:16-22, 83:1-21.
798 Claimants' Opening Statement, Day 1 Transcript, 83:1-6.

ANNEX II

1. During the hearing, Claimants introduced new legal authorities to support their *"ex post facto allegations"* argument that discredits Respondent's inadmissibility defense. Those authorities can be gathered into four different categories of arguments. None of them are applicable to this case.

2. First, Claimants rely on the decisions in *HICEE B V v Slovakia*, *Bayindir Insaat Turizm Ticaret ve Sanayi A S v Pakistan*, and *Daimler Financial Services AG v Argentina* (dissenting opinion).[799] In all these cases, the tribunals rejected *ex post evidence* in relation to **jurisdictional matters**. In the first case, the Tribunal decided to reject an *ex post facto* expression of opinion about what was presumed to have animated the negotiation of a treaty text, while in the second case, the tribunal considered that the ratification of the New York Convention during the arbitral proceedings could not retrospectively affect the jurisdiction of the tribunal. The last case –the dissenting opinion– refers to a "clarification" finding on how a treaty had to be interpreted, and Judge Brower rejected such finding as it was based on *ex post evidence*.

3. Respondent's position in relation to the illegalities committed by Claimants as a bar for the admissibility of their claims is neither a jurisdictional objection nor an argument requiring *ex post facto* evidence. As stated above, Respondent is addressing an admissibility bar for Claimants' claims, which is based on irregularities that in most of the cases were found before the commencement of this arbitration, were duly informed to Claimants, and resulted in an action by Respondent with the initiation of local proceedings. In turn, in relation to other illegalities, it was not until this arbitration where Respondent took knowledge of them, due to Claimants' concealment of information from local agencies. Since *ex post facto* evidence has not been brought for a jurisdictional challenge, the reasoning of these cases has no bearing in this case.

4. Second, Claimants allege that an *ex post facto* analysis was also rejected in cases where the tribunal, applying the *Salini test*, had to determine whether the economic development criteria for the existence of an investment was fulfilled:

> "[e]xamples of how the "contribution to development" prong of the infamous, so-called "Salini Test" was defenestrated in subsequent practice, on the basis that it offended the principle of fairness by encouraging post hoc analyses encouraging suppositions that could not be grounded in contemporaneous evidence."[800]

5. In particular, they refer to *Philip Morris v Uruguay*, *SGS Sociètè Gènèralè de Surveillance SA v Paraguay*, *Deutsche Bank AG v Sri Lanka,* and *Alpha Projektholding GMHB v*

[799] CLA-172, *Hicee B.V. and The Slovak Republic*, PCA Case No. 2009-11, May 23, 2011; CLA-173, *Bayindir v. Islamic Republic of Pakisatan*, ICSID Case No. Arb/03/29, November 14, 2005; and CLA-175, *Daimler FInancila Service AG v. Argentine Republic*, ICSID Case No. ARB/05/1, May 20, 2014 respectively.

[800] Claimants' Closing Statement Demonstrative, Day 6, slide 34.

Ukraine.[801] In all these cases the crux of the argument was that in order to determine whether an investment is capable of contributing to the economic development of the host State, the tribunals would have to conduct an *ex post facto* analysis, which is not appropriate for a decision on jurisdiction.

6. Once again, Claimants are relying on case law in the context of jurisdictional objections, where the discussion is focused on whether a claimant satisfies the necessary jurisdictional requirements for establishing the existence of the adjudicative power. More specifically, these cases relate to the assertion of jurisdiction *ratione materiae*: whether the requirement of an economic contribution to the development of the country exists for the purposes of affirming that an investment is covered by the treaty. Respondent's position in the instant case relates to the unlawful operation of Claimants' investment which involves an admissibility analysis.

7. It would be wild to transpose the reasoning on jurisdiction of these tribunals relating to the concept of a "covered investment" or the interpretation of a treaty –both attempted to be made based on *ex post facto* evidence– to an analysis on admissibility which relates to the claim, and in particular, to the illegality of that claim. The analogy that Claimants would propose proves to be out of context, and would imply that a party would never be entitled to contend an illegality for the risk of being considered an *ex post facto* analysis, unless it has been raised in the domestic fora. Respondent does not see any support in these cases for that assertion.

8. Third, Claimants cite few cases where tribunals disregarded *ex post facto* circumstances. For instance, Claimants rely on *Biwater Gauff Ltd v Tanzania*, where, in relation to the standard of reasonableness in the State's conduct and non-discriminatory treatment, the tribunal held that:

> "With respect to the Minister's press conference of 13 May 2005, for the reasons already set out earlier, the Arbitral Tribunal considers that it was unreasonable. It cannot be justified *ex post facto* by the need to inform the public of an important decision […]"[802]

> "The Tribunal also considers that these actions cannot be justified *ex post facto* by the need to inform the public of an important decision that, taken alone, had a concrete effect on City Water's contractual rights, and taken together with the acts that followed (of which it formed part) ultimately contributed to an expropriation."[803]

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801 CLA-168, *Morris v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, July 8, 2016; CLA-169, SGS *Societe Generale De Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARD/07/29, Decision on Jurisdiction, February 12, 2010; CLA-170, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, October 31, 2012; and CLA-99, *Alpha Projektholding GMBH v Ukraine,* ICSID Case No. ARB/07/16, Award, October 20, 2010 respectively.

802 CLA-86, *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008, para. 696.

803 Id., para. 500.

9. Claimants argue that the tribunal rejected an *ex post facto* rationalization of an impugned measure, and that analysis would be also applicable to this case to disregard Respondent's analysis. The press conference in *Biwater Gauff Ltd v Tanzania* seemed to have been used by the State to justify the measure it had adopted. However, Respondent does not see how this reasoning helps Claimants' case. In the instant case, the illegalities are clearly referred to Claimants' conduct against the law and they are not an *ex post facto* justification for the measures adopted by Respondent in response to that misconduct.

10. Claimants also cite the decision in *Quiborax v Bolivia*[804] where the claimants, seeking to argue in favor of the procedural integrity of the arbitration proceedings, argued that by instituting criminal proceedings, the respondent fabricated *ex post facto* evidence, *"forcing false confessions out of a potential witness and thus making him unavailable to testify, and seeks to do the same with other potential witnesses."* The tribunal in that case considered that:

> "[t]he criminal proceedings may indeed be impairing Claimants' right to present their case, in particular with respect to their access to documentary evidence and witnesses […]
>
> The Tribunal is also troubled by the effect that the criminal proceedings may have on potential witnesses […]
>
> Even if no undue pressure is exercised on potential witnesses, the very nature of these criminal proceedings is bound to reduce their willingness to cooperate in the ICSID proceeding. […]
>
> In any event, whether Claimants made an investment in Bolivia that is covered by the Chile-Bolivia BIT will not be proved or disproved by criminal proceedings, but by evidence related to ownership and to the manner in which the investment was made, among others. Even if the criminal proceedings could potentially result in evidence of facts related to this Tribunal's jurisdiction, the Tribunal would not be bound by it.
>
> Thus, the Tribunal finds that Claimants have shown the existence of a threat to the procedural integrity of the ICSID proceedings, in particular with respect to their right to access to evidence through potential witnesses. In the words of the Plama tribunal, the Tribunal finds that, under the particular circumstances of this case, the rights invoked by Claimants and analyzed in this Section relate to Claimants" "ability to have [their] claims and requests for relief in the arbitration fairly considered and decided by the arbitral tribunal".[805]

11. As it can be inferred from the excerpts, the issue at stake in *Quiborax v Bolivia* was the existence of criminal proceedings against claimants, initiated after they notified Bolivia of their claim. The tribunal decided that, although the ICSID Convention and investment treaties do not prevent a State from exercising criminal jurisdiction or *"exempt suspected criminals from prosecution by virtue of their being investors"* if criminal proceedings impair

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804 CLA-7, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaphln v. Plurinational State of Bolivia,* ICSID Case No. ARB/06/2, Decision on Provisional Measures, February 26, 2010, paras. 139, 143, 147-148.

805 Id., paras. 139-140, 142-143, 145-148.

the procedural integrity of arbitration proceedings, they can be enjoined by provisional measures.

12. Thus, the factual scenario in *Quiborax* is very unique: criminal proceedings commenced *after* the arbitration; the effect of those proceedings on the evidence to be produced; and most importantly; the effect of those proceedings on claimants' rights in the arbitration. In contrast, in the instant case: (i) the criminal proceedings were commenced *before* the arbitration and abandoned by Claimants; (ii) there has been no allegation by Claimants that the illegalities raised by Respondent (which are broader than the issues discussed in the criminal proceedings in Costa Rica) have impacted the evidence that was provided by them in the arbitration; and (iii) Claimants have never alleged that their misconduct somehow affected their procedural rights in this arbitration.

13. In light of these discrepancies, *Quiborax* clearly does not apply to this case.

14. Claimants also rely on *Lemire v Ukraine,*[806] alleging that the tribunal *"rejected respondent's attempt to rely on post facto attempts to reserve impugned measure under treaty from compliance with obligation named in claim."* The tribunal stated that a State's right to make or maintain exceptions to the national treatment in protected sectors is not unlimited, but subject to specific notification requirements. The tribunal affirmed accordingly that:

> "Previous notification of limiting laws and regulations is not simply a formality: it is a fundamental requirement in order to guarantee that investors enjoy legal certainty, and that States cannot invoke the exception ex post facto, surprising the investor's good faith."[807]

15. Then, the tribunal had to decide whether Ukraine notified the US of any laws or regulations concerning the sector involved in the dispute, and it found that the respondent never argued the existence of such notification, and there was no evidence in the file showing that it took place. It concluded that non-compliance with the procedural safeguards included in the treaty was a final factor reinforcing the conclusion that the exceptions to the national treatment had no bearing.[808]

16. The tribunal then referred to exceptions to national treatment that the respondent should have notified the U.S. This case is not about any exception or regulation that should have been informed by Respondent to Claimants. Claimants knew or should have known the legal framework in which they decided to make the investment. Thus, the illegalities raised by Respondent do not entail any surprise against "Claimants' good faith". Rather, they constitute the enforcement of the environmental protection in force at the time they decided to invest.

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806 CLA-102, *Joseph Charles Lemire v Ukraine*, ICSID Case No. ARB/06/18, Award, March 29, 2011 paras. 48-49 and 196.

807 Id., para. 49.

808 Id., para. 51.

17. Claimants also quoted some paragraphs from the decision of the tribunal in *Achmea BV v Slovakia*.[809] Those paragraphs refer to the discussion on expropriation, and particularly, they refer to some facts raised by the claimant which took place after its submission of the Statement of Claim. Those facts had the effect of bringing other entities to the case. In these circumstances, the tribunal found that it did not have jurisdiction regarding the claim related to those facts and entities, since no specific conduct regarding those entities was complained of in the Statement of Claim.

18. Certainly, the tribunal was right in preventing the claimant to incorporate novel breaches later in the proceeding. It is in its first submission where a claimant has to delineate the legal and factual basis for its claim.

19. The case at hand is not an allegation of novel breaches by Respondent. On the contrary, Respondent's allegations on Claimants' misconduct relate to the very same facts that were exposed by them in their submissions. Therefore, the reasoning in *Achmea BV v Slovakia* has nothing to offer in the instant case.

20. Lastly, the only case which relates to the issue of illegalities is *Rusoro Mining v Venezuela*.[810] In that case, Venezuela raised a number of illegalities based on what they called *"indirect evidence"* which "*demonstrates that Rusoro systematically evaded mining regulations."*[811] However, the tribunal was not convinced by the kind of evidence the respondent was relying on:

> "[…] the "indirect evidence" marshalled by the Bolivarian Republic is blatantly insufficient to prove Venezuela's allegation, that Rusoro knowingly colluded with domestic purchasers to foster illicit gold exports."[812]

21. Thus, the reason why the tribunal dismissed the alleged *ex post facto* argument raised by respondent was not because it was *ex post facto*, but because it was based on evidence which was not convincing. On the contrary, in this case Respondent has brought direct evidence of Claimants' misconduct.

22. Therefore, Respondent is not estopped from raising, before the Tribunal, Claimants' misconduct, and accordingly, has provided abundant evidence in this regard. The *ex post facto* analysis of which Claimants now complain for the very first time in this arbitration has been a consequence of their misrepresentation of their investment to Costa Rica authorities.

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809 CLA-174, *ACHEMA B.V. v. The Slovack Republic*, PCA Case No. 2013-12, Award of Jurisdiction and Admissibility, May 20, 2004, paras. 266-270.

810 CLA-171, *Rusoro Mining Ltd. And Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, August 22, 2016, paras. 494-498.

811 Id., 496.

812 Id., 498.

23. In sum, none of the cases prove Claimants' contention that Respondent would be required under local laws to address the non-compliance first in order to allow the Tribunal a finding of fact to base their decision.

ANNEX III

Mr Mussio's contradictions	
Testimony on Mussio Madrigal's responsibility to obtain construction permits for Easements 8 and 9	
"ARBITRATOR BAKER: So, again, sticking with the scope of the representation for a moment, you were also going to provide—in addition to the revised architectural drawings, you were also going to provide permitting application services for the project; is that correct? THE WITNESS: Correct. Yes. Yes, sir."[813] "ARBITRATOR BAKER: Okay. And so, in that situation, your firm would be coordinating the overall submissions from each one of those experts; but it was your firm that was, in fact, signing the application; is that correct? THE WITNESS: Yes, sir. Yes. That is correct, that assessment. We coordinated, yes, but—yes."[814]	"ARBITRATOR BAKER: […] So, it was your firm that went forward to Parrita to obtain the construction permits as well? THE WITNESS: In 2008? ARBITRATOR BAKER: Yes. THE WITNESS: No. We gave the group, David, everything that was ready so he could go to the local government and obtain the permit. He had to take the plans to the local government. They do an evaluation, and then they charge taxes on that. It's 1 percent."[815]
Knowledge of wetlands	
"Q: And wetlands are also protected by the law; correct? You don't know? A: Well, it would be based on my scarce knowledge, I understand, yes."[816]	"As for my experience with wetlands, I must say it is broad."[817]
Testimony on the legality of the easements	
"THE WITNESS: […] And then we have the fragmentation-well, first of all, we have the analysis of the fragmentation for Easements. And this—because regulations or national laws allow you—authorize you to fragment the land before—that's next to roads and new sales. That initiative comes from the Las Olas group, of course, definitely; but I should say that it fully complies with the law. That is fully and completely legal. ARBITRATOR BAKER: So, was the land development concept of fragmentation that we've been talking about, was that discussed with attorneys prior to the filing of the D1 Statement? THE WITNESS: No, sir."[818]	Mr Aven said that his lawyer approved the segregation of the easements prior to engaging Mr Madrigal: "But let me be clear about this because it's—it's talked about a lot. And—like we did something—another something we did illegally. There's no illegal things going on here. Before we did anything with the Project I—I got a—my attorney at the time, Gavridge Pérez, gave—recommended that I—that this—the law in Costa Rica was that you could subdivide off parcels from the main highway."[819]
Testimony on Mussio Madrigal's responsibility to file D1 Forms with SETENA	
"Q: Understood sir. But you're giving advice in this context on the D1 Application; correct? A: No. No, sir. There's a concept that's off here. Everything that has to do with drawing up D1 and preparation of Environmental Viability is given to a	"PRESIDENT SIQUEIROS: […] Now, the person that does the reports for SETENA, who presents the information to SETENA? THE WITNESS: Yes, it would be our firm. Yes, it would

813 Redirect Examination of Mauricio Mussio, Day 2 Transcript, 494:16-22.
814 Redirect Examination of Mauricio Mussio, Day 2 Transcript, 500:11-18.
815 Redirect Examination of Mauricio Mussio, Day 2 Transcript, 509:4-12.
816 Cross Examination of Mauricio Mussio, Day 2 Transcript, 401:3-6.
817 Witness Statement of Mauricio Mussio, para. 13.
818 Redirect Examination of Mauricio Mussio, Day 2 Transcript, 504:18-22; 505:1-10.
819 Redirect Examination of David Aven, Day 3 Transcript, 899:18-22; 900:1-3.

consulting firm. It's Geoambiente. They prepare everything, all the protocols."[820]	be our firm."[821]
Testimony on the Protti Report	
"Q: Would—what would you say this report is actually about? A: It's basically a technical study that is called the Transit of Contaminants. The purpose of such a study is to identify whether bacteria in treated water could perhaps contaminate an aquifer."[822]	"Mussio Madrigal contracted a company called Tecnocontrol S.A. to carry out soil studies of the Las Olas project, and so that the environmental impact evaluation procedure be carried with SETENTA. It is likely that Tecnocontrol subcontracted Mr. Roberto Protti, an ecologist, to carry out such a study."[823]
Testimony on his involvement with the Costa Montaña Project	
"ARBITRATOR BAKER: So, your history as an environmental consultant and professional in Costa Rica, how many projects, in your firm's history, have received complaints throughout the life of the project? Every one? None? Some number in between?"[824] "THE WITNESS: None of my projects. ARBITRATOR BAKER: So, let me make sure I'm—none of the projects that you or your firm have been involved in since the formation of the firm have ever had an official complaint filed like the one in this case; is that correct? THE WITNESS: No, none, sir."[825]	Mr Mussio's witness statement: "In spite of all the projects that we have participated in, the only time we have had problems with a project was in 2008 with the Costa Montaña project involving agricultural land parceling. The Administrative Environmental Tribunal visited the Costa Montaña project and subsequently lodged a complaint against Mussio Madrigal and me personally, as head of that project, in the Federated College of Engineers and Architects."[826]
Testimony on the sanction imposed by the Federate College of Architects and Engineers of Costa Rica	
"Q: As well as the Association of Engineers and Architects had a disciplinary process issued against your and your partner, Edgardo Madrigal; is that correct? A: Against the company, against my partner, and against me, yes. […] Right now I don't have a single document from that association that says anything to the contrary."[827]	"Q: You did not research it after finding out about the resolution? A: I spoke to an attorney. His name is Mike. I called him and I said, 'What does this mean?' […]."[828]

820 Cross Examination of Mauricio Mussio, Day 2 Transcript, 411:14-21
821 Redirect Examination of Mauricio Mussio, Day 2 Transcript, 519:3-6.
822 Redirect Examination of Mauricio Mussio, Day 2 Transcript, 474:5-10.
823 Witness Statement of Mauricio Mussio, para. 46.
824 Redirect Examination of Mauricio Mussio, Day 2 Transcript, 512:7-11
825 Redirect Examination of Mauricio Mussio, Day 2 Transcript, 513:18-22; 514:1-2.
826 Witness Statement of Mauricio Mussio, para. 10.
827 Cross Examination of Mauricio Mussio, Day 2 Transcript, 446:17-22; 447:4-5.
828 Cross Examination of Mauricio Mussio, Day 2 Transcript, 450:17-20.